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Character Attacks as Complex Strategies of Legal Argumentation

Fabrizio Macagno[1] and Douglas Walton

In this paper we analyze leading criminal cases taken from the Supreme Court of the United States, in which *ad hominem* arguments played a crucial role. We show that although such character attack arguments can be used for legitimate purposes in legal argumentation, in many cases they are weak arguments, but so persuasive that they can effectively prejudice the judgment of a jury. Their dangerous and prejudicial effect can be used as a fundamental component of more complex strategies, aimed, for instance, at shifting the burden of producing evidence or proving character. Using argumentation schemes, we provide criteria for establishing the reasonableness and the weaknesses of this type of argument in different circumstances. We show how *ad hominem* arguments can be used legitimately as undercutters aimed at undermining the conditions on which arguments from a source (such as arguments from expert testimony) are based. We explain the rhetorical persuasiveness of personal attacks by revealing their structure as complex strategies that fit clusters of arguments together to arouse different types of emotions.

Keywords: argumentation, personal attacks, ad hominem, emotions, prejudice, presumptions, undercutter, burden of proof, argumentation schemes

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Ad hominem arguments represent one of the most worrisome, suspicious, tricky and controversial yet effective argumentation moves in law (Cantrell, 2003; Arnold, 1995), and they play a pivotal role in criminal law. They are potentially inadmissible arguments, as they are not directed against the issue or the interlocutor's argument, but against the character of the person who puts it forward. But these attacks can be extremely effective (Holt, 1990), as "society at large, and juries, tend to disbelieve people of 'bad character'" (Bosanac, 2009, p. 39). For this reason, *ad hominem* arguments, even though inadmissible most of the time, are used both by the prosecution and the defense in the heat of a courtroom battle (Cantrell, 2003; Clifford, 1999; Carlson, 1989).

Use of personal attack to discredit an opponent or witness in a trial setting is an extremely important form of argument for an advocate or a judge to be aware of. Cicero, who clearly described this type of attack in a court, and showed he was well aware of its power, described how he dealt with witnesses who had been allegedly paid for by the prosecution. He advised that when the words cannot be attacked, the only possible option is to attack the person (*in hominem*)[2]. Instead of arguing against the facts testified to by such witnesses, Cicero argued against their status as witnesses of persons who were "in partnership […] with the prosecutor".

Although *ad hominem* arguments have long been considered to be fallacious, recent research in argumentation studies has progressively moved toward acceptance of the view that they are not always fallacious, and that when they are, they are best seen as "perversions or corruptions of perfectly good arguments" (Raley, 2008, p. 16). The fundamental problem with these arguments is their nature and classification. "*Ad hominem*" is an umbrella term, excessively broad, which generally comprises all personal attacks, often noticeably different in their reasoning structure and dialogical purpose. The purpose of this paper is to inquire into the implicit structures

[2] "And why should I, the counsel for the defense, ask him questions, since the course to be taken with respect to witnesses is either to invalidate their testimony or to impeach their characters? But by what discussion can I refute the evidence of men who say, "We gave," and no more? Am I then to make a speech against the man, when my speech can find no room for argument? What can I say against an utter stranger?" (Ciceronis *Pro Flacco* X, 23)

underlying and supporting personal attack arguments, including different reasonable or mischievous types of reasoning, implicit premises and tacit conclusions.

Personal attacks can be strategic choices of the prosecution or the defense. First, they need to be detected, which can be more complex when the attacks are implicit. Second, the risk of incurring sanctions is sometimes balanced by the effect of the attack. On the one hand, the defense's attack can be objected to, while it can affect the jury's evaluation of the case and lead the prosecutor to a counter-attack (which can be judged as inadmissible). On the other hand, even when the prosecutor's *ad hominem* moves are inadmissible (and punishable with mistrial), they can be still considered as harmless (Holt, 1990, p. 140), especially when the case is strong (Gershman, 1986a). For this reason, little guidance is given on how to determine the propriety of his actions (Gershman, 1986a, p. 140), especially when he wants to communicate the strength of his case to the jury, or reply to a personal attack.

The choice of investigating personal attacks in a legal context of dialogue (and in particular criminal cases, mostly from the U.S. Federal court of appeal), has twofold purpose. It can provide criteria, taken from a philosophical and linguistic approach, for analysing specific legal moves, enabling us to grasp their strategic dimension and the balance between risks and benefits. But it also provides a structure for studying their rhetorical uses. The choice of selecting attacks from American criminal cases places such moves within a rhetorical framework, where the jury plays the role of the audience, and is the target of the *ad hominem*.

1 Types of *ad hominem* in argumentation

The existing argumentation theories on *ad hominem* arguments can provide some useful insights on the characteristics and uses of this type of argument. Walton (1998) distinguishes *ad hominem* arguments according to the types of grounds provided to support a value judgment or a decision on the conclusion advocated. For instance, the attacker can support the claim that the interlocutor's argument should not be accepted with a judgment on different aspects of his or her character,

such as logical reasoning, perception, veracity, or cognitive skills (Walton, 1998, pp. 198-199, 217; 2002, p. 51). On this perspective, depending on the nature of the interlocutor's claim and the scope of the attack, the move can be reasonable or fallacious (see also Battaly, 2010). On Walton's theory, character attacks can be (1) based on an allegation that the person attacked has some sort of ethically reprehensible character suggesting a lack of veracity or some other indication of untrustworthiness or (2) based on circumstantial evidence from which an inconsistency in the opponent's commitments can be extracted. For instance, past actions or advocated positions or associations with groups holding a specific view can be used as reasons for not accepting the interlocutor's viewpoint or argument. In an even stronger form, the personal attack may be used to suggest that, since the speaker was found to have a bad character (for veracity, for instance) all of his viewpoints or arguments may be automatically dismissed (for instance, based on the reasoning "if he lied in the past, he will lie also this time"). This latter variant of the *ad hominem* argument is often called poisoning the well (once the well is poisoned, all the water that can be taken from it in the future will be undrinkable) (Walton, 1998, pp. 220-257). Walton also distinguishes these kinds of arguments based on attacks to the person's character from the ones against his attitude to stick to a particular viewpoint or interest (bias *ad hominem*). While the first type of attack can be considered as an argument based on the quality of the source, in the second case the attacker grounds his move on the person's failure to be a good interlocutor, his unwillingness consider contrary arguments, and his penchant for manipulating the evidence to advance its own interests and views. Used in these ways, an *ad hominem* argument attack can be used to exclude one's opponent from a discussion altogether by suggesting that he is not trustworthy enough to engage in rational argumentation in a balanced and collaborative manner. This kind of move can be a knock-out blow which the opponent may not be able to recover from.

These varieties of types of *ad hominem* argument have also been studied by the pragma-dialectical school. On their view, *ad hominem* arguments are aimed at preventing an interlocutor from advancing his standpoint, on the basis that he is not qualified to do so. For this reason these kinds of *ad hominem* argument are considered as fallacies, moves

that are not acceptable as they breach the fundamental rule of an ideal critical discussion, stating that "neither party should prevent the other party from expressing standpoints or doubts" (van Eemeren, Meuffels & Verburg, 2000, p. 419).

These theories reveal important aspects of the structure of *ad hominem* arguments and also show the usefulness of classifying this type of argument into several subtypes. However, they do not point out the possible scopes and purposes of *ad hominem* arguments, distinguishing between the different possible levels where the arguments are characteristically employed. On the account we now propose, personal attack arguments can be used in law at a meta-dialogical or dialogical level in three different fashions. First, they can be used to exclude the interlocutor from the dialogue by showing his failure to comply with the conditions (namely the rules) of the dialogue (*ad hominem* 1). For instance, the speaker can attack the hearer in order to interrupt the dialogue, exclude him from the discussion or justify his own refusal to continue it. This type of move is used in legal (criminal) proceedings to attack the person who is putting forward the arguments in defense or against the defendant, or, in *voir dire* examination, to exclude an incompetent, biased or unqualified juror (*Federal Rules of Criminal Procedure* Rule 6b(1)). Second, *ad hominem* moves can be used as arguments supporting a specific judgment or a decision (*ad hominem* 2). For example, the prosecutor can attack the defendant in order to trigger a negative judgment and support the conclusion that he is likely to have committed the crime, or deserve a severe punishment. Third, a personal attack can be used as arguments against the conditions of an argument (*ad hominem* 3). For instance, the persuasive force of expert or witness testimony lies in an implicit argument grounded on the credibility and privileged or superior knowledge of their source. By attacking the source, the credibility of the testimony can collapse (Pollock, 1974).

This classification of types of *ad hominem* arguments according to the scope and characteristics of the aim of the argument is summarized in figure 1.

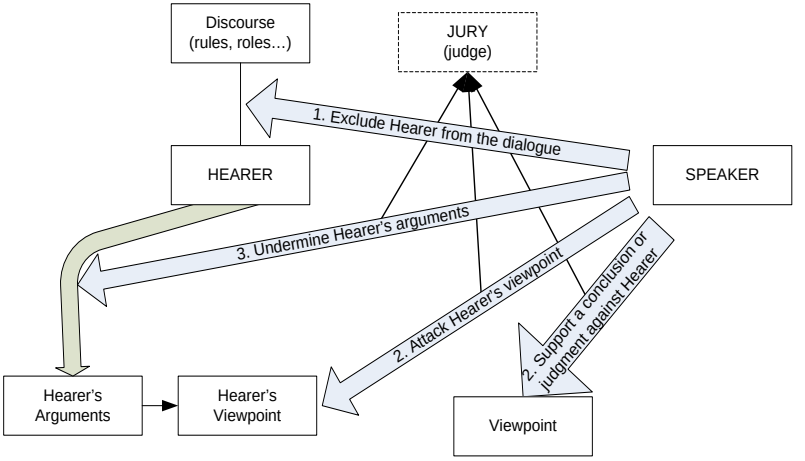

Figure 1: Scopes of *ad hominem* attacks

In the following sections the deeper structure of these different types of personal attacks will be presented, describing the different components of the strategies of which they are part and the possible tactics, or rather maneuvers, to achieve a specific goal.

In addition to the specific literature on *ad hominem* argumentation, the general theory required by the analysis shown in figure 1 presupposes a framework of argumentation that is based on two components. One is the use of argumentation schemes, which represent commonly used types of arguments that are defeasible. To say that they are defeasible means that they are subject to default as new information comes in case, for example information about an exception to a rule. Schemes identify patterns of reasoning that be challenged by raising critical questions (Walton, Reed & Macagno, 2008). Below will we will identify some schemes that represent different types of *ad hominem* arguments.

However, there is more than this notion of defeasible reasoning required. The argumentation framework needs to examine pro-arguments supporting a claim as well as contra arguments attacking or defeating the claim, and by its nature defeasible argumentation proceeds by examining both the evidence for and against a claim. Argumentation is appropriate under conditions of lack of knowledge

and inconsistency so that there is uncertainty and a conflict of opinions on whether a claim should be accepted or not. In this framework in argument needs to be evaluated in the context of a dialogue in which two, in the simplest case, parties take turns criticizing each other's arguments and supporting their own arguments with evidence. A dialogue is defined as an ordered 3-tuple {*O*, *A*, *C*} where *O* is the opening stage, *A* is the argumentation stage, and *C* is the closing stage (Gordon, 2010). At the opening stage, the participants agree to take part in an orderly discussion or investigation that has a collective goal. The nature of the conflict of opinions is framed at the opening stage, and then the pro and contra argumentation moves from there toward the closing stage through the intermediating argumentation stage. Every argument needs to be seen not only as an argumentation scheme, a structure with a set of premises and conclusion, but it also needs to be analyzed and evaluated within the communicative context where the argument is being used for some purpose in discourse. Moreover, there can be different types of dialogue. The goal of a persuasion dialogue is to reveal the strongest arguments on both sides by having a strenuous contest between the conflicting viewpoints during the argumentation stage.

A common law criminal trial is generally taken to represent a type of persuasion dialogue (Walton, 2002), where there is a burden of persuasion set at the opening stage on the prosecution, which needs to bring forward its stronger arguments in order to meet a burden of proof. In particular, he has to prove beyond reasonable doubt that the defendant is guilty, producing the evidence needed to support such a claim. No weakness in it argument can be left by the prosecution, or proof beyond a reasonable doubt will not be achieved. Once the prosecution has made his case (for instance presenting witnesses' testimonies), the defense can advance its arguments to weaken it (for instance, by attacking their arguments or their character, or presenting contrary testimonies, which in their turn can be attacked by the prosecution). However, the burden of production for proving an exception is on the defense: for instance, if the defendant has pleaded self-defense, he will have to provide some evidence to support this claim (burden of production). Once he has met this burden of production, even by a small amount of evidence, the prosecution then

has the burden of persuasion that there was no self-defense. Trials are different from ordinary persuasion dialogues because their purpose is not to convince the opponent (the prosecution or the defense), but a third party, the judge, or in US criminal trials, the jury. In particular, the popular jury at common law is the trier of fact: they find the facts and apply (or at least they are instructed to do so) the law as given by the judge in order to reach a verdict. On this perspective, in order to support their position, the prosecution or the defense advance different types of arguments and counterarguments that can persuade the jury. Some of these arguments are admissible, other are considered as inadmissible or improper, and can lead to curative instructions (namely instructions given to a jury by the judge to avoid prejudice and correct error) or more serious decisions when they can affect the final outcome. *Ad hominem* attacks in criminal cases are one of the most problematic types of argument, as they can greatly affect the prejudice and passions of the jury.

2 Meta-dialogical moves in legal argumentation

The first type of move is against the participants in the dialogue (in this case the defense counsel or the prosecution) and its structure can be represented as follows (Walton, 1998, p. 249):

Argumentation scheme 1: Generic ad hominem

a is a bad person.

Therefore, *a*'s argument □□ should not be accepted.

By attacking the speaker (in this case the prosecution or the defense counsel) it is possible to draw the conclusion that his arguments (in general or a specific argument) should not be accepted. The prosecution can attack and undermine all the possible evidence and arguments advanced by the defense by suggesting or claiming that the counsel is dishonest (*State v. Reyes,* 108 S.W.3d 161, 2003), or has lied and fabricated evidence. Apart from their potential fallacious character, these moves can effective, but also dangerous for the party that advances them. For this reason they are used in more complex strategies.

Ad hominem attacks can be extremely dangerous when made by the prosecution. As stated in *Berger v. United States* (295 U.S. 78, at 89, 1935), “improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused, when they should properly carry none.” For this reason, if the prosecutor is allowed to strike “hard blows”, he cannot strike “foul ones.” One of the most prejudicial blows can be the direct *ad hominem* on the defense counsel, especially where the credibility of his defense is attacked not based on evidence. A clear example is from the case cited above (*Berger v. United States*, 295 U.S. 78, at 89, 1935):

> Again, at another point in his argument, after suggesting that defendants' counsel had the advantage of being able to charge the district attorney with being unfair, "of trying to twist a witness," he said:
> "But, oh, they can twist the questions, . . . they can sit up in their offices and devise ways to pass counterfeit money; 'but don't let the Government touch me, that is unfair; please leave my client alone.'"

This attack was considered to be improper and highly prejudicial (and for this reason it led to reversal)[3] because it implied that the defense counsel has an extra-record reason to believe her client guilty, and that the prosecution held information not in evidence to support such an accusation (see also *United States v. Rios*, 611 F.2d 1335, at 1342, 1979, where the prosecutor suggested that the defense counsel conspired to fake exculpatory evidence). The effectiveness of these attacks stems from the role and superior knowledge of the prosecutor, which trigger a presumption of knowledge (if he suggests a fact, he

[3] The analysis of a prosecutor’s reversible error (in this case an ad hominem attack) is based on “a two-step approach; first, it determines whether the prosecutor's remarks were improper, and second it determines whether the error was harmless.” Concerning the second step, four factors are considered:
(1) whether the remarks tended to mislead the jury or to prejudice the accused;
(2) whether they were isolated or extensive;
(3) whether they were deliberately or accidentally placed before the jury; and
(4) the strength of the evidence against the accused.
(*United States v. Carroll*, 26 F.3d 1380, at 1385-87, 1994)

must have unstated reasons supporting it) (Gershman, 1986a, pp. 135-136; Clifford, 1999, p. 264).

The attacks can be acceptable when they proceed from circumstantial evidence, and be simply launched as generalizations based on the counsel's alleged behavior in specific instances. Instead of attacking simply his arguments, the opposing party can draw or suggest a conclusion about his character. For instance, in the O.J. Simpson murder trial, the prosecutor Marcia Clark attacked the defense attorney Lee Bailey starting from some alleged "hair splitting" behavior (*People v. Simpson*, No. BA 097211, 1995. Official transcripts 34A, March 15, 1995 at 0008-0010):

> MS. CLARK: This is kind of nonsense that gives lawyers a bad name. It is clear what he said to the Court and was intending to convey. He had personal knowledge of what this man said. He said it personally, Marine to Marine. Now he is standing up in hair-splitting with us. I never said he said this. I just said he spoke to me personally. That's nonsense. That shows you what we have over here in the way of ethics. They will get up and misrepresent to their heart's content. They start splitting hairs. They have this; they have that. I felt like we are Alice in Wonderland. Nothing means what it says. […] Because Mr. Bailey, you can see how agitated he is, has been caught in a lie. You know something, in this case you don't get away with that. There are just too many people watching.

Clark's attacks are mostly implicit, or rather implicatures and were not even objected to at trial. She does not call directly Bailey a liar, but she claims that "he has been caught in a lie" and that "in this case" he cannot get away with it, taking for granted that he is used to lying. The other comments concerning the ethics similarly imply a negative judgment.

Meta-dialogical attacks made by the defense counsel on the prosecution are common and equally dangerous tactics. However, in this case the danger lies in the invited response doctrine: a defense argument may 'open the door to otherwise inadmissible prosecution rebuttal, because prosecutors must be allowed to offer "legitimate

responses" to defense arguments raised during summation (*United States v. Rivera*, 971 F.2d 876, at 883, 1992). In other words, an attack by the defense can allow an otherwise inadmissible argument (a counter-attack by the prosecution, for instance). A clear example is the aforementioned case (id. at 883, emphasis mine):

> Rivera claims that the prosecutors initiated ad hominem attacks against Rivera's trial counsel by referring to him as a "**know-it-all**" and "**Mr. Thorough**." These characterizations were made in response to Rivera's counsel's arguments that he had obtained material from many sources, including private investigators, and was "very thorough." They also responded, less directly, to the contention of Rivera's counsel that he was presenting the "truth" of the case, as distinguished from the prosecution's representations. For example, Rivera's counsel asserted, in his opening statement: "[Cooperating witness] Ward Johnson has a great motive to follow [the prosecutors'] script and not be truthful in this case. Will Ward Johnson tell their truth or the truth during the course of his testimony?"
> […] Rivera also argues that the prosecutors attacked his counsel's credibility and integrity, pointing to numerous characterizations of Rivera's case as "**smoke screens**," **game-playing, distractions, and distortions**.

This attack was considered as legitimate, as they were aimed not at prejudicing the jury, but at rebutting the counsel's attack that the prosecution framed the defendant. The ironic characterizations of the counsel simply undermined an attack, instead of advancing one (see also *United States v Martinez* 419 Fed. Appx. 34, at 37; 2011). However, the invited response can often become a "springboard affirmatively to attack the defense" (see *States v. Young*, 470 U.S. 1, at 12-1, 1985), which amounts to an improper (and potentially prejudicial) remark.

In case of a defense's attack on the prosecutor, the latter is faced with a problematic alternative. On the one hand, he needs to reply to the attack in order to defend his reputation (or the reputation of his witnesses); on the other hand, the risk of advancing inadmissible or

prejudicial remarks is high. The risk of exceeding the boundaries of an admitted reply can be the very purpose of the defense's attacks, and in particular the points of order (Hamblin, 1970, p. 283), or rather the procedural locutions aimed at pointing out alleged prosecutorial misconduct. This strategy consists in the ungrounded allegation of inadmissible moves. For instance, in (*United States v. Pelullo*, 964 F.2d 193 at 219; 1992), the defense counsel accused, without any reasons, the prosecution of an incorrect behavior:

> During summation, Pelullo's counsel attempted to insinuate that the prosecutors suborned perjury by noting that three Government witnesses had changed their testimony following meetings with the Government. […] Finally, Pelullo suggested that the Government employed heavy-handed techniques to influence the testimony of Janice Spreadborough, a disbursement coordinator for FCA Mortgage.
> […] the defense proffered that the witness was "pestered" by the prosecutor until she would testify in a manner consistent with the Government's theory of its case. The prosecutor categorically denied the allegations, and again objected on relevancy grounds. After a sidebar, the court sustained the objection.

The purpose of this move was to lead the prosecution to moves that could have been considered as actually prejudicial. As the Court found, "Where there is no foundation for the defendant's assertions, the prosecutor will undoubtedly feel the need to respond during rebuttal which often leads to improper prosecutorial vouching as to the credibility of witnesses or to the prosecutor's own integrity or that of his or her office" (id. at 219). For this reason, such attacks need to be objected to by the court in order to avoid possible risks.

3 Arguments from character attack – attacks based on prior actions

Character attacks can be used as powerful arguments supporting a judgment on the defendant. In law, the effectiveness, or dangerousness,

of character attacks is described and governed by the *Federal Rules of Evidence*[4]. According to rule 401, the prosecution can introduce evidence of the defendant's past actions only if it is relevant, that its, only if "it has any tendency to make a fact more or less probable than it would be without the evidence and if the fact is of consequence in determining the action." In this framework, the item of evidence is required to be connected with the matter to be proved by a relationship "based upon principles evolved by experience or science, applied logically to the situation at hand." However, even if a piece of evidence is admissible according to rule 401, it may be excluded if its probative value "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence" (Rule 403). According to this rule, the relevance of evidence, such as facts concerning the defendant's character, shall be considered together with the risk of prejudice (Park, Leonard & Goldberg, 1998, p. 720). In particular, as stated in Rule 404, character evidence (including both a person's character or character traits and evidence of other crimes, wrongs, or acts used to prove the character of a person, FRE 404a; b) is not admissible for the purpose of proving conduct (or rather "action in conformity therewith on a particular occasion", FRE 404a) but it can be introduced if it is necessary to establish "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" (FRE 404b). A man cannot be proved to be guilty because he has a bad character. However, previous crimes can be cited "when they are so blended or connected with the one on trial as that proof of one incidentally involves the other; or explains the circumstances thereof; or tends logically to prove any element of the crime charged […] as well as to establish identity, guilty knowledge, intent and motive" (*Bracey v. United States*, 142 F.2d 85, at 89, 1944). For instance, prior acts can be used to prove emotional predisposition or passion in sexual offences. The strategies of character attack against the defendant hinge on the thin balance between relevance and prejudice. However, in order to analyze how and why character attacks are made, it is necessary to distinguish between their different

[4] The latest version of these rules can be found on the web at www.uscourts.gov/rules/newrules4.html.

reasoning structures, which reveal the different potential instruments of persuasion or prejudice.

The powerful and dangerous relationship between character attacks and prejudice lies in the notion of presumption, which is essential for the notion of character evidence. The passage from previous negative actions to the judgment on the person is grounded on a pattern of presumptive reasoning that is clearly outlined in fields of law directly concerning a person's personality, such as family law. In family law, child custody is granted considering the best interest of the child, and one of the material conditions determining whether the parent shall be awarded custody is his character (Myers, 2005, pp. 666-668). This type of reasoning is grounded on a fundamental presumption, namely the "stability" of the person (Perelman & Olbrechts-Tyteca, 1951, p. 254). Persons are characterized by patterns of behavior that allows one to judge and somehow predict his actions. For instance, if we know that a person behaved bravely in the past, we will tend, in an evidential situation where there is lack of contrary evidence, to judge his actions as brave (see Rescher, 1977, pp. 2-3; Dascal, 2001). The choices made in the past are regarded as a pattern that will be likely repeated in the future. Therefore, past actions can be thought of as a reason to draw a judgment on the person, then used to judge his actions or predict or retrodict his possible acts.

This presumptive reasoning can be represented as a combination of an argument from sign, leading from one or more acts to a judgment on the agent's character (Perelman & Olbrechts-Tyteca, 1951, p. 256), and an argument from cause to effect, leading from a character disposition to possible past or future actions. In philosophy, the basic presumptions on which this twofold reasoning step were made explicit by Aristotle (*Rhetoric* 1368b 13-15; 1369a 1-2):

> For the wrongs a man does to others will correspond to the bad quality or qualities that he himself possesses. […] All actions that are due to a man himself and caused by himself are due either to habit or to rational or irrational craving.

