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First Among Equals: Abduction in Legal Argument from a Logocratic Point of View

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I. INTRODUCTION: WHAT IS A LEGAL ARGUMENT?

What is a legal argument? More specifically, what are the criteria of identity that specify what constitutes a single legal argument? When a legal arguer offers what seem to be several broadly related arguments, how exactly does one distinguish them into their component parts? Although the argumental phenomena that concern me and the explanations I will offer are not limited to the domain of legal argument, they occur prevalently there. Judges and litigants typically make several arguments that seem clearly to be orchestrated to achieve a single goal, arguing either to establish a litigative position (as do parties' attorneys) or to resolve a contest of litigants' arguments (the task of the judge of that competition).

To illustrate and explain my topic more fully, I quote a judicial opinion that is well-known in American Contract Law pedagogy. The opinion is *Dougherty v Salt*,[1] written by Benjamin Cardozo, one of the acknowledged masters of American common law for the highest court in the State of New York. In full, the opinion reads as follows:

> The plaintiff, a boy of eight years, received from his aunt, the defendant's testatrix, a promissory note for $3,000, payable at her death or before. Use was made of a printed form, which contains the words 'value received.' How the note came to be given was explained by the boy's guardian, who was a witness for his ward. The aunt was visiting her nephew.
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> 'When she saw Charley coming in, she said, "Isn't he a nice boy?" I answered her, Yes; that he is getting along very nice, and getting along nice in school; and

[1] *Dougherty v Salt*, 125 NE 94 (NY 1919) (Cardozo, J).

> I showed where he had progressed in school, having good reports, and so forth, and she told me that she was going to take care of that child; that she loved him very much. I said, "I know you do, Tillie, but your taking care of the child will be done probably like your brother and sister done, take it out in talk." She said, "I don't intend to take it out in talk; I would like to take care of him now." I said, "Well, that is up to you." She said, "Why can't I make out a note to him?" I said, "You can, if you wish to." She said, "Would that be right?" And I said, "I do not know, but I guess it would; I do not know why it would not." And she said, "Well, will you make out a note for me?" I said, "Yes, if you wish me to," and she said, "Well, I wish you would."'

A blank was then produced, filled out, and signed. The aunt handed the note to her nephew, with these words:

> 'You have always done for me, and I have signed this note for you. Now, do not lose it. Some day it will be valuable.'

The trial judge submitted to the jury the question whether there was any consideration for the promised payment. Afterwards, he set aside the verdict in favor of the plaintiff, and dismissed the complaint. The Appellate Division, by a divided court, reversed the judgment of dismissal, and reinstated the verdict on the ground that the note was sufficient evidence of consideration.

We reach a different conclusion. The inference of consideration to be drawn from the form of the note has been so overcome and rebutted as to leave no question for a jury. This is not a case where witnesses, summoned by the defendant and friendly to the defendant's cause, supply the testimony in disproof of value. Strickland v Henry, 175 NY 372, 67 NE 611. This is a case where the testimony in disproof of value comes from the plaintiff's own witness, speaking at the plaintiff's instance. The transaction thus revealed admits of one interpretation, and one only. The note was the voluntary and unenforcible promise of an executory gift. Harris v Clark, 3 NY 93, 51 Am Dec 352; Holmes v Roper, 141 NY 64, 66, 36 NE 180. This child of eight was not a creditor, nor dealt with as one. The aunt was not paying a debt. She was conferring a bounty. Fink v Cox, 18 Johns 145, 9 Am Dec 191. The promise was neither offered nor accepted with any other purpose. 'Nothing is consideration that is not regarded as such by both parties.' Philpot v Gruninger, 14 Wall 570, 577 [20 L Ed 743]; Fire Ins Ass'n v Wickham, 141 US 564, 579, 12 Sup Ct 84, 35 L Ed 860; Wisconsin & M Ry Co v Powers, 191 US 379, 386, 24 Sup Ct 107, 48 L Ed 229; De Cicco v Schweizer, 221 NY 431, 438, 117 NE 807, LRA 1918E, 1004, Ann Cas 1918C, 816. A note so given is not made for 'value received,' however its maker may have labeled it. The formula of the printed blank becomes, in the light of the conceded facts, a mere erroneous conclusion, which cannot overcome the inconsistent conclusion of the law. Blanshan v Russell, 32 App Div 103, 52 NY Supp 963, affirmed on opinion below 161 NY 629, 55 NE 1093; Kramer v Kramer, 181 NY 477, 74 NE 474; Bruyn v Russell, 52 Hun, 17, 4 NY Supp 784. The plaintiff through his own witness, has explained the genesis of the promise, and consideration has been disproved. Neg Instr Law, § 54 (Consol Laws, c 38).

We hold, therefore, that the verdict of the jury was contrary to law, and that the trial judge was right in setting it aside. He went too far, however, in dismissing the

> complaint. He might have dismissed it if he had reserved his ruling on the defendant's motion for a nonsuit or for the direction of a verdict. Code Civ Proc §§ 1185, 1187. Instead of reserving his ruling, he denied the motion absolutely. Upon the return of the verdict, he should have granted a new trial.
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> A new trial was also necessary because of error in rejecting evidence. The defendant attempted to prove that the signature to the note was forged. The court refused to hear the evidence, because forgery had not been pleaded as a defense. The answer did deny the execution of the note. The evidence of forgery was admissible under the denial. Schwarz v Oppold, 74 NY 307; Farmers' L & T Co v Siefke, 144 NY 354, 39 NE 358.
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> The judgment of the Appellate Division should be reversed, and the judgment of the Trial Term modified by granting a new trial, and, as modified, affirmed, with costs in all courts to abide the event.
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> Hiscock, CJ, and Chase, Collin, Hogan, Crane, and Andrews, JJ, concur.
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> Judgment accordingly.[2]

Abstracting from several details to which we will return, before us is a dispute about whether an aunt made a legally enforceable promise to her nephew to give him $3,000.[3] In his opinion for New York Court of Appeals (which is the highest court in the State of New York), Judge Cardozo concluded that Tillie did not make a legally enforceable promise. How did he arrive at that conclusion? Did he offer *an* argument whose conclusion it was? Several arguments? If there are several arguments, how are they related? Are there several arguments for the same conclusion? Several partial arguments that add up to one conclusion? Are arguments analysable into elements that can be added in this way? Cardozo concluded that although the trial judge was correct to overrule the jury's verdict in favour of plaintiff Charley, the trial judge was mistaken in dismissing the complaint outright and mistakenly refused to grant a new trial to determine whether, as the defendant claimed (directly or indirectly), the note allegedly given by Tillie to Charley was forged. Is this argument about the mistaken dismissal and the need for a new trial the same argument as the argument about the promise from Tillie to Charley? Different? If different, how are they related? In general, how does one determine whether an arguer is offering one argument with several conclusions, or several arguments for one conclusion, or several arguments for several conclusions? What are the identity criteria of *an* argument?

[2] ibid.

[3] Cardozo's opinion also reveals additional procedural details and complexity. The action for breach of contract initiated at the trial court was on behalf of Charles Napoleon Dougherty ('Charley'), an 8-year-old boy, by Susan M Teves, who was Charley's guardian. The action was against Emma L Salt, who was the executrix of the last will and testament of Helena M Dougherty, Charley's aunt (and also the testatrix for Salt), who had died by the time of the action for breach of Contract. In effect, the boy's Contract claim was that his aunt made him a legally enforceable promise to give him $3,000 in the circumstances that Cardozo offers in the opinion quoted above.

The answer I will offer is an *abduction*, that is, an argument whose premise is some phenomenon to be explained and whose conclusion is an explanation of that phenomenon. The phenomena that concern me in this abduction are the *practices of argument*, both legal argument specifically and argument more generally. Fractal-like, abduction ramifies. The explanation of the identity criteria of argument is supplied by an abduction. That abduction itself also provides an explanation of the nature of abduction – creating an abduction of abduction, or a meta-abduction.[4] This meta-abduction is, like all arguments, a tool, which I have come to call the *Logocratic Method*. The Logocratic Method is a philosophical system for explaining and evaluating arguments, their formal structures and their principal uses in contexts of argument, including, but not limited to, varying contexts of legal argument. (A fair – and aspirational! – analogue is Charles Sanders Peirce's semiotic system, which is a philosophical system for explaining and evaluating signs, their types and their uses.)

Why are the questions about the identity criteria of argument and the Logocratic explanatory (abductive) answer to those questions important? One reason among others is this: arguments, like language (the medium in which arguments exist), are tools used by arguers for many different purposes. Tools, in turn, are used for (literally) instrumental purposes, to achieve specific tasks. There are features of a hammer, for example, that make it a good hammer, and there are features of instruments other than those originally designed as hammers that might make them good *as* hammers.[5] How is the efficacy of the tool of argument to be measured? Put another way, if a specific argument is regarded as a tool, how well does it serve its purpose as a tool – how good is it *as* an argument? Obviously, a single arguer can have many distinct purposes for a given argument, and different arguers can have different purposes for different arguments. There are, accordingly, different ways to assess the efficacy of arguments. One of the central goals that legal arguers have for their arguments is to *justify* the legal judgments that are those arguments' conclusions. This goal is reflected in conceptions of the *rule of law*, an action or judgment *according to law*.[6] A moment's reflection shows that, in order to assess the efficacy of the tool of legal argument as a tool of justification, one must be able to identify instances in which that tool is operating. One cannot know how good a tool is at its intended purpose without being able to tell *what* the tool is, *when* it is being used and *how* it is being used.

[4] 'My colleague, Leon Lipson, once described a certain species of legal writing as "Anything you can do, I can do meta." What follows is a pure instantiation of his category.' Arthur Allen Leff (1979) 'Unspeakable Ethics, Unnatural Law' *Duke Law Journal*: 1229–49, 1230, fn 2. Perhaps needless to say (but still said), this often applies to philosophical writing, as it does in this chapter.

[5] I anticipate a point developed further in discussion below, see n 34 and accompanying text.

[6] I have long urged this point. See, eg, Scott Brewer (2000) 'On the Possibility of Necessity in Legal Argument: A Dilemma for Holmes and Dewey' *John Marshall Law Review* 34: 9–47, 46–47.

To anticipate, the Logocratic abduction I present and rely on offers answers to these *what*, *when*, and *how* questions about legal arguments:

1. The criteria of identity of *any* argument, including legal arguments (such as in *Dougherty*) are supplied by *interpretive abduction*, which is an inference to the explanation of the meaning of a text.
2. According to the best explanation *of* abduction (meta-abduction[7]), all abductions are rendered from a *point of view*, and all *legal abductions* are rendered from a *legal point of view*.
3. The fundamental form of legal argument is *legal abduction*.
4. All legal abductions include *within them* (in a relation of logical subsumption[8]) both *interpretive abduction* and *rule-based deduction* (Cardozo relies on both within his legal abduction in *Dougherty*). Very often, especially in Anglo-American legal-argument practice, legal abductions also involve induction and analogical argument (but Cardozo does not rely on either of these in *Dougherty*).
5. Best explained, Cardozo's legal abduction in *Dougherty* consists of two legal abductions each of which contains both interpretive abductions (of the legal rules Cardozo judges to be applicable to the case) and rule-based deductions (under those rules). This makes for a total, within the relatively short judicial opinion, of two overall legal abductions, within each of which is an interpretive abduction and a deduction, thus a total of six arguments.

Explaining and defending these claims – and along the way trying to indicate that the complexity of the Logocratic meta-abduction, applied to *Dougherty* is warranted – are my central overarching goals. To be sure, this is a complex explanation in answer to the question: *What is a legal argument?* We should not sacrifice explanatory power to oversimplification, and my closing remarks suggest the fruitility (fruitful utility) of a more general exploration of coherence and resonance among theories of argument and many of the multiple-disciplinary studies of complexity itself.

II. OUTLINE OF THE (META) ARGUMENT

I proceed as follows. Like the land of those who had the Gauls to oppose Caesar, this chapter presents arguments about the nature of argument, meta-arguments, in three main parts. First, I present the elements of the Logocratic theory of argument that in turn explains the nature of abduction – including interpretive abduction, which is central to the explanation of the identity criteria of argument, and legal abduction, which is central to the explanation of cases like *Dougherty*. Second, using a close application of Logocratic theory, I use *Dougherty* to explain and

[7] See Leff (n 4).

[8] In set-theoretic terms, logical subsumption is the *proper-subset* relation of sets. Set A *properly subsumes* Set B if and only if every element of Set A is an element of Set B, but the converse does not hold.

to illustrate how legal abduction serves as the core of legal argument both for the Logocratic account of the identity criteria of legal argument specifically and arguments in general. Finally, I conclude with a summary of the complex argumental path taken and a very brief suggestion for further research in light of the analysis I have offered.

III. ELEMENTS OF THE LOGOCRATIC POINT OF VIEW

In this section, I sketch those parts of the Logocratic Method (hereinafter also 'LM') that I draw on for my answers to the central questions of the chapter: *What is a legal argument?* and, more generally, *What is* an *argument?*, answers I shall illustrate by my analysis of *Dougherty*.

Before framing the theory explicitly as the 'Logocratic Method',[9] I developed explanations of different types of arguments that anticipated the Logocratic approach, including an explanation of interpretive arguments[10] (which I later came to refer to as 'interpretive abduction'[11]), analogical arguments,[12] and arguments relied on by non-experts facing a practical reasoning task (judges and juries in litigation are examples of practical reasoners who face this task) in consulting and deferring epistemically to experts to aid them in their practical-reasoning decisions.[13] I have also identified and articulated a distinct domain of

[9] I first used that term in Scott Brewer (2007) 'Satisfaction and Posner's Morin Opinion: Aliquando Bonus Dormitat Posnerus?' *Harvard Law Review* 120: 1123–36, but did not develop the first full articulation of the method until Scott Brewer (2011) 'Logocratic Method and the Analysis of Arguments in Evidence' *Law, Probability & Risk* 10: 175–202.

[10] In Scott Brewer (1988) 'Figuring the Law: Holism and Tropological Inference in Legal Interpretation' *Yale Law Journal* 97: 823–43, I modelled interpretation as a two-place relation between a text being interpreted (*interpretandum*) and a distinct text that offers the interpretation, where the relation is *states the meaning of*. The model also explained interpretation as the application of a set of inference rules leading from the *interpretandum* to the *interpretans*. Although I did not at the time style this process as 'abduction', the model coheres strongly and well with my later framing of interpretation as 'interpretive abduction': see sources cited in n 11.

[11] See Scott Brewer (2020) 'Interactive Virtue and Vice in Systems of Arguments: A Logocratic Analysis' *Artificial Intelligence & Law* 28: 151–79; Scott Brewer (forthcoming) 'Logic and the Life of the Law (Professor): A Logocratic Lesson from Hohfeld' in *Wesley Hohfeld A Century Later: Edited Work, Select Personal Papers, and Original Commentaries*, eds Shyamkrishna Balganesh, Ted Sichelman and Henry E Smith; Jack Weinstein, Norman Abrams, Scott Brewer and Daniel Medwed (2017) *Evidence*, 10th edn, St Paul, MN: Foundation Press. Other theorists of abduction have also explained interpretation as a type of abduction. See, eg, Atocha Aliseda (2008) *Abductive Reasoning: Logical Investigations into Discovery and Explanation*, Netherlands: Springer, 43–44 ('In linguistics, abduction has been proposed as a process for natural language interpretation, where our "observations" are the utterances that we hear (or read). More precisely, interpreting a sentence in discourse is viewed as providing a best explanation of why the sentence would be true.'); Dov M Gabbay and John Woods (2005) *The Reach of Abduction: Insight and Trial*, 1st edn, Amsterdam: Elsevier Science, ch 9, 'Interpretation Abduction'.

[12] See Scott Brewer (1996) 'Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy' *Harvard Law Review* 109: 923–1028.

[13] See Scott Brewer (1998) 'Scientific Expert Testimony and Intellectual Due Process' *Yale Law Journal* 107: 1535–1681.

Jurisprudence, the 'Jurisprudence of Logical Form', whose subject matter is the jurisprudential significance of the question of how one might fairly interpret the logical form of legal arguments.[14]

Most of these explanations[15] assert and rely on two principal explanatory propositions that comprise what I have called the Logocratic 'interactive virtue' theory of argument.[16] It is this aspect of Logocratic theory that provides the identity criteria of arguments and that allows me to answer the questions that I posed (in section I) about Cardozo's opinion in *Dougherty v Salt*. Two theses are at the core of this interactive virtue theory:

(a) There are precisely four argument forms, deduction, induction, abduction and analogy, which are logically distinct, none of which is reducible to any other.[17]
(b) Both the *identity* criteria and the distinct *evaluative* criteria for each individual argument form are best explained such that some forms include other forms in the multi-step inferential process from premises to conclusion.

In accord with proposition (b), I have argued that: analogical argument is a multi-step inferential process that involves both abduction (*analogical abduction*) and either induction or deduction;[18] induction always involves abduction;[19] and, like analogical argument, abduction always involves either induction or deduction. I have never argued that deduction always involves some other mode of inference, but even concluding that deduction does *not* necessarily involve any other logical form may presuppose a non-nominalist semantics.[20]

A. The Evidential Conception of Logic

The Logocratic Method endorses an *evidential conception of logic*, according to which *logic is the study of the evidential relation between the premises*

[14] See Scott Brewer (2000) 'Traversing Holmes' Path Toward a Jurisprudence of Logical Form' in *The Path of the Law and Its Influence: The Legacy of Oliver Wendell Holmes, Jr*, ed Steven J Burton, Cambridge: Cambridge University Press, 94–132.

[15] Unlike other cited sources, Brewer (n 10) did not discuss argument forms generally, though, as noted, it did model interpretation as a type of argument in a 'Logocratic-friendly' way, providing details to fill out what has become the Logocratic model of *interpretive abduction*. See also discussion in section V of this chapter.

[16] See Brewer (2020) (n 11).

[17] Contrast assimilative accounts that, for example, explain induction as a type of abduction, as in Gilbert H Harman (1965) 'The Inference to the Best Explanation' *The Philosophical Review* 74: 88–95, 88 ('all warranted inferences which may be described as instances of enumerative induction must also be described as instances of the inference to the best explanation'; the former are a 'special case' of the latter), or that explain analogy as a type of induction, as in Heather Walters and Kristen Stout (2019) *Understanding Argument in a Post-Truth World*, San Diego, CA: Cognella, 116–17 (treating 'Argument by Analogy' as a 'Type of Induction').

