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Commentary on Katie Hannken-Illjes: “Building a Winning Team: The Development of Arguments in Criminal Cases”

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Hannken-Illjes has given us a detailed, well-evidenced account of the finding, developing, and making (or dropping) of two lines of argument in a particular criminal case. This is just the sort of empirical work on argumentation that has been called for since the inception of the informal logic movement (Johnson & Blair, 1996 [1980]), and it demonstrates the challenges of working with full and actual, as opposed to invented or excerpted, material. Using a methodology which encourages her to rely exclusively on participants' talk, importing as little of her own understanding as possible, Hannken-Illjes recounts the developmental history not only of an argument in the "official" trial text, but also of one in its silences—an argument *not* made. In this response, I will focus on what argumentation theorists can learn from this excellent empirical work: about the concept set necessary to give an account of argumentative practice, and about the limits of the general theoretical project of argument reconstruction.

Hannken-Illjes relies on three concepts: argument, topos and theme. An *argument* is "a fully fleshed" unit of discourse with (I presume) something like a manifest premise-conclusion structure (see Jacobs 2000 for a similar conception). In a German criminal trial, it is usually the judge who gets to make arguments, in the course of justifying the verdict. A *topos*, by contrast, is "a generic concept, a place, that one needs to go to and fetch arguments[:] . . . not something that can be found and described on the discursive surface." Among the many sorts of topoi that have been suggested by theorists since classical times, Hannken-Illjes relies on "material" topoi—the topics commonly raised in arguments in a particular context, e.g. Motive, Means, Opportunity and Character in a criminal trial.¹ Finally, "between" topos and argument there lie *themes*. More determinate than the abstract topoi, themes "appear on the discursive surface"—they are realized in, not implicit in, the talk of and around the trial. At the same time, themes are not fully

¹ Hannken-Illjes' conception of topoi seems most similar to the Hermagorean system evident e.g. in Cicero's *De inventione* or Pseudo-Augustine's *De rhetorica*. This system encouraged the advocate to select an overall case strategy by determining the *stasis* or central issue of a legal case, and then provided him with a specific set of topical resources useful for carrying out that strategy. Hermagoras also recognized the same tension Hannken-Illjes emphasizes, drawing a distinction between a *thesis* or abstract issue (e.g., "Is it wrong to kill your mother if she killed your father?") and a *hypothesis* or concrete issue as realized at a particular place and time, between particular people (e.g., "Is Orestes guilty of murder?"). In fact, the word "circumstances" is from the Latin translation of Hermagoras' technical term for the factors which move an issue from abstract to concrete: *peristaseis*, *circumstantiae*.

realized arguments; they are instead more or less determinate topics which guide participants in particular situations as they look for, develop and even create support for arguments they may later make. For example, while Character may be a topos available in criminal cases, "Kevin's job" is a theme through which that topos is made specific and effective in the particular case Hannken-Illjes is studying. Themes, in short, are argument potentials.

Now, argumentation theorists have ordinarily worked with a set of at most two concepts: the concrete *argument*, and the *topos*, or *scheme*, or other abstract pattern (including diagram) which specifies the "kind" of argument the argument is. Although I'm not sure the specific vocabulary of "themes" will play out, I am convinced that Hannken-Illjes is on the right track in proposing a *tripartite* concept set, distinguishing abstract topoi, semi-determinate argument potentials, and fully realized arguments. And this move from two to three concepts in fact will have large consequences for the theory of argument reconstruction.

On the optimistic side, Hannken-Illjes' work confirms the sense that there is a *lot* of argumentative material out there in the world of discourse. Scholars across the various disciplines contributing to argumentation theory have proposed that many objects not manifestly argumentative, like images and advertisements, should be reconstructed as arguments, at least in some circumstances. As one textbook title puts it, *Everything is an Argument*. Hannken-Illjes provides evidence that these scholars are in a sense right: in this criminal trial, the defense ensemble consistently orients to argumentative potentials throughout its work. These argument potentials are expressed in all sorts of talk in the trial process: "the narration of a story, the showing of evidence, notes, highlighted statements, comments in lawyer-client conferences" (Hannken-Illjes et al. 2007). All these different forms of manifest talk realize argument themes; they are the makings of argument.

But there is also a pessimistic side to Hannken-Illjes' tripartite conceptual scheme—pessimistic, that is, for those who want to reconstruct everything as argument. One feature of the talk instantiating an argument theme is that it is *not an argument*. We recognize argument potential as *potential* because it is not *actual*. It would be wrong, therefore, to reconstruct talk on an argument theme as if it were a fully realized argument. In particular, such a reconstruction will face two difficulties.