On this view, bad actions reveal a bad quality, which can be a habit or an irrational craving. In their turn, habits and cravings are

(teleological) causes, or rather reasons, of action. This philosophical perspective can illustrate the reasoning that can be ordinarily triggered, providing a possible reconstruction of the effect of an attack on the popular jury. The first step in this complex reasoning can be represented as follows (Walton, 2002, p. 42):

Argumentation scheme 2: Argument from sign

MAJOR PREMISE	Generally, if this type of indicator is found in a given case, it means that such-and-such a type of event has occurred, or that the presence of such-and-such a property may be inferred.
MINOR PREMISE	This type of indicator has been found in this case.
CONCLUSION	Such-and-such a type of event has occurred, or that the presence of such-and-such a property may be inferred, in this case.

An action can be regarded as an indication of a certain habit (negative in this case) or irrational desire. From this character trait it is possible to predict or retrodict the possible actions of the person, or rather establish his possible criteria of choice and decision. Such a reasoning is based on the presumptions that the character and habit of a person is presumed to continue as proved to be at a time past (Lawson, 1885, p. 180), and that the habit of an individual being proved he is presumed to act in a particular case in accordance with that habit (Lawson, 1885, p. 184; Park, Leonard & Goldberg, 1998, p. 158). We can represent the complex structure of this reasoning as follows:

Argumentation scheme 3: Causal argument from character

SIGN Presumption Judgment	• Agent *a* committed the negative actions A, B, C. • *A, B, C are a sign that a has an unchangeable negative characteristic P.* • Agent *a* has (is) *P*.
CAUSE Prediction	• *P is a cause of a's choices for negative actions of the kind Q.* • *Agent a is presumably inclined towards committing negative actions of the kind Q.*

This argument can be reasonable in conditions of lack of evidence, where a decision such as custody needs to be made based on incomplete knowledge, or in the penalty phase of a trial, where any prior felony conviction can be used for establishing the defendant's status as a habitual offender (*Johnson v. Mississippi*, 486 U.S. 578, at 588, 1988). However, the use of character evidence in the guilty phase can be extremely dangerous because it leads from a sign to a retrodiction based on two different defeasible patterns of presumptive reasoning. The risk is that the defeasible nature of the presumptive reasoning is overlooked, especially when the evidence triggers emotions or shows a prior crime materially similar to the one tried.

4 Attacking the defendant: strategies and dangers

Character attacks based on previous negative actions are usually carried out in three phases of a trial: in the opening statement, during cross-examination of the defendant, and in the closing argument. The prosecution's statements, and in particular the summation, are particularly strategic, as inferences from evidence can be drawn and the prosecution (and the defense) is expected to be passionate in their arguments. However, sometimes the boundaries of an acceptable argument are exceeded, and an attack, instead of being merely passionate, can become an inadmissible appeal to passions.

4.1 Opening statement

In the opening statement, the prosecution can attack the defendant based on the facts that will be presented, leading the jury to analyze carefully the seriousness and the implications of the evidence. For instance, in *United States v. Correa Arroyave* (721 F.2d 792, at 796; 1983) the prosecutor labeled the defendant as "a big-time, high stakes, narcotics dealer here in Dade County." This claim risked prejudicing the accused, suggesting enhanced and prior criminality. However, since the evidence (namely about 20 pounds of cocaine that the government found) indicated a large involvement on a large scale, the description was considered as proper.

Sometimes the prosecution exceeds the boundaries of the evidence and attacks the defendant using in particular two strongly prejudicial

types of attack: the reference to prior similar crimes and the amplificatio, or rather the strategy of taking guilt for granted. The first strategy consists in leading the jury to a generalization from prior bad actions to the defendant's generally bad character, from which the perpetration of the charged crime can be drawn or suggested. For instance we can consider the following case (reversed for improper opening statement), where the prosecutor introduces evidence of the defendant's past crimes, which he compares to the one he is actually charged with (transporting in interstate commerce a forged instrument) (*Leonard v. United States*, 277 F.2d 834, at 848, 1960):

> Before I give you the explanation of the crime charged in the indictment I want to recite for you some of the false names used by this man in perpetrating these 84 crimes. In the indictment crime he used the false name, Joe Hill. In the false official statement made to obtain a fishing license he used the false name Don Woods. In the Alaska Housing Authority forging and uttering, 12 offenses, he used the names Eddie Wilson and Bobby Wilson. And with respect to the Fairbanks group of crimes when he registered in a hotel room he registered as James Williams or James Wilson. It is quite impossible to determine absolutely because the manager of that hotel was subpoenaed and telegraphed -- I got the telegram this morning -- she could not appear due to complete disability. In addition to the names, said James Wilson or James Williams used to register at the Fairbanks hotel, this defendant used on the 50 crimes conspiracy and attempts, the name Willie Lee Andrews. A total, I believe, of nine false names that will appear as used by this defendant in the evidence to be presented to you.

A similar dangerous strategy is to arouse prejudice by implicitly depicting the defendant as a bad person, based on prior crimes or other features of his character. For instance, in *United States v. Stahl* (616 F.2d 30, at 33, 1980), the prosecutor described the defendant (accused of bribing a government official in order to reduce an estate tax) as "a man whose total life is geared to make money in real estate" and

suggesting the equation between wealth and wrongdoing, in particular corruption:

> By way of example, the prosecutor stated in his opening that "this case is also about money, tremendous amounts of money", and then continued:
> The proof in this case will not deal with small time bribe-givers. It will deal, however, with the basic roots of corruption both within and without or outside the IRS. . . . (Y)ou are going to hear proof, members of the jury, about the unchecked flow of corruption in various Park Avenue offices, in the IRS, and in the executive offices of a major real estate company in this city. . . . (I)t will deal with the man whose illegal conduct in business made him a major corrupt bribe-giver in the City of New York.

The prosecution suggested that the wealth of the defendant depended on his “illegal conduct in business”, and took for granted that he committed the crime of bribery several times (major corrupt bribe-giver). Since such claims were only aimed at arousing prejudice, the case was reversed.

This fallacious and improper attack leads us to consider the other strategy of personal attack, the so-called *amplificatio* (see Calboli Montefusco, 2004), which Aristotle described as follows (*Rhetoric* II, 24, 3): “This [fallacious topic] occurs when the “one amplifies the action without showing that it was performed.” One of the clearest cases is *State v. Couture* (194 Conn. 530, at 562, 1984; see also Bosanac, 2009, p. 45), where the prosecution took for granted the defendants’ guilt and used indignant language to describe their crime:

> “I implore you not to forget that . . . the lives of three good men . . . were literally sacrificed to satisfy the greed of two murderous fiends."
> "Now, it did not take you long, did it, ladies and gentlemen, to discover that this was not a case about cats and mice. No, ladies and gentlemen. It was a case about rats. And what else would you call some people who would lay in wait and shoot three men in the back except maybe cowards."

> "We have learned . . . they are cold blooded and merciless killers that took the lives of three good, decent and hard working men . . ."
> "What kind of person would lay in wait and attack three unsuspecting and almost defenseless men but shoot them in the back? They must be the most inhumane, unfeeling and reprehensible creatures that God has damned to set loose upon us."

In this case the prosecution characterized the defendants as murderers before proving them guilty and for this reason the attack was considered as prejudicial and led to reversal.

4.2 Cross-examination

One of the most problematic dimensions of *ad hominem* attacks against the defendant is their dangerous nature. They can lead to prejudice, which in its turn can lead to reversal. As mentioned above, the introduction of the defendant's character, supported by the history of his previous convictions, is forbidden by the Federal Rules of Evidence. However, previous crimes can be cited in order to show intent or establish the defendant's credibility as a witness (*Gordon v. United States*, 383 F.2d 936, at 939, 1967)[5]. For this reason one of the strategies (and dangers) of character attack consists in introducing during the defendant's cross-examination evidence of his previous crimes. This move can be at the same time extremely effective and risky: "When the prior conviction is used to impeach a defendant who elects to take the stand to testify in his own behalf, two inferences – one permissible and the other impermissible – inevitably arise. The fact that the defendant has sinned in the past implies that he is more likely to give false testimony than other witnesses; it also implies that he is

[5] The prejudicial effect of this move is underscored also in the Uniform Rules of Evidence and Rule 106 of the American Law Institute's Model Code of Evidence: "Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility. If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility."

more likely to have committed the offense for which he is being tried than if he had previously led a blameless life. The law approves of the former inference but not the latter." (*United States v. Harding*, 525 F.2d 84, at 90, 1975). The prosecution needs to avoid the second impermissible inference especially in cases where the crimes were similar. A risky and powerful strategy of attack consists in suggesting this latter inference instead of blocking it, underscoring the similarity between the charged crime and the past one. For instance, in the following cross-examination a past conviction (for possession of marijuana) with strong similarities with the tried offence (distribution of cocaine) is introduced allegedly to attack credibility. However, the prosecutor introduces details useless for the issue of trustworthiness, but crucial for arousing prejudice (525 F.2d 84at 88):

> Q. Have you ever used marijuana or smoked marijuana?
> A. No, sir, I have not. […]
> Q. What was the felony you were convicted of?
> A. Marijuana possession.
> Q. Do you remember exactly what the felony was that you were convicted for, was it just possession?
> A. Yes, sir, possession. It was simple possession, that is all.
> Q. Wasn't it possession with intent to distribute?
> A. No, sir, it was not.
> Q. What sentence did you receive?
> A. Two to ten. […]
> Q. For possession of marijuana?
> A. Yes, sir.
> Q. You couldn't be mistaken about the crime that you were found guilty of, could you?
> A. The crime they charged me with was 80 pounds of simple possession.
> Q. Where did they find the 80 pounds at?
> A. At my residence, sir. […]
> Q. Mr. Harding, this 80 pounds of marijuana that was found in your house in June of '74, was that there in January of '74 when this cocaine sale took place?
> A. No, sir, it was not.

The prosecutor suggests that the defendant not merely possessed marijuana, but had intent to distribute it, just as in the tried case. The use of innuendo to misstate the prior conviction provides a strong reason for believing that the defendant also committed a very similar crime (see also *Gordon v. United States*, at 940). Because of its prejudicial nature, the move was considered as plain error and the case reversed.

The boundary between impeaching credibility and triggering inadmissible inferences is extremely risky. Past offences can show contradiction, but at the same time also bad character, turning an argument into an implicit attack (Gershman, 1986b, p. 484). For instance we can consider the following attack based on prior crimes, which was held reversible because of its prejudicial effects (*United States v. Carter*, 482 F.2d 738, at 740, 1973):

> Q. (The Assistant United States Attorney): And you wouldn't rob that man, right?
> A. I had no reason to rob when I am working.
> Q. You wouldn't do something like that?
> A. No, I wouldn't.
> Q. But in 1968, you were convicted of six counts of robbery and assault with a dangerous weapon, weren't you, on three different people?
> A. Yes, I was, and I have learned my lesson from that.
> Q. You did?
> A. Right.

The prosecutor introduced evidence of past crimes to underscore an inconsistency between acts and statements on an issue, credibility, which was brought forward by the defense. However, the attack on the credibility triggered a much stronger inference, namely that “appellant would rob a man, and in fact committed the robbery for which he was now charged.” For this reason the case was reversed.

A more powerful and dangerous strategy consists in the use of presuppositions. Instead of introducing past convictions by means of questioning, the prosecution can take for granted evidence that cannot

be considered as false, even though not admissible (Hopper, 1981a; 1981b). For instance, we can consider the following move (*United States v. Sanchez*, 176 F.3d 1224, 1999):

> During cross-examination, the prosecutor asked the defendant the following question: "Can you explain to me Mr. Sanchez, why you have a reputation [for] being one of the largest drug dealers on the reservation but you don't have more than one source of supply?"

This question presupposes a fact that could not be introduced as evidence, suggesting to the jury that "the defendant had a reputation for being one of the largest drug dealers on the reservation" (*United States v. Sanchez*, at 1225). This move triggers prejudices and value judgments. The defendant is shown to be a criminal, and for this reason more likely to have committed also the present crime.

An even more powerful and dangerous tactic aimed at triggering prejudices is the characterization of the defendant as a "bad person" based on innuendo, instead of an explicit description of his previous crimes. For instance, we can consider the following case, where the defendants were depicted as "sinister characters" by means of innuendo, triggered by irrelevant questions during cross-examination concerning their unemployment, their possession of money and their apparently aimless activities in a drug-trafficking area (*United States v. Shelton*, 628 F.2d 54, at 57-58, 1980):

> In the case before us, the prosecutor did not openly present evidence of "other crimes." Rather, by innuendo, he painted a picture of Clifton Duke and David Shelton as seedy and sinister characters. This picture showed two unemployed men possessed of a large sum of money, driving in a car which was the subject of an investigation by the Drug Enforcement Administration. And, lest the jury miss the point, the prosecutor directed no fewer than four questions at Duke that were designed to show that he frequented the area of 14th and T Streets, N.W., a known center for narcotics activity. We cannot avoid the conclusion that, in a case the essence of which is common law

> assault, the prosecutor sought to persuade the jury that the defendant and one of his principal witnesses were members of the drug underworld involved in all sorts of skulduggery.

The prosecution did not explicitly introduce evidence of other crimes. On the contrary, the defendant's character was described in a fashion that corresponded to the prototypical drug trafficker. The innuendo makes a possible rebuttal or a critical assessment of the evidence more difficult (at 58): "Where the "other crime" alleged is not specified, it is more difficult for the defendant to refute the charge or to demonstrate its insignificance. Where the evidence is presented by innuendo, it is less likely that the jury will guard against manipulation." For this reason, the error was classified as prejudicial and the case reversed.

4.3 Closing statement

In closing argument the counsels are allowed to advance their arguments with generous latitude; in particular, given the nature of such statements, the courts tend not to infer that every remark is intended to carry "its most dangerous meaning." Moreover, the prosecution is expected to be passionate in arguing that the evidence supports conviction (*Donnelly v. DeChristoforo*, 416 U.S. 637, 646-47, 1974; *United Stated v. Farhane* 634 F.3d 127, 2011), and draw reasonable inferences from the facts in evidence. Sometimes the admissible attack on the defendant can be used for achieving further effects, such as in the following case (*United States v Molina*, 934 F.2d 1440 at 1446, 1991):

> You could only come to one conclusion: That somebody is lying. And who is that? Who's lying? Is Special Agent Reyes lying? Did he get up on the stand under oath and lie to you for the sole purpose of convicting an innocent man? It's unbelievable. The one who lied to you is the one who is guilty of possessing with the intent to distribute the cocaine. And that's the defendant, Frank Molina. And when you weigh the credibility of the witnesses, remember that there was one witness here who had a greater motive to lie than any other

> witness, a greater stake in this case than either Art Reyes or Alvaro or Agent Leppla or anybody, and that man was the defendant, Frank Molina. He had the greatest bias in this case and the greatest motive to lie.

The attack (the defendant is lying) is based on inferences drawn from conflicting testimonies and commonly accepted principles (it is not reasonable that a man faces risks to convict an innocent; who has greater motives to lie can presumably lie). At the same time the prosecutor attacks the credibility of the defendant and bolsters the one of the witnessing agent, providing the jury with conflicting probabilities.

The use of inferences from facts in evidence for attacking the defendant can be extremely slippery, as the prosecution needs to block the inadmissible inferences to the culpability of the accused. As mentioned in the subsection above, the prejudicial conclusion needs to be avoided; however, sometimes in the closing argument the prosecutor leads the jury to draw the very inference that he should prevent. For instance, in the aforementioned case *United States v. Harding* (525 F.2d 84, at 89, 1975), the prosecutor underscored the similarity between the prior and the tried crime as follows:

> The Defendant has also denied ever using marijuana or any narcotics, but admitted to being convicted of a felony of possession, which 80 pounds of marijuana was found in his home in June of 1974, five months after this transaction took place. The Government submits that is a little unusual.

The prosecutor emphasized the similarity between the two offenses (and the details thereof), so that the improper inference was suggested, instead of blocked. For this reason, the error was considered as plain and the case reversed.

Triggering inadmissible inferences needs to be distinguished from taking the defendant's guilt for granted. This move can be extremely prejudicial, as the jury may be led to believe that the prosecutor holds unstated evidence to convict the defendant. The effect of the act of presupposing guilt can be further increased by means of other ancillary

implicit arguments, such as the fear appeal. In the following case (reversed for plain error) three implicit strategies are combined (*United States v. Weatherspoon*, 410 F.3d 1142, at 1150, 2005):

> Convicting Mr. Weatherspoon is gonna make you comfortable knowing there's not convicted felons on the street with loaded handguns, that there's not convicted felons carrying around semiautomatic...."

Here, first, the prosecution refers to the defendant as a "convicted felon", which was in evidence, but could lead to inadmissible inferences (the defendant is bad; therefore, he committed this offence as well; the defendant is generally bad and dangerous; therefore he should be convicted). Second, he took for granted that the offence that the accused was charged of (possession of firearms) was a proven fact. Third, he took for granted the dangerous character of the defendant appealing to the jury's fears. This latter strategy is based on argument from consequences (from Walton, 1995, pp. 155-156):

Argumentation scheme 4: Argument from consequences

PREMISE	If *A* is brought about, good (bad) consequences will plausibly occur.
EVALUATION	Good (bad) consequences are (not) desirable (should (not) occur).
CONCLUSION	Therefore *A* should (not) be brought about.

The bad habit is shown as a reason for future negative actions, but such actions are presented as negative consequences of acquittal. Moreover, the consequences are directly related to the jury's experiences and negative judgments concerning violent people, showing the relationship between the potential freedom of the defendant and the jurors' lack of personal safety. The prosecutor triggers fears in order to lead the jury by heuristic reasoning based on emotions. Emotions are forms of judgment leading to heuristic choices (Damasio, 1999, p. 302; Solomon, 2003, p. 107; Macagno & Walton, 2008), that is, decisions made in a situation of lack of evidence and time to assess all the possibilities. In order to avoid negative

consequences or pursue positive ones, the most convenient, even if not the best, solution is chosen. Triggering emotions can become a powerful strategy for precipitating a decision not justified by the evidence.

Another strategy of character attack based on prior negative actions is grounded on innuendo, which from a linguistic perspective corresponds to the use of implicatures. 'Implicature' (Grice, 1975) is a technical term in pragmatics, a subfield of linguistics, referring to a proposition suggested implicitly by an utterance, even though it was neither expressed nor strictly implied by the utterance. Implicatures are triggered by the deliberate flouting of a conversational maxim (such as the principle that speakers make their contribution as informative as required) to convey an additional meaning not expressed literally. For instance, the prosecutor does not state that the defendant committed a crime, but simply leads the jury to this conclusion by providing details apparently providing more information than required. In this fashion, he communicates a proposition to the jury and suggests its acceptance without explicitly committing to any assertion. In the following case (*United States v. Ayala-Garcia*, 574 F.3d 5, at 10, 2009, reversed), the prosecutor claims that the confiscation of the weapons that the defendants allegedly possessed (the charge was of firearm possession) saved actually several lives:

> Ladies and gentlemen of the jury, those (indicating) are bullets from an AK-47 assault rifle. There are 31 of those bullets that were in this gun, ready to go on May 25th. Thirty-one potential lives were saved on May 25th, 2006. And for that, the district of Puerto Rico should be thankful, 31 lives were saved.

The statement, apparently providing irrelevant and excessive information, can be explained only by presuming (Macagno 2012) that the defendants "were potential killers who would have murdered thirty-one individuals if they had not been arrested" (*id*. at 10). This implicit character attack carried two fundamental risks. First, it triggered fear and led the jury to the conclusion that the defendants need to be convicted in order to avoid possible killings. Second, the implicit intentions of the defendants to commit a mass murder elicited the

presumption that “the prosecutors knew something about the defendants' intentions beyond what had been revealed at trial.”

Attacks on a defendant’s character can be extremely powerful and prejudicial, and can be explicit or implicit. In both cases, the common strategy is to state or suggest the existence of prior crimes, or take for granted the defendant’s guilt, crime or intentions. The danger and effectiveness of this move consists in the conclusions that it suggests by directing the interlocutors to a specific type of reasoning, based on the inference from past actions to a character trait, and from character to actual or future actions. The force of this reasoning is further increased by the role of the prosecutor, who is presumed to hold the evidence on which he bases his explicit or implicit claims. A subtler and more dangerous strategy is grounded on the implicit effects of some words that are usually referred to as “emotive”.

5 Arguments from character attack – Emotive words

Attacks based on prior negative actions are based on a two-step chain of presumptive reasoning, leading from actions to a habit (or desire) and from the habit to a prediction or retrodiction. This type of reasoning is defeasible and can be objectively assessed by the jurors. The speaker can simplify this complex pattern of inference using emotive words, in particular negatively charged words (Cantrell, 2003). The speaker does not advance prior bad acts, or rather does not *only* advance them. He provides the interlocutors with the conclusion of the defeasible reasoning from sign, classifying the defendant as a member of a negative category of people, characterized by a criminal or extremely negative habit. In this fashion, the defendant is not simply shown to *have behaved* badly in the past, but to have a bad habit, or rather to be a person that *behaves* badly.

Emotive words have an extremely powerful effect on the interlocutor’s decision-making (Macagno & Walton, 2010a; 2010b). First, they are connected with emotions. They can represent generic negative concepts mirroring the interlocutors’ possible negative experiences, so creating a relationship between them and the case at issue. Such identification can trigger an immediate emotive response or a disposition to act accordingly (Damasio, 1999; Frijda & Mesquita,

1998, p. 274). Moreover, emotions are physiological conditions often limiting or diverting the attention of the agent from the critical assessment of the logical and rational structure of an argument (Blanchette, 2006; Blanchette & Richards, 2004). For this reason, emotions can be successfully used for communicating information and beliefs poorly supported by evidence, and lead the interlocutor to a specific decision or action (Frijda & Mesquita, 2000, pp. 46-47).

Emotive words are directly connected with imagination and past experiences. Without mentioning facts that can be assessed, these words simply provide an image of the interlocutor that can evoke associations with negative past experiences (Doerksen & Shimamura, 2001) and trigger immediate responses to the perceived negative consequences. Emotive words provide a "vivid representation" (Quintiliani *Institutio Oratoria*, VI, 2, 34; Frijda (1998, p. 276) calls it the "vividness effect"), an instrument for linking the crime with the interlocutors' experiences and leading them to the reactions they would have in a similar situation.

The use of emotive words can be a tactic that can be used in a reasonable and harmless way. The speaker can "amplify" (Aristotle, *Rhetoric* II, 1401b 3-9) the facts, using indignant language that proceeds from evidence and for this reason is not prejudicial, even though it can stir the jury's emotions and emphasize the reasons on which they may ground their decision. For instance we can consider the following case (*United States v. Hoffman*, 415 F.2d 14, at 21, 1969):

> In an examination of the Government's closing argument, we believe counsel did appeal to sympathy and passion. His reference to defendant as a liar, crook, wheeler and dealer, and similar terms were not conducive to the fair trial to which defendant was entitled. The reference to "contempt for law and order," at a time when there is a general public concern for personal safety, is an unfortunate reference. […] Counsel's argument, while improper in its intensity, was an accurate characterization of defendant's actions.

The speaker, in this case, does not go beyond the evidence produced, even though he amplifies the character of the defendant by

reducing him to (grounded) negative features. For this reason, even though the appeal to the jury's sympathy and passions was judged as inadmissible, the error was considered as harmless.

However, sometimes the use of emotive language can prejudice the outcome of the trial. A clear example of its improper use can be found the following case from the court of appeal of Connecticut, which was reversed for prejudicial error (*State v. Williams*, 529 A.2d 653 at 663, 1987):

> "We have such nice words for these crimes now. Child-abuser; child abuser. Abuse? Abuse? That's what we do to alcohol. We abuse alcohol. That's not graphic enough a term. Baby-beater, that's what they ought to call this. Infant-thrasher, baby-beater. The more disgusting a term, the better it fits this crime. A child-abuser? 'Oh, isn't that nice. He's a child-abuser. We'll have to treat him.' He's an infant-beater; he's a baby-beater."

