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The Hidden Role of Pathos in Toulmin's Layout of Argument

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ABSTRACT: Stephen Toulmin's use of a judicial model for argumentation in *The Uses of Argument* means that he is introducing the complexity of rhetorical appeals to the hitherto logic-based study of argumentation, including the appeal to the emotions, pathos. Toulmin's acknowledgment of the role of the emotions in practical reasoning moves from being implicit in *The Uses of Argument* to becoming more explicit in Toulmin's *Return to Reason*: 'Warm hearts allied with cool heads seek a middle way between the extremes of abstract theory and personal impulse' (2001, p. 214). This paper analyzes the hidden role of pathos in Toulmin's distinction between rationality and reasonableness, particularly as it appears in *Cosmopolis* and his later works. To Toulmin's characterization of the oral, particular, local, and timely nature of reasonableness, I add Peter Goldie's notions of intelligibility, appropriateness, and proportionality of emotions to describe what role emotions play in reasonable argumentation. Using as a case study the victim impact testimony in Timothy McVeigh's Oklahoma City bombing trial, I argue that in certain situations and fields of argumentation, pathos—or data with a high emotional content—is warranted in a reasonable argument, and that it would be unreasonable to exclude such data.

KEY WORDS: reasonableness, Stephen E. Toulmin, pathos, emotions, rationality, victim impact testimony

INTRODUCTION

One of the ways that Stephen Toulmin distinguishes his project in *The Uses of Argument* (1958) from standard logic theory is to change the model of reasoning on which argumentation theory is based. Logicians, he argues, take as their model mathematical reasoning: 'an argument is made of propositions, and the logician's objects of study are the formal relations between propositions; to ask whether an argument is valid is to ask whether it is of the right form, and the study of form is best undertaken in a self-consciously mathematical manner' (1958, p. 6). Toulmin posits, instead, a jurisprudential model of argumentation: 'Logic (we may say) is generalised jurisprudence. Arguments can be compared with law-suits, and the claims we make and argue for in extra-legal contexts with claims made in the courts' (1958, p.7). Indeed, Toulmin rejects an analogical relation between jurisprudence and argumentation as being too weak, arguing instead that 'law-suits are just a special kind of rational dispute, for which the procedures and rules of argumentation have hardened into institutions' (1958, pp. 7-8). Using judicial argumentation as a model helps Toulmin clarify points about field dependency and the layout of arguments, as well as demonstrate the complexity of practical arguments in non-theoretical situations.

Real-world models, however, have a way of bringing unintentional as well as intentional features into the discussion. Aristotle claims that judicial cases are more open to irrelevant emotional appeals than legislative deliberations (trans. 1991, sect. 1354b), and while he may be overstating the disinterestedness of legislators, actual court cases often show a tension between the emotional investments of participants and the legal limitations on permissible considerations. What judicial argumentation shows us is that the outcome of trials is not always dependent on a

strictly rational weighing of the facts and the law. Trial by a jury of one's peers means that the human element creeps in.

In this essay I argue that Toulmin's understanding of argumentation and reasonableness open the door to the consideration of emotional data in argumentation. I then examine the role of pathos in rhetoric, and connect Toulmin's understanding of reasonableness being oral, particular, local, and timely to Peter Goldie's discussion of the intelligibility, appropriateness, and proportionality of emotions. Finally, I demonstrate how this framework of the role of emotion in argumentation applies to arguments about victim impact testimony in the 1997 capital trial of Timothy McVeigh for bombing the Alfred R. Murrah building in Oklahoma City. I conclude that argumentative pathos is not just an attempt to sway the jury or audience, but can function as a mechanism to insure the reasonableness of important deliberations.

