Aristotle Teaches Persuasion: The Psychic Connection*

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Introduction

Aristotle's *Rhetoric*[1] is a set of three books written more than 2,300 years ago. It is a testament to its power that the *Rhetoric* is still studied today as a living, breathing work. The *Rhetoric* endures, I believe, for two main reasons. First, Aristotle got it mostly right. He was insightful and understood the human heart. Second, Aristotle used an approach that is not time-locked — seeking out and articulating general principles that can then be applied in appropriate contexts. In contrast, Aristotle's contemporary Isocrates taught rhetoric mainly through examples. The examples may still be instructive, but they are bound to time and place. Because Isocrates' manifold references to events of the ancient world are so central to his work and because those examples depend for their instructional force on so many assumptions about that world, his lessons are more difficult to extract today.

The *Rhetoric* is concerned with persuasion in the public sphere. In his 1991 translation, George Kennedy hit the mark well with his subtitle: "A Theory of Civic Discourse." Indeed, one could argue that Aristotle, through his focus on tying one's argument to what the audience values, provides the best means yet devised for engaging in civic discourse to create what John Rawls has called an "overlap-

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* This article elaborates on a presentation I made at the biennial Legal Writing Institute Conference in Seattle, Washington, in 1994.

[1] ARISTOTLE, ON RHETORIC (George A. Kennedy trans., Oxford Univ. Press 1991) [*Rhetoric*].

ping consensus" among disparate groups.[2] To tie one's argument to the values and beliefs of the various audiences, the speaker must understand their concerns and work to meet or at least address their disparate interests. Creating that "psychic connection" between the speaker and the audience is the central, unifying theme of the *Rhetoric*.

To demonstrate my thesis, I will concentrate mainly on how, to Aristotle, logical argument — particularly the enthymeme (rhetorical syllogism) — is less about logic per se and less about form than about knowing and connecting with the audience. To Aristotle, logical arguments are persuasive not because of something inherently true about logic, but rather because the audience values and responds to logical arguments. That is, logic is not outside human experience, but of it. Even the seeming inevitability of the syllogistic mode of thinking has been shown to be culture-bound, at least in the sense that one must believe in the validity of the syllogism as a method of thinking for it to be persuasive.[3] One can choose not to believe either in its logic or in its completeness or precision.

What's more, not just any logical arguments will do; the premises for the arguments must be drawn from the experience and values of the audience. Even if one accepts the validity of syllogistic or enthymematic reasoning in general, the enthymeme is still open to attack in any domain that is complex and indeterminate because the premises of an enthymeme are never fully precise or complete. In the law, both the imprecise nature and the incompleteness of the rhetorical syllogism or enthymeme open it to rhetorical attack.

Aristotle's basic approach is to analyze the subject, break it down into component parts, analyze the component parts, break

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[2] JOHN RAWLS, POLITICAL LIBERALISM 133-72 (1993); *see* Lawrence E. Mitchell, *Trust and Overlapping Consensus*, 94 COLUM. L. REV. 1918 (1994); *see also* Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 CAL. L. REV. 329 (1994).

[3] DOUGLAS R. HOFSTADTER, GÖDEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID 43-45 (1979).

each of them down further, and so on. This analytic tour de force results in innumerable possible means of persuasion in any given instance. The overwhelming amount of information is made manageable because after breaking it all down, Aristotle categorizes the information and then extracts and presents general principles. As a result of his exhaustive labors, Aristotle has given us a complete art of rhetoric.

Aristotle defines rhetoric as "an ability, in each [particular] case, to see the available means of persuasion."[4] Contrast this meaning with the term's common pejorative connotation, as in "that is pure rhetoric," implying that something has been done merely as a matter of style, not substance.[5] This usage ignores Aristotle's emphasis on reasoned argument in civic discourse as part of rhetoric and distinguishes too sharply between style and substance. As demonstrated by Douglas Hofstadter, style cannot — or at least ought not — be separated too sharply from substance.[6] Dismissing rhetoric as empty style also seriously undervalues the ways in which meaning is tied to narrative and to rhetorical choices.[7]

Lawyers can benefit from studying Aristotle's *Rhetoric*, whether merely diving for pearls of wisdom or seeking to develop a coherent approach to persuasion. The *Rhetoric* can also be used as a lens through which to analyze the law.[8] One author used the "tools of

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[4] *Rhetoric*, *supra* note 1, 1.2.1, at 36 (referring to Book 1, chapter 2, passage 1, at page 36 of the Kennedy translation) (alterations in the translation).

[5] *E.g.*, Anthony T. Kronman, *Rhetoric*, 67 U. CIN. L. REV. 677 (1999).

[6] DOUGLAS R. HOFSTADTER, LE TON BEAU DE MAROT: IN PRAISE OF THE MUSIC OF LANGUAGE (1997); *see also* J.M. Balkin, *A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks & Paul Gewirtz eds., 1996); Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 141 (1997); Linda Meyer, *Between Reason and Power: Experiencing Legal Truth*, 67 U. CIN. L. REV. 727 (1999) (responding to Dean Kronman's speech, *supra* note 5).

[7] *See* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW chs. 4, 6 (2000).

[8] *See id.* ch. 7 (examining rhetorical devices used in Supreme Court opinions).

rhetoric" to examine "this matter of thinking, writing, and talking 'like a lawyer.'"[9] My aim is more modest — to highlight a core teaching of the master.

Despite their value to law and lawyers,[10] Aristotle's teachings are not in themselves well known. This unfamiliarity with the source of the ideas and with Aristotle's technical analysis contrasts with their pervasive influence — many of the basic forms of persuasion in American public speech are essentially Aristotelian, especially those in the judicial setting. Indeed, as Amsterdam and Bruner have stated: "*Categorization, narrative, and rhetorics* [are] the stuff of everyday life in the law."[11] Likewise, James Boyd White has highlighted the rhetorical roots of law as follows:

> [L]aw is most usefully seen not, as it usually is by academics and philosophers, as a system of rules, but as a branch of rhetoric; and . . . the kind of rhetoric of which law is a species is most usefully seen not, as rhetoric usually is, either as a failed science or as the ignoble art of persuasion, but as the central art by which community and culture are established, maintained, and transformed. So regarded, rhetoric is continuous with law, and like it, has justice as its ultimate subject.[12]

White's conception reinforces the idea of formal rhetoric as a path to effective Rawlsian liberalism, especially as a path to creating that overlapping consensus.

The value of knowing Aristotle's *Rhetoric* is increasingly recognized by some advocates and by teachers of law-school courses

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[9] Gerald Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1546 (1990).

[10] *See, e.g.*, John W. Cooley, *A Classical Approach to Mediation – Part I: Classical Rhetoric and the Art of Persuasion in Mediation*, 19 U. DAYTON L. REV. 83 (1993); Jeffrey R. Parsons, *Managing the Jury: A Trial Lawyer's Perspective on the Art of Jury Persuasion*, 497 PRAC. L. INST./LITIG. 301 (1994).

[11] AMSTERDAM & BRUNER, *supra* note 7, at 2.

[12] James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 684 (1985).

in legal writing, law and literature, evidence, and legal reasoning.[13] To set the stage for seeing how relevant Aristotle's *Rhetoric* still is, I have included a brief summary of certain core aspects of modern legal reasoning. From that brief summary I move on to summarize and explain a select few of the *Rhetoric*'s ideas in some depth. But I have not attempted a full exegesis of any of Aristotle's many points; only by reading the *Rhetoric* can one glean their richness and textured subtlety. (Readers interested in informal logic and modern rhetoric theory might enjoy various authors from outside the law, including in particular Toulmin[14] and Perelman.[15]) Having thus set the stage, I then demonstrate, by using the few to stand for the many, that Aristotle's insights into substance and style are premised on the central idea of tailoring the argument to the knowledge and values of the audience.