[18] See Brewer (n 12).

[19] Weinstein, Abrams, Brewer and Medwed (n 11) ch 2, esp 128–29 and fn 8.

[20] I have in mind here the kind of considerations that Friedrich Nietzsche adduces in 'On Truth and Lying in a Non-moral Sense': 'Let us consider in particular how concepts are formed; each word

and conclusions of arguments.[21] This conception explains that at the root of all references to 'evidence', including visual evidence, testimonial evidence and physical evidence, is the basic idea that evidence is *propositional*. The key reason for conceiving evidence in this way is to capture the role that evidence plays in reasoning to conclusions about matters that are (purportedly) justified on the basis of evidence. When evidence enters the process of reasoning, it is *propositional* and *argumental* (that is, it plays an inferential role in arguments, as defined in section III.C). When judges and lawyers claim that some object (eg a knife with fingerprints) or an action or event (eg a person's running away when police come to his house) is evidence for some proposition (the person whose fingerprints were on the knife committed the stabbing; the person who ran from the police was guilty of the crime whose culprit the police were seeking), those judges and lawyers are actually 'propositionalising' the object or action or event. That is, they are claiming that the *fact* that the defendant's fingerprints can be found on the knife that was at the scene of the crime serves as evidence for the hypothesis that the defendant committed the stabbing. And facts are expressed as propositions.

immediately becomes a concept, not by virtue of the fact that it is intended to serve as a memory (say) of the unique, utterly individualized, primary experience to which it owes its existence, but because at the same time it must fit countless other, more or less similar cases, ie cases which, strictly speaking, are never equivalent, and thus nothing other than nonequivalent cases. Every concept comes into being by making equivalent that which is nonequivalent. Just as it is certain that no leaf is ever exactly the same as any other leaf, it is equally certain that the concept "leaf" is formed by dropping these individual differences arbitrarily, by forgetting those features which differentiate one thing from another, so that the concept then gives rise to the notion that something other than leaves exists in nature, something which would be "leaf", a primal form, say, from which all leaves were woven, drawn, delineated, dyed, curled, painted – but by a clumsy pair of hands, so that no single example turned out to be a faithful, correct, and reliable copy of the primal form. We call a man honest; we ask, "Why did he act so honestly today?" Our answer is usually: "Because of his honesty." Honesty! – yet again, this means that the leaf is the cause of the leaves. We have no knowledge of an essential quality which might be called honesty, but we do know of numerous individualized and hence nonequivalent actions which we equate with each other by omitting what is unlike, and which we now designate as honest actions; finally we formulate from them a *qualitas occulta* with the name "honesty".' Friedrich Nietzsche (1873) 'On Truth and Lying in a Non-Moral Sense' in *The Birth of Tragedy and Other Writings*, eds Raymond Guess and Ronald Speirs, Cambridge: Cambridge University Press (1999), 145 (citation omitted). These kinds of considerations suggest that one's ontology does or should contain only individuals whose grouping under concepts is affected only by what we might call *analogical grouping*, groupings in which distinct individuals are regarded as sufficiently similar to warrant including under one conceptual name, eg, in Nietzsche's examples, *leaf* and *honest*. Israel Scheffler offers this kind of rigorous ontology in Israel Scheffler (1979) *Beyond the Letter: A Philosophical Inquiry into Ambiguity, Vagueness, and Metaphor*, Boston, MA: Routledge & Kegan Paul. John Wisdom also considers whether deduction always presupposes 'case by case' reasoning that is, according to my Logocratic account, paradigmatic of analogical argument. See John Wisdom (1991) *Proof and Explanation: The Virginia Letters* 49, Lanham, MD: University Press of America ('The deductive proof of *C* from *P* is no more than a case-by-case proof of *C*.').

[21] Here I extend Brian Skyrms (2000) *Choice and Chance: An Introduction to Inductive Logic*, 4th edn, Australia: Thomson Learning, 15: 'Logic is the study of the strength of the evidential link between the premises and conclusions of arguments.'

B. The Asserted-Support Conception of Argument and Definition of 'Argument' as Dyadic Relation

The basic subject matter of Logocratic theory is arguments, where *argument* is defined as *a set of premises*, *E*, *that is or could be offered to provide support for a set of conclusions*, *H*. Put in formal terms, an argument is a *dyadic relation* between two types of sets of propositions. One set is called *premises*, the other set is called *conclusions*, and the relation is identified by this phrase: *is or could be offered to provide support for.*

This definition reflects LM's reliance on an *asserted-support conception of argument*, according to which the identity criteria of argument are whether a given set of premises is or could be offered to support a given set of conclusions.[22] This is a permissive standard, since in principle any set of premises could be offered (by someone or other) to support any set of conclusions. The work of *evaluating* the support that a given set of premises provides for a given set of conclusions is conducted at a later stage of Logocratic analysis, using a framework of 'virtues' (see section III.E).

C. Argument, Evidence and Mode of Logical Inference

Building on this evidential conception of logic, Logocratic theory conceives of an argument's premises as providing evidence for its conclusions and defines an argument's *mode of logical inference* as *the evidential relation between the argument's premises and its conclusion*. Logocratic theory says that, by definition, the set of premises, *E*, provides *evidence* for and is claimed, or can be taken to claim, to provide support for the set of conclusions, *H*.

[22] This is in contrast to an *actual-support* conception of argument, which would build into the identity criteria of an argument a requirement that the support be good or adequate. Asserted-support conceptions of argument are perhaps most common, and surely seem most explanatorily fruitful. See, eg, Trudy Govier (2014) *A Practical Study of Argument*, Boston, MA: Cengage Learning, 1 ('An argument is a set of claims in which one or more of them – the premises – *are put forward* so as to offer reasons for another claim, the conclusion.') (emphasis added); Skyrms (n 21) 13 ('An argument is a list of statements, one of which *is designated* as the conclusion and the rest of which are designated as premises.') (emphasis added). The Logocratic conception slightly broadens the scope of these versions of asserted-support conceptions to include the modality that the premise 'could be' offered to support. LM also completes the explanatory circle of concepts of evidence and argument (evidence is a type of argument, and argument is a type of evidence), and accordingly endorses an asserted-support conception of evidence as well as an asserted-support conception of argument. *Actual-support* conceptions of evidence are easier to find than are actual-support conceptions of argument but are explanatorily inferior to asserted-support conceptions of evidence. Actual-support conceptions of *evidence* disusefully conflate the concepts of *evidence* and *good evidence*, while actual-support conceptions of *argument* disusefully conflate the concepts of *argument* and *good argument*. LM also uses the concept of the *virtues* of arguments to provide an analysis of two of the most important ways in which arguments and evidence can be 'good'. See section III.E.

The Logocratic Method fashions and endorses a conception of *evidence as argument*, according to which evidence is any factual proposition (including but not limited to factual propositions regarding some action, event, object, mental state or proposition) that a person does or could assert as the basis for inferring a proposition about some action, event, object, mental state or proposition (including, in principle, the same thing – that is, something can in principle be evidence for itself). Without loss of explanatory power, other conceptions of evidence in law, philosophy and everyday life can be recast in terms of evidence as argument. For many conceptions of evidence, this recasting will actually enhance explanatory power.

The conceptual relation between evidence and argument is central to LM's explanation of the four distinct modes of logical inference. What differs among the four modes is well described, perhaps even best described, as a distinction in the *types of evidential support* that the premises of the different modes of inference provide for their conclusions. Terminologically, this account provides us with a way to express these distinctive types of argumental-evidential support as follows: the set of premises of a deductive argument provides *deductive* evidence for the set of propositions in its conclusion; the set of premises of an inductive argument provides *inductive evidence* for the set of propositions in its conclusion; the set of premises of an analogical argument provides *analogical evidence* for the set of propositions in its conclusion; and the set of premises of an abductive argument provides *abductive evidence* for the set of propositions in its conclusion.

D. The Centrality of the Enthymeme and its Fair Formal Representation

The Logocratic Method articulates a conception of the *enthymeme* that is central to Logocratic explanation of the identity criteria of arguments and their interaction. On the Logocratic conception, an enthymeme is any rule (*rule-enthymeme*) or argument (*argument-enthymeme*) whose logical form is not explicit in its original mode of presentation – in the domain of legal argument, for example: a judicial opinion, a lawyer's brief, a regulation or a statute.[23] This is a deliberated extension and modification of the classical conception of the enthymeme, often (mis)attributed to Aristotle, of the enthymeme as a syllogism in which one of the three steps is not expressly stated.[24]

[23] I first articulated the extended concept of the enthymeme in Brewer (n 12) 984.

[24] There are, to my mind, cogent arguments that the strong tendency among logic textbooks to explicate the enthymeme as a syllogism with a missing or 'suppressed' step is historically misguided in its reliance on Aristotle's conception of the enthymeme in *The Rhetoric*. See Brewer (n 12) 984, fn 184; and Myles Burnyeat (1994) 'Enthymeme: Aristotle on the Logic of Persuasion' in *Aristotle's 'Rhetoric': Philosophical Essays*, eds David J Furley and Alexander Nehamas, Princeton, NJ: Princeton University Press, 3–56, 3.

To illustrate these basic ideas, consider a 'Common Law Family' in which Mom is an authorised law-promulgator and interpreter and Jane is subject to Mom's laws. Suppose Mom says to Jane:

(1) 'On a weeknight, you can watch TV only when you've done all your homework, and you haven't tonight. No TV!'

Is there a *rule* in what Mom has said? Has she offered an *argument* based on that rule? Recall (section III.B) that an *argument* is a set of propositions some of which, premises, are or could be offered to support members of another set of propositions, namely, conclusions. If (1) is an argument, what is the set of premises and what is the set of conclusions? (Note that a set may have only one member.) This is an *interpretive* decision. If one does explain Mom's behaviour as a speech act of *argument*, what is its mode of logical inference? That is, is it *fairly represented, as a matter of interpretation*, as a deductive, or as an inductive, or as an abductive, or as an analogical argument? And if, as a matter of interpretation, one decides that it has one of these modes of inference, does it have those distinctive characteristics (distinctive of deduction, or of induction, or of abduction, or of analogy) that make it a good argument of its kind? For example, if one interprets (1) as a deductive argument, does it have the *characteristic virtue* (see section III.E.ii.b) of a deductive argument, namely, validity?[25]

Note that if one takes Mom's utterance in (1) to be an argument, it is an *argument-enthymeme*, that is, its mode of logical inference (its status as a deduction, or an induction, or an abduction, or an analogical argument) is not explicit in the mode of presentation of the utterance. We may give a fair formal representation of the argument-enthymeme, that is 'argufy' it,[26] by identifying ε_1 and ε_2 as the set of premises containing two elements, and h as the unit set comprising the conclusion:

ε_1 For all weeknights, if Jane has permission to watch TV then Jane has done all of her homework.

ε_2 On this weeknight, Jane has not done all of her homework.

h On this weeknight, it is not the case that Jane has permission to watch TV.

This argument, as interpreted and represented above, is both deductive and valid.[27] Note that the first premise is a *rule* for the circumstances under which Jane may watch TV, so this 'argufication' of the argument-enthymeme contains

[25] An argument is *valid* when in any possible set of circumstances in which all its premises are true, the conclusion is also true.

[26] In Logocratic terms, to give a fair formal representation of an argument-enthymeme is to *argufy* it, and to give a fair formal representation of a rule-enthymeme is to *rulify* it.

[27] Construed thus, her argument-enthymeme becomes an instantiation (here using the grammar of propositional logic, without the further complexities of either predicate or deontic logics) of *modus tollens*, the pattern of argument that corresponds to the tautologous conditional proposition $(P \supset Q) \wedge \sim Q) \supset \sim P$. For discussion of using non-deontic logical grammars to represent

a 'rulification' of a rule-enthymeme, namely, Mom's utterance 'On a weeknight, you may watch TV only when you've done all your homework.'

i. Enthymemicity and the Surface Structure-Deep Structure Distinction

The basic idea of the Logocratic conception of the enthymeme is familiar to theorists of argument, as well as to philosophers of language and linguistics who rely on a distinction of 'deep structure' from 'surface structure' of language.[28] Consider, for example, this statement in *Dougherty*, in which Cardozo states the main rule of consideration on which he relies (quoting and citing a US Supreme Court opinion and citing additional sources as well):

> (1) '"Nothing is consideration that is not regarded as such by both parties."'[29]

This is a rule-enthymeme. By the definition offered above, it is a rule whose logical form is not explicit in its original mode of presentation – that mode being, in this case, the text of Cardozo's opinion for the Court. All rules have the deep logical structure of conditional, that is, an 'if … then' structure.[30]

natural-language concepts of permission, requirement and prohibition, see Brewer (forthcoming) (n 11) section 5.45, fn 64.

[28] See Alexandro Lenci and Gabriel Sandu (2009) 'Logic and Linguistics in the Twentieth Century' in *The Development of Modern Logic*, ed Leila Haaparanta, New York: Oxford University Press, 775–847, 810: 'The idea that the logical form of sentences differs from their surface structure is a leitmotif in twentieth-century logic and analytic philosophy.' A classic example of this distinction, outside of and preceding structuralist linguistics, is Russell's analysis of definite descriptions in Bertrand Russell (1905) 'On Denoting' *Mind* 14: 479–93. See n 30.

[29] See *Dougherty* (n 1) 95 (citing *Philpot v Gruninger*, 81 US 570, 577; *Fire Ins Ass'n v Wickham*, 141 US 564, 579 (1891); *Wisconsin & M Ry Co v Powers*, 191 US 379, 386, (1903); *De Cicco v Schweizer*, 221 NY 431, 438 (1917)).

[30] Going further, according to Logocratic theory, not just rules but all norms have the *deep structure* logical form of conditionals and are explained by the concept of the enthymeme. Norms that are hypothetical imperatives are obviously both rules and have a conditional form. One can model both norms of practical reasoning and norms of theoretical reasoning in this way. How does one handle norms that may not seem to have a conditional structure, like those in the Old Testamentary Ten Commandments ('Thou shalt not steal', etc), or those in HLA Hart's 'primary rules of obligation' ('Don't murder')? For these, Logocratic theory deploys the distinction of surface structure from deep structure to explain that a norm may have a surface structure, indicated by grammar (such as the person, number, tense, mood and voice of a verb) and a deep structure, which is (or should be) its fair formal representation in a chosen logical grammar, such as, for deductive representations, the grammar of propositional or predicate, or modal or deontic logic. Applying the Logocratic model to Russell's well-known example, the surface grammar of the sentence *The present king of France is bald* is an indicative, and the fair formal representation of its deep structure, where 'P' is the unary predicate *the present king of France* and 'B' is the unary predicate *is bald* is: $(\exists x)\ (Px\ \&\ (y)\ (Py \supset y = x)\ \&\ Bx))$. Similarly, in Logocratic terms, the command (a type of norm) 'Don't steal' is a rule-enthymeme whose surface grammatical structure is an imperative and whose deep logical structure, that is, whose *fair formal representation*, is a type of deontic conditional, **If** *you are doing what you ought* [or, *If you are doing what you must*] **then** *you will not steal*. In Leibniz's terms – Leibniz being one of the founders of formal deontic logic, *If you are doing as a good man would do, then you will not steal*. See Leibniz's 1671 letter to Arnauld, quoted and discussed in Alberto Artosi and Giovanni Sartor (2018) 'Leibniz as Jurist' in *The Oxford Handbook of Leibniz*, ed Maria Rosa Antognazza, Oxford: Oxford University Press ('That is permissible (*licitum*) which is possible for a

But many rules articulated in ordinary language have a surface structure that is not conditional. The rule for consideration that Cardozo asserts does not have an explicit conditional structure. Its surface structure has the grammatical form of an indicative, 'Nothing is X that is not Y'. But *fairly formally represented*, its structure is the conditional that, in the grammar of predicate logic, is:

(1') *If* something is consideration *then* it is regarded as consideration by both parties.[31]

E. The Explanatory Role of Virtue

Logocratic theory relies extensively on a conception of virtue, harking back to Aristotle's conception but also departing from it in significant ways.

i. (Non-Moral) Virtue as Functional Excellence

In Logocratic theory, the term *virtue* means *functional excellence*. The basic framework used here is found in Aristotle's conception of arete (Greek, *ἀρετή*), translated as *virtue* or *excellence*. If some object x is an F, then the virtue of x as an F is that characteristic of x that makes x a good F. Put concisely: an object x's virtue reflects its good performance of the function of Fs. For example, consider an object (x) that is a hammer (F). The virtues of a hammer are those features

good man. That is duty (*debitum*) which is necessary for a good man.'). Similarly, Hohfeld, another deontic pioneer, relied on a surface structure-deep structure distinction in his analysis of lawyers' and judges' talk of 'rights' (surface structure) in terms of Hohfeldian 'correlative' and 'opposite' relations, which, to my present point, are (as properly understood) articulated as conditionals, such as *person A has a claim right against person B if and only if person B has a duty to person A*. For comparison of Hohfeldian and Logocratic analysis of legal arguments, see Brewer (n 11). According to Cardozo's argument in *Dougherty*, for example, one might say that the boy did not have a 'right' to payment from the aunt. This would be a surface structure-level claim, and the Hohfeldian deep structure claim is that the boy did not have a claim right against the aunt. An additional nice complexity is that Hohfeld presented his original articulation of the deep logical structure of rights not in formal language but in the natural language of English, so that his articulation of the deep structure is itself enthymematic, receiving many, sometimes competing, formal interpretations from later deontic logicians following and developing Hohfeld's ideas. See discussion Brewer (n 11).

[31] Where the unary predicate *C* is *is consideration* and the unary predicate *R* is *is regarded as consideration by both parties*, in symbolic terms one may represent the deep logical structure of (1) as:

(1") (x) (Cx ⊃ Rx).

At the deep structure level, this is logically equivalent to:

(1"') ~ (∃x)(Cx & ~Rx).

[There does not exist anything that is consideration and is not regarded as consideration by both parties.]