1. TOULMIN ON ARGUMENTATION AND REASONABLENESS

There are two senses in which Toulmin's understanding of argumentation leaves open the possibility of pathos in practical argument. In *The Uses of Argument*, Toulmin is more concerned with the structure of substantial arguments and showing why they cannot be reduced to analytical terms than with exploring the characteristic concerns of practical argumentation. However, while he does not directly address the possible role of pathos in practical argumentation, Toulmin implicitly leaves room for it in his description of the field-dependence of warrants and their backing. In some areas of argumentation, warrants allowing emotion-laden 'data' are accepted, and in some they are not. Thus, in mathematics—Toulmin's archetypical example of a field operating in the purely logical realm—emotions are irrelevant; it does not matter to the formal validity of a proof whether the mathematician or her audience are angry, prejudiced, or patriotic when they write or read it. A field in which emotion-allowing warrants are rife is politics: in the 2004 U.S. presidential election, for example, all the intellectual argumentation about issues such as the economy, civil liberties, and the environment could not overcome the insistent drumbeat of emotional appeals to 'moral values' and the 'war on terrorism.' A minor example of this in *The Uses of Argument* is his discussion of 'you can't talk about a fox's tail': while Toulmin characterizes this as a 'terminological impropriety' (1958, p. 25), it might also be discussed as an appeal to class prejudice—as classic an example of pathos as one could wish for. More important, perhaps, is his repeated use of judicial parallels and examples throughout the text, which I argue is a venue through which emotion-laden data enter the study of argumentation. Clearly, in the case of victim impact testimony that I discuss here, emotionally laden testimony becomes part of the judicial process.

In his later works, Toulmin's disassociation of idealized logic from working logic is expanded into a distinction between rationality and reasonableness. Rationality is held up by modernist philosophers and scientists as the model or ideal for reasoning: it is timeless, universal, impersonal, and highly theoretical. In *Cosmopolis*, Toulmin (1990) traces its development as an intellectual ideal back to the New Science initiated by Isaac Newton and the New Philosophy initiated by Rene Descartes. Toulmin argues that the closer rationality—in the form of a 'science' of logic—gets to universal, timeless certainty, the further away it is from being able to meaningfully describe practical reasoning in everyday life (1958, pp. 2-3). Hence, he distinguishes a different intellectual ideal, reasonableness, which he associates with humanist philosophers such as Michel de Montaigne. Reasonableness encompasses the way that reasoning happens in the world: it is often oral, retaining its rhetorical connection to speaker and audience;

particular, in that it deals with specific cases rather than abstract principles; local, in Clifford Geertz's sense of being culturally and historically specific; and timely, in that it is bound by occasion and exigency (1988, pp. 338-341; 1990, pp. 186-189). Reasonableness, applicability to daily life, is exactly what Toulmin argues logic lost as philosophers pursued an idealized, theoretical logic divorced from the vagaries of imprecise language and specific situations. As I will argue in the next section, bringing human situatedness into considerations of reasonableness necessarily brings in human emotions—not as destroyers of reason, as they have often been characterized in both past and present—but as elements in the reasoning process.

My own sense of where pathos fits into reasonableness is confirmed in the 2001 book *Return to Reason*, where Toulmin finally characterizes his ongoing critique of the logical ideal of rationality as a 'rhetoric of philosophy' (p. 12). Here, Toulmin associates 'practical philosophy'—dedicated to an ideal of reasonableness—with clinical practice and social action. His description of a 'practical' philosopher is one 'who sees philosophical theories as relevant to our problems not because they provide formal solutions to abstract queries, but because they confer practical and concrete meaning on the lives of individuals, and families, and political communities' (2001, p.214). Finally, then, Toulmin grounds reasonableness in an almost Ciceronian union of rhetoric and philosophy: 'The future belongs not so much to the pure thinkers who are content—at best—with optimistic or pessimistic slogans; it is a province, rather, for reflective practitioners who are ready to act on their ideals. Warm hearts allied with cool heads seek a middle way between the extremes of abstract theory and personal impulse' (2001, p. 214). With this eloquent witness to reasonableness, I would like to explore for a bit the role of pathos in rhetoric, and what that tells us about the use of the emotions in argumentation.

