All-out attack

TSHEPO BOGOSI MOSAKA
University of Nottingham
Tshepo.mosaka@nottingham.ac.uk

This paper is sceptical about the practical meaning of a "defensive" argumentative move in legal proceedings. In order to overcome the typical doctrinal and argumentative challenges that arise in legal argumentation, defensive moves ultimately manifest in attacking form; that is, by *undercutting* and *rebutting* the Proponent's case. Because both of these are here characterised as "attacking" moves, legal argumentation is conceived of as being an occasion of "all-out attack".

KEYWORDS: [Legal Argumentation, Burdens of Proof, Defensive arguments, Pragma-Dialectic, Forensic Proof]

1. INTRODUCTION

A football team that plays according to Johann Cruyff's (former Dutch footballer) philosophy of 'Total football" blurs the distinction between attacking and defensive moves in a football match. For example, in a team such as Barcelona, which was the classical test-case for Total football in the late 1980s and early 90s, both the defenders and attackers joined attacking moves. According to Winner, "the whole team thinks offensively" (Winner, 2012, p. 55). For players positioned in the rear part of the team, the goalkeeper had to have sufficient technical ability so that he or she could be an extra option to pass the ball to, the fullbacks had to overlap and join in the attack from the wings and the central defenders had to spread wider to allow the goalkeeper to be an option to pass the ball to.

Under these circumstances, one could say that there would be no need to defend if the team always has the ball and is in unrelenting attack. However, strictly speaking a team playing Total football did plenty of defending, albeit of a peculiar form. It would be absurd for a football coach to develop only an attacking plan for a match, let alone as a comprehensive football philosophy. This would be the unrealistic position of the gambler without an insurance policy or the gangster without a safe and exit plan. Rather, Total football brought into question

what it means to defend, whether there could be only one way of doing it and which was the most effective way. Cruyff's interpretation of what it means to defend effectively was similar to that of Sun Tzu:

> The good fighters of old first put themselves beyond the possibility of defeat, and then waited for an opportunity of defeating the enemy. To secure ourselves against defeat lies in our own hands, but the opportunity of defeating the enemy is provided by the enemy himself. Thus the good fighter is able to secure himself against defeat, but cannot make certain of defeating the enemy. Hence the saying: One may know how to conquer without being able to do it. Security against defeat implies defensive tactics; ability to defeat the enemy means taking the offensive. Standing on the defensive indicates insufficient strength; attacking, a superabundance of strength. The general who is skilled in defense hides in the most secret recesses of the earth; he who is skilled in attack flashes forth from the topmost heights of heaven. Thus on the one hand we have ability to protect ourselves; on the other, a victory that is complete (Tzu, 2000, p. 12).

This paper likewise is interested in what it means to be a defendant (or accused) or respondent (the "Opponent") in criminal or civil proceedings ("legal proceedings").[1] With the aim of ultimately identifying and analysing the possible general types of arguments that an Opponent could make, this paper begins with the kind of skepticism articulated by Cruyff about what it means to advance "defensive arguments" and what about the quality of these arguments makes them peculiarly "defensive".

Next, we consider a potential challenge ("argumentative challenge") to these defensive arguments. The challenge arises from a passage in the work of Augustus De Morgan (the nineteenth century British mathematician), who contends that "no one can be required to prove a negative" and that it is to commit the fallacy of arguing from ignorance to transfer the burden of proving a negative to one's Opponent (for example, if you cannot prove that witches do not exist, then they do exist) (De Morgan, 1847, pp. 206-1).

Furthermore, there are also significant doctrinal challenges to defensive arguments in legal proceedings. These have to do largely with firstly, the particular obligations (commonly known as 'burdens') that

[1] Although the scope of this paper is legal proceedings in general across various Common Law jurisdictions, it does not include the rules followed and arguments permissible in so-called 'secret trials' or immigration cases such as *A v United Kingdom*.

the law[2] imposes on the participants, the Proponent and the Opponent,[3] in legal proceedings and secondly, with the consequences that the law provides for in the event that either party succeeds or fails in fulfilling these obligations. For example, if a defendant in a civil trial opts to defend herself by refraining from testifying, one possible consequence of this may be that adverse findings may be made against her by the fact-finder.