The expression (1"') is not conditional, but I rely on the claim that anything that is logically equivalent to a conditional at the level of deep structure is fairly formally representable, 'deeply', as a conditional.

that make it a good hammer, such as having a 'face' (the part of the hammer that strikes the types of objects the hammer is intended to strike) of appropriate diameter, or having the hammer head be made of appropriate material. We say 'appropriate', because, for example, as one can see on quick reflection, the virtue of a claw hammer used to strike ¾ inch diameter steel nails differs from that of a rubber mallet used to force plasterboard into place without damaging it. (Yet other types of hammers are distinguished by their use as *philosophical* tools.[32])

Many and varied kinds of things can be 'bearers' of virtue, that is, can properly be said to be virtuous (or not). Among this vast array of possibly virtuous (or non-virtuous) items are: implements, such as knives, hammers and spoons; institutions, such as schools, universities, legal institutions, and doctrines that comprise the 'rule of law';[33] professionals, such as lawyers, doctors, judges and professors; and *arguments*, which are the central focus of LM. An explanatory theory (such as LM) can also have virtue in this sense, *explanatory virtues*, and LM aspires to exhibit those virtues in its explanation of the nature of argument.

ii. Two Types of Argumental Virtue: Mode-Independent and Mode-Dependent

The Logocratic Method focuses on two distinct types of virtue an argument can possess. It distinguishes them by reference to two distinct *functions* that arguments perform for arguers, which serve as the measure of an argument's virtue. Here one might just as well speak of the *purposes* or *goals* that arguers have for arguments.

As noted, the *virtue* of an argument is its functional excellence; the *vice* of an argument is its lack of functional excellence. The virtues (and vices) of arguments are tied to the function and purpose of argument as a tool. The virtue of an argument is its strength as measured by the function (goal, purpose) the arguer has for it. Arguers seek to do different kinds of things with arguments, and Logocratic theory focuses on two of these goal-purpose-functions for argument that are prevalently used by and of special interest to arguers.[34]

[32] See, eg, Friedrich Nietzsche (1889) *Götzen-Dämmerung oder Wie man mit dem Hammer philosophiert*, Leipzig: CG Naumann.

[33] See Joseph Raz (2009) *The Authority of Law: Essays on Law and Morality*, New York: Oxford University Press, 210–28.

[34] In his classic and lovely treatise by that title, Georg Henrik von Wright explores and explains the 'varieties of goodness', including virtue as a type of goodness. See Georg H von Wright (1963) *The Varieties of Goodness*, New York: Humanities Press. The Logocratic analysis of the 'goodness' of arguments, is, in von Wright's terms, an overlap of the 'instrumental goodness' of the argument-tool itself ('Instrumental goodness is mainly attributed to implements, instruments, and tools-such as knives, watches, cars, etc', ibid, 19), and the 'technical' goodness of the user of that tool, that is, the arguer ('The goodness called technical relates to ability or skill. Somebody, we say, is *good at* (doing) this or that.', ibid).

a. Mode-Independent Argumental Virtues

There are two analytically distinct mode-independent argumental virtues, but they stand in a subsumption relation. Such a relation can also be found in the logical relation of general-specific or a proper subset to its superset as, for example, the relation between the set of cats and the set of animals, or the relation of the set of regular polygons to the set of all polygons. The mode-independent argumental virtues are: *dialectical-rhetorical virtue* and *internal-inferential virtue*.[35]

1. Dialectical-Rhetorical Virtue

As measured by its goal (see section III.E.i), the dialectical-rhetorical virtue of an argument lies in its capacity to persuade the authorised referee of a given argument contest to accept an argument that the arguer-contestant submits to

[35] Explaining inferential-internal virtue as a type of dialectical-rhetorical virtue is an important change in Logocratic theory, which has previously regarded these types of virtue as analytically distinct. I cannot here discuss the reasons for the change in much detail, but the point is important (for, among other things, explaining the role of arguments in a so-called 'post-truth' world). The basic argument is as follows. Even the identification of the degree of evidential support that the premises of a given argument (more precisely, a given argument-enthymeme) provide for its conclusion is always in principle a matter of exercising *contestable* judgement from a putatively expert point of view. The evaluation of the degree of evidential support of any given argument is determined by some (putatively) expert referee of the argument or arguments in question. Hilary Putnam's emphasis on the social dimension of epistemic expertise well illustrates this important point. See Hilary Putnam (1975) *Mind, Language and Reality: Philosophical Papers*, vol 2, New York: Cambridge University Press, 215–71. Putnam argues that in linguistic communities there is a 'division of linguistic labor' between epistemic experts and epistemic non-experts in the use of natural-kind terms like *gold*, *beech* and *elm*, such that, when non-experts use these terms, they manage to refer, for example, to real gold, or to distinguish beech from elm trees, even though they do not have the epistemic expertise that would be required to make these distinctions accurately. The experts, by contrast, do have the sort of knowledge that is relevant to the accurate identification of the referents of *gold*, *beech*, *elm* and other natural-kind terms, and the rest of the community defers to them epistemically in their use of the terms. That is to say, the non-experts use natural-kind terms *to mean, in effect, whatever the experts mean by them*. Putnam's basic idea here seems correct, and importantly for my point here, extends to non-natural-kind terms, even though, one must emphasise, expertise itself – who has it, who should have it, over what domains – is deeply politically contested. See, eg, Thomas M Nichols (2017) *The Death of Expertise: The Campaign against Established Knowledge and Why It Matters*, New York: Oxford University Press. Though this issue has received a good deal of attention in recent years because of its salient role in political conflicts around the world, it seems obvious that the contestation of proper expertise is not a new cultural phenomenon. It was, for example, a central plank of Paul Feyerabend's various epistemic manifestos, culminating in his 'Dadaist' epistemology. See, eg, Paul Feyerabend (1978) *Science in a Free Society*, New York: Schocken Books, 120–21. But the fact of that contestation actually reinforces the explanatory power of Putnam's idea that communities operate with a kind of allocation of power according to some such idea, with different communities vying over who **is** or should be deferred to. Because of the contests of expertise, actual and potential, Putnam is right regarding the politics of argument. Thus, even establishing what counts as a valid deductive argument – for example, and more generally, establishing for any argument the degree of evidential support that the argument's premises provide for its conclusion – is a matter of persuading a dialectical-rhetorical referee, operating explicitly (as in litigation or jury panels for mathematical prizes) or implicitly.

the referee as the basis for deciding in favour of that contestant.[36] Both the existence and the measurement of this virtue depend on there being:

(a) a *contest* of arguments in some *forum* of argument;
(b) at least two *argument-contestants*, although they need not be distinct persons. The criteria for a contestant are an actual arguer or hypothetical arguer[37]

[36] LM insists on the importance of the distinction between a dialectical-rhetorical referee's *accepting an argument*, on the one hand, and *accepting the conclusion of an argument*, on the other. For an argument from premise set Φ to conclusion set θ (that is, the argument is *Φ therefore θ*), this is the difference between a referee's (intentionally) accepting θ *on the basis of* Φ and simply coming to accept θ but not necessarily for the reasons in Φ. The distinction is, for example, central to Cass Sunstein's idea of 'incompletely theorized agreement'. See Cass R Sunstein (1996) *Legal Reasoning and Political Conflict*, New York: Oxford University Press, 35–61. It is important to note that it can sometimes be much easier to determine which *arguer* wins a dialectical-rhetorical competition than it is to determine which, *if* any, of the arguer's *arguments* was responsible for the victory. Consider a thought experiment in which Arguer *A* is competing against Arguer *B* in front of dialectical-rhetorical referee *R*. *A* offers three distinct arguments for conclusion θ (each of the Φ_i is a distinct set of premises offered for the same conclusion):

Φ_1 therefore θ
Φ_2 therefore θ
Φ_3 therefore θ

and *B* offers one counterargument to each of those arguments, and *R* declares *A* to be the winner *but without stating reasons* for the declaration. In such a case we would know that arguer *A* was the winner of the dialectical-rhetorical competition, but we would not know which of the *arguments* that *A* offered for θ was the basis for the referee's decision. And in this case, we could not confidently say which of the arguments that *A* offered was the winner. Indeed, there might be reasons for a dialectical-rhetorical referee to declare *A* the winner that are wholly apart from *any* argument for θ that *A* offers, such as a bribe from *A* to the referee. We may call such a circumstance *dialectical-rhetorical-virtue opacity*. There are circumstances like this in American litigation before juries, who are dialectical-rhetorical referees (acting along with trial judges, who guide and constrain them in some ways) and who are often not required to offer reasons for their votes in favour of one or the other litigant. (Use of special verdicts can mitigate this opacity to some extent but is not a widely used procedural mechanism in American law.) Competitive elections also involve candidates who make several arguments for the conclusion (among many other conclusions) that the candidate should be elected, and when one candidate wins it can be difficult to know which of the candidate's *arguments* was responsible for a voter's vote or the voters' votes. Here, as in the case of bribing a judge, a voter might vote for a candidate partly, mostly or wholly apart from the arguments the candidate offers for his election, such as the race, gender or ethnicity of the candidate. In general, the private intentions and reasons for which a referee declares an argument to be a winner of a dialectical-rhetorical contest can be hidden, either from others or (if one believes Nietzsche and Freud, who followed Nietzsche's steps in this regard) from the referee himself. It is possible, that is, for the arguer in *bad faith* (knowingly offer a reason for declaring victory other than the real motivating reason) or *ignorant faith* (unknowingly doing so) to declare a winner of a dialectical-rhetorical argument contest. There are well-developed strains of Legal Realism and Critical Legal Studies that maintain that a great many legal arguments offered by judges are in this sense offered in bad or in ignorant faith. The LM provides an effective way to measure which *arguer* wins a contest under rules that are known, but cannot always discern which *argument* has won. Even so, sometimes a careful analysis (Logocratic and Logocratic-like) of a referee's overtly declared argument for a judgement so withers under scrutiny as to raise serious doubts about the referee's good faith. Such, for example, would be the result of Logocratic analysis of *Bush v Gore*, 531 US 98 (2000) – as it was the result of many other Logocratic-friendly analyses, see, eg, Bruce Ackerman (ed) (2002) *Bush v Gore: The Question of Legitimacy*, New Haven, CT: Yale University Press.

[37] Wayne Booth explores a phenomenon similar to that of the hypothetical arguer in his concept of the 'implied author'. See Wayne Booth (1983) *The Rhetoric of Fiction*, 2nd ed, Chicago, IL:

who is *advancing* the argument (*advancing* an argument is the speech-act of offering the premises of the argument as support for its conclusion). On this view, argumental contests are ubiquitous in the practices of both reaching judgements for oneself and articulating judgements to others. Such contests not only take place, for example, in the litigative domains familiar to jurists, but also extend to every domain of argument, including the domain of internal argument comprised of a single person's deliberatively assessing pros and cons of possible theoretical or practical judgements;[38]

(c) some *referee*, that is, a person or persons who is (are) authorised to apply rules of argument so as to declare the winner of the contest.

2. Internal-Inferential Virtue

On the Logocratic evidential conception of logic, internal-inferential virtue is explained as the *degree of evidential support* that an argument's premises provide for its conclusion(s). The greater the degree of internal-inferential support, the greater the degree of internal-inferential virtue. 'Degrees' in this sense can be explicated in at least three different ways, all pointing to the same argumental phenomenon. Degrees can be explicated in *modal* terms, where one says that if the argument's premises are true, it is not possible for the conclusion to be false. Degrees can be explicated in *epistemic* (or perhaps *psychological*) terms, where one says that if the argument's premises are true, it is not conceivable that the conclusion is false. And degrees can be explicated in *probabilistic* terms, more specifically, in terms of *conditional probability*, where one measures the degree of likelihood that the conclusion is true conditioned on the (assumed) truth of the premises.[39]

The concept of internal-inferential virtue also provides an analysis of *defeasible* arguments. Defeasible arguments are arguments in which it is possible to reduce the level of the internal-inferential support (virtue) that premise set S_1 provides for conclusion set C by adding members of an additional set, S_2 to the premises of S_1, so that the degree of support that $S_1 \cup S_2$ provides for C is lower than the degree of support that S_1 alone provides for C. For defeasible

University of Chicago Press, 73: 'Our sense of the implied author includes not only the extractable meanings but also the moral and emotional content of each bit of action and suffering of all of the characters. It includes, in short, the intuitive apprehension of a completed artistic whole; the chief value to which this implied author is committed, regardless of what party.'

[38] Two well-known examples in the domain of philosophical argumentation are Descartes' *Meditations* and Wittgenstein's *Philosophical Investigations*, works in which a single author (person) presents multiple arguers debating one another. And, of course, philosophical texts written as dialogues, as in works by Plato, Berkeley and Hume, are also examples of a debate enacted 'within' the mind of the dialogue's author.

[39] Walter Sinnott-Armstrong uses the model of conditional probability in his explication of the 'strength' of inductive generalisations in Walter Sinnott-Armstrong (2018) *Think Again: How to Reason and Argue*, Oxford: Oxford University Press (discussion 'How Strong Are You'). If I recall correctly, in conversation with me, Walter also suggested that the model of conditional probability could serve to explain the strength of arguments (in Logocratic terms) in all modes of inference, not only induction. Anyway, the model is quite usefully generalisable in this way.

arguments, there is in principle a spectrum of probabilities from 0 to something short of 100, perhaps approaching 100 asymptotically. For indefeasible arguments, the premises provide the maximal degree of support – and are thus maximally internally-inferentially virtuous – for the conclusion(s). Logocratic theory is in accord with other theories of argument in explaining that the premises of valid deductive arguments provide *indefeasible* or *incorrigible* evidential support for their conclusion; this kind of evidential support is also the condition of the entailment of the conclusion by the premises.

Logocratic theory explains the possible degrees of internal-inferential virtue thus: All valid deductions are *maximally internally-inferentially* virtuous (their premises provide incorrigible or indefeasible internal-inferential support for their conclusions) and all inductions, no matter how high the degree of internal-inferential support their premises provide for their conclusions, are *less-than-maximally internally-inferentially* virtuous (their premises provide corrigible or defeasible internal-inferential support for their conclusions). These conclusions it shares with many, perhaps most or all, other theories of argument. Unusually among theories of argument, however, Logocratic theory explains that some analogical arguments and some abductive arguments, are *maximally* internally-inferentially virtuous, while some analogical arguments and some abductive arguments are less-than-maximally internally-inferentially virtuous.[40]

b. Mode-Dependent Argumental Virtues ('Characteristic Virtues')

As defined in section III.A, an argument's mode of logical inference is the evidential relation between the set of the argument's premises and the set of the argument's conclusions. Recall also that there are four fundamental, irreducible modes of logical inference. They are distinguished from one another by the relation that obtains between the premises of the argument and its conclusion when the argument yields the most warranted inference from premises to conclusion that it is logically capable of yielding, or, to put the same point in another way, when it has the highest possible degree of internal-inferential virtue (see section III.E.ii.a.2) that an argument of its form can have.

The Logocratic Method describes this feature of arguments as *characteristic virtue*. Thus, the characteristic virtue of a deductive argument is validity, the property in which the premises provide incorrigible or indefeasible evidence (again, see section III.E.ii.a.2) for the conclusion. Put another way, the characteristic virtue of a type of argument (deductive, inductive, analogical or abductive) is that property or set of properties of that type of argument that makes it the best exemplar of that type. All four modes of logical inference are found in

[40] I offer the arguments regarding analogical arguments in Brewer (n 12) and Scott Brewer (2018) 'Indefeasible Analogical Argument' in *Analogy and Exemplary Reasoning in Legal Discourse*, eds Hendrik Kaptein and Bastiaan van der Velden, Amsterdam: Amsterdam University Press, 33–48. Regarding this point about induction, see discussion in section V.B.

legal argument and in arguments in every domain of argument. A clear understanding of the mode-specific virtues of an argument, that is, the characteristic virtues of a deductive, inductive, analogical or abductive argument, is essential to the LM as a type of philosophical abduction (specifically, explanation of the nature of argument) and to its application to assess the strengths or weaknesses (virtues or vices) of particular arguments.

It is easiest to state the characteristic, mode-dependent virtue of deduction. In a valid deductive argument, it is logically impossible that the premises should all be true while the conclusion is false. That is, the truth of the premises of a valid deductive argument provides incorrigible and indefeasible evidence for the truth of its conclusion. (See discussion in section III.E.ii.a.2.) Validity is the characteristic virtue of a deductive argument. Some arguments are deductive but lack this virtue – they are invalid – and in that way, they are vicious. Explanation (abduction) of the characteristic virtues of the other three modes, namely, induction, abduction and analogy, requires a detailed look at the structures of those arguments, which is beyond the scope of this chapter. However, I will say something about the characteristic virtues of abduction in the course of presenting the Logocratic analysis of *Dougherty*.

IV. ABDUCTION FROM A LOGOCRATIC POINT OF VIEW ('META-ABDUCTION')

A. Abduction: Goals, Purposes and Truth

The Logocratic Method offers a distinctive explanation (abduction, thus, 'meta-abduction') of abduction as a mode of logical inference.[41] The basic idea is that abduction is an inference to an explanation. Like all arguments, by definition, it is a set of propositions, called *premises*, that are or could be offered as warrant for a distinct[42] set of propositions, called *conclusions*. Theorists of argument

[41] See discussions of the Logocratic 'meta-abduction' (abduction of abduction) in Brewer (2020) (n 11) section 2.6.5; Brewer (forthcoming) (n 11) sections 5.7 through 5.11 Scott Brewer (2017a) 'Agonophobia (Fear of Contest) In the Theory of Argument?: The Case of Gary Lawson's Evidence of the Law' *Boston University Law Review* 97: 2303–19, 2316; Scott Brewer (2017b) 'Evident Virtue' in *Evidence, Cases and Materials*, 10th edn, eds Weinstein, Abrams, Brewer and Medwed, St Paul, MN: Foundation Press, 205–11; Scott Brewer (2013) 'An Essay by S Brewer: Law, Logic, and Leibniz. A Contemporary Perspective' in *Leibniz: Logico-Philosophical Puzzles in the Law*, eds Alberto Artosi, Bernardo Pieri and Giovanni Sartor, New York: Springer, 199–226, 205, 213, fn 24; Brewer (2018) (n 40) 34, fn 2 and 47; Brewer (2011) (n 9) 178. I offered precursor, 'proto-Logocratic,' explanations of abduction in, most importantly, Brewer (n 12) 978–83, sections IIC, V, IX Brewer (n 13) 1658–69, section VIE; and Brewer (n 14) 109–17.

