

St. John's Law Review

Volume 66

Number 1 *Volume 66, Winter 1992, Number 1*

Article 3

April 2012

Greco-Roman Legal Analysis: The Topics of Invention

Michael Frost

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

Frost, Michael (1992) "Greco-Roman Legal Analysis: The Topics of Invention," *St. John's Law Review*: Vol. 66 : No. 1 , Article 3.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol66/iss1/3>

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

GRECO-ROMAN LEGAL ANALYSIS: THE TOPICS OF INVENTION

MICHAEL FROST*

I. INTRODUCTION

Despite a wealth of commentary on legal reasoning and legal logic, modern writers on the subject demonstrate a curious and regrettable disregard for the close connections between classical Greco-Roman theories of forensic discourse and modern theories of legal reasoning and analysis. Two recent treatises on logic and legal reasoning, Judge Ruggero Aldisert's *Logic for Lawyers*¹ and Professor Steven Burton's *An Introduction to Law and Legal Reasoning*,² are exceptions to this rule. Their treatises fall within a 2,000-year-old tradition of rhetorical analysis and discourse especially designed for lawyers. Beginning with treatises on rhetoric by Aristotle, Cicero, and Quintilian, philosophers and lawyers have repeatedly attempted, some more ambitiously than others, to describe and analyze legal reasoning and methodology. Judge Aldisert implicitly acknowledges his participation in this ancient tradition with an epigraph drawn from Cicero's *Republic*, with his choice of subject matter, and with his use of centuries-old rhetorical terminology.³ Professor Burton's approach to legal analysis and argument can also be traced back to ancient rhetorical treatises especially written for the instruction of beginning advocates. Their reliance on these ancient traditions is understandable because, from its inception down to the present day, effective forensic discourse invariably depends on the same argumentative topics and uses the same rhetorical techniques.

Since Greco-Roman rhetoricians are among the most endur-

* Associate Professor of Legal Writing, Southwestern University School of Law. Ph.D. English, State University of New York, Binghamton; B.A. English, University of California, Davis.

¹ RUGGERO J. ALDISERT, *LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING* (1989).

² STEVEN J. BURTON, *AN INTRODUCTION TO LAW AND LEGAL REASONING* (1985).

³ ALDISERT, *supra* note 1, at 54. Here and elsewhere, Judge Aldisert uses the term "enthymeme" to describe a rhetorical concept that was analyzed extensively by classical rhetoricians. See *infra* notes 12, 68-73 and accompanying text (discussing enthymeme).

ing, successful, and thorough analysts of legal reasoning, even the most experienced and harried of modern practitioners will undoubtedly discover in their works numerous time-saving analytical and argumentative techniques that will improve their efficiency and deepen their insights. Contemporary advocates will also discover that, in most important ways, thinking about legal problems has not changed very much in 2,000 years. As Karl Keating demonstrates in his article, *Winning with Aristotle: The Four Kinds of Arguments*,⁴ a good understanding of classical logical and analytical principles can make modern lawyers more persuasive. Writing from a practitioner's perspective and relying on four classical argumentative modes, Keating shows how advocates persuade courts by using arguments from definition (deduction) and similitude (induction) in conjunction with policy arguments based on circumstance and consequence.

The *locus classicus* for Keating's four argumentative modes, and for almost every other form of formal or informal argument, is Aristotle's *Organon*, a collection of treatises on logic. Two of those treatises, *Prior Analytics* and *Posterior Analytics*,⁵ focus on deductive and inductive reasoning and were adapted for use in legal argument by Aristotle and by Roman lawyers like Cicero and Quintilian.⁶ Cicero and Quintilian, as well as the anonymous author of the *Rhetorica ad Herennium*,⁷ analyze in great detail the analytical, logical, and rhetorical techniques Roman lawyers used to argue their cases successfully. This Article examines these techniques and reveals the connections between classical and modern analyses of legal argument and logic in order to show how classical rhetoric and legal analysis is relevant for modern lawyers.

II. RHETORIC AND RHETORICS

Roman rhetorical treatises were written for inexperienced advocates or for anyone who might sometime argue a case in court.⁸

⁴ Karl Keating, *Winning with Aristotle: The Four Kinds of Arguments*, 52 CAL. ST. B.J. 308 (1977).

⁵ ARISTOTLE, ARISTOTLE'S PRIOR AND POSTERIOR ANALYTICS (W.D. Ross trans., 1957) (1949).

⁶ Marcus Tullius Cicero (circa 106-45 B.C.) was a Roman statesman, lawyer, and teacher whose major works on rhetoric include *De Oratore*, *Brutus*, and *Oratore*. Marius Fabius Quintilianus (circa 35-95 A.D.) was a Roman instructor of public speaking and rhetoric whose major rhetorical work is *Institutio Oratoria*.

⁷ RHETORICA AD HERENNIVM (Harry Caplan trans., 1932).

⁸ In addition to serving these functions, rhetorical treatises also describe a comprehen-

The treatises were not directed solely at lawyers or students but were intended for use by all members of the educated classes.⁹ In effect, they were practice manuals replete with examples drawn from famous cases. They described the analytical methodology and practice of experienced lawyers and were descriptive, rather than prescriptive, in force. With varying degrees of success, these rhetorics¹⁰ regularized and systematized legal analysis and suggested ways of effectively organizing the available arguments.

Most Roman rhetoricians were directly or indirectly indebted to Aristotle's *Rhetoric*¹¹ for their basic assumptions about reasoning in general and legal reasoning in particular. Aristotle divided all reasoning into two categories—induction and deduction. In *Rhetoric*, Aristotle used a special terminology to explain the function of induction and deduction in rhetorical discourse: “[I]n Dialectic [logic] we have, on the one hand, induction, and, on the other, the syllogism and apparent syllogism, so in Rhetoric: the *example* is a form of induction; while the *enthymeme* is a syllogism, the apparent enthymeme an apparent syllogism.”¹²

Centuries later, Aristotle's two categories were accepted and preserved by Roman rhetoricians like Cicero, who relied on them and employed Aristotle's terminology. In *De Inventione*,¹³ for ex-

sive educational curriculum and provide instruction on public speaking for ceremonial and political occasions.