2. PATHOS AND CONTEMPORARY VIEWS OF THE EMOTIONS

From the beginning of codifications of rhetoric, the use of appeals to the emotions has been explained, contested, and, often, excoriated. Aristotle considers arousing pathos, emotion, as one of the three means of persuasion created by the speaker in the body of his or her speech (trans. 1991; sect. 1356a), the others being logos, the reasoning in the speech, and *ēthos*, an appeal to the credibility and authority of the speaker. Although he warns against 'warp[ing] the jury by leading them into anger or envy or pity: that is the same as if someone made a straightedge rule crooked before using it' (trans. 1991, sect. 1354a), he proceeds in Book II of *On Rhetoric* to tell speakers exactly how to do that. Aristotle analyzes how to use the emotions in argumentation according to three characteristics: the state of mind of the person experiencing the emotion, the object of the emotion (against or toward whom or what it is experienced), and the reasons we feel emotions (trans. 1991, sect. 1378a). Jeffrey Walker describes Aristotelian pathos as 'neither wholly propositional nor strictly 'syllogistic', nor is it wholly under the rule of *logos*, reason....But because the process is describable, one can still contrive a *technē/pharmakon* [art/drug] that can, at least in principle, produce a *katharsis* [manifestation or forcing-out] of *pathos*—not of any *pathos* whatsoever at any time but of the specific *pathos* or the *pathē* latent in the emotional potentialities of a given person at a given moment' (2000, p. 81). The use of pathetic appeals in rhetoric, then, is both an insertion of the facts of human emotions into an argumentative structure and the use of the emotions to sway the audience's judgment in the desired direction.

One could argue that these are not separate enterprises. Perelman and Olbrechts-Tyteca, for example, argue that we cannot think of humans as being 'made up of a set of completely

independent faculties' (1958/1969, p. 47). They therefore claim that the strict distinction between logical argumentation aimed at reason and persuasion aimed at the emotions is false, a matter of degree rather than kind. So one contribution that rhetoricians make in discussing the role of the emotions in argumentation is to accept a more nuanced relation of emotions to reason, rather than seeing them in necessary opposition to one another. This attempt to balance emotions and reason, rather than denying the relevance of the former to argumentation, will appear in the examination of victim impact testimony, in that the court is aiming for emotions playing a role in structured argument without their overwhelming the reasoning process.

What we need, then, are criteria by which emotional data can be warranted in argumentation. An account of the emotions that is particularly useful for this discussion of the reasonable use of emotional appeals is that of Peter Goldie, who finds three notions particularly 'important in understanding, explaining, and predicting what we think, feel, and do in emotional experience: ... intelligibility, appropriateness, and proportionality' (2000, p. 3). Intelligibility has to do with the 'relationship between an emotion and the beliefs involved' (2000, p. 20): we find it intelligible if someone is afraid of something they believe to be dangerous. For example, if someone is 'irrationally' afraid of dogs, that fear might be unintelligible to a dog lover until it is explained that she was attacked by a dog at a young age. Goldie also claims that 'it is possible for an emotion to be intelligible but either inappropriate or disproportionate given the beliefs which putatively ground it' (2000, p. 23). Appropriateness and proportionality are particularly culturally defined, so that the loud displays of grief common to many cultures seem excessive or unseemly to people from other cultures. The separability of these three notions makes them much more precise than a blanket attribution of rationality or irrationality to emotional states; what someone might judge as an 'irrational' emotional response could be that the relation between the stimulus and response is unintelligible or that the response seems disproportionate to the stimulus or that the response seems inappropriate given the stimulus. What we will find when we look at victim impact testimony is that intelligibility, appropriateness, and proportionality become the criteria used in the courtroom for whether victim impact testimony is to be allowed and what specific testimony will be allowed.

Goldie is not here using the term 'rationality' in the specific way that Toulmin uses it, in contrast to reasonableness, but his three notions of intelligibility, appropriateness, and proportionality do relate to Toulmin's characterization of reasonableness as being particular, local, and timely. Proportionality and appropriateness are inherently criteria belonging to particular situations situated in time: the exuberance displayed at sporting events, for example, would be inappropriate at a funeral or an academic symposium and disproportionate if displayed at a wine-tasting or symphony. The culturally bound nature of proportionality and appropriateness are by definition part of Toulmin's description of reasonableness being 'local': the particular exuberance exhibited by soccer/football hooligans is generally considered excessive even in the United States.

