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Paul van den Hoven

Utrecht University, Utrecht Institute of Linguistics

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Mimetics in judicial argumentation: A theoretical exploration

PAUL VAN DEN HOVEN

*Utrecht Institute of Linguistics
Utrecht University
Muntstraat 2a, 3512EV, Utrecht
The Netherlands
p.vandenhoven@uu.nl*

ABSTRACT: To resolve a conflict of opinion regarding the past it is inevitable to present a reconstruction of that past, explicitly or implicitly. This we call the *mimetic* element. On an abstract level, a complete argumentation in the genus iudiciale requires a start that is mimetic and a follow-up that is diegetic. The question to be discussed is whether mimetic elements need to be formatted as sets of propositions and if so by whom.

KEYWORDS: diegetics, evidence, judicial argumentation, mimetics, proposition, visual argumentation,

1. INTRODUCTION

General argument theories show only marginal attention for the argumentative function of non-verbal discourse elements such as images, just as they show marginal attention as well for narrative discourse. Looking at forensic argumentative discourse this minimal attention for images and narratives, and sometimes even the hesitation to accept images and narratives as means of argumentation altogether, is surprising because these discourse formats play a central role during the stage in which a case is introduced and the facts are discussed. It may actually be this very fact that offers an explanation for the marginal attention general argument theories tend to pay to images and narratives because the introductory stage in which the objects, events, relations relevant to the argument are presented is usually also neglected in general argument theory, or even considered not to be part of the argumentative discourse at all. In this paper, it will be argued that this lack of attention for the *mimetics* of argumentation is regrettable, both theoretically and practically. Focusing on the mimetics raises questions concerning the dominant 'propositional' format of argumentation assumed to be essential for argumentative assessment.

It is difficult to substantiate the negative claim that only marginal attention is paid to images and narratives and that there may sometimes even be a hesitation to accept these as modalities in argumentative discourse. Indeed, there are important exceptions. In 1982, Fisher and Filloy claim that there are arguments in narrative forms, even in drama and literature. Subsequently, Fisher develops his test for narrative reason, including narrative probability and narrative fidelity (Fisher, 1987). A debate develops (Rowland, 2009). Oldenburg and Leff (2009, discussed in Govier & Jansen, 2011) raise the question whether telling an anecdote can have

argumentative force. In the debate about the issue whether images can convey arguments there are a number of protagonists that would answer this question in the affirmative (see Van den Hoven, 2012a). Groarke (2002) tries to develop a set of criteria to assess images as arguments. But still, the core of argument theory finds its object and its examples in discourse in which more or less orderly sets of verbal utterances are assumed to convey single propositions that are more or less clearly related to a standpoint¹.

In legal contexts, we find there is more of a debate going on about narrative structures² and there is a substantial – be it predominantly critical – literature about the use of images in this discourse to defend a position in a legal procedure³. The fact that in legal discourse the mimetic element cannot be overlooked because it is crucial in arguing a case may offer an explanation for this difference in the attention paid to images and narratives.

In this paper, I will first elaborate on the difference between the mimetic and the diegetic elements of argumentative discourse. Subsequently, I will argue that images and narratives are very well suited to conveying mimetic elements, but that these two modalities also share the characteristic that they tend to merge mimetics with diegetics in a such a way that it is hard to disentangle the two.. This is caused by the fact that both discourse modalities are far removed from the modality that conveys more or less clearly distinguished and ordered sets of propositions. The question to be discussed then is whether mimetic elements presented in argumentative discourse need to be formatted as sets of propositions and if so by whom? This discussion illustrates why the mimetics in argumentative discourse - and the modalities that are often used to present these mimetic elements - deserve more attention than they are currently being given in general argument theory.

¹ Sometimes it is not easy to distinguish whether scholars advocate the possibility of multimodal or purely visual arguments. For example, Dove (2012) seems to distinguish the evidential argument that interprets an image from the image itself, excluding the image itself from the argument as merely verifying the truth (p.228). Later, however, he seems to acknowledge that the image as well as its interpretation together is the argument (p.231, rejecting fig.15.3). This illustrates exactly the point I am making in this paper.