⁹ 1 MARIUS FABIUS QUINTILIAN, INSTITUTIO ORATORIA 5-19 (H.E. Butler trans., 1954); Susan Miller, *Classical Practice and Contemporary Basics*, in THE RHETORICAL TRADITION AND MODERN WRITING 46 (James J. Murphy ed., 1982); Donovan J. Ochs, *Cicero's Rhetorical Theory*, in A SYNOPTIC HISTORY OF CLASSICAL RHETORIC 96 (James J. Murphy ed., 1983).

¹⁰ In this Article, the term “rhetoric” sometimes refers to a rhetorical treatise written by a Greek or Roman author. “Rhetoric” is also used in the Aristotelian sense of being the “faculty [power] of discovering in the particular case what are the available means of persuasion.” ARISTOTLE, THE RHETORIC OF ARISTOTLE 7 (Lane Cooper trans., 1932).

¹¹ *Id.*

¹² *Id.* at 10 (emphasis added). An enthymeme is a syllogism whose major premise is unstated. See ALDISERT, *supra* note 1, at 54; *infra* notes 68-73 and accompanying text; see also EDWARD P.J. CORBETT, CLASSICAL RHETORIC FOR THE MODERN STUDENT 73 (2d ed. 1971).

In modern times, the enthymeme has come to be regarded as an abbreviated syllogism—that is, an argumentative statement that contains a conclusion and one of the premises, the other premise being implied. A statement like this would be regarded as an enthymeme: “He must be a socialist because he favors a graduated income-tax.” Here the conclusion (He is a socialist) has been deduced from an expressed premise (He favors a graduated income-tax) and an implied premise (either [a] Anyone who favors a graduated income-tax is a socialist or [b] A socialist is anyone who favors a graduated income-tax).

Id.

¹³ MARCUS TULLIUS CICERO, DE INVENTIONE 93 (H.M. Hubbell trans., 1949).

ample, Cicero observes that

[a]ll argumentation, then, is to be carried on either by induction or by deduction.

Induction is a form of argument which leads the person with whom one is arguing to give assent to certain undisputed facts; through this assent it wins his approval of a doubtful proposition because this resembles the facts to which he has assented.¹⁴

When devising *deductive* arguments, Cicero and other Roman rhetoricians "used an adaptation of the logical syllogism . . . in the form of the enthymeme, a syllogism in which the major premise is only probable, or one in which one term is omitted."¹⁵

Aristotle carefully distinguished between the discipline of formal logic, or dialectic, as it appears in his *Prior Analytics* and *Posterior Analytics*, and the discipline of rhetoric.¹⁶ Dialectic is designed to produce irrefutable proofs. Rhetoric, however, is employed to inform or persuade.¹⁷ Arguments in a rhetorical or persuasive context demonstrate only *probable outcomes*, not irrefutable proofs. Aristotle and other rhetoricians recognized and emphasized the limits of logic as a tool of persuasion and carefully describe those limits. They explicitly emphasized that their treatises were written to introduce readers to traditional forms of legal analysis and to teach a systematic method of devising and organizing arguments.¹⁸ Their treatises describe a multifaceted and recursive analytical process during which advocates examine and re-examine the procedural, factual, and legal issues of a case and choose the most effective lines of argument.

III. PROCEDURAL ANALYSIS

Before dealing with the substantive aspects of a case, Cicero, one of the most successful and famous lawyers of his time, recommended that advocates first examine their case from a procedural

¹⁴ *Id.* (footnote omitted); *see also* 2 QUINTILIAN, *supra* note 9, at 273 (noting that Cicero divides all arguments into two classes, induction and ratiocination (deduction)).

¹⁵ CICERO, *supra* note 13, at 104 n.a.; *see also supra* note 12; *infra* notes 68-73 and accompanying text (discussing enthymemes).

¹⁶ ARISTOTLE, *supra* note 10, at 9-10. "Rhetoric is a branch of Dialectic, and resembles that. Neither . . . is a science. with a definite subject-matter; both are *faculties* for providing arguments." *Id.*

¹⁷ James L. Kinneavy, *Translating Theory into Practice in Teaching Composition: A Historical View and a Contemporary View*, in ESSAYS ON CLASSICAL RHETORIC AND MODERN DISCOURSE 70 (Robert J. Connors et al. eds., 1984).

¹⁸ ARISTOTLE, *supra* note 10, at 1.

point of view, especially

when the case depends on the circumstance that it appears that the right person does not bring the suit, or that he brings it against the wrong person, or before the wrong tribunal, or at a wrong time, under the wrong statute, or the wrong charge, or with a wrong penalty, the issue . . . seems to require a transfer to another court or alteration in the form of pleading.¹⁹

Beyond these very general recommendations, however, classical rhetoricians did not give much attention to procedural matters. Instead, they focused on analyzing the facts of the case and the available substantive arguments and argumentative strategies.

IV. FACTUAL ANALYSIS

Classical rhetoricians knew they must fully investigate and understand the facts of a case²⁰ and the applicable law before arguments or an argumentative strategy could be chosen. They regarded factual analysis as the first step in *inventio* (to come upon or find arguments).²¹ To insure that this factual analysis is conducted effectively, most classical rhetorics described the process with detailed inventories and illustrations of the *types* of facts that are most likely to be legally significant. These inventories functioned as informal checklists to insure that no significant facts were overlooked.

Most classical rhetoricians analyzed the facts of the case under the assumption that "[a]ll propositions are supported in argument by attributes of *persons* or of *actions*. We hold the following to be the attributes of persons: name, nature, manner of life, fortune, habit, feeling, interests, purposes, achievements, accidents, speeches made."²² Quintilian provided a slightly different list when

¹⁹ CICERO, *supra* note 13, at 23; see also RHETORICA AD HERENNIO, *supra* note 7, at 89 ("[W]e [must] first examine whether one has the right to institute an action, claim, or prosecution in this matter, or whether it should not rather be instituted at another time, or under another law, or before another examiner.").

