

FROM ARGUMENTATION THEORY TO ARGUMENT PRAGMATICS: A CALL  
TO REFLECT ON SITUATED LANGUAGE USE

by

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**Abstract**

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From Argumentation Theory to Argument Pragmatics: a call to reflect on situated language use

Thesis directed by Professor Karen Tracy

Argumentation theory, as a field, has moved over time from the abstractions of formal logic to a growingly direct concern for more pragmatic ways of thinking about matters that it has traditionally taken up (such as reasoning, rules of argument, fallacies, etc.). An overview of this trajectory in which the field has been traveling suggests that language pragmatics will take on an increasing importance. In anticipation of language pragmatics' growing importance, this study reviews it as it relates to current interests in argumentation theory. The pragma-dialectical approach, which has made major contributions to the field of argumentation theory and already pushes toward language pragmatics (along with 'conversational argument' work), is explicated and critiqued. The study calls upon argumentation scholars to re-envision their work as becoming less a matter of argumentation theory, and more a matter of 'argument pragmatics.' The re-envisioned field of argument pragmatics is tentatively outlined in terms of its general theoretical and methodological posture, its role in describing, explaining, and improving argumentative practice(s), and its theoretical significance with regards to some concerns that are (and have long been) central to argument studies. This discussion is supported and facilitated by use of data samples taken from a specific case of appellate advocacy.

*Keywords:* argumentation theory, pragmatics, language use, context, agreement, reasoning, rules, phronesis

## Table of Contents

Abstract.....	ii
Chapter 1: The Trajectory of Argumentation Theory as a Field .....	1
A brief historical overview of argumentation theory .....	1
The rhetorical/legal turn in European argument studies.....	3
Toulmin's argumentation project .....	5
Perelman & Olbrechts-Tyteca's argumentation project .....	6
Contemporary argumentation theory in a practical field.....	7
Chapter 2: Meet My Data .....	13
Rationale for data choice .....	13
Appellate advocacy overview.....	14
The case of Lewis v. Harris.....	16
Chapter 3: Language Pragmatics, Anyone? .....	20
Foundational Theory: Gricean Conversation Studies, Speech Act Theory.....	20
Politeness and face .....	26
Talk in Interaction .....	27
'Context' studies.....	29
Themes/connections .....	31
Chapter 4: On the Shoulders of Giants .....	35
The pragma-dialectical approach .....	36
Conversational argument.....	39
Some points of convergence.....	40
The underlying snag .....	43
Preliminary issues for an application of the pragma-dialectical approach.....	46
The written brief.....	50
Application of Commandments 4 (the relevance rule), 5 (the unexpressed-premise rule), 6 (the starting-point rule), and 7 (the validity rule) .....	51
Application of Commandment 3 (the standpoint rule) .....	53
Application of Commandment 10 (the general language use rule) .....	56
The oral argument.....	57
Application of Commandments 4, 6, 7, and 10 .....	57
Application of Commandment 3 (the standpoint rule) .....	57
Application of Commandment 5 (the unexpressed-premise rule) .....	61
Reflecting on the application of the commandments .....	62
Chapter 5: Towards an Argument Pragmatics.....	65
Practice and empiricism .....	65
Describing the discourse.....	68
Explaining argument .....	73
Topics of argumentation theory.....	77
Argument normativity, or making the pragmatics practical.....	80
Conclusions/Starting Points.....	85
References .....	89
Appendix 1 .....	94
Appendix 2 .....	100

## **Chapter 1: The Trajectory of Argumentation Theory as a Field**

The field of argumentation theory is a thriving and growing one. It has a history that is in some ways long, and short in others. In this chapter, I outline the trajectory along which I see the field traveling, from its beginnings to present. I highlight the rhetorical/legal turn in European argument studies as a key moment for the field, explicating the contributions of Toulmin and Perelman and Olbrechts-Tyteca in that turn, and show that this turn and the work that has followed it have increasingly created a space for a thoroughly pragmatic approach to argument studies.

### **A brief historical overview of argumentation theory**

Before 1958, scholarly work that dealt with argument-related questions took place primarily within two traditions. The first tradition, a philosophical one, was the result of efforts across millennia to develop a systematic basis for evaluating knowledge claims and for making new knowledge claims based upon previously accepted claims and foundational principles of reasoning. The philosophical foundationalism that was the basic epistemological stance driving these efforts led its adherents to believe that they could arrive at an indisputable (and correct) understanding of the world by identifying some number of essential, generally self-evident ideas that would then build upon each other indefinitely into higher and higher levels of complexity, leading to more and more knowledge claims, all of which are rationally grounded.

Accomplishing this project eventually required systems of notation that would allow logicians to consider arguments on a level of abstraction that transcended any contextual particulars and shifted the focus from those particulars to the basic form of reasoning itself, which could then be reconstructed, analyzed, and, if valid, proven. The culmination of this project as it continued into the 19th and 20th centuries is reflected in the extremity of its mathematical turn in seminal works such as the *Principia Mathematica* (Whitehead & Russell,

1910), which developed a highly systematized notation and treatment of argument as a mathematical science of reasoning in which, as with other work in this tradition, propositions were determined to be either valid or invalid, depending on their adherence to the foundational principles. The mathematical (symbolic—non-naturally occurring) language through which this kind of inquiry was accomplished allowed logicians to abstract from ambiguities, equivocations, and other difficulties found in conventional spoken language in order to analyze the very forms of reason on which people were believed to rely. Philosophically, then, logic was both a tool through which other philosophical arguments could be examined and also an epistemological enterprise in its own right.

Beyond this philosophical work that eventually became the space from which argumentation theory was born, it is important to note that the rhetorical tradition, too, had dealt with argument-related issues for centuries before argumentation theory's defining works were published. From its beginnings in ancient Greece, the rhetorical tradition took as its principal task to cultivate the practical art of discourse, usually with an emphasis on persuasion (Craig, 1999). Thus, to the extent that argument consists of people's attempts to persuade each other through discourse, the rhetorical tradition carried an extensive history and collection of ideas that were very relevant to argument studies. The rhetorical tradition endured from those ancient times as a major field of study, and continued on from Europe into other parts of the world. In the United States, competitive debate in academic settings and the emergence of departments of speech communication brought rhetorical concerns into the foreground for many scholars who were interested in argument (Keith, 2007). However, despite the growing interest in argument among communities of rhetoricians in the United States, no systematic, holistic theories of argumentation emerged from there and the primary object of study among such scholars was

rhetoric itself. Instead, such theories began to emerge in Europe, quite independently of American discussions,<sup>1</sup> and one might indeed maintain that argumentation theory as a field was in fact born in, and still derives much of its vitality from, scholarly efforts in Europe.

### **The rhetorical/legal turn in European argument studies**

In the mid-twentieth century, some European logicians and other philosophers with an interest in reasoning apparently began to grow dissatisfied with the impractical abstractions that had become the *modus operandi* in scholarly inquiry that took up argument issues. In addition to this apparent dissatisfaction, some scholars (e.g., Perelman) began to rediscover the rhetorical tradition<sup>2</sup> and embrace it as a means of counterbalancing and escaping from the absolutism of the foundationalist project so prevalent in studies of formal logic. These two turns in thinking about argument were initiated in a new wave of theorizing that can be said to have begun in 1958 when two major works on the subject of argument (Perelman & Olbrechts-Tyteca, 1969; Toulmin, 2003) were first published. Interestingly, both of these works, each independently of the other, rejected the model of reasoning and argument that prevailed until then. The authors of these works considered this model to fall short of satisfaction when brought into non-technical spheres (Goodnight, 1982) and everyday arguments. The assumptions that grounded the logicians' approach to argument evaluation, and the mathematical notation used to express and evaluate arguments, allowed only for purely deductive reasoning that was based on the ideal of absolute truth and essential(ized) concepts and rules. Everyday arguments, which are subject to linguistic nuances and deal with concepts that do not easily conform to the idea of absolute truth (e.g., differences in values and their priority, or variable standards regarding acceptability and force of arguments), escaped the reach of formal logic. Instead, the authors of these

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<sup>1</sup> These theories would, however, profoundly influence, if not entirely create a space for, the subsequent work in the field of argumentation theory in the United States.

<sup>2</sup> In the case of Perelman, this rediscovery most specifically involved a return to Aristotle's treatment of rhetoric.

revolutionary works focused on the possibilities of argument beyond the restrictions imposed by the formal logic model.

Although the two works took different approaches to their study and treatment of argumentation, both of them drew on the authors' experiences in the legal world as a source of inspiration. In effect, both of them asked the question: "How does argument work in legal (and particularly courtroom) discourse?" Asking this kind of question gave argumentation theory a somewhat more pragmatic edge, since thinking about the subject went from a generalized and abstracted language to a focused and contextualized consideration of reasoning practices. However, and perhaps somewhat surprisingly, this shift did not necessarily entail a strongly empirical methodology for studies in argumentation. Instead, it could be said that this shift entailed the institution of a new framework or model for argumentation theorizing: the legal model.

At the risk of oversimplification, it might be said that the legal model constitutes the primary space in which argumentation theory has been built since its departure from a philosophical grounding in formal logic (with, of course, a number of debatable exceptions). Though this connection is rarely made explicit, much of the vocabulary (e.g., "case," "burden of proof," "claim") and the typical topics of concern (e.g., strengthening arguments, finding weaknesses in arguments of others, rules about appropriate argumentative behavior and interaction) in argument studies reflect grounding in the legal tradition. Given the strategic and contentious flavor of much of Western legal discourse, and the historically close relationship between courtroom oratory and rhetorical learning, the rhetorical tradition has been a major



influence in the legal model of argumentation.<sup>3</sup> Thus, from the perspective of the (particularly adversarial) legal model, although truth- or resolution-seeking may be the basic premise for the implementation of argumentative procedures from an institutional perspective, the practical side of argument is generally assumed to be strategically designed for another activity: victory-seeking. Though both Toulmin (2003) and the authors of the New Rhetoric (1969) develop their models of argument around this basic activity, each of them concludes with a legally inspired model that is fairly different from the other.

### **Toulmin's argumentation project**

Toulmin's (2003) argumentation project was inspired not only by his dissatisfaction with the epistemological absolutism of the analytic philosophy surrounding him at the time, as embodied in the tradition of foundationalism that seemed to be propelling and sustaining interest in formal logic, but also by an equal dissatisfaction with the kind of relativism that might be viewed as an extreme epistemological opposite to absolutism. Opting for a third, new way of thinking about such matters, Toulmin outlined an approach built around *argument* as the central concept by which reasoning would be understood. Toulmin's great accomplishment was to show how a simple model of argument could elegantly capture basic reasoning practices and expectations in a way that is neither totalizing nor entirely relative. He did this by proposing that argument, if it is to be convincing, will have three basic parts: a claim, data that points to the claim, and some kind of premise that connects the data to the claim logically (a warrant). In addition, a good argument might also have supporting features, such as qualifiers (e.g., making a claim less absolute by saying 'most,' 'probably,' etc. rather than leaving the claim as a bald assertion), backing (some sort of fact that validates the warrant as a likely proposition), and a

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<sup>3</sup> In fact, Perelman and Olbrechts-Tyteca's work was framed as a contribution to discussions in rhetorical circles, as reflected in its title: "The New Rhetoric."

rebuttal (expressing admitted limitations to the argument or reservations that a person might reasonably have with regard to the argument).

In Toulmin's theoretical vocabulary, these elements of argument (especially the first three basic ones) should be expected across a variety of settings, communities, or expectations (he calls these 'fields,' making these elements 'field-invariant'). On the other hand, even when these necessary elements are present, the argument is subject to judgment. The appropriateness of each element as it has been selected may in some cases be deemed sufficient, while in other cases not. This more situational, audience-based aspect of what makes an argument good is what Toulmin calls the 'field-dependent' side of any given argument. Recognizing that the same argument may be acceptable in one field and not in another does not mean, though, that Toulmin ultimately gives way to relativism, because, within his framework, each field carries relatively consistent expectations for arguments. Thus, in any given field, some arguments are acceptable and some are not—and this acceptability transcends the whims of any one particular individual.

### **Perelman & Olbrechts-Tyteca's argumentation project**

Much like Toulmin, Perelman and Olbrechts-Tyteca (1969) set out to propose a model of reasoning that navigated the extremes of absolutism and relativism. However, unlike Toulmin, these authors were primarily interested in a practical, rather than an epistemological, problem. In essence, these authors did not really endeavor to propose a non-absolutist, non-relativist scheme for evaluation of validity. Instead, they outlined a number of argumentative practices that demonstrate a socially realistic grounding for their claim that reasoning about beliefs and values is a practically feasible, and socially helpful, and indeed, even an observable activity. Furthermore, their project demonstrated that this sort of reasoning could be accomplished relying neither on relativism nor absolutism (leaving questions of "validity" behind). They accomplished this, largely, by showing how the strength of an argument (as a rhetorical attempt to gain an

audience's adherence to a proposition) can vary not only because of its appropriateness for the audience (even an imaginary one), but also by the kind of premises on which they rely (e.g., facts, presumptions, values, etc.).

For Perelman and Olbrechts-Tyteca, the making of the argument can also involve a variety of techniques. The authors outline a long, though not necessarily exhaustive, list of such techniques. Each of these can be summarized, though, as representing one of only a few general categories: quasi-logical arguments (e.g., ridicule, comparison, probabilities), arguments based on the structure of reality (e.g., causal links, 'pragmatic argument,' argument from authority), arguing relations establishing the structure of reality (e.g., use of example, analogy, metaphor), and dissociation of concepts (i.e., breaking links between things such as appearance and reality, or proposing dissociative definitions). The authors also note the role of things such as presentation and organization of argument as elements of argument that have a role in the final force thereof.

### **Contemporary argumentation theory in a practical field**

Significantly, the work of Toulmin, Perelman and Olbrechts-Tyteca is hailed as a great step forward in thinking about argumentation precisely because of its increased attention to the situational shaping of argumentative discourse. Indeed, a key issue of concern for both of these projects was the way in which different arguments or argument strategies become appropriate for different audiences (in the case of Perelman & Olbrechts-Tyteca) or fields (in the case of Toulmin). However, this concern can be summarized as the incorporation of a rhetorical inflection into an a priori approach to theory rather than a method of theorizing that privileges the empirical. This general approach to theorizing is largely shared by both of these two founding theories.

As previously mentioned, Toulmin's model of argument was presented primarily as a

statement on epistemology, situated in a philosophical text that reflects a process of critical thinking. When it draws on examples, the examples are regularly abstracted from any immediate context and variable markers are used in the place of situation-based specifics, making everyday utterances look more like semi-mathematical propositions. The work does not pretend to constitute an empirical study of argumentative discourse, but instead constitutes something more akin to a philosophical treatise. Similarly, Perelman and Olbrechts-Tyteca's major statement on argument is also presented primarily as a philosophical treatise. Though it draws on many, many examples of (primarily written) discourse from a variety of sources, and does so without de-particularizing them (as Toulmin does with his examples), these examples do not function as generators of theory. Instead, the excerpts of discourse in Perelman and Olbrechts-Tyteca's treatise serve a more pedagogical purpose, employed principally for the purposes of illustration, elaboration, and clarification. This notion is further supported by the authors' account of the writing process: Perelman's job was to develop and systematize the ideas, and Olbrechts-Tyteca's task was to generate the wealth of examples that are now found in the treatise. Although this project was a collaborative work between the two authors, this particular division of labor suggests that the theory was treated as if it were independent of discursive particulars, rendering it, as with Toulmin, more a philosophical statement than an empirical study.

In the end, however, it is undeniable that Toulmin and Perelman and Olbrechts-Tyteca laid the foundation for argument studies by making a significant departure from the abstract in order to move more closely toward the everyday. Similarly, much of the contemporary work in the field of argumentation theory has continued along the same trajectory. Granted, this trend is not necessarily universal, however it is clearly recognizable. In fact, it is possible that the practicality of argument knowledge has become so commonly taken as given among contributing

scholars that such practicality operates as a justifying assumption for much of their (often very theoretical) work. Even only a cursory review of contemporary work in the field of argumentation theory reveals that work in the field seldom reflects a tendency to navel gaze. The field's introductory texts (e.g., van Eemeren et al., 1996) seem to be more concerned with explication of key concepts and modes of thought than with reflecting and elaborating on the tradition's *raison d'être*<sup>4</sup> for its novices and critics.

It is likely that the field of argumentation theory does indeed derive institutional and cultural legitimacy from its apparent applicability to problems in every day life, institutional settings, larger sociocultural contexts, etc. Not only is argument an important way in which problems surface and get worked out, but it is also a ubiquitous and consequential social phenomenon that is often recognized by its participants as involving a number of problems that are often difficult to navigate and manage. A more highly developed understanding of argument seems to entail the promise of a smoother, fairer, consistent, rational, less violent, and generally more desirable kind of social existence. In short, argumentation theory is valued, at least

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<sup>4</sup> Having sprung from a dissatisfaction with formal logic's inadequacy when translating its accomplishments to the everyday, argumentation theory's immediate concerns were with issues that fall within the general field of inquiry about 'reasoning' but that could only be addressed by stepping outside the disciplinary sandbox the logicians had created and entering into the world of the 'pragmatic.' It has been suggested that these issues include "unexpressed elements in the argumentative discourse, argumentation structures, argumentation schemes, and fallacies" (van Eemeren et al., 1996, p. 12). Prominent argumentation theorists (van Eemeren et al., 1996, p. 12) also appear to agree that "argumentation theorists are, broadly speaking, interested in the problems involved in the *production, analysis, and evaluation* of argumentative discourse." Thus, combined, argumentation theorists can be said to study problems involved in producing, analyzing, and evaluating argumentation issues such as unexpressed elements in the discourse, argument structures, argument schemes, and fallacies. This phrasing of the current focus of argumentation theory probably takes up the most explicit and universal objectives of work in the field. To this list, I add another (even more fundamental) concern: *defining* argument and *identifying* argument as a discursive phenomenon. I add this concern because there appears to be significant disagreement among argumentation theorists regarding the way 'argument' ought to be conceptualized. Van Eemeren & Grootendorst (2004, p. 1), for example, offer the following definition: "a verbal, social, and rational activity aimed at convincing a reasonable critic of the acceptability of a standpoint by putting forward a constellation of propositions justifying or refuting the proposition expressed in the standpoint". On the other hand, Anscombe and Ducrot (1983), in what has been called 'radical argumentativism,' conceptualize argument such that it basically, in the most radical formulation, pervades all signification. There are quite a few additionally well-known attempts to systematically conceptualize the term 'argument,' such as O'Keefe's (1977) argument1 (commonly called 'argument as product') and argument2 ('argument as process') distinction.

partially, because of its potential to inform and improve practice.

In service of its promising potential, the contemporary field of argumentation theory has made multiple and various contributions to thinking about argument (and arguing) practices. Many of these contributions emphasize practical knowledge that can in some way be useful for participants in various practices/settings that involve argument (e.g., Bench-Capon, 2003; Govier, 2009; Lumer, 2005). The theory cultivated within the argumentation tradition, however, has largely been reached via a theoretical framework that has (or begins with) a minimal contextual emphasis (though Brossmann & Canary, 1990; and Craig, 1996 are examples of exceptions). This is perhaps the result of the argumentation scholars operating largely in the space created by Toulmin and Perelman, which primarily inherits a philosophical approach to scholarship.

That is not to suggest, though, that such theory is completely out of touch with situated social practice. Au contraire, many contemporary studies give situation, or some variation on situation, consideration. In fact, the growing number of volumes that directly take up issues of ‘practice’ and context (e.g., van Eemeren & Houtlosser, 2005; van Eemeren, 2009) have helped to make great headway in that regard. Such a move is increasingly typical among scholars with pragmatist leanings, as well as those who have become known as informal logicians. Walton (2003), for example, has shown that a proper understanding of what constitutes a fallacy in argumentation may best be grounded in a sensitivity to the type of interaction in which the argumentation takes place—not just the form of the argument itself. This perspective on argument entails the conclusion that what could reasonably be called a fallacy in one situation may not necessarily constitute a fallacy in another. Garfinkel (1990) and Schiappa (2003) have given a similar kind of pragmatist treatment to the subject of explanations and definition,

respectively, each of which are of serious interest to the field of argumentation theory.

In addition to the shift toward a more directly contextual focus exemplified in the work of these scholars, the last few decades have seen the emergence of work that takes an interest in the ‘natural’ side of argument. The ways in which scholars have followed this route are many. For instance, Amossy (2005; 2006) has argued for attention to the ‘argumentative dimension of discourse,’ which, for her, means empirical studies of naturally occurring communicative conduct. Another approach to seeing argument in the everyday of discourse is the theory of ‘argumentation in language’ (Ducrot & Anscombre, 1983)<sup>5</sup>, which goes to great lengths to show that language itself is argumentative, both at the level of the basic sentence and at the level of individual words themselves. Interestingly, Amossy (2009) has also noted the significance of language, reminding scholars that *logos* should be understood to mean both ‘reason’ and ‘discourse.’ Such a connection is also emphasized by the proponents of ‘natural logic’ (Grize, 1982; Grize, 1986), who focus their studies on discursive data in order to uncover situated practices of reasoning and convincing. These are only a few of the most widely-known examples, but each one illustrates argumentation theorists’ growing concern for the ways in which their work connects with the natural, the practical, and the everyday.