[42] Note that in a single argument the same proposition could occur in both the set of premises and in the set of conclusions. The argument *P, therefore P*, is both deductively valid and paradigmatically both *question-begging* and *circular*. An argument is *question-begging* just when one of its conclusion-propositions Φ_i appears also as one of its premise-propositions. An argument is *circular* just when one of its premise-propositions Φ_i is offered as warrant for a conclusion-proposition θ_I and θ_i is offered as warrant for a Φ_i. An example of explanatory circularity that is particularly apt for my concerns in this chapter is from Molière's *Le Malade imaginaire*, in which a 'learned' doctor,

disagree about the proper use of the names for this type of inference. Most often it is referred to as either *abduction* or *inference to the best explanation*, and these are in turn often treated as synonyms. Charles Sanders Peirce, who perhaps most influentially called attention to this as a mode of logical inference, used different labels for it, including *abduction, retroduction* and *hypothesis*, and his own explanation of its structure varied significantly over his career.

The Logocratic Method's explanation of abduction shares with most accounts of this logical form its structure as an argument that contains three types of premises offered as support for one type of conclusion, namely, an inference to an explanation (an *explanans*) of an *articulated phenomenon* to be explained, an *explanandum*, which appears as the first premise of the argument, often in the form of one complex proposition comprised of a conjunction of component propositions. One of the ongoing debates in the literature on this logical form is whether what Peirce referred to as *abduction* is actually the same inferential process, as Gilbert Harman seems to believe it is, as what Harman christened *inference to the best explanation*.[43] There is good textual evidence that Peirce thought of abduction as only one step – roughly, the discovery step – of the full inference to the best explanation to which Harman referred.[44] The Logocratic Method has in its explication of this logical form consistently regarded abduction and inference to the best explanation as synonymous. Without overlooking Peirce's changing explanations of this form, LM accepts Harman's basic conception of the process:

> In making this inference one infers, from the fact that a certain hypothesis would explain the evidence, to the truth of that hypothesis. In general, there will be several hypotheses which might explain the evidence, so one must be able to reject all such alternative hypotheses before one is warranted in making the inference. Thus one infers, from the premise that a given hypothesis would provide a 'better' explanation for the evidence than would any other hypothesis, to the conclusion that the given hypothesis is true.[45]

The Logocratic Method differs substantially from many conceptions and discussions of this logical form in four principal ways.

in a mélange of Italian, French and Latin, offers a causal explanation (a causal abduction) according to which a potion causes sleep because it contains a 'dormitive principle' (*Vertus dormitiva*) that is, a sleep-producing principle ('Mihi a docto doctore/ Demandatur causam et rationem quare/ Opium facit dormire./ A quoi respondeo,/ Quia est in eo/ *Vertus dormitiva*/ Cujus est natura/ Sensus assoupire.'). There are interesting issues, beyond my scope here, of whether valid deductive arguments are always problematically circular in some way, as are the Humean (possibly Pyrrhonian) arguments about whether inductive inference also rest on problematically circular reasoning.

[43] See Gilbert H Harman (1965) 'The Inference to the Best Explanation' *The Philosophical Review* 74: 88–95, 88–89: '"The inference to the best explanation" corresponds approximately to what others have called "abduction" "the method of hypothesis" "hypothetic inference" "the method of elimination" "eliminative induction" and "theoretical inference". I prefer my own terminology because I believe that it avoids most of the misleading suggestions of the alternative terminologies.'

[44] The debate is presented in detail in William HB Mcauliffe (2015) 'How Did Abduction Get Confused with Inference to the Best Explanation?' *Transactions of the Charles S Peirce Society* 51: 300–19. See also Susan Haack (2014) 'Credulity and Circumspection: Epistemological Character and the Ethics of Belief' *Proceedings of the American Catholic Philosophical Association* 88: 27–47.

[45] Harman (n 43) 89.

First, taking the form to be, as Harman conceives it, an inference to an explanation that is 'best' among several possibly competing explanations of a given *explanandum*, the Logocratic (and proto-Logocratic) theory of abduction has always maintained that it is a condition of adequacy on any account of this logical form that it provide an accompanying account of what it is to *explain*. The Logocratic Method has developed and defended such an explanation – meta-explanation (explanation of explanation, or, equally from the Logocratic point of view, a meta-abduction, abduction of abduction).

Second, in an explanation (abduction) of this logical form and its related abduction of explanation that is rooted in pragmatics,[46] LM emphasises the context-dependency of abduction as a type of speech-act (namely, the speech-act of *arguing to an explanation*).

Third, one structural feature of this context-dependency is the interests and purposes an arguer has for offering an explanation, and of course those interests and purposes vary from arguer to arguer.

Fourth, *which* of the possible alternative explanations an arguer actively considers is also a function of the arguer's interests and purposes. Harman's assertion that '[i]n making this inference one infers, from the fact that a certain hypothesis would explain the evidence, to the truth of that hypothesis'[47] underdescribes the reasoning process. There must be some kind of filter on the process of selecting those alternative hypotheses that are worthy of consideration – selecting, one might say, the worthy contestants of the contest for the 'bestness' of a particular explanation.[48]

A simple example comes from an exercise I have used for years in introducing audiences to the Logocratic abduction of abduction. I ask the audience to imagine that one is walking along and gets a sudden sharp pain in one's heel. I solicit answers from them to the question 'What might it be?' The answers I have received over many audiences around the world tend strongly to converge around such answers as 'a pebble in your shoe' (or some other sharp object either inside or penetrating the shoe) and 'plantar fasciitis' (or some other description of a medical condition of which an audience member happens to know). None of them suggests that it might be an invisible creature from Mars stabbing

[46] See Brewer (n 12) sections V, VI, and VIII.

[47] Harman (n 43) 89.

[48] Peirce correctly observes that 'Proposals for hypotheses inundate us in an overwhelming flood, while the process of verification to which each one must be subjected before it can count as at all an item, even of likely knowledge, is so very costly in time, energy, and money – and consequently in ideas which might have been had for that time, energy, and money, that Economy would override every other consideration even if there were any other serious considerations. In fact there are no others.' CS Peirce (1931–35) *Collected Papers of Charles Sanders Peirce*, eds C Hartshorne and P Weiss, Cambridge, MA: Harvard University Press, para 5.602. WM Brown, an astute Peirce interpreter, explains Peirce's point thus, 'As a matter of social policy, or of individual practice and personal commitment, one ought not to bother entertaining a hypothesis if the "money, time, thought, and energy" which are likely to be needed to test it, exceed that needed by any other competing hypotheses.' WM Brown (1983) 'The Economy of Peirce's Abduction' *Transactions of the Charles S Peirce Society* 19: 397–411, 401.

the walker though the shoe with a laser spear. Now, *if* it were true, the Martian spear-creature hypothesis would explain the pain, but no abductive reasoner in my audience poses anything like it. Instead, within the economy of their interests and purposes, they filter the possible explanations to those that are *sufficiently plausible for their argumental purposes*, here, the purpose of abducing an explanation for the (hypothetical) pain in the heel.

The Logocratic Method explicates this step of abduction-cum-inference to the best explanation as a norm that abductive arguers follow that directs them to consider only those alternative hypotheses that are *serviceably plausible* given their interests and purposes. This is a slight but improving and clarifying sharpening of the concept of 'plausibility' that has been central to prior Logocratic accounts of abduction.[49] It connects *the interest-and-purpose relativity of explanations* on which LM relies to the process of abduction. It also provides a criterion, surely crucial to any adequate conception of abduction, of the criteria of 'bestness', namely, best according to the abductive arguer's interests and purposes. And it also makes clear that, from a Logocratic point of view, arguments in general (including but not limited to abductive arguments) are explained not as *truth-conducive* but instead as *interest-and-purpose-advancing*. It focuses on and seeks to explain not what *is* true but rather what is *asserted to be true by means of the tools of argument*.

The Logocratic Method does not purport to offer a theory of *truth*, instead focusing, as noticed, on *truth claims* that are made and purportedly justified by argument. Nevertheless, its focus on truth claims might be mistaken for a type of idealism. It is not. It seems neither plausible nor correct to say, as some relativists, constructivists, irrealists, idealists and Pragmatists do, that descriptions of the world and phenomena in it *make* the world or its phenomena. What seems true in the claims of Irrealists & Co should be carefully separated from what seems false. What seems true is that we (humans) seem to have no access to what is true about the world apart from descriptions of the world that are asserted and defended by means of arguments – principally (*prima inter pares* among the four modes of logical inference), abductive arguments. Postulate that there is objective reality, or God, or what have you. There are always competing arguments (both actual and hypothetical) about what are the features and objects of that reality, or what are the commands of that God.

But – and here is what seems false in the position of Irrealists & Co – the argument-dependence of claims to truth (including objective truth, God's truth, gods' truths, etc) should not be mistaken for the argument-dependence of the referents of those arguments. As even the Ur-Irrealist Nelson Goodman puts this point (though not consistently across his *oeuvre*), 'A version saying that there is a star up there is not itself bright or far off, and the star is not made up of letters.'[50]

[49] See sources cited in n 41.

[50] Nelson Goodman (1984) *Of Mind and Other Matters*, Cambridge, MA: Harvard University Press, 41. Israel Scheffler, one of Goodman's most careful and sympathetic students and colleagues,

One ought not to do as do those 'philosophers [who] sometimes mistake features of discourse for features of the subject of discourse', for '[w]e seldom conclude that the world consists of words just because a true description of it does'. We also should not 'conclude that the world is made by us just because a true description of it is'.[51] It is intellectually courageous[52] to accept that we do not have the godlike power to make the world as we would like it to be and must instead find ways to play within what seem to be our limits.[53] 'In any science … the requisite objectivity forbids wishful thinking'.[54]

B. Abduction as Reasoning from a Point of View

As I have asserted, a successful meta-abduction – inference to the best explanation of inference to the best explanation – must have or rely on some cogent conception of the speech-act of explanation. Reasoners offer explanations that take different forms, such as: *why* something is what it is; or *how* something is what it is; or *how something came to be what it is* (its genealogy); or *what* something is.

According to the Logocratic account of abduction (presented in additional detail in section V), explanations are always offered from and according to the criteria of a *point of view*. One might be said literally to have a point of *view*, that is, to occupy some position in space that gives one a particular visual vantage, as in a 'bird's-eye view'. Expertise provides another type of point of view, as when an expert witness tells a jury or judge what the facts are from the point of view of a biologist, a chemist, a ballistician, a psychiatrist and so on. One might also identify an institutional or social point of view, the point of

has long argued, convincingly, that Goodman is inconsistent on this point. See, eg, Israel Scheffler (2009) *Worlds of Truth: A Philosophy of Knowledge*, Malden: Wiley-Blackwell, ch 3 and other sources cited there.

[51] Scheffler (n 50) 61 (quoting and citing Israel Scheffler (1996) 'Reply to Goodman' in *Starmaking: Realism, Anti-Realism, and Irrealism*, ed Peter J McCormick, Cambridge, MA: The MIT Press, 173 (quoting Nelson Goodman (1972) *Problems and Projects*, Indianapolis, IN: Bobbs-Merrill, 24).

[52] One of the most important aspects of the virtue I have in mind here is what Raymond Guess describes as the 'prized Nietzschean trait', *Tatsachen-Sinn*. See Raymond Guess (2005) 'Thucydides, Nietzsche, and Williams' in *Outside Ethics*, Princeton, NJ: Princeton University Press, 219–33, 220 (citations omitted): 'Nietzsche found Thucydides more illuminating about human life than Plato … Socrates, however, dragged moralizing into science, and Plato followed in his wake. Such moralizing, Nietzsche thought, was a result of weakness, of a deep-seated inability to bear looking the facts of the world in the face; it crippled Plato intellectually and prevented him from ever developing that most highly prized of Nietzschean traits: "*Tatsachen-Sinn*," a "sense for the facts," that steely realism that is so abundantly evident on every page of Thucydides.'

[53] For the conception of 'play' I have in mind, see Ian Bogost (2016) *Play Anything: The Pleasure of Limits, the Uses of Boredom, and the Secret of Games*, New York: Basic Books, x, '[T]o play [is] [t]o take something-anything on its own terms, to treat it as if its existence were reasonable …. Play, generalized, is the operation of structures constrained by limitations. Play is not an alternative to work, nor a salve for misery. Play is a way of operating a constrained system in a gratifying way.'

[54] Nelson Goodman (1968) *Languages of Art: An Approach to a Theory of Symbols*, Indianapolis, IN: Bobbs-Merrill, 251. Nevertheless, emotion is an inevitable part of the cognitive architecture of abduction. See the discussion in n 59.

view of a particular type of actor in an institutional or other social setting – the points of view, for example, of a legislator, a judge, a lawyer, a citizen, a president, a 'bad man', a parent, a child, a professor, a student.

One might also identify an 'enterprise' conception of point of view, and indeed the enterprise conception is the common thread that runs through all the notions of point of view mentioned above, both the more ordinary and the more reflectively philosophical. This point of view might even be understood as the point of view of an enterprise, an enterprise in which particular methods of analysis are chosen both to produce factual judgements and to serve specified cognitive goals. Examples of such enterprises include: systems of legal reasoning (the 'legal point of view'); systems of moral reasoning (on a cognitivist account of morality, at least, this yields the 'moral point of view'); philosophical reasoning (the 'philosophical point of view'); systems of reasoning in support of business objectives (the 'business point of view'); the 'military point of view'; the 'economic point of view'; 'the religious point of view'; 'the political point of view'; and so on for many other enterprises.

An abductive reasoner does, and must, rely on some point of view in order to *justify some explanatory claim*, a claim about either what one ought to believe (a theoretical claim) or how one ought to act (a practical claim).[55] Note that simply identifying the general point of view of an enterprise does not by itself answer the following question: What are the specific cognitive aims of the enterprise for abductive reasoners who recognise themselves as pursuing the same generic enterprise, but who often disagree about what are the proper specific aims of the enterprise? Such disagreements are a principal source (but not the only source) of the difference among theories within an enterprise. It is, for example, a source of disagreement regarding the legal point of view among legal theorists who march under banners such as 'Legal Positivism', 'Natural Law', 'Legal Realism' and 'Critical Legal Studies'. (There are also competing 'Contract-Law points of view', as I shall discuss later.[56])

Borrowing from Larry Laudan's model of scientific explanation, LM explains the enterprise conception of a point of view as a reason-giving enterprise (one that operates in what Sellars calls the 'space of reasons' as distinct from the 'space of causes'[57]) that produces three types of justificatory claims:

(a) factual judgements;
(b) the distinctive methods that the enterprise uses to generate those factual judgements (methodological rules);
(c) the distinctive axiological goals that the methods are chosen to advance and serve.

[55] Like many conceptions of Pragmatism, LM does not see a sharp separation between so-called theoretical and practical reasoning, endorsing instead the view that believing is best explained as a type of action. See n 63 and accompanying text.

[56] See nn 112 and 113 and accompanying text.

[57] See Wilfrid Sellars (1963) *Science, Perception, and Reality*, New York: Humanities Press, 169: '[I]n characterizing an episode or a state as that of knowing, we are not giving an empirical

These three elements yield a definition of *point of view* as that idea operates in the Logocratic Method:

> The *point of view* of enterprise *E* consists of the factual judgements, produced by the methodological rules, that are adopted to serve the axiological goals of *E*.

These justificatory components of a point of view operate in a *coherent* pattern of mutual support and not in a linear and foundationalist structure of justification from, say, (c) to (b) to (a).[58] To serve this justificatory function, the point of view is assumed to be a reliable method of achieving the (explicit or implicit) axiological goals of some reason-giving enterprise, an enterprise that uses the tool – sometimes, a weapon-tool – of argument.[59]

Although the Logocratic meta-abduction follows the same basic structure found in many other meta-abductions (see the discussion in section IV.C), one of the most distinctive aspects of the Logocratic account is the contention that abductive reasoners seek to use explanations as tools to serve their chosen cognitive aims-axiological goals, which, in turn, guide their choice of methods, which, in turn, produce the explanatory judgements that are the conclusions of their

description of that episode or state; we are placing it in the logical space of reasons, of justifying and being able to justify what one says.' See also John McDowell (2018) 'Sellars and the Space of Reasons' *Claves de Pensamiento Contemporaneo* 21: 1–22.

[58] In his model of scientific explanation, Laudan refers to this as a 'reticulated' structure of justification. See Larry Laudan (1984) *Science and Values: The Aims of Science and Their Role in Scientific Debate*, Berkeley, CA: University of California Press, 50–66; ibid, 63 ('No longer should we regard any one of these levels as privileged or primary or more fundamental than the others. Axiology, methodology, and factual claims are inevitably intertwined in relations of mutual dependency. The pecking order implicit in the hierarchical approach must give way to a kind of leveling principle that emphasizes the patterns of mutual dependence between these various levels.').

[59] LM recognises both 'reason' and 'emotion' as among the axiological goals that operate to guide abductions, abducing the existence and operation of *cognitive affects* among those aims. A kindred account is the discussion of 'Emotion and Cognition' in Scheffler (n 51) ch 6. See also Goodman (n 54) 251: '[I]n any science, while the requisite objectivity forbids wishful thinking, prejudicial reading of evidence, rejection of unwanted results, avoidance of ominous lines of inquiry, it does not forbid use of feeling in exploration and discovery, the impetus of inspiration and curiosity, or the cues given by excitement over intriguing problems and promising hypotheses.' Similarly, Peirce offers an abduction of *emotion as abduction*: 'Now, when our nervous system is excited in a complicated way, there being a relation between the elements of the excitation, the result is a single harmonious disturbance which I call an emotion. Thus, the various sounds made by the instruments of an orchestra strike upon the ear, and the result is a peculiar musical emotion, quite distinct from the sounds themselves. *This emotion is essentially the same thing as an hypothetic inference, and every hypothetic inference involves the formation of such an emotion*.' Charles Sanders Peirce (1931–58) *Collected Works*, Cambridge, MA: Harvard University Press, para 2.643 (emphasis added). Cognitive affects functioning as axiological goals are powerful elements of the divisive moral, political, legal and cultural abductions that drive members of politically contesting groups around the world and through history. These cognitively-affective abductions provide a crucial part of the explanation of political and cultural phenomena that currently afflict the world, such as the sometimes violent contentions over 'post-truth', 'fake news' and alleged political conspiracies, not to mention millennially deadly religious strife. See, among many sources, Amy Chua (2018) *Political Tribes: Group Instinct and the Fate of Nations*, New York: Penguin Press; Spencer Critchley (2020) *Patriots of Two Nations: Why Trump Was Inevitable and What Happens Next*, Independently Published; Thomas E Patterson (2019) *How America Lost Its Mind: The Assault on Reason That's Crippling Our Democracy*, Norman, OK: University of Oklahoma Press.

abductive arguments. Sometimes, but by no means always, do these aims include producing a factual *claim* that is true. In a nutshell, there are many instances in which an abductive arguer seeks to produce an argument for a conclusion that will be accepted by the dialectical-rhetorical referee of an abductive argument (see section III.E.ii.a.1) but whose conclusion the abductive reasoner does not himself accept or to whose truth or likely truth he is indifferent.[60] Important examples include settings of abductive argument in which the abductive reasoner offers an argument with a goal or cognitive aim other than truth-telling, such as garnering votes (LM models the dialectical-rhetorical referee of elections as the electorates to whom abductive arguments are made by the candidates regarding, for example, why the candidate or his policies are the best among those of the electoral contestants) or winning a litigative contest (LM models the dialectical-rhetorical referee of litigation as the judge or the judge along with a jury in a division of legal decision-making authority guided by rules).[61]

The cognitive aims-axiological goals of an abductive reasoner guide her decision about both *plausibly serviceable explanations* and the *most serviceable among the set of serviceably plausible explanations*. Stephen Toulmin trenchantly explains that arguments in general have an implicitly dialectical structure, that is, they exist in *competition* with other arguments, either explicitly or implicitly.[62] Put in Logocratic terms, Toulmin's insight is that all arguments, in whatever setting (law, politics, mathematics, philosophy, *la vie quotidienne*) are parts of a *contest of arguments* before some dialectical-rhetorical referee. Sometimes that

[60] In such circumstances: (i) the reasoner violates Grice's maxim of 'quality', namely, that one ought in conversation (including argumental conversation) not to say that which one knows to be false or for which one lacks adequate evidence. See HP Grice (1975) 'Logic and Conversation' in *Syntax and Semantics 3: Speech Acts*, eds Jerry L Morgan, Peter Cole and Paul Grice, New York: Academic Press, 41–58; (ii) the abductive reasoner engages in what Harry Frankfurt calls 'bullshit', namely, a speech act in which the utterer is indifferent to the truth or falsity of an utterance (including an argumental utterance). See Harry Frankfurt (2005) *On Bullshit*, Princeton, NY: Princeton University Press.

