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Commentary on Tomasi's "Diversity of judgments: Reason and Emotions in Forensic Practice"

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1. Introduction: Empirical work in Argumentation Theory

A position that undergirds Tomasi's paper on the study of judgments in legal arguments I quote directly from Tomasi: "*Ethos* and *pathos* are not in the 'suburbs' of cognition and are not an alternative route: *logos ethos* and *pathos* are not alternative or parallel ways of persuasion but interlaced" (p. 9). Argument-making and argument-having is complex. Theorists like Brockriede (1975), Willard (1978), Gilbert (1994), and Hample (2005) - among others - put forward theories that recognize the social aspects of argument, the *arguers*. In this paper Tomasi describes and explains the parameters around an empirical research project that investigates to what extent emotion influences judges' final decisions in legal arguments. This is a project that also emphasizes social aspects (i.e., emotion) involved in arguments. As the term emotion is widespread, Tomasi first articulates important criteria of emotion and related concepts. Then the author concentrates on the epistemic feelings of judges. Tomasi ends the paper with an explanation of the connections between legal arguments and epistemic feelings. Tomasi's paper recognizes the layers of complexity in the process of argument-making.

I applaud the empirical efforts of this project, as it is important for the field of argumentation to develop theories validated by *real* arguments. I share the following responses to Tomasi's paper, in an effort to broaden the conversation generally in a helpful way (i.e. more about argumentation theory generally, and less about particular arguments made in legal cases). First, there are critiques of science that have explained the impossibility of *neutrality* in human decision-making. These works corroborate Tomasi's point that judges' legal arguments cannot be based on, or assessed with, solely rationality - this is simply insufficient (Tomasi, p. 4). Second, I demonstrate how *implicitly* inferring epistemic feelings function similarly to conversational implicatures in conversations and enthymemes in argument. I end with a discussion of the potential idealism that may be apparent in acknowledging and working with epistemic feelings in argumentation. This has nothing to do with Tomasi's ideas, and more to do with our culture's *detachment* from emotion. A sense of awareness is expected when investigating epistemic feelings that perhaps is not simple, or inherent, for some individuals (judges or researchers for that matter). Overall, this investigation contributes value to the argumentation literature, and especially to emotion in argument.

2. A Judge is not superman

I borrow some criteria about argument from Brockriede (1975) that, I think, supports Tomasi's research agenda. Brockriede states that arguments can be found in the vicinity of people (1975, p.

179); succinctly put, they are a *social* activity. Arguments occur because some x needs to be solved or justified, and arguments are based on perceptions arguers have (Brockriede, 1975, p. 181). This depiction of argument drives home the point that neutral stances, or arguments following normative parameters or expectations, are not always practical. In fact, a study of arguments made by people will likely shed light on how argumentative decisions, or claims, are influenced in large by aspects of the arguer (e.g., arguer bias, arguer experience, arguer-selected research, etc.). Tomasi begins her paper by questioning the extent to which judges may be influenced by the emotions displayed by others in a court case (p. 1). In essence, if judges are influenced by emotional displays in the context of a legal case (and why wouldn't they be? They are humans, not superman), then to what extent are judges' perceptions being shaped by what they hear?

I offer a parallel analogy related to knowledge construction. Feminist epistemologists, for example, question the knowledge scientists rely on to make decisions in their empirical research - from deciding what to study, how to study it, how to analyze findings from a study, etc. (see Longino, 1990; Fricker, 2000; among others). If different cultural contexts, social conditions, educational backgrounds, and so on give rise to (obviously) diverse belief systems and worldviews, then it follows that decisions within the realm of science originate from particular people and their particular choices. That a scientist decides to study a , and not b ; that a scientist has hypothesis c and not d or e ; that a scientist uses methodology f ; all these choices that are executed may be derived from intuition, not *neutral* knowledge. And, yet, a point epistemologists referenced above make is that these findings are generalized and then extrapolated as universal knowledge.

