

# Reconstructive Charity, Soundness and the RSA-Criteria of Good Argumentation

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**ABSTRACT:** This paper discusses an example of social policy argumentation from an opinion of the 2007 majority among the German National Ethics Council (NEC 2007). It is employed to problematize argument reconstruction with respect to the Informal Logic quality criteria *relevance, sufficiency, acceptability* (RSA) (Johnson & Blair 2006, <sup>1</sup>1977). The main thesis is conditional and rather weak: If the RSA criteria are substitutes for the notion of *soundness*, then – next to *premise-truth* and *validity* – they also substitute *reconstructive charity*.

## 1. INTRODUCTION

This paper discusses an example of social policy argumentation from an opinion of the 2007 majority among the German National Ethics Council (NEC 2007). It is employed to problematize argument reconstruction with respect to the Informal Logic quality criteria: *relevance, sufficiency, acceptability* (RSA) (Johnson & Blair 2006, <sup>1</sup>1977).

The example is an artefact of the debate on human embryonic stem cell research (hESCR) in Germany, where a comparatively restrictive legal compromise had been adopted in 2002. Parliamentary vote established a cut-off date for the legal import of hES-cells. In like mode, the date shifted ahead, and sanctions were clarified, in March 2008.

After providing a brief background to the debate (section 2), the NEC example is introduced (section 3), comprising altogether three positions: ‘revision of *status quo*’ (majority) (3.1), ‘either *status quo* or open debate’ (3.2) and ‘update within *status quo*’ (3.3). Summarizing the structure of the majority opinion (3.4), we locate new information relative to 2002 (3.5). This is argued to provide the majority’s reason for changing the *status quo* (3.6). We suggest evaluating the majority’s argumentation *internally*, i.e., under the self-professed constraint of ‘*not* questioning either the stem cell law or embryo protection law’ (3.6).

Section 4 offers a detailed reconstruction of a crucial section of the majority opinion (4.1). The sparseness of argumentative indicators (4.2) is brought to bear on the role of the RSA criteria in argument-reconstruction (4.3). I offer a particular enrichment of the majority’s argumentation (5) and briefly indicate its evaluation (5.1). Finally, the notion of *sound argument* is discussed with respect to a sense in which the RSA criteria *substitute* for it (6).

The main thesis is conditional and rather weak: If the RSA criteria are substitutes, then – next to ‘premise-truth’ and ‘validity’ – they also substitute ‘reconstructive charity’.

## 2. THE COMPROMISE ON HESC RESEARCH IN GERMANY

Up to 2002, public and parliamentary debate in Germany had not resulted in a consensus on the permissibility of hESCR. To the present day, a Rawlsian reflective equilibrium remains absent, and the legal *status quo* on hESCR debated.

The German embryo protection law (*Embryonenschutzgesetz*) 1990 prohibited the *in vitro* fertilization and, *a fortiori*, the frozen-state suspension of development (read: production and

storing) of excorporeal embryos for purposes other than artificially induced pregnancy. Therefore, by prior law (*lex anterior*), the derivation of stem-cells from said fertilized pronuclei was illegal. However, the import and use of such cells remained otherwise unregulated.<sup>1</sup>

In June 2002, the German parliament adopted a compromise between the diverging positions of the national debate. Then backed by a large majority, the compromise has since been honoured for bringing peace (*Befriedung*) to the issue and, without irony, is said to have been conceived in a “glorious hour” (“*Sternstunde*”) of the Bundestag. Other MPs considered it a dead-birth. Beckmann (2004) summarizes it as follows:

The stem cell act [in its 2002 version; F.Z.] permits the importing and research use of hESC under certain conditions, namely if 1) there is scientific evidence that the research concerned serves “high-priority research goals either in an area of fundamental research (“Grundlagenforschung”) or in the enlargement of medical knowledge of diagnostic, preventive, or therapeutic procedures in human medicine” (principle of high priority) (article 5, section 1), and 2) such research, having already been attempted as far as possible *in vitro* and *in vivo* in the animal model, can be advanced only by using embryonic stem cells (principle of absence of alternatives) (article 5, section 2 a/b). Only if these two principles are respected may a research project be qualified as “ethically admissible” (article 6, section 4/2). If it is so qualified, hESC may be imported and used for research provided 1) they were derived from embryos created for reproductive purposes by *in vitro* fertilization and left over (“super-numerous”) for reasons related not to themselves but to the donor, 2) they have been freely given by their parents for research purposes without honorarium or other benefit, and 3) they were derived from embryos before January 1, 2002 (so as to ensure that these embryos were not killed for the purpose of exporting their stem cells to Germany). Beckmann (2004: 609)

The above three conditions – high-priority research, absence of alternatives, derivation prior to 2002 – can be viewed as the result of a political process which aimed at a balance of interests (*Interessenausgleich*).