Finally, the paper concludes, as Cruyff and Sun Tzu did, that the defensive position in legal proceedings is one of offense and that it is difficult to conceive of defense in the strict sense of the word. Two main types of arguments that the Opponent can possibly make are suggested: she can undercut the Proponent's case by attacking the admissibility of her evidence, including the credibility of her witnesses or her personal character. Secondly, she can also rebut the Proponent's case on the merits by raising a defence or challenging the sufficiency or weight of the probative value of the Proponent's case in the discharge of her burden of proof. The second type of defensive argument suggested concerns the Opponent widening the Proponent's burden of proof by raising a defence. This adds an extra layer to the mountain that the Proponent has to climb.

2. BACKGROUND AND METHODOLOGICAL CONTEXTUALISATION

A core part of what may be called 'Legal Method' entails having the skills to analyse cases, interpret statutes and argumentation about questions of law and questions of fact (Twining, 1988, p. 6). Thus, it may appear that lawyers know a lot about argumentation, and perhaps they in fact do, but any such knowledge certainly does not have the entrenched methodological self-consciousness that argumentation theorists appear to have. Although used in a slightly distinguishable context, Josiah Royce's classic sentiment that to philosophise is to 'reflect critically upon what you are doing in your world' (Royce, 1892, p. 1). It is one thing to be able to do something, but quite another to do so with the knowledge of what you are doing at every step.

Only a small selection of jurists over the years have exhibited this kind of methodological self-consciousness, and chief among them, is John Henry Wigmore, or 'The Colonel' (Hilton, 1941, p. 351; Twining, 1985, p. 110). During the course of a successful career spanning almost

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[2] This paper is concerned specifically legal proceedings in the Common Law tradition. However, most of the arguments are set out in terms that are sufficiently broad to be of application to the Continental tradition too.

[3] The term "Proponent" is used here to refer to the state or plaintiff, whereas the "Opponent" is used to refer to the defendant, accused or respondent in criminal and civil proceedings respectively.

five decades since 1887 when he started practising law in Boston, Wigmore produced many works, but is most remembered for his *Treatise on the system of evidence in trials at common law* and *The Principles of Judicial Proof: As Given by Logic, Psychology, and General Experience, and Illustrated in Judicial Trials* ("*Principles*"). Wigmore's theorisation about argumentation in law is about questions of fact and is contained in the latter of these two texts. The contrast, in law, to this type of argumentation about 'questions of facts' (another example is Walton, 2002) is argumentation about 'questions of law' (for example, Alexy, 2010; Feteris, 1999).

Wigmore's *Principles* spans over a thousand pages and is structured into three parts: 'circumstantial evidence' (pp. 30-311), 'testimonial evidence' (pp. 312-724) and 'problems of proof' (pp. 735-1080). It is in the third part that Wigmore theorises about factual argumentation. In particular, Wigmore theorises that trials generally involves four processes of proof, that is: the *Assertion* process consisting of the proponent advancing evidence and arguments about the relevant facts in issue; *Explanation* consists in the opponent deflecting by showing the existence or probability of alternative hypotheses to the ones advanced by the proponent; *Denial* involves the opponent this time undercutting the persuasive force of the proponent's arguments or the credibility of the evidence on which they are based; *Rivalry* is about the opponent raising a substantiated defence or excuse in rebuttal of what the proponent has alleged (Wigmore, 1913, p. 26). The contribution of this particular article is to reformulate this Wigmorean paradigm in a contemporary, Common law and interdisciplinary setting.