²⁰ ARISTOTLE, *supra* note 10, at 157-58.

[I]n forensic speaking; prosecution and defence alike must be based upon a study of the facts. . . .

. . . The more facts he has at his command, the more easily will he make his point; and the more closely they touch the case, the more germane will they be to his purpose, and the less like sheer commonplace.

Id.

²¹ JAMES MURPHY, A SYNOPTIC HISTORY OF CLASSICAL RHETORIC 93 (1983).

²² CICERO, *supra* note 13, at 71 (emphasis added)(footnote omitted).

he observed that "all arguments fall into two classes, those concerned with *things* and those concerned with *persons*."²³ According to Quintilian, most arguments from *person* focus on birth, nationality, country, sex, age, training, bodily constitution, fortune, occupation, past life, and previous utterances.²⁴ Quintilian's checklist and others like it were designed to comb the record for legally significant information regarding the personality and background of those involved in the case and to focus the advocate's attention on any fact that might be legally significant.

In addition to analyzing the personal attributes of those involved in the case, advocates must also analyze the *circumstances* within which the events in question took place. For Cicero this meant classifying facts according to kind, nature, meaning, importance, time, and place.²⁵ For Quintilian it meant taking into account "time, place, occasion, instruments, means."²⁶ Quintilian also noted that a thorough analysis focuses on why, where, and how the conduct transpired.²⁷ The *Rhetorica ad Herennium* suggested examining the *place* where the events took place, the *time* they took place, the *duration* of events, the *special circumstances* surrounding events, the person's hope of success, and the person's hope of escaping detection.²⁸ Each rhetorician's checklist differs somewhat from the others, but the purpose of each is the same—to insure an exhaustive examination of what caused the legal dispute.

Aristotle understood, of course, that arguments depend on the particular facts of the case and that factual analysis must, therefore, be focused as well as thorough. Arguments "do not start out from any and every fact, but from the *characteristic* facts belonging to their *particular* subject."²⁹ But he also noted that the "more facts he [the advocate] has at his command, the more easily will he make his point; and the more closely they touch the case, the more germane will they be to his purpose, and the less like sheer commonplace [generic facts]."³⁰

²³ 2 QUINTILIAN, *supra* note 9, at 213 (emphasis added).

²⁴ *Id.* at 213-15.

²⁵ CICERO, *supra* note 13, at 127.

²⁶ 2 QUINTILIAN, *supra* note 9, at 213.

²⁷ *Id.* at 219.

²⁸ RHETORICA AD HERENNIUM, *supra* note 7, at 67.

²⁹ ARISTOTLE, *supra* note 10, at 157 (emphasis added).

³⁰ *Id.* at 157-58. This section of Aristotle's *Rhetic* lists most, but not all, of the available *topoi*. Aristotle discusses other *topoi* elsewhere in the treatise, and those *topoi* are discussed later in this article. See *infra* notes 31-35 and accompanying text.

V. *Topoi* OR THE TOPICS OF INVENTION

This exhaustive, but focused, factual analysis helps advocates identify which arguments should be made. It is here, in the identification and description of argumentative premises, that Aristotle made one of his most significant and enduring contributions. Aristotle listed, described, and illustrated dozens of *topoi*, or commonly used lines of argument.³¹ Like the checklist for insuring that no important facts are overlooked, the *topoi* insure that no line of argument is overlooked.

For Aristotle, *topos* is a live metaphor, a *place* where arguments of different kinds may be found:

[They] are the commonplaces in which are found the universal forms of argument used by all men, and in every science. And, again, [they] are *special places* [like judicial or forensic *topoi*] where you naturally seek a particular argument, or an argument on some point in a more special branch of knowledge *Topos*, then, may be regarded as a place or region in the whole realm of science, or as a pigeon-hole in the mind of the speaker.³²

These *topoi* provide invaluable shortcuts to discovering available arguments and issues; when coupled with factual analysis, they provide advocates with a comprehensive "investigative research methodology."³³

Although the *topoi* are important, they are not infallible, as Quintilian observed when he stated that the "places" may be an obstacle to progress "unless a certain innate penetration and a power of rapid divination seconded by study lead us straight to the arguments which suit our case."³⁴ As Quintilian and the other rhetoricians compiled these *topoi*, they understood that "the discovery of arguments was not the result of the publication of text-books, but every kind of argument was put forward before any rules were laid down, and it was only later that writers of rhetoric noted them and collected them for publication."³⁵ Thus, the treatises written by Greco-Roman rhetoricians described and memorialized the most effective *topoi* and the most successful techniques of their colleagues, but did not attempt to create or recommend untested

³¹ ARISTOTLE, *supra* note 10, at 159.

³² *Id.* at xxiv.

³³ MURPHY, *supra* note 21, at 93.

³⁴ 2 QUINTILIAN, *supra* note 9, at 271.

³⁵ *Id.* at 269.

arguments or techniques.

VI. *Confirmatio*

Classical rhetoricians divided forensic argument into two broad categories—*confirmatio*, or affirmative arguments, and *refutatio*, or refutations.³⁶ Cicero described *confirmatio* as that part of the argument “which by marshalling arguments lends credit, authority, and support to our case.”³⁷ *Refutatio* is that part “in which arguments are used to impair, disprove, or weaken the confirmation or proof in our opponents’ [argument].”³⁸ Within these broad categories, advocates place the “proofs” of their case.