These three notions, intelligibility, proportionality, and appropriateness, provide the criteria that are used in courtrooms in the U.S. to determine whether emotionally laden testimony is allowable. What will become evident in the next section is that two balancing acts are taking place in the admission of this kind of evidence during the Oklahoma City bombing trial: finding a balance between admitting emotional evidence in the service of argumentation without overwhelming the jury's reasoning process with it, and the balance between the appropriateness and proportionality of what emotion can be brought into a courtroom and the appropriateness and proportionality of emotions on the scene and in the aftermath of the bombing itself. Testimony

about emotional impact tries to make it intelligible without allowing emotions to override reason in the jury's deliberations.

3. EMOTION AND THE OKLAHOMA CITY BOMBING TRIAL

To illustrate how emotion is seen as a part of practical reasoning in contemporary U.S. society, I would like to examine the deliberations over the use of victim impact testimony during the trial of Timothy McVeigh for bombing the Alfred P. Murrah federal building in Oklahoma City, Oklahoma, USA on April 19, 1995. Although 168 people died as a result of the blast, including 19 children who were in a daycare center in the building, McVeigh was charged with only eight counts of first-degree murder for the federal agents killed, in addition to one count of conspiracy to use a weapon of mass destruction, one count of use of a weapon of mass destruction, and one count of destruction by explosives (*United States v. McVeigh* 1998). An issue that came up during the trial was what victim impact testimony would be allowed. The term 'victim impact testimony' covers three types of testimony in the sentencing phase of U.S. death penalty trials: testimony given by witnesses as to the immediate and long-term effects of the crime, testimony about the previous lives of the victims of the crime, and summary statements made by prosecutors concerning these two. In using this case, I want to acknowledge the ethically problematic situations in which victim impact testimony is used: it is used by the prosecution to persuade juries to impose the death penalty on a defendant, most often for the crime of first-degree murder. Most developed nations do not have the death penalty and consider its use in the U.S. as barbaric.¹ I do not use the example of victim impact testimony because I advocate the death penalty; rather, I am using it because it provides a clear case of reasoning about the use and limitations of emotional testimony, and thus provides us with a case study that will illuminate the role of pathos in Toulmin's analysis of argumentation.

The question of whether victim impact testimony is appropriate in judicial argument highlights the contradictory warrants that can exist in any field of argumentation. If the field of argumentation about sentencing decisions is defined strictly in terms of the crime and the defendant, then victim impact testimony is prejudicial, unwarranted. If, however, the field is defined more broadly—taking into account the predictable effects of the crime on family, associates, and society—or more adversarially—allowing aggravating circumstances to be testified to because extenuating circumstances are testifiable, then victim impact testimony is allowable. The United States has had a mixed history concerning the use of victim impact testimony. In 1987, the Supreme Court ruled in *Booth v. Maryland* that victim impact testimony is impermissible according to the Federal Constitution's Eight Amendment ban on 'cruel and unusual punishment' because 'evidence relating to a particular victim or to the harm that a

¹ In the U.S., opinion is mixed about the death penalty. In a December 2004 Quinnipiac University poll, 62% of respondents support the death penalty, a figure which drops to 42% when respondents were given a choice of the death penalty or life without parole (46%). An earlier Gallup poll (May 2003) shows an ideological divide about the death penalty: 'among ideological conservatives, 62% favor the death penalty and 36% prefer life imprisonment. Among ideological liberals, 37% prefer the death penalty and 60% prefer life imprisonment' ('Summaries of Recent Poll Findings', 2005). Jurors in a death penalty case would be examined as to their views on the death penalty and, I assume, adamant opponents of the death penalty would be eliminated from the pool. It is interesting that judicial votes in the *Payne v. Tennessee*, which would presumably make it easier for prosecutors to get the death penalty, did not fall along ideological lines: while the three dissenters, Justices Marshall, Blackmun, and Stevens, are all liberal-to-moderate, concurring votes were cast by justices as diverse as David Souter, a moderate liberal, Sandra Day O'Connor, a moderate, and Antonin Scalia, a conservative.

capital defendant causes to a victim's family does not in general reflect on the defendant's 'blameworthiness' and 'only evidence relating to 'blameworthiness' is relevant to the capital sentencing decision' (Payne v. Tenn., 1991). Earlier courts had ruled that the defendant was allowed to present a wide range of evidence about mitigating factors in order to show the defendant as a 'unique human being'; part of the ruling in Booth says that 'the obligation to consider the defendant's uniqueness limits the data about the crime's impact, on which a defendant's moral guilt may be calculated, to the facts he specifically knew and presumably considered. His uniqueness, in other words, is defined by the specifics of his knowledge and the reasoning that is thought to follow from it' (Payne v. Tenn., 1991). This ruling was extended to include prosecutors' statements in a subsequent ruling, South Carolina v. Gathers in 1989 (Payne v. Tenn., 1991).

