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CIVIL PROCEDURE AS A CRITICAL DISCUSSION

Susan E. Provenzano and Brian N. Larson*

This Article develops a model for analyzing legal dispute resolution systems as systems for argumentation. Our model meshes two theories of argument conceived centuries apart: contemporary argumentation theory and classical stasis theory. In this Article, we apply the model to the Federal Rules of Civil Procedure as a proof of concept. Specifically, the model analyzes how the Federal Rules of Civil Procedure function as a staged argumentative critical discussion designed to permit judge and jury to rationally resolve litigants' differences in a reasonable manner. At a high level, this critical discussion has three phases: a confrontation, an (extended) opening, and a concluding phase. Those phases are the umbrella under which discrete argumentation phases occur at points we call stases. Whenever litigants seek a ruling or judgment, they reach a stasis—a stopping or standing point for arguing procedural points of disagreement. During these stases, the parties make arguments that fall into predictable “commonplace” argument types. Taken together, these stock argument types form a taxonomy of arguments for all civil cases. Our claim that the Federal Rules of Civil Procedure function as a system for argumentation is novel, as is our claim that civil cases breed a taxonomy of argument types. These claims also mark the beginning of a broader project. Starting here with the Federal Rules of Civil Procedure, we embark on a journey that we expect to follow for several years (and which we hope

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other scholars will join), exploring our model's application across dispute resolution systems and using it to make normative claims about those systems. From a birds-eye view, this Article also represents a short modern trek in a much longer journey begun by advocates in city states in and near Greece nearly 2500 years ago.

TABLE OF CONTENTS

INTRODUCTION.....	969
I. THE CONTEMPORARY CIVIL SUIT AND ARGUMENTATION THEORY	973
A. <i>FRCP: The Reform and Its Objectives</i>	975
B. <i>Pragma-Dialectics: Argument as a Critical Discussion</i>	977
C. <i>Shared Philosophy: Critical-Discussion Framework and FRCP</i>	979
D. <i>The Critical Discussion: A Theory of Civil-Suit Argumentation</i> .	983
II. THE CONTEMPORARY CIVIL SUIT AND CLASSICAL STASIS THEORY ...	986
A. <i>Stasis Theory as a System of Argument and Dispute Resolution</i>	988
B. <i>Stasis Theory's Trans-Substantive Issues and Arguments</i>	991
1. <i>Stasis Subdivisions: Well-Theorized but Fluid and Blurred</i> ..	992
2. <i>The Static Topoi: A Taxonomy of Commonplace Arguments with a Normative Problem</i>	995
a. <i>Topoi for the Stasis of Conjecture</i>	996
b. <i>Topoi for the Stasis of Definition</i>	997
c. <i>Topoi for the Stasis of Quality</i>	998
d. <i>Topoi for the Stasis of Objection (a.k.a. Transference)</i> .	1000
e. <i>The Victory-Based Philosophy of Stasis Theory</i>	1000
C. <i>Hohmann's Adaptation of Stasis Theory</i>	1001
1. <i>Dimensions of Factual Arguments</i>	1002
2. <i>Dimensions of Rule Interpretation/Application Arguments</i> .	1003
3. <i>Hohmann's Contributions to the Critical Discussion- Stasis Model</i>	1004
III. THE CRITICAL DISCUSSION-STASIS MODEL.....	1005
A. <i>The Rivera Case</i>	1006
B. <i>The Lawsuit as a Critical Discussion in Action</i>	1008
1. <i>Seeking Common Ground: Initial and Subsidiary Opening Stages</i>	1009
2. <i>Litigation Moves: Confrontation, Argument, and Concluding Stages</i>	1014
C. <i>Stases: Claim, Defense, and Procedure</i>	1019
D. <i>Stasis Dimensions: Conjecture and Definition</i>	1022
E. <i>Topoi: Empirical, Conventional and Value Based</i>	1024

Spring 2020]	CIVIL PROCEDURE	969
1. <i>Claim and Defense Stasis Topoi in the Definitional Dimension</i>		1025
2. <i>Claim and Defense Stasis Topoi in the Conjectural Dimension</i>		1030
3. <i>Procedural Stasis Topoi in the Conjectural and Definitional Dimensions</i>		1032
CONCLUDING THOUGHTS		1034

INTRODUCTION

The American civil suit under the Federal Rules of Civil Procedure¹ has long been the subject of scholarly study. The legal literature has thoroughly treated the FRCP's reform agenda, grounding in legal realism, trust in judicial discretion, and aims to reach just results on the merits.² It has also criticized the Rules from multiple angles as a method of dispute resolution.³ What the literature has not addressed, however, is the Rules' functioning on another plane: as a system for argumentation.

This Article is the first to apply an argumentation-theoretic model to an American legal dispute resolution system.⁴ We have chosen the FRCP as our

¹ Throughout this Article, we variously use "FRCP" or "Rules" to refer to the Federal Rules of Civil Procedure generally, and we use "Rule" to refer to particular provisions.

² See, e.g., Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 98 (1989) [hereinafter Bone, *Mapping*]; Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 875, 895 (2009) [hereinafter Bone, *Pleading Rules*]; Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1067 (1982); Simona Grossi, *The Claim*, 55 HOUS. L. REV. 1, 3–5, 22 (2017); Richard Marcus, *Confessions of a Federal "Bureaucrat": The Possibilities of Perfecting Procedural Reform*, 35 ST. U. L. REV. 103, 118–19 (2007) [hereinafter Marcus, *Confessions*]; David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Reform*, 44 GA. L. REV. 433, 445, 471, 492 (2010) [hereinafter Marcus, *Legal Realism*]; Richard Marcus, *How to Steer an Ocean Liner*, 18 LEWIS & CLARK L. REV. 615, 618 (2014) [hereinafter Marcus, *How to Steer*]; Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 916 (1976); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 986, 1001 (1987); Kellen Richard Funk, *The Lawyers' Code: The Transformation of American Legal Practice, 1828-1938*, 43, 74 (Nov. 2018) (unpublished Ph.D. dissertation, Princeton University) (available at <http://kellenfunk.org/wp-content/uploads/2018/09/Funk.Lawyers-Code.20180915.pdf> [<https://perma.cc/H9VV-DA4C>]).

³ See Bone, *Mapping*, *supra* note 2, at 117; Bone, *Pleading Rules*, *supra* note 2, at 908; Burbank, *supra* note 2, at 1090; Grossi, *supra* note 2, at 14; Marcus, *Confessions*, *supra* note 2, at 118; Marcus, *Legal Realism*, *supra* note 2, at 455; Marcus, *How to Steer*, *supra* note 2, at 618; Smith, *supra* note 2, at 946; Subrin, *supra* note 2, at 980; Funk, *supra* note 2, at 414.

⁴ References in legal scholarship to argumentation theory without connecting it to any system of dispute resolution include Kathryn Stanchi, *Persuasion: An Annotated Bibliography*, 6 J. ASS'N LEGAL WRITING DIRECTORS 75, 80 (2009); Paul T. Wangerin, *A Multidisciplinary Analysis of the Structure of Persuasive Arguments*, 16 HARV. J.L. & PUB. POL'Y 195, 195 (1993) (discussing argumentation theory as a tool to "analyze the nature of persuasion and the structure of persuasive messages[.]" but not at the scale of the dispute). More than fifty

focus, but we hope to apply our model to a range of legal dispute resolution systems. Our model aims to determine whether such systems, in accord with argumentation theory, advance critically rational discussions and resolutions of parties' disputes. That determination turns on several key questions: How and when do parties present differences of opinion to the arbiter, and conversely, how do they discover common ground between them? What processes help narrow the central matters in dispute? What processes promote the full, fair, and rational airing and assessment of those matters along with subsidiary issues that arise along the way? What parameters govern the scope and thrust of arguments parties may make in these matters, and which argumentative appeals may they employ? And how do the rules running the system get chosen in the first place?

We start with the roots and core of a philosophically and theoretically grounded model that conceives of a legal dispute as a critical discussion filled with argumentation. This characterization is fitting for the adversarial system in which the FRCP operates, a system that is fundamentally dialogic:⁵ at all stages of a civil suit, parties stand on opposing sides, take opposing positions, and craft opposing arguments, responding directly to and anticipating each other. The parties make these arguments to win. But the Rules want a *rational* argumentative engagement, not a zero-sum game.⁶

The Rules already offer advocates argumentative guidance in one sense, by licensing procedural motions tied to litigation stages, demarcating the proper times and proper methods for bringing contested issues to the judge. The Rules also tie the permissible scope of argument to procedural aims.⁷ But the Rules

journal articles in Westlaw refer to "argumentation theory," but most do so in passing, without discussing or applying any particular theory. *See, e.g.*, Arno R. Lodder & John Zeleznikow, *Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three-Step Model*, 10 HARV. NEGOT. L. REV. 287, 294 (2005); Kristen K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 VT. L. REV. 483, 490 n.39 (2003); P. Christopher Smith, *The Uses of Aristotle in Gadamer's Recovery of Consultative Reasoning: Sunesis, Sungnômê, Epieikeia, and Sumbouleuesthai*, 76 CHI.-KENT L. REV. 731, 731 (2000) (making a single reference to "argumentation theory").

⁵ 'Dialogic' here does not necessarily mean a discussion with *two* parties, but rather refers to a discussion in which each argument always involves *at least two* parties—plaintiff and defendant or one of them and the tribunal.

⁶ *See infra* text accompanying notes 16–41, 63–71, 73.

⁷ *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 682 (2009) (setting the argumentative target for a Rule 12(b)(6) dismissal as whether the complaint's well-pled facts support a "reasonable inference that the defendant is liable for the misconduct alleged[]" without an "obvious alternative legal explanation" in order to "unlock the doors of discovery . . ."); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (setting the argumentative target on Rule 56 summary judgment motions as whether the non-moving party has raised a "*genuine* issue of *material* fact" under the applicable substantive law in order to move forward to trial); *Hickman v. Taylor*, 329 U.S. 495, 508–09 (1947) (setting the argumentative target for excluding trial preparation material from Rule 26's scope of discovery as whether it was prepared "in anticipation of litigation[]" without a showing of "necessity" or that its exclusion would "unduly prejudice the preparation of petitioner's case . . .") (now codified at

do not define the content of civil procedure arguments. Advocates are left to the substantive law and procedural precedent to forge case-specific positions, supporting contentions, and responsive points. They lack guidance that carries *across* cases, trans-substantive guidance about the range and contours of permissible arguments.⁸ Scholars of the law who theorize about these arguments similarly lack a model to describe and normatively evaluate what advocates and courts do. They require a taxonomy of the same range and contours.

Viewing the Rules as a system for argumentation, and identifying that system's defining features, is one step toward solving this problem. As a second step, we propose a taxonomy of commonplace litigation arguments that is consistent with the FRCP's goal of a rational dispute resolution system. With the parties and judge guided by this argumentation framework, the Rules have a better chance of doing what they were designed to do: providing a "good method of inquiry"⁹ for resolving suits on their merits. And scholars have better tools to assess whether the Rules meet this objective.

Our model for civil procedure as a critical discussion relies on two theories. Part I discusses the more recent, the *pragma-dialectic* school of contemporary argumentation theory, advanced by Professors Frans van Eemeren and Rob Grootendorst.¹⁰ Pragma-dialectics (PD) holds that argumentation occurs within a "critical discussion": a staged, dialectical debate run under agreed-upon rules and designed to rationally persuade a reasonable critic.¹¹ With PD comes a normative stance and a framework that we argue fits the philosophical and practical objectives of the FRCP. Specifically, the FRCP and PD share an essential understanding of the kinds of arguments that a reasonable critic should find acceptable. The two also have in common the theoretical and analytical objectives of identifying and constructing relevant argumentative moves.

FED. R. CIV. P. 26(b)(3)); *Lind v. Schenley Indus. Inc.*, 278 F.2d 79, 90 (3d Cir. 1960) (addressing Rule 59 conditional new trial rulings and distinguishing the scope of arguments challenging the "weight of the evidence" from arguments challenging erroneous court rulings, jury instructions, or attorney misconduct).

⁸ "The term 'trans-substantive' refers to doctrine that, in form and manner of application, does not vary from one substantive context to the next. Trans-substantivity has long influenced the design of the law of civil procedure . . ." David Marcus, *Trans-Substantivity and the Process of American Law*, 2013 BYU L. REV. 1191, 1191.

⁹ Marcus, *Legal Realism*, *supra* note 2, at 485 ("[T]he Federal Rules reflect a pragmatic emphasis on the tentative nature of a reform project, as well as the comparative importance of a *good method of inquiry* over a single normative goal for procedural reform going forward.") (emphasis added).

¹⁰ See FRANS H. VAN EEMEREN & ROB GROOTENDORST, *A SYSTEMATIC THEORY OF ARGUMENTATION: THE PRAGMA-DIALECTICAL APPROACH* vii (2004). Pragma-dialectics has received very little attention in American legal scholarship. It has a rich tradition in European law and outside the field of law more generally. See *infra* text accompanying notes 43–44.

¹¹ VAN EEMEREN & GROOTENDORST, *supra* note 10, at 16.

In Part II, we draw on the stasis¹² theory of classical Greek and Roman rhetoric to supplement the pragma-dialectic model and to build the argumentative content in the FRCP's critical discussion. Much as the FRCP sets junctures for advocates to pursue dialogic argument, classical stasis theory identifies predictable points for the parties to halt or stand still¹³ and advance arguments on diametrically opposed positions. Stasis theory supplies stock issues and supporting arguments for any given legal dispute during these halting points. Although classical rhetoric's objective of winning at all costs and its failure to constrain emotional appeals¹⁴ clash with contemporary aims to reach rational conclusions in legal disputes, stasis theory retains theoretical and analytical parallels to civil litigation. These parallels provide a sound basis for developing what is missing in the FRCP—a taxonomy of conventional arguments for civil actions.¹⁵

In Part III, we adapt and integrate these two theories to create our critical discussion–stasis model. Using litigated cases and representative examples, we

¹² Throughout this Article, we use English transliterations of the Greek terms στάσις ('stasis,' pl. 'stases') and τόπος ('topos,' pl. 'topoi') to refer to the concepts we are using. JAMES DONNEGAN, A NEW GREEK & ENGLISH LEXICON 1102, 1104, 1212 (2d ed. 1831). We do so even though Cicero and Quintilian, whose versions of stasis theory are among the most sophisticated we discuss, see *infra* Part II.B, wrote in Latin, where the applicable terms were 'status' and 'topic(a/e).' *Status*₂, CHARLTON T. LEWIS, AN ELEMENTARY LATIN DICTIONARY 806 (1890); *Topica/topicē*, *id.* at 862. If we were to use the cognate English words 'status' and 'topic,' we believe their contemporary English senses would hinder the reader's grasp of how these ancient concepts differ from their everyday contemporary counterparts. We also use a convention preferred by some writers in philosophy: when referring to a concept, we use its name; when referring to the name of a concept, we use its name in single quotation marks; and when showing emphasis, we use italics. Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 931 n.14 (1996). So we might write:

'Stasis' is the name of the key concept in stasis theory, but it is *not* a concept in the theory of *evolution*.

Of course, we use double quotation marks to show content actually quoted from an authority. The etymology of 'stasis' is unclear, but many scholars associate it either with "the position of a boxer in a fight . . . mean[ing] something like 'attitude' or 'stance[]'" or with the "state characterized by the absence of movement . . . mean[ing] something like 'stopping point' or 'touch point.'" Jean H.M. Wagemans, *Rhetorical Status Theory as an Institutional Framework for Legal Discussions*, in LEGAL ARGUMENTATION AND THE RULE OF LAW 205, 206 (Eveline Feteris et al. eds., 2016).

¹³ Ray Nadeau, *Classical Systems of Stases in Greek: Hermagoras to Hermogenes*, 2 GREEK, ROMAN & BYZANTINE STUD. 51, 54 (1959); Ray Nadeau, *Hermogenes' On Stases: A Translation with an Introduction and Notes*, 31 SPEECH MONOGRAPHS 361, 375 (1964) [hereinafter Nadeau, *Hermogenes*].

¹⁴ See *infra* Part II.B.2.e.

¹⁵ This Article is the first to use classical stasis theory to explore contemporary procedure. Compare Hanns Hohmann, *The Dynamics of Stasis: Classical Rhetorical Theory and Modern Legal Argumentation*, 34 AM. J. JURIS. 171, 171 (1989) (adapting stasis theory to contemporary legal argument in general), with WILSON HUHN, THE FIVE TYPES OF LEGAL ARGUMENT 13 (2002) (providing a taxonomy for legal arguments unconnected to stasis theory).

apply the model to describe civil litigation's structure as a critical discussion and to identify acceptable arguments—what we call the 'stases,' 'stasis dimensions,' and 'topoi'—in the critical discussion. We claim—tentatively at least—that our model exhausts the range of points upon which the parties may seek adjudication and the types of rational argumentation that can support them.

Although this Article advances the understanding of legal dispute resolution (and the FRCP specifically) from an argumentation-theoretic perspective, it does not provide all the answers. As our concluding remarks suggest, that is work to come—the leaves and fruits with which we hope to adorn the model as we apply and refine it. At present, we plan to continue assessing the FRCP with this model and to expand its application to other adversarial systems, generating empirical observations and normative recommendations. We also plan to apply the model to less strictly adversarial systems with the same assessment and reform goals in mind. Finally, we believe the model may shed light on important procedural debates—such as whether any principled distinction separates *questions of fact* from *questions of law*.

I. THE CONTEMPORARY CIVIL SUIT AND ARGUMENTATION THEORY

The Federal Rules of Civil Procedure, adopted in 1938, were a reaction to the failures of the common-law and code-pleading systems before them.¹⁶ According to the FRCP drafters and reporter Charles Clark, these systems' rigidity, formality, and technicality valued procedure at the expense of both sub-

¹⁶ See Bone, *Mapping*, *supra* note 2, at 78–79; Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 862–63 (2010); Grossi, *supra* note 2, at 3; Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 307 (1938) [hereinafter Clark, *Handmaid*]; Marcus, *Legal Realism*, *supra* note 2, at 478; Subrin, *supra* note 2, at 917; Charles E. Clark was professor and dean of Yale Law School at the time the rules were adopted and later became a judge on the Second Circuit. Clark, *Charles Edward*, FED. JUDICIAL CTR., <https://www.fjc.gov/history/judges/clark-charles-edward> [<https://perma.cc/MH6A-YF3V>] (last visited Oct. 16, 2019). Common-law pleading began in England after the Norman Conquest and governed pleadings before that country's common-law courts. BENJAMIN J. SHIPMAN, HANDBOOK OF COMMON-LAW PLEADING 1, 2, 3 (Henry W. Ballantine ed., 3d ed. 1923). Code pleading followed New York's 1848 adoption of a system of pleading that combined some elements of common-law and some of equity pleading. *Id.* at 1–2. The New York code was strongly influenced by one of the members of the commission that developed it, David Dudley Field, and is thus sometimes called the "Field Code." CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 22 (2d ed. 1947) [hereinafter CLARK, CODE PLEADING]. The result applied to suits in law and equity. CLARK, CODE PLEADING, *supra*; SHIPMAN, *supra*, at 2; Bone, *Mapping*, *supra* note 2, at 10. The combination of actions at law and equity in code states was the single "civil action." CLARK, CODE PLEADING, *supra*. Many states later adopted pleading codes with the Field Code as their model. *Id.* Revising and editing a common-law pleading hornbook in 1923, Ballantine noted that a majority of states had already moved to code pleading, though several retained elements of common-law pleading. SHIPMAN, *supra*, at 1–2. Writing in 1947, Clark concluded that thirty-two states and territories had adopted code pleading, with the remaining states and territories using common-law pleading or the same modified with some code principles. CLARK, CODE PLEADING, *supra*, at 23.

stance and fair, efficient results.¹⁷ In addition, these systems encouraged advocates to conceal their arguments and evidence until trial. After a lengthy process of exchanging pleadings refining the issue under the common law, or a briefer exchange of pleadings under the code system, the parties proceeded to trial, with neither knowing what evidence the other would present.¹⁸ In reforming federal civil procedure, Clark and his contemporaries wanted procedure to get out of the merits' way; they were committed to a legal realist philosophy that "would entrench a good method of decision making."¹⁹ Above all, the FRCP drafters wished procedure to be the modest "handmaid of justice"²⁰ serving "fair and efficient elaboration and vindication of substantive rights."²¹

Here in Part I, using contemporary argumentation theory, we begin to account for the FRCP as an argumentative critical discussion that embodies the features its framers sought. Contemporary argumentation theory is an interdisciplinary field whose members include scholars in linguistics, rhetoric, philosophy, law, psychology, computer science, and artificial intelligence.²² We draw on the pragma-dialectics (PD) branch of argument theory because it provides a like-minded, well-theorized framework for constructing argumentation in the context of civil procedure.

Section I.A provides a brief overview of the FRCP's history and objectives, contrasting it with earlier systems. Section I.B describes PD and its conception of argument as a critical discussion and explains how civil procedure is

¹⁷ See, e.g., Clark, *Handmaid*, *supra* note 16, at 310 (discussing a case thrown out on a technicality likely inscrutable to a layperson or party to the suit); Walter Wheeler Cook, *Statements of Fact in Pleading Under the Codes*, 21 COLUM. L. REV. 416, 417 (1921) (criticizing the Field Code's impenetrable distinctions between pleading "facts constituting the cause of action" and improperly pleading "evidentiary facts" and "conclusions of law"); Marcus, *Legal Realism*, *supra* note 2, at 473 ("Common law pleading required that the contours of the forms of action, not practical considerations or concerns of justice, dictate the boundaries and progress of suits. . . . If the plaintiff chose a writ that did not precisely match the facts at issue, his case would be dismissed, no matter how meritorious."); *id.* at 474 (noting the writ system's elevation of "'real or fancied distinctions of logic'" over "'[q]uestions of convenience, even questions of substantial justice.'") (quoting CHARLES M. HEPBURN, *THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND* 52 (1897)); *id.* at 481 (under the Field Code, "[w]hat constituted a 'statement of facts' and a 'cause of action[]' . . . proved difficult questions that, in the spirit of the times, resulted in formalistic and conceptualistic answers."); *id.* at 484 (under the Field Code, plaintiffs "could not join the causes of action" because a "defendant could not invade both primary rights in the same transaction."); Subrin, *supra* note 2, at 973 ("For Clark, procedural history was a sort of morality play in which the demon, procedural technicality, keeps trying to thwart a regal substantive law administered by regal judges. Clark would use equity procedure to conquer the demon where Field had failed.").

¹⁸ See CLARK, *CODE PLEADING*, *supra* note 16, at 76–77; SHIPMAN, *supra* note 16, at 32–34.

¹⁹ Marcus, *Legal Realism*, *supra* note 2, at 443.

²⁰ Clark, *Handmaid*, *supra* note 16, at 297; accord Subrin, *supra* note 2, at 962 (noting that Clark "wanted the law applied to the situation without procedural interference.").

²¹ Grossi, *supra* note 2, at 4.

²² FRANS H. VAN EEMEREN ET AL., *HANDBOOK OF ARGUMENTATION THEORY* 29, 30, 44 (2014).

a similar form of discourse. Section I.C explains how the PD critical discussion and the FRCP share a normative philosophy to achieve rational results with agreed-upon rules for dialectical confrontation. Section I.D then lays out the critical-discussion framework, and explains its utility for civil procedure.

A. *FRCP: The Reform and Its Objectives*

The FRCP were designed with two overriding objectives for resolving civil suits:²³ (1) functional competence,²⁴ and (2) facilitating discretionary judicial case-management decisions.²⁵ Functional competence means assigning each phase of a suit the job it can best perform along the road to fair and efficient substantive results.²⁶ For example, the FRCP drafters took the view that pleadings, as preliminary statements of parties' positions reflecting only a sliver of the ultimate informational universe,²⁷ were poorly suited to refine the issues to be tried²⁸ or resolve factual questions.²⁹ Contrast this with common-law pleading, where the plaintiff had to bring her claim within one of the pre-existing common-law forms of action, after which the parties engaged in pleading maneuvers designed in theory to sharpen the case to a single issue for the jury, but which in practice often resulted in purely technical dismissals.³⁰ A claim under

²³ Marcus, *Legal Realism*, *supra* note 2, at 485 (stating that these two “foundational principles” of Clark’s “procedural jurisprudence, themselves manifesting realist tenets, characterize major features of the Federal Rules.”).

²⁴ *Id.* at 458 (“The first job for the rules was functional competence.”).

²⁵ Bone, *Mapping*, *supra* note 2, at 98 (“[J]udicial discretion was the critical mechanism at work in the reformers’ pragmatic approach.”); Charles E. Clark, *The Cause of Action*, 82 U. PA. L. REV. 354, 362 (1934) (“Court procedure, to be workable . . . should be operated flexibly by wise administrators exercising wide discretion.”).

²⁶ Marcus, *Legal Realism*, *supra* note 2, at 458 (according to the legal-realist FRCP drafters, “[r]ules should provide useful guidance to judges as they try to resolve problems to reach the best results with their decisions. Rules thus should be stated in such a way that illuminates the functions they are supposed to serve.”).

²⁷ Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 183 (1957-1958) (lauding the functional leanness of Form 9’s negligence complaint because the pleader “may not know all those details. He may not know what his witnesses are going to testify.”).

²⁸ Marcus, *Legal Realism*, *supra* note 2, at 494 (under the code pleading system, “[t]he pleadings had also handled the important task of issue formulation, but they were functionally ill-suited for the job.”).

²⁹ See Clark, *Handmaid*, *supra* note 16, at 314; Marcus, *Legal Realism*, *supra* note 2, at 493 (“Pleadings, Clark insisted, did a poor job resolving cases on their factual merits.”).