A. *Inductive “Proofs”*

Although some of Aristotle’s *topoi* are inapplicable in a modern legal context, most of them still apply. Aristotle identified several *topoi* as being particularly suitable in forensic discourse: arguments based on *induction*, existing decisions (precedents), definition, time, ambiguity, division (status and enumeration), consequence, motivation, conflicting facts, and cause and effect.³⁹

In compiling their own lists of argumentative *topoi*, Cicero, Quintilian, and the author of the *Rhetorica ad Herennium* discussed and illustrated almost all of Aristotle’s *topoi*, and, in the process, identified the most distinctive qualities of forensic arguments. The complexity and depth of their analysis of each *topos* are exemplified by the attention they gave to *topoi* such as “previous decisions” (precedents), examples (either historical or hypothetical), and definition.

In discussing various inductive arguments, for example, Roman rhetoricians thoroughly analyzed and illustrated even the comparatively unimportant *topos* of “existing decisions” (precedents).⁴⁰ Unlike modern lawyers who rely heavily on “existing decisions” to support their arguments, Greco-Roman rhetoricians regarded the use of precedents as a stylistic embellishment, not a substantive necessity.⁴¹ Moreover, since the Greeks and Romans

³⁶ CICERO, *supra* note 13, at 41.

³⁷ *Id.* at 69.

³⁸ *Id.* at 123.

³⁹ ARISTOTLE, *supra* note 10, at 159-72.

⁴⁰ But see CICERO, *supra* note 13, at 209 (noting necessity of *topoi* for discovering all important arguments and of focusing those arguments).

⁴¹ RHETORICA AD HERENNIVM, *supra* note 7, at 141. “Since Embellishment consists of

had civil rather than common-law legal systems, the precedential value of "existing decisions" was limited. Notwithstanding the limited applicability of precedent-based arguments in the classical context, these rhetoricians still compiled a nearly comprehensive catalogue of all the points that advocates must consider when using precedents to argue a case. Beginning with Aristotle's rather broad discussion of "existing decisions," they emphasized that the precedent must be on point factually and widely accepted as authoritative.⁴²

Another *topos* is from an existing decision. The decision may be on the point at issue, or on a point like it, or on the opposite point—preferably a decision that has been accepted by all men at all times; but if not that, then a decision accepted by the majority of mankind; or by wise or good men, all or most of them; or by the actual judges of our question; or by men whose authority these judges accept.⁴³

The *Rhetorica ad Herennium* offers a similarly broad description of precedent-based arguments, but takes a different tack by focusing on the logical flaws commonly associated with them:

The citing of a Previous Judgment will be faulty if the judgement applies to an unlike matter, or one not in dispute, or if it is discreditable, or is of such a kind that previous decisions either in greater number or of greater appropriateness can be offered by our adversaries.⁴³

Cicero elaborated on these same points but focused most of his attention on precedent-based argumentative strategies:

In case a decision or judgement is offered as an argument, it should . . . be attacked by using the same topics [lines of argument] by which it is supported, viz. by praising those who have made the decision, by the similarity between the matter under discussion and the matter about which judgement has been given; by stating that not only has the judgement not been attacked but that it has received universal approval; and by demonstrating that the case cited was more difficult or more important to decide than the present case . . . One ought also to notice if a unique or extraordinary case has been cited when many decisions have been

similes, examples, amplifications, *previous judgments*, and the other means which serve to expand and enrich the argument, let us consider the faults which attach to these." *Id.* (emphasis added).

⁴² ARISTOTLE, *supra* note 10, at 164-65.

⁴³ RHETORICA AD HERENNIUM, *supra* note 7, at 143.

made in the opposite tenor.⁴⁴

Quintilian, a great admirer of Cicero, built on Cicero's list and suggested additional techniques for dealing with adverse precedents:

[W]e must complain of the negligence shown in the conduct of the previous case or of the weakness of the parties condemned, or of undue influence employed to corrupt the witnesses, or again of popular prejudice or ignorance which reacted unfavourably against our client If none of these courses can be adopted, it will still be possible to point out that the peculiar circumstances of many trials have led to unjust decisions We must also ask the judges to consider the facts of the case on their merits rather than make their verdict the inevitable consequence of a verdict given by others.⁴⁵

Taken together, these writers' advice regarding the use of precedents is fairly comprehensive; they identify most of the available precedent-based arguments. As even this limited sampling shows, they clearly understood the basic principles of precedent-based arguments.

The preceding passages also reveal a number of critical differences between classical and modern inductive methodology and use of authority. The most important difference is that Greco-Roman rhetoricians, unconstrained by the principle of *stare decisis*, had greater flexibility than do modern lawyers in choosing precedents or other authorities to support their arguments. In a common-law system, for instance, modern lawyers reason inductively to synthesize a general rule based on the holdings of numerous precedents. These precedents provide "examples" of how previous courts have solved legal disputes and control the ways in which a case may be used. The persuasive value of cases is, in some instances, dispositive of the dispute. By contrast, under the Greek and Roman civil-law systems, precedents were not dispositive. Moreover, advocates were free to reason inductively from numerous historical and hypothetical, or "invented," examples instead of from a limited number of judicial "examples" (precedents). Despite these differences, classical rhetoricians used examples in much the same way that modern advocates use judicial precedents—to support and illustrate their arguments.

⁴⁴ CICERO, *supra* note 13, at 129 (footnote omitted).

⁴⁵ 2 QUINTILIAN, *supra* note 9, at 161.

For classical rhetoricians, "existing decisions" were simply a special type of "example" that advocates could use to embellish or strengthen an argument. When Aristotle said that "[e]xamples serve the end of logical proofs,"⁴⁶ he had two types of "examples" in mind—historical and hypothetical.⁴⁷ Aristotle also emphasized that the function, quality, and placement of these examples determines their effectiveness. To make his point, Aristotle compared examples with witnesses:

If however he [the advocate] has Enthymemes, he must use *Examples* for the ends of confirmation, subsequent and complementary to the Enthymemes. The Examples should not precede [the enthymemes]. . . . When they follow the Enthymemes, Examples function like witnesses—and there is always a tendency to believe a witness. Accordingly, when the speaker puts the Examples before [the enthymeme], he must use a good many of them; if he puts them after, one may suffice—on the principle that a single witness, if you have a good one, will serve the purpose.⁴⁸

"Examples" are also included in Cicero's list of comparison-based arguments:

Lastly, probability [proof] which depends on comparison involves a certain principle of similarity running through diverse material. It has three subdivisions, similitude, parallel, *example*. A similitude is a passage setting forth a likeness of individuals or characters. A parallel is a passage putting one thing beside another on the basis of their resemblances. An *example* supports or weakens a case by *appeal to precedent* or experience, citing some person or historical event.⁴⁹

Like Cicero, Quintilian also included example-based arguments in his class of inductive arguments. Quintilian too emphasized that the choice of examples depends on factual parallels between the example and the client's case: "We must therefore consider whether the parallel is complete or only partial, that we

⁴⁶ ARISTOTLE, *supra* note 10, at 149 (emphasis added).