Modern Legal Reasoning

To better see the place of Aristotle's teachings in modern legal reasoning, I will briefly summarize some of its core aspects. Nuances

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[13] *E.g.*, LOUIS J. SIRICO, JR. & NANCY L. SCHULTZ, PERSUASIVE WRITING FOR LAWYERS AND THE LEGAL PROFESSION 1-2, 13-20 (2d ed. 2001); MICHAEL R. SMITH, ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING 75-252 (2002); Linda S. Durston & Linda G. Mills, *Toward a New Dynamic in Poverty Client Empowerment: The Rhetoric, Politics, and Therapeutics of Opening Statements in Social Security Disability Hearings*, 8 YALE J.L. & FEMINISM 119 (1996); Michael Frost, *Greco-Roman Analysis of Metaphoric Reasoning*, 2 LEGAL WRITING 113 (1996); Michael Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage*, 8 S. CAL. INTERDISC. L.J. 613 (1999); Leigh Hunt Greenshaw, *"To Say What the Law Is": Learning the Practice of Legal Rhetoric*, 29 VAL. U. L. REV. 861 (1995); Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 AM. U. L. REV. 1717 (1995).

[14] STEPHEN E. TOULMIN ET AL., AN INTRODUCTION TO REASONING (1984).

[15] CHAIM PERELMAN, THE REALM OF RHETORIC (William Kluback trans., Univ. Notre Dame Press 1982); *see also* Paul T. Wangerin, *A Multidisciplinary Analysis of the Structure of Persuasive Arguments*, 16 HARV. J.L. & PUB. POL'Y 195 (1993).

and refinements are not included.[16] After this brief detour, I will return to Aristotle and explain both the core of what I think he was teaching and how that core understanding can be used in the modern setting.[17]

Legal reasoning consists of several interrelated attributes, including analysis, synthesis, syllogistic reasoning (rule application), and comparing (including both analogizing and distinguishing).[18]

The first attribute, analysis, is the "separation of an intellectual or substantial whole into its constituent parts for individual study."[19] Lawyers analyze the facts and the law. Analyzing, as used by lawyers, typically involves categorizing. Facts are placed into categories with potential legal significance: the type of thing (real or personal property), the status of the persons (spouse, landlord, vendor, licensee), the nature of the interaction (tort or contract), and so on. Law is similarly analyzed: cases are briefed (broken down into constituent parts of issues, facts, law, reasoning, and result), and statutes are parsed (broken down into rules that are categorized as definitional, substantive, procedural, general, exceptions, defenses, and so on). The cases and statutes themselves are also placed into legal categories such as commercial warranty, constitutional rights, and environmental matters. Aristotle illustrates this important aspect of reasoning by the very structure of his treatise — he

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[16] *See* Steven D. Jamar, *This Article Has No Footnotes[1]: An Essay on RFRA[2] and the Limits of Logic in the Law*, 27 STETSON L. REV. 559 (1997) (examining paradoxes and truth values).

[17] *See* Robert H. Schmidt, *The Influence of the Legal Paradigm on the Development of Logic*, 40 S. TEX. L. REV. 367 (1999) (approaching a similar idea from a quite different perspective).

[18] *See, e.g.*, LINDA H. EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION chs. 1-6 (3d ed. 2002); RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING chs. 2, 4, 10, 12, 13 (4th ed. 2001); NANCY L. SCHULTZ & LOUIS J. SIRICO, JR., LEGAL WRITING AND OTHER LAWYERING SKILLS chs. 3-5 (3d ed. 1998).

[19] AMERICAN HERITAGE ELECTRONIC DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1992) (version 3.6.1, for the Macintosh; interface and other implementation software by Softkey International, Inc., 1994) [AM. HERITAGE DICTIONARY].

analyzes rhetoric by breaking it into constituent parts and categorizing those parts.

The second aspect of legal reasoning is synthesis. Here are two of its definitions: (1) "a. The combining of separate elements or substances to form a coherent whole. b. The complex whole so formed"; and (2) "*Philosophy*. a. Reasoning from the general to the particular; logical deduction."[20] I am using the first definition. The philosophical usage is confusing in the legal context; I refer to that type of reasoning as "syllogistic reasoning" or "rule application."

"Synthesis" in the first sense refers not to deductive, but rather to inductive, reasoning. As used here, "induction" is defined as "*Logic*. a. The process of deriving general principles from particular facts or instances. b. A conclusion reached by this process."[21] When we synthesize law or create rules of law by "combining separate elements to form a coherent whole," we sometimes (but not always) do so through inductive reasoning. When we synthesize the law, we take law from several sources (from several cases, for example, or from a statute and the cases interpreting it) and create a newly minted, synthesized rule.[22] Sometimes synthesis requires reconciling seemingly contradictory decisions through analogizing and distinguishing their facts and law. Sometimes synthesis is a matter of extracting multiple factors from various cases that address a similar issue and creating a more complete statement of the law. Synthesis may be as simple as applying a case's definition of a statutory term or as subtle and sophisticated as finding, in seemingly disparate or

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[20] *Id.*

[21] *Id.*

[22] *E.g.*, NEUMANN, *supra* note 18, chs. 12-13; DEBORAH A. SCHMEDEMANN & CHRISTINA L. KUNZ, SYNTHESIS: LEGAL READING, REASONING, AND WRITING ch. 4 (1999) (This title is regrettable insofar as it takes a relatively settled term, "synthesis," and uses it in a different way, requiring the authors to use the word "fusing" for synthesis as a facet of reasoning.).

even unrelated cases, an underlying or unifying theme. (The development of privacy law is a good example of the latter.[23])

The third basic form of legal reasoning, syllogistic reasoning, is perhaps the most familiar form and is probably the most common form used by practitioners. We apply a rule to facts: we reason from the general to the specific — we deduce.[24] The relevant formal definitions of "deduction" are these: (1) "The drawing of a conclusion by reasoning; the act of deducing"; and (2) "*Logic.* a. The process of reasoning in which a conclusion follows necessarily from the stated premises; inference by reasoning from the general to the specific. b. A conclusion reached by this process."[25] The first definition reflects the vague, general use of deduction as a near synonym for reasoning in general. It's the second, more formal definition from logic that characterizes a legal or rhetorical syllogism. Aristotle calls a rhetorical syllogism an enthymeme, which I discuss at some length below.

The fourth critical aspect of legal reasoning is comparing — lawyers compare one thing to another to analogize[26] as well as to distinguish.[27] The dictionary includes two relevant definitions of the word "analogy": (1) "a. Similarity in some respects between things that are otherwise dissimilar. b. A comparison based on such similarity"; and (2) "A form of logical inference or an instance of it, based on the assumption that if two things are known to be alike in

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[23] *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890); William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960) (tracing privacy law from its beginning in the Warren and Brandeis article through its development in the courts to its incorporation in the *Restatement (Second) of Torts*); RESTATEMENT (SECOND) OF TORTS §§ 652A-652E (1965) (summarizing the caselaw on privacy).

[24] *E.g.*, CHARLES CALLEROS, LEGAL METHOD AND WRITING ch. 6 (4th ed. 2002); NEUMANN, *supra* note 18, ch. 10; SCHMEDEMANN & KUNZ, *supra* note 22, ch. 8.

[25] AM. HERITAGE DICTIONARY, *supra* note 19.

[26] *See* Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923 (1996) (a very long, theory-focused article).

[27] *E.g.*, EDWARDS, *supra* note 18, at 110-14; NEUMANN, *supra* note 18, ch. 12.

some respects, then they must be alike in other respects."[28] Analogical reasoning in the law typically corresponds most closely to the latter definition. To convince the court that two cases are so similar that they should be treated alike, we speak of an earlier reported decision as being analogous to the present one. The often unstated premise of this enthymeme is, by the way, that like cases should be treated alike. But we use the first definition as well. And often those sorts of analogies are most potent: they are surprising and illuminating because of the freshness of the insight that sparked them. One such analogy often used by law teachers is that synthesizing a rule from various sources is in part like combining ingredients to bake a cake.

Linda Holdeman Edwards connects the persuasive power of narrative to the implicit and sometimes explicit analogies inherent in narratives.[29] This use of analogy is very close to what Aristotle had in mind in writing of inductive reasoning as being from part to part. That is, the audience connects parts of the story being told to parts of already known stories. Once the link is established, the audience may naturally extend the ending of the known story to the new one — if a defendant was convicted in an earlier similar case, then the defendant should be convicted in the present one.