3. INITIAL SCEPTICISM

The term "defence" in legal proceedings on its face can be ambiguous and somewhat misleading. The Proponent, in instituting legal proceedings, is defending his, her or its interests by either preventing certain conduct from occurring or seeking restitution from any harm suffered from the conduct. The Southern African Litigation Centre was defending the broad interests of justice on the African continent in attempting to have President Omar Al Bashir arrested in South Africa in 2015 (*Southern Africa litigation centre v Minister of Justice and Constitutional Development*), Melania Trump was defending her 'good name and reputation' against the Daily Mail newspaper (*Trump v Associated Newspapers Ltd*), Tony Nicklinson and "Martin" were defending their "right to die" when they sued the United Kingdom government (*R (Nicklinson) v Ministry of Justice (CNK Alliance Ltd intervening)*; *R (AM) v DPP (CNK Alliance Ltd intervening*) and Lionel Messi was defending his right to trademark a logo on which the words

"MESSI" appear (*Messi Cuccittini v European Union Intellectual Property Office*). Needless to say, the Opponents in each of these cases were likewise defending their interests.

It is equally misleading to say that one party must "prove" a case and the other must "disprove" it because an Opponent, in a trial, is also required to "prove" her defence, if she raises one, or version of events. Inaction or being "absent from court", if done advertently, not only raises the danger of an adverse finding being made, but it is also a form of positive action that can be strategic and effective in certain instances.[4]

Therefore, characterising an argument as advancing either the Proponent's or Opponent's case tells us very little about its peculiar quality. This paper aims to insulate and critically analyse "defensive arguments". On the face of it, the argumentative moves open to the participants in legal proceedings are both affirmative or offensive and only temporally distinguishable. The Proponent always makes the first move and is thereafter followed by the Opponent. On this construction, legal proceedings are made up of two separate and opposing cases or argumentative positions, which have to be established by the Proponent and Opponent respectively.

It is in this sense that forensic proof is understood as being dialectic (Walton, 2002, p. 156-8; Bex *et al*, 2010, p. 132). Furthermore, because the goal of forensic proof, on the view taken in this paper, is rational persuasion, which means "using good reasons to persuade your audience by convincing arguments", this makes, according to Johnson, legal argumentation pragmatic. It is in that narrow sense that forensic proof is referred to as being pragma-dialectic (Johnson, 2000, p. 159. Cf Pardo and Allen, 2007, pp. 223-4 and 227-8).

A pragma-dialectic conception of legal argumentation further underscores two qualities of forensic proof: firstly, that legal proceedings are a fallibilistic institution that does not permit stalemates and that uses certain "decision rules" (Jackson, 2004, pp. 124, 127 and 137) (burdens and standards of proof) to resolve disputes (Walton, 2002, p. 159-60). Secondly, forensic adjudicators will not only be persuaded by rational arguments. Aristotle's *pathos* and *ethos* arguments also have persuasive force in the forensic context (Aristotle, 1991, pp. 74-5; see also Williams, 2009, p. 36, Scallen, 1995, p. 1717). Other factors that may be effective are: tactical astuteness, extra-curial political or societal pressure and, sometimes, having respected or senior counsel tends to help too. This makes reasoning, fact-finding and

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[4] For example, in civil cases an application may be made to set aside a judgment granted by default on the ground of service of process not having been lawfully effected, see *Ferris*, paras. [24]-[25]; *Rajval Construction Ltd*, paras. [1] and [20].

argumentation in the forensic context inherently complicated and untidy. Therefore, the use of similarly chaotic and convoluted references to war (such as "lawfare") to describe what is going on in the forensic context is unsurprising. For example, Socrates admired Euthydemus and his brother Dionysodorus as being "skilled in legal warfare":

> [S]uch is their skill in the war of words, that they can refute any proposition whether true or false…for they know all about war,-all that a good general ought to know about the array and command of an army, and the whole art of fighting in armour: and they know about law too, and can teach a man how to use the weapons of the courts when he is injured. (Plato, *Euthydemus*).