³⁰ According to its latter-day proponents, common-law pleading “involve[d] the study of how to arrive at the issues of a case, the foundation of all legal investigation,” and it provided “the strictest rules of pure dialectics[.]” leading practitioners to “the true points in dispute” SHIPMAN, *supra* note 16, at 5. Clark’s characterization of this system belied its relation to stasis theory:

The two great characteristics of common-law pleading were the issue-forming process and the system of forms of action. The parties by successive steps of affirmation or denial were expected eventually to reach an issue which formed the sole point to be tried in the case. Under the system of forms of action a party seeking judicial relief was compelled to bring his claim within the limits of one of the existing forms or he was denied relief.

the FRCP can still be dismissed for pleading or jurisdictional defects,³¹ but this threshold claim-sorting function³² plays a far more discrete role than code and common-law pleading did. Instead, the FRCP drafters made discovery and summary judgment the primary issue formulators.³³ Under Rules 16 and 26, the judge and the parties work together to define and narrow the contours of the case through an adversarial (but now slightly more cooperative) exchange of evidence.³⁴ The discovery process amasses evidence that a motion for summary judgment may then test for issues amenable to fact-finding.³⁵ Those issues, then, are determined by a judge or jury at trial.

To facilitate the second objective, judicial discretion in case management, the Rules were designed to encourage the “best sort of judicial engagement with facts . . .”³⁶ “Flexible rules” demanded that judges “consider consequences,” “engender[ing] more responsible decision making.”³⁷ To this end, the Rules gave the judge an “active and empowered” role in shepherding the case via Rule 16’s pretrial conference provisions, which made the judge “less . . . a

CLARK, CODE PLEADING, *supra* note 16, at 12; *see also* discussion of stasis theory in Part II *infra*. This need for reaching the single issue at dispute in each case Clark attributed to the role of juries, which under the common law passed on the questions of fact; he claimed it was felt essential to clarify the issue so that it might not confuse these “laymen” who were not “trained judge[s].” CLARK, CODE PLEADING, *supra* note 16, at 13 (citing 3 HOLDSWORTH, A HISTORY OF ENGLISH LAW 639–56 (4th ed. 1935)). Nevertheless, “the merits of the controversy were frequently lost in the maze of technicalities” as the system “developed, used and insisted upon” “[g]reat exactness and technical niceties.” A. C. Umbreit, *Outline of the Law of Common Law Pleading*, 4 MARQ. L. REV. 130, 130 (1920). Code pleading was not much better. Clark lamented that code pleading’s rigid and formalistic “cause of action . . . purported to offer ‘a mathematically exact test which . . . dispense[d] with brains upon the part of the judge . . .’” Marcus, *Legal Realism*, *supra* note 2, at 482 (quoting Charles E. Clark, *The Code Cause of Action*, 33 YALE L.J. 817, 831 (1924)).

³¹ FED. R. CIV. P. 12(b).

³² *See* STEPHEN C. YEAZELL & JOANNA C. SCHWARTZ, CIVIL PROCEDURE 385 (10th ed. 2019) (describing the FRCP’s pleading function as a baseline mechanism for sorting strong and weak claims).

³³ *See* Grossi, *supra* note 2, at 25 (“Discovery on the inchoate claim could either broaden or narrow the specific claim to be litigated.”); Marcus, *Legal Realism*, *supra* note 2, at 493 (noting that the FRCP’s more limited role for pleadings yielded to “broad discovery, an invigorated summary judgment mechanism, and flexible pre-trial case management powers vested in the district judge.”).

³⁴ Marcus, *Legal Realism*, *supra* note 2, at 494 (noting that Rule 16’s scheduling order, and pretrial conference, and pretrial order provisions were the “superior mechanism for issue formulation.”); *see also id.* at 493 (stating that “Rules 8 and 16, the discovery rules, and Rule 56 were ‘complements,’ organized around the principle of functional competence . . .”).

³⁵ Grossi, *supra* note 2, at 16 (noting that “summary judgment was expected to be the primary pre-trial vehicle for framing and challenging the legal and factual sufficiency of a claim.”); Marcus, *Legal Realism*, *supra* note 2, at 494 (“As for summary judgment, Clark believed it a better tool to test the legal and factual sufficiency of a party’s case . . .”).

³⁶ Marcus, *Legal Realism*, *supra* note 2, at 443.

³⁷ *Id.* at 458.

bystander and more . . . an administrator . . .”³⁸ Likewise, the Rules’ “detailed treatment of discovery” showed “the multitude of ways to best shepherd a case through an evidence-gathering stage.”³⁹ Together, the Rules’ functional and discretionary characteristics aimed to produce the “good method of inquiry”⁴⁰ that trumped all other goals of procedural reform.⁴¹

This carefully constructed functional phasing, guided by the judge’s discretion, has important implications for considering the FRCP as a system for argumentation: it means that the parties’ opportunities for argument are not perpetually ongoing, they are not automatic, and they are highly circumscribed. Argumentative opportunities arise at set times when the Rules and the judge permit the parties to advance their positions on claims and defenses and to seek procedural and dispositive rulings—but only on matters corresponding to the case’s current functional phase. Any theory used to analyze the FRCP’s argumentative functions must account for these constraints. The theory most suited to that task is contemporary PD.

B. *Pragma-Dialectics: Argument as a Critical Discussion*

Also known as the ‘Amsterdam School of Argument,’ PD has achieved international prominence in argumentation theory over the last forty years, having been applied in a variety of argumentation domains, including legal, political, medical, and academic discourse.⁴² PD has been applied to legal argumentation, but generally only by scholars in Europe, and then only to judi-

³⁸ *Id.* at 499; *see also id.* at 473 (explaining, in contrast, how the writ system “nullified judicial control over case management because it placed the power to formulate issues in the parties’ hands.”); *id.* at 494 (“For Clark, the judge, working with the parties during or after discovery, could better handle the task” of issue formulation and keeping the focus on the case’s merits).

³⁹ *Id.* at 501.

⁴⁰ *Id.* at 485.

⁴¹ *Id.* at 447 (characterizing “functional competence and good method as key planks in [the realists’] positive program.”).

⁴² VAN EEMEREN ET AL., *supra* note 22, at 581–86.

cial opinions.⁴³ The PD model has received little attention in American legal scholarship.⁴⁴

PD views argument as a dialogical or dialectical activity, and specifically as a critical discussion where a party puts forward a standpoint that the other party subjects to critical evaluation. In PD parlance, a ‘critical discussion’ is “a verbal, social, and rational *activity* aimed at convincing a *reasonable critic* of the *acceptability of a standpoint* by putting forward a constellation of propositions justifying or refuting the proposition expressed in the standpoint.”⁴⁵ The goal is rational persuasion, not deductive validity.⁴⁶ The critical-discussion framework is unique because it evaluates this argumentation from a single perspective that is both normative and descriptive. The normative aspect requires the parties to agree on rules conducive to solving their differences of opinion.⁴⁷

⁴³ Leading scholars in this area are Professors Eveline Feteris, Harm Kloosterhuis, and José Plug. Their work has included discussion of “pragmatic argumentation” in opinions where courts justify their decisions. Eveline Feteris, *Prototypical Argumentative Patterns in a Legal Context: The Role of Pragmatic Argumentation in the Justification of Judicial Decisions*, 30 ARGUMENTATION 61, 62 (2016) [hereinafter Feteris, *Patterns*]; Harm Kloosterhuis, *Reconstructing Complex Analogy Argumentation in Judicial Decisions: A Pragma-Dialectical Perspective*, 19 ARGUMENTATION 471, 472 (2005) (identifying and reconstructing arguments from legal analogy in court opinions); José Plug, *Indicators of Obiter Dicta: A Pragma-Dialectical Analysis of Textual Clues for the Reconstruction of Legal Argumentation*, 8 ARTIFICIAL INTELLIGENCE & L. 189, 190 (2000) (studying textual clues for *obiter dictum*). For the relationship of PD to other theories of legal argumentation, see EVELINE T. FETERIS, FUNDAMENTALS OF LEGAL ARGUMENTATION: A SURVEY OF THEORIES ON THE JUSTIFICATION OF JUDICIAL DECISIONS 192 (2d ed. 2017).

⁴⁴ The scant legal scholarship addressing PD includes William Twining, *Narrative and Generalizations in Argumentation About Questions of Fact*, 40 S. TEX. L. REV. 351, 356 n.27 (1999) (citing FRANS H. VAN EEMEREN & ROB GROOTENDORST, ARGUMENTATION, COMMUNICATION, AND FALLACIES: A PRAGMA-DIALECTICAL PERSPECTIVE (1992) in support of Twining’s claims about philosophical nature of generalizations); Douglas N. Walton, *A Pragmatic Model of Legal Disputation*, 73 NOTRE DAME L. REV. 711, 718 (1998) (citing FRANS VAN EEMEREN & ROB GROOTENDORST, SPEECH ACTS IN ARGUMENTATIVE DISCUSSIONS (1984) for rules of a critical discussion in legal argumentation).

⁴⁵ VAN EEMEREN & GROOTENDORST, *supra* note 10, at 1 (emphasis added).

⁴⁶ See TRUDY GOVIER, THE PHILOSOPHY OF ARGUMENT 45–46 (John Hoaglund ed., 1999); VAN EEMEREN ET AL., *supra* note 22, at 17, 34. The use of ‘rational’ in this non-deductive sense is not universally accepted. Compare GOVIER, *supra*, at 125 (“While we often think of rationality in terms of conformity to universally applicable principles or rules, which can themselves be justified by appeals to further such principles or rules, such an understanding of rationality produces rather well-known philosophical problems.”), with Chaim Perelman, *The Rational and the Reasonable*, 10 PHILOSOPHIC EXCHANGE 29, 29 (1979) (“The rational corresponds to mathematical reason . . . which grasps necessary relations, which knows a priori certain self-evident and immutable truths, which is at the same time individual and universal . . .”). Govier seeks cogent arguments: “[a]n argument is cogent if and only if: (1) its premises are acceptable to the audience to whom the argument is addressed; and (2) its premises are relevant to its conclusion; and (3) its premises, considered together, offer sufficient or adequate grounds for its conclusion.” GOVIER, *supra*, at 108.

⁴⁷ VAN EEMEREN & GROOTENDORST, *supra* note 10, at 18.

The descriptive aspect requires empirical data to establish what those agreed-upon rules are.⁴⁸

A suit under the FRCP, a system founded on conduct-based rules, rationality, and pragmatic logic,⁴⁹ is precisely this type of discourse. A suit's verbal, social, and rational activity consists of the parties' adversarial moves—primarily pleadings and motions.⁵⁰ These moves and their resolutions by the judge are also verbal, and they are predominantly written. The moves are driven by litigation standpoints—conclusions for or against that a party argues.⁵¹ And the reasonable critics evaluating this discourse in a civil suit are the standpoint's opponent and the judge, jury, or both. In the next three sections, we contend that the PD critical discussion framework begins—but does not end—the work of reconstructing a civil suit's argumentative dimensions on three essential levels: philosophical,⁵² theoretical, and analytical.⁵³

C. Shared Philosophy: Critical-Discussion Framework and FRCP

Just as the essence of PD is the rational critic judging acceptable arguments reasonably,⁵⁴ modern civil procedure, despite some advocates' win-at-all-costs

⁴⁸ Eveline Feteris & Harm Kloosterhuis, *The Analysis and Evaluation of Legal Argumentation: Approaches from Legal Theory and Argumentation Theory*, 16 *STUD. LOGIC, GRAMMAR & RHETORIC* 307, 310 (2009).

⁴⁹ See Grossi, *supra* note 2, at 5 (noting that the FRCP are “steeped in the school of legal realism” and an “earth-bound philosophy” that rejected a natural law/primary rights viewpoint); Marcus, *Legal Realism*, *supra* note 2, at 446–50 (noting that Clark and the FRCP drafters were first and foremost “pragmatists” who rejected the purely deductive methods of classical legal science in favor of “[p]ragmatic truth”); *id.* at 454 (“For Clark, the philosophical consensus required for the success of a deductive method from first principles . . . no longer existed in American intellectual life.”); Subrin, *supra* note 2, at 966 (“The deductive reasoning of the common law was flawed, and set, defined legal categories were suspect. [In the FRCP], [b]alancing tests replaced attempts at categorization and definition.”).

⁵⁰ See *infra* Part III.B.

⁵¹ VAN EEMEREN & GROOTENDORST, *supra* note 10, at 2, 18.

⁵² Any model designed to explain a phenomenon must have a philosophical grounding: “[n]o consistent scientific practices are possible without well-conceived philosophical principles.” *Id.* at 13.

⁵³ Pragma-dialectics discusses two more levels, empirical and practical improvement. See VAN EEMEREN & GROOTENDORST, *supra* note 10, at 27–37. They are beyond the scope of this Article, but in essence (and in our view) these two aspects really share a level, and the researcher or practitioner may pursue either, neither, or both: In the empirical level, one may engage in empirical study, “describing those parts of empirical reality . . . that fall within our theoretical scope, and that correspond to our philosophy of reasonableness.” *Id.* at 27. Here, the researcher asks: In what ways does empirical reality, as reconstructed with the analytical framework, conform to the theoretical model to achieve the philosophical objective? In the practical level, one may make argumentation more consistent with the philosophical and analytical models by “attempt[ing] to improve argumentative practice . . . by teaching those people who take part in this practice, or will do so in the future,” *id.* at 32–33, and by fashioning rules for the critical discussion. *Id.* at 35–36.

⁵⁴ See VAN EEMEREN & GROOTENDORST, *supra* note 10, at 1–4. For van Eemeren and Grootendorst to suggest that parties generally engage in argumentation rationally to convince

behavior, is also designed to reach a rational resolution of the parties' differences of opinion.⁵⁵ Indeed, the Rules renounce previous procedural regimes' vaunted technicalities and form battles in favor of rational judging aimed at fair results on the merits.⁵⁶ Furthermore, congruent with the FRCP, the goal of a critical discussion is to convince the tribunal of the *acceptability* of the claim, not its truth. In civil cases, the preponderance-of-the-evidence standard asks the fact-finder to reach a verdict on a more-likely-than-not basis.⁵⁷ This just-over-50%-likely approach hardly takes capital-T truth as its goal, but it nevertheless sets a rational standard for acceptable determinations.⁵⁸

For the critical-discussion framework and the FRCP's philosophies to fully align, they must agree on a method for assessing argument acceptability. Frans H. van Eemeren and Rob Grootendorst offer three such perspectives, only one of which is relevant to an externally regulated argument system like the FRCP: the critical-rationalistic perspective.⁵⁹ This perspective "focuses pre-eminently

a reasonable critic is perhaps optimistic. In everyday social and political life, it seems argument proponents engage in argumentation to win, often seemingly at any cost. So, too, it is in litigation, despite the FRCP drafters' ideals. An effective system of procedure should work to curb those tendencies.

⁵⁵ See sources cited *supra* note 49.

⁵⁶ See *supra* text accompanying notes 23–41.

⁵⁷ See James Brook, *Inevitable Errors: The Preponderance of the Evidence Standard in Civil Litigation*, 18 TULSA L.J. 79, 80–81, 89, 108 (1982) (discussing this probability-based evidentiary standard in civil trials, its relationship to "truth," its assumptions, and its flaws).

⁵⁸ We do not deny that there are emotions and biases—both explicit and implicit—that affect the arguments made before civil courts and that affect the decisions of tribunals, and a rich critical literature has engaged with those shortcomings. See, e.g., Lucy Jewel, *Neurorhetoric, Race, and the Law: Toxic Neural Pathways and Healing Alternatives*, 76 MD. L. REV. 663, 673 (2017) (discussing the power of emotional appeals); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1142–47 (2012) (discussing implicit bias among factfinders). Though such shortcomings seem unavoidable in the human, social context, court procedures are nevertheless designed to maximize rational, and minimize non-rational, appeals in judicial arguments. See, e.g., FED. R. EVID. 403 (excluding evidence when its rational probative value is outweighed by the potential for prejudice).

⁵⁹ VAN EEMEREN & GROOTENDORST, *supra* note 10, at 13–18. The two perspectives not discussed here are the geometric and the anthropologico-relativistic. *Id.* Under the geometric perspective, acceptable argumentation takes conclusively established premises and reasons deductively to conclusions; adherents of this view "try to prove their claims by showing step by step that these claims ultimately derive from something that is an incontrovertible certainty." *Id.* at 13–14. Though deductive arguments are useful—and used—in the law, the "heavy lifting" of legal argumentation is in less certain forms. See Brian N. Larson, *Law's Enterprise: Argumentation Schemes & Legal Analogy*, 87 U. CIN. L. REV. 663, 697 (2019). Moreover, purely deductive arguments are but a segment of what American civil procedure would define as "acceptable" argument. See Marcus, *Legal Realism*, *supra* note 2, at 469 (explaining how the legal realist philosophy driving the FRCP rejects "deductive niceties" in favor of understanding of truth); Steven M. Quevedo, Comment, *Formalist and Instrumentalist Legal Reasoning and Legal Theory*, 73 CAL. L. REV. 119, 122 (1985) (noting the legal realist view that "logical deduction could solve very few concrete legal controversies."); Subrin, *supra* note 2, at 1001 (discussing legal realists' rejection of "a formalistic, oracular view of law that allegedly used deductive logic to decide who had what rights.").

on discussion” and “encourages the systematic submission of the one party’s standpoints to the other party’s critical doubts.”⁶⁰ It also accepts rules or external constraints placed on arguments if they are directed at “solving the problem at hand.”⁶¹ Under this perspective, then, argumentation is acceptable if it “is an effective means of resolving a difference of opinion in accordance with discussion rules acceptable to the parties involved.”⁶²

As a dispute resolution system, the FRCP adopts the critical-rationalistic perspective, viewing the lawsuit as a regulated process⁶³ that resolves the parties’ differences of opinion based on normative commitments that the parties share, or at least agree to be subject to.⁶⁴ These commitments include a view of

Under the anthropologico-relativistic perspective, argumentation is acceptable if it “complies with the standards that apply to the people in whose cultural community the argumentation takes place[.]” VAN EEMEREN & GROOTENDORST, *supra* note 10, at 14, but without any particular external constraints. For them, acceptable argumentation is that which has “the force to persuade an audience . . . due to the beliefs that specific audience has . . .” *Id.* at 15. With its twin focus on beliefs and persuasion, this theoretical position has been called “epistemo-rhetorical.” *Id.* at 20. Scholars of legal rhetoric and communication have exhaustively explored this perspective. See LINDA L. BERGER & KATHRYN M. STANCHI, *LEGAL PERSUASION: A RHETORICAL APPROACH TO THE SCIENCE* 3 (2018); CATHERINE J. CAMERON & LANCE N. LONG, *THE SCIENCE BEHIND THE ART OF LEGAL WRITING* 101 (2015); Kenneth D. Chestek, *Fear and Loathing in Persuasive Writing: An Empirical Study of the Effects of the Negativity Bias*, 14 *LEG. COMM. & RHETORIC: JALWD* 1, 2, 6 (2017) (reporting the empirical study suggested by the title); Lucille A. Jewel, *Old-School Rhetoric and New-School Cognitive Science: The Enduring Power of Logocentric Categories*, 13 *LEG. COMM. & RHETORIC: JALWD* 39, 77 (2016); Lance N. Long, *Is There Any Science Behind the Art of Legal Writing?*, 16 *WYO. L. REV.* 287, 288 (2016); Shaun B. Spencer & Adam Feldman, *Words Count: The Empirical Relationship Between Brief Writing and Summary Judgment Success*, 22 *LEGAL WRITING* 61, 61–62 (2018) (reporting the empirical study suggested by the title); Kathryn M. Stanchi, *Playing with Fire: The Science of Confronting Adverse Material in Legal Advocacy*, 60 *RUTGERS L. REV.* 381, 382 (2008).

⁶⁰ VAN EEMEREN & GROOTENDORST, *supra* note 10, at 16.

⁶¹ *Id.* van Eemeren and Grootendorst relate this perspective to work of philosopher of science Karl Popper. *Id.* at 16–17.

⁶² *Id.* at 16. When the parties have agreed on the discussion rules, the argumentation has “intersubjective validity.” *Id.* at 17. The argumentation further has “problem validity” if, when playing by those rules, it resolves differences of opinion. *Id.* at 16–17.

⁶³ See, e.g., Bone, *Mapping*, *supra* note 2, at 79 (discussing the reform emphasis on a “flexible’ [procedural] approach that would make it possible to tailor procedures to the requirements of each case in a ‘rational’ way.”); Clark, *Handmaid*, *supra* note 16, at 299 (“The necessity of procedure in the sense of regularized conduct of litigation is obvious. Court trials, like other matters of human conduct involving continually recurring processes, must be systematized.”).

⁶⁴ The Rules embody this agreement, stating that they “govern the procedure in all civil actions and proceedings in the United States district courts . . .” FED. R. CIV. P. 1. If they do not wish to be subject to the FRCP, plaintiffs are sometimes free to sue in state courts or other tribunals. Likewise, defendants can choose not to remove an action that would otherwise garner federal jurisdiction from state court. Obviously, there are statutory and constitutional constraints on these choices—defendants may remove cases that plaintiffs would prefer to keep in state court and plaintiffs can choose to sue in federal court or seek remand of removed cases—so the “agreement” is not entirely within the parties’ control. See 28 U.S.C. §§ 1441, 1446 (2018) (removal statutes); George Lieberman, *A Guide to Removal Remand*,

procedure as a flexible, pragmatic means of serving substantive law ends,⁶⁵ being concerned with real-world outcomes rather than abstract notions of rights,⁶⁶ predictability and certainty calibrated to achieve individualized justice,⁶⁷ accurate outcomes attained with efficiency,⁶⁸ and litigant autonomy balanced with judicial discretion.⁶⁹ Professor Richard Marcus aptly terms these values and their manifestation in the Rules as “the Liberal Ethos of [P]rocedure.”⁷⁰ This ethos reveals the same commitment to pragmatism, rationality, and transparency as the critical-discussion framework, manifested in several ways.

First, this ethos maintains that no artificial barriers should prevent airing the argument; procedural rules should promote a full assessment of the merits over time.⁷¹ Second, it guards against determining the merits prematurely, through a process of argumentative vetting and disclosure—disclosure transparent enough to prevent surprise or prejudice to a party when the time comes for merits decisions.⁷² Third, it promotes rational argumentation and decision-making with procedural rules that are regular and predictable, but not so intricate as to blind the judge to context or inhibit individualized justice.⁷³ Fourth, this ethos fosters dialectic argument, guiding autonomous parties’ presentations to a judge empowered with discretion to move the case—and the argument—forward toward a rational resolution.⁷⁴

FED. LAW., Aug. 2009, at 47–51 (discussing state and federal court jurisdiction and removal and remand procedures). This also squares with PD’s own view of legal argumentation “as specific, institutionalized forms of argumentative discussion.” Feteris & Kloosterhuis, *supra* note 48, at 322.

⁶⁵ Bone, *Mapping*, *supra* note 2, at 86, 98; Marcus, *Legal Realism*, *supra* note 2, at 443, 456–58, 462, 469.

⁶⁶ Bone, *Mapping*, *supra* note 2, at 79; Marcus, *Legal Realism*, *supra* note 2, at 469, 489.

⁶⁷ Bone, *Mapping*, *supra* note 2, at 88; Subrin, *supra* note 2, at 948.

⁶⁸ Bone, *Mapping*, *supra* note 2, at 101; Marcus, *Legal Realism*, *supra* note 2, at 471; Smith, *supra* note 2, at 916, 932.

⁶⁹ Bone, *Mapping*, *supra* note 2, at 45–46, 102; Marcus, *Legal Realism*, *supra* note 2, at 485–86.

⁷⁰ Marcus, *Confessions*, *supra* note 2, at 106; *see also* Marcus, *Legal Realism*, *supra* note 2, at 493 (discussing how the Rules’ realism values manifested in the interrelationships among the rules on pleading, discovery, pretrial case management, and summary judgment); Subrin, *supra* note 2, at 923–24 (discussing how the Rules’ “equity mentality” manifested, *inter alia*, in “ease of pleading; broad joinder; expansive discovery; greater judicial power and discretion; flexible remedies, [and] latitude for lawyers . . .”).

⁷¹ Bone, *Mapping*, *supra* note 2, at 109; Subrin, *supra* note 2, at 947; *see also* Marcus, *Legal Realism*, *supra* note 2, at 491–92, 496.

⁷² *See supra* notes 17–19 and accompanying text.

⁷³ *See* Marcus, *Legal Realism*, *supra* note 2, at 462–63 (describing the Rules’ reasoning philosophy as thus: “[t]he thinking necessary for solutions is problem-based and contextual and does not proceed in some abstract, a priori manner . . .”); *id.* at 505 (“[T]he open-textured Federal Rules represent a significant break with the rigid and detailed procedural codes of Clark’s era.”).

⁷⁴ *See supra* notes 25–26, 33–34. There are certainly more candidates for core FRCP values. And the reader may have quite different philosophical commitments—a topic whose exploration awaits another day.

At bottom, then, the critical-discussion framework and the FRCP share the following distinct philosophy: pointed disagreements in an argument must be fully aired and resolved by a critic who is reasonable, and who accepts arguments that are rational, vetted through dialectical scrutiny, and made under agreed-upon, externally imposed rules. With a shared philosophy in hand, we next assess how well the critical discussion's theoretical and analytical framework operates to construct the argumentation moves in a civil suit.

D. *The Critical Discussion: A Theory of Civil-Suit Argumentation*

At a theoretical and analytical level, the critical-discussion framework gives “particular, well-defined content . . . to concepts that occupy a crucial place in argumentation”⁷⁵ This framework is process oriented, with four critical discussion stages designed to ensure that dialectical argumentative discourse reaches a rational resolution. Those stages are confrontation, opening, argumentation, and concluding.⁷⁶

The confrontation stage is the point at which parties realize they have a difference of opinion requiring resolution.⁷⁷ There are two confrontation types: *mixed* and *non-mixed* differences of opinion.⁷⁸ In a non-mixed difference of opinion, the standpoint “runs up against doubt” but not contradiction.⁷⁹ In other words, the opponent interrogates the proponent's support for her standpoint without the opponent maintaining the contrary. In a mixed difference of opinion, the opponent maintains the contrary of the proponent's standpoint.⁸⁰ The civil suit involves both confrontation types, driven by its adversarial model.⁸¹ Under this model, the judge rarely issues rulings or orders *sua sponte*;⁸² the judge more typically responds to parties' motions, which the rules designate as the mechanism for asking the court to make a decision.⁸³ Many motions, especially of the administrative kind, are uncontested, or jointly submitted, and therefore involve a non-mixed difference of opinion interrogated solely by the judge.⁸⁴ In those situations, the judge will probe—either privately within cham-

⁷⁵ VAN EEMEREN & GROOTENDORST, *supra* note 10, at 18.