Sometimes "analogizing" is used loosely to refer to finding differences as well as similarities. But it is better to use the simple word "comparison" for this aspect of reasoning and to define "analogizing" and "distinguishing" more narrowly as the two sides of the comparison coin.

Aristotle collapses logical persuasion into just two types: paradigm or inductive reasoning "from part to part"; and enthymeme or syllogistic reasoning from the general to the specific. But

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[28] AM. HERITAGE DICTIONARY, *supra* note 19.

[29] Linda Holdeman Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 LEGAL STUD. FORUM 7 (1996).

he has much to say about analysis and about comparison; he simply subsumes them into his two categories.

Overview of the *Rhetoric*

A. The Audience

A speaker is persuasive to the extent that the message resonates with the audience. Indeed, most of the first two books of the *Rhetoric* can be understood as an insightful guide on how to make exactly this connection based on a deep understanding of the audience's values and psychology. The audience can be judges, juries, litigants (the main audience for most judicial decisions), or students. Effective practitioners of the Socratic method realize the importance of asking "real questions that connect to matters the students value."[30] In the third book Aristotle addresses style and format. Not surprisingly, Aristotle explains the reasons for his comments on style in terms of what audiences find pleasing. In short, you persuade by connecting the substance of your arguments and the style of their presentation to what the audience values.

Aristotle starts his analysis by noting that a speech requires three things: "a speaker and a subject on which he speaks and someone addressed."[31] Aristotle divides public speaking into three groups according to the audience: legislators, judges (including juries), and spectators.[32] He thus defines "three genera of rhetoric," based not on style, but on the nature of the audience — deliberative (or legislative), judicial, and "epideictic" (ceremonial or demonstrative).[33] By dividing speeches by audience type rather than by the nature of the

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[30] Steven D. Jamar, *Asking Questions*, 6 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 69 (1998).

[31] *Rhetoric*, *supra* note 1, 1.3.1, at 47.

[32] *Id.*, 1.3.2, at 47.

[33] *Id.*, 1.3.3, at 48.

speaker or the subject matter, Aristotle establishes the primacy of attending to audience as the core problem in persuasion. What matters most is whether the audience is a legislature, a judge or jury, or a crowd.

In a legislative setting, the audience is concerned with what is advantageous and what is harmful for the state in general. In a judicial setting, the audience cares about what is just and unjust in a particular case. And in a ceremonial setting, such as the delivery of a eulogy, the audience is concerned with what is honorable and what is shameful.[34]

My favorite illustration of connecting your point to something the audience values is from the 1962 movie *Lawrence of Arabia*.[35] In one scene, British Lieutenant T.E. Lawrence is trying to persuade a reluctant Arab leader, Auda abu Tayi, to attack Aqaba. Lawrence appeals to pride, nationalism, money, and power. Although each of these has some value to Auda, he values something else more highly. Once Lt. Lawrence discovers that key, persuasion is easy.

Lawrence:	A 100, a 150, what matters? It's a trifle. A trifle which they take from a great box they have.
Ali:	In Aqaba.
Auda:	In Aqaba?
Lawrence:	Where else? (Ali nods)
Auda:	You trouble me like women.
Lawrence:	(Laughing) Friends, we have been foolish. Auda will not come to Aqaba.
Auda:	No.
Lawrence:	For money . . .
Auda:	No.
Lawrence:	For [King] Feisal . . .

[34] *Id.*, 1.3.5, at 49.

[35] LAWRENCE OF ARABIA (Sam Speidel & David Lean 1962).

Auda: No.
Lawrence: Nor to drive away the Turks . . . . He will come, because it is his pleasure.

Auda's key value is autonomy — he will go to Aqaba not for money, not for power, not for the Arab cause, but rather "because it is his pleasure." Upon being thus trapped, Auda, in the movie version of events, concludes the scene muttering that Lawrence's "mother mated with a scorpion."[36]

B. The Means of Persuasion

Aristotle's second grand division relates to the means of persuasion, which he divides into artistic and nonartistic.[37] Nonartistic refers to preexisting facts external to the speaker — contracts, witnesses, and the like. In contrast, artistic refers to "whatever can be prepared by method and by [the speaker]."[38] Aristotle is not as concerned with the nonartistic means (those things that by definition the speaker cannot affect) as he is with the artistic means, since that is where the speaker's artistry matters most.

The artistic means of persuasion are famously divided into three categories: *ethos*, *logos*, and *pathos*.[39] At the core, the persuasive power of each of these means derives from the effect each has on the audience — on what the audience will find persuasive.[40]

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[36] *Id.*, http://www.filmsite.org/lawr.html (last visited Apr. 24, 2002) (reproducing the script of key scenes).

[37] *Rhetoric*, *supra* note 1, 1.2.2, at 37.

[38] *Id.*

[39] *Id.*, 1.2.3-.5, at 37-39.

[40] *See* Michael Frost, *Ethos, Pathos & Legal Audience*, 99 DICK. L. REV. 85 (1994) (exploring *ethos* and *pathos* more fully).

1. Ethos

People are persuaded through *ethos* (the speaker's character) "whenever the speech is spoken in such a way as to make the speaker worthy of credence."[41] The persuasive value of the speaker's character should not depend on "a previous opinion that the speaker is a certain kind of person."[42] As the following quotation illustrates, the speaker must present himself or herself in a way that gains the audience's trust. And that is done by creating a psychological connection with the audience:

> There are three reasons why speakers themselves are persuasive; for there are three things we trust other than logical demonstration. These are practical wisdom [*phronesis*] and virtue [*arete*] and good will [*eunoia*]; for speakers make mistakes in what they say or advise through [failure to exhibit] either all or one of these; . . . for either through lack of practical sense they do not form opinions rightly; or though forming opinions rightly they do not say what they think because of a bad character; or they are prudent and fair-minded but lack good will, so that it is possible for people not to give the best advice although they know [what] it [is]. These are the only possibilities. Therefore, a person seeming to have all these qualities is necessarily persuasive to the hearers.[43]

If the audience perceives the speaker to have practical wisdom, virtue, and goodwill, then the trustful connection is made. This is not sufficient to persuade, though; one still needs logical argument to carry the day.

Later, in chapters 12 through 17 of Book 2, Aristotle expands the concept of character beyond that of the speaker to include the character of the audience. The speaker needs to adapt the presenta-

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[41] *Rhetoric*, *supra* note 1, 1.2.4, at 38; *see also* EUGENE GARVER, ARISTOTLE'S RHETORIC: AN ART OF CHARACTER 172-205 (1994) (discussing the relationship of character to persuasion).

[42] *Rhetoric*, *supra* note 1, 1.2.4, at 38.

[43] *Id.*, 2.1.5-.6, at 120-21 (alterations in the translation).

tion of his or her character to the character of the audience. As Aristotle explained in Book 1, the character of the audience is defined in part by the setting (legislative, judicial, or ceremonial). In Book 2, Aristotle is more concerned with the attributes of people as people, not the attributes of people by virtue of their function. Aristotle, in his typical fashion, analyzes and characterizes audiences and the types of things they find persuasive. These chapters, together with the ones on *pathos* described below, constitute a kind of psychological profile of people by relevant groups. For example, in chapter 12, titled "Introduction; the Character of the Young," among the more choice comments are these:

> In terms of their character, the young are prone to desires and inclined to do whatever they desire. Of the desires of the body they are most inclined to pursue that relating to sex, and they are powerless against this. . . . They are changeable and fickle in desires, and though they intensely lust, they are quickly satisfied; for their wants, like the thirst and hunger of the sick, are sharp rather than massive.[44]

The character or nature of the audience relates not just to *ethos*, but also to *logos*. One should choose premises for enthymemes that will appeal most strongly to the particular group. For example, a reference to Jennifer Lopez or the Backstreet Boys will connect with a certain set of a younger audience in a way that a reference to Marilyn McCoo or the Everly Brothers might not.