Euthydemus and Dionysodorus were Sophists, skilled in rhetoric, which, at the time, included not only rational argumentation, but communicative flair and emotion-stirring too. Rational persuasion in the forensic context, on the view taken in this paper, is made up of these things too. Furthermore, the references to war additionally emphasise the inherently offensive-mindedness of the participants in legal argumentation. This adds further obscurity to the concept of a "defence". In the next two sections, further complexity is added to defensive argumentation by a consideration of several sets of argumentative and doctrinal challenges.

3. ARGUMENTATIVE CHALLENGE

The argumentative challenge arising from De Morgan's work forces us to think deeply and more carefully about defensive legal argumentation.

To introduce De Morgan's argument, it may be helpful to recall an award-winning advertisement by Adidas (Whitehead, 2004*)*. The advertisement was coined 'impossible is nothing' in tribute of the Greek football team, which had the odds of 1:100 against winning before the Euro 2004 championship began but later ended up winning the tournament.

There are two possible interpretations of the phrase "impossible is nothing": the first is radically sceptical and commits the fallacy of arguing from ignorance, whereas the second relates to the classical impossibility of proving negation, which is De Morgan's argument.

On the first interpretation, which seems to be the intended one by Adidas (Adidas, 2004), we are encouraged to "keep an open mind" and to infer from the fact that our evidence of the Greek football team's chances of winning was inconclusive that it was always possible that they could win. In other words, because it has not been proven that "there are no flying saucers" (Robinson, 1971, p. 97) or "freak winds

that will land us safely on the ground after we jump off the Burj Khalifa," (Adler, 1998, p. 41) then both these events are possible. For many reasons that have been written about, and are beyond the scope of this paper, this reasoning is fallacious on many levels (Copi, Cohen & McMahon, 2014, p. 132).

Our interest for present purposes lies in the second of the two interpretations. Since Socrates' day many philosophers have recognised the impossibility of proving negation (Plato, *Euthydemus*). However, De Morgan articulates a narrow distillation of this argument, which poses a particular challenge for defensive legal argumentation and is thus of interest for purposes of this paper. According to De Morgan, if a book has been misplaced in either one of two rooms (A or B), it is impossible to prove the absence of the book in either of the two rooms (De Morgan, 1847, pp. 261-2). The same impossibility applies to a person being absent from a conference, not being a registered student at a particular university or a person not cheating on their spouse.

We are left with only two possibilities of proving negation, according to De Morgan: the one is concluding that despite our best efforts in searching for the misplaced book in room A or B, we could not find it ("the no-evidence option") and the other is attempting to prove a countervailing positive proposition (for example, that the book was found in room A and thus could not be in B) ("the alternative option") (De Morgan, 1847, pp. 261-2). It is in this sense that De Morgan contends that negative and positive propositions are bound up together:

> When contrary terms are introduced, it is impossible to define the opposition quality by assertion or denial: for every assertion is a denial and every denial is an assertion…all negations are contained among affirmations about contrariness (De Morgan, 1847, pp. 13 and 18).

In the forensic context, this supports what lawyers have always believed: that bare denials do not establish anything (Wharton, 1877, p. 311). The only functional value that an Opponent's denial has is that it distills the *facta probanda* ("the facts in dispute") between the parties. Apart from that, it does nothing further for the Opponent's case and may even, in certain instances, result in adverse inferences being drawn.[5]

The upshot of the argumentative challenge posed by De Morgan against defensive legal argumentation is that there are two options

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[5] See *De Beer,* 2010, paras. 6-7, where Molopa J held that the wife in a dispute between a couple undergoing divorce proceedings was not "playing open cards" with the court by not disclosing her income.

available and neither of these are "defensive" in the strict sense,[6] which we interpret here to mean a passive bare denial.[7] The Opponent can either opt for the alternative option by advancing an argument that establishes a countervailing proposition to that of the Proponent (for example, Mr Manuwa raised the alibi defence that he was "drinking all night at a pub" in the company of his friends and not at the scene of a rape of an 11 year-old girl) (*Manuwa*, 2012, paras. 176E and 178A-B; Minghui, 2009, pp. 68 and 71) or for the no-evidence option by arguing that there is insufficient evidence to establish the Proponent's case (for example, President Emerson Mnangagwa of Zimbabwe contended that his electoral competitor had produced 'no proof or evidence' to support his allegations of electoral rigging) (*Chamisa*, 2018, p. 12ff).