[61] In an account of abduction that has both many similarities and some very substantial differences (including, unlike the Logocratic Method, *not* regarding all abductions as inferences to explanations), Gabbay and Woods come close to recognising the abductive phenomenon that Logocratic theory identifies in their discussion of 'Non-Plausibilistic Abduction'. See Gabbay and Woods (n 11) ch 5; ibid, 115 ('A … distinction … of great salience to abductive logic … is that between abductions that advance prepositionally plausible hypotheses and those that advance prepositionally implausible hypotheses.'). LM's explanation of the role of plausibility obviously differs somewhat. In Logocratic terms, it may suit the explanatory goals of an abductive reasoner to offer (endorse) an explanation that some members of the intended audience might regard, at least prima facie, as implausible. In such a case, on the Logocratic model of abduction these explanations would be *plausibly serviceable* for that reasoner.

[62] See Stephen E Toulmin (2003) *The Uses of Argument*, New York: Cambridge University Press, 7–8: 'There is one special virtue in the parallel between logic and jurisprudence: it helps to keep in the centre of the picture the critical function of the reason. … A sound argument, a well-grounded or firmly-backed claim, is one which will stand up to criticism, one for which a case can be presented coming up to the standard required if it is to deserve a favourable verdict. How many legal terms find a natural extension here! One may even be tempted to say that our extra-legal claims have to be justified, not before Her Majesty's Judges, but before the Court of Reason.'

referee, who declares the winner of the competition, is external to the arguer (as with juries and judges and electorates and professional colleagues in a self-identified discipline), and sometimes that referee is the arguer herself (as in deliberating about a course of action, including the *action* of accepting a proposition as true[63]). Enthusiastically motivated by this understanding of the pragmatics of arguments, LM recognises that one of the most important aspects of the *serviceability* of arguments in abduction is *anticipating arguments that compete with those that the arguer might prefer to be the winner of competition*. This is why Toulmin's insight so appropriately draws on the comparison of argument in general to legal argument in particular, where elementary legal pedagogy in a contestatory litigative system (such as the Anglo-American 'adversarial' system) teaches that a lawyer favouring one side of a litigation (his client) is well-advised to anticipate and counter a competitor's arguments that the judge or the judge and jury, acting as dialectical-rhetorical referees, might find persuasive.

C. The Abstract Structure of Abduction

A good many expositions of abduction, which follow Harman's reconstrual of abduction as *inference to the best explanation* (in contrast to one of Peirce's conceptions of the abduction involving only the inference process concerned in generating possible plausible explanations), present abduction as a four-step argument to one explanation that is superior to all other plausible explanations. An example is this presentation from two leading theorists of abduction:

> We take abduction to be a distinctive kind of inference that follows this pattern pretty nearly:
>
> *D* is a collection of data (facts, observations, givens).
> *H* explains *D* (would, if true, explain *D*).
> No other hypothesis can explain *D* as well as *H* does.
> Therefore, *H* is probably true.[64]

With some very important differences (including one addition) to be discussed presently (pages 309–10), the Logocratic exposition of abduction has also long endorsed this pattern of abduction as a four-step inference from the statement of some phenomenon to be explained to the conclusion stating the best

[63] Writing in a Pragmatist tradition, Israel Scheffler puts the point well and concisely: '[A] … pervasive parallel unites the realms of cognition and action. Cognition is a kind of action, and justifiability applies to the one as it does to the other.' Scheffler (n 50) 119.

[64] John R Josephson and Susan G Josephson (1994) *Abductive Inference: Computation, Philosophy, Technology*, New York: Cambridge University Press, 5 (in turn attributing this model to William Lycan).

explanation of that phenomenon.[65] The Logocratic version of the model, at this level of abstraction and with symbolic abbreviations,[66] is as follows:

Premise ε_1	Θ [some phenomenon to be explained, the *explanandum*]
Premise(s) $\varepsilon_{2n\text{-}m}$	For each candidate Φ_i, '$\Phi_i \surd \rightarrow \Theta$' is true.
	['$\Phi_i \surd \rightarrow \Theta$' is the *plausibly serviceable explanation conditional*, read as 'if explanans Φ_i were true or otherwise warranted, it would provide a *plausibly serviceable explanation* of Θ.']
Premises ε_3 and ε_4	For candidate Φ_n, '$\Phi_n \surd\surd \rightarrow \Theta$' is true.
	['$\Phi_n \surd\surd \rightarrow \Theta$' is the *most serviceable explanation conditional*, that is, the one member of the set of proposed explanations that, in the abductive reasoner's judgement, is the *most serviceable among the set of plausibly serviceable explanations*. This step is constituted by the disconfirmation of all of those plausibly serviceable explanations identified in the articulation of Premise(s) $\varepsilon_{2n\text{-}m}$ until one, Φ_n is 'left standing' to be endorsed as *the most* serviceable explanation. The Logocratic explanation of abduction, like the accounts that regard abduction as inference to a single best explanation among those that are plausible, regards all abductions as instances of what some philosophers refer to as *contrastive inferences*.[67]]
Conclusion h	Φ_n
	[Φ_n is the explanation identified in step ε_3 that is settled on as *the* explanation, the *explanans* of the explanandum.]

Two points about these two types of conditional are important for the Logocratic explanation of the identity criteria of argument. First, neither type

[65] See sources cited in n 41.

[66] One finds in the literature a variety of formalisations of abduction. See, eg, Gabbay and Wood (n 11); Aliseda (n 11).

[67] Possible explanatory coherence between the literatures of contrastive inference, on the one hand, and formal and informal logic, on the other, is interesting and worth more discussion than is within the scope of this chapter. Walter Sinnott-Armstrong provides a clear and cogent overview of (in Logocratic terms) the abductive utility of contrastive explanations in several domains of philosophical inquiry. See Walter Sinnott-Armstrong (2008) 'A Contrastivist Manifesto' *Social Epistemology* 22: 257–70 (2008). See also Anjan Chakravartty (2010) 'Perspectivism, Inconsistent Models, and Contrastive Explanation' *Studies in History and Philosophy of Science* 41: 405–12.

of conditional is fairly formally represented as a *material* conditional.[68] Instead, in Logocratic theory, the meaning of these conditionals is given by the role of generating an explanation from a specified point of view (see section IV.B). The explanatory conditionals in abduction, on the Logocratic account (as in some other accounts of abduction), are subjunctive conditionals to the effect '*If this were* the explanation, *then that would explain …*'.[69]

Second, while the model of abduction as a four-step inference, which many prior statements of the Logocratic account of abduction share with many other accounts,[70] is not incorrect, it is importantly incomplete – incomplete, indeed, in a way that numerous examples of legal abduction, including *Dougherty*, make quite clear. The four-step model does not make explicit the fact that there is a structure reasoning process *within* the final three steps of an abduction, that is, in the transition from those premises coming after the first premise, which state the phenomenon to be explained, leading to the conclusion. As I will illustrate below with *Dougherty*, a more fully explicit model of abduction represents it not in four steps but in five steps (in this articulation of the fuller model, I embolden the step that supplements the model offered above):

Step 1: Premise ε_1	Θ [statement of the *explanandum*]
Step 2: Premise(s) $\varepsilon_{2n-(n-1)}$	For each candidate Φ_i, '$\Phi_i \surd \rightarrow \Theta$' is true. [statement of 1-(n-1) plausibly serviceable explanation conditionals, *If* Φ_i *were true or otherwise warranted, then* Φ_i *would serviceably plausibly explain* θ]

[68] The material conditional symbolized by '⊃' (or, often instead by '→') is the truth-functional relation such that, for any two propositions Φ and θ, $\Phi \supset \theta$ is true if and only if θ is true or Φ is false, that is, for the arguments (in the sense of inputs to a truth-function) <T,T>, <F,T>,<F,F>. This standard interpretation of the material conditional makes the conditional proposition true whenever the antecedent is false, which yields the so-called 'paradox of material implication' (eg, both propositions, *If the Nazis won World War II then everyone would be happy* and *If the Nazis won World War II then everyone would be unhappy* are true on the material implication construal of the conditional). Despite these paradoxes, there is a deep utility to using material implication to represent conditionals in natural language, including legal language, instead of, for example, causal conditionals (*If it rains the sidewalk gets wet)*, strict conditionals (*If Sam is a bachelor then Sam is an unmarried adult male*) and stochastic conditionals (*If there are six dinner places set then six people are expected for dinner*). A nice discussion of that utility is Raymond Bradley and Norman Swartz (1979) *Possible Worlds: An Introduction to Logic and its Philosophy*, Oxford: Blackwell, 266–67. Nelson Goodman's original identification and articulation of what John Rawls (borrowing from Goodman) later called *reflective equilibrium* concerned the justification of rules of inference. Goodman's profound insight applies to the choice to interpret natural language conditionals as material implications. See Nelson Goodman (1983) *Fact, Fiction, and Forecast*, 4th edn, Cambridge, MA: Harvard University Press, 62 (original emphasis): 'The point is that rules and particular inferences alike are justified by being brought into agreement with each other. *A rule is amended if it yields an inference we are unwilling to accept; an inference is rejected if it violates a rule we are unwilling to amend*.'

[69] See, eg, the discussion of 'Subjunctive explanationism' in Gabbay and Wood (n 11).

[70] See n 64 and accompanying text.

Step 3: Premise(s) $\varepsilon_{3n-(n-1)}$	**Each candidate $\mathbf{\Phi_i}$ in $\mathbf{\Phi_1 \ldots \Phi_{(n-1)}}$ is *disconfirmed*.** **[statement that each $\mathbf{\Phi_i}$ of $\mathbf{\Phi_1 \ldots \Phi_{n-1}}$ of the plausibly serviceable explanation conditionals is false or otherwise not warranted *as* the explanation of the *explanandum*]**
Step 4: Premise ε_3	For candidate Φ_n, '$\Phi_n \surd\surd \rightarrow \Theta$' is true. [statement that Φ_n of the plausibly serviceable explanation conditionals is *the most serviceable* explanation of the *explanandum* among those that are considered]
Step 5: Conclusion h	Φ_n [assertion of Φ_n as *the* explanation offered by the argument]

Note that there is an *internal structure* involved in moving from Steps 2 to 5. Using the grammar of propositional logic, where each proposition Ψ_i stating a plausibly serviceable explanation conditional is $\Psi_1, \Psi_2, \Psi_3 \ldots \Psi_{n-1}, \Psi_n$, we may model that internal structure as:

$\Psi_1 \vee \Psi_2 \vee \Psi_3 \vee \ldots \Psi_{n-1} \vee \Psi_n$

$\sim \Psi_1$

$\sim \Psi_2$

$\sim \Psi_3$

.

.

.

$\sim \Psi_{n-1}$

$\therefore$

Ψ_n

Table 13.1 (page 311) sets out a tabular version of this inference pattern, which reveals the internal structure of the steps that comprise the second, third and fourth steps of an abductive argument. It is done in that table for an abduction that considers a total of five plausibly serviceable explanations. The number of plausibly serviceable explanations obviously will vary from context to context; sometimes there is only one, which then by default serves as *the most* plausibly serviceable explanation. The table models a process in which the reasoner considers five explanations in total, rejects four and concludes that one is the most serviceable.

Table 13.1 The Logocratic 5-Step Model of Abduction

Step of abduction	Proposition type and number	Description	Abstract expression of proposition
Step 1 Statement of the *explanandum*	Premise ε_1	**Explanandum: Statement of conjunction of material facts**	θ
Step 2 A set of five premises comprise Step 2. Each premise in this set asserts that the explanation mentioned in the premise would serviceably plausibly explain the *explanandum*	Premise $\varepsilon_{2\text{-}1}$	**Serviceably plausible explanation conditional #1**	$\Phi_1 \surd \rightarrow \Theta$
	Premise $\varepsilon_{2\text{-}2}$	**Serviceably plausible explanation conditional #2**	$\Phi_2 \surd \rightarrow \Theta$
	Premise $\varepsilon_{2\text{-}3}$	**Serviceably plausible explanation conditional #3**	$\Phi_3 \surd \rightarrow \Theta$
	Premise $\varepsilon_{2\text{-}4}$	**Serviceably plausible explanation conditional #4**	$\Phi_4 \surd \rightarrow \Theta$
	Premise $\varepsilon_{2\text{-}5}$	**Serviceably plausible explanation conditional #5**	$\Phi_5 \surd \rightarrow \Theta$
Step 3 Assertion that each of these, despite its capacity serviceably to explain the *explanandum*, is disconfirmed as the most serviceable explanation	Premise $\varepsilon_{3\text{-}1}$	**Disconfirmation of serviceably plausible explanation conditional #1**	$\sim \Phi_1$
	Premise $\varepsilon_{3\text{-}2}$	**Disconfirmation of serviceably plausible explanation conditional #2**	$\sim \Phi_2$
	Premise $\varepsilon_{3\text{-}3}$	**Disconfirmation of serviceably plausible explanation conditional #3**	$\sim \Phi_3$
	Premise $\varepsilon_{3\text{-}4}$	**Disconfirmation of serviceably plausible explanation conditional #4**	$\sim \Phi_4$
Step 4 Asserted confirmation of the one *most* serviceably plausible explanation – compare hypothetical syllogism (see page 310 and n 72)	Premise ε_4	**Confirmation of serviceably plausible explanation conditional #5**	$\Phi_5 \surd\surd \rightarrow \Theta$
Step 5 Conclusion, assertion that the most serviceably plausible explanation is the actual explanation of the explanandum	Conclusion h	**Assertion of serviceably plausible explanation conditional #5 as *the most serviceably plausible explanation***	Φ_5

It is worth pausing a moment to discuss why the LM presents this as a five-step model, when other models present it as a four-step model.[71] The short answer is that the five-step model explains a greater variety of abductions, because there is behavioural variety among abductive reasoners. In some abductions, a reasoner will offer additional reasons to support the explanation that is chosen as most serviceable, and do so as a step separate from arguing for the rejection of the alternative he considers. In these abductions, the argument-enthymeme is fairly formally represented with a distinct set of premises for Steps 4 and 5. In other abductions, a reasoner will not offer additional reasons to support the explanation that is chosen as most serviceable and instead will rely on the disconfirmation of each rival explanation *as* support for the ultimately chosen explanation. This model has a structure similar to that of the deductive *disjunctive syllogism* – although, importantly, it is not to be understood as inherently deductive in form.[72] In these abductions, there is effectively no difference between Steps 4 and 5, but it seems best even so to regard abduction as a five-step inference process in which Step 4 offers no additional reasons for endorsing the explanation.

I have just asserted that, for abductive argument-enthymemes in which Steps 4 and 5 are explicitly distinct, the pattern is similar to that of the deductive disjunctive syllogism. The Logocratic Method also maintains, however, that this abductive pattern is *not* to be understood as inherently deductive in form. There are several reasons for this interpretive decision. One is that such a construal would attribute question-begging arguments to abductive reasoners in a way that seems inconsistent with a compelling principle of interpretive charity.[73]

[71] See, eg, the model offered by Josephson and Josephson (n 64) and accompanying text.

[72] For discussion of the form of the deductive hypothetical syllogism, see Bangs Tapscott (1976) *Elementary Applied Symbolic Logic*, Englewood Cliffs, NJ: Prentice-Hall, 384. Tapscott refers to various names in the logic literature for the inference

p v q
~p
∴ q

– namely, *cancellation disjunctive syllogism*, *modus tollendo ponens*, *V-elimination*, *elimination of alternate*, *denying one alternant*. I offer reasons for not construing abduction as a version of hypothetical syllogism, see n 73 below and accompanying text.

[73] Note that, interpreted as a deductive inference,

p v q
~p
q
∴ q

– although deductively valid, would also be paradigmatically question-begging. A properly charitable interpretation of abductions in natural language should avoid it. (See section V.A for a discussion of the Logocratic version of the principle of interpretive charity.) The domain of argument theory here is what I have called 'structural enthymemicity'. See Brewer (n 12) 985: 'The theorist of informal (including legal) argument must reconstruct enthymematic arguments in order to explain, from a theoretical point of view, what logical form they have in general – deductive, inductive, analogical (exemplary), or abductive. That is, what is not perspicuous in the manner of presentation of an informal argument, and what therefore calls for theoretical explication, is its logical type (inductive,

Another is that, according to Logocratic theory, two kinds of inference operate *within* abduction (and this point is central to my main thesis in this chapter): one kind is evaluable as a deductive inference, as is the true disjunctive syllogism; the other is evaluable as an inductive inference, that is, as defeasible *modus tollens*. This is a crucial aspect of Logocratic theory, and one that sharply separates its meta-abduction (its explanation of the nature of abduction). On the Logocratic account of abduction, in some contexts, such as abduction in mathematics and logic, the premises of abductive arguments provide *indefeasible evidence* (see section III.A) for their conclusions.[74] In other contexts, such as empirical abductions, the premises of abductive arguments provide *defeasible evidence* for their conclusions. I return to this important point later,[75] and it is vital for understanding the Logocratic analysis of the identity criteria of arguments, as illustrated by the Logocratic analysis of legal abduction in *Dougherty*, to which I now (re)turn.

