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Preciseness is a virtue: What are critical questions?

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ABSTRACT: The paper compares the uses of “critical question” in recent publications on the topic, contrasting explicit definitions where they exist and reconstructing implicit definitions where possible, and suggests a taxonomy of different “critical questions” as they are used in argumentative evaluation and criticism. In distinguishing different meanings of “critical question” horizontally between authors and vertically within the analysis, it strives to make a contribution to the ongoing work on the systematization of argumentative criticism.

KEYWORDS: argumentative criticism, critical questions, enstasis, objections, undercutters

1. INTRODUCTION

Besides fostering our understanding of human reasoning, one of the most important tasks of modern argumentation studies is to provide the theoretical background for applied argumentative criticism, that particular kind of rhetorical criticism that is concerned with assessing the reasonableness of a real life persuasive effort.

One of the key instruments argumentation theory provides for this purpose is lists of the so called ‘Critical Questions’¹ (also know – with slight variations in their specific scope and grammatical structure as ‘undercutting defeaters’ (Pollock), ‘objections’ (Krabbe and Govier), ‘enstaseis’ (Aristotle), or ‘evaluation criteria’ (Schellens), to name just a few). These taxonomies of Critical Questions should – in theory – be able to serve as checklists for the argumentative critic and enable a better-organized and more precise scrutiny of the argumentative validity of a given text.² Significant progress has been made in the understanding of the theory of Critical Questions, most notable in a recent article by Krabbe and van Laar (2011), as well as the works of Hansen, Walton et al., Ihnen and others. Yet, while these works contribute much to the argumentation theory discourse it seems that they provide little advancement for the applied argument critic, who is still mostly limited to using the rough and ready (and unfortunately often dissenting) checklists of Walton (1996), Kienpointner (1996), Walton et al. (2008) or the debate tradition

¹ I will capitalize “Critical Questions” as a technical concept in this paper to distinguish them from questions that are critical.

² I use „validity“ here in its dialectical, defeasible, non-logical sense, and „text“ in its widest meaning of written or spoken, monological or dialogical argumentative discourse.

(such as Freeley & Steinberg, 2009). This situation produces an undesirable widening gap between argumentation theory and critical praxis. This paper attempts to make a modest contribution to reducing the size of this gap, by taking a look at some of the contemporary understandings of Critical Questions in the argumentation theory literature and applying them to a real life argumentative text.

In order to do this, three main steps will be required: first, I want to briefly compare and contrast some of the contemporary notions and (where available) definitions of Critical Questions and their related concepts. Second, I will suggest a hybrid model for a taxonomy of Critical Questions which incorporates some of the complexities of the theoretical side, while keeping it simple enough to be of practical use for the applied critic. Third, I will attempt to use this taxonomy as a guiding model or practical checklist in the critical analysis of a recent argumentative text, which has stirred a significant amount of public reaction and argues for a rather controversial policy change in western governments: Swedish Pirate Party founder Rickard Falkvinge's proposal to legalize the possession of child pornography. Given the nature and purpose of this paper, the emphasis in this last section will be less on a line by line reconstruction of unexpressed premises and identification of particular argumentative moves and schemes (which is an important task, but one that has many times been well exemplified, for example in numerous works of the pragma-dialectical school and others), but rather I will take the ground level analysis for granted and concentrate on the structural criticism that a Critical Question analysis can offer. This should by no means suggest the priority of one aspect over the other; a full and careful argumentative criticism of a given text would have to engage with both.

2. WHAT ARE CRITICAL QUESTIONS?

'Critical Question', 'objection', and their closely related terms have been used in such a wide variety of meanings in recent argumentation theory that it appears practically impossible to provide a comparison and contrast of the terms that could even attempt to be considered complete. Douglas Walton has recently proposed a meaning tree for some of the key terms, including 'attack', 'rebuttal', 'objection', 'undercutter', 'defeater' and 'refutation' (Walton, 2009), but even a dedicated analysis of just this incomplete list of related terms must remain preliminary. Accordingly I will not attempt to provide an exhaustive analysis or comparison by any means, but rather briefly review some of the more recent and influential notions that present the basis for a simplified taxonomy of Critical Questions in the next section. The key question guiding this short review of some definitions and descriptions of Critical Questions and objections concerns the scope of argumentative phenomena that is covered by the two concepts.

Additionally one important caveat must be added: When looking at definitions of 'objection' in particular I will make a certain selection in favor of those that understand 'objection' to mean something roughly equivalent to 'Critical Question' (but in a different grammatical form). Other usages of this term, such as Walton's (2012, p. 371) "Objection is the widest category, including procedural objections. An objection does not have to be an argument." or Govier's (1999, p.

231) type 4 objection “Objections against the situation (that is, qualifications, personal characteristics, and circumstances) of the arguer.” are less relevant for the context of this paper.

