Character Attacks as Complex Strategies of Legal Argumentation

Fabrizio Macagno[1] and Douglas Walton

In this paper we analyze leading criminal cases taken from the Supreme Court of the United States, in which *ad hominem* arguments played a crucial role. We show that although such character attack arguments can be used for legitimate purposes in legal argumentation, in many cases they are weak arguments, but so persuasive that they can effectively prejudice the judgment of a jury. Their dangerous and prejudicial effect can be used as a fundamental component of more complex strategies, aimed, for instance, at shifting the burden of producing evidence or proving character. Using argumentation schemes, we provide criteria for establishing the reasonableness and the weaknesses of this type of argument in different circumstances. We show how *ad hominem* arguments can be used legitimately as undercutters aimed at undermining the conditions on w hich arguments from a source (such as arguments from expert testimony) are based. We explain the rhetorical persuasiveness of personal attacks by revealing their structure as complex strategies that fit clusters of arguments together to arouse different types of emotions.

Keywords: argumentation, personal attacks, *ad hominem*, emotions, prejudice, presumptions, undercutter, burden of proof, argumentation schemes

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Ad hominem arguments represent one of the most worrisome, suspicious, tricky and controversial yet effective argumentation moves in law (Cantrell, 2003; Arnold, 1995), and they play a pivotal role in criminal law. They are potentially inadmissible arguments, as they are not directed against the issue or the interlocutor's argument, but against the character of the person who puts it forward. But these attacks can be extremely effective (Holt, 1990), as "society at large, and juries, tend to disbelieve people of 'bad character'" (Bosanac, 2009, p. 39). For this reason, *ad hominem* arguments, even though inadmissible most of the time, are used both by the prosecution and the defense in the heat of a courtroom battle (Cantrell, 2003; Clifford, 1999; Carlson, 1989).

Use of personal attack to discredit an opponent or witness in a trial setting is an extremely important form of argument for an advocate or a judge to be aware of. Cicero, who clearly described this type of attack in a court, and showed he was well aware of its power, described how he dealt with witnesses who had been allegedly paid for by the prosecution. He advised that when the words cannot be attacked, the only possible option is to attack the person (*in hominem*)[2]. Instead of arguing against the facts testified to by such witnesses, Cicero argued against their status as witnesses of persons who were "in partnership […] with the prosecutor".

Although *ad hominem* arguments have long been considered to be fallacious, recent research in argumentation studies has progressively moved toward acceptance of the view that they are not always fallacious, and that when they are, they are best seen as "perversions or corruptions of perfectly good arguments" (Raley, 2008, p. 16). The fundamental problem with these arguments is their nature and classification. "*Ad hominem*" is an umbrella term, excessively broad, which generally comprises all personal attacks, often noticeably different in their reasoning structure and dialogical purpose. The purpose of this paper is to inquire into the implicit structures

[2] "And why should I, the counsel for the defense, ask him questions, since the course to be taken with respect to witnesses is either to invalidate their testimony or to impeach their characters? But by what discussion can I refute the evidence of men who say, "We gave," and no more? Am I then to make a speech against the man, when my speech can find no room for argument? What can I say against an utter stranger?" (Ciceronis *Pro Flacco* X, 23)

underlying and supporting personal attack arguments, including different reasonable or mischievous types of reasoning, implicit premises and tacit conclusions.

Personal attacks can be strategic choices of the prosecution or the defense. First, they need to be detected, which can be more complex when the attacks are implicit. Second, the risk of incurring sanctions is sometimes balanced by the effect of the attack. On the one hand, the defense's attack can be objected to, while it can affect the jury's evaluation of the case and lead the prosecutor to a counter-attack (which can be judged as inadmissible). On the other hand, even when the prosecutor's *ad hominem* moves are inadmissible (and punishable with mistrial), they can be still considered as harmless (Holt, 1990, p. 140), especially when the case is strong (Gershman, 1986a). For this reason, little guidance is given on how to determine the propriety of his actions (Gershman, 1986a, p. 140), especially when he wants to communicate the strength of his case to the jury, or reply to a personal attack.

The choice of investigating personal attacks in a legal context of dialogue (and in particular criminal cases, mostly from the U.S. Federal court of appeal), has a twofold purpose. It can provide criteria, taken from a philosophical and linguistic approach, for analysing specific legal moves, enabling us to grasp their strategic dimension and the balance between risks and benefits. But it also provides a structure for studying their rhetorical uses. The choice of selecting attacks from American criminal cases places such moves within a retorical framework, where the jury plays the role of the audience, and is the target of the *ad hominem*.

1 Types of *ad hominem* in argumentation

The existing argumentation theories on *ad hominem* arguments can provide some useful insights on the characteristics and uses of this type of argument. Walton (1998) distinguishes *ad hominem* arguments according to the types of grounds provided to support a value judgment or a decision on the conclusion advocated. For instance, the attacker can support the claim that the interlocutor's argument should not be accepted with a judgment on different aspects of his or her character,

such as logical reasoning, perception, veracity, or cognitive skills (Walton, 1998, pp. 198-199, 217; 2002, p. 51). On this perspective, depending on the nature of the interlocutor's claim and the scope of the attack, the move can be reasonable or fallacious (see also Battaly, 2010). On Walton's theory, character attacks can be (1) based on an allegation that the person attacked has some sort of ethically reprehensible character suggesting a lack of veracity or some other indication of untrustworthiness or (2) based on circumstantial evidence from which an inconsistency in the opponent's commitments can be extracted. For instance, past actions or advocated positions or associations with groups holding a specific view can be used as reasons for not accepting the interlocutor's viewpoint or argument. In an even stronger form, the personal attack may be used to suggest that, since the speaker was found to have a bad character (for veracity, for instance) all of his viewpoints or arguments may be automatically dismissed (for instance, based on the reasoning "if he lied in the past, he will lie also this time"). This latter variant of the *ad hominem* argument is often called poisoning the well (once the well is poisoned, all the water that can be taken from it in the future will be undrinkable) (Walton, 1998, pp. 220-257). Walton also distinguishes these kinds of arguments based on attacks to the person's character from the ones against his attitude to stick to a particular viewpoint or interest (bias *ad hominem*). While the first type of attack can be considered as an argument based on the quality of the source, in the second case the attacker grounds his move on the person's failure to be a good interlocutor, his unwillingness consider contrary arguments, and his penchant for manipulating the evidence to advance his own interests and views. Used in these ways, an *ad hominem* argument attack can be used to exclude one's opponent from a discussion altogether by suggesting that he is not trustworthy enough to engage in rational argumentation in a balanced and collaborative manner. This kind of move can be a knock-out blow which the opponent may not be able to recover from.

These varieties of types of *ad hominem* argument have also been studied by the pragma-dialectical school. On their view, *ad hominem* arguments are aimed at preventing an interlocutor from advancing his standpoint, on the basis that he is not qualified to do so. For this reason these kinds of *ad hominem* argument are considered as fallacies, moves

that are not acceptable as they breach the fundamental rule of an ideal critical discussion, stating that "neither party should prevent the other party from expressing standpoints or doubts" (van Eemeren, Meuffels & Verburg, 2000, p. 419).

These theories reveal important aspects of the structure of *ad hominem* arguments and also show the usefulness of classifying this type of argument into several subtypes. However, they do not point out the possible scopes and purposes of *ad hominem* arguments, distinguishing between the different possible levels where the arguments are characteristically employed. On the account we now propose, personal attack arguments can be used in law at a meta-dialogical or dialogical level in three different fashions. First, they can be used to exclude the interlocutor from the dialogue by showing his failure to comply with the conditions (namely the rules) of the dialogue (*ad hominem* 1). For instance, the speaker can attack the hearer in order to interrupt the dialogue, exclude him from the discussion or justify his own refusal to continue it. This type of move is used in legal (criminal) proceedings to attack the person who is putting forward the arguments in defense or against the defendant, or, in *voir dire* examination, to exclude an incompetent, biased or unqualified juror (*Federal Rules of Criminal Procedure* Rule 6b(1)). Second, *ad hominem* moves can be used as arguments supporting a specific judgment or a decision (*ad hominem* 2). For example, the prosecutor can attack the defendant in order to trigger a negative judgment and support the conclusion that he is likely to have committed the crime, or deserves a severe punishment. Third, a personal attack can be used as an argument against the conditions of an argument (*ad hominem* 3). For instance, the persuasive force of expert or witness testimony lies in an implicit argument grounded on the credibility and privileged or superior knowledge of the source. By attacking the source, the credibility of the testimony can collapse (Pollock, 1974).

This classification of types of *ad hominem* arguments according to the scope and characteristics of the aim of the argument is summarized in figure 1.

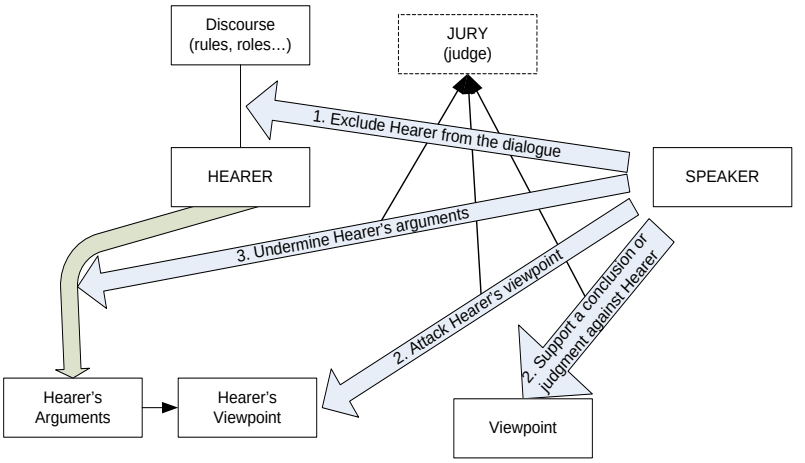

Figure 1: Scopes of *ad hominem* attacks

In the following sections the deeper structure of these different types of personal attacks will be presented, describing the different components of the strategies of which they are part and the possible tactics, or rather maneuvers, to achieve a specific goal.

In addition to the specific literature on *ad hominem* argumentation, the general theory required by the analysis shown in figure 1 presupposes a framework of argumentation that is based on two components. One is the use of argumentation schemes, which represent commonly used types of arguments that are defeasible. To say that they are defeasible means that they are subject to default as new information comes into a case, for example information about an exception to a rule. Schemes identify patterns of reasoning that be challenged by raising critical questions (Walton, Reed & Macagno, 2008). Below we will identify some schemes that represent different types of *ad hominem* arguments.

However, there is more than this notion of defeasible reasoning required. The argumentation framework needs to examine pro-arguments supporting a claim as well as contra arguments attacking or defeating the claim, and by its nature defeasible argumentation proceeds by examining both the evidence for and against a claim. Argumentation is appropriate under conditions of lack of knowledge

and inconsistency so that there is uncertainty and a conflict of opinions on whether a claim should be accepted or not. In this framework an argument needs to be evaluated in the context of a dialogue in which two, in the simplest case, parties take turns criticizing each other's arguments and supporting their own arguments with evidence. A dialogue is defined as an ordered 3-tuple $\{O, A, C\}$ where O is the opening stage, A is the argumentation stage, and C is the closing stage (Gordon, 2010). At the opening stage, the participants agree to take part in an orderly discussion or investigation that has a collective goal. The nature of the conflict of opinions is framed at the opening stage, and then the pro and contra argumentation moves from there toward the closing stage through the intermediating argumentation stage. Every argument needs to be seen not only as an argumentation scheme, a structure with a set of premises and conclusion, but it also needs to be analyzed and evaluated within the communicative context where the argument is being used for some purpose in discourse. Moreover, there can be different types of dialogue. The goal of a persuasion dialogue is to reveal the strongest arguments on both sides by having a strenuous contest between the conflicting viewpoints during the argumentation stage.