⁴⁷ *Id.* at 147.

⁴⁸ *Id.* at 149 (emphasis added); see also *supra* note 12; *infra* notes 68-73 and accompanying text (discussing enthymemes). In some respects, modern lawyers analyze the relationship between enacted law and cases interpreting that law in the same way that Aristotle analyzes the relationship between the major premise of an enthymeme and examples that support it. When, for instance, a modern advocate applies a statute to the facts of a case and then supports his argument with a precedent case (example), one "good" case will "serve the purpose."

⁴⁹ CICERO, *supra* note 13, at 89-91 (emphasis added) (emphasis removed).

may know whether to use it in its entirety or merely to select those portions which are serviceable."⁵⁰

The preceding analysis shows that classical rhetoricians supported and illustrated their arguments in much the same way as do modern advocates. The principal difference between them is that classical rhetoricians relied primarily on historical or hypothetical "examples," whereas modern lawyers rely on judicial precedents. Notwithstanding these differences, the analytical techniques and argumentative strategies that classical rhetoricians developed for working with "examples" apply equally well to judicial precedents. That is, both classical and modern advocates use the same *form* of argument to support their interpretation of the law.

B. *Deductive "Proofs"*

Given the civil-law system within which they worked, Greek and Roman rhetoricians understandably devoted most of their analysis to what Aristotle termed "particular" (enacted) laws, that is, laws "which an individual community lays down for itself,"⁵¹ as opposed to the "universal" law or the law of nature, which is a "natural and universal notion of right and wrong, one that all men instinctively apprehend."⁵² They used this "particular" or enacted law as a starting point for syllogistic arguments in support of their case. In their search for a strong major premise, they again used standardized arguments, or *topoi*, to analyze the language and intent of the law. Once they established their major premise, they formed their minor premise from the facts of the case.⁵³ Then, based on the relationship between these two premises, they drew their conclusions.

Aristotle's principal contributions to this subject were his suggestions about which kinds of arguments to look for and his insistence on examining and defining the premises of those arguments.⁵⁴ Classical rhetoricians' selection of deductive *topoi* was governed in part by their understanding that, given the imperfect nature of the legislative process and the inherent ambiguities of language, enacted laws are very often imprecise or incomplete:

⁵⁰ 2 QUINTILIAN, *supra* note 9, at 275.

⁵¹ ARISTOTLE, *supra* note 10, at 73.

⁵² *Id.*

⁵³ See *supra* notes 20-30 and accompanying text (discussing factual analysis).

⁵⁴ MURPHY, *supra* note 21, at 54.

[Imprecision] is unintentional when a point escapes their [the legislators'] notice. It is intentional when they find themselves unable to make the law precise, and are forced to lay down a sweeping rule, but only one that is applicable to the majority of cases; also when the endless number of possible cases makes it hard to frame specific laws—hard, for example, [when making a law regarding] “wounding with an iron instrument” to specify sizes and kinds. Life would be too short to enumerate them.⁵⁵

Given the imprecision and limits of language and the inevitable question of legislative intent, Aristotle described several commonplace arguments, beginning with those that are useful when the law is adverse to an advocate's case. He suggested that, when faced with an adverse law, an advocate can argue that the statute is inequitable, ineffective, self-contradictory, ambiguous, outdated or in conflict with another law:

[I]f the written law is adverse to [the advocate's] case, he must appeal to the universal law, and to the principles of equity as representing a higher order of justice . . . equity is permanent and unchanging, and the universal law likewise . . . whereas the written laws are subject to frequent change . . . [or he can contend that] the written law is a sham, since it does not produce the effect of true law . . . [or that] a given law . . . conflicts with another, approved, law, or even contradicts itself . . . [or that] a law is ambiguous . . . [or that] the circumstances for which the law was made no longer exist, while the law remains in force.⁵⁶

Like Aristotle, Cicero was acutely aware that legislative draftsmen and those who draft contracts must work with imprecise language and do not always clearly express their intent. His analysis of enacted laws and written contracts focused on five common problems:

⁵⁵ ARISTOTLE, *supra* note 10, at 76-77.

⁵⁶ *Id.* at 80-81. The *Rhetorica ad Herennium* offers a similar list of suggestions as well as a schematic for organizing an argument:

When the intention of the framer appears at variance with the letter of a text, speaking in support of the letter we shall employ the following topics: . . . a eulogy of the framer . . . next the questioning of our adversaries . . . After that the interpretation devised and given to the text by our adversaries will be disparaged and weakened . . . Then we shall ascertain the writer's intention and present the reason why he had in mind what he wrote, and show that that text is clear, concise, apt, complete, and planned with precision. Thereupon we shall cite examples of judgements rendered in favour of the text. . . . Finally, we shall show the danger of departing from the letter of the text.

RHETORICA AD HERENNIVM, *supra* note 7, at 81.