There are a couple of key sections within the pragma-dialectical literature that give a fairly clear definition of the extent and purpose of Critical Questions and clarify some of their key qualities. Van Eemeren & Grootendorst (1992, p. 98) write

A person who puts forward an argumentation anticipates criticism, and by choosing a particular type of argumentation, using the one argumentation scheme rather than the other, he implies that he thinks he knows which route will lead to the justification of his standpoint. At any rate, whether he really thinks this or not, if he is to be taken seriously by the other party, he may held to be committed to deal with the critical questions which pertain to a justification via the argumentation scheme that is inherent in his argumentation. [...] each argumentation scheme calls, as it were, for its own set of critical reactions.” and further on: “The argumentation scheme has been used correctly only if the correctness conditions have been fulfilled. These conditions correspond to the critical questions that are associated with the argumentation scheme concerned.” (1992, p. 162)

Critical Questions are here clearly deduced from arguers’ obligations and linked to the level of individual argument schemes. It is also indicated that each type of argument, or mode of reasoning has an individual and fixed set of Critical Questions that can be used to determine the strengths or validity of that argument. Similarly van Eemeren, Grootendorst, & Snoeck Henkemans (2002, p. 96)

To determine whether a given argument meets the criteria relevant to that type of argumentation, certain critical questions must be asked. For an adequate evaluation, it is thus essential to carefully distinguish the main types of argumentation and to ask the right set of critical questions.

Within the context of strategic maneuvering van Eemeren & Houtlosser (2002, p. 21) add an explicit reference to the inherent burden of proof that the protagonist takes on and distinguish Critical Questions from other kinds of critical reactions or resistance to an argument, namely counter-arguments, which do not attack the connection of the claim and the reason, but rather provide alternative reasons for an incompatible claim:

A crucial role in the testing procedure is played by the critical questions associated with the argument scheme used by the protagonist. These questions differ for causal argumentation, comparison argumentation, and symptomatic argumentation. Only by responding to all relevant critical questions, by adding a – subordinative, coordinative or multiple – extension to the argumentation, can the protagonist discharge his – possibly cumulated – burden of proof. The pragma-dialectical critical questions are not identical with ‘objections’ an arguer should respond to according to Johnson (1998). As a matter of course, critical questions are not equal to counter-arguments and they do not involve any burden of proof, however ‘serious’ they may be.

Garssen (2001, p. 91) emphasizes the previously indicated quality of Critical Questions to not just be specific to each argument scheme, but their difference to

even be so central that schemes might as well be defined via their Critical Questions. This is not to say however that there may not be an overlap between some of the Critical Questions, in other words there may be *some* Critical Questions that are different for each scheme and others who, while being on the scheme level, are nevertheless scheme-independent

The argument scheme is applied correctly if all the relevant critical questions that the antagonist in the dispute could ask can be answered satisfactorily. [...] The arguments differ from each other because each scheme comes with different critical questions. [Fn. 15: With each argument scheme come specific critical questions. The most central critical question pertains directly to the relation between the premise and the standpoint. The other critical questions pertain to additional factors that may hinder transference of acceptability.]

An interesting note is added by van Eemeren & Grootendorst (2004, pp. 149f.) who point out that Critical Questions do not solely stem from an objective standard of reasoning, but may be individualized by the discussants in a given situation. This aspect and understanding of Critical Questions seems to be rather unique to the pragma-dialectical approach:

They [the discussants] may also determine which critical questions the different argument schemes are expected to answer. In these cases they may agree that although a comparison is in principle an admissible form of argumentation, argumentation of this kind will only be regarded as decisive if no single relevant difference can be demonstrated between the cases under comparison.

Finally van Eemeren & Grootendorst (2004, p. 172) provide a clear placing of Critical Questions within the theory of a critical discussion by linking them to the dialectical obligation stemming from rule 8 of the pragma-dialectical canon: "Another way in which the protagonist can violate rule 8 is by refusing to respond to the critical questions that correspond to the argument scheme he has used, or even by preventing these questions from being raised."

In sum, the pragma-dialectical understanding of Critical Questions outlines a concept that is on the scheme level, heavily scheme-dependent in most of its parts and stemming from the burden of proof a reasonable arguer carries as explained in the dialectical obligations within a critical discussion. In addition to the generally emphasized Critical Questions that are scheme-dependent (e.g. Are the source object and the target object of an analogy or comparison really sufficiently similar?), the pragma-dialectical tradition explicitly acknowledges factual premise questions (e.g. Does the source object really have the quality q?) as part of the set of Critical Questions as well.

Schellens (1985) uses a very similar concept. While not referring to 'Critical Questions', his 'evaluation criteria' are also presented in the form of (usually closed, yes/no) questions and closely resemble later lists. One important aspect in which his evaluation criteria differ – while not from explicit definitions, but at least from the most common presentations of Critical Question – is the fact that there is no correlation between an affirmative answer and a positive evaluative result. While most Critical Questions require a "yes" to yield a positive evaluation, Schellens'

questions are sometimes aimed at an affirmative and sometimes at a negative reply.