A common law criminal trial is generally taken to represent a type of persuasion dialogue (Walton, 2002), where there is a burden of persuasion set at the opening stage on the prosecution, which needs to bring forward its stronger arguments in order to meet a burden of proof. In particular, he has to prove beyond reasonable doubt that the defendant is guilty, producing the evidence needed to support such a claim. No weakness in its argument can be left by the prosecution, or proof beyond a reasonable doubt will not be achieved. Once the prosecution has made his case (for instance presenting witnesses' testimonies), the defense can advance its arguments to weaken it (for instance, by attacking their arguments or their character, or presenting contrary testimonies, which in their turn can be attacked by the prosecution). However, the burden of production for proving an exception is on the defense: for instance, if the defendant has pleaded self-defense, he will have to provide some evidence to support this claim (burden of production). Once he has met this burden of production, even by a small amount of evidence, the prosecution then

has the burden of persuasion that there was no self-defense. Trials are different from ordinary persuasion dialogues because their purpose is not to convince the opponent (the prosecution or the defense), but a third party, the judge, or in US criminal trials, the jury. In particular, the popular jury at common law is the trier of fact: they find the facts and apply (or at least they are instructed to do so) the law as given by the judge in order to reach a verdict. On this perspective, in order to support their position, the prosecution or the defense advance different types of arguments and counterarguments that can persuade the jury. Some of these arguments are admissible, while others are considered as inadmissible or improper, and can lead to curative instructions (namely instructions given to a jury by the judge to avoid prejudice and correct error) or more serious decisions when they can affect the final outcome. *Ad hominem* attacks in criminal cases are one of the most problematic types of argument, as they can greatly affect the prejudice and passions of the jury.

2 Meta-dialogical moves in legal argumentation

The first type of move is against the participants in the dialogue (in this case the defense counsel or the prosecution) and its structure can be represented as follows (Walton, 1998, p. 249):

Argumentation scheme 1: Generic ad hominem

a is a bad person.
Therefore, *a*'s argument α should not be accepted.

By attacking the speaker (in this case the prosecution or the defense counsel) it is possible to draw the conclusion that his arguments (in general or a specific argument) should not be accepted. The prosecution can attack and undermine all the possible evidence and arguments advanced by the defense by suggesting or claiming that the counsel is dishonest (*State v. Reyes,* 108 S.W.3d 161, 2003), or has lied and fabricated evidence. Apart from their potentially fallacious character, these moves can effective, but also dangerous for the party that advances them. For this reason they are used in more complex strategies.

Ad hominem attacks can be extremely dangerous when made by the prosecution. As stated in *Berger v. United States* (295 U.S. 78, at 89, 1935), "improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused, when they should properly carry none." For this reason, if the prosecutor is allowed to strike "hard blows", he cannot strike "foul ones." One of the most prejudicial blows can be the direct *ad hominem* on the defense counsel, especially where the credibility of his defense is attacked not based on evidence. A clear example is from the case cited above (*Berger v. United States*, 295 U.S. 78, at 89, 1935):

> Again, at another point in his argument, after suggesting that defendants' counsel had the advantage of being able to charge the district attorney with being unfair, "of trying to twist a witness," he said:
> "But, oh, they can twist the questions, . . . they can sit up in their offices and devise ways to pass counterfeit money; 'but don't let the Government touch me, that is unfair; please leave my client alone.'"

This attack was considered to be improper and highly prejudicial (and for this reason it led to reversal)[3] because it implied that the defense counsel has an extra-record reason to believe her client guilty, and that the prosecution held information not in evidence to support such an accusation (see also *United States v. Rios*, 611 F.2d 1335, at 1342, 1979, where the prosecutor suggested that the defense counsel conspired to fake exculpatory evidence). The effectiveness of these attacks stems from the role and superior knowledge of the prosecutor, which trigger a presumption of knowledge (if he suggests a fact, he

[3] The analysis of a prosecutor's reversible error (in this case an *ad hominem* attack) is based on "a two-step approach; first, it determines whether the prosecutor's remarks were improper, and second it determines whether the error was harmless." Concerning the second step, four factors are considered:
(1) whether the remarks tended to mislead the jury or to prejudice the accused;
(2) whether they were isolated or extensive;
(3) whether they were deliberately or accidentally placed before the jury; and
(4) the strength of the evidence against the accused.
(*United States v. Carroll*, 26 F.3d 1380, at 1385-87, 1994)

must have unstated reasons supporting it) (Gershman, 1986a, pp. 135-136; Clifford, 1999, p. 264).

The attacks can be acceptable when they proceed from circumstantial evidence, and be simply launched as generalizations based on the counsel's alleged behavior in specific instances. Instead of attacking simply his arguments, the opposing party can draw or suggest a conclusion about his character. For instance, in the O.J. Simpson murder trial, the prosecutor Marcia Clark attacked the defense attorney Lee Bailey starting from some alleged "hair splitting" behavior (*People v. Simpson*, No. BA 097211, 1995. Official transcripts 34A, March 15, 1995 at 0008-0010):

> MS. CLARK: This is kind of nonsense that gives lawyers a bad name. It is clear what he said to the Court and was intending to convey. He had personal knowledge of what this man said. He said it personally, Marine to Marine. Now he is standing up in hair-splitting with us. I never said he said this. I just said he spoke to me personally. That's nonsense. That shows you what we have over here in the way of ethics. They will get up and misrepresent to their heart's content. They start splitting hairs. They have this; they have that. I felt like we are Alice in Wonderland. Nothing means what it says. […] Because Mr. Bailey, you can see how agitated he is, has been caught in a lie. You know something, in this case you don't get away with that. There are just too many people watching.

Clark's attacks are mostly implicit, or rather implicatures and were not even objected to at trial. She does not directly call Bailey a liar, but she claims that "he has been caught in a lie" and that "in this case" he cannot get away with it, taking for granted that he is used to lying. The other comments concerning his ethics similarly imply a negative judgment.

Meta-dialogical attacks made by the defense counsel on the prosecution are common and equally dangerous tactics. However, in this case the danger lies in the invited response doctrine: a defense argument may open the door to otherwise inadmissible prosecution rebuttal, because prosecutors must be allowed to offer "legitimate

responses" to defense arguments raised during summation (*United States v. Rivera*, 971 F.2d 876, at 883, 1992). In other words, an attack by the defense can allow an otherwise inadmissible argument (a counter-attack by the prosecution, for instance). A clear example is the aforementioned case (id. at 883, emphasis mine):

> Rivera claims that the prosecutors initiated ad hominem attacks against Rivera's trial counsel by referring to him as a "**know-it-all**" and "**Mr. Thorough**." These characterizations were made in response to Rivera's counsel's arguments that he had obtained material from many sources, including private investigators, and was "very thorough." They also responded, less directly, to the contention of Rivera's counsel that he was presenting the "truth" of the case, as distinguished from the prosecution's representations. For example, Rivera's counsel asserted, in his opening statement: "[Cooperating witness] Ward Johnson has a great motive to follow [the prosecutors'] script and not be truthful in this case. Will Ward Johnson tell their truth or the truth during the course of his testimony?"
> […] Rivera also argues that the prosecutors attacked his counsel's credibility and integrity, pointing to numerous characterizations of Rivera's case as "**smoke screens**," **game-playing, distractions, and distortions**.

This attack was considered as legitimate, as it was aimed not at prejudicing the jury, but at rebutting the counsel's attack that the prosecution framed the defendant. The ironic characterizations of the counsel simply undermined an attack, instead of advancing one (see also *United States v Martinez* 419 Fed. Appx. 34, at 37; 2011). However, the invited response can often become a "springboard affirmatively to attack the defense" (see *States v. Young*, 470 U.S. 1, at 12-1, 1985), which amounts to an improper (and potentially prejudicial) remark.

In case of a defense's attack on the prosecutor, the latter is faced with a problematic alternative. On the one hand, he needs to reply to the attack in order to defend his reputation (or the reputation of his witnesses); on the other hand, the risk of advancing inadmissible or

prejudicial remarks is high. The risk of exceeding the boundaries of an admitted reply can be the very purpose of the defense's attacks, and in particular the points of order (Hamblin, 1970, p. 283), or rather the procedural locutions aimed at pointing out alleged prosecutorial misconduct. This strategy consists in the ungrounded allegation of inadmissible moves. For instance, in (*United States v. Pelullo*, 964 F.2d 193 at 219; 1992), the defense counsel accused, without any reasons, the prosecution of an incorrect behavior:

> During summation, Pelullo's counsel attempted to insinuate that the prosecutors suborned perjury by noting that three Government witnesses had changed their testimony following meetings with the Government. […] Finally, Pelullo suggested that the Government employed heavy-handed techniques to influence the testimony of Janice Spreadborough, a disbursement coordinator for FCA Mortgage.
> […] the defense proffered that the witness was "pestered" by the prosecutor until she would testify in a manner consistent with the Government's theory of its case. The prosecutor categorically denied the allegations, and again objected on relevancy grounds. After a sidebar, the court sustained the objection.

The purpose of this move was to lead the prosecution to moves that could have been considered as actually prejudicial. As the Court found, "Where there is no foundation for the defendant's assertions, the prosecutor will undoubtedly feel the need to respond during rebuttal which often leads to improper prosecutorial vouching as to the credibility of witnesses or to the prosecutor's own integrity or that of his or her office" (id. at 219). For this reason, such attacks need to be objected to by the court in order to avoid possible risks.

3 Arguments from character attack – attacks based on prior actions

Character attacks can be used as powerful arguments supporting a judgment on the defendant. In law, the effectiveness, or dangerousness,

of character attacks is described and governed by the *Federal Rules of Evidence* [4]. According to rule 401, the prosecution can introduce evidence of the defendant's past actions only if it is relevant, that is, only if "it has any tendency to make a fact more or less probable than it would be without the evidence and if the fact is of consequence in determining the action." In this framework, the item of evidence is required to be connected with the matter to be proved by a relationship "based upon principles evolved by experience or science, applied logically to the situation at hand." However, even if a piece of evidence is admissible according to rule 401, it may be excluded if its probative value "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence" (Rule 403). According to this rule, the relevance of evidence, such as facts concerning the defendant's character, shall be considered together with the risk of prejudice (Park, Leonard & Goldberg, 1998, p. 720). In particular, as stated in Rule 404, character evidence (including both a person's character or character traits and evidence of other crimes, wrongs, or acts used to prove the character of a person, FRE 404a; b) is not admissible for the purpose of proving conduct (or rather "action in conformity therewith on a particular occasion", FRE 404a) but it can be introduced if it is necessary to establish "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" (FRE 404b). A man cannot be proved to be guilty because he has a bad character. However, previous crimes can be cited "when they are so blended or connected with the one on trial as that proof of one incidentally involves the other; or explains the circumstances thereof; or tends logically to prove any element of the crime charged […] as well as to establish identity, guilty knowledge, intent and motive" (*Bracey v. United States*, 142 F.2d 85, at 89, 1944). For instance, prior acts can be used to prove emotional predisposition or passion in sexual offences. The strategies of character attack against the defendant hinge on the thin balance between relevance and prejudice. However, in order to analyze how and why character attacks are made, it is necessary to distinguish between their different

[4] The latest version of these rules can be found on the web at www.uscourts.gov/rules/newrules4.html.

reasoning structures, which reveal the different potential instruments of persuasion or prejudice.