In one case it seems that there is a variance between the actual words and the *intent* of the author; in another, that two or more laws *disagree*; again, that what is written has *two or more meanings*; again, that from what has been written something is discovered *which has not been written*; finally, that there is a question about the *meaning of a word*. . . . [T]he first class is said to be concerned with the letter and the intent, the second with the conflict of laws, the third with ambiguity, the fourth with reasoning by analogy, and the fifth with definition.⁵⁷

Quintilian compiled a similar list and, in addition, suggested several techniques for resolving problems and creating arguments. If, for instance, an issue is raised by a conflict between the letter and the spirit of a law, advocates can show that obeying the letter of the law is impossible ("[c]hildren shall support their parents under penalty of imprisonment" does not apply to infants, indigents, incompetents, imbeciles, etc.).⁵⁸ Advocates may also "find something in the actual words of the law which enables [them] to prove that the intention of the legislature was different."⁵⁹ If the issue is raised by a conflict of laws, the advocate must determine which law is most "stringent," which is the oldest, which will suffer most by its contravention, and consider whether the laws concern the state or private individuals, rewards or punishments.⁶⁰ Issues based on ambiguity should be settled by reference to what is most natural and equitable and which most reflects the intent of the author.⁶¹

These lists of argument topics show that Aristotle, Cicero, Quintilian, and the other rhetoricians had a clear sense of which argumentative strategies are the most common and effective when a case centers on enacted law or written contracts. They classified these arguments in various ways in an effort to find the best possible premise from which to argue a case. Moreover, their frequent emphasis on precision, on the letter and spirit of laws, and on ambiguity reveals their understanding that *definition* is a quintessen-

⁵⁷ CICERO, *supra* note 13, at 35-37 (emphasis added)(footnote omitted); see also RHETORICA AD HERENNIUM, *supra* note 7, at 81 (discussing framers' intent).

⁵⁸ 3 QUINTILIAN, *supra* note 9, at 139.

⁵⁹ *Id.*

⁶⁰ *Id.* at 147; see also RHETORICA AD HERENNIUM, *supra* note 7, at 85. "When two laws conflict, we must first see whether they have been superseded or restricted, and then whether their disagreement is such that one commands and the other prohibits, or one compels and the other allows." *Id.*

⁶¹ 3 QUINTILIAN, *supra* note 9, at 161.

tial starting point for syllogistic or enthymematic arguments.

According to Aristotle, an argument from definition explicates important terms, "gets at [their] essential meaning, and then proceeds to reason from it on the point at issue."⁶² In one way or another, the rhetoricians' *topoi* help advocates define critical terms and focus on the important issues. Sometimes, as the *Rhetorica ad Herennium* notes, an argument from definition requires refuting contradictory definitions:

When we deal with the Issue of Definition, we shall first briefly define the term in question . . . then we shall connect our conduct with the explanation of the term; finally, the principle underlying the contrary definition will be refuted, as being false, inexpedient, disgraceful, or harmful.⁶³

Quintilian provided the most complete discussion of definition-based arguments. He stated that the "most effective method of establishing and refuting definition is derived from the examination of properties and differences, and sometimes even from consideration of etymology."⁶⁴ Elsewhere, he stated that definition "consists mainly in the statement of genus, species, difference and property."⁶⁵ He cautioned, however, against definitions that are superfluous, irrelevant, ambiguous, inconsistent, or too narrow.⁶⁶ Important as they are, he also observed that overreliance on arguments from definition "is a most dangerous practice, since, if we make a mistake in a single word, we are like to lose our whole case."⁶⁷

VII. ENTHYMEMES

Quintilian's reservations regarding the dangers surrounding arguments from definition simply reflect his awareness that advocates seldom argue solely on the basis of a narrow definition or a formally correct syllogism. Instead of using formal syllogisms, Greco-Roman rhetoricians used a modified form of syllogism called an enthymeme to compose their rhetorical "proofs." Like a syllogism, an enthymeme is comprised of a major premise, a minor pre-

⁶² ARISTOTLE, *supra* note 10, at 163.

⁶³ RHETORICA AD HERENNIUM, *supra* note 7, at 87-89.

⁶⁴ 3 QUINTILIAN, *supra* note 9, at 97.

⁶⁵ *Id.* at 85.

⁶⁶ *Id.* at 95.

⁶⁷ *Id.* at 93.

mise, and a conclusion. However, in an enthymeme, the major premise is left unstated or is understood.⁶⁸ According to Aristotle, enthymemes are a "kind of syllogism which almost entirely deals with [human life and action]"⁶⁹ and are divided into two classes:

- (1) Demonstrative Enthymemes, which prove that a thing is, or is not, so and so; and (2) Refutative Enthymemes [which controvert the Demonstrative]. The difference between the two kinds is the same as that between syllogistic proof and disproof in dialectic. By the demonstrative enthymeme we draw a conclusion from *consistent* propositions; by the refutative we draw a conclusion from *inconsistent* propositions.⁷⁰

Unlike the complex, formal proof achieved with a traditional syllogism, enthymematic "proofs" or arguments are comparatively simple, informal arguments which, like all rhetorical arguments, draw only "a *probable* conclusion from the *facts* under consideration."⁷¹ Aristotle emphasized both this informality and simplicity and the importance of facts when he admonished advocates not to

begin the chain of reasoning too far back, or its length will render the [enthymematic] argument *obscure*; and you must not put in every single link, or the statement of what is obvious will render it *prolix*. These are the reasons why uneducated men are more effective than the educated in speaking to the masses. . . . Educated men lay down *abstract principles* and draw general conclusions; the uneducated argue from their *everyday knowledge*, and base their conclusions upon immediate *facts*.⁷²

Thus, enthymematic arguments, like other syllogistic arguments, depend on the advocate's clear, precise presentation, his complete grasp of the relevant facts, and his ability to detect and deal with any unstated premises. Modern advocates, like their ancient counterparts, can use the enthymematic topics of invention⁷³ to examine their own and their opponent's arguments for the un-

⁶⁸ CICERO, *supra* note 13, at 104-05 n.a. "The rhetorician used an adaptation of the logical syllogism either in the form of the enthymeme, a syllogism in which the major premise is only probable, or one in which one term is omitted . . ." *Id.*; see also 2 QUINTILIAN, *supra* note 9, at 203 (noting that some authorities say that an enthymeme is a "rhetorical syllogism, others an incomplete syllogism, because its parts are not so clearly defined or of the same number as those of the regular syllogism").