The consequence of De Morgan's argumentative challeng is that although directly proving negation is impossible, the kinds of indirect defensive arguments (that is, the no-evidence and alternative options) set out above could be advanced at least to reveal inconsistency, which is not the same as direct negation.

4. DOCTRINAL CHALLENGES

The foremost doctrinal challenge against defensive legal argumentation is what are called burdens of proof (Dennis, 2017, p. [448]).[8] These are very particular types of sanction-backed obligations that the law places on rival participants. They are a challenge for defensive legal argumentation in particular because unless fulfilled, in accordance with the law (that is, in the appropriate way, and up to the prescribed legal standard), certain legal consequences follow. The worst of these are the Opponent losing their case and having a punitive costs order being made against them.

The starting point to understanding burdens of proof is the common law principle that "she who alleges must prove" (*necessitas probandi incumbit ei qui agit*) (Walton, 2014, p. 49). This holds in both criminal and civil cases. Attempts to distinguish the Proponent's burden

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[6] Wharton is one of the earliest evidence scholars to adopt this view: "We may prove a negative indirectly, by proving conditions incompatible with the alleged fact, showing, for instance, that a party charged was in another place than that necessary to the plaintiff's case; or we may do it directly, by calling a witness present at the latter place and proving that the defendant was not there." (Wharton, 1877, pp. 311-2).

[7] In addition to these two options, Wharton points out the third 'defensive' option of the Opponent pointing out an inadvertent admission from the Proponent's pleadings or papers, see (Wharton, 1877, pp. 311-2).

[8] The term "onus of proof" is sometimes used interchangeably with 'burden of proof'.

from the burden that the law imposes on the Opponent have resulted in the former going by many names: "primary onus", "overall onus", "full onus", "onus in its true or original sense", "risk of non-persuasion", "persuasive burden", "legal burden", "general burden", "ultimate burden", "burden at the end of the day", "probative burden" and "fixed burden of proof" (Zeffert & Paizes, 2009, p. 128; Williams, 1977, p. 156; Dennis, 2017, pp. [449] – [450]). On the hand, the Opponent's burden has had its own share of alias: evidential burden, provisional burden, tactical burden, initial hurdle, burden of production, burden of going forward with evidence and particular burden (Williams, 1977, p. 156; Walton, 2014, 49; *Gill*, 1963, p. 688). The law is thus not in need of any more nomenclature nor any superficial linguistic splitting of hairs. Rather, this area of law may do better with far more conceptual analysis and critique.

Burdens of prove were, according to Williams, "invented by adjudicators" and historically are constructs of adversarial English jury trials (Williams, 1977, p. 156; *Bratty*, 1963, pp. 416-7). Although they served historically the function of apportioning adjudicative power between the judge and jury by having the latter decide the discharge of the Proponent's burden and the former the discharge of the Opponent's (Williams, 1977, p. 156), burdens of proof are also a function of the pragma-dialectic nature, in the sense described above, of forensic proof in so far as the law recognises its epistemic fallibility and the many practical concerns (such as: pressures of time and costs of litigating) (Jackson, 2004, p. 124) putting pressure on the adjudication process. Under these circumstances, the law has had to contend with the risk of error and thus having sanction-backed burdens of proof distributes this risk between the participants (for example, by having the rule that if the Proponent fails to fulfil her burden, the Opponent is absolved) and thus avoids having argumentative stalemates (Dennis, 2017, p. [449]).

There are at least three layers of obligations in all legal proceedings. First, as indicated above, there is the decisive obligation relating to who bears the risk of loss in the event that the *facta probanda* are not "proved, in accordance with the law." This layer of obligation is always on the Proponent.[9] Secondly, there is what is sometimes known as the "duty to begin", which largely is more of practical than legal significance (Zeffert & Paizes, 2009, p. 129). Once again, the Proponent usually bears the duty to begin, which she discharges, among other things, by making her opening statement and presenting her evidence first.