When considering argumentation theory in a holistic sense, accounting for everything from the philosophy of formal logic, to the innovations of the 1958 argumentation theorists, to the various contemporary projects in the field, an underlying trend seems to emerge. In my assessment, argumentation scholarship is slowly but steadily moving away from the place where it began, heading along a trajectory of sorts that is leading it further and further from the abstract and closer still to the ‘concrete’ (to put it loosely). It has been my intention to illustrate that

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<sup>5</sup> The most recent iteration of this theory has been reformulated as a theory of ‘semantic blocks’ (Carel & Ducrot, 2005).

trajectory in my review of the literature above. However, the shape this more ‘concrete’ version of argumentation theory will take remains to be discovered, and depends largely on the choices argumentation theorists have yet to make. There are probably many different ways in which argumentation studies can continue and flourish in the place where they appear to be going.

In the following chapters of this project I will identify and outline language pragmatics (chapter 3) as what I believe to be a very promising approach to argument studies, consistent with, and also to some degree anticipating, the trajectory of the field. This re-envisioned approach to argument studies, as I outline it, would be an ‘argument pragmatics,’ and I initiate discussion of what this might involve in chapter 5. In addition to anticipating the trajectory of the field in general, my call to re-envision argument studies is, in part, taking a cue from the pragma-dialectical approach. In chapter 4, I give special attention to this approach, highlighting its contributions, but also subjecting it to critical analysis. As a part of this discussion, I also acknowledge moves that have been made toward a theory of ‘conversational argument,’ as these moves both constitute an interesting contrast from the pragma-dialectical approach and also present useful ideas in their own right as starting points for an argument pragmatics. First, though, I address a procedural matter (*viz.*, an overview of data I have chosen to include as an empirically grounded source of illustration and analytic material throughout the rest of the project) in chapter 2 in order to facilitate discussion in the chapters that follow.



## Chapter 2: Meet My Data

Although this project is primarily a proposal addressing theoretical questions, I have chosen to use some ‘argumentative’<sup>6</sup> discourse as data on which ongoing discussion of these theoretical issues can be grounded, and from which examples can be taken to illustrate my points. I will also make a few points (chapter 5) that emerge upon consideration of this particular data, but which are important for this project inasmuch as they have a more general bearing on the theoretical questions at issue here. I do not pretend to be conducting any kind of empirical study with this data, per se, for the time being. Such an acknowledgement should not be taken, however, as an eschewal of that kind of study in light of the argument I make in this proposal. Quite the contrary, my hope is that my argument will make the need for empirical studies glaringly apparent. For the purposes of this proposal, though, I do not believe that such study is necessary beyond the data I have chosen and the studies that have led to the theories I take up for discussion. Therefore, in this chapter I present the data that facilitates my argument, thereby doing away with the need to preface references to this data in the following chapters. First, I present the rationale behind my choice of data. Then, I give some background explanation about the general kind of data this is. Finally, I focus in on my particular data with more specific description and explanation.

### **Rationale for data choice**

Various kinds of data would have been appropriate choices for a study of this sort. The principal concerns in data selection were that the data must plausibly constitute an example of argument discourse, while at the same time bringing a set of distinctive complexities that can be readily tied to the activity type in which the argumentative discourse is observed. A complete list

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<sup>6</sup> As noted in the review of the argumentation literature in chapter 1, the very use of the word ‘argument’ has yet to see universal agreement among argumentation theorists.

of the kinds of data that meet these criteria would extend beyond the reach of this study. There were, however, a few compelling reasons to choose a case of appellate argument practice for this study (which is what I indeed decided to do).

To begin with, appellate advocacy discourse not only meets the requirement of plausibly constituting an example of argument discourse, but it is also discourse that emerges in the specific kind of argument practices that the two founding theories of argumentation (viz., the Toulmin model and the New Rhetoric) took as a primary source of inspiration: legal argument. The fact that the general expectations and mechanics of argumentative conduct in this setting are well-known and discussed is also helpful because it allows analysts of this particular kind of discourse to operate reasonably on a number of assumptions about the goals and strategies that are pursued by participants. Also, given the emphasis on moving toward an appreciation of situation variability, appellate argument seems to be an ideal kind of data for these considerations because it serves as a clear example of how the same party can argue for the same position to the same audience and yet do so in a process that involves different situations, each of which requires that argument be constructed and enacted in a way that is unique to that situation.

### **Appellate advocacy overview**

Appellate advocacy processes are the activities involved in victory seeking in appellate courts. Generally, appellate courts serve the function of verifying the legality of the decisions made in trial courts. In the United States, these courts are usually split into two levels: an intermediate level (e.g., a “court of appeals”), and a superior level (e.g., a “Supreme Court”). Generally, legal disputes come to these courts after having been heard at the trial level, and appealed (the losing party at the trial level asks the intermediate-level court to overrule the decision made by the trial court based on some question of law or irregularity in trial procedure. Because the issues in dispute at the appellate level are primarily constitutional ones, appellate

courts occasionally become the site of serious debate regarding consequential and controversial questions in society (e.g., in the domain of civil rights and liberties), as is the case with my data, which takes up questions regarding the legality of marriage between partners of the same sex.

Victory seeking in an appellate court involves a number of phases, each of which is fundamentally argumentative. For purposes of simplicity, these phases can be reduced to two basic activities: writing and speaking. Although these two activities have a central role throughout the appellate process, the culminating instances of each are in the writing of briefs and the doing of oral arguments. In the United States, legal briefs are the principal written documents used to advance the position of either the appellants (viz., the people who are not satisfied with the decision of a lower court, and are thus initiating the appeal—also called the ‘plaintiffs’ in this case) or the appellees (viz., the people constituting the opposing side in the case, who are responding to the appeal initiated by the appellants—elsewhere called ‘defendants’ in this case). Briefs written by the parties directly involved in a case (or, more commonly, by the attorneys representing them) are expected to focus on the legal arguments of an issue and adhere to a well-defined and conventionalized structure (generally laid out in the rules of the court where the dispute is adjudicated). Deviation from these expectations, such as relying on moral or emotional premises for an argument, is invariably subject to rejection in some form. Oral arguments, on the other hand, are an opportunity to address issues not discussed in the written briefs, and also for the attorneys to clarify their arguments for the judges of the court. Most often, oral arguments are organized so that each party in the dispute is given an amount of time that is equal to the amount of time allotted the opposing side, in which the party’s representative appears before the Court (usually a panel seven or so high judges and a small public audience) and defends the resolution it seeks. This is done by 1) opening with some prepared remarks,

which continues until 2) the judges begin to intervene in the discourse with questions for the representative. These questions and answers occur in a locally managed turn-taking style, but judges' questions have priority over any non-elicited arguments the attorney may wish to make. The representative then responds to the judges' questions until the allotted time is expended. Attorneys assume a conventionalized role in this context, where they help the judges evaluate the case, without interrupting, and work through the implications of the argument advanced by their clients in the written briefs.

### **The case of *Lewis v. Harris***

The particular case of appellate advocacy I have chosen as a grounding for my theoretical discussion of argument, which has also been specifically studied (Tracy & Delgadillo, in press) for somewhat different purposes while basically connecting with an interest in this data as it relates to argumentative conduct, is the written and oral argument produced/enacted by counsel for the appellants in the 2006 New Jersey Supreme Court case: *Lewis v. Harris*. This case was, in part, a response to the New Jersey legislature's enactment of a Domestic Partnership law, which allowed domestic partnerships for all same-sex couples. This law provided a certain number of rights for domestic partnerships concerning things such as healthcare and property rights. It did not, however, provide these partners with the full array of rights that the legal status of marriage provided for different-sex couples. David Buckel, a New York attorney, represented the appellants in the oral arguments, and, with contributions from a few associates, authored the brief for this case. Because the oral arguments at the Supreme Court were preceded by the earlier stages of the appellate process, multiple briefs<sup>7</sup> do exist in relation to this case—even when excluding the overwhelming number of amicus briefs that were submitted by various parties

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<sup>7</sup> e.g., lower court complaint briefs, reply briefs, briefs in opposition to motion to dismiss, etc.

supporting either side of the argument. Each of these briefs reflects various stages, interests and moments in the appellate process. However, no briefs other than the one submitted by the plaintiffs at the final appellate iteration of *Lewis v. Harris* (dated October 21, 2005) will be considered in this study (see appendix 1 for an extended sample of this brief).

In total, the brief numbers 69 pages, although the ‘argument’ itself runs from page 21 to the end. As may be expected for a document of this kind, it is organized by each point (there are 5 major points) the appellants wish to make, separated into different sections (with parts and subparts) in the body of the text, and includes legal citations, footnotes, and other references throughout. In addition to the ‘argument’ portion of the brief, though, there is a Preliminary Statement (3 pages), which provides a sort of introductory summary of the appellants’ position, and a Statement of Facts (about 6 and a half pages), which highlights various bits of background information about the parties involved in the case, constitutional injuries they claim to have suffered, etc., that are relevant to the case.

The second part of the data for this study is the recording of the portion of the oral arguments in which Mr. Buckel, the plaintiffs’ representation, participated (see appendix 2 for the full transcript of this portion of the oral argument). That portion of the recording begins when the proceedings formally commence, and ends when Mr. Buckel formally concludes his remarks (in the first few seconds of minute 36). The total running time of the recording, which included the complete oral argument proceedings, is 1 hour, 9 minutes, putting the relative length of Mr. Buckel’s participation at slightly more than half of the total session. Mr. Buckel was the first of the two attorneys to argue before the court for this case, the other attorney taking the floor immediately after Mr. Buckel to argue on behalf of the state of New Jersey. Buckel’s primary audience was the panel of judges (all seven of the Court’s judges participated), although

observers from the general public who attended the session (including, we may assume, the arguing attorneys' clients) also constituted a part of the de facto audience for the arguments. The oral arguments are also made available to the public for general use in audio and video recorded forms, expanding the de facto audience even further.

During his turn at the podium, Buckel made an (roughly 6-minute) opening statement and then continued his argument responding to over 30 questions from the panel of New Jersey Supreme Court justices hearing his case. Many of the issues that surface during the oral arguments, either in the opening remarks or else during the questioning from the judges, are echoed in the brief submitted by Buckel for this case. Often, however, these echoes materialize as mere references to, or occasionally as approximate restatements of, the material in the briefs. In addition, some issues that are not at all addressed in the brief, such as the immutability of sexual orientation, surface in the oral arguments. Thus, although the arguments that are constructed in the brief and in the oral argument session are complementary, they are not identical in their breadth and depth.

For analytic purposes, the recording of the oral arguments was transcribed in harmony with the transcription methods, and the rationale for those methods, espoused by Tracy (1995) in her development of action-implicative discourse analysis. Basically, this method entails particular attention to 1) words and sounds, such as partially formed words, "um"s, etc., and 2) any instances of overlap between speakers. Action-Implicative Discourse Analysis (AIDA) is centrally interested in the choices speakers make, and presumes the most intentional choices to be at the level of words and turns at talk. Sounds of talk (e.g., prosody and paralinguistic features), though they may also reflect speakers' choices, cannot be as easily presumed to do so. Because this study works toward a vision of argument studies in which the primary concern

regards language *use* in context, the features of talk that cannot as easily be recognized as decision-based features have been left for consideration in some later addition to this basic starting point. Thus, the transcription method chosen for this study provides a means for reconstructing the content and sequence of the interaction between the attorney and judges, which should adequately highlight the most accessible choices involved in the construction and enactment of argument in this particular setting.

### **Chapter 3: Language Pragmatics, Anyone?**

Language pragmatics (or just ‘pragmatics’) is generally regarded as one of the newer fields of study in Linguistics, with its foundational theories emerging around the 1960s-70s (Austin, 1975; Grice, 1975). Contemporary use of the term ‘pragmatics’ in reference to this kind of inquiry, however, has been attributed to an earlier philosopher commonly linked with Pragmatist thought, Charles Morris (1938), who maintained that ‘pragmatics’ is the study of relationships between ‘signs’ (in the semiotic sense) and their users. Thus, unlike syntax or semantics, which, for Morris, are concerned with the relationships of signs to other signs or to reality, respectively, pragmatics approaches ‘sign’ issues by focusing on situated use. Among the various accomplishments of pragmaticians, two in particular (Grice’s work on conversational implicature and the cooperative principle, as well as speech act theory) have proven to be especially powerful and have become classic foundational theories of language pragmatics. In this chapter I will review these two projects in some detail and then review (in less detail) a number of additional projects that have proven to be influential. These include theories of politeness and face/facework, studies of ‘talk in interaction,’ and what I have chosen to call ‘context studies.’ I will then discuss some important themes that emerge in Pragmatics and suggest ways in which these themes might contribute to argumentation studies.

#### **Foundational Theory: Gricean Conversation Studies, Speech Act Theory**

One of the most important contributors to language pragmatics was Paul Grice. Grice’s (1989) investigations in meaning making, especially in the interactive sense, have led to two particularly useful ideas. The first idea is what has come to be known as the cooperative principle. In a nutshell, Grice (1989, p. 26) postulated that there is a “rough general principle” of cooperation that people in conversation are expected to follow. His formulation of the principle is as follows:



Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged.

From this general expectation of cooperation, Grice derives four maxims, which serve the purpose of breaking the principle into more specific expectations that bear on participants' conversational contributions. These maxims concern questions of quantity, quality, relation, and manner. The maxim of quantity holds that participants' contributions should give the requisite amount of information and no more than that. The quality maxim holds that interlocutors should try to contribute only information that is true. For the relation maxim, Grice suggests that the rule, quite simply, is "be relevant" (p. 27). The maxim of manner concerns the way in which a contribution is made (rather than the substance of the contribution), and highlights the expectation that interlocutors will "be perspicuous," avoiding obscurity and ambiguity, and strive to be brief and orderly.

Though Grice acknowledges the possibility that other maxims may be at play in conversation, this set of four maxims has become widely accepted as the fundamental systematic treatment of the Cooperative Principle. The value in outlining the maxims that make up the Cooperative Principle lies in the possibility of applying such maxims to another concept that originates with Grice: conversational implicature. In postulating the existence of the cooperative principle, with its associated maxims, Grice was not suggesting that interlocutors actually conform to the expectations he outlines. Instead, what Grice is actually describing is the principle by which interlocutors are able to make sense of each other's utterances, overcome ambiguity, and create meaning at levels of sophistication that go beyond the semantic value of the words they use. In essence, the idea is that speakers regularly say things in conversation that, on the

surface, appear to violate Grice's maxims. However, because the expectation of cooperativeness remains, *ceteris paribus*, interlocutors are able to interpret each other's utterances in such a way that the apparent maxim violations are resolved and become consistent with expectations. For example, in the following excerpt from my oral argument data the question the judge poses to the attorney, strictly speaking, requires a 'yes' or 'no' answer. Yet the attorney's response does not adhere to this expectation.

J: Mr- Mr Buckel if the legislature passed a law that provided same sex couples every right that straight couples have except the civil sacrament of marriage, would you still argue before us today?

A: It would be helpful in terms of strengthening relationships and strengthening strengthening families your honor. But it would not address the underlying Constitutional injury, where the state has set up two different legal structures one privileged and one not. And that can only send one message, which is that the group given the separate status the inferior status, those relationships of- of individuals in that group are unworthy.

This response that never actually says 'yes' or 'no' would appear, at face value, to violate the maxim of quantity. Although the attorney's contribution is relevant to the question, the information provided is insufficient for the purpose of deriving an answer without doing extra cognitive work on the suspicion that the answer (which, in this case, is 'yes') is in fact given via implicature. But because the expected answer can indeed be derived from an implicature, this excerpt does not illustrate a violation of the quantity maxim after all. Instead, this excerpt illustrates a flout that exploits the maxim of quantity (presumably for some rational purpose). Given the character of the attorney's response, it is reasonably apparent that the attorney's

response is supposed to be cooperative in regard to the meaning-making objectives of conversation, and also that the attorney is openly disregarding quantity expectations. From these observations, everything necessary is in place for the judge to suspect an implicature and interpret the attorney's response as one that satisfactorily answers the question consistent with the Cooperative Principle.

Conversational implicatures, as they can be observed in language use that flouts one of the maxims while ultimately conforming to the cooperative principle, are thus not only the process by which discourse is interpreted, but also a resource that enables more sophisticated and nuanced uses of language. A key point of significance in all of this, though, is that Grice provided a compelling reason to rethink meaning-making as a an everyday phenomenon that relies heavily on contextual and practical considerations. Grice was not alone among philosophers in taking an interest in everyday conversation by moving toward context and language use in everyday experience. In fact, Grice's claims emerged from his time at Oxford in a scholarly community that has become known as the school of 'ordinary language philosophy,' led by the likes of another vitally important contributor to language pragmatics: J.L. Austin.

Austin is best known for his theory of speech acts, which he famously formulated in his book, *How to do things with words* (Austin, 1975), and which his student, John Searle, further developed in the following years (Searle, 1970; Searle, 1975; Searle, 1976). Until the theory of speech acts, the standard (though clearly not exclusive) approach to philosophy of language considered speech from a propositional view. In other words, the operational assumption in thinking about language was that it was an informational phenomenon. By shifting his focus to the idea of language use, Austin arrived at the conclusion that the informational aspect of language was in fact just one piece of the puzzle. Words are indeed used for informational

activities such as making assertions, but they are also used for other purposes that are not only or even primarily informational. Perhaps the most famous examples of this are phrases such as “I now pronounce you husband and wife,” or “You’re fired,” which actually change a state of affairs by their mere utterance. The observation that something is accomplished in the very act of uttering extends to all utterances, such that speech, contrary to the popular ‘sticks and stones’ discourse that places action at a level above talk in terms of consequentiality, is equated with action. Hence the name: speech act theory.

From the realization that speech is doing things, Austin and his successors postulated that utterances are actually locutions, illocutions, and perlocutions all at the same time. The ‘act’ part of an utterance is the illocutionary function, which, in addition to the locutionary function (propositional or semantic value), complements and contributes to the larger (perlocutionary) force or effect of the utterance. In terms of argument, an utterance might accomplish the illocutionary function of clarifying (beyond and through the semantic content), but ultimately the goal is that the utterance will have the perlocutionary force of convincing, persuading, or something to a similar effect. This is apparently the case in the following excerpt taken from my data.

- J: But that argument suggests that the state- the legislature cannot engage in any line drawing. And I did not understand your argument to be that broad. I believe you accepted for example the prohibition on polygamy. Is that not correct?
- A: Well, with regards to polygamy Your Honor the state would have a mountain of public needs to advance to justify a prohibition there. Um i- in terms of a hypothetical claim by individuals seeking multiple marriage licenses. Our clients seek one marriage license. In the hypothetical claim ah with multiple marriage

licenses which of multiple spouses would decide who will get divorced or not. Or if there is an additional spouse to be added to that family or with regard to children in the family how do issues of custody and visitation get worked out should there be a dissolution what happens if one spouse dies intestate?

Here the attorney responds to the judge's question with a series of utterances that, together, have the function of clarifying his position regarding the state's 'line drawing' activities. However, given the institutional context, we can also assume that this clarification is given with the objective of leading the judge toward a favorable decision.

From the distinction of these three functions, most of the developments in speech act theory have moved on to a more particular focus on the second (illocutionary) function. Perhaps the most widely known development in this regard is Searle's (1975) taxonomy of illocutionary acts, which groups all speech acts into five categories: assertives, directives, commissives, expressives, and declaratives. The idea is that every utterance can be understood as constituting some form of any one of these act categories. Thus, the illocutionary act of 'pronouncing,' as in pronouncing a couple 'husband and wife' as mentioned above, is actually an example of one form of declarative.

It is important to note that in many places a declarative of this kind cannot in fact be (successfully) accomplished by just anyone. In order for a marriage to be legally binding, it is usually necessary that the person making the declaration be recognized as someone having authority to do so. Observations of this kind led the speech act theorists to a further development in which they postulated sets of rules for each speech act, usually called felicity conditions (Austin, 1975), that determine whether a given illocutionary function can appropriately be ascribed to a particular utterance. In this way, speech act theorists have a theoretical basis by

which they can reflect on how, and why, saying one thing or another works (or doesn't) in a given situation.

The developments of speech act theory exemplify how Pragmatics focuses on both the use and situatedness of language. On the one hand, the theory makes it quite apparent that speaking is doing, and for an ultimate purpose at that. On the other hand, it is sensitive to the contextual exigencies that will influence the degree to which the given act will be successful. There are, however, a number of additional theories in Pragmatics that have proven to be helpful in thinking about these two aspects of language (viz., use & situatedness). These include studies of politeness and face, talk in interaction (especially findings from Conversation Analysis), and what I have chosen to group together under the label 'context studies.' In the next sections, I briefly review each of these contributions, and then in the final part of this chapter I summarize the themes of pragmatics and discuss how they relate to argument studies.