By identifying the defendant with a category of criminals, the prosecutor takes for granted not only that he committed the crime he is charged with, but also that he committed such a crime before. Moreover, by arousing emotions, he diverts the jury's attention from the analysis of the evidence, leading them to the wanted conclusion based on contempt or fear. He provides a representation of the defendant replacing generic words ("child", "abuser") with terms referring specifically to the first year of life of the victim ("baby", directly connected with the audience's experiences) and to physical violence ("trash", "beat"), charging them with personal comments ("disgusting"). Such terms were considered as highly prejudicial and extremely dangerous for the evaluation of the evidence.

There are two important fallacious strategies grounded the improper use of emotive words, each based on a different dimension of their structure as condensed arguments. The first strategy consists in unduly attributing a word to a fragment of reality, taking for granted facts that have not been proven or are simply false. The second one, on the contrary, amounts to a correct attribution of a word, whose function, however, is not to describe reality, but to reduce it to a simple characteristic that triggers prejudices, namely forms of presumptions

leading to ungrounded judgments (and not subject to rational assessment of its defeasibility). Both strategies carry strong presumptions, especially when they are used by the prosecution. The first one triggers the presumption that the grounds for the predication of a word are shared or known (by the prosecution) even if not stated (Macagno, 2012). From a trial perspective, this amounts to triggering the presumption that the prosecution holds evidence not presented at trial on which the attack is based, which corresponds to manipulating evidence, classifiable as a reversible error (*United States v. Bess*, 593 F.2d 749, at 755, 1979). The second strategy is aimed at arousing passions and prejudices through hasty generalizations that are commonly shared by a community. Classifying a person as a member of a specific ethnic or cultural community negatively judged can stir negative emotions and lead the interlocutor to the conclusion that he is guilty of the alleged crimes that such a community is commonly believed to commit (this attack is commonly referred to as "guilty by association", see Walton, 1998, p. 257).

The use of emotive language for attacking the defendant based on facts not in evidence amounts to expressing personal beliefs as they were based on undisclosed facts (*United States v. Young*, 470 U.S. 1 at 18-19, 1985). The danger of an improper use of such terms lies in the relationship between the reasonableness of the predication and its effects. The predication can be unreasonable because based on unstated facts, suppositions, or the very action the defendant is charged for. For instance, in the aforementioned case (*State v. Williams*), the prosecutor took for granted that the defendant committed the beating he was charged for and committed other child abuses before. However, the unreasonableness of the move is accommodated by reconstructing its controversial presuppositions. In other words, the jury presumes that the prosecutor knows the reasons why he is using such a word. For this reason, an emotive word used inappropriately, namely not based on prior evidence, presupposes the existence of the facts making its use reasonable. We can consider the following case (*Hall v. United States* 419 F.2d 582, at 587, 1969):

> I just don't believe that Harry Degnan who took Beck's statement and whom you have seen in this courtroom all this

> time would force anybody to make a statement. I know him to be a fine F.B.I. officer — absolutely the finest I know. A man of absolute integrity. And I get a little tired of the F.B.I. being whipping boys for hoodlums. And that is the only way I know how to describe the defendant Donald Hall, he is a hoodlum.

This argument was considered as improper and prejudicial for two reasons. First, the prosecutor expressed a personal belief in order to support the character of his witness. Second, in order to increase the force of his bolstering the officer's credibility, he attacked the defendant's character based on facts not in evidence. The court described its dangerous and inflammatory nature as follows (id. at 587):

> This type of shorthand characterization of an accused, not based on evidence, is especially likely to stick in the minds of the jury and influence its deliberations. Out of the usual welter of grey facts it starkly rises — succinct, pithy, colorful, and expressed in a sharp break with the decorum which the citizen expects from the representative of his government.

The manipulation of evidence is a crucial element for the assessment of the prejudicial effect of a move. In this case, the personal opinion was aimed at leading the jury to ground their decision on crucial evidence that the prosecutor took for granted, and therefore presumed to be in his possession.

Instead of presupposing facts not in evidence, the prosecutor can suggest their existence by describing the defendant with words eliciting specific inferences or prejudices. On this perspective, the use of emotional words can introduce implicitly the existence of "other crimes" to imply that the defendant is a bad person or has criminal propensity (*United States v. Shelton*, 628 F.2d 54, at 57, 1980; see FRE 404). The generalization can be triggered by a description of the defendant focused on his association with groups against which there are prejudices, or rather that are commonly presumed to be bad or have criminal propensity. A clear case is *United States v. Doe*, where the prosecutor described the defendants, African Americans (referred to

during the trial as "Jamaicans") accused of drug and firearm possession, as follows (903 F.2d 16, at 24, 1990):

> And what is happening in Washington, D.C. is that Jamaicans are coming in, they're taking over the retail sale of crack in Washington, D.C. It's a lucrative trade. The money, the crack, the cocaine that is coming into the city is being taken over by people just like this — just like this. They're moving in on the trade. They're going to make a lot of money on it....

The Jamaican ethnicity at the time of the trial was commonly connected with crimes (during the trial media reported threats by Jamaican drug gangs on the life of the Mayor of Annapolis). The prosecutor's use of the term "Jamaicans" to refer to the defendants, and the vivid representation of the activities of the group they belonged to (strengthened by labeling defendants as "people like this") triggered the conclusion that the defendants were simply guilty because they shared the same nationality as those whom were described in such negative terms. For this reason, the error was considered as prejudicial and the case reversed.

The prejudicial force of emotive words lies in the inferences that a vivid description can trigger. A common strategy for increasing their force is to increase the force of the most useful (and often inadmissible) inferences. In the case above, the stereotypes concerning Jamaicans were already commonly shared, and the media bolstered them. In order to increase the effect of a categorization, the speaker can support or create a stereotype of the group the defendant belongs to. For instance, in the following case (*Bains v. Cambra*, 204 F.3d 964, 2000) the prosecutor described the defendant, accused of homicide, as a Sikh, and then proceeded to create the stereotype of this religion. In this case, the potentially emotive classification was motivated (the defendant's Sikh beliefs could show motive); however, the prosecutor instead used the epithet to trigger powerful inferences (at 975-976):

> A not insignificant portion of the prosecutor's closing arguments, however, […] invited the jury to give in to their prejudices and to buy into the various stereotypes that the

> prosecutor was promoting. […] Here, the prosecutor relied upon clearly and concededly objectionable arguments for the stated purpose of showing that all Sikh persons (and thus Bains by extension) are irresistibly predisposed to violence when a family member has been dishonored ("If you do certain conduct with respect to a Sikh person's female family member, look out. You can expect violence.") and also are completely unable to assimilate to and to abide by the laws of the United States ("[T]he laws in the United States [are] not what we're talking about. We're playing by Sikh rules.").

The use of a potentially emotive characterization can trigger different types of inferences (such as Bains, a particular Sikh person, may have had a motive to kill a family member). However, the inflammatory arguments were aimed at bolstering its prejudicial effects, guiding the jury to draw the very inferences that were inadmissible, given their prejudicial nature (Bains, as a Sikh, was compelled to kill a family member).

6 *Ad hominem* undercutters

The last type of personal attacks is the *ad hominem* undercutter. The personal attack is not used as a reason to support a specific viewpoint, but is rather a move aimed at rebutting the foundation on which the interlocutor's argument is based. In law undercutters are usually used against argument from testimony (including both witness and expert witness testimony), from appearances and from pity. Undercutter character attacks have a twofold dimension. They need to be directed against the presuppositions of the argument, such as the credibility of the witness or the expertise of the authority, based on available and admissible evidence. However, in addition to being relevant, character undercutters need to be effective. They need to lead the jury to the conclusion that the source is not credible or does not deserve pity from factual evidence. For this reason, *ad hominem* undercutters are often complex strategies, involving tactics for arousing emotions, emotive words or arguments from consequences. Moreover, *ad hominem* undercutters have different scopes, or rather targets, depending on the

argument they are undermining. Different dimensions of the person are attacked, depending on the characteristics that put forward as preconditions of the argument.

6.1 Undercutting witness testimony

Ad hominem moves can be aimed at attacking the witnesses in order to defeat the implicit argument based on their position to know and reliability. This pattern of argument, called argument from witness testimony, can be represented as follows (Walton, Prakken & Reed, 2003, p. 33, Walton, Reed & Macagno, 2008, p. 309):

POSITION TO KNOW PREMISE	Witness *W* is in position to know whether *A* is true or not.
TRUTH TELLING PREMISE	Witness *W* is telling the truth (as *W* knows it).
STATEMENT PREMISE	Witness *W* states that *A* is true (false).
CONCLUSION	*A* may be plausibly taken to be true (false).

This argument can be undermined by attacking the credibility of the testimony, which amounts to attacking his character for truthfulness and, more specifically, his propensity for lying or his bias (propensity and interest for lying in the specific situation). The undercutter of a witness testimony can be grounded on the witness's inconsistencies or his past actions.

The witness's character can be impeached based on his contradictions during the trial, which can be considered as a sign of bad character untruthfulness. One of the most famous cases of character attack based on the witness's contradictions is the O.J. Simpson murder trial, where the crucial witness for the prosecution, Detective Fuhrman, was found to have lied concerning his racial statements. In the same trial, however, we can notice that the counsel for the defence widened the scope of the attack, showing the witness as a corrupt, racist and evil person, and therefore biased against the defendant. This *ad hominem* move was made in the closing argument by the defence attorney Johnnie Cochran (*People v. Simpson*, No. BA 097211, 1995):

> Then we come, before we end the day, to Detective Mark Fuhrman. This man is an unspeakable disgrace. He's been unmasked for the whole world for what he is, and that's hopefully positive. […]
> Then Bailey says: "Have you used that word, referring to the `n' word, in the past 10 years? "Not that I recall, no. "You mean, if you call someone a Nigger, you had forgotten it? […] Why did they then all try to cover for this man Fuhrman? Why would this man who is not only Los Angeles' worst nightmare, but America's worst nightmare, why would they all turn their heads and try to cover for them? Why would you do that if you are sworn to uphold the law? There is something about corruption. There is something about a rotten apple that will ultimately infect the entire barrel, because if the others don't have the courage that we have asked you to have in this case, people sit sadly by. […]
> We owe a debt of gratitude to this lady that ultimately and finally she came forward. And she tells us that this man over the time of these interviews uses the "N" word 42 times is what she says. […] And you of course had an opportunity to listen to this man and espouse this evil, this personification of evil.[…] The tape had been erased where he said, "We have no niggers where I grew up." These are two of 42, if you recall. […]Talking about women. Doesn't like them any better than he likes African Americans. They don't go out and initiate contact with some six foot five inch Nigger who has been in prison pumping weights. This is how he sees this world. That is this man's cynical view of the world. This is this man who is out there protecting and serving. That is Mark Fuhrman.

In this closing argument the defense counsel undermines the crucial testimony of detective Fuhrman by attacking his character for truthfulness. His testimony was shown to partially conflict with factual evidence, but to undercut this argument effectively the counsel needed to erase any doubt about the truth of his words. For this reason, he destroys Fuhrman’s character. The defense counsel’s attack is based on evidence. Fuhrman lied about his racist addresses and was shown to

hate Afro-Americans. However, the counsel drew from these facts inferences about his character emphasizing with emotive words the concepts of evil, racism, corruption and cynic character. The counsel did not draw the conclusion that Fuhrman lied, but simply aroused indignation and contempt in a jury that was mostly composed of Afro-American jurors.

Despite its violent attack to the witness's character, this move did not lead to any objection because of its internal structure. The evidence on which the attack was based emerged during the trial and concerned a specific attitude of bias against the group to which the defendant belonged. Moreover, the counsel for the defense attacked Fuhrman's character only relative to the evidence presented. No conclusions concerning his trustworthiness are made explicit, even though the emotive language used a gloomy image of the detective is depicted. According to the *Federal Rules of Evidence* (Rule 609) it is possible also to introduce evidence of the witness's past convictions in order to impeach his character for truthfulness. The counsel only needs to provide such evidence, so that the jury can assess the witness's character and his possible bias: "One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. […] The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony" (*Davis v. Alaska*, 415 U.S. 308, at 316, 1974).

Personal attacks against the witness can be extremely effective, and are for this reason dangerous. Even though "counsel must be given leeway to argue reasonable inferences from the evidence", "the personal opinion of counsel has no place at trial" (*United States v. Collins*, 78 F.3d 1021, at 1050, 1996). As noticed above, the circumstantial evidence (or rather the sign) should to be provided without making the conclusion explicit (as it would be a personal opinion, even if drawn from the facts). While in implicit attacks the jury is free to draw the more reasonable conclusion on the basis of the evidence presented, in explicit attacks the speaker provides the jury with his own point of view. However, depending on whether it is the prosecutor or the defense to attack the witness, the possible prejudicial effects are noticeably different. Defense counsel, like the prosecutor, must refrain from interjecting personal beliefs and must not be admitted

to make unfounded and inflammatory attacks (*United States v Young*, 470 U.S. 1, at 9, 1985). However, the prosecutor's attacks based on personal beliefs can have a much greater effect than the defense counsel's ones, leading to "devastating impact" on a jury (see *United States v. Bess*, 593 F.2d 749, at 755, 1979), as:

> Such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence (*United States v. Young*, 470 U.S. 1 at 18-19, 1985).
> The statement is an expression of the prosecutor's personal belief regarding the guilt of the witness (see *United States v. Zehrbach*, 47 F. 3d 1252, 1995).

For this reason, in order to analyze the effects and the strategies of a personal attack, it is useful to investigate the cases in which they can prejudice a trial, namely when they are made by the prosecution. The explicit and potentially inadmissible attacks that can be advanced by prosecutors can be divided in three categories, according to their prejudicial effect: 1. explicit attacks based on the evidence presented; 2. explicit attacks not based on evidence; 3. implicit attacks not based on evidence (presupposing the witness's bad character);

The first type of explicit attack is more effective than simply presenting evidence, but, given its inadmissibility, risks leading to a mistrial if proven prejudicial (see *United States v. DiLoreto*, 888 F.2d 996, 1989). This strategy is based on evidence on prior convictions or bad acts that can be only weak signs of the witness's poor trustworthiness. Obviously, when such evidence is simply provided and no conclusion is explicitly drawn, it can have little effect on the jury, especially when the crimes committed do not trigger directly and powerfully a negative judgment on the person. For this reason, the attacker needs to increase the weight of his attack by making its

conclusion explicit, as in the following case (*United States v. Zehrbach*, 47 F. 3d 1252, at 1265, 3d Cir. 1995):

> I suggest you shouldn't believe Drizos and Smith because they're guilty of exactly the same bankruptcy fraud that these two defendants are guilty of. And don't you assume that they are not going to get what's coming to them either.

Here the prosecutor, in his closing argument, draws a personal conclusion based on crimes that are not directly relevant to the credibility issue. The jury could have been led to believe that the prosecutor had other information or evidence not produced during the trial to come to such a conclusion, unduly increasing the effect of the attack. For this reason, the move was considered as inadmissible, even if it did not lead to reversing the judgment because of its limited prejudicial effect, considering the strength of the prosecution's case, its occurrence in the trial (it occurred only once) and the following curative instructions.

The second strategy consists in an explicit ungrounded attack. Instead of presenting facts from which the jury or the counsel can later draw inferences, the speaker can directly attack the witness without advancing evidence, or classify him or her with emotive epithets not supported by the facts. These *ad hominem* moves are extremely effective and prejudicial, and risk leading to a mistrial. We can consider the following leading case (*United States v. Collins*, 78 F.3d 1021, at 1049 (1996).

> The prosecutor's statements, paraphrased, are: […] 3) when the DLJ witnesses swore to tell the truth they demonstrated from the tales they told that they have a lot of contempt for the people in Kentucky; 4) the witnesses must think we drive turnip wagons if they expect you to believe this tale; 5) I am not sure every witness fulfilled the oath to tell the truth; and 6) do you have a sense that certain witnesses took their oath seriously to tell the truth?

In this case, the prosecution advanced unwarranted attacks on the defense's witnesses. However, the prosecutor at the same time reminded the jurors of their obligation to weigh the credibility of the witnesses, pointing out that his remarks were just aimed at underscoring that the jury should consider the issue of credibility. Given these instructions and the overwhelming evidence, the error was considered as harmless[6].

A subtler strategy consists in taking for granted the witness's bad character, suggesting to the jury that he is a liar. In cross examination the counsel or the prosecution can presuppose attacks in order to prevent the interlocutor or the opposing counsel from denying the accusation or blocking the question. For instance we can consider the following case (*United States v. Everage*, 19 M.J. 189, at 191, 194, 1985):

> Q. Well, according to the story that you told when your counsel was examining you, what you apparently did was take these items and just walk out without even checking to see if they were in there. Do you think that happened? […]

[6] Explicit ungrounded attacks can lead to mistrial. For instance we can consider the following case, taken from the court of appeals of Florida. The lawyer, after withdrawing as defendant's counsel, was called at trial as a defense witness to establish that the identification of the aggressor with the defendant was tainted. During the closing argument, the prosecution attacked the witness directly (*Barnes v. State*, 743 So. 2d 1105 at 1106; 1999):

> In rebuttal the state's prosecutor, Alberto Milian, responded by characterizing this testimony as "the mercenary actions of . . . a hired gun, [e.s.] hired by the -- ." At that point the following occurred:
> "DEFENSE: Objection to that.
> COURT: Sustained.
> DEFENSE: Ask that it be stricken.
> COURT: Ignore the last comment.
> STATE: -- who was hired to go over there and defend this guy."

In this case, the prosecution used a loaded word (hired gun) to characterize the witness as biased and untruthful, without providing any evidence to support such a claim. The use of the emotive word shifts the burden of proof and can seriously affect the jury's assessment of the testimony. For this reason, it was considered as a reversible error.

> Q. When you're being asked detailed questions about something that's a lie, don't you get nervous?
> Q. ". . . But it takes a real smart person to get on the stand and lie because, to do that, you first have to make up the story, you then have to tell it, you have to remember it, and you have to be able to tell it the same way again." . . .

Here, "the substance of his questions was directed to the clear implication that the accused was lying" (*United States v. Everage*, 19 M.J. 189, 191, 1985) and that he was a skilled liar. For this reason, the error was considered as prejudicial and led to reversal.

The defense counsel attacks to the reputation of the prosecution's witness carry different effects and risks. The crucial problem concerning personal belief, namely the presumption of the prosecutor's background knowledge, does not arise in the attacks made by the defense. Such attacks are on this perspective much weaker, as the jury cannot infer that the defense held undisclosed evidence to support their claims. However, they can affect the witnesses' reputation and influence the assessment of their character by the jury, especially when the attacks are based on prejudices. For instance, the following case was based on the credibility of the prosecution's witnesses (DelGiorno and Caramandi), who were convicted felons. The defense tried to destroy their credibility by attacking them personally, and accusing the prosecution of scripting their testimony (*United States v. Pungitore*, 910 F.2d 1084, at 1123, 1990):

> Joseph Grande's attorney claimed that DelGiorno's and other witnesses' testimony was completely fabricated by the government: "You know that [DelGiorno and Caramandi] they're liars, killers, thieves, burglars, flim-flam artists, cheaters, crooks, perjurers. . . . Their testimony has been colored, it's been nursed, rehearsed, practiced, planned, engineered if you will so that when they testify that they'll appear believable."
> […] Here in the 80's . . . what they do is they buy them off with hundreds of thousands of dollars, change their identification. You're going to read about DelGiorno and Caramandi maybe 10 years from now doing some other things, but they were bought

> off. They didn't have to torture them like they tortured people during the Inquisition.

This violent attack to the witness and the prosecution is grounded on the plausibility of an agreement between prosecution and witnesses, presupposing that the purpose of the Government is to punish an innocent person. The risk of these attacks consists in a double possibility that they give to the prosecution (Myers, 2005, pp. 669-671): bolster the credibility of the witnesses that has been affected by an improper argument, so that "the unfair prejudice flowing from the two arguments may balance each other out, thus obviating the need for a new trial. (*United Stated v. Young*, 470 U.S. at 12-13, 1985)[7], and offer a bad-character witness to rebut the same (*Bracey v. United States*, 142 F.2d 85, at 90, 1944). This type of move, invited by the defense, may carry a greater effect, due to the role and credibility of the prosecutor, even if it cannot be based on undisclosed evidence, which would raise the presumption of its existence[8].

6.2 Undercutting arguments from expert opinion

Another type of undercutter is directed against the so-called argument from expert opinion. The expert witness is any person that has scientific, technical or specialized knowledge including knowledge gained through experience. Experts are introduced to help the fact finder to make an informed decision in which scientific or technical topics, of which he may lack adequate knowledge, are concerned. In order to establish whether an expert's scientific testimony is based on a valid methodology and therefore be admitted, five criteria need to be met (*Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 1993): (1)

[7] The prosecutor, however, "may not rely on them as a 'springboard' for the launching of affirmative attacks upon the defendants." (*United States v. DiPasquale*, 740 F.2d at 1296, 1984).

[8] For instance, in *United States v. DiLoreto* (888 F.2d 996, 1989), the prosecution replied to a similar attack made by the defense in order to discredit his witnesses as follows (at 999): "And you also heard that they have a plea bargain, and you heard what happened when that plea bargain is not fulfilled. If they lie, that bargain is off. That's it, no bargain. We don't take liars. We don't put liars on the stand. We don't do that." This argument, however, advanced a generalization not based on evidence, which suggested the existence of undisclosed facts.

can the theory or technique in question be tested? Has it been tested? (2) has it been subjected to peer review and publication? (3) what is its known or potential error rate? (4) are there standards controlling its operation? Have they been fulfilled? (5) has it attracted widespread acceptance within a relevant scientific community?

The crucial problem becomes the possible persuasive effect that experts may have on juries. Both in case of witness and expert testimony the element of character becomes crucial, as the finder of fact needs to rely on the trustworthiness (and expert knowledge) of the witness. Character attacks can become in this case extremely powerful instruments. *Ad hominem* moves can be used against the expert witness in order to undermine the relationship between the credibility of his or her statements and his expertise and reliability. In order to understand the possible targets of the attack, it is useful to outline the structure of the argument from authority (Walton, Reed & Macagno, 2008, p. 19):

PREMISE 1	Source *E* is an expert in subject domain *S* containing proposition *A*.
PREMISE 2	*E* asserts that proposition *A* (in domain *S*) is true (false).
CONDITIONAL PREMISE	If source *E* is an expert in a subject domain *S* containing proposition *A*, and *E* asserts that proposition *A* is true (false), then *A* may be plausibly taken to be true (false).
CONCLUSION	*A* may be plausibly taken to be true (false).

Instead of examining the expert's opinion, drawing a defeasible conclusion from the evidence, or comparing his opinion with other expert opinions, the counsel or the prosecutor can launch character attacks using an *ad hominem* strategy. Personal attacks are aimed at demolishing the credibility and trustworthiness of the source of a statement in order to undercut the grounds on which the reliability and acceptability of his claim is based. If the source is an expert, two personal qualities are relevant for the reasonableness of the argument: expertise and impartiality.

One of the strongest strategies of personal attack is the implicit or explicit accusation of bias, and in particular financial bias. In cross examination, courts generally permit questions "directed at establishing

(1) financial interest in the case at hand by reason of remuneration for services, (2) continued employment by a party or (3) the fact of prior testimony for the same party or the same attorney" (Graham, 1977, p. 50). However, sometimes the prosecution or the defense try to insinuate bias by asking controversial questions, such as the amount of previous compensation by the same party or how the income from the expert's testimony on behalf of a party affects the expert's total income. Such questions can be considered as admissible or inadmissible depending on the court (Graham, 1977).

The questions aimed at eliciting potential bias need to be distinguished from explicit or implicit attacks in the summation. The most common attack is so-called "hired-gun" attack, which is inadmissible when not grounded on evidence, and can lead to mistrial. Some implicit attacks can suggest that there can be room for bias, without eliciting prejudice. For instance, we can consider the following case from the Supreme Court of North Carolina (*State v. Rosier*, 370 S.E.2d 359, at 360 1988):

> [L]et me get down to this, Dr. Hoffman. Good old Dr. Hoffman flying in here on the defendant's paycheck to testify for the defendant.
> Mr. Metcalf: Objection.
> Mr. Lyle: And the first thing he wants to say is what a wonderful person he is in High Point, how he helps every victim and every little child in High Point.

The prosecution used an innuendo from facts not in evidence, from which the jury could have drawn the conclusion that "he would not testify truthfully." However, this was only a possibility, and such conclusion did not need to be drawn. For this reason, the error was considered as harmless.