V. INTERPRETIVE ABDUCTION FROM A LOGOCRATIC POINT OF VIEW

A. The Structure of Interpretive Abduction

The Logocratic model of abduction presented in section IV.B illustrated how explanations have a three-part structure, operating in the space of reasons, which produces three types of justificatory claims:

(a) factual judgements;
(b) the distinctive methods that the enterprise uses to generate those factual judgements (methodological rules);
(c) the distinctive axiological goals that the methods are chosen to advance and serve.

From a Logocratic point of view, interpretation is a type of abduction, which for obvious reasons is called *interpretive abduction*. Much more can fruitfully be said about this form of abduction than I can say within the scope of this chapter. Even so, I can here sketch the basic elements and note that *interpretive* abduction is not only an essential part of *legal* abduction but also figures pervasively in the everyday production and consumption of spoken and written language.

On this view, interpretation is a dyadic (that is, two-place) relation between a text being interpreted (an *interpretandum*) and a text doing the interpretation

deductive, etc). We may call this type of nonperspicuity "structural enthymemicity."' My point here is that we should not construe the abductive structural enthymeme as containing a question-begging deductive inference.

[74] See, eg, G Polya (1954) *Mathematics and Plausible Reasoning*, vol I: *Induction and Analogy in Mathematics*, Princeton, NJ: Princeton University Press; G Polya (1968) *Mathematics and Plausible Reasoning*, vol II: *Patterns of Plausible Inference*, Princeton, NJ: Princeton University Press. Polya does not refer to abduction using that term, but, according to the Logocratic explication of abduction, he is clearly presenting examples of abduction in mathematics.

[75] See section VI.B.ii.b and n 104.

(an *interpretans*). The predicate for the relation is the dyadic relation *is the meaning of*. To take a simple example, if the *interpretandum* is

(1) Juliet is the sun

as it occurs in Shakespeare's play, we might offer (2) as the *interpretans*

(2) Juliet radiates Romeo's life

– where our justificatory claim in offering (2) *as the interpretation* of (1) is that (2) *is the meaning of* (1). In the Logocratic model of explanation, the *interpretandum* is the *explanandum*, and the *interpretans* is the *explanans*.[76]

On this Logocratic model of interpretive abduction:

- The *factual judgements* interpreters make are their statements (to others or to themselves) of the meaning of texts being interpreted – that is, the *interpretantia* (*explananda*) that are the conclusions of their interpretive abductions.
- The *distinctive methods* that interpreters use to generate those factual judgements are many and varied among interpreters and contexts of interpretation. What are judged to be appropriate methods of interpretation for the interpretation of *Finnegan's Wake* may be judged inappropriate for interpreting directions to the bus stop. The example above resorts to interpreting (1) metaphorically. By contrast, a method of literal interpretation would read (1) as a literal assertion that Juliet is the astronomical entity that warms (or threatens to overwarm) planet Earth.[77]
- Like interpreters' distinctive methods, the distinctive *axiological goals* interpreters choose to advance and serve are many and varied among interpreters and contexts of interpretation. In some domains of interpretation, including the domain of legal interpretation, there are ongoing debates about *which* methods of interpretation (for example, literal interpretation *versus* interpretation in accord with the intent of the author) are appropriate for interpretation in that domain.[78]

Vital to the *fair formal representation* (it should be clear by now, see section III.D and page 291, that this is a process of interpretive abduction) of both rule-enthymemes and argument-enthymemes is commitment to the axiological goal of a *principle of charity* – a reasoning procedure that seeks to recover the *intent of the arguer as charitably (but not profligately) construed*.[79]

[76] I here 'Logocratise' the proto-Logocratic modelling of interpretation as 'tropological inference' in Brewer (n 10). See also the discussion of other theories that model interpretation as abduction mentioned in n 11.

[77] Compare one's inclination to interpret Camus' Caligula literally when he asserts, 'I want to possess the moon.' See Brewer (n 10) 832 and fn 37.

[78] The tropological theory I advance in *Figuring the Law* refers to the different methods of interpretation as *interpretive norms*. See Brewer (n 10) 827–36. I also discuss some of the jurisprudential controversies about (in Logocratic terms) what are the proper methods of interpretation for judges to use in making their legal abductions. See ibid, 838–40.

[79] As I have argued, 'The injunction to interpret charitably is an interpretive norm. Following Robert Nozick's trenchant critique of prevalent versions of the principle of charity among analytic

B. The Identity Criteria of Arguments

One of the most distinctive aspects of Logocratic theory is its articulation and defence of two principal explanatory propositions that comprise the Logocratic *interactive virtue* theory of argument:[80]

(a) There are precisely four modes of inference (deduction, induction, abduction and analogy) that are logically distinct, with none reducible to any other.
(b) Both the *identity* criteria and the distinct *evaluative* criteria for each individual argument form are best explained such that some forms include other forms in the multi-step inferential process from premises to conclusion.

It may seem that the dynamic interactive explanation of the identity criteria of arguments is problematically circular. In the example of the Logocratic analysis of *Dougherty*, for example, how can it be that there are four distinct arguments, two legal abductions and two deductions *within* the legal abductions, and yet it also be the case, as LM maintains, that there are precisely four argument forms (deduction, induction, abduction and analogy) that are logically distinct? Additional questions about the ontology of arguments are also raised by LM's endorsement of propositions (a) and (b) above, including questions about whether any of the four distinct modes of inference *supervenes* on any other, provides a *ground* for any other or is *ontologically dependent* on any other.[81] Exploration and application of these concepts to the ontology of argument may indeed be useful. I shall not pursue these questions here, however, merely asserting that the answer I do provide can provide a compelling explanation of the ontology of argument that is wholly consistent with explanations framed in such terms as *supervenience* and *grounding*, and *ontological dependence*.

Logocratic theory, particularly its analysis of the argument-enthymeme and its fair formal representation (an instance of interpretive abduction), provides this answer: the *identity* criteria and the distinct *evaluative* criteria for each individual argument (the distinct characteristic virtues of arguments – recall

philosophers of language, we should understand the content of this interpretive norm as follows: On the Logocratic view, a rule-enthymeme or argument-enthymeme ought to be interpreted *to make as intelligible as possible the fact that in that context that person (or persons) promulgating the rule or making the argument promulgated it or made it*. This accords well with Logocratic theory's deep reliance on pragmatics as a core part of its approach to the interpretation of rules and arguments. Unlike variants of the principle of charity that direct an interpreter to maximize agreement of the author of the text with the interpreter, or to maximize the rationality of the author, this principle seeks to reconstruct the enthymeme as reconstructed by a fair construction of the interpreter's intent. The "maximize agreement" (or "maximize rationality") norm would, for example, seem always to counsel that one find another way to interpret an argument-enthymeme if it seemed prima-facie that it might be offering a deductively invalid argument. But some arguers do offer argument-enthymemes that are accurately represented as invalid, and a principle of fair formal representation should not hide that [possibility].' Brewer (2020) (n 11) 158 (citing Robert Nozick (1993) *The Nature of Rationality*, Princeton, NJ: Princeton University Press, 151–59).

[80] See Brewer (2020) (n 11).

[81] For useful explication of these distinctions in current discussions of metaphysics, see Benjamin Schnieder, Miguel Hoeltje and Alex Steinberg (eds) (2013) *Varieties of Dependence, Ontological Dependence, Grounding, Supervenience, Response-Dependence*, Munich: Philosophia.

section III.E.ii.b) are a function of both the interpretation of argument-enthymemes and the choice of which evaluative criteria to use on the set of sentences that comprise an enthymeme.

The familiar 'Socrates syllogism' provides a clear example of this point. An argument that occurs as a token in a natural language very often has the property of what we may call *enthymeme ambiguity*. Indeed it may be, for reasons I cannot canvas here, that all arguments, not only in natural language but also in the formal argument domains of mathematics and logic) have that property. An example of such ambiguity is the proposition (appearing in written discourse as a sentence or in spoken discourse as an utterance):

(1) Socrates is a man, so he'll die.

Proposition (1) presents four interpretive questions for the Logocratic analyst:

(i) Is (1) an argument-enthymeme?
(ii) If so, what are its premises, and what are its conclusions?
(iii) And if so, what is the mode of logical inference (also referred to as the logical form) of the argument?
(iv) And if so, does the argument have the characteristic virtues of its form, that is, does it have the properties that enable the premises of an argument of its type to provide the greatest degree of evidential support for its conclusion of which an argument of that type is capable? (The easiest example is deduction: for an argument-enthymeme that has been represented as deduction, the question is whether the argument has the characteristic virtue of validity.)

One can easily imagine two contexts in which an arguer utters a token of (1). In one context, the arguer might intend, and expect his hearer to recognise his intention, that (a) the interpreter of the argument will supply a premise that is not explicitly stated but is intended to be assumed by the interpreter, namely, some synonym of

(2) All living men will die.

and that (b) this proposition has the force of a true universal generalisation, which, taken together with *Socrates is a living man* [Note that there is already some *interpretation* – interpretive abduction – involved in extracting what is a basically a *rule* from utterance (1); I represent that rule as (2).], is capable of yielding a valid inference to the conclusion expressible as some synonym of the proposition *Socrates will die* by means of the inference rule of universal instantiation. On this interpretation, the answer to the interpretive questions listed above are, respectively:

(i) Is (1) an argument-enthymeme?: Yes
(ii) If so, what are its premises, and what are its conclusions?: Premises: *All living men will die* and *Socrates is a living man*; Conclusion: *Socrates will die*.

(iii) And if so, what is the mode of logical inference (or, the logical form) of the argument?: Deduction
(iv) And if so, does the argument have the characteristic virtues of its form: Yes, it is valid.

In a different context, the arguer might intend, and expect his hearer to recognise his intention, that (a) the interpreter of (1) will supply a premise not explicitly stated but intended to be assumed by the interpreter, namely,

(2') [Probably] All living men will die.

and that (b) this proposition *does not have* the force of a true universal generalisation but instead is an *inductive specification*, that is, an inductive generalisation applied to a particular case in what is sometimes referred to as *defeasible modus ponens*.[82] According to this interpretation of (1) the answers to the interpretive questions listed above are, respectively:

(i) Is (1) an argument-enthymeme?: Yes
(ii) If so, what are its premises, and what are its conclusions?: Premises: *[Probably] All living men will die.* and *Socrates is a living man*; Conclusion: *[Probably] Socrates will die.*
(iii) And if so, what is the mode of logical inference (or, the logical form) of the argument?: Induction (specifically, inductive specification).
(iv) And if so, does the argument have the characteristic virtues of its form: Yes, it meets the criteria of a strong inductive inference.[83]

This example supports two important conclusions. First, one must always *interpret* an argument-enthymeme into an 'argufied' argument, that is, an argument that is (or at least, aspires to be) a fair formal representation of the argument-enthymeme in order to determine which mode of inference might provide a fair formal representation of the argument. Second, often the same argument-enthymeme is capable of being fairly formally represented (that is, interpreted), as distinct modes of inference. In the example above, the argument-enthymeme *Socrates is a man, so he'll die.* could, depending on contextual considerations, be fairly formally represented as either a deductive or an inductive argument. This is the property possessed by argument-enthymemes that we may call *argument-enthymeme underdetermination*. It is the fact of argument-enthymeme underdetermination that shows that there is no circularity in the Logocratic

[82] See, eg, Henry Prakken (2006) 'Artificial Intelligence & Law, Logic and Argument Schemes' in *Arguing on the Toulmin Model: New Essays in Argument Analysis and Evaluation*, eds David Hitchcock and Bart Verheij, Dordrecht: Springer Netherlands, 231–45 ('the *defeasible modus ponens rule* … is formalised by many systems of nonmonotonic logic … *P./If P then usually Q./Therefore (presumably), Q.*').

[83] See, eg, the criteria for strong (in Logocratic terms, *virtuous*) inductive inference that Trudy Govier offers as "Guidelines for Evaluating Inductive Generalizations" in Govier (n 22) 265.

dynamic interactive theory of the identity criteria of arguments.[84] We may call this view an *interpretive theory of argument identity*.

VI. LEGAL ABDUCTION IN *DOUGHERTY V SALT* FROM A LOGOCRATIC POINT OF VIEW

A. Doctrinal Background Relevant for Understanding Legal Abduction in *Dougherty v Salt*

For those not familiar with the doctrines of US Contract Law, a bit of doctrinal background is useful for understanding my arguments in this section. A 'contract', as understood in American legal practice, is a legally enforceable promise.[85] The whole of Contracts analyses (in Logocratic terms to be explained below, such analyses are *legal abductions* in the domain of Contract Law) can be modelled as a set of legal norms designed to distinguish those promises that are not legally enforceable from those that are.[86] This was the issue for one of Cardozo's two principal arguments in *Dougherty*, the conclusion of which was that Aunt Tillie did *not* make a legally enforceable promise to nephew Charley.

There are two basic methods of forming a contract and several legal norms that guide this formation. In one method (and related set of norms), one party, the *offeror*, makes an *offer* to another party, the *offeree*, and the offeree *accepts* the offer, in circumstances in which each party has *consideration* from the other. *Consideration* is present between offerors and offerees when the parties are trading either a promise for a performance (this is a *unilateral contract*) or a promise for a promise (this is a *bilateral contract*).[87] American Contract Law relies on a

[84] Brian Skyrms also strongly endorses this same underlying account of the interpretive and evaluative nature of the identity criteria of arguments. See Skyrms (n 21) 22 (emphasis added): 'Some books appear to suggest that there are two different types of arguments, deductive and inductive, and that deductive logic is concerned with deductive arguments and inductive logic with inductive arguments … Nothing, however, is further from the truth, for, as we have seen, all inductively strong arguments are deductively invalid … *Deductive and inductive logic are not distinguished by the different types of arguments with which they deal, but by the different standards against which they evaluate arguments.*'

[85] *Restatement (Second) of Contracts* § 1. 'Contract Defined: A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.'

[86] I present additional detailed Logocratic analysis of the formation of Contracts under American law in Scott Brewer (2017) 'Using Propositional Deductive Logic as an Aid to Teaching American Contract Law: The Logocratic Approach; in *Law and Logic: Contemporary Issues*, eds Dieter Krimphove and Gabriel M Lentner, Berlin: Duncker & Humblot, 97–124.

[87] Consider the two types of actions (both are speech-acts, and specifically, performative utterances of promising) between two contracting parties, *A* and *B*. Abstractly, we can depict the two actions as follows:

> **(i) offer and acceptance of a *bilateral* contract**
> A says to B: *If you promise to do Act X, I promise to do Act Y*. This is an *offer* for a *bilateral contract*, defined as *a promise in exchange for a promise*. When *B* makes the return promise

rule for contractual obligation according to which, if there is offer and there is acceptance and there is consideration then there is a legally enforceable promise (ie a contract), *unless* the inference from antecedent to consequent is blocked by a 'defeator doctrine', such as fraud, duress, mutual mistake, unconscionability, etc. (As we shall see, one of Judge Cardozo's arguments in *Dougherty* concerned the possibility that there was fraud, a defeator doctrine, in the writing of the alleged promissory note from Tillie to Charley.) Another method (and related set of norms) of forming a contract is through some variety of *promissory estoppel*, roughly, a circumstance in which even when a promise has not been part of a trade, the court deems it too unfair or unjust not to enforce it.[88] Consideration, not promissory estoppel, is the main doctrinal concept operating in *Dougherty*.

B. Summary of Cardozo's Two Legal Abductions in *Dougherty*

In Logocratic terms, Judge Cardozo, like every judge called on to resolve a litigative dispute, faced the task of producing an *explanation from a legal point of view* (see section IV.B). The facts and procedure of *Dougherty* presented, as Cardozo saw it, *two* distinct phenomena that required explanation, so

('I promise to do Act X'), B *accepts* the offer and the contract is said to be *formed*. As of that moment, both A's promise and B's promises are legally enforceable, that is, they have a contract. And in this case the *consideration* to A is B's *promise*, and the consideration to B is A's *promise*. In *Restatement (Second) of Contracts* § 1 (n 85), this is the circumstance of a contract's being constituted by 'a set of promises for the breach of which the law gives a remedy'.

(i) offer and acceptance of a *unilateral* contract
A says to B: *If you do Act X, I promise to do Act Y*. This is an *offer* for a *unilateral contract*, defined as a promise in exchange for a performance. Under traditional rules, when B *completes the performance* that A seeks, the contract is said to be *formed*. The *consideration* to A is B's *performance* and the consideration to B is A's *promise*. In *Restatement (Second) of Contracts* § 1 (n 85), this is the circumstance of a contract's being constituted not by a 'set of promises' but instead by virtue of *a* promise exchanged for a performance.