⁷⁶ *Id.* at 59.

⁷⁷ *Id.* at 60.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 60 n.41.

⁸¹ For a full discussion of how the confrontation stage applies to a civil suit, *see infra* Part III.B.

⁸² *See, e.g.*, FED. R. CIV. P. 56(f), 59(d) (providing that the judge may grant summary judgment and new trials *sua sponte*).

⁸³ *See* FED. R. CIV. P. 7(b) (“A request for a court order must be made by motion. The motion must . . . be in writing unless made during a hearing or trial; . . . state with particularity the grounds for seeking the order; and . . . state the relief sought.”).

⁸⁴ *See* discussion of the *Rivera* case *infra* Part III.A. Our analysis of the docket there revealed that, of the sixty requests parties made of the court for orders (usually in the form of motions), the court granted thirty-four, at least in part, and denied twenty-six. Twenty-eight

bers or publicly at a hearing or in a written ruling—the motion’s contentions, without hearing contrary standpoints.⁸⁵ In contrast, a contested motion, where both parties speak dialectically to the judge and the judge responds, is a mixed difference of opinion.⁸⁶ The parties also propound opposing arguments in response to a court’s request for submissions in, for example, a pretrial order or in a jury instruction charging conference.⁸⁷ These submissions are, by definition, mixed differences of opinion, because they contain contrary standpoints requested by the judge.

After confrontation comes the opening stage, where “the parties to the difference of opinion try to find out how much relevant common ground they share (as to the discussion format, background knowledge, values, and so on) . . . to be able to determine whether [they can] . . . conduct a fruitful discussion.”⁸⁸ In a civil suit, this discovery of common ground recurs in every procedural phase, as the Rules prescribe mechanisms for defining disputed and undisputed territory at each functional juncture.⁸⁹

The confrontation and opening stages are followed by the argumentation stage, where the parties “advance their arguments for their standpoints that are intended to systematically overcome the antagonist’s doubts or to refute the critical reactions given by the antagonist.”⁹⁰ In this stage, “argumentation is not only advanced, but also critically evaluated.”⁹¹ Argumentation also recurs in every civil procedural phase—and often many times within each phase.

But the argumentation stage of the critical discussion runs into two problems that stop it short of full theoretical and analytical congruity with civil procedure. The first problem is that the critical-discussion framework views argumentation stages as linear, not recurring.⁹² The second is that the framework does not fully capture the content of civil procedure argumentation, which evades the framework because a critical discussion views argumentation as a

of the motions granted were unopposed, as were thirteen of those denied. In many instances, the court granted or denied a request without permitting time for the opposing party to file an opposition.

In fact, the Rules do not expressly grant the non-moving party the right to respond to a motion. *See* FED. R. CIV. P. 78 (using the discretionary “may” when referencing the court’s power to set an argument schedule on motions and to consider motion arguments on the briefs). Many local rules nevertheless do. *See, e.g.*, D.P.R. CIV. R. 7(b) (allowing opposition to a motion within fourteen days after service of the motion by the moving party); *id.* 7(c) (further allowing the moving party to respond to the non-moving party’s opposition).

⁸⁵ *See, e.g., supra* note 84 (discussing uncontested motions in a single case).

⁸⁶ *See* discussion *infra* Part III.B.

⁸⁷ *See* discussion *infra* Part III.B.

⁸⁸ VAN EEMEREN & GROOTENDORST, *supra* note 10, at 60.

⁸⁹ For a full discussion of how the opening stage applies to a civil suit, see *infra* Part III.B.

⁹⁰ VAN EEMEREN & GROOTENDORST, *supra* note 10, at 61.

⁹¹ *Id.*

⁹² *Id.* at 62 (describing the critical discussion model’s stages that “have to be passed through in order to arrive at a resolution,” and then presenting those stages sequentially, rather than recursively, even though the order may vary).

complex *speech act*.⁹³ Speech acts serve diverse functions: they may commit the speaker to propositions, strive to motivate listener action, commit the speaker to act, or call a state of affairs into being.⁹⁴ In the argument stage, the critical discussion's analytical goals are to identify each discrete speech act and to understand its role in the argument and evaluate it.⁹⁵ But this analysis necessarily entails a detailed textual review, practically sentence-by-sentence, or at least paragraph-by-paragraph. Consequently, in the context of legal discourse, scholars have nearly always chosen to limit their consideration to individual judicial opinions rather than the parties' argumentation directed at the judge throughout a lawsuit.⁹⁶ Although these speech-act theoretic aspects may well yield other insights for legal reasoning and civil procedure, they operate at too minute a scale to capture civil procedure's argumentative content.

In the concluding stage, the parties determine whether "the protagonist's standpoint is acceptable and the antagonist's doubt must be retracted, or . . . the standpoint of the protagonist must be retracted."⁹⁷ This stage is not a straight match with the civil suit either. In a critical discussion, PD imagines this stage as two parties reaching an understanding about which standpoints are acceptable to both and which must be retracted.⁹⁸ Such a concluding stage *is* available to the litigants in a federal civil case, who are free to settle their differences of opinion at any time—and indeed are encouraged to do so by the Rules.⁹⁹ And

⁹³ *Id.* at 22. The notion of speech acts should not be alien to law-trained readers. There are numerous instances in the law where the verbal performances of a person function as acts with legal consequences, such as making and accepting a contract offer, making an admission, defaming someone, etc.

⁹⁴ Based on the typology of philosopher John Searle, the advocates of pragma-dialectics term these speech acts 'assertives,' 'directives,' 'commissives,' and 'declaratives,' respectively. *Id.* at 63–66.

⁹⁵ *See id.* at 100.

⁹⁶ *See, e.g.,* Feteris, *Patterns*, *supra* note 43, at 70–77 (analyzing a single U.S. Supreme Court case); Kloosterhuis, *supra* note 43, at 475–82 (examining three court opinions for evidence of argumentation schemes); Plug, *supra* note 43, at 192–202 (examining short phrases in a small number of court opinions for their role in marking dictum). We believe the voluminous content of multi-actor argumentation throughout a lawsuit is simply too daunting for scholars to analyze under this theory.

⁹⁷ VAN EEMEREN & GROOTENDORST, *supra* note 10, at 61.

⁹⁸ "The difference of opinion can only be considered to be resolved if the parties are, concerning each component of the difference of opinion, in agreement." *Id.*

⁹⁹ *See, e.g.,* FED. R. CIV. P. 16(a)(5) (listing the facilitation of settlement as a core purpose of pretrial conference proceedings that take place throughout the case); *id.* 26(f)(2) (requiring the parties to consider "the possibilities for promptly settling or resolving the case" at their Rule 26(f) discovery planning conference); *id.* 41(a)(1)(A)(ii) (permitting voluntary dismissal without a court order by filing a "stipulation of dismissal signed by all parties who have appeared."); *see also* W. Whitaker Rayner, Note, *Judicial Authority in the Settlement of Federal Civil Cases*, 42 WASH. & LEE L. REV. 171, 172–73 (1985) (describing how judicial participation in settlement negotiations plays a vital role in resolving civil cases); *cf.* FED. R. CIV. P. 23(e) (requiring court approval of settlement of certified class actions).

statistically, this resolution accounts for the majority of civil-suit endings.¹⁰⁰ But civil suits also yield resolutions borne of no agreement whatsoever,¹⁰¹ a type of conclusion not envisioned in the PD critical discussion.

We address these theoretical and analytical incongruities in two ways. First, in Part II we discuss how the stasis theory of ancient Greek and Roman rhetoric steps in to supply the content for civil procedure's argumentation stage. Although we conclude that stasis theory does not offer a complete solution, it does fill a content gap that the critical-discussion framework leaves open. Second, in Part III, we construct a model that combines stasis theory and the critical-discussion framework in a way that addresses the critical discussion's linearity and its cabined view of conclusions.

II. THE CONTEMPORARY CIVIL SUIT AND CLASSICAL STASIS THEORY

This Part shows how an adapted form of classical stasis theory generates content for civil procedure's argumentation stage—the missing link in the critical-discussion framework. To begin, a brief backstory on classical stasis theory is in order. The theory was developed by the ancient Greeks and Romans as a method of “deciding what the problem to be addressed really is” in a legal dispute,¹⁰² determining the questions that must be answered along the way, and identifying supporting arguments.¹⁰³ It was conceived as a method of rhetorical invention, or discovering “in [any given] case, . . . the available means of per-

¹⁰⁰ One study reported the settlement rate in two federal district courts in 2001–02 at “about 67 percent, or two-thirds of terminated cases.” Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 132 (2009). Some settlements, however, require the court's approval. See FED. R. CIV. P. 23(e) (requiring court approval of settled certified class actions). The Rules, local rules, and individual judges support alternative dispute resolution and settlement. See, e.g., FED. R. CIV. P. 16(a)(5) (making “facilitating settlement” one purpose of the pre-trial conference); D.P.R. CIV. R. 83J(b) (permitting the judge to direct the parties to mediation under certain circumstances); Order, *Rivera v. Mendéz & Compañía*, 824 F. Supp. 2d 265 (D.P.R. 2011) (No. 11–1530), ECF No. 6 (setting a “Settlement/Mediation Conference” with the judge less than two months after service of the suit).

¹⁰¹ As explained *infra* Part III.B, a civil suit can conclude in many involuntary ways, the most notable of which are dismissals and defaults.

¹⁰² Nadeau, *Hermogenes*, *supra* note 13, at 370, 373; Donald A. Russell, *Introduction to 3 QUINTILIAN: THE ORATOR'S EDUCATION* 2, 6 (Donald A. Russell trans., 2001) [hereinafter QUINTILIAN].

¹⁰³ QUINTILIAN, *supra* note 102, at 6–7; accord Hohmann, *supra* note 15, at 172. In addition to Quintilian's THE ORATOR'S EDUCATION (“INSTITUTIO ORATORIO”), important and surviving Greek and Latin works describing or outlining stasis theory include the anonymous, first-century B.C.E. RHETORICA AD HERENNIUM 33, 35 (Harry Caplan trans., 1954) [hereinafter HERENNIUM]; CICERO, DE INVENTIONE (H.M. Hubbell trans., 1949) [hereinafter CICERO, INVENTIONE]; CICERO, ON THE IDEAL ORATOR (DE ORATORE) (James M. May & Jakob Wisse trans., 2001) [hereinafter CICERO, ORATORE]; *On Stases* of the second-century C.E. Hermogenes of Tarsus (appearing in Nadeau, *Hermogenes*, *supra* note 13, at 389). For an indispensable, comprehensive review of stasis theory among the Greeks and Romans (but sadly available only in Italian), see LUCIA CALBOLI MONTEFUSCO, LA DOTTRINA DEGLI “STATUS” NELLA RETORICA GRECA E ROMANA (1986).

suasion.”¹⁰⁴ If well-schooled in stasis theory and the specifics of a legal dispute, a skilled rhetor could identify not only the stases but also the range of potential arguments supporting or opposing each one, including typical arguments known as ‘topoi.’¹⁰⁵ In that sense, stasis theory gave forensic rhetors a decision tree to follow in narrowing issues and identifying arguments. For the decisionmaker,¹⁰⁶ the stases operated as “halts or blocks set up and standing in the way of the various major (or subordinate) steps in the analysis.”¹⁰⁷ The party who provided the decisionmaker a “better answer to the question” succeeded in resolving the stasis in his favor.¹⁰⁸

That brings us to the stases themselves. Believed to have been set down first by the Greek rhetorician Hermagoras of Temnos,¹⁰⁹ who lived in the late second century BCE, the stases numbered three: (1) the stasis of conjecture (questions of fact), (2) the stasis of definition (the legal significance attached to the facts), and (3) the stasis of quality (mitigating or aggravating factors affecting culpability).¹¹⁰ Some theorists added a fourth stasis, the stasis of objection, which encompassed a variety of technical procedural issues.¹¹¹ Theoretically, this issue categorization system was comprehensive: every case *had to* and *could only* raise these stock issues of conjecture, definition, quality, or objection.¹¹²

Section II.A explains how the stases functioned in Greek and Roman trials, contrasting those affairs with modern civil litigation but identifying both proceedings’ need to anticipate conventional issues and arguments. Section II.B

¹⁰⁴ 1 ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 37 (George A. Kennedy trans., 2d ed. 2007). Note that in many cases when citing to ancient works, we will provide a page number to the edition we are using and also the standard location information that should work for readers using other editions. So, in the previous citation, “bk. 1, ch. 2, 1355b, at 37” should allow a reader to find the cited text in any edition.

¹⁰⁵ Nadeau, *Hermogenes*, *supra* note 13, at 367, 369.

¹⁰⁶ For the contrast between a focus on the parties vs. a focus on the judge, compare Wage-mans, *supra* note 12, at 206 (“Status theory is then to be interpreted as a typology of stand-points that can be employed by the accused party for strategically choosing the best response in the given situation.”), with *id.* at 207 (“[S]tatus theory is to be interpreted as a typology of differences of opinion or as a method to ‘reduce complex disputes to one or more of their key points of conflict.’”).

¹⁰⁷ Nadeau, *Hermogenes*, *supra* note 13, at 373.

¹⁰⁸ *Id.* at 375. We use masculine pronouns here to reflect the historical context: the speakers in the ancient courts were almost exclusively men. See CHERYL GLENN, RHETORIC RETOLD: REGENERATING THE TRADITION FROM ANTIQUITY THROUGH THE RENAISSANCE ix (1997). For a discussion of the role of women in classical rhetorical contexts, see *id.*

¹⁰⁹ Nadeau, *Hermogenes*, *supra* note 13, at 370. Secondary Greek and Latin sources reconstructed Hermagoras’ system; his original handbook on the topic is lost to time. *Id.* at 370 n.55.

¹¹⁰ For a comprehensive history, explaining which stases appeared in which systems and under which names, see *id.* at 373–81.

¹¹¹ See *id.*

¹¹² See CICERO, INVENTIONE, *supra* note 103, at 23 (“There will always be one of these issues applicable to every kind of case; for where none applies, there can be no controversy.”); Hohmann, *supra* note 15, at 178 (supporting the comprehensiveness of this list).

takes a deep dive into stasis theory in its fullest form as articulated by Roman thinkers, showing that it is an analytically rich source of trans-substantive argument content but suffers from theoretical fluidity and lacks the rational undergirding of civil procedure. Section II.C considers Professor Hanns Hohmann's adaptation of stasis theory to contemporary legal argument. His adaptation solves the theoretical fluidity problem, but it too stops short of a philosophical match. We resolve these problems with our model in Part III, which adapts stasis theory and integrates it into the critical-discussion framework.

A. *Stasis Theory as a System of Argument and Dispute Resolution*

The classical stases functioned the same way in ancient Greek and Roman trials no matter what type of claim was involved.¹¹³ In all cases, the starting point was the legal accusation and response: a party (which we will call 'the prosecution') charged the accused with a legal wrong, and the accused answered the charge.¹¹⁴ Together, the charge and response resulted in a stasis—a question reflecting a pointed disagreement and requiring resolution to move forward or decide the case.¹¹⁵ Notably, generalized questions such as 'is the accused guilty' or 'is the accused liable' were not true stases; the stasis had to be precise, a question pinpointing a contested line of defense.¹¹⁶

The initial stasis kicked off a standard progression for analyzing and resolving the case: conjecture, then definition, quality, and finally, procedure.¹¹⁷ The order makes analytical sense. The basic facts are the starting point: wheth-

¹¹³ Hohmann, *supra* note 15, at 176. Hohmann called stasis theory a "systematization of patterns of possible arguments," distinguishing this from the choice of how to express arguments and from the procedural order of consideration or making of the arguments. *Id.* at 193; *see also id.* at 183 n.46 ("This is not necessarily to be understood as a matter of actual temporal sequence, but rather as a matter of systematic sequence.").

¹¹⁴ Nadeau, *Hermogenes*, *supra* note 13, at 374; *see also* Hohmann, *supra* note 15, at 178 (referring to the origin of stasis theory as the Greek criminal trial).

¹¹⁵ Nadeau, *Hermogenes*, *supra* note 13, at 375 (noting all theorists agree that a stasis "takes the form of a question which focuses the contrary views of proponents and opponents" but some disagreed as to when the stasis actually arises).

¹¹⁶ Quintilian explained that positions lacking specificity cannot create a true "stasis" because they do not crystallize the point for decision. As an example, Quintilian distinguished the non-specific accusation and response, "You killed him" and "I did so justifiably" vs. "Horatius committed a crime, because he killed his sister" and "He did not commit a crime, because it was his duty to kill a woman who was mourning for the death of an enemy." QUINTILIAN, *supra* note 102, at 87. The latter leads to the following stasis of quality: "Is it just to kill a woman who mourns an enemy?"

¹¹⁷ Cicero makes clear that this progression does not necessarily reflect the actual arrangement of the speech: "[I]n every case it will be proper for both sides to consider by whom and through whom and how and at what time it is fitting that action be brought or judgment given or any decision made about this case." CICERO, *INVENTIONE*, *supra* note 103, 2.60–61, at 223–25; *accord id.*, 1.19–20, at 41; *see also* QUINTILIAN, *supra* note 102, 3.6.12–13, at 53–55 (explaining that the stasis of greatest analytical importance to the case "is the first thing to be considered, but not necessarily the first thing to be said.").

er the act happened and was committed by the accused.¹¹⁸ Consider a case of theft. If the property was simply lost, or if someone else took the property, then there is no legal dispute at all, the stasis of conjecture favors the accused, and the analysis ends. If the accused did take the property, then a potentially illegal *act* has happened, and the analysis moves to the next step, the stasis of definition, where the law is applied to determine the act's essential legal character.¹¹⁹ If, say, the evidence shows the accused was merely protecting the owner's property rather than stealing it, then the act was not theft. It was lawful, and the stasis of definition favors the accused, terminating the analysis.¹²⁰ But as in contemporary times, even if an act met the definition of a legal wrong in the ancient world, it did not necessarily mean legal culpability. So the accused could still raise the stasis of quality in a variety of ways, mitigating the legal effect of his conduct.¹²¹ If these circumstances fit prevailing norms and conventions for avoiding legal culpability, then the stasis of quality would favor the accused, and the case would be resolved there.¹²²

The FRCP bear a functional trans-substantive resemblance to this system, but the Greek and Roman cases in which stasis theory operated were far more streamlined. Claims and issues were narrowed during limited proceedings shortly before trial, at which the parties (or their patrons) had brief, structured opportunities to speak—a one-shot chance to argue the dispute.¹²³ In these oral performances, with the evidence already submitted, ancient Greek and Roman

¹¹⁸ Throughout this Article we use the word 'act,' but legal disputes, and thus the stases, apply equally to events, persons, and objects. Hohmann, *supra* note 15, at 180.

¹¹⁹ CICERO, INVENTIONE, *supra* note 103, 1.8.11, at 23; "[T]he controversy about definition arises when there is agreement as to the fact and the question is by what word that which has been done is to be described . . . the deed appears differently to different people." Cicero uses the example of stealing a sacred article from a private home—is it theft or sacrilege? *Id.* at 25. To resolve the question, "it will be necessary to define both theft and sacrilege, and to show by one's own description that the act in dispute should be called by a different name from that used by the opponents." *Id.*

¹²⁰ See Nadeau, *Hermogenes*, *supra* note 13, at 375 for this basic pattern.

¹²¹ CICERO, INVENTIONE, *supra* note 103, 1.12, at 25 (framing issues of quality as those where "there is both agreement as to what has been done and certainty as to how the act should be defined, but there is a question nevertheless about how important it is or of what kind, or in general about its quality . . . ?"); Nadeau, *Hermogenes*, *supra* note 13, at 375.

¹²² See Nadeau, *Hermogenes*, *supra* note 13, at 375 for this basic pattern. For those subscribing to the four-stasis structure, ending with the stasis of objection, issues of procedure would be raised here. The rationale for putting the stasis of objection at the analytical back end seems to have been the notion that procedure was something of a last resort. See QUINTILIAN, *supra* note 102, 3.6.83–85, at 91 (explaining that if the first three stases fail, "the last (and now the only) hope of safety lies in escaping by some helpful device of law from a charge which can neither be denied nor defended, in such a way as to make it seem that the legal action is not justifiable," a reference to the stasis of objection, which Quintilian calls transference).

¹²³ Anton-Hermann Chroust, *Legal Profession in Ancient Athens*, 29 NOTRE DAME L. REV. 339, 343–50 (1954) (cases in Athens); see also GEORGE A. KENNEDY, A NEW HISTORY OF CLASSICAL RHETORIC 15–16 (1994) (cases in Athens). See generally O.F. ROBINSON, THE SOURCES OF ROMAN LAW (1997) (cases in Rome).

rhetors used the stases to sequence their affirmative positions, attacks, and defensive responses on merits and procedural questions.¹²⁴ In contrast, our civil litigation system offers multiple occasions for the parties to argue merits and procedure, typically in writing, and almost always without a trial.¹²⁵ And if a case goes to trial, witness examinations, rather than speeches, drive the proceedings.¹²⁶ Thus, the issues and arguments presented in diverse ways over months or years in today's civil cases were usually presented over a day or two in Greek and Roman cases, anchored by the parties' oral performances.¹²⁷

These structural differences aside, civil procedure does have 'stases,' or defined points at which the parties crystallize advocacy positions and pinpoint issues for the court to decide.¹²⁸ And these decision points mirror, at least in a basic sense, the ancient stasis types, as civil cases are regularly argued and disposed of on grounds of fact, definition, quality, and procedure.¹²⁹ But in civil litigation, the decision points do not follow the ancient analytical sequence of the stases, and some stases (e.g., definition) arise more often than others (e.g., conjecture), since civil litigation is a process of gradually expanding the universe of information while narrowing what is at stake and leaving the ultimate facts for the jury to decide.¹³⁰

Any model that uses stasis theory to fill civil procedural argument content must account for these differences. And it must examine theoretical and normative compatibility as well. The sections that follow take on these tasks.

¹²⁴ See Nadeau, *Hermogenes*, *supra* note 13, at 383–84.

¹²⁵ See the discussion of motions to dismiss and for summary judgment, *infra* text accompanying notes 257–61, 277–82.

¹²⁶ See, e.g., Transcript of Trial Record, *Rivera v. Méndez & Compañía*, 988 F. Supp. 2d 174 (D.P.R. 2013) (Civ. No. 11-1530-BJM), ECF Nos. 210–12.

¹²⁷ For the twelve-month periods ending in September 2014–September 2019, the median time from filing to disposition in federal court civil cases ranged from 8.3 months to 10.8 months. U.S. COURTS, U.S. DISTRICT COURTS—COMBINED CIVIL & CRIMINAL FEDERAL COURT MANAGEMENT STATISTICS data tbl. National Judicial Caseload Profile (2019). In contrast, after brief preliminary proceedings, ancient Greek and Roman cases went directly to trial, which consisted of reading testimony and hearing the parties' court speeches. See ROBERT J. BONNER, *LAWYERS AND LITIGANTS IN ANCIENT ATHENS: THE GENESIS OF THE LEGAL PROFESSION* 55–56 (1927) (describing the typical Athenian court case as reading aloud the parties' pleadings and witness testimony that was already "in the hands of the clerk," followed by the parties' (or their representatives') argumentative speeches, and concluding with the jury's secret ballot vote after the speeches' conclusions); Ernest Metzger, *An Outline of Roman Civil Procedure*, 9 *ROMAN LEGAL TRADITION* 1, 8–9 (2013) (describing Roman trial procedure as a preliminary hearing to isolate the issues followed by a trial that was "conducted according to . . . the rhetorical conventions cultivated by the orators who spoke on behalf of the litigants.").

¹²⁸ See *supra* Part I.A.

¹²⁹ See *infra* Part III.C, D.

¹³⁰ See, e.g., FED. R. CIV. P. 8, 12, 26, 39, 43, 49, 52, 54, 56 (setting up civil litigation to proceed from assessing the sufficiency of the complaint's allegations, to collecting evidence through discovery, to testing the evidence's basic sufficiency on summary judgment, to the trial phase where a full evidentiary record is developed and assessed by the judge or jury rendering a verdict, followed by the court's entry of judgment).

B. Stasis Theory's Trans-Substantive Issues and Arguments

Building on the original Greek model, early in the first century BCE the ancient Romans entered the stasis discussion.¹³¹ In our view, these Roman thinkers offer by far the most developed and sophisticated account of stasis theory, and that is why we focus on them here. Foremost among them were one anonymous and two towering Roman figures. First came the writer of the *Rhetorica ad Herennium* (c. 80 BCE), a text that remains the oldest extant Latin work on rhetoric and the oldest extant work on stasis theory.¹³² Second was Cicero, writing as a youth in *De Inventione* (87 BCE)¹³³ and then again in the twilight of his career in *De Oratore* (55 BCE).¹³⁴ Finally, Quintilian joined the ranks of elite stasis theorists with his *Institutio Oratoria* (95 CE).¹³⁵

All three writers eyed the stases with the same objective as the Greeks: as a method of invention and a means of locating the central points of the adjudication along with commonplace arguments.¹³⁶ But each writer had different audiences and agendas, each of which shaped the content and direction of the theo-

¹³¹ A later Greek scholar and teacher, Hermogenes of Tarsus (second century C.E.), wrote extensively about stasis in his school manual *On Stases*, in a manner consistent with Hermagoras' theory. Nadeau, *Hermogenes*, *supra* note 13, at 363, 381–82 (*On Stases* “rel[ies] heavily on Hermagoras”). However, because Hermogenes did not himself theorize about the topic, this Article does not discuss him beyond this footnote. *Id.* at 366 (*On Stases* “deals mainly with the mechanical intricacies of the ‘division’ of the stases (issues in modern parlance) rather than with basic theory . . .”).

¹³² See HERENNIUM, *supra* note 103, at vii. Originally thought to be written by Cicero, the book has long since been attributed to an unknown Roman Ciceronian contemporary. *Id.* at ix, xiv. But like many Roman rhetorical works, it relies heavily on its Greek forebears. *Id.* at xv.