Douglas Walton's (1996, p. 13) earlier introductions to Critical Questions closely resembles that of the pragma-dialectical tradition

On our analysis, each argumentation scheme has a set of critical questions attached to it. [...] The asking of an appropriate critical question, one that matches the argumentation scheme, shifts the weight of the presumption back to the other side, in turn.

It also locates Critical Questions at the argument-scheme level and emphasizes the individual relationship between a scheme and its questions. The above noticed tendency to prioritize the one, decisive, scheme-defining question (as seen in Garssen for example) is less pronounced here, but the deduction of the questions from the protagonist's probative obligations is similar. Walton adds an important observation in conjunction with the introduction of Critical Questions however: He notices that often the scheme-level criticism will only be the first, 'local' step, which must be supplemented with argumentative criticism on the 'dialectical' and 'global' level which is concerned with the complex argumentation and the argumentative process beyond individual schemes. He does not refer to the tools employed in these additional levels as 'Critical Questions', but the function of the elements appears to be highly parallel.

Walton, Reed, & Macagno (2008, pp. 15f.) largely reiterate the usage of the term found in Walton's earlier introduction:

[...] critical questions – questions that can be asked (or assumptions that are held) by which a nondeductive argument based on a scheme might be judged to be (or presented as being) good or fallacious. The critical questions form a vital part of the definition of a scheme, and are one of the benefits of adopting a scheme-based approach.

Turning to objections, Govier (1999, p. 229) supplies a very clear and widely cited definition of 'objections' that addresses the counterpart to Critical Questions:

[...] an objection is (a) any claim alleging a defect in an argument or in its conclusion; (b) which, insofar as it does not compete for the same intellectual and social space at that conclusion, does not constitute an alternative position to the conclusion; and is either (c) raised by the audience to which the argument is addressed or (d) might plausibly be raised by that audience; or (e) might plausibly be raised by a rational person to whom the argument might plausibly be addressed.

She later breaks this concept up into five sub-types of 'objections' of which two are particularly informative for the present purposes: "[...] 2. Objections raised against the argument in support of that conclusion. [...] 5. Objections against the way in which the argument and conclusion are expressed." (1999, p. 231) Within this tentative categorization of objections, objection type 2 seems to be the affirmative counterpart to the most common, scheme-dependent concept of Critical Questions above. The only difference between those Critical Questions and Govier's objection type 2 is their grammatical form (interrogative versus affirmative) and – resulting

from that – the burden of proof that the antagonist employing either carries: little to none for a Critical Question versus a full burden of proof for an objection.³ Govier's type 5 objections on the other hand seem to be the counterpart to Walton's higher level criticism that analyses the interaction of the individual argument with the dialogue at large.

Pollock's (1995, p. 41) famous 'defeaters' also closely match type 2 objections and classical scheme-dependent Critical Questions. He defines them as: "Undercutting defeaters attack the connection between the reason and the conclusion rather than attacking the conclusion directly." He thereby clearly distinguishes between the two types of resistance ('undercutting defeaters' and 'rebutting defeaters') that an individual argument can encounter on the scheme level.

Krabbe (1997, p. 61) also attempts to give an overview over the different forms of criticism and objections that can be distinguished. His complete taxonomy is too complex to be reviewed here, but his cornerstone fits neatly into the definitions of Critical Questions and objections we have seen:

In this essay, (strong) objections are seen as a subspecies of critical reactions, in an explicit dialogue, vis-à-vis a point of view or an argument put forward by a proponent. The following ingredients can be distinguished as implicit or explicit elements of this type of critical reaction: a verdict, a substance, an evaluative argument, and a substantive argument.

The last work to be considered here is Krabbe & van Laar's (2011) most artful multidimensional taxonomy of critical reactions. Their taxonomy distinguishes between different foci, norms, forces, and levels of critical reactions and probably represents the most sophisticated understanding of the functions objections and Critical Questions can have in argumentative criticism. Beyond some of the expected areas that are covered by Krabbe and van Laar, such as the counterparts to scheme-level criticism and Walton's 'dialectical' and 'global' criticism, there are also some new aspects such as criticism of norm of optimality. While their taxonomy is thus without any doubt an impressive step forward in our theoretical understanding of critical reactions, it is probably quite a bit too complex to be a practical guideline for an applied critic. A taxonomy attempting to be of use for practical criticism should thus take careful note of some of those key findings but simplify the actual lists of Critical Questions to a more useable format.

³ A number of writers, especially within the pragma-dialectical group insist that asking Critical Questions incurs no burden of proof for the questioner at all. This is very plausible on the face-value level of the discourse. As soon as one steps up the analysis into the backing of any argument delivered by a human agent which usually consists of a second level argument from authority based in the speakers own knowledge and opinion this question becomes more complicated. Whatever the verdict on this position – full discussion of which goes beyond the scope of this paper – asking a Critical Question will always at least incur a *lesser* burden of proof for the antagonist than raising an objection.

