

fact, neither is conditionally relevant upon the other, unless the probability of one of them is 0.0. Assume that the probability of authority is not 0.0. In that case, any evidence that affects the probability of offer and acceptance obviously may affect the outcome of the case. By making the probability of offer and acceptance higher or lower, the probability of which one of the parties will ultimately prevail is changed, which obviously means the evidence is relevant. Holding the probability of authority constant, if the probability of offer and acceptance increases, then the probability of finding a valid contract increases, and the reverse is true as well. Consequently, evidence of offer and acceptance is in no fashion dependent upon evidence of authority, and thus the received wisdom on conditional relevancy is wrong.

The only qualification that Professor Ball felt it necessary to express to his thesis occurs if the probability of any element is 0.0. In that case, evidence on other elements is conditionally relevant on proof of the element whose probability is 0.0. Why? Because proof of offer and acceptance is of no consequence whatsoever if the probability of authority is 0.0. If the probability of authority is 0.0, a directed verdict of no contract must be entered, no matter what the evidence of offer and acceptance is. This is, to be sure, a case of conditional relevancy, but it is also a case in which the concept is insignificant because the judge will always direct a verdict for insufficiency of evidence. Thus, the only case in which the doctrine of conditional relevancy can operate is, ironically, a case in which it is of no consequence.

...

No evidence is simply relevant in its own right. Evidence is relevant only because there is an intermediate premise or set of premises that connects the evidence to some proposition involved in the litigation.¹⁶ But if determining the relevance of evidence always requires relying on some intermediate premise, no distinction can be drawn between relevancy and conditional relevancy.

Allen, *Op. Cit.* 872–73, 877 (footnotes omitted).

2. EVIDENT VIRTUE: CONCEPTS AND PROCEDURES OF THE LOGOCRATIC METHOD

A. THE TERM ‘LOGOCRATIC’¹ AND THE BASIC UTILITY OF THE LOGOCRATIC METHOD FOR THE EVIDENCE ANALYST

We here introduce a method of analysis of evidence rules, principles, and institutions that many students of evidence (including law students, lawyers, and judges, in the U.S. and Europe) have found useful. The method is called the “Logocratic Method,” a systematic, precise method for assessing the virtues (and

¹ In this Chapter we follow a convention among philosophers of using single-quotation marks to name a word or phrase placed within matching marks. Thus, for example, ‘Harvard’ is the name of a university (here, the word ‘Harvard’ is *mentioned*), while Harvard is a university (here, the word ‘Harvard’ is *used*). Double quotation marks used to mark a quotation of what some person or group has said or might say are used in the standard way.

vices) of arguments, whether one's own or others', including those of judges and lawyers and moot court competitors. (The Greek term *λογος* [*logos*] means, among other meanings, 'argument' and the term *κρατος* [*kratos*] means 'strength'—compare the word 'democracy', the strength of the *demos*.) The Logocratic Method takes *virtue* seriously—the virtues of arguments of the kind that judges, lawyers, law students, and other legal analysts make. An argument's strength can be one of its virtues, weakness, one of its vices. Because the rules of relevance introduced above are so fundamentally a part, overtly or covertly, of arguments in evidence law, this Relevance chapter is an appropriate place to introduce this rigorous method for assessing the virtues of evidentiary arguments.

We will in this and some other chapters use this method to help explain and analyze cases and the evidence rules and arguments that those cases deploy. Chapter 2, new to this (tenth) edition, is wholly devoted to a more detailed look at the Logocratic Method and its application to the analysis of evidence rules, arguments, and doctrines. Whether or not one learns the details (and logic) of this method of evaluating and creating evidentiary arguments, the framework of the Logocratic Method also provides a system of explanation of the nature of arguments with evidence that is independently valuable for the evidence student, evidence jurist, and lawyer for the clarity of understanding it can bring.

Although the Logocratic Method is applicable to any type of argument, we present it here with a focus on the Logocratic framework for assessing the virtuous strengths and vicious (characterized by or pertaining to vice) weaknesses of *evidentiary legal arguments*, arguments offered in litigation in which evidentiary propositions are proffered to support hypotheses. The focus is on American law, but the Logocratic analysis offered here can be (and has been) applied to handle evidentiary arguments in other systems of litigation.

For any legal system that aspires to have an adjudicative fact-finding process that is sufficiently reliable to meet the requirements of justice (see Fed.R.Evid. 102: "These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."), we may fashion an analogue for the Socratic maxim "the unexamined life is not worth living": *the unexamined evidentiary argument is not worth believing*. The Logocratic Method seeks to help the evidence analyst pursue that Socratic mission, tailored to the rules and institutions of evidence law.

B. USING KNAPP V. STATE TO SHOW THE LOGOCRATIC METHOD AT WORK

To help explain the motivation for and operation of the Logocratic Method, and the reason for including a presentation of it in this book and Chapter, we present an analysis of a deeply illuminating case from the Supreme Court of Indiana, *Knapp v. State*, 79 N.E. 1076 (Ind. 1907). We shall use the example of *Knapp* to present and explain basic features of the Logocratic Method that are of perhaps greatest and most immediate use to the evidence analyst, especially the idea that *evidence is argument* and thus that the evaluation of evidential claims necessarily involves evaluations of the virtuous strengths and vicious weaknesses of arguments.