¹³³ See CICERO, *INVENTIONE*, *supra* note 103, at viii. This youthful effort, whose name reveals its invention orientation, is a contemporaneous, less complete rhetorical treatise than *Rhetorica ad Herennium* but bears substantive and terminological similarities to it. *Id.* at vii–viii. Aimed at practitioners rather than students, *De Inventione* reads as a “Practical Pleader’s Guide,” or lawbook concentrating on invention. *Id.* at ix.

¹³⁴ See CICERO, *ORATORE*, *supra* note 103, at 9. Cicero revisited stasis theory in *De Oratore* at a time when he was trading public life as an orator and statesman for an existence of quiet study. *Id.* *De Oratore* is an ambitious work that expounded on the entire endeavor of oratory, presented in a dialogue format unusual for its time. *Id.* at 3–4. Its aim was primarily ethical, visualizing the ideal orator as a moral guide of the state. *Id.* at 11. Still, *De Oratore* blended philosophy with technique, taking up Aristotle’s laboring oar. *See id.* at 31.

¹³⁵ When he published *Institutio Oratoria*, Quintilian was writing in a political culture far removed from Cicero’s Roman Republic. LAURENT PERNOT, *RHETORIC IN ANTIQUITY* 128–34 (W.E. Higgins trans., 2005). Indeed, Cicero’s execution is said to have ushered in the Roman Empire, under which public oratory all but died; for a brilliant mind with well-developed rhetorical theories, it was no doubt safer to expound them in pedagogical rather than political terms. *See id.* at 129–34, 142–51, 156–57, 159–63. Quintilian did just that, titling his exhaustive twelve-volume work “the education of the orator.” *Id.* at 159.

¹³⁶ These were vital functions, on which “[t]he entire hope of victory and the entire method of persuasion rest . . .” HERENNIUM, *supra* note 103, 1.17–18, at 31–33; *see also* QUINTILIAN, *supra* note 102, 7.3.15, at 225 (noting the need to “persuade the judge” on each stasis until he assents to one side or the other).

ry.¹³⁷ The sections below synthesize these texts in an effort to capture a unified stasis theory while acknowledging individual differences. As we will see, the Romans progressively developed the theory, adding subdivisions to the stases and identifying commonplace supporting arguments. These developments at once reveal stasis theory's strengths and shortcomings for constructing civil procedure's argumentation stage content.

1. Stasis Subdivisions: Well-Theorized but Fluid and Blurred

On the precise number of stases, all three writers concurred on the essential three: (1) conjecture, (2) definition, and (3) quality.¹³⁸ The stasis of objection assumed lesser importance in the *Rhetorica ad Herennium*¹³⁹ and *De Oratore*.¹⁴⁰ The theorists also agreed on these stases' basic differentiating features, following the Greek doctrine that every case turns in its entirety on "what was done" (conjecture), "the name that should be applied" (definition), or "the character of the matter involved" (quality).¹⁴¹ All three theorists also seemed to view the stasis of quality, with its array of mitigating possibilities, as undertheorized, and consequently, the *Rhetorica ad Herennium* and *De Inventione* further divided the stasis of quality beyond the Greeks' exculpatory notions of excuse and justification.¹⁴² Specifically, these texts interposed two divisional layers that aimed to identify and define stasis-of-quality subtypes with greater precision.

¹³⁷ As a pedagogical text, the *Rhetorica ad Herennium* centered on invention and rhetorical guidance for students. HERENNIUM, *supra* note 103, at xxxiv. In keeping with this educational role, its focus was on systematizing and building out the basic contours of the Greek theory. *Id.* at vii. Cicero's early practical treatise, *De Inventione*, provided a sense of how the stases shaped legal arguments in court speeches and the trajectory of cases in ancient Rome, though it was less complete than *Rhetorica ad Herennium*. PERNOT, *supra* note 135, at 113. Thirty years later in *De Oratore*, Cicero made an effort to simplify the stases, eliminate artificial distinctions, and abandon rigidity. CICERO, ORATORE, *supra* note 103, at 34. Quintilian, in *Institutio Oratoria*, continued to build on Cicero's theoretical foundation, and his treatment of stasis theory is the most complete and sophisticated of the classical Roman theorists. *See generally* QUINTILIAN, *supra* note 102, 3.6, at 55–101 (emphasizing this distinction many times over).

¹³⁸ CICERO, INVENTIONE, *supra* note 103, 1.10, at 21–23 (four stases); CICERO, ORATORE, *supra* note 103, 2.104, at 150 (three stases: conjecture, quality, definition); QUINTILIAN, *supra* note 102, 3.6.66–68, at 83 (three stases: conjecture, definition, and quality). In the largest departure from the Greeks, the *Rhetorica ad Herennium* writer defined the stases as: (1) conjectural (2) legal (interpretation of a text, including the stases of definition and objection); and (3) juridical (aka quality—act admitted, but legality in question). HERENNIUM, *supra* note 103, 1.18–19, 1.24, at 35, 43.

¹³⁹ Notably, the *Rhetorica ad Herennium* writer points out that the technical procedural issues raised in transference, such as a postponement of time or change in judges, can be addressed in a preliminary ruling. HERENNIUM, *supra* note 103, 1.22, at 39–41.

¹⁴⁰ *See* CICERO, ORATORE, *supra* note 103, 2.104–05, at 150–51.

¹⁴¹ *Id.* 2.104, at 150.

¹⁴² HERENNIUM, *supra* note 103, 1.24–25, at 43–49; CICERO, INVENTIONE, *supra* note 103, 2.62–110, at 225, 233, 261, 263, 265, 267, 277.

The first division split the stasis of quality into equitable and legal issues.¹⁴³ Equitable issues raised questions about “the nature of justice and right or the reasonableness of reward or punishment”¹⁴⁴ based on legal understandings formed outside of positive law. In contrast, legal issues were those firmly within the grasp of Roman civil law.¹⁴⁵ If the sheer devotion of space to equitable issues in *Rhetorica ad Herennium* and *De Inventione* are any measure, these issues were far more common and had far more argumentative play in Roman court cases than legal issues.¹⁴⁶ Whether absolute or assumptive, equitable issues in ancient trials ultimately came down to moral arguments and lay judgment.¹⁴⁷

Equitable issues were further divided into *absolute* and *assumptive* kinds. Put simply, absolute issues asked whether an act was right in and of itself according to principles of morality or justice,¹⁴⁸ akin to natural law. In contrast, assumptive issues drew on “extraneous circumstances” to exculpate the accused via the mitigating factors of justification and excuse.¹⁴⁹

Under this rubric, an absolute issue would ask, for example, whether it was “right or wrong” for one contingent of Greeks to erect a permanent memorial commemorating a victory over another contingent of Greeks;¹⁵⁰ such a structure would normally be an affront to the culture. If that act was not deemed *inherently* right or wrong, the accused might raise an assumptive issue, bringing in extraneous mitigating proof that the conquered Greeks had started an illegal war.¹⁵¹ Another absolute or assumptive example with a more contemporary flavor is the case of a performer who defames a poet on the stage.¹⁵² Social mores at the time might have deemed such a performance inherently right or wrong, in which case the issue would be absolute. If specific facts suggested that the performer was engaged in a satire, and if then-prevailing values excused satiric defamation, then the issue would be assumptive.

These quality subdivisions deepened the theory but also exposed its fluidity. Notably, the Roman thinkers did not offer clear or principled distinctions between absolute and assumptive issues. With regard to the defaming perform-

¹⁴³ CICERO, *INVENTIONE*, *supra* note 103, 1.14–15, at 31.

¹⁴⁴ *Id.* 1.14, at 31.

¹⁴⁵ *Id.*

¹⁴⁶ *E.g.*, HERENNIUM, *supra* note 103, 2.19–20, at 91–97 (law); *id.* 2.21–26, at 97–105 (equity); CICERO, *INVENTIONE*, *supra* note 103, 2.62–68, at 225–33 (legal); *id.* 2.68–85, at 233–51 (equity).

¹⁴⁷ According to Cicero, an equitable absolute issue “contains in itself the question of right and wrong, not confusedly and obscurely, as in the legal, but more clearly and obviously.” CICERO, *INVENTIONE*, *supra* note 103, 2.69, at 233.

¹⁴⁸ HERENNIUM, *supra* note 103, 2.19, at 91.

¹⁴⁹ CICERO, *INVENTIONE*, *supra* note 103, 2. 69–71, at 235, 237; HERENNIUM, *supra* note 103, 2.21–23, at 97, 99.

¹⁵⁰ This example is from Cicero. CICERO, *INVENTIONE*, *supra* note 103, 2.69–70, at 235.

¹⁵¹ *Id.* 2.70, at 235.

¹⁵² HERENNIUM, *supra* note 103, 1.24, at 45.

er, for example, what makes the issue one of *inherent* right or wrong (absolute) versus an exculpatory excuse (assumptive)?¹⁵³ If both succumb to lay understandings of societal values, how is one to say whether that judgment turns on “extraneous matter” making it assumptive, or a holistic understanding of the situation that renders the issue “absolute”?¹⁵⁴

Even more important, these subdivisions of quality, when applied in many situations, raised nested stases of *other types*,¹⁵⁵ creating categorical confusion. This confusion cuts against the principle that the three (or four) stases were self-contained with well-defined boundaries.¹⁵⁶ Consider a defense raised by a soldier accused of *lese majesty*, the crime of flouting authority, when he abandoned his arms in order to save his troops.¹⁵⁷ In this scenario, the troop-saving assumptive defense would raise nested issues of conjecture (did the soldier actually make this choice and why did he do it?), as well as nested issues of definition (dueling arguments about the scope of *lese majesty* or whether this act actually constitutes a different offense).¹⁵⁸ Is the soldier’s defense then truly an issue of quality, or is it just a combination of conjecture and definition?¹⁵⁹

¹⁵³ See Hohmann, *supra* note 15, at 179 (observing that “[t]hese interrelationships between the different levels of argumentation account for the difficulties” in trying to draw lines between the stases).

¹⁵⁴ Other examples of absolute and assumptive issue fluidity abound in *De Inventione*. See, e.g., CICERO, *INVENTIONE*, *supra* note 103, 2.79-86, at 245-53 (in a case involving an accused’s vigilante behavior, the issue could be absolute based on inherent justice, or an assumptive justification for the act); *id.* 2.89, at 255 (articulating defense arguments as “first, he will show by whose fault the event happened” (assumptive necessity) and that it “was not possible or obligatory for him to do what the prosecutor says he should have done,” (combination of absolute and assumptive) bringing in “principles of advantage” and “reference to honour.” (absolute)); see also Hohmann, *supra* note 15, at 178 (discussing these fluidity problems).

¹⁵⁵ See Hohmann, *supra* note 15, at 179 (discussing the stases, “no one term would fully exhaust all aspects of each level, and no one term is exclusively limited to each level.”).

¹⁵⁶ Indeed, this ran counter to Cicero’s purist stance: “a conjectural argument *cannot* at one and the same time and from the same point of view and under the same system of classification *be both* conjectural and definitive, *nor can* a definitive argument be at one and the same time and from the same point of view and under the same system of classification *both* definitive and translative.” (emphasis added). CICERO, *INVENTIONE*, *supra* note 103, 1.14, at 29. In a concession to this category confusion, in *De Oratore* Cicero’ trimmed the stasis of quality down to a single level, describing it as “an appeal to justice is the basis of the defense for all those actions that were [a] obligatory or [b] permitted or [c] unavoidable or [d] that seem to have been done out of ignorance or by accident.” CICERO, *ORATORE*, *supra* note 103, 1.106, at 151.

¹⁵⁷ CICERO, *INVENTIONE*, *supra* note 103, 2.72-73, at 237.

¹⁵⁸ *Id.*

¹⁵⁹ *De Inventione* discusses another scenario in which a necessity defense—also an assumptive issue—raises nested issues of conjecture, multiple definitions, and an absolute issue from the equitable prong. CICERO, *INVENTIONE*, *supra* note 103, 2.98-100, at 265-67. *Institutio Oratoria* also revealed how issues of quality could raise nested issues of conjecture and definition. *Id.* 2.99, at 265. Quintilian pointed out that when an accused defends his act on the grounds of his good intentions (an assumptive defense), it must be determined what his intentions, in fact were—an issue of conjecture. 3 QUINTILIAN, *supra* note 102, 7.4.26, at

These nested stases were not unique to the issue of quality. In like fashion, an issue of objection or procedure (also called ‘transference’ in Latin), could raise nested stases of definition and conjecture. For example, disputes over the proper tribunal could turn on jurisdictional facts and jurisdictional definitions.¹⁶⁰ Indeed, the stasis of definition itself could merge with other stases; after all, definitions must be applied to facts (conjecture), while mitigating and aggravating factors (also conjecture) can drive the applicable definition.¹⁶¹ Stasis theory did not attempt to reconcile this nesting and blurring with its rather hard-and-fast conception of independent, self-contained stases, exposing fault lines in the theory.

2. *The Static Topoi: A Taxonomy of Commonplace Arguments with a Normative Problem*

The most significant Roman contribution to stasis theory—and in turn, to our critical discussion-stasis model—was the articulation of commonplace arguments deemed both relevant and likely to succeed under each stasis. *De Inventione* touted these ‘topoi’ as lines of argument that could be “transferred to [any case].”¹⁶² Quintilian’s *Institutio Oratoria* followed suit, theorizing the topoi in even greater depth.¹⁶³ The topoi generally branched in three directions, which we will call empirical, conventional, and value based. We have adopted these terms,¹⁶⁴ building on and borrowing from contemporary theorist Hanns Hohmann’s conception of these topoi: *Empirical* topoi are arguments grounded in observations about the world. *Conventional* topoi are arguments that employ legal conventions—that is, licenses to make certain inferences based on certain evidence, including presumptions and tools of construction. *Value-based* topoi are arguments that appeal to emotions or a sense of justice or fairness.¹⁶⁵ These same three topoi apply to modern civil procedure argumentation. But as used by the ancients, the topoi reveal that stasis theory stands on a much different normative foundation than our procedural system.

251. An accused who raises the assumptive excuse of mental incapacity must define what mental incapacity encompasses and show that he fits that definition. *Id.* 7.4.25–26, at 251; see also Hohmann, *supra* note 15, at 174 (“[C]an one really distinguish between *coniectura* [stasis of conjecture] and *definitio* [stasis of definition]? Are not both concerned with the ascertainment of facts, and is not the same true for the *status qualitatis*? Is not definition also required in describing the basic act in question, and does not that description also impart to us something about the quality of the act?”).

¹⁶⁰ Consider the example from CICERO, *INVENTIONE*, *supra* note 103, 2.59–60, at 223.

¹⁶¹ As Quintilian said, this led “some writers to include Definition under Conjecture, others under Quality . . .” 3 QUINTILIAN, *supra* note 102, 7.3.13, at 225.

¹⁶² CICERO, *INVENTIONE*, *supra* note 103, 2.48, at 209.

¹⁶³ 3 QUINTILIAN, *supra* note 102, 7.2–7.4, at 185–261.

¹⁶⁴ See *infra* Part III.E.

¹⁶⁵ See *supra* Part II.B; *infra* Part III.E.

a. *Topoi for the Stasis of Conjecture*

Under the stasis of conjecture, Quintilian identified two primary lines of argument: (1) disputes over acts—what happened and who did it?—and (2) disputes over intent—if the act and person are clear, why did the person do the act?¹⁶⁶ An example: An ill elderly man dies after drinking a concoction made by his son but administered to him by his friend.¹⁶⁷ The son is charged with homicide by poison. It is clear the man died, but of what cause—preexisting illness or poisoning? If poisoning, did the son or the friend introduce the poison? These arguments are *empirical* questions about observable facts.

Conjectural arguments were not just empirical. They could also be *conventional*, driven by law and society's understandings about certain categories of evidence: "one should and should not" credit suspicions, rumors, testimony given under torture, and the like.¹⁶⁸ Indeed, conjectural *topoi* covered all manner of what contemporary lawyers would call credibility and evidentiary weight questions, such as disputes over the significance of the accused's past acts, character, and propensities; how much to credit motives, rumors, and witnesses; and the effect of torture on a given witness's credibility.¹⁶⁹ In particular, arguments about character drew on conventional wisdom about how one's lineage or past deeds suggested that an accused did or did not do the act in question.¹⁷⁰ As to motive, conventional arguments could forge inferential links between emotions and actions based on common experience ('one who feels this way tends to act that way' or 'unless one feels this way one will not act that way').¹⁷¹

Finally, community *values* often animated conjectural arguments. Prosecutors could emphasize a crime's atrocity to contend that the perpetrator should not be pitied.¹⁷² The defense could plead for mercy,¹⁷³ an appeal to empathy. If the prosecutor continued to push punishment based on the nature of the crime, the defense could attribute malicious motives to the prosecutor, that he was essentially piling on in the hopes that a "damaged and wounded defendant could

¹⁶⁶ 3 QUINTILIAN, *supra* note 102, 7.2.1–27, at 185–201.

¹⁶⁷ *Id.* 7.2.12–21, at 193–97.

¹⁶⁸ CICERO, *INVENTIONE*, *supra* note 103, 2.50, at 211.

¹⁶⁹ *Id.*

¹⁷⁰ In Quintilian's words, "a good character and an honourable past life never fail to be a great help." 3 QUINTILIAN, *supra* note 102, 7.2.33, at 205.

¹⁷¹ *Id.* 7.2.35–38, at 205–07. Drawing on the poisoning example, if the son was proven responsible for administering the poison, a conjectural motive question might be whether the son introduced the poison as a means of assisted suicide or cold-blooded murder. Conventional arguments supporting assisted suicide might center on the elderly man's health and state of mind (was he feeling hopeless?), the son's statements and attitudes towards his father (was he loving, compassionate?), and the son's behaviors near the time of the poisoning (did he act in a caring, somber manner?). *Id.* 7.2.12–21, at 193–97.

¹⁷² CICERO, *INVENTIONE*, *supra* note 103, 2.51, at 213.

¹⁷³ *Id.*

be crushed by the odium thus aroused.”¹⁷⁴ The prosecutor might respond that “it is wrong for crimes to be defended on the ground of their outrageousness.”¹⁷⁵

b. Topoi for the Stasis of Definition

Under the stasis of definition, Cicero and Quintilian articulated two lines of argument: (1) locating the definition itself (which Quintilian called “choosing the right name”), and (2) proving its connection to the facts.¹⁷⁶ Cicero offers the example of a father who admitted to dragging his son out of the popular assembly as his son was haranguing the people during a debate.¹⁷⁷ Because the father’s act effectively undermined the assembly’s authority, he was accused of *lese majesty*. In this case, the stasis of definition turned not only on the meaning of *lese-majesty* as far as words are concerned¹⁷⁸—a matter of locating an authoritative definition—but also on how assembly authority interacted with paternal authority under the facts of the case—a matter of applying the definition to the specific situation at hand.

As with the stasis of conjecture, the stasis of definition could raise empirical, conventional, and value-based arguments. Here, empirical arguments would involve locating and establishing an authoritative source for the meaning of *lese majesty*. Because ancient legal definitions stemmed from many sources outside of Roman civil law,¹⁷⁹ pinning down an authoritative source may have proved challenging for the ancients. Conventional arguments would center on the source’s interpretation; they would discern the definition’s ontological crux based on conventional methods of reasoning and construction of meaning.¹⁸⁰ In this scenario, the parties might debate whether the essence of *lese majesty* was flouting only a particular type of authority or whether it extended more broadly to a greater range of authoritative figures or bodies. A value-based argument

¹⁷⁴ 3 QUINTILIAN, *supra* note 102, 7.2.31, at 203 (internal quotations omitted).

¹⁷⁵ *Id.* 7.2.32, at 205 (internal quotations omitted).

¹⁷⁶ *Id.* 7.3.4, 7.3.19, at 219, 227 (“The order is fixed: first, what a thing is; then, whether it is this.”); accord CICERO, INVENTIONE, *supra* note 103, 2.53–55, at 215–17.

¹⁷⁷ CICERO, INVENTIONE, *supra* note 103, 2.52, at 213.

¹⁷⁸ *Id.* 2.53, at 215. Notwithstanding the translated terminology about choosing “names” and “words,” both Quintilian and Cicero made clear that they were concerned with definitions whose ontological meaning suited the situation, not simply with finding words that fit at face value. *See, e.g., Id.* 2.62, at 225 (speaking of “the nature and the essence of the occurrence”).

¹⁷⁹ HERENNIUM, *supra* note 103, 2.18, at 89; *id.* 2.19–20, at 91–97.

¹⁸⁰ CICERO, INVENTIONE, *supra* note 103, 2.53, at 215 (identifying the need for a “clear and conventional definition of the word whose meaning is sought”); *see also* 3 QUINTILIAN, *supra* note 102, 7.3.25, at 231 (explaining that “[t]he most useful resource for establishing and refuting a Definition is to be found in Properties and Differentiae, sometimes also in Etymology.”); *id.* 7.6–7.9, at 265–288 (describing various methods of constructing meaning for definitions based on laws that are ambiguous in their meaning or scope).

might then, in Cicero's words, "enlarge[e] on the advantage and honour arising from the [father's] act."¹⁸¹

Quintilian offered his own interpretive example. If a man stole private money from a temple, was it ordinary theft or sacrilege?¹⁸² Empirical arguments would center on finding authoritative sources for the definitions of theft and sacrilege. Then the analytical work would begin with conventional arguments about sacrilege's ontological essence. The prosecution might contend, for example, that the essence of sacrilege is "stealing something *from a sacred place*."¹⁸³ The defense might retort that "[s]acrilege is stealing *something sacred*," contending that the location is not part of the offense's definition.¹⁸⁴ This may look like verbal sophistry,¹⁸⁵ but the dispute was really about pinning down the essence of sacrilege—nature of object or type of location? Which definition prevailed might depend not only on how sacrilege had been conventionally defined, but also perhaps on animating values. Thus, the prosecution's value-oriented arguments might appeal to feelings about the sanctity of religious spaces, while the defense's value-oriented arguments might draw on sentiments tied to religious objects.¹⁸⁶

c. *Topoi for the Stasis of Quality*

Quintilian's theorizing on the topoi for the stasis of quality reveals two key points.¹⁸⁷ First, he demonstrates how quality topoi were often empirical, conventional, and value based all at once.¹⁸⁸ Second, just as the stasis of quality

¹⁸¹ CICERO, INVENTIONE, *supra* note 103, 2.55, at 219.

¹⁸² 3 QUINTILIAN, *supra* note 102, 7.3.21–22, at 229.

¹⁸³ *Id.* 7.3.23, at 229 (emphasis added). This would arguably exclude sacred items stolen from a private home—perhaps not a problem for the prosecution in this case since the original location of the item is undisputed. *See id.* 7.3.24, at 229.

¹⁸⁴ *Id.* 7.3.23–24, at 229 (emphasis added). This would arguably exclude garden-variety items stolen from a sacred place.

¹⁸⁵ For Quintilian, discerning a definition was difficult and fraught with the risk of engaging in the "acute verbal sophistry" characteristic of philosophical dialectic. *Id.* 7.3.14, at 225. He thus insisted that a definition must be an "impregnable," *id.* 7.3.18, at 227, and an "accurate, lucid, and brief verbal expression of a fact." *id.* 7.3.2–3, at 219.

¹⁸⁶ A slightly different interpretive problem is presented by extending a definition outside of its essence, which, Quintilian says, is a matter of using conventional reasoning "from a certain fact to an uncertain one." 3 QUINTILIAN, *supra* note 102, 7.8.6, at 279. An example: "It is illegal to drag a man to court from his house. [The accused] has dragged him out of his tent." *Id.* 7.8.7, at 279 (internal quotations omitted). The definitional arguments over the legality of this act would start with conventional logical reasoning: Is the act illegal because a tent is lived in like a house, or not, because a tent is a more transient structure? Value-based arguments could be made here as well, such as whether being dragged from a more transient structure is less an affront to the sense of security one has in a residence.

¹⁸⁷ *Id.* 7.2.1, at 185. Regarding the topoi for this stasis, Cicero said they are often *sui generis* and must be developed in response to each case's specifics. CICERO, INVENTIONE, *supra* note 103, 2.68, at 233.

¹⁸⁸ *See infra* notes 192–195 and accompanying text.

raises nested stases of conjecture and definition, the quality topoi are really just a combination of conjecture and definition topoi, as explained below.

To begin with, Quintilian designated separate topoi for absolute and assumptive issues.¹⁸⁹ Empirical arguments for absolute questions centered on finding the *source* establishing an inherent right.¹⁹⁰ Once identified, the source embodied the relevant conventions and values—they were basically built into the source, requiring no further argumentation. Quintilian used the example of fathers who disinherited sons acting against paternal wishes by becoming soldiers, running for office, or marrying.¹⁹¹ The legality of these instances of disinheritance turned entirely on how intrinsically or conventionally right they were by nature or custom without reference to anything else.

For assumptive issues, Quintilian maintained the standard exculpatory categories of justification and necessity.¹⁹² A justification example: “He was blinded, but he was a rapist.”¹⁹³ Here, empirical arguments might mirror those under the conjectural stasis—did the accused actually blind the person, and was the person really a rapist? But the topoi could also track the definitional stasis arguments, trying to pin down a source that justifies vigilante justice for an unpunished crime. Conventional arguments concerning the accused’s rapist-punishing motive could likewise track the conjectural, drawing on inferences from the accused’s acts and statements around the time of the incident. Conventional arguments might also interpret the source of the justification to discern its true essence, as in the definitional realm. Value-based arguments could appeal to a sense of justice based on the proportionality of the injury to the behavior that motivated it.

Similar topoi applied to excusing arguments, exemplified in the case of a soldier who defends his act of making an illegal treaty under duress from his commander.¹⁹⁴ Empirical arguments would, again, look like a combination of conjecture and definition: testing these contentions’ factual accuracy and locating the sources for a just-following-orders duress excuse. Similarly, conventional arguments would deal with inferences about the accused’s motives and the sources’ meanings. Value-based arguments would appeal to audience feelings about which directive was more important to follow—a superior’s military order or the general law of the land.¹⁹⁵

¹⁸⁹ 3 QUINTILIAN, *supra* note 102, 7.4.4–12, at 239–43.