The powerful and dangerous relationship between character attacks and prejudice lies in the notion of presumption, which is essential for the notion of character evidence. The passage from previous negative actions to the judgment on the person is grounded on a pattern of presumptive reasoning that is clearly outlined in fields of law directly concerning a person's personality, such as family law. In family law, child custody is granted considering the best interest of the child, and one of the material conditions determining whether the parent shall be awarded custody is his character (Myers, 2005, pp. 666-668). This type of reasoning is grounded on a fundamental presumption, namely the "stability" of the person (Perelman & Olbrechts-Tyteca, 1951, p. 254). Persons are characterized by patterns of behavior that allows one to judge and somehow predict his actions. For instance, if we know that a person behaved bravely in the past, we will tend, in an evidential situation where there is lack of contrary evidence, to judge his actions as brave (see Rescher, 1977, pp. 2-3; Dascal, 2001). The choices made in the past are regarded as a pattern that will be likely repeated in the future. Therefore, past actions can be thought of as a reason to draw a judgment on the person, then used to judge his actions or predict or retrodict his possible acts.

This presumptive reasoning can be represented as a combination of an argument from sign, leading from one or more acts to a judgment on the agent's character (Perelman & Olbrechts-Tyteca, 1951, p. 256), and an argument from cause to effect, leading from a character disposition to possible past or future actions. In philosophy, the basic presumptions on which this twofold reasoning step were made explicit by Aristotle (*Rhetoric* 1368b 13-15; 1369a 1-2):

> For the wrongs a man does to others will correspond to the bad quality or qualities that he himself possesses. […] All actions that are due to a man himself and caused by himself are due either to habit or to rational or irrational craving.

On this view, bad actions reveal a bad quality, which can be a habit or an irrational craving. In their turn, habits and cravings are

(teleological) causes, or rather reasons, of action. This philosophical perspective can illustrate the reasoning that can be ordinarily triggered, providing a possible reconstruction of the effect of an attack on the popular jury. The first step in this complex reasoning can be represented as follows (Walton, 2002, p. 42):

Argumentation scheme 2: Argument from sign

MAJOR PREMISE	Generally, if this type of indicator is found in a given case, it means that such-and-such a type of event has occurred, or that the presence of such-and-such a property may be inferred.
MINOR PREMISE	This type of indicator has been found in this case.
CONCLUSION	Such-and-such a type of event has occurred, or that the presence of such-and-such a property may be inferred, in this case.

An action can be regarded as an indication of a certain habit (negative in this case) or irrational desire. From this character trait it is possible to predict or retrodict the possible actions of the person, or rather establish his possible criteria of choice and decision. Such reasoning is based on the presumptions that the character and habit of a person is presumed to continue as proved to be at a time past (Lawson, 1885, p. 180), and that the habit of an individual being proved he is presumed to act in a particular case in accordance with that habit (Lawson, 1885, p. 184; Park, Leonard & Goldberg, 1998, p. 158). We can represent the complex structure of this reasoning as follows:

Argumentation scheme 3: Causal argument from character

SIGN Presumption Judgment	• Agent *a* committed the negative actions A, B, C. • *A, B, C are a sign that a has an unchangeable negative characteristic P.* • Agent *a* has (is) *P*.
CAUSE Prediction	• *P is a cause of a's choices for negative actions of the kind Q.* • *Agent a is presumably inclined towards committing negative actions of the kind Q.*

This argument can be reasonable in conditions of lack of evidence, where a decision such as custody needs to be made based on incomplete knowledge, or in the penalty phase of a trial, where any prior felony conviction can be used for establishing the defendant's status as a habitual offender (*Johnson v. Mississippi*, 486 U.S. 578, at 588, 1988). However, the use of character evidence in the guilty phase can be extremely dangerous because it leads from a sign to a retrodiction based on two different defeasible patterns of presumptive reasoning. The risk is that the defeasible nature of the presumptive reasoning is overlooked, especially when the evidence triggers emotions or shows a prior crime materially similar to the one tried.

4 Attacking the defendant: strategies and dangers

Character attacks based on previous negative actions are usually carried out in three phases of a trial: in the opening statement, during cross-examination of the defendant, and in the closing argument. The prosecution's statements, and in particular the summation, are particularly strategic, as inferences from evidence can be drawn and the prosecution (and the defense) is expected to be passionate in their arguments. However, sometimes the boundaries of an acceptable argument are exceeded, and an attack, instead of being merely passionate, can become an inadmissible appeal to passions.

4.1 Opening statement

In the opening statement, the prosecution can attack the defendant based on the facts that will be presented, leading the jury to analyze carefully the seriousness and the implications of the evidence. For instance, in *United States v. Correa Arroyave* (721 F.2d 792, at 796; 1983) the prosecutor labeled the defendant as "a big-time, high stakes, narcotics dealer here in Dade County." This claim risked prejudicing the accused, suggesting enhanced and prior criminality. However, since the evidence (namely about 20 pounds of cocaine that the government found) indicated a large involvement on a large scale, the description was considered as proper.

Sometimes the prosecution exceeds the boundaries of the evidence and attacks the defendant using in particular two strongly prejudicial

types of attack: the reference to prior similar crimes and the amplificatio, or rather the strategy of taking guilt for granted. The first strategy consists in leading the jury to a generalization from prior bad actions to the defendant's generally bad character, from which the perpetration of the charged crime can be drawn or suggested. For instance we can consider the following case (reversed for improper opening statement), where the prosecutor introduces evidence of the defendant's past crimes, which he compares to the one he is actually charged with (transporting in interstate commerce a forged instrument) (*Leonard v. United States*, 277 F.2d 834, at 848, 1960):

> Before I give you the explanation of the crime charged in the indictment I want to recite for you some of the false names used by this man in perpetrating these 84 crimes. In the indictment crime he used the false name, Joe Hill. In the false official statement made to obtain a f ishing license he used the false name Don Woods. In the Alaska Housing Authority forging and uttering, 12 offenses, he used the names Eddie Wilson and Bobby Wilson. And with respect to the Fairbanks group of crimes when he registered in a h otel room he registered as James Williams or James Wilson. It is quite impossible to determine absolutely because the manager of that hotel was subpoenaed and telegraphed -- I got the telegram this morning -- she could not appear due to complete disability. In addition to the names, said James Wilson or James Williams used to register at the Fairbanks hotel, this defendant used on t he 50 crimes conspiracy and attempts, the name Willie Lee Andrews. A total, I believe, of nine false names that will appear as used by this defendant in the evidence to be presented to you.

A similar dangerous strategy is to arouse prejudice by implicitly depicting the defendant as a bad person, based on prior crimes or other features of his character. For instance, in *United States v. Stahl* (616 F.2d 30, at 33, 1980), the prosecutor described the defendant (accused of bribing a government official in order to reduce an estate tax) as "a man whose total life is geared to make money in real estate" and

suggesting the equation between wealth and wrongdoing, in particular corruption:

> By way of example, the prosecutor stated in his opening that "this case is also about money, tremendous amounts of money", and then continued:
> The proof in this case will not deal with small time bribe-givers. It will deal, however, with the basic roots of corruption both within and without or outside the IRS. . . . (Y)ou are going to hear proof, members of the jury, about the unchecked flow of corruption in various Park Avenue offices, in the IRS, and in the executive offices of a major real estate company in this city. . . . (I)t will deal with the man whose illegal conduct in business made him a major corrupt bribe-giver in the City of New York.

The prosecution suggested that the wealth of the defendant depended on his "illegal conduct in business", and took for granted that he committed the crime of bribery several times (major corrupt bribe-giver). Since such claims were only aimed at arousing prejudice, the case was reversed.

This fallacious and improper attack leads us to consider the other strategy of personal attack, the so-called *amplificatio* (see Calboli Montefusco, 2004), which Aristotle described as follows (*Rhetoric* II, 24, 3): "This [fallacious topic] occurs when the "one amplifies the action without showing that it was performed." One of the clearest cases is *State v. Couture* (194 Conn. 530, at 562, 1984; see also Bosanac, 2009, p. 45), where the prosecution took for granted the defendants' guilt and used indignant language to describe their crime:

> "I implore you not to forget that . . . the lives of three good men . . . were literally sacrificed to satisfy the greed of two murderous fiends."
> "Now, it did not take you long, did it, ladies and gentlemen, to discover that this was not a case about cats and mice. No, ladies and gentlemen. It was a case about rats. And what else would you call some people who would lay in wait and shoot three men in the back except maybe cowards."

> "We have learned . . . they are cold blooded and merciless killers that took the lives of three good, decent and hard working men . . ."
> "What kind of person would lay in wait and attack three unsuspecting and almost defenseless men but shoot them in the back? They must be the most inhumane, unfeeling and reprehensible creatures that God has damned to set loose upon us."

In this case the prosecution characterized the defendants as murderers before proving them guilty and for this reason the attack was considered as prejudicial and led to reversal.

4.2 Cross-examination

One of the most problematic dimensions of *ad hominem* attacks against the defendant is their dangerous nature. They can lead to prejudice, which in its turn can lead to reversal. As mentioned above, the introduction of the defendant's character, supported by the history of his previous convictions, is forbidden by the Federal Rules of Evidence. However, previous crimes can be cited in order to show intent or establish the defendant's credibility as a witness (*Gordon v. United States*, 383 F.2d 936, at 939, 1967)[5]. For this reason one of the strategies (and dangers) of character attack consists in introducing during the defendant's cross-examination evidence of his previous crimes. This move can be at the same time extremely effective and risky: "When the prior conviction is used to impeach a defendant who elects to take the stand to testify in his own behalf, two inferences – one permissible and the other impermissible – inevitably arise. The fact that the defendant has sinned in the past implies that he is more likely to give false testimony than other witnesses; it also implies that he is

[5] The prejudicial effect of this move is underscored also in the Uniform Rules of Evidence and Rule 106 of the American Law Institute's Model Code of Evidence: "Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility. If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility."

more likely to have committed the offense for which he is being tried than if he had previously led a blameless life. The law approves of the former inference but not the latter." (*United States v. Harding*, 525 F.2d 84, a t 90, 1975) . The prosecution needs to avoid the second impermissible inference especially in cases where the crimes were similar. A risky and powerful strategy of attack consists in suggesting this latter inference instead of blocking it, underscoring the similarity between the charged crime and the past one. For instance, in the following cross-examination a past conviction (for possession of marijuana) with strong similarities with the tried offence (distribution of cocaine) is introduced allegedly to attack credibility. However, the prosecutor introduces details useless for the issue of trustworthiness, but crucial for arousing prejudice (525 F.2d 84at 88):

> Q. Have you ever used marijuana or smoked marijuana?
> A. No, sir, I have not. […]
> Q. What was the felony you were convicted of?
> A. Marijuana possession.
> Q. Do you remember exactly what the felony was that you were convicted for, was it just possession?
> A. Yes, sir, possession. It was simple possession, that is all.
> Q. Wasn't it possession with intent to distribute?
> A. No, sir, it was not.
> Q. What sentence did you receive?
> A. Two to ten. […]
> Q. For possession of marijuana?
> A. Yes, sir.
> Q. You couldn't be mistaken about the crime that you were found guilty of, could you?
> A. The crime they charged me with was 80 pounds of simple possession.
> Q. Where did they find the 80 pounds at?
> A. At my residence, sir. […]
> Q. Mr. Harding, this 80 pounds of marijuana that was found in your house in June of '74, was that there in January of '74 when this cocaine sale took place?
> A. No, sir, it was not.

The prosecutor suggests that the defendant not merely possessed marijuana, but had intent to distribute it, just as in the tried case. The use of innuendo to misstate the prior conviction provides a strong reason for believing that the defendant also committed a very similar crime (see also *Gordon v. United States*, at 940). Because of its prejudicial nature, the move was considered as plain error and the case reversed.

The boundary between impeaching credibility and triggering inadmissible inferences is extremely risky. Past offences can show contradiction, but at the same time also bad character, turning an argument into an implicit attack (Gershman, 1986b, p. 484). For instance we can consider the following attack based on prior crimes, which was held reversible because of its prejudicial effects (*United States v. Carter*, 482 F.2d 738, at 740, 1973):

> Q. (The Assistant United States Attorney): And you wouldn't rob that man, right?
> A. I had no reason to rob when I am working.
> Q. You wouldn't do something like that?
> A. No, I wouldn't.
> Q. But in 1968, you were convicted of six counts of robbery and assault with a dangerous weapon, weren't you, on three different people?
> A. Yes, I was, and I have learned my lesson from that.
> Q. You did?
> A. Right.

