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Commentary on Feteris

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Commentary on: E. Feteris' "Arguments from Unacceptable Consequences and a Reasonable Application of Law"

I agree with the main points of Eveline's analysis of what she calls arguments from unacceptable consequences. I agree that argument from consequences is a distinctive argumentation scheme that applies to legal argumentation in the way she outlines. I also agree with the analysis of Alexy showing it to be a species of practical, goal-directed reasoning. And I agree that such practical reasoning is based on goals attributed to statutes. The application of this form of argument in the way she describes is fundamentally important for any attempt to grasp how rules are applied to facts in cases at trial. We already knew that the rational argumentation in such cases is defeasible, meaning that drawing an inference based on the application of a rule is an argument that can be defeated by some particulars of a case, once they are revealed by having applied the rule. Now we can grasp one especially important way in which some legal arguments are defeasible. If applying a rule to a case is shown to have consequences that are judicially unacceptable, that is a reason for defeating the argument based on that rule in that case. The examples presented by Eveline, and her analysis of the forms of argument in them, are subjects of fundamental importance in legal argumentation studies. By way of commentary, I will merely elaborate on some logical and historical aspects of the forms of argument she has cited.

In her footnote 3, she attributes the formulation of an argumentation scheme to me, calling it argument from consequences, mentioning that it can be positive or negative, and commenting that it is an acceptable way of arguing. Let's begin by reviewing this argumentation scheme. Argument from consequences can take either of the two following forms, where *S* is a variable for a state of affairs that can be brought about (Walton, 1996, p. 76).

Argumentation Scheme for Argument from Positive Consequences
If *S* is brought about, then good consequences will (may plausibly) occur.
Therefore, *S* should be brought about.

Argumentation Scheme for Argument from Negative Consequences
If *S* is brought about then bad consequences will (may plausibly) occur.
Therefore, *S* should not be brought about.

In these schemes 'good' or 'bad' is determined in a dialogue according to goals of the proponent advocating the argument and the respondent who expresses doubts about it. For example, in legal argumentation, as Eveline noted (p.2), when the judge gives a negative

evaluation of the consequences in case, it is based on the purpose of a rule and the intentions of a rational legislator. I take this acknowledgement to imply that there exists a kind of dialogue, a framework of rational argumentation, between parties engaging in legal argumentation. Accordingly, if the respondent in the dialogue agrees that the cited consequences are good or bad, the argument from consequences will offer his a reason to bring about *S* or not to bring it about. There is a long history of recognition of this type of argument. Aristotle showed an awareness of it as a form of rational argument in *Topica* 117a7 - 117a15 where he wrote, "when two things are very similar to one another and we cannot detect any superiority in the one over the other, we must judge from their consequences; for that of which the consequence is a greater good is more worthy of choice, and, if the consequences are evil, that is more worthy of choice which is followed by the lesser evil." Windes and Hastings (1965, p. 227) recognized argument from consequences when they wrote that one way of proving a proposition of action is to list and prove the benefits that will result from adopting it. Perelman and Olbrechts-Tyteca (1969, p. 266) defined a type of argumentation they called "pragmatic," which "permits the evaluation of an act or an event in terms of its favorable or unfavorable consequences." All these writers refer to the same form of argument, that it can be called argument from consequences, and that it has a positive and a negative form.

Having staked out the tradition on what argument from consequences is generally taken to be in the literature, we can now turn to how Eveline sees this kind of argument as used in trials. The best way is to start with the leading example she cites, the Millenaar case. In this case, the husband was driving the car, and the wife was injured in the traffic accident. There is a rule in Dutch law saying that the driver has to pay for injury to the passenger caused by his fault. But then apply this rule to case in which the driver and passenger are man and wife, as in the Millenaar case. If the rule were to be applied to this case, "it would lead to the unacceptable result that the wife would be deprived of her right to compensation" (Feteris, p. 11). This is a bad consequence, therefore the rule should not be applied to it. It is clear then that what we have in such a case is an argument from negative consequences.

The bad consequence cited in the Millenaar case is not so just a bad causal consequence of the action of applying the rule. It is a consequence that is bad because it would undermine some goal that may be presumed to be relevant in a legal case. Thus it is not surprising that this form of argument in legal tradition is often called by other names like *reductio ad absurdum*, apagogical argument, or reasonable application of law, as Eveline noted (p. 1). It is a distinctive type of argumentation that has to with applying general rules, formulated in law as generalizations, to particular cases, called "facts" by lawyers. This form of argumentation arises from a case where two rules apply to case. The one rule, when applied to the facts, warrants an inference to conclusion *A*. The other rule, when applied to the same facts, warrants an inference to conclusion *B*. The problem is that *A* is contrary to *B*. For example in the Millnaar case, one rule says that the victim of an accident should have the right to compensation. But another rule says the driver has to pay for injury to the passenger caused by his fault. But if this rule is applied to the Millenaar case, it deprives the wife of her right to compensation. Applying the second rule negates what is supposed to be the outcome of applying the first one. The conclusion derived from applying the first rule conflicts with the conclusion derived from the second. As the Dutch Supreme Court wording puts it, applying the first rule is "so incompatible with the purport of the legal accident insurance" that it "should not be applied in the concrete case" (quoted by Feteris, p. 12).

This phenomenon is important for anyone interested in studying how legal case-based argumentation works. But it is also fundamentally important in two other contexts of the use of case-based argumentation. One is ethical argumentation, which is also based on applying general rules to facts (or assumed facts) of a particular case. Here we have the famous dilemmas of ethics, as in the Antigone case and the famous cases of medical ethics, like those concerning euthanasia. Such cases are usually classified as dilemmas. But the dilemma is based on argumentation from negative consequences and on goal-directed practical reasoning, as one can see in the Antigone case. In this case, Athenian law rules that anyone who buries a traitor is executed.