Both of these rulings were overturned in 1991 by the Supreme Court in Payne v. Tennessee, when the Court found that 'the assessment of harm caused by the defendant as a result of the crime charged has long been an important concern of criminal law' and 'victim impact testimony is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question' (Payne v. Tenn., 1991). The decision also acknowledged the possibility of misuse of victim impact testimony, but allowed that 'in the event that victim impact evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the due process clause of the Fourteenth Amendment provides a mechanism for relief' (Payne v. Tenn., 1991). Victim impact testimony is needed to show 'each victim's 'uniqueness as an individual human being''; the Court found that denying it turns 'the victim into a 'faceless stranger'', 'deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder' (Payne v. Tenn., 1991). In a concurring opinion, Justice Souter deals at length with the question of the defendant's knowledge about his or her victim. I will quote this long passage because it demonstrates the justification for allowing victim impact testimony:

Murder has foreseeable consequences. When it happens, it is always to distinct individuals, and, after it happens, other victims are left behind. Every defendant knows, if endowed with the mental competence for criminal responsibility, that the life he will take by his homicidal behavior is that of a unique person, like himself, and that the person to be killed probably has close associates, 'survivors', who will suffer harms and deprivations from the victim's death. Just as defendants know that they are not faceless human ciphers, they know that their victims are not valueless fungibles; and just as defendants appreciate the web of relationships and dependencies in which they live, they know that their victims are not human islands, but individuals with parents or children, spouses or friends or dependants. Thus, when a defendant chooses to kill, or to raise the risk of a victim's death, this choice necessarily relates to a whole human being and threatens an association of others, who may be distinctly hurt. The fact that the defendant may not know the details of the victim's life and characteristics, or the exact identities and needs of those who may survive, should not in any way obscure the further facts that death is always to a 'unique' individual, and harm to some group of survivors is a consequence of a successful homicidal act so foreseeable as to be virtually inevitable. (Payne v. Tenn., 1991)

This passage speaks to the value of victim impact testimony in making the impact of first-degree murder intelligible. Payne v. Tennessee, then, provides the backing for the warrants that allow potentially emotion-laden victim impact testimony in cases like the Oklahoma City bombing trial of Timothy McVeigh.

In what follows, I primarily examine arguments made at the beginning of the sentencing phase of Timothy McVeigh's trial about the admissibility of particular pieces of victim impact

testimony and evidence. In these arguments, we will see how concerns about appropriateness and proportionality are addressed, as well as issues about the probative value of emotional testimony. Opinions on whether Judge Richard Matsch succeeded in allowing only appropriate victim impact testimony vary: John Gibeaut, a reporter for the *American Bar Association Journal*, claims that ‘a stern judge nearly lost control of the proceedings after prosecutors presented a parade of witnesses to describe the blast’s aftermath’ (1997). Ryan Ross, also writing for the *ABA Journal*, characterizes the trial as ‘circus-free’ and ‘no-nonsense’ (1997). As we examine the trial transcripts, the careful scrutiny that Judge Matsch gave the proposed victim impact testimony will become evident.

Matsch himself gives a summary of the issues surrounding victim impact testimony during the preliminary arguments of the sentencing phase. He speaks to the differences between the emotional impact experienced by victims and survivors and the type of evidence allowable by law as follows:

I appreciate the efforts made by Government counsel here to resist what I’m sure is strong effort by those most directly affected here to tell the whole story. I mean, I understand that. That’s part of the response. That is a human response to this event and this—all of the aftermath. But of course, what these lawyers representing the Government know and what they’re doing here is to acknowledge and try professionally to accommodate that interest but also their obligation to the law and to the Court to ensure that this hearing will be conducted in a manner that is consistent with the limitations that the Constitution commands, knowing that those limitations are not at all clear. (U.S. v. McVeigh, 1997)