### 3. THE LAST OPINION OF THE GERMAN NATIONAL ETHICS COUNCIL

Throughout its term, the German National Ethics Council (*Deutscher Nationaler Ethikrat*)<sup>2</sup> published twelve opinions; the first (2001) and last (NEC 2007) treat hESCR. Not bound to unanimous recommendations, the council was intended to represent not the distribution, but the range of ethical opinion in Germany. Consequently, argumentation and recommendations set forth in its opinion can count as *representative* artifacts of the debate.<sup>3</sup>

With a view to initiating a new debate, discussion among the council’s members had started in autumn 2006, also in response to opinions on hESCR forwarded by commissions of the federal states and the German Research Council (DFG 2006). The latter had lobbied against the stem cell law in the name of the constitutionally granted freedom of research which the

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<sup>1</sup> As no law applied, the deed could not be a criminal act (*nullum crimen sine lege*), cf. Stark (2007: 641f). According to the predominant legal interpretation, the stem cell law “only” protects an embryo’s stem cells *when imported*, thus strengthens the protection afforded by the embryo protection law. E.g., this stance was adopted by Merkel in the *Committee on Education, Research and Appraisal of the Consequences of Technology* (CERACT 2008) in March and presented as the majority interpretation to the Bundestag in April 2008. Cf. Merkel (2002, 2007).

<sup>2</sup> Founded in 2001, members had been directly appointed by the federal chancellor. The council formed an independent, yet heterogeneous expert-group of “up to 25 members, who represent the scientific, medical, theological, philosophical, social, legal, ecological and economic worlds” (NEC website). Upon having created a (hitherto absent) legal basis in 2007, this body was superseded by the German Ethics Council (*Deutscher Ethik Rat*). Appointed by parliament, the group first met in summer 2008.

<sup>3</sup> On the standards of discourse in the NEC, cf. the critical van den Daele (2008), a recent member of the council.

law sought to *balance* against the obligation to “protect human dignity and the right to life” (SCL 2002: sect. 1).

In May of 2007, three positions were published as the council’s opinion on a revision of the cut-off date. It explicitly attempted to answer the question: “[W]hether the emerging international trend of stem cell research and the experience so far gained with the Stem Cell Law constitute reasons for amending the provisions in force since 2002” (NEC 2007: 10). Taking the 2002 compromise as a basis rather than questioning it, the opinion “presents proposals on how individual provisions of the law can be further developed *under changed conditions*” (ibid., *italics added*).

Clearly mutually exclusive, the three positions agree on the compromise character of the stem cell law. They diverge with respect to its significance and its consequences. The positions can be indexed by the policies favored, reaching (the majority position) *status-quo revision* with fourteen votes, the minorities *status quo-or-open debate* (nine votes) and *status quo update* (one vote). The majority lays out its position on 43 pages. The minority takes nine and six, respectively. The following summarizes these proposals, starting with the majority:

### 3.1 Revise the status quo towards wider uses of hESC

*Summary:* The cut-off date should be replaced by “practical and reliable case-by-case consideration” (NEC 2007: 49), such that the central approval authority created in the stem cell act “must be satisfied that the production of the relevant cell lines was neither instigated by the [research project-]applicant itself nor otherwise effected by virtue of actions in Germany” (ibid.). Import from universally accessible stem cell banks on a non-profit basis should be allowed, from commercial stem cell banks prohibited. As the derivation of hESC from embryos in Germany is already prohibited by the Embryo Protection Act, “[t]he Stem Cell Law should merely determine the action to be taken in the event of infringements of the approval requirements (...) [while] the import and use of stem cells should be permissible not only for research but also for diagnosis and treatment” (ibid).<sup>4</sup>

### 3.2 Either adhere to the status quo or reopen the debate

*Summary:* The cut-off date should either be retained, the likely marginalization of German research in this area accepted and resources invested in alternatives, e.g. research on adult stem cells. Else, the debate on the fundamental normative positions, including that laid down in the Embryo Protection Act, should be reopened in order to consider “whether it might not after all be more consistent [!] to use for research the embryos and fertilized pro-nuclei no longer required for reproductive purposes in Germany, rather than constantly importing new hES cells from abroad” (NEC 2007: 57).<sup>5</sup>

### 3.3 Adhere to the status quo under cut-off updating

*Summary:* With additional uses constituting a breach of the 2002 compromise and the case-by-case considerations being comparatively less reliable than the unequivocal cut-off date, the addition of further permitted uses for hES cells not only violates the 2002 compromise. It is

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<sup>4</sup> Signed by: Wolfgang van den Daele, Horst Dreier, Detlev Ganten, Volker Gerhardt, Martin J. Lohse, Christiane Nüsslein-Volhard, Peter Propping, Jens Reich, Jürgen Schmude, Bettina Schöne-Seifert, Richard Schröder, Jochen Taupitz, Kristiane Weber-Hassemer, Christiane Wooten.

<sup>5</sup> Signed by: Eve-Marie Engels, Regine Kollek, Christiane Lohkamp, Anton Losinger, Eckhard Nagel, Therese Neuer-Miebach, Peter Radtke, Eberhard Schockenhoff, Spiros Simitis, of which three signed a supplementary position statement favoring to uphold the *status quo* (A.L., P.R., E.S).

also unclear if a majority for liberalization would be forthcoming. Next to currently funding hES cells research elsewhere through German EU contributions, and although future medical therapy remains uncertain, Germans would in any case profit eventually, if the “wrong” now done elsewhere lead to therapeutic success. To adhere to the compromise, “the setting of a later cut-off date, albeit in the past, is the appropriate means: it is adequate, takes account of the normative principles of the embryo protection law and conforms to the spirit of the 2002 compromise” (NEC 2007: 64).<sup>6</sup>

### 3.4 Structure of the Majority Opinion

Section I of the document declares that the opinion will only pertain to the stem cell law, but not the embryo protection law: One does not aim at reopening the debate.