3. A SIMPLIFIED TAXONOMY OF CRITICAL QUESTIONS FOR ARGUMENTATIVE CRITICISM

Based on the mainstream understanding of Critical Question as an individual argument level, scheme-dependent concept, it appears only natural that any practical taxonomy should start there. Given the important additional functions of argumentative criticism that Walton, Govier, and Krabbe and van Laar point to, one might however not want to restrict such a taxonomy entirely to the scheme-level. Following an insightful earlier approach by Hansen, who distinguishes five kinds of Critical Questions - catchingly called P-questions (premiss acceptability), S-questions (premiss sufficiency), D-questions (defeaters), K-questions (nature of conclusions), and X-questions (so far unclassifiable 'left-over issues') - I would like to extend the Critical Questions to the main sections of practical argumentative criticism that should be covered and distinguish between the main clusters of questions that are of use.

I am of course aware that some people might prefer to restrict the label 'Critical Question' to only one particular segment of argumentative criticism, such as for example only the individual argument, or even further just the scheme-specific questions. In making the (ultimately arbitrary) choice of how assign the concept, it might be of use to look at the actual term for a moment. What *are* Critical Questions? I am not aware of the first usage of the term in modern argumentation theory, but at face value 'Critical Questions' can mean two things: 'Questions that are useful for criticism' or 'Questions that test what is critical'. It is the latter understanding that I want to employ in this paper. Critical Questions offer a systematic map of the parts that are critical. But critical in what?

Critical in an individual argument? Critical in a complex argumentation seen as a product? Or critical in the argumentative process? All three are crucial for a successful argumentative effort and for each of them the critical parts are different.⁴ Accordingly, why not just distinguish between those three as the main groups of Critical Questions that can be employed by the argumentative critic. These three main levels also roughly match Walton's distinction between local, dialectical and global criticism and can be further divided into a general and a specific form each. The resulting simplified taxonomy accordingly looks as follows:

A. Argument level questions

A.1 Scheme-independent argument level questions

A.2 Scheme-dependent argument level questions

⁴ Some of Krabbe and van Laar's larger list of potential categories of Critical Questions is not 'critical' for the success of the argumentative effort in this sense. The most notable category that they introduce, but that does not seem to warrant a separate cluster of Critical Questions in this sense are the 'norms of optimality'. Even if one does not choose the strongest available argument, one might well be able to produce a valid single argument, complex argumentation and sound process, thereby achieving all central argumentative goals.

B. Argumentation product level questions

- B.1 presumption-sufficiency questions
- B.2 counterargument-sufficiency questions

C. Argumentation process level questions

- C.1 general dialectical process questions
- C.2 setting dependent special process questions

It is important to notice that while all three levels of Critical Questions address critical parts of the argumentation at large, failing to answer a question in the desired way⁵ has significantly different *consequences* in each level. On the A-level, answering in the negative means that the individual argument loses most or all of its reasonable argumentative force – from the protagonist’s perspective this is equal to the appeal ‘Find a new argument or drop your point!’. The exact repercussions of this loss for the overall argumentation of course depend on the position within the complex argument structure that the individual argument concerned occupies. Answering in the negative to a B-level question means that while there might be *some* valid argumentation, it is not sufficient for defending the case yet – ‘Find more arguments or suspend your case!’ Finally C-level negatives speak about the reliability of the current argumentation for testing the validity of the discussed arguments. It thus presents an appeal to the critical audience, rather than the protagonist ‘Double-check all claims that have been made and accepted, they may or may not have been as strong as they appeared!’ A C-level negative is thus not automatically an overall negative verdict of the argumentative validity, but instead an important caveat. Good arguments *can* be delivered under bad conditions – they are just a lot less frequent.

In practical terms the following groups of Critical Questions are then to be considered by the argumentative critic who is looking for a systematic toolset:

A.1: Scheme-independent argument level questions

- Are all relevant stated premises correct? (Did authority A really say this? Did cause C really occur?)
- Are the modal qualifiers in the source proposition and the target proposition identical (or logically implied)?

The second A.1-level question tests against naturalistic fallacies. Both questions are applicable in virtually every argument, independent of the specific scheme used.

⁵ For clarity’s and consistency’s sake I will understand that to be (against Schellens) equivalent with an affirmative answer to a closed question, thus asking for example in an Analogy ‘Are A and B essentially similar?’ rather than ‘Are there significant differences between A and B?’

