

# Rooting Gilbert's Multi-Modal Argumentation in Jung, and its Extension to Law

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Article abstract

This paper discusses how an understanding of Jung's psychological types is important for the relevance of Gilbert's multi-modal argumentation theory. Moreover, it highlights how the types have been confirmed by contemporary neuroscience and cognitive psychology. Based on Gilbert's approach, I extend multi-modal argumentation to the area of legal argumentation. It seems that when we leave behind the traditional fortress of "logical" legal argumentation, we "discover" alternate modes (such as the intuitive, emotional, and sensory) that have always been present, concealed in the theoretically underestimated rhetorical skills of arguers.

# Rooting Gilbert's Multi-Modal Argumentation in Jung, and its Extension to Law

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**Abstract:** This paper discusses how an understanding of Jung's psychological types is important for the relevance of Gilbert's multi-modal argumentation theory. Moreover, it highlights how the types have been confirmed by contemporary neuroscience and cognitive psychology. Based on Gilbert's approach, I extend multi-modal argumentation to the area of legal argumentation. It seems that when we leave behind the traditional fortress of "logical" legal argumentation, we "discover" alternate modes (such as the intuitive, emotional, and sensory) that have always been present, concealed in the theoretically underestimated rhetorical skills of arguers.

**Résumé:** Cet article explique comment une compréhension des types psychologiques de Jung est importante pour la pertinence de la théorie de l'argumentation multimodale de Gilbert. De plus, il met en évidence comment leur découverte a été confirmée par les neurosciences contemporaines et la psychologie cognitive. En me fondant sur l'approche de Gilbert, j'élargis le champ d'application de l'argumentation multimodale à l'argumentation juridique. Il semble que lorsque nous abandonnons les remparts traditionnels de l'argumentation juridique «logique», nous «découvrons» des modes alternatifs (tels que l'intuitif, l'émotionnel et le sensoriel) qui ont toujours été présents, dissimulés dans les capacités rhétoriques théoriquement sous-estimées des personnes qui argumentent.

**Keywords:** multi-modal argumentation, Michael Gilbert, Jung's psychological types, legal argumentation

## 1. Introduction

Argumentation theory has become de-logicalized in recent decades: it is now commonplace to consider not only logical modes,

arguments, and reasons but also emotional, intuitive, visceral, contextual, and other factors. Rather than relying on static arguments, it is increasingly concerned with dialogic interactions (Gilbert 2004, p. 245). A more realistic approach to arguments, one which emphasizes their interrelated and intermingled character, requires an understanding of specific modes and the nature of their interactions. In terms of its breadth or the scope of different modes of argumentation, Gilbert's concept of multi-modality seems to have been the most productive.<sup>1</sup> To understand multi modes, it is especially useful to be familiar with psychological typology and one of the most influential and still widely used in practice is that of Jung.<sup>2</sup> With the advent of neuroscience and cognitive psychology, Jung has enjoyed something of a revival.

Yet, is multi-modal argumentation theory also still relevant for legal argumentation? The context of legal argumentation is about a particular professional arena, one in which both arguers and audiences are more restricted by certain normative constraints than in other fields of argumentation. Thus, it is necessary from the outset to admit that the logical mode of argumentation dominates the field, and that logic (in its informal variant) is an idealized form of argumentation. However, both arguers and audiences in the legal context are individuals who enjoy multi-modality in communication and argumentation to its full extent. Therefore, in legal practice, in real live communication and argumentation, it can be observed that other modes are also used to justify legal positions, at least to some extent.

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<sup>1</sup> However, with respect to at least one mode, which also includes visual and auditory arguments as well as other arguments such as those of taste, smell, etc., Groarke's multimodal argumentation theory, one must admit, has been even more developed with respect to those aspects of that mode. There are certain differences as well as overlaps between the two theories, but it is not my intention to discuss these here. I feel it is more important to show how Gilbert's four modes corresponded to Jung's famous four cognitive functions, and what potential it has for legal argumentation.

<sup>2</sup> It is impossible to refer the reader to all the references emphasizing the importance of Jung's psychology in contemporary psychoanalytic theory and practice. It suffices to refer the reader to the website of the International Association for Analytic Psychology (IAAP, 2019) in order for them to obtain a glimpse of its magnitude.

In Section 1, I briefly outline the basics of Gilbert's multi-modality—especially for the reader interested in argumentation who is perhaps unfamiliar with the historical roots of multi-modal argumentation. Section 2 connects Gilbert's multi-modality with Jung's psychological typology, which seems fundamental to any understanding of the dimension and operation of different modes. In the same section, based on the overlaps between Gilbert and Jung, I explain how I understand multi modes, the arguments based within them, and their semiotic resources. Subsequently, a longer Section 3 introduces how alternate modes (i.e., emotional, intuitive, and sensory) add argumentative and rhetorical flesh to the logical skeleton in the legal context. Finally, the conclusion presents situations in which alternate modes are not always simply subordinated to the logical mode, but also help determine its content.

## **2. Gilbert's multi-modal argumentation**

The multi-modal<sup>3</sup> theory of argumentation appeared as a critique of formal (logical) reasoning. It stressed the point that human beings, when making decisions and arguing about them, are necessarily multi-dimensional,<sup>4</sup> not one-sided “machines.” According to multi-modal theory, the requirements for argumentation as stressed by formal logicians are quite far from what goes on in reality when people make and justify their decisions. Thus, the multi-modal approach maintains that there are also modes other than logic that people use to argue.

One of the ideas of multi-modality which is also used in the context of argumentation is decentering language as a favored manner of meaning making (Groarke 2015a, p. 142), and adding, not replacing, the importance of (other) “signs” for (social) communication. Multi-modality describes communication practices in

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<sup>3</sup> There is a question of whether the word ‘multi-modality’ should be written using a hyphen or without, as ‘multimodality.’ Gilbert suggested that it is better to use a hyphen than not, in order to stress the fact that there are other modes of communication and argumentation rather than just the logical.

<sup>4</sup> Groarke maintains that divergent modes of arguing, including non-verbal arguing, correspond to a theory of different modes of intelligence, such as the one outlined by Gardner (Gardner 2011) (Groarke 2015b).

terms of the textual, aural, linguistic, spatial, and visual resources—or different modes—used to compose messages (Murray 2013). It is about the use of several modes, the collection of which contributes to how multi-modality affects different rhetorical situations, or opportunities to increase an audience's reception of an idea or concept (Lutkewitte 2013). In Gilbert's multi-modality, unlike Groarke's, the semiotic resources of the modes are not limited to non-verbal expressions but may also be verbal.

One of the forerunners of multi-modality in argumentation was certainly Michael Gilbert,<sup>5</sup> and it is his version of multi-modality that interests me the most. Gilbert associated arguments with a "wider notion of communication between people" including "non-verbal communications or contextual ramifications" (Gilbert 1994, p. 159). In this regard, Gilbert also referred to Willard's definition of an argument as "a form of interaction in which two or more people maintain what they construe to be incompatible positions," and to his position that arguers "use any or all of the communication vehicles available to them" (Willard 1989, p. 92). Gilbert concluded, following such a broad view, that an argument can be anything that is communicated and used to convince or persuade (Gilbert 1994, p. 162). He understood argumentation as a process of producing arguments and, in a very broad manner, communication as being any activity of making meaning. This was very important in order to connect the notion of argumentation to communication, especially concerning non-verbal communication. According to multi-modal argumentation theorists, this necessarily implies that the "reasons" used to support a claim can also be of a non-rational character.

To be able to include non-verbal communication within the notion of argumentation, he needed to subscribe to a wider concept of argumentation and rationality since, in his opinion, people argue with whatever sorts of material, evidence, modes of communication, maneuvers, and fallacies are available to them. To supplement rationality, he preferred to refer to reasonableness, instead of irrationality, since the latter had overly negative connotations

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<sup>5</sup> His seminal paper, published in 1994, was entitled "Multi-Modal Argumentation."

