LECTURE

AGONOPHOBIA (FEAR OF CONTEST) IN THE THEORY OF ARGUMENT?: THE CASE OF GARY LAWSON'S *EVIDENCE OF THE LAW*

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PROEM

I begin by commending my friend Gary Lawson for his important treatment of the nature of evidence and proof in his book *Evidence of the Law*.[1] I write, very much, I think, in the spirit of his book and his own *agonophilic* (I shall explain this concept) style, to question whether his theory of proof hinders its explanatory power by omitting to recognize *virtues* of arguments other than the one on which he (and, for that matter, most philosophers—he is in good company) focuses, namely, argumentative proofs that produce true or probabilistically warranted propositions. To make my argument I draw on my own theory of the nature of argument and method of analyzing the virtues and vices of argument. I call this method and its supporting theory the *Logocratic Method* ("LM"). My task in this Lecture is to present enough of the LM— including two of its concepts central to my critique, "agonophilia" and "agonophobia"—and enough of a re-presentation of what I understand Gary's argument about the nature of proof to be, to raise my question about the explanatory adequacy of Gary's theory.

I.   GARY'S PROJECT AS A WORK OF PHILOSOPHY

Two questions that occurred to me early in reading Gary's book are: What exactly is his project in the book and, relatedly, what does he understand his project to be? I take Gary's project to be a work of philosophy, specifically the branch of philosophy that deals with the nature of knowledge and justified belief, known as 'epistemology.'[2] Gary is, as I read him, firmly committed to the view that his project is epistemology, even as he is energetically epistemically modest about this commitment. The modesty is reflected, for example, in such passages as these:

> [(1)] I suspect that concepts describing degrees of warranted certainty can only be defined ostensively—by illustration rather than verbal expression. But like so many other questions lurking in the background, this is a question best reserved for professional philosophers.[3]
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> . . . .
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> [(2)] Collectively, these five elements—principles of admissibility, principles of significance, standards of proof, burdens of proof, and (for lack of a better term) principles of closure or completeness—define the legal process of proof for facts. I suspect that these five elements are both necessary for and exhaustive of the process of proof, but I do not know

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[1] GARY LAWSON, EVIDENCE OF THE LAW: PROVING LEGAL CLAIMS (2017).

[2] I follow a single-quotation convention in philosophical academia according to which single-quotation marks are used to give the name of a name. Thus, for example 'Boston University' is the name of Boston University. Double-quotation marks are used in the familiar ways, to quote actual oral or written texts, or to present a word or phrase as if someone were stating it where I intend some kind of ironic distance, as if to say, "so-called, but mis-called."

[3] LAWSON, *supra* note 1, at 23-24.

how to demonstrate the point. I do not even know if it is either important or possible to make such a demonstration. I am especially hesitant to make any sweeping claims about having offered an exhaustive account of the concept of legal proof of facts because the full significance of the problem of defining the completeness of the evidence set did not occur to me until after nearly two decades of thinking about this kind of problem, so I shudder to imagine what other considerations are out there that I have overlooked.[4]

. . . .

[(3)] I emphasize at the outset that the purpose of this discussion is solely to highlight the inescapable epistemological role of the five facets of proof that I have identified, not to resolve ages-old questions of philosophy.[5]

. . . .

[(4)] The foregoing two simple sentences casually sweep away thousands of years of philosophical wrangling over the nature of truth, of knowledge, and of the connection between human cognition and reality. Since I am merely a humble law professor trying to write a book about the proof of legal claims, it is hard for me to see how I can do much else.[6]

Despite Gary's proclaimed epistemic modesty, he makes clear (to me, at least) not only that his project is thoroughly philosophical, but also that it seems to exhibit what I call the *highest ambition* of philosophy, that is, to explicate the necessary and sufficient conditions of a concept—its essence. Applied to the philosophy of law, for example, this is the project of discerning and specifying the necessary and sufficient conditions for "the concept" of law, to specify the "essence" of law. In this mode of doing philosophy as conceptual analysis, the task is not to explain the meaning of a concept—the concept of law, or knowledge, or meaning, or truth, or justice—in Chinese, or in English, or in French, or in German, or in Urdu, but to explicate the meaning of the concept per se, in every place, at every time, everywhere and everywhen. Thus, for example, some have attributed to Plato an influential articulation of the concept of knowledge according to which the necessary and sufficient conditions for the concept of knowledge (the essence of knowledge) are:

- Person S knows some proposition, call it P, *if and only if*
- S believes P;
- P is true; and
- S is justified in believing P.[7]

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[4] *Id.* at 27.

[5] *Id.* at 29.

[6] *Id.* at 217 n.44.

[7] *See* Edmund L. Gettier, *Is Justified True Belief Knowledge?*, 23 ANALYSIS 121, 121 n.1 (1963) ("Plato seems to be considering some such definition at *Theaetetus* 201, and perhaps accepting one at *Meno* 98."); *see also* PLATO, THEAETETUS 201 (Robin A. H. Waterfield trans., photo. reprint 1988) (1987).