A.2: Scheme-dependent argument level questions

These are all remaining argument level questions. Attempting to present a complete taxonomy of all A.2 questions for all schemes goes way beyond this paper. A number of varying ad hoc lists have been previously proposed in the works of Hastings, Schellens, Kienpointner, Walton, Walton et al. as well as in many works within the debating textbook tradition. It remains a strong theoretical desideratum to revisit, contrast and unify those lists in an inductive approach, or (preferably) to find a deductively sound way to deduce more systematically reliable lists of scheme-dependent Critical Questions. Samples of A.2 questions are as follows:

Analogy:

- Are A and B really essentially similar?

Effect to Cause:

- Is C present in all relevant possible worlds in which E is present?
- Is C temporally prior to E?

Direct Authority:

- Have previous statements of authority A been reliable indicators of the acceptability of P?
- Is A speaking in a similar way (e.g. free from extraordinary influences or bias) now as during the time that reliability was established?

B.1. Argumentation product presumption sufficiency questions

Most claims, opinions, or propositions are interacting with some sort of presumption or presumptions on one or both sides. Most frequently this is just some variety of the presumption in favor of the (intellectual, social, political or legal) status quo, sometimes it is a stronger presumption, such as in the case of legal or moral accusations or certain kinds of legislation. Understanding what it takes to be *ceteris paribus* successful in defending your claim is critical for understanding what it means for an argumentation to be sufficient. Depending on the setting, B.1 questions can rely on previously developed models that further explain the burden of proof of the protagonist (most famous among which are stasis theory for accusations, stock issues models for debate propositions, as well as some legal models for policy propositions) or they can remain general.

- Did the protagonist supply sufficient argumentation to overcome existing presumptions against the main claim?

B.2 Argumentation product counterargument sufficiency questions

Independent of the presumption analysis the sufficiency of the argumentation will also always be influenced by existing (i.e. realized) or accessible relevant counterargumentation. Evidently, the better the relevant counterarguments the higher the burden for the protagonist.

- Did the protagonist supply sufficient argumentation to overcome relevant counterarguments?

C.1 General dialectical argumentation process level questions

To check if all critical components of the argumentation process are intact and are thus reliable for the reasonable solution of a difference of opinion, one can use any of the established definitions of good process (such as the pragma-dialectical rules) as a guideline, or just list a pragmatic set of the main requirements, including, but not limited to:

- Were all participants allowed to speak freely, without fear of repercussions?
- Did all participants have the right to speak in sufficient length, order and repetition?
- Did all participants possess the necessary rhetorical, intellectual, linguistic and physical skills for the exchange?
- Did all participants have the necessary motivation in conducting the exchange?
- Were all participants free from overriding concerns that prevent them from employing their ability and motivation in the exchange?
- Did all participants have time to prepare and access to relevant information?

C.2 Special setting dependent special process questions

Beyond the general process rules that follow from the understanding of the argumentative process as such, some setting (such as courtroom proceedings, parliamentary meetings, etc.) will assign additional rights and duties to the discussants. Examples of these are the right to counsel, the right to remain silent and to refrain from self-incrimination, the duty to maintain a certain level of politeness, etc. Independent from their legal repercussions, a notable deficit in these special discursive rights and duties might also inhibit the discussion and thus make its outcome less reliable:

- Did all participants follow the relevant special discursive rules mandated by the setting?

Other than the previous parts A.1 to C.1 the applicability of C.2 questions is of course limited to discussions under special conditions and in defined settings. Those settings usually provide their own toolsets that can be used by the argumentative critic.

The simplified taxonomy above provides a hybrid between the highly complex distinctions of levels or criticism provided in recent argumentation theory and the rough and ready checklists of introductory debate and critical thinking textbooks. In the last section I will illustrate its application to a recent controversial piece of real life argumentation, Rickard Falkvinge's call for the legalization of the possession of child pornography.

4. CRITICAL ANALYSIS: RICKARD FALKVINGE'S CASE IN FAVOR OF THE LEGALIZATION OF THE POSSESSION OF CHILD PORNOGRAPHY

Falkvinge's originally argued in 2010 – and then reiterated to a larger public in 2012 – that principles of freedom of speech demand the legalization of the possession of child pornography, and that current legislation criminalizing the possession are likely counterproductive in the prosecution of child abuse as well. The proposal to amend the legislation stirred an international controversy, led to wide media coverage, caused the German pirate party to explicitly distance themselves from the founder of the Swedish pirate party and triggered a myriad of serious rebuttals and hateful comments on the internet. This is understandable given the sensitive nature of the topic to many, but rather surprising when one reads the – at least at face value – well reasoned opinion piece that caused this response. The controversial nature of the claim, and the width of the connected argumentation make this piece an interesting choice for a brief showcase in Critical Questions guided argumentative criticism.

Two important caveats must be added beforehand: 1) The whole argumentative piece, while written in a clear and concise manner is about 3600 words long (not counting the follow up piece and more than 200 pages of – mostly hateful – online comments) and presents a complex structure of three main argument, supported by a large number of backup arguments and illustrations. As such is too long and too complex to analyze in full here in the space of an example. Especially on the A-level criticism I must accordingly limit myself to one or two individual schemes. 2) The purpose of this brief analysis is to illustrate the structure of the simplified taxonomy, *not* to provide a state-of-the-art discourse analysis and argumentative reconstruction. While Falkvinge's essay might benefit from such an analysis, this is not the place for it.