(Gilbert 1994, p. 160). In his opinion, this more realistic approach to argumentation goes beyond the rational (which he associates with the logical), beyond deduction and induction, and beyond the rationalistic and scientific tradition and therefore he called this traditional mode of argumentation the logical mode. But he wanted to expand our modes of argumentation beyond the logical, since he opined that the logical mode of argument is what argumentation theorists believe ought to be used (normative), while he was more interested in what forms of arguments are actually used (descriptive).

In his view, citing O'Keefe (1982), it is, firstly, true that all arguments are ultimately linguistic or even linguistically expressible since there are no non-linguistic arguments. But, secondly, if there is non-verbal communication, then where there is communication there can be argumentation and so any mode of communication can serve as a mode of argumentation (Gilbert 1994, p. 173). As a matter of fact, Gilbert subsequently departed from the necessity of linguistic explicitness, admitting that this is not a necessary condition of an argument. According to him, any argument can be enthymematic and thus a "translation" from the verbal to the nonverbal is only an analogue or shadow of it (Gilbert 1997, p. 85).

In general, multi-modal theorists claim that specific modes cannot be translated into other modes. Here we can find a great similarity with Jung's cognitive functions, which I use in the continuation as a psychological correlation or explanation of Gilbert's multi-modality. For those functions (i.e., thinking, feeling, intuition, and sensation) Jung claimed the following: "The intellect proves incapable of formulating the real nature of feeling in conceptual terms, since thinking belongs to a category incommensurable with feeling; in fact, no basic psychological function can ever be completely expressed by another" (De Laszlo 1990, pp. 257-258).

In Gilbert's view, besides the logical mode of argumentation which he identified as the traditional one, there are three other non-logical modes of argumentation: the emotional, the visceral, and the kisceral mode (Gilbert 1994, p. 161). All three are non-

verbal modes but can be linguistically explicable to a greater or lesser extent.

The emotional mode normally deals with emotions as a means of communication and thereby argumentation (Willard 1989) that is used to convince or persuade and hence we can speak of emotional arguments. Gilbert also highlighted the visceral mode of argumentation, which stems from the area of the physical (and our senses) such as visual arguments and arguments based on touch (Gilbert 1994, pp. 169-172).<sup>6</sup> Although not rational per se, both the emotional and visceral modes can be “linguistically explicable” (O’Keefe 1982), are able to be communicated and may be used to “effect some difference in another person.” Thirdly, the last mode that Gilbert mentioned is called the kisceral (from the Japanese term “*ki*” that means energy) and covers intuitive and non-sensory arenas, thus intuitive arguments (Gilbert 1994, p. 173). In such a manner, these intuitive arguments are vehicles of communication, conviction, or persuasion. According to Gilbert, the kisceral is a mode that relies on the intuitive, the imaginative, the spiritual, the extra-sensory. It covers a wide range of communicative phenomena, such as hunches, feelings, coincidences (Gilbert 1994, p. 173).

### 3. Multi-modality and Jungian psychological typology

In Gilbert’s view, a claim includes “icons for positions that are actually much richer and deeper” (Gilbert 1995, p. 839) and include reasons—in the case of the logical mode of arguing (the classical CR [‘claim’ and ‘reason’] analysis)—or some other similarly supporting material (such as attitudes, beliefs, feelings, values) (Gilbert 1995, p. 837), which are not necessarily rational. Gilbert maintained that “understanding position requires exploration of all the available modes of argumentation, from the logical, emotional, visceral, and kisceral aspects of a view” (Gilbert 1995, p. 843), which is what he called multi-modal argumentation.

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<sup>6</sup> In the framework of the visceral mode as discussed by Gilbert, other arguments based on our sensations could be added, such as auditive arguments and arguments based on smelling and tasting, as discussed by Groarke (Groarke 2015b, 2018).

Gilbert's four modes very much resemble Jung's four cognitive functions. I claim that Jung's psychological typology is very important to understand not only Gilbert's modes, but the modes in multi-modal argumentation theory in general. Cognition as a psychological term explains how people take in information through their perception, and how they evaluate such data. One of Gilbert's main intentions was to show that the traditional rational approach to argumentation, which is mainly based on a logical manner of arguing, is only one of the approaches which he typically called logical (Gilbert 1994, p. 161). Comparing Gilbert's logical mode of argumentation with Jung's cognitive function of thinking, we may find many similarities.

To be honest, Gilbert is not particularly convincing in terms of explaining why there should be precisely four types of modes within multi-modal argumentation. He merely argued the following: "... by explicitly opening up means of argument that are not logical we come closer to capturing the richness of everyday disputing. One might, of course cavil at my categories. Perhaps there should be five modes, or seven of them. Future discussions will, I hope, examine these possibilities" (Gilbert 1994, pp. 176-177). Therefore, is this number four simply a "magical number" that Gilbert plucked from the ether?

I believe that this is not the case. For example, the number four was also used by Jung to describe the four cognitive functions (i.e., thinking, feeling, sensation, and intuition) in the framework of his psychological type theory. The purpose of using Jung and his type theory here is to support the idea that Gilbert's number four has a firm grounding in Jung's theory of cognition, which is today widely used by clinical psychology and psychoanalytical practice and has to a certain extent been confirmed by the findings of neuroscience.<sup>7</sup>

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<sup>7</sup> For example, Kahneman introduced the idea of the fast thinking System 1, one which "operates automatically and quickly, with little or no effort and no sense of voluntary control." There is also a System 2 which "allocates attention to the effortful mental activities that demand it, including complex computations. The operations of System 2 are often associated with the subjective experience of agency, choice, and concentration" (Kahneman 2011, pp. 20-21). That is very similar to what Jung discussed concerning active and passive thinking (Jung



Accordingly, using Jung's four cognitive functions seems more than useful to ground and further develop the idea of fourness in Gilbert's multi-modal argumentation. And we need psychology to discuss argumentation in order to better understand arguers and audiences as real people that are engaged in the process of argumentation, rather than only focusing on the argument as a product of such (Tindale 2004).

Furthermore, there are other similarities between Jung's types and Gilbert's modes, not just the one related to thinking and the logical mode. In Jung's view, a sensation is determined by the perception of our senses and is in such a manner empirical; thinking, once again, is a rational model of analysis and logic; intuition is our "sixth sense;" and feeling is a rational evaluative cognitive function, but quite connected with our emotions.<sup>8</sup> Apart from the logical mode, according to Gilbert, there are also visceral, kisceral, and emotional modes as "alternate modes." Following Jung, the four cognitive functions consist of two rational (thinking and feeling as the functions of evaluation) and two "irrational"<sup>9</sup> ones (sensation and intuition being the functions of perception) (Jung 1971, pp. 330-407). For Jung, all four functions are equally important for individuals and society but certainly differ in this re-

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1971, pp. 342-346). On the basis of Kahneman, Greene discussed the idea of fast and slow morality. The first is based on our automatic settings, where we base our decisions on moral intuitions and emotions, while in the second settings, we rely on our practical rationality. The automatic setting refers to our gut reactions as biological imperatives that can be good for ourselves and our tribes over others, and as such is biased (Greene 2013, pp. 15, 328). Further, Haidt emphasized the strong role of intuition in peoples' decision-making (Haidt, 2013). Moreover, close to Jung, Mercier and Sperber claim that in people's cognition what comes first is intuition or perception, with the second evaluation being reasoning. Or, more precisely, they claim that "reasoning is not an alternative to intuitive inferences; reasoning is a use of intuitive inferences about reasons" (Mercier, Sperber 2018, p. 133).

<sup>8</sup> In *The Type Theory of Law* (2016), Novak analyzes legal phenomena through the four Jungian cognitive functions.

<sup>9</sup> In Jung's psychological theory, irrationality does not have a negative connotation; it only points to the opposite side of rationality. However, since argumentation theory is much more sensitive to the term 'irrational,' I would rather keep using 'non-rational,' instead of irrational, to be more coherent with the field's terminological canon.

gard in the various matters that they deal with. Jung's idea was that we always perceive "matters" corporal or incorporeal either more by sensation or predominantly by intuition, and that we always make evaluations based on thinking or feeling, taking into consideration the fact that feeling seems to be more connected with emotions, while thinking is closer to logic. Moreover, among people there are the so-called rational types such as "thinkers" and "feelers," in whom the rational cognitive functions of thinking or feeling predominate over non-rational functions of intuition and sensation. But we also have "intuitors" and "sensors," in which the relation between the dominant non-irrational functions and their rational functions is quite the contrary (Jung 1971).