That Gary has this high philosophical ambition is reflected at many places in his text. To pick just one:

> The foregoing five principles of proof are all *essential* to the proof of adjudicative facts in the law. The legal system recognizes those principles in some fashion, albeit sometimes more explicitly than at other times. The next step is to recognize that *these five principles are integral to the process of proof for any fact, in the law or otherwise.* That is, the basic structure of the process of proof for adjudicative facts in the law is simply a specific application, and an unexceptional one at that, of the basic structure of the process of proof for facts of any kind. The broad outline—not the particulars, but the broad outline—of the law's framework for proof of adjudicative facts is *universalizable.*[8]

There are alternative and competing ways of conceiving the philosophy task, such as those associated with the (not always non-obscure) work of the later Wittgenstein, who seemed to call into question this highest-ambition philosophical project, instead replacing it with a kind of therapy that cures its practitioners of the illness of philosophical essentialism.[9] Gary strongly associates himself with this highest philosophical ambition despite his avowed epistemic modesty, simultaneously telling us that he is "merely a humble law professor trying to write a book about the proof of legal claims"[10] and that he is not seeking "to resolve ages-old questions of philosophy,"[11] while also declaring that the Cartesian answer to "the epistemological question . . . whether the appropriate standard of proof for any claim is beyond *an imaginable* or *conceivable* doubt, beyond a *reasonable* doubt, or something else," is "the wrong one" since it "precludes any knowledge, including the knowledge that two plus three equals five."[12] So Gary helps himself, without argument, to one conception of doing philosophy, and indeed its most ambitious conception. Fair enough. My own query and challenge meet him on that terrain, not suggesting that the very enterprise is misguided but instead pondering whether he has executed an adequate explanatory argument within that enterprise.

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[8] LAWSON, *supra* note 1, at 28 (emphases added).

[9] *See* LUDWIG WITTGENSTEIN, THE BLUE AND BROWN BOOKS: PRELIMINARY STUDIES FOR THE 'PHILOSOPHICAL INVESTIGATIONS' 18 (Harper Perennial 2d ed., 1960) (1958) ("Our craving for generality has [as one] main source: our preoccupation with the method of science. I mean the method of reducing the explanation of natural phenomena to the smallest possible number of primitive natural laws; and, in mathematics, of unifying the treatment of different topics by using a generalization. Philosophers constantly see the method of science before their eyes, and are irresistibly tempted to ask and answer in the way science does. This tendency is the real source of metaphysics, and leads the philosopher into complete darkness. I want to say here that it can never be our job to reduce anything to anything, or to explain anything. Philosophy really *is* 'purely descriptive'.").

[10] LAWSON, *supra* note 1, at 217 n.44.

[11] *Id.* at 29.

[12] *Id.* at 34 & 219 n.51.

II.   SUMMARY OF GARY'S THEORY OF THE NATURE OF ARGUMENT: HIS FIVE ESSENTIAL "PRINCIPLES OF PROOF"

On Gary's philosophical explication of the concept of proof, there are five essential components in all proof, anywhere, anywhen, including but not limited to legal proof. They are, as he states early and clearly:

[P]rinciples of admissibility (what counts toward establishing a claim), principles of weight or significance (how much the admissible evidence counts toward establishing a claim), standards of proof (how much total admissible evidence one must have in order to establish a claim), burdens of proof (how one makes decisions in the face of uncertainty), and principles of closure (when one can stop looking for more information and declare the evidence set closed).[13]

III.   SHOULD WE ACCEPT GARY'S STRONG CLAIM THAT THESE ARE FIVE *ESSENTIAL* ASPECTS OF PROOF IN ANY DOMAIN?

Gary does a deep service to the theory of argumentative proof by clearly articulating and arguing for these five principles. Should we accept his highly ambitious claim that these are five essential conditions of proof? I have some doubts. It is beyond the scope of this Lecture to consider in detail all five supposedly essential principles of proof—I have other fish to fry. But it will suffice here to say that I express my doubt concerning just a few of those supposed principles.

Consider first, "principles of admissibility" as they may operate in philosophy, the discipline Gary deploys in this book. Given his high philosophical ambition, as I have noted, he is committed to the claim that principles of admissibility operate in this, as in every, domain of proof. Are there principles of admissibility in philosophy that are fairly placed in the same categories as such rules as Federal Rules of Evidence 401, 402, 403, and 702? This is not at all clear. In making arguments, philosophers consult a plethora of sources that are, collectively, seemingly too varied to be guided by any principle that is clear enough to guide conduct. Thus, philosophers appeal to myths;[14] to explicitly fictional histories and genealogies;[15] to science and mathematics;[16] to

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[13] *Id.* at 9.

[14] *See, e.g.*, PLATO, THE REPUBLIC OF PLATO 38 (Benjamin Jowett trans., Oxford Univ. Press 3d ed., photo. reprint 1925) (1888) (c. 380 B.C.E.) (invoking myth of ring of Gyges).