Section II states the object of legal protection (1), summarizes the position of the Embryo Protection Act as a premise (2), argues for the permissibility of revising the stem cell act by re-balancing objects of legal protection against each other (3), reminds that no categorical ban on profiting from “wrongful acts” in other countries has been laid down in the stem cell act (4), and stresses that hES cells are not to be used for arbitrary purposes (5), then draws interim conclusions (6).

Section III lays out future prospects for hESC research (1), reminds of the disadvantages at which German research is placed by the cut-off date (2) and of the obstacles which the law’s criminal provisions bring about for international co-operations that involve German researchers (3), finds the permissible uses of hESC research overly restrictive (4) and claims freedom of research be violated through the stem cell law (5).

Section IV presents alternatives to the cut-off date measure (1), suggests provisions for additional permitted uses (2), and discusses if penal provision could be amended or repealed (3).

Section V, finally, presents the recommendations of the majority (see 3.1).

### 3.5 Nothing new, except...

Importantly, sections I, III and IV do *not* offer information or argumentation going beyond the state of the debate up to 2002. Section III (2) contains the *only* premise that could provide grounds for re-evaluating the 2002 compromise, as it pertains to new information.

[T]he majority of the worldwide publications up to 2005 involved research with hES cells (...). [I]t must be deemed a worrying sign that, while applications for work with hES cells have increased worldwide, no new application has so far been submitted in Germany in 2007. Whether this situation reflects the concerned diagnosis of “stagnation” described in the Stem Cell Committee’s latest activity report will perhaps only become fully clear from further developments. What is, however, certain is that the new hES cell lines developed in the last few years must not be imported and used in Germany because they do not conform to the cut-off date criterion. Yet precisely these cell lines are currently being used in experimental research in other countries; their use will eventually define what is regarded at international level as top-ranking, relevant hES cell research. Germany is excluded from the use of these stem cell lines by the cut-off date criterion. (NEC 2007:31)

To a large extent, the above *is* the argumentation of the German Research Council (DFG 2006) in favor of a revision of the law: hES cells derived before 2002 were claimed to be of insufficient quality for research.<sup>7</sup> During a meeting of the *Committee on Education, Research*

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<sup>6</sup> Signed by Hermann Bart.

<sup>7</sup> The DFG (2006) went farther, arguing that *even if* researchers only worked with adult stem cells, newer hESC lines are still required as a “gold-standard” to assess if adult cells are “equally [!] toti-potent”.

*and Appraisal of the Consequences of Technology* in March 2008 (CERAT 2008), Hans R. Schöler (Max Planck Institute for Molecular Biomedicine) put it as follows:

I believe that, since 2002, there are *new scientific reasons* to import new cell lines: Back then, we did not at all know how bad the cells were. Possibly, they are even worse now. For me, however, it is decisive that they were already bad then, but that we did not know it” (CERACT 2008: 10, *italics added*, my translation).<sup>8</sup>

Like the majority opinion, he grounds his position in the availability of a new premise.

### 3.6 Implications for evaluation

To *substantially* evaluate the recommendations forwarded by the majority is therefore a posterior task. The prior task consists in establishing that it is possible to respect the new premise *without* questioning either the stem cell law or the embryo protection law. This task is shouldered exclusively in section II (3) of the opinion, whence attention can be restricted to the argumentation there forwarded.<sup>9</sup> In section 5.2, we sketch such an evaluation.

## 4. RECONSTRUCTION OF A KEY SEGMENT

The following text constitutes section II (3) of the NEC’s (2007) opinion. Comprising five paragraphs, we structure the text by adding letters at paragraph- and numbers at sentence-level, then reconstruct each paragraph. Argumentative indicators are *italicized*.

In section 5, below, we seek to demonstrate that argument-reconstruction for paragraphs E and, especially, for D is by far more problematic than we make it appear here. The following is an *enriched* reconstruction of the text. We will problematize this reconstruction in sections 4.3 and 5.1. There, the guiding question is: By what criteria of good argumentation has this reconstruction been arrived at?

### 4.1 Section II(3) of the NEC’s Opinion

Paragraphs A, B and C are, strictly speaking, *preparatory steps* for the majority’s argumentation in paragraphs D and E. Paragraph A states constraints under which the majority seeks to establish its position. Paragraph B as well as the first and second sentence of paragraph C render the difference of opinion between parties. This is undisputed material which serves to lead up to the argumentation in paragraphs D and E.

A “pure” version of the text is found in the appendix. The reader may wish to refer to it before reading on, to reach an assessment of the text which is independent of what will be said below (especially for paragraph D).