¹⁹⁰ According to Quintilian, absolute sources must either be from nature, or from conventional law, custom, legal precedent, or contract. *Id.* 7.4.6, at 239–41.

¹⁹¹ *Id.* 7.4.4, at 239.

¹⁹² *Id.* 7.4.9, at 241.

¹⁹³ *Id.* 7.4.9, at 241 (internal quotations omitted).

¹⁹⁴ *Id.* 7.4.13–14, at 243, 245.

¹⁹⁵ Less desirable assumptive arguments according to Quintilian were the excuses of ignorance and necessity. *Id.* 7.4.15, at 245. About topoi for these, Quintilian said only that the lines of argument rest on the wrongdoer’s well-meaning. *Id.* In other words, the more compelling and strongly held the value underlying this excuse, the more likely the argument was to succeed. *See id.* 7.4.31–32, at 255 (“[I]t is sometimes sufficient to secure an acquittal to

d. Topoi for the Stasis of Objection (a.k.a. Transference)

Because Quintilian did not consider procedural issues to raise their own stases,¹⁹⁶ he did not develop topoi for them. *De Inventione* did, but Cicero pointed out that procedural issues rarely come up in trial speeches,¹⁹⁷ because many of them—particularly those going to the form of the case—were disposed of before the trial by the praetor.¹⁹⁸ Nonetheless, Cicero did identify some commonplace arguments, ranging from contending that “the action is set up this way through stupidity,” “necessity,” or “convenience”; to interpreting civil law and “studying what has been done in similar cases”; to condemning the elevation of technicalities over substance versus lauding procedural integrity.¹⁹⁹ But just as Quintilian viewed the content of procedural arguments as dependent on nested issues of conjecture, definition, and quality, Cicero’s own description of procedural topoi concedes the same.

e. The Victory-Based Philosophy of Stasis Theory

The stases came of age in Greek and Roman legal systems whose values and boundaries diverged sharply from modern civil procedure and the critical-discussion framework. The very fact that the stases operated largely outside of formal law as we know it, appealing to communal notions of justice and natural law, seems to render it a *wholly other* system of argument—one not constrained by rationality, restraint, and contemporary notions of fairness.

Indeed, as this Part reveals, rather than building arguments aimed at convincing a reasonable critic, stasis theory constructed arguments to ensure victory—using any facts and reasons available—including appeals to emotion, assumptions based on past deeds, and now-condemned conceptions of retribution and formal class hierarchies. Among other things, our legal system would not accept arguments justifying acts of vigilantism. It would not condone appeals to a person’s lineage or license bald assertions about liability based on reputation.

say that the culprit has only sinned once, or that the act was done in error, or that it is not as bad as is alleged.”). A case-in-point was mental incapacity, which may be so impairing as to remove moral culpability entirely, although Quintilian urged caution since “anger and passion are only too much like madness.” *Id.* 7.4.31, at 253.

¹⁹⁶ See HERENNIIUM, *supra* note 103, 1.18–19, 1.24, at 35, 43.

¹⁹⁷ The range of translative issues is wide, encompassing what contemporary law would consider jurisdictional issues, party issues, statute of limitations issues, venue issues, and technical pleading issues that include failure to state a claim. CICERO, *INVENTIONE*, *supra* note 103, 2.57, at 219, 221 (translative covers contentions that “the proper person does not bring the action, or it is not brought against the proper person or before the proper court, or under the proper statute, or with a proper request for a penalty, or with the proper accusation, or at the proper time.”)

¹⁹⁸ *Id.* 2.57–58, at 221. Though more rarely, translative issues could come up at trial when the theory of the case rested on one very serious charge, but the trial evidence pointed to another much less serious charge, rendering the original indictment void. *Id.* 2.58–59, at 221–23.

¹⁹⁹ *Id.* 2.60–61, at 223–25.

And it would not allow parties to attribute bad personal motives to the opposition and then use those motives to justify a result in their favor. In our system, constraints on these types of arguments may stem from the substantive law, ethical rules, the Rules of Evidence, or the FRCP. But because the FRCP aims to facilitate fair and rational decisions on the merits,²⁰⁰ it incorporates these systemic values no matter what their source.

In sum, as satisfying as stasis theory is from an analytical standpoint—it offers a range of commonplace arguments for trans-substantive issues that mirror those raised in civil cases—it presents theoretical and normative challenges for our model. Still, when integrated with the critical-discussion framework, constrained to fit civil procedure norms, and adapted to cure categorical and fluidity problems, the stases do offer a range of acceptable trans-substantive argument types.

C. Hohmann's Adaptation of Stasis Theory

Our adaptation of the stases draws on the work of law-trained communication scholar Hanns Hohmann.²⁰¹ Hohmann meant to rescue the stases from charges of poor theorization and to apply them to legal and other types of argument.²⁰² As this subsection shows, his approach was to view the stases through the lens of internal argument dynamics that are consistent across the stases and which account for their apparent overlap and fluidity. By identifying these dynamics—what he called “argument dimensions”—Hohmann aimed to “generate a useful systematization of basic types of arguments in law as well as in other fields”²⁰³

Hohmann's first step toward systemization was to reconceive of the three primary stases according to the claims they make: “(1) [t]hat something exists of whose precise nature the audience is to be persuaded” (conjecture); “(2) [t]hat according to applicable standards this existing thing belongs to a certain category[,] which indicates to the audience the proper response to the thing” (definition); and “(3) [t]hat these applicable standards themselves and the categorization based on them are justified by a higher standard” (quality).²⁰⁴ These claims, he noted, correspond roughly to the argumentative activities of verifica-

²⁰⁰ See *supra* text accompanying notes 16–41, 63–71, 73.

²⁰¹ Hohmann, Hanns J, SAN JOSÉ STATE UNIV., <http://www.sjsu.edu/people/hanns.hohmann> [<https://perma.cc/VG6Q-FLHZ>] (last visited Feb. 4, 2020).

²⁰² See Hohmann, *supra* note 15, at 171.

²⁰³ *Id.* at 175–76. This article is limited to Hohmann's discussion of legal argument.

²⁰⁴ *Id.* at 178. Notably, Hohmann's characterization of quality claims as dependent on the justification provided by a “higher standard” is consistent with the stasis theorist's description of absolute and assumptive issues. Both turn on notions of right and wrong and justice that stem from natural law and community norms. See *supra* text accompanying notes 147–159.

tion, interpretation, and justification.²⁰⁵ And, in his view, they represent argument dimensions *within* each stasis, as well as within legal arguments.²⁰⁶

Hohmann renamed the verification dimension “operative,” the interpretation dimension “regulative,” and the justification dimension “optative.”²⁰⁷ Mirroring the empirical, conventional, and value-based topoi we found in Cicero and Quintilian for the rational stases, each dimension appears in recurring patterns in what Hohmann deems law’s three essential argument types: (1) factual arguments, (2) rule-interpretation/application arguments, and (3) philosophical/moral arguments.²⁰⁸ Because purely philosophical and moral arguments do not commonly play a role in civil-procedure argumentation, we address only two argument types: factual and rule-interpretation/application. As we will see in Part III, these two argument types map directly onto the civil-procedure critical-discussion argumentation stage.²⁰⁹

1. *Dimensions of Factual Arguments*

In arguments about facts, Hohmann’s operative dimension deals with observable phenomena that “point in the direction” of a factual conclusion,²¹⁰ just as Cicero and Quintilian’s empirical topoi did in the conjectural stasis.²¹¹ Arguments along this dimension might try to establish, for example, “that there was a corpse in a certain place, that at some point there was a knife nearby, [and] that the witness has reported that he saw the accused in the vicinity”²¹² Hohmann’s regulative dimension, in turn, incorporates conventional standards of fact-finding. This includes drawing permissible inferences through logical reasoning and human experience,²¹³ such as inferring that A was responsible for B’s death based on the location of B’s corpse, the nearby knife, and A being near the scene at the time, covered with blood. The regulative dimension also covers presumptions and evidentiary rules,²¹⁴ which can dictate the weight of evidence, reject certain inferences from the evidence, and even exclude evidence altogether.²¹⁵ These regulative arguments parallel the Roman conventional topoi in the stasis of conjecture.²¹⁶

²⁰⁵ Hohmann, *supra* note 15, at 179.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 180. Huhn describes five types of legal argument, argument from text, intent, precedent, tradition, policy. *See generally* HUHNS, *supra* note 15.

²⁰⁹ *See* discussion *infra* Part III.B, C, D.

²¹⁰ Hohmann, *supra* note 15, at 180.

²¹¹ *See supra* note 103; *supra* text accompanying notes 168–169.

²¹² Hohmann, *supra* note 15, at 180.

²¹³ *See id.*

²¹⁴ *See id.*

²¹⁵ *See id.* at 181.

²¹⁶ *See supra* text accompanying notes 166–75.

Rarely, Hohmann notes, an optative dimension comes into play when fact-finding standards “are as good as we can make them,” but a higher value militates against finding a given fact.²¹⁷ Our current system so devalues this sort of reasoning that we rarely see it; the classic example is jury nullification.²¹⁸ This “higher value” argument dimension played a much larger role in the ancient stasis of conjecture, where bald appeals to pity, outrage, retribution, and the like were legion.²¹⁹

2. *Dimensions of Rule Interpretation/Application Arguments*

Hohmann next addresses arguments about rule interpretation and rule application, which he packaged together just as the Roman stasis of definition did.²²⁰ These arguments “establish that a certain rule does indeed apply to the facts found, and that thus a particular legal characterization of and response to those facts is justified.”²²¹ Here, Hohmann treats rule *validity* arguments separately from rule *interpretation/application* arguments.²²² Most salient for civil procedure are rule interpretation/application arguments, which track the Romans’ definitional stasis topoi.²²³ Here, Hohmann’s operative dimension covers debates over “the common understanding of the terms used in the rule,” the existence of which he deems an empirical matter.²²⁴ If the terms’ common meanings are unclear or unsatisfactory, the regulative dimension kicks in, encompassing all of the conventional interpretive tools our system offers.²²⁵ These standard methods of constructing meaning correspond to Quintilian’s legal-interpretive topoi;²²⁶ nowadays they are directed foremost at discerning legislative will.²²⁷

In line with this focus on legislative purpose, the optative—or “higher standard”—dimension of rule interpretation and application arguments rarely makes explicit justice or equity appeals. Instead, these value-based “considera-

²¹⁷ Hohmann, *supra* note 15, at 182 (characterizing this dimension as a conflict “between our normal standards of fact-finding and the demands of justice as we see them in particular circumstances.”).

²¹⁸ Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 253–56 (1996) (describing the controversial nature of jury nullification, which “occurs when the defendant’s [legal] guilt is clear beyond a reasonable doubt, but the jury, based on its own sense of justice or fairness, decides to acquit.”); *see also id.* at 257 (positing that any benefits of jury nullification “pale in comparison to the doctrine’s undesirable collateral effects.”).

²¹⁹ *See supra* text accompanying notes 168–75.

²²⁰ *See* Hohmann, *supra* note 15, at 185 (“[T]he argument may next turn to the applicability of that rule to the situation at hand, and we thus deal with the question of interpretation”); *supra* text accompanying notes 176–86.

²²¹ Hohmann, *supra* note 15, at 183.

²²² *Id.* at 184–90.

²²³ *See supra* text accompanying notes 176–86.

²²⁴ Hohmann, *supra* note 15, at 185.

²²⁵ *Id.*

²²⁶ *See supra* text accompanying notes 182–86.

²²⁷ Hohmann, *supra* note 15, at 187.

tions are used to reach or further justify results[,] which are primarily based on letter or spirit,”²²⁸ as when one statutory reading would lead to a “parade of horrors”²²⁹ while another would create efficiencies or observe proper institutional roles for legal actors.²³⁰

3. *Hohmann’s Contributions to the Critical Discussion-Stasis Model*

Hohmann’s theory of argument dimensions makes sense of the classical stases’ category confusion and divisional fluidity by channeling their core claims into dimensions of legal arguments. But Hohmann’s argument dimensions are not limited to points actually licensed in contemporary civil procedure. In fact, Hohmann concedes that his optative dimension is frequently extra-legal and generates purely moral or philosophical arguments that, in PD terms, a reasonable judge acting rationally within our system’s constraints would likely not accept. In theoretical terms, it is important to recognize the optative dimension because the optative or value-based law-change arguments of one generation often become the regulative or conventional status quo in the next.²³¹ Nonetheless, because our model aims to fit civil procedure’s current norms and constraints, the optative/value-based dimension plays a lesser role in our model, while the operative/empirical and regulative/conventional dimensions take center stage.

²²⁸ *Id.* at 178, 188. Another, more purely optative argument echoes the goal of the ancient stasis of definition: “the task of the legal interpreter should not be the attribution of meaning to terms according to semantic contentions, but rather the determination of the true nature of the entities to which legal terms refer”—for example, arguments about the “true nature” of “death” or “malice.” *Id.* at 188; *see also* text accompanying notes 179–86. As of now, this dimension of interpretation and application remains truly optative, for it has not been adopted as a conventional method of interpretation in American law.

²²⁹ Ellie Margolis, *Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs*, 62 MONT. L. REV. 59, 73 (2001) (“A slippery slope argument asserts that if the proposed rule is adopted, the court will not be able to prevent its application to an ever broadening set of cases.”).

²³⁰ *Id.* at 68. Hohmann also addresses “the overall optative dimension of the arguments focusing on legal rules,” a more radical approach that advocates disregarding the rule notwithstanding the operative and regulative aspects in its favor. Hohmann, *supra* note 15, at 188. As an example, he points to constitutions whose explicit provisions state that international law may supersede them. *Id.* at 189. Such arguments held more sway in ancient court cases, where natural law and other norms frequently *were* the law. *See* text accompanying notes 148–52.

²³¹ For the role of value-based arguments in definitional disputes, consider the extended discussion of the values and history behind the institution of marriage in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593–96 (2015), which Justice Kennedy mobilized in support of the decision that same-sex marriage would be legally recognized throughout the United States; an optative argument about the rule thus became an empirical fact. For their role in conjectural contexts, consider the common-law convention that a child born to a married woman is legally the child of her husband. Helene S. Shapo, *Assisted Reproduction and the Law: Disharmony on a Divisive Social Issue*, 100 NW. U. L. REV. 465, 467 (2006). There were no doubt optative arguments for that conclusion the first time a court reached it, but once courts widely accepted it, it became a conventional presumption.

III. THE CRITICAL DISCUSSION–STASIS MODEL

In the Introduction to this Article, we proposed that modern and classical argument theories offer a way to understand dispute-resolution systems in argumentation-theoretic terms. We chose to explore the FRCP as a paradigm case. To develop the philosophical, theoretical, and methodological tools for that exploration, Part I of this Article adopted pragma-dialectics (PD) as a framework for viewing the FRCP as a critical discussion. There, we described the roles of a critical discussion's confrontation, opening, argumentation, and concluding stages, but we noted that these stages need adjustment to fit the structure of a civil suit. We also observed that PD's argumentation stage operates on too minute a scale—sentence- or paragraph-level—to construct civil procedure argument content. In Part II, we proposed Roman classical stasis theory as a candidate to fill this content gap. Stasis theory does this by identifying the stopping points where an arbiter is called on to resolve a difference of opinion on the core questions of conjecture (what happened), definition (its legal name or characterization), quality (mitigating circumstances or defenses), and procedure. Stasis theory also offers a method for devising common arguments or *topoi* that can be used in cases of any kind. Some of its theoretical problems were resolved by contemporary theorist Hanns Hohmann's argument dynamics theory, but Hohmann did not cure the normative mismatch.

Here in Part III, we integrate and adapt both theories to develop our critical discussion-stasis model—a model that is philosophically, theoretically, and analytically congruent with civil procedure. Our model has two primary components. The first component maps the four PD critical discussion stages onto the discourse moves in a civil suit. We use this normatively compatible framework to show how civil procedure moves are designed to convince the reasonable critic to reach rational results, with the overriding goal of fairly resolving suits on the merits. Against this backdrop, the parties advance litigation stases; that is, disputed standpoints seeking decisions from the court. Those stases supply the second component of our model.²³² Molded to fit the procedural structure of civil suits, our litigation stases are a package of confrontations, argumentation, and conclusions about a claim, defense, or procedural issue. Working together, these two components of our model supply a complete framework for understanding how a rational decisionmaker may judge reasonably in federal civil litigation, along with a taxonomy of rational argument types, or *topoi*.

To illustrate the first component, the mapping of a lawsuit's critical discussion, we use the case of *Rivera v. Méndez & Compañía*,²³³ litigated in the United States District Court for the District of Puerto Rico. In section III.A, we tell the basic story of the case. Section III.B then uses our model to reconstruct how the *Rivera* litigation proceeded through the critical discussion's opening stages,

²³² The stases are synonymous with PD standpoints, but the stases come with an argument taxonomy.

²³³ Docket, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. 2013).

while also making discourse moves advancing standpoints that were resolved through confrontation, argumentation, and concluding stages.²³⁴ Section III.C defines the stases in a civil suit, and section III.D reveals their conjectural and definitional dimensions. Section III.E then develops the rational range of permissible arguments—the topoi—in these static dimensions.

A. *The Rivera Case*

The claims in *Rivera v. Mendéz & Compañía* were born together on June 7, 2011, and were decided by a jury over two years later on December 26, 2013.²³⁵ The case was brought by Dennis Mario Rivera, a Puerto Rican artist who designed promotional posters for the Puerto Rico Heineken Jazz Fest each year from 1998 through 2009.²³⁶ The organizer of the festival was Mendéz & Compañía, the distributor of Heineken beer in Puerto Rico. Its executive, Luis Álvarez, was also a friend of the artist. For over a decade, the festival organizers paid Mr. Rivera to reproduce his artwork on “posters, t-shirts, bus shelter[ads], etc.”²³⁷ But for the twentieth annual festival in 2010, the organizers hired a different artist.²³⁸ Still they continued to use Mr. Rivera’s works, incorporating them into a collage featured on festival programs, displaying them on commemorative merchandise, and featuring them on a website celebrating the festival’s history.²³⁹ Though Mr. Rivera eventually won nearly \$150,000 at trial,²⁴⁰ the case settled on appeal to the First Circuit.²⁴¹

²³⁴ As the rare case proceeding through trial to a judgment, *Rivera* is a rich source of discourse moves, illustrating how a case moves through all litigation phases as a critical discussion designed to convince a reasonable judge to reach rational results. The argumentative content of the *Rivera* discourse moves is not as robust, however, and as a result we use other examples for the stasis-based aspects of our model in sections III.C, III.D, and III.E.

²³⁵ Docket, *supra* note 233. Reported opinions for this case appear at 824 F. Supp. 2d 265 (D.P.R. 2011) (granting Defendants’ motion to dismiss Plaintiff’s moral right claims), 988 F. Supp. 2d 159 (D.P.R. 2013) (granting in part and denying in part Plaintiff’s motion for summary judgment and denying Defendants’ motion for partial summary judgment), 988 F. Supp. 2d 174 (D.P.R. 2013) (granting in part and denying in part Defendants’ motions to strike and exclude expert testimonies). For ease of reference in this Article, we refer to the other documents in the case’s docket by document name and docket number. See Complaint for Copyright Infringement & Injunctive Relief at 1, No. 11-1530 (D.P.R. June 7, 2011), ECF No. 1; Final Judgment at 1, No. 11-1530 (D.P.R. Dec. 30, 2013), ECF No. 205.

²³⁶ *Rivera*, 988 F. Supp. 2d at 164–65.

²³⁷ *Id.*

²³⁸ *Id.* at 165.

²³⁹ *Id.*

²⁴⁰ Final Judgment, *supra* note 235, at 1.

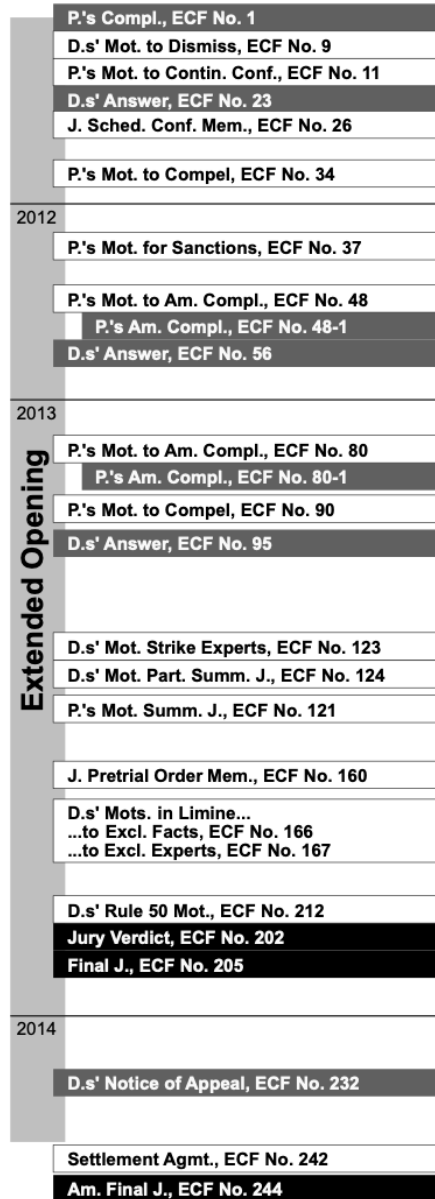
²⁴¹ Amended Final Judgment at 1, No. 11-1530 (D.P.R. Nov. 6, 2014), ECF No. 244; Notice of Appeal at 1, No. 11-1530 (D.P.R. May 12, 2014), ECF No. 232.

Figure 1: Rivera portrayed as a critical discussion

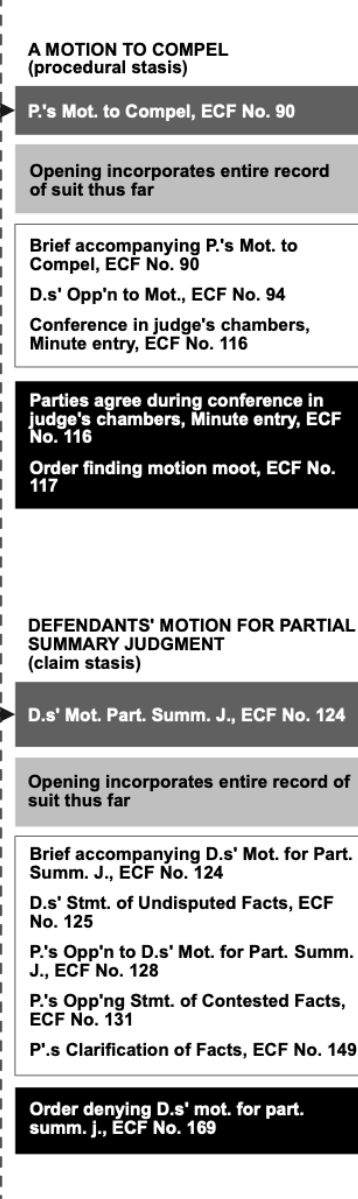
Showing selected moves of the parties and court

KEY to stages: **Confrontation** **Opening** **Stasis/Argumentation** **Concluding**

Stages of the suit



Stages of two stases



Although the *Rivera* case is not substantively remarkable, the fact that it was tried makes it exceptional in a procedural sense as the rare dispute to proceed through every litigation phase.²⁴² The next section explains how the stages of a critical discussion map onto a lawsuit, using *Rivera* as an illustration. Figure 1 provides a graphical representation that may prove helpful for following the structure.

B. The Lawsuit as a Critical Discussion in Action

Adapted to the non-linear nature of litigation, the four PD critical discussion stages can be mapped onto the discourse moves in every phase of a civil case. Broadly speaking, just as these four stages anticipate areas of agreement and disagreement, the FRCP envision the parties both cooperating and advocating. At the same time as the Rules require advocates to periodically advance diametrically opposed positions to narrow down what the suit is really about, the Rules expect ongoing cooperation—for parties to negotiate, to stipulate, and, if necessary, to concede.²⁴³ The judge, in turn, manages and decides the parties' dialectical disputes but also encourages agreement whenever possible, often coaxing parties to settle.²⁴⁴ These dichotomous party and judging roles surface in the critical-discussion framework's opening stage (cooperative) as well as in its confrontation, argument, and conclusion phases (adversarial).

²⁴² Of more than 325,000 federal district court cases terminated in the one-year period ending June 30, 2019, less than 1 percent were terminated during or after trial. See U.S. COURTS, TABLE C-4—U.S. DISTRICT COURTS—CIVIL STATISTICAL TABLES FOR THE FEDERAL JUDICIARY (2019), <https://www.uscourts.gov/statistics/table/c-4/statistical-tables-federal-judiciary/2019/06/30> [<https://perma.cc/Y3NW-NAT9>].

²⁴³ *E.g.*, FED. R. CIV. P. 16(a), (c)(1), 26(c)(1), 36, 37(a)(1), (d)(1)(B) (requiring parties to discuss settlement at pretrial conferences, to meet and confer about discovery disputes before filing motions, and to make stipulations and admissions).

²⁴⁴ See, *e.g.*, FED. R. CIV. P. 16(a) (“In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as . . . facilitating settlement.”); see also sources cited *supra* note 99.

Specifically, a federal lawsuit starts with a *confrontation* stage, the lawsuit's filing. This is followed by an *initial opening* stage that gives way to *subsidiary opening* stages as understanding of facts improves, as legal positions become more refined, and as the true merits of the case come into focus. In effect, everything that happens in the suit is part of an *extended opening stage*, serving as the opening stage for argumentation that happens after it. This large-scale structure is depicted on the left side of Figure 1. All four stages then recur *within the stases*: the points at which the parties seek a judicial decision. Figure 1 depicts two example stases on its right side. Following a subsidiary opening, which consists of the record in the suit to that point, each stasis begins with a *confrontation* where a party presents a standpoint, and the other parties and the judge learn there is a difference of opinion requiring adjudication. The *argumentation stage* follows, where the proposing party seeks to overcome the decisionmaker's or opponent's doubts about the standpoint. As Figure 1 shows, the same motion paper can function both to give notice to the court and opposing parties of the matter—as confrontation—and to provide argumentative support for it—as argumentation. The stasis ends with a *concluding* stage, in which the proposing party retracts, the opposing party concedes—via negotiation, stipulation, or concession—or the court decides the standpoint.