### **Politeness and face**

Within the subfield of pragmatics, there are two major research projects involving 'politeness.' The first of these (Leech, 1989) can be seen as somewhat of an extension of Grice's work. From this perspective, which might be called a maxim-oriented perspective, much of conversation and meaning making is in fact governed by a number of maxims resembling the four presented by Grice. These maxims refer to conversational expectations such as tact, modesty, agreement, and more, and all of them are derived from what Leech (1989), again in a move reminiscent of Grice's work, calls the Politeness Principle. In Leech's words, the Politeness Principle is, quite simply, that interlocutors are expected to "minimize (all things being equal) the expression of impolite beliefs" and also "maximize (all things being equal) the expression of polite beliefs."

The second major ‘politeness’ project aligned with Pragmatics is tied primarily to the work of Brown and Levinson (1987), often simply known as ‘politeness theory.’ Politeness theory draws on Goffman (1982), making his concept of ‘face’ the central concept in the theory. Face, in a word, is the positive image of self that a person wishes to project and maintain at any social level. The concept refers to the way a person’s ‘self’ is presented to others through communication. In politeness theory, face takes on the distinction of having two kinds: positive face, which refers to esteem needs (e.g., being liked), and negative face, which refers to a person’s autonomy needs or the desire not to be imposed upon. Thus, though the title of ‘negative face’ may lead some to believe that it is not supposed to be seen as a good thing, this interpretation is in fact erroneous.

In politeness theory, it is postulated that interlocutors conduct themselves so as to maintain both kinds of face. Maintaining face requires work and cooperation, though, because a wide variety of interactional maneuvers can have the consequence of impinging on the needs and desires of (either kind of) face. Such interactional maneuvers are called ‘face threatening acts,’ using language reminiscent of (and in fact building on) speech act theory. The idea of politeness theory, then, is that interlocutors are involved in managing their own face needs, as well as their partners’ needs, by monitoring and controlling the ways in which their speech acts may either build or threaten face (i.e., do ‘facework’). The positive/negative distinction provides a systematic basis on which facework, including the various ‘politeness strategies’ interlocutors might employ, can be accomplished and analyzed.

### **Talk in Interaction**

Another set of ideas that have proven to be influential and important for studies of situated language use originate in the tradition of Conversation Analysis (CA). Without entering into a detailed explanation of CA, suffice it to say that CA is a scholarly tradition that is

concerned with close examination of talk in interaction. One useful observation from this tradition is that conversation consists of a complex configuration of complementary turns at talk, called adjacency pairs (Schegloff & Sacks, 1974). Adjacency pairs are turns at talk that have been coupled together based on their function. For example, if someone says ‘Hello,’ it is likely that the person receiving this utterance will take it as a greeting (in most situations) and respond by reciprocating with a similar greeting. The greeting/greeting pattern, along with other common patterns such as question/answer, reproach/account, etc., are some of the many kinds of adjacency pairs that occur in conversation.

From the observation that conversation can be understood, in part, in terms of adjacency pairs comes another important observation: conversational preference (Pomerantz, 1985). Conversational preference refers to the observation that certain kinds of utterances ought to be complemented with specific kinds of follow up utterances when doing so is reasonable. A common example of this is that requests (e.g., “May I please have some more tea?”) made over the course of conversation will, preferably, be granted by the person receiving the request (“Sure!”) unless doing so appears to be unreasonable (“I think you’ve had enough tea dear.”). A related observation here is that, when it does not appear to be reasonable to respond according to preference, there is a tendency to do extra work to provide an explanation for why that is the case. This concept should be of interest to many argumentation scholars who view argument as an agreement-seeking activity<sup>8</sup> because, generally speaking, the various forms of conversational preference can reasonably be summarized as reflecting a preference for agreement in interaction.

The notion of the adjacency pair also builds on a larger commitment in CA to devote significant attention to questions of ‘orderliness’ in conversation. Conversation is seen as a series

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<sup>8</sup> Or even an activity that prefers disagreement, as Bilmes (1991) argues.



of turns at talk consisting of any number of complex, yet organized sequences that are cooperatively completed, and anything meaningful that emerges from the conversation is, in part, the result of this sequentiality. In addition, conversation analysts observe orderliness in turn-taking procedures, topic selection, ways of dealing with problems such as misunderstanding (e.g., ‘repair’ sequences), speaker selection, and more. Thus, to a large degree, CA has developed a relatively robust framework in which the ‘ruliness’ of conversation is made evident.

### **‘Context’ studies**

The emphasis on sequentiality in CA allows scholars to situate any given utterance in the context of the utterances that preceded it, as well as those that follow in the rest of the conversation. This possibility speaks to the more general concern with context that is at the heart of Pragmatics. However, in its strictest application, CA does not take up the various ways in which utterances might be ‘situated’ in addition to their sequential situation. For Pragmaticians, then, it becomes necessary to transgress the tradition-specific methods of dealing with context in CA in order to address these sorts of contextual concerns. Thomas (1995) has outlined one possible way in which this might be done, taking a cue from Levinson’s (1979, p. 368) notion of ‘activity types.’ According to Levinson, an activity type is:

A fuzzy category whose focal members are goal-defined, socially constituted, bounded, events with constraints on participants, setting, and so on, but above all on the kinds of allowable contributions. Paradigm examples would be teaching, a job interview, jural interrogation...and so on.

This kind of idea is not entirely unique when it comes to systematic ways of thinking about context, a key example being the SPEAKING mnemonic proposed by Hymes (1962). Perhaps that is why Thomas (1995, p. 189) begins with the observation that, although very useful (and much more popular), the SPEAKING mnemonic sometimes obscures “the most interesting

features” of interactions by bringing “a welter of (frequently incidental) detail” into focus.

Thomas also expresses skepticism toward the mnemonic’s power (or even intention) to address the practical variability that emerges within the same kind of speech event (e.g., success/failure in a job interview). For Thomas (1995, p. 189), although the mnemonic makes for a good start in painting a contextual picture, ‘activity types’ are a better way of thinking about context because they operate on the assumption that “speakers use language in order to change the situation they find themselves in,”<sup>9</sup> and this assumption is more consistent with the objectives of Pragmatics.

Thomas (1995, p. 190) then proceeds to suggest how one might describe an activity type. Specifically, she proposes that such a description might include 1) goals of participants, 2) allowable contributions, 3) the degree to which Gricean maxims are adhered to or suspended, 4) the degree to which interpersonal maxims (e.g., politeness maxims) are adhered to or suspended, 5) turn-taking and topic control, and 6) the manipulation of pragmatic parameters (e.g., social distance, rights and obligations, etc.). Thomas (1995, p. 192-193) then shows how this kind of description makes differences in language use apparent in situations that the SPEAKING mnemonic would describe as being essentially the same. Thus, she implies, in research where differences in language use are of interest, the ‘activity types’ model is likely to be helpful. It is worth noting that a recent, major statement in the field of argumentation theory (van Eemeren, 2010) calls for attention to context using the exact language (i.e. ‘activity type’) favored here by Levinson and Thomas and acknowledges that this overlapping label reflects a relation between its uses in the two cases.

In addition to the notion of ‘activity types’ that has been explicitly claimed by pragmatics, ‘intertextuality’ (and a number of variants on that term or idea, ‘reported speech’

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<sup>9</sup> As opposed to the SPEAKING mnemonic, which, according to Thomas, basically operates by focusing on the inverse of that assumption: “features of context systematically constrain language use” (Thomas, 1995, p. 189).

being one example) is another idea that has been more or less directly pinned as a context-oriented (or perhaps co-text-oriented) issue that is relevant to Pragmatics (Maingueneau, 2009, p. 101), which I would like to briefly describe before moving on. Kristeva (1980) first used the term ‘intertextuality,’ drawing on the notion of dialogicality (Volosinov, 1986 [1973]; Bakhtin, 1982), to describe the way in which meaning can travel and be transformed in a diachronic sense. It has since become a common notion in semiotics and a number of other traditions. In Pragmatics, intertextuality (or some variant thereof) is of interest because it simultaneously addresses both context and use of language in practice. This is because, for example, things that have previously been said not only constitute a portion of the context that contributes to the meaningfulness of present utterances (overlapping with and extending CA’s observation about sequentiality), but they also become a part of the present when interlocutors use these utterances themselves and (re)appropriate and (re)define their meaning. Interestingly, the concept of intertextuality appears to connect quite nicely to argumentation theory via some of its language-oriented scholars (Ducrot, 204; Amossy, 2005). This connection will become even clearer in a later chapter when my appellate advocacy data is used to show how intertextuality can become a concept of special analytic importance for certain activity types.

### **Themes/connections**

Looking across all of the theories reviewed in this chapter, a few themes that are relevant to studies of argument seem to emerge. The first of these themes materializes around the notion that social interaction relies on principles of cooperation and reasonableness. This is perhaps most obvious in Grice’s work, but these principles are implicit in other pragmatic theories as

well.<sup>10</sup> These principles are important for studies of argument because, as most anyone who has had a less-than-ideal experience with argument can likely attest, many of the problems that arise in argument can be summarized as resulting from lacking reasonableness or insufficient cooperation. The fact that Pragmatics has developed powerful theories addressing these principles as they apply to language use ought to generate interest among scholars who see argument as a phenomenon where language use is a key concern.

A second theme that appears to unite the various theories of pragmatics is the issue of agreement (and agreeability). The conversational ‘preference for agreement’ (which, interestingly, also connects with the principle of reasonableness, as explained above) appears to have quite a bit of overlap with both of the major politeness projects in this regard, but these theories are indirectly connected to others mentioned above by way of their reliance on principles such as cooperation (e.g., there appears to be an implicit premise across these theories that it is not cooperative to perform an act that amounts to disagreeing if it would be reasonable to agree). The connection with argumentation theory here should be obvious inasmuch as argument is commonly conceptualized as an activity that emerges from disagreement (or at least a difference of opinion). Because language pragmatics has made significant progress toward understanding how language users manage disagreement and other agreement-related issues, this theme constitutes an additional reason for argumentation theorists to consider emphasizing Pragmatics.

A final unifying theme that connects with argumentation theory is the assumption that language use is largely a matter of navigating and exploiting a given context and the communicative rules associated with that context (recognizing that some rules may transcend

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<sup>10</sup> Politeness theory, for example, both encourages interlocutors to appear reasonable for the sake of their own face needs and suggests that doing facework requires a significant amount of cooperation.

contextual variability for the most part, although these rules still constitute an element of the communicative context and are thus a part of what gets ‘navigated’ and ‘exploited’). Indeed, the combined attention to the role of context and rules governing language use (and not just language itself) is at the heart of language pragmatics.<sup>11</sup> Once again, however, thinking about argument-related discourse in terms of ‘rules’ and violations of rules have been treated as the prerogative of argumentation theorists (and their predecessors, the logicians) since the beginning. Granted, the ‘rules’ for which argumentation theory has become most famous are rules of reasoning, and are thus not quite the same thing as what pragmaticians take up.<sup>12</sup> Still, expanding the repertoire to include rules of the pragmatic kind is a growing interest among argumentation theorists. Goodwin (2009, p. 287), for example, has called for greater attention to the ‘ruliness’ of argument. She begins with the observation that, as one speaking from within the community of argumentation theorists,

Our interest in argumentation is provoked at least in part by the apparent paradox it presents. People are arguing because they disagree, sometimes deeply. But despite their disagreement, their transaction is orderly—at least, somewhat orderly. Furthermore, this orderliness apparently has a normative element; it establishes grounds for participants to critique each other’s conduct as good and bad. How is this normative orderliness achieved, even in the face of disagreement?—That must be a central question for any theory, especially one that aims to deepen our understanding of the normative pragmatics of arguing.

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<sup>11</sup> An interesting secondary observation regarding the ‘ruliness’ of language use, though, is that interlocutors apparently use and interpret the rules of language use in creative ways, facilitating their various meaning-making maneuvers, metacommunicative efforts, etc., and ultimately subjecting the rules of use to the role of becoming a discursive resource like any other and thereby resulting in the primacy of usage.

<sup>12</sup> A key exception to this being those argumentation theorists whose rules are more procedurally-oriented. The pragma-dialecticians are probably the most obvious example of this exception, and their thought will be discussed more directly in the next chapter.

Goodwin (2009) takes a cue from the pragma-dialecticians in maintaining, “A theory of argument is... ‘a system of descriptive and/or normative rules for the performance of the communicative act complex of argumentation.’” Goodwin goes on to suggest that, as in various other fields of social inquiry, an emphasis on ‘rules’ is a promising way of approaching argument studies. And although some communicative rules may come close to universal applicability, a much greater portion of whatever rules can be discovered are likely to be intimately connected with, and indeed bounded by, contextual matters. Therefore, if Goodwin’s wish for greater attention to argument ‘ruliness’ and orderliness becomes a reality, then this shift in attention will inevitably entail a greater appreciation of contextual variability as well.

To return to what I attempted to show in chapter 1, I believe that argumentation theory is already headed in the direction of greater attention to these pragmatic matters. For the most part, this is the trajectory along which the community is traveling. Given the relatively obvious thematic connections between argumentation theory and pragmatics, as well as the ways in which pragmatics is already equipped to make significant contributions to the emerging questions in argumentation theory, devoting more serious and widespread attention to pragmatics in argument studies is likely to be a productive move. Making such a move, however, may also require argumentation theorists to re-envision their work, such that it is no longer so much a matter of ‘theory’ as it is a matter of pragmatics. However, I believe that by strengthening the focus on language pragmatics in studies of argument, and indeed by re-envisioning the field as now primarily a matter of pragmatics, argument studies will better accomplish their objectives of explaining and improving argumentative interaction.

### **Chapter 4: On the Shoulders of Giants**

Many of the approaches to argumentation theory mentioned until now only imply a turn toward pragmatics. Most active members in the community of argumentation theorists will have noticed, by now, a gaping hole in my review of the argumentation literature: the pragma-dialectical approach. I have intentionally left this approach alone until now so that it could be discussed more directly and in detail. The pragma-dialectical school stands out because of the way in which it explicitly claims to draw on pragmatics. Another strand of argumentation theory, sometimes called ‘conversational argument,’ may also come to mind for the same reason here, though this is not an approach that appears to have accumulated the kind of currency that pragma-dialectics has (and one might even argue that conversational argument in some ways has not been sufficiently treated as an approach independent from pragma-dialectics). The purpose of this chapter is to recognize the basic claims and accomplishments of the pragma-dialectical approach, recognize the merits of conversational argument work, point to how these two converge, and demonstrate some limits of the pragma-dialectical approach (especially its ability to take up concepts and concerns from language pragmatics), all the while acknowledging its importance in leading argumentation theory in the direction of pragmatics. Because conversational argument is not subject to the theoretical difficulties with which pragma-dialectics must grapple, I only provide an overview of its key ideas, foregoing critique so that my discussion of conversational argument can function primarily as an acknowledgement of what it contributes to my vision of an ‘argument pragmatics,’ although its juxtaposition with pragma-dialectics should also point to the difference in how pragmatics has been taken up and thereby suggest what may be the most helpful way in which further studies would continue to draw on pragmatics.

**The pragma-dialectical approach**

In the field of argumentation theory, a large majority of the work focuses on a number of specific topics that can be viewed, principally, as elements of argument (e.g., validity, burden of proof, the various kinds of argument, etc.) or argument-related issues (e.g., the role of argumentation in society, ethics of argument, various philosophical questions, etc.). Works that attempt to bring all of these elements and issues together into a coherent whole as a (at least relatively) complete theory of argumentation are not common in the field. Perhaps the most recent work of that kind to receive wide scholarly attention and praise in its theorization of argumentation is what has become known as van Eemeren and Grootendorst's (2004) 'pragma-dialectical approach.'

The pragma-dialectical approach is grounded in a systematic philosophical framework that takes rational and critical discussion designed to resolve a difference of opinion as its ideal. In order to provide a basis upon which this sort of discussion can be built, van Eemeren and Grootendorst develop a view of argument as a specific kind of complex speech act consisting of a variety of smaller speech acts grouped into four stages (confrontation, opening, argumentation, and concluding). Drawing on Searle's (1975) taxonomy of speech acts, the speech act theory notion of felicity conditions, and Grice's (1975) Cooperative principle (with its associated maxims), the authors then propose an integrated "communication principle," with a set of communication rules, that outlines the ways in which a discussion might most reasonably be expected to happen. From this principle emerges a rationale for evaluating and critiquing the various utterances that compose an argument event, which eventually materializes in the form of ten behaviorally oriented rules for a "critical discussion." In theory, these rules (which I will discuss and apply to my data later in this chapter) ensure rational argumentative conduct if followed, as manifested in a cumulative constellation of speech acts that are communicatively



appropriate. Additionally, the pragma-dialectical approach suggests that adherence to its rules will move discussants toward the fair resolution of a difference of opinion, if not resolve it all together. However, those who espouse the pragma-dialectical approach do not necessarily assume that discussants will actually adhere to the rules the approach proposes in a given argumentative situation. Rather, the pragma-dialectical model is supposed to have heuristic merit to the extent that it provides a basis for sound argument production, as well as critical merit to the extent that it provides a basis for analyzing an argumentative exchange and considering the ways in which it may have gone wrong.

Though it began via a somewhat philosophical method of formulation that led the theory to its first iteration (van Eemeren & Grootendorst, 2004), the pragma-dialectical approach has taken shape over time in a way that seeks more and more empirical harmonization. That is not to say that analysis of argumentative discourse has been off the radar in this tradition. Such is far from the truth, as the approach includes painstakingly systematic methodological instruction that aims to outline an appropriate analytic procedure that complements the rest of the theory. In a word, this procedure is a reconstructive one, in which the analyst rearranges the utterances of the data under examination in order to make it more readily comparable with the ideal argumentative model. A reconstruction of this kind includes not only moving things around in terms of sequence, but also of deleting utterances that do not appear relevant to the process of reaching a resolution in the difference of opinion, and also adding in pieces that are not explicitly in the data but that nonetheless can be inferred to have a role in the argumentation. Upon completion of the reconstruction, the analyst is encouraged to take an additional (de-contextualizing?) step by formulating an analytic overview that summarizes the key points in the difference of opinion.

Whatever the analytic methods, the point is that they have been included as an integral

part of the pragma-dialectical approach for decades now. Thus, although an invitation to engage in empirical study is not new to the approach *per se*, there has been an increased emphasis on that invitation, accompanied by the development of additional methodological considerations that target more contextually comprehensive analyses. This shift is reflected in some of the more recent work from pragma-dialecticians (van Eemeren, 2009; van Eemeren, 2010; van Eemeren, 2011), and appears to have grown out of the recognition for a need to integrate a rhetorical perspective into a framework that otherwise touts only the banner of rhetoric's counterpart (dialectic). Pragma-dialecticians have accomplished this integration by suggesting that, within dialectical constraints, participants in a critical discussion are still able to manage those constraints in order to accomplish their goals of convincing their argument partners. Pragma-dialecticians have labeled this rhetorical management of dialectical constraints 'strategic maneuvering' (van Eemeren, 2006; van Eemeren, 2010), and it is now center-stage in most current pragma-dialectical work. In addition to the growing body of theoretical work that takes up the notion of strategic maneuvering, there is a growing body of empirical work to complement the theory (van Eemeren, 2009), which is indicative of the emphasis on context that is becoming more and more common among pragma-dialecticians.

The pragma-dialectical approach, with its enduring commitment to a theory that draws on foundational ideas in pragmatics, and also with its more recent emphasis on the role of context, has clearly taken some crucial steps in the direction of an argument pragmatics. It has provided a systematic basis for thinking about argument in terms of speech act theory, and it has done a significant amount of the philosophical and theoretical footwork necessary in order to have a clear, operational, and well-grounded understanding of what it means to study argument in this way. Without the accomplishments of this approach, including the tremendous approval it has

met in the community of argumentation theorists, the idea of an argument pragmatics might not be a realistically viable one.

### **Conversational argument**

The idea of an argument pragmatics is also greatly indebted to the accomplishments of what might be called the rational-pragmatic theory of conversational argument. This tradition is especially interesting because it uses ideas from strands of language pragmatics (e.g., conversational preference, language as a tool for dealing with problems, the crucial role of context in understanding exchanges that might be called argumentative). Starting with their now classic article on that topic, Jackson and Jacobs (1980) have given argumentation theory some very original and useful tools for analyzing and reflecting on argumentative discourse. Specifically, they “show that the production of conversational argument is a particular realization of general conversational principles” (Jackson & Jacobs, 1980, p. 251) such as agreement and cooperation. The thing that most people would usually call ‘argument,’ they claim, is actually the language use (and specifically the reason-giving) activity that emerges when speakers project, avoid, produce, or resolve disagreement (Jackson & Jacobs, 1980, p. 254). They operationalize disagreement, in turn, using the vocabulary of adjacency pairs, such that ‘managing’ disagreement involves either attempting to attain the preferred second pair part (for the person who utters/uttered the first pair part) and thus reach ‘agreement,’ or else reaching agreement by seeking a revocation or withdrawal of a problematic first pair part (for the person on the receiving end of that utterance).