Thus, Jung's approach to cognition was holistic in a manner similar to Gilbert's multi-modal approach to argument. Moreover, although their terminology with respect to "mode" and "function" is different, they meant very similar things by these terms.

What Jung included in his type theory is that from among the four functions in every individual, (only) one is dominant, one inferior, another secondary, and a fourth of tertiary importance. Thus, the thinking type would predominantly subordinate his cognition to the rational evaluation of what he or she perceived. The feeling type would focus his or her perception on personal consideration very much taking into account his or her emotions, which would aid his or her consideration. The sensing type would primarily emphasize his or her sensory perception of the situation, and then he or she would try to evaluate such, considering that his or her evaluation would be very much (or even predominantly) influenced by sensation. Finally, the intuitive type would proceed in a similar manner to the sensing type, however, not from outside inwardly but, vice versa, from within herself or himself, his or her insights, outwardly.

It follows that different cognitive functions necessarily influence other cognitive functions in people (for example, the non-rational impact on the rational ones and vice versa) to some extent since we are personalities in which the relevance of different cognitive functions, although they might have a certain hierarchy in terms of their impact on us, cannot be strictly separated. In such a manner, this seems to suggest that Jung's psychological types

basically confirm Gilbert's position that reality oriented argumentation is necessarily multi-modal.

My claim is that by knowing Jung's psychological types we can better understand what Gilbert wanted to say to us with his four modes of arguing. Concerning a potential overlap between Jung's functions and Gilbert's modes, a short explanation seems to be in order. If we have four different functions of cognition, why should we not have four different types of arguing or four modes of communication to address the cognition of others? What can be perceived and evaluated can also be communicated and argued.

Jung's "functions" of cognition could also be understood as "modes" of cognition. His four cognitive functions (or modes) are universal. As such, they are potentially relevant for every situation, not only cognitive but also communicative and argumentative. There is no communication and argumentation without prior cognition, which to an important extent determines at least the potential direction in which we decide to argue about certain issues. In the context of such, people might back their standpoints with logical, emotional, intuitive, or sensory reasons. Consequently, different means of persuasion, such as those existing in the realm of rhetoric, have developed on the basis of the different means of cognition that people share.

Table 1: A comparison of Gilbert's argumentative modes with Jung's cognitive functions

Gilbert's Modes of Argumentation	Jung's Modes of Cognition Functions	Jung Cont'd
Logical	Thinking	Rational / evaluation
Emotional	Feeling	Rational/ evaluation
Visceral	Sensation	Irrational / perception
Kisceral	Intuition	Irrational / perception

One word of caution is needed here. Jung's understanding of feeling is not simply emotions but something he considers as a rational function of evaluation. Jung did not study emotions very much, but he paid attention to them in his theory of complexes. Nonetheless, I have found certain elements of emotions in his

cognitive function of feeling. The fact that Jung's concept of feeling included, to some extent, a special relation, or at least a consideration of emotions, follows from his description of feeling in connection with a particular way of valuation in terms of "acceptance or rejection ("like" or "dislike"), which seems to be a kind of evaluation in which different emotions are taken into account. In this respect, Jung used the notion of "valuation by feeling." Furthermore, in connection with feeling, he used the word "mood" that can also be described as a particular state of mind based on emotions. He also asserted that when the intensity of feeling increases it turns into an "affect," which is also a state of strong emotions. However, he differentiated between "active feeling (e.g., loving)" and "passive feeling (e.g., being in love)." Moreover, he spoke of feeling in conjunction with expressions "speaking to the heart" and "human warmth," words that are easily associated with emotions (Jung 1971, pp. 256-258, 601).

There have been a number of post-Jungians who have confirmed the important connection between feeling and emotions in their research, since this very link separates feeling from thinking as an "impersonal" cognitive function. Isabel Briggs Myers emphasized the said connection by claiming that what is typical for feeling types is, for example, that they "value sentiment above logic; are usually personal, being more interested in people than things; if forced to choose between tactfulness and truthfulness, will usually be tactful; suppress, undervalue, and ignore thinking that is offensive to the feeling judgments" (Briggs Myers, Myers 1995, p. 68). Similarly, among the five facets of feeling, Quenk mentioned "empathetic (focusing on relationships), compassionate (considering unique and personal needs of individuals rather than objective criteria to be most important in actual decision making); accepting (using kindness and tolerance of others); and tender (the use of gentle persuasion and a personal approach to gain others' agreement)" (Quenk 2009, p. 11). All the above-mentioned examples indicate a serious consideration of emotions by feeling, albeit in a rational manner.

In his theory of the soul, Jung located emotions in a more primitive location. They are involuntary and reactions to certain (external) events and are connected with the conscious mind (ego), such

as experiencing fear because of a physical danger, or with individual unconsciousness<sup>10</sup> (in relation to complexes) (Cope 2006), or with collective unconsciousness (concerning archetypes). According to Jung, the emotions cannot be separated from cognitive functions, and they definitely influence them since they are connected to a certain extent. This precise notion has been confirmed in recent years by neuroscience, where scientists established the location of emotions in the more primitive parts of the brain (the limbic system) whereas cognitive functions are part of the more developed parts (the cortex) (Eagleman 2015).

Thus, at least according to Jung, feeling is different from emotion because it is rational and voluntary while emotion is non-rational and involuntary, but, as generally claimed (Novak 2016, pp. 27-28), it is still much closer to emotions than thinking which is also a (rational) function of evaluation that is more based on objective evaluation and detached from (personal) emotions. Thus, in my opinion, the emotions have an important role to play in how feeling is used as a cognitive function, so I am quite certain that there is a strong parallel between Gilbert's emotional argument and Jung's feeling.

Similarities between Gilbert and Jung are not only about the (a) list of four modes (or functions), but also (b) how specific modes interrelate. For Jung, people rationally evaluate non-rational intuitions and sensations as perceptions by thinking or feeling in order to establish, communicate, or argue what they mean for them. This seems to conform with Gilbert's idea that non-logical modes can also be rationally presented in the logical C-R form of an argument. In line with an emotional argument, if A loves B (reason), he would like to kiss her (claim). For a sensory argument, if I see a bear fast approaching me (reason), I become very afraid (claim). Finally, for an intuitive argument, I have a strong intuition that

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<sup>10</sup> In a different piece of research, neuroscientists established that people are subject to 'implicit biases' that are developed in early childhood which influence any adult activity that is not backed merely by conscious consideration, so emotional arguments, in particular, have deep connections with arguers' biases. (Carozza 2016, p. 2). This is quite similar to what Knox claims about 'image schemas' as the basis for the integration of archetypes in childhood (Knox 2003).

there is God (reason), so I have a need to pray (claim). Although it seems that all of the above situations could be fully rational, only their argument structures are such; their premises or reasons are not the result of non-rational cognitive processes. However, the premises are the ones which determine the mode. According to Jung, sensations, intuitions, and emotions are non-rational and thus, translated in the language of Gilbertian modes, only the logical mode will be entirely rational. However, if the non-logical arguments can be rational *per se* when it comes to the non-logical modes taken independently, they cannot be so in the context of law. To be rational in the context of law, both modes and arguments must be indispensably connected with legal provisions as the premises or reasons of the logical mode.