[88] The paradigmatic rule for this in American Contract Law is *Restatement (Second) of Contracts* § 90, which states, in relevant part, 'A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.' This doctrine was not nearly as well-known or established at the time of *Dougherty* as it is now, and even now Contract jurists debate how ready judges are to use it as a reason for legally enforcing promises that is an alternative to consideration. Less than a decade after *Dougherty*, Cardozo himself gave the doctrine a strong if somewhat covert endorsement in his influential opinion in *Allegheny College v National Chautauqua Bank of Jamestown*, 159 NE 173 (NY 1927). See ibid, 175: '[T]here has grown up of recent days a doctrine that a substitute for consideration or an exception to its ordinary requirements can be found in what is styled "a promissory estoppel." … Whether the exception has made its way in this state to such an extent as to permit us to say that the general law of consideration has been modified accordingly, we do not now attempt to say.'

that, on the best interpretation of the *Dougherty* argument-enthymemes (see section I) there are two discernibly distinct, albeit closely related, legal abductive arguments.

i. Cardozo's First Legal Abduction Conclusion: No Contractual Consideration

a. Doctrinal Summary (from a Logocratic Point of View)

One of the two legal abductions that Cardozo offers in *Dougherty* seeks to explain the phenomenon (the *explanandum*, that is, the first premise in the first Step of an abduction, see section IV.C) that Cardozo states as the material facts of the interaction among Aunt Tillie, Charley and Charley's legal guardian (who gave Tillie what turned out to be legal advice that Cardozo ultimately rejects). The central question for this legal abduction, as it seemed to Judge Cardozo, was whether authoritative rules of contract, as properly interpreted, indicated that there was an enforceable promise between Aunt Tillie and her nephew, Charley. (See the discussion of the doctrinal background for *Dougherty* in section VI.A.) Five distinct explanations of the transaction, each corresponding, in the Logocratic fair formal representation, to one plausibly serviceable explanation conditional, seemed serviceable to Judge Cardozo. Four of these were worth considering because (as Toulmin might explain Cardozo's argument[89]), in Cardozo's estimation, other referees of the contest might accept them, and Cardozo thought it important to argue against those other abductions of the transaction. Thus, he discussed them, only to reject them in favour of the one that he concluded was *the* best one among the five serviceable explanations he considered.

b. Abstract Representation

Using the schema presented in section IV.C, in the first legal abduction that he offers (the one in which he assesses, from a legal point of view, whether there is consideration for Aunt Tillie's promise to Charley), Cardozo considers a total of five plausibly serviceable explanations of which he rejects four and endorses one. The first legal abduction in *Dougherty* may be fairly formally represented as shown in Table 13.2.

[89] See Toulmin (n 62) and accompanying text.

Table 13.2 Logocratic Representation of the First Legal Abduction in *Dougherty*

Step of abduction	Proposition type and number	Abstract expression of proposition	Description and Enthymematic Text	Comments
Step 1 Statement of the *explanandum*	Premise ε_1	θ	**Explanandum: Statement of conjunction of material facts** Enthymematic text: 'The plaintiff, a boy of eight years, received from his aunt, the defendant's testatrix, a promissory note for $3,000, payable at her death or before. Use was made of a printed form, which contains the words "value received." How the note came to be given was explained by the boy's guardian, who was a witness for his ward. The aunt was visiting her nephew. … "When she saw Charley coming in, she said, 'Isn't he a nice boy?' I answered her, Yes; that he is getting along very nice, and getting along nice in school; and I showed where he had progressed in school, having good reports, and so forth, and she told me that she was going to take care of that child; that she loved him very much. I said, 'I know you do, Tillie, but your taking care of the child will be done probably like your brother and sister done, take it out in talk.' She said, 'I don't intend to take it out in talk; I would like to take care of him now.' I said, 'Well, that is up to you.' She said, 'Why can't I make out a note to him?'	• To use the common law doctrinal term, this is Cardozo's statement of *material* facts of the case, that is, those facts that have significance given them from applicable substantive, evidentiary and procedural laws

(continued)

Table 13.2 *(Continued)*

Step of abduction	Proposition type and number	Abstract expression of proposition	Description and Enthymematic Text	Comments
Step 1 (cont.)	Premise ε_{-1}	θ	I said, 'You can, if you wish to.' She said, 'Would that be right?' And I said, 'I do not know, but I guess it would; I do not know why it would not.' And she said, 'Well, will you make out a note for me?' I said, 'Yes, if you wish me to,' and she said, 'Well, I wish you would.'… A blank was then produced, filled out, and signed. The aunt handed the note to her nephew, with these words: 'You have always done for me, and I have signed this note for you. Now, do not lose it. Some day it will be valuable"'.	
Step 2 A set of five premises comprises Step 2.	Premise $\varepsilon_{2\text{-}1}$	$\Phi_1 \surd \rightarrow \Theta$	<u>Serviceably plausible explanation conditional #1</u> This child of 8 was either a creditor or being dealt with as a creditor. <u>Enthymematic text:</u> 'This child of eight was not a creditor, nor dealt with as one.' *Dougherty*, 125 NE at 95.	**Argumentative economy reflected in this fair formal representation of Cardozo's legal abduction:** • For reasons of argumentative economy, Cardozo, like a great many legal abductive reasoners, simultaneously expresses what he considers to be a plausibly serviceable explanation (serviceable enough to be worth mentioning, if only to reject it, see discussion in section IV.B). I list it twice, in both Step 2 (assertion) and Step 3 (rejection)

Step 2 (cont.) Each premise in this set asserts that each explanation mentioned in the premise would serviceably plausibly explain the *explanandum*	Premise $\varepsilon_{2\text{-}2}$	$\Phi_2 \surd \rightarrow \Theta$	**Serviceably plausible explanation conditional #2** The aunt was paying a debt. Enthymematic text: 'The aunt was not paying a debt.' *Dougherty*, 125 NE at 95.	(continued from previous page) because the assertion of it as worth considering and then rejecting it even so are analytically distinct parts of Cardozo's legal abduction, as fairly formally represented.
	Premise $\varepsilon_{2\text{-}3}$	$\Phi_3 \surd \rightarrow \Theta$	**Serviceably plausible explanation conditional #3** There was both consideration for the promise and offer and acceptance because the parties intended to trade either a promise for a promise or a promise for a performance.[1] Enthymematic text: 'She [the aunt] was conferring a bounty. … The promise was neither offered nor accepted with any other purpose. "Nothing is consideration that is not regarded as such by both parties."' *Dougherty*, 125 NE at 95 (citation omitted).	
	Premise $\varepsilon_{2\text{-}4}$	$\Phi_4 \surd \rightarrow \Theta$	**Serviceably plausible explanation conditional #4** The signed note stating 'value received' sufficed for consideration. Enthymematic text: 'A note so given is not made for "value received," however its maker	

(continued)

[1] See n 87 and accompanying text, discussion of bilateral and unilateral contracts.

Table 13.2 *(Continued)*

Step of abduction	Proposition type and number	Abstract expression of proposition	Description and Enthymematic Text	Comments
Step 2 (cont.)	Premise $\varepsilon_{2\text{-}4}$ (cont.)	$\Phi_4 \surd \rightarrow \Theta$	may have labeled it. The formula of the printed blank becomes, in the light of the conceded facts, a mere erroneous conclusion, which cannot overcome the inconsistent conclusion of the law.' *Dougherty*, 125 NE at 95.	
	Premise $\varepsilon_{2\text{-}5}$	$\Phi_5 \surd \rightarrow \Theta$	**Serviceably plausible explanation conditional #5** The aunt's promise in the promissory note was a promise for a gift, not a legally enforceable promise. Enthymematic text: [Same as for Premise $\varepsilon_{2\text{-}3}$ above.]	
Step 3 Assertion that each of these, despite capacity serviceably plausibly to explain the *explanandum*, is disconfirmed as the most serviceable explanation	Premise $\varepsilon_{3\text{-}1}$	$\sim \Phi_1$	**Disconfirmation of serviceably plausible explanation conditional #1** Enthymematic text: 'This child of eight was not a creditor, nor dealt with as one.' *Dougherty*, 125 NE at 95.	• Again (see the Comments to Step 2), the reason for which several of the disconfirmation texts in Step 3 appear also in Step 2 is Cardozo's (not atypical) argumentative economy; like a great many legal abductive reasoners, Cardozo simultaneously expresses what he considers to be a serviceably plausible explanation (serviceable enough to be worth mentioning, if

Step 3 (cont.)	Premise $\varepsilon_{3\text{-}2}$	$\sim \Phi_2$	**Disconfirmation of serviceably plausible explanation conditional #2** Enthymematic text: 'The aunt was not paying a debt.' *Dougherty*, 125 NE at 95.	only to reject it, see discussion in text above at p 26). I list it twice, in both Step 2 (assertion) and Step 3 (rejection) because the assertion of it as worth considering and then rejecting it even so are analytically distinct parts of Cardozo's legal abduction, as fairly formally represented. • A central part of the Logocratic analysis of *dynamic interactive virtue* of arguments explains that *this step of the abduction relies on the deductive application of a rule.* See discussion in section VI.B.ii.b.
	Premise $\varepsilon_{3\text{-}3}$	$\sim \Phi_3$	**Disconfirmation of serviceably plausible explanation conditional #3** Enthymematic text: ' She [the aunt] was conferring a bounty. … The promise was neither offered nor accepted with any other purpose.' *Dougherty*, 125 NE at 95.	
	Premise $\varepsilon_{3\text{-}4}$	$\sim \Phi_4$	**Disconfirmation of serviceably plausible explanation conditional #4** Enthymematic text: 'A note so given is not made for "value received," however its maker may have labeled it. The formula of the printed blank becomes, in the light of the conceded facts, a mere erroneous conclusion, which cannot overcome the inconsistent conclusion of the law.' *Dougherty*, 125 NE at 95.	

(continued)

Table 13.2 *(Continued)*

Step of abduction	Proposition type and number	Abstract expression of proposition	Description and Enthymematic Text	Comments
Step 4 Asserted confirmation of the one most serviceably plausible explanation – compare hypothetical syllogism	Premise ε_4	$\Phi_5 \surd \not\vdash \Theta$	<u>**Confirmation of serviceably plausible explanation conditional #5**</u> <u>Enthymematic text:</u> 'The transaction thus revealed admits of one interpretation, and one only. The note was the voluntary and unenforcible promise of an executory gift.' *Dougherty*, 125 NE at 95.	• Cardozo does not offer additional separate reasons to support this conclusion over and above asserting the conclusion in the process of rejecting the alternative explanations he considers, so in this case (but, as explained in the text above, not in all abductions), the text comprising Step 4 does not differ from the text comprising Step 5.
Step 5 Conclusion, assertion that the most serviceably plausible explanation is the actual explanation of the *explanandum*	Conclusion h	Φ_5	<u>**Assertion of serviceably plausible explanation conditional #5 as *the most serviceably plausible explanation***</u> <u>Enthymematic text:</u> [Same as for Step 4].	

ii. Cardozo's Second Legal Abduction Conclusion: Trial Judge Error in Disposition of Case

The second, analytically distinct but obviously closely related phenomenon that Cardozo seeks to explain from a legal point of view concerns the trial judge's disposition of the case. As does Cardozo, the trial judge offered two legal abductions. According to one, the jury was wrong to conclude that there was consideration in the promise from the aunt to her nephew. Cardozo agrees with and endorses this legal abduction (as discussed in the previous section). According to the second of the trial court's two legal abductions, the proper overall disposition of the case was to dismiss it. Cardozo disagrees with this second legal abduction,[90] and his argument explaining his disagreement is what I now model in this section.

a. Doctrinal Summary (from a Logocratic Point of View)

Cardozo's second legal abduction is occasioned by applicable New York State rules of evidence and procedure. What called for explanation from a legal point of view in this argument was whether the trial judge's disposition of the case was proper under the applicable rules of procedure. In Logocratic terms, the jury, as *dialectical-rhetorical referee* of the litigative contest of legal abductions between plaintiff and defendant (see section III.E.ii.a.1), accepted the conclusion of the plaintiff's legal abductive argument that Aunt Tillie's promise was legally enforceable. In turn, the trial judge, in granting the defendant's motion to set aside the jury's verdict, offered a legal abduction of the litigative question of whether Aunt Tillie had made a legally enforceable promise. This legal abduction was in a *dialectical-rhetorical contest* with that of the jury. Under applicable New York State rules of procedure[91] (as, in turn, authorised by the New York State Constitution), the trial judge was empowered to declare himself the winner of this contest, a ruling that would stand unless and until a duly authorised appellate court overturned it. In his second legal abduction in *Dougherty*, Cardozo argued that the trial judge's decision to set aside the verdict was correct under applicable rules of Contract (these rules were the subject of his first legal abduction) and procedure, but that the decision to dismiss the case was incorrect. His conclusion also explained the mistake, as he saw it, of the actions of the intermediate appellate court, which reversed the trial court's judgment notwithstanding the verdict and reinstated the jury's conclusion that the Aunt's promise was indeed legally enforceable.

b. Abstract Representation

Cardozo's second legal abduction assesses whether, from a legal point of view, the trial judge's actions in setting aside the jury verdict and then dismissing the plaintiff's complaint were correct. Using the schema presented in section IV.C, this legal abduction may be fairly formally represented as shown in Table 13.3.

[90] In Logocratic terms, Cardozo, speaking for a unanimous New York Court of Appeals, offered a legal abduction that was in a *dialectical-rhetorical contest* (see section III.E.ii.a.1) with the legal abduction of the trial judge.

[91] See the text of these State rules of procedure (rule-enthymemes, in Logocratic terms) in n 100.

Table 13.3 Logocratic Representation of the Second Legal Abduction in *Dougherty*

Step of abduction	Proposition type and number	Abstract expression of proposition	Description and Enthymematic Text	Comments
Step 1 Statement of the *explanandum*	Premise ε_1	θ	**Explanandum: Statement of the trial court's and intermediate appellate court's disposition of the case after jury trial** Enthymematic text: 'The trial judge submitted to the jury the question whether there was any consideration for the promised payment. Afterwards, he set aside the verdict in favor of the plaintiff, and dismissed the complaint. The Appellate Division, by a divided court, reversed the judgment of dismissal, and reinstated the verdict on the ground that the note was sufficient evidence of consideration.' *Dougherty*, 125 NE at 95.	• This is Cardozo's statement of procedural facts, that is, the disposition of the case by the two prior courts
Step 2 A set of two premises comprises Step 2. Each premise in this set asserts that each explanation mentioned in the premise would serviceably explain the explanandum.	Premise $\varepsilon_{2\text{-}1}$	$\Phi_1 \surd \rightarrow \Theta$	**Serviceably plausible explanation conditional #1** The trial judge correctly granted the motion for judgment notwithstanding the verdict (ie, correctly set aside the jury finding that the aunt's promise was enforceable and the appellate court was wrong to overturn the trial judge's ruling).	• Interpreted in context (as with all interpretation, including interpretation of argument-enthymemes), Cardozo mentions *by implicature*[1] the possibility that the trial judge's disposition was correct.

[1] See the classic discussion of 'conversational implicature' in Grice (n 60). See also my use of Grice to explicate the (proto)Logocratic abduction of analogy in Brewer (n 12) 990–1003.

Step 2 (cont.)	Premise $\varepsilon_{2\text{-}1}$	$\Phi_1 \surd \rightarrow \Theta$	Enthymematic text: 'The trial judge submitted to the jury the question whether there was any consideration for the promised payment. Afterwards, he set aside the verdict in favor of the plaintiff, and dismissed the complaint. The Appellate Division, by a divided court, reversed the judgment of dismissal, and reinstated the verdict on the ground that the note was sufficient evidence of consideration.' *Dougherty*, 125 NE at 95.	• As we interpret Cardozo's argument using principles of implicature, we conclude that his assessment, in his legal abduction, of the possibility that the trial judge ruled *correctly* amounts as well – in economy of expression – to considering the possibility that the trial and appellate courts ruled *incorrectly*.
	Premise $\varepsilon_{2\text{-}2}$	$\Phi_2 \surd \rightarrow \Theta$	**Serviceably plausible explanation conditional #2** The trial judge correctly dismissed the complaint and the appellate court was wrong to overturn the trial judge's ruling. Enthymematic text: [Same as for Serviceably plausible explanation conditional #1.]	

(continued)

Table 13.3 *(Continued)*

Step of abduction	Proposition type and number	Abstract expression of proposition	Description and Enthymematic Text	Comments
Step 3 & Step 4 Simultaneous assertion of the correctness of explanation and incorrectness of its counterpart negation. Cardozo judges that each of these, despite its capacity serviceably plausibly to explain the *explanandum*, is disconfirmed as the most serviceable explanation.	Premise $\varepsilon_{3\text{-}1}$	$\sim \Phi_1$	***Confirmation* of plausibly serviceable explanation conditional #1 and simultaneous disconfirmation of its *contrastive counterpart* negation** Enthymematic text: 'The inference of consideration to be drawn from the form of the note has been so overcome and rebutted as to leave no question for a jury … The transaction thus revealed admits of one interpretation, and one only … We hold, therefore, that the verdict of the jury was contrary to law, and that the trial judge was right in setting it aside.' *Dougherty*, 125 NE at 95.	• In the expressive economy of his legal abduction, Cardozo simultaneously rejects the possible explanation that the trial judge was *incorrect* to set aside the jury verdict, asserts that the judge was correct to do so and, relatedly, asserts also that the appellate court was incorrect to overrule the trial judge. • Thus, although the enthymematic text is compressed, *the fair formal representation* of Cardozo's rejection of one explanation (Step 3) and endorsement of its *contrastive counterpart* explanation (Step 4) are analytically distinguishable and distinct. • A central part of the Logocratic analysis of *dynamic interactive virtue* of arguments explains that *this step of the abduction relies on the deductive application of a rule*. See discussion below.
	Premise $\varepsilon_{3\text{-}2}$	$\sim \Phi_2$	***Confirmation* of plausibly serviceable explanation conditional #2 and simultaneous disconfirmation of its *contrastive counterpart* negation** Enthymematic text: '[The trial judge] went too far, however, in dismissing the complaint. He might have dismissed it if he had reserved his ruling on the defendant's motion for a nonsuit or for the direction	

Step 3 & Step 4 (cont.) Simultaneous assertion of the correctness of explanation and incorrectness of its counterpart negation that each of these, despite capacity serviceably plausibly to explain the explanandum, is disconfirmed as the most serviceable explanation.	Premise $\varepsilon_{3\text{-}2}$	$\sim \Phi_2$	of a verdict. Code Civ Proc §§ 1185, 1187. Instead of reserving his ruling, he denied the motion absolutely. Upon the return of the verdict, he should have granted a new trial. A new trial was also necessary because of error in rejecting evidence. The defendant attempted to prove that the signature to the note was forged. The court refused to hear the evidence, because forgery had not been pleaded as a defense. The answer did deny the execution of the note. The evidence of forgery was admissible under the denial. Schwarz v Oppold, 74 NY 307; Farmers' L & T Co v Siefke, 144 NY 354, 39 NE 358. The judgment of the Appellate Division should be reversed, and the judgment of the Trial Term modified by granting a new trial, and, as modified, affirmed, with costs in all courts to abide the event.' *Dougherty*, 125 NE at 95.	

We may now address the questions I have previously posed regarding how many arguments there are in Cardozo's opinion in *Dougherty v Salt* and how are they related. There are two legal abductions, obviously related, but distinct, for each of which five distinct legal arguers offered competing arguments. The pattern of legal-abductive contest lines up in this way:

- plaintiff's legal abductions competed with defendant's
- trial judge's legal abductions competed with jury's
- appellate court's legal abductions competed with trial judge's
- Court of Appeals' (per Cardozo) legal abductions *agreed* with *one* of the trial judge's legal abductions and *competed* with the trial judge on the other legal abduction.