[15] *See, e.g.*, LON L. FULLER, THE MORALITY OF LAW 245-53 (rev. ed. 1969) (including fictional story modeled on Nazi Germany, entitled "The Problem of the Grudge Informer"); H.L.A. HART, THE CONCEPT OF LAW 89 (1961) (imagining "a society without a legislature, courts or officials of any kind"); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 292 (1974) (examining "hypothetical histories"); BERNARD WILLIAMS, TRUTH AND TRUTHFULNESS 20 (2002) ("[G]enealogy is not simply a matter of what I have called real history.").

[16] *See generally* DANIEL C. DENNETT, DARWIN'S DANGEROUS IDEA: EVOLUTION AND THE MEANINGS OF LIFE (1995).

science fiction;[17] to history; and to general fiction,[18] including novels, films, and paintings.[19] To be sure, Gary seems to have anticipated and preempted my point here in his assertion that "principles of admissibility might be 'anything goes,' or they might be something far more limiting and technical such as the Anglo-American trial system provides"[20] and "might be formulated as relatively definite rules or as relatively vague standards."[21] But is it really cogent to say, given the vast array of sources that philosophers draw on to make their arguments, that their methods of proof are guided by *principles* of admissibility?

In suggesting that "anything goes" might be a principle of admissibility, Gary seems to invoke, though without explicit reference, a claim of the profound iconoclastic epistemologist and philosopher of science Paul Feyerabend. Feyerabend's statement of this "principle" is actually instructive for a worry I have regarding Gary's claim about the principle of admissibility. Feyerabend argued that:

> To those who look at the rich material provided by history, and who are not intent on impoverishing it in order to please their lower instincts, their craving for intellectual security in the form of clarity, precision, 'objectivity', 'truth', it will become clear that there is only one principle that can be defended under *all* circumstances and in all stages of human development. It is the principle: *anything goes*.[22]

In a later comment on his own articulation of this "principle," Feyerabend asserted that "'anything goes' is not a 'principle' I hold—I do not think that 'principles' can be used and fruitfully discussed outside the concrete research situation they are supposed to affect—but the terrified exclamation of a rationalist who takes a closer look at history."[23] Is "anything goes" really a "principle" of admissibility of proof, in science, philosophy, or anywhere? Gary's claim that it is betokens a deeply intellectualist approach to the concept of proof that would be familiar to, and warm the hearts of, many philosophers.

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[17] *See, e.g.*, DEREK PARFIT, REASONS AND PERSONS 199-217 (1984) (rooting chapter about beliefs in science fiction story about "teletransporting" to Mars); HILARY PUTNAM, *The Meaning of 'Meaning'*, *in* MIND, LANGUAGE AND REALITY 215, 223 (1975) ("That psychological state does not determine extension will now be shown with the aid of a little science-fiction."); HILARY PUTNAM, REASON, TRUTH AND HISTORY 3-5 (1981) (using science fiction stories to illustrate that "[t]hought words and mental pictures do not *intrinsically* represent what they are about").

[18] *See generally* ISAIAH BERLIN, *The Originality of Machiavelli*, *in* AGAINST THE CURRENT: ESSAYS IN THE HISTORY OF IDEAS 25 (Henry Hardy ed., 2d prtg. 1980) (discerning political attitude of Machiavelli in part through analysis of his works of fiction).

[19] *See generally* STANLEY CAVELL, MUST WE MEAN WHAT WE SAY? (rev. ed. 2002) (1969).

[20] LAWSON, *supra* note 1, at 20.

[21] *Id.* at 21.

[22] PAUL FEYERABEND, AGAINST METHOD 18-19 (Verso 3d ed., 1993) (1975).

[23] *Id.* at vii.

Although it is clear that there are many *practices* of admissibility in the process of offering arguments for propositions—that is, seeking to prove them—it is not clear that these are best explained as *principles*. Here is an analogy to make my point. One could offer one master "principle" for all of morality, namely: "Do the right thing, all things considered." (A counterpart for one master legal "principle" might be: "Do what the law requires, all things considered.") One can claim that these are principles. They have the logical, conditional structure of rules. But they are so vague as to give virtually no guidance, and thus are suspect when offered as explanations of the behavior of those who would be said to "follow them." So if Feyerabend is right that "anything goes" is indeed the best explanation of a norm that can be said to guide proof in science—there is reason to believe that he is onto something important, though I do not further argue the point here—that one explanation seems to me to cast serious doubt on Gary's claim for the universalizable requirement of a principle of admissibility in every domain of proof.

Consider next Gary's putatively essential, universal proof principle requiring a "*standard of proof* that tells you when a claim can be pronounced legally true or false by expressing the total weight or magnitude of admissible evidence that is epistemologically required for that result."[24] (Clearly he intends the claim for this principle that it is required for proof outside of law as well as within.)[25] Once again, facts about argumentative proof practices in philosophy occasion some doubt about Gary's claim. There is wide disagreement about whether, for example, to be compelling, philosophical arguments must meet a standard of apodictic proof, on the model (beloved of Rationalist philosophers like Descartes and Leibniz) of deductive logic; or instead something more like Charles Peirce's abduction (which at some points in his theorizing he thought committed the fallacy of deductive logic known as affirming the consequent); or Wittgenstein's "family resemblance"; or the "non-coercive" philosophy contemplated by Robert Nozick.[26] Of course, Gary might maintain the claim that all proof, including proof in philosophy, must have some standard of proof even when the participants in debate disagree about what that is. Fair enough, except that—as the Pyrrhonian skeptical practitioner suggests—even with regard to the

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[24] LAWSON, *supra* note 1, at 23.