Jackson and Jacobs’ focus on the context of disagreement is important because it allows the analyst to distinguish argument from other activities that bear a resemblance. Teaching, for example, is an activity in which claims are advanced and reasons are generally given in support of that claim. Explanation and clarification, too, are activities that involve linking reasons to

central ideas. The pragmatic insight that we get from conversational argument is that argument cannot be understood in terms of language use alone, or, even worse, in terms of ‘reasoning’ methods alone. The discursive activity that is commonly called ‘argument’ can only be appropriately understood when a contextual appreciation becomes a central element in the theory. Thus, because teaching, explanation, clarification, and any number of additional activities that involve similar discursive conduct are not generally carried out in a context of disagreement per se, an appreciation of that particular contextual feature helps to distinguish argument from the rest (and hopefully better understand argument and language use as a result).

These ideas might reasonably be taken as a somewhat superficial overview of the core of Jackson and Jacobs’ theory of argument. The authors have expanded their theory somewhat since the first statement (e.g., Jacobs, 1989; Jacobs, 2000; Jacobs, 2005; Jacobs & Jackson, 1982; Jacobs & Jackson, 1983; Jacobs & Jackson, 1992; Jacobs & Jackson, 2006), taking up various concepts and theories of argumentation and reconceptualizing and connecting with them through their own lens of conversational argument. Thus, what I have presented here cannot, and should not, be taken as an attempt to cover everything about conversational argument. At the same time, I believe that I have captured the most fundamental and important ideas of this theory in my short overview. It is in fact a fairly simple theory, but that simplicity is an important part of what makes the theory so elegant.

### **Some points of convergence**

I have, until now, presented pragma-dialectics and conversational argument as if they were basically separate projects. Although the two probably should be considered independently of each other in order to appreciate their respective merits, these two theories have been in a dialogue of sorts with each other for quite some time. Probably the most definitive result of this dialogue is the collaboration that occurred between key pragma-dialecticians (van Eemeren &

Grootendorst) and the conversational argument theorists (Jackson & Jacobs) in the Netherlands. This collaboration saw the publication of a jointly conceptualized and elaborated treatise (van Eemeren, Grootendorst, Jackson, & Jacobs, 1993) that, in my estimation, is primarily a restatement of the pragma-dialectical approach in which the authors draw on some of the insight and empirical framework of Jackson and Jacobs' approach in order to create a somewhat more robust theory of argumentation.

One interesting point of agreement between the two theories is concerning the idea of a 'normative pragmatics.' The pragma-dialecticians consistently champion this idea (van Eemeren & Houtlosser, 2003; van Eemeren & Grootendorst, 2004), and one might even argue that their entire theory is built on it. Although it may be more difficult to show how conversational argument is built on the notion of normative pragmatics (doubting the normative part, not the pragmatics), Jacobs (2000) has also championed the concept. He offers two primary reasons for viewing argumentation in terms of normative pragmatics (p. 262):

First, treating argumentation as normative pragmatics would focus attention on the communicative properties of actual argumentative messages. Second, it would focus attention on analysis and assessment of the functional properties of argumentation as an activity.

It is true that thinking of argumentation as normative pragmatics would indeed accomplish these two things, but I believe that these two things can be accomplished just as well (if not better) if the 'normative' part is dropped. Focusing attention "on the communicative properties of actual" discourse and on "analysis... of the functional properties of [communicative] activity" can easily be taken as a basic description of the enterprise of language pragmatics. What Jacobs is adding here (and this is a good thing!), is a specific focus on

argumentative discourse and, perhaps, the concept of assessment. Bringing the notion of assessment to the table could indicate some kind of appeal to normativity, depending on the way in which ‘assess’ is used. If it is used as a synonym for ‘evaluate’ and thus ‘assert some degree of good- or badness,’ then the normativity seems to be clear. If it is used, rather, as a synonym for ‘estimate the nature of’ and thus ‘describe’ or ‘better understand,’ then there is not necessarily any normativity. In my reading of Jacobs’ (2000) argument, there are no overwhelmingly strong reasons to assume that he is invoking the evaluative side of the word, and I therefore do not believe that there is a strong reason, *a priori*, to accept that Jacobs (while using the term) is necessarily advocating a ‘normative’ pragmatics so much as he is simply encouraging the field to move in the direction of pragmatics, regardless of any descriptor that pragmatics might be given—at least not in the way that the pragma-dialecticians use the term. For pragma-dialecticians, the normativity is built into pragmatics itself: pragmatics *is* (treated as) a normative enterprise. For theorists of conversational argument, I do not believe that normativity is taken to be inherent in the doing of pragmatics, *per se*, even though such inquiry can facilitate the formulation of normative arguments.

Although I will discuss the notion of normative pragmatics in further detail in chapter 5, showing why I believe the name can be misleading if not problematic, what I have given in this vein for the moment should suffice to show that both pragma-dialecticians and conversational argument theorists entertain sentiments of convergence on this point. In some ways, this agreement is a helpful one, because it pushes argumentation theory in a promising direction (again, I agree with Jacobs’ reasons for advocating a re-envisioning of argumentation studies as some kind of pragmatics). At the same time, the visibility of this sentiment of agreement is unfortunate because it provides implicit support for what I believe to be an error at the very

foundations of the pragma-dialectical approach.

### **The underlying snag**

The error to which I refer boils down to a misuse of the two most famous ideas in pragmatics: the four maxims derived from the cooperative principle and the felicity conditions of speech acts.<sup>13</sup> In essence, what the pragma-dialecticians have done regarding these ideas in the name of ‘normative pragmatics’ is rely on these ‘rules’ as a justification for asserting that language use, ideally, should happen in a particular way. More specifically, what the pragma-dialecticians attempt is a kind of integrated rule formulation (which, as previously noted, they call the ‘Communication Principle’) in which Grice’s maxims and the felicity conditions of speech acts are combined into a list of five rules that interlocutors would follow in an ideal conversation. It is from these five rules that the pragma-dialecticians extract a longer list of rules, the Ten Commandments for a critical discussion, their theory of fallacy, and all the rest.

The problem with this use of pragmatics (and especially with this use of Grice’s work) is that it assumes that the various rules pragmaticians postulate are in fact rules that speakers need to observe in order for their interaction to be successful. This understanding of such rules misses the logic (and the genius) of pragmatics. As explained in chapter 3, Grice’s maxims are not rules that speakers are supposed to follow *per se*, but rather general expectations in interaction that allow interlocutors to make sense of ambiguities in each other’s utterances. For Grice, the idea that a person would make a conversational contribution that, on the surface, does not conform to the maxims is not necessarily problematic. Generally speaking, such cases of nonconformity can be just as appropriate and meaningful as utterances that more clearly meet the conversational expectations that are expressed in the four maxims. It is for this reason that Grice includes a

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<sup>13</sup> Each of these ideas has been presented in some detail in chapter 3, and so I have chosen to forego any reminding or additional explanation for the sake of economy.

systematic vocabulary for the various ways in which the maxims are transgressed or otherwise left behind. An important part of Grice's point was that people exploit the maxims in ways that are meaningful, and that such transgressions actually enable interlocutors to the extent that they can do more with language by making such moves.

Similarly, the rationale behind the project of describing felicity conditions for speech acts was not so much to assert any kind of norm (as an analytic claim suggesting that interlocutors *ought* to change their conduct in some way) that would control language use (beyond the degree to which some kind of emergent normativity already does) as it was to lay out a systematic taxonomy of speech acts and explain how interlocutors are able to discern the fit between contextual givens and the (apparently intended) illocutionary force of an utterance. So, when these two factors do not appear to fit, the problem that arises is not necessarily a matter of 'less-than-ideal' language use. More likely, the result of a bad fit of this kind will be the emergence of an ambiguity that must be managed in order to 1) bridge the ambiguity or 2) realize that some kind of pathology (e.g., dishonesty, insanity), incommensurability (e.g., wildly different cultural perspectives?), or other form of 'unbridgeable' is at work.

My point in all of this is that neither of these theories (and especially not Grice's) should be understood as a claim that interaction necessarily should happen one way or another. Thus, these theories do not actually provide, as they are supposed to do, any justification for the kind of codified ideal of argument that is outlined in the pragma-dialectical approach. If anything, because the rules for a critical discussion are loosely based on these theories of pragmatics, what the pragma-dialecticians have actually done is create a more elaborate and integrated system for reflecting on the ways in which participants in an argumentative exchange make sense of each other's utterances and creatively make their own contributions. However, this is not at all the



way the model is treated, and the result is that, although the model seems generally reasonable, the pragma-dialectical approach advocates a normative model for which there is no a priori justification (or at least not from the theories of pragmatics that are purportedly the source thereof) beyond its inspiration in critical rationalist epistemology.

But, if my critique is correct, and there is indeed no such justification from pragmatics, why does this matter? What difference does it make? There is probably a long and involved discussion waiting to happen in response to those questions, which I can only begin to address here. So, perhaps a beginning concern to address is regarding the traction that the pragma-dialectical rules, such as the commandments for a critical discussion, should really be presumed to have when applied to naturally occurring argumentative discourse. In consideration of such a question, I propose the following case study of my own data, in which I attempt to view my data from a pragma-dialectical perspective and apply the Ten Commandments (see table 1) for a critical discussion to the data in an effort to reach some conclusion regarding the insight the rules might provide when used as an analytic tool.

Table 1: The Ten Commandments for a Critical Discussion

#	Name	Stipulation
1	Freedom rule	Discussants may not prevent each other from advancing standpoints or from calling standpoints into question
2	Obligation-to-defend rule	Discussants who advance a standpoint may not refuse to defend this standpoint when requested to do so
3	Standpoint rule	Attacks on standpoints may not bear on a standpoint that has not actually been put forward by the other party
4	Relevance rule	Standpoints may not be defended by non-argumentation or argumentation that is not relevant to the standpoint
5	Unexpressed-premise rule	Discussants may not falsely attribute unexpressed premises to the other party, nor disown responsibility for their own unexpressed premises
6	Starting point rule	Discussants may not falsely present something as an accepted starting point or falsely deny that something is an accepted starting point
7	Validity rule	Reasoning that in an argumentation is presented as formally conclusive may not be invalid in a logical sense

8	Argument scheme rule	Standpoints may not be regarded as conclusively defended by argumentation that is not presented as based on formally conclusive reasoning if the defense does not take place by means of appropriate argument schemes that are applied correctly
9	Concluding rule	Inconclusive defenses of standpoints may not lead to maintaining these standpoints, and conclusive defenses of standpoints may not lead to maintaining expressions of doubt concerning these standpoints
10	General language use rule	Discussants may not use any formulations that are insufficiently clear or confusingly ambiguous, and they may not deliberately misinterpret the other party's formulations

### **Preliminary issues for an application of the pragma-dialectical approach**

Assessing the usefulness of the pragma-dialectical approach (at least in the way I conceptualize the notion of usefulness for this study) basically requires that an analysis determine the decisional implications that emerge from the analytical application of this approach. Because the pragma-dialectical approach is framed as providing a model with both heuristic and critical value, the question, in consequence, might be most appropriately framed as one concerned with the decisional implications that relate to empirically observable application of the model, whether heuristically or critically. This, however, is not an entirely empirical question, since the heuristic value of the model as it applies to argument that has been observed in 'naturally occurring' discourse is somewhat shrouded by the fact that any analysis is necessarily a posteriori, and thus is not as conducive to considering the generation of arguments as it is to considering the arguments that were in fact generated.

For the pragma-dialecticians, it is assumed that argument is, at least in its ideal form, primarily resolution-oriented. As they explain (van Eemeren et al., 1993), this means that no finality can be imposed upon the disagreement unless the disagreeing parties are genuinely satisfied with that finality. For this reason, a 'neutral' third party-imposed decision defeats the purpose of argumentation.

Argumentation differs from other ways of handling disagreement in that it seeks not mere acquiescence or mere settlement but resolution of the dispute... A system built for resolution of disputes must operate in such a way as to satisfy both parties to the dispute. A system that results in mere settlement of a dispute (e.g., through externally imposed choice of one position over another) does not resolve the disagreement but only ends the discussion of the disagreement. Any resolution-oriented system is structured in such a way as to assure that if it comes to any settlement at all, the settlement is one recognized by both parties as correct, justified, and rational. Hence, one characteristic of the ideal model is an unlimited opportunity for further discussion; an ideal system does not constrain the possibilities for expansion of a discussion. In a resolution-centered system, there is no judge other than the participants themselves; it is they who must decide when one position or another is no longer tenable (p. 25).

Thus, in the application of a pragma-dialectical approach that is attempted in this study, it is necessary to begin by acknowledging that, though the data can be taken to be an example of argument, it is not ideal in the sense that the discussion orients more to settlement than to resolution. However, this particular kind of data has not altogether gone unconsidered or unappreciated in pragma-dialecticians' research. In fact, this specific kind of discourse has been recognized by the pragma-dialecticians as 'adjudication,' and observed to have important points of compatibility with the general pragma-dialectical framework (van Eemeren, 2009).

Adjudication aims for the termination of a dispute by a third party rather than the resolution of a difference of opinion by the parties themselves. Although the cluster of adjudication is broader, it is commonly understood as taking a difference of opinion that has become a dispute to a public court, where a judge, after having heard both sides, will

make a reasoned decision in favor of either one of the parties. The judge determines who is wrong and who is right according to a set of rules. As a closer analysis shows, most of these rules are tantamount to specifications of rules for critical discussion aimed at guaranteeing that the dispute is terminated in a reasonable way. There are, for instance, special rules concerning the division of the burden of proof, the data that can be considered as a common starting point and the kinds of proof that count as acceptable. In adjudication, the parties readjust their discussion roles from trying to persuade each other to trying to convince the adjudicator (p. 8).

Thus, although this particular kind of interaction doesn't entirely fit the ideal model (in terms of goals), the process, despite a shift in audience, is basically an institutionalized version of the pragma-dialectical rules in application. Thus, understanding the argument process in a way that accounts for the institutionalization of these rules, as well as other similarities and differences with the basic model, Van Eemeren and Houtlosser (2009, p. 10) proposed a (relatively) context-specific conceptualization of the four stages of argumentation for adjudication, presenting each stage as follows:

Confrontation stage- dispute, 3<sup>rd</sup> party with jurisdiction to decide;

Opening stage- largely explicit codified rules, explicitly established concessions;

Argumentation stage- argumentation based on the interpretation of concessions in terms of facts and evidence;

Concluding stage- settlement of dispute by sustained decision 3<sup>rd</sup> party (no return to initial situation)

If the stages of argument in this context are conceptualized accordingly, then the attention in this study can be taken to focus exclusively on the argumentation stage, as accomplished in

the written briefs and the oral arguments, granted that these portions of the discourse are the exclusive sites of ‘argumentation based on the interpretation of concessions in terms of facts and evidence’ and are not the sites of the activities described as constituting the other three stages. Such does indeed appear to be the case with the data for this study. Therefore a reconstruction of the discourse, in the traditional pragma-dialectical sense, where a reconstruction of “an argumentative discourse as a critical discussion is to construct a model or representation of that discourse as if it were a critical discussion” (van Eemeren, Grootendorst, Jackson & Jacobs, 1993, p. 38) via the transformational moves of ‘deletion,’ ‘addition,’ ‘substitution,’ and ‘permutation,’ is not a part of the analysis in this study. The institutionally disciplined argument practices in the data for this study are already organized and situated in their relative stages (and in fact constitute each phase of the appeals process). Similarly, the analytic overview, which involves searching for the points at issue, the different positions that the parties concerned adopt with respect to these points, etc., is not of special interest in this study to the extent that this study is less concerned with the particular arguments and argument strategies of this discourse than it is with the usefulness and analytic applicability of the primary tool of the pragma-dialectical approach: the “ten commandments” of a critical discussion.

Second, because the written brief is a highly institutionalized form of argument in this context, the rules and norms (largely invisible in the data) governing the construction of the arguments are likely to function such that many of the rules postulated in the pragma-dialectical approach may falsely appear to ‘say something’ about the argumentation. If the relationship between the rules and norms of appellate advocacy and the actual construction and enactment of argument in that setting are not taken seriously, there is a risk of naively applying the rules of the pragma-dialectical approach and largely missing the complexity of the situation (and perhaps

overestimating the heuristic and critical value of the ‘critical discussion’ model of argument).

Given these concerns, an analysis of the argumentation accomplished in this study’s data where the basic analytic move is to evaluate adherence to the Ten Commandments of the pragma-dialectical approach cannot easily account for those commandments which primarily address the three stages of argumentation that are external to this data. Instead, this study must direct attention to those commandments that are intended to address the argumentation stage directly. Therefore, both the analysis of the brief and that of the oral argument here will ignore commandment 1 (which is primarily concerned with the confrontation stage), commandment 2 (also directed at the confrontation stage), commandment 8 (addressing the concluding stage), and commandment 9 (also addressing the concluding stage).

The exclusion of these commandments from the analysis in this study leaves six of Ten Commandments available for consideration. That roughly half of the commandments are put ‘off limits’ even before analysis is fully in progress,<sup>14</sup> however, may already indicate a problem in the applicability of pragma-dialectical theory to empirically observable argument situations. Specifically problematic here is the realization that significant revision of the rule-set is necessary before such can be applied, even when the data subject to application is institutionally recognized as a (more or less) bounded instance of argument.

### **The written brief**

When evaluating adherence to the Ten Commandments postulated in the pragma-dialectical approach, there is an inherent difficulty that must first be acknowledged. The brief represents only the construction and enactment of argument for one party, or, put differently,

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<sup>14</sup> Of course, these commandments have been accounted for institutionally and so are still applicable in a sense, though not in the phase of argument studied here.

only one piece of the full argument as constituted in a kind of interaction between at least two disputing parties. In the pragma-dialectical approach, ‘socialization,’ which is more or less a recognition of the inherently social, dialogical side to argument, is a core commitment in this type of study of argumentation (van Eemeren & Grootendorst, 2004). Given that the brief can basically be said to constitute only a piece of the ‘discussion’ as a whole, there may be room for reservations regarding the correctness of the application of this approach to the data. Although I agree with the basic assumptions of such reservations, I contend that they overlook the complexity of this particular argumentative situation. It is true that argument, even in this case, is basically social. However, the written brief represents a kind of mediated argumentation in which the disputing parties do not directly address each other. Instead, briefs are addressed to the judges of a court, who act as a mediating third party. Thus, rather than *arguing with each other* in writing, the disputing parties *argue to the court* in writing despite each other. Furthermore, the briefs are produced at more or less the same time, such that the authors of the brief are not in face to face interaction and capable of responding to each other per se. Each party authors a brief and then submits it to the court by the assigned deadline. Thus, practically speaking, a completed written brief represents the entirety of an argument moment, or phase of argument, and can reasonably be taken as such in an analysis.

**Application of Commandments 4 (the relevance rule), 5 (the unexpressed-premise rule), 6 (the starting-point rule), and 7 (the validity rule).**

Commandments 4, 5, 6, and 7 have been grouped together here because all four of them basically function, analytically speaking, like checkboxes where there really is little room for comment on any of them than a superficial assertion either that the rule appears to be satisfied or is somehow irrelevant to the data in question. Considering commandment 4, for example, there appears to be no room for comment other than recognition that the prohibited argumentative

moves do not appear to occur in the brief, making it entirely satisfied. Commandments 5 and 6 are (apparently) half-satisfied and half-irrelevant. The first half of each of these two rules regards argumentative moves that the brief-writers could conceivably make, but which they do not in fact make. Thus, the first halves of 5 and 6 are satisfied. The second halves of these two rules, though, basically rely on an assumption that the argument is enacted in a conversational situation. Of course, the written brief does not fit this model of the argumentative situation, rendering these second halves of the commandments basically irrelevant for analytic purposes. For commandment 7, on the other hand, the question of satisfaction (partial or complete) is lost entirely. This is because the plaintiffs do not appear to explicitly resort to formal logic in the brief. Instead, the kind of argument that is constructed might best be understood as a ‘legal’ argument, where the plaintiffs propose a decisional method (in this case it is the Court’s “balancing test”) and then the plaintiffs work through that decision method for the Court. Granted, this way of doing argument might be said to bear a resemblance to formal logic (e.g., it could be made to look like *modus ponens* at a macro level, where the condition is that same-sex marriage should be allowed if they pass the balancing test, the fact is that they do pass the balancing test, and the conclusion is that same-sex marriage should be allowed), but making that resemblance explicit requires significant reconstruction of the entire argument. Given this result, commandment 7, too, can be dismissed as basically irrelevant in this particular case. Of note, however, is that such a finding is not altogether unexpected. Van Eemeren and Grootendorst (2004, p. 194) observe that it is possible that, depending on “the communicative situation at hand, a... drastic reconstruction is required... that goes beyond the ‘logical minimum’ and renders Commandment 7 irrelevant.”