In multi-modal argumentation scholarship, different theorists understand the concept of mode differently. In order to avoid confusion, let me now explain what I mean by the following concepts: argumentation, mode, argument, and semiotic resources. I view argumentation as a social, externalized, communicative act, one that can be externalized in the form of arguments (C-R) by using different semiotic resources, and the reasons, as essential parts of arguments, that one may want to externalize and that can refer to four different modes. Thus, a mode is a way of arguing (Groarke 2015b, p. 140) in which, according to multi-modal argumentation theory, reasons need not be strictly rational—in the traditional sense of the word being close to logic. Thus, the reasons for our claims can also be emotions, intuitions, and physicalities, since modes of arguing may be seen as people's externalized modes of cognition, as their psychological properties. Finally, the semiotic resources by which we express our arguments can be numerous: verbal (words) and non-verbal (pictures, sounds, smells, bodily expressions, tastes, touches, etc.).

In this regard, see the table below:

Table 2: Multi modes, arguments, and semiotic resources

<b>Mode</b>	<b>Reasons/Premises for a Claim</b>	<b>Semiotic Resources</b>
Logical	Rational thoughts	Mostly verbal
Emotional	Emotions	(Non)verbal
Sensory	Physicalities	(Non)verbal
Intuitive	Intuitions	(Non)verbal

Accordingly, non-logical modes are not substantially rational, thus we perceive their premises on the basis of non-rational functions such as sensation and intuition, rather than thinking. However, according to Jung, we generally evaluate them rationally because we are also rational beings. According to Jung, both rational and non-rational functions are present in every human being. What makes us different is the predominance of either perception or evaluation.

With respect to law, there is a prevalent institutional requirement that legal norms are to be applied to cases in a logical (rational) manner. Concerning such, there are two possibilities with respect to deciding legal cases and justifying the decisions thereof: (1) we are entirely successful in rationally considering all those non-rational reasons (taken into consideration by legal provisions) that have been foreseen by the law as part of the legal provisions and eradicate those that have not been foreseen by the same, which would be the position of an idealized form of legal argumentation; or (2) we are not fully successful with the former for various reasons, which would follow from a more realist form of legal argumentation, one that is supported in this article.

#### **4. The logical mode and alternate modes in law**

##### *Introduction*

Taking into consideration the fact that Gilbert's and Jung's approaches overlap to an important extent, I have decided to simplify the terminology that I use in the continuation by analyzing the importance of argumentative modes within the multi-modal theory of argumentation. I retain the logical and emotional modes from

Gilbert, but instead of the 'visceral' and 'kisceral' modes of arguing, I rather prefer to use 'sensory' and 'intuitive' modes of argument, to be termed directly according to the cognitive functions on the basis of Jung's psychological type theory.

Are the above-presented modes appropriate for what goes on in law, legal procedures, and legal argumentation? At first glance, it seems that the context of legal argumentation is about a particular professional field, in which both arguers and audiences are restricted by legal provisions as some kind of contours only in the framework of which they are allowed to argue. But then both arguers and audiences in the legal context are people with a full range of abilities for multi-modality in communication and argumentation. To what extent is multi-modal argumentation relevant for the area of law and legal argumentation?

As outlined and explained above, apart from what Gilbert calls the logical mode, there are also other modes which are important for people's communication and therefore also argumentation. When it comes to law, however, it is important to see whether the so-called alternate modes (i.e., the intuitive, emotional, and sensory modes) are present in legal procedures, and if so, to what extent, and what role (if at all) (should) they have in law as a relatively formal discipline of resolving peoples' conflicts.

Below I first briefly present the logical mode, being the most important mode in law and legal procedures, and, second, I discuss the presence of the three other modes, their potential overlap with the logical mode, and the possibility of their separation.

### *The logical mode*

The logical mode has traditionally been considered as the only (by formalists) or at least the dominant (for non-formalists) mode of legal procedures and legal argumentation. By this mode Gilbert and Jung, who actually used a similar concept of "active thinking," both meant linear<sup>11</sup> and analytical reasoning that is as systematic as possible and verbal in particular. What should be pointed out

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<sup>11</sup> Sometimes Gilbert even prefers 'linear' to 'logical' (arguments), and also uses 'clinical' (i.e., analytically or coolly dispassionate) (Gilbert 1995), whereas Jung also calls it *ratio* to differentiate it from intellect (Jung 1971, p. 481).



from the above characterization of this mode is certainly logic, at least in the sense as understood by *quasi*, informal logic or critical thinking.<sup>12</sup> Part and parcel of this mode is the deductive syllogistic argument as the “backbone” of legal proceedings, making it possible for legal facts and legal norms to meet at some point so that we are able to designate a situation evaluated thereby as legal (or not legal). It is the prototypical argument of this mode and represents one of the major processes in law, that is, the application of law. The deductive syllogistic argument is composed of a major premise, where lawyers place legal norms, and a minor premise including legal facts and the evaluation of whether legal facts and norms meet being the conclusion. At least at the level of a framework, this argument is indispensable for any procedure that wants to be in conformity with the rule of law. Legal argumentation theory understands it to be crucial for justifying the so-called clear (or easy) cases in the internal context of justification (Alexy 1989).

However, in unclear cases we can have ambiguous, vague, or gapful legal norms in the major premise, or an uncertainty in the minor premise as to whether facts correspond to selected legal norms in order to qualify as legal facts. Thus legal argumentation theory claims that in such a situation, we need to go through a process of external justification (Alexy 1989), and (a) interpret legal provisions, or (b) additionally establish facts to become legal facts on the basis of evidence meeting specific standards of proof. Even in its informal variant, logic is definitely one of the most important aspirations to be pursued when normativity in law and legal argumentation is desired. However, realistically speaking, there are also other modes applicable in law and legal proceedings apart from the predominant and most typical logical mode, which may be called alternate modes, the role of which in the context of law will be presented below.

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<sup>12</sup> One interesting definition of that kind of thinking reads as follows: “Critical thinking is a metacognitive process that, through purposeful, self-regulatory reflective judgment and application of a number of sub-skills (i.e. analysis, evaluation and inference), when used appropriately, increases the chance of producing a logical solution to a problem or a valid conclusion to an argument” (Dwyer 2017, p. 73).

Once one departs from the “safe” area of internal justification, which is the gist of the logical mode, one steps onto a slippery path of external justification with a thin dividing line between the legal and the extra-legal. This is not to say that alternate arguments are not used in clear cases. But in clear legal texts, their place is within legal provisions. For example, a picture is used as evidence in a trial to prove the existence of a fact that has already been envisaged in the relevant statute as a legal fact. Therefore, by virtue of its being clear, a legal text restricts the possibilities of the application of non-legal arguments, which has not been foreseen to be used. However, as soon as there occurs a major problem of “translating” alternate modes into the logical one, the case might become an unclear one.

Various canons and arguments of interpretation have traditionally been used by jurists to justify claims that their decisions were as close as possible to the legal text (as the most important institutional constraint in the legal field) in situations in which the text was not clear. Contemporary legal theory is aware that we cannot expect some kind of mechanical jurisprudence from our judges, they need to be creative when deciding unclear legal cases, which would fall within a framework of some kind of material justification rather than the formal. This stems from the assumption that it is impossible for a judge to simply deduce a legal solution from premises in situations in which they are not clear.

The above-presented picture of law has traditionally drawn on the basis of the predominance of (rational if not logical) reasons which need to predominate over (non-rational) emotions, intuitions, senses, etc. It has an important rationale and is normatively very important for dealing with clear cases. It is an indispensable tool to safeguard against arbitrariness, unpredictability, vagueness, ambiguity, gaps, etc. Essentially it is everything that can be understood as safeguarding against legal instability (unpredictability and uncertainty). It is an important link with legal norms and the overarching legal value of the ‘rule of law’ (the “parent” of all legal norms). However, there is a problem with this picture of law in unclear cases in which the traditional legal mode is unable to legally justify judicial behavior by the so-called internal means

(including the facts given to become legal facts, the legal norm selected, and the final legal inference or conclusion made).

In an unclear case in which the internal means of justification are exhausted, the premises and conclusion need to be justified by the so-called external means, at least external concerning their clear meaning, which is lacking and needs to be determined *a posteriori*. We therefore need to reach out to the legal context in which the premises are situated. This context is basically a legal system in which we have legal principles and legal values in addition to legal rules from legal texts, in which different individual and social values are embedded. The just mentioned non-formal dimension of the logical mode can be called material or substantive because it goes beyond the formal context of selecting the premises and making a final inference thereupon. Thus, realistically speaking, such a material dimension necessarily accommodates part of the alternate modes.