In *Knapp*, the defendant Knapp had been convicted of first-degree murder for killing a local marshal. In the portion of the opinion that interests us, the court considers the defendant's claim that it was an error for the trial judge to have admitted testimony by one of the prosecution's witnesses, because the testimony was not *logically relevant* (under the state version of the rules for logical relevance—compare Fed.R.Evid. 401, quoted above). Here is the relevant portion of the opinion:

Knapp v. State

Supreme Court of Indiana, 1907.
168 Ind. 153, 79 N.E. 1076.

■ GILLETT, J.

Appellant appeals from a judgment in the above-entitled cause, under which he stands convicted of murder in the first degree. Error is assigned on the overruling of a motion for new trial.

Appellant, as a witness in his own behalf, offered testimony tending to show a killing in self-defense. He afterwards testified, presumably for the purpose of showing that he had reason to fear the deceased, that before the killing he had heard that the deceased, who was the marshal of Hagerstown, had clubbed and seriously injured an old man in arresting him, and that he died a short time afterwards. On appellant being asked, on cross-examination, who told him this, he answered: "Some people around Hagerstown there. I can't say as to who it was now." The state was permitted, on rebuttal, to prove by a physician, over the objection and exception of the defense, that the old man died of senility and alcoholism, and that there were no bruises or marks on his person. Counsel for appellant contend that it was error to admit this testimony; that the question was as to whether he had, in fact, heard the story, and not as to its truth or falsity. While it is laid down in the books that there must be an open and visible connection between the fact under inquiry and the evidence by which it is sought to be established, yet the connection thus required is in the logical processes only, for to require an actual connection between the two facts would be to exclude all presumptive evidence. Best on Evidence (Morgan's Ed.) § 90. Within settled rules, the competency of testimony depends largely upon its tendency to persuade the judgment. 1 Bentham, Rationale Judicial Ev., 71, et seq.; Chicago, etc., R. Co. v. Pritchard (Ind. Sup.) 79 N. E. 508. As said by Wharton: "Relevancy is that which conduces to the proof of a pertinent hypothesis." 1 Wharton, Ev. § 20. In *Stevenson v. Stuart*, 11 Pa. 307, it was said: "The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend in a slight degree to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth." See, also, *Trull v. True*, 33 Me. 367; *State v. Burpee*, 65 Vt. 1, 25 Atl. 964, 19 L. R. A. 145, 36 Am. St. Rep. 775; *Brown v. Clark*, 14 Pa. 469; *Wells v. Fairbank*, 5 Tex. 582; *Holmes v. Goldsmith*, 147 U. S. 150, 13 Sup. Ct. 288, 37 L. Ed. 118.

We are of opinion that the testimony referred to was competent. While appellant's counsel are correct in their assertion that the question was whether appellant had heard a story to the effect that the deceased had offered serious violence to the old man, yet it does not follow that the testimony complained of did not tend to negative the claim of appellant as to what he had heard. One of the first

principles of human nature is the impulse to speak the truth. “This principle,” says Dr. Reid, whom Professor Greenleaf quotes at length in his work on Evidence (volume 1, § 7n), “has a powerful operation, even in the greatest liars; for where they lie once they speak truth 100 times.” Truth speaking preponderating, it follows that to show that there was no basis in fact for the statement appellant claims to have heard had a tendency to make it less probable that his testimony on this point was true. Indeed, since this court has not, in cases where self-defense is asserted as a justification for homicide, confined the evidence concerning the deceased to character evidence, we do not perceive how, without the possibility of a gross perversion of right, the state could be denied the opportunity to meet in the manner indicated the evidence of the defendant as to what he had heard, where he, cunningly perhaps, denies that he can remember who gave him the information. The fact proved by the state tended to discredit appellant, since it showed that somewhere between the fact and the testimony there was a person who was not a truth speaker, and, appellant being unable to point to his informant, it must at least be said that the testimony complained of had a tendency to render his claim as to what he had heard less probable. . . .

C. WHAT EXACTLY IS EVIDENCE?

(1) OPENING QUESTIONS ABOUT THE NATURE OF EVIDENCE

The **proponent** of an item of evidence is the person proffering the evidence and seeking to have it admitted for consideration by the fact-finder. The **opponent** of an item of evidence is the person seeking to exclude the opposing party’s proffered evidence from consideration by the fact-finder. In *Knapp* the prosecutor was the proponent and defendant Knapp was the opponent. The disputed item of evidence was testimonial evidence by a physician regarding how an old man (who apparently had been identified in the trial proceedings) had died. The prosecutor proffered this testimony in the context of defendant Knapp’s argument for self-defense, in which the defendant claimed that he had heard—from whom, he could not say—that his victim (the marshal whom he had shot and killed) had beaten this old man to death. The prosecutor sought to have the physician testify that the old man had died from senility and alcoholism and that there were no bruises or marks on his person when he died. The evidence was deemed relevant, and admissible, by the trial judge, and that ruling was on appeal in the *Knapp* case.

