> 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.

> 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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