This version of less clear legal language is all the more appropriate for the application of multi-modal alternate modes and their arguments in the context of law, since the logical “restriction” applying in clear cases is much less firm. The alternate modes enable people to go beyond legal language, or just fill in its blank content.

As a matter of fact, to be clearer about what I mean by the logical mode in the context of law, an additional adjective “legal” could be added to the syntax “logical mode” so the whole concept could be termed “legal logical mode.” That would emphasize the particular character of legal logic, which is indispensably connected with legal norms, their provisions, legal facts, and texts as more or less verbal. However, for the matter of simplicity of my multi-modal terminology, I most often retain the expression “logical mode.”

Let us see which other modes may be present in the legal context, how these modes interact with the logical mode, how they influence it (whether consciously or unconsciously) (Posner 2008), and determine when the alternate modes fall within the legal framework and when they are to be found outside of it.

*The intuitive mode in law*

I have already mentioned Gilbert's approach of including the *kisceral* as a specific mode in his multi-modal argumentation. Further, I have also explained that what he considers as *kisceral* is very similar to Jung's intuitive (Jung 1971, pp. 398-403), a term I prefer in order to make it more understandable.

Even if we are dealing with a separate intuitive mode and intuitive arguments, we need to present them in a logical form (the claim-reason structure) in order to analyze them. From all of the mentioned multi-modes and their arguments, the intuitive mode is the most elusive and therefore the most problematic. The problem lies in its externalization: it simply cannot be communicated to one's audience by means of intuitive semiotic resources, which would be the most "natural" resources for that mode. We quite easily communicate (and argue about) stuff from the logical mode (for example, by (verbal) logical statements), the sensory mode (for example, by visuals, voices, movements), as well as the emotional mode (for example, by expressing our emotions). But with the intuitive mode, it is different. How can we express a thing such as intuition which as a rule is an internal and introverted matter? The fact that we do have intuitions, that intuition is an important psychological function of perception, that there are not only some fleeting hunches but important moral intuitions that go all the way at least to basic archetypes and that they are reasons for our claims is one thing. But quite another thing is whether we are able to communicate them to our audiences. To do so we need to make use of the other modes (i.e., the logical, emotional, and sensory modes) through which we express our intuitive reasons. The non-intuitive modes' semiotic resources are usually close to the "stuff" of their reasons: that is, logical reasons are communicated as a rule by means of logical sentences composed of (rational) thoughts, emotional through (non)verbally expressed emotions, and sensory through pictures, sounds, etc. The problem with the intuitive mode is that it does not have "its own" semiotic resources. Still, we can communicate it by means of semiotic resources that are more natural to other modes.

It is the rhetoric<sup>13</sup> of values that provides the requisite grounds to enable the use of intuitive arguments. The text of a legal provision, being the primary source of the logical mode and especially in hard legal cases, becomes exhausted and there is no other way for judges than to rely on their (moral) intuitions. Dworkin claimed that in hard cases judges rely on their moral integrity (Dworkin 1978) as responsible persons who have been entrusted with an important job by their societies. In the framework of moral integrity, there is a prominent place in particular for moral intuitions as a priori elements of such integrity and only the a posteriori rational evaluation of such intuitions. The externalization of judges' (moral) intuition is presented in values that they read in unclear legal provisions as the necessary premises for legal decision-making. Through their rhetoric of values (or "ethos") they try to steer<sup>14</sup> the discussion into a certain direction such that the unclear legal provisions would be understood in a certain manner, of which several of them are considered reasonable.

At least in civil-law legal systems, judges pledge to uphold the constitution and statutes and to adjudicate impartially using their "conscience" when sworn into their judicial office. So what does their conscience mean in this respect? I believe it is their moral intuition on the basis of which in unclear cases in which the legal text runs out, they find a necessary premise in it. But the problem is that their moral intuition might depend on the different moral values they uphold; and we can have both liberal as well as conservative values—all of which are moral. When the above-mentioned canons of interpretation and arguments are concerned, there is more room for judges to rely on their different values and

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<sup>13</sup> I understand rhetoric in a classical Aristotelian sense, embracing logos, ethos, and pathos as the means of persuasion, with logos being the most important although far from the only means of persuasion (Aristotle 2004). When logos somewhat "runs out," in the legal domain, that would be a case when the legal provisions to be applied are not really clear and there are no prior precedents, it is the arguers' credibility (ethos) that might persuade the audience. Moreover, the arguers also try to be effective in their arguing, thereby also employing non-rational means of persuasion. For how classical legal rhetoric can be still applied in modern situations, see Frost (2005).

<sup>14</sup> Van Eemeren would say "strategically maneuver," although he only recognizes the role of rhetoric in the field of logos (van Eemeren 2010).

intuitions when using arguments in the framework of the evaluative-teleological group.<sup>15</sup>

According to Perelman and Olbrechts-Tyteca: "In a legal proceeding, the tendency to judge according to the law is combined with that of judging on the basis of equity. ... he is not entirely immune to arguments addressed to him as a member of a particular, but not specialized, social group or a member of the universal audience: this appeal to his moral sense may have had him to discover new arguments..." (Perelman, Olbrechts-Tyteca 1969, p. 104).

In his later work, Gilbert developed the idea of *kisceral* further. His approach to this issue, as well as to multi-modality itself, is descriptive, as is appropriate for real arguers. Gilbert was aware that the *kisceral* is an elusive area of cognition as it can be based on intuitive, imaginative, religious, spiritual, as well as mystical aspects. Thus, he understands its controversial character but, having cited some historical quotes from famous philosophers and scientists, concluded, firstly, that "an appeal to intuition is philosophically, mathematically, and scientifically acceptable, and, secondly, these intuitions are amenable to argument" (Gilbert 2011, p. 164).

Although Gilbert initially maintained that his approach to multi-modality including that the *kisceral* was descriptive, he also could not resist the temptation to discuss it normatively. Thus he developed "a number of criteria that can be used to judge intuitions." Thus, upon the importance of application of the principle of defeasibility, he further referred to persuasibility, consequentiality, and evidential responsibility as those "procedural" criteria that may be used when separating reliable intuitions from false ones (Gilbert 2011, pp. 166-169).

In *The Type Theory of Law* (Novak 2016), in which the author discussed the relevance of Jung's psychological types for law, he pointed to two versions of intuition. Jung defines intuition (Lat. *intueri*, to look at or into) as the function that mediates perceptions in an unconscious way. He sees it as a kind of "instinctive appre-

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<sup>15</sup> The famous comparative study of various national approaches to statutory interpretation made by the "Bielefelder Kreis" indicated four groups of arguments, including linguistic, systemic, teleological/evaluative, and transcategorical (argument from intention) (MacCormick, Summers 1991, pp. 512-516).

hension,” knowledge that “possesses an intrinsic certainty and conviction.” Furthermore, he considers intuition to be either subjective or objective depending on whether it stems from the subject or is somewhat related to the object, as well as abstract or concrete, depending on whether it is directed to inner ideational connections or outside facts (Jung 1971, pp. 269-270).

Novak’s understanding of intuition in relation to law is twofold. First, he refers to the so-called extraverted intuition as the one which helps people quickly find possible connections between external objects as the so-called “insights” into the possibilities of these connections or relations (Jung 1971, p. 368), which he calls ‘instrumental intuition’ (Novak 2016, p. 96). Kahneman calls this type of intuition ‘expert intuition’ (Kahneman 2011, pp. 11-12). In the legal arena, the sense (“feeling”) of law or *Rechtsgefühl* designates a situation in which an experienced lawyer, one with a certain degree of knowledge and experience already obtained, quickly “guesses” what a legal solution would be when initially faced with a factual situation brought to him or her by a client. This quick “consultation” between the facts of a legal case and the legal norm, the two premises of deductive argument, is intuitive in this phase. However, for a serious opinion to be made, such guesses must be followed up by a rational analysis of the resolution of the legal problem, which is reasoned in an analytical and linear manner in the reasoning of a legal decision/opinion.