So one disputed item of evidence in *Knapp* was testimonial evidence by the prosecution witness. But what exactly is evidence? As a philosopher might put this question, what is the *ontology* of evidence—what kind of entity is it? Is it a *thing*, an object like a knife or a fingerprint or a blood sample or a bloody glove? Is it an *action*, such as running away from the scene of a crime (see, e.g., *Allen v. United States*, 164 U.S. 492, 499 (1896) (flight by the accused is competent evidence having a tendency to establish guilt))? Is it all of these, none of these? Here we can learn from *Knapp*. Consider this passage from the opinion:

The state was permitted, on rebuttal, to prove by a physician, over the objection and exception of the defense, that the old man died of senility and

alcoholism, and that there were no bruises or marks on his person. Counsel for appellant contend that it was error to admit this testimony.

Clearly the prosecutor sought to use the physician's testimony as evidence. How is it that the physician's testimony could be *evidence* at all? What might *Knapp* teach us as we seek to answer this question?

When evidence enters the process of *reasoning*—it is *propositional* and *argumental*. The *Knapp* prosecutor calls the physician as a witness to provide testimonial evidence that is in a condensed form of *argument*. We can fairly represent this argument, in the abbreviated form in which it likely occurs to the prosecutor and judge, as follows:

evidentiary proposition ϵ:	<i>the physician testified that the old man died of senility and alcoholism and that there were no bruises or marks on his person when he died</i>
hypothesis h:	the old man died of senility and alcoholism and there were no bruises or marks on his person when he died

The prosecutor claimed (in effect) that the evidentiary proposition ϵ *provides a good reason for the factfinder to infer* that the conclusion, hypothesis h, is true (or sufficiently likely to be true to be believed). This simple example illustrates something deep and important about the concept of evidence itself, namely, ***evidence is argument***. Thus we may frame the **argument conception of evidence**.

(2) ARGUMENT, AND THE ARGUMENT CONCEPTION OF EVIDENCE

Two basic claims comprise the argument conception of evidence. First, all argument consists of sets of propositions that stand in a particular relation. Second, all evidence is argument.

Let's consider the first claim. In explaining the concept of "relevancy" in evidence law—the subject of this chapter—jurist George F. James, says:

Relevancy, as the word itself indicates, is not an inherent characteristic of any item of evidence but exists as a relation between an item of evidence and a proposition sought to be proved.

James, *Probability and the Law*, 29 Cal. L. Rev. 689 (1941). Following James (and slightly adapting his point for our purposes), we will find it useful to speak about evidence as a *relation* between two kinds of propositions:

(i) an *evidentiary proposition*, which we will label ' ϵ_i ' (the subscript ' i ' indicates some number in a series, because not infrequently more than one item of evidence will be at issue in evidence litigation)

and

(ii) a *hypothesis proposition* ('hypothesis' for short) for which evidentiary propositions are offered, which we will label ' h_i '

In order to make arguments about evidence we must, as it were, *convert objects and events into propositions*. Thus, one might say:

- (1) “The knife found at the scene of the crime that had the defendant’s fingerprints on it is evidence that the defendant stabbed the victim.”

Proposition (1) suggests that there is a *relation* between an *object* (the knife with the defendant’s fingerprints on it) and a *proposition* (the defendant stabbed the victim), namely, that the *object* is related to the *proposition* by being evidence for the truth of the proposition. James, in the quotation above, speaks this way. There’s nothing wrong with that way of speaking. But when judges and lawyers claim that some object (e.g., a knife with fingerprints) or an action or event (e.g., 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 “propositionalizing” the object or action or event. That is, they are claiming that *the fact that* the knife found at the scene of the crime had the defendant’s fingerprints on it is evidence for the hypothesis that the defendant committed the stabbing. And *facts* are propositions.

Thus, we would represent proposition (1), in our Logocratic framework, as

- ϵ_1 The knife found at the scene of the crime had the defendant’s fingerprints on it
- h_1 The defendant committed the crime

In *Knapp*, the contested item of evidence was testimony. The prosecutor offered the testimony of the doctor (evidentiary proposition ϵ_1) as evidence that what the doctor stated (hypothesis h_1) was true.

Let’s now bring in a definition of the term ‘argument’ that can help us deepen our observation that evidence is argumental. An argument is a *relation* between two sets of propositions. One set is called ‘premises’. We may label the whole set of premise propositions ‘E’ and we may label each individual premise $\epsilon_1, \epsilon_2, \epsilon_3, \dots \epsilon_n$. The other set is called ‘conclusions’. We may label the whole set of conclusion propositions ‘H’, and we may label each individual conclusion $h_1, h_2, h_3, \dots h_n$. The relation that the premise-set E stands in toward the conclusion-set H is the relation *is offered to, or can be taken to, provide warrant for*. We can describe the type of support that premises are offered to provide for conclusions in two ways. One is that the premises provide *inferential support* for the conclusion. Here we say that if the premises are true (or otherwise warranted), they provide support for *inferring the conclusion*. Another way to describe this support is that the premises provide *epistemic support* for the conclusion. Here we say that if the premises are *believed*, they provide support for *believing* the conclusion.