4.1 Argumentative criticisms of Falkvinge's proposal:

At the beginning of his essay Falkvinge gives a brief overview and summary of his main arguments as follows:

This article argues that our current laws on the topic are counterproductive, because they protect child molesters instead of bringing them to justice, they

criminalize a generation of normally-behaving teenagers which diverts valuable police resources from the criminals we should be going after, and they lead to censorship and electronic book burning as well as unacceptable collateral damage to innocent families. Child abuse as such is not condoned by anybody, and this article argues that current laws are counterproductive in preventing and prosecuting it.

When possession of this type of information was criminalized, those who opposed that criminalization (which I didn't, at the time – this was before my activism) pointed at four major objections:

- It would not be effective, and possibly counterproductive, in catching child molesters.
- It would lead to censorship without accountability.
- Reporters complained it would undermine journalistic freedom that has stood intact for centuries.
- Constitutional and political science scholars pointed out that it undermined centuries of free speech/expression traditions in a way that would be used by special interests to silence opponents of business interests unrelated to child porn.

In retrospect, all of this has come true. This is bad enough in itself; it is downright catastrophic. There are three overarching reasons why possession of child pornography must be re-legalized: the ban prevents catching child molesters, especially in light of new technology; it creates a generation of branded sex offenders that did nothing wrong; and it is the battleground for free speech itself. Let's take these one at a time." (Falkvinge, 2012)

Of the arguments he mentions I will take the first reason for the (re)legalization of child pornography as a sample object for the argument schemes level analysis. His arguments run as follows:

So imagine a scenario ten years down the road, as you're taking a stroll in the park. Your glasses ("mobile phone") are on, as are mostly everybody else's. You're broadcasting and recording what you see in public, as is mostly everybody else, in case a friend drops in on your feed and start chatting about it, or in case you observe something where you need to back up your story later, if you're so inclined – kind of why people use dashcams in cars and constantly record everything that happens.

So, on your lovely stroll in the park, you turn a corner, and to your shock, see a 12-year-old being brutally raped right in front of you.

WHAM. You are now a criminal, guilty of recording, distributing, and possessing child pornography. You are now guilty of a crime that carries higher penalties than the rape and molestation of a child right taking place right in front of you.

The rapist notices you and laughs, knowing that you can't do anything. If you were to call the police and offer to be a witness to the rape taking place before you, you would lose your job, children, and house over the worse crime you have just committed. As you struggle in panic to delete any and all imagery that could be used to convict the child rapist, hoping that nobody was able to make a copy, you see another person coming into view of the rapist and reacting just like you did.

And on the ground, a 12-year old who is being raped watches helplessly as witnesses turn away and delete all evidence of the crime being committed against her.

This is not some far-fetched science fiction scenario. This is exactly what will happen as our mobile phones take the next step, which has already started, and we will be there in less than ten years. (The very first iPhone was released to sales about five years ago, for perspective – imagine what will happen in twice more the time since then.)

[UPDATE: Some people have complained that no court would ever convict in this

scenario, since you also recorded your unintentional approach. But possession of child pornography is a strict liability offense, like possession of cocaine, at least in the entire United States as soon as you know you have it, as well as several other countries. Intent, mens rea, is irrelevant: if you have it, no matter why, you're guilty.]

This brings us to the crucial question why we have the ban on child pornography in the first place.

Is possession of child pornography harshly banned because we want to catch child rapists and molesters, or because we're so uncomfortable with its existence that we want to legislate it out of our own field of view, raped children be damned as long as we're feeling comfortable ourselves?

I would argue that the ban on possessing child pornography is already preventing the capture of child molesters, and it will get many, many times worse so in the coming decade. I also have a very strong feeling that the ban is in place because we'd like to pretend that things like this don't happen, and legislate it out of our field of view, throwing actual victims of crime to the wolves in the process. That's not worthy. (Falkvinge, 2012)

This is a two-step argument from (negative) effect to (negative) cause, which can be simplified as follows:

First step: Criminalization of the possession of child pornography (pocp) is a (quasi)sufficient cause of more frequent occurrences of the destruction of materials that would be useable as evidence in a trial against child molesters.

Second step: A more frequent destruction of evidence is a (quasi)sufficient cause for a less effective prosecution of child molesters.

A less effective prosecution of child molesters is bad.

Therefore, the criminalization of pocp is bad.

A-level criticism:

Taking a classical set of scheme-level critical questions (e.g. Hoppmann, 2011) as a guideline for the first level argumentative criticism will lead to the following questions:

A.1 abstract

- a) Are all relevant stated premises correct?
- b) Are the modal qualifiers in the source proposition and the target proposition identical (or logically implied)?