² This debate is given a strong new dimension, in my view. with a crucial publication by Jackson (1988). in which it is argued that the presentation of seemingly propositional facts is actually guided by the pragmatics of a narrative act. Later there are important contributions from forensic psychology showing how narrative structures determine the frame in which facts are placed, selected, completed, evaluated (Crombag, & Israels, 2008; Wagenaar & Crombag, 2005; Wagenaar, van Koppen & Crombag, 1993; with an important comment by Twining (1995)). Bex 2009 tries to combine an 'argumentative' approach with a narrative approach while Kjus, building on Jackson (1982) as well as on Bennett & Feldman (1981) and Brooks & Gewirtz (1996). elaborates on the more fundamental thesis that narratives *are* arguments.

³ This literature is discussed in Van den Hoven (2010). Important are the reviews in Bright & Goodman-Delahunty (2004, 2006) as well as in Douglas, Lyon & Ogloff (1997) and Feigenson (2010). A typical study in which the argumentative value of images is analyzed as a problem is Kassin & Garfield (1991). A synthesis is found in Feigenson and Spiesel (2009).

2. THE MIMETICS OF ARGUMENTATIVE DISCOURSE

Going through text books on argumentation theory one comes across numerous examples. Closer inspection of a great many of them reveals that knowledge of the object or situation argued about is either presupposed, introduced in an introduction of the excerpt, or presented as part of the excerpt but excluded from argumentative analysis. The classic textbook example par excellence illustrates this point quite clearly. The argument adduced for Socrates being mortal is the fact that he is a man. The sentence that Socrates is a man needs no further introduction or clarification because the audience is assumed to already have a mental representation of Socrates.

What if an audience were to associate the term *Socrates* with a software program, for instance, or an institution of the European Union or a fund for academic scholarships? None of these are human. The point is that in this typical example Socrates is already presupposed as being present in the discourse world as a mimetic object. We can thus picture him in our minds and agree with the speaker that he is human. But what if no mime of Socrates is present yet? In that case, it will have to be introduced into the discourse world, perhaps by using an image. Having established this, we can now rephrase the informal observation made at the beginning of this paragraph: glancing through text- books, generally speaking, one finds that examples tend to presuppose the mimetics or isolate the mimetic elements in some preceding introduction or concentrate on what seem to be the diegetic elements of the discourse. I use the term diegetic – to contrast it analytically with mimetic – for those elements in which the discussant qualifies or evaluates objects or events in the discourse world.

I am fully aware of the fact that this distinction between mimesis and diegesis is not without certain problems. That in fact is the main reason why argument theory should not neglect the mimetics⁴. If analytically and in practice the two elements could be distinguish and separated without any problem, indeed one could call it a matter of choice whether to include mimesis within the scope of argument theory or to exclude it.

Lawyers in court rooms cannot do what text books on argumentation theory do. From an ideological point of view, the discourse world is mimetically empty at the start of a case. All the elements that a lawyer considers relevant to the case - objects, events, relations - need to be introduced in the discourse world, usually accompanied by the claim that such elements are indeed part of and relevant to what 'really' happened, that is that the mimetics of the discourse world as presented are 'true'. These mimetic acts – the lawyer claims to 'mime' reality in his discourse – are prototypically performed with the use of objects, images, narrative descriptions by witnesses, narratives by the lawyer himself. Legal argumentation distinguishes the phase of introducing and establishing the facts, guided by the rules of evidence, from qualifying the facts in legal terms and from attaching legal effects to these

⁴ This is also the main point in Wagenaar, van Koppen & Crombag (1993); narratively organized facts invite diegetic elements; if one is presented as factually good, his opponent tends to be evaluated as bad without supporting facts being adduced, and so on.

qualified facts. The last two steps are clearly diegetic. General argument theory seems designed to deal with these last two steps, but seems to more or less exclude the part of the first step where the relevant phenomena are introduced, the mimesis.