#### 4.1.1 Paragraph A

Permissibility of balancing objects of legal protection against each other

(A1) If the compromise of the Stem Cell Law is accepted as the starting point and foundation of evaluation, *it follows that*, in the regulation of the import and use of hES cells, *on the one hand* the embryo protection criteria must not be set below the level provided for in the Stem Cell Law, and, *on*

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<sup>8</sup> “Ich finde, es gibt seit 2002 neue wissenschaftliche Gründe, um neue Stammzelllinien zu importieren: Wir wussten damals gar nicht, wie schlecht die Zellen waren. Sie sind jetzt möglicherweise noch schlechter. Für mich ist aber entscheidend, dass sie damals schon schlecht waren, wir das nur nicht wussten“.

<sup>9</sup> This is not the only way of evaluating the argumentation, but it is feasible on pains of otherwise having to evaluate, e.g., if younger HES cells are indeed required for research in Germany? Not only is the answer to this question debated, answering it also clearly transcends the resources of *argument* evaluation.

*the other*, research must not be subjected to restrictions that would have the effect of completely precluding the use of hES cells. (2) Nor must the interest of the sick in the development of new therapies be disregarded. (3) *However*, differences of opinion exist as to the consequences of these premises for the detailed provisions.

(A1) names three conditions which, given the compromise is accepted, must be fulfilled: the regulation on hES-cell import is not to be set below the Stem Cell law, nor their use to be precluded or, as (A2) adds, therapy interest to be disregarded. (A3) suggests that disagreement pertains to specific consequences of these conditions, i.e., to the socio-technological means of fulfilling them, but also to general considerations (the use of ‘consequences’ is vague).

#### 4.1.2 Paragraph B

(B1) *To begin with*, no one disputes that any system intended to be compatible with the compromise of the Stem Cell Law must retain the objective of preventing any German causal contribution to the destruction of embryos in other countries. (2) *For this reason*, the production of hES cells abroad must not be “instigated” from Germany – that is to say, it must not, by any action in Germany, be carried on, commissioned or facilitated by incentives.

(B1) claims that the difference of opinion does *not* pertain to retaining the objective of providing no instigation (causal contribution) to hES cell production abroad. (B2) explicates this objective by characterizing actions which, in accordance, are prohibited.

#### 4.1.3 Paragraph C

(C1) *However*, opinions differ on whether the compromise represented by the Stem Cell Law is departed from if alternatives to the present cut-off date criterion or threat of penal sanctions are considered. (2) Some hold that these two provisions do not in themselves constitute the objective and purpose of the Stem Cell Law, but are simply means of achieving its objectives and purposes. (3) The cut-off date criterion is intended, as provided in Section 1 No. 2 of the Stem Cell Law, to prevent the derivation of hES cells from being instigated as a result of action in Germany, whereas the criminalization provision has the aim of ensuring that the conditions for approval are observed. (4) In the opinion of others, the cut-off date criterion is one of the essential ends of the Stem Cell Law. In their view, the compromise achieved in the Law would no longer be respected if the cut-off date were to be modified or replaced. [end. p. 15].

(C1) states the difference of opinion to pertain to the compatibility of changing measures and remaining within the boundaries of the 2001 compromise, citing the two measures which are in place since the compromise (cut of date and penal sanctions). (C2) presents the standpoint of the pro-side, namely: the two measures are *means* of the law. (B3) supports the proposition by quoting the stem cell law, and the action-guiding (rather than deterring) character of the penal sanctions. (C4) presents the standpoint of the opponent (the con-side) as the claim: The two measures are *ends* of the law whence, as (C5) adds, a change of measures is incompatible with the compromise.

#### 4.1.4 Paragraph D

(D1) This position is no doubt underlain by the assumption that the risk of the production of hES cells being “instigated” by action in Germany would be increased in the event of a departure from the present criterion of a fixed cut-off date. (2) In this connection, *however*, it is not enough to maintain that concessions on the cut-off date might in effect be perceived as a signal of symbolic support for researchers who produce hES cells in other countries. (3) Symbolic reinforcement of this kind cannot validly be adduced as an instance of the “instigation” of the production of hES cells within the meaning of the Stem Cell Law. (4) Experience has shown that it cannot be assumed that such an incentive would automatically arise if the current cut-off date criterion were dropped because this would create the

abstract possibility of using the new cell lines in Germany as well as abroad. (5) The development of new cell lines in other countries is part of a dynamic that proceeds without regard to what is happening in German research. (6) Rather than speculating on a conceivable demand for hES cells in Germany, scientists are in fact pursuing perceived research goals, strategies and opportunities. (7) The fixed cut-off date criterion surely has the sole function of reliably precluding any concrete instigation of the production of new hES cell lines in other countries. (8) Conversely, with regard to the extent to which new hES cell lines are produced abroad – apart from the conceivable case of such instigation – it is immaterial whether or not the cut-off date criterion is retained in Germany. (9) *For this reason*, the indispensability or otherwise of the cut-off date criterion depends on the possible existence of regulatory alternatives capable of equally reliably precluding the concrete instigation, by means of action in Germany, of the production of hES cell lines in other countries.