There is thus a deep conceptual connection between the concept of evidence and the concept of argument. There is what we may call a chiasmic relation² between evidence and argument: just as all evidence involves argument, so also all argument involves evidence. For logic itself is the study of the different modes of logical inference that different kinds of arguments display, and an argument’s *mode of*

² Chiasmus is a trope with the pattern



as in the quip, “In every generation there are both more neurons and new morons.” If one connects with a straight line the A term (phoneme “mor-”) with the B term (phoneme “new”) the result is an “X” shape, Greek letter Chi, hence “chiasmus,” “X-ness.”

logical inference (or, synonymously, its *logical form*) is *the evidential relation between the argument's premises and its conclusion*.³

Let's use *Knapp* to illustrate this relation of evidence and logic. One of Justice Gillett's arguments may be fairly represented as an application of the rule for logical relevance (in a style not uncommon for common law writing of the time, the Justice presents a few different versions of the rule for relevance, of which this is one; compare Fed.R.Evid. 401, quoted above):

ε_1 "Relevancy is that which conduces to the proof of a pertinent hypothesis."

ε_2 Testimony by prosecution witness physician "conduces to the proof of a pertinent hypothesis"

therefore

h: Testimony by prosecution witness physician is relevant.

In the Logocratic Method we label the premises of an argument with ' $\varepsilon_1, \varepsilon_2, \dots, \varepsilon_n$ ' precisely to let the symbol ' ε ' mark the fact that *the premises of any argument are evidence for the conclusion of the argument*. Why? Because, as we have defined 'argument', the premises of an argument provide inferential (or epistemic) support for the conclusion. If one believes that premises ε_1 and ε_2 are true (or otherwise warranted), then one has good reason to infer (or to believe) the conclusion h is true (or otherwise warranted) as well.

D. ARGUMENTS AND RULES IN THEIR NATURAL (NON-FORMAL) HABITATS: THE ENTHYMEME

Logocratic analysis is designed to handle a familiar problem in the evaluation of non-formal legal arguments ("non-formal" in the sense that judges, lawyers, and other legal arguers most often do not present their arguments, and the rules on which their arguments are based, with the arguments' and rules' full logical structure made explicit): they are most often *enthymematic*. Generally, an enthymeme is a *sentence* (including rules) or a *set of sentences* (the set may have one or more members) whose *logical structure* is not *explicit*.⁴ More specifically, we may say that an *enthymeme* is any rule or argument whose logical form is not explicit in its "natural habitat"—that is, in its original mode of presentation, for example, in a judicial opinion, a lawyer's brief, a regulation, or a statute.

We identify two types of enthymeme, the *rule-enthymeme* and the *argument-enthymeme*. *Knapp* again provides illustrations of both types.

(1) RULE ENTHYMEME IN *KNAPP*

Recall that one version of the rule for relevancy that Justice Gillett offered was in this passage:

³ See also B. Skyrms, *Choice & Chance* 4 (1966) ("Logic is the study of the strength of the evidential link between the premises and conclusions of arguments.").

⁴ We distinguish *sentences*, which are grammatical units in natural languages like English, French, Urdu, and Sanskrit, from *propositions*, which are abstract entities. Thus, the Latin *sentence* 'Gallia est omnis divisa in partes tres', is translated by the English *sentence* 'All Gaul is divided into three parts', but it could also be translated into the French sentence 'Tout Gaule est divisée en trois parties', and so on. The sentences in all those languages are natural language versions of the same *proposition*.

As said by Wharton: “Relevancy is that which conduces to the proof of a pertinent hypothesis.”

Clearly the justice is intending to quote, endorse, and apply this rule to his case. But, from a logical point of view, a rule has a *conditional* structure, either that of a *monoconditional* (usually referred to more simply as a “conditional”), as in

If [such and such] then [so and so]

or as a *biconditional*, as in

[such and such] if and only if [so and so]

In his written opinion, Justice Gillett does not explicitly present the rule for relevance in a way that makes its logical structure explicit. (Nor, by the way, do legal rules tend to appear with their logical form explicit, even in statutes and regulations.⁵ Such rules have a canonical form—that is, a fixed form of words—but this canonical form is distinct from *logical form*.) We can, however, make a fair *interpretive* judgment in this context, and *represent* the rule Justice Gillett states in in a way that makes its logical form explicit. Using a simple logical tool (from the grammar of what is called “propositional deductive logic”), we might represent the rule in this way:

evidence is relevant **if and only if** evidence conduces to the proof of a pertinent hypothesis

We have reason in context to interpret Justice Gillett’s statement of the rule as a biconditional, because he seems to offer a *definition* of relevance (note his phrasing suggesting identity, “Relevancy is that which conduces to the proof of a pertinent hypothesis”), and the logical form of definition is that of a biconditional, as in “A person is a bachelor if and only if the person is an unmarried adult male.”⁶

⁵ It is interesting to note that the most recent version of the Fed.R.Evid. contains a great many changes from the previous versions of the rules that the rule drafters call “merely stylistic.” Many of those stylistic changes are actually changes that make clearer the logical structures of the rules. Compare, e.g., the current version of Fed.R.Evid. 401 (“Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”) with the previous version (“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.)