[25] *See id.* at 24 ("[S]ome standard of proof—whether explicit or implicit, whether cardinal or ordinal or normative—*must* be operative in any process of decision making, or no conclusion, including 'I don't know,' can rationally be advanced. You have to know when to declare epistemological victory or defeat and move on.").

[26] *See* ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 5 (1981) ("Why are philosophers intent on forcing others to believe things? Is that a nice way to behave toward someone? I think we cannot improve people that way—the means frustrate the end. Just as dependence is not eliminated by treating a person dependently, and someone cannot be forced to be free, a person is not most improved by being forced to believe something against his will, whether he wants to or not. The valuable person cannot be fashioned by committing philosophy upon him." (footnote omitted)).

question of what the standard of proof is for the question what is the standard of proof, there is disagreement.[27] When it is disagreement all the way down, the assertion that there is always a standard of proof in every domain of argumentative proof seems to require such attenuation as substantially to undermine the force of the claim itself.

Finally, and very briefly, consider Gary's claim that there must be principles of closure or completeness in every domain of proof. Suffice it to say here, once again pointing to practices of philosophical argument, that it is hard to see what kind of *closure* there is in these practices when, notoriously, a good deal of philosophy today is still debating arguments—those of Aristotle, Plato, and Pyrrhonian skeptics, as examples—that were articulated thousands of years ago, with no "closure" in sight. Related to this point is Immanuel Kant's lament, in a founding eighteenth-century text of modern philosophy with which we continue to argue to this day, that:

> [I]t . . . remains a scandal of philosophy and universal human reason that the existence of things outside us (from which we after all get the whole matter for our cognitions, even for our inner sense) should have to be assumed merely on faith, and that if it occurs to anyone to doubt it, we should be unable to answer him with a satisfactory proof.[28]

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[27] It is beyond my purpose here to discuss at length the deep Pyrrhonian dialectic, whose locus classicus is Sextus Empiricus's *Outlines of Pyrrhonism*. *See generally* THE SKEPTIC WAY: SEXTUS EMPIRICUS'S *OUTLINES OF PYRRHONISM* (Benson Mates trans., 1996). Here is a summary of the main point that supports my claim in the text. Suppose an evidence jurist or scientist believes that being justified according to the proper criteria of justification is a necessary condition for the justification of a belief—as, by the way, Gary clearly seems to believe. The Pyrrhonian points out that, according to this interlocutor, it is important to determine whether the criterion of justification that the interlocutor proposes is itself a justified criterion. There is, after all, disagreement concerning what are the criteria of justification. So the interlocutor seems to be committed, by his own view, to show that the criterion he proposes for justification of belief is the justified criterion. But if he does defend his proposed criterion of justification on the basis of a criterion of justification, then it must either be the same criterion as the one he proposes, say, lack of bias, low error rate, and so on, or a different criterion. But if he uses the same criterion of justification to judge the justifiability of his criterion of justification, then his defense of the criterion will be question-begging. And if he uses a different criterion to try to justify the first criterion, then the Pyrrhonian repeats the challenge, ad infinitum if necessary. Thus, what have been aptly called "the dual demons of circularity and infinite regress" rear up as soon as an interlocutor, or indeed anyone, attempts to defend his choice of a criterion of justification. ROBERT FOGELIN, WALKING THE TIGHTROPE OF REASON: THE PRECARIOUS LIFE OF A RATIONAL ANIMAL 116 (2016) And if they refuse to defend it, then they have simply abandoned their idea that all judgments must be made in conformity with a justified criterion of justification. For an excellent introductory discussion, see *id.* 95-125 (2003).

[28] IMMANUEL KANT, CRITIQUE OF PURE REASON 121 (Paul Guyer & Allen W. Wood eds. & trans., Cambridge Univ. Press 1998) (1781).

IV. TRANSITION: FROM NON-UNIVERSALITY TO EXPLANATORY ADEQUACY

My foregoing arguments have raised questions about the nature of Gary's enterprise (despite his many qualifications, it is philosophy) and whether it lives up to its high philosophical ambition to have articulated five essential principles of proof in any domain of argument. (With regard to putative principles of admissibility, standards of proof, and closure, there is reason to doubt this.) I now shift the focus of my response from a challenge to his claim of universality to a question about the *explanatory adequacy* of his philosophical explanation of the nature of proof. I do so by sketching, necessarily very succinctly, the main points of my own alternative account of the nature of proof, which I call the Logocratic Method ("LM"). My main points will be that Gary does not sufficiently account for the role of *argument* in proof, nor for the variety of uses that arguers, including most notably, legal arguers, make of arguments. More specifically, Gary's theory of proof does not, it seems to me, account for the use of arguments to *win dialectical competitions of arguments*, of which litigation is a leading example. The Logocratic account regards this competitive use of arguments in contest (in an *agon*, the Greek term for 'contest') as a central feature of the nature of arguments. The prominence the LM gives to dialectical competition of arguments makes the LM methodologically "agonophilic"— contest loving. And an explanation of argumentative proof that does not account for this feature of the use of arguments is in that way "agonophobic." My closing question will be whether Gary's theory is agonophobic in a way that diminishes the explanatory adequacy of his theory.