A.1 concrete

- a) Is a less effective prosecution of child molesters a bad thing?
- b) Does the argument reason from a normative premise onto a normative premise?

The answers⁶ to both of the first critical questions here is simple: yes, a vast amount of reasonable humans would agree, that an effective prosecution of child molesters is *ceteris paribus*, a positive value; and yes, there is no naturalistic fallacy in this argument.

A.2 abstract

- c) Are there no relevant scenarios (possible worlds) in which the alleged (quasi)sufficient cause is not followed by the alleged effect?

A.2 concrete

- c1) Are there no relevant scenarios in which criminalization of pocp is not followed by a more frequent occurrences of the destruction of materials that would be useable as evidence in a trial against child molesters?
- c2) Are there no relevant scenarios in which a more frequent destruction of evidence is not followed by a less effective prosecution of child molesters?

The answers to these scheme-dependent critical questions are slightly more complicated. c2) appears to be rather unproblematic: yes, more frequent destruction of evidence makes any kind of prosecution harder in any relevant scenario. This is not even limited to child abuse, but a general truth about the legal system. c1) on the other hand is probably the weakest link on the scheme-level (and thus the most likely point for an objection by an opponent to this position). There is probably good reason to believe that the danger of self-incrimination and the potential grave effects that an accusation of pocp can have (and has had in the past) is a serious incentive for the destruction of evidence. It presumes however that a: people would even be aware that they could be charged with pocp if they contact the police (as many seem not to be) and that b: people would act out of pure self interest and set a priority of avoiding legal risks to themselves at the cost of the victims of child abuse (which is probably true for many, but not all people). Taken together c1) leaves room to challenge, but seems not to defeat the argument immediately.

B-level criticism:

Given that Falkvinge is proposing the change of an existing law, he has to overcome the presumption in favor of the status quo of a law. This is a presumption that has been spelled out in detail by debate theory under the label of 'stock issues' theory.

⁶ Needless to say, that while the set of critical questions generated for each text will be mostly objective, the answers to them are not, but require a significant amount of subjective judgment of the critic. This is by no means to say that they are arbitrary, but depending on the premise set and judgment of each person, there will be (and must be) a certain amount of variety.

Stock issues models provide a list of critical questions or check labels that varies slightly from theorist to theorist. Skipping over the frequently included ‘topicality’ issue which only deals with the specifics of competitive debate and tests whether the team or debater addresses the topic provided (which in this case is freely chosen and certainly matches between label and content), this leaves one with three or four key issues, which address the existence of a problem, its general solvability, the capability of the plan or proposal to solve the problem, and potential negative side effects or costs.

B.1 abstract:

- a) Problem: Is there a problem in the legal status quo?
- b) Solvability: Is this problem generally solvable with human means?
- c) Plan: Does the proposed plan solve the problem?
- d) Cost: Are the positive effects not outweighed by the newly created problems?

B.1 concrete:

- a) Is there a problem with the current prosecution of child molesters?⁷
- b) Is this a problem that can be solved by changes in the law?
- c) Would the legalization of the pocp solve this problem?
- d) Are there no newly created issues that are larger than the original problem?⁸

The answers to these critical questions once again require a certain amount of judgment (and background knowledge) by the critic, but some can be identified as larger, and others as smaller. a) is an issue that will hardly be objected to. Problems can exist either because something (e.g. a law) is fully dysfunctional and needs to be displaced, or because it is less effective than it could be. At least the more modest, second alternative can certainly be attested. As long as there is still a notable amount of child abuse and the abusers are not effectively prosecuted there is without a doubt a problem. It would take the denial of the existence of child abuse to produce a full negative to the first critical question. Similarly critical question b). While the mere existence of crime, even crime as heinous as child abuse, is probably an unchangeable fact of human nature, especially in an open democratic society, the scope to which it exists and is punished is changeable with societal means (i.e. laws and policies). The third critical question leaves a more mixed result. If Falkvinge’s argument from effect to cause is correct (or at least has some merit as the A-level analysis seems to indicate) then the proposal would address at least *some* aspect of the problem. What Falkvinge fails to prove however, is whether the potential

⁷ There is more than one problem identified in the entire essay. For a complete analysis one would need to repeat this step with other problems Falkvinge identifies, such as the limitations to the freedom of speech and the freedom of the press.

⁸ This last stock issue already links onto the questions of counterarguments tested in B.2

destruction of evidence is a relevant factor in the overall prosecution of child molesters. If this factor was usually minor (for which – admittedly – there is little indication), then the impact of his proposal might be too small to address the problem. Finally, d) there might be new problems that the legalization of pocp creates. Some of those will be better address as counterarguments under B.2, but a host of others can be listed here. They include the continued victimization of abused children, their personality rights, questions of perceived decency or obscenity etc. Weighing this list against to potential good that better prosecution would bring is probably the most subjective part of the B.1 analysis, but there is some good reason to believe that any of the mentioned secondary effects which are only even made possible by existing child abuse would be outweighed by addressing the root of the problem and eliminating more child abusers from the free society. This leaves the, equally complicated, question of existing counterarguments:

B.2 abstract

- Did the protagonist supply sufficient argumentation to overcome relevant counterarguments?