Antigone has a familial duty to bury her brother.
Antigone is obliged to her state not to bury a traitor.
She must either bury her brother or not bury her brother.

The dilemma arises because of the two goals (obligations) that lead to a conflict when applied to this particular case. The other context is that of rule-based expert systems as used in AI. Here we have the same phenomenon, arising where one rule applied to a knowledge base may lead to a conclusion opposed to the conclusion derived by applying another rule to the same set of facts. The Millenaar case, and the other legal cases cited by Eveline are instances of a kind of conflict of arguments, or opposed arguments, typically found in ethical argumentation and rule-based expert systems, as well as in legal argumentation. Another famous case of argument from consequences related to a dilemma of an ethical sort is of course the Pascal's wager argument (Rescher, 1985). In this argument, I have to make a decision whether to be a believer or not, and the argument for believing is grounded on the good consequences it will have – a happy life now and some chance of eternal bliss later.

There are two questions I would like to pose briefly. One concerns the nature the of the consequence relation that is used to apply to the facts of a case and derive the bad consequence by inference. Is this a causal relation, or is it some sort of defeasible inference relation used to derive defeasible inference from a set of facts and a rule? It should be recalled that Hamblin (1970, pp. 78-80) showed that there is a connection between *reductio ad absurdum* and causal reasoning in his analysis of the fallacy of non-cause as cause. But in this analysis he wrote, "The word cause is not here being used in its natural scientific sense at all, but in a purely logical sense." There is no space to go into detail on this matter. I only wish to raise the question of whether the relation is one of logical consequence or causal consequence. It could well be, of course, that this distinction is a blurred one, given that we lack any exact and widely accepted theory of causation.

The other question I would ask is how, in general, should arguments from consequences be evaluated? Some logic textbooks have classified this type of argumentation as a fallacy. Rescher (1964, p. 82) wrote in his textbook, "logically speaking, it is entirely irrelevant that certain undesirable consequences might derive from the rejection of a thesis, or certain benefits accrue from its acceptance". He offered the following example (p. 82).

> The United States had justice on its side in waging the Mexican war of 1848. To question this is unpatriotic, and would give comfort to our enemies by promoting the cause of defeatism.

This example has always been very interesting to me, because the fallacy appears to be based on a dialectical shift. The dialogue begins as a critical discussion on the ethical issue of which side in the war was supposedly more in the right or "had justice on its side." The problem is that it appears to shift to a deliberation on the consequences of advocating one side in such a critical discussion. The argument that such advocacy would have the bad consequences of promoting defeatism appears to violate rule of the critical discussion if it is an attempt to prevent the advocate from expressing his viewpoint. This remark refers to the rule of the critical discussion that prevents a party from preventing the other party from advancing or casting doubt on a viewpoint.[1]

Some typical cases of the *argumentum ad misericordiam* of a kind often cited by the logic textbooks as fallacious fall under the category of argumentation form negative consequences. Consider the following example from (Little, Wilson and Moore, 1955, p. 39).

> The attorney for the defense may, for example, bring into the courtroom the poorly-dressed wife of the defendant, surrounded by pathetic children in rags, and thus say in effect to the jury, "If you send my client to the electric chair, you make a widow of this poor woman and orphans of these innocent children. What have they done to deserve this?

Such an appeal to pity would be irrelevant and fallacious in criminal trial because the thesis to be proved or cast into doubt is the claim that the defendant is guilty of the charge. The argument that his family will suffer if he is convicted is not evidence that is relevant to proving or casting doubt on this thesis. In such a trial, argument from negative consequences is fallacious, whereas in the sentencing hearing after the trial, the same argument could be reasonable.

I only mention these examples because they pose the question of how argumentation from consequences should be evaluated, in general. If this form of argument is sometimes fallacious, it might be questionable to take for granted that it is a reasonable argument when used in law.

Notes

[1] This set of rules can be found in (van Eemeren and Grootendorst, 1992, pp. 208-209), and also in (van Emeren and Grootendorst, 1987, pp. 284-291).

References

Aristotle, *Topica*, trans. E. S. Forster, Loeb Classical Library, Cambridge, Mass., Harvard University Press, MCMLX.

Charles L. Hamblin, *Fallacies*, London, Methuen, 1970.

Winston W. Little, W. Harold Wilson and W. Edgar Moore, *Applied Logic*, Boston, Houghton Mifflin, 1955.

Chaim Pereleman and Lucie Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, Notre Dame, University of Notre Dame Press, 1969.

Nicholas Rescher, *Introduction to Logic*, New York, St. Martin's Press, 1964.

Nicholas Rescher, *Pascal's Wager*, Notre Dame, Indiana, University of Notre Dame Press, 1985.

Frans H. van Eemeren and Rob Grootendorst, 'Fallacies in Pragma-Dialectical Perspective', *Argumentation*, 1, 1987, 283-301.

Frans H. van Eemeren and Rob Grootendorst, *Argumentation, Communication and Fallacies*, Hillsdale, N.J., Lawrence Erlbaum Associates, 1992.

Douglas Walton, *Argumentation Schemes for Presumptive Reasoning*, Mahwah, New Jersey, Erlbaum, 1996.

Douglas Walton, 'Historical Origins of *Argumentum Ad Consequentiam*', *Argumentation*, 13, 1999, 251-264.

Russel R. Windes and Arthur Hastings, *Argumentation and Advocacy*, New York, Random House, 1965.