V. SUMMARY OF THE LOGOCRATIC METHOD'S PHILOSOPHICAL
EXPLANATION OF THE NATURE OF ARGUMENT[29]

A. *All Proof Is a Matter of Argument, That Is, It Is Best Explained by a Focus on Arguments*

An argument consists of a set of propositions, called 'premises', that stand in a particular relation to another set of propositions, called 'conclusions'. The relation between these two sets is: *is or can be taken to be offered as the evidential warrant for*. More colloquially, the premises of an argument are or can be taken to be offered as the warrant for conclusions.

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[29] The most complete recent statement of the LM is found in JACK B. WEINSTEIN, NORMAN ABRAMS, SCOTT BREWER & DANIEL S. MEDWED, EVIDENCE: CASES AND MATERIALS 3-145 (10th ed. 2017). *See also* Scott Brewer, *Logocratic Method and the Analysis of Arguments in Evidence*, 10 LAW, PROBABILITY & RISK 175, 175-202 (2011); Scott Brewer, *Using Propositional Deductive Logic As an Aid to Teaching American Contract Law: The Logocratic Approach*, *in* LAW AND LOGIC: CONTEMPORARY ISSUES 97, 97-124 (Dieter Krimphove & Gabriel M. Lentner eds., 2017). For a very succinct account, see Scott Brewer, *HLS Thinks Big 2016*, YOUTUBE (July 5, 2016), https://www.youtube.com/watch?v=xkECmHYMJxA&t=33s; Scott Brewer, *Harvard Lectures that Last 2015*, YOUTUBE (June 23, 2015), https://www.youtube.com/watch?v=oPvwEsvtfs0.

B.   *All Evidence Is Also Best Explained by a Focus on Arguments*

The LM relies on an *evidential conception of the concept of "argument,"* according to which "[l]ogic is the study of the strength of the evidential link between the premises and conclusions of arguments."[30] Chiasmically, even as *argument is evidence*, the LM argues that the concept of *evidence* is best explained as *argument*. This yields a Logocratic 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 action, event, object, mental state, or proposition—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 not only result in no loss of explanatory power, but in a gain.

Corresponding to the claim that evidence is argument, there are types of evidence that correspond to four types of argument, which I shall explain, more precisely, as "modes of logical inference." Specifically, corresponding to deductive argument is deductive evidence, to inductive argument is inductive evidence, to analogical argument is analogical evidence, and to abductive argument is abductive evidence. In accord with this evidential conception of argument, the LM identifies *modes of logical inference*. A mode of logical inference is the distinct pattern of the evidential warrant relation between the premises and conclusion of an argument. There are exactly four modes of logical inference: deduction, induction, analogy, and abduction (synonymously 'inference to the best explanation'). The list of four types of argument (modes of logical inference, "modes" for short) is exhaustive, and although each of the four modes is irreducible to any other, there are complex patterns of interaction and intersection among some of them. (For example, induction and deduction can play a role within either analogical argument or abductive argument.)

C.   *Given the Argumentative Nature of Evidence—and of Proofs Made Using Evidence—the Evaluation of Evidence Is Best Explained As a Focus on the Evaluation of Arguments*

Unlike what is perhaps the dominant approach to the concept of evidence, the Logocratic conception does not build *warrantedness* into the definition of evidence. Instead, on the Logocratic conception, for example, if some person does or could infer a proposition about some action, event, object, mental state, or proposition—such as the existence of a supreme being—from facts of testimonial evidence of some sort in the Bible or the Koran or the Torah or the Bhagavad Gita, then the Bible or the Koran or the Torah or the Bhagavad Gita

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[30] BRIAN SKYRMS, CHOICE AND CHANCE: AN INTRODUCTION TO INDUCTIVE LOGIC 4 (1966).

are *evidence* for that proposition. Not, I hasten to add, necessarily *good* evidence in the judgment of some analysts, but evidence nonetheless. Just as there can be arguments that are strong or weak (in precisely defined senses) and still be arguments (an invalid deductive argument is still both deductive and an argument), evidence can be very weak and still be evidence. The Logocratic conception of evidence as argument defers the assessment of how *good* (virtuous) an evidentiary claim is until one gives a fair formal representation of the evidentiary claim into an argument, and then, and only then, assesses the strength or weakness (the virtue or vice) of that claim *as* an argument.