3. THE MIMETIC FORCE OF IMAGES AND NARRATIVES

We can be brief about the fact that the pictorial modality is superior to words in evoking images in the mind of the audience. Pictures are much more efficient and effective to introduce a crime scene into the discourse world than a merely verbal description. To introduce a document in the discourse it is much more effective to submit the document or a photocopy of it than to describe it at length. The difference is clear.

By the same token, narrative discourse is mimetically superior to a discourse of utterances conveying propositions that are more or less ordered as premises and conclusion in argument schemes⁵. By indicating an underlying narrative discourse structure, a discussant evokes the narrative scheme in the mind of the audience. A narrative scheme assumes a syntagmatically focused causal chain as well as a reason to tell, often called the epilogue (Brannigan, 1992, based on Labov). All acts in the causal chain can be characterized as constituting a pentad structure, a pentad of act, agent, agency, scene and purpose (Burke, 1945). All this implies that the activated narrative scheme makes the audience construct a tightly connected web of information that far exceeds the content of the utterances that are presented to the audience. As I argued before (Van den Hoven, 2012a). the utterance “Suspect hit his daughter on her wrist with a hammer” in isolation can be read as conveying a single proposition, to be proved. Presented as an element in a narrative, however, it is the act of the villain that needs to be responded to, that disturbs the equilibrium a family should live in, that characterizes the patient involved as a victim, that invokes almost visually an entire scene sharply contrasting with the prototypical scenes the audience relates to father–daughter interactions, that raises sets of questions and speculations about what must have preceded to end up in this horrific climax.

Avoiding the term holistic, the important point to make is that like an image, the narrative conveys more than a delineated set of propositions. Not only are additional propositions inferred – this is also the case in the most strictly ordered, purely diegetic, prototypically argumentative discourse as we find it in the textbooks – but a tight network of relations is evoked that is both creative and productive and not strictly delineated. This is the problem that is discussed by legal psychologists Wagenaar, van Koppen, and Crombag (1993); an evoked narrative framework guides expectations because it is a tight syntagmatic (the chain) and paradigmatic (the pentad structure of act - agent - agency- scene - purpose) web of relations. It may therefore block alternative scenarios and limit hypotheses about what might possibly have happened; hypotheses about the mimetics of the case.

⁵ If that is possible at all. In Van den Hoven 2012, I argued for a position that the interpreter will still read a narrative in a series of proposition. This is also a difficulty in the distinction Bex (2009) tries to make.

This in itself negative aspect illustrates the mimetic superiority of the narrative over a set of descriptive propositions.

4. MERGING MIMETICS AND DIEGETICS

In forensic discourse, the mimetics of the discourse world have to be introduced before they can be proven. Once proven, arguments can be put forward to propose legal qualifications. Once qualified, legal effects can be attached. Formulated this way, it appears that we have a distinguishable series of steps. Images and narratives play a major part in the first step. Stylized like this, one could take the theoretical position that the mimetic introduction of Socrates can be distinguished from the 'real' argumentation.

When argument theory takes a difference of opinion as its point of departure, this suggestion is even stronger. In such theories, the final standpoint is the starting point for a reconstruction of the argumentation. We thus work backwards from the final standpoint. Once we have reached the premises that underpin the truth claims about the facts, we can declare the reconstruction completed. The image, the story as such is not part of the argument then, but the propositions about the image or the story are. Perhaps one will still consider utterances such as: "That is what the picture shows", or "That is what the witness clearly states" to be part of the argumentation, but that is as far as it goes. This means that in the end diegetic statements concerning the interpretation of the images are part of the argumentation, and diegetic statements concerning the interpretation of the narratives, but not the images and narratives as such.

This reflects the ideology of legal theory that prefers to clearly separate these mimetic phases in the discourse from the 'following' phases. This approach does however leave a major problem unsolved, a problem that concerns not only argumentative discourse in general, but even judicial discourse submitted to the rules of court room procedures. The literature mentioned above on the use of images in courtroom procedures and on narrative in criminal cases, but also the theoretical work of Jackson (1988) emphasizes the pragmatics of courtroom communication in which not a clear distinction is in fact made or can be made between mimetic introduction and diegetic comment. The discourse does not start with the mortality claim about Socrates; the discourse starts with a highly elaborated web of images of and stories about Socrates; that also explains why this prototypical example is so non-prototypical when it comes to real-life argumentation. As Blair observes, discussing the general question whether images can convey arguments, "(...) the conditions of interpretation of visual expression are indeterminate to a much greater degree than is the case with verbal expression" (Blair, 2012: 210). We can add that this also applies to narratives, whether conveyed by multimodal discourse or by verbal formats.