The other kind of intuition, which Novak calls ‘creative intuition’ (Novak 2016, p. 96) from Jung’s introverted intuition (Jung 1971, p. 400), is related to perceptions from within ourselves. It is connected to what Plato called ideas, what Jung termed archetypes, what other philosophers named abstract ideals, and what Kant coined as *noumena*. According to Jung, introverted intuition is related to the images arising from what he calls archetypes: “the accumulated experiences of organic life in general, a million times repeated, and condensed into types” (Jung 1971, p. 236).

In the area of argumentation theory, like Gilbert, Robinson rejects the experimentalists’ claim that intuitions are not valuable as reasons. Instead he argues that intuitions are the best kind of evidence for judgments about moral responsibility, and distributive justice. According to him, any argument about moral respon-

sibility would either appeal directly to intuition, or else rely on a premise which itself appeals directly to intuition (Robinson 2014, p. 158).

As this work is about multi-modal argumentation in the legal domain, a more common version of such intuitively perceived meta-norms in the field of law would be (legal) values, as a kind of an established category for such in the framework of legal philosophy. They are certain concepts, beliefs, and goals that we value as our personal orientations, and which are (non)rational and semi-conscious.

According to psychological theory, an individual's values and thus social values, assuming that those perceived and evaluated first at the individual level are then communicated and debated at the social level, are (non)rational: emotional, cognitive, and (un)conscious. What influences their formation are (1) biological, genetic, and evolutionary factors (Musek 2000, pp. 276-277). Various genetic studies have demonstrated that it is not only our temperaments and personality features that are under the influence of hereditary factors but also our viewpoints, convictions, and values (Eysenck 1990a, 1990b). There are also mechanisms in people in which there are connections between genetic activity and environmental influences (Reiss 1997). Thus we also have (2) cultural, social, and educational formation of values (Musek 2000 pp. 277-278). Then there are (3) motives and our needs that shape our values, as well as our emotions. Finally, (4) cognitive factors also influence value formation (Musek 2000, pp. 278-292).

Through values as a kind of higher premises or norms we evaluate various material things, concepts, and other phenomena such as food, beverages, clothes, transportation, life, freedom, peace, responsibility, order, religion, family, marriage, etc. People make value judgements when they evaluate (or judge) certain phenomena by resorting to the mentioned values which they incorporate half-consciously. Through intuition, which according to Jung is a non-rational cognitive function, we have (non)rational access to our (personal and social) values as those values that we integrate as the major premises for our life and activities.

We have internalized social values at some point in our lives and they have become our personal values, those which we share



with other people and recognize (un)consciously. For example, some prefer more responsible attitudes towards society (respecting social security and equality) over individual freedom, and vice versa. Law as a social discipline is concerned mostly with values of this kind, which do not appear necessarily as meta-norms and, most certainly not, as explicitly legal norms. Such values appear in the “background” (being inexplicit) of many legal norms, usually legal principles that are fundamental and indeterminate (Guastini 2014, pp. 77-81).

Whenever the application of legal provisions is considered, these hidden (intuitively perceived) premises, acting as enthymemes that are not explicitly written in the legal text, may become important when we evaluate legal norms. This is more probable the more abstract, general, vague, and gappy the legal provisions are. In such a manner, these values determine judges’ evaluation of explicit legal provisions in certain manners. There is an extensive literature on how the ideology of judges enters their decision-making through their value judgements based on either principles or policies.<sup>16</sup> In unclear cases, deduction “runs out” and the premises need to be re-created, first by rational means although it is impossible to exclude value judgements. This is because value judgments can be hidden behind a rational judgment as a kind of logical “decoration” for a true value judgement as the main impetus or stimulant for such a final judgement.

Let me provide an example at this point. In *Plessy v. Ferguson*, 163 U.S. 537 (1896), Plessy, who claimed to be seven-eighths white and one-eighth black, refused to comply with a demand that he sit in the black railway carriage rather than the one for whites. A Louisiana statute namely required railroad companies to provide “equal but separate accommodations for the white and colored races.” A passenger using facilities intended for the other race was made criminally liable. Plessy was persecuted under the statute when he failed to leave the coach reserved for whites. The state supreme court upheld the constitutionality of the statute (Stone *et al.* 1991, pp. 488-490). He then appealed to the US Supreme Court.

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<sup>16</sup> For one such notable example, see Kennedy (1996).

In 1865 the 13<sup>th</sup> amendment to the US Constitution was adopted prohibiting slavery throughout the United States. It also gave Congress the power to enforce its provisions through appropriate legislation; however, it did not prohibit states from discriminating against blacks, which many states did through enactment of so-called "Black Codes" which restricted their rights. One such code was the above-mentioned Louisiana statute. Finally, the 14<sup>th</sup> amendment to the US Constitution was adopted to provide a constitutional basis for imposing (federal) civil rights, such as equal protection before the law, on the states (Stone *et al.* 1991).

Affirming the state legislation to allow separate railway carriages for whites and blacks, the Court majority held that the state legislature may have properly concluded that the law would preserve the public peace and good order. That was within the competency of the state legislature in the exercise of their police powers, following established usages, customs, and traditions in that state. Justice John Marshall Harlan dissented from the majority. By taking the equal protection clause literally, he argued that "in respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such right. . . . Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law" (Stone *et al.* 1991).

Surprisingly, Harlan had been a slave owner and defender of slavery as a Whig, but he then changed his position dramatically to become the "lonely dissenter" in *Plessy*. Beth suggests that for years Harlan's private racial attitudes had been more liberal than his public statements, which were fueled by "a partisan enthusiasm and the desire to win elections . . . with a resulting split between the private and the public man" (Beth 1992, p. 105). According to Thompson, there are numerous factors in Harlan's background that might have softened his racial attitudes. Although he owned household slaves, Harlan's father abhorred the brutality of the system. John's wife wrote in a memoir that John had imbibed "a deep dislike of involuntary servitude in any form" from his father and teachers. Her own distaste for slavery also may have influenced his views, too. Then there was John's slave half-brother

Robert, who was treated to some degree as a member of the family. According to some accounts, his father once tried, unsuccessfully, to send Robert to school along with his other children. That knowledge may have made him more sensitive to racial injustice. Moreover, there was the terrorism that the Ku Klux Klan and similar groups inflicted upon blacks in Kentucky immediately following the war, which also pushed Harlan toward the Republicans. He was appalled by the arson, beatings, and murders, and the revulsion he felt was reinforced by his friendship with a leading Republican, who as U. S. Attorney for Kentucky prosecuted the white terrorists (Thompson 1996).

Accordingly, from the above accounts, we can see how Justice Harlan's private system of values and moral intuitions, also accompanied with his family members' views and changed social circumstances, progressed to break his onetime public positions. Consequently, he began seeing the equal protection clause differently than the other seven judges (one was missing from the verdict). His intuitive (moral and (ir)rational) reasons must have played an important part in that.

In Groarke's view, expressions of value are usually multi-modal because their language is uncertain, unclear, vague, and elusive, which causes problems for expressing them in exact words. This is also a problem in the area of legal reasoning, especially because concerning the judgements of value, "the complications that arise for language in the realm of value further limits the adequacy of language" (Groarke 2017, pp. 24-25).

Harlan's rhetoric of values suggests his dissent to the audience and a different reading of the US Constitution than the majority one, something which eventually led to its overall change of opinion about the "equal but separate" notion thereafter. In connection with such, it might seem to be a pretty ordinary claim that moral factors influence judicial decision-making. However, by pointing to a specific intuitive mode within a multi-modality theory of legal argumentation, I would like to show its distinct character in comparison with the logical mode. This contributes to greater transparency in decision-making and its justification since, on one hand, it stresses the importance of judges' creativity, and, on the other

hand, it reveals that judges may potentially hide behind the letter of the law in unclear cases.