**Application of Commandment 3 (the standpoint rule).**

In order to ascertain whether or not commandment 3 is observed in the plaintiffs' argumentative conduct, it is first necessary to determine the standpoint of the defendants in this dispute. In this case, where the issue can be summarized as a contention regarding the legality of same-sex marriage in New Jersey and the defendants' refusal to allow same-sex couples to marry has been called into question, the defendants' standpoint might be broadly summarized as claiming that their refusal was legal and should be upheld by the court. Although this basic characterization captures the thrust of the contention in this case, it is important to note that a large part of the argumentation accomplished in the data here, being a form of adjudication, is the work attorneys do to clarify and nuance their positions for the court. Because the data for this analysis does not include the defendants' portions of the process, only the plaintiffs' clarifying and nuancing of their position will be considered, and only the basic characterization of the defendants' position as described above can reasonably be taken into consideration here. Given such a characterization, the key analytical consideration for commandment 3 is a question of whether the plaintiffs attack, either momentarily or globally, any claim other than that the defendants' refusal to allow same-sex couples to marry was both legal and should be upheld. In the written brief there are two places, a priori, that require special attention in order to answer this question.

First, the overarching claim of the argument advanced by the plaintiffs should be considered. This claim is most explicit in the concluding sentence of the argument in the brief:

New Jersey's laws concerning marital rights should be read as neutral with regard to the sex of the marital partners, and plaintiffs and other same-sex couples should be granted full access to civil marriage and the rights and responsibilities that flow from it.

The concluding section of the brief, quoted in full as follows, formulates the same basic

position:

Plaintiffs respectfully request that this Court overturn New Jersey's statutory barrier to exercising their freedom to marry. The decision of the lower court to grant the State summary judgment should therefore be reversed, and the matter should be remanded for entry of a declaratory judgment and an injunction requiring that the State grant marriage licenses to plaintiffs.

This claim, as formulated in these two excerpts from the brief, is directly attacking the defendants' standpoint. In addition, there does not appear to be any plausible reason to suspect that some ancillary standpoint, whether actually expressed by the defendants or invoked by the plaintiffs' imagination, is under attack. There is, therefore, no violation of the commandment in question with regard to these two excerpts.

Second, it is necessary to search for any place in the written brief that makes an argument or sub-argument that is either explicitly or implicitly against a standpoint other than that which can be reasonably assumed to be espoused by the defendants. In this regard, it turns out that there are very few explicit characterizations of the defendants' claim and sub-claims. In each case of such a characterization occurring, the brief in which the (sub-) claim is cited, and exact language is used, maintaining at least the appearance that what's being attacked is indeed the defendants' standpoint as they've argued it. For example, the plaintiffs cite the defendants' appellate division brief, using exact language, in referencing the argument that same-sex marriage would "disrupt long-settled expectations and deeply-held beliefs of the vast majority of New Jersey's citizens" (p. 48).

The plaintiffs then proceed to attack this argument. However, in the heading that presents this portion of their argument, the plaintiffs use a somewhat reformulated representation of the

claim they then proceed to cite (shown above), asserting that “the state’s argument that the marital exclusion should remain the law because it is familiar and comfortable to the majority conflicts with settled constitutional precepts.” Thus, in downgrading the defendants’ language (“long-settled expectations” and “deeply-held beliefs”) with new descriptors (“familiar and comfortable”) and altogether dropping old descriptors (“the vast majority” becomes simply “the majority”), the quote that is provided in the argument is subjected to a framing with which, though basically an accurate characterization, the defendants might reasonably take issue. Such a complication is interesting in this study’s larger consideration of theoretical usefulness because it suggests that the nuances of language and language use may render an apparently otherwise straightforward determination (of fidelity to a standpoint as argued by one’s opponent) somewhat problematic. The question of what degree of fidelity is sufficient when an opponent’s standpoint is re-presented appears to be inevitable.

One final consideration for commandment 3 here is that there are cases in which the plaintiffs make arguments that explicitly respond to claims that were not necessarily advanced by the defendants, but which are nonetheless reasonable and important for the plaintiffs to address. One example of such a case is in an argument made in response to a claim advanced by the appellate division majority in their ruling on the case (p. 18). Such an occurrence is indicative of the complexity of the situation in which appellate attorneys must produce arguments of varied origins in order to convince their audience. This does not mean, though, that doing such argumentative work makes their arguments irrelevant with regards to standpoint. Indeed, when the plaintiffs attack a claim that was not made directly by the defendants, but to which the current audience has access, and which ultimately goes to in support of the standpoint advanced by the defendants, it is difficult to conceive of a reason to hold that such an attack is

unreasonable in this situation.

**Application of Commandment 10 (the general language use rule).**

Applying this final commandment is especially tricky for two reasons. The first reason is somewhat general. Given that commandment 10 is concerned with the relatively subjective issues of intention and interpretation, it is unclear whether it should be within the analyst's right to determine insufficient clarity or sincerity in language use and interpretation, or if that right is reserved exclusively for the discussants themselves. However, since the undertaking of this study is to assess the analytic usefulness of (in this case pragma-dialectical) argumentation theory, it is necessary to assume that such determinations are within the analyst's access. This leads to the second, more case-specific difficulty in analytically applying commandment 10. Since written briefs ought to be seen as fitting into a larger dialogical process, they have a more monological feel when considered alone. In even only a cursory application of commandment 10, this monological feel becomes an important frustration because it highlights the absence of a respondent who might otherwise "deliberately misinterpret [the plaintiffs'] formulations." Similarly, because the brief is considered on its own terms, it is practically impossible to know not only whether the plaintiffs have deliberately misinterpreted the other party's formulations, but even more fundamentally whether they can be accused of 'misinterpreting' the other party's formulations at all. Even if the brief is considered in tandem with the oral arguments this difficulty is present, primarily because the opposing parties are never placed into direct dialogue with each other in the kind of situation where rectification might be accomplished. Instead of responding to each other, as might be expected in an everyday prototype of argumentative discourse, the attorneys defend their own arguments primarily in response to the questions posed by the judges of the court. As a result, from the perspective of the analyst, only the first half of

commandment 10 can be used at all, quite simply by reading through the brief and seeking out uses of language that are, or are likely to be, confusing or excessively ambiguous. In my reading of the brief, there are no such uses of language.

### **The oral argument**

#### **Application of Commandments 4, 6, 7, and 10.**

As was also the case for the application of certain commandments (i.e., 4, 5, 6, and 7) in analysis of the written brief, a number of commandments, though perhaps more apparently relevant to the argumentation in oral argument than that in written briefs, do not appear to be useful in leading to analytic or critical insight when applied to the oral arguments. In essence, the application of these commandments simply leads to the conclusion that the discussants basically appear to conform. As noted in the analysis of the written brief above, however, the very application of some of these commandments (e.g., 7 & 10) appears to be a somewhat elusive project. However, to the extent that there are no obvious irregularities in the apparent conformity to these commandments, this analysis will simply conclude that the commandments have been kept for all practical purposes. Thus, these commandments will not be subject to further consideration. Instead, attention will be devoted to those (two) commandments that call for at least some discussion.

#### **Application of Commandment 3 (the standpoint rule).**

Pinpointing specific places where the plaintiffs might be said to attack the defendants' standpoint is not exactly a straightforward undertaking. This is because the focus in the oral arguments is almost entirely on the plaintiffs' argument. In a very general sense, all of the plaintiffs' argument is a sweeping attack on the defendants' position. However, there are a few places where the plaintiffs reference the defendants' standpoint directly. Excerpt 1, taken from the plaintiffs' opening remarks, exemplifies the way in which the plaintiffs characterize the

defendants' standpoint.

Excerpt 1 (Mr. Buckel, lines 9-16)

The state fences plaintiffs out of marriage by closing the gate against same sex couples.

Which labels their relationships as unworthy as a matter of law. The state tries to

minimize the harm with a handful of protections under the domestic partnership act.

Domestic partnerships are important in that they strengthen relationships somewhat but

they reinforce the core injury of second-class citizenship. Not only does the state block

plaintiffs from the privileged status of marriage, it has created an alternative status with a different name.

This is the standpoint that the plaintiffs attack throughout the oral arguments. An example of an explicit attack on this standpoint is in excerpt 2.

Excerpt 2 (Chief Justice Poritz & Mr. Buckel, lines 126-142)

JDTP: The problem with that is that the legal premise today also is that the

marriage will be between man and a woman. And you do challenge that

and you need to differentiate between the two. On what basis do you

challenge the one. And the other is unaffected?

MrB: Well Your Honor we challenge the state's closing of the gate. Because the

state controls the gateway to marriage. And so we're what we're

challenging is that they close the gate to plaintiffs. And in the past with uh

similar challenges it has been argued that there was some kind of inherent

nature of marriage. Such as the inherent nature of men and of women

means that the inherent nature of marriage is that women are subordinate

to men. That doesn't come into this court's constitutional discourse. The

court opens with what are the plaintiffs' interests? And in- in this respect the record is undisputed before the court. That as couples individuals in couples there is really no distinction between those individuals in same sex couples and those in different sex couples with regard to their interest in marriage and the weight that should attach. The extraordinary weight that should attach to those interests.

Mr. Buckel's response to Justice Poritz' question is interesting, though, because it addresses a concern raised by a judge (by doing work to make concerns about the 'inherent nature' or historical understanding of marriage irrelevant to the duty before the Court) while framing itself as a challenge to the defendants. Thus, the manner of Mr. Buckel's response suggests blurriness between the standpoint under attack and the voice at the source of that standpoint. This blurriness is further evidenced in the occurrence both of places where judges claim to speak for the defendants (excerpt 3) and also of places where judges are clearly reaching beyond a strict construal of the defendants' standpoint (excerpt 4).

Excerpt 3 (Justice Albion & Mr. Buckel, lines 388-393)

JBTA: I- I- I- thought what Justice LaVecchia was suggesting is the state is- is basically arguing that issues of great social moment, that will bring about tremendous transformation in our social economic and political system, is- is best left to the elective branches of government. What do you have to say about that?

MrB: Wel[l

JBTA: [Thats what the state's going to argue when it gets up to the lectern

Excerpt 4 (Justice Long & Mr. Buckel, lines 153-164)

JVL: Counsel let me ask you a procedural question. The state ha- has narrowed its response to your challenge to two uh specific interests. We see however in the um amici briefs a vast array of arguments on either side of the issue. What are we to make of those and how do those um those additional bases play into what's facing us today? Should we be looking at those amici materials to the extent that they expand what the state has narrowly articulated or not?

MrB: Well as to whether or not the court should be looking at those interests, uh one incredibly important factor of course is that the state itself has disclaimed those interests. As far as I can tell the interests seem to boil down to this idea of steering heterosexual procreation into marriage. Um and ((throat clear)) the state has uh disclaimed that interest. I mean to the extent what underlies it is a concern for ch- for children which indeed is an important interest of the state-

Excerpt 4 also evidences what appears to be the beginning of a response to arguments that were not advanced by the defendants, but which have nonetheless been presented to the plaintiffs as a concern. Thus, this excerpt provides a good example of a situation in which it is in fact reasonable for a disputing party to attack a claim that has not directly been advanced by that party's opponent. Practically speaking, it is likely that this result of serious blurriness in standpoint source makes it very difficult for an attorney to ever really take the role of addressing and arguing against the standpoint advanced by his or her official opponents. Instead, the de facto audience becomes a third party whose espoused standpoint is often unclear. Similarly, this result makes definitive analytic judgments with respect to commandment 3 especially difficult in



argument settings of this kind.

**Application of Commandment 5 (the unexpressed-premise rule).**

Although there do not appear to be any obvious instances of the violation of this commandment, good examples of adherence to the commandment are visible in the oral arguments.

Excerpt 5 (Justice Long & Mr. Buckel, lines 98-101)

MrB: ...The legislature can take or give away benefits, protections, things of that sort. But if it determines to provide benefits and protections, it must do so even handily- even handily and that's true anywhere on the spectrum. As I said from the mundane, in terms of garbage collection to the profound in terms of reproductive freedom or claims against sex discrimination.

JJL: But that argument suggests that the state- the legislature cannot engage in any line drawing. And I did not understand your argument to be that broad. I believe you accepted for example the prohibition on polygamy. Is that not correct?

MrB: Well, with regards to polygamy Your Honor the state would have a mountain of public needs to advance to justify a prohibition there...

Excerpt 5 illustrates an example of how a participant in appellate argument may detect a potentially unexpressed premise and hold the interlocutor accountable for it. In this particular case, Mr. Buckel explains that he does not in fact claim that "the legislature cannot engage in any line drawing" (which is the alleged unexpressed premise), and then provides a qualifying statement that supports the thrust of the assertion that led to Justice Long's objection while

cancelling the concern about an unexpressed premise. In the ensuing discussion, although the tenability of Buckel's argument is subjected to further scrutiny, the possibility of the unexpressed premise in question fades into the background. This exchange, therefore, demonstrates a relatively effective resolution of a concern presented in regard to suspicion of an unexpressed premise, and therefore a more general example of how discussants in this setting adhere to commandment 5.

### **Reflecting on the application of the commandments**

The pragma-dialectical approach appears to have had more analytic traction in its application to the oral arguments than as applied to the written briefs. This is probably at least in part because a greater number of 'commandments' were relevant to the oral arguments.

Another problematic finding in the analysis of this theory's application is that, although the application worked better with the oral arguments, the theory really did not provide distinctive insight when the argument phase was varied. In essence, the application of the rules said nearly the same thing (which, for most commandments, was basically nothing) for both the written briefs and the oral arguments.

For the pragma-dialectical approach, however, a key concern leading to claims of usefulness goes beyond a simple determination of whether the commandments turned out to be relevant, or even whether they applied better to one phase of argument or another. More fundamentally is the question of what value can be derived from reaching the analytic conclusion that the discussants' argumentative conduct basically appears to conform to all of the relevant rules for a critical discussion. To the extent that the pragma-dialectical approach seeks to have normative thrust, and the commandments are the tool by which the quality of the argumentation can be discerned, there is effectively no basis for a normative critique if all of the commandments are satisfied. This result, of course, basically implies (barring a few nuances)

that the argumentation was exemplary.

Still, in light of some of the contextual givens in this particular data, there is reason to doubt that the participants' conduct was actually aligned with the principle of reasonableness that underlies the ideal for argumentative conduct as formulated in the pragma-dialectical perspective. This doubt flows from observations about the way the performances of the argument participants can be assumed to be institutionally shaped. In essence, the adjudication activity type, for the attorneys' part, involves making every effort to convince the judge of the standpoint espoused by the client. By default, then, the attorney participates in the activity having the commitment to be in disagreement with the other party regardless of the arguments that are advanced. The game, for the attorneys (who are the most explicit 'arguers' in this setting), is not to test ideas, as a critical discussion would have it, but rather to be more convincing than the opposition. Thus, in effect, the institutional configuration requires participants in this activity to act in ways that, arguably, are fundamentally in conflict with the ideal of 'reasonableness' at the heart of pragma-dialectics. If this is truly the case, then the fact that an application of the pragma-dialectical commandments suggests the opposite conclusion (that the discourse is close to perfect) may indicate a serious problem.

Furthermore, the fact is that it is not conceptually impossible for the same 'perfect' arguments to take place before two different panels of judges with a different 'winner' and 'loser' in each case. Indeed, it is likely that such a hypothetical basically describes the turn of events in the appellate process for this case, which saw the Supreme Court vary from the appellate division's decision. Perhaps this problem points to a need for recognition that a theory of argument can derive utility not only from its ability to bend argumentative conduct towards fairness, but also from its ability to bend argumentative conduct towards victory (at least in this

setting).

Of course, from the perspective of language pragmatics, it probably should not come as a surprise that the argumentative conduct seems to fit the model's expressed normativity. After all, the rules for a critical discussion are supposed to be based on maxims and felicity conditions that basically postulate that people generally expect each other to communicate in a particular way. If anything, then, what the apparent adherence to the rules for a critical discussion suggests is that the participants in this case of appellate advocacy are, for the most part, not making particular efforts to be engaged in communicative practices that involve creatively exploiting rules of language use.

Although the better part of this chapter has been devoted to demonstrating and working through some of the limits of the theories it examines, it bears reminding before moving on that these theories have proven to be very helpful in working toward an argument pragmatics, despite whatever limits they may have. The influence of pragma-dialectics on the field of argumentation theory has been overwhelming, and it has clearly been a vital force in moving the field toward a concern with pragmatics. Conversational argument, perhaps less visible but also less problematic, has in its own right provided some key ideas on which argument studies should seriously consider building if language pragmatics is to be taken seriously as a part of the enterprise. Therefore, as a concluding thought for this chapter, I would like to insist that an argument pragmatics might never have even had a chance at emerging<sup>15</sup> if argumentation studies today could not stand on the shoulders of these giants.

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<sup>15</sup> This presumes, of course, that this is even a viable possibility now in the space these theorists have cut out.

### **Chapter 5: Towards an Argument Pragmatics**

If argumentation theory as a field is indeed headed toward a more explicit relationship with the realm of pragmatics, the principal task that remains, and that will doubtlessly require ongoing empirical and theoretical development, is to outline this new iteration of argument inquiry in a way that more appropriately reflects its conceptualization as an ‘argument pragmatics.’ Chapter 4 has shown how the pragma-dialecticians and the proponents of ‘conversational argument’ have made some important first steps in this direction. Neither of these approaches, however, makes the full transition to a re-envisioning of argumentation theory as argument pragmatics. The purpose of this chapter, then, is to initiate the discussion of how an argument pragmatics ought to be conceptualized and executed. Because some foundations have been laid, it makes sense to use those foundations as a starting point in this undertaking. I will, therefore, offer some thoughts on conceptualizing and executing an argument pragmatics, but I as I do so I will attempt to integrate and build upon the two foundational approaches from chapter 4. I do not by any means pretend to offer a framework of any kind in this discussion at this time. Rather, the thoughts in this chapter are intended to identify and parse through some key issues that seem to require attention if ever an argument pragmatics is to have a chance at emerging. After a preliminary reflection on core assumptions for an argument pragmatics, I organize the rest of my thoughts by grouping them into three sections that loosely follow some common objectives of social inquiry as it concerns argumentative discourse: describing, explaining, and improving. Along the way, I reflect on how concepts such as ‘reasoning’ and ‘fallacy,’ which have become stock-in-trade in argument studies, would be included in work that accomplishes these objectives as they are re-envisioned as a part of argument pragmatics.

#### **Practice and empiricism**

A good place to start thinking about the possibility of argument pragmatics’ emergence

is, quite simply, with regard to what it might look like as a form of scholarship. What would it mean to do argument pragmatics? This is an interesting question from a methodological point of view because pragmatics, historically, has stood at a sort of crossroads of both philosophical and empirical modes of thought. This is most evident in the pragmatism and ordinary language philosophy of the key thinkers from whom the name, general (praxeological) orientation, and foundational theories of pragmatics originated. However, consistent with the trajectory of the field of argumentation theory, and also in the spirit of pragmatics' philosophical heritage, the most helpful methodological starting point may rely on the assumption that 'practice' rightfully takes a place of primacy. In my view, this primacy, though perhaps at times ambiguous, ultimately suggests a leaning toward the empirical, inductive approach to thinking about argument-related language practices.

The implication of asserting the primacy of practice, if such primacy is interpreted as I have done, is that argumentation theory cannot proceed as it has previously by attempting to practicalize theory. This *modus operandi* is based on the inverse assumption: that theory is supreme. Instead, our efforts to study argument should flip this assumption around to resemble the efforts of pragmatists such as Dewey, who reportedly claimed that his project was not to practicalize theory, but rather to intellectualize practice (Frankel, 1977, p. 4-5). If studies of argumentation, including analytic frameworks of any scale, are to be useful, the primacy of practice makes intuitive sense. Although a multitude of ontological questions regarding any kind of 'reality' might be raised, the fact remains that language users experience a practical reality that requires reflection and action. Practice, in this sense, is a necessity, and cultivating knowledge that encourages a more intelligent participation in that inevitable practice ought to be the goal of an argument pragmatics.

A further result from the notion of the primacy of practice is that some of the methods of supposedly pragmatic approaches to argumentation theory may be problematic to the extent that they flow from the contrary view of the relationship between theory and practice. This problem is notably evident in the idea from pragma-dialectics that in order to study argumentative discourse, one must ‘reconstruct’ the data by rearranging, deleting, and adding things in order to make it more readily comparable with the theoretical ideal. I believe that this method would be inconsistent with an argument pragmatics for a few reasons. To start, if a primary goal of pragmatics is to understand situated language use, then it is counterproductive to conduct such a reconstructive exercise, since the thing that gets analyzed is no longer a faithful record of what was said, how it was said, how many times, when, etc. Similarly, a key contextual element for any instance of language use, especially in an argumentative exchange, is sequentiality. Because participants’ contributions to an argumentative exchange continually produce and refine the context over time, matters of sequence should not be treated as negligible. It is not at all unrealistic to suggest that a participant in such an exchange could repeat exactly the same utterance at two or more different moments with a different effect each time because of the evolving context and its pragmatic influence.

A further issue that arises along these lines is the preservation of presentational nuances. As Grize (1982; 1986) has argued, reasoning is probably best understood as it is presented: embedded in discursive conduct. A pragmatic understanding of argumentative discourse necessarily relies on close examination of any number of presentational nuances whose relevance becomes apparent in analysis. The presence or absence of particular types of utterances can only be determined if nothing is deleted or added. Similarly, a study of the rhetorical features of argumentative discourse will be difficult if it is not possible to look at presentational aspects.