1. *Seeking Common Ground: Initial and Subsidiary Opening Stages*

To say that a civil suit's opening stage is cooperative is not to say that the parties agree with each other or that the judge agrees with any of the parties. It simply refers to the cooperative objective of discerning common ground.²⁴⁵ In a federal civil suit, the obvious common ground consists of the discussion format and rules: a combination of the FRCP themselves, federal jurisdictional statutes, and constitutional procedural doctrines that govern where and how the case should be litigated.²⁴⁶

As a practical matter, a civil case's opening stage begins with the pleadings, which reveal the scope of the lawsuit.²⁴⁷ This is vital common ground, for a critical discussion requires a clear understanding of what is being discussed and who is participating. To that end, the complaint articulates the bases for ju-

²⁴⁵ See *supra* text accompanying notes 89–90.

²⁴⁶ See, e.g., 28 U.S.C. § 1331 (2018) (conferring federal question jurisdiction); 28 U.S.C. § 1332 (2018) (conferring diversity jurisdiction); 28 U.S.C. § 1367 (2018) (conferring supplemental jurisdiction); *Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1773, 1781–83 (2017) (refining the standards for specific personal jurisdiction); *Daimler AG v. Bauman*, 571 U.S. 117, 133–37 (2014) (setting the standard for general personal jurisdiction); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980) (establishing minimum contacts framework for specific personal jurisdiction).

²⁴⁷ FED. R. CIV. P. 4(c) (requiring service of the complaint on the defendant to begin a lawsuit); FED. R. CIV. P. 5 (requiring service of all pleadings on opposing parties); Fed. R. Civ. P. 8(a) (requiring litigants to provide “short and plain statement[s]” of the basis for federal jurisdiction, the claims, and the relief sought); Fed. R. Civ. P. 8(c) (describing required contents of responsive pleadings).

risdiction, the legally relevant factual allegations, the legal claims that make the allegations actionable, the remedies sought, and, if applicable, a demand for a jury trial.²⁴⁸ In the answer, the defendant admits or denies those allegations and can raise unwaived 12(b) defenses and affirmative defenses.²⁴⁹ The answer can also bring the defendant's own claims, either against the plaintiff or against a third party involved in the same transaction or occurrence.²⁵⁰ Together, then, the pleadings identify common ground in the form of uncontested allegations, along with defining the claims, defenses, and counterclaims that will be addressed in the case, as well as identifying who will participate in the critical discussion.²⁵¹

The *Rivera* case's pleadings illustrate this initial opening stage and its function of defining common ground in the suit's scope. Based on the alleged continued and unauthorized use of his artwork, Mr. Rivera sued Mendéz & Compañía, Luis Álvarez, Heineken, and several Does, bringing four intellectual property claims. These claims alleged that the defendants had (1) infringed the copyrights in his works under federal copyright law; (2) "[d]istorted, mutilated or modified" his works in violation of the federal Visual Artists Rights Act (VARA); (3) "destroyed the integrity" of his works under the Puerto Rico Intellectual Property Act (PRIPA); and (4) "attacked the paternity of the works" under PRIPA by attributing them to another artist. Álvarez and Mendéz joined the critical discussion when they received their summons on June 8.²⁵² After filing a successful Rule 12(b)(6) motion to dismiss the VARA and PRIPA claims,²⁵³ Mendéz and Álvarez filed an answer to the remaining copyright claim.²⁵⁴ There, they denied some of Mr. Rivera's factual allegations, including the scope of the license that Mr. Rivera alleged he had given them to his works.²⁵⁵ They also asserted other facts about their use of the images and the circumstances of their creation to support affirmative defenses raised in the answer,

²⁴⁸ FED. R. CIV. P. 8(a), 38(b).

²⁴⁹ FED. R. CIV. P. 8(b), 8(c), 12(b), 12(h).

²⁵⁰ FED. R. CIV. P. 13 (counterclaims); FED. R. CIV. P. 14 (third-party claims). Those parties, then, have largely the same options as the original defendant did. FED. R. CIV. P. 13(a), 13(b), 14(a)(2), 14(5).

²⁵¹ Common ground is also temporarily ceded when the defendant files a Rule 12(b)(6) motion. Even if the defendant ultimately disagrees with the complaint's allegations, for purposes of challenging legal sufficiency, those allegations are common ground that must be assumed true, drawing all reasonable inferences in the plaintiff's favor. *See* FED. R. CIV. P. 12(b)(6); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). *But see id.* ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

²⁵² Complaint, *supra* note 235, at ¶¶ 45, 48, 50.

²⁵³ *See infra* text accompanying note 261.

²⁵⁴ Answer, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. Aug. 30, 2011), ECF No. 23.

²⁵⁵ *Id.* ¶ 17; Complaint, *supra* note 235, at ¶ 17.

including implied license and fair use.²⁵⁶ Thus, by the end of the pleadings phase, it was clear that, at least at the outset, the critical discussion would involve three parties engaged in a copyright dispute that would be defended by both contesting whether the copyright infringement elements existed in the first place, and by excuse: a legal use of copyrighted materials.

But in a federal civil suit, the scope is continually up for discussion and reformulation.²⁵⁷ Even though the basic parameters are set early on through the pleadings, those pleadings can be amended. Claims and defenses can be added, dismissed, or stricken.²⁵⁸ Parties can join or be joined, intervene, interplead, or be impleaded;²⁵⁹ class actions can be certified.²⁶⁰ In *Rivera*, for instance, three of the four claims were dismissed by 12(b)(6) motion,²⁶¹ and Mr. Rivera twice amended the complaint to add defendants, once more than eighteen months after filing the first complaint.²⁶² That is why our model views the initial opening stage as *extended*. Consequently, the confrontation moves depicted in dark gray in Figure 1 continue intermittently for nearly two years after the summons was originally served.

Subsidiary opening stages arise as the parties continue to establish common ground on discrete procedural matters. In discovery, a subsidiary opening stage takes the form of the Rule 26(f) conference and Rule 16 scheduling conferences.²⁶³ A mandatory meeting under the Rules, the 26(f) conference gets the

²⁵⁶ Answer, *supra* note 254, at ¶¶ 1–9.

²⁵⁷ The concept of a shifting suit scope prompting recurring but focused opening stages is a built-in feature of the FRCP that is fully consistent with both the normative and theoretical goals of the critical discussion framework. Just as that framework aims to fully air, vet, and evaluate arguments rationally, the Rules' liberal stance towards changing claims and parties (within limits) is one that serves the merits by capturing as fully as possible an accurate universe of facts, legal issues, and participants needed to decide the case efficiently, fairly, and accurately, as described so well by Charles Alan Wright:

The genius of the new rules is their recognition that no rule of pleading . . . can offer a satisfying answer to all the different kinds of fact situations which may arise. The only valid way to handle the problem is to say that it is desirable to include as many claims and parties as there are in one suit And no legislature can say what the optimum size of a lawsuit is under each particular constellation of allegations in the pleadings. The new rules, therefore, allow, for practical purposes, joinder of any claim or any party, and then leave it to the trial judge to order separate trials for particular claims or issues

Charles Alan Wright, *Joinder of Claims and Parties Under Modern Pleading Rules*, 36 MINN. L. REV. 580, 581 (1952).

²⁵⁸ See FED. R. CIV. P. 12(b)(6), 12(f), 15.

²⁵⁹ See FED. R. CIV. P. 12(b)(7), 14, 18–22, 24.

²⁶⁰ See FED. R. CIV. P. 23.

²⁶¹ *Rivera v. Méndez & Co.*, 824 F. Supp. 2d 265, 269; *see also* Motion to Dismiss Moral Right Claims Under VARA & the Puerto Rico Intellectual Property Law, *Rivera*, 824 F. Supp. 2d at 269 (D.P.R. 2011) (No. 11-01530), ECF No. 9.

²⁶² Motion for Leave to Amend Pleadings & Extension to Serve Waiver of Summons, *Rivera v. Mendez & Co.*, No. 11-1530 (D.P.R. Mar. 12, 2012), ECF No. 48; Motion for Leave to Amend Pleadings at ¶ 7, 10, *Rivera v. Mendez & Co.*, No. 11-1530 (D.P.R. Feb. 6, 2013), ECF No. 80.

²⁶³ *See infra* notes 264–69.

parties together without the judge to formulate a joint discovery plan.²⁶⁴ During this conference, the parties explore and settle on as many discovery matters as possible, including the nature and basis of claims and defenses; preservation issues; and a plan that (1) specifies the timing and subjects of discovery, (2) identifies anticipated privilege, work product, and protective order issues, and (3) alters discovery default rules.²⁶⁵ The 26(f) conference also provides a built-in opportunity to conduct settlement negotiations.²⁶⁶ Following the 26(f) conference, the parties submit a joint proposed discovery plan to the judge and attend a Rule 16 scheduling conference.²⁶⁷ There, the judge and the parties discuss the plan, along with the possibility of submitting the case to a magistrate judge, dates for future Rule 16 conferences and trial, and any admissions or stipulations that can be obtained at that time.²⁶⁸ Emerging from that conference is a Rule 16 scheduling order embodying the parties' agreements on these matters, insofar as the judge also concurs with them.²⁶⁹

This extended opening stage is visible in *Rivera* over the summer and fall of 2011.²⁷⁰ In an order issued on August 9, the judge set a settlement/mediation conference for August 18.²⁷¹ On that date, the parties met with the judge but did not settle,²⁷² and the judge thereafter issued a scheduling order that referred the case to a magistrate judge.²⁷³ After a meeting with the parties on October 12, the magistrate judge issued a scheduling order for the major phases of the litigation in 2012: (1) the January and February due dates for expert reports, (2) a March close of discovery, and (3) a dispositive motions deadline in April.²⁷⁴ The parties later moved to revise this schedule,²⁷⁵ resulting in a new August

²⁶⁴ FED. R. CIV. P. 26(f).

²⁶⁵ FED. R. CIV. P. 26(f)(2)–(3).

²⁶⁶ FED. R. CIV. P. 26(f)(2).

²⁶⁷ FED. R. CIV. P. 16(b)(1)(a), 26(f)(2).

²⁶⁸ FED. R. CIV. P. 16(a); D.P.R. CIV. R. 16(a)(5); *see also* FED. R. CIV. P. 29.

²⁶⁹ FED. R. CIV. P. 16(b); D.P.R. CIV. R. 16(b).

²⁷⁰ The docket and many of these entries are accessible on ECF/PACER, which charges a fee for access. For references to them, see Docket, *supra* note 233.

²⁷¹ Order, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. Aug. 9, 2011), ECF No. 19. The judge apparently ordered this D.P.R. CIV. R. 16(i) settlement/mediation conference before the Rule 26 scheduling conference. Order, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. Aug. 23, 2011), ECF No. 22.

²⁷² Minute Entry, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. Aug. 18, 2011), ECF No. 20.

²⁷³ Referral to Magistrate Judge for Initial Scheduling Conference, *Rivera v. Mendez & Co.*, No. 11-1530 (D.P.R. Aug. 23, 2011), ECF No. 21. The parties filed a Joint Initial Scheduling Conference Memorandum, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. Sept. 15, 2011) ECF No. 26, in anticipation of the Rule 26 conference.

²⁷⁴ Minutes of Proceedings, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. Oct. 13, 2011), ECF No. 33.

²⁷⁵ Plaintiff's Informative Motion and Request for Extension at ¶ 5, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. Feb. 13, 2011), ECF No. 40; Motion for Extension to Conclude Discovery at ¶ 2–5, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. Mar. 6, 2011), ECF No. 45; Motion for Extension of Time to Answer Interrogs, Request for Production of Docu-

deadline for discovery and a new September dispositive motion deadline.²⁷⁶ Over time, then, the *Rivera* parties' common discovery ground was sought, obtained, shifted, and obtained again.

Another subsidiary opening stage arises on summary judgment. Under Rule 56(c) (and as detailed by local rules), both parties must submit, along with their summary judgment briefings, statements of undisputed and disputed facts based on the full discovery record.²⁷⁷ Typically, by local rule the moving party submits in numbered-paragraph form the facts that are undisputed with citations to the discovery record;²⁷⁸ the non-moving party responds by agreeing or disagreeing with what is undisputed, again with citations to the record.²⁷⁹ The parties in *Rivera* submitted these statements in connection with the defendants' motion for partial summary judgment.²⁸⁰ The defendants attempted to set common evidentiary ground with twenty-six numbered paragraphs of "uncontroverted" factual assertions and 280 pages of exhibits.²⁸¹ Mr. Rivera rejoined by conceding some of these facts—all of which he deemed non-material—

ments and Request for Admissions, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. June 24, 2011), ECF No. 59; Plaintiff's Motion Requesting Extension of Discovery Period at ¶ 4–6, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. June 29, 2011), ECF No. 60; Informative Motion as to Mendez and Alvarez and Motion for Enlargement of Time as to HNK Americas, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. July 17, 2012), ECF No. 65; Plaintiff's Motion Announcing Experts and for Brief Extension at ¶ 2–4, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. Sept. 21, 2012), ECF No. 70; Plaintiff's Motion to Compel and for Additional Extension at ¶ 6, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. Oct. 23, 2012), ECF No. 73; Motion Requesting Additional Time to Plead, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. Apr. 19, 2013), ECF No. 88; Plaintiff's Urgent Motion for Extension to File Dispositive Motion at ¶ 3–4, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. Apr. 29, 2011), ECF No. 91.

²⁷⁶ Minute Entry, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. June 5, 2013), ECF No. 116.

²⁷⁷ FED. R. CIV. P. 56(c)(1) ("A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record. . . ; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.").

²⁷⁸ *E.g.*, D.P.R. CIV. R. 56(b) ("A motion for summary judgment shall be supported by a separate, short, and concise statement of material facts, set forth in numbered paragraphs, as to which the moving party contends there is no genuine issue of material fact to be tried. Each fact asserted in the statement shall be supported by a record citation . . .").

²⁷⁹ In the case of the District Court for the District of Puerto Rico, the non-moving party also submits a statement of additional disputed facts, D.P.R. CIV. R. 56(c), to which the moving party must respond by agreeing or disagreeing on their disputed nature. D.P.R. CIV. R. 56(d).

²⁸⁰ Defendant's Motion for Partial Summary Judgment at 1, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. Sept. 10, 2013), ECF No. 124. Interestingly, defendants founded this argument on a second stasis that they raised the same day: a motion to strike the plaintiff's expert testimony regarding the value of his works and damages he had sustained. Defendants' Motion to Strike Experts Felix Norman Roman & Ruben Alejandro Moreira, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. Sept. 10, 2013), ECF No. 123.

²⁸¹ Statement of Uncontroverted Facts in Support of Motion for Partial Summary Judgment, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. Sept. 10, 2013), ECF No. 125.

denying others, and adding disputed facts of his own.²⁸² The lower right panel of Figure 1 depicts this process. The court was left to sift through these statements for common evidentiary ground to consider in deciding the motion. But just as important, the parties' competing statements allowed the court to see the full scope of their disagreement—the common ground for trial.

What remains of the case following a summary judgment decision supplies the final subsidiary opening stage, which takes shape in the pretrial conference. In this conference, parties formulate a trial plan, agreeing as much as possible on what the trial should look like and how it should proceed. This agreement is usually embodied in a joint proposed pretrial order.²⁸³ To fill the contents of this proposed order, the parties discuss and agree on as much as possible regarding witnesses, evidence, and legal issues.²⁸⁴ In *Rivera*, all the parties signed on to a seventy-three-page "proposed pretrial order memorandum," the contents of which included the following stated from both the plaintiff's and the defendants' perspectives: a statement of the nature of the case, legal and factual contentions, controverted and stipulated facts and admitted facts, lists of evidence and witnesses, the estimated trial length, and more.²⁸⁵ In effect, through the joint proposed order, the parties agree on some matters and further concur on their disagreements.²⁸⁶

The extended opening stage of a lawsuit's critical discussion, then, operates as a continuous examination of accord on the scope of the lawsuit, the method and manner of discovery, the facts and legal issues involved, and the content and presentation of the evidence at trial. The parties make these cooperative efforts even as they are fighting tooth and nail over disputed territory, which comprises the remaining stages of the critical discussion in a federal suit.

2. *Litigation Moves: Confrontation, Argument, and Concluding Stages*

Just as the Rules require cooperation, they anticipate and license arguments for dialectical presentation to and resolution by the judge. This section explains how the parties' adversarial moves can be reconstructed as the remaining stages of the critical discussion. Those stages recur every time a party requests the resolution of a stasis. We define a stasis—consistently with its etymology—as a

²⁸² Opposing Statement of Contested Facts and Counter Statement of Facts in Opposition to Motion for Summary Judgment, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. Sept. 26, 2013), ECF No. 131. In fact, the plaintiff filed another document in this contest over the evidence. Plaintiff's Clarification of Facts & Opposing Statement of Additional Facts in Support of Response to Opposition to Motion for Summary Judgment, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. Oct. 21, 2013), ECF No. 149.

²⁸³ D.P.R. LOCAL R. 16(d) (Dec. 3, 2009, with Amendments through Apr. 12, 2018).

²⁸⁴ *Id.*

²⁸⁵ Joint Proposed Pretrial Order Memorandum, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. Dec. 2, 2013), ECF No. 160.

²⁸⁶ In this sense, the final pretrial order is not just a subsidiary opening stage but also poses standpoints that the judge or jury must resolve at trial. Joint Proposed Pretrial Order Memorandum, *supra* note 285.

stopping point, a point where the parties require the resolution of an issue before moving forward.²⁸⁷ In the next section, we differentiate among three types of litigation stases, but first we explain here how each stasis, no matter the type, is a packaged critical discussion comprising confrontation, argumentation, and concluding stages. The right side of Figure 1 depicts two examples.

Each stasis begins with a confrontation, the point at which the parties realize there is a difference of opinion that requires resolution.²⁸⁸ The Rules envision several types of confrontations, all of which involve one party notifying the judge and the other party about an issue that must be resolved.²⁸⁹ The most common confrontations are motions, which explicitly request a court ruling on a disputed matter.²⁹⁰ FRCP motions run the litigation gamut, from jurisdictional motions to other pre-answer motions challenging the complaint, to motions for sanctions, to discovery motions, to summary judgment motions, to post-trial motions.²⁹¹ All of these motion types were filed in *Rivera*.²⁹² Motions to join, interplead, intervene, or to implead parties are confrontations about the scope of the lawsuit, as are motions to amend the pleadings,²⁹³ such as the two *Rivera* motions seeking to add defendants. The Rules also permit all manner of administrative motions.²⁹⁴ The *Rivera* docket is replete with these: requests for continuances and extensions of time and for permission to exceed word limits and to file additional briefing.²⁹⁵

Another type of confrontation happens when the parties submit disputed positions on a matter in response to a court order. For example, the discovery or trial items that remain in contention following a Rule 26(f) or Rule 16 conference must be presented to the judge for resolution in a Rule 16 order—whether of the interim or final pretrial variety.²⁹⁶ Likewise, *Rivera* included motions in limine to admit or exclude evidence pretrial, submitted pursuant to a pretrial order.²⁹⁷ Contested jury instructions, also submitted in *Rivera*, are required by

²⁸⁷ See discussion *supra* note 12.

²⁸⁸ VAN EEMEREN & GROOTENDORST, *supra* note 10, at 60.

²⁸⁹ The arrows pointing from the upper to the lower portion of Figure 1 depict points in the *Rivera* suit where stases arose.

²⁹⁰ See FED. R. CIV. P. 7(a), 78.

²⁹¹ See, e.g., FED. R. CIV. P. 11(c), 12(b), 15(a), 26(g), 37(a), 37(e), 50(a)–(b), 56(a), 59.

²⁹² See generally Docket, *supra* note 233.

²⁹³ FED. R. CIV. P. 14 (third party practice), 18–21 (joinder), 22 (interpleader), 24 (intervention).

²⁹⁴ See, e.g., FED. R. CIV. P. 6(b), 7(b).

²⁹⁵ See generally Docket, *supra* note 233.

²⁹⁶ FED. R. CIV. P. 16(b) (scheduling conference); (c), (d) (pretrial conference); (e) (final pretrial conference).

²⁹⁷ See *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984) (discussing how motion in limine practice, though not governed explicitly by the Federal Rules of Evidence, has developed “pursuant to the district court’s inherent authority to manage the course of trials.”); Minute Entry, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. Dec. 10, 2011), ECF No. 165 (Minute entry setting due date for motions in limine as December 11 for trial slated to begin December 17); Defendants’ Motion in Limine to Exclude Irrelevant Facts, *Rivera v. Méndez & Co.*,

local rule to be submitted at least seven days before the trial starts, “unless otherwise ordered by the Court.”²⁹⁸ Ultimately, the judge will rule on those and instruct the jury accordingly.²⁹⁹ Finally, the Rules license a host of confrontations during the trial, including juror challenges, opening and closing arguments, trial objections, offers of proof, and final jury instructions.³⁰⁰

Every confrontation, whether by motion or submission, proceeds to the argumentation stage. Rule 78 explicitly authorizes motion arguments, empowering the court to “establish regular times and places for oral hearings on motions” and “provide for submitting and determining motions on briefs”³⁰¹ Aside from Rule 78, local rules often specify methods for arguing motions.³⁰² Judges also use their discretionary powers to hear arguments on disputed submitted points during pretrial conferences and at trial. Here, the notion of mixed and non-mixed confrontations becomes relevant, for each involves a different argumentative stance.³⁰³ Sometimes, parties’ submissions stand unopposed, or are even submitted jointly to the court.³⁰⁴ In that situation, the dialectical argument is unorthodox, casting the judge as the opponent.³⁰⁵ Our review and analysis of the docket in *Rivera*, for example, revealed that the parties made fifty-six motions. Of these, only sixteen were opposed by the other party; the others remained unopposed. Of those not opposed, the court granted (at least in part) twenty-seven (67.5 percent) of them, denying the other thirteen (32.5 percent). The lack of opposition to many stases, and the court’s decisions to deny the

No. 11-1530 (D.P.R. Dec. 11, 2013), ECF No. 166; Defendants’ Motion in Limine to Exclude Plaintiff’s Experts, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. Dec. 11, 2013), ECF No. 167.

²⁹⁸ See FED. R. CIV. P. 51; D.P.R. CIV. R. 51; Order, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. Dec. 13, 2013), ECF No. 174 (requiring parties to file jury instructions by December 17); Plaintiff’s Proposed Jury Instructions, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. Dec. 16, 2013), ECF No. 185; Defendant’s Motion Submitting Proposed Jury Instructions, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. Dec. 17, 2013), ECF No. 189.

²⁹⁹ See Jury Instructions, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. Dec. 20, 2013), ECF No. 191.

³⁰⁰ See, e.g., FED. R. CIV. P. 46 (objecting to a ruling or order), 47(b) (juror challenges), 50(a) (permitting motion for judgment as a matter of law against a party after that party has closed its case). Defendants in *Rivera* moved for judgment as a matter of law at the close of trial. Jury Trial Transcript at Dec. 19, 2013, 9:25, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. Jan. 16, 2014), ECF No. 212.

³⁰¹ FED. R. CIV. P. 78.

³⁰² See, e.g., D.P.R. LOCAL R. 7(b) (providing instructions for non-moving to oppose a motion in writing); D.P.R. LOCAL R. 7(c) (allowing the moving party to reply to the opposition); D.P.R. LOCAL R. 7(f) (providing for oral argument in some cases and determination solely on the memoranda in others).

³⁰³ See *supra* text accompanying notes 77–87.

³⁰⁴ The Rules do not require a non-moving party to oppose a motion. See FED. R. CIV. P. 7(b).

³⁰⁵ On the judge’s side, the argument resolving the stasis is likely to be unexpressed, as when the judge simply grants or denies the motion in a minute order without explaining her reasons.

motions presenting some stases, supports our view that litigation stases are often non-mixed differences of opinion.³⁰⁶

On more significant stases, the argumentation stage proceeds as a dialectical discussion between the parties, by virtue of a supporting brief, an opposition brief, and a reply brief filed according to a judicially set briefing schedule—or more rarely, through oral presentations.³⁰⁷ In this stage the parties must advance rational contentions that a reasonable judge would find acceptable under the governing Rules. As a foundational matter, the parties must take rational stances supported by law and fact and relevant to the point being advanced, articulate affirmative and responsive positions, and rely on generally accepted rhetorical appeals for legal argument, as any critically rationalistic argument would do.³⁰⁸ Aside from following these generally accepted legal argument conventions, for arguments to be considered rational and acceptable they must also stick to the scope of the motion or submission. Arguments on a Rule 12(b)(6) motion cannot debate the truth of the allegations; arguments on Rule 11 motions cannot ask to sanction a complaint whose only fault is legal insufficiency; motions to compel cannot base their arguments on the moving party's general cooperativeness; and motions for summary judgment cannot rely on disputed evidence.³⁰⁹

The concluding stage for each stasis culminates in judicial rulings or orders. Motions are resolved by rulings granting or denying them;³¹⁰ jury instruc-

³⁰⁶ See *supra* text accompanying notes 77–87.

³⁰⁷ See, e.g., D.P.R. CIV. R. 7.

³⁰⁸ The Rules require as much. FED. R. CIV. P. 11(b) (“By presenting . . . a . . . motion[] or other paper . . . an attorney . . . certifies that . . . the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law . . . [and] the factual contentions have evidentiary support . . .”). The advice of scholars is consistent on this point. See, e.g., SUSAN E. PROVENZANO ET AL., *ADVANCED APPELLATE ADVOCACY* 87–111, 205–10, 215–18, 223–26, 249–53, 261–69 (2016) (delineating these bounds and rhetorical features of relevant and rational affirmative and responsive arguments in briefs); ROBIN WELLFORD SLOCUM, *LEGAL REASONING, WRITING, AND OTHER LAWYERING SKILLS* 379–96, 401–26, 431–46, 449–55 (3d ed. 2011) (same); Mortimer Levitan, *Confidential Chat on the Craft of Briefing*, 4 J. APP. PRAC. & PROCESS 305, 312–20 (2002) (describing these attributes of effective and persuasive arguments in federal court briefs); Richard A. Posner, *From the Bench: Convincing a Federal Court of Appeals*, 25 LITIGATION 3, 3(1999) (same).