In (D1), the con-side is claimed to be supported and motivated by the reasoning: If measures are changed, then instigation risk increases. This being supported by the stem cell law is doubted in (D2). The claim is raised, in D3, that one cannot sufficiently support this reasoning by citing only an increase in *abstract* instigation risk, since the Stem Cell law's prohibition of instigation does not cover abstract instigation. Why not? (D4) answers: Increasing abstract instigation is *not from experience* known to be a causal factor in the derivation of hES cells. Why not? (D5) and (D6) "explain" the absence of knowledge cited in (D4) by the causal independence of abstract instigation and (concrete) derivation of hES-cells. (D7) states that, therefore, the cut-off date measure *can only be seen* to serve the function of precluding concrete instigation, i.e., causally effective instigation of the derivation of hES cells abroad. (D8) applies the foregoing to the cut-off measure, concluding that the cut-off date measure is not causally connected to the production of hES cells abroad, but only to the instigation of such production. Finally, (D9) states the dispensability of the cut-off date measure to *therefore* depend only on its being replaceable by equally reliable and equally effective regulatory alternatives.

#### 4.1.5 Paragraph E

(E1) *However*, the legislative history of the Stem Cell Law suggests that it was actually only the strict cut-off date criterion and the symbolic signal to society of the threat of a severe penalty that persuaded some deputies to vote for the bill. (2) *Perhaps* these provisions did in this way make some contribution to achieving "peace" in the dispute about the import and use of [end p. 16] embryonic stem cells. (3) It may *nevertheless* be doubted that the strict cut-off date criterion is an integral component of the compromise defined in the Stem Cell Law. (4) *An argument against this idea* is that eventually no one in Germany would any longer be able to take part in research with hES cells on the level of international science if the cut-off date really were set in stone (on this point, see Section III.2 below). (5) The Stem Cell Law would then not be a compromise, but simply a deferred complete abandonment of the import and use of hES cells. (6) Such an interpretation can surely not be reconciled with the other declared objective of the Law – that of ensuring the freedom of research. (7) If the compromise character of the Stem Cell Law is taken seriously, the cut-off date criterion cannot be deemed indispensable. (8) This is also implicitly conceded by those who oppose changes to the cut-off date criterion by arguing that science does not in fact need the new cell lines. (9) Anyone who rejects a change in the cut-off date criterion on the grounds that it is not necessary at least does not rule out the possibility of the criterion being modified if this is necessary. [end of section, p. 17]

(E1) concedes that both the cut-off date and the penal sanctions were indispensable in moving some deputies towards the compromise. In (E2), a peace-conduciveness interpretation for this legislative historical fact is offered, though the 'perhaps' turns (E2) into a hypothesis. It can be seen as the strongest hypothesis consistent with (E3), which claims, it can be doubtful that the cut-off date is an integral compromise part. Why doubtful? In support of (E3), (E4) and (E5) together make the claim that, were it otherwise, the compromise character of the stem cell law would be lost; the law then took on the character of a delayed complete abandonment of hESCR in Germany. Hence, as (E6) states, freedom of research can longer be

seen to be respected. (E7) construes an incompatibility between upholding the compromise character under the indispensability interpretation of the cut-off date and upholding freedom of research. In (E8) support for this incompatibility view is located amongst those who oppose changing the cut off date measure on the grounds that newer cells are not necessary, because, as (E8) states, this position does not preclude changing the measure *if necessary*.

#### 4.2 An oddity with respect to argumentative indicators

It will have been observed that the number of argumentative indicators is surprisingly low. In particular, paragraphs D and E – which I take to be the crucial sections *of the entire opinion* – feature only two and three indicators, respectively (*however, nevertheless, perhaps, for this reason, an argument against this idea is*). Insofar as these paragraphs indeed contain the central argument for the majority position, it should be theoretically interesting (and perhaps surprising) to note that the number of indicators correlates inversely with importance.

#### 4.3 What is the argument here?

As argumentative indicators are largely missing, we are challenged with respect to justifying our reconstruction of the text. At face value, going through paragraph D leaves one with a series of sentences (speech-act theoretically: assertives) for which it is not at all clear in what manner they confer support upon a conclusion. The support relations between sentences are *largely not* part of the text, but need to be reconstructed.

We single out paragraph D, because it serves particularly well to compare a traditional (deductive) reconstruction which is based on the (*near*) *truth* of premises and the *logical validity* of the argument schema with a reconstruction guided by assuming that premises must be *acceptable, relevant* and *sufficient* for the paragraph's conclusion. We do so in the light of the following explication from van Eemeren (2002) of the well known *Informal Logic* criteria.

In the case of 'relevance' the question is whether there is an adequate (substantial) relation between the premises and the conclusion of an argument; in the case of 'sufficiency' the question is whether the premises provide enough evidence for the conclusion; in the case of 'acceptability' the question is whether the premises themselves are true, probable or in some other way trustworthy. None of the three criteria has been more clearly defined. (van Eemeren 2002: section 3.2)

Rather than give improved definitions, we seek to demonstrate that the criteria already got us to a point where their superiority vis a vis considerations of premise truth and validity is apparent. Implications for the traditional conception of *sound argument* will be discussed below.

## 5 RECONSTRUCTING PARAGRAPH D

(D1) is part of locating the difference of opinion. (D2) is a straightforward claim for which one expects support in the immediate vicinity. (D3) does provide support for (D2), but is itself in need of further support. Does (D4) provide support for (D3)? I take it, for (D4) to (D8), it is less than obvious what they support. After all, we have no overt argumentative indicators to go on. Only (D9), using "for this reason", is explicitly related to the sentence(s) preceding it.