[9] This also holds in the event that the Opponent *counterclaims*, and thus becomes the "Proponent in *reconvention*" too.

The third layer of obligations is the most contentious because it includes both participants in legal proceedings. Every participant in legal proceedings bears the duty to prove whatever they allege or counter-allege. This is the true meaning of the Latin maxim referred to above, and not that the Proponent necessarily or exclusively bears the burden, which is the position with the first two layers of obligations. Therefore, our reference above to a burden of proof being a doctrinal challenge to defensive legal argumentation relates specifically to this third layer of obligation that the Opponent shares with the Proponent. These three layers of obligation are reflected in diagram 1 below:

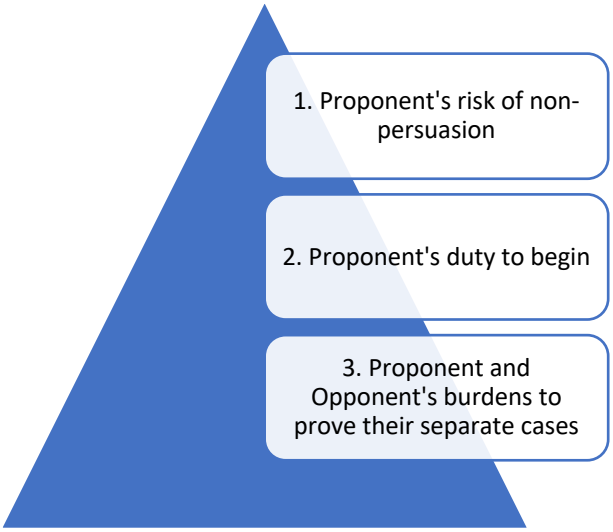

Table 1

As indicated above, merely coining the two burdens at the third layer of obligations as being one of the Proponent or Opponent in order to distinguish them without more is just as unhelpful as temporal references to a burden that shifts between the participants at varying times in legal proceedings.[10] The idea of a shifting burden is orthogonal to a very mechanical conception of legal proceedings that is performative and akin to the anachronistic formalism of medieval common law trials in Europe (Esmein, 1913, p. 251). At any rate, moving burdens in complicated cases may well be very difficult to track. On the view adopted by this paper, the obligations imposed on the participants at all three layers remain stable and binding respectively on the participants for the duration of the legal proceedings.[11]

One helpful way of distinguishing the third-layer burdens imposed on the Proponent and Opponent respectively is suggested by a

[10] The latter is a characterization made by Zeffert & Paizes, 2009, pp. 128-9.
[11] This view is also espoused by Williams, 1977, p. 156.

nineteenth-century US lawyer named Francis Wharton. He said that the goals of the two burdens, within the third layer, can be used to distinguish them: the Proponent's goal is to establish a claim, whereas the Opponent aims to be released from it (Wharton, 1877, p. 313-7). The words "establish" and "release", however, cannot be taken literally or too far on this paper's view. For instance, the Opponent is also required to "establish" her defence, if she raises one, in as much as the Proponent wants to be "released" from any claims made by the Opponent in mitigation or defence.

What is clear, however, is that the Proponent's goal will always be an order on precisely the terms set out in the prayer of her summons (or its equivalent), whereas the Opponent seeks a discharge, "submission of no case" or absolution from the instance, as the case may be (Zeffert & Paizes, 2009, p. 129; Dennis, 2017, pp. [448] - [449]). Once again, the dialectical nature of forensic proof is empahised by the fact that the latter types of orders are made only if the Proponent has not discharged her first layer of obligations.

Therefore, the specific doctrinal challenge against defensive legal argumentation in this regard is the legal obligation of having to discharge a third-layer burden of proof with the goal of being discharged (or its equivalent).