2. *Pathos*

People are persuaded through *pathos*, through being "led to feel emotion [*pathos*] by the speech; for we do not give the same judgment when grieved and rejoicing or when being friendly and hostile."[45] An angry jury is likely to view things differently from a

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[44] *Id.*, 2.12.3-.4, at 165.

[45] *Id.*, 1.2.5, at 38 (alteration in the translation).

dispassionate, detached one.[46] In fact, jury verdicts can be set aside when a court concludes that a jury was acting under the influence of passion or prejudice. Despite the pride of place that Aristotle awards logical persuasion, Aristotle recognizes, as stated by Kennedy, "that among human beings judgment is not entirely a rational act."[47]

In addition to the brief treatment in Book 1, Aristotle expands on the idea of *pathos* in Book 2, chapters 2–11. As described by Kennedy, "These famous chapters on the emotions [together comprise] the earliest systematic discussion of human psychology . . . ."[48] In these chapters Aristotle provides tips on arousing and defusing anger and the like and explains what motivates people. Not all the tips are directly related to judicial, deliberative, or ceremonial settings, and as Kennedy notes, they seem to have been originally written for another purpose and then later included in the *Rhetoric*.[49]

For each emotion considered, the chapters explore the person's state of mind, the target of the emotion, and the reasons for the feelings.[50] The emotions explored are anger (ch. 2), calmness (the opposite of anger) (ch. 3), friendliness toward someone and enmity (ch. 4), fear and confidence (ch. 5), shame and lack of shame (ch. 6), kindliness (or benevolence) and unkindliness (mean-spiritedness) (ch. 7), pity (ch. 8), indignation (ch. 9), envy (ch. 10), and emulation (meaning admiration resulting in the opposite of envy) (ch. 11).

The point of including this analysis of human emotions is to help the student of rhetoric understand how to better address an audience that may already be feeling one or more of these emotions

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[46] *See id.*, 2.1.4-.9, at 120-21.

[47] *Id.*, 1.2.5, at 39 n.45.

[48] *Id.*, *Introduction to Chapters 2-11*, at 122.

[49] *Id.*

[50] *Id.*, 2.1.9, at 121.

and how to generate or defuse such emotions.[51] One commentary asserts that "[t]he secret of successful advocacy is in using emotion effectively to persuade different audiences."[52] Although this statement grossly oversimplifies the ingredients of successful advocacy and overstates the role of *pathos*, it does illustrate that at least some current authorities recognize the importance of understanding "how [people] respond to emotional as well as logical arguments."[53] To persuade, the speaker needs to connect with or, if appropriate, create the emotional tone of the audience.

3. Logos

Useful as *ethos* and *pathos* are, Aristotle is most concerned with *logos* — persuasion through the use of logical arguments. In our culture, logic is often connected with math and science and has developed a sort of objective, outside-of-self aura. It is often thought of as sterile and remote, and not as closely connected to human nature as instinct and emotions are. Indeed, reason is sometimes set up as a check on our natural inclinations.

Aristotle would not entirely agree with these characterizations. To Aristotle, reason is persuasive because people value reason and accept reasoned arguments. There is nothing intrinsic in using *logos* to persuade that is not also intrinsic in humankind. *Logos* is not an external; it is not extrinsic to humankind. Reason is a human creation and is part of what people value.

People find reason persuasive, but the reasoning itself must be grounded in the common knowledge and understandings of the audience. Aristotle goes so far as to assert that "it is necessary for

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[51] *See* Stephen R. Leighton, *Aristotle and the Emotions*, *in* ESSAYS ON ARISTOTLE'S RHETORIC 206 (Amélie Oksenberg Rorty ed., 1996).

[52] John C. Shepherd & Jordan B. Cherrick, *Advocacy and Emotion*, 138 F.R.D. 619, 619 (1991).

[53] *Id.*

[the means of persuasion] and [for] speeches [as a whole] to be formed on the basis of common [beliefs]."[54]

People value reason not for its own sake, not because of some attachment to its forms, but because reason is used in service of the truth. The syllogism and the enthymeme, as well as induction and paradigmatic reasoning, are not intrinsically truth-generating; they are just forms or tools for getting at substantive truth. If they are used well and properly for good aims, then truth or even justice can be the result.[55] But the means are not truth itself. Reason, no matter how formally correct, does not persuade if it does not carry the ring of truth, or at least its semblance.

Aristotle divides reasoning into two types: induction and deduction.[56] Aristotle calls inductive reasoning paradigmatic reasoning, or reasoning by example.[57] In the field of rhetoric, induction includes reasoning by analogy from one or more examples of similar situations both (1) to create a premise for an enthymeme and (2) to compare, as Aristotle says, "part to part" or case to case.[58]

The formal deductive syllogism from math and science becomes the less formal enthymeme in rhetoric. Unlike a mathematically rigorous syllogism in which all premises must be stated and conclusions necessarily and universally follow, an enthymeme is less strict. In a typical enthymeme, a general, probabilistic rule is applied to a particular situation to lead to a sufficiently acceptable conclusion. Oftentimes, not all of the enthymeme's parts are fully developed or

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[54] *Rhetoric*, *supra* note 1, 1.1.12, at 34 (third and fourth alterations in the translation).

[55] *See* Roger A. Shiner, *Aristotle's Theory of Equity*, 27 LOY. L.A. L. REV. 1245 (1994); Eric G. Zahnd, *The Application of Universal Laws to Particular Cases: A Defense of Equity in Aristotelian and Anglo-American Law*, 59 LAW & CONTEMP. PROBS. 263 (1996).

[56] *Rhetoric*, *supra* note 1, 1.2.8, at 40.

[57] *Id.*, 1.2.9, at 40.

[58] *See* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1 (1949) (using the "case-to-case" terminology).

even stated.[59] Enthymemes and the types of topics from which to draw premises are discussed more fully in the next section.

Aristotle considers both types of reasoned arguments (enthymematic and paradigmatic) persuasive, but he favors enthymematic ones: "Speeches using paradigms are not less [logically] persuasive, but those with enthymemes excite more favorable audience reaction."[60]

> If one does not have a supply of enthymemes, one should use paradigms as demonstration; for persuasion [then] depends on them. But if there are enthymemes, paradigms should be used as witnesses, [as] a supplement to the enthymemes. When the paradigms are placed first, there is the appearance of induction, but induction is not suitable to rhetorical discourses except in a few cases; when they are put at the end they become witnesses {examples}, and a witness is everywhere persuasive. Thus, too, when they are first, it is necessary to supply many of them [but] when they are mentioned at the end one is sufficient; for even a single trustworthy witness is useful.[61]

Ultimately, both derive their power from the extent to which the examples used or premises stated resonate with the audience. In Aristotle's words, "one should not speak on the basis of all opinions but of those held by an identified group, for example, either the judges or those whom they respect; and the fact that what is said seems true should be clear to all or most people."[62]

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[59] *Rhetoric*, *supra* note 1, 2.22.3, at 186-87.

[60] *Id.*, 1.2.10, at 41.

[61] *Id.*, 2.20.9, at 181 (square-bracketed alterations in the translation; material in braces added by me).

[62] *Id.*, 2.22.3, at 187.

Aristotle's Teachings on Connecting Reasoning with the Audience

A. Paradigmatic Reasoning

As described by Aristotle, paradigmatic reasoning "is reasoning neither from part to whole nor from whole to part but from part to part, like to like, when two things fall under the same genus but one is better known than the other."[63] A person's ability to reason inductively allows the speaker to use paradigmatic reasoning to create the general rule implicitly, without stating it. The audience then creates the general rule explicitly, by native recognition of the "genus," or general type, from the examples given.

Today we use inductive reasoning to synthesize or create rules, which are then stated explicitly and applied syllogistically (enthymematically). We also use paradigmatic reasoning much as Aristotle envisioned it — to show similarities and differences between two cases. A common structure of a modern legal argument involves several components: statement of a rule, inductive reasoning used to develop the rule, illustration of the rule by summarizing a decided case, and application of the rule to the case at hand. The rule application (the deductive portion of the argument) often includes comparing the facts of the problem at hand to the illustrating case. Not surprisingly, when we make legal arguments in actual practice, we do not use only enthymemes or only paradigms — we use both.