Subtle differences in wording, for example, may speak to imperatives of effect(iveness), or perhaps an indirect style would be employed as a means of doing politeness work. However, these presentational aspects of discourse can only be examined if the record of the discourse faithfully represents the discursive event. An argument pragmatics would not only focus on these issues, but also treat the data in a way that is sensitive to such analytic necessities.

### **Describing the discourse**

Most likely, a very large part of the work in a re-envisioned argumentation theory would continue along similar themes. All the various features of argumentative discourse that have become commonplace foci would still be of interest. However, the way in which these foci are taken up would change inasmuch as argumentation theorists would generally rely on the logic and language of pragmatics more explicitly and more heavily. Doing argument pragmatics in this regard would entail substantial description of discourse that is a priori considered, for one reason or another, 'argumentative.' This activity would be based on the assumption that such description, which uses the best available theoretical tools for thinking about language use, would help to inform practice and enable more sophisticated reflection thereon by cultivating understandings that bear on aspects of practice in which participants (can be presumed to) have some kind of decisional potential. This decisional potential, from the perspective of argument pragmatics, would rest primarily in the choices that interlocutors are afforded given the various relations between context and discursive possibilities.

There are a few different paths that descriptions with such objectives might take. A first path would be to enrich understandings of argument by conceptualizing it in more situated ways. As noted above, there is some diversity (to put it optimistically) among argumentation theorists' claims regarding such fundamental notions as how argument ought to be defined. An argument pragmatics would draw on theories of pragmatics as well as pragmatic studies of argument in



order to address this issue. Fortunately, both the pragma-dialecticians and the conversational argument scholars have already provided a starting point for such a project.

For the pragma-dialecticians, a relatively recent definition of argument is as follows: “a verbal, social, and rational activity aimed at convincing a reasonable critic of the acceptability of a standpoint by putting forward a constellation of propositions justifying or refuting the proposition expressed in the standpoint” (van Eemeren & Grootendorst, 2004, p. 1). This definition clearly reflects the authors’ preference for an approach that highlights rational and reasonable language use, and thus aligns it nicely with what would normally be important commitments in an argument pragmatics. Similarly, it suggests that argument can be more or less structurally recognized by the kind of activity it involves (convincing, as well as putting forward, justifying, and refuting propositions), which again resonates with pragmatics (especially speech act theory). However, this definition seems to imply a few boundaries as to what ‘counts’ as argumentation that could become limiting. For example, if a person were to write out an argument in support of some cause and never show it to anyone, then the product of this person’s activity would escape the reach of the pragma-dialectical definition, which stipulates that argument must be social. Perhaps this stipulation could be interpreted as a description of the social nature of language use in the sense that the discursive resources on which this person has drawn in order to write out this constellation of propositions in support of a claim are acquired socially. This interpretation, however, does not appear to be consistent with the way in which the pragma-dialecticians use the ‘social’ stipulation.<sup>16</sup> Furthermore, the pragma-dialectical definition neglects to include any hint of a context or situational inflection. The result of this is

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<sup>16</sup> In everything I’ve read on pragma-dialectics, the ‘social’ aspect of argument is used to maintain the understanding that argument is something that is accomplished between at least two people who have encountered a difference of opinion.

that, at face value, the pragma-dialectical definition of argument must be taken as having an exclusive focus on what interlocutors are doing without any regard for the ways in which the situatedness of that doing helps to shape and, most likely, define the very activity this conceptualization seeks to describe. Thus, the definition of argumentation as proposed by the pragma-dialecticians may entail some frustration from both argumentation theorists (some of whom would probably see the ‘written argument’ example as a qualifying instance of argumentation) and for pragmatics (for whom context and language use are basically inseparable issues), but it also aligns with pragmatics quite usefully in a couple of ways.

Jacobs (1989, p. 361), from the perspective of conversational argument, has alternatively proposed “a speech act theory of argument in which there are recurring features that justify a common treatment [as constituting an instance of argumentative discourse] - e.g., the conveyance of reasons in a context of disagreement (potential, actual, virtual, hypothetical, etc.).” This approach to conceptualizing argument appears to be quite promising for a few reasons. First, the idea of the definition is setup with a methodological qualifier that is quite consistent with the spirit of pragmatics. Specifically this means that a part of the definition, or ‘theory,’ is the assertion that the definition must be adaptable and warranted by observation of “recurring features.” Put differently, Jacobs’ definition expresses an aversion to a priori dogmatism in favor of an approach that leaves room for expansion based on observation of situated language use. In addition, Jacobs’ definition of argument explicitly touches on the two key concerns of pragmatics: context, and language use. Thus, this particular definition more fully reflects the basic commitments of an argument pragmatics. In addition, because Jacobs’ definition explicitly references the concept of agreement, he is able to establish a very strong connection to an issue that is not only central to argumentation theory, but also to the field of

language pragmatics.

On a related note, Jacobs (1989, p. 345) also argues that even though native/folk theories of argument, as reflected in the metapragmatics of the discourse, should be (carefully) taken up as providing a basis for describing the constitutive features of argument illocutions, because they are a good “heuristic entry point” for the identification and analysis of argumentative discourse. This claim opens the way for more work resembling what Craig and Tracy (2005) have done, making metacommunicative phenomena a primary consideration for argument scholars. Such a move is also consistent with the relatively open attitude reflected in Jacobs’ definition as quoted above. Indeed, such a move would allow the ‘argument pragmatician’ to wander from specific kinds of target discourse (eliminating the *a priori* determination of what constitutes argument and what doesn’t) and discover the ‘argumentative’ aspects of discourse in places where it might not be expected at first, thereby expanding and also problematizing commonplace notions of (non)argument. This claim is especially interesting in light of a few observations about the data I am using to support this proposal. For example, in one case, a judge asked the attorney a question of which the basic function was to determine whether the attorney was willing to accept an alternative formulation of something the attorney had said.

J: Put differently you’re saying that the enforcement of these fundamental rights trumps jurisdictional disputes. Is that fairly said?

The thing I would like to highlight about this particular turn at talk is that “to say” is a socially significant act in this particular activity type, and it is treated here as being equivalent with “to argue.” Generally, however, ‘saying’ is taken to be a fairly general word that can entail a very wide variety of illocutionary functions. Here, though, it is taken as a given that ‘saying’ is arguing. From this observation one might also infer that rephrasing what the other person is

"saying" is also a socially (pragmatically) and argumentatively significant act that must be accomplished with special attention, as indicated in the thrust of the final question ("is that fairly said?"), which allows the attorney to approve of the reformulation and attest to its fidelity in relation to what he is "saying." Although this is only one small example, I believe it provides good support for Jacobs' approach to conceptualizing argument and shows how special attention to metapragmatics can bring useful contributions to an argument pragmatics.

An activity that is related to describing and identifying argument is what might be called 'de-argumenting' discourse that would commonly be thought of as a kind of argumentative exchange. Although absolutely negating the possibility that a particular activity should be considered argumentative may not be an entirely realistic objective, it is likely that attempts to do so would add a degree of complexity and nuance to the way people think about that activity. The assumption here is, of course, that an appreciation of such complexity would somehow inform practice. There is no guarantee that such a move would actually inform practice, but it doesn't appear to be inconceivable that it could in some cases. For example, we might return to my data and recall how the performances of key players in appellate advocacy are, from a sheer institutional perspective, grossly shaped by the role they are supposed to play in this activity (see chapter 4). This result unhinges the possibility that paradigm cases of argument such as that which occurs in the courtroom may challenge traditional ways of conceptualizing argumentative activity. The oral argument portions of my data can easily come across as extended 'clarification sessions,' where the immediate contextual inflection of disagreement is often (though not always) ambiguous at best.<sup>17</sup> If Jacobs' suggestion that argument occurs in a context of

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<sup>17</sup> Granted, if the extended context is taken into consideration, as in the way that the pragma-dialecticians appear to propose in their reconstruction of 'adjudication,' then there is a context of disagreement even if that context is not necessarily obvious when question/answer activity between judge and attorney is considered in isolation as an

disagreement, then whether oral argument activity truly should be viewed as a paradigm case of argument is less than obvious.

### **Explaining argument**

Beyond questions of identifying and defining argumentative discourse, another important element of argument pragmatics is to understand and explain that discourse in a useful way. Doing that kind of work presupposes a basic operational consensus, or, minimally, a sufficiently explicit definition determining that the discourse can be labeled as argumentative. As the discussion above shows, this is not really the state of affairs in argument studies for the moment. However, I see no reason why it would be inappropriate to imply an acknowledgement of the complexities inherent in claiming that some bit of discourse is ‘argument’ and then move on with the study and whatever argumentative issues it may raise so long as the rationale behind choosing the data and treating it as argument is sufficiently clear. This could also be done such that both the argumentative issues and the more fundamental issue of conceptualizing argument are in fact examined in tandem, making the two problems complement each other.

In moving on with the study, there are a number of pragmatic considerations that should prove to be of use in examining argumentative discourse. Some obvious ones would be speech acts (which have already taken a role of importance as shown in chapter 4), face and politeness (providing some analytic concepts that powerfully and elegantly open up the strategic use of language while maintaining a reasonable degree of empirical orientation), and pragmatic principles such as cooperation and agreement, including the ways in which language use accomplishes meaning in interaction by adhering to these principles. Each of these considerations, which might be summarized as considerations that view argument and its results

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independent practice. However, it bears emphasizing that the lived experience for any given participant, be it judge, defendant or plaintiff, is such that the language use decisions are not always explicitly situated in an immediately accessible form of disagreement.

as accomplishments, strongly reflects the tendency in pragmatics to take up questions of language function and usage.

Because context is a key consideration for a pragmatic analysis, the examinations of use should always be attentive to the situatedness thereof. Integrating both kinds of consideration is not likely to prove difficult, especially since many of the considerations listed above quite clearly rely on contextually based insight already. The use of speech act theory may be a good example of this, because one must be careful to take context into account in order to apply it correctly. As Jacobs (1989, p. 350) explains:

...There is a problem in [any analysis of argument that], like speech act analysis in general, locates the structure and function of argumentative intentions in the unit of the isolated act (Schegloff, 1988). It... suggests a constancy of structure and function across a broad range of contexts and patterns of expression (which is, of course, part of its appeal). While the conceptual analysis above appears to provide a straightforward and clearcut description of argument in just this way, close examination of the actual circumstances in which arguments occur and of the actual ways in which arguments get expressed reveals that arguments do not always submit to this type of analysis. Instead of an isolable and homogeneous speech act, one finds a family of act types that vary in function and pragmatic logic depending upon the context of their use and the form of their expression.

This is why a successfully performed speech act depends on its conformity to the contextual expectations that are known as felicity conditions (presuming these conditions are indeed discovered as having a bearing on the language use as it is situated). In my data, for instance, the interactional identity (Tracy, 2002) of each participant determines in large part what

sorts of utterances constitute reasonable contributions to the oral argument. More specifically, one might point out how the only questions the attorney ever poses over the course of the event are either procedural questions (e.g., “Unless that Your Honors have other questions I wo- may I close?”), or otherwise treated as rhetorical questions (and probably are).

Example of attorney questions treated as assertions (and not requests) by two judges

A: Well, with regards to polygamy Your Honor the state would have a mountain of public needs to advance to justify a prohibition there. Um i- in terms of a hypothetical claim by individuals seeking multiple marriage licenses. Our clients seek one marriage license. In the hypothetical claim ah with multiple marriage licenses which of multiple spouses would decide who will get divorced or not? Or if there is an additional spouse to be added to that family or with regard to children in the family how do issues of custody and visitation get worked out should there be a dissolution what happens if one spouse dies intestate?

J1: Should that determine whether it's a fundamental right? W- what you tell us is that the heterosexual nature of marriage is not a fundamental right. But you will argue that the binary nature of marriage is a fundamental right, when it comes to polygamy?

J2: Moreover you seem to be arguing that because it's complicated to...

Because of the institutional expectations regarding the interactional roles of participants in oral argument, an attorney could not make utterance contributions that constitute requests for information/argument from the judges without violating the felicity condition of sincerity (actually making the request with the intention of receiving the preferred response from a judge), or at least not without appearing to violate it. This is of course not the only way in which context

connects with speech act theory, and the various other kinds of connections might be explored as they apply to argument in a newly envisioned field of argument pragmatics.

The performativity that is captured so elegantly in speech act theory is so bound up in contextual matters in part because of the role-playing that is probably always a part of argumentative interaction in some way. This insight suggests that the notion of performance itself could become quite helpful in explaining the various features of argumentation. And ‘argument as performance’ not only aligns with a pragmatic approach, but it also opens the way to making connections with scholarly communities from whom, at least for the moment, the field of argumentation theory remains somewhat isolated. Performance studies is clearly included as an option here, but there are other communities as well that could connect with an argument pragmatics that involves ‘argument as performance.’ Most notably, perhaps, would be various communities that take an anthropological approach, for whom hopping from the notion of performance to the notion of ritual would be all too easy.

This connection, though, brings us back to the larger discussion of the ways in which the contextual emphasis of an argument pragmatics would contribute to formulating explanations of the various features of argument. Generally operating on the assumption that argumentative discourse is necessarily situated, and that this situatedness is shaping the discourse will undoubtedly lead to studies of activity type (Thomas, 1995), genre, speech event (Hymes, 1962) or other variants on the theme of ‘practice.’ Similarly, this kind of *modus operandi* is very likely to lead to numerous and sundry observations of intertextuality that provide useful new ways of thinking about argument. In activity types such as the appellate advocacy example I’ve used throughout this study, the potential, and even the importance, of inquiring into intertextual relations seems fairly obvious. With my data, for example, a key analytic move could be to look



for relationships between the two argument phases (brief and oral argument) and especially consider the ways in which the second phase may be built on and shaped by the first. Finally, it bears noting that it is not improbable that the contextual consideration that is fundamental to an argument pragmatics will open a space in which novel, and perhaps even argumentation-specific or argumentation-inspired, approaches to reflecting on the situatedness of discourse.

### **Topics of argumentation theory**

Even in doing the kind of describing and explaining I have championed in this chapter so far, it may become necessary to find additional ways of dealing with leftover concerns from the more traditional approach to argumentation theory. Though I do not intend to run through an exhaustive list of such concerns, there is one traditionally central topic in argumentation theory that I have not yet addressed: reasoning. There are other words with which the name of this topic has been articulated (logic, both formal and informal, as well as argument construction are examples). I have chosen to privilege the ‘reasoning’ label because, as I hope to show below, that label is most compatible with the notion of an argument pragmatics.

When it comes to including ‘reasoning’ theories as an element of argument pragmatics, even as a central element, one question that must come to the foreground is how ‘reasoning’ ought to be viewed. Is it a social activity? A mode of thought? Something else altogether? In my estimation, it can be any of these in one way or another. And each of these views of reason has a place in an argument pragmatics.

When the ‘social activity’ aspect of reasoning is in focus, then argument pragmatics must examine the interlocutors’ actions and how those actions collaboratively contribute to this superordinate act of reasoning. In order to do this, I propose that it will be helpful to take a cue from Jacobs (1989, p. 361) and think of reasoning as colloquial shorthand for reason conveyance, or, written with a deconstructive twist, reason-ing. Conceptualizing the activity in

this way renders a pragmatic analysis relatively feasible, since it is immediately clear that understandings of ‘reasoning’ can be cultivated by highlighting the practices involved in conveying (and challenging?) reasons. Furthermore, this view of reasoning resonates with the very roots of argumentation theory because of the ways in which it can connect with contributions from Toulmin (i.e., the argument that knowledge claims, as warranted beliefs, are dependent upon reasons in order to be sustained is the basis on which he develops his model of argument) and Perelman (who devoted a significant amount of effort toward cataloguing the various ways in which socially credible reason-giving appears to take place).

Building on the reason-ing view of argument, Jackson and Jacobs (1980) are able to speak to the notion that reasoning is a mode of thought with great originality and insight. Specifically, they take up a foundational concept of logic that has been of interest at least since Aristotle: the enthymeme. Enthymemes, which are basically syllogisms<sup>18</sup> with an unstated element (usually a premise), have long been considered by rhetoricians and logicians alike as the archetypal manifestation of reasoning in discursive practice. Jackson and Jacobs’ accomplishment, though, was to propose “pragmatic bases for the enthymeme.” In a nutshell, they argued that “conversationalists usually produce arguments which are minimally sufficient to gain agreement” (Jackson & Jacobs, 1980, p. 262). Although their argument frames enthymematic reasoning mostly as a de facto approach to managing disagreement, and thus as a kind of communicative conduct, it treats this pattern in a way that basically preserves the assumption that it is a mode of thought while calling attention to the collaborative and practically-driven aspects thereof.

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<sup>18</sup> Syllogisms are, in short, a form of three-part argument in which the conclusion (part 1) is reached by connecting two propositions (parts 2 and 3). For example, “All prisons have prisoners (premise 1), and some institutions are prisons (premise 2). Therefore, some institutions have prisoners (conclusion).”

In making this claim, Jackson and Jacobs take a significant step toward blurring the boundaries between activity and mode of thought. The pragma-dialecticians accomplish something similar in their approach to dealing with fallacies. The basic idea for the pragma-dialecticians is that a ‘fallacy’ (which, it bears noting, is traditionally the term used to describe bad or faulty logic) is any speech act that violates the dialectical or communicative expectations of the ideal argument model (a critical discussion). From this concept of fallacy, the very idea of logic takes a procedural turn and makes good conduct nearly equivalent to good reasoning. However, an important nuance is guiding this turn, which also blurs the boundaries between activity, mode of thought, and yet another phenomenon: reason as principle.

Recall that, for the pragma-dialecticians, the aim of argumentation is to convince a reasonable critic of the acceptability of some claim. In order to convince a reasonable critic that some claim is acceptable, it is necessary that the argumentation advanced also be reasonable. But for the pragma-dialecticians, argumentation is first and foremost a kind of communicative conduct. Therefore, from the perspective of pragma-dialectics, communicative conduct must in fact be guided by the principle of reasonableness (at least as far as argumentation is concerned).

That reasonableness is a principle that centrally connects argumentation theory with pragmatics is not a new conclusion in this proposal (see chapter 3). Nor is there any need to further illustrate how reasonableness fits in with the disagreement management model of conversational argument. However, that ‘logic,’ from a discursive perspective, can realistically be re-envisioned as the principle of reasonableness that guides argumentative conduct is a significant and promising conclusion on which an argument pragmatics can be built. Furthermore, from this conclusion comes the consequent possibility of an integrated pragmatic theory of logic that pairs ‘reason-ing’ activities with the principle of behaving in a way that is

‘reason-able’ (to again give the terminology a deconstructive twist).

### **Argument normativity, or making the pragmatics practical**

Much of the pragma-dialectical approach is built upon the concept of ‘normative pragmatics,’ which, as the pragma-dialecticians use the term, I have called into question in its interpretation of basic theories of pragmatics (chapter 4). Though the currently popular version of this idea is misguided and apparently problematic, it seems that the idea can still be helpful. After all, cultivating practical knowledge is not likely to improve practice if that knowledge does not include some kind of suggestion as to how the practice can be improved. Normativity, in turn, appears to be a necessity in an argument pragmatics that seeks such improvement.

In the case of pragma-dialectics, it may be that ‘normative pragmatics’ is actually a misnomer for the kind of move that is made. Rather than simply incorporating a normative element, what pragma-dialectics appears to be doing might be better understood as dialectifying language use. In other words, pragma-dialectics is creating a dialectical framework for argument and laying that framework upon language use by employing the vocabulary of speech act theory. So, in a way, what is proposed in pragma-dialectics is not a ‘normative pragmatics,’ but rather a dialectified pragmatics (which actually suggests that the name of the tradition, ‘pragma-dialectics,’ is very well chosen).

Although I believe the impulse to dialectify language use (or even normativize pragmatics) reflects the best of intentions, it is also missing the logic of pragmatics. In some ways, pragmatics is already attentive to normativity because it cultivates knowledge about how users rely on norms for pragmatic purposes. Clearly, this sensibility is not normative in a critical sense, but it does cultivate a kind of implicative normativity. For this reason, argument pragmatics is perhaps best thought of as *practical* first, and normative after. The implicative practicality I reference is grounded in two additional forms of practicality. First, the kind of

inquiry in question concerns the ways in which the inevitable ambiguities inherent to attempting the impossible (that is to say, attempting to accomplish ‘shared meaning’ or intersubjectivity by the use of symbolic conduct) are actually overcome in ways that allow interlocutors to move on with pragmatic ideals such as cooperation. Second, the object of study in pragmatics is, quite simply, language practices. This means that, more likely than not, the conclusions reached in these studies will also relate to practice at the most basic level at least. In argument pragmatics, the task, therefore, is not necessarily so much to enforce some well-intentioned but impractical ideal as it is to seek out the most useful observations about argumentative discourse and reflect on those observations in a way that can be brought back to the practice with the goal of improving it by cultivating the aspects of the practice that seem to work, moving away from those that do not, developing an appreciation for the complexities and problems of the practice, and perhaps contributing insight that can help participants to deal with those problems and complexities. For this reason, the impulse to dialectify argument may better be redirected to a *phronetic* approach to argument ruliness and practice.