³⁰⁹ See FED. R. CIV. P. 11(b)(2), (3), (4) (identifying sanctionable filings as those lacking evidentiary support or resting on frivolous legal contentions); FED. R. CIV. P. 37(a)(1) (requiring motions to compel to be founded on an “evasive or incomplete disclosure, answer, or response” or a “failure to disclose, answer, or respond”); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (requiring an assumption of truth for well-pled factual allegations); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (citations omitted) (stating that on summary judgment, “[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.”). As we explain in Sections III.C and III.D *infra*, within these Rule parameters, the range of acceptable argument content can be constructed using the second component of our model: our system of stases, argument dimensions, and *topoi*.

³¹⁰ FED. R. CIV. P. 7(b).

tions are likewise settled by judicial rulings, as are trial objections.³¹¹ Court orders resolving submitted stases include scheduling-order determinations about the scope or methods of discovery.³¹² Final pretrial orders resolve stases about the presentation of evidence and conduct of trial;³¹³ discovery orders resolve what information must be produced or protected from discovery;³¹⁴ sanctions orders specify the punishment that befits a party's misbehavior.³¹⁵ The court may also enter larger-scale orders, such as an order for a new trial³¹⁶ or for relief from a judgment.³¹⁷

In the *Rivera* case, the plaintiff's motion to compel discovery,³¹⁸ represented in the upper right panel of Figure 1, illustrates how a stasis moves through these four critical discussion stages. The motion was preceded by an opening stage in which Mr. Rivera consulted with defendants' counsel to resolve their discovery differences.³¹⁹ He then filed the motion to compel, kicking off the confrontation stage by alerting the court to the parties' unresolved dispute. The motion's accompanying brief captured the argumentation stage, supporting the motion's standpoint by contending that a defense witness had failed to provide information requested during a deposition.³²⁰ The defendants' opposition brief³²¹ dialectically opposed that standpoint, arguing that the witness had provided everything requested—and that plaintiff had either never requested or had no right to other documents.³²² With that, the argumentation stage closed. The concluding stage took place during an in-chambers conference, where the parties resolved their differences, after which the judge denied the plaintiff's motion as moot.³²³

³¹¹ See FED. R. CIV. P. 51 (describing this jury instruction process); Wylie A. Aitken, Comment, *The Jury Instruction Process—Apathy or Aggressive Reform?*, 49 MARQ. L. REV. 137, 145 (1965) (explaining the jury instruction process as putting “the attorney in the role of the consultant. He recommends the instructions to the judge but the final responsibility for which instructions are given, and in what form, rest [sic] with the presiding judge.”).

³¹² FED. R. CIV. P. 16(b)(3).

³¹³ FED. R. CIV. P. 16(e).

³¹⁴ FED. R. CIV. P. 26(c) (protective orders); FED. R. CIV. P. 37(a)(1), (5) (orders on motions to compel).

³¹⁵ FED. R. CIV. P. 11(c)(1), (4) (scope of permissible sanctions relating to non-discovery filings); FED. R. CIV. P. 26(g)(3) (scope of permissible sanctions relating to discovery filings).

³¹⁶ FED. R. CIV. P. 59.

³¹⁷ FED. R. CIV. P. 60(b).

³¹⁸ Plaintiff's Motion to Compel Discovery at 1, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. Apr. 29, 2013), ECF No. 90.

³¹⁹ *Id.*

³²⁰ *Id.* at 1–3 (claiming that the witness failed to respond after the deposition to questions raised during it).

³²¹ Opposition to Motion to Compel at 1, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. May 9, 2013), ECF No. 94.

³²² *Id.*

³²³ Minute Entry, *supra* note 276.

Apart from the conclusion of each stasis, a civil lawsuit always culminates in a concluding stage. The statistically most common and most encompassing conclusion is the type expressly envisioned by the PD critical-discussion framework: a full or partial settlement, which can happen at any time.³²⁴ Another large-scale conclusion of litigation stases is the dismissal of an action. This can take the form of a Rule 12(b)(6) dismissal, a voluntary or involuntary dismissal under Rule 41, or a disciplinary dismissal pursuant to discovery sanctions.³²⁵ On the other side of the coin is judgment, including default judgment under Rule 55, summary judgment under Rule 56, or judgment as a matter of law under Rule 50.³²⁶ In a case that proceeds to a bench trial, the judge will issue findings of fact and conclusions of law, resolving all remaining stases in one way or another,³²⁷ while a jury trial will result in a verdict converted to a judgment by the court.³²⁸

This section has shown how the four-stage critical-discussion framework maps onto the stases in a lawsuit's adversarial moves. This framework does not, however, identify the types of rational arguments that can be made at each stasis. For that, we turn to the second major component of our model—the stases themselves.

C. *Stases: Claim, Defense, and Procedure*

In Parts I and II, we concluded that classical stasis theory, viewed through the lens of Hohmann's theory of argument dynamics, supplies the analytical content left open in the critical-discussion framework's argumentation stage. The previous section showed that this stage happens at every civil procedure stasis, when the Rules permit the parties to stop and make adversarial moves. In the static component of our model, three elements work in a nested fashion to define the range of rational arguments that can be advanced in the argumentation stage: (1) the stases; (2) the dimensions of argument within the stases; and (3) the commonplace topics, or 'topoi,' of the arguments within each static dimension.

We start by defining the stases. We depart from classical stasis theory and Hohmann's conception of it by having three stases, each with two dimensions.

³²⁴ See *supra* text accompanying note 100. In *Rivera*, for example, the parties settled after the defendants appealed the jury verdict in the plaintiff's favor to the First Circuit Court of Appeals. Notice of Appeal, *supra* note 241, at 1; Amended Final Judgment at 1, *Rivera v. Méndez & Co.*, No. 11-1530 (D.P.R. Nov. 6, 2014), ECF No. 244.

³²⁵ FED. R. CIV. P. 12(b)(6), 41. Regarding discovery sanctions, see FED. R. CIV. P. 37(c), (d), (e).

³²⁶ The Rules also specify procedures for entering judgment and determining costs and fees. See FED. R. CIV. P. 50, 54–58. And they provide for executing the judgment and determining and enforcing remedies. See FED. R. CIV. P. 64–65, 69–71.

³²⁷ FED. R. CIV. P. 52.

³²⁸ FED. R. CIV. P. 58(b).

In our model, a civil suit encompasses three stasis types, which correspond to a lawsuit's three party designations.

The first of these three stasis types, the claim stasis, occurs when the parties have a difference of opinion about the legal harm for which the plaintiff seeks relief. For example, when the defendant files a 12(b)(6) motion or a Rule 12(c) motion for judgment on the pleadings, the defendant disputes the allegations' sufficiency and the claim's ability to move forward to discovery.³²⁹ When the defendant moves for summary judgment under Rule 56 or judgment as a matter of law (JMOL) under Rule 50, the defendant disputes the sufficiency of the claim's evidence and the need for a fact-finder.³³⁰ More rarely, the plaintiffs move for summary judgment or JMOL on their own claims, also disputing the need for a fact-finder but for a different reason—that the evidence supports only one possible outcome: judgment in their favor.³³¹

Second, a defense stasis reflects a difference of opinion on the defendant's justification or excuse from liability.³³² The stopping points are similar to the claim stasis. The plaintiff may challenge a defense's facial validity by moving to strike the defense under Rule 12(f).³³³ A plaintiff may conclusively dispute the existence of a valid defense by filing a motion for judgment on the pleadings if the defendant admits the operative allegations and neglects to plead a

³²⁹ FED. R. CIV. P. 12(b)(6) (providing for defense motion for a complaint's "failure to state a claim upon which relief can be granted"); FED. R. CIV. P. 12(c) (providing for motion for judgment on the pleadings at the close of the pleading stage); Patrick M. Blanchard & Craig M. Sandberg, *Winning Without Trial: Rule 12(c) Motions for Judgment on the Pleadings*, A.B.A.: LITIGATION, (2007) (explaining that a Rule 12(c) motion "challenges the legal sufficiency of the opposing party's pleadings"); see, e.g., Motion to Dismiss Moral Right Claims Under VARA and the Puerto Rico Intellectual Property Law, *supra* note 261, at 2, 4–8.

³³⁰ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (citations omitted) (stating that the summary judgment "standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict"); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.").

³³¹ See FED. R. CIV. P. 50, 56; see, e.g., Plaintiff's Motion for Summary Judgment at 5, 20, *Rivera v. Méndez & Co.*, 988 F. Supp. 2d 159 (D.P.R. 2013) (No. 11-01530), ECF No. 121.

³³² In this sense, a defense stasis resembles the classical stasis of quality. See *supra* text accompanying notes 142–59.

³³³ FED. R. CIV. P. 12(f) ("The court may strike from a pleading an insufficient defense . . . on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading."). "Motions to strike are viewed with disfavor and are not frequently granted." *Operating Eng'rs Local 324 Health Care Plan v. G & W Constr. Co.*, 783 F.3d 1045, 1050 (6th Cir. 2015) (citations omitted). Nevertheless, "[a] motion to strike should be granted if 'it appears to a certainty that plaintiffs would succeed despite any state of the facts which could be proved in support of the defense and are inferable from the pleadings.'" *Id.* (citations omitted).

defense.³³⁴ And a plaintiff may dispute the legal sufficiency of an affirmative defense in a motion for summary judgment or JMOL.³³⁵

Third, and finally, a procedure stasis challenges the conduct of the case's critical discussion, including where it should happen and whether a particular move is permitted or required. For example, a defendant may dispute the forum for hearing the case in a motion to dismiss for lack of subject matter or personal jurisdiction.³³⁶ Parties may dispute their opponents' ability to change the litigation's scope in a motion to amend a pleading after the expiration of Rule 15(a)'s deadline for amendments as a matter of course.³³⁷ Discovery motions to compel and for protective orders are likewise procedural stases about which documents must be produced or withheld, or which witnesses may be deposed about what and for how long.³³⁸ Because the Rules grant judges case management discretion,³³⁹ these procedural stases focus more squarely on the court, which must manage the critical discussion consistently with the normative goals of civil procedure.

It may appear that we have renamed one of the four classical stases, deleted two of them, and added one. As Figure 2 shows, however, we have retained all parts of the classical system, but in a way that fits the civil litigation mold. As the next section explains, our *claim* stasis combines the stases of definition and conjecture. Those stases were the basis for a lawsuit in classical times and, as Part II revealed, they undergird every other stasis. Our *defense* stasis resembles the classical stasis of quality, encompassing justifications and excuses. And we have kept the *objection* stasis as it was, merely renaming it.

³³⁴ Blanchard & Sandberg, *supra* note 329 (noting that a plaintiff's 12(c) motion can succeed when the "closed pleadings have a substantial likelihood of containing the entire relevant universe of information," which is the case if the defendant does not deny the operative allegations or raise an affirmative defense).

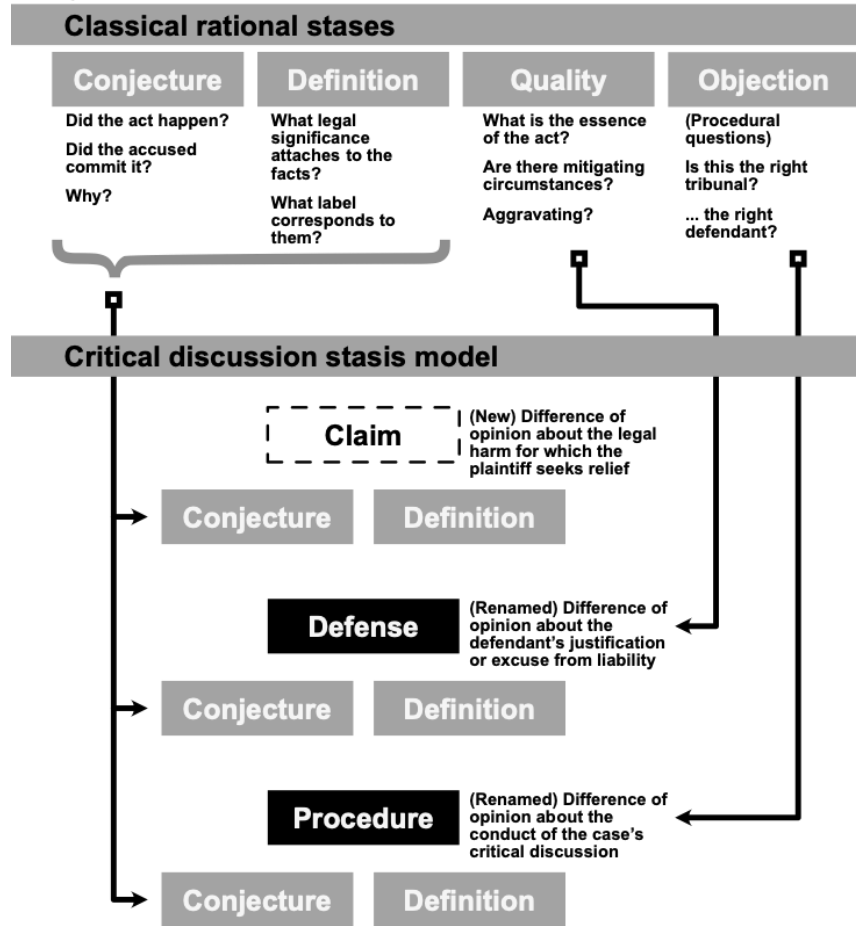
³³⁵ See Fed. R. Civ. P. 50(a)(1) (giving the court the power to grant a motion for judgment as a matter of law against a party if a "reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue") (emphasis added); Jones v. Bock, 549 U.S. 199, 204 (2007) (referring to an affirmative defense as a matter that the "defendant must plead and prove."); *Celotex*, 477 U.S. at 322 (stating that summary judgment may be entered against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.") (emphasis added); Savino v. C.P. Hall Co., 199 F.3d 925, 931 (7th Cir. 1999) (explaining that Rule 50 motions for judgment as a matter of law are the proper vehicle for challenging the sufficiency of an affirmative defense).

³³⁶ See FED. R. CIV. P. 12(b)(1)–(2).

³³⁷ FED. R. CIV. P. 15(a). The defendants in *Rivera* did not do so when the plaintiff moved to amend the complaint. See *supra* text accompanying note 262.

³³⁸ FED. R. CIV. P. 26(c)(1) ("A party or any person from whom discovery is sought may move for a protective order" including for matters related to depositions); FED. R. CIV. P. 37(a)(3)(B) ("A party seeking discovery may move for an order compelling an answer, designation, production, or inspection.").

³³⁹ See *supra* text accompanying notes 36–41.

Figure 2: Classical stases mapped to the critical discussion

Having defined the stasis types in civil litigation, what remains is to construct the argument stage content within those stases. The final sections accomplish this work with the next two static elements of our model: the dimensions and topoi of trans-substantive litigation arguments.

D. Stasis Dimensions: Conjecture and Definition

To construct the argumentation stage for each stasis, our model starts, as Hohmann's theory did, by outlining argument *dimensions*—that is, the directional thrusts of an acceptable argument.³⁴⁰ As we saw in Part II, every stasis

³⁴⁰ See *supra* text accompanying notes 203–06.

has precisely two dimensions or potential thrusts: conjecture and definition.³⁴¹ Those dimensions are obvious in the classical conjectural and definitional stases, but our analysis showed that even the classical stases of quality and procedure rest on nested factual and definitional questions.³⁴² Hohmann's theory shows that the same is true of legal argument in general: to one degree or another, legal arguments give way to factual (conjectural) and legal interpretive/application (definitional) questions.³⁴³ So too, each stasis in a civil suit is grounded in assertions that (1) a set of operative facts exists, and (2) a legal standard calls for a certain outcome in the presence of those facts.

As Figure 2 shows, these conjectural and definitional dimensions characterize all the stases in our tripartite typology. A Rule 12(b)(6) claim stasis, for instance, targets operative factual allegations that must be assumed true (conjecture), and which must be judged against the *Twombly/Iqbal* plausibility pleading standard in light of the claim's substantive legal requirements (definition).³⁴⁴ A summary judgment defense stasis testing an affirmative defense focuses on the discovery evidence viewed in the light most favorable to the defendant—the universe of operative facts defined by Rule 56 (conjecture)—and argues that those facts fail the substantive law's requirements for that defense (definition).³⁴⁵ A procedural stasis arguing for a protective order has as its factual basis some set of otherwise relevant confidential, private, or proprietary information or facts showing oppression (conjecture), to which is applied Rule 26(c)'s "good cause" standard for shielding that information from discovery or for stopping the oppressive behavior (definition).³⁴⁶

Even stases with standpoints that seem purely legal have conjectural and definitional dimensions. For instance, a Rule 12(c) motion for judgment on the pleadings may raise the purely legal question of whether a party is a *state actor* subject to First Amendment regulation (definition).³⁴⁷ But even that question is tethered to a fact set—the character of the actor as alleged in the pleadings and

³⁴¹ See *supra* text accompanying notes 155–61.

³⁴² See *supra* text accompanying notes 157–63.

³⁴³ See *supra* Part II.C. These dimensions are not inherent to law; they characterize argumentation in general. Legal argument is a subtype of argumentation that relies on modes of reasoning, both deductive and non-deductive types. See Larson, *supra* note 59, at 666–67, 696–98. (proposing defeasible argumentation schemes as a model for non-deductive argumentation in law). Stephen Toulmin's model is frequently cited as illustrative of legal reasoning. Toulmin's model requires a *warrant* legitimating the move from *data* to some *claim*. STEPHEN E. TOULMIN, *THE USES OF ARGUMENT* 93–94 (updated ed. 2003). In Toulmin's model, the data is conjectural; the warrant is definitional; and the claim is the argumentative conclusion that follows.

³⁴⁴ "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); see also *supra* note 251 for further discussion of this standard.

³⁴⁵ See *supra* note 330 for further discussion of this standard.

³⁴⁶ FED. R. CIV. P. 26(c).

³⁴⁷ See *supra* note 329 explaining these standards for Rule 12(c).

admitted in the answer (conjecture). On the flip side, even fact-intensive procedural stases, such as motions to compel under Rule 37(a), have a definitional dimension. In such motions, the parties may wrangle over the efforts the responding party did or did not make to produce the desired information (conjecture).³⁴⁸ But to prevail, the motion must ultimately address that information's legal relevance, or else it is not discoverable no matter how obstreperous the responding party's conduct (definition).

These conjectural and definitional dimensions are not self-substantiating; each needs its own "backing"³⁴⁹ or how-do-we-know proof. That backing must, in turn, have conjectural or definitional support or both. A 12(b)(6) motion must back its assertions concerning which factual allegations are and are not well pled (conjecture), and must substantiate with authority and explanation both the movant's interpretation of plausibility and its application to the claim's legal requirements (definition).³⁵⁰ Under Rule 56, the summary judgment movant needs backing for what evidence is and is not disputed (conjecture), as well as authority interpreting and applying the standards for summary judgment and substantive legal requirements for which the evidence is purportedly lacking (definition).³⁵¹ A Rule 26(c) protective order motion must explain why the facts sought to be shielded from discovery are, in fact, confidential, proprietary, or private or show oppression (conjecture).³⁵² And the motion must explain and apply the authority substantiating the good cause that makes this otherwise relevant information non-discoverable (definition).³⁵³

Theoretically, every conjectural and definitional dimension in every stasis could devolve into more and more discrete conjectural and definitional dimensions—in other words, "turtles all the way down."³⁵⁴ But before the arguments disintegrate into infinite regressions, the final static element of our model—the topoi—steps in to fill the argumentative content.

E. Topoi: Empirical, Conventional, and Value Based

The topos element of our model forms our trans-substantive argument taxonomy. Derived from the classical topoi and Hohmann's legal argument dimensions, our topoi consist of empirical, conventional, and value-based arguments. Part II explained how each classical stasis embodied topoi or

³⁴⁸ See *supra* note 309 explaining these standards for Rule 37(a)(1).

³⁴⁹ TOULMIN, *supra* note 343, at 95–96.

³⁵⁰ See *supra* note 329 explaining these standards for Rule 12(b)(6).

³⁵¹ See *supra* note 330 explaining these standards for Rule 56.

³⁵² FED. R. CIV. P. 26(c)(1)(A)–(H) (identifying these grounds for obtaining a protective order).

³⁵³ FED. R. CIV. P. 26(c)(1) (stating that a party must establish "good cause" on these grounds for the court to enter a protective order).

³⁵⁴ David Gray Carlson, *Duellism in Modern American Jurisprudence*, 99 COLUM. L. REV. 1908, 1927 n.129 (1999) (referring to the *infinite regress* problem).

commonplace arguments of these three types.³⁵⁵ In the context of legal argumentation, Hohmann did as well, under the headings ‘operative,’ ‘regulative’ and ‘optative.’³⁵⁶ Our model has three topoi: Its *empirical* topos refers to arguments grounded in observations about the world, including observations about factual events and legal texts, and rational inferences about them. Its *conventional* topos refers to arguments that employ legal standards to categorize or interpret facts or law in a certain manner. Its *value-based* topos covers arguments that appeal to underlying legal norms or real-world consequences, but within the constraints that our legal system imposes on such policy-oriented and emotionally appealing arguments.

These three topoi run parallel in each stasis’s conjectural and definitional dimensions. Empirical arguments address the direct experiences of the arguing parties, witnesses, and tribunal. Conventional arguments are abstractions that reflect *rules of thumb*, which may be more or less accurate. And finally, value-based arguments call on even more abstract principles and concepts, making them more difficult to substantiate. Provisionally, we make the normative claim that empirical topoi are more rationally persuasive than conventional topoi, and that both are more rationally persuasive than value-based topoi. There is some evidence that our civil legal system shares this ranking, as we shall see in the coming subsections.

What follows is an explanation of how each topos functions in each dimension to create a taxonomy of rational civil procedure arguments. We start with definitional-dimension arguments, which are much more common than conjectural-dimension arguments because the Rules do not license true merits arguments until trial.³⁵⁷

1. Claim and Defense Stasis Topoi in the Definitional Dimension

In a claim or defense stasis’s definitional dimension, empirical topoi are arguments about the observable content of authoritative legal texts.³⁵⁸ In our system of written opinions recording the common law, legislative bodies enacting statutes, and administrative bodies issuing regulations, it is rare for parties to dispute whether an opinion, statute, or regulation exists.³⁵⁹ More typically, empirical arguments appear in the definitional realm when the parties debate linguistic meaning, particularly in litigation over statutes.³⁶⁰ As Hohmann ex-

³⁵⁵ See *supra* Part II.B.2.

³⁵⁶ See *supra* Part II.C.

³⁵⁷ See *supra* text accompanying notes 17–19.

³⁵⁸ See Hohmann, *supra* note 15, at 183 (describing his “operative” dimension); *supra* text accompanying notes 179–81.

³⁵⁹ The exception would be arguments that contend a law has been preempted, abrogated, or superseded based on established standards for interpreting legislative actions. Hohmann, *supra* note 15, at 184.

³⁶⁰ *Id.* at 185–89 (discussing these kinds of language-meaning arguments in the context of statutory interpretation).

plains, the sources of ordinary meaning—including assessing what words are used and dictionary definitions and other sources of ordinary meaning for those words—are actually questions of fact.³⁶¹ The ongoing debate about which lexical sources to employ to which ends and which ones should trump others³⁶² makes the empirical topos relevant to any stasis that contests the meaning of a statute.

In contrast to empirical arguments validating legal content, conventional arguments in the definitional dimension employ legal standards to interpret, categorize, and apply that content.³⁶³ In the case of a statute, conventional arguments address “particular standards of meaning”³⁶⁴ using accepted interpretive tools for clarifying ambiguous, contradictory, or impenetrable language. These conventional standards license inferences about meaning using canons of construction and by deeming relevant the interpretive context of the statutory scheme, statutes with parallel language, statements of purpose, and legislative history.³⁶⁵ Conventional definitional arguments interpreting judicial opinions rely on accepted modes of legal reasoning for extracting legal rules and definitions from opinion text and for using legal opinions as examples in legal analogies.³⁶⁶

In the definitional dimension, interpretation leads to application. Here, conventional definitional arguments take the rule that the parties have interpreted or categorized, and dispute whether it covers the situation at hand.³⁶⁷ Such arguments not only draw on the terms of the legal rule to debate whether and how it applies to the facts, but also draw on conventional methods of law-fact application reasoning.³⁶⁸ Those reasoning methods include characterizing fact sets at higher or lower levels of abstraction to fit or fail the rule, applying broad or narrow interpretations of the rule, and reasoning by analogy, among oth-

³⁶¹ Hohmann explains, “[t]he existence of such an understanding is itself a question of fact and thus potentially subject to further discussion: we may be able to distinguish different dimensions of usage, debate in turn how these can be verified and how they interact, and which of them should prevail, in the sense of being regarded as ‘the’ usage, if they conflict, etc.” *Id.* at 185.

³⁶² See Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court’s Use of Dictionaries*, 47 BUFF. L. REV. 227, 242–44 (1999). In recent years, scholars have debated the role of corpus linguistics in interpreting legal texts, especially the U.S. Constitution. See Larson, *supra* note 59, at 679 n.79.

³⁶³ See Hohmann, *supra* note 15, at 183–84 (discussing his “regulative” dimension).

³⁶⁴ *Id.* at 185.

³⁶⁵ PROVENZANO ET AL., *supra* note 308, at 100–01 (discussing these methods of statutory interpretation).

³⁶⁶ See *id.* at 90–91 (discussing these methods of interpreting and formulating arguments based on judicial opinions); Larson, *supra* note 59, at 701–03.

³⁶⁷ See Hohmann, *supra* note 15, at 186.