The prosecutor introduced evidence of past crimes to underscore an inconsistency between acts and statements on an issue, credibility, which was brought forward by the defense. However, the attack on the credibility triggered a much stronger inference, namely that "appellant would rob a man, and in fact committed the robbery for which he was now charged." For this reason the case was reversed.

A more powerful and dangerous strategy consists in the use of presuppositions. Instead of introducing past convictions by means of questioning, the prosecution can take for granted evidence that cannot

be considered as false, even though not admissible (Hopper, 1981a; 1981b). For instance, we can consider the following move (*United States v. Sanchez*, 176 F.3d 1224, 1999):

> During cross-examination, the prosecutor asked the defendant the following question: "Can you explain to me Mr. Sanchez, why you have a reputation [for] being one of the largest drug dealers on the reservation but you don't have more than one source of supply?"

This question presupposes a fact that could not be introduced as evidence, suggesting to the jury that "the defendant had a reputation for being one of the largest drug dealers on the reservation" (*United States v. Sanchez*, at 1225). This move triggers prejudices and value judgments. The defendant is shown to be a criminal, and for this reason more likely to have committed also the present crime.

An even more powerful and dangerous tactic aimed at triggering prejudices is the characterization of the defendant as a "bad person" based on innuendo, instead of an explicit description of his previous crimes. For instance, we can consider the following case, where the defendants were depicted as "sinister characters" by means of innuendo, triggered by irrelevant questions during cross-examination concerning their unemployment, their possession of money and their apparently aimless activities in a drug-trafficking area (*United States v. Shelton*, 628 F.2d 54, at 57-58, 1980):

> In the case before us, the prosecutor did not openly present evidence of "other crimes." Rather, by innuendo, he painted a picture of Clifton Duke and David Shelton as seedy and sinister characters. This picture showed two unemployed men possessed of a large sum of money, driving in a car which was the subject of an investigation by the Drug Enforcement Administration. And, lest the jury miss the point, the prosecutor directed no fewer than four questions at Duke that were designed to show that he frequented the area of 14th and T Streets, N.W., a known center for narcotics activity. We cannot avoid the conclusion that, in a case the essence of which is common law

> assault, the prosecutor sought to persuade the jury that the defendant and one of his principal witnesses were members of the drug underworld involved in all sorts of skulduggery.

The prosecution did not explicitly introduce evidence of other crimes. On the contrary, the defendant's character was described in a fashion that corresponded to the prototypical drug trafficker. The innuendo makes a possible rebuttal or a critical assessment of the evidence more difficult (at 58): "Where the "other crime" alleged is not specified, it is more difficult for the defendant to refute the charge or to demonstrate its insignificance. Where the evidence is presented by innuendo, it is less likely that the jury will guard against manipulation." For this reason, the error was classified as prejudicial and the case reversed.

4.3 Closing statement

In closing argument the counsels are allowed to advance their arguments with generous latitude; in particular, given the nature of such statements, the courts tend not to infer that every remark is intended to carry "its most dangerous meaning." Moreover, the prosecution is expected to be passionate in arguing that the evidence supports conviction (*Donnelly v. DeChristoforo*, 416 U.S. 637, 646-47, 1974; *United Stated v. Farhane* 634 F.3d 127, 2011) , and draw reasonable inferences from the facts in evidence. Sometimes the admissible attack on the defendant can be used for achieving further effects, such as in the following case (*United States v Molina*, 934 F.2d 1440 at 1446, 1991):

> You could only come to one conclusion: That somebody is lying. And who is that? Who's lying? Is Special Agent Reyes lying? Did he get up on the stand under oath and lie to you for the sole purpose of convicting an innocent man? It's unbelievable. The one who lied to you is the one who is guilty of possessing with the intent to distribute the cocaine. And that's the defendant, Frank Molina. And when you weigh the credibility of the witnesses, remember that there was one witness here who had a greater motive to lie than any other

> witness, a greater stake in this case than either Art Reyes or Alvaro or Agent Leppla or anybody, and that man was the defendant, Frank Molina. He had the greatest bias in this case and the greatest motive to lie.

The attack (the defendant is lying) is based on inferences drawn from conflicting testimonies and commonly accepted principles (it is not reasonable that a man faces risks to convict an innocent; who has greater motives to lie can presumably lie). At the same time the prosecutor attacks the credibility of the defendant and bolsters the one of the witnessing agent, providing the jury with conflicting probabilities.

The use of inferences from facts in evidence for attacking the defendant can be extremely slippery, as the prosecution needs to block the inadmissible inferences to the culpability of the accused. As mentioned in the subsection above, the prejudicial conclusion needs to be avoided; however, sometimes in the closing argument the prosecutor leads the jury to draw the very inference that he should prevent. For instance, in the aforementioned case *United States v. Harding* (525 F.2d 84, at 89, 1975), the prosecutor underscored the similarity between the prior and the tried crime as follows:

> The Defendant has also denied ever using marijuana or any narcotics, but admitted to being convicted of a felony of possession, which 80 pounds of marijuana was found in his home in June of 1974, five months after this transaction took place. The Government submits that is a little unusual.

The prosecutor emphasized the similarity between the two offenses (and the details thereof), so that the improper inference was suggested, instead of blocked. For this reason, the error was considered as plain and the case reversed.

Triggering inadmissible inferences needs to be distinguished from taking the defendant's guilt for granted. This move can be extremely prejudicial, as the jury may be led to believe that the prosecutor holds unstated evidence to convict the defendant. The effect of the act of presupposing guilt can be further increased by means of other ancillary

implicit arguments, such as the fear appeal. In the following case (reversed for plain error) three implicit strategies are combined (*United States v. Weatherspoon*, 410 F.3d 1142, at 1150, 2005):

> Convicting Mr. Weatherspoon is gonna make you comfortable knowing there's not convicted felons on the street with loaded handguns, that there's not convicted felons carrying around semiautomatic...."

Here, first, the prosecution refers to the defendant as a "convicted felon", which was in evidence, but could lead to inadmissible inferences (the defendant is bad; therefore, he committed this offence as well; the defendant is generally bad and dangerous; therefore he should be convicted). Second, he took for granted that the offence that the accused was charged of (possession of firearms) was a proven fact. Third, he took for granted the dangerous character of the defendant appealing to the jury's fears. This latter strategy is based on argument from consequences (from Walton, 1995, pp. 155-156):

Argumentation scheme 4: Argument from consequences

PREMISE	If *A* is brought about, good (bad) consequences will plausibly occur.
EVALUATION	Good (bad) consequences are (not) desirable (should (not) occur).
CONCLUSION	Therefore *A* should (not) be brought about.

The bad habit is shown as a reason for future negative actions, but such actions are presented as negative consequences of acquittal. Moreover, the consequences are directly related to the jury's experiences and negative judgments concerning violent people, showing the relationship between the potential freedom of the defendant and the jurors' lack of personal safety. The prosecutor triggers fears in order to lead the jury by heuristic reasoning based on emotions. Emotions are forms of judgment leading to heuristic choices (Damasio, 1999, p. 302; Solomon, 2003, p. 107; Macagno & Walton, 2008), that is, decisions made in a situation of lack of evidence and time to assess all the possibilities. In order to avoid negative

consequences or pursue positive ones, the most convenient, even if not the best, solution is chosen. Triggering emotions can become a powerful strategy for precipitating a decision not justified by the evidence.

Another strategy of character attack based on prior negative actions is grounded on innuendo, which from a linguistic perspective corresponds to the use of implicatures. 'Implicature' (Grice, 1975) is a technical term in pragmatics, a subfield of linguistics, referring to a proposition suggested implicitly by an utterance, even though it was neither expressed nor strictly implied by the utterance. Implicatures are triggered by the deliberate flouting of a conversational maxim (such as the principle that speakers make their contribution as informative as required) to convey an additional meaning not expressed literally. For instance, the prosecutor does not state that the defendant committed a crime, but simply leads the jury to this conclusion by providing details apparently providing more information than required. In this fashion, he communicates a proposition to the jury and suggests its acceptance without explicitly committing to any assertion. In the following case (*United States v. Ayala-Garcia*, 574 F.3d 5, at 10, 2009, reversed), the prosecutor claims that the confiscation of the weapons that the defendants allegedly possessed (the charge was of firearm possession) saved actually several lives:

> Ladies and gentlemen of the jury, those (indicating) are bullets from an AK-47 assault rifle. There are 31 of those bullets that were in this gun, ready to go on May 25th. Thirty-one potential lives were saved on May 25th, 2006. And for that, the district of Puerto Rico should be thankful, 31 lives were saved.

The statement, apparently providing irrelevant and excessive information, can be explained only by presuming (Macagno 2012) that the defendants "were potential killers who would have murdered thirty-one individuals if they had not been arrested" (*id*. at 10). This implicit character attack carried two fundamental risks. First, it triggered fear and led the jury to the conclusion that the defendants need to be convicted in order to avoid possible killings. Second, the implicit intentions of the defendants to commit a mass murder elicited the

presumption that "the prosecutors knew something about the defendants' intentions beyond what had been revealed at trial."

Attacks on a defendant's character can be extremely powerful and prejudicial, and can be explicit or implicit. In both cases, the common strategy is to state or suggest the existence of prior crimes, or take for granted the defendant's guilt, crime or intentions. The danger and effectiveness of this move consists in the conclusions that it suggests by directing the interlocutors to a specific type of reasoning, based on the inference from past actions to a character trait, and from character to actual or future actions. The force of this reasoning is further increased by the role of the prosecutor, who is presumed to hold the evidence on which he bases his explicit or implicit claims. A subtler and more dangerous strategy is grounded on the implicit effects of some words that are usually referred to as "emotive".

5 Arguments from character attack – Emotive words

Attacks based on prior negative actions are based on a two-step chain of presumptive reasoning, leading from actions to a habit (or desire) and from the habit to a prediction or retrodiction. This type of reasoning is defeasible and can be objectively assessed by the jurors. The speaker can simplify this complex pattern of inference using emotive words, in particular negatively charged words (Cantrell, 2003). The speaker does not advance prior bad acts, or rather does not *only* advance them. He provides the interlocutors with the conclusion of the defeasible reasoning from sign, classifying the defendant as a member of a negative category of people, characterized by a criminal or extremely negative habit. In this fashion, the defendant is not simply shown to *have behaved* badly in the past, but to have a bad habit, or rather to be a person who *behaves* badly.

Emotive words have an extremely powerful effect on the interlocutor's decision-making (Macagno & Walton, 2010a; 2010b). First, they are connected with emotions. They can represent generic negative concepts mirroring the interlocutors' possible negative experiences, so creating a relationship between them and the case at issue. Such identification can trigger an immediate emotive response or a disposition to act accordingly (Damasio, 1999; Frijda & Mesquita,

1998, p. 274). Moreover, emotions are physiological conditions often limiting or diverting the attention of the agent from the critical assessment of the logical and rational structure of an argument (Blanchette, 2006; Blanchette & Richards, 2004). For this reason, emotions can be successfully used for communicating information and beliefs poorly supported by evidence, and lead the interlocutor to a specific decision or action (Frijda & Mesquita, 2000, pp. 46-47).

Emotive words are directly connected with imagination and past experiences. Without mentioning facts that can be assessed, these words simply provide an image of the interlocutor that can evoke associations with negative past experiences (Doerksen & Shimamura, 2001) and trigger immediate responses to the perceived negative consequences. Emotive words provide a "vivid representation" (Quintiliani *Institutio Oratoria*, VI, 2, 34; Frijda (1998, p. 276) calls it the "vividness effect"), an instrument for linking the crime with the interlocutors' experiences and leading them to the reactions they would have in a similar situation.