### *The sensory mode in law*

Under the so-called sensory mode, I understand everything that is perceived by our five senses: in essence, seeing, hearing, tasting, touching, and smelling. Thus, communication and argumentation are based on sensory messages as reasons on the basis of which we make claims. For example, A claims that B is loud, because A hears strong sounds made by B ('reasons' for his 'claim').

The adjective 'sensory' basically augments Gilbert's visceral since it is broader. It refers to all the psychicalities that we sense and may argue upon, including hearing, taste, and smell, which are in the multimodal argumentation theory discussed by Groarke.

Jung understood sensation as "the psychological function that mediates the perception of a physical stimulus. ... It is related not only to external stimuli but to inner ones, that is, to changes in the internal organic processes. It is perception that is mediated by the sense organs and body-senses. ... Since it is an elementary phenomenon, it is given *a priori*, and, unlike thinking and feeling, is not subject to rational laws" (Jung 1971, pp. 276-277).

He differentiated further between concrete and abstract sensation. Concrete sensation is related to the external objects as seen by a subject whereas abstract sensation can be termed aesthetic and is found chiefly among artists. Concrete sensation never appears in a pure form but is always mixed up with ideas, feelings, and thoughts (Jung 1971, pp. 276-277). Furthermore, according to Jung: "Objects are valued in so far as they excite sensations, and, so far as they lie within the power of sensation, they are fully accepted into consciousness whether they are compatible with rational judgments or not. The sole criterion of their value is the intensity of the sensation produced by their objective qualities" (Jung 1971, p. 213).

Following multi-modal argumentation theory, in the framework of this mode there are sensory arguments which have mostly non-verbal reasons of their own, those which can be linguistically explicable, but their verbal equivalent cannot fully express their entire dimension. If there exists some kind of "translation" of such

between the modes, it is often very general, shallow, and superficial. People do indeed “translate” (or at least transfer) non-rational information that they receive (perception) into rational information (evaluation). However, the problem is that this kind of translation can never be literal and is only an approximation.

Groarke argues that “words are clumsy instruments” unable to entirely encapsulate what was communicated not only by visual multi-modal arguments but also by other multi-modal arguments in general (such as sounds, tastes, smells, values, and other non-verbal properties) (Groarke 2017, p. 16). Kjeldsen would add that a picture as such would be a “thick” representation of its content in comparison with the words describing it being a “thin” representation of the same (Kjeldsen 2015, p. 200).

But how and where is this mode important for law, legal procedures, and, ultimately, legal argumentation?

It is particularly important for the area of evidence assessment (see also van den Hoven, Kišiček 2017). It generally concerns the minor premise of a deductive syllogism, in the framework of which it is the role of evidence to prove that the facts of a case are indeed legal facts—the “facts” of a relevant legal norm. When it comes to seeing or visual argumentation, suppose A is charged with the criminal offence of fraud for having sold a fake painting of a famous painter as the original one. To prove this in court, an expert would appear to testify about the fake nature of the painting. He would describe certain details to demonstrate that there are visual differences between the original and the fake in order to prove the fraudulent act. These differences as visual arguments are described in words, but it is questionable whether they can be full (or literal) translations of the visual into words. In borderline (unclear) cases, linguistic categorization or conceptualization can go either way by missing certain important points.<sup>17</sup>

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<sup>17</sup> Groarke reports a case, known as the so-called “Keane controversy,” in which the court was to decide who the real painter was in a dispute between two painters about the authorship of a work. To determine this, the court made the two artists paint the same painting again in front of the court. However, only one artist complied with the court’s request, while the other excused himself on account of some pain in his arm. Finally, the first artist painted the painting in a

Neuroscientists would say that the senses are “translated” in the brain into words, yet gestures and words may tell different stories. In this context, Sigman points to a football player being tested by means of a verbal description of how to take a free kick (Sigman 2017, pp. 224-225). In everyday life, we take such “translations,” for example from images into words, for granted, but in unclear situations, judges sometimes need a few experts to interpret the images to them, as in the case, for example, of determining whether a footprint found at the crime scene belongs to the defendant.

Furthermore, concerning the sense of hearing and auditive arguments, van den Hoven and Kišiček presented the interesting case of Stanley ‘Tookie’ Williams, a former gang-leader, sentenced to death in 1979 and then executed in 2005. They analyzed a video clip as a part of a 2005 campaign to urge the then governor of California, Arnold Schwarzenegger, to grant clemency to Williams. Convinced that he should have been pardoned by the governor, they claimed that the prosodic information, such as “pitch, pitch range, voice quality, intonation, tempo, loudness, emphasis, accentuation, and (non-)fluencies of the speaker (i.e. Williams),” which cannot be translated into words, showed that Williams had become “re-socialized” and thus a better person while in prison for such a long time. They mainly associated such prosodic features with emotions (*pathos*) and ethics (*ethos*) (van den Hoven, Kišiček 2017).

The basic problem concerning these alternate arguments is how we “translate” them into verbal and most often logical arguments for the reason of their application in law. The problem is that such “translations” or transpositions are only approximate, and the less approximate the transposition of some alternate argument into the legal one is, the less room there is for legal certainty and the greater the possibility of a legal decision being reached in one way or another, especially in unclear cases. Instead of translation, it is better to speak about the ‘transformation’ from one mode to the other.

### *The emotional mode in law*

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manner which completely resembled the original, thus she passed the court's test and the case decided in her favour (Groarke 2017, p. 17).

People who participate in legal proceedings, whether as professionals or interested parties, are far from being only rational, they are also emotional beings. This makes life more colorful and richer, however, emotions are generally not the most appropriate ways of communication and argumentation in law and legal procedures, which tend to be rational, objective, and impartial—at least when seen from a judicial perspective, which is one of the most important points of view in law.<sup>18</sup> Frankly, legal procedures not being such is not only a problem for the emotional mode but also for other non-legal modes such as intuitive and sensory modes.

The emotional mode deals with emotions, such as love, affection, anger, hatred, etc. In such a mode, people make claims supported by emotional premises. In an ideal linear, logical, systematic, and rational mode of legal procedures, there is usually no significant room for emotions as sole or independent criteria for legal decisions and legal arguments. But, realistically, it is people that argue in legal procedures and listen to arguments from other people, decide upon them, and then justify their decisions on the basis of legal norms. Thus, we cannot expect judges to entirely eliminate the presence of their emotions in decision-making, because that is impossible, as has been scientifically proven. However, we still expect them to be impartial, not siding with either party solely due to their sympathy or anger for that party. Otherwise they might be biased, legally erroneous, or violate rules of judicial

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<sup>18</sup> In the last decade especially, scholarship dealing with law and emotion has been growing fast (the most prominent author in the area being Maroney (Maroney 2011a, 2011b, 2012)). Based on neuroscientific and psychological findings that emotions are deeply intertwined with the process of reasoning, scholars want to demystify the traditional picture of law as necessarily dispassionate. Maroney also cites Justice Brennan (Maroney 2016). More than 30 years ago, a justice of the US Supreme Court, William J. Brennan, held that judges should recognize passion in themselves, which he described as the “range of emotional and intuitive responses to a given set of facts or arguments, responses which often speed into our consciousness far ahead of the lumbering syllogisms of reason.” In his opinion, this would keep judges closer to human reality and prevent law from becoming sterile (Brennan 1988, p. 9). It seems eerily reminiscent of Kahneman’s fast and slow thinking, some twenty years before it was formulated!

ethics. Accordingly, instead of the traditional ideal of the dispassionate judge, a new ideal has been proposed in the law and emotional scholarship—that of the emotionally well-regulated judge (Maroney, Gross 2014).

Gilbert calls emotional argument “one in which the feelings being communicated by the participants are more important than the words being used to communicate those feelings.” He further points to “the relative importance of the words versus the feelings they express that is crucial” (Gilbert 1995).

As already indicated, from a normative point of view, in the framework of legal procedures, they are required not to rely solely on emotions as independent criteria for legal decisions, as judges could appear to be biased (not impartial). It is certainly not possible to get rid of emotions and “dehumanize” a person in such a manner, but judges are asked to subordinate their emotions to rational arguments (i.e. verbal and most often logical) because this is what legal premises require in order for a rule of law to be followed.