Stated briefly, when reading these sentences individually or as a group, it remains *unclear* what the argumentative structure of paragraph D, especially (D4) to (D8), amounts to. I had offered one such structure in the reconstruction above. This structure was rather *not* forced by the text. It resulted from an effort to keep the sentences *relevant* to the conclusion in (D9).<sup>10</sup>

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<sup>10</sup> We thus find that relevance is a criterion which pertains to argument reconstruction, see section 6, below.

E.g., (D4), when read to stand in direct support of (D3), would come out as irrelevant – not only initially, also upon reflection. The same can be said of (D5) and (D6). If so, the problem arising is that (D7), which is crucial for the majority’s standpoint, stands amidst sentences which turn out to be *irrelevant*, although, colloquially speaking, they “look true”. Moreover, when evaluated on the (near-)truth criterion, then (D7), by repeating what is to be argued for, would be analyzed as an instance of *begging the question* (cf. Ritola 2003)

Going carefully through this paragraph, the reader will confirm that her understanding of it is reached by having provided for it a structure which the text supports, perhaps even strongly suggests (to you), but – and this is the point to make – *does not openly present*.

None of the premises are in any good sense unacceptable. Yet, judging their acceptability is not enough. In order to satisfy the sufficiency criterion – or so I shall argue –, we have to complete the reasoning by making explicit the relations of relevance between what is overtly stated and at least one unexpressed premise. It pertains to the interim conclusion in (D7).

This conclusion – or so I claim – is not *sufficiently* supported by the forgoing reasons (D4) to (D6). On the reconstruction offered here, (D4) to (D6) are descriptions intended to capture the *de facto* causal relations between a measure and the end which this measure is intended to serve. We thus deal with the causal nexus between hES-cell production outside of Germany and abstract instigation of such production by measures taken in Germany.

The claim raised in the text is: There is no such causal connection.<sup>11</sup> So, (D8) states the empirical aspect of this matter (cut-off date is immaterial for the extent to which new hES-cells are produced), while (D7) states the legal aspect with respect to the function intended by the cut-off date measures (the cut-off date cannot be seen<sup>12</sup> to have any other function than reliably precluding concrete instigation of hES cell production in Germany).

The item by which (D4) to (D7) can confer *sufficient* support upon (D8), I submit, is a variation on the legal principle of proportionality. Applied to this case, it can be stated as:

(PP) A measure *M* employed with intent *I* (i.e., to achieve function *F*) is *not* permissible, if a less drastic and available measure *M\** already achieves *F*.

The majority appealed to this principle when arguing for the permissibility of restricting freedom of research (NEC 2007: 40). In analogy, one may formulate the reasoning that yields (PP) in order to relate *not* the functional measure to its permissible corresponding legal intent, but the sensible legal intent to the measure’s function:

(PP’) For a given measure, *M*, employing it with intent *I* (i.e., to achieve function *F*) is non-sensical, if the particular measure is causally impotent with respect to *F*.

If a change in measures would only lead to a risk increase with respect to abstract instigation, and abstract instigation is irrelevant *for*, because not causally connected *to* embryo-derivation abroad, then the stem cell law *cannot* (sensibly) intend to preclude abstract instigation.

Hence, (D7) is forwarded – cf. the use of ‘consequence’ in paragraph A – as the *correct legal consequence* of the experiences stated in (D4) to (D6). Thus, (D7) supports the thesis

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<sup>11</sup> Cf. NEC (2007:41): “The assumed overall causal relationship is (...) a fiction and can for that reason not suffice to justify an appreciable restriction of the freedom of research.”

<sup>12</sup> The German original reads “Man wird die Funktion der festen Stichtagsregelung nur darin sehen können, jede konkrete Veranlassung der Herstellung von neuen HES-Zelllinien im Ausland sicher auszuschließen“ (DER 2007:11). The English translation renders „man wird nur können“ by using the term “surely”, suggesting that something is largely (perhaps completely) beyond doubt. Even choosing ‘completely beyond doubt’, however, fails to bring out that the German original is yet stronger. It should read “one will only be able to”. This use suggests (to me) the implicit invocation of a *principled* reason which needs to be reconstructed, precisely because the preceding sentences (D4) to (D6) are not strong enough to sufficiently support (D7).

that, given the proportionality principle (PP'), the stem cell act *could* only have been intended – therefore “can only be seen” – to preclude acts of concrete instigation, not of abstract instigation, *because* symbolic reinforcement, i.e., abstract instigation, is not experienced to lead to an increased risk in concrete instigation of hES cell production abroad.

Finally, then, (D4) to (D8) support (D9) which applies the preceding reasoning to the dispensability of the cut-off date measure, which is claimed to depend – “for this reason” – only on being replaceable by equally reliable and equally effective regulatory alternatives that prevent concrete instigation.

### 5.1 Brief evaluation

We shall not elaborate on the reconstruction of paragraph E (beyond section 4.1.5), nor attempt to finally evaluate the argumentation at this point. In passing, however, we can note: As a counter-argument, *if* paragraph D is dialectically adequate, then only against an opponent who regards the cut-off date and the penal sanctions as *means* of the law, not *ends*.