⁶ Here is further explanation of the distinction between monoconditionals and biconditionals. All rules (legal, logical, and otherwise) have a conditional structure, and some are best represented as monoconditionals, others as biconditionals. Compare, for example, ε_1 and ε_2 :

ε_1 if the evidence is admissible, then the evidence is logically relevant.

[See FRE 401 and FRE 402, especially the sentence ‘Irrelevant evidence is not admissible.’]

In jurisdictions governed by the FRE, proposition ε_1 is true, while in the same jurisdictions proposition ε_2 (the so-called converse of ε_1) is false:

ε_2 if the evidence is logically relevant, then the evidence is admissible.

[See, e.g., FRE 403]

Both ε_1 and ε_2 are conditionals. If they were both true, then the biconditional ε_3 would be true:

ε_3 the evidence is logically relevant if and only if the evidence is admissible.

Contrast the falsity of ε_3 with the truth of ε_4 , the example from the text to this note:

ε_4 a person is a bachelor if and only if the person is an unmarried adult male.

It is very helpful for the legal analyst to note that sometimes a judge or lawyer states a rule-enthymeme that seems to have the structure of a conditional, but in the context in which the rule is stated is best represented as a biconditional. This is part of a larger phenomenon in the logic of legal argument referred to as the “sole sufficient condition rule,” which is a rule of *interpretation* (and whose legal counterpart is the rule of interpretation *expressio unius est exclusio alterius*). Putting the sole sufficient condition rule in formal logical terms, for any two propositions α and β , if α is a sufficient condition for β

To move from the rule-enthymeme to the fair formal representation of the rule in a way that makes explicit its logical form is to *rulify* the rule. Whether or not they think in these “Logocratic” terms (‘enthymeme’, ‘rulification’, etc.), *lawyers and judges who manipulate legal rules in arguments must identify the logical elements and logical structure of legal rules in order to apply those rules to fact patterns, whether actual or hypothetical*. The Logocratic Method makes explicit, conscious, and deliberative the manipulations and understandings of rules and arguments that legal analysts already have, to some extent, but with the hope and expectation that making these moves explicit can enhance both understanding of and skill at manipulating rules and arguments, in evidence and in law (and life) more generally.

(2) ARGUMENT-ENTHYMEME IN *KNAPP*, AND ITS “ARGUFICATION”

The other type of enthymeme that is the focus of Logocratic analysis is the *argument-enthymeme*, which is any argument whose logical form is not explicit in its original mode of presentation (in, for example, a lawyer’s brief, a judge’s opinion, a scholar’s article). In *Knapp*, the argument-enthymeme applies the rule on logical relevance and concludes that, under this rule, the prosecution witness’s testimony is relevant. We may fairly identify the argument-enthymeme as the entire second and third paragraphs of the opinion as quoted above. To “argufy” this argument-enthymeme is *to give a fair formal representation* in a way that makes explicit its logical form. Argufication is a process of *representation and interpretation* of the argument-enthymeme. The criteria used to give a fair formal representation are quite familiar to legal analysts. They are: (i) intent of the arguer, (ii) a principle of interpretive charity, and (iii) a hybrid of (i) supplemented by (ii).

A fair formal representation of Justice Gillett’s argument-enthymeme regarding the logical relevance of the prosecution witness’s testimonial evidence is as follows:

proposition (type and #)	Proposition	Justification for this step in the argument
Premise ε_1	Evidence is relevant if and only if evidence conduces to the proof of a pertinent hypothesis.	Given as authoritative rule of law
Premise ε_2	The defendant’s claim that he heard that the victim (of the defendant’s shooting) had beaten the old man to death is pertinent to the defendant’s affirmative defense of self-defense.	Given in the defendant’s brief
Premise ε_3	It is unlikely that people speak falsehoods.	Justice Gillett cites a treatise for this

and α is the sole sufficient condition for β , then α is also a necessary condition for β . This in turn means that while a rule-enthymeme might initially seem to be fairly formally represented as the conditional ‘If α then β ’, it actually, in context, is best represented as the biconditional ‘ α if and only if β ’. See Robert E. Rodes and Howard Pospesel, *Premises and Conclusions: Premises and Conclusions for Legal Analysis* 235–39 (1997). For discussion of the importance of this point for understanding the logic of legal argument, see Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument By Analogy*, 109 *Harv. L. Rev.* 923, nn. 215, 263 (1996); Brewer, *On the Possibility of Necessity in Legal Argument: A Dilemma for Holmes and Dewey*, 34 *J. Marshall L. Rev.* 9, nn. 18, 32 (2000).