Matsch is here differentiating between what emotions were experienced by those directly affected by the bombing and what kinds of emotional testimony are appropriate in a court of law. He recognizes that that line is hard to draw, even given the backing of *Payne v. Tennessee*:

Payne v. Tennessee involved, you know, cautions given by every justice who wrote; and almost every justice wrote in that case. And there simply is no clear guidance as to where the line between appropriate, particularly victim-impact testimony ends and an appeal to passion, the human reactions, emotive reactions of revenge, rage, empathy—all those things—begins. So I know that these rulings are not going to be consistent with the views of many; but nonetheless, we have to guard this hearing to ensure that the ultimate result and the jury’s decision be one made as a truly moral response to appropriate information, rather than an emotional response. (U.S. v. McVeigh, 1997)

These are the poles along which the proposed testimony is judged: will it help the jury make a ‘reasoned moral judgment’, or will it ‘risk upsetting the balance between emotion and reason’ (U.S. v. McVeigh, 1997)?² In arguing against various pieces of victim impact testimony and evidence, the defense stresses its emotional content; in arguing for them, the prosecution stresses their factual nature and the fact that they are warranted by *Payne v. Tennessee*. In the following, I examine some of these arguments in light of Goldie’s criteria of appropriateness and proportionality.

The first category of testimony that the defense objected to as being inappropriate concerns the way that victims were going to be portrayed. Speaking for the defense, Richard Burr claims that some of the testimony was eulogistic, ‘overly idealizing, as we all do, in eulogies to our loved ones, idealizing the person and presenting a sentimental view’ (U.S. v. Timothy McVeigh, 1997). Related to that is their concern about ‘memorializing the kind of testimony—or kind of statements that one might make at a funeral, designed to evoke empathetic

² The former quotation is from prosecution attorney Sean Connelly; the latter from defense attorney Richard Burr.

identification with the person who has been lost, not dealing with the facts of the loss' (U.S. v. Timothy McVeigh, 1997). In both cases, the defense suggests occasions in which the evidence would be appropriate (eulogies, funerals) in order to contrast with the inappropriateness of their use in a law court. They also repeatedly, as here, argue that the purpose of the testimony is to inappropriately sway the jury's decision through emotions rather than aid in reasoned decision-making, which would be appropriate in the circumstances. When the defense later argues against testimony as to the careers of two law enforcement officers who died in that it inappropriately 'risks changing the focus in the way that, that Payne and the statute guide against', Judge Matsch asks him whether 'one of the appropriate things to be considered here is the effect of the loss of the life of the victim; the effect in terms of impact on the community.' Defense attorney Burr replies 'in a limited factual way, yes, if there a function that person served that is sorely missed' (U.S. v. McVeigh, 1997). The defense clearly wants the prosecution's case to be strictly limited according to the narrowest possible standards of appropriateness.

The prosecution's answer to these claims about inappropriateness of the testimony is to stress the factual nature of the evidence they were going to present: 'what we intend to do with victim impact testimony is to call some 40 to 45 witnesses...to offer objective factual testimony about the circumstances of the offense and the effects they felt from the offense'; 'what we do intend to offer...is an objective story'; 'it will basically just be very objective, factual testimony' (U.S. v. McVeigh, 1997). This is their response to the defense's claims about over-idealizing and sentimentalizing the victims. They also claim that the brevity of their presentations is a guarantor of their appropriateness. Implicitly comparing their planned testimony to Payne v. Tennessee's balancing of the defendant as a unique individual and the victim as an individual, prosecutor Sean Connelly argues 'the jury will certainly know more about the defendant individually at the end of the process than it knows about any one of these victims or even, I would say, the victims who testify all together' (U.S. v. McVeigh, 1997). If it is appropriate for the jury to get to know McVeigh, Connelly implies, it is certainly appropriate for them to get to know the victims.