We may also represent this pattern of contesting legal abductions as shown in Table 13.4, using Logocratic concepts already explained (see especially section III.E.ii.a.1).

Table 13.4 Pattern of contesting legal abductions in *Dougherty*

Dialectical-rhetorical referee	**Question posed for legal abduction (the *explanandum*): Legal abduction 1 ('LA1'): Was there consideration for Aunt Tillie's promise of money to Charley and was her promise was legally enforceable?**	**Question posed for legal abduction (the *explanandum*): Legal abduction 2 ('LA2'): What is the proper disposition of the case, in light of the best answer to LA1?**
plaintiff[1]	Yes	Trial court should enforce Aunt's (estate's) promise to pay Charley, appellate court(s) should affirm
defendant	No	Trial court should dismiss the complaint, appellate court(s) should affirm

(continued)

[1] It is worth commenting on the inclusion of plaintiff and defendant as dialectical-rhetorical referees here, amplifying the discussion in section III.E.ii.a.1. Although it is the trial judge, the jury, the appellate court and the Court of Appeals who have state-sanctioned power to decide which legal abductions win the contests of plaintiff and defendant, *each arguer* is also a dialectical-rhetorical referee in his or her deliberation and judgment about which argument to endorse. This is a general point about the vital Logocratic idea of the dialectical-rhetorical competition of arguments. It is not that some argument audiences are dialectical-rhetorical referees while others are not. Instead, every argument audience – *including* the arguer who advances an argument – is a referee. What differs is *how much and what kind of institutional political power* a given audience for an argument has in the settings in which the argument is advanced.

Table 13.4 ***(Continued)***

Dialectical-rhetorical referee	**Question posed for legal abduction (the *explanandum*): Legal abduction 1 ('LA1'): Was there consideration for Aunt Tillie's promise of money to Charley and was her promise was legally enforceable?**	**Question posed for legal abduction (the *explanandum*): Legal abduction 2 ('LA2'): What is the proper disposition of the case, in light of the best answer to LA1?**
jury	Yes	Court should enforce Aunt's (estate's) promise to pay Charley
trial judge	No	Trial court should grant defendant's motion to set aside the jury verdict, appellate court(s) should affirm
appellate court (majority of split opinion)	Yes	Trial court judgment setting aside the jury verdict should be reversed, appellate court(s) should affirm
Court of Appeals (per Cardozo unanimously opinion for court)	No	Trial court should set aside the verdict but *not* dismiss the complaint, and instead should grant a new trial (to assess defendant's claim of fraud)

Within each of Cardozo's two *legal* abductions in *Dougherty*, when fairly formally represented, one can discern the operation of two additional argument forms, both related to Cardozo's application of (what he takes to be) applicable legal rules. One is an *interpretive abduction* and one is a *deduction*. The conclusions of these arguments in turn serve as premises in the abduction. Modelling one of the two interpretive-abduction-and-deduction-within-the-legal abductions that Cardozo's opinion exhibits (when fairly formally represented)is sufficient for my purposes here.

Recall that the first legal abduction (LA1 in Table 13.4) concerns whether Aunt Tillie's promise, rendered in the promissory note stating 'value received' and listing an amount to be paid to Charley ($3,000, payable at or before her death), had 'consideration'.[92] On the facts of the case, if the aunt's promise was enforceable, it would be on the basis of consideration – the exchange of a promise for a promise or of a promise for a performance.[93] From a (deductive) logical

[92] American Contract Law relies on a rule for contractual obligation according to which a transaction, in which there is offer, acceptance and consideration, is to be explained as a legally enforceable promise, ie a contract, unless the inference is blocked by a 'defeator doctrine', such as fraud, duress, mutual mistake, unconscionability, etc. See Brewer (n 86).

[93] See n 87 for illustration of these two types of consideration.

point of view, consideration in this case is a necessary condition of the aunt's contractual liability to her nephew. In the course of his legal abduction on the question of consideration (LA1), Cardozo relies on this argument-enthymeme:

> The aunt was not paying a debt. She was conferring a bounty. Fink v Cox, 18 Johns 145, 9 Am Dec 191. The promise was neither offered nor accepted with any other purpose. 'Nothing is consideration that is not regarded as such by both parties.'[94]

Cardozo's argument is fairly formally represented as follows:

ε_1 Nothing is consideration that is not regarded as consideration by both parties. [Equivalently: All consideration *is* regarded as consideration by both parties. Abstractly: All X is Y.]

ε_2 Parties who intend to give [the donor] and receive [the recipient] a gift do not intend consideration. [Abstractly: If something is W then it is not-Y.]

ε_3 Aunt Tillie and Charley intend for her to give Charley a gift. [Abstractly: This case involves W.]

h There was no consideration. [Abstractly: This case involves not-X.]

In the grammar of first-order predicate logic, the fully abstract version of the argument is an instance of *modus tollens*, which is a valid deductive inference, that is, an inference in which whenever all the premises are true, the conclusion must also be true:

ε_1 All X is Y.

ε_2 If something is W then it is not-Y.

ε_3 This case involves W.

h This case involves not-X.

Note here that Cardozo's deductive argument *itself relies on an interpretive abduction*, namely, his own representation of the logical elements of the rule of consideration. *Every legal analyst's use of rule-based deduction within legal abduction* relies on interpretive abduction in this way, whether or not the analyst dwells explicitly on that abduction. In *Dougherty*, Cardozo neither offered nor made explicit his interpretive abduction, and instead quoted the consideration rule he endorsed and relied on from the US Supreme Court's opinion *Philpot v Gruninger*.[95] But under fair assumptions of interpretive charity, he offered a deductive argument[96] whose first premise, which I have represented as a form of *All X is Y*, necessarily relies on his own interpretation of the logic of the

[94] See *Dougherty* (n 1) 95.

[95] See *Dougherty* (n 1) 95 (citing *Philpot v Gruninger*, 81 US 570 (1871)).

[96] An important issue in the Jurisprudence of Logical Form (see Brewer (n 14) and accompanying text) is whether some, if not all, legal arguments are best fairly formally represented as deductions.

consideration rule that he applies to yield his legal abduction regarding the question of consideration.

A deductive inference with this same basic structure also serves Cardozo's first legal abduction in which he rejects, as noted in section VI.B.i.b, the possible explanations of the aunt's promise as paying a debt or making an enforceable promise simply by saying 'value received' (as if this was a performative utterance, making the assertion true just by virtue of making the assertion). Another occurrence of deduction, whose conclusion then serves as a premise in Cardozo's abduction, comes in his abduction of the issue of whether the trial court made the proper disposition of the case after the jury verdict. The conclusion of Cardozo's abduction on this point (see Table 13.3 and Table 13.4) is that the trial judge was mistaken. This legal abduction relies, in turn, on a deductive application of two rules of New York State procedure that Cardozo cites.[97]

The Logocratic explanation of Cardozo's legal abduction in *Dougherty* is but one instance of a general point that has long been part of Logocratic (and proto-Logocratic) theory, which I have referred to as the *dynamic interaction* of arguments. In the proto-Logocratic model of practical reasoning, in which practical reasoners take account of expert testimony, I have argued that an argument modelled as a practical syllogism, which is a legal abduction, will interact with expert empirical abductions offered by expert witnesses.[98] And as noted in section I, LM explains that each of the four modes of inference – deduction,

Some Legal Realist theorists seem to deny this, in contrast to other theorists, including me. I have offered detailed reasons for concluding that deduction does operate in legal argument in Brewer (n 12) 989–1003.

[97] One is New York Code of Civil Procedure § 1185, which states, in relevant part (bracketed numbers added):

> Where, [1] upon the trial of an issue by jury, the case presents only questions of law, [2] the judge may direct the jury to render a verdict subject to the opinion of the court. [3] Notwithstanding that such a verdict has been rendered, [4] the judge holding the trial term may, at the same time, set aside the verdict, and direct judgment to be entered for either party, with like effect and like manner, as if such a direction had been given at trial.

The other is New York Code of Civil Procedure § 1187. Both of these are, in Logocratic terms, *rule-enthymemes* (see section III.D). Just to illustrate briefly the 'Method' in the Logocratic Method, one may fairly formally represent this using the grammar of propositional deductive logic. I refer to the bracketed number [1] that I have added in the quoted text above in this fair formal representation, which represents the enthymematic statutory text as two rules:

Rule 1: *If* [1] upon the trial of an issue by jury, the case presents only questions of law, *then* [2] the judge may direct the jury to render a verdict subject to the opinion of the court.

Rule 2: [3][4] [*If* the judge holding the trial term is acting within his authorised powers,] *then* the judge holding the trial term may, at the same time, set aside the verdict, and direct judgment to be entered for either party, with like effect and like manner, as if such a direction had been given at trial.

This fair formal representation proceeds in accord with the Logocratic view that all norms, including deontic norms, have a 'deep structure' of conditionals even when the 'surface structure' grammar is not conditional. I have represented that deep structure in the representation of rule elements labelled '[3]' and '[4]' as the deontic antecedent '[If the judge holding the trial term is acting within his authorised powers]'. Recall the discussion of this point in n 30.

[98] See Brewer (n 13).

induction, analogy and abduction – is logically distinct, that is, each is not reducible to (an instance of) any of the others.

But, unusually among theories of argument, LM also explains, indeed emphasises, the dynamic interactive nature of several of the four modes of inference.[99] On this explanation, analogical argument always involves both abduction and either induction or deduction,[100] induction always involves abduction, and abduction, in turn, always involves either deduction or induction. Offering a much-needed correction of a widespread misunderstanding of the nature of abduction, Logocratic theory explains that there are many abductions whose premises provide *indefeasible argumental evidence* (see section III.E.ii.a.2) for their conclusions.[101] According to the Logocratic-friendly Jurisprudence of Logical Form that I endorse, legal abductions, which are rule-based (even when vague rules must first be interpreted – very often through reasoning by analogy[102]), rely on deductive application of rules. In this way, legal abductions are like abductions used in mathematics and logic.[103]

This explanation of the role of rule-based deductive reasoning coheres strongly with the Logocratic explanation of abduction. Recall that, on the Logocratic explanation (abduction), abduction is explanation from a *point of view*, and a point of view consists of the distinctive *methods* of an enterprise that generate the kinds of *factual judgements* of the sort that the enterprise generates, whose methods are in turn chosen to serve particular the *axiological aims* of that enterprise.[104] The practices of legal abduction, namely, offering explanations from a legal point of view (as Cardozo does in *Dougherty*), involve the distinct *methods* that are familiar to lawyers, judges and students who learn to 'think like a lawyer'. Those methods include: (i) reasoning under applicable rules, which involves deduction; (ii) reasoning about the empirical world in ways necessary to apply legal rules whose concepts have empirical content, which means using the inputs of empirical (including expert) inductions;[105] (iii) reasoning about judgements of similarity and difference (reasoning by analogy) – which is especially prominent in Anglo-American 'common law' reasoning in which judges are overtly empowered to make judgements about the scope of meaning of potentially authoritative precedents;[106] and (iv) interpretive reasoning, judging the meanings of cases, statutes, regulations and constitutions.[107]

[99] See Brewer (2020) (n 11).
[100] See Brewer (n 12) 968–78; Brewer (2018) (n 40).
[101] Thus, for example, consider this *explanandum*: How is it possible for two chess pawns of the same 'team' (colour, side) to be in the same column as the result of legal play, that is, play permitted under the rules? On the Logocratic model of abduction (meta-abduction) presented above (see section IV), there are, as far as I know, only two serviceably plausible explanations of this explanandum: that one pawn moved diagonally to capture an opposing piece, or did so using the *en passant* option. This is an abduction – induction has nothing to do with it, despite the many theories that conflate abduction and induction in one way or another.
[102] See Brewer (n 12) 978–83.
[103] See the discussion in n 74 and accompanying text.
[104] Recall the discussion of 'point of view' in section IV.B.
[105] See Brewer (n 13).
[106] See Brewer (n 12).
[107] Recall the discussion in nn 10 and 11 and accompanying text.

Additionally, as a matter of what one might explain as philosophical-anthropological investigation,[108] judges in American Contract Law tend to sort into two 'tribes' with regard to the axiological goals that they use legal methods to serve. Detailed examination of those aims is beyond the scope of this chapter, but I can sketch them. Fairly tracking the literature of American Contract jurisprudence, I label one set of rationales 'Classical' and the competing set of rationales 'Romantic'.[109] According to the explanatory scheme I have developed, the judge who endorses *Classical* axiological goals in his Contract-Law legal abductions relies on a strong presumption that the parties should be given very wide latitude to arrange their contractual deals themselves, without modification by judges; presumes against using the tools of Contract-Law legal abduction to redress inequalities between the parties to a contract (such as inequalities in bargaining power, information and resources); and similarly presumes against reallocating the risk that a more-or-less literal interpretation of the transaction has imposed on the parties. The judge who endorses *Romantic* axiological goals in his Contract-Law legal abductions, by contrast, gives much narrower latitude to the parties to arrange their contractual deals themselves, without modification by judges; is quite ready to use the tools of contract legal abduction to redress inequalities between the parties to a contract; and quite ready to reallocate the risk that a more or less literal interpretation of the transaction has imposed on the parties, including by resorting to non-literal interpretations of the terms of the transaction. Cardozo himself is one of the pioneers of the Romantic values of Contract Law, although he does not rely on them in his legal abduction in *Dougherty*.[110]

C. So, How Many Arguments in *Dougherty*, and How Are They Related?

At the end of a winding road, based on the abductions and meta-abductions offered, my bottom-line answer to the question I posed early in this chapter

[108] As I understand and deploy this concept, philosophical anthropology is the investigation of the conceptual relations and commitments of the contingent methods of reasoning of cognitive agents. See, eg, the discussion of von Savigny in Brewer (n 6) 41–46.

[109] To offer just one example, the casebook I have used for many years of teaching Contracts, *Problems in Contract Law*, by Knapp, Crystal, Prince, uses the concept of 'Classical' throughout to label what I refer to as the set of Classical rationales. See also the detailed explication of these norms in Jay M Feinman (2004) *Un-Making Law: the Conservative Campaign to Roll Back the Common Law*, Boston, Beacon Press; and Duncan Kennedy (2006) *The Rise and Fall of Classical Legal Thought*, Washington, DC: Beard Books. Common among writers who use 'Classical' in their explanations of law (Contract Law as well as other domains of law) is the use of 'post-classical' as the conceptual antonym. I use 'Romantic' to label this set of Contracts rationales, partly under the influence of the superb essay by James Whitman (1987) 'Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code' *Yale Law Journal* 97: 156–75, arguing that '[Karl] Llewellyn's conception for the [Uniform Commercial] Code, … his love for the "law merchant" and his peculiar ambitions for a political transformation of the United States all had common roots in little-known corners of German Romantic and post-Romantic legal thought'.

[110] Within a decade of *Dougherty*, he took a paradigmatically and very influentially Romantic approach in his legal abduction in *Allegheny Coll v Nat'l Chautauqua Cnty Bank of Jamestown*, 159 NE 173 (1927).

about how many arguments there are in *Dougherty* is this: there are two legal abductions, one concerning contractual liability, the other concerning the proper disposition of the case. Each of those legal abductions relies, as is typical of legal abductions, on a deductive application of rules – rules for consideration and two procedural rules. And the deductive arguments rely in turn on interpretive abductions – one for each of the deductive arguments – in their fair formal representation of the legal rules on which the deductive argument relies. This makes for a total of six arguments: two *overarching* arguments (the legal abductions) *within* each of which is one deductive argument within each of which, in turn, in one interpretive abduction (recall the discussion on page 334).

VII. CONCLUSION AND DIRECTIONS FOR FURTHER RESEARCH

In this chapter, I have offered a detailed analysis of a well-known American Contracts case to illustrate the Logocratic answer to what seems to be a simple question: *What is a Legal Argument?* I have tried to show that the best answer to this simple question is complex, thereby mirroring the complexity of arguments themselves and the specific complexities of legal arguments. Arguments are composed of propositions, and the assembly of a given set of propositions into *an* argument is always an interpretive decision. That same interpretive decision in turn guides one's evaluation of the argument. *All* arguments have one or another of the four modes of inference – deduction, induction, abduction and analogy – but *no* set of propositions has any *inherent* logical form. What logical form it has is always a function of an *interpretive* decision about how to evaluate the support that the premises of the argument provide for its conclusion. In general, there is no entity without identity, in the familiar Quinequip.[111] On the best explanation of the phenomena of argument, there is no argument, no logical form of argument and no evaluation of argument, without interpretation. To be *an argument* is to be taken as such.

This Logocratic explanation of the identity criteria of arguments made perspicuous the complexity of what might have seemed like Cardozo's short, simple argument in *Dougherty v Salt*, revealing a structure of six arguments, two of which are legal abductions, each of which in turn contains a deductive argument and an interpretive abduction. Many other legal arguments have a good deal more complexity than does *Dougherty*.

Two lines of further research arise from this kind of analysis. First, one may profitably continue to develop explicit criteria for the adequacy of interpretations of (in Logocratic terms) argument-enthymemes into their fair formal representations. Second, it seems likely that the rich multi-disciplinary

[111] Willard Van Orman Quine (1981) *Theories and Things*, Cambridge, MA: Harvard University Press, 102.

bodies of research into complexity – including, to name a few, biology,[112] physics,[113] social science,[114] law[115] and philosophy[116] – could also yield additional insights into the nature of arguments that broaden and deepen the Logocratic analysis of the dynamic interactive virtue of arguments. What is complex in its nature can be made simple to a suitably trained Logocratic understanding.

[112] See the richly provocative and evocative discussion in Lawrence B Slobodkin (1992) *Simplicity and Complexity in Games of the Intellect*, Cambridge, MA: Harvard University Press.

[113] See, eg, Michael Strevens (2003) *Bigger than Chaos: Understanding Complexity Through Probability*, Cambridge, MA: Harvard University Press.

[114] See Philip Pond (2020) *Complexity, Digital Media and Post Truth Politics: A Theory Of Interactive Systems*, Cham: Palgrave Macmillan.

[115] See, eg, Ronald J Allen (2011) 'Rationality and the Taming of Complexity' *Alabama Law Review* 62: 1047–71.

[116] See, eg, Justus Buchler (1966) *Metaphysics of Natural Complexes*, New York: Columbia University Press.