		proposition about the relation between people’s assertions and the truth or falsity of those assertions
Premise ϵ_4	According to the prosecutor’s witness’s testimony, what the defendant claims to have heard (about how the old man died) is false.	Justice Gillett’s observation about what the defendant claims to have heard and what the prosecutor’s witness testifies
Conclusion h_1	The prosecutor’s witness’s testimony, if true or otherwise warranted, reduces the likelihood that the claim that the defendant makes (ϵ_2) is true.	Inference from propositions ϵ_3 and ϵ_4
Conclusion h_2	The prosecutor’s witness’s testimony conduces to the proof of a pertinent hypothesis.	Inference from propositions ϵ_1 and h_1
Conclusion h_3	The prosecutor’s witness’s testimony is relevant.	Inference from propositions ϵ_1 and h_2

(3) ENTHYMEME OF SPECIAL IMPORTANCE FOR EVIDENCE ANALYSTS: EVIDENTIARY ENTHYMEMES AND *UNDERLYING EVIDENTIAL CLAIMS*

We have discussed rule-enthymemes and argument-enthymemes, illustrating each from the *Knapp* case. One special type of argument-enthymeme is worth special treatment, because it has been found to be of great value for Evidence analysts who use the Logocratic Method. It is called the *evidentiary enthymeme*.

We may introduce this concept by observing that reasoners with evidence (whether legal doctrinal evidence or evidence in one of the innumerable other domains in which reasoning with evidence occurs) very often single out one item of “evidence” (and use that term) that is offered for and claimed to be linked to one specified hypothesis. Thus, reasoners with evidence might speak and reason about cloudy skies as evidence that it is likely to rain, about a statement in a newspaper as evidence for the truth of one or more propositions in the newspaper (this is a type of testimony), about the evidence of smoke as an indication of fire, about the evidence of a frown on a friend’s face as evidence of the friend’s disapproval or unhappiness. The reasons for this selective focus in evidentiary claims are likely related to the context in which an evidentiary judgment is made and reported.⁷

⁷ Computer scientist John R. Josephson argues for a claim that is closely related to the one we offer in the text:

When we conclude that data D is explained by hypothesis H, we say more than just that H is a cause of D in the case at hand. We conclude that among all the vast causal ancestry of D we will assign responsibility to H. Commonly, our reasons for focusing on H are pragmatic and connected rather directly with goals of producing, preventing, or repairing D. We blame the heart attack on the blood clot in the coronary artery or on the high-fat diet, depending on our interests. We can blame the disease on the invading organism, on the weakened immune system that permitted

As these examples indicate, we seem to tend to frame evidence as a relation between two individual propositions, one evidentiary proposition ('it is cloudy out') and one hypothesis proposition ('it is likely to rain'). It is not inaccurate to frame evidence this way, but it is importantly incomplete. And we can explain the incompleteness by asking—as we did of the *Knapp* prosecutor's testimonial evidence (see discussion above, pages 12–14—what do we think actually constitutes the *evidence* for the hypothesis in these and other instances of evidence and hypothesis?

The answer is twofold. First, we believe that the first proposition ('it is cloudy out') stands in the relation *is evidence for* the second proposition ('it is likely to rain'). But we have also observed that this relation "is evidence for" is a relation of *argument*, since an argument is defined as a premise set and a conclusion set such that the former stands in the relation *is offered to provide support for* to the latter.

Here is another way to think about the examples just presented. Each of these pairs of propositions is an *argument*, which we might represent in this way:

Argument 1

premise ε_1 the sky is cloudy

[therefore]

conclusion h_1 it will (or might) rain

Argument 2

premise ε_2 the newspaper states P [some proposition]

[therefore]

conclusion h_2 P is true

Argument 3

premise ε_3 there is smoke

[therefore]

conclusion h_3 somewhere in the vicinity of the smoke, there is fire

Argument 4

premise ε_4 my friend is frowning

[therefore]

conclusion h_4 my friend disapproves [or is unhappy, etc.]

the invasion, or on the wound that provided the route of entry into the body. I suggest that it comes down to this: the things that will satisfy us as accounting for D will depend on what we are trying to account for about D, and why we are interested in accounting for it; but the only things that count as candidates are plausible parts of the causal ancestry of D according to a desired type of causation.

John R. Josephson, Smart Inductive Generalizations are Abductions, in *Abduction and Induction Essays on their Relation and Integration* (P. Flach and A. Kakas eds., 2000) (emphases added).

Each of these pairs is what we may call an *underlying evidential claim*, and we have represented four such claims:

Underlying evidential claim that corresponds to Argument 1

The fact that the sky is cloudy is evidence that it will (or might) rain

Underlying evidential claim that corresponds to Argument 2

The fact that the newspaper states P is evidence that P is true

Underlying evidential claim that corresponds to Argument 3

The fact that there is smoke is evidence that somewhere in the vicinity of the smoke, there is fire

Underlying evidential claim that corresponds to Argument 4

The fact that my friend is frowning is evidence that my friend disapproves [or is unhappy, etc.]