The use of emotive words can be a tactic that can be used in a reasonable and harmless way. The speaker can "amplify" (Aristotle, *Rhetoric* II, 1401b 3 -9) the facts, using indignant language that proceeds from evidence and for this reason is not prejudicial, even though it can stir the jury's emotions and emphasize the reasons on which they may ground their decision. For instance we can consider the following case (*United States v. Hoffman*, 415 F.2d 14, at 21, 1969):

> In an examination of the Government's closing argument, we believe counsel did appeal to sympathy and passion. His reference to defendant as a liar, crook, wheeler and dealer, and similar terms were not conducive to the fair trial to which defendant was entitled. The reference to "contempt for law and order," at a time when there is a general public concern for personal safety, is an unfortunate reference. […] Counsel's argument, while improper in its intensity, was an accurate characterization of defendant's actions.

The speaker, in this case, does not go beyond the evidence produced, even though he amplifies the character of the defendant by

reducing him to (grounded) negative features. For this reason, even though the appeal to the jury's sympathy and passions was judged as inadmissible, the error was considered as harmless.

However, sometimes the use of emotive language can prejudice the outcome of the trial. A clear example of its improper use can be found the following case from the court of appeal of Connecticut, which was reversed for prejudicial error (*State v. Williams*, 529 A.2d 653 at 663, 1987):

> "We have such nice words for these crimes now. Child-abuser; child abuser. Abuse? Abuse? That's what we do to alcohol. We abuse alcohol. That's not graphic enough a term. Baby-beater, that's what they ought to call this. Infant-thrasher, baby-beater. The more disgusting a term, the better it fits this crime. A child-abuser? 'Oh, isn't that nice. He's a child-abuser. We'll have to treat him.' He's an infant-beater; he's a baby-beater."

By identifying the defendant with a category of criminals, the prosecutor takes for granted not only that he committed the crime he is charged with, but also that he committed such a crime before. Moreover, by arousing emotions, he diverts the jury's attention from the analysis of the evidence, leading them to the wanted conclusion based on contempt or fear. He provides a representation of the defendant replacing generic words ("child", "abuser") with terms referring specifically to the first year of life of the victim ("baby", directly connected with the audience's experiences) and to physical violence ("trash", "beat"), charging them with personal comments ("disgusting"). Such terms were considered as highly prejudicial and extremely dangerous for the evaluation of the evidence.

There are two important fallacious strategies grounded the improper use of emotive words, each based on a different dimension of their structure as condensed arguments. The first strategy consists in unduly attributing a word to a fragment of reality, taking for granted facts that have not been proven or are simply false. The second one, on the contrary, amounts to a correct attribution of a word, whose function, however, is not to describe reality, but to reduce it to a simple characteristic that triggers prejudices, namely forms of presumptions

leading to ungrounded judgments (and not subject to rational assessment of its defeasibility). Both strategies carry strong presumptions, especially when they are used by the prosecution. The first one triggers the presumption that the grounds for the predication of a word are shared or known (by the prosecution) even if not stated (Macagno, 2012). From a trial perspective, this amounts to triggering the presumption that the prosecution holds evidence not presented at trial on which the attack is based, which corresponds to manipulating evidence, classifiable as a reversible error (*United States v. Bess*, 593 F.2d 749, at 755, 1979). The second strategy is aimed at arousing passions and prejudices through hasty generalizations that are commonly shared by a community. Classifying a person as a member of a specific ethnic or cultural community negatively judged can stir negative emotions and lead the interlocutor to the conclusion that he is guilty of the alleged crimes that such a community is commonly believed to commit (this attack is commonly referred to as "guilt by association", see Walton, 1998, p. 257).

The use of emotive language for attacking the defendant based on facts not in evidence amounts to expressing personal beliefs as they were based on undisclosed facts (*United States v. Young*, 470 U.S. 1 at 18-19, 1985). The danger of an improper use of such terms lies in the relationship between the reasonableness of the predication and its effects. The predication can be unreasonable because based on unstated facts, suppositions, or the very action the defendant is charged for. For instance, in the aforementioned case (*State v. Williams*), the prosecutor took for granted that the defendant committed the beating he was charged for and committed other child abuses before. However, the unreasonableness of the move is accommodated by reconstructing its controversial presuppositions. In other words, the jury presumes that the prosecutor knows the reasons why he is using such a word. For this reason, an emotive word used inappropriately, namely not based on prior evidence, presupposes the existence of the facts making its use reasonable. We can consider the following case (*Hall v. United States* 419 F.2d 582, at 587, 1969):

> I just don't believe that Harry Degnan who took Beck's statement and whom you have seen in this courtroom all this

> time would force anybody to make a statement. I know him to be a fine F.B.I. officer — absolutely the finest I know. A man of absolute integrity. And I get a little tired of the F.B.I. being whipping boys for hoodlums. And that is the only way I know how to describe the defendant Donald Hall, he is a hoodlum.

This argument was considered as improper and prejudicial for two reasons. First, the prosecutor expressed a personal belief in order to support the character of his witness. Second, in order to increase the force of his bolstering the officer's credibility, he attacked the defendant's character based on facts not in evidence. The court described its dangerous and inflammatory nature as follows (id. at 587):

> This type of shorthand characterization of an accused, not based on evidence, is especially likely to stick in the minds of the jury and influence its deliberations. Out of the usual welter of grey facts it starkly rises — succinct, pithy, colorful, and expressed in a sharp break with the decorum which the citizen expects from the representative of his government.

The manipulation of evidence is a crucial element for the assessment of the prejudicial effect of a move. In this case, the personal opinion was aimed at leading the jury to ground their decision on crucial evidence that the prosecutor took for granted, and therefore presumed to be in his possession.

Instead of presupposing facts not in evidence, the prosecutor can suggest their existence by describing the defendant with words eliciting specific inferences or prejudices. On this perspective, the use of emotional words can introduce implicitly the existence of "other crimes" to imply that the defendant is a bad person or has criminal propensity (*United States v. Shelton*, 628 F.2d 54, at 57, 1980; see FRE 404). The generalization can be triggered by a description of the defendant focused on his association with groups against which there are prejudices, or rather that are commonly presumed to be bad or have criminal propensity. A clear case is *United States v. Doe*, where the prosecutor described the defendants, African Americans (referred to

during the trial as "Jamaicans") accused of drug and firearm possession, as follows (903 F.2d 16, at 24, 1990):

> And what is happening in Washington, D.C. is that Jamaicans are coming in, they're taking over the retail sale of crack in Washington, D.C. It's a lucrative trade. The money, the crack, the cocaine that is coming into the city is being taken over by people just like this — just like this. They're moving in on the trade. They're going to make a lot of money on it....

The Jamaican ethnicity at the time of the trial was commonly connected with crimes (during the trial media reported threats by Jamaican drug gangs on the life of the Mayor of Annapolis). The prosecutor's use of the term "Jamaicans" to refer to the defendants, and the vivid representation of the activities of the group they belonged to (strengthened by labeling defendants as "people like this") triggered the conclusion that the defendants were simply guilty because they shared the same nationality as those whom were described in such negative terms. For this reason, the error was considered as prejudicial and the case reversed.

The prejudicial force of emotive words lies in the inferences that a vivid description can trigger. A common strategy for increasing their force is to increase the force of the most useful (and often inadmissible) inferences. In the case above, the stereotypes concerning Jamaicans were already commonly shared, and the media bolstered them. In order to increase the effect of a categorization, the speaker can support or create a stereotype of the group the defendant belongs to. For instance, in the following case (*Bains v. Cambra*, 204 F.3d 964, 2000) the prosecutor described the defendant, accused of homicide, as a Sikh, and then proceeded to create the stereotype of this religion. In this case, the potentially emotive classification was motivated (the defendant's Sikh beliefs could show motive); however, the prosecutor instead used the epithet to trigger powerful inferences (at 975-976):

> A not insignificant portion of the prosecutor's closing arguments, however, […] invited the jury to give in to their prejudices and to buy into the various stereotypes that the

> prosecutor was promoting. […] Here, the prosecutor relied upon clearly and concededly objectionable arguments for the stated purpose of showing that all Sikh persons (and thus Bains by extension) are irresistibly predisposed to violence when a family member has been dishonored ("If you do certain conduct with respect to a Sikh person's female family member, look out. You can expect violence.") and also are completely unable to assimilate to and to abide by the laws of the United States ("[T]he laws in the United States [are] not what we're talking about. We're playing by Sikh rules.").

The use of a potentially emotive characterization can trigger different types of inferences (such as Bains, a particular Sikh person, may have had a motive to kill a family member). However, the inflammatory arguments were aimed at bolstering its prejudicial effects, guiding the jury to draw the very inferences that were inadmissible, given their prejudicial nature (Bains, as a Sikh, was compelled to kill a family member).

6 *Ad hominem* undercutters

The last type of personal attacks is the *ad hominem* undercutter. The personal attack is not used as a reason to support a specific viewpoint, but is rather a move aimed at rebutting the foundation on which the interlocutor's argument is based. In law undercutters are usually used against argument from testimony (including both witness and expert witness testimony), from appearances and from pity. Undercutter character attacks have a twofold dimension. They need to be directed against the presuppositions of the argument, such as the credibility of the witness or the expertise of the authority, based on available and admissible evidence. However, in addition to being relevant, character undercutters need to be effective. They need to lead the jury to the conclusion that the source is not credible or does not deserve pity from factual evidence. For this reason, *ad hominem* undercutters are often complex strategies, involving tactics for arousing emotions, emotive words or arguments from consequences. Moreover, *ad hominem* undercutters have different scopes, or rather targets, depending on the

argument they are undermining. Different dimensions of the person are attacked, depending on the characteristics that put forward as preconditions of the argument.

6.1 Undercutting witness testimony

Ad hominem moves can be aimed at attacking the witnesses in order to defeat the implicit argument based on t heir position to know and reliability. This pattern of argument, called argument from witness testimony, can be represented as follows (Walton, Prakken & Reed, 2003, p. 33, Walton, Reed & Macagno, 2008, p. 309):

POSITION TO KNOW PREMISE	Witness *W* is in position to know whether *A* is true or not.
TRUTH TELLING PREMISE	Witness *W* is telling the truth (as *W* knows it).
STATEMENT PREMISE	Witness *W* states that *A* is true (false).
CONCLUSION	*A* may be plausibly taken to be true (false).

This argument can be undermined by attacking the credibility of the testimony, which amounts to attacking his character for truthfulness and, more specifically, his propensity for lying or his bias (propensity and interest for lying in the specific situation). The undercutter of a witness testimony can be grounded on the witness's inconsistencies or his past actions.

The witness's character can be impeached based on his contradictions during the trial, which can be considered as a sign of bad character untruthfulness. One of the most famous cases of character attack based on the witness's contradictions is the O.J. Simpson murder trial, where the crucial witness for the prosecution, Detective Fuhrman, was found to have lied concerning his racial statements. In the same trial, however, we can notice that the counsel for the defence widened the scope of the attack, showing the witness as a corrupt, racist and evil person, and therefore biased against the defendant. This *ad hominem* move was made in the closing argument by the defence attorney Johnnie Cochran (*People v. Simpson*, No. BA 097211, 1995):

> Then we come, before we end the day, to Detective Mark Fuhrman. This man is an unspeakable disgrace. He's been unmasked for the whole world for what he is, and that's hopefully positive. […]
> Then Bailey says: "Have you used that word, referring to the `n' word, in the past 10 years? "Not that I recall, no. "You mean, if you call someone a Nigger, you had forgotten it? […] Why did they then all try to cover for this man Fuhrman? Why would this man who is not only Los Angeles' worst nightmare, but America's worst nightmare, why would they all turn their heads and try to cover for them? Why would you do that if you are sworn to uphold the law? There is something about corruption. There is something about a rotten apple that will ultimately infect the entire barrel, because if the others don't have the courage that we have asked you to have in this case, people sit sadly by. […]
> We owe a debt of gratitude to this lady that ultimately and finally she came forward. And she tells us that this man over the time of these interviews uses the "N" word 42 times is what she says. […] And you of course had an opportunity to listen to this man and espouse this evil, this personification of evil.[…] The tape had been erased where he said, "We have no niggers where I grew up." These are two of 42, if you recall. […]Talking about women. Doesn't like them any better than he likes African Americans. They don't go out and initiate contact with some six foot five inch Nigger who has been in prison pumping weights. This is how he sees this world. That is this man's cynical view of the world. This is this man who is out there protecting and serving. That is Mark Fuhrman.