*Phronesis* can be rendered in English in various ways (often depending upon the dictionary one consults), such as ‘practical wisdom,’ ‘prudence,’ or ‘wisdom in choosing ends and means.’ There has been much discussion and use of this Aristotelian concept of knowledge (e.g., Craig, 1995; Flyvbjerg, 2001; Tracy, 2005), and I use the term simply in echoing these scholars’ use of it. An important overtone in the idea of *phronesis* is that the ‘practical’ aspect of it relates to its situatedness. Unlike the knowledge that is part and parcel in many forms of inquiry grounded in natural sciences, *phronesis* is not concerned with generalizability or universal application. It is a kind of knowledge that is tightly bound up in the context from which it emerges. Because of its tight linking with context, this kind of knowledge may prove less

useful in situations that are wildly incomparable to the kind of situation from which the knowledge was cultivated, but it may also prove to be invaluable in other settings that bear a stronger resemblance.

In an argument pragmatics, *phronesis* seems to be a valuable concept, in part because of the relationship it suggests between rule, context, and conduct. Because *phronesis* is not generalizable, it becomes fairly difficult to formulate rules that will guide argumentative conduct while maintaining sufficient applicability to be meaningful across an array of argumentative activity types. In fact, even if this were possible, *phronesis* could just as well be viewed as the kind of knowledge that informs decisions to *transgress* an argumentative code of conduct. The reality of the need for the ability to break away from rules in argumentative situations has been demonstrated empirically. For example, by means of a case study, Goodwin (2009) reaches the claim that, at least in the data she examines, argument is simultaneously “a matter of following rules” and “irreducible to rules” (but rather a matter of practical reasoning). She concludes, “If we do adopt accounts of the second shape [envisioning argument as a matter of practical reasoning], admittedly we will be taking argument as unruly. Still, we will be able to see how arguers achieve some order in their disagreements, and in particular, how they and we can justify the judgments of good and bad that we want to make” (Goodwin, 2009, p. 296). In light of key theories of pragmatics, such as conversational implicature, the paradoxical situation of having rules so that their transgression can lend meaningfulness to argumentative conduct seems to fit comfortably within my concept of argument pragmatics. Therefore, in argument pragmatics, deviation from any rule or ‘scripts’ that may be a part of a particular activity type are not necessarily bad from a practical perspective, but they are undoubtedly worth examining in the interest of *phronesis*.

A similar consideration for an argument pragmatics regarding phronetic understanding of paradox in communication is the idea that participants in the various kinds of argumentative activity types must often (if not always) pursue multiple (and often competing) goals. One potential example of this is in the need to pursue the ideals of both reasonableness and effectiveness. These two goals, when paired, have the potential to arouse tensions because, in some cases, it may be more effective to do something unreasonable in an effort to reach a form of agreement. In like manner, being excessively reasonable to the detriment of rhetorical sensitivity may also lead to unnecessary complications (one might imagine, for example, the problems that would arise if a speaker chose to openly discuss an unpleasant fact that hurts or distracts from his/her case instead of finding ways to sidestep the issue, even if the person believes that he/she is in the right despite the unpleasant fact).

Another example of this problem could be the apparently common goals of having both cooperation and agreement in argumentative discourse. These goals parallel the reasonableness/effectiveness pair while formulating them more directly in the language of pragmatics. However, the necessarily contradictory nature of these two ideals is not evident, and perhaps they are not universally contradictory. One basic situation in which they are contradictory though might be, for example, in the emergence of disagreement that creates the distinctive contextual element that renders the discourse argumentative. If a person says something that his or her interlocutor cannot in good faith believe to be true, the cooperative thing for that interlocutor to do, one might infer, is to treat it as an untruth. However, in such a scenario, responding in that way also requires the interlocutor to perform some speech act that basically amounts to an expression of disbelief or skepticism. In other words, if the interlocutor wishes to be cooperative, he or she must also disagree. Of course, it is practical wisdom that will

enable the interlocutor not only to determine an appropriate interpretation for the ambiguous utterance, but also to reflect on appropriate ways to respond to the utterance.

When phronesis is understood as ‘wisdom in choosing means and ends,’ it becomes apparent that dealing with multiple goals that are apparently in competition is a phronetic matter (Jacobs, Jackson, Stearns & Hall, 1991; Tracy, 1984; Tracy & Coupland, 1990). From this view, which one might call a dilemmatic view of argumentative interaction, the question is not so much whether or not the argumentation satisfies abstracted rules, especially competing ones, but rather if the dilemma has been managed in a way that is satisfyingly consistent with the context-dependent ideals for argumentative conduct. In reflecting on questions of this kind, some helpful considerations might include short- and long-term prudence of argumentative conduct (especially in light of the various competing rules and goals embedded in each unique instance of argument), as well as the extent to which the situated conduct attends to cultural, institutional, historic, or other context-variable imperatives, expectations, ideals, etc.



### **Conclusions/Starting Points**

I have attempted to take some first steps toward outlining a re-envisioned field of argument studies: argument pragmatics. As I have shown, there are several existing strands of argument research that already to some degree draw on and anticipate the importance of language pragmatics in the field. Although these strands of research have their limits, their usefulness in moving toward an argument pragmatics has proven (and probably will continue to prove) to be invaluable. My hope is that argumentation theorists will become aware of the trajectory along which the field is traveling, see the value in re-inventing argument studies as a matter of pragmatics, and work together to bring their own insights and backgrounds to the benefit of such a field. The pragma-dialecticians have provided some very interesting initial ideas about how pragmatics and argument studies could be enjoined, and conversational argument brings some very useful modifications and starting points to this enterprise as well. Still, as I have shown, there are many problems yet to be worked out, and also quite a few connections and emerging fields that require development and exploration.

In doing so, there are a number of important issues that remain and that will require attention. A first project, for example, might be to find ways to make the idea of an ‘argument pragmatics’ more elegant, but also more robust. The first and most important step in doing this, as I see it, would be to commence the work of building a body of empirical study that focuses on argumentative matters and discourse while maintaining the vision that such study is and should be treated as falling within the realm of pragmatics. Some themes that might be especially helpful to explore in this regard could be, as outlined in chapter 3, especially interesting points of overlap between the two fields (e.g., agreement/disagreement, cooperation/reasonableness, rules/orderliness—especially in relation to context).

In taking this first step of conducting empirical research, it is likely that some unifying

themes will emerge across studies. This is important because, for the moment, my outline of the re-envisioned field must grapple with the inherent limitation that it may be an insufficiently ‘tight’ collection of lenses and interests, lacking a basic unifying principle or idea that lends coherence to the whole. Such coherence would help create a stronger sense of field-ness for argument pragmatics. On the other hand, a complementary question would be whether it is even possible or desirable to make such a move, given the role of context and variability in the field. If a framework were created, for example, one risk would be that the framework would not be close enough to the discourse as it occurs; it would, in effect, be too removed. For this reason, it is probably important to insist that, while recognizing and even celebrating the emergence of unifying themes within an argument pragmatics, there will always be many, many aspects of this kind of inquiry that are quite situated and incompatible with the project of postulating acontextual or generalizable principles/rules.

Perhaps it is not necessary, though, to turn toward such unifying principles in order to make the idea of argument pragmatics more elegant and robust. Another means of improving those aspects of the re-envisioned field could be to unpack and work through the various interrelated levels of philosophical distinctions and implications that would ground an argument pragmatics. Indeed, another limitation of what I have done here is that there are admittedly a number of important philosophical, paradigmatic assumptions and considerations that have gone unchecked in this project. Fostering an understanding of the way an argument pragmatics relates to ontological, epistemological, axiological, methodological, and praxeological problems would likely inform the ways in which argument pragmatics connects with other fields, and also make philosophical threads that run through each level of these philosophical considerations more explicit. This sort of endeavor, though, will likely be difficult and misleading if it is not preceded

by the kind of empirical work for which I have called.

Beyond philosophical considerations, a second project could be to find ways to integrate attention to variability in culture, practice, etc. in a more or less consistent way. This need, of course, is based on the assumption that variability will be an important issue. That assumption, though, is not without warrant. Jacobs (1989, p. 361), for example, drawing on the framework of speech act theory, explains that multiple forms of variability ought to be expected in what I, in this proposal, have called an argument pragmatics. He says that

The specification of felicity conditions for pro- and contra-argumentation are not simply arbitrary stipulations of what it means to perform such acts, but are assumptions about what it would reasonably take to successfully pursue the goal of convincing someone under ordinary circumstances using the ordinary, direct means of overtly stating one's case. In this case, the variation in the characteristics of the act of arguing will be as open as the variations in its context of activity and forms of expression... [And] we would also find variation in the functions and preconditions that structure argument according to the language activities and forms of expression in which arguments are embedded.

Simply paying due attention to the situatedness of language use is probably a good way to start with the question of variability, but it would be helpful to come up with some kind of theoretical repertoire for this. Such a repertoire would help to ensure quality in the way variability is addressed, but also accessibility to the community of argument pragmatics. A starting point for some of this work might be for argument studies to consider the merits of pragmatics-friendly inquiries into cultural matters that also take up explicitly rhetorical interactional issues. Fitch (2003), for example, offers the notion of 'cultural persuadables,' which

seems promising for work within an argument pragmatics, and Boromisza-Habashi (2011) has given a recent example of how one might conduct a rich, culturally oriented approach to an analysis of what might be called argumentative phenomena.

The situatedness of argumentative phenomena, it seems, should also include considerations that go beyond culture (or at least beyond the most simplistic notion of it). A variety of considerations that bring multimodality, space/place, embodiment, materiality, etc. into the picture are also likely to lead to valuable contributions. This is especially the case when one brings this considerations into juxtaposition with the ways in which I have called for a focus on situated language use, since one might ask what counts as ‘language’ use, and also whether it is really a matter of ‘language’ that argument scholars ought to pursue or some other, even more encompassing phenomenon. My suspicion, once again, is that empirical studies are the best way to shed light on these questions.

A final project I might propose is to reflect on how wedding the fields of argumentation theory and language pragmatics may cause them to mutually challenge each other. As is often the case when two independent ideas are brought together into a relationship of interdependence, a number of tensions and novel contributions are likely to emerge. Each of the fields I am combining could benefit from the insight, comment, and critique of the other. And as my case study seems to suggest,<sup>19</sup> empirical studies may simultaneously challenge both of these fields because they have been combined in this way.

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<sup>19</sup> The notion of certain roles making acts felicitous or not is complicated because the data provides evidence that a role can actually provide a basis for reconceptualizing the social function of an utterance. This is apparent, for example, when I show above how ‘saying’ is arguing in the case of my data.

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## Appendix 1

### TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	iv
PRELIMINARY STATEMENT .....	1
PROCEDURAL HISTORY .....	4
STATEMENT OF FACTS .....	5
ARGUMENT .....	11
I. PLAINTIFFS' CLAIMS UNDER THE LIBERTY AND EQUALITY GUARANTEES OF THE NEW JERSEY CONSTITUTION MUST BE EVALUATED UNDER THE COURT'S BALANCING TEST IN LIGHT OF THE STATE'S STRONG COMMITMENTS TO INDIVIDUAL FREEDOM AND EQUAL TREATMENT .....	11
II. PLAINTIFFS HAVE EXTREMELY WEIGHTY INTERESTS IN EXERCISING THE FUNDAMENTAL RIGHT TO MARRY THEIR IRREPLACEABLE LOVED ONE, WHICH IS A CENTRAL ASPECT OF PROTECTED LIBERTY GUARANTEED TO ALL PERSONS, AND IN EXERCISING THE FREEDOM TO MARRY ON EQUAL TERMS WITH OTHERS .....	13
A. The Right to Marry is Fundamental for Plaintiffs as It Is for "All Persons"; Plaintiffs Have an Extremely Weighty Interest in Exercising This Protected Liberty Free of Government Interference .....	13
B. The Fundamental Right to Marry That Plaintiffs Seek to Vindicate Cannot Be Refused By Defining It To Exclude Those Historically Denied The Right to Exercise It, or Out of Unfounded "Slippery Slope" Concerns .....	18

1. Plaintiffs are Not Seeking a New Right to "Same-Sex Marriage" but the Freedom to Exercise the Existing Right to Marry the Person of Their Choice.....	18
2. The Majority Below Erroneously Sought to Justify Denying Same-sex Couples the Right to Marry Based on Timeworn Alarms About Polygamy.....	28
C. Whether or Not Labeled Fundamental, Plaintiffs' Interests in Being Able to Marry an Irreplaceable Partner on Equal Terms With Others are Extremely Weighty and Constitutionally Guaranteed .....	31
1. The Equality Guarantee in Article I Protects Plaintiffs Regardless of Whether the Right at Stake is Labeled Fundamental.....	31
2. Plaintiffs, Like "All Persons", Have Extremely Weighty Interests in Choosing Whether and Whom to Marry Upon Which the State Intrudes.....	35
a. Plaintiffs and their children have substantial tangible interests in having access to the comprehensive legal structure that shelters married families; the State's domestic partner law does not offer comparable protections.....	37
b. Plaintiffs and their families have substantial interests in the dignitary and intangible benefits of marriage.....	40

III. THE STATE'S DENIAL OF ACCESS TO THE RIGHT TO MARRY IS COMPLETE, NOT MERELY INCIDENTAL, INCREASING THE STATE'S BURDEN TO JUSTIFY ITS BAR .....	44
IV. THE PURPORTED PUBLIC NEEDS FOR THE STATE'S INTRUSION DO NOT OVERCOME THE INTERESTS OF PLAINTIFFS IN SHEDDING THE DEPRIVATIONS OF EXCLUSION FROM MARRIAGE AND IN HAVING FULL AND EQUAL DIGNITY AND AUTONOMY .....	47
A. The State's Argument That the Marital Exclusion Should Remain the Law Because it is Familiar and Comfortable to the Majority Conflicts With Settled Constitutional Precepts .....	48
B. The New Jersey Constitution Places No Value on Remaining Consistent With Discriminatory Laws in Other Jurisdictions; There is No Such Public Need .....	52
C. Excluding Same-Sex Couples From Marriage Does Not Advance Any Public Need to Promote Heterosexual Procreation Within Marriage, As the State Has Agreed .....	53
V. THE APPROPRIATE REMEDY IS FOR THE COURT TO CONSTRUE NEW JERSEY LAW TO ALLOW SAME-SEX COUPLES EQUAL ACCESS TO MARRIAGE .....	57
CONCLUSION .....	59

**PRELIMINARY STATEMENT**

Plaintiffs challenge the State of New Jersey's denial of their liberty interest in being able to direct the course of their intimate lives by choosing to marry the irreplaceable person each loves, as others freely may do. Plaintiffs are lesbian and gay individuals in long-term committed relationships; many are parents raising their children together. Article I, paragraph 1 of the New Jersey Constitution guarantees liberty and equality to these lesbian and gay citizens as it does to "[a]ll persons."

This Court has recognized that the choice to marry another individual is among the most intimate of personal decisions and a vital part of freedom preserved from government interference. For most people, the State does not intrude on the distinctly personal choice of a marriage partner beyond matters such as age, consanguinity, and marital status. Each person is free to choose wisely or poorly, without regard to whether the marriage is popular with government officials, but under current New Jersey law, one may do so only *so long as one chooses a different-sex partner* to marry.

It can be difficult for anyone with unfettered access to this pervasive social institution to step back and appreciate what it means for one's dignity, security and social standing

to be entirely excluded from it. Plaintiffs have submitted substantial evidence providing a picture of life under this exclusion. Nor is New Jersey's domestic partner benefits law a meaningful replacement for marriage. Indeed, this separate legal structure only makes starker the government's determination to maintain two classes of citizens.

In assessing liberty and equality claims under Article I, the Court employs a balancing test. The Court already has determined that the right sought here, the right to marry, is fundamental and thus is assigned maximum weight on the constitutional scales. The effort of the Appellate Division majority to strip it of its fundamental nature by calling it the right of "same-sex marriage" - as if fundamental liberties depend on whether one conforms to the majority group - must fail or Article I means little. To deny the fundamentality of the right to marry here is to marginalize one class of citizens and debase their intimate lives and their rights to personal autonomy.

Even without labeling the right at stake as fundamental, however, the interests plaintiffs have in entering into marriage are extremely weighty. Those interests - in companionship, security, intimacy, family, and commitment - are common denominators of human life. Plaintiffs cannot enjoy dignity, security and first-class status as citizens

when the government denies them access to one of society's most esteemed institutions, marriage, with the person each loves. And arguments that plaintiffs must wait for the legislature to rectify entrenched injustice in the marriage laws misunderstand New Jersey's constitutional system and the courts' role in safeguarding individual liberties.

The two purported needs Defendants (the "State") offer for the exclusion carry no weight. The first - to avoid a change in the traditional limitation of marriage to a man and a woman so as not to jar society's expectations - makes majority sentiments in New Jersey the test. The second - to ensure that New Jersey's marriage laws remain uniform with the exclusionary laws in most other states - tethers this State's constitutional rights to discrimination practiced elsewhere. Nor is the asserted "public need" to encourage heterosexual procreation within marriage, adopted by the concurring judge below, at all advanced by excluding lesbian and gay families from the institution of marriage.

In the end, this is really a very simple case in constitutional terms. Plaintiffs ask to be given what their friends, relatives, co-workers and neighbors already enjoy - participation with the one person each loves in the central rite of passage in American family life.

## Appendix 2

### Transcript

Chief Justice Poritz, Justices Long, La Vecchia, Albion, Wallace, Rivera-Soto, Zazzali  
David Buckel =Attorney for the appellants; David De Almeida, attorney for the respondents

MrB: Good morning your Honors. And may it please the court, my name is David Buckel representing the plaintiffs. Who have joined us in the courtroom today. This is an historic case for civil rights in New Jersey. Many Americans hold dear the dream that they will one day settle down and marry the person they hope to spend their lives with. Part of that dream is participating in the most significant rite of passage in American family life. Everyone knows: how important that is to all our lives. As reflected by all the weddings we attend over the years. The state fences plaintiffs out of marriage by closing the gate against same sex couples. Which labels their relationships as unworthy as a matter of law. The state tries to minimize the harm with a handful of protections under the domestic partnership act. Domestic partnerships are important in that they strengthen relationships somewhat but they reinforce the core injury of second-class citizenship. Not only does the state block plaintiffs from the privileged status of marriage, it has created an alternative status with a different name. Plaintiff Cindy Mannegan explained for the record that without marriage she gets the constant message that her family doesn't count. At times giving her what she calls a deep ache in her chest. And it adds up to her finding it harder to participate in community activities. The very thing this court identified in the Dale v Boy Scouts case as forming the terrible human price of discrimination. Domestic partnerships only reinforce the official message that plaintiffs' relationships do not count as much as married relationships. Plaintiff Karen Nicholson McFadden explained that without being married, in everyday conversations she feels like her dignity is always on the line, quote open for anyone to question rather than assume. And that the battle is not to feel like our commitment and our family is pretend. Her dignity remains open to question if she calls her relationship a domestic partnership. Because the message is still there. Not marriage. How do plaintiffs answer their children's questions about why they are not married? The only answer is that the state does not believe the parent's relationship is worthwhile enough. The state's construction of two different legal structures for protecting relationships and families. One privileged and one not, creates a stigma that the New Jersey Constitution does not allow. The difference between the two claims that plaintiffs have brought before this court one liberty claim and one ((clears throat)) equality claim. In terms of how the balancing test operates for these two claims, boils down to how the court would weigh the plaintiff's interests in the balancing test. With a fundamental right there's a requirement that the maximal weight be assigned because the court has determined that the underlying liberty interests warrant the protection of the ah fundamental right. And that the maximum weight attaches to the interests that underlie. For the equality claim, it is undisputed on the record before this court that the plaintiff's interests are the same as those of heterosexuals who would seek to choose to marry. There's really no difference. And there is no dispute that the same sex couples and



different-sex couples have the same interests. So it's as if when the court raised the plaintiffs' interests for the purpose of the equality claim, that the court has before it different-sex couples who are seeking to exercise that right. The interests are no different, the weight is the same. The other point that seems to be helpful to make at the outset is that the equality claim stands whether or not there is a fundamental right. There's a claim that women have for sex discrimination under the Constitution, even though there may be no fundamental right to be free of sex discrimination. On the more mundane end of the spectrum, there is a claim that municipalities can not selectively provide garbage collection services. Whether or not there is any fundamental right as to garbage collection. To hinge an equality right to the fundamental right is to essentially write the guarantee of equality out of article one paragraph one and make the Constitution, the state Constitution the floor in the state as opposed to the federal Constitution providing the floor for protection. On the fundamental right, the appellate division made the most common error (1.0) out there in this area of law. The appellate division focused on the fundamental right in terms of which individuals have historically been able to exercise the liberty. And which individuals have been historically excluded from that exercise. That conflicts with this court's jurisprudence. In the Grady case, this court examined an historically excluded group with the regard to the decision of sterilization. That historically group excluded group were the mentally incapacitated. This court was not distracted by the fact that the group had been historically excluded. In fact the court took great note of how abhorrent the history of exclusion had been. The court focused on the underlying liberty interests available to all individuals. The nature of liberty is- is- is- that it is possessed by all individuals. And it cannot be viewed in terms of who has the historical exercise and who has been historically excluded.