B.2 concrete

- Are Falkvinge's arguments for the legalization of the pocp better than existing or accessible counterargument?

This question no longer tries to find any intrinsic faults with his argumentation, but rather compares it to other sound arguments. The immediate responses to Falkvinge's proposal (or at least those few of them who did not focus on hostilities, name calling and threats), such as David Newhoff's blog post (Newhoff, 2012) mostly limit themselves to attacking Falkvinge's reasoning rather than providing independent counterarguments (assumedly, because they perceive them as too evident to spell out). But there are still some counterarguments that are indeed accessible enough to require consideration. The most striking one could be formulated as "If you can't prove the involvement of an alleged criminal in any of the larger crimes (such as the actual violence, or the production, sale or distribution of child pornographic materials) then you should at least be able to lock him up for pocp." There are some intuitive benefits of this argument, but a closer analysis will reveal considerable flaws. These include the importance of the presumption of innocence ("If you can't prove a person's involvement with any of the other crimes, that might very well be, because he is actually innocent.") and the danger of considerable collateral damage by the and to the legal system (with any kind of strict liability offense being a massive red flag for anyone interested in legal philosophy and theories of justice). Openly acknowledging the danger of committing a straw man fallacy by ignorance, it seems that until opponents of Falkvinge's proposal produce compelling independent counterarguments, his reasons seem to outweigh existing counterarguments.

C-level analysis:

Most of the C-level critical questions take a dialogue as dominant paradigm. Using them on an argumentative text that is (at least at face value) a monologue, or – if reconstructed dialectically – just one turn of a dialogue, makes some of them less applicable than others. Using the above list as guideline for the process criticism leads to the following results:

C.1 abstract

- a) Were all participants allowed to speak freely, without fear of repercussions?
- b) Did all participants have the right to speak in sufficient length, order and repetition?
- c) Did all participants possess the necessary rhetorical, intellectual, linguistic and physical skills for the exchange?
- d) Did all participants have the necessary motivation in conducting the exchange?
- e) Were all participants free from overriding concerns that prevent them from employing their ability and motivation in the exchange?
- f) Did all participants have time to prepare and access to relevant information?

C.1 concrete

- a) Are there no indications that Falkvinge or opponents of the legalization of the pocp cannot speak freely, without fear of repercussions?
- b) Do both Falkvinge and his opponents have equal access to public attention?
- c) Do both Falkvinge and his opponents possess the necessary rhetorical, intellectual, linguistic and physical skills for the exchange?
- d) Are those that are opposing Falkvinge motivated to speak up?
- e) Are those that are opposing Falkvinge free from overriding concerns that prevent them from employing their ability and motivation in the exchange?
- f) Do both Falkvinge and his opponents have time to prepare and access to relevant information?

Again, given the monological setting, some of the critical questions are more relevant than others. The first critical question brings a theoretically interesting result. While it may be safe to assume that the *opponents* of Falkvinge's proposal can speak up without fear, Falkvinge himself has to fear (and has encountered) serious repercussions for speaking up against a social taboo. This would lead to a negative result on critical question a) which contradicts the intuition, that if he manages to produce reasonable argumentation and defend his case even in the face of this

resistance, this should not be hold against him on the process level. The second critical question might produce a soft negative, if one would assume that Falkvinge uses his celebrity status and the popularity of his blog to be heard more clearly than others. Likely this is not a key problem in a free online culture though. There are no indications that critical questions c), d) or e) bring a negative result. Given the large number of potential opponents it is safe to assume that at least some of them possess the sufficient skills and motivations to counter Falkvinge. Finally, critical question f) produces a certain positive as Falkvinge only makes use of publicly available information in his arguments.

C.2 abstract

- Did all participants follow the relevant special discursive rules mandated by the setting?

The last set of critical questions does not apply, as Falkvinge's contribution is not part of a setting to which a discernable set of special discursive rules applies.

5. CONCLUSION

This paper tries to reduce a gap between sophisticated theories of critical questions and objections on the one side, and one of the main objects of those theories, applied argumentative criticism on the other. In proposing a simplified taxonomy of critical questions which covers a larger territory in more detail than the rough and ready lists found in debating handbooks and similar texts, yet simple and straightforward enough to be of actual use in real life criticism, I have tried to show how both sides can benefit from each other. The brief example of an applied criticism illustrated on a recent controversial essay by Rickard Falkvinge shows some of the uses that a better-structured list of critical questions on different levels can have for the practical critic trying to evaluate the reasonableness of an argumentative text.

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