Judge Matsch, too, has to make very careful decisions about the nature of what appropriate victim impact testimony would be. He speaks at various times about the 'foreseeability' of the impact: if McVeigh could have foreseen the results of his actions, even if he did not have specific knowledge, then that was one criterion for allowing that piece of testimony or evidence in. A further line that he draws is to exclude evidence that pull in emotional reactions about something other than the bombing. Matsch questions Connelly about some photographs the prosecution wanted to show in the following exchange:

The Court: These are not special occasion photographs. They're just ordinary photographs.

Mr. Connelly: Some may be. One—there will be a couple of wedding photographs.

The Court: No, there won't...

The Court: I have no problem with the family as a unit; but where there is an additional aspect to it, like Christmas or a wedding ceremony, those things have implications that go beyond just what the family unit consisted of. (U.S. v. McVeigh, 1997)

The composition of the 'family unit' is factual; the addition of emotionally laden occasions is inappropriate. Matsch also tries to insure the appropriateness of the proposed testimony by asking the prosecution what function it would serve in argumentation, what claim it would serve as data for: 'What does that go to?' 'What's the value of that? What does it prove?' (U.S. v. McVeigh, 1997). In answer, the prosecution often cited their backing as well as their claims: 'I think it goes to the effect of the offense, and that's under Payne'; 'I think again under Payne...it identifies six of the victims' (U.S. v. McVeigh, 1997).

The defense, prosecution, and judge also speak to the proportionality of the proposed evidence and testimony, not referring to its proportionality with the crime but to its proportionality with the goal of the jury being able to make a reasoned judgment in the case. The defense argues that the prosecution's evidence and testimony would be 'gruesome and graphic' and that it would contain 'highly charged emotional statements... There are some statements that seem simply to go beyond the limit of emotional content and risk upsetting the balance between emotion and reason' (U.S. v. McVeigh, 1997). Judge Matsch, too, expresses his concern about material being 'incendiary and prejudicial' (U.S. v. McVeigh, 1997).

In response to these concerns, the prosecution did not just emphasize the factuality of its proposed presentation, but also argued that the defense was trying to use the wrong measure of proportionality in their objections:

Where we do have differences with the defense is in terms of the notion the defense has that we need to prove these facts in the least prejudicial manner, in the sense that if we could prove a technical aggravating factor, that's all we need to do. And I think the difference comes from Payne, where the court said we're entitled to the moral force of the evidence as well. And I think we have done it in a way that is not gruesome. For example, we have not sought to offer any postmortem evidence of any of the deceased. We're not looking to inflame the jury, to have them decide this case on passion, but rather to make a reasoned moral judgment. (U.S. v. McVeigh, 1997)

Defense attorney Connelly thus takes issue with the defense's representation of what is the proper proportionality for the display of emotion-laden testimony and evidence. Most of the prosecution's argumentation concerning the defense's objections about proportionality take the form of reassuring the judge of the factual and probative value of their planned case, although often Connelly says that they have decided to withdraw evidence they thought was too highly charged.

What this examination of the arguments concerning the use of victim impact testimony in the Timothy McVeigh trial demonstrates is that the participants in the trial all have similar views on what role emotion-laden testimony and evidence should play in a court of law. Allowing testimony with emotional content makes the emotional impact of the bombing intelligible to the jury, but allowing testimony with disproportionate or inappropriate emotional content would 'warp' the jury and render them incapable of making a 'reasoned moral judgment as the conscience of the community as to the appropriate punishment' (U.S. v. McVeigh, 1997). What constitutes disproportionate or inappropriate emotional testimony is determined through oral, particular, local, and timely argumentation.

CONCLUSION

In this essay, I have argued that the characterization of 'reasonableness' that grows from Stephen Toulmin's early discomfort with the inapplicability of logic to practical argumentation allows pathos to play a role in reasonable argument. I distinguished between pathos as emotionally warping the judgment of the audience/jury and pathos as the insertion of emotionally-laden data into an argumentative framework, and used Peter Goldie's criteria of the intelligibility, appropriateness, and proportionality to describe ways of judging that assertion. Finally, I used the arguments over victim impact testimony in the Timothy McVeigh trial as a case study to illustrate how arguments are made about the appropriateness and proportionality of emotion-laden data in a court of law. In cases like this, emotional data are not antithetical to reasonable

decision-making, but are seen to enable juries and audiences to make reasonable moral judgments about the cases presented for their consideration.

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