JJRZ: Mr- Mr Buckel if the legislature passed a law that provided same sex couples every right that straight couples have except the civil sacrament of marriage, would you still argue before us today?

MrB: It would be helpful in terms of strengthening relationships and strengthening strengthening families your honor. But it would not address the underlying Constitutional injury, where the state has set up two different legal structures one privileged and one not. And that can only send one message, which is that the group given the separate status the inferior status, those relationships of- of individuals in that group are unworthy

JJRZ: So you would argue that Vermont's civil union statute under New Jersey's constitution would be unconstitutional?

MrB: That's right your Honor. As well as Connecticut's civil union law. Both have the official message sent to the rest of the state that this group of individuals' relationships are inferior to others. They're unworthy. And that is the core constitutional injury here. As the supreme judicial court of Massachusetts explained in finding a civil union bill in that state inadequate. The considered choice of different language is at the very center of the constitutional infirmity. And no amount of tinkering with language will eradicate that stain

JBTA: Well putting it more positively on your end of it you want the respect and the respectability of marriage and the stature and status of marriage?

- MrB: Well Your Honor on the liberty side, uh what we want for the plaintiffs is the dignity and the worth that the New Jersey constitution protects for all individuals in terms of their freedom. And on the equality side, what we want is even handed treatment. Under the equality claim is a doctrinal matter. The legislature can take or give away benefits, protections, things of that sort. But if it determines to provide benefits and protections, it must do so even handily- even handily and that's true anywhere on the spectrum. As I said from the mundane, in terms of garbage collection to the profound in terms of reproductive freedom or claims against sex discrimination.
- JJL: But that argument suggests that the state- the legislature cannot engage in any line drawing. And I did not understand your argument to be that broad. I believe you accepted for example the prohibition on polygamy. Is that not correct?
- MrB: Well, with regards to polygamy Your Honor the state would have a mountain of public needs to advance to justify a prohibition there. Um i- in terms of a hypothetical claim by individuals seeking multiple marriage licenses. Our clients seek one marriage license. In the hypothetical claim ah with multiple marriage licenses which of multiple spouses would decide who will get divorced or not. Or if there is an additional spouse to be added to that family or with regard to children in the family how do issues of custody and visitation get worked out should there be a dissolution what happens if one spouse dies intestate?
- JBTA: Should that determine whether it's a fundamental right? W- what you tell us is that the heterosexual nature of marriage is not a fundamental right. But you will argue that the binary nature of marriage is a fundamental right, when it comes to polygamy?
- JDTP: Moreover you seem to be arguing that because it's complicated to deal with polygamy that somehow undercuts defining um this as a fundamental right whether it's people of the same sex, different sexes or multiple persons.
- MrB: What we're arguing Your [Honor]
- JDTP: [it's about] complexity is it
- JVL: That's right your argument isn't that it's complicated. Your argument basically is that there are public interests that would undergird ah ah a prohibition against polygamy that are absent in this case.
- MrB: That's correct Your Honor. A- at every stage of this court's balancing test there are issues that arise that do not arise in this case. And the mountain of public needs is an example because the legal structure for marriage as it now stands is premised upon a couple. Two individuals getting a marriage license. Plaintiffs here do not challenge that. Uh the structure will not change in any way.
- JDTP: The problem with that is that the legal premise today also is that the marriage will be between man and a woman. And you do challenge that and you need to differentiate between the two. On what basis do you challenge the one. And the other is unaffected?
- MrB: Well Your Honor we challenge the state's closing of the gate. Because the state controls the gateway to marriage. And so we're what we're challenging is that they close the gate to plaintiffs. And in the past: with uh similar challenges it has been argued that there was some kind of inherent nature of marriage. Such as the inherent nature of men and of women means that the inherent nature of marriage is

that women are subordinate to men. That doesn't come into this court's constitutional discourse. The court opens with what are the plaintiffs' interests? And in- in this respect the record is undisputed before the court. That as couples individuals in couples there is really no distinction between those individuals in same sex couples and those in different sex couples with regard to their interest in marriage and the weight that should attach. The extraordinary weight that should attach to those interests. Marriage changes over time. It used to be that couples when they got married could never get divorced. It used to be that couples of a different race could not get married. And the arguments were made about the inherent nature of marriage there. And it used to be that women had their legal identities subsumed into that of their husbands. And that was attributed to the inherent nature of marriage. Under this court's methodology the examination begins with plaintiffs' interests. And those interests are just not distinguishable. And it's undisputed, I mean that's probably one of the most remarkable future- features of this litigation. Is that as to the first part of the balancing test there is no dispute that the plaintiffs' interests are identical to those of different sex couples.

JVL: Counsel let me ask you a procedural question. The state ha- has narrowed its response to your challenge to two uh specific interests. We see however in the um Amici Briefs a vast array: of arguments on either side of the issue. What are we to make of those and how do those um those additional bases play into what's facing us today? Should we be looking at those amici materials to the extent that they expand what the state has narrowly articulated or not?

MrB: Well as to whether or not the court should be looking at those interests, uh one incredibly important factor of course is that the state itself has disclaimed those interests. As far as I can tell the interests seem to boil down to this idea of steering heterosexual procreation into marriage. Um and ((throat clear)) the state has uh disclaimed that interest. I mean to the extent what underlies it is a concern for children which indeed is an important interest of the state

JVL: yes a state disclaimer I'm at I'm really asking you do you think that the states disclaimer binds us in light of the fact that inferentially at least in Judge Skillman's opinion and right up there in Judge Perillo's opinion, those factors were considered.

MrB: I don't know that binds the court Your Honor I mean the court would have the power to exercise in terms of looking at interests that the state itself has disclaimed. I mean the state is placing children in foster children and adoptive children in the homes of same sex couples the state has the experience to know that these- these concerns that it has disclaimed, ah should not be in front of this court.

JJL: Mr Buckel, forget about whether we're bound by what the attorney general has chosen to argue. If the rational basis test is applied in this setting, don't we have an obligation to give all rational inferences to the legislative choice? So if there is a possible rational basis for the legislative decision, we have an obligation to support it?

MrB: mhm well in that regard Your Honor um the court would not be applying the rational basis test. But given that these claims are premised exclusively on the New Jersey constitution would be under th- the balancing test. And that brings to the- the second response really to what to do with these interests that have been disclaimed

- by the state and
- JJL: [All of the balancing tests but if we are not treating it as a fundamental right we are looking for the rationality of the legislative choice.
- MrB: By balancing the plaintiffs' interests against the states. And I guess that's brings me to my point which is that this- this court has repeatedly stated that its interest having rejected the federal test, which includes the rational basis tier. This court has repeatedly stated that its goal is to look at the clash of interests between individuals on the one hand whose rights have been infringed and the state. And for- an in cases where the plaintiffs' interests are weighty and it's undisputed here that plaintiffs' interests are weighty. The court is even less likely to go searching for interests that the state has rejected. And finally Your Honor in terms of these interests, they're wrong. There is nothing about banning marriages of same sex couples that leads to steering procreation of heterosexuals into marriage. So even if we go that far, it's just plain wrong there's just its insupportable as uh any kind of state interest.
- JJTP: Just the way the state has rejected certain arguments um plaintiffs have um agreed that the statute, the marriage statute pertains to a man and a woman. And have not made a statutory argument with reference to the law against discrimination which includes sexual orientation. And which arguably should be read at the very least empowering material with the marriage statute. Um such that it provides the gloss on the marriage statute. Why? Why have the plaintiffs eschewed a statutory argument?
- Mr. B Well on- on that Your honor the parties are in agreement. And in agr- agreement with the trial court as well. Um the trial court in the ah joint appendix at 139-141 did a very thorough review of the marriage statutory framework identifying how clearly as a facial matter, as a facial matter the statutory framework precludes same sex couples [from marriage
- JJTP: [yes but- but doesn't the argument remain that the law against discrimination um amended to include sexual orientation should be read with that statute?
- MrB: Well I think uhh- I think that's true Your Honor. It- it seems like a difficult argument I mean I- I also think its very useful backdrop for the constitutional claim to know that the state legislature in the early nineties determined that sexual orientation should be a category entitled to protection in the law against discrimination.
- JVL: And you don't want this case decided on a statutory interpretation basis?
- MrB: Ah no Your Honor. I mean we advance constitutional claims. Um and only constitutional claims premised on this state's [constitution
- JVL: [And that's the battlefield on which you wish that we will remain
- MrB: That's correct Your Honor [and
- JJTA: [Mr- Mr. Buckel(.) do you have a view as to whether or not sexual orientation is an immutable characteristic? I raise that because there is an Amici uh- ah brief that says that the science isn't there. And if it were an immutable characteristic such as race or color, would it make a difference to our consideration of the issues in this case?

- MrB: Not under this court's methodology uh for constitutional analysis. But because this court(.) given its interest repeatedly stated in citing the clash of interests between individuals and the state and in adopting the balancing test, uh looks at the plaintiffs' interests first and then moves for[ward]
- JBTA: [so you're saying it wouldn't make a difference But- bu the first part of my question is do you have a view as to whether or not sexual orientation is an immutable characteristic such as race or- or color are people. Are people gay by- by nature or by choice or - or some by nature and some by choice?
- MrB: It's a- it's a an analysis we haven't presented to the court. Um we presented elsewhere where for example a federal analysis applies and we might argue for heightened scrutiny? In which case uh what the point Your Honor raises becomes pertinent. Um it's most useful perhaps to bring the court's attention to the brief submitted by the American Psychological Association which lays out how very complicated sexual orientation is in terms of origin.
- JJRZ: We agree but Justice Albion is asking you if you have a view on the issue. And it's- it's the old debate the old question, is it genetics? Is- is it or is it a combination of that and- and en- environment?
- MrB: It's- it's a variety of factors that are at play Your Honor. In terms of I mean that's why I bring your attention to the APA brief. Because it does have to do ah somewhat with genetic influences. It's- it has to do somewhat in some instances with environmental influences. It's a very complicated uh set of factors that are at play. But it's most certainly not for this court because in no way does it come into the uh analysis, the constitutional analysis
- JJRZ: Fairly said is the jury still out on the issue?
- MrB: It's not out in terms of- of how complicated the [origin
- JJRZ: [agre[ed
- MrB: [of sexual orientation
- [is Your Honor
- JJRZ: [agreed
- MrB: Um on the intrusion which is the second part of this court's test. Um the bar here is, Er I should say the exclusion here of access to marriage is a bar and not a burden. Um the state advances the domestic partnership act to minimize the intrusion on plaintiffs' interests. But the state no where disputes the fact that by virtue of having a separate legal structure, um combined with the exclusion from marriage that that in and of itself as plaintiffs have argued, is the core constitutional injury because of the message it sends that these relationships are unworthy. So in not disputing that anywhere the state is conceding that this is a bar. And it's not a burden in terms of the intrusion on plaintiffs' interests. That means that there is extraordinary weight that attaches to that second piece of the balancing test on the plaintiffs' side of the scales.
- JJL: What about the state's concern about same sex marriage if it were permitted here not being recognized under federal law or in the vast majority of other states? And I believe in the brief they also cite to the defense of marriage act, talking about the IRS consequences and the overlap between situations where certain state benefits are calculated based upon eligibility for certain federal status. Ha- how do you

respond to that Mr Buckel?

MrB: As to the so called defense of marriage act Your Honor. Um that expressly left it up to the states to decide for themselves whether or not to end discrimination of marriage against same sex couples. So

JJL: What about the IRS consequence?

MrB: In terms of things like IRS consequences which certainly flow from the defense of marriage act unconstitutionally so, ah that will be for another forum. Um plaintiffs given what is protected by Article 1 Paragraph 1 of New Jersey's constitution in terms of liberty and equality. Plaintiffs come out way ahead if they stand with their full constitutional stature, even if there are problems that might flow from the federal government's discrimination. Or from other states discrimination. These things will get worked out in terms of the states interests in uniformity, we're in a federalist system that actually takes it as a premise that there will be a lack of uniformity across the states. And we have a whole body of law, the choice of laws doctrine conflicts of law, to work those things out. New Jersey's domestic partnership law is one example. That the state joins a few other states in terms of extending benefits and protections of that nature. Many other states do not. When someone with a domestic partnership leaves the state of New Jersey and seeks recognition for that in another state, it will get worked out under these um very well established rules [for

JJL: [So if I understand your response i- I maybe I'm interpreting it but tell me if I am wrong. The states asserted interest is rational but its outweighed by your plaintiffs' rights. Correct? Your interests that would be burdened if the state were to prevail?

MrB: Well I'd have to stop and think a moment because I- I don't see anywhere in the court's authority the use of the rational basis analysis. Um although it's a challenge because this court is so often adjudicated federal claims and state claims in tandem. And that's very difficult for the court and sometimes its- to parse those out but [even

JJL [applying- applying your balancing test what I'm asking you is are you acknowledging that the state has some interest in this respect? But that that interest is outweighed because of the importance of the right that your plaintiffs are asserting?

MrB: No Your Honor. Ah because New Jersey's constitution cannot possibly be subject to the discriminatory laws of other states. And there is a body of law that allows all the states to work out these conflicts. They've been doing it forever.((laugh)). And they will continue to do so. And it will soon come up with [New Jersey's domestic partnership

JBTA: [Wh- wh- what- your argument is saying that even if the state's don't work at the conflicts. The truth of the matter is there's a hostility in other states to this very issue. There are constitutional amendments. Um the legislatures have spoken. Courts have spoken. Your argument is directed to the laws of this state. To the constitution of this state an ta- to the norms and the traditions of this state.

MrB: That's right Your Honor and what happens in other states will happen. We will see a patchwork in this nation have- as we have seen before in- in civil rights work. Uuh

the closest analogy is with regard to the anti-miscegenation laws. From 1948 when the high court of California was the first dant- to strike down such laws until nearly twenty years later in 1967 when the Supreme Court struck down the remaining sixteen. In that intervening period there was a very complicated patchwork uh and it got worked out. Same uh with the work over the years to equalize women in marriage. Uh there was a patchwork of even broader duration. And that got worked out. That will happen here. But ah in New Jersey ah the constitution um should- should apply without respect to discriminatory laws of other states. Or the federal government. Um I mean another way to look at this is that uh y- you can't tell someone who's dying of thirst not to take a drink of water and that drink of water is the New Jersey constitution just because there is going to be some dribbles on the chin. Uh believe me these plaintiffs desperately seek their dignity and their worth and their freedom under the New Jersey constitution. And they're very well prepared to deal with ever whatever problems might arise because of other state's discriminatory laws or the federal governments discriminato[ry laws

JJRZ: [indeed you would add

to that this state through the legislature's already broken ranks with most of those other states. By virtue of the domestic partnership act?

MrB: That's right Your Honor. I mean there's a mix in the states in terms of um respect for relationships of same sex coupl[es

JJRZ: [n- An the preamble to the- to the act- to the DPA, they speak in terms of ah dignity and autonomy as I understand it. In the prefatory language?

MrB: That's right. And also recognize that, reinforcing the relationships of same sex couples is not only important for those couples in terms of dignity and worth but is good for the state. Because the more couples are allowed to assume responsibility for each other through a legal status, the less reliant they are on the state for support. So it was on both ends of the equation Your Honor. Not only with regard to what it means to individual human beings and how important that is. But also that it's good for the state and the communities in which the plaintiffs live. ((throat clearing)) As I- I thought I'd briefly mention Your Honors the um- the Tomartio case which is analogous in terms of the correction for the constitutional violation here. Ah in Tomartio it was an example of a number of cases in this court's jurisprudence that fall under the heading of judicial surgery. And ((throat clear)) there the court was looking at the workers compensation law, and had determined that uh men and women should be treated equally under that law. And rather than strike down the statute, turn to ah and grafting upon the statute a neutrality concept. And that meant that ah there was an equalization as to both men and women. The court would do something similar here in terms of correcting the constitutional defect..In- in- in just in grafting on the marriage laws a gender neutrality that really cha:nges those laws in- in no way other than to make sure that ah the constitutional principle of equality and liberty is honored across the marriage laws. It's similar to what the legislature accomplished in ah- in it's ah Cha- Chapter one where it sets out its rules of construction. And to deal with gender inequality as to men and women across the statutory framework, it stipulated a number of things including that whenever the pronoun he appears in the statutory framework it is to be read

also as she. In that way um equalizing the two groups. Be very similar to what the court did here. Although it's easier here in a way because in Tomartio uh the court had to make some decisions as to whether or not to uh disadvantage both men and women or advantage both women- men and women. For example with ah there was a proof of dependency requirement built in to the worker's compensation statute. And the question was, do we do we put that proof of- proof of dependency on both men and women or do we take it away from both of them. Here the court is not faced with that at all. It's just a neutrality concept across the um marriage laws.

JJL: That trivializes the state's argument though Mr Buckel. I mean this is not just changing pronouns in the statute. It's changing historical understanding of what marriage has- has been in the laws of New Jersey. Since the MT decision written by Justice Handler when he was then a judge. I- everyone understood that's exactly how New Jersey's laws have been operating

MrB: Well this court has confronted such historical exclusions of similar magnitude. And I would- I would take the court back to the Grady case when the court examined what mentally incapacitated individuals had been through over the years in terms of the proclution of their exercise of liberty with regard to the decision to sterilize. Similie- in the Saunders case the court was examining whether or not unmarried individuals share the liberty interests of married individuals in terms of matters of sexual intimacy. And the court made very clear that the examination is as to the liberty interests shared by all. That the nature of the inquiry must look at individuals across the board, all human individuals across the board

JBTA: I- I- I- thought what Justice LaVecchia was suggesting is the state is- is basically arguing that issues of great social moment, that will bring about tremendous transformation in our social economic and political system, is- is best left to the elective branches of government. What do you have to say about that?

MrB: Wel[l

JBTA: [Thats what the state's going to argue when it gets up to the lectern

MrB: When it comes to issues such as that Your Honor, that is precisely when if the question is a constitutional one that the court must step in. Because that is what implicates our American system of government I think more than anything else in- in many ways [The court

JBTA: [the state the state's going to argue that seven people or four people on this court shouldn't make the choice for eight and a half million people particularly where the l legislature has made great s- s- strides towards trying to equalize the lives of- of gay people. What do you have to say?

MrB: I have to say that this court has consistently found that the New Jersey constitution means something. And that the court will play the role of defining for uh- finding where those lines are drawn by the constitution and consistently applying them. Um and controversy- controversy does not change that. Secondarily though Your Honor(.) um its important to point out where we are in the discourse in New Jersey. The state repeatedly suggests uh that this is quite controversial when in fact it was in the early nineties that the legislature added sexual orientation for the law against discrimination. And we come forward to the year two thousand four where the legislature has recognized that same sex relationships are important to respect and reinforce with a legal status.



- JDTP: But doesn't that undercut your argument? Because the legislature appears to be considering this issue and over time has made strides in addressing it. And wouldn't in that circumstance, wouldn't it be appropriate for the court to hold back and let the legislature do what it's supposed to do. And it is- it certainly has indicated, that it is concerned about this issue and that it is over time gradually dealing with this issue.
- MrB: (.5) Our we would far preferred Your Honor if the legislature had passed an open marriage law making sure that this discrimination had ended and that all citizens of New Jersey could exercise the right to marry. That would have been preferable. But what has happened is that the legislature has made a choice. It has made a classification. It has closed the gate to a group of citizens within this state. And a constitutional question is presented. And when it comes to constitutional questions which relate to the dignity and the worth of individuals, which relate to whether or not equality truly means something. Uh this court has always stepped up to the plate. Consistently so. And sh- should do so here as well
- JBTA: Put differently you're saying that the enforcement of these fundamental rights trumps jurisdictional disputes. Is that fairly said?
- MrB: I- I- beg your pardon [s
- JBTA: [The enforcement of these fundamental rights that you are advocating(.) trumps jurisdictional disputes for lack of another phrase between the executive and the jud- and excuse me between the legislative and the judiciary branches. Not that there's a dispute but as between the two we should exercise jurisdiction?
- MrB: That's correct Your Honor. I mean another way to put it is that in our system of government with checks and balances, it is precisely at a moment like this when the court steps in to determine if the legislature has crossed a line. The legislature is left to do its important job on most occasions but when the constitutional question is presented, it's one that the court answers ((throat clearing)) (1.0) Unless that Your Honors have other questions I wo- may I close? Over the past four years the plaintiffs have often read and heard the state to say in its defense that it does not doubt the sincerity of plaintiffs' relationships. That rings hollow for the plaintiffs. They do not seek the state's approval but instead are in this courtroom today to ask to be free of the state's label of unworthiness. We respectfully request that the court restore them to their full citizenship under the New Jersey constitution. Thank you.
- JDTP: Thank you counselor.