As suggested above, we tend to frame statements about evidence in these relatively simple individual underlying evidential propositions, which are themselves, we may now observe, *a type of enthymeme*. More specifically, they are *argument-enthymemes*. This brings us to our second main point. What makes these *argument-enthymemes*, and not complete arguments, is that we usually judge that the evidentiary proposition (ε_1 , ε_2 , ε_3 , ε_4 in the examples above) *is evidence for the hypothesis* (h_1 , h_2 , h_3 , h_4 in the examples above, respectively) by virtue of additional propositions we have not explicitly stated, but which operate in the background of our reasoning (or, if we are not the proponents of the evidence, which the proponent of the evidence invites us to supply). Thus, in each of the four simple evidentiary enthymemes above, something like the following additional premises will very likely operate in the reasoning that is used or invited by the proponent of the evidence to help make the simpler evidentiary proposition provide evidential, argumental support for the conclusion.

Argument 1—argument-enthymeme “argufied” by supplying likely unstated but assumed premise, labeled here “ ε_0 ”

ε_0 cloudiness is (likely) a sign of rain

ε_1 the sky is cloudy

h_1 it is likely to rain

Argument 2—argument-enthymeme “argufied” by supplying likely unstated but assumed premise, labeled here “ ε_0 ”

ε_0 articles in this newspaper [or perhaps, articles by this reporter] are reliable

ε_2 the newspaper states P [some proposition]

h_2 P is likely true

Argument 3—argument-enthymeme “argufied” by supplying likely unstated but assumed premise, labeled here “ ε_0 ”

ε_0 smoke is a sign of fire in the vicinity of the smoke

ε_3 there is smoke

h_3 somewhere in the vicinity of the smoke, there is fire

Argument 4—argument-enthymeme “argufied” by supplying likely unstated but assumed premise, labeled here “ ϵ_0 ”

ϵ_0 a frown is a sign of disapproval [or unhappiness, etc.]

ϵ_4 my friend is frowning

h_4 my friend likely disapproves [or is unhappy, etc.]

It is hard to overstate the ubiquity of the operation of unstated premises in our informal reasonings about evidence,⁸ whether we ourselves are the proponents of evidence and are the ones who frame an evidentiary claim, or we are instead evaluators of evidential claims made by proponents other than ourselves, in which case we are invited to supply the unstated premises. Indeed, we may frame a proposition central to the Logocratic analysis of evidentiary claims and evidentiary arguments: *Every assertion that some evidentiary propositions $\epsilon_1 \dots \epsilon_n$ support some hypotheses propositions $h_1 \dots h_n$ relies on argument, either explicit (this is non-enthymematic evidence) or implicit (this is enthymematic evidence).*

Consider some additional examples of evidentiary enthymemes and the assumed or invited unstated propositions that operate to enable the explicit evidentiary proposition to provide evidential, argumental support for the hypothesis:

Solomonic evidentiary wisdom⁹

ϵ_0 [Only?] the natural mother of a baby would refuse to sacrifice the baby’s life instead of giving up possession of the baby

ϵ_1 woman A chooses not to have baby cut in two in a custody battle

h woman A is the natural mother

***Union Paint and Varnish Co. v. Dean, 137 A. 469 (R.I. 1927)*¹⁰**

ϵ_0 paint cans of the same brand, bought from the same store six months earlier, will likely have the same qualities of fitness

ϵ_1 paint can A, bought six months earlier from the store, had defective paint

h_1 paint can B (unopened), bought six months later, from the same store, had defective paint

⁸ A trenchant note in the Advisory Committee Note for FRE 201 makes this same basic point: [E]very case involves the use of hundreds or thousands of non-evidence facts. When a witness in an automobile accident case says “car,” everyone, judge and jury included, furnishes, from non-evidence sources within himself, the supplementing information that the “car” is an automobile, not a railroad car, that it is self-propelled, probably by an internal combustion engine, that it may be assumed to have four wheels with pneumatic rubber tires, and so on. The judicial process cannot construct every case from scratch, like Descartes creating a world based on the postulate Cogito, ergo sum.

⁹ See Old Testament, 1 Kings 3:16–28. For an interesting assessment of this evidentiary enthymeme, see LaRue, Solomon’s Judgment: a Short Essay on Proof, 3 Law, Probability and Risk 13 (2004).

¹⁰ This example is discussed in Chapter 6, below, and in James, Relevancy, Probability and the Law, 29 Cal. L. Rev. 689, 692 (1941).