³⁶⁸ See PROVENZANO ET AL., *supra* note 308, at 97 (discussing the nature and construction of law-fact application arguments).

ers.³⁶⁹ Finally, value-based definitional arguments contend that the rule's animating norms—the reason for its existence—would be furthered or hindered by applying it one way or the other. Such arguments may also appeal to favorable or unfavorable anticipated real-world consequences that would follow from the facts being deemed to meet or fail the rule.³⁷⁰

In civil procedure, the classic embodiment of arguments on a claim stasis's definitional dimension is the Rule 12(b)(6) motion, which investigates the legal nature of a set of allegations to determine whether they state a cognizable legal wrong.³⁷¹ Consider a well-known case in which a plaintiff sued his employer and high-ranking executives for terminating him because he testified in a fraud prosecution against the employer.³⁷² The plaintiff in *Haddle v. Garrison* challenged his termination by bringing state law claims and a federal retaliation claim under a Civil War era statute, 42 U.S.C. § 1985(2).³⁷³ The complaint alleged that the defendants violated the federal statute's prohibition against conspiracies that “deter” a person's anticipated court testimony or “injure” someone “in his person or property” because of his actual court testimony.³⁷⁴ The case proceeded all the way to the Supreme Court on the definitional dimension of a claim stasis.³⁷⁵

Seeking to dismiss the Section 1985(2) claim, the defendants advanced the empirical definitional argument that there is no legal remedy for this form of retaliation, because the plaintiff was employed at will, and this law did not reach at-will terminations of any kind.³⁷⁶ Defendants also made a conventional definitional argument using circuit authority that limits injuries “in his . . . property” to constitutionally protected employment interests.³⁷⁷ As an at-will

³⁶⁹ See PROVENZANO ET AL., *supra* note 308, 97 (discussing the levels of abstraction used to build law-fact application arguments); Larson, *supra* note 59, at 701–04 (describing an “argumentation scheme” for constructing and assessing legal analogies).

³⁷⁰ See Margolis, *supra* note 229, at 71–74, 77–78 (discussing consequences in several categories: judicial administration, institutional competence, and economics).

³⁷¹ See FED. R. CIV. P. 12(b)(6); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

³⁷² *Haddle v. Garrison*, 525 U.S. 121, 122 (1998).

³⁷³ *Id.* at 122, 124.

³⁷⁴ *Id.* at 123, 125 (“We disagree with the Eleventh Circuit's conclusion that petitioner must suffer an injury to a ‘constitutionally protected property interest’ to state a claim for damages under § 1985(2).”).

³⁷⁵ The exemplars that follow are simplified versions of the parties' arguments.

³⁷⁶ Brief on the Merits of Respondents at 27–30, *Haddle v. Garrison*, 525 U.S. 121 (1998) (No. 97-1472), (1998) WL 552375, at *27–30. Significantly, the *Conley v. Gibson* “beyond doubt no set of facts” dismissal standard governed at the time. 355 U.S. 41, 45–46 (1957) (articulating the “accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”). As a result, this empirical argument implied that there were no facts consistent with the complaint that could be alleged to constitute a harm cognizable under section 1985(2).

³⁷⁷ Brief on the Merits of Respondents, *supra* note 376, at 37–41; see also *Morast v. Lance*, 807 F.2d 926, 930 (11th Cir. 1987) (“[T]o make out a cause of action under § 1985(2) the plaintiff must have suffered an actual injury. Because *Morast* was an at will employee, he

employee, plaintiff had no such interest.³⁷⁸ The plaintiff responded with the conventional argument that a circuit split on this issue made the time ripe to revisit circuit precedent.³⁷⁹ Further, the plaintiff made a combined empirical and conventional argument about the relevant statutory language, emphasizing the need to consider the full phrase “in *his person or* property,” which, as an interpretive matter, referred to any tortious injury, not just a constitutionally protected interest.³⁸⁰

Because *Haddle* was litigated before the *Iqbal* and *Twombly* era, the defendants did not raise conventional arguments about the plausibility standard.³⁸¹ But after these decisions, they might have. That is because the complaint relied primarily on timing to link the plaintiff’s testimony to his termination, and the timing was not especially close.³⁸² As a result, post-*Iqbal*, the defendants could have made the conventional argument that the well-pled timing facts did not reasonably suggest a retaliatory termination, leaving only conclusory allegations of motive, which are ignored in the plausibility analysis.³⁸³ We expect plaintiff would doubtless have both disputed the conventional characterization of his allegations as conclusory and contended that the well-pled facts, viewed in the light most favorable to him, reasonably suggested retaliatory intent.

The parties also waged the definitional battle on value-based grounds. The statute’s original objective was to protect newly freed, previously enslaved persons from those who would conspire to harm them or to destroy their property in retaliation for their actual or anticipated testimony against those flouting civil rights laws.³⁸⁴ According to the defendants, applying the law to at-will employment terminations, without any allegations of race discrimination and outside of this historical context, would expand the law far beyond its original aims.³⁸⁵ The plaintiff responded in part with the conventional interpretive ar-

had no constitutionally protected interest in continued employment. Therefore, Morast’s discharge did not constitute an actual injury under this statute.”) (internal citations omitted).

³⁷⁸ *Morast*, 807 F.2d at 930; Brief on the Merits of Respondents, *supra* note 376, at 37–39.

³⁷⁹ Petition for a Writ of Certiorari at 10, 15, *Haddle v. Garrison*, 525 U.S. 121 (1998) (No. 97-1472).

³⁸⁰ Petitioner’s Brief on the Merits at 17–25, *Haddle v. Garrison*, 525 U.S. 121 (1998) (No. 97-1472), 1998 WL 425991, at *17–25.

³⁸¹ See Brief on the Merits of Respondents, *supra* note 375, at 9, 41, 43.

³⁸² Complaint at 10–11, *Haddle v. Garrison*, 525 U.S. 121 (1998) (No. CV 196029) (alleging that three-and-a-half-month time span between Haddle’s grand jury testimony and his termination supported retaliatory discharge in violation of section 1985(2)).

³⁸³ See *Ashcroft v. Iqbal*, 556 U.S. 662, 680–81 (2009) (concluding that allegations of the involvement of certain officials in enacting a policy did not by itself support a claim that their intent was discriminatory or that mere coincidence, without evidence supporting a discriminatory intent as opposed to a non-discriminatory one, would not support the complaint).

³⁸⁴ Indeed, the statute was enacted as a provision in the Civil Rights Act of 1871, also known as the ‘Ku Klux Klan Act.’ *United Bhd. of Carpenters v. Scott*, 463 U.S. 825, 835 (1983) (noting the main purpose of the act was to protect African Americans in the South and white northerners working to advance their interests from attacks by the Klan); *id.* at 839 (Blackmun, J., dissenting) (referring to “Ku Klux Klan Act”).

³⁸⁵ Brief on the Merits of Respondents, *supra* note 375, at 26.

gument that Section 1985(2)'s language imposed no such limitations, but also by arguing the value-based point that plaintiff's interpretation advanced the statute's broader goal of dissuading interference with federal legal processes.³⁸⁶

These same topoi can be raised in a defense-stasis definitional dimension; for example, a defendant's summary judgment motion on its affirmative defense of exhaustion of remedies can yield empirical, conventional, and value-based arguments. So, following the Supreme Court's decision in *Jones v. Bock*, failure to exhaust prison grievance remedies must be raised as an affirmative defense in prisoner litigation suits brought under 42 U.S.C. § 1983.³⁸⁷ If a defendant omitted this defense from the answer but raised it for the first time on a summary judgment motion requesting judgment on that defense, the defendant would be subject to the plaintiff's waiver arguments (along with arguments that the discovery evidence on exhaustion is not decisive as a matter of law).³⁸⁸ To at least a degree, waiver is an empirical definitional question—did the defendant's answer actually plead what constitutes the legal defense of exhaustion? If not, then waiver becomes a conventional definitional debate over whether the defendant waited too long to raise the defense, based on judicial interpretations of the type of delay that operates as a waiver.³⁸⁹ On the plaintiff's side, value-based definitional arguments could draw on the normative goals of waiver—getting fair notice of defenses, avoiding prejudice, and honoring repose.³⁹⁰ On the defense side, value-based arguments could raise the competing considerations of full and fair merits decisions and the consequences of treating too lightly Congress's strict exhaustion requirement in the Prisoner Litigation Reform Act.³⁹¹

³⁸⁶ Petitioner's Brief on the Merits, *supra* note 380, at 14–15, 24–25.

³⁸⁷ *Jones v. Bock*, 549 U.S. 199, 212 (2007).

³⁸⁸ See FED. R. CIV. P. 8(c) (“In responding to a pleading, a party *must* affirmatively state any avoidance or affirmative defense . . .”) (emphasis added); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Henricks v. Pickaway Correctional Inst.*, 782 F.3d 744, 752 (6th Cir. 2015) (raising waiver argument based on defendants' failure to plead exhaustion as an affirmative defense in its answer); *supra* note 278 for summary judgment standard.

³⁸⁹ See, e.g., *Henricks*, 782 F.3d at 751 (upholding defendants' waiver of an affirmative defense based on the prejudice that resulted from the defendant's failure to raise the defense in its answer: “When the defendant is unable to offer any reasonable explanation for its tardiness in presenting a defense, finding waiver is not an abuse of discretion.”); see also 2 MOORE'S FEDERAL PRACTICE—CIVIL § 8.08[2]–[3].

³⁹⁰ See Jarod S. Gonzalez, *A Tale of Two Waivers: Waiver of the Jury Waiver Defense Under the Federal Rules of Civil Procedure*, 87 NEB. L. REV. 675, 705 (2009) (discussing these animating principles in courts' decisions on waiver of affirmative defenses, including “the amount of the delay, the reason for the delay, and the surprise and prejudice the opposing party has suffered due to the failure to timely plead.”).

³⁹¹ See *Jones*, 549 U.S. at 202–03 (“In an effort to address the large number of prisoner complaints filed in federal court, Congress enacted the Prison Litigation Reform Act of 1995 . . .” “Prisoner litigation continues to ‘account for an outsized share of filings’ in federal district courts.” “What this country needs, Congress decided, is fewer and better prisoner suits.”) (citations omitted). Notably, the fact that each stasis is focused on one party does not mean that the others cannot invoke it: in the *Haddle* example the defendant invoked a claim

These are but two examples of how claim and defense stases generate a three-way argument taxonomy along the definitional dimension. The same topoi would characterize any claim or defense stasis that turns on a question of interpreting or applying a legal standard.

2. *Claim and Defense Stasis Topoi in the Conjectural Dimension*

In the conjectural dimension, empirical, conventional, and value-based topoi argue questions of fact—facts about what happened, who did it, and why. Empirical arguments in the conjectural dimension of a Rule 12(b)(6) motion may, for instance, debate which facts are and are not alleged in the complaint, in an effort to discern what must be assumed true, and the inferences that one can draw from them using logical reasoning.³⁹² Conventional arguments, which employ legal standards to categorize facts, would center on the range of inferences supported by those facts that legal standards license. Value-based arguments would not play a role here because our system does not permit disregarding empirically or conventionally determined facts in the name of some higher value.³⁹³ A similar set of topoi would characterize summary judgment arguments, but with a different factual universe. Empirical arguments would contest what evidence is or is not in the discovery record; conventional arguments would contest the inferences reasonably drawn from that evidence.

But in its purest form, the conjectural dimension of a claim or defense stasis surfaces at trial, where the facts are finally determined subject to burdens of proof. After all the evidence has been submitted, the Rules license the advocates, for the first time, to argue what happened, who did it, and why in closing arguments.³⁹⁴ Here, too, the topoi are empirical, conventional, and value based. Empirically, the plaintiff's attorney may explain how the trial evidence "points in the direction" of an important factual conclusion.³⁹⁵ Perhaps four witnesses observed the same event and had consistent accounts, while no other witness contradicted these accounts. In contrast, the defense attorney may argue that the observable phenomena addressed by witnesses and documents support the op-

stasis, and in the exhaustion example the defendant would invoke a defense stasis. *See supra* text accompanying notes 375–77, 386–88.

³⁹² *See supra* note 329 (explaining these standards for Rule 12(b)(6)).

³⁹³ *See Hohmann, supra* note 15, at 182–83.

³⁹⁴ *See supra* notes text accompanying notes 71–74 (highlighting how, under the FRCP, argument should proceed to a well-founded conclusion). Although the FRCP do not explicitly address closing arguments, the United States Courts website offers practitioners an educational resource titled "Guide to Writing Closing Arguments." It states that the purpose of closing argument is "[t]o persuade the jurors to adopt your view of the significance of the evidence and your view of the case," and emphasizes that "[a]ttorneys are free to argue the merits of their case" at this juncture. *Guide to Writing Closing Arguments*, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outrreach/activity-resources/guide> [<https://perma.cc/ZH34-QEY9>] (last visited Feb. 8, 2020).

³⁹⁵ Hohmann, *supra* note 15, at 180.

posite factual conclusion—perhaps a document establishes the time, place, and occurrence of an event that no witness has contradicted.

Threaded into these empirical assertions will be conventional arguments about the credibility and weight of the evidence based on evidentiary rules and conventional inferences from human behavior.³⁹⁶ For example, a party's closing argument may contend that a witness cannot be believed because of her past criminal record, because she has a motive to lie, or because she acted improbably under the circumstances, suggesting her account should be disregarded.³⁹⁷ A party may also contend that a witness's poor perception devalues his testimony, that he is making his own strained and unreasonable inferences from the facts, or that he was too unfamiliar with the events to give credible testimony about them.³⁹⁸ Presumptions,³⁹⁹ too, are conventional conjectural arguments that can be used in summation. So, for example, in the absence of contrary evidence, a closing argument may rely on the presumption that a properly mailed letter was received, that a design defect existed at the time of purchase based on its quick discovery, or that a party was of sound mind when he signed a contract.⁴⁰⁰

Value-based arguments along the conjectural dimension are rare in summation, just as they are in pretrial claim and defense stases. Although a closing argument can fashion an *evidence-based narrative*, designed to arouse emotions and to appeal to the jury's sense of justice, ethical and evidentiary rules sharply constrain such appeals. Lawyers are not permitted to ask the jury to send a message to a large corporation that can afford a judgment; they cannot ask the jury to punish a defendant because he is an unrepentant liar; they cannot ask jurors to draw on extra-legal moral or religious beliefs in coming to a verdict;

³⁹⁶ See, e.g., James H. Seckinger, *Closing Argument*, 19 AM. J. TRIAL ADVOC. 51, 58, 60–61 (1995) (discussing the importance of arguing inferences, witness credibility, and burdens of proof in closing arguments); J. Alexander Tanford, *Closing Argument Procedure*, 10 AM. J. TRIAL ADVOC. 47, 52–56 (1986), (discussing permissible credibility and evidentiary weight contentions permissible in closing argument).

³⁹⁷ See FED. R. EVID. 609 (stating the rules for “attacking a witness’s character for truthfulness by evidence of a criminal conviction”); Seckinger, *supra* note 396, at 63–66 (offering examples of closing arguments making these points).

³⁹⁸ See, e.g., *Pennsylvania R.R. Co. v. Chamberlain*, 288 U.S. 333, 342 (1933) (directing a verdict in favor of the defendant in a wrongful death case when the plaintiff’s sole witness speculated upon his own perception of the facts, when he had not been in a good position to see the accident, rendering his testimony “suspicious, insubstantial[,] and insufficient”); *id.* at 336–37 (citing majority opinion reversed below, which contended that problems with visual perception or an opportunity to observe are credibility questions properly decided by and argued to a jury).

³⁹⁹ A presumption is an evidentiary rule that compels the finding of a fact when a subset of more discrete facts has been proven and there is no contradictory evidence. See FED. R. EVID. 301 (discussing the evidentiary effect of presumptions in civil cases); J. Clinton Kelly, Note, *Presumptions in Civil Cases: Procedural Effects Under Maryland Law in State and Federal Forums*, 5 U. BALT. L. Rev. 299, 303 (1976) (stating that such a lack of contradiction relieves the party of the usual preponderance burden of proof).

⁴⁰⁰ See Kelly, *supra* note 399, at 303–05 (discussing these presumptions).

they cannot encourage jurors to act on their own bigotry.⁴⁰¹ On the other hand, a motion for a new trial asserting that a verdict was against the weight of the evidence licenses a conjectural value-based argument of sorts. A plaintiff who challenges a defense verdict on this ground may contend that the number, quality, and gravitas of her witnesses and documents were so overwhelming that a verdict for the defendant amounts to a serious miscarriage of justice,⁴⁰² requiring a do-over with a new fact-finding crew.

In sum, the conjectural dimension of claim and defense stases raises the same three topoi that inhabit the definitional dimension. The conjectural topoi isolate questions of fact while the definitional topoi interpret and apply the law. The final stasis—the procedural type—encompasses the same three topoi along the same two dimensions.

3. *Procedural Stasis Topoi in the Conjectural and Definitional Dimensions*

In contrast to claim and defense stases, the conjectural dimensions of which are constrained until trial,⁴⁰³ procedural stases can raise and determine factual questions along the way. As a result, the procedural stasis's conjectural dimension appears more frequently than it does in claim or defense stases. And when it does, all three topoi come into play. Consider the conjectural dimension of a procedural stasis raised on a Rule 37(a) motion to compel the production of documents. Empirically, the parties may debate the responding party's production efforts: Which files were checked? Which witnesses were interviewed about documents in their possession? What was produced and what was not produced?⁴⁰⁴ Conventionally, the parties may dispute whether those efforts can be categorized as sufficient or insufficient given the factual context. Perhaps the responding party overlooked an obvious file or witness under the circumstances, or engaged in a cursory review not befitting the request's demands.⁴⁰⁵

⁴⁰¹ See Seckinger, *supra* note 396, at 73 (discussing these rule-breaking closing argument contentions); Tanford, *supra* note 396, at 93 tbl. 2 (same).

⁴⁰² *Lind v. Schenley Indus.*, 278 F.2d 79, 89 (3d Cir. 1960) (citations omitted).

⁴⁰³ See *supra* text accompanying note 394.

⁴⁰⁴ See, e.g., FED. R. CIV. P. 34(a), (b) (identifying these document production obligations for responding parties); FED. R. CIV. P. 37(a), (c), (d) (identifying sanctions for failures to produce documents or to respond to discovery requests); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 424 (S.D.N.Y. 2004) (imposing sanctions for counsel and parties' failure to thoroughly inspect their own documents for production).

⁴⁰⁵ These arguments about the adequacy of the responding party's efforts will stay in the conjectural dimension unless and until they interpret or apply a legal definition. Here, the arguments would shift to the definitional dimension if the responding party's efforts implicated a Rule 26(b) definition that, for example, the efforts were adequate in light of the request's burdensome, cumulative, or duplicative nature. FED. R. CIV. P. 26(b)(2). They would also shift to the definitional realm if prior precedent addressed a similar "failure" to produce and branded it sufficient or insufficient. See, e.g., *Zoobuh, Inc. v. Better Broadcast, LLC*, No. 2:11-cv-00516 DN, 2017 WL 1476135, at *4-*5 (D. Utah Apr. 24, 2017) (defendant failed to provide "some quantification . . . of the material in its possession that [was] respon-

As with the claim and defense stases, the value-based topos in this dimension is virtually non-existent: facts empirically or conventionally determined cannot be discarded on policy grounds.

The same motion to compel has a definitional dimension as well. But instead of debating what was and was not reviewed and produced and the quality of those efforts, the definitional dimension would interpret and apply Rule 26(b)(1) and (2)'s scope of discovery standards, filtered through substantive legal requirements.⁴⁰⁶ Empirically speaking, the parties cannot debate the existence of these discovery rules or the words contained in them. And they would rarely, if ever, debate at this juncture the existence of a substantive law supporting a document request.⁴⁰⁷ But the parties may empirically debate the ordinary meaning of words that have yet to be judicially defined—for example, the new language in Rule 26(b)(1)'s proportionality standard.⁴⁰⁸ If, on the other hand, these standards have been accorded a common-law interpretation, then such interpretive arguments would be conventional rather than empirical. As a definitional matter, the motion to compel may also make conventional arguments about whether the desired information is “relevant” under Rule 26(b)(1).⁴⁰⁹ Those arguments would interpret and apply the requirements of the substantive law driving the document request, debating whether the documents would tend

sive” and thus failed to establish undue burden); *Scott Hutchison Enter. v. Cranberry Pipeline Corp.*, No. 3:15-cv-13415, 2016 WL 5219633, at *2 (S.D.W. Va. Sept. 20, 2016) (collection of cases that require specific proof); *Fish v. Kobach*, No. 16-2105-JAR-JPO, 2016 WL 893787, at *1 (D. Kan. Mar. 8, 2016) (“Objections based on undue burden must be clearly supported by an affidavit or other evidentiary proof of the time or expense involved in responding to the discovery request.”); *McKinney/Pearl Rest. Partners v. Metro. Life Ins. Co.*, 322 F.R.D. 235, 242 (N.D. Tex. Jan. 8, 2016) (“party resisting discovery must show how the requested discovery was overly broad, burdensome, or oppressive by submitting affidavits or offering evidence revealing the nature of the burden.”).

⁴⁰⁶ See *infra* notes 408–11.

⁴⁰⁷ See *supra* text accompanying note 359.

⁴⁰⁸ FED. R. CIV. P. 26(b)(1) (permitting discovery that is “proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit . . .”). A version of this language previously appeared in FED. R. CIV. P. 26(b)(2)(C)(iii)’s provision for making motions to limit discovery on grounds of disproportionality. By moving the language into the “scope” provision, the Rule now incorporates proportionality as an affirmative duty to consider in making discovery requests. FED. R. CIV. P. 26 (2015 Amendment). Courts have already begun ascribing meaning to this language. See, e.g., *Abbott v. Wyoming Cty. Sheriff’s Office*, No. 15-CV-531W, 2017 WL 2115381, at *2 (W.D.N.Y. May 16, 2017) (considering under proportionality whether discovery production has reached a point of diminishing returns); *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, No. 14-CV-7126 (JMF), 2016 WL 6779901, at *3 (S.D.N.Y. Nov. 16, 2016) (“Rule 26(b)(1)’s proportionality requirement means [that a document’s] ‘marginal utility’ must also be considered.”) (citations omitted).

⁴⁰⁹ See FED. R. CIV. P. 26(b)(1) (stating in its first clause on the scope of discovery, that “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense . . .”).

to prove or disprove one of those requirements.⁴¹⁰ Value-based definitional arguments, in turn, might buttress a party's empirical and conventional arguments with appeals to the discovery rules' underlying norms. For instance, the moving party might appeal to the Rules' wide-open discovery philosophy, while the responding party may cast the movant's request as a "fishing expedition" that runs counter to the FRCP's distaste for gamesmanship and inefficiency.⁴¹¹

This section has explained how the three topoi—empirical, conventional, and value based—represent the range of rational civil procedure argument types. This range holds whether the parties are haggling over a claim, a defense, or a point of procedure, or whether the parties are contesting factual or legal questions within those contexts. But this section's illustrations are just the beginning. In future work, we will examine how the topoi hold up in the mine-run of civil cases.

CONCLUDING THOUGHTS

This Article accounts for the contemporary civil suit as a staged critical discussion designed to reach a rational resolution of the parties' differences of opinion. It classifies the argumentation within this discussion under three stases: claim, defense, and procedure, each having conjectural and definitional dimensions. Within these dimensions lies a taxonomy of acceptable arguments—empirical, conventional, and value based—that can be used to promote rational outcomes across cases of all types. Now, given the theoretical roots and trunk of this critical discussion-stasis model, what other fruits might it bear? In other words, what can we do now that we could not do before? At present, we offer three possibilities.

First, our model provides a descriptive vocabulary and normative framework for assessing legal dispute-resolution mechanisms as systems for argumentation. As the *Rivera* case shows, the model *can* fit the data. Potential next moves include a more searching application of the model to civil cases, and to other procedural regimes such as the rules of evidence and arbitral systems, both domestic and international. We anticipate making normative claims about these systems' argumentative efficacy as a result.

Second, with continued development, we hope our model will shed light on pressing procedural debates. For example, our treatment of the conjectural and definitional stases brings to mind the long-standing debates about the line, if

⁴¹⁰ See, e.g., *Rengifo v. Erevos Enters.*, No. 06 Civ. 4266(SHS)(RLE), 2007 WL 894376, at *2 (S.D.N.Y. Mar. 20, 2007) (finding irrelevant as not bearing on plaintiff's Fair Labor Standards Act claim defendants' request for plaintiff's tax return); *Favale v. Roman Catholic Diocese of Bridgeport*, 233 F.R.D. 243, 245–47 (D. Conn. Nov. 8, 2005) (refusing to allow production of documents or deposition testimony that would not tend to prove or disprove negligent retention and supervision claims).

⁴¹¹ See Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 702–06 (1998) (discussing these competing tensions).

any, between *questions of fact* and *questions of law*.⁴¹² For now, we observe that the speech-act theoretic components of pragma-dialectics may support an ontological distinction between them notwithstanding the many thoughtful scholarly views to the contrary.⁴¹³

Third, we expect our model to generate richer theories about arguments across legal domains. For example, the normative hierarchy among our topoi resembles the “hierarchy of interpretation methods”⁴¹⁴ described by Professors MacCormick and Summers in their comparative study of statutory interpretation methods around the world.⁴¹⁵ Although it remains to be seen, we expect that insights about the rationally persuasive effects of these topoi should carry across this domain and others.

⁴¹² Indeed, Toulmin notes the similarity when describing his model. TOULMIN, *supra* note 343, at 92.

⁴¹³ Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1770 (2003); *see also* Cook, *supra* note 17, at 417 (“[T]here is no logical distinction between statements which are grouped by the courts under the phrases ‘statements of fact’ and ‘conclusions of law.’”).

⁴¹⁴ Feteris, *Patterns*, *supra* note 43, at 63.

⁴¹⁵ D. Neil MacCormick & Robert S. Summers, *Interpretation and Justification*, in INTERPRETING STATUTES: A COMPARATIVE STUDY 511, 512–14 (D. Neil MacCormick & Robert S. Summers eds., 1991); *see also* Fetereis, *Patterns*, *supra* note 43, at 63. MacCormick and Summers proposed such a hierarchy of argument types: “Linguistic arguments,” those based on the meanings of the actual words used in a statute; “systemic arguments,” including arguments based on “contextual-harmonization,” precedent, and analogy; and “teleological/evaluative arguments,” including arguments about legislative purpose. MacCormick & Summers, *supra*, at 512–15.