In this closing argument the defense counsel undermines the crucial testimony of detective Fuhrman by attacking his character for truthfulness. His testimony was shown to partially conflict with factual evidence, but to undercut this argument effectively the counsel needed to erase any doubt about the truth of his words. For this reason, he destroys Fuhrman's character. The defense counsel's attack is based on evidence. Fuhrman lied about his racist addresses and was shown to

hate Afro-Americans. However, the counsel drew from these facts inferences about his character emphasizing with emotive words the concepts of evil, racism, corruption and cynic character. The counsel did not draw the conclusion that Fuhrman lied, but simply aroused indignation and contempt in a jury that was mostly composed of Afro-American jurors.

Despite its violent attack to the witness's character, this move did not lead to any objection because of its internal structure. The evidence on which the attack was based emerged during the trial and concerned a specific attitude of bias against the group to which the defendant belonged. Moreover, the counsel for the defense attacked Fuhrman's character only relative to the evidence presented. No conclusions concerning his trustworthiness are made explicit, even though the emotive language used a gloomy image of the detective is depicted. According to the *Federal Rules of Evidence* (Rule 609) it is possible also to introduce evidence of the witness's past convictions in order to impeach his character for truthfulness. The counsel only needs to provide such evidence, so that the jury can assess the witness's character and his possible bias: "One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. […] The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony" (*Davis v. Alaska*, 415 U.S. 308, at 316, 1974).

Personal attacks against the witness can be extremely effective, and are for this reason dangerous. Even though "counsel must be given leeway to argue reasonable inferences from the evidence", "the personal opinion of counsel has no place at trial" (*United States v. Collins*, 78 F.3d 1021, at 1050, 1996). As noticed above, the circumstantial evidence (or rather the sign) should to be provided without making the conclusion explicit (as it would be a personal opinion, even if drawn from the facts). While in implicit attacks the jury is free to draw the more reasonable conclusion on the basis of the evidence presented, in explicit attacks the speaker provides the jury with his own point of view. However, depending on whether it is the prosecutor or the defense to attack the witness, the possible prejudicial effects are noticeably different. Defense counsel, like the prosecutor, must refrain from interjecting personal beliefs and must not be admitted

to make unfounded and inflammatory attacks (*United States v Young*, 470 U.S. 1, at 9, 1985). However, the prosecutor's attacks based on personal beliefs can have a much greater effect than the defense counsel's ones, leading to "devastating impact" on a jury (see *United States v. Bess*, 593 F.2d 749, at 755, 1979), as:

> Such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence (*United States v. Young*, 470 U.S. 1 at 18-19, 1985).
> The statement is an expression of the prosecutor's personal belief regarding the guilt of the witness (see *United States v. Zehrbach*, 47 F. 3d 1252, 1995).

For this reason, in order to analyze the effects and the strategies of a personal attack, it is useful to investigate the cases in which they can prejudice a trial, namely when they are made by the prosecution. The explicit and potentially inadmissible attacks that can be advanced by prosecutors can be divided in three categories, according to their prejudicial effect: 1. explicit attacks based on the evidence presented; 2. explicit attacks not based on evidence; 3. implicit attacks not based on evidence (presupposing the witness's bad character);

The first type of explicit attack is more effective than simply presenting evidence, but, given its inadmissibility, risks leading to a mistrial if proven prejudicial (see *United States v. DiLoreto*, 888 F.2d 996, 1989). This strategy is based on evidence on prior convictions or bad acts that can be only weak signs of the witness's poor trustworthiness. Obviously, when such evidence is simply provided and no conclusion is explicitly drawn, it can have little effect on the jury, especially when the crimes committed do not trigger directly and powerfully a negative judgment on the person. For this reason, the attacker needs to increase the weight of his attack by making its

conclusion explicit, as in the following case (*United States v. Zehrbach*, 47 F. 3d 1252, at 1265, 3d Cir. 1995):

> I suggest you shouldn't believe Drizos and Smith because they're guilty of exactly the same bankruptcy fraud that these two defendants are guilty of. And don't you assume that they are not going to get what's coming to them either.

Here the prosecutor, in his closing argument, draws a personal conclusion based on crimes that are not directly relevant to the credibility issue. The jury could have been led to believe that the prosecutor had other information or evidence not produced during the trial to come to such a conclusion, unduly increasing the effect of the attack. For this reason, the move was considered as inadmissible, even if it d id not lead to reversing the judgment because of its limited prejudicial effect, considering the strength of the prosecution's case, its occurrence in the trial (it occurred only once) and the following curative instructions.

The second strategy consists in an explicit ungrounded attack. Instead of presenting facts from which the jury or the counsel can later draw inferences, the speaker can directly attack the witness without advancing evidence, or classify him or her with emotive epithets not supported by the facts. These *ad hominem* moves are extremely effective and prejudicial, and risk leading to a mistrial. We can consider the following leading case (*United States v. Collins*, 78 F.3d 1021, at 1049 (1996).

> The prosecutor's statements, paraphrased, are: […] 3) when the DLJ witnesses swore to tell the truth they demonstrated from the tales they told that they have a lot of contempt for the people in Kentucky; 4) the witnesses must think we drive turnip wagons if they expect you to believe this tale; 5) I am not sure every witness fulfilled the oath to tell the truth; and 6) do you have a sense that certain witnesses took their oath seriously to tell the truth?

In this case, the prosecution advanced unwarranted attacks on the defense's witnesses. However, the prosecutor at the same time reminded the jurors of their obligation to weigh the credibility of the witnesses, pointing out that his remarks were just aimed at underscoring that the jury should consider the issue of credibility. Given these instructions and the overwhelming evidence, the error was considered as harmless[6].

A subtler strategy consists in taking for granted the witness's bad character, suggesting to the jury that he is a liar. In cross examination the counsel or the prosecution can presuppose attacks in order to prevent the interlocutor or the opposing counsel from denying the accusation or blocking the question. For instance we can consider the following case (*United States v. Everage*, 19 M.J. 189, at 191, 194, 1985):

> Q. Well, according to the story that you told when your counsel was examining you, what you apparently did was take these items and just walk out without even checking to see if they were in there. Do you think that happened? […]

[6] Explicit ungrounded attacks can lead to mistrial. For instance we can consider the following case, taken from the court of appeals of Florida. The lawyer, after withdrawing as defendant's counsel, was called at trial as a defense witness to establish that the identification of the aggressor with the defendant was tainted. During the closing argument, the prosecution attacked the witness directly (*Barnes v. State*, 743 So. 2d 1105 at 1106; 1999):

> In rebuttal the state's prosecutor, Alberto Milian, responded by characterizing this testimony as "the mercenary actions of . . . a hired gun, [e.s.] hired by the -- ." At that point the following occurred:
> "DEFENSE: Objection to that.
> COURT: Sustained.
> DEFENSE: Ask that it be stricken.
> COURT: Ignore the last comment.
> STATE: -- who was hired to go over there and defend this guy."

In this case, the prosecution used a loaded word (hired gun) to characterize the witness as biased and untruthful, without providing any evidence to support such a claim. The use of the emotive word shifts the burden of proof and can seriously affect the jury's assessment of the testimony. For this reason, it was considered as a reversible error.

> Q. When you're being asked detailed questions about something that's a lie, don't you get nervous?
> Q. ". . . But it takes a real smart person to get on the stand and lie because, to do that, you first have to make up the story, you then have to tell it, you have to remember it, and you have to be able to tell it the same way again." . . .

Here, "the substance of his questions was directed to the clear implication that the accused was lying" (*United States v. Everage,* 19 M.J. 189, 191, 1985) and that he was a skilled liar. For this reason, the error was considered as prejudicial and led to reversal.

The defense counsel attacks to the reputation of the prosecution's witness carry different effects and risks. The crucial problem concerning personal belief, namely the presumption of the prosecutor's background knowledge, does not arise in the attacks made by the defense. Such attacks are on this perspective much weaker, as the jury cannot infer that the defense held undisclosed evidence to support their claims. However, they can affect the witnesses' reputation and influence the assessment of their character by the jury, especially when the attacks are based on prejudices. For instance, the following case was based on the credibility of the prosecution's witnesses (DelGiorno and Caramandi), who were convicted felons. The defense tried to destroy their credibility by attacking them personally, and accusing the prosecution of scripting their testimony (*United States v. Pungitore*, 910 F.2d 1084, at 1123, 1990):

> Joseph Grande's attorney claimed that DelGiorno's and other witnesses' testimony was completely fabricated by the government: "You know that [DelGiorno and Caramandi] they're liars, killers, thieves, burglars, flim-flam artists, cheaters, crooks, perjurers. . . . Their testimony has been colored, it's been nursed, rehearsed, practiced, planned, engineered if you will so that when they testify that they'll appear believable."
> […] Here in the 80's . . . what they do is they buy them off with hundreds of thousands of dollars, change their identification. You're going to read about DelGiorno and Caramandi maybe 10 years from now doing some other things, but they were bought

> off. They didn't have to torture them like they tortured people during the Inquisition.

This violent attack to the witness and the prosecution is grounded on the plausibility of an agreement between prosecution and witnesses, presupposing that the purpose of the Government is to punish an innocent person. The risk of these attacks consists in a double possibility that they give to the prosecution (Myers, 2005, pp. 669-671): bolster the credibility of the witnesses that has been affected by an improper argument, so that "the unfair prejudice flowing from the two arguments may balance each other out, thus obviating the need for a new trial. (*United Stated v. Young*, 470 U.S. at 12-13, 1985)[7], and offer a bad-character witness to rebut the same (*Bracey v. United States*, 142 F.2d 85, at 90, 1944). This type of move, invited by the defense, may carry a greater effect, due to the role and credibility of the prosecutor, even if it cannot be based on undisclosed evidence, which would raise the presumption of its existence[8].

6.2 Undercutting arguments from expert opinion

Another type of undercutter is directed against the so-called argument from expert opinion. The expert witness is any person that has scientific, technical or specialized knowledge including knowledge gained through experience. Experts are introduced to help the fact finder to make an informed decision in which scientific or technical topics, of which he may lack adequate knowledge, are concerned. In order to establish whether an expert's scientific testimony is based on a valid methodology and therefore be admitted, five criteria need to be met (*Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 1993): (1)

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[7] The prosecutor, however, "may not rely on them as a 'springboard' for the launching of affirmative attacks upon the defendants." (*United States v. DiPasquale*, 740 F.2d at 1296, 1984).

[8] For instance, in *United States v. DiLoreto* (888 F.2d 996, 1989), the prosecution replied to a similar attack made by the defense in order to discredit his witnesses as follows (at 999): "And you also heard that they have a plea bargain, and you heard what happened when that plea bargain is not fulfilled. If they lie, that bargain is off. That's it, no bargain. We don't take liars. We don't put liars on the stand. We don't do that." This argument, however, advanced a generalization not based on evidence, which suggested the existence of undisclosed facts.

can the theory or technique in question be tested? Has it been tested? (2) has it been subjected to peer review and publication? (3) what is its known or potential error rate? (4) are there standards controlling its operation? Have they been fulfilled? (5) has it attracted widespread acceptance within a relevant scientific community?