D.   *Logocratic Focus on the Virtues (and Vices) of Arguments*

Virtue (and counterpart vice) are central to the Logocratic analysis of evidence, argument, and argumentative proof. In the LM 'virtue' means *functional excellence*. The basic framework is found in Aristotle's conception of *arete* (Greek ἀρετή), translated as 'virtue' or 'excellence'.[31] 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 *F*s. For example, consider an object (*X*) that is a knife (*F*). The virtues of a knife are those features that make it a good knife, such as having an appropriately sharp blade—we say "appropriately," because as we can see on quick reflection, the virtue of a butter knife differs from that of a steak knife in the degree of sharpness required for functional excellence. 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 vicious) items are implements such as hammers, knives, and spoons; institutions such as schools, universities, and the legal institutions that comprise the "rule of law";[32] professionals such as doctors, lawyers, and professors; and *arguments*, which are the central focus of the LM.

E.   *Mode-Dependent vs. Mode-Independent Virtues and Vices of Arguments*

There are various kinds of purpose one might have for arguments, and those purposes guide our judgments about what is virtuous, that is, what is functionally excellent in arguments.[33] The LM focuses on *two types of virtue of argument*, "mode-independent" and "mode-dependent." The reference in these terms to "mode" is to the "mode of logical inference" of an argument. *Mode-independent*

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[31] *See* ARISTOTLE, NICOMACHEAN ETHICS 18 (Terence Irwin trans., Hackett Publ'g Co. 2d ed. 1999) (c. 384 B.C.E.).

[32] *See* JOSEPH RAZ, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 226 (2d ed. 2009).

[33] Trenchantly, my law school professor (and Gary's too) Arthur Allen Leff captures the basic point of functional excellence in his article *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 466 (1974) ("[Y]ou can't know that a thing is not being done well until you know what it is that is being done."); *id.* at 467 ("[Y]ou can't know something is ill-done unless you *assume* an aim other than the one achieved . . . .").

virtues are virtues or vices (note that for every reference to virtue there is a corresponding conceptual antonym, "vice") that are properties of any argument in any logical form—deduction, induction, analogy, or inference to the best explanation.

Mode-dependent virtues are virtues that are properties that pertain to one of the specific modes of logical inference (logical forms)—deduction, induction, analogy, or inference to the best explanation. The articulation of the mode-dependent virtues requires a level of detail that is beyond my present purpose. Suffice it to say here that, for example, the *characteristic*, that is, mode-dependent virtue, of a deductive argument is the property of validity, defined as the property of an argument such that whenever all the premises are true, the conclusion must be true.[34]

F.   *Three Mode-Independent Virtues of Arguments*

More to my present point in dialogue (and dialectical competition) with Gary's proof theory of argument are the three *mode-independent* virtues of arguments that the LM identifies and articulates.

1.   Internal (or Inferential or Epistemic) Virtue

Because virtue and vice are, as noted, functional excellences, the virtues and vices of arguments are tied to the function and purpose of argument as a *tool*. Arguers seek to do different kinds of things with arguments, and the LM focuses on three of these goal-purpose-functions for argument. They sometimes seek to make arguments that are *internally* strong (or, synonymously in my use, *epistemically* or *inferentially* strong). That is, they seek to make arguments in which, if the premises are true or otherwise warranted (for example, probabilistically), they provide good reason for inferring or believing that the conclusion is true or otherwise warranted. As noted, the strongest possible internal strength an argument can have is found in valid deductive argument; whenever all the premises are true, the conclusion must be true (cannot conceivably be false).

2.   Dialectical Virtue

Sometimes arguers seek to make arguments that are strong in competition with other arguments. Arguments that are strong in this way are said to be *dialectically virtuous*. Dialectical competitions of arguments can take place *within* an arguer ("internal dialectical competition"), as for example Descartes's

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[34] See WEINSTEIN ET AL., *supra* note 29, at 123-38, for a summary statement of the mode-dependent virtues of all four modes of inference.

Meditations[35] and Wittgenstein's *Philosophical Investigations*.[36] It can also take place between or among arguers ("external dialectical competition"), of which the arguments of plaintiffs or prosecutors and defendants, or majorities and dissents in multi-member courts are paradigm examples.[37] In legal dialectical competitions, many of the most influential rules of competition of arguments come from rules of evidence and procedure, first among which are burdens (that is, presumption rules) of production and persuasion. One of the most philosophically significant examples of dialectical competition is found in *arguments about what is true*. Thus, the "external" dialectical strength of an argument—*its arguably accurate version of the world*—is a counterpart to the "internal" strength of an argument.[38] (For example, the counterpart to the difference between *valid* and *sound* deductive arguments.)

3.   Rhetorical Virtue

Sometimes arguers seek to make arguments that are strong in their capacity to persuade a chosen target audience. An argument that achieves this goal-purpose has *rhetorical virtue*.[39]

G.   *Independence of the Three Mode-Independent Virtues*

The three virtues—internal strength, dialectical strength, and rhetorical strength—are both intensionally (conceptually) and extensionally (empirically) independent of one another. This point was central to Plato's Socrates suggestion

[35] RENE DESCARTES, *Meditations on First Philosophy*, *in* PHILOSOPHICAL WRITINGS 161 (Norman Kemp Smith trans., 1958).