The position of those regarding them as ends is addressed in paragraph E. It centrally argues on the basis of the semantics of the term ‘compromise’, thus conceding that the counter-argument consists in construing an incompatibility between regarding them as ends and establishing such ends *via a compromise*.

From the evaluative point of view, the problem of the argumentation in paragraph E is that the legal commentary to the stem cell law included the following passage:

Article 5 limits research on embryonic research to high-priority research aims. At the same time, only such projects are permissible whose conduct with alternative methods, according to the research project’s concretely planned research question, does not allow to expect results of equal value. In this way, the demand for embryonic stem cells by researchers working in Germany shall be limited to a minimum. *Also the danger of a possibly arising eventual request of a further relaxation of the legal provision shall thereby be opposed from the outset* (German Lower House of Parliament, printed matter 14/8394: 9; *italics added*, my translation).

The majority opinion does not explicitly address this part of the law’s commentary. Without further assumptions, this passage cannot invalidate the majority’s argumentation. Yet, it shows that, at the time of compromising, the con-party was well aware of the possibility of an eventual request for relaxing the law.

It is presently unclear to me how one should evaluate the significance of this passage. I find it reasonable, to regard the majority’s argumentation in paragraph E to be implicitly directed at the standpoint here expressed. We would then deal with an instance of pro/con argumentation, *one or the other* of which can be defeated. In other words, the 2002 anticipatory opposition against eventual relaxation is defeasible by the 2007 compromise-semantic argument *or vice versa*. If so, *the* outcome depends on something beyond argumentation.

Rather than elaborate on this, I would now like to come back to the quality criteria for argument evaluation.

## 6. RECONSTRUCTIVE CHARITY

We had seen that paragraph D was in need of a structure of argumentative support by means of which (D4) to (D6) can be related to (D7) and (D8) which, in turn, support the conclusion (D9). We reached this structure by attempting to relate the sentences in ways that would leave them *relevant* for the argumentation. We added a principle (PP') in order to achieve a *sufficient* support for the conclusion. All premises in paragraph D were deemed acceptable.

This paragraph was selected to show, in an exemplary manner, that an analysis which relies *exclusively* on the traditional epistemological notions of premise truth and scheme-validity disqualifies itself, because applying these considerations renders premises irrelevant and one such that it begs the question against the conclusion to be supported.

On the basis of this paragraph, I suggest, an important insight can be exemplified. It primarily has to do with the effort that goes into argument reconstruction. The reason why working with premise truth and schema-validity gets one not too far here (indeed it sets one out in the direction of the wrong reconstruction) can be stated as follows: The application of the traditionally epistemological evaluation-criteria presupposes a prior application of *reconstructive charity* on the part of the analyst.

Such charity (though not by this term), for example, is known to Pragma-Dialecticians from having to specify, for a given episode of argumentation, either a *logical minimum* or a *pragmatic optimum* (depending primarily on whether a speaker overtly claims logical validity for an argument).<sup>13</sup> The general consideration pertains to analyzing the argumentation in such a way that maximum credit can be given to the arguer (cf. van Eemeren and Grootendorst 2004: 117f., esp. note 32). Thus, there is an obligation to assume that the arguer is at least as intelligent as the analyst.<sup>14</sup>

The Informal Logic criteria (*relevance, sufficiency, acceptability*), which have been described “as replacements for the (...) logico-epistemological criterion of ‘soundness’” (Blair 2007: 34), can thus be seen to replace *at any rate more* than only premise truth and scheme validity (together making up *soundness*).

After all, as was shown above, approaching a text only with the latter two criteria can demonstrably result in partial non-sense. Put differently: The presumed skill, intelligence and experience on the part of the arguer (here: a member of an expert body) is *pragmatically inconsistent* with reconstructing irrelevant premises and question begging ones (cf. Blair 2007: 38).<sup>15</sup> This, it seems to me, is the insight that both Pragma-Dialectics and Informal Logic correctly capitalize on when rejecting the argument form ‘*p*, therefore *p*’ as uninformative (cf. Blair *ibid.*, van Eemeren and Grootendorst 2004: 3, note 8).

Conversely, then, the traditional logico-epistemological criteria fail to explicate a crucial precondition of their application, namely having reached a charitable reconstruction. Such reconstructions retrace support relations and add premises (like our principle PP’, above) which transform the text into parts that, taken together, constitute a sound argument, while avoiding the otherwise ensuing non-informativeness of a logical reconstruction.

The relevance criterion, then, is most susceptible to be the substitute of what the logico-epistemological approach would call *charity*. After all, the norm of reconstructive charity will demand amendments to the argument’s explicit textual form such that it satisfies the relevance-criterion. At any rate, it is in this sense that one may most charitably understand Blair (2007: 38f.) who writes: “[T]he relevance ‘criterion’ is in the first place a criterion of inclusion in the analysis and reconstruction of arguments from discourse”.

On this note, it might be tempting to regard the validity of the argument scheme to correspond to the sufficiency-criterion, and acceptability to the true-premise criterion. Appealing as this simple projection appears, however, it is likely too simplistic.

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<sup>13</sup> In distinction to prior versions of the Pragma-Dialectical theory, I have briefly discussed this in Zenker (2007).