The crucial problem becomes the possible persuasive effect that experts may have on j uries. Both in case of witness and expert testimony the element of character becomes crucial, as the finder of fact needs to rely on the trustworthiness (and expert knowledge) of the witness. Character attacks can become in this case extremely powerful instruments. *Ad hominem* moves can be used against the expert witness in order to undermine the relationship between the credibility of his or her statements and his expertise and reliability. In order to understand the possible targets of the attack, it is useful to outline the structure of the argument from authority (Walton, Reed & Macagno, 2008, p. 19):

PREMISE 1	Source *E* is an expert in subject domain *S* containing proposition *A*.
PREMISE 2	*E* asserts that proposition *A* (in domain *S*) is true (false).
CONDITIONAL PREMISE	If source *E* is an expert in a subject domain *S* containing proposition *A*, and *E* asserts that proposition *A* is true (false), then *A* may be plausibly taken to be true (false).
CONCLUSION	*A* may be plausibly taken to be true (false).

Instead of examining the expert's opinion, drawing a defeasible conclusion from the evidence, or comparing his opinion with other expert opinions, the counsel or the prosecutor can launch character attacks using an *ad hominem* strategy. Personal attacks are aimed at demolishing the credibility and trustworthiness of the source of a statement in order to undercut the grounds on which the reliability and acceptability of his claim is based. If the source is an expert, two personal qualities are relevant for the reasonableness of the argument: expertise and impartiality.

One of the strongest strategies of personal attack is the implicit or explicit accusation of bias, and in particular financial bias. In cross examination, courts generally permit questions "directed at establishing

(1) financial interest in the case at hand by reason of remuneration for services, (2) continued employment by a party or (3) the fact of prior testimony for the same party or the same attorney" (Graham, 1977, p. 50). However, sometimes the prosecution or the defense try to insinuate bias by asking controversial questions, such as the amount of previous compensation by the same party or how the income from the expert's testimony on behalf of a party affects the expert's total income. Such questions can be considered as admissible or inadmissible depending on the court (Graham, 1977).

The questions aimed at eliciting potential bias need to be distinguished from explicit or implicit attacks in the summation. The most common attack is so-called "hired-gun" attack, which is inadmissible when not grounded on evidence, and can lead to mistrial. Some implicit attacks can suggest that there can be room for bias, without eliciting prejudice. For instance, we can consider the following case from the Supreme Court of North Carolina (*State v. Rosier*, 370 S.E.2d 359, at 360 1988):

> [L]et me get down to this, Dr. Hoffman. Good old Dr. Hoffman flying in here on the defendant's paycheck to testify for the defendant.
> Mr. Metcalf: Objection.
> Mr. Lyle: And the first thing he wants to say is what a wonderful person he is in High Point, how he helps every victim and every little child in High Point.

The prosecution used an innuendo from facts not in evidence, from which the jury could have drawn the conclusion that "he would not testify truthfully." However, this was only a possibility, and such conclusion did not need to be drawn. For this reason, the error was considered as harmless.

In *Commonwealth v. Shelley* (374 Mass. 466, at 470, 1978), the Supreme Court of Massachusetts reversed the case based on the following attack on the expert witness:

> The argument essentially urged the jury to discount the testimony of the defendant's expert witnesses because they were paid large fees by the defendant's family. There was evidence that the witnesses were paid by the family, but there was no evidence that they received anything more than their usual fees. Thus, to urge an inference that the expert testimony was purchased by the defendant was improper and unfair. Second, the argument attempted impermissibly to play on the prejudices of the jurors. Suggestions were made, albeit in disclaimer form, that the expert witnesses were "mercenary soldiers" and "prostitutes." Further, characterizations of psychological testing techniques as "well-meaning ink-blot tests . . . m ice . . . goblins," could only have been made for their emotional impact.

The use of emotive words and innuendo was continued in this case, and struck at the defendant's sole defense and only witness. For this reason, no curative instructions could neutralize the prosecutorial misconduct.

When the prosecution case is strong and curative instructions are provided, even strong personal attacks can be judged as harmless. For instance, in *State v. Whipper* (258 Conn. 229, 2001), the prosecution presupposed that the defense's expert was not a real expert, and suggested to the jury by implicature that his opinion had been contrived during a private conversation with the defense attorney (*State v. Whipper*, 258 Conn. 229, at 257, 2001):

> During its rebuttal argument, the state's attorney commented: "And remember Dr. Rudin. I don't call her Dr. Rudin, Mrs. Rudin. She's a paid for, hired consultant. . . . Ms. Rudin, she comes in here. She's not even a PGM expert. . . . In her report she says, 'Hey, these results [regarding Santiago's DNA and PGM on the defendant's jeans] are okay.' Then she goes in the bathroom [with the defendant's attorney]. Then she comes back and . . . all of a sudden [she says] this [report] is no good. So don't go for that. You know Dr. Rudin or Mrs. Rudin, Ms. Rudin is a paid for, hired consultant."

Here, the State refused to use the title "Dr." to refer to the expert, presupposing that he does not have the qualifications. The prosecution exploited the maxim of relevance, associating the expert's private meeting during the trial with the defense's attorney with his change of his testimony. In this fashion, the State triggered the only possible explanation that the testimony has been concocted. However, the defense requested curative instructions, and the case was affirmed despite the inadmissible argument.

The prejudicial effect of an inadmissible *ad hominem* attack can be avoided by the defense, who can request curative instructions. A clear case of the effects of failing to request instructions is *Caban v. State*, discussed before the Supreme Court of Florida. The prosecution advanced the following improper argument (*Caban v. State* , 9 So. 3d 50, at 52-53, 2009):

> The judge further observed the prejudice suffered by Caban as a result of the improper impeachment:
> And I think anybody who sat through the trial could see almost the physical reaction of the jury when one of the state's experts described the defense experts as simply folks who travel around the country and testify for defendants to try and get them off in serious cases. It's almost as if the jurors just shut down and didn't care what else the defense experts had to say.

The accusation of bias was triggered by the charged description made by the State's witnesses. They depicted the defense's experts as mercenaries whose purpose was to get paid to help the defense "get the defendants off in serious cases". This vivid description was aimed at undercutting an argument from expert opinion by showing the defense experts as molding their opinion to support the interests they are serving. The improper attack, however, was not objected to by the defense, and such a failure to object was found by the Court as prejudicial in a case where expert opinion testimony was crucial. For this reason, the case was reversed. The deliberate omission of objections, on the other hand, can be a deliberate choice of the defense counsel, who can prefer seeking a verdict and use the prosecutorial misconduct in order to demand a post-conviction motion for mistrial

(*Grimaldi v. United States*, 606 F .2d 332, at 339,1979). In the aforementioned case *Caban v. State* (9 So. 3d 50, at 52-53, 2009) this strategy was used effectively when the counsel failed to object to attack of the prosecution on the expert witnesses (they were described as "folks travelling around the country and testify for defendants"). The failure to object was considered by the Court as prejudicial, as expert opinion testimony was crucial to both sides. For this reason, the case was reversed. However, this tactic can be regarded by the court as indicating that the attack was not considered as prejudicial by the defense (*Commonwealth v. O'Brien*, 377 Mass. 772, at 777-778).

6.3 Undercutting appearances

In the sections above we have pointed out how the *ethos* of the witness, the expert or the counsel can be the target of attacks aimed at undermining arguments from authority or position to know. However, not only are source-based arguments the target of *ad hominem* moves, but also other types of presumptive reasoning such as reasoning from appearance or from pity.

Reasoning from appearance is a defeasible type of reasoning in lack of knowledge, where in absence of contrary evidence the classification of an entity is drawn from the exterior signs. The structure of this pattern of inference is grounded on a rule of presumptive reasoning called "perception rule" (Pollock, 1995, p. 41):

> Having a percept with content φ is a prima facie reason to believe φ.

This rule is the ground leading from a sign (*x* seems to be *P*) to a classificatory conclusion (*x* is *P*). The structure of the inference can be represented as follows (Walton, 2010):

> It appears that object could be classified under verbal category C.
> Therefore this object can be classified under verbal category C.

This type of scheme is a simplification of an abductive reasoning from classification, where from an accidental property of a category the

predication of the category is concluded. For example, this object looks like a red light, therefore it is a red light (Pollock, 1995, p. 41). This defeasible type of reasoning can be specified as follows (Walton & Macagno, 2010, p. 49):

MAJOR PREMISE	Generally, if this type of indicator is found in a given case, it means that the presence of such-and-such a property may be inferred. (If *p* then *q*)
MINOR PREMISE	This type of indicator has been found in this case. (*p*)
CONCLUSION	Such-and-such a type of event has occurred, or that the presence of such-and-such a property may be inferred, in this case. (Therefore *q*)

In law the jury can reason from abductive classification or perception when the defendant does not fall within the stereotypical image of criminals. If he is a senior, educated and middle class individual, he is less likely to appear as a criminal than a young and strong man belonging to the poorest class. In order to dispel this presumption, the prosecutor can attack the sign, namely the individual. This *ad hominem* move is made to undercut a plausible sign, a presumption, and for this reason it needs to fulfill an implicit burden of proof. Such an attack cannot simply consist of a judgment, but needs to be supported by evidence. The risk of arousing prejudice is high, as the prosecution needs to introduce prior bad actions and lead the jury to a value judgment. For instance we can show this type of reasoning in the following case, where the prosecution is addressing the jury in his closing statement (*State v. James*, 734 A.2d 1012 at 1025, 1026, 1999):

> You're saying to yourself, holy mackerel, this guy, a seventy year old man and he's in here with a cane, and the fellow is charged with murder and two weapons violations. It's inconceivable. It's just inconceivable that someone who looks like this gentleman over here could be charged with that type of conduct. And I'm sure that probably was going through most of your minds. Don't be fooled by that. Don't be fooled by appearances.[…]You know, if you looked at [the defendant] when you first walked in here, you probably said to yourself,

> geez, you know, looks like a nice old guy, you know, seventy year old guy was sitting there with a cane, he looks harmless, he looks like he wouldn't hurt anybody, but you heard that he's been convicted of felonies three times. Three times. Not once, not twice, but three times. And this is the same gentleman since -- who since 1987 on almost a continuous basis has illegally possessed countless firearms. In fact, he's had so many firearms, he can't even keep track of them. He can't remember where they came from, who bought them or where they came from.

The prosecutor used evidence of past crimes to show a pattern of behavior, indicative of his state of mind, and for this reason the court found no error. However, the potential conclusion that can be drawn is his tendency to commit crimes. In this case the prosecutor insisted on details (the number of firearms) and shows the contradiction between his harmless appearance and the past felonies. Here a defeasible classification (based on appearance) is countered by the signs of a dangerous character. The generalization drawn from appearance is easily rebutted by evidence of a contradicting behavior, leading to the most reasonable conclusion that the defendant is not harmless at all. *Ad hominem* undercutters, for this reason, can be noticeably more effective than *ad hominem* arguments or meta-dialogical moves. They can be considered as relevant, as they concern character issues raised by the defendant. Moreover, they need to rebut generalizations, which is a much lower burden to meet. Finally, a strong refutation of an argument or a generalization can support an opposite conclusion, as in the case above.

6.4 Undermining emotions

One of the most common arguments in the penalty phase in criminal trials is the appeal to pity. The defense provides evidence of the good character of the defendant, claiming that the crime was an error and that he is ashamed of his actions. For instance, in *California v. Brown* (479 U.S. 538 at 540, 1987) the defendant, found guilty of murder, presented in the penalty phase the following argument:

> Respondent presented the testimony of several family members, who recounted respondent's peaceful nature and expressed disbelief that respondent was capable of such a brutal crime. Respondent also presented the testimony of a psychiatrist, who stated that Brown killed his victim because of his shame and fear over sexual dysfunction. Brown himself testified, stating that he was ashamed of his prior criminal conduct and asking for mercy from the jury.