[36] LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans., 10th prtg. 1980).

[37] A powerful and influential abstract model for dialectical competition of argument in artificial intelligence argumentation theory is the pioneering paper by Phan Minh Dung, *On the Acceptability of Arguments and Its Fundamental Role in Nonmonotonic Reasoning, Logic Programming and n-Person Games*, 77 ARTIFICIAL INTELLIGENCE 321 (1995).

[38] For a fascinating discussion, though not in these terms, of legal dialectical competitions over claims about factual truth, see LAURA FELTON ROSULEK, DUELING DISCOURSES: THE CONSTRUCTION OF REALITY IN CLOSING ARGUMENTS 8-12 (Roger W. Shuy ed., 2015).

[39] One person's great dissent might well be another's pathetic diatribe (I note, *agonophilically*), but one might still cite for example Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896), which lost its dialectical competition but came eventually (arguably) to display rhetorical virtue as reflected in *Brown v. Board of Education*, 347 U.S. 483 (1954). *See* Plessy v. Ferguson, 163 U.S. at 559, 562 (Harlan, J., dissenting) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved . . . If evils will result from the commingling of the two races upon public highways established for the benefit of all, they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race.").

that the Sophists, the first lawyers and law professors of the West, masters of rhetoric, had the skill of "making the weaker argument appear to be the stronger."[40] The one exception to this independence is the case in which there is a formal dialectical competition of arguments, governed by an official referee. The referee of a given formal dialectical competition (e.g., judge, judge and jury, or electorate) must be *persuaded* to accept a dialectical competitor's abduction (e.g., a litigant's legal abduction). In that way, an argument must be rhetorically strong with the referee as target audience, and it will thereby be dialectically strong, declared by the referee to be the winner of the dialectical competition. Despite this exception, constitutional law offers many examples of "great dissents" by Supreme Court Justices that, perforce (by being dissents) have lost the dialectical competition of inferences to the best legal explanation with the majority, and yet have been rhetorically virtuous with regard to later target audiences.

H. *Logocratic Method Explanation of Argument Compared to Gary's Explanation of Proof*

From a Logocratic point of view, Gary's theory of argument, and the LM, are offerings of the mode of argument known as inference to the best explanation or, synonymously (for my purposes here) and more tidily, *abduction*. Abduction is an inference to an explanation, that is, an argument (a set of premises that is or could be offered to support a set of conclusions) whose conclusion is an explanation of some phenomenon that the arguer believes is in need of explanation. Gary offers a philosophical abduction (inference to the best philosophical explanation) of the *concept of proof* and applies it to the "law-fact" language of legislation, regulation, and judicial decision. The LM offers a philosophical abduction of the nature of argument and of three principal uses (and corresponding virtues as functional excellences, or vices as lack thereof). An overarching question that emerges for my comparison and contrast with Gary's theory of proof is whether his philosophical explanation of the concept of proof adequately accounts for the fact (so I claim) that all proof is proof in *argument*? I have reason to doubt this.

First, like perhaps too many theorists of argument, Gary does not seem to recognize all four modes of logical inference; he recognizes, as far as I can tell, only deduction and induction.[41] If all proof is achieved by argument, and there are four modes of argument—as the LM explains there are—then a theory that does not recognize all four is explanatorily deficient in that important way. There

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[40] *See* PLATO, APOLOGY OF SOCRATES 18b, 19c (Michael C. Stokes ed. & trans., Aris & Phillips Ltd. 1997) (c. 399 B.C.E.).

[41] *See* LAWSON, *supra* note 1, at 28 ("The broad outline—not the particulars, but the broad outline—of the law's framework for proof of adjudicative facts is universalizable. I can think of no way to demonstrate this point either deductively or inductively."). The word "analogy" appears thrice in the book, but not specifically as attributed to arguments. Neither "abduction" nor "inference to the best explanation" seem to appear at all.

are in his book many references to 'argument' (and cognates) but very few, or none, on *the mode-dependent and mode-independent virtues of argument*, neither (of course) in those terms nor, as far as I can see, in any other terms. In this way his allegedly universal (philosophically high-ambitious), *see supra* Part I) theory of what constitutes *good* proof seems to miss the crucial explanatory point that, in Logocratic terms, *virtuous, functionally excellent* proof can be assessed only relative to the mode-independent virtue sought: arguments that are internally strong, or dialectically strong, or rhetorically strong.

VI. AGONOPHILIA AND AGONOPHOBIA IN THEORIES OF ARGUMENT: IS GARY'S THEORY AGONOPHOBIC?

I close by offering this final characterization to—and friendly dialectical combat with—Gary's theory of proof. A dialectical competition of arguments is an "agony" (from Greek *agon*, ἀγών, "contest"). There is deep explanatory value of recognizing the operation of argument competitions, and dialectical strength or weakness, in many domains of argument, including—very notably for us—in the domain (arena!) of law. Does Gary's philosophical explanation of proof get the benefit of this explanatory value or suffer the detriment of failing to recognize the explanatory value of dialectical competition for the explication of the concept of proof? Gary's proof theory seems to focus only on the internal virtues of argument, thereby weakening the explanatory power of his philosophical explanation of the concept of proof. That is, it seems to suffer *as an explanation of the concept of proof* from too little focus on the dynamics of argument, and specifically on the two types of virtue (mode-dependent and mode-independent). In a word, his theory suffers from "agonophobia."