Knowledge is multi-dimensional, diverse, and we do not all have access to the same knowledge. While the critiques of science are for the purpose of illuminating the exclusion of particular voices and experiences in the construction of knowledge, the point is relevant to judges' decision-making. Judges experience their own situatedness - this does not disappear when they assume the role of judge. Others involved in the court systems also speak, and present views, from their limited situatedness. This is not a criticism, but rather an observation. How judges are influenced by others in their legal arguments involves these epistemological processes, and often implicitly. If these critiques of epistemology are not enough to support the process of emotions influencing judges' legal arguments, de Sousa (1987, 2009) claims that emotions play a crucial role in *rational* decision-making (p. 139).

3. Epistemic feelings as a variation of an enthymeme in argument

To quickly summarize epistemic feelings, Tomasi references de Sousa's four categories: wonder, doubt, certainty, and familiarity (p. 3). These feelings lie below the surface of conscious deliberation, and they guide evaluative appraisals (de Sousa, 2009, p. 140). While they guide us in such intellectual activity, epistemic feelings are intuitive in nature (Tomasi, p. 4). Sometimes we may be aware of our epistemic feelings, and other times they become explicit because some subsequent event or thought occurs. This is Tomasi's point - a judge may not be aware of his/her epistemic feelings, though they can be inferred from his/her judgments. In the study of the Court of Appeal in Trento Tomasi describes, judges would be interviewed on their reactions to the parties' speeches.

Grice discusses the concept of a conversational implicature (1975), which aids individuals conversing to fill-in-the-blanks that are left out of conversation. A conversational implicature is not explicit to a listener in a conversation, but s/he understands the meaning intended by a speaker if each participant in the conversation is abiding by the cooperative principle and implying

meanings intended. We have a similar mechanism in arguments - enthymemes. Missing components of arguments are obvious to arguer and audience, even if they are never explicit. In fact, an arguer him/herself may need to think about whether, and what, enthymemes are present in his/her own argument. It is possible that epistemic feelings work analogously to conversational implicatures and enthymemes - they are obvious, if unmentioned, components of a judge's decision, just as conversational implicatures and enthymemes are obvious but implicit to audiences. The interviews of judges in the research study Tomasi discusses function as a methodology for helping us flesh out our emotions related to evaluative appraisals. The questions help us fill-in-the-blanks in a culture where we are removed, or distanced, from emotion (i.e. valuing, studying, emulating logic and rational processes over other sub-personal processes). The point that I make here is that the process Tomasi describes already has accepted terminology and methodology in conversation and arguments, where what is implicit can be made *discursive*. Perhaps we can use a parallel method for filling-in-the-blanks for what is intuitive in the development of legal arguments (or arguments in general). This is more challenging than it sounds, of course.

4. Cultural shift with respect to emotion

It is particularly challenging to be aware of how one is affected by others' emotion, how it influences the audience's thoughts and decisions, because emotion itself is rather elusive, or an unpracticed mode of being, at least in Western culture. If we rely on value-hierarchical thinking (i.e., thinking that subscribes to rational normative frameworks) then we are trained to develop, access, and respond to, etc. thoughts in a discursive manner (Warren, 1988) rather than with emotional awareness. Quite frankly we are out of our element when it comes to truly understanding, using, receiving our emotions. And, so, it is quite conceivable that judges' decisions can be influenced by their responses to parties' speeches in a legal framework.

My concerns lie with the challenges in uncovering epistemic feelings, even if guided by questions. There may be individuals who are distanced from emotions, or who may not know how to articulate how others affect them. Cognitive behavioural therapy is a therapy process that can help individuals change their thought patterns once they come to an understanding of interlinking patterns of thinking, behaving, and feeling. For example if a judge believes that socio-economic factors - which are uncontrollable - can influence individuals to steal (thought), then a judge may compensate for being in a middle-class social bracket by donating money to panhandlers (behaviour), and the judge may feel more care towards thieves on trial compared to other judges (feeling). Making a judgment based on an emotional speech can play a role in how such a judge reacts in specific cases. It takes time to recognize knowledge of these processes, but it does not follow that it is impossible.