<sup>14</sup> One (perhaps unavoidable) problem with current textbook treatments is that their “canned and simplistic” (Johnson 2007: 82) examples seem to be chosen in such a way that his norm is violated.

<sup>15</sup> It is not, however, incompatible with producing an argument that can be objected to.

## 7. CONCLUSION

Based on a particular example of real-life public policy argumentation, it was argued that the Informal Logic criteria of relevance, sufficiency, and acceptability (RSA) do not function only as evaluative criteria, but – at least as far as relevance is concerned – as criteria that also guide argumentative reconstruction.

As for the Informal Logic position's being explicitly distanced to traditional logico-epistemological notions, the RSA criteria should not be seen to replace *only* soundness (true premises plus valid inference scheme), but soundness *and* reconstructive charity. The latter was identified as 'always already presupposed' when applying the soundness-criterion.

Consequently, proponents of the traditional logico-epistemological approach to argumentation who defending them against later developments should be seen to presuppose reconstructive charity, and, in turn, would do well to *explicate* charity next to soundness.

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## 9. APPENDIX

### Section II (3) Opinion

#### 3. Permissibility of balancing objects of legal protection against each other

If the compromise of the Stem Cell Law is accepted as the starting point and foundation of evaluation, it follows that, in the regulation of the import and use of hES cells, on the one hand the embryo protection criteria must not be set below the level provided for in the Stem Cell Law, and, on the other, research must not be subjected to restrictions that would have the effect of completely precluding the use of hES cells. Nor must the interest of the sick in the development of new therapies be disregarded. However, differences of opinion exist as to the consequences of these premises for the detailed provisions.

To begin with, no one disputes that any system intended to be compatible with the compromise of the Stem Cell Law must retain the objective of preventing any German causal contribution to the destruction of embryos in other countries. For this reason, the production of hES cells abroad must not be “instigated” from Germany – that is to say, it must not, by any action in Germany, be carried on, commissioned or facilitated by incentives.

However, opinions differ on whether the compromise represented by the Stem Cell Law is departed from if alternatives to the present cut-off date criterion or threat of penal sanctions are considered. Some hold that these two provisions do not in themselves constitute the objective and purpose of the Stem Cell Law, but are simply means of achieving its objectives and purposes. The cut-off date criterion is intended, as provided in Section 1 No. 2 of the Stem Cell Law, to prevent the derivation of hES cells from being instigated as a result of action in Germany, whereas the criminalization provision has the aim of ensuring that the conditions for approval are observed. In the opinion of others, the cut-off date criterion is one of the essential ends of the Stem Cell Law. In their view, the compromise achieved in the Law would no longer be respected if the cut-off date were to be modified or replaced. [end. p. 15]

This position is no doubt underlain by the assumption that the risk of the production of hES cells being “instigated” by action in Germany would be increased in the event of a departure from the present criterion of a fixed cut-off date. In this connection, however, it is not enough to maintain that concessions on the cut-off date might in effect be perceived as a signal of symbolic support for researchers who produce hES cells in other countries. Symbolic reinforcement of this kind cannot validly be adduced as an instance of the “instigation” of the production of hES cells within the meaning of the Stem Cell Law. Experience has shown that it cannot be assumed that such an incentive would automatically arise if the current cut-off date criterion were dropped because this would create the abstract possibility of using the new cell lines in Germany as well as abroad. The development of new cell lines in other countries is part of a dynamic that proceeds without regard to what is happening in German research. Rather than speculating on a conceivable demand for hES cells in Germany, scientists are in fact pursuing perceived research goals, strategies and opportunities. The fixed cut-off date criterion surely has the sole function of reliably precluding any concrete instigation of the production of new hES cell lines in other countries. Conversely, with regard to the extent to which new hES cell lines are produced abroad – apart from the conceivable case of such instigation – it is immaterial whether or not the cut-off date criterion is retained in Germany. For this reason, the indispensability or otherwise of the cut-off date criterion depends on the possible existence of regulatory alternatives capable of equally reliably precluding the concrete instigation, by means of action in Germany, of the production of hES cell lines in other countries.

However, the legislative history of the Stem Cell Law suggests that it was actually only the strict cut-off date criterion and the symbolic signal to society of the threat of a severe penalty that persuaded some deputies to vote for the bill. Perhaps these provisions did in this way make some contribution to achieving “peace” in the dispute about the import and use of [end p. 16] embryonic stem cells. It may nevertheless be doubted that the strict cut-off date criterion is an integral component of the compromise defined in the Stem Cell Law. An argument against this idea is that eventually no one in Germany would any longer be able to take part in research with hES cells on the level of international science if the cut-off date really were set in stone (on this point, see Section III.2 below). The Stem Cell Law would then not be a compromise, but simply a deferred complete abandonment of the import and use of hES cells. Such an interpretation can surely not be reconciled with the other declared objective of the Law – that of ensuring the freedom of research. If the compromise character of the Stem Cell Law is taken seriously, the cut-off date criterion cannot be deemed indispensable. This is also implicitly conceded by those who oppose changes to the cut-off date criterion by arguing that science does not in fact need the new cell lines. Anyone who rejects a change in the cut-off date criterion on the grounds that it is not necessary at least does not rule out the possibility of the criterion being modified if this is necessary. [end of section, p. 17]