⁶⁹ ARISTOTLE, *supra* note 10, at 150.

⁷⁰ *Id.* at 158 (emphasis added).

⁷¹ MURPHY, *supra* note 21, at 101 (emphasis added).

⁷² ARISTOTLE, *supra* note 10, at 155-56.

⁷³ See *supra* notes 31-35 and accompanying text (topics of invention).

derlying but sometimes unstated premises. During this examination, they must also consider whether the case or argument depends on what the classical rhetoricians called "demonstrative" proofs (based on consistent propositions) or "refutative" proofs (based on inconsistent propositions).

VIII. REFUTATIO

A. *Refutation by Form*

Although the *topoi* help advocates discover the "available means of persuasion" and devise affirmative arguments for their case, they can also help advocates discover ways to refute their opponents' arguments. Some of these standard refutations have already been discussed in connection with inductive and deductive arguments.⁷⁴ As the preceding discussion shows, classical rhetoricians were very resourceful in finding faults and logical flaws in their opponents' arguments. Cicero said that to detect these flaws, advocates must use "the same sources of invention that *confirmation* [affirmative argument] does, because any proposition can be attacked by the same methods of reasoning by which it can be supported."⁷⁵ Quintilian concurred, observing that the "principles of argument in refutation can only be drawn from the same sources as those used in proof, while topics and thoughts, words and figures will all be on the same lines."⁷⁶

To illustrate this point, many rhetoricians discussed refutative enthymemes which are refutations based on the *form* of the argument and which focus on the enthymeme's premises and conclusion. Aristotle, for example, listed four common techniques: attack your opponent's own premise, adduce another premise like it, adduce a premise contrary to it, and adduce previous decisions.⁷⁷ Quintilian adopted a similar strategy and noted that the *form* of an enthymematic proof may be "countered in three ways, that is to say it may be attacked in all its parts. For either the major premise or the minor or the conclusion or occasionally all three are re-

⁷⁴ See *supra* notes 40-45 and accompanying text (logical flaws associated with adverse "previous judgments"); *supra* notes 56-61 and accompanying text (enacted laws adverse to client's interest); *supra* notes 62-67 and accompanying text (adverse definitions).

⁷⁵ CICERO, *supra* note 13, at 123.

⁷⁶ 2 QUINTILIAN, *supra* note 9, at 311.

⁷⁷ ARISTOTLE, *supra* note 10, at 177.

futed."⁷⁸ Aristotle particularly liked "refutative enthymemes" because "the refutative kind brings out, in small compass, two opposing arguments, and the two things, side by side, are plainer to the audience."⁷⁹

Aristotle listed and described several fallacious or "spurious enthymemes,"⁸⁰ some of which—hasty generalization, *post hoc, ergo propter hoc*—are familiar logical fallacies. The *Rhetorica ad Herennium* and other Roman rhetorics also contain extensive lists of these fallacies along with examples of how to detect them. The *Rhetorica ad Herennium* calls these fallacies "faults"⁸¹ and says they appear, for instance, if "we misapply a sign designating a variety of things in such a way as to indicate specifically a single thing"⁸² or if "that which is directed against the adversary can as well fit some one else or the speaker himself"⁸³ or if we "assume as certain, on the ground that 'it is universally agreed upon,' a thing which is still in dispute."⁸⁴

Like the affirmative arguments, these refutations deal with probable "proofs," not irrefutable "proofs." Their principal purpose is to enable advocates to point out flaws in their opponent's argument and thereby impair its credibility. Moreover, by directing advocates' attention back to the same *topoi* they used for their affirmative arguments, the rhetoricians help insure that advocates engage in that recursive and thorough analysis that characterizes the classical method.

B. Refutation Strategies

Refutations based on the form of an argument or on its logical

⁷⁸ 2 QUINTILIAN, *supra* note 9, at 361 (emphasis removed).

⁷⁹ ARISTOTLE, *supra* note 10, at 172.

⁸⁰ *Id.*

⁸¹ RHETORICA AD HERENNIVM, *supra* note 7, at 125.

⁸² *Id.* at 129; cf. CICERO, *supra* note 13, at 127.

Therefore in the refutation it will be shown . . . that it is not a sign, or not an important one, or that it favours one's own side rather than the opponents', or that it is absolutely false, or that it can be shifted so as to create a suspicion in a different quarter.

Id.

⁸³ RHETORICA AD HERENNIVM, *supra* note 7, at 129; cf. CICERO, *supra* note 13, at 139 (criticizing argument "which is no less helpful to the opponents' case than to ours"); 2 QUINTILIAN, *supra* note 9, at 329 (same).

⁸⁴ RHETORICA AD HERENNIVM, *supra* note 7, at 129; cf. CICERO, *supra* note 13, at 141 (criticizing use of "controvertible" arguments in "which a dubious reason is given to prove a dubious case").

fallacies are not, however, the only argumentative tools at the advocate's disposal. Rhetorical treatises also provide extensive descriptions of argumentative strategies designed to insure that arguments are effectively presented. Classical rhetoricians directed advocates to devote as much thought to organizational and stylistic strategies as to substantive arguments. In fact, according to these rhetoricians, organization and style are integral parts of argument because they strengthen and embellish argumentative "proof" by drawing on and reinforcing familiar patterns of thought.⁸⁵

Because they recognized the importance of effective presentation, classical rhetoricians discussed argumentative strategy on a variety of levels. For example, Aristotle's warning against lengthy chains of reasoning⁸⁶ and his assertion that refutations are "better liked" because they are "plainer to the audience"⁸⁷ reflect his preference for short, clear arguments and his understanding that *how* arguments are presented helps determine their persuasiveness.