The major point is that images as well as narratives, and a fortiori narratives conveyed by multimodal discourse, communicate a (an inextricable) mixture of mimetic elements and diegetic elements. If in the narrative structure the one agent is characterized as honest, and this is underpinned by evidence, this automatically suggests that his opponent is dishonest, without this being explicitly stated as such.

The image of Socrates is a means to introduce Socrates as an element in the discourse world, but at the same time the selection of the specific picture is an invitation to attribute certain features to him, denying others. “The moment I showed my client as a salesman in his shop, I saw the attitude of the judge change, although this occupation was already known to him from the files”, a practicing lawyer assured me once. An animated reconstruction is a hard to disentangle mixture of modelling the facts and interpreting the facts; the presentation of such a reconstruction complicates the merging of mimetics and diegetics even more. And so on.

5. REDUCING IMAGES AND NARRATIVES TO ORDERLY SETS OF PROPOSITIONS

In courtroom procedures, techniques have been developed to extract sets of propositions from images and narratives and to identify unambiguously the protagonists for these propositions. In Dutch legal practice, images can be brought in. However, one of the participants is usually obliged to produce discourse in which is stated what can be seen on the image and this statement subsequently replaces the image as part of the argumentation. After telling a story, a witness can be interrogated, extracting sets of propositions. This seems to solve the problem in the courtroom.

How relative this is becomes clear from legal psychological and legal semiotic studies that were mentioned above. What may be more convincing even in this respect is the behaviour of experienced lawyers. As we said, images can be acknowledged as part of the files, stories can be told, subsequently to be ‘replaced’ by sets of propositions. However, an experienced lawyer in his concluding remarks will present the images again as images and put the ‘propositional facts’ back in a narrative structure (Kjus, Feigenson & Spiesel, 2009, about the Moxley case).

This shows that replacing the tight suggestive networks by sets of propositions is not the ultimate solution in judicial discourse. Argument theory aims at an assessment of the reasonability of the discourse. If the stories remain relevant for the diegetic propositions extracted from them, images and stories should be phenomena argument theories deal with explicitly.

6. CONCLUSION

A fortiori this is the case in many other discussion settings in which procedural rules do not oblige participants to specify what propositions should be inferred from the images or from the narratives. Outside the courtroom the problem is even more elusive. This intermediary step of extracting propositions, regulated by discussion rules, is usually missing. This raises the question whether mimetic elements need to be formatted as sets of propositions and if so by whom? Neglecting this issue results in a situation in which analytically we cannot decide between the straw man fallacy and the fallacy of hedging. When one of the participants denies being accountable for a certain argumentative reconstruction, is he justified to do so (the antagonist commits a straw man fallacy) or is he escaping his argumentative commitments

(hedging)? This depends entirely on the interpretation of the image or the narrative (Van den Hoven, 2012a).

The implication of this for argument theory is that it either needs to develop reconstruction procedures that can deal with the mimetics of argumentation (as we tried to propose in Van den Hoven (2012b) and in Van den Hoven & Yang) or it needs to develop argument schemes such as argument by narration and argument by image, including narrative theory and visual semiotics as its elements.

Although some semiotic theories regarding these areas of images and narratives claim a fairly straightforward semantics in the visual domain (Kress & Van Leeuwen, 1996). the dominant insight seems to indicate that argument theory may be confronted with a necessary inclusion of domains in which the concept of propositionally may be problematic. This of course is also indicated by legal psychological studies. Although this raises interesting theoretical problems, it may also reflect that argument theory needs to connect more closely to argumentative practice as one can observe that problems with propositionally actually exist.

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