In *Commonwealth v. Shelley* (374 Mass. 466, at 470, 1978), the Supreme Court of Massachusetts reversed the case based on the following attack on the expert witness:

> The argument essentially urged the jury to discount the testimony of the defendant's expert witnesses because they were paid large fees by the defendant's family. There was evidence that the witnesses were paid by the family, but there was no evidence that they received anything more than their usual fees. Thus, to urge an inference that the expert testimony was purchased by the defendant was improper and unfair. Second, the argument attempted impermissibly to play on the prejudices of the jurors. Suggestions were made, albeit in disclaimer form, that the expert witnesses were "mercenary soldiers" and "prostitutes." Further, characterizations of psychological testing techniques as "well-meaning ink-blot tests . . . mice . . . goblins," could only have been made for their emotional impact.

The use of emotive words and innuendo was continued in this case, and struck at the defendant's sole defense and only witness. For this reason, no curative instructions could neutralize the prosecutorial misconduct.

When the prosecution case is strong and curative instructions are provided, even strong personal attacks can be judged as harmless. For instance, in *State v. Whipper* (258 Conn. 229, 2001), the prosecution presupposed that the defense's expert was not a real expert, and suggested to the jury by implicature that his opinion had been contrived during a private conversation with the defense attorney (*State v. Whipper*, 258 Conn. 229, at 257, 2001):

> During its rebuttal argument, the state's attorney commented: "And remember Dr. Rudin. I don't call her Dr. Rudin, Mrs. Rudin. She's a paid for, hired consultant. . . . Ms. Rudin, she comes in here. She's not even a PGM expert. . . . In her report she says, 'Hey, these results [regarding Santiago's DNA and PGM on the defendant's jeans] are okay.' Then she goes in the bathroom [with the defendant's attorney]. Then she comes back and . . . all of a sudden [she says] this [report] is no good. So don't go for that. You know Dr. Rudin or Mrs. Rudin, Ms. Rudin is a paid for, hired consultant."

Here, the State refused to use the title "Dr." to refer to the expert, presupposing that he does not have the qualifications. The prosecution exploited the maxim of relevance, associating the expert's private meeting during the trial with the defense's attorney with his change of his testimony. In this fashion, the State triggered the only possible explanation that the testimony has been concocted. However, the defense requested curative instructions, and the case was affirmed despite the inadmissible argument.

The prejudicial effect of an inadmissible *ad hominem* attack can be avoided by the defense, who can request curative instructions. A clear case of the effects of failing to request instructions is *Caban v. State*, discussed before the Supreme Court of Florida. The prosecution advanced the following improper argument (*Caban v. State* , 9 So. 3d 50, at 52-53, 2009):

> The judge further observed the prejudice suffered by Caban as a result of the improper impeachment:
> And I think anybody who sat through the trial could see almost the physical reaction of the jury when one of the state's experts described the defense experts as simply folks who travel around the country and testify for defendants to try and get them off in serious cases. It's almost as if the jurors just shut down and didn't care what else the defense experts had to say.

The accusation of bias was triggered by the charged description made by the State's witnesses. They depicted the defense's experts as mercenaries whose purpose was to get paid to help the defense "get the defendants off in serious cases". This vivid description was aimed at undercutting an argument from expert opinion by showing the defense experts as molding their opinion to support the interests they are serving. The improper attack, however, was not objected to by the defense, and such a failure to object was found by the Court as prejudicial in a case where expert opinion testimony was crucial. For this reason, the case was reversed. The deliberate omission of objections, on the other hand, can be a deliberate choice of the defense counsel, who can prefer seeking a verdict and use the prosecutorial misconduct in order to demand a post-conviction motion for mistrial

(*Grimaldi v. United States*, 606 F.2d 332, at 339,1979). In the aforementioned case *Caban v. State* (9 So. 3d 50, at 52-53, 2009) this strategy was used effectively when the counsel failed to object to attack of the prosecution on the expert witnesses (they were described as "folks travelling around the country and testify for defendants"). The failure to object was considered by the Court as prejudicial, as expert opinion testimony was crucial to both sides. For this reason, the case was reversed. However, this tactic can be regarded by the court as indicating that the attack was not considered as prejudicial by the defense (*Commonwealth v. O'Brien*, 377 Mass. 772, at 777-778).

6.3 Undercutting appearances

In the sections above we have pointed out how the *ethos* of the witness, the expert or the counsel can be the target of attacks aimed at undermining arguments from authority or position to know. However, not only are source-based arguments the target of *ad hominem* moves, but also other types of presumptive reasoning such as reasoning from appearance or from pity.

Reasoning from appearance is a defeasible type of reasoning in lack of knowledge, where in absence of contrary evidence the classification of an entity is drawn from the exterior signs. The structure of this pattern of inference is grounded on a rule of presumptive reasoning called "perception rule" (Pollock, 1995, p. 41):

> Having a percept with content φ is a prima facie reason to believe φ.

This rule is the ground leading from a sign (*x* seems to be *P*) to a classificatory conclusion (*x* is *P*). The structure of the inference can be represented as follows (Walton, 2010):

> It appears that object could be classified under verbal category C.
> Therefore this object can be classified under verbal category C.

This type of scheme is a simplification of an abductive reasoning from classification, where from an accidental property of a category the

predication of the category is concluded. For example, this object looks like a red light, therefore it is a red light (Pollock, 1995, p. 41). This defeasible type of reasoning can be specified as follows (Walton & Macagno, 2010, p. 49):

MAJOR PREMISE	Generally, if this type of indicator is found in a given case, it means that the presence of such-and-such a property may be inferred. (If *p* then *q*)
MINOR PREMISE	This type of indicator has been found in this case. (*p*)
CONCLUSION	Such-and-such a type of event has occurred, or that the presence of such-and-such a property may be inferred, in this case. (Therefore *q*)

In law the jury can reason from abductive classification or perception when the defendant does not fall within the stereotypical image of criminals. If he is a senior, educated and middle class individual, he is less likely to appear as a criminal than a young and strong man belonging to the poorest class. In order to dispel this presumption, the prosecutor can attack the sign, namely the individual. This *ad hominem* move is made to undercut a plausible sign, a presumption, and for this reason it needs to fulfill an implicit burden of proof. Such an attack cannot simply consist of a judgment, but needs to be supported by evidence. The risk of arousing prejudice is high, as the prosecution needs to introduce prior bad actions and lead the jury to a value judgment. For instance we can show this type of reasoning in the following case, where the prosecution is addressing the jury in his closing statement (*State v. James*, 734 A.2d 1012 at 1025, 1026, 1999):

> You're saying to yourself, holy mackerel, this guy, a seventy year old man and he's in here with a cane, and the fellow is charged with murder and two weapons violations. It's inconceivable. It's just inconceivable that someone who looks like this gentleman over here could be charged with that type of conduct. And I'm sure that probably was going through most of your minds. Don't be fooled by that. Don't be fooled by appearances.[…]You know, if you looked at [the defendant] when you first walked in here, you probably said to yourself,

> geez, you know, looks like a nice old guy, you know, seventy year old guy was sitting there with a cane, he looks harmless, he looks like he wouldn't hurt anybody, but you heard that he's been convicted of felonies three times. Three times. Not once, not twice, but three times. And this is the same gentleman since -- who since 1987 on almost a continuous basis has illegally possessed countless firearms. In fact, he's had so many firearms, he can't even keep track of them. He can't remember where they came from, who bought them or where they came from.

The prosecutor used evidence of past crimes to show a pattern of behavior, indicative of his state of mind, and for this reason the court found no error. However, the potential conclusion that can be drawn is his tendency to commit crimes. In this case the prosecutor insisted on details (the number of firearms) and shows the contradiction between his harmless appearance and the past felonies. Here a defeasible classification (based on appearance) is countered by the signs of a dangerous character. The generalization drawn from appearance is easily rebutted by evidence of a contradicting behavior, leading to the most reasonable conclusion that the defendant is not harmless at all. *Ad hominem* undercutters, for this reason, can be noticeably more effective than *ad hominem* arguments or meta-dialogical moves. They can be considered as relevant, as they concern character issues raised by the defendant. Moreover, they need to rebut generalizations, which is a much lower burden to meet. Finally, a strong refutation of an argument or a generalization can support an opposite conclusion, as in the case above.

6.4 Undermining emotions

One of the most common arguments in the penalty phase in criminal trials is the appeal to pity. The defense provides evidence of the good character of the defendant, claiming that the crime was an error and that he is ashamed of his actions. For instance, in *California v. Brown* (479 U.S. 538 at 540, 1987) the defendant, found guilty of murder, presented in the penalty phase the following argument:

> Respondent presented the testimony of several family members, who recounted respondent's peaceful nature and expressed disbelief that respondent was capable of such a brutal crime. Respondent also presented the testimony of a psychiatrist, who stated that Brown killed his victim because of his shame and fear over sexual dysfunction. Brown himself testified, stating that he was ashamed of his prior criminal conduct and asking for mercy from the jury.

This type of argument can be represented as follows (Walton 1997: 105):

Argumentation scheme 5: Appeal to pity

PREMISE 1	Individual *x* is in distress (is suffering).
PREMISE 2	If *y* brings about *A*, it will relieve or help to relieve this distress.
CONCLUSION	Therefore, *y* ought to bring about *A*.

This argument is based on two crucial implicit preconditions: first, the individual needs to suffer from misfortune; second, the jury needs to be emotionally involved with him (Ben Ze'ev, 2000, p. 328). The first condition is essential for the feeling of pity, while the second for the perception of an emotion. In the case above, the defense presents evidence of the good character of the defendant and shows a relationship between his crime and his physical and psychical problems. The defense suggests that the accused is suffering from serious problems and claims that he is ashamed of his actions. In this fashion, the first condition of pity is met. The second element is essential for the arousing sympathy, or rather an emotion towards the defendant (Ben Ze'ev, 2000, p. 328). In the aforementioned case, the defense called family members to testify and the accused asked for mercy. In this fashion, the jurors could identify themselves with the accused (like the defendant they have a family).

Appeals to pity are instruments for defusing emotions (Solomon, 2003). They can be directed against the identification of the jury with the defendant and the misfortune that he is suffering. In the first case

the prosecutor can attack the strategy of the defense by declaring it and showing that it is or can be purely fictional. In the second case, the prosecutor attacks directly the character of the defendant, so that he is shown to deserve the punishment and that it is not resulting from an error or misfortune. *Ad hominem* attacks aimed at undercutting potential or actual appeals to pity can proceed from a direct implicit or explicit negative judgment on the suffering individual, or from his negative actions. In non-explicit attacks, facts supporting a negative evaluation are simply put forth, leaving it up to the interlocutor to draw an evaluative conclusion. On the contrary, explicit attacks can be criticized if not adequately based on evidence. In both cases, in order to overcome an emotion such as pity, the speaker combines the attack with other tactics aimed at arousing contrary emotions. The use of emotive words becomes a crucial tactic for triggering contempt or hate against the allegedly pretended sufferer, so that the positive emotion is annulled (see Groarke, 2011).

In the aforementioned case, the prosecutor replied to the defense's appeal to pity by undercutting the trigger of the emotion and attacking implicitly the defendant (*California v. Brown*, 479 U.S. 538 at 554, 1987):

> They did not testify, ladies and gentlemen, regarding any of the factors which relate to your decision in this case. Their testimony here, ladies and gentlemen, I would suggest, was a blatant attempt by the defense to inject personal feelings in the case, to make the defendant appear human, to make you feel for the defendant, and although that is admirable in the context of an advocate trying to do his job, you ladies and gentlemen must steel yourselves against those kinds of feelings in reaching a decision in this case".

The prosecutor does not explicitly attack the defendant. He presents the appeal to pity as a ploy, aimed at concealing the ferocious nature of the accused. In this fashion, he implicitly "dehumanizes" the defendant (Cantrell, 2003, p. 559), so that the jury cannot make an empathetic link with him.

Ad hominem attacks directed against pity are aimed at arousing conflicting emotions, in particular hate. Hate presupposes dangerous traits and depersonalization (Ben Ze'ev, 2000, pp. 380-381). For this reason, emotive words play a crucial role, reducing the man to some negative and dangerous qualities, arousing hate (Ben Ze'ev, 2000, p. 382): "The negative evaluation in hate is global, not in the sense that every aspect of the hatred person is considered to be negative, but in the sense that the negative aspects are so fundamental that other traits become insignificant." For instance, in the following case the prosecution uses a highly emotive word (*Gore v. State*, 719 So. 2d 1197 at 1202, 1998):

> You know, Ladies and Gentlemen, there's a lot of rules and procedures that I have to follow in court, and there's a lot of things I can say or can't say, but there's one thing the Judge can't ever make me say and that is he can never make me say that's a human being.

The prosecution describes the defendant, accused of raping a minor, as a not-human being. He reduces the person to one trait, being non-human because of his ferocity. The strategy of dehumanizing the defendant is extremely effective and dangerous, as it can lead to mistrial, such as in the case above, for its prejudicial effects. For this reason, such attacks are strategically effective when implicit.

Fear is also aroused by stressing the dangerous nature of the criminal. For instance, in the following example, drawn from the penalty phase of a murder case, the prosecutor attacks the character of the defendant is attacked by arousing fear and hate (*Martinez v. State*, 984 P.2d 813, at 830-831, 1999):

> Further, the prosecutor argued, "you have the final say, Ladies and Gentlemen, on whether Tillman County and the world is safe from Gilberto Martinez." [55] Later, the prosecutor stated, "I don't care what he's done in the last ten years, watched every second. Given the opportunity and appropriate circumstances, he's as cold blooded and dangerous today as he was the night this occurred." Finally, the prosecutor reasoned, "He's getting

> no more or less than he deserves for what he did to these little girls."

In this case the attack is “at the very edge” of what is acceptable in a trial. The attack is not directly on the defendant, but on his dangerous character. The prosecutor arouses fear, essential component of hate, and undercuts the concept of misfortune that could be at the basis of pity.

Personal attacks undercutting pity can be combined with different types of strategies. For instance, in the penalty phase of *Rhodes v. State* (547 So. 2d 1201, 1989), the prosecutor attacked the defendant directly, pointing out to the jury that he “acted like a vampire” (547 So. 2d 1201, at 1211, 1989). He fought the jury’s potential pity for the defendant with the pity that he aroused for the victim, urging the jurors to place themselves in the position of the victim. He described the heinous actions of the defendant after the death of the victim to trigger contempt. Finally, he suggested the possibility of parole in case of the defendant’s conviction, which triggered fear.

7 Conclusions – Weak arguments and presumptive reasoning

How can a weak argument be so effective? The rhetorical effectiveness of personal attacks can be explained by showing how they function as complex strategies involving clusters of arguments, where the role of authority (or rather the presumption of better knowledge) and emotions play crucial roles. *Ad hominem* attacks are generalizations based on signs, or simply negative judgments often unsupported by evidence, or insufficiently grounded. The person is reduced to only one character feature from which his possible future actions or decisions can be predicted. Such attacks can be relevant, if the quality of the character property is related with the quality of the conclusion (Battaly, 2010) and if the judgment is based on evidence. However, even if relevant and grounded, the argument is only presumptive, leading to a tentative conclusion acceptable under conditions of lack of knowledge and contrary evidence. Often such attacks, weak and defeasible in nature, are also irrelevant and poorly borne out by factual evidence. For this reason, their weakness is clouded by ancillary implicit or explicit

arguments. Personal attacks are aimed at leading the interlocutor to a decision made in haste under conditions of uncertainty and lack of evidence, and for this reason presumptions and emotions play crucial roles in filling the evidential gap.

As noticed in the cases analyzed above, the effectiveness of an attack corresponded to the prejudice that it could arouse in the jury. On the one hand, this prejudice can invoke a presumption of knowledge. An attack by a prosecutor can trigger the presumption that he knows facts not in evidence supporting an otherwise ungrounded characterization of the counsel, the defendant or the witness. On the other hand, emotions such as indignation, fear, contempt, or hate divert the interlocutor's attention from the weakness of the attack, affecting its logical assessment (Blanchette, 2006; Blanchette & Richards, 2004), and lead him to a hasty decision (Frijda & Mesquita, 1998). For this reason, as we saw, *ad hominem* moves can trigger implicit arguments from negative consequences or threats, and through their vivid representations arouse negative emotions.

Personal attacks are therefore complex strategies, clusters of arguments where the explicit or suggested attack is only the more visible part of the argument move. A personal attack can be powerful not because it is a weak argument, but because it is not the only argument that is advanced. As Quintilian put it (*Institutio Oratoria* V, 12, 5):

> […] the allegations, considered separately, have little weight and nothing peculiar, but, brought forward in a body, they produce a damaging effect, if not with the force of a thunderbolt, at least with that of a shower of hail.

Now we have analyzed the legal dialogues in the cases studied above, it has been shown that what is usually labeled as an *ad hominem* actually comprises attacks against the interlocutor, arguments aimed at supporting a wanted conclusion, and counter-arguments. For this reason, in this paper we have analyzed personal attacks as moves, a generic term indicating a speech act aimed at achieving different types of dialogical effects. We have seen how *ad hominem* attacks are based on a negative implicit or explicit character judgment. Such value

judgments were shown to be used for four different purposes. They can (1) justify the interruption of a dialogue, (2) support a conclusion, (3) undercut an argument or (4) activate or defuse an emotion. In many cases, as we saw they are at best weak arguments, providing only defeasible, provisional and heuristic support for a conclusion. However, from a rhetorical perspective, as we saw, they can be extremely effective arguments, so effective that their use can powerfully prejudice judgment.

We have identified three types of *ad hominem* attacks, each of which has its own distinctive strategy as a move and special *modus operandi* of argumentation. The first type we call "meta-dialogical" (*ad hominem 1*), as it is used for underscoring the interlocutor's (in the criminal cases analyzed herein the defense counsel's and the prosecutor's) unfairness or bias. It was shown how these attacks can be acceptable (or rather admissible) when certain requirements are complied with. The second type of attack (*ad hominem 2*) is the one used to support a specific conclusion, more specifically the defendant's guilt. As shown by the examples, *ad hominem arguments* are extremely risky for the prosecution when they are not conclusions of reasonable inferences drawn from the evidence. However, there are different strategies to increase their force and make their detection more difficult. For instance, attacks based on implicit dimensions of discourse, such as presuppositions and implicatures, can have an even greater effect on the jury than the explicit ones. As we have seen, in *ad hominem* arguments a crucial role is played by emotive words, words that strongly prejudice the audience through their twofold dimension of implicit arguments and triggers of emotions. The third type of *ad hominem* move is the undercutter (*ad hominem 3*), namely an argument aimed at attacking an argument advanced by the other party. Three different types of attacks used as undercutters were distinguished, illustrated and analyzed: (1) attacks on arguments from sources (argument from witness testimony and from expert opinion), (2) arguments from appearances and (3) emotional appeals.

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Review

Patterns of Linguistic Variation in American Legal English: A Corpus-based Study
Stanislaw Goźdź-Roszkowski (2011)
Peter Lang 277 pages

Reviewed by Tammy Gales

Stanislaw Goźdź-Roszkowski's *Patterns of Linguistic Variation in American Legal English: A Corpus-based Study* is one of the newest volumes (22) in the Łódź Studies in Language series, edited by Barbara Lewandowska-Tomaszczyk. This book, which contains seven chapters, a bibliography, two appendices, and an index, presents a very well-written, thorough examination of variation in legal language. Goźdź-Roszkowski's primary goal is to "demonstrate that the universe of legal texts involves not only different situational characteristics of legal genres, such as different modes (speech, writing) and different production circumstances in which legal genres are created, different participants and the relations among them, or different communicative purposes, but that legal texts differ dramatically in terms of their linguistic characteristics" (p.11). By comparing legal language through a variety of corpus-based approaches, Goźdź-Roszkowski successfully demonstrates that what has traditionally been treated "as a largely monolithic phenomenon" (p.15), is, in reality, composed of a variety of genres that each contain highly systematic patterns of language use.

In the Introduction (Chapter 1), Goźdź-Roszkowski explores previous research on legal language, defines existing perspectives on categorizing text varieties, and outlines his own research within these traditions. First, while previous research has acknowledged that legal language is heterogeneous, scholars have primarily focused on describing lexico-grammatical features found across all legal categories (e.g., the use of passive voice, *shall*, archaic adverbs) or on describing one particular type of legal text (e.g., testament language or prescriptive legal texts). Thus, Goźdź-Roszkowski aims to fill this void by

describing both the "linguistic variation *within* legal language" and the "variation between legal language and other specialized languages" (p.16).

Second, in defining his method of categorizing texts, Goźdź-Roszkowski draws on Biber and Conrad's (2009) framework, wherein the terms *genre* and *register* refer to different approaches to the study of variation rather than different text types. For example, when analyzing a power of attorney document from a genre perspective, an outline of language characteristics emerges that includes the date the document was created, the name of the person who created it, and the designation of a person appointed to have power of attorney. From a register perspective, an analysis reveals that power of attorney documents pervasively contain lexical and grammatical features such as *to*-infinitive clauses, nominalizations, and prepositional phrases. Goźdź-Roszkowski utilizes both perspectives by using whole texts to examine lexico-grammatical features and specialized expressions and to identify the location of clusters of linguistic features within each text variety.

Finally, through a comprehensive linguistic description and functional analysis of variation among legal genres, Goźdź-Roszkowski proposes, after Bhatia's (2004) notion of disciplinary genres, that "what is commonly referred to as 'legal English' should be more accurately described as a system of related domain-specific genres, which vary widely in terms of patterning, understood here as recurring lexical and lexico-grammatical combinations discernible in large collections of authentic texts by means of quantitative and qualitative analytical techniques" (p.24). To this end, described below, he successfully achieves his goal.

Chapter 2, The Methods and the Corpus, offers a comprehensive description of the texts that comprise "the world of law" (p.27) and describes the methods used in their analysis. The American Law Corpus (ALC) contains more than 5,500,000 words from 687 texts across 7 legal genres: academic journals, briefs, contracts, legislation, opinions, professional articles, textbooks. From each category (except textbooks), Goźdź-Roszkowski used complete texts rather than excerpts and he aimed for representativeness by including at least 1 million words in each general category (e.g., legislation and contracts)

and 200,000-500,000 words in more narrowly-defined genres (e.g., professional articles and textbooks); all texts were randomly sampled from a range of written activities within American legal contexts.

The corpus was tagged using the Biber tagger and counted with Biber's tag-count program, which provides overall rates of frequencies for more than 150 linguistic features that occur in a corpus (Biber, 2006). WordSmith 5.0 was used to extract data from the corpus and all results were normed per 1000 words, except for the lexical bundles which were normed per 1,000,000 words.

Goźdź-Roszkowski used three corpus-based approaches in his study. First, he performed a keyword analysis (utilizing frequency cutoff points, statistical significance tests, and dispersion plots) to determine which words were significantly more common in one legal genre as compared to the others; second, he performed an analysis of lexical bundles, wherein he adopts the corpus-driven methods of Biber *et al.* (1999) and Biber *et al*. (2003) to uncover multi-word expressions that occur with a statistically high rate of frequency in legal genres; and third, he performed a Multi-Dimensional (MD) analysis (Biber, 1988, 1995; Conrad and Biber, 2001) to identify linguistic features that are statistically correlated and reveal the functions shared by those clusters of co-occurring features. In the final approach, Goźdź-Roszkowski both employs the dimensions from Biber's (1988) model and also performs a new MD analysis in order to "understand the specialized legal genres relative to a number of spoken and written genres or registers in English" and "establish the dimensions of variation valid for this domain of language use" (p.51), respectively.

Chapter 3 presents an innovative analysis of Vocabulary Use across Different Legal Genres. While the majority of research on vocabulary has prioritized legal terminology at the expense of other vocabulary and has not focused on its use, Goźdź-Roszkowski provides a more comprehensive examination of the lexical variation within legal genres. Starting with an analysis of word types, Goźdź-Roszkowski finds that there is a range of variation, with legislation and contracts on the low end of word types used and academic journals and professional articles on the high end. Upon further investigation, Goźdź-Roszkowski attributes the diversity in word choice to the use of specialized vocabulary, where the two genres that function to create and modify

legal relations—legislation and contracts—utilize the fewest types of specialized vocabulary.