The next two questions that arise relate to the standard according to which the Opponent's argumentation will be judged, together with the consequences of a failure to discharge her burden.

In civil cases, the standard against which all the participants' obligations at the first and third layers are judged is on a balance of probabilities. In criminal cases, however, there is a much higher standard against which the fulfilment of the Proponent's (usually, the state) first-layer burden is judged: for most Common Law jurisdictions, the standard is beyond reasonable doubt, but the current position in England and Wales is that jurors are asked to be sure before they convict (*Summers; Ferguson; Majid; Miah;* Maddison *et al*, 2018, p. [5-1]). At the third layer, however, there seems to be no good reason[12] why the respective burdens imposed on the Proponent and Opponent should not be measured according to the same standard, which is on a balance of probabilities. This, however, is contentious in some respects. Often, lawyers in this regard prefer rather to say no more than that the Proponent's third-layer burden is to establish a prima facie case sufficient for the judge to refer it to the jury (Dennis, 2017, p. [452];

[12] Although this is controversial as an alternative view to this may be that the Proponent's burden at all three levels of obligation in criminal cases is to be measured against the standard of *beyond a reasonable doubt* (or being sure in England and Wales).

Khoza, 1982, paras. 1043C-E; *Downey*, paras. 20j – 21a), and that the argumentation advanced to discharge the Opponent's burden at this third layer cannot be fanciful or remote (*Scagell*, 1997, para. [12]; *Miller*, 1947, p. 373; *R v Downey*, 1992, paras. 20j – 21a; Williams, 1977, p. 182).

Therefore, although the criminal Opponent has no second-layer duty to testify (Williams, 1977, p. 184), or to give any evidence whatsoever, she still has a third-layer obligation to discharge. The only problem with this is that the consequences of failing to discharge the Opponent's burden within the third layer are often left unsaid and taken for granted. For example, if the Proponent fails to discharge her third-layer burden, the judge is obliged not to refer the case to the jury for consideration. It is for this reason that this particular burden at the third layer is referred to as being "provisional" so as to distinguish it from the Proponent's other burdens from the first and second layers. If, however, the Opponent fails to discharge her burden at the third layer, the Proponent is not readily entitled to a remedy through a summary procedure (which is referred to by different names depending on the jurisdiction). In fact, under these circumstances, the Proponent usually has to bring a separate interlocutory application for summary judgment.

What certainly cannot be the correct position is that the Opponent's failure to testify or to discharge her third-layer obligation, as Cory J held (*Downey,* 1992, paras. 20j – 21a; *Morgan*, 1976, p. 229), automatically converts the Proponent's prima facie case into a conviction (or any other final finding). It should not be problematic, this paper argues, to acquit an Opponent who has not discharged her third-layer burden if the probative value of the Proponent's case goes no higher than a prima facie case, in which event the Proponent's first-level burden would not have been discharged.

For these reasons, it is contended that the standard against which the Opponent's burden from the third layer is judged is controversial and represents a ceiling without a floor. For purposes of defensive legal argumentation, this is not a challenge, but rather an advantage. The Opponent's argumentation, in response to the doctrinal challenge of having to discharge a third-layer burden of proof on a balance of probabilities, must navigate between avoiding being too fanciful or remote and, on the other hand, achieving sufficient rational persuasion to meet the relevant prescribed civil or criminal standard. We turn now to the final part of the paper to set out the two main types of defensive legal argumentation, including their paradoxically offensive features.

5. DEFENSIVE STRATEGIES

According to Slob, an Opponent may either be critical of the Proponent's claim or have a separate standpoint herself (Slob, 2006, p. 167). The latter argumentative move is called by Bex *et al* a rebuttal, whereas the former is an undercutting (Bex *et al*, 2010, p. 132). These are the two basic forms of defensive legal argumentation. However, there is some further nuance to this.