There are three types of "agonophilia" and "agonophobia": *conceptual, instrumental,* and *stylistic*. Each type has its conceptual antonym: conceptual, instrumental, and stylistic *agonophobia. Conceptual* agonophilia uses the fact of some kind of contest to explicate a concept. *Instrumental* agonophilia values contest as an instrument for achieving some goal—for example, the adversarial system seeks to use contest (allegedly) to produce factual truth in litigation. Hearsay restrictive rules are also designed to produce factually accurate trial outcomes in light of the four so-called testimonial infirmities. *Stylistic* agonophilia is a sharp confrontational style of writing, speaking, and arguing (such as was characteristic of Gary's former boss Justice Antonin Scalia).[42]

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[42] As recounted in CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS (8th ed. 2015), when

> [a]sked in 2013 why he writes such sharp dissents, Scalia replied that he writes them for law students: "They will read dissents that are breezy and have some thrust to them." The clarity and vigor of Scalia's opinions call to mind Nietzsche's comment that "it is not the least charm of a theory that it is refutable" (then it "attracts more subtle minds"): Scalia opinions definitely have charm, and they definitely draw attacks in the academy and in popular media (you can judge for yourself whether the attackers have "more subtle

(There is an obvious overlap among these three types of agonophilia, with instrumental playing some role in the other two, though it is still useful to identify them as separate categories.)

I am particularly interested here in conceptual agonophilia, use of the fact of some kind of contest to explicate a concept. What kind of contest will depend on the concept at issue. In jurisprudence, for example, conceptual agonophilia uses the fact that law is a product of conflict and contest as an effort to offer the best philosophical explanation of the concept of law. For example, Wesley Hohfeld's philosophical abduction of the deontic logic of rights[43] is deeply conceptually agonophilic. Even more pertinently for my purpose here, the philosopher and theorist of argument Stephen Toulmin is conceptually agonophilic in his explication of the *concept of argument*, and he is worth a sizeable quotation on this very point:

> [T]o break the power of old models and analogies, we can provide ourselves with a new one. Logic is concerned with the soundness of the claims we make—with the solidity of the grounds we produce to support them, the firmness of the backing we provide for them—or, to change the metaphor, with the sort of *case* we present in defence of our claims. The legal analogy implied in this last way of putting the point can for once be a real help. So let us forget about psychology, sociology, technology and mathematics, ignore the echoes of structural engineering and *collage* in the words 'grounds' and 'backing', and take as our model the discipline of jurisprudence. Logic (we may say) is generalised jurisprudence. Arguments can be compared with law-suits, and the claims we make and argue for in extra-legal contexts with claims made in the courts, while the cases we present in making good each kind of claim can be compared with each other. A main task of jurisprudence is to characterise the essentials of the legal process: the procedures by which claims-at-law are put forward, disputed and determined, and the categories in terms of which this is done. Our own inquiry is a parallel one: we shall aim, in a similar way, to characterise what may be called 'the rational process', the procedures and categories by using which claims-in-general can be argued for and settled. . . .
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>   Indeed, one may ask, is this really an analogy at all? When we have seen how far the parallels between the two studies can be pressed, we may feel that the term 'analogy' is too weak, and the term 'metaphor' positively misleading: even, that law-suits are just a special kind of rational dispute, for which the procedures and rules of argument have hardened into

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minds").

Id. 388-89 (citation omitted).

[43] *See, e.g.*, Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 32 (1913) (articulating concept of rights that is connected to duty, such that when individual has right over property, duty is attached to those who do not hold that right).

institutions. Certainly it is no surprise to find a professor of jurisprudence taking up, as problems in his own subject, questions familiar to us from treatises on logic—questions, for instance, about causation—and for Aristotle, as an Athenian, the gap between arguments in the courts and arguments in the Lyceum or Agora would have seemed even slighter than it does for us.[44]

The LM is conceptually and instrumentally (and, in my happier moments, stylistically) agonophilic. A theory of argument, including Gary's theory of proof, that does not make a recognition of contest sufficiently salient to recognize dialectical and rhetorical virtues of argumentative proofs, seems to me to be, in that way, and at least to that extent, conceptually agonophobic, and therefore to suffer from a failure of explanatory adequacy. The good news is that Gary's treatment of proof actually teaches us a good deal about the dialectical competitions of legal arguments regarding both fact and law, especially since, as noted, burdens of proof and legal principles of closure are such important parts of the rules of legal dialectical competition. So, in friendliest competition, I invite Gary to tap the explanatory energy of the LM and stroll with me in the Kingdom of Logocratic Agonophilia.

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[44] STEPHEN E. TOULMIN, THE USES OF ARGUMENT 7 (rev. ed. 2003).