To use examples persuasively, the speaker must choose them carefully. The audience must be able to draw parallels readily between the case at hand and the thing to which it is being compared. Aristotle advises that the thing to which the current problem is being compared should be the better known of the two.[64] If the

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[63] *Id.*, 1.2.19, at 44.

[64] *Id.*

audience does not know what you are analogizing to, then the persuasive value of the example is lost. Thus the power of a paradigmatic argument depends on the speaker's ability to choose examples that are familiar to and ring true to the audience.

To argue that a particular politician is a scoundrel, you might argue enthymematically as follows: "All politicians are scoundrels; this particular person is a politician." The conclusion need not be stated since the implication is clear.

Or you might argue paradigmatically: "Richard Nixon was a scoundrel [one example]; Bill Clinton is a scoundrel [a second example]. This person is running for President." Once again you need not state the conclusion. The strength of this argument depends, of course, on the extent to which the audience agrees that Nixon and Clinton are scoundrels and buys the idea that because these two politicians are scoundrels, so are most Presidents. The persuasive force depends not on the universality of the proposition, but rather on the strength of its probability. To be more precise, it is not the strength of the probability in the abstract or even empirically that matters, but the extent to which the audience regards this proposition as true. If the audience believes the implicit, underlying general proposition, then the examples reinforce it. Note that both of the examples, Nixon and Clinton, are well known. Using examples such as Harding and Cleveland would not work well with most audiences today.

But there is a problem here. The unstated premise that the audience actually believes may not be that all politicians are scoundrels, but rather that only politicians who get elected are scoundrels, or even that only a few politicians are scoundrels. The potential fuzziness of the premises that give the paradigmatic reasoning its force may undermine the reasoning too fully to make it persuasive. The persuasive force is further eroded by counter-examples — Eisenhower, Roosevelt, Ford, Lincoln, and Washington are not generally considered scoundrels.

In practice, of course, when making the point that a particular person is a scoundrel, one does not rely on just one paradigmatic

argument or enthymeme. This being true, the Nixon-Clinton example becomes less a complete argument and more a brick in the wall. The example supports the ideas that some Presidents are scoundrels and that there is a significant danger that someone seeking the office will also fall into the same category.

Paradigms and enthymemes are subtle tools. They are not intended to be used to demonstrate truth absolutely, because the fields in which they are used (the Aristotelian "topics" that they address) are not susceptible to such absolutes.

B. Enthymematic Reasoning

1. The Enthymeme Explained

Aristotle's second type of reasoning is deductive reasoning using a rhetorical syllogism that Aristotle terms an "enthymeme."[65] Enthymematic reasoning closely resembles the familiar legal-reasoning structure: state a general or universal rule, apply it to a specific situation (the "facts"), and then reach a conclusion. What distinguishes an enthymeme from a scientific or strictly logical syllogism flows from the differences in their domains. In math and science, the syllogism deals in absolutes with necessary, universally true conclusions. In rhetoric and in the fields in which rhetoric applies, such as law and politics, arguments are based on likelihoods and probabilities, not certainties.[66] The type of probability that Aristotle has in mind, however, is not simple commonness or frequency. Instead, such a probability is "whatever, among things that can be other than they are, is so related to that in regard to which it is probable as a universal is related to a particular."[67] To

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[65] *Id.*, 1.1.11, at 33; *see* M.F. Burnyeat, *Enthymeme: Aristotle on the Rationality of Rhetoric*, *in* ESSAYS ON ARISTOTLE'S RHETORIC 88 (Amélie Oksenberg Rorty ed., 1996) (discussing the term "enthymeme" at some length).

[66] *Rhetoric*, *supra* note 1, 1.1.11, at 33; 1.2.13-.15, at 42-43; 2.22.3, at 186-87.

[67] *Id.*, 1.2.15, at 43.

Aristotle, something is probable when it is a particular instance of a more general rule. To be sure, general rules are often considered general because they reflect common or frequent occurrences, but the enthymematic probability is, to Aristotle, based not on frequency as such, but rather on the relationship of the generally true statement to the particular instance.

The basic structure of a syllogism is:

> Major premise(s).
> Minor premise(s).
> Conclusion.

A simple and popular example is this:

> All humans are mortal.
> Socrates is a human.
> Therefore, Socrates is mortal.

To state it a bit more formally: in a formal syllogism, the major premise is a general statement that is universally true about some set or some condition (within the set of all humans, all are mortal); the minor premise is a specific statement about a specific thing within the universal set (Socrates is a member of the set of humans); the conclusion necessarily follows if both the major premise and the minor premise are true. As explained by Kennedy, in symbolic logic the syllogism is expressed as "If all A is B, and some A is C, then all C is B,"[68] where "A" = humans, "B" = mortal, and "C" = Socrates. The language within the formal statement sounds a bit weird — "If all humans is mortal, and some humans is Socrates, then all Socrates is mortal" — but that is how it works. If we replace "C" with "Greeks" and "is" with "are" and add a few words, then it sounds a bit better: "If all humans are mortal, and some of the members of the group of humans are Greeks, then all Greeks are mortal."

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[68] *Id.*, 1.1.11, at 33 n.23.

In formal logic and in a formal syllogism all the premises must be stated explicitly. In a rhetorical syllogism or enthymeme, frequently a premise is unstated because "if one of [the premises] is known, it does not have to be stated, since the hearer supplies it."[69] That is, there are often many premises on which a conclusion rests, and to state them all would be nearly impossible or even actually impossible. For the hearer to be able to supply the missing premise, the enthymeme must be based on premises that the audience knows or believes to be true. In other words, the enthymeme will not be effective if the unstated premise is not a part of common understanding. A speaker's persuasiveness is reduced to the extent that the enthymeme does not resonate with the audience.

Even if it were possible to determine and express all the information being relied on for the conclusion, it would be extremely tiresome to do so.[70] For example, most Americans will have no trouble understanding that "the swimmer won the gold medal" means that the swimmer won first place in the race. Unstated are premises such as (1) the swimmer was competing in a race; (2) gold medals are awarded for first place; (3) first place means that the swimmer beat the other swimmers in the race; (4) other swimmers were competing; (5) it was a formal competition (not two friends racing for the heck of it); and so on.

In an enthymeme, the statements, premises, and conclusions are not usually absolute. Instead, they tend to be couched in terms of probabilities: things like "people who are starving *sometimes* steal for food," or "people will *generally* be distracted by thunder," or "people who are deaf do not *generally* get distracted by thunder." This is the true dwelling of the enthymeme — drawing a conclusion that may be true based on the strongest, most likely generalities that one can bring forth to interpret the situation.

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[69] *Id.*, 1.2.13, at 42.

[70] *Id.*, 2.22.3, at 187.

Because enthymemes deal mainly in probabilities rather than certainties, what people will find most persuasive is an explanation that comports most strongly with their own understanding and experience. That is how the connection is made. An enthymeme that relies on premises, beliefs, or experiences not shared by the audience, regardless of how convincing or strong or apt it might be to another audience, simply will not persuade.

Clifford Geertz, a brilliant anthropologist, provides a wonderful example of the importance of connecting with the audience. He critiques anthropologist Evans-Pritchard's interpretation of Zande witchcraft.

> Take a Zande boy, [Evans-Pritchard] says, who has stubbed his foot on a tree stump and developed an infection. The boy says it's witchcraft. Nonsense, says Evans-Pritchard, out of his own common-sense tradition: you were merely bloody careless; you should have looked where you were going. I did look where I was going; you have to with so many stumps about, says the boy — *and if I hadn't been witched I would have seen it*. Furthermore, all cuts do not take days to heal, but on the contrary, close quickly, for that is the nature of cuts. But this one festered, thus witchcraft must be involved.
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> . . . .
>
> Thus, however "mystical" the content of Zande witchcraft beliefs may or may not be (and I have already suggested they seem so to me only in the sense that I do not myself hold them), they are actually employed by the Zande in a way anything but mysterious — as an elaboration and defense of the truth claims of colloquial reason. Behind all these reflections upon stubbed toes, botched pots, and sour stomachs lies a tissue of common-sense notions that the Zande apparently regard as being true on their face: that minor cuts normally heal rapidly; . . . that in walking about Zandeland it is unwise to daydream, for the place is full of stumps. And it is as part of this tissue of common-sense assumptions, not of some primitive metaphysics, that the concept of witchcraft takes on its meaning and has its force. For all the talk about its flying in the night like a firefly, witchcraft does not celebrate an unseen order, it certifies a seen one.