When discussing organizational strategies for arguments, the *Rhetorica ad Herennium* observes that

[i]n the Proof and Refutation of arguments it is appropriate to adopt an *Arrangement* of the following sort: (1) the strongest arguments should be placed at the beginning and at the end of the pleading; (2) those of medium force, and also those that are neither useless to the discourse nor essential to the proof, which are weak if presented separately and individually . . . should be placed in the middle. . . . [3] when ceasing to speak . . . [it is useful] to leave some very strong argument fresh in the hearer's mind.⁸⁸

Of all the Roman rhetoricians, Quintilian provided the most comprehensive discussion of argumentative strategy. He not only endorsed the organizational "arrangement" recommended by the

⁸⁵ Michael Frost, *Brief Rhetoric—A Note on Classical and Modern Theories of Forensic Discourse*, 38 KAN. L. REV. 411 (1990).

⁸⁶ See *supra* note 72 and accompanying text.

⁸⁷ See *supra* note 79 and accompanying text.

⁸⁸ RHETORICA AD HERENNIVM, *supra* note 7, at 189; cf. MARCUS TULLIUS CICERO, DE ORATORE 421 (E.W. Sutton trans., 1942). In disclosing his own argumentative strategy, Cicero noted the following:

[M]y own method . . . is to take the good points of my case and elaborate these, embellishing and enlarging and lingering and dwelling on and sticking to them, while any bad part or weakness in my case I leave on one side, not in such a manner as to give the appearance of running away from it but so as to disguise it and entirely cover it up by embellishing and amplifying the good point referred to.

Rhetorica ad Herennium, but also explained *why* it is effective:

In insisting on our strongest arguments we must take them singly, whereas our weaker arguments should be massed together: for it is undesirable that those arguments which are strong in themselves should have their force obscured by the surrounding matter, since it is important to show their true nature: on the other hand arguments which are naturally weak will receive mutual support if grouped together. Consequently arguments which have no individual force on the ground of strength will acquire force in virtue of their number, since all tend to prove the same thing.⁸⁹

Elsewhere Quintilian noted that various authorities disagree about such matters as whether a strong argument must be placed at the end of the plea, but added that "in the disposition of our arguments we must be guided by the interests of the individual case."⁹⁰ He also warned against burdening "the judge with all the arguments we have discovered, since by so doing we shall at once bore him and render him less inclined to believe us."⁹¹

On the topic of refuting an opponent's arguments, Quintilian observed that

[w]e must further consider whether we should attack our opponent's arguments *en masse* or dispose of them singly. We shall adopt the former course if the arguments are so weak that they can be overthrown simultaneously, or so embarrassing that it would be inexpedient to grapple with them individually.⁹²

Later, he suggested that

those arguments which rely on their cumulative force must be analysed individually The cumulative force of these arguments is damaging. But if you refute them singly, the flame which derived its strength from the mass of fuel will die down as soon as the material which fed it is separated.⁹³

These and other observations about how audiences respond both to the merits of the argument and to the way it is presented illustrate why classical rhetoricians are sometimes regarded as the first practical psychologists.⁹⁴ Their desire to devise arguments

⁸⁹ 2 QUINTILIAN, *supra* note 9, at 299-300.

⁹⁰ *Id.* at 305.

⁹¹ *Id.* at 303.

⁹² *Id.* at 317-19.

⁹³ *Id.* at 319.

⁹⁴ ARISTOTLE, *supra* note 10, at xvii.

that are clear, interesting, memorable, and "better liked" and to avoid "embarrassing" themselves or "boring" their audience shows they thought that argumentative strategy was as important as logical integrity and consistency. Grounded as these strategies are in human psychology, they are as applicable today as they were 2,000 years ago.

IX. DISCLAIMER AND CONCLUSION

Although these rhetorical treatises are almost encyclopedic on the subject of forensic discourse, they were never regarded, even by their authors, as comprehensive compendia of all types of legal analysis and strategy. Their primary purpose was to provide "technical instruction in the art of rhetoric."⁹⁵ Throughout their works, the Greco-Roman rhetoricians repeatedly offered caveats, like Quintilian's concerning the limited scope of these treatises and how they should be used:

[A]ll the forms of argument which I have just set forth cannot be found in every case. . . . [I]t is no use considering each separate type of argument and knocking at the door of each with a view to discovering whether they may chance to serve to prove our point. . . . Such a proceeding merely retards the process . . . to an incalculable extent . . .⁹⁶

According to Quintilian, each of the *topoi* contains within itself "an infinite number of arguments."⁹⁷ Obviously, all of them cannot be used in every case. Instead advocates should treat the *topoi* as a starting point for analysis; they insure that important facts and arguments are not overlooked.⁹⁸ These rhetoricians also emphasize that none of their teachings can be applied mechanically; they must be internalized until they are automatic.

Modest though they were about their treatises, the Greek and Roman rhetoricians nonetheless offer timeless and invaluable insights about analytical methods and argumentative strategy. By reading their works, modern lawyers can attain a broader understanding of analytical methods and legal logic. Contemporary lawyers need to be reminded and, in some cases, informed about standard analytical techniques, common arguments and refutations,

⁹⁵ RHETORICA AD HERENNIUM, *supra* note 7, at xxiv.

⁹⁶ 2 QUINTILIAN, *supra* note 9, at 269.

⁹⁷ *Id.* at 257.

⁹⁸ *Id.*

basic logical principles, and the relationships between argument and presentation.

Based on years of experience, most practicing lawyers have acquired this knowledge and use it unconsciously. But beginning lawyers do not have the same breadth of experience to draw on, and even experienced lawyers sometimes forget. The real value of these rhetorical treatises lies more in what they teach about the basic principles of legal reasoning, legal methodology, and rhetorical strategy than it does in any particular example or illustration. They show what it means to "think like a lawyer" and how to develop lawyerly habits of mind. Aristotle, Cicero, and Quintilian know at least as much about "thinking like a lawyer" as does any modern authority on the subject. It is both arrogant and parochial to ignore their works simply because those works are 2,000 years old.