The remaining part of the chapter identifies keywords relevant to each legal genre in context (Appendix A lists the 100 keywords for each genre) and then separates the keywords within each genre into functional categories such as "citation keywords," "keywords expressing evaluation," "self-mention keyword 'we'," and "legal terms as keywords" (p.65). Goźdź-Roszkowski finds, in general, that the only functional category shared by all legal genres is that of legal terms and that the categories each possess a range of keywords from highly-specialized (e.g., *Miranda*, *penalty*, and *treaty* in academic articles) to general language (e.g., *patient*, *university*, and *values* in the same genre). The categories proposed in this chapter reveal the major trends in lexical composition within each genre, from legislation and briefs possessing several classes of keywords that serve clearly functional purposes to professional articles and textbooks that are marked by terminological density, supporting Goźdź-Roszkowski's position that "the legal lexicon should not be perceived as consisting primarily of terms in the sense defined by the traditional theory of terminology," but as one in which the lexicon serves diverse roles within and across legal genres (p.107).

Recognizing the important relationship between multi-word expressions and genres, Goźdź-Roszkowski next examines Multi-Word Patterns in Legal Genres in Chapter 4. He starts "from the premise that the analysis of how multi-word expressions are used in contexts provides a reliable indicator of variation between different text types, genres and registers" (p.109). In legal genres, in particular, Kjaer (1990) pointed out that the failure to use specific legally-prescribed combinations of words can alter or invalidate the entire meaning of a document; however, very little research has been done on this highly important topic in legal genres. This chapter fills that void by investigating the distribution and use of lexical bundles within legal genres.

In order to produce findings that are comparable with previous research on lexical bundles, Goźdź-Roszkowski adopts parameters similar to those in related studies (e.g., Biber, 2006; Cortes, 2004; Hyland, 2008); in particular, he focuses on four-word sequences and

sets the frequency cut-off point at 40 times per million words. Bundles meeting the frequency requirement have to occur in at least five different texts. His analysis identified 915 bundles, with contracts possessing the highest percentage of words in bundles (10.1%). By examining the distribution of bundles among genres, Goźdź-Roszkowski reveals, for example, that when comparing genres of similar sizes (e.g., contracts, legislation, and opinions), contracts and legislation have the greatest range of different bundles, the largest number of bundles, and the highest proportion of words contained in bundles, pointing to the high degree of formulaicity and repetitiveness in these two genres. Opinions, on the other hand, possess a relatively small range of different bundles, but rely on the greatest proportion of frequent bundles, evidence of the genre's operative function in communicating judicial decisions, which are highly procedural in nature. The variation in distribution and reliance on lexical bundles found among genres leads to a more detailed examination of the structural characteristics of bundles.

Based on Biber *et al.*'s (1999) framework and his own prior research on lexical bundles in a 500,000 word corpus of judgments from the House of Lords (2006), Goźdź-Roszkowski identifies and analyzes the ten major structural characteristics of lexical bundles found within the ALC, which include, for example, noun phrase with *of*-phrase fragment, prepositional phrase expressions, verb phrase with active verb, and (verb phrase +) *that*-clause fragments. He finds very little variation across genre types in that they all make frequent use of noun phrase and prepositional phrase bundles—supporting the notion that legal genres are nominally dense—and infrequent use of verb phrase bundles.

The remainder of the chapter analyzes the functions of bundles as they are categorized within three broad types previously proposed by Biber *et al.* (2004), Biber (2006), and Hyland (2008): "lexical bundles marking legal reference, stance and text-oriented bundles" (p.117). Referential bundles, found with the highest proportion in legislation, contracts, and professional articles, directly reference abstract or physical concepts within the domain of law; stance bundles, which express attitudes or assessments, were found to vary most among genres with academic journals and opinions containing the highest

percentage of bundles; and text-oriented bundles, which signal relationships between textual segments, were found with the highest percentage in academic journals and opinions wherein a third of all bundles were used in this manner.

Goźdź-Roszkowski concludes that his findings "show considerable variations in the frequency of forms, structures and functions of lexical bundles across different types of legal writing" (p.142). Of particular note is the fact that legislation and contracts contained more formulaic expressions than any other genre to date. Also revealing were differences in shared bundles across genres (e.g., contracts shared less than 20% of its bundles with other genres, meaning more than 80% of the bundles were unique to that genre, while academic journals shared more than 80% of its bundles with other genres); these findings, in conjunction with previous lexical distribution and functional analyses, further demonstrate that legal genres are, in fact, highly distinct genres within the broad category of legal language.

In the final two analytic chapters—Chapter 5: Multi-Dimensional Variation across Different Genres and Disciplines and Chapter 6: Multi-Dimensional Patterns of Variation across Legal Genres—Goźdź-Roszkowski approaches the study of legal genres from the perspective of co-occurrence patterns, or "dimensions" (Biber, 1988). Specifically, he uses MD analysis to examine the distribution of linguistic features across individual texts and genres and then identify groups of regularly co-occurring features in order to interpret their most commonly shared functions. In order to provide the most comprehensive description of legal genres, Goźdź-Roszkowski first analyzes the co-occurrence patterns in legal genres along the dimensions identified in Biber's (1988) study of non-legal genres (e.g., history textbooks, professional letters, and ecology research articles); and second, he performs a new MD analysis on legal genres in order to reveal co-occurrence patterns that may be new and relevant to the domain of law.

In Chapter 5, Goźdź-Roszkowski provides comparisons of the seven legal genres to four specialist and disciplinary non-legal genres (textbooks and journal articles in biology and history) and five non-specialist non-legal genres (conversation, general fiction, popular non-fiction, official documents, and academic prose). The dimensions used in this analysis are 1) Involved vs. Informational Production, 2)

Narrative vs. Non-narrative Discourse, 3) Explicit (Elaborated) vs. Situation-dependent Reference, 4) Overt Expression of Persuasion/Argumentation, and 5) Impersonal vs. Non-impersonal Style (Biber, 1988, 1995; Conrad, 2001). Goźdź-Roszkowski finds that while legal genres inherently vary across the dimensions, in general, all legal genres tend to be "clearly informational with little concern for affective or interactive features. They are all relatively non-narrative and they [are] marked by explicit reference and abstract or impersonal style" (p.181). Also of note is that their mean scores often far exceed those of non-legal genres, making them, for example, "*the most* informational and *the most* impersonal in terms of the MD analysis" (p.181, italics in original). What is especially interesting in the cross-disciplinary comparison of genres is that legal genres tend to be more spread out along the dimensions than many of the non-legal genres, further supporting the hypothesis that there is considerable variation within the domain of legal language.

In Chapter 6, Goźdź-Roszkowski performs a new MD analysis to identify patterns of variation within legal genres that may be of particular importance to that domain, resulting in a three-dimensional model of variation within legal discourse. Specifically, these dimensions include 1) Narrative, Stance-focused vs. Informational and Normative Discourse, 2) Instructive and Advisory Discourse, 3) Abstract, Elaborated and Operative vs. Content-focused Lexically Specific Discourse.

Dimension 1 contained 24 total features with 17 on the positive side (e.g., demonstrative pronouns, 3rd person pronouns, all stance adverbs, mental verbs, and past tense) and 7 on the negative side (e.g., prepositions, nominalizations, quantity nouns, and the modal *shall*) of the factor. Unsurprisingly, contracts and legislation had negative loadings for this dimension and were found to be the least narrative genres (i.e., the most informational); yet, the other five legal genres (textbooks, opinions, journal articles, briefs, and professional articles) all had positive loadings and were found to be the most narrative genres with textbooks and opinions leading the scale, even using features in a manner similar to history textbooks that narrate historical accounts.

Dimension 2, which exists more along a continuum since the two negative features have larger loadings on Dimension 3, contained ten

features. These included, for example, non-past tense forms, *be* as a main verb, necessity modals, and 2nd person pronouns. Similar to Dimension 1, textbooks had the highest positive score on Dimension 2 and legislation had the largest negative score with the remainder of the genres clustered within +/- 3 of the center.

Finally, Dimension 3 contained 15 features, with 10 on the positive side (e.g., prepositions, perfect aspect verbs, agentless passives, and communication verbs) and 5 on the negative side (e.g., word length, nouns, attributive adjectives, and *that* relatives). Interestingly, while textbooks still had the highest positive score for Dimension 3, legislation was joined by briefs and academic journals on the negative end, with academic journals actually having the most negative score.

Through this analysis, Goźdź-Roszkowski confirmed that legal genres vary remarkably along the new dimensions; however, one of the most striking results here is the demonstrated need to perform new MD analyses on different genres (as opposed to simply using existing dimensions). He revealed that while there was some similarity to Biber's (1988) original dimensions (most notably regarding non-narrative aspects of the discourse), Goźdź-Roszkowski found that his Dimensions 2 and 3 had no direct counterparts in Biber's dimensions. His new patterns revealed a dynamic split between legal genres in Dimension 1 with academic, expository, and persuasive genres falling on the narrative, stance-oriented side and informational, normative genres falling on the other. Additionally, in Dimension 2, he demonstrated that legal genres fell along a continuum that was linked to instructive and advisory discourse, with those genres written for non-expert audiences having the highest scores. Finally, Dimension 3 demonstrated the complexity of legal discourse by "cut[ting] across the so far fundamental distinction between operative and expository/persuasive genres" (p.225). These fine-grained nuances would not have been revealed without preforming a new MD analysis on the legal genres.

Finally, in Chapter 7, Synthesis and Final Conclusions, Goźdź-Roszkowski concludes that "despite the widely-held perception of legal language as constituting a relatively homogenous and uniform linguistic phenomenon, the situation appears to be much more complex" as exemplified by the "highly systematic patterns of use

occurring across legal genres" (p.227). Goźdź-Roszkowski leaves the reader with a succinct overview of these highly systematic patterns of variation for each of the legal genres.

Overall, Goźdź-Roszkowski presents a very well organized, much needed description of the patterns of variation in American legal genres. His methodologies are well attested within corpus research and his execution of such methods is clearly described and concise (even to the inclusion of his keyword lists in Appendix A and MD statistical results in Appendix B). However, there is one aspect of his study that could have used further exploration. Specifically, while the decision to focus on 4-word bundles was sound, especially for cross-study comparison purposes, an opportunity was missed to explore the extent of formulaicity that occurs within legal genres by not examining longer bundles. Within his own study, Goźdź-Roszkowski builds an argument for examining longer sequences of words, stating that "the highly formulaic and repetitive nature of many legal genres … makes such texts particularly amenable to a methodology which focuses on very frequent uninterrupted sequences of word forms" (p.110) and that, other than legislation and contracts, "no other genre or text type has been shown to contain such a large proportion or formulaic expressions" (p.142). When compared to Biber *et al.*'s (1999) findings, 3-4 word bundles were the most pervasive within the registers of conversation and academic prose, but the number of bundles decreased sharply in the 5-6 word range. Given Goźdź-Roszkowski's own confirmation of the formulaic, repetitive nature of language in legal genres, especially contracts and legislation, it would have been highly informative to investigate the upper end of bundle length given the scarcity of studies in this vein (i.e., bundle length in legal genres or bundle length within specialized vs. non-specialized registers). Perhaps future opportunities will arise to investigate this research trajectory as it would make an additional, valuable contribution to studies on legal genres and lexical bundles in English.

In sum, Goźdź-Roszkowski's *Patterns of Linguistic Variation in American Legal English* is a much needed and highly praised addition to studies of language variation and studies of legal language, or, what we may now more appropriately call, studies of 'legal genres'.

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The Analysis of Police Crisis Negotiations: Important Interactional Features

Terry Royce

In recent years understandings of the interactional features of police crisis negotiations have developed through approaches which have built on and developed the precursor bargaining and expressive models of crisis negotiations. This paper draws upon this more interactional interpretation of police crisis negotiations by highlighting and discussing their main features: the use of active listening to build rapport with a person of interest (POI), the discourse staging of the negotiation (critical moments), and the role that features of the context before and during the incident can play in the language choices made by the negotiator in interaction with the POI. These interactional features are illustrated via extracts from a police crisis negotiation in Australia, and suggestions for further research are provided.

Keywords: negotiation, negotiators, crisis negotiation, police, active listening, forensic linguistics, interaction, critical moments

1 Introduction

The hostage crisis at the 1972 Munich Olympic Games culminated in the deaths of eleven Israeli athletes and coaches, one West German police officer, and eight members of the Black September terrorist group. This was an event that stunned the world, not the least because local media outlets broadcast the actions of the German police live; the kidnappers were thus able to watch the police as they prepared their tactical response, and the world was presented with the iconic images of kidnappers leaning over balconies to look at the police taking up positions. Since that crisis and subsequent critical and political

evaluations, law enforcement agencies and professionals have increasingly been pressured to use negotiation as the most appropriate alternative to the use of tactical assault to resolve terrorist, hostage, barricade [siege] and suicide situations (Rogan, Hammer, & Van Zandt, 1997).

The term typically used in the literature and police training manuals in this area is that of 'crisis negotiations'. A 'crisis' is deemed to occur when a subject is unable to cope with a life situation or to utilise familiar problem-solving methods; typically the person experiences a cycle of escalating tension, associated with a range of increasingly intense feelings where there may be shifts from fear to panic, from anger to rage, and the development of increasingly confused thinking (McMains & Mullins, 2001, p. 68). An individual experiencing this kind of emotional excitation can be considered to be 'in crisis', and when the situation escalates to the point where police intervention is required, and where there is a need to de-escalate the crisis, crisis negotiation methods are typically utilised.

Initial classifications of negotiation dynamics by early scholars in this area have identified two main approaches to modelling crisis negotiation, one characterized as the *instrumental* approach, and the other as the *expressive acts* approach (Rogan, Hammer, & Van Zandt, 1997). The instrumental approach derives from social exchange theory and "conceptualizes crisis negotiations in terms of instrumental issues present during negotiation". The orientation of the behaviours of the subjects or the negotiators in this "bargaining" approach is thus towards some kind of substantive instrumental outcome and it essentially views negotiation as "agreement-making through bargaining or problem-solving, typically via quid pro quo" (Rogan, Hammer, & Van Zandt, 1997, p. 11). The way this approach works out in practice is that in the interchange between the parties, there are expressed goals that they hope to meet, and an understanding that neither side can meet those goals without some kind of balancing between rewards and costs, a quid pro quo or tradeoff, where the goal is to maximize returns (rewards) and to minimize what must be given up (costs).

The expressive negotiation approach has its derivation in psychotherapy (see discussions of the 'Stockholm Syndrome' in Schlossberg, 1979), which presumes that "the nature and quality of

interpersonal relationships plays a large role in resolving conflict" (Rogan, Hammer, & Van Zandt, 1997, p. 12). This approach views emotion and relationship variables as the central elements, so relationship development, developing rapport, and building trust are accepted as being crucial to resolving crisis incidents. In typical negotiator training contexts the emphasis is thus placed on [active] "listening, paraphrasing, self-disclosure, open-ended questioning, and specific skills for reducing the perpetrator's anxiety level" (Rogan, Hammer, & Van Zandt, 1997, p. 13). The establishing, building and maintaining of rapport is important in other policing contexts besides crisis negotiation: it is especially emphasized in police investigative interviewing, as well as in interrogation contexts. The discussion of active listening which follows below explains and illustrates the ways that rapport can be established, and the role it can play in a crisis negotiation.

More recently, a third approach emphasises communicational aspects in negotiations (Rogan, Hammer, & Van Zandt, 1997): this approach assumes that all communication, in line with basic communication theory, has *both* a content and a relational dimension, the former relating to the instrumental focus of communication, and the latter to its expressive features (which is further broken down into relational and identity information). In this interpretation of crisis negotiation "parties to conflict interaction pursue three functional interactional concerns which impact on conflict escalation/de-escalation – these are instrumental, relational, and identity or face goals" (Rogan, Hammer, & Van Zandt, 1997, pp. 14-15). This approach has been further developed into the S.A.F.E. model, which proposes that there are 4 "*triggers*" working as predominant "*frames*" for communicative interaction as a crisis incident unfolds (Hammer, 2008). These can be summarised as:

- **S**ubstantive Demands: instrumental wants/demands made by subject & negotiator
- **A**ttunement: the relational trust established between the parties
- **F**ace: the self image of each of the parties that is threatened or honored
- **E**motion: the degree of emotional distress experienced by the parties

Given the context of this developing interactional interpretation of police crisis negotiation dynamics, this paper highlights and discusses the main interactional features that are typically emphasized in both police training modules and in the published literature. The features discussed cover the use of active listening to build rapport in the interaction, aspects of the discourse staging of the negotiation (often referred to as critical moments), and the role that features of the context before and during the incident can play in the language choices made by the negotiator. The discussion of these interactional features will be illustrated via extracts from a case study of a police crisis negotiation in Australia.

2 Active Listening

Active listening as an interpersonal skill is taught and utilized in a wide range of contexts, and the way it is defined depends on how and why it is used. Generally however, it deals with empathizing and listening constructively, with a focus on developing and showing an understanding of another's feelings (Cambria et. al., 2002, p. 339). It is used in a range of contexts: in dispute/conflict resolution and mediation (Potter, 1995), in marital, religious, self-help, parenting and even educational counseling or advice (Charles, 2007; *Active listening skills*, 2012), in journalism, sales and management (Romano, 2002), and in suicide prevention (*Listening Skills: A powerful key to successful negotiating*, 2000). An alternative characterisation is “empathetic listening”, which according to Pickering (1986) can be interpreted in terms of the desire to be other-directed and non-defensive, to imagine the roles, perspectives, or experiences of the other person, and to listen to understand rather than trying to achieve agreement or produce some kind of change in the other person.

Active listening in the literature for crisis negotiators however is generally defined as “the ability to see a circumstance from another’s perspective and to let the other person know that the negotiator understands his [or her] perspective” (Lanceley, 1999, p. 17). Two of the most prominent of the major classifications are those by Noesner & Webster (1997) in their work on specific verbal skills in the FBI Law Enforcement Bulletin, and McMains & Mullins’ (2001) generalised

groupings (which subsume the verbal skills developed by Noesner & Webster). These classifications are listed in Table 1 below.

Noesner & Webster verbal skills (1997 FBI Law Enforcement Bulletin)	
Labelling	emotion labelling (*you sound…, I hear…*)
Silence/pausing	the use of silence/pausing to encourage a subject to talk
Back-channelling	the use of back-channelling or minimal encouragers (OK, *oh…, I see…, really?*)
'I' Messages	the use of 'I' messages or first person singular by the negotiator (I know that …; *I feel.. xx .. when you* …)
Questions	open-ended questions which do not encourage yes/no answers (*how, when, what, where, why, who* … etc.)
McMains & Mullins groupings (2001)	
Paraphrasing	a response in which the negotiator gives the subject the essence of his message in the negotiator's words
Reflecting feelings	a response in which the negotiator mirrors back to the subject the emotions the subject is communicating (mirroring)
Reflecting meaning	a response in which negotiators let the subject know they understand the facts and the feelings the subject is communicating
Summative reflections	a response in which the negotiator summarises the main facts and feelings that the subject has expressed over a relatively long period

Table 1: Classifications of Active Listening

The New South Wales Police Service in Australia (which is the context of the case study of police crisis negotiation used in this paper) takes a more verbal skills approach to the use of active listening in the professional development training workshops it offers to its serving police negotiators. These approximate most of the FBI's listings, with a

couple of psychologically derived terms (association, interpreting) included. These may be summarised as:

- **Attending** (being physically or vocally there for a subject)
- **Paraphrasing** (statements which exactly/closely mirror the subject's words)
- **Reflection** (helps the subject understand that negotiator understands his/her feelings)
- **Summarising** (clarifies the subject's meanings & shows the negotiator is listening)
- **Association** (building rapport through sharing feelings, attitudes, opinions etc.)
- **Probing** (open-ended questions to get subject to express more ideas)
- **Interpreting** (drawing upon ideas expressed and re-framing them for the subject)
- **Confrontation** (using questions/statements to clarify avoided feelings or states)

The case study of a police crisis negotiation that is commonly used in workshops for professional development purposes by the New South Wales (NSW) Police Service in Australia is an effective illustrative exemplar of the ways that active listening can be used in a negotiation (for full analyses see Royce, 2005; 2009). The incident, referred to internally by the NSW Police and in subsequent press reports as *Operation Terrall* (The Sun-Herald, 2001; Daily Liberal, 2002), involved NSW police negotiators tasked with the serving of a "high-risk warrant" on a "person of interest' (POI) who is known to be armed, is expected to resist, and has demonstrated that he is a serious danger to other people (McMains & Mullins, 2001, pp. 39-40). The subject of this warrant lives on a farm in rural NSW and was alleged to be regularly entering a nearby town carrying loaded weapons and wearing a live, home-made body-bomb, apparently for self-protection against perceived threats.

A more detailed analysis of this incident published in Harvard University's Negotiation Journal (Royce, 2005) revealed the use of a majority of the identified verbal skills that have been outlined by Noesner & Webster (1997) in their FBI report:

- the interactional use of *'I'* messages or first person singular by the negotiator
- the use of *mirroring*, where he repeats the last words/ phrases or main idea
- the use of tag questions and eliciting statements which are used to draw out some appreciation or acknowledgment of other people's feelings and positions.
- *reflective empathizers*, which ellipse the meanings expressed and operate to maintain the interactional exchange at a discoursal level (a verbal skill not included by Noesner & Webster 1997, but introduced by Royce, 2005).

A sampling and brief discussion of these elements is provided in the following.

2.1 The interactional use of 'I' messages

In active listening for crisis incidents, the usage of *'I' messages* is usually discussed in terms of a negotiator expressing his feelings about the POI's actions so the sense that he/she is a real person with feelings is projected. However, in the initial exchange and as the text below shows, the negotiator does in fact use 'I' messages, but not simply to express his feelings about what has been said. What is interesting interactionally is the shift that occurs in the usage of a range of referential forms, the reasons why, and the effect these choices have on the exchange as it unfolds.

POI: *Hello?*
Neg: *Hello, "POI".*
POI: *Who's this?*
Neg: *Yes, my name's John, "POI". I'm a police negotiator.*
POI: *Oh, yeah.*
Neg: *We know you've been going into town with a bomb and there's a lot of people very worried about that. O.K. That's why we're here, because we know you've got guns and we know that you've got a bomb.*
POI: *Well that's only if I was attacked.*
Neg: *I understand what you mean, but no-one wanted to attack you, no-one wants to go near you, they're frightened, very worried about the bomb. You can understand that, can't you?*

POI: *Yes, but it's absolute safe when I've got it.*

Neg: *Yes, look I know what you're saying and I know you have been into town and I know no-one's been injured.*

POI: *No-one will be either unless you decide to declare war on me.*

Neg: *No, we don't want to declare war on you, not at all, not at all, but I do need you to take off the bomb and to leave the guns on the roadway there.*

POI: *Well certainly I'm going to keep my weapons, I've had them for most of my life.*

Neg: *I know that, I know that, but police have to make sure that the bomb is disarmed.*

POI: *Yes.*

Neg: *And they can't let you go with the weapons, they are going to have to take the weapons from you now. You are under arrest, O.K.?*

POI: *Now listen, this is absolutely bloody ridiculous.*

Neg: *I know from your perspective it may seem ridiculous, but the people in town are very worried about it and the police are obligated to act, as you can understand.*

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Neg: *Now there's no problem, you're safe if you stay where you are, but you won't be safe if you leave that spot.*

POI: *The police - - -*

Neg: *Now just listen to me for one second please, "POI". The police can't let you get near them because of that bomb.*

POI: *I don't intend to get near them, dear or dear, I'll go back home.*

Neg: *No, you can't go home "POI".*

POI: *What are you gunna do, shoot me in the back?*

Neg: *You can't leave that area, there's police all around you, there's police back down the road towards your house. If you look down the road you'll see a saracen.*

POI: *Down the, which way?*

Neg: *The way you've come, you can't go back that way.*

POI: *This is amazing.*

Neg: *O.K.*

POI: *Rightio, well what are you going to do?*
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The negotiator starts the exchange by identifying himself and his relationship to the NSW Police; however he immediately chooses a referential first person plural *'we'*, which aligns himself with the other interactants in the situation (the police tactical and bomb disposal teams present, the townspeople). The POI immediately personalizes through his choice of first person singular '*I*', but in order to establish initial rapport and to distance himself from these 'others', the negotiator shifts to first person singular "*I*" and the non-assertive "*no-one*" to make a generalised claim about the people's intentions. There is also a first usage, which acts to create some distancing, of a referral to the previously identified 'others', through the third person plural and verbal contraction "*they're*".