> It is when ordinary expectations fail to hold, when the Zande man-in-the-field is confronted with anomalies or contradictions, that the cry of witchcraft goes up. It is, in this respect at least, a kind of dummy variable in the system of common-sense thought. Rather than transcending that thought, it reinforces it by adding to it an all-purpose idea which acts to reassure the Zande that their fund of commonplaces is, momentary appearances to the contrary notwithstanding, dependable and adequate. . . . Similarly, ignorance, stupidity, [and] incompetence, culturally defined, are quite sufficient causes of failure in Zande eyes. If, in examining his cracked pot, the potter does in fact find a stone, he stops muttering about witchcraft and starts muttering about his own negligence — instead, that is, of merely assuming that witchcraft was responsible for the stone's being there. And when an inexperienced potter's pot cracks, it is put down, as seems only reasonable, to his inexperience, not to some ontological kink in reality.[71]

The Zande boy's explanation for the infection — witchcraft — makes perfect sense within the Zande culture. But it does not under current Western standards of common sense or from a Western view of human activity (people sometimes stub their toes even when being careful) and infection (some cuts get infected and do not heal quickly).

Knowing even this much about Zande culture would affect how one might go about introducing some biology-based medical treatment. For example, you could take a functional, short-term, result-oriented approach and say that the antibiotic medicine is magical and counters the hex placed on the boy. (After all, how could eating something that was not magical counteract the magic-induced festering sore?) Or you could explain that the mechanism the witch used to carry out the hex is microbes and that the medicine attacks and kills the microbes. Or you could explain about biology and infection and, without negating that the boy may have been hexed, explain that the infection can be treated regardless

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[71] CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 78-79 (1983).

of any witchcraft involved. Or you could try to explain the illusory nature of this particular witchcraft, or of all belief in witchcraft, and try to explain the workings of the medicine.

Regardless of the approach chosen, your knowledge of the local beliefs would be critical if your goal were to convince the Zande to accept antibiotic treatment. It would plainly make more sense to appeal to what their common sense tells them and what their mythology teaches them than to base an argument on merely the biological nature of bacterial infections or on the beliefs of other cultures. You would want to tie your argument to what is true to the audience and to show how your argument fits their notions, their received premises, their understanding of the world. You will be persuasive only to the extent that your enthymemes and your premises comport with those of the audience.

In law teaching, we describe this audience-centered approach as testing your theory for its reasonableness and realism.[72] Students sometimes present arguments that, while logical in form, have little persuasive impact unless you accept a suspect premise, an assumed fact not in the actual problem, or some other dodge. The Aristotelian flaw in this approach is that the audience will not accept the enthymeme's conclusion unless the premises ring true. An argument proper in form will not persuade unless the substance of it seems right. A syllogism does not guarantee true conclusions if you start with a false premise. For example, the following syllogism fails because the major premise is false: "All humans, except those whose names begin with 'S,' are mortal; Socrates is human and his name begins with 'S'; therefore, Socrates is immortal." In more direct, modern terms: garbage in, garbage out.

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[72] *See* NEUMANN, *supra* note 18, at 141, 277-78.

2. *Working with Enthymemes*

To craft a persuasive enthymeme, you must use appropriate general rules or premises. In Aristotle's terminology, you need to understand the topics or sources from which to draw premises. As he does in other parts of the *Rhetoric*, Aristotle analyzes and categorizes topics and presents them in what may be thought of as annotated lists. Aristotle's categories of topics are not neatly hierarchical or compartmentalized, and indeed his use of the term *topos* is somewhat inconsistent. He addresses the topics of rhetoric in several places and from several different perspectives. For example, in Book 1 he categorizes topics primarily on the basis of the type of speech being given. Certain topics are most suited for legislative speech, others for judicial, and others for ceremonial. In Book 2, Aristotle cuts things differently and distinguishes between domain-specific topics,[73] which require specialized knowledge of the subject of the speech, and general topics,[74] which do not.

In what follows, I do not provide a full summary of Aristotle's treatment of topics; I only seek to show the relationship between topics and the underlying necessity of making the psychological connection to the audience. To illustrate the point, I will note only a few of the topics from the judicial-rhetoric chapters in Book 1 and from the topics chapters (22 and 23) in Book 2.

In Book 1, Chapter 10, Aristotle first posits and then answers the question about where to find topics on which to base enthymemes for judicial rhetoric:

> [F]rom how many and what sort of sources should their syllogisms be derived? . . . One should grasp three things: first, for what, and how many, purposes people do wrong; second, how these persons are

[73] Rhetoric, *supra* note 1, 2.22.4, at 187.

[74] *Id.*, 2.23, at 190-204.

> [mentally] disposed; third, what kind of persons they wrong and what these persons are like.[75]

Understanding why people act as they do is important even though motive is generally not an element of a cause of action or a crime. People want to understand what happened and why; they want things to make sense. (Recall the Zande use of magic to explain things that violate their commonsense understanding.) Therefore, the speaker must understand a person's motivation; otherwise, the speaker will not be able to connect persuasively with the audience.

Aristotle focused first on understanding human nature, for if you understand the human heart, you can connect with the audience. (Note the enthymeme embedded in that statement.) Aristotle does not ignore issues of evidence and fact, but he is concerned here with the "artistic" aspects of persuasion. If all the facts are in your favor, then the persuasive enthymeme is simply this: the facts speak for themselves. You need only connect the facts to the legal elements, and you are finished. There is, of course, art in selecting, organizing, and presenting the facts, even the hard facts. But few cases that require serious negotiations or that are actually tried are open-and-shut on the facts.

Aristotle analyzes and catalogues motives so that we can draw on them to create persuasive enthymemes. According to Aristotle, "people do everything they do for seven causes: through chance, through nature, through compulsion, through habit, through reason, through anger, through longing."[76] He then expands on each of these, leading up to a more extended discussion of the motive power of pleasure[77] — which to Aristotle cuts across several of the causes, including in particular habit, nature, and longing (both desiring and obtaining are pleasurable). In the next chapter, Aristotle

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[75] *Id.*, 1.10.1-.2, at 87-88 (second alteration in the translation).

[76] *Id.*, 1.10.8, at 89.

[77] *Id.*, 1.10.18, at 90-91.

explains in great detail what is pleasurable, including doing things from habit, learning new things, taking revenge, and many others.[78]

Pleasure is a quintessential psychological attribute. Pleasure is neither a crime nor a specific type of conduct. It is a sensation and is a motivating force — people act as they do because, to recall Auda, it pleases them.[79] The point is simply that speakers need to understand the psychological motivations of people in order to persuade them.

Some of the pleasurable actions are contradictory. People act out of habit and like to have familiar surroundings and do familiar things. But people also like to learn new things, to break routines, to do unfamiliar things. The rhetorician's art is to use these topics in creating enthymemes that are more persuasive than your opponent's. To impugn an alibi and help place a suspect at the scene of a crime, the prosecutor could argue that the defendant was bored, that he needed excitement, and that he wanted something new to stimulate him. The defense attorney might argue that the defendant's Wednesday evening habit was to stay home to watch *The West Wing*. The rebuttal might be that *The West Wing* was a rerun that evening.

Notice how the particular enthymeme resonates with you, acting here as a stand-in for the courtroom audience. You know from your own experience that people will sometimes stay home to watch a favorite show. You also know that people are more likely to break that habit when the show is a rerun. And you also know that people sometimes get bored and seek new things to do. The force of these arguments depends on the extent to which they fit the specific facts of the case and comport with the audience's expectations and understanding of why people act as they do.

As noted above, in contrast to Book 1, which divides topics by types of speech (deliberative, judicial, and ceremonial), Book 2

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[78] *Id.*, 1.11, at 91-97.