For illustrative purposes, consider this example: Mrs A is accused by her husband, Mr B, of cheating with Mr X. In her defence, Mrs A realises that she has four arguments available to her: she could deny the allegation and counter-argue that Mr B is simply paranoid and thus mistaken. Secondly, Mrs A could counter-argue ad hominem that Mr X is her estranged cousin, who has been missing for the past twenty years. In the third instance, Mrs A could release all her private communications and diary to Mr B in order to show the absence of any interaction with Mr X. Finally, Mrs A could admit to having interacted with Mr X, but further argue that she had a good reason in substance (for example, that she was not discussing anything inculpatory with Mr X) for this.

The first of these four arguments is what we have referred to above as the undercutting defensive argument. A useful description of this type of argument is given by Kahane's description of the barrister who is furnished with a thin solicitor's brief containing only one short sentence of instructions: "No case, abuse the plaintiff's attorney" (Kahane, 1992, p. 57). There is a sense in which this can be a fallacious *ad hominem* argument, but it is meant in this sense to refer to, among other things: attacking the credibility of the witnesses led by the Proponent, using the exclusionary rules to exclude crucial evidence relied on by the Proponent or to lead admissible bad character evidence against the Proponent personally. All of these arguments serve the purpose of reducing the persuasive force of the Proponent's argumentation.

For example, in *S v Mhlongo; S v Nkosi*, two, out of six accused persons who had been charged, among others, with robbing and killing a police officer, contended that informal admissions made by their co-accused are inadmissible because they incriminate the two (*Mhlongo*; *Nkosi*, paras. [3] – [6]).[13] Furthermore, Bex *et al* provides the example of an Opponent making the claim that Miss N, who testified that the Opponent killed a person, was lying (Bex *et al*, 2010, p. 129).

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[13] There is a common law rule that renders incriminating confessions and informal admissions inadmissible against someone other than their maker.

The remaining three of the four arguments are all different forms of rebuttal. They are all attempts to raise a defence so as to widen the Proponent's burden of proof. In other words, if an Opponent raises a rebuttal, the Proponent's burden at the first layer is to prove both its own case and to disprove the Opponent's rebuttal. Rebuttals can be negative or positive. The negative sense of rebuttals takes the form of the two arguments discussed above in relation to De Morgan: the no-evidence and alternative options. For example, Mrs A's release of all her private communications and diary to Mr B to show the absence of any interaction with Mr X is the no-evidence option, whereas the contention that Mr X is her estranged cousin is the alternative option.

Further examples of negative rebuttals are Mr Irwin, on behalf of The Countryside Alliance Limited ("the CAL"), denying that the CAL's dogs killed the plaintiff's pigeons and counter-arguing that the plaintiff did this himself by "wringing their necks" (alternative option) (*Weir*, 2017, p. 16), and Mr Wahid arguing that he should be discharged at the close of the prosecution's case because the identification evidence that the latter relied upon had weak probative value' (no evidence option) (*Wahid*, 2010, p. 23).

The positive sense of the rebuttal is the more usual type of defence where the Opponent admits to having committed the conduct in question, but further alleges that he was justified or had an excuse. This is the fourth of Mrs A's arguments above. A useful illustration of the positive rebuttal is from the salient facts of *S v Engelbrecht* where Mrs Engelbrecht killed her husband on the grounds that he was in the habit of physically abusing her (*Engelbrecht,* 2005, para. [6]). In rather extraordinary circumstances, Mrs Engelbrecht's domestic violence defence was contended to be a form of private defence, which was ultimately accepted by the court (*Engelbrecht,* 2005, paras. [6]). Therefore, this being a positive rebuttal, the prosecution's burden of proof was widened to include the obligation of disproving that Mrs Engelbrecht did not act in private defence.

6. CONCLUSION

Once we overcome the initial skepticism about whether or not defensive legal arguments are actually "defensive", we realise that they are just as offensive as the Proponent's arguments. Furthermore, defensive legal argumentation is confronted by a set of argumentative and doctrinal challenges, which give rise to its ultimate distillation into two main forms, undercutting arguments and rebuttals. The latter further breaks down into a set of positive and negative senses in which they may be formulated.

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