The ensuing and multiple use of '*I know'* in response to the POI's direct challenges on safety are also instances of '*I'* messages for rapport-building. And although the negotiator still must ensure that the POI still sees him, at some level, as a figure associated with the police via a brief usage of the inclusive first person plural "*we"*, he quickly chooses the more intimate first person singular to project the idea that the POI will be dealing with him, and not those 'others', whom he also refers to as '*police'* and later as '*the police'*. These choices are deliberate and necessary for the POI to be able to start aligning himself with the negotiator, to feel some sense of rapport (O'Reilly, 2003). This attempt at relationship building is further reinforced through the use of the third person plural pronominal "*they"* for the tactical team and the noun phrase "*the people in town*" in the following choices.

This facilitates the next series of exchanges in the negotiation, where the negotiator starts to firmly take on the role of the 'rescuer', but where the POI's developing realization that he is in a predicament, that he is boxed in by the police leads to some agitation. At this point the negotiator cuts him off with an imperative, but continues to refer to '*the police*' and '*them'* in order to maintain the sense of separation and the idea that it is these "others' who are constraining the POI, not the negotiator. His reference to the 'Saracen' adds further to the sense of the 'otherness' for the POI, and is a deliberate choice of words by the negotiator because he knows that the POI would be impressed by the machine and the tactics used, a point discussed in terms of context-driven choices later in this paper (O'Reilly, 2003). The POI confirms

this perception of being constrained by the 'others' and signals the start of his acquiescence and a change in attitude by expressing his amazement; this is further confirmed by the next comment when he asks what the negotiator intends to do next, not the police. In doing this, the POI has assigned the negotiator agency in the situation.

The interactional sub-text in these choices by the negotiator is that '*they*' can do these things, that these "others" are frightened and worried, but "I" [the negotiator] am here to help "you" [the POI] get out of this predicament. In doing this, the negotiator distances himself from an association with the potential actions of the 'others', and starts to set himself up as the 'rescuer'. He is in a sense identifying with the plight of the POI and projects the message that he wants to work with him to help him save himself.

2.2 The use of mirroring

The negotiator also makes use of *mirroring*, where he repeats the last words/ phrases or main idea provided by the POI to mirror back to him the ideas or feelings that he has stated, to let him know that what is being stated is being listened to (though not necessarily accepted), and that he is being understood.

POI: *Well that's only if I was attacked.*

Neg*: I understand what you mean, but no-one wanted to attack you, no-one wants to go near you, they're frightened, very worried about the bomb. You can understand that, can't you?*

POI: *No-one will be either unless you decide to declare war on me.*

Neg: *No, we don't want to declare war on you, not at all, not at all, but I do need you to take off the bomb and to leave the guns on the roadway there.*

POI: *Now listen, this is absolutely bloody ridiculous.*

Neg*: I know from your perspective it may seem ridiculous, but the people in town are very worried about it and the police are obligated to act, as you can understand.*

Here we have various instances where the negotiator reflects back what the POI has stated. These are where the negotiator is mirroring to negate and reassure the POI regarding his fear of attack, or his perception of a threat of declaration of war by police. The negotiator is

also mirroring in order to reflect the POI's feelings/emotions about the fact that the he is under arrest and cannot keep his weapons.

2.3 The use of tag questions and eliciting statements

Tag questions and *eliciting statements* are used to draw out some appreciation or acknowledgment of other people's feelings and positions, thus further reinforcing other rapport-building choices.

POI: *Well that's only if I was attacked.*

Neg*: I understand what you mean, but no-one wanted to attack you, no-one wants to go near you, they're frightened, very worried about the bomb. You can understand that, can't you?*

POI*: Yes.*

Neg*: And they can't let you go with the weapons, they are going to have to take the weapons from you now. You are under arrest, O.K.?*

POI: *Now listen, this is absolutely bloody ridiculous.*

Neg*: I know from your perspective it may seem ridiculous, but the people in town are very worried about it and the police are obligated to act, as you can understand.*

Here the exchange reveals that the negotiator is using a tag question to obtain an acknowledgment or some kind of verbal or emotive response from the POI about the townspeople's fears, and a tag question to elicit some kind of understanding from the POI that he is under arrest – this of course produces a rather emotive response from the POI, which the negotiator responds to with the eliciting statement designed to convey the police's obligation to act to protect the townspeople from their perceptions of the danger that the POI's weapons pose.

2.4 The use of reflective empathizers

What is interesting from the analysis of this incident however, is the consistent and effective usage, throughout the entire negotiation of what Royce (2005) refers to as *reflective empathizers*, an interactional technique which has not really been covered in the literature on active listening in crisis situations. This interactional technique does not reflect back the propositional content of the POI's utterances through repetition or synonymizing (which is what *mirroring* is basically described as

doing), but ellipses the meanings expressed and works to maintain the interactional exchange at a discoursal level.

POI: *Well that's only if I was attacked.*

Neg*:* *I understand what you mean, but no-one wanted to attack you, no-one wants to go near you, they're frightened, very worried about the bomb. You can understand that, can't you?*

POI: *Yes, but it's absolute safe when I've got it.*

Neg: *Yes, look I know what you're saying and I know you have been into town and I know no-one's been injured.*

POI: *Well certainly I'm going to keep my weapons, I've had them for most of my life.*

Neg*:* *I know that, I know that, but police have to make sure that the bomb is disarmed.*

POI: *Now listen, this is absolutely bloody ridiculous.*

Neg*:* *I know from your perspective it may seem ridiculous, but the people in town are very worried about it and the police are obligated to act, as you can understand.*

Reflective empathizers are used for maintaining the interactional flow for rapport building purposes (by acknowledging the focus of previously given messages), and assume as understood (or ellipse) the meanings expressed, in order to maintain the interactional exchange. In this extract there is an ellipsis of the knowledge that the POI loves his weapons and has had them most of his life, followed by an expressed empathy with what the POI is going through in the situation he now finds himself.

3 Discourse: the stages in crisis negotiations

It can be assumed that all communication, no matter what the context or whether the mode is written or spoken, can be interpreted in terms of an understanding that it unfolds through time, and is generally organised into recognizable stages. The interaction between a negotiator and a POI in a critical incident can also be interpreted as unfolding in stages, and an understanding of how crisis incidents can unfold naturally or be moved along in stages is important for negotiator teams to be able to obtain a resolution. Two well-known approaches to crisis negotiation staging, both of which approach it mainly from the

point of view of the negotiator are important: the first derives from a forensic psychology perspective, and the second a law enforcement and corrections context (adapted from Royce, 2009, pp. 26-27).

From a forensic psychology perspective, Call (2003; 2008, p. 280) suggests that crisis negotiations may be interpreted in terms of five distinct stages, or what can be characterised as strategic steps the negotiation teams should take:

1. **Intelligence gathering**: the need here is to develop strategy(s) to approach the crisis and to make preparations so the team can deal with any potential or unforseen problems.
2. **Introduction and relationship development**: after contact is made with the POI, steps need to be taken to build rapport. The team also needs to defer action on instrumental demands until rapport is evident and established.
3. **Problem clarification and relationship development**: with rapport established negotiate (bargain) 'normatively' rather than by using 'brinkmanship'.
4. **Problem solving**: based on the developing rapport, start to advance proposals to solve the situation and seek compliance from the POI.
5. **Resolution**: based on continuing rapport carefully organise steps for any hostage release, and steps for an efficient and safe surrender.

In the police training and correctional context, the stages of a crisis as suggested by McMains and Mullins (2001, pp. 68-76) are characterised as going through four distinct, unfolding stages:

1. **Pre-crisis**: those involved in a potential crisis carry on their normal daily activities.
2. **Crisis/Defusing**: something triggers intense emotional excitation in the subject, unpredictability and uncertainty increases, and he/she chooses a course of action which leads to police involvement and their initial attempts to defuse the crisis.
3. **Accommodation/Negotiation:** the subject involved is beginning to be open to suggestions, emotional excitation decreases, and rational thinking increases (often with instrumental purposes).

4. **Resolution/Surrender**: the subject can start to see solutions and perhaps a clear path for alternative choices, agrees with and tries new ideas, and makes moves towards a conclusion.

McMains and Mullins take the view that a crisis should be viewed as a process, with "predictable stages through which people move [and that] each stage has different issues with which negotiators must deal and requires different skills that are valuable in dealing with the issues of that particular stage" (2001, p. 68). Their view of the interaction as a process is an interactive, process-based view, which takes into account that the stages unfold as the interlocutors involved draw upon various interactive processes.

Given these two main approaches as background, the exchange between the POI and negotiator has been analyzed in terms of:

1. **The pre-incident context**: the important background details of the intelligence gathered on the POI prior to the crisis, and details about the tactical setup (extracted from a tape-recorded interview and police video).
2. **The initial stages of the POI text**: an analysis of how the POI is isolated and contained, and the moves made towards establishing rapport and moving towards defusing the crisis.
3. **The subsequent and final stages:** where the interaction unfolds towards resolution and surrender via cycles of instrumental and expressive processes.

The whole exchange between the negotiator and the POI from initiation to arrest lasts for around 47 minutes. The analysis and characterisation of the stages will be informed by elements of the model suggested by McMains and Mullins (2001), and due to the incident's atypical nature (in terms of the role and use of prior contextual knowledge), elements of Call's (2003, 2008) perspectives on staging from forensic psychology will be drawn upon and adapted (specifically the intelligence gathering stage). A full summative analysis of the stages and processes, the purposes associated with each, and sample utterances are given in Table 2 following.

STAGES	PROCESSES	EXCHANGES AND INSTANCES
PRE-CRISIS	**INTELLIGENCE-GATHERING**	• Incidents in town (visiting town, bank, police station wearing armed body IED and guns). • Police interview (with person who knows POI) • Police intel on property (carrying guns while patrolling perimeters; general paranoid behaviours)
CRISIS	**CONTAINMENT & ISOLATION**	**N**: *"POI" You are under arrest. Stop immediately, and stay exactly where you are ….., There are police all around you, …… You will be safe if you stay exactly where you are, and do exactly as I ask.*
CRISIS-DEFUSING	**EXPRESSIVE**	**N**: *We know you've been going into town with a bomb and there's a lot of people very worried about that…* **P**: *Well that's only if I was attacked.……*
		N: *… but no-one wanted to attack you, no-one wants to go near you, …. very worried about the bomb .....* **P**: *Now listen, this is absolutely bloody ridiculous.*
		P: *Well certainly I'm going to keep my weapons, I've had them for most of my life.* **N**: *I know that, I know that, but police have to make sure that the bomb is disarmed.*
		P: *Rightio, well what are you going to do?* **N**: *Well I need you to take off your overalls …..* **P**: *Then what do you intend to do? …..*
NEGOTIATION and	**INSTRUMENTAL (BARGAINING)**	**P**: *Well what about my property and everything? …. ….. what do you intend to do with my weapons? …… my land, my bike … selling my land? ….. getting out of the country? ….. The pistol ….* **N**: *Well they are your property ……..*
		N: *….. but you just can't go into town with a bomb.* **P**: *What I've got is absolutely safe, that's the only problem. …..* **N**: *Well I know that you've got it really well made and I know it's as safe as it can be …..*

ACCOMMODATION		**P**: *I was worried you were attacking me on my land to get my weapons which I've had for years, because you've all gone bloody well mad. …..*
		P: *OK I'll leave my things here on the road. …..* **N**: *And if you feel you could, if you can disarm it* [the IED] *easily.* **P**: *It is disarmed now. ….. Rightio, I'll even disconnect the battery from it. …..*
		N: *Yes, I can guarantee that that* [the money] *will be returned to you. …..* **P**: *But you're giving me a guarantee that I can definitely get out of this country?*
RESOLUTION / SURRENDER	**SURRENDER RITUAL**	**P**: *Rightio, now you want me to walk down toward the armoured personnel carrier?* **N**: *Please, if you could just place the phone there ….. And if you do that you'll be absolutely safe.* **…..** **N**: *Just keep walking towards them …. until they call out to you.* **P**: *This is wonderful .....*

Table 2: The Stages in Operation Terrall (Adapted from Royce, 2009, pp. 36-38)

4 Context: the activating role of contextual knowledge

While the exchanges between a negotiator and POI can and should be viewed interactively from the point of view of instrumental and expressive concerns, another fundamental aspect which is important to consider is the understanding that all communication (no matter what type) occurs in some kind of context of situation (Halliday, 1978), and that this context also plays a very important role for realizing a negotiator's and a POI's verbal message choices. This view also incorporates an understanding that a particular exchange does not occur in isolation but can also often be the result of previous interactions that have differing contextual features. One can say, in effect that the "context is in text" via the choices that the interactants make through time (Eggins, 1994, p. 49). Accordingly, the context, and the use of contextual knowledge by the negotiator, can be examined as to their role and importance in facilitating the successful resolution of

Operation Terrall (besides the controlling effect of the tactical setup, and the use of active listening). For a fuller discussion of these factors in this incident, see Royce (2005; 2009).

Apart from the immediate contextual knowledge used in active listening as an exchange develops and unfolds, the negotiator can also draw upon prior contextual knowledge that may have been gathered prior to the incident (from police reports about a POI, possible immediate causes of the excitation, or notes from the initial attending officers etc.), or via tactical intelligence gathering. One of the most interesting aspects of the way that Operation Terrall developed and was ultimately resolved, is the use of a great deal of information garnered from a formal interview the NSW Police negotiator and members of the tactical/bomb disposal teams held with an informant who was aware of the POI's personality, attitudes and behaviours (see the Pre-crisis Stage in Table 2). The details of this interview, which have been derived from the negotiator's own personal recordings and which reveal a rather disturbed individual with sociopathic tendencies, focussed on the POI's background profile in terms of his personality traits, feelings towards others, habitual actions, possessions, interests and skills, and living circumstances.

Table 3 below summarises these characteristics.

Personality traits	Secretive, explosive temper. Paranoia - feels protected and in command when wearing IED in town – always wears it in town – feels it is better protection in town than just handguns. Admires 'Rambo'. Limited conversational abilities. Likes to feel that he is in control or has power.
Belief systems	No religious affiliations or beliefs in organised religion. Machines come before people. His pets come before people. Human life has no value.
Interests and skills	Mechanical aptitude and has respect for machines. Pilots licence. Significant knowledge of and background with weapons. Able to build own firearms/cannon and to construct a pressure-switched IED. Strong interest in Thailand where he feels he can do anything he wants [money and prostitution].
Family relations	Estranged – did not attend mother's funeral. No contact with father. Other family members seen very occasionally. His guns and dogs come before family.
Reaction to authority	Government are 'thugs' who manipulate everyone (telephones, banks, TV, police etc.). Hates local council – they should be shot. No trust in doctors – self medicates.
Feelings towards others	Weapons are more valuable than people. Misogynist. Humans are 'domestics', 'two legs' or 'functionoids'. The local townspeople should be shot and used for fertiliser. No friends except an 'Old Nazi' in Thailand.
Living circumstances	Lives in a caravan on own property. Largely self- sufficient existence – buys supplies in town occasionally. Caravan is booby-trapped when he is away. Has made land mines ready to plant on property away from access track.
Possessions	Keeps antique pistols/guns, 1-inch cannon, stockpile of weapons and ammunition. Owns and uses forge, lathe and machine tools.
Habitual actions	No history of actual violence. Used to wear two IEDs and carried two handguns in town. Now carries one more powerful body IED and three handguns. Has been wearing a 'hot' pressure-switched IED to town for about four months. Uses a motorised bike to leave property along sandy access track.

Table 3: Informant Interview Results

Evidence of the use of this prior knowledge is sprinkled throughout the negotiation exchange, some of which is illustrated below (for a fuller discussion of these factors the way this case relates to Register Theory, see Royce, 2009). The first uses of this prior knowledge occur at the very beginning of the interaction, when the negotiator switches from the megaphone announcing the POI's need to stop where he is, to the police radio phone line. Here he identifies himself, and once the identification phase of the exchange is over, he then consistently draws upon, directly and indirectly, the background contextual knowledge obtained from the previously mentioned informant interview. These can be analysed and summarized in terms of the following:

Neg *We know you've been going into town with a bomb* [**habitual actions]** *and there's a lot of people very worried about that. O.K. That's why we're here, because we know you've got guns* [**possessions**] *and we know that you've got a bomb* [**possessions**].

Here the negotiator states facts all derived from the informant. The POI of course is already aware of this information since they involve him, and he is well aware of the town situation - what is new for him is the fact that the police also know about him carrying a bomb and weapons into town, and that people are concerned.

Neg *I understand what you mean, but no-one wanted to attack you* [**feelings towards others**], *no-one wants to go near you* [**feelings towards others**], *they're frightened* **[personality traits**], *very worried about the bomb* **[personality traits**]. *You can understand that, can't you?*

Here the negotiator lets the POI know that he understands that the POI is carrying the weapons and bomb in case of attack, or fear of attack, and he refers to the fears of the townspeople who are worried and fearful [again based on the informant' interview]. This is repeated throughout the rest of the negotiation. An important aspect of this expressed fearfulness by the people is that it feeds into the POI's feelings of superiority and disdain towards the townspeople, and it feeds into his need to be in control. It is thus a clear recognition and appreciation of the POI's insecurities.

Neg *Yes, look I know what you're saying* [**interests and skills** – the POI has made a safe bomb] *and I know you have been into town* [**habitual actions**] *and I know no-one's been injured* [**interests**

and skills – the POI has made a safe bomb].

Again, the negotiator knows that the bomb is relatively safe because of the knowledge he has gained about the construction of the bomb the POI made; it is relatively safe for detonation because it has an enclosed push-switch [speed of detonation is important in this context, because of it were a more sensitive detonation switch, the implications for police and public safety would change markedly].

Neg *You can't leave that area, there's police all around you, there's police back down the road towards your house. If you look down the road you'll see a Saracen* [**interests and skills**].

POI *This is amazing. ……..*

~~~~~

Neg2 *Yes, he had a look at the Saracen and that was the clincher, yes.* [**interests and skills**].

The negotiator's and the tactical team's prior knowledge of the POI's love for technology, tactics, and mechanical devices is also at play here. This can be seen in the reaction of the POI to the use and placement of a Saracen (armoured personnel carrier), and the later comments by a second negotiator that the POI seemed impressed with the use of such a show of quasi-military firepower.

POI *Well certainly I'm going to keep my weapons* [**possessions**]*, I've had them for most of my life* [**possessions**].

Neg *I know that, I know that, but police have to make sure that the bomb is disarmed.*

This is an important exchange in relation to the importance of the POI's weapons. The negotiator demonstrates his knowledge and understanding of this, which he continues to do throughout the bargaining phase, via statements demonstrating surety of knowledge [*I know that, I know that*]. The importance of this particular usage based on prior knowledge grows in importance during the middle and latter part of the negotiation, where considerable numbers of exchanges revolving around the bargaining over the POI's property, guns, money, etc. occur.

Neg *No, you can't go home* [**living circumstances**] *"POI"*.

POI *What are you gunna do, shoot me in the back?*

Neg *You can't leave that area, there's police all around you, there's police back down the road towards your house* [**living**
~~~~~

circumstances]. *If you look down the road you'll see a Saracen.*
The use of background knowledge obtained is also used tactically to cut off the POI from his home base. When the POI states his intention or desire to go back home, he is quickly told that he cannot go home, that he is effectively isolated, and that if he tries to return he will be in danger. The police already know that this is the source of the POI's security, strength and multiple forms of weaponry and booby traps, so they make sure that he is dissuaded from trying to return.

5 Conclusion

The analysis and discussion that has been presented in this paper has shown that police crisis negotiations are complex interactive events which can and should be looked at from a range of different aspects. There are instrumental or bargaining aspects, as well as expressive and emotional aspects to how the exchanges can unfold. It is important however to look at how the exchanges unfold due to the choices made by the interactants in response to each other (the importance of active listening for building rapport), the ways that the interaction can be moved along through various stages (the discourse stages in crisis negotiations and their associated critical moments), and the ways that purposeful choices can be made based on the negotiator's prior contextual knowledge (the activating role of contextual knowledge). Operation Terrall is unusual in that the police were able to obtain a great deal of prior intelligence which was used to great effect in the incident, but it is also true that a crisis negotiation which occurs rapidly in real time, with little time to gather such extensive information, can also be influenced by the purposeful, context-driven choices of the negotiator and his/her team.

This analysis suggests areas for further interactional study of this kind of incident. One important area would be an intonational analysis of vocal recordings of these kinds of interactions, especially in the move from a public megaphone to the more 'intimate' police phone. This could be correlated with the stages and functional moves occurring as an interaction unfolds. The implications of this kind of analysis would be interesting for police training, as an awareness of how their voice can be used in conjunction with their lexical choices to

build rapport, and where needed move the exchange along in stages, and bring in the "voice of reason" to start to move the interaction towards the resolution/surrender phase (O'Reilly, 2003), can greatly assist the successful resolution of crisis incidents. Another good example of this is the insertion of the active listening skill the NSW Police refer to as "Confrontation", where they purposely use questions/statements to clarify avoided feelings or states, and to ensure that the POI is 'getting the message' or should be 'jolted' along a little. The usage of this kind of interactive device could be seen as having its dangers, so an understanding of its usage along with effective intonational choices could help in its more subtle and effective use.

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The Semiotic Model of Legal Reasoning

Vadim Verenich

The scope of this paper is the analysis of semiotic models of legal argumentation and legal discourse. The paper explores how different semiotic models of legal reasoning underscore our appreciation for legal reasoning. The analysis of different models of legal discourse also aims to provide insight into the relationship between rhetoric and semiotics within the holistic semiotic framework of legal reasoning. In order to compare the discursive structures emanating from existing types of rhetorical discourse of law to those created by logical models, it is necessary to develop a sophisticated methodology that mimics and analyzes on a deeper level of coherence in the structure of legal discourse. By examining the assumptions necessary to generate such a methodology, we may clarify the relationships between semiotic, rhetorical and logical images of legal discourse. In order to eliminate discrepancies, we propose the creolization of two distinct metalanguages, that inevitably leads to the reducing of those distinctions and that may have far-reaching consequences for understanding the legal argumentation in all its contextual meaning.

Keywords: legal discourse, legal reasoning, semiotics of reasoning, semiotic model of discourse, rhetoric of law, legal semiotics

1 The diversity of existing models of legal reasoning: from general accounts of argumentation to Morris's model

"Argumentation" is a polysemic word. All the meanings attributed to this word fall into different (more narrow or more universal) categories, which require different conceptual and methodological assumptions

including rules and conversational interaction. The term "argumentation" (or "reasoning") is so thoroughly ambiguous that some attempts (described in van Eemeren (2001)) to define its various meanings have resulted, as we will see later, in contrasting formal and non-formal analyses of argumentation (the prevailing view seems to equate a formal account of argumentation with formal logic, while a non-formal account of argumentation is built on dialectic grounds). However, this is an exaggerated dilemma, since the diversity of situations (in which the necessity for reasoning) arises is very useful for establishing the distinction between different conceptions of argumentation. It is clear that a theory of argumentation will have to be much more elaborate than what goes by that name at the moment. In its most general form, all reasoning, regardless of methods specifically adapted for special kinds of inquiry, is the link between the reality one has thus far perceived and the reality one has semiotically constructed.

Methodologically, the argumentation can be investigated with all manner of approaches, regarding the various functions of argumention in the art of conversation. An outline of these functions demands a concise survey of the constituant components of a comprehensive research program for argumentation scholars. The state of the art in the study of argumentation is itself characterized by the variety of theoretical approaches (van Eemeren, 2001), which differ considerably in conceptualization, scope, and theoretical refinement. **Among the types of research in the field of argumenatation are:** "philosophical studies of the concepts of rationality and reasonableness, theoretical studies in which models of argumentation are developed that are based on such concepts, qualitative as well as quantitative empirical research of various aspects of argumentative reality, analytic studies aimed at a theoretical reconstruction of argumentative discourse and texts, and practical studies of specific kinds of argumentative practices" (van Eemeren, 2001 p.109), since the skill of argument construction is the primary among essential skills of a lawyer.