[79] *See supra* text accompanying note 36.

divides the topics of rhetoric into two types that are not so tied: (1) domain-specific topics and (2) general topics.

Domain-specific topics require specialized knowledge of the particular field. For example, the concepts of the reasonable person and unreasonably dangerous product are quite specific to law, and premises drawn from them would be domain-specific premises. Although these topics may be used in some fields other than law, they are still domain-specific in the Aristotelian sense: we do not generally use the term "reasonable person" in physics or math or chemistry, for example. Some concepts, like justice, live in a variety of domains but would still be considered domain-specific under Aristotle's scheme, since they are more concerned with substance than with general attributes (like cause and effect).

By their very nature, domain-specific premises vary with the subject of the speech and the nature of the audience. Consequently, to persuade an audience, the speaker must know the content of the specific domain from which to draw the premises.[80] As Aristotle puts it: "First, then, one should grasp that on whatever subject there is need to speak or reason, it is necessary to have the facts belonging to that subject, whether [supplied] by political or any other argument . . . ."[81] Know the facts of the case and know the law; know all that you can about the car accident and all the relevant tort law. In other words, know what you are talking about.

In contrast, general topics are those that apply across various areas of knowledge.[82] For example, the ideas of more or less,[83] cause and effect,[84] and mistake[85] apply in math, physics, art, law, and other fields. In physics, if you apply enough ("more") force to an object, it

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[80] *Rhetoric*, *supra* note 1, 2.22.4, at 187.

[81] *Id.* (alteration in the original).

[82] *Id.*, 2.23, at 190-204.

[83] *Id.*, 2.23.4, at 192-93.

[84] *Id.*, 2.23.25, at 202.

[85] *Id.*, 2.23.28, at 203.

will move. In law, a driver who is drunk, speeding, and dialing a cell phone and who gets into an accident is "more" likely to have been negligent and a cause of the accident. In physics, a calibration error on an instrument can lead to mistaken results. In art, a mistake can ruin or make a painting. In law, a mistaken identity is a common defense. These topics are thus general.

Aristotle identifies and explains 28 general topics for enthymemes. As noted by Kennedy, these are really "lines, or strategies, of argument, useful in treating many different subject matters in all three species of rhetoric."[86] Unlike the topics in Book 1, the topics in this part of Book 2 are less overtly psychological and more technical. Nonetheless, because they follow an extended discussion of human emotion, focus on what people value, and explain how the speaker can touch those emotions and values, the insights are still deeply rooted in human psychology.

To show some of what Aristotle means by general topics for use in enthymemes, I have selected the topics relating to (1) definition of terms, (2) "more and less," and (3) what motivates people to think one way or another.

Aristotle includes several topics related to definitions.[87] The simplest definitional "topic" or approach is to explore the meaning of a particular word or concept, to illustrate the meaning by example, and then to apply that refined meaning to the situation. Aristotle illustrates this approach for the term "nobility." In addition to merely describing someone as "noble," you could expand on what the word "noble" means. Aristotle uses this example: a person is not judged noble until he has done a noble deed; one should judge the person's nobility by deeds, not words.[88]

Another topic concerning definitions relates to using different grammatical forms or different uses of the same word to refine the

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[86] *Id.*, *Introduction to Chapter 23*, at 190.

[87] *Id.*, 2.23.1, at 190; 2.23.2, at 191; 2.23.8, at 195; 2.23.9, at 196.

[88] *Id.*, 2.23.8, at 195.

understanding of that word.[89] Take "negligence," for example. Sometimes in negotiating a negligence claim, the parties may talk about what "negligence" really means. To more fully explain it, one may well want to go beyond the legal definition — not acting as a reasonable person would act — and focus on the verb "neglect" and on what that means. Note how the enthymeme works here:

> *Premise (unstated):* Two variants of the same word ("to neglect" and "negligence") should mean much the same thing.
>
> *Premise (stated):* "To neglect" means "to fail to care for or attend to properly."[90]
>
> *Premise (may be unstated):* Mary failed to attend to her driving properly or she would have slowed down.
>
> *Conclusion:* Mary was negligent in driving so fast.

Employing this rhetorical device may well lead to the same conclusion as the straightforward application of the reasonable-person test. You can certainly argue that a person in Mary's circumstances would have slowed down (and indeed you must argue that legally). What the definitional approach gives you is a different set of words that may catch the audience better. The premise of "lack of attention" may be more convincing than the premise of "reasonable person."

In each of these two examples, the argument's strength depends on the audience's agreeing with the first premise — that noble is as noble does and that the meaning of the noun term of art such as "negligence" should be controlled by (or at least affected by) the definition of the verb form. If the audience does not agree that these premises are generally true, then the arguments have little force.

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[89] *Id.*, 2.23.2, at 191.

[90] AM. HERITAGE DICTIONARY, *supra* note 19.

The topic of "more and less" is subtler, but the strength of the argument based on this topic is equally dependent on the audience's agreeing with this proposition, as stated by Aristotle: "If something is not the fact in a case where it would be more [expected], it is clear that it is not a fact where it would be less."[91] For example, "If not even the gods know everything, human beings can hardly do so."[92] A variant would be that if something true is less likely to be true than your particular facts, then your facts seem more plausible. For example, if someone will run a red light in the middle of the day when he or she is not in a hurry, then that person is more likely to do so during rush hour when late for a meeting. If the audience does not buy into the underlying "more and less" premise, then the enthymeme will not persuade. Aristotle identifies this premise as a nearly universally agreed-upon (or common) one. Nonetheless, as with most enthymemes, the proposition should not be overstated. One is dealing in likelihoods, not certainties.

The third general topic to be considered is what motivates people, or as Aristotle puts it, "what turns the mind in favor and what turns the mind against something and for what reasons people both act and avoid action."[93] This topic illustrates most clearly the idea that you must understand the audience and connect to its values. Aristotle gives this example of factors that impel actions: "[consider] if [an action was] possible and easy and advantageous to a person or friends or harmful to enemies and, if punishable, [consider whether] the punishment is less than the reward of the action."[94] People are, of course, motivated by things other than material gain, such as morality and legality, and these motivations, too, need to be appreciated as sources from which to draw premises.

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[91] *Rhetoric*, *supra* note 1, 2.23.4, at 192 (alteration in the translation).

[92] *Id.*

[93] *Id.*, 2.22.21, at 200.

[94] *Id.* (alterations in the translation).

Ultimately, Aristotle creates a psychology of human motives and values that is well worth reading. His focus on understanding the psychology of the actor (such as a wrongdoer) and of the audience highlights that persuasion is based largely on the speaker's ability to tap into shared understandings about life. That is, a speaker who understands what motivates people to act wrongly — and who understands this in the same way that the audience does — will be more persuasive than one who does not. Put more simply, to use enthymemes successfully, a speaker must understand how the audience thinks.

3. Recognizing Enthymemes

Enthymeme hunting is useful. Recognizing enthymemes and then trying to construct unstated premises that support them helps you understand the argument better, helps you see strengths and weaknesses in your position and the other side's, and helps you connect to the audience more effectively. In the Zande example discussed above, understanding the Zande sense of magic as well as one's own sense of the world helps the speaker bridge the gap. If you can make the implicit premises explicit, you can more readily test them for marketability and believability, and you can explain them more thoroughly and accurately to the audience. This use of Aristotelian enthymematic reasoning underlies the advice that David Binder and Paul Bergman give lawyers to investigate facts by "forc[ing] oneself to articulate explicitly the generalizations on which one relies."[95]

Enthymeme hunting is useful in another way as well: it can provide a new window to analyzing and understanding court

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[95] DAVID A. BINDER & PAUL BERGMAN, FACT INVESTIGATION: FROM HYPOTHESIS TO PROOF 92 (1984); *see also* STEFAN H. KRIEGER, RICHARD K. NEUMANN, JR., KATHLEEN H. MCMANUS & STEVEN D. JAMAR, ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS § 13.4 (1999); NEUMANN, *supra* note 18, § 14.4.

decisions.[96] For example, let's hunt for enthymemes underpinning *Brown v. Board of Education*[97] to see whether our understanding of the case can be refreshed or deepened. The issue in *Brown* was whether, under the 14th Amendment, the plaintiffs were correct in contending that "segregated public schools are not 'equal' and cannot be made 'equal,' and that hence [the petitioners] are deprived of the equal protection of the laws."[98] Many premises underlie this assertion, and it is interesting to tease some of them out.