Emotions *per se* are not “hostile” to law when they are part of legal norms. It is especially constitutional values and human rights that were built on the basis of strong public emotions (such as liberty, equality, etc., with which strong emotions might be associated). In his *Constitutional Sentiments*, Sajo argues the following: “Widely shared moral judgements are summarized and fixed as vague values and principles of the constitution and set constitutional principles. These priorities are needed to solve otherwise hard-to-treat complex problems. ... Values animated by moral sentiment have specific regulatory power here: moral values preclude the consideration of some of the consequences of value-driven decisions. Protected values operate as emotion-backed constraints on choice.” (Sajo 2011, pp. 42-43.) Accordingly, there is no problem with using emotions to back legal norms. A problem appears when they are used to circumvent or undermine legal norms.

In performing their judicial function impartially, judges should not be biased, a very typical version of which is emotional bias. To avoid situations in which this might occur, legal systems provide for the possibility of their recusal. There are (a) absolute reasons



for recusal in which, if they are in very close relations with certain people (such as spouse, children, parents, brothers and sisters, etc.), they must recuse themselves from deciding the case. With regard to (b) relative reasons for recusal, they need to recuse themselves from a case if they decide that their emotions could make them biased. Thus, the law has envisaged the problem and provided solutions but only for the gravest or most common situations of emotional bias. What about all other cases in which parties do not know about judges' relations with specific people, or judges are not aware of being emotionally biased? We could say, following Kjeldsen (Kjeldsen, 2015, p. 200), that legal provisions are much "thinner" than the emotional situations they are supposed to deal with rationally. This gives parties, attorneys, and even judges tremendous potential for their rhetorical strategies.

For example, according to Bandes (2016), there are at least two areas where it is interesting to study implicit emotional norms: one is remorse, the other rape. First, several studies found that when a defendant does not look suitably remorseful, his or her sentence is likely to be harsher. A particularly harsh price is paid in such situations by those facing capital punishment (Haney, Sontag & Constanzo 2010). Second, it is generally believed that rape victims should act hysterically, rather than seeming calm shortly after the crime, so one victim was even charged with perjury for reporting a rape, largely based on her flat emotional response (Miller, Armstrong 2015). Moreover, a study demonstrated that judges in Minnesota adjudged rape victims as most credible when they expressed compassion or forgiveness for their assailant, rather than anger (Schuster and Proppen 2011).

Therefore, to act legally in such emotionally explicit situations, and to rely solely on legal arguments, judges would need to overcome their emotional arguments or, if they feel that they are unable to do so, recuse themselves from the case. But that is often not easy, and we are frequently not even aware of the impact some emotional arguments have on us, especially when it happens semi-consciously or even unconsciously. We may think that we can handle an emotionally sensitive situation but that might only be our rationalization as a psychological defense mechanism. In a real situation, just like other people, judges are not immune to all of

these influences. As professionals they are trained and experienced to avoid such situations and know how to overcome them, but it is impossible to say that they would do the right thing in a hundred percent of cases. It is more realistic to say that, just like all other people, they are fallible, and it is more likely that they will slip up the more complicated the case is and when the premises for making use of inference are unclear.

The above findings present a challenge for argumentation theory, at least one which is more rhetorically oriented. Thus, we will no longer deal with emotions in law in a black-and-white manner but will study “grey areas” of how the emotional mode and emotional arguments interrelate with the logical mode and arguments and will determine what are acceptable, non-fallacious emotions in the law. This is because, to date, the sharp emotion versus reason dichotomy has clouded the issue of how arguments actually persuade (Bandes and Salerno 2014).

That judges are also emotional in their decision-making is one issue, but quite another is to analyze this from the justification of their judgments, which is primarily the interest of legal argumentation theory. Indeed, especially in their dissenting opinions,<sup>19</sup> one can find examples where they are more personal and use emotions as rhetorical devices or figures (pathos) to try to steer the understanding of legal provisions in a certain direction. For example, from the history of U. S. constitutional law, Holmes' dissenting opinion in *Lochner v. New York*<sup>20</sup> was quite emotional when he stressed the following: “... The Fourteenth Amendment does not enact Mr. Herbert Spencer' Social Statics ... But a constitution is not intended to embody a particular economic theory, whether of

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<sup>19</sup> Frost also finds judges' dissents as having rich potential in terms of studying their rhetorical strategies (Frost 2005, pp. 111-138).

<sup>20</sup> Mr. Lochner was convicted of permitting an employee to work for him more than the statutory maximum of 60 hours per week. Lochner appealed, claiming the law violated his freedom of contract under the Fourteenth Amendment, as part of the due process clause. Deciding on the issue of whether a state may have generally prohibited private agreements to work more than a specified number of hours, the U. S. Supreme Court found no violation of the Constitution, deeming that the general right to contract in business was clearly part of the individual liberty protected by the Fourteenth Amendment (Stone at al. 1991, pp. 790-796).

paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views ...” (Lochner v. New York, 198 U.S. 45, 1905 in Stone et al. supra, pp. 795-796).

## 5. Conclusion

We generally have one crucial mode in the context of law, namely the logical mode, and three other seemingly less relevant modes that we call alternate modes. Although they should have no decisive importance in the context of law, albeit from an idealized point of view, realistically speaking they keep appearing all the time in a broader context of decision-making and argumentation as they remain present in both arguers and audiences that consist of people as multi-dimensional individuals.

As a rule, the four modes influence one another and overlap in the process of argumentation all the time. However, to have a non-fallacious relation between non-logical modes and the logical mode from the point of view of the rule of law and legal validity, in their decisive capacity they need to be subordinated to the logical mode, that is, to legal premises, the major one consisting of a legal norm and the minor one including legal facts, and there needs to be a meeting thereof to form a legal conclusion. This is certainly true if we know what legal premises actually require in a specific case. The non-logical modes may be relevant for a legal case if the logical mode allows room for their relevance and to the extent that it does so (a) the sensory mode is important in certain cases, in the epistemic sense, for establishing the lower premise in particular with regard to evidence; and (b) the intuitive and emotional modes add an important rhetorical dimension to the legal premises.

All of the examples of the alternate modes above would be completely useless if we are certain that all of them can fully be translated into the logical mode. We would simply say that all these alternate modes need to be subordinated to the logical mode if they want to have any relevance in legal argumentation, that is, to the one that is verbal, logical, and rational in the traditional sense of the word (i.e. *logos*—being both logical and verbal). But

if we are not fully sure about that, by understanding that there is a certain gap between an idealized legal situation and what actually occurs in legal reality, we have to take into account the possibility that the alternate modes that appear in legal procedures are not always fully subordinated to the logical mode. As a result, they can thus influence how it is used, which is more common in hard or unclear legal cases in which legal premises are unclear, ambiguous, and gappy. This opens up a certain space for the relevance of rhetoric and rhetorical dimensions (such as *pathos* and *ethos*) when arguing in legal procedures. In such decisions, there are several possible solutions, which all need to be in accordance with the law, and alternate non-legal modes can also influence the understanding of legal premises.

Lawyers who represent their clients in numerous court proceedings every day are very aware of the rhetorical value of the mentioned alternate modes and their arguments. They know logic is only one part of the “story” and thus they prepare strategies for how to influence judges. In doing so, they are not concerned with idealized legal argumentation's requirements, which uphold logical results, but rather in its realistic outcomes. This applies particularly, but not exclusively, to their strategies in unclear or hard cases.

Gilbert's multi-modal theory of argumentation played a very important role in demonstrating that there is no single mode of argumentation but rather that it is in fact multi-modal. This created a more holistic approach to arguments in which we should consider logic as only a skeleton of the whole body of an argument (Carozza 2016, p. 8). Further, Jung's psychological types are needed to better understand the psychological grounding of the mentioned modes and to justify the number enumerated.

All of the above is intended to convey the idea that logical, linear, or clinical arguments only exist in theoretical models, whereas in reality, in real-life situations, we have multi-modal ones, where different modes and their arguments influence each other incessantly.

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