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Commentary on Paul van den Hoven's "Argumentative Discourse as a Sign"

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1. INTRODUCTION

Reading Paul van den Hoven's paper, I was reminded of the United States Supreme Court decision in *Bush v. Gore* (2000) that effectively ended the 2000 Presidential election campaign and handed the Presidency to George Bush. Like all Supreme Court decisions, it was built on a detailed statement of the facts of the case, addressed the arguments in play and the relevant Constitutional principles, and gave a rationale for the decision rendered. It was a decision that surprised a lot of people—not because the decision was unexpected, but because the rationale of the Court was taken to be an unusually transparent front for the real reasons and motives for the majority (5-4) decision. Justices aren't supposed to be partisan (the majority 5 were appointed by Republicans; the minority dissenters all by Democrats) or practically motivated (there was a strong sense of "Enough, already!"). A desire to uphold the Constitution is supposed to be the overriding motive and the opinion of the Court should give a rationale that convincing based on that consideration alone. And to many, the decision just didn't look like it did that job.

I was also reminded of how the news media's follow-up to President Obama's nomination of Sonia Sotomayor for the Supreme Court reflected the assumptions that the Court had become a "deeply political institution" (Douthat 2009) and that Justices would allow all sorts of non-Constitutional considerations to intrude into their decisions.

Both cases illustrate an interesting tension that I take to be central to van den Hoven's paper. It is this: We all know that all kinds of personal, political, social, and cultural factors can influence legal decision-making. But they aren't supposed to. And we don't like it when they do. Furthermore, we assume that they don't have to, or at least we assume that the influence of such factors can be minimized.

Now, my take on this tension is a little different than van den Hoven's. He sees lurking behind this tension a modernist ideology that is a myth. The myth is that facts and legal principle sort of speak for themselves and inevitably determine (for a rational judge) the conclusion to be drawn. Maybe that ideology is at work in legal decisions. It certainly is a myth if it is at work. But I think a less ambitious claim can be made: We try to keep out these "illegitimate" influences by requiring that any decision be justified by

arguments that are based on, and only on, the facts of the case, the arguments made, and the law. The problem is that we don't like the wiggle room this still affords individual decision-makers. Moreover, many of the discursive tactics that we use to promote this kind of justification don't always work as well as we'd like and in any case become empty exercises when deployed by people who don't know what they're doing. This is the difference between genuine strategy that is heuristically functional and mere style and hollow conventions that only gives the appearance of reasoned justification. So the problem is that this defensive Line of Reasoned Justification gets breached too often, and even when it does hold, the Enemies of Reason find ways to get around it and do all sorts of trouble.

Van den Hoven seems to think this line of defence is pointless. I wonder where we go if we abandon it. Take the three cases in point to which van den Hoven draws our attention. The first is order of presentation. Van den Hoven suggests that the conventional order of presenting reasoning-then-conclusion simply promotes a (false) impression of objective inevitability to the decision while harming comprehensibility. He seems to think that an order that puts conclusion first would be more easily comprehended. That may be true. It's an empirical matter that we could find out. But I worry about the reverse cost. If this conventional order implicates objectivity, think what is communicated by using the opposite order. I worry that if the conventional order does in fact implicate objectivity, then deliberately using the unconventional order is going to implicate subjectivity, partiality, and arbitrariness. Do we really want that accepted and expressed in our legal decisions?

Take the other two cases: the conventional sections of the decision and the linguistic conventions that suppress personal agency and judgment. I agree entirely with van den Hoven that filling in the sections in the decision can become an empty exercise and that the language stylistics can become a mere form of posturing. Interestingly, Bazerman (1988) makes very similar observations about the APA Manual of Style and its effects on the writing style in the experimental research reports in psychology. But again, even if the effects of such stylistic conventions is merely to convey adherence to a norm of objectivity, what would be the effect of deliberately flouting such conventions? Do we want to communicate that? And if we don't, how is that to be avoided, and avoided convincingly?

There is another observation to be made about all these conventions: They do have a point, a function, even if writers do not always understand that point or how the convention functions strategically to promote that point. I can take my own experience as a student in experimental psychology. One of the first things I had to learn was how to write a research report and how to write in the style expected of an "objective" researcher. And I can report from first-hand experience that the writing style has a point: It gets you to observe in the desired way. It's not that I became objective in any deep metaphysical sense—but I did learn to look at my rats and my subjects differently, to note different facts, and to find visible signs and evidence for my own inferences and judgments. There is a real effect here, just as making people fill-in certain sections in their reports makes them do the things they have to write-up (like do a literature review, plan a research design, use a standard research protocol). Those categories don't prevent shallow or sloppy work—but they do promote attention to better work for those who care to do it. I have no doubt that similar rationales lie behind legal documents. And maybe

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those rationales would be best served by teaching people what those rationales are, explaining the functions, showing their point. When conventional practice appears to be a hollow exercise, perhaps the diagnosis should extend to the way the practices are taught.

[Link to paper](#)

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