Some argumentation scholars (with a background in rhetoric and discourse analysis), describe how speakers and writers use argumentation in order to convince or persuade others. In other words, they are engaged in a systematic study of speech act sequences. Völzing (Völzing, 1979) discussed such critical features of actual

arguments as the trust the hearer has for the speaker and basic attitudinal differences between cooperation and competition. Perelman and Olbrechts-Tyteca (Perelman & Olbrechts-Tyteca, 1969) emphasize the world of the audience as critical aspect or argumentation. In the examples from a legislative hearing we will use shortly, the question/answer structure characteristic of institutional discourse introduces problems different from an argument where all speakers have equal rights to the floor (Agar, 1986). This approach implies accord with Jackobson's communicative functions and factors. Other argumentation scholars, often inspired by logic and philosophy, study argumentation for **normative** purposes. For example, we may recall Habermas (1987), who introduced argumentation only as a partial solution in his broader concerns with the conditions that characterize rational discourse. The discourse scholars and rhetoricians are interested in developing criteria that must be satisfied for the argumentation to be reasonable. Although in the study of argumentation both extremes are represented, comparative studies of argumentation (reasoning) tend to take a middle position and focus on general contrasts/similarities between **the normative and the descriptive dimensions of argumentation**. Such comparative studies usually tend to be insightful for the manner in which they seek to reintroduce dialectical relationships between the structures of legal discourse and ordinary, purposeful (justificatory) dialogue.

The interdisciplinary research of argumentation poses certain problems of methodology, regarding the applicability of concepts designed to account for objects with different status. From the standpoint of semiotics, the above problem is reduced to a statement of the differences and similarities between two different (meta)languages (sign-systems). The semiotic analysis of argumentation liberates (at least, partly) the argumentation studies from problelms of transferring concepts from one discipline to another, thus enabling the creolization of two heterogenous metalangauages. Hence, semiotics – which is often designated as a transdisciplinary or even supradisciplinary theory – allows one not only to describe problems of argumentation by referring to the set of semiotic theories, but also to develop disciplinary semiotics of argumentation in a transdisciplinary way. Considering the vast range of established approaches in the study of argumentation, the

disciplinary identity of the semiotics of argumentation will thus depend on a dialogue with other disciplines that deal with various aspects of argumentation (logic, rhetorics, discourse analysis, phiolsophy, linguistics).

In order to illustrate the semiotic potential of argumentation studies, it is possible to conflate this model with the three dimensions of semiotics (Morris, 1938, p.9) such that each theoretical approach in the study of argumentation will be represented as they are reflected within the process of semiosis. Such a rendering of the two heterogenous models requires some explanation. Morris proposed to introduce a distinction between pure semiotics, descriptive semiotics and applied semiotics. While the normative dimension of argumenation is akin to *Morris's pure semiotics*, descriptive dimension is akin to descriptive *semiotics*. Pure semiotics is concerned with the elaboration of a metalanguage in terms of which all sign situations would be discussed, and possible structures and functions of sign systems would be explored. Descriptive semiotics implements this metalanguage to the study of instances of semiosis, and applied semiotics includes the application of semiotics as an instrument (i.e, the aforementioned semiotics of legal argument). There is also another additional layer in pragmatic dimension of legal argumentation, - that of meta-semiotics, which consists of the exchange between and across different legal contexts, and the difference between different modes of legal reasoning, employed by legal "subjects who end up creating "objects", who "leave" their control, and who take on a life of their own within exchange" (Williams, 2005, p.714). Yet, one should always keep in mind that the basic ambiguity of notion "argument" is found in all fields of argumentation and it makes no sense to say that "the semiotics of legal argument is essentially pragmatics, whereas the semiotics of mathematical argument is essentially syntax and semantics" (Horovitz, 1972, p.129). Instead, in order to understand the semiotics of legal argument, one would have to recall Peirce's idea of the continous growth of thought, of semiosis as a dialogical process, which is characterized by inquiry. At the same time, it doesn't make sense to stipulate that the formal semantic validity of the argumentation is a *conditio sine qua non* for material correctness of argumentation; and showing the formal incorrectness of reasoning is a powerful dialectical

or a rhetorical tool. What could appear as a logic deficiency, may become efficiency from the point of view of the practical reasoning (rhetoric), and *vice versa*.

Building one's own methodology upon Morris's semiotic legacy, one must adopt Morris's famous definition of semiotics – that semiotics as a framework is equivalent to the Medieval European trivium of *artes dicendi*, that is, grammar, dialectic (logic) and rhetoric (Morris, 1938, p. 56); for instance, Morris saw rhetoric as an early form of pragmatics. The classic trivium has privileged grammar and logic at the expense of the problematizing effects of the third element. Although semiotic accounts of legal reasoning tend to incorporate Morris's tripartition (pragmatics, semantics and syntactics), some authors have expressed their dissenting opinion in regards of the issue of rhetorics, which is seen as being extended into the domain of pragmatics. Although the analytic part of 'legal rhetoric' has traditionally been confined to the pragmatic dimension of semiosis in law, the scope of which has been extended in many ways to deal with the questions of law in adjudication. For example, Ballweg expressed his own view of the relationships between semiotics and rhetorics is true: semiotics is a restricted part of rhetoric (Ballweg, 2009, p.122) and as we can see, this view is the opposite to Morrs' view. It is also common among legal scholars to consider the rhetorical element as the destabilizing and subversive element in discourse, that undoes the claims of the trivium to be an epistemologically stable construct (de Man, 1986, p.17). Drawing on the ideas of Saussure and Nietzsche, de Man points out that the rhetorical and tropological dimension of language makes it an unreliable medium for the communication of truths, because literary language is predominantly rhetorical and figurative. Therefore, to take for granted that literature is a reliable source of information about anything but itself would be a great mistake.

We might be tempted then, to keep a single set of terms for both the general accounts of argumentation, the logical ones and the rhetorical ones as well. We would arrange these in a system useful for both kinds of analysis, general account of argumentation and semiotic. Then, the epistemic amount of terminology we require would be reduced. Such a procedure of simplification would have a number of disadvantages, however. Most important is that, for the sake of the

simplicity of a system such as the one we are going to develop, we must sacrifice some of the important distinctions between different theories of argumentation. Despite its power and sophistication as an analytical and critical tool, the simplicistic semiotic methodology developed here cannot completely eliminate any of the terminological discrepancies between the logical account of legal reasoning and the rhetorical ones. Those who study argumentation are constantly generating names for and distinctions among the elements of discourse or the forms of argument. To compare the discursive structures emanating from existing types of rhetorical discourse of law to those created by logical models, it is necessary to develop a sophisticated methodology that mimics and reflects a deeper level of coherence and contradiction in the structure of legal discourse. By examining the assumptions necessary to generate such methodology, we may clarify the relationships between semiotic, rhetorical and logical images of legal discourses. Instead of the elimination of discrepancies, we propose the 'creolization' (the synthesis) of two distinct metalanguages, that inevitably leads to the reducing of those distinctions and that may have far-reaching consequences for understanding of legal argumentation in all its contextual peculiarities.

2 Comparison between structuralist and post-positivist models of legal discourse

It is widely accepted that the relationships between semiotics, rhetorics and logic are marked by close association: and in all those fields one can mention the explicit preclusion of single theory of argumentation, - the phenomenon that contributes to the heterogeneity of methodology, as well as to the inherent diversity of argumentation theories. The broader field of discoursive study of argumentative practices is the site of intersection between two currents (logic and rhetorics), not usually called semiotics, but in practice implicitly or explicitly drawing on semiotic theories to such extent that some scholars (Toulmin, 1958) see argumentation as a prototypical example of *rational* discourse, which can be expanded into the domain of normative discourse. Toulmin’s layout of practical argument can be used both to critique and to generate legal arguments This layout is based on a metaphor of

movement along a path - “an argument is *movement* from accepted *data*, through a *warrant*, to a *claim*” (Berger, 2009). Toulmin set as his goal the development of a theory that better approximates everyday argumentation than traditional models of logic. In its schematic form, his theory may be presented as follows: certain data lead to a conclusion. The relationship between data and conclusion are supported by a warrant (A) that, in turn, has a backing (B). The relationship between data and conclusion may be qualified, since under certain conditions a rebuttal may be possible that invalidates the relationship between data and conclusion. The structural correspondence between the axiological hierarchy of values, expressed in the formal language of logic, and the normative hierarchy of normative concepts, lends support to Toulmin’s conclusion that logic is nothing but a generalized form of jurisprudence (Toulmin, 1958, p.6). As to Toulmin’s conclusion, Roberta Kevelson (who was a leading figure in Peircean semiotics of law), invoked him, when she summarized the particular type of logical theory of law that she theorized in her papers (Kevelson, 1980) and whose semiotics she expounds in the title “the semiotics of legal argument”. From epistemological perspectives of legal discourse, this particular type of a discourse is dominated by normative concepts. Examples of these normative concepts are found in “most general legal ideas, such as the notion of right, a permission, and an obligation“ (von Wright, 1968, p.11). Traditionally, legal discourses, especially used in the legislative context, are considered notorious for their complex semantics and rigorous syntax, which is explained by the fact that until recently the law was not considered as communication.

The position of legal discourse is thus dependent on the ability of its participants to reconceptualize legal activity - law-making and law-finding, - which has intentionally been directed at intertextuality (Kristeva, 1967), especially in case of the collision between international legal order and national jurisdictions. This is the occasion of symbolic struggle (Bourdieu,1987; Voloshinov, 1973), which is characterized by the co-existence of several distinct linguistic sign-systems of discourses (legal, oppositional, scientific), each of which can be conceived of as a *habitus*. Various rhetorical dimensions of various discourses (world-views) compete for dominance, but this symbolic struggle is pre-eminent in the legal sphere, in which a legal

text sets itself into an intertextuality, as a interdiscourse between discourses (texts, etc.) whether in the in a more metaphorical sense; the text being considered as a place of complex interactions between different texts which give precedence of one over others. It is commonly known that in legal practice, the hierarchy of texts is defined through a general priority mechanism of *lex specialis, lex posterior, lex superior*. The legal habitus can be metaphorically describes as the force of law or the constituve effect of the law (Derrida, 1992) which operates like fundamental categories of juridical perception that structure a group of foundational concepts and principles of law (Bourdieu, 1987, p.832). For example, in tort law (which has certain distinctive rules), the juridical field is organized around the basic concepts of fault, intent, or causation, and more recently, the notions of cost-benefit analysis and economic efficiency- juridical scope of tort law is to be defined such that all these concepts included. Public norms of tort law prescribe "absolute duties" not owed to anyone in particular: therefore some of the concepts (like the concept of culpability from the dominant voculabry of moral theories in tort law) are simply irrelevant being replaced by the objective standards of due care as well as by standards of negligence and strict liablity. Hence, most of modern theories of tort are aligned to the abstract principle of corrective justice, that puts in order and relationships of dependency the concepts of wrong, loss, responsibility and repair. The notion of responsibility on which determinations of tort liability depend, is strictly a political notion (Postema, 2001) or, in othe words, this notion depens for its content on legal habitus (tort practice). The significance of habitus to legal theory is difficult to underestimate, for it makes possible a more inclusive depiction of the legal discourse by incorporating the elements of deconstructive practice into the context of semiotics. These elements will include the deep structure (not to be confused with the deep structure in Chomsky's theory, in our case the deep structure is a pre-semiotic sphere of psychological drives, which in our example would be "intent"), the discursive structure (defined by the postions of utterances within the paradigm and syntagm semiotic axis, i.e., defined by categories of "fault" and "causation"), the referential structure (dictated by the metonymic and metaphoric semiotic axis) and extra-verbal context (the pragmatic elements, like "economic efficiency")

(Milovanovic, 1992, p.104-105). From the general perspective, it is possible to group the semiotic accounts of legal discourses according to the object of their preoccuption. For example, the semiotic accounts of law inspired by Greimasian structuralism (rooted in logic and grammar) are concerned with the referential structure of discourse (it holds that the meaning has its own reference rooted in logic and grammar). Those semiotic accounts of law, drawing inspiration from Peircean semiotics, are usually associated with the pragmatic elements which subsume the dialogical nature of legal discourse. Other accounts of laws, drawing inspiration from Lacan's psychoanalytic semiotics, the integration of Freudo-Marxism with Nietzscheanism (developped by Deleuze and Guattari) and/or French postmodernits feminists are focused on the deep-structure of legal discourse.

It is important to emphasize here that the term “discourse” in the previous passage is considered nearly synonymous with the terms “*message”*, *“dialogue”* and *“argument”*. It is that type of a unified coherent discourse, which “is held together by a ruling theme, by a non-ambiguous system of cross-reference, and by certain implications, or presuppositions, which permits deleted verbal phenomena to be recovered in so-called 'deep structure analysis'” (Kevelson, 1980, p.54). According to Kevelson, “dialogue” or “discourse” is defined upon a certain type of underlying communicative structure, which Kevelson, following Jan Mukařovský, labelled as “a dialogical structure” (Mukařovský, 1970).

Thus, Roberta Kevelson, introduced into semiotics of legal arguments a new appraisal of the reciprocal relationships between logic (formal argument) and dialectic (non-formal argument), which lends support to a very specific explanation of “a coherent discourse” in terms that correspond to the function of theme and rheme in the Prague School’s theory of the principles of functional sentence, whereby the theme of a sentence is meant that part that refers to what is already known, and by the rheme is meant that part, what is asserted about the theme (Mathesius, 1929).

To make that explanation more explicit, we would have to refer to another, more traditional “structuralist” definition of discourse. According to this definition, a discourse is considered a unified, coherent system of sequential sentences beyond the level of a single

sentence, organized along the syntagamatic and paradigmatic axes of language. As we may learn from the writings of legal post-positivists, the criteria of coherence, used in post-positivist theories of law, are merely syntactic, because the concept of "coherence" itself is traditionally expressed in the following way (even the word "theory" itself is used here in a strict sense similar to "discourse"): "the more the statements, belonging to a given theory, approximate a perfect supportive structure, the more coherent is theory" (Peczenik, 1989, p.161). This type of "syntactic" **coherence** is considered one of six underlying preconditions for **"rational practical discourse"** (Alexy, 1989, p.188): that is a concept which is trickier than it seems, for it transports us into the much contested terrain of discursive rationality, which is, according to Habermas (1996), simply one component of reason. Habermas' dialogic conception of the ideal, discursively rational, speech act is marked by strong idealisation, regarding everything as irrational so long as it is not completely discursively vindicated. While the principle of dialogue can be treated as the foundation of "rational discourse", Habermas' potentially fallible conception of "ideal speech situation" fails to take sufficient account of the rules of the discourse and its starting points – the normative and semantic investments (which are symptomatic of the terms of an ideological system) of those persons, participating in the discourse (Pintore 2000:188).

The possibilities of the communicative situation, free of coercion is present in any speech act. However, there is as large a gulf between understanding a speech act and agreeing with its semantic and pragamatic force. Moreover, another potential fallacy of Habermas' model of "discourse" is that it follows traditional practice in associating truth-functionality with *ideational* sentence truth-meaning and communicative competence (Habermas, 1979), which is viewed as a "universal pragmatics of making universal claims of validity" (Jackson, 1996, p.91). Even if post-positivist theories of law generally ought to accept that a lie can constitute a rational action, it is believed that in a perfectly rational discourse a lie is no correct reason. It is on this basis that legal postpositivism asserts the main discursive paradox: **a discourse full of lies is not perfect as a discourse** (Alexy, 1989; Peczenik, 1989, p.191) , i.e a discourse full of lies is equivalent to an

invalid discourse. It is also important to mention that Habermas took a radical stand against Peirce's logic of inquiry, criticizing it for precisely that which it is not (Habermas, 1971[1968]). Habermas insists that a reliable theory of human knowledge must be constructed so that it resembles the dialogic structure of social exchange and this dialogic structure alone is a sign of authentic communication. In fact, this is precisely what was claimed by Peirce when he spoke of dialogic communication (CP 6.109). But Habermas, for obvious reasons, resists the contamination of rational argument by formal and rhetorical factors. He attempts to maintain a clear and rigorous distinction between philosophy and other forms of writing, particularly literature and literary criticism; he rejects the postmodern assault on reason on the grounds that it occupies the no-man's-land between argumentation, narration and fiction.

By comparison with post-positivist legal theories, Prague School has revealed the structural markers of the functional styles, and therefore this school has paid much more attention to the stylistic and aesthetic, rather than syntactic, criteria in analyses of discourse. The stylistic analyses of discourses, which constitute the object of a semiotics of conversational activity (Eco, 1976, p.278), are dominated by the discussion of rhetoric figures (tropes and schemes) and stylistic features, realized in the surface of the discourse as deviations from the coded norm or *zero degree level of language* (Dubois, 1970). In line with his cautions regarding the theory of unlimited semiosis, Eco asserts the primacy of a "common-sense" reading based on a text's literal meaning: "the interpreter must first of all take for granted a zero-degree meaning" (Eco, 1991, p.36). A respect for this level of literal meaning, plus a belief in the principle of 'internal textual coherence', the belief that any portion of a text can be used to conform or reject an interpretation of any other portion, can guide the interpreter along the straight and narrow path in the realm of understanding into the *dialogic* direction of the interpretive act: from the author's intention through the text's intention to the intention of the reader. Each of those 'intentions' is the actual interpretation of any kind of text. On other hand, the significance of stylistic analysis in discourse which is considered essentially dialogic in structure is central to Vološinov's concept of dialogue. As was shown by structuralists, the aesthetic structure of

discourse arises out of a violation of norms (Mukařovský, 1970). Structuralism is scientific not so much in the degree of precision which it hopes to achieve as in the level of generality on which it operates. Rather than, for example, interpreting an individual literary text, the structuralist seeks to establish the general laws of which this text is the product. Structuralism can be defined in part by reference to its interest in sign systems and signifying processes derived from Saussurean linguistics. That is the reason why a structuralist approach to the analysis of discourse is characterized by a great *interest in* certain "structuration marks"- textual features and parts of speech - which otherwise (in ordinary language) are not meaningful: substitution, ellipsis, repetition, structural relationships between lexemes and morphemes ("operators" or "connectors"). Certain "structuration marks" (such as connectors *"besides"*, *"notably"*, *"only"*, *"no less than"*, *"but"*, *"even"*, *"still"*, *"because"*, *"and"*, *"so"*, *"that is to say*", etc.,) give the linguistic utterances a specific "argumentative force" and determine "argumentative direction" of the conclusion that is suggested by the whole sentence and not the content of this conclusion (Anscombre & Ducrot 1983). The normal concerns of an inter-disciplinary study of legal practices usually involve matter which either are of a clearly semiotics nature (such as syntax, semantics and pragmatics of legal discourses) or are more closely applied to actual legal situatations. By evoking representation of the discourse situation, different discursive registers of legal practice display an extensive use of typical intertextual and interdiscursive devices which by their design often create specific problems in their construction, interpretation and use, especially when placed in interdisciplinary context. These intertextual (interdiscursive) devices are intended to induce certain discourse situation/ behaviour, performing 4 major pragmatic function of (1) signaling a link between different level of intertextual authority; (2) providing terminological explanation; (3) facilitating textual mapping; and (4) defining legal scope. Of the mentioned functions, the first function of signaling is most comprehensive from semiotic point of view. Textual authority is usually signaled in the form of a typical use of complex prepositional phrases, which may appear to be almost *formulaic* to a large extent. We may try to emulate the formalist approach to legal text by breaking down intertextual patterns in legal

normative texts of the same structure into their smallest narrative units, we are able to arrive at a typical sequence of inter textual connectors "…in accordance with/ in pursuance of/ by virtue of+(the provisions of) +subsection/chapter/section/paragraph...+ of the ..... Act/of the schedule/of ..... instrument" (Bhatia, 1993). Consider the following example of normative statement from Law of Obligations Act of Republic Estonia § 15. **Party's awareness of deficiencies of contract** *(3):*

> *Compensation for damage pursuant **to the provisions of subsection (2) of this section** shall not be demanded if the other party was also aware or should **have been aware of circumstances** rendering the contract void or if the contract was rendered void due to the party's restricted active legal capacity or the unconformity of the contract with good morals.*

The use of the complex prepositional phrase "*pursuant to the provisions of subsection*" fulfills here the technical obligation to indicate how quoted legal provision positions itself and draws on other texts (in the indicated subsections). On other hand, this phrase explicitly signals an inter-textual link to another subsection that expresses certain restriction of rights, imposed on the other party of contract. The subsequent part of the cited legal provision draws on prior texts as a source of meanings to be used at face value. This occurs whenever one text takes statements from another source as authoritative and then repeats that authoritative information or statement for the purposes of the new text. For example, in a U.S. Supreme Court decision, passages from the U.S. Constitution can be cited and taken as authoritative givens, even though the application to the case at hand may be argued.

Since every "dialogue" (or more generally, conversation) is strongly marked by the aesthetic function, aesthetic *dialogue* is the superordinate type of all possible types of *discourse* within a particular dialogical or discursive system (Kevelson, 1977b, pp.281-282). If we turn then to the aforementioned Alexy's discursive paradox, which now will be reformulated in terms of norms and violation of norms, we may claim that in spite of deviation from the basic rules of normative

sincerity, a *discourse full of lies* still constitutes a valid discourse from an aesthetic perspective. A number of theorists have specified the co-existence of diverse discourse or bounded discursive subject-positions (Foucault, 1972[1969], pp.107-108) and what is suggested is that Symbolic Order is not a monolithic system. Each particular type of legal discourse is very much dependent on the context in which it is eventually applied, the pragmatic context is treated as the fulcrum in generalizing properties of discourse, -for instance, the context of lies in a particular legal discourse of veridiction (a truth verifying procedure). In terms of speech act (i.e.) pragmatic theories, lies as speech acts are considered being induced by the abuse of communicative act, resulting in various constellations of speech acts: misrepresentations, misinterpretations, self-deceptions and temporary infatuations (Searle, 1999).

In regular cases, at an oral hearing, the participants are obliged to answer the questions and the legal competence or capacity of witnesses to testify is determined by an understanding of the obligation to tell the truth (in modern legal systems of proof witnesses must swear or solemnly affirm that he or she will testify truthfully). A faithful *witness* will not *lie*; but a false *witness* uttereth *lies* - if the witness intentionally lies about material matters (i.e. about matters which affect the outcome of the case), perjury or forswearing charges may be filed against him or her. In reality, intentional and non-intentional lies often dominate legal discourse, especially witness testimony, where lies are especially dangerous. Some specific cases of lies are even permitted: for instance, the police do not have to tell the suspect of all crimes being investigated. Needless to say that skillful lawyers usually have no problems constructing *deliberately misleading* arguments that contain non-existent references to legal provisions or precedents which allegedly support constructed arguments. Here we can formulate a substantial difference between semiotic and pragmatic approaches: in the vast range of semiotic approaches, a sign is everything which can be taken as substituting for “something else”, and this “something” does not necessarily have to exist in objective reality.

To put it in Umberto Eco’s words – “semiotics is in principle discipline studying everything which can be used to lie“ (Eco, 1976, p.7). And, on the contrary, pragmatists are not interested in lies,

because the limits of speech act theories are defined by the preconditioned requirements (sincerity, trust, symmetry of communcation, etc.). We will probably have already seen the same approach, applied to Habermas's idealistic model of discourse, hence, pragmatists and Habermas are agnostic about the existence of more very complex and multifaceted discursive illusions, meanwhile in real legal disourse, democracy and human rights are some of the most appropriate concepts that are prone to different conceptualizations of reality, and hence discursive illusions (Bhatia & Bhatia, 2011).

Another limitation faced by Habermas' model of discourse is that the representation of so called half-truths, which are encountered in legal discourse as a result of the violation of discursive rules. In legal practice, half-truths emerge in a situation where there is a discrepancy between the requirements for a complete testimony and a lawyer's strategy. But this serious limitation of Habermas' model has profound theoretical implications as well. First of all, from the perspective of classical legal rhetoric, the half-truths are expressed by litotes - figures of speech consisting of an understatement in which an affirmative is expressed by negating its opposite. As we'll see later, this specific rhetorical tactic could lead to a problematic situation in the axiological system of reasoning, when interpretation is being heavily loaded by an overworked but defining semiotic zero-sign. A zero-sign may be conceived as if its sign-vehicle is signified merely by its very absence, occuring in a zero form (Sebeok, 1976). Thus it signifies the apparent contradiction between used terms, presenting opposing frames of reference in conflict. The problem of zero-sign is definately related to that one of *minus-device* (Lotman, 1972, pp.82-83), which is defined as a significant absence of a semiotic device. In this respect, Lotman refered to Roland Barthes's "writing degree zero" (Barthes, 1967[1953]), although the similiar idea was expressed and generalized in Šklovskij's, Bally 's and Jakobson's works (Šklovskij, 1990 [1925]; Bally, 1965 [1932]; Jakobson, 1939) in which "zero-sign" marks a significant interval in a message continuum and also indicates a shift from syntagm to paradigm.