This type of argument can be represented as follows (Walton 1997: 105):

Argumentation scheme 5: Appeal to pity

PREMISE 1	Individual *x* is in distress (is suffering).
PREMISE 2	If *y* brings about *A*, it will relieve or help to relieve this distress.
CONCLUSION	Therefore, *y* ought to bring about *A*.

This argument is based on two crucial implicit preconditions: first, the individual needs to suffer from misfortune; second, the jury needs to be emotionally involved with him (Ben Ze'ev, 2000, p. 328). The first condition is essential for the feeling of pity, while the second for the perception of an emotion. In the case above, the defense presents evidence of the good character of the defendant and shows a relationship between his crime and his physical and psychical problems. The defense suggests that the accused is suffering from serious problems and claims that he is ashamed of his actions. In this fashion, the first condition of pity is met. The second element is essential for the arousing sympathy, or rather an emotion towards the defendant (Ben Ze'ev, 2000, p. 328). In the aforementioned case, the defense called family members to testify and the accused asked for mercy. In this fashion, the jurors could identify themselves with the accused (like the defendant they have a family).

Appeals to pity are instruments for defusing emotions (Solomon, 2003). They can be directed against the identification of the jury with the defendant and the misfortune that he is suffering. In the first case

the prosecutor can attack the strategy of the defense by declaring it and showing that it is or can be purely fictional. In the second case, the prosecutor attacks directly the character of the defendant, so that he is shown to deserve the punishment and that it is not resulting from an error or misfortune. *Ad hominem* attacks aimed at undercutting potential or actual appeals to pity can proceed from a direct implicit or explicit negative judgment on the suffering individual, or from his negative actions. In non-explicit attacks, facts supporting a negative evaluation are simply put forth, leaving it up to the interlocutor to draw an evaluative conclusion. On the contrary, explicit attacks can be criticized if not adequately based on evidence. In both cases, in order to overcome an emotion such as pity, the speaker combines the attack with other tactics aimed at arousing contrary emotions. The use of emotive words becomes a crucial tactic for triggering contempt or hate against the allegedly pretended sufferer, so that the positive emotion is annulled (see Groarke, 2011).

In the aforementioned case, the prosecutor replied to the defense's appeal to pity by undercutting the trigger of the emotion and attacking implicitly the defendant (*California v. Brown*, 479 U.S. 538 at 554, 1987):

> They did not testify, ladies and gentlemen, regarding any of the factors which relate to your decision in this case. Their testimony here, ladies and gentlemen, I would suggest, was a blatant attempt by the defense to inject personal feelings in the case, to make the defendant appear human, to make you feel for the defendant, and although that is admirable in the context of an advocate trying to do his job, you ladies and gentlemen must steel yourselves against those kinds of feelings in reaching a decision in this case".

The prosecutor does not explicitly attack the defendant. He presents the appeal to pity as a ploy, aimed at concealing the ferocious nature of the accused. In this fashion, he implicitly "dehumanizes" the defendant (Cantrell, 2003, p. 559), so that the jury cannot make an empathetic link with him.

Ad hominem attacks directed against pity are aimed at arousing conflicting emotions, in particular hate. Hate presupposes dangerous traits and depersonalization (Ben Ze'ev, 2000, pp. 380-381). For this reason, emotive words play a crucial role, reducing the man to some negative and dangerous qualities, arousing hate (Ben Ze'ev, 2000, p. 382): "The negative evaluation in hate is global, not in the sense that every aspect of the hatred person is considered to be negative, but in the sense that the negative aspects are so fundamental that other traits become insignificant." For instance, in the following case the prosecution uses a highly emotive word (*Gore v. State*, 719 So. 2d 1197 at 1202, 1998):

> You know, Ladies and Gentlemen, there's a lot of rules and procedures that I have to follow in court, and there's a lot of things I can say or can't say, but there's one thing the Judge can't ever make me say and that is he can never make me say that's a human being.

The prosecution describes the defendant, accused of raping a minor, as a not-human being. He reduces the person to one trait, being non-human because of his ferocity. The strategy of dehumanizing the defendant is extremely effective and dangerous, as it can lead to mistrial, such as in the case above, for its prejudicial effects. For this reason, such attacks are strategically effective when implicit.

Fear is also aroused by stressing the dangerous nature of the criminal. For instance, in the following example, drawn from the penalty phase of a murder case, the prosecutor attacks the character of the defendant is attacked by arousing fear and hate (*Martinez v. State*, 984 P.2d 813, at 830-831, 1999):

> Further, the prosecutor argued, "you have the final say, Ladies and Gentlemen, on whether Tillman County and the world is safe from Gilberto Martinez." [55] Later, the prosecutor stated, "I don't care what he's done in the last ten years, watched every second. Given the opportunity and appropriate circumstances, he's as cold blooded and dangerous today as he was the night this occurred." Finally, the prosecutor reasoned, "He's getting

> no more or less than he deserves for what he did to these little girls."

In this case the attack is "at the very edge" of what is acceptable in a trial. The attack is not directly on the defendant, but on his dangerous character. The prosecutor arouses fear, essential component of hate, and undercuts the concept of misfortune that could be at the basis of pity.

Personal attacks undercutting pity can be combined with different types of strategies. For instance, in the penalty phase of *Rhodes v. State* (547 So. 2d 1201, 1989), the prosecutor attacked the defendant directly, pointing out to the jury that he "acted like a vampire" (547 So. 2d 1201, at 1211, 1989). He fought the jury's potential pity for the defendant with the pity that he aroused for the victim, urging the jurors to place themselves in the position of the victim. He described the heinous actions of the defendant after the death of the victim to trigger contempt. Finally, he suggested the possibility of parole in case of the defendant's conviction, which triggered fear.

7 Conclusions – Weak arguments and presumptive reasoning

How can a weak argument be so effective? The rhetorical effectiveness of personal attacks can be explained by showing how they function as complex strategies involving clusters of arguments, where the role of authority (or rather the presumption of better knowledge) and emotions play crucial roles. *Ad hominem* attacks are generalizations based on signs, or simply negative judgments often unsupported by evidence, or insufficiently grounded. The person is reduced to only one character feature from which his possible future actions or decisions can be predicted. Such attacks can be relevant, if the quality of the character property is related with the quality of the conclusion (Battaly, 2010) and if the judgment is based on evidence. However, even if relevant and grounded, the argument is only presumptive, leading to a tentative conclusion acceptable under conditions of lack of knowledge and contrary evidence. Often such attacks, weak and defeasible in nature, are also irrelevant and poorly borne out by factual evidence. For this reason, their weakness is clouded by ancillary implicit or explicit

arguments. Personal attacks are aimed at leading the interlocutor to a decision made in haste under conditions of uncertainty and lack of evidence, and for this reason presumptions and emotions play crucial roles in filling the evidential gap.

As noticed in the cases analyzed above, the effectiveness of an attack corresponded to the prejudice that it could arouse in the jury. On the one hand, this prejudice can invoke a presumption of knowledge. An attack by a prosecutor can trigger the presumption that he knows facts not in evidence supporting an otherwise ungrounded characterization of the counsel, the defendant or the witness. On the other hand, emotions such as indignation, fear, contempt, or hate divert the interlocutor's attention from the weakness of the attack, affecting its logical assessment (Blanchette, 2006; Blanchette & Richards, 2004), and lead him to a hasty decision (Frijda & Mesquita, 1998). For this reason, as we saw, *ad hominem* moves can trigger implicit arguments from negative consequences or threats, and through their vivid representations arouse negative emotions.

Personal attacks are therefore complex strategies, clusters of arguments where the explicit or suggested attack is only the more visible part of the argument move. A personal attack can be powerful not because it is a weak argument, but because it is not the only argument that is advanced. As Quintilian put it (*Institutio Oratoria* V, 12, 5):

> […] the allegations, considered separately, have little weight and nothing peculiar, but, brought forward in a body, they produce a damaging effect, if not with the force of a thunderbolt, at least with that of a shower of hail.

Now we have analyzed the legal dialogues in the cases studied above, it has been shown that what is usually labeled as an *ad hominem* actually comprises attacks against the interlocutor, arguments aimed at supporting a wanted conclusion, and counter-arguments. For this reason, in this paper we have analyzed personal attacks as moves, a generic term indicating a speech act aimed at achieving different types of dialogical effects. We have seen how *ad hominem* attacks are based on a negative implicit or explicit character judgment. Such value

judgments were shown to be used for four different purposes. They can (1) justify the interruption of a dialogue, (2) support a conclusion, (3) undercut an argument or (4) activate or defuse an emotion. In many cases, as we saw they are at best weak arguments, providing only defeasible, provisional and heuristic support for a conclusion. However, from a rhetorical perspective, as we saw, they can be extremely effective arguments, so effective that their use can powerfully prejudice judgment.

We have identified three types of *ad hominem* attacks, each of which has its own distinctive strategy as a move and special *modus operandi* of argumentation. The first type we call "meta-dialogical" (*ad hominem 1*), as it is used for underscoring the interlocutor's (in the criminal cases analyzed herein the defense counsel's and the prosecutor's) unfairness or bias. It was shown how these attacks can be acceptable (or rather admissible) when certain requirements are complied with. The second type of attack (*ad hominem 2*) is the one used to support a specific conclusion, more specifically the defendant's guilt. As shown by the examples, *ad hominem arguments* are extremely risky for the prosecution when they are not conclusions of reasonable inferences drawn from the evidence. However, there are different strategies to increase their force and make their detection more difficult. For instance, attacks based on implicit dimensions of discourse, such as presuppositions and implicatures, can have an even greater effect on the jury than the explicit ones. As we have seen, in *ad hominem* arguments a crucial role is played by emotive words, words that strongly prejudice the audience through their twofold dimension of implicit arguments and triggers of emotions. The third type of *ad hominem* move is the undercutter (*ad hominem 3*), namely an argument aimed at attacking an argument advanced by the other party. Three different types of attacks used as undercutters were distinguished, illustrated and analyzed: (1) attacks on arguments from sources (argument from witness testimony and from expert opinion), (2) arguments from appearances and (3) emotional appeals.

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Fabrizio Macagno (Ph.D. Università Cattolica del Sacro Cuore, Milan, 2003) works as a r esearcher and auxiliary professor at the Universidade Nova de Lisboa. His current research, between the fields of Linguistics and Philosophy of language, is focused on the persuasive use of emotive language and on the dialectical dimension of discourse implicitness, which he analyzes within the contexts of legal and political discourse. He is author of several papers on definition, informal fallacies, argumentation schemes, and dialogue theory. His most important publications include the book *Argumentation Schemes* and the papers ***Argument from Analogy in Law, the Classical Tradition, and Recent Theories, What we hide in words: emotive words and persuasive definitions,*** *Presumptive Reasoning in Interpretation*, *Implicatures and Conflicts of Presumptions, The presumptions of meaning* and *Dichotomies and Oppositions in Legal Argumentation*.

Douglas Walton (PhD University of Toronto, 1972) is a Canadian academic and author, well known for his many widely published books and papers on logic, argumentation, artificial intelligence, and computational models of

argumentation. He presently holds the Assumption Chair in Argumentation Studies and is Distinguished Research Fellow of the Centre for Research in Reasoning, Argumentation and Rhetoric (CRRAR) at the University of Windsor, Canada. Walton's work has been used to better prepare legal arguments and to help develop artificial intelligence. His books have been translated worldwide, and he attracts students from many countries to study with him. A festschrift honoring his contributions, *Dialectics, Dialogue and Argumentation*: ***An Examination of Douglas Walton's Theories of Reasoning and Argument***, ed. C. Reed and C. W. Tindale, London: College Publications, 2010, shows how his theories are increasingly finding applications in computer science.