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Commentary on Henrike Jansen's "Legal Arguments about Plausible Facts and their Strategic Presentation"

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1. INTRODUCTION

This is an interesting and intriguing paper on the neglected notion of an *eikotic* argument and its use in judicial settings. An *eikotic* argument is one in which an appeal is made to imaginable behaviour. Three kinds of considerations are typically referred in order to explain the imaginable behaviour: the suspect's emotions, habits, and possible advantage. It is also known as an argument from plausibility. *Eikotic*, or arguments from plausibility are not ethotic arguments; an ethotic argument is one that deals with some feature of the character of the speaker. The key difference, I take it, is that while ethotic arguments focus on the character of the arguer or suspect, *eikotic* arguments focus on the circumstances that the suspect finds herself in; the plausibility of an agent's behaviour given a particular set of circumstances.

The intriguing argument of the paper is that when dealing with arguments from plausibility, the more convincing presentation is likely the one that suggests it to be a causal argument instead of a symptomatic one. Jensen's paper adopts the pragma-dialectic perspective which emphasises the dialogical need to reach an audience in a suitably economical way and where argument schemes are defined by the pragmatic relationship between premises and conclusion by the inference licence that connects them. I will endeavour in my elucidatory comments to view her analysis from a Critical Thinking perspective since my hope is that this clashing of methodology will bring to the fore the salient issues.

2. THE ARGUMENT FROM PLAUSIBILITY

The hypothesis of the paper is that when dealing with arguments from plausibility where the conclusion contains the earlier event a presentation with an explicit inference license that gives the argument a *modus tollens* structure is the better choice. Now, the *modus ponens* and the *modus tollens* are two forms with very similar elements. They are each other's counterpart by contraposition since the statements of the antecedent and the

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consequent have switched places and each is the other's negation. Nevertheless, their rhetorical effectiveness can be rather different.

Different presentation modes have different presentational effects and the suggestion is that the use of an argument with a *modus tollens* structure gives an argument an "air of causality" whereas the presentation modes of *modus ponens* suggest a symptomatic argument. This, we are told, has to do with a temporal status of the state-of-affairs. In a *modus tollens* presentation, the behaviour in question is presented as after the state-of-affairs depicted in the conclusion; the inference license goes from earlier situation to later situation. The purported cause is presented in such a way as to preclude or exclude other plausible causes; the causal having to do with how something would have to have turned out. Whereas when the inference is presented in the *modus ponens* form, the behaviour at issue is presented as prior to the state-of-affairs depicted in the conclusion. So structured, the inference license is experienced as abductive rather than causal. Furthermore, the subjective mood of the *modus tollens* seems to be more effective in suggesting that the inference license belongs to common starting points.

An example will help. Consider the following two presentations of a rather controversial conclusion. The first one is presented in a *modus tollens* pattern, the second exhibits a *modus ponens* form:

- Mulroney must have known that the money he received from Schreiber was tainted otherwise he would not have kept the money hidden.
- Mulroney must have known that the money he received from Schreiber was tainted because he kept the money hidden.

The *modus tollens* argument can be reconstructed as follows:

1. Mulroney must have known that the money he received from Schreiber was tainted otherwise he would not have kept the money hidden.
2. (Since) he kept the money hidden (implied premise)
- C: He must have known that the money he received from Schreiber was tainted.

The *modus ponens* argument can be reconstructed as follows:

1. Anyone who keeps money he receives hidden must know (or at least, suspect) that it is tainted (implied premised.)
2. Mulroney kept the money hidden.
- C. He must have known that the money he received from Schreiber was tainted.

Note that in my reconstruction, the *modus tollens* argument's missing premise is the negation of the presented conditional, whereas in the *modus ponens* version, the implied premise the conditional itself. This conditional is symptomatic (an argument from sign); i.e., it invites analysis as either a comparison or a generalisation. In this case, it appears to be a generalisation, and, as generalisations are wont, to invite counter-examples that may weaken or vitiate the generalisation itself. There are many reasons to hide money irrespective of any illicit behaviour.

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The situation is subtly yet significantly different when the argument is given a *modus tollens* presentation. In this case, the missing premise to be supplied is the negation of the consequent of the conditional. The acceptability of this implicit premise brings to the fore the assessment based on criteria bound up with plausibility concerns. The audience (be they jurors, etc.) is asked to engage in an act of imaginative exploration. The assessment that the suspect did not act in a manner that a typical person in similar circumstances would have behaved takes on added significance. It is, I submit, this added significance that makes the *modus tollens* formulation of the argument seem psychologically more persuasive. The beauty of the argument scheme is that it narrows the compass of the implicit premise to objection and defeat.

Hence the main claim of the paper: when the conclusion contains the earlier event, the presentation mode is relevant since the argument exhibits an inference license with a causal order when presented as a *modus tollens*, but exhibits an abductive order when presented as a *modus ponens*. Moreover, if the argument is presented in the *modus ponens* form, then the implicit conditional interpreted as a generalisation is subject to, and may fail to satisfy, what is colloquially known as the but-for test (the *sine qua non* rule). A cause-in-fact issue arises; i.e., the attempt to establish the behaviour as a necessary condition. It must be established that the effect would not have occurred without the act. Contrapositively, if there are good reasons for the standpoint to have occurred anyway, without the defendant's harmful act, then the defendant's act is not the cause-in-fact of the injury.

Part of the reason the *modus tollens* argument seems more persuasive is that the implicit premise (that the consequent is not the case) is that there appears to be a filtering process already taking place. It shifts the onus of the argument to the plausible behaviour of the agent for actions subsequent to the state-of-affairs depicted in the conclusion. It is the implausibility of the consequent of the implicit conditional that is at stake in the argument. The explicit conditional being offered has, so to speak, already pre-selected what would be plausible behaviour one can imagine a person would do when they are in that situation. This is then buttressed by the implicit assertion that the accused did not do what would be expected for her to do.

3. CONCLUSION

The target of Jensen's analytical eye is the rhetorical effectiveness of arguments from plausibility. She argues that, under certain conditions, arguments using a *modus tollens* pattern are more effective than those presented in a *modus ponens* structure. The key is that in the *modus tollens* pattern, the conclusion is located temporally prior to the contentious behaviour that is at issue whereas in a typical *modus ponens* formulation the behaviour at issue is located prior to the state-of-affairs that constitutes the conclusion.

One question unresolved in the paper was the relationship between arguments from plausibility and conditional prediction in general. Was this connection essential or accidental? Much seems to hang on the claim that the *modus tollens* has an "air of causality" about it, although this fuzzy phrase is never really clarified. Seeking for an answer in the section on The Role of the Standpoint proved disappointing since the discussion in this penultimate section, while illuminative, was eliminative rather than constructive; or better, tactical rather than substantive. The section seemed more

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concerned to thwart two hasty conjectures that do not follow from the observations made in the paper but did not really suggest clues for further consideration. This demonstrated once again the meticulousness of the analysis, but simply noting blocked avenues is seldom satisfying. Moreover, although the paper explicitly says that it would not grapple with the role of negation and that “the influence of negation is subject to further study,” it seems to me that this venue holds much promise and that this avenue deserved adumbration.

As such, there is an air of incompleteness about the paper; but in a good way. This paper is clearly but a way-station, a chance to report on work in progress, for a much larger, more ambitious, project that has at its heart a preoccupation with the *modus tollens* and its role as a form of indirect proof; a project that I see reflected in the author’s recent publications. And, if this brief paper is any indication, it is clearly a substantive project with much depth and promise.

[Link to paper](#)