The first difficulty is familiar: in reconstructing a theme as an argument, what is the reconstructor licensed to put in, what to fill in, and what to leave out? Hannken-Illjes work documents the large amount of material, e.g. about Kevin's job search, that apparently doesn't make it into the final "reasons for the verdict." Some of the argument potential the defense ensemble likely attempts to keep unrevealed for strategic reasons; other argument potential seems to be known to the judge, but omitted, again presumably for strategic reasons. How is an argumentation theorist to reconstruct "*the argument*" about the Kevin's job from the "mixed mass of evidence" (Wigmore's term; see e.g. 1913) developed on the theme during the trial process? In practice, the gap between argument potential and actual, fully realized argument is filled by participants' strategic choices—by their *design*. So there is no "the argument" there to be reconstructed until a participant makes one.²

² Hannken-Illjes also faces this difficulty, but in reverse. She rightly resists reconstructing non-argument as argument in part because doing so involves "normative baggage. This baggage consists among others in the

The second difficulty facing those who would reconstruct everything, or many things, as an argument is less well recognized, and more potent. Hannken-Illjes documents an instance where a theme with well-developed argument potential was *not* realized in actual argument at the trial. Kevin's motive of fear is in the course of the trial preparation supported by his own statements, by independent corroborating witnesses, and even by some physical evidence. The theme would seem to provide good reasons for mitigating Kevin's punishment. Nevertheless, no one made a Motive argument at the trial. We must presume that participants had a reason for their silence. It is possible that the defense ensemble thought the argument could backfire: if it were rejected as yet another lie, Kevin's apparent efforts at fabricating evidence would suggest he has a bad character and is still not cooperating with the authorities, thus justifying a harsher punishment. In any case, the *non*making of the motive argument shows that participants are making strategic choices, not only in the design of the arguments they do make, but in deciding whether or not to make an argument at all. Arguments, it seems, are viewed by participants as having a certain force, and sometimes that particular force is not what is wanted. As Hannken-Illjes notes, in ordinary language, theme-talk is not taken as argument. "Argumentation," she points out, "is often not a participant category. Rarely would participants refer to their conversational activities as argumentation." But this means that reconstructing argument potential as actual argument significantly misconstrues what participants in a transaction are doing with their talk. In developing an argument theme, participants are choosing *not* to make an argument; instead, they are choosing to engage in other kinds of discourse, with other kinds of force. Reconstructing argument potential as argument occludes that force.

So what?—one might ask—what is lost if theorists neaten up discourse with muddled potential for argument, transforming it into what it could be, if actualized? In addition to a general sentiment of loyalty to talk as it actually occurs, if we paid attention to what is being said we might find that *not* making an argument is much more common, and much more useful, than we have previously imagined. In other work, Hannken-Illjes (2007) has documented the use of argument themes in testing out potential arguments and learning from their failure in a safe, behind-the-scenes setting. Scott Jacobs and Mark Aakhus (2002) have shown that even in third-party mediations, where conditions for "critical discussion" are as close to ideal as may be achievable in practice, arguments are not only not made, they are even cut off and reconstructed away by the mediators. At the

notion, that crucial parts of the argument—premises, topoi, themes—stay implicit and are not visible on the discursive surface," thus requiring the reconstructor to rely on his/her own "normative" sense of a model argument to fill in the gaps. Note, however, that a researcher can only identify a theme as an *argument* theme if he/she perceives the material to be relevant to any one of a number of arguments that could reasonably be made—arguments that could work in the ways a participant might want an argument to work. But in large part the researcher must rely on her own intuitions about what these arguments and workings might be, and how the potential for them appears in discourse. Participants' use of certain terms (e.g., "fear") is not enough to identify a theme in their discourse, since the terms used in developing an argument theme may vary and not all uses of a given term may be on the theme. In short, it is probably impossible for a researcher to avoid importing his/her intuitions into an investigation of argumentative practice. The advantage of the tripartite conceptual scheme, distinguishing topoi, themes and arguments, is that it restricts the use of intuition to the realm of the theme, where the argumentative material is admittedly relatively indeterminate and fluid—"clear and recognizable . . . , yet . . . flexible" and changeable—while insisting on relying on participants' own talk (including their talk about their talk, their metadiscourse, Craig 1999) when analyzing their actual arguments.

same time, in mediations appears that participants make significant efforts to display to each other argument *potential* as a sort of threat. Developing an argument theme in nonargument discourse (e.g., through telling a story, offering an explanation or asserting a fact) allows the mediation participant to make it manifest that the other side will "appear unreasonable or blatantly unfair" (43) if he/she does not agree. Beth Manolescu (2005) has also demonstrated how non-argumentative material, such as presentational devices and emotional appeals, can do the same work in public oratory: not because they are arguments, but because they create conditions in which an audience will find it difficult to be manifestly unreasonable. In these instances, argument potential is like a nuclear arsenal, creating a space for certain types of negotiations.

In summary, Hannken-Illjes tripartite conceptual scheme, recognizing purely abstract topoi, fully realized, concrete arguments, and in between argument potential manifest in themes, in fact presents a significant challenge to theorists who would reconstruct both potential and actual arguments as arguments. Her exemplary empirical work thus shows both the "thickness" of the process of developing arguments even in a relatively minor, uncontested criminal case, and also the complexity of the concepts needed to deal with that process in a way reasonably loyal to the actual discourse. So I can end by deploying an academic topos: more work like this is needed!

[link to paper](#)

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