Morgan's Love Letter

- ε₀ A person who loves the wife of another man has some motive to kill the other man¹¹
- ε₁ X wrote Y's wife a love letter
- h₁ X killed Y

Sherrod v. Berry, 856 F. 2d 802 (7th Cir. 1988)

- ε₀₋₁ A person who suddenly reaches into his coat while sitting in his car with two policemen pointing guns at the car is likely to have a weapon in his coat
- ε₀₋₂ A person who has no weapon is unlikely to reach suddenly into his coat while sitting in his car with two policemen pointing guns at the car
- ε₁ The search of the deceased (shot by the officer while the deceased was in the deceased's car) revealed that he had no weapon
- h₁ The officer "acted reasonably in the circumstances," namely, in self-defense

The last listed case, *Sherrod v. Berry*, is especially noteworthy for its illustration of the ways in which judges reason with evidentiary enthymemes. It also makes for a very interesting comparison and contrast to the reasoning of the judge in *Knapp*—central to the judges' arguments in both cases was the rule of logical relevance.

Sherrod was a § 1983 action brought by the father of a person shot and killed by a policeman while that policeman and his partner had weapons pointed at the victim and the other car car passenger. The defendant policeman argued that he behaved reasonably in the circumstances because, according to his testimony, the victim reached suddenly into his coat. This put the officer in reasonable fear for his life, so he shot and killed the person who allegedly reached into his coat. There are several detailed opinions in this en banc case, on appeal from a district court holding in favor of the § 1983-plaintiff. In Logocratic terms, the several opinions are in a *dialectical competition* of arguments, each of which has the logical form of an *inference to the best legal explanation*, which in turn relies in a deductive application of both Fed.R.Evid. 401 or 403, or both. See discussion in Chapter 2, section 1(D)(3). Of great interest for our discussion in this section is that the majority seems to have fashioned and argued one version of an unstated generalization in order to apply Fed.R.Evid. 401, while a dissenting judge's opinion fashions and argues for another, also while applying Fed.R.Evid. 401. The majority's version is this:

- ε₀₋₁ A person who suddenly reaches into his coat while sitting in his car with two policemen pointing guns at the car is likely to have a weapon in his coat

This judge's argument concludes that evidence that the person sitting in his car, whom the policeman shot and killed, in fact had no weapon had no *logical relevance* in the case, because the issue was whether the policeman acted with "objective reasonableness under the circumstances." Even if the person in custody had no

¹¹ This example is from is from E. Morgan, *Basic Problems of Evidence* 185–88 (1961). Morgan himself represents the argufied evidentiary enthymeme into a more complex series of linked arguments. See discussion in Brewer, *Logocratic Method and the Analysis of Arguments in Evidence, Logocratic Method and the Analysis of Arguments in Evidence*, 10 *Law, Probability and Risk*, 175, 198–201 (2011).

weapon, the officer still acted “objectively reasonably” in the face of the victim’s sudden reach into his jacket.

A dissenting opinion instead constructs and supplies a different proposition to complete the evidentiary enthymeme:

ε0-2 A person who has no weapon is unlikely to reach suddenly into his coat while sitting in his car with two policemen pointing guns at the car

This judge argued that in the face of the § 1983-plaintiff’s lawyer’s challenge *to the officer’s claim that the victim did make a sudden move into his coat*, the fact that he did not in fact have a weapon made it less likely *that the officer was telling the truth*, and that therefore evidence that the victim did not have a weapon was relevant under Fed.R.Evid. 401.

How would you complete the evidentiary enthymeme? Would you supply the version endorsed by the majority, or the version endorsed by the dissent? How would you decide which to choose, or would you fashion yet a different proposition to complete the enthymeme? Also, compare the reasoning of *Knapp* and the majority in *Sherrod*. Are they consistent in the way they supply premises for their respective evidentiary enthymemes?

3. RELEVANCY: ADDITIONAL ISSUES, EXAMPLES, AND METHODS OF ANALYSIS

People v. Adamson

Supreme Court of California, 1946.

27 Cal.2d 478, 165 P.2d 3, aff’d, 332 U.S. 46 (1947).

■ TRAYNOR, JUSTICE.

The body of Stella Blauvelt, a widow 64 years of age, was found on the floor of her Los Angeles apartment on July 25, 1944. The evidence indicated that she died on the afternoon of the preceding day. The body was found with the face upward covered with two bloodstained pillows. A lamp cord was wrapped tightly around the neck three times and tied in a knot. The medical testimony was that death was caused by strangulation. Bruises on the face and hands indicated that the deceased had been severely beaten before her death.

The defendant does not contend that the evidence does not justify a finding that murder in the first degree had been committed. Pen.Code, § 189. The sole contention of fact that he makes is that the evidence is not sufficient to identify him as the perpetrator. The strongest circumstance tending to so identify the defendant was the finding of six fingerprints, each identified by expert testimony as that of the defendant, spread over the surface of the inner door to the garbage compartment of the kitchen of the deceased’s apartment. See Wigmore, *Evidence*, 3d Ed., 389. After the murder, this door was found unhinged, leaning against the kitchen sink. Counsel for defendant questioned witnesses as to the possibility of defendant’s fingerprints being forged, but the record does not indicate that any evidence to that effect was uncovered. The theory of the prosecution was that the murderer gained his entrance through the garbage compartment, found the inner door thereof latched from the kitchen side, and forced the door from its hinges. It was established that defendant could have entered through the garbage compartment by having a man about his