Whichever of these two discursive approaches we are inclined to follow in our analysis of argumentation, they pose a serious dilemma for semioticians who study argumentation - the dilemma of selecting

minimal elements for apprehending and producing signification from a vast purposive complex of discourse. Despite methodological and thematic differences in the methods of inquiry, there is a verisimilitude such that a structuralist method of inquiry may be mapped onto methods of inquiry in legal post-positivist philosophy. Here we see semiotics as a more general method of inquiry capable of providing necessary bridge rules to bring two methods of inquiry into a relational unity.

3 Underlying rhetorical model of legal discourse

It is evident that this relational unity of methods is dependent on a rhetorical model. In order to obtain an appropriate representation of this rhetorical model, we will take as a guide Roberta Kevelson's elaboration on Peircean division of logic (Kevelson, 1990; Kevelson, 1992; Kevelson, 1998), according to which it is Peirce's *Speculative Rhetoric* which provides "bridge rules" transition from semantic function of logical terms to the pragmatic dimension of language. This transition is "the chief instrument for expanding traditional logic into semiotic logic, by understanding the concept of Property as a device of Rhetoric, i.e., of Semiotic Methodology… law becomes prototypical of semiotics, in process, practice and theory, by means of a more complex and continually evolving concept of Property" (Kevelson, 1992, p.189; the same idea expressed in Kevelson (1990, p.117)). "Property in Law" is **a rhetorical and semiotic instrument for** the creating of meaning in law and in society, **whose purpose is to bring together two or more universes of inquiry (i.e dialogues) or semiotic sign-systems into relationship**, or into ever more general comprehensiveness and meaning. For each sign of law, there is a corresponding determined operation of social systems, which is the foundation of the sign itself: the regulations constituting law have their origin in the practical requirements of the social structure (Carzo & Morabito 1988). This idea of bridging different sign-systems in itself is not by any means, original – the analogous theses have been widely shared among the theorists representing various semiotic schools and approaches. For instance, the similar theses may be seen as being endorsed by theses of cultural semiotics, where cultural semiotics is defined as a study of the

functional correlation of different sign-systems (Lotman, 1975). The same idea expressed by Lotman in his writings on Jakobson's structural rhetorics, where he argued that the sphere of rhetorics cannot come into being on the basis of only one language, - rhetoric phenomena emerge when at least two semiotically heterogenous languages collide (Lotman, 2009). Therefore, semiotics seek to create new value in junctures established by two different sign-systems, such as the system of law or the economic system by bringing together two or more unrelated systems into more comprehensive complex sign-systems.

Nevertheless, Kevelson's contention that law is prototypical of semiotics by means of a rhetorical device of *Property*, has important implications for both legal semiotics and critical legal studies. Every time we bring together two methods of reasoning in the mind, we are acquisitors of new property of reasoning, which can be described as *syllogistic* recollection (Kevelson, 1987, p.33), since recollection bears a likeness to a sort of syllogism. This analogy suggests that the grasp of new truths may be compared to the acquisition of new possessions. In particular, the concept of *Law as Property* has received a significant reception in post-colonial and feminist studies of law, where the concept of property (which is seen as being inseparable from power over people as objects), like law itself, is used as a semiotic device for creating the artificially imposed exclusions on what is and is not law (Threadgold 1999): the distinction between property rights and human rights is spurious, as human rights (based on the notion of individual freedom) are simply corollary to people's property rights. However the actual law of property includes the limitations that the public author imposed on property rights, by bringing together a legal institution of property to the rhetoric developed around that legal institution and creating a highly technical level of lawyer's discourse, which remains inaccessible to laymen (Mattei, 2000). As has been exemplified by Kevelson and her followers, the concept of property is very useful for examining legal concepts of property, trusts, successions and contractual relations in law (Kevelson, 1990, p.8).

Consider the following example from EHRC practice - *James v United Kingdom* (1986) 8 EHRR 123, where the applicants claimed that the compulsory transfer of their *property* under the Leasehold Reform Act 1967, as amended, gave rise to a violation of Article 1 of

Protocol No. 1 (P1-1) to the Convention, which reads: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the private use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties". In this context, legal rights of property over assets (that consists of the rights to consume, to obtain income from, and alienate those assets) are seen here as the rhetorical enhancement of economic right, which is closely related to the concept of transaction costs, associated with the transfer, capture and protection of rights (Barzel 1989:2)

The Court considered that Article 1 (P1-1) in substance guarantees the right of property. In its judgment of 23 September 1982 in the case of *Sporrong and Lonnroth*, the Court analysed Article 1 (P1-1) as comprising "three distinct rules": the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest (Series A no. 52, p. 24, para. 61). The Court further observed that, before inquiring whether the first general rule has been complied with, it must determine whether the last two are applicable (ibid.). *The three rules are not, however, "distinct" in the sense of being unconnected*. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule.

4 The functional correlation of structuralist and post-positivist conceptions of legal discourse

In order to accommodate a sufficient explanation of transition from semantic and syntactic features of structuralist and post-positivist conceptions to the unified semiotic theory of "discourse", we must place these theories within the larger context and look more specifically at the mutual functional correlation of structuralist (A) and post-positivist (B) theories of discourse. To give a very strict definition of the term "dialogue" (A) (in the sense it was commonly used in the Prague School, which is almost interchangeable with "discourse"), we can recall Mukařovský's studies of dialogue (Mukařovský, 1977), aimed at furnishing of a comprehensive, albeit arbitrary, approach to "dialogue". What defined dialogue for Mukařovský was triadic relationship: the first is the relationship between two dialogical participants; the second is the relationship between two dialogical participants and the material situation "theme"; and, finally, "semantic structure" of dialogue, provided by the unity of "theme", or "thematisation" of semantics on discursive level (Mukařovský, 1977, pp.86-87). At the same time, the post-positivist (B) model of discourse in its purest (Habermasian) form can be also reformulated in terms of triadic relations: the relation between the participants in the communicative *ideal* situation; the relation between the participants and the *ideal speech situation*; the explicit procedural rules, which are meant to guarantee consensus.

What is isomorphic to the discussed models (A and B), is that in both cases the discourse has an inherent meaningful structure, which is related to the dialogical structure of conversation shaped by the relations of a specific logic. Kevelson's investigations of the particular category of legal speech acts (decisions), show that this is based on a specific logic of questions and answers - erotetic logic, while the other categories of legal speech acts are based on a deontic logic, and that both types of logic presuppose a dialogic or relational structure (Kevelson, 1998, p.69). It was also Roberta Kevelson, who made an important step towards the unified semiotic theory of erotetic discourse by contending that any given discourse is an answer to a deleted, entailed, implied or presupposed question (or enthymeme, which we

will discuss later) (Kevelson, 1977b; Kevelson 1978). Later, she laid out several of the starting points for transferring methodological property of "discourse" into the dynamic space of semiosis, that is in the sense of interaction between replica of discourse and its representament (type) (Kevelson, 1985). Two partical kinds (tokens) of discourse, which are instantiated by interrogative structure (type of discourse) - legal decisions, and riddles in literature - are said to be prototypical in regards to the process of discovery that is the process of dynamically interpreting known signs into new meaningful signs (Kevelson, 1985). In Kevelsonian semiotics of law, the interrogative structure of a legal discourse (or a legal speech act) is envisioned as expressing an anaphoric reference of the interrogative index sign to the deleted subject of proposition. A careful examination of Kevelson's idea reveals a certain analogy between the process of dynamical interpretation of signs (i.e semiosis) and Peircean conception of hypothetical reasoning, though not necessarily in the sense initially ascribed to it. According to Peirce, hypothetical reasoning is dependent upon perceptual judgments, containing general elements such that *universal propositions may be deduced from them*[1].

In other words, the concept of theme stands for "old" (deleted, entailed, implied or presupposed) information, while the concept of rheme implies the emergence of new information. It is clear that Kevelson considerably attenuates the scope of distinctions between the terms rheme and theme by showing (borrowing Peirce's definition of "rheme" in "A Syllabus of Certain Topics of Logic", EP 2:299, 1903) that a rheme is the blank form of proposition which was first produced by the erasures and if these blanks are of such a nature that if each of them be filled by a proper name the result will be a proposition (Kevelson, 1992). The approach to legal speech acts, developed by Kevelson through Peircean semiotics, tends to equate the pragmatic approach with erotetic discourse. Such erotetic discourse seems to be worth reconsideration in a form more pertinent to legal reasoning, especially in Common Law discourse. What is considered fruitful in this type of legal discourse in Common Law, is that Common Law discourse recognizes the creative role of legal interpretation, where

[1] Peircean conception of perceptual judgements is discussed in (Sebeok & Sebeok-Umiker, 1979).

rules and canons of legal reasoning serve as tools of trade "for the professionals who can choose among them, and may sometimes manipulate the text by using them" (Jemelianek, 2002, p.327). The creative role of judges in manipulating the legal dispositions by means of legal argumentation is - at least on formal level, - indicative of certain semiotic isomorphism between elements of legal discourse (legal norm) and aesthetic dialogue (aesthetic value). If we are able to establish such relations between law and aesthetic value, then it is possible to inject "the legal concept with an aesthetic sense, a symbolism inspired by Kant's thesis that beauty is the symbol of morality" (Kaldis 2003:239). The similar viewpoint was already known to ancient Roman jurists of high Classical epoch and was epitomized by Publius Iuventius Celsus's (2nd. ct. AD) dictum *"Ius est ars boni et aequi" – "Law is the art of the good and the equitable"* (Dig. 1, 1, 1). Common Law's principles of equity, which mitigate the rigor of the Common Law discourse, also include in their purview the conduct that springs from exceptional goodness.

The study of **two different sign systems – rhetorics and jurisprudence – in their mutual correlation** has solid methodological underpininnigs. From historical perspectives, the legal science – jurisprudence - has intimate and profound connections to the rhetorics. The earliest magical form of Roman law (jus) was rhetorical in a variety of related senses, as it was drawing heavily on the rhetorical language, inducing by symbolic or figurative means the impenetrability of legal language. The secularization of ancient Roman law led to the separation of *ars rhetorica* from *juris prudentia*, resulting in the establishments of two separate disciplines. ***Rhetorics as an art of speech*** grew out of the practical needs of democratic institutions - court and political speeches became the most important rhetorical genres. ***Rhetorics as a discipline***, in which the objects of formal study are the conventions of discourse and argument, has its roots in the classical world of the pre-Socratics, Aristotle, Cicero**.** Already by the 5th century BC there had emerged an intuitive notion of truth that could be termed the rhetorical ideal**.** According to this ideal, thinking, speaking and acting form an inseparable complex: it is possible for a human being to develop and formulate one's thoughts and ideas properly (the sphere of

logic), to express them properly (rhetorics) and, in accordance with these, to act properly (justice) (Lotman, 2009, p.3).

As an independent discipline, rhetorics had to define and position itself in relation to other branches of learning. Rhetorics opposed poetics as a skill of verbalizing real events against the skill of verbalizing fictional events; rhetorics opposed *dialectics* as an art of monological speech against the art of dialogue; rhetorics opposed logic as an art of expressing one's thoughts against the art of thinking, According to Aristotle, rhetorics is something like applied logic; logic is the art of proving, in rhetorics instead of strict logical evidence there are *soriteses* consisting *of enthymemata* (Lotman, 2009, p.3). Enthymeme is a term known from classical rhetoric which describes an argument that does not make explicit either the major or minor premise or the conclusion (enthymeme, being the core of persuasive speech, is also called a rhetorical syllogism). The topic of *enthymemata* was skilfully presented from a semiotic perspective in Kevelson's explanation of Peirce's claim, according to which all arguments are being based on unexpressed presuppositions (Kevelson, 1988b, p.5). Tacit, or unexpressed presuppositions, are held to be typical and characteristic to the judicial discursive structure, because not all the used legal norms are revealed, many of them staying not only out of question but also hidden. The presence of imperfect syllogism (*enthymeme*) is usually marked by specific *topoi*: "the employment of oppositions and equivalences of terms (antonyms and synonyms), the comparison, differences in degree, previous experiences, polysemy, ambiguities, generalizing judgments of value" (Adeodato, 1999, p.142). What seems to be the case of legal practical reasoning is that rhetorical syllogisms (*enthymemata*) connect statements, which are substantially based on only probable imputations expressed in the topoi (Kratochwil, 1991, p.218). This specific feature of practical reasoning in legal discourse is best explained by pointing to a set of oppositions, which distinguished practical legal reasoning from closed and highly formalized systems of logical reasoning. As we show in subsequent section, irreconcilable oppositions between formal logic and legal reasoning are motivated by both historical tradition and some methodological contentions.

5 Conclusion

The most obvious sequitur of our discussion is that **legal reasoning as such is topical, rather than logical**. Although rhetorics was originally a discipline to define the semiotic links between language and power by semiotic devices of enthymemeta, ituntil recently the dominant tendency within jurisprudence has been that of the formalism, and the discipline of rhetorics has remained loosely connected to jurisprudence. With the preponderance to the logical rigorism, jurisprudence seemed to privilege syllogism and viewed enthymeme as a lesser form of argument, which was meant only to be used in speech acts of persuasion in absence of clear logical syllogistic certainity. The crisis of rhetorics lasted until the middle of the 20th century, when structural linguistics rediscovered anti-formalist concepts of practical reasoning. This made it possible to be considerably more specific than the ancient rhetorical teaching of tropes as figures of thought, and more specific than the ancient rhetorical teaching used for the *discovery of arguments* (*inventio*) from the various sources of information (*topoi*). In Aristotelian rhetorics, topoi are general instructions saying that a conclusion of a certain form can be derived (or discovered) from premises of a certain form. In 1965, Theodor Viehweg (Viehweg, 1965) offered a topical account of legal reasoning and convincingly demonstrated that the mechanism of legal argumentation is designed to solve whatever material/formal problems of law by referring to an open, undetermined and ever expanding list of *topoi*. At the same time, the work of the Brussels school (founded by Chaim Perelman), established the contemporary disciplinary meaning of the term rhetoric (New Rhetoric), as that of the discipline which studies the linguistic form of *discourse a*nd more particularly the word-based figures of literary and poetic genres, primarily those of metaphor and metonymy (Goodrich, 1984a). The use of a metaphor may be preceded by discussion of the subsidiary subject, which has the effect of controlling the associations carried over in the metaphor, the text becomes not just a sentence, but a syntagmatically constructed set of paradigmatically defined elements. Excelent analysis of rhetorical devices employed in

legal practice (*R.A.V. v. City of St. Paul, Minnesota*)[2], may be found in M. Facchini and P.Grossmann's article (Facchini & Grossmann, 1999), where the authors sought to reveal rhetorical figures in USA Supreme Court's majority opinion, which was concluded by writing: "*Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire*". As authors explained:

The Court metaphorically reduces cross burning to the burning of the First Amendment. The court expresses the unconstitutionality of the ordinance by saying that allowing the law to stand would be essentially equivalent to burning the First Amendment. The Court here first metonymically reduces cross burning to First Amendment rights, and then metonymically shifts the meaning to the burning of the First Amendment. (Facchini & Grossmann, 1999, p.219)

Secondly, we can recall another important methodological contention that legal reasoning is *dialectical rather than analytical*, since legal reasoning operates by means of dialectical persuasion, convincing the audience through discourse to accept legal arguments (which otherwise would be unfeasible). As for rhetorical conceptions. In "Logique Juridique" (Perelman, 1976), Perelman described the generally accepted starting points of an argumentation: facts, truths, presumptions, values, hierarchies, and the loci-topoi, which are necessary for convincing an audience of the acceptability of a legal decision, i.e. audience-accepted commonplaces, which are encapsulated into the structure of schemes for making inferences. Among the most popular typology schemes in legal reasoning are *argumentum e contrario* and *analogy*.

It is worth mentioning that Perelman made explicit the special role of enthymeme in practical reasoning: not all premises of those arguments are made explicit, since explicit assumptions gain their meaning only in the context of the presuppositions (Perelman, 1977).

[2] R. A. V. v. City of St. Paul, 505 U.S. 377 (1992) was a United States Supreme Court case involving hate speech and the free speech clause of the First Amendment to the Constitution of the United States. An unanimous Court struck down St. Paul, Minnesota's Bias-Motivated Crime Ordinance, and in doing *so overturned the conviction of a teenager,* referred to in court documents only as R.A.V., for burning a cross on the lawn of an African American family.

Of special importance in New Rhetoric is that the practical reasoning has grown out of the value hierarchies, practices and norms mutually accepted by interlocutors who participate in argumentation. In contrast to the closed system of inference in logic, the inference to the rhetorically best explanation in practical reasoning is made possible rhetorically. However one should always keep in mind that the notion of legal rhetorics is hardly defineable. For instance, CLS (Crtitical Legal Studies) scholar, Gerald B. Wetlaufer, identifies the *rhetoric of law* in terms of a linked set of rhetorical commitments to different discursive levels, i.e rhetorical commitments "to toughmindedness and rigor, to relevance and orderliness in *discourse*, to objectivity, to clarity and logic, to binary judgment, to the closure of controversies; to hierarchy and authority, to the impersonal voice, and to the one right (or best) answer to questions and the one true (or best) meaning of texts" (Wetflaufer, 1990, p.1552). Thus, rhetorical commitments are describable as indicants of the real values of the authors of any particular legal discourse; these commitments deemed to exist as subversive precondition of the formalist legal argument which such discourse purports to convey as a message within the system of legal communication. Here, we could confirm the existence of the deeper affinities between CLS's conception of "central contradictions" and Hjemslev's semiotic model that suggests that both expression and content have substance and form (Hjemslev, 1961, p.49). In Critical Legal Studies movement, the form and the substance of law are regarded as being related and opposed rhetorical modes, tied to contradictory substantive commitments to individualism (individual autonomy) and altruism (communal force), reflecting a deeper level of contradiction in the western legal order and providing additional evidence of the legal system's indeterminacy and incoherence (Kennedy, 1979, pp.211-213). The CLS scholars have identified several fundamental contradictions embedded in the structure of western discourse of law: the public versus the private spheres; subjectivity versus objectivity; individualism versus altruism; and rules versus standards (Oetken, 1991, p.2212). The essential sign relationship between the rhetorical codes of legal discourses - for example, between individual autonomy and communal force – is made explicit in civil litigations, where discursive values and interests (of public and private

law) appear as semiotically transformed into the functions of legal procedure. Generally, conflict resolution is considered as a relevant function of civil procedure in the form of comunally enforced compensation (reparation or restoration), with an emphasis on increased protection of individuals acting as plaintiff. The ideal type of civil action in civil litigation would then account for both rhetorical or sign modes: the conflict resolution and the public interest in law enforcement.

In Critical Legal Studies, the notion of ‘‘discourse’’ is understood differently from Kevelson’s account, and regarded as being closer in meaning to Saussurean defintion: discourse is a series of occurrences of a *language*, produced by a given speaker at a given time, a collection of instances of *parole.* The “grammar“ of legal discourse allows legal semiotician to trace the way legal system produces meaning and analyzing the discursive levels at which rhetorical tropes can occur in form of rhetorical commitments. Therefore, we may be tempted to admit that the whole identity of each particular legal discourse is created through rhetorical commitments of the lawyer - but we should not attribute to rhetorical commitments the task of doing an overly onerous job , of playing too many roles at the same time. While rhetorical arguments of persuasion are usually made by a lawyer, concerning *logos* - the logical ends or purposes of discursive practice (i.e in our case – the functions of litigation), - a good lawyer would also rely on pathos (invoking client’s expections or fears), and on *ethos*, presenting the constitutive elements of legal ethos, such as prudence, virtue and goodwill.

Another important disciplinary problem of legal semiotics that deserves discussion in regards of rhetorical issues is the problem of disciplinary competence of a legal semiotician. According to Balkin, semiotic sensitivity to discourse (rhetoric) is of utmost concern for the making of knowledge (inquiry), because the objective of the legal semiotician is to *rhetorize* legal discourse: “The purpose of semiotic study is to understand the system of signs which creates meaning within a culture. The legal semiotician seeks to identify what might be called the “grammar” of legal discourse—the acceptable moves available in the language game of legal discourse” (Balkin, 1991, p.1845). In legal semiotics, inspired by Peirce’s *Semeiotic*, Balkin's

'acceptable moves' in the language of legal discourse roughly corresponds to the moves from **speculative grammar** (the second branch of semiotics) to **speculative rhetoric** (the third branch of semiotics), i.e. to the move from the level of abstract definition to that of pragmatic clarification, such that the third branch of semiotics is the most pragmatic division of semiotics. Thus, in Peircean semiotics, the disciplinary competence of a legal semiotician concerns a critical assessment of the power of signs to move agents and to change the habits, i.e. to modify a person's tendencies toward action (CP 5.476(1907)). Legal semioticians seek to revitalise theoretical legal thinking demonstrating that the ultimate logical interpretant in the universe of legal discourse is best characterised as a habit of legal practice/action, or a modification of such a habit, contributing to the development of a theory of analytical rhetoric and its application to examples of legal argumentation. Another approach to legal semiotics – highly popularized Greimasian narrative semiology of law –makes it possible to widen the range of disciplinary competence of legal semioticians. In order to understand what permits us to make sense out of the whole legal discourse, the followers of Greimasian legal semiotics seek systematically to apply the insights of Greimasian semiotics to legal discourse, looking for "basic structures of signification" and the basic grammar of sense construction in legal discourse. Greimasian semiotics of law posits the following disciplinary limits of semiotic analysis. First of all, the semiotics analysis of a specific legal text (which is a product of "*production juridique*", i.e. a product of the performance of the legislator), presupposes reflecting on the semiotic status of legal discourse as a whole. By legal discourse Greimas and Landowski understand a subset of text that is part of a larger set made up of all the texts in any particular natural language. Secondly, the specific subset of (legal) texts presupposes the linear manifestation of language on the syntagmatic level; on the paradigmatic level, the specific organisation of legal language phrastic and transphrastic units implies the existence of a specific connotation underlying this type of discourse (legislative vs. referential types of legal discourse) (Greimas & Landowski 1976).

The described properties of legal discourse presuppose the specific disciplinary objectives of inquiry for practitioners of Greimasian legal

semiotics. Among those objectives, the most important one is the application of narrative models (including narrative typifications of professional behaviour) to the pragmatics as well as the semantics of both fact and law construction in the courtroom (Jackson, 1988e; Jackson, 1988b). Another important objective of legal semiotics is to develop the interdisciplinary model of legal communication, represented as a particular stock of narratively-constructed themes, against which the individual encodes, stores, retrieves and communicates individual events (Jackson, 1994).

Analyzing some of the work of legal semiotics in the light of disciplinary integrity may lead to a certain questioning of the disciplinary identity of legal semiotics. Even for for many legal scholars, the disciplinary status of legal semiotics is unclear and ambiguous. On one hand, there is a sceptical attitude expressed towards the existence of explicit methodological intertextuality between Greimasian semiotics and Hart's tradition of legal positivism. Due to that intertextuality, some legal scholars consider legal semiotics as a radical form of criticism against normativism rather than legal positivism in general, since semiotics of law shares the same methodological and epistemological assumptions with legal positivism. Peter Goodrich also sees legal semiotics as "the apotheosis of positivism in the addition of a further layer of descriptive metalanguage superimposed upon the dominant belief in the univocality of legal language" (Goodrich, 1984b, p.183). Bernard Jackson argues against this viewpoint, claiming that Greimasian legal semiotics is a radical criticism of legal positivism, even if it still privileges essentialist view of language; it is also able to mediate critically between legal realism and legal positivism by clarifying the interrelations between sense and meaning (Jackson, 1990).

Although different approaches within legal semiotics tend to be positively deconstructive and critical, the rather sparse legal semiotics scholarship hasn't contributed to the accumulation of common methodology, since the writings of legal semioticians would seem to form a single corpus only at the level of interdiscursivity, lacking the disciplinary integrity. From this point of view, legal semiotics is hardly a discipline, but rather an open-ended "meta-discourse", aimed at evaluating and producing critical meta-language (or meta-discipline),

providing either a language within which to study the traditional methods of "legal science" (Greimasian legal semiotics, Peircean semiotics) or a useful auxiliary tool to advance some legal disciplines. Nevertheless, considering the existence of autonomous meta-language, we may accept that, following Landowski, legal semiotics can be viewed as a sub-discipline of general semiotics.

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