Tomasi shares some of the questions asked of judges (pp. 6-7), recognizing that judges may be analyzing their behaviour, thoughts, and feelings - and so the questions focus on the *facts* of the case that are related to epistemic feelings. The study relies on the responses to fact-based questions to infer emotions that influence decisions. Tomasi shares that a subsequent study would ask judges explicit questions related to emotions as reasons for decisions and associated epistemic feelings (p. 7). I am a bit weary of how to analyze judges' answers to even the factual questions. For example, one question asks whether something disturbed the judge while the parties spoke. If a judge answers with low, or moderate, or high - how does this connect with epistemic feelings? What are we inferring? How do we know if the judge him/herself knows if they were *disturbed*?

Do we need a definition of what it means to be disturbed? This type of study requires an audience, and perhaps even researchers, with a sense of *unskewed* awareness. This in itself is oxymoronic, though, as the goal of the study is to help uncover implicit processes with emotion that judges remain unaware of.

5. Conclusion: You know it because you feel it

There are theorists who have discussed emotion in argument (Gilbert, 1994; Plantin 2004, 2011; Ben-Ze'ev, 1995; Walton, 1992; and so on). Tomasi takes the discussion of emotion in a particular direction with respect to judges' decisions, and Plantin (2011) is referenced. Ben-Ze'ev (1995) may also help this endeavour, as he states that emotions have cognitive, evaluative, motivational, and feeling aspects. They are considered different aspects of a single state. For Ben-Ze'ev *emotions can be reasons for a conclusion rendered*. Analogously, a judge's legal argument can be influenced similarly by his/her emotional state (even if not explicit to the judge him/herself) with these four criteria of emotion in the background. Epistemic feelings, like Ben-Ze'ev's account of an emotional argument, can be functional in that they aid judges in making decisions.

I await the results of the study, not because I do not trust emotions are indeed affective, in that "you know something because you feel that" (Tomasi, p. 9) but because the analyzed data would i) help us visualize and understand the connections of pathos, emotion, and decision-making, ii) shine a light on subjects' perceptions and self-awareness; iii) tell us if whether the analysis of data (who analyzes and how are they analyzing it) needs to be revisited. The latter two remain concerns for me, though I expect they can be addressed.

References

- Brockriede, W. (1975). Where is argument? *Journal of American Forensic Association*, *XI*, 179-182.
- de Sousa R. (1987). *The Rationality of Emotion*. Cambridge: MIT Press.
- de Sousa, R. (2009). Epistemic feelings, in *Mind Matter*, 7(2), 139-161.
- Fricker, M. (2000). Feminism in epistemology: pluralism without postmodernism. In M. Fricker, & J. Hornsby (Eds.), *The Cambridge companion to Feminism in philosophy* (pp. 146-165). Cambridge, UK: Cambridge University Press.
- Gilbert, M. A. (1994). Multi-modal argumentation. *Philosophy of the Social Sciences*, 24(2), 159-177.
- Hample, D. (2005). *Arguing: Exchanging reasons face to face*. Mahwah, NJ: Lawrence Erlbaum Associates, Inc., Publishers.
- Longino, H. E. (1990). *Science as social knowledge*. Princeton, NJ: Princeton University Press.
- Plantin, C. (2004). On the inseparability of emotions and reason in argumentation. In E. Weigand (Ed.), *Emotions in dialogic interactions* (pp. 265-276). Amsterdam: John Benjamins.
- Warren, K. J. (1988). Critical thinking and Feminism. *Informal Logic*, 10(1), 31-42.
- Willard, C. A. (1978). A reformulation of the concept of argument: The constructivist/interactionist foundations of a sociology of argument. *Journal of American Forensic Association*, 14(3), 121-140.