The enthymeme states three of its premises:

1. the 14th Amendment requires that all citizens receive equal protection of the laws;

2. segregated public schools are not equal; and

3. separate schools cannot be made equal.

The conclusion that follows from these premises is that having separate schools violates the Equal Protection Clause. Unstated but understood premises include at least the following:

1. public schools are created by laws;

2. laws relating to public education are included within the idea of "protection" of citizens (actually, this was extensively briefed and argued, but in the single passage I have quoted, this premise is unstated; it was explicitly addressed by the *Brown* court[99]);

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[96] *See* AMSTERDAM & BRUNER, *supra* note 7, chs. 6-7 (analyzing Supreme Court cases from a rhetorical perspective); Steven D. Jamar, *Everything Old Is New Again: An Essay Review of Anthony G. Amsterdam & Jerome Bruner,* Minding the Law *(Harv. U. Press 2000)*, 22 PACE L. REV. 155 (2002) (analyzing Supreme Court cases from a rhetorical perspective).

[97] 347 U.S. 483 (1954).

[98] *Id.* at 488.

[99] *Id.* at 489-90.

3. the 14th Amendment's protections apply to the states;

4. there is such a thing as "race";

5. some schools were legally segregated by race;

6. the previously decided case permitting separate-but-equal education was wrongly decided;[100]

7. segregation itself is an evil;[101] and, most profoundly,

8. equality is a matter of heart and mind, not mere objectively measurable criteria.

This last premise warrants close examination because the Court's conception of the core value in the case — equality — underlies the entire decision. The lower courts, relying on *Plessy v. Ferguson*, treated equality as something to be determined solely by quantifiable attributes: "physical plant, curricula, and transportation" and "teacher training, pupil-teacher ratio, extracurricular activities."[102] Competing conceptions of equality could include:

1. evaluation of student performance in school;

2. evaluation of student performance after school (types of jobs, income, etc.);

3. equality of participation in society at large;

4. equality of opportunity in general; and

5. equality as a state of mind — equality as measured by psychological attributes.

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[100] Plessy v. Ferguson, 163 U.S. 537 (1896).

[101] *See Brown*, 347 U.S. at 492.

[102] *Id.* at 486 n.1.

If equality means less than full recognition of the inherent worth and dignity of every person, if it means nothing more than quantifiable equal treatment under the law, then the decision would tend to go one way — toward *Plessy*. But if equality is a loftier ideal than that, then the decision would go quite a different way — toward *Brown*.

The Court articulated this distinction as follows: "Our decision . . . cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education."[103] The Court felt compelled to justify this functional approach to equality. It chose to justify it neither on the grounds of the Declaration of Independence ("We hold these truths to be self-evident, that all men are created equal") nor on the grounds of the guiding premise of the Universal Declaration of Human Rights and all human-rights treaties (all people are of equal inherent worth and dignity). Instead, the Court publicly justified its decision in large part on the role of public education in society at the time:

> In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.[104]

The enthymeme embedded in this paragraph concludes with the proposition that the Court must interpret the Constitution in light of then current conditions in public education. Why must the court do that? What is the unstated premise here? The Court explained that it must determine whether the plaintiffs were being deprived of equal protection when the suit was being litigated. The unstated

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[103] *Id.* at 492.

[104] *Id.* at 492-93.

premise is that the Equal Protection Clause, at least, must be applied to things as they are, not to things as they were. Like other individually protected rights enshrined in the Constitution, equal protection protects people now. It is a present-tense right.

What about the phrase "throughout the Nation"? Faced with four discrete cases, the Court explicitly looked to public education throughout the nation, not just in those four localities. The Court recognized its plenary power and its responsibility to protect rights nationwide.

In support of its reliance on the equality-as-effects premise, the Court described the role of public education in American society. In the passage that follows, the Court explicitly tied public education to commonly held values to justify the remarkable, but absolutely necessary and correct, departure from *Plessy*:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[105]

Note how the Court proves the asserted value of public education as "perhaps the most important function of state and local governments." The Court recites data from which it draws inferences based on often unstated premises. For example, it infers that "great expenditures" on public education show its importance. The

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[105] *Id.* at 493.

unstated premise here is that people spend money on what they value, on what is important to them. Similarly, why does compulsory attendance show the importance of public education? Because given our (also unstated) values of liberty and freedom from compulsion, when we as a society compel something, it reflects a high value.

This glowing assessment of the value and importance of public education is itself but one part of the proof; it is but one premise offered in support of the larger issue. The premise works in part like this: because public education plays such a profound role in our democracy and because equality is a cherished value enshrined in the 14th Amendment, we should make certain that everyone's access to this public good is equal — or as close as possible to equal.

It is still a leap from here to examining "those qualities which are incapable of objective measurement but which make for greatness in a . . . school."[106] The Court identified some of those "intangible considerations" as a student's "ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."[107] The Court went on to state:

> Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates feelings of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone.[108]

Note the startling premise here: equality is a matter of heart and mind — a matter of feelings, not merely a matter of legal standing.

Of course, *Brown v. Board of Education* can be and has been read from many perspectives.[109] I am trying to illustrate Aristotle's

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[106] *Id.* (quoting Sweat v. Painter, 339 U.S. 629, 634 (1950)).

[107] *Id.* (quoting McLaurin v. Oklahoma State Regents, 339 U.S. 637, 641 (1950)).

[108] *Id.* at 494.

[109] *E.g.*, AMSTERDAM & BRUNER, *supra* note 7, at 250-51, 265-81.

teachings about enthymemes at work. In *Brown*, the Court could not simply follow precedent. Nor could it rely solely on textual interpretation of the 14th Amendment or a historical gloss on it. The Court was making a decision that would lead the nation, not follow it; it was making a decision for justice and equality.

In departing from precedent and breaking new ground, the Court chose to base its decision on fundamentally shared values to give the decision legitimacy and persuasiveness. The Court relied most heavily on three shared values: (1) equality, (2) public education, and (3) psychological understandings and evidence. The Court tied its decision to these public values and to a public vision of a better world in the mid-twentieth century — and it did so largely by using the Aristotelian enthymeme. The Court relied not just on law, but also on shared values for the premises to support the conclusion it deemed necessary and proper.

In addition to relying on value-tied *logos*, the Court relied in part on *ethos*. Indeed, the people's perception of the Court's "character" — the Court's legitimacy and credibility — was critical to the general acceptance of the *Brown* decision.

Ultimately, then, the Court persuaded through a carefully crafted enthymematic appeal based on broad cultural values presented by a respected speaker, the Court itself. This is what Aristotle taught.

Aristotle's Teachings on Style

Though I have concentrated primarily on the importance of enthymematic reasoning and connecting one's enthymemes to the audience, Aristotle also had much to say about style. Indeed, the *Rhetoric*'s Book 3 is all about style and format. It is a bit humbling that more than two millenniums ago Aristotle gave the same advice

that we still need to give and heed today.[110] The recommendations of legal-writing texts on style and format are substantively Aristotelian.

Not surprisingly, Aristotle teaches that the speaker's choice of style is to be informed by the audience; one should adopt a style that meets the audience's expectations and values and the needs of the situation. The plain-language movement is an ongoing manifestation of this attention to a style pleasing to a particular audience.[111] Although Aristotle wrote about the spoken word, most of his teachings on style apply to writing as well. A few apt snippets about style:

- "[A]uthors should compose without being noticed and should seem to speak not artificially but naturally. (The latter is persuasive, the former the opposite; for [if artifice is obvious] people become resentful, as at someone plotting against them, just as they are at those adulterating wines.)"[112]

- "Metaphor especially has clarity and sweetness and strangeness, and its use cannot be learned from someone else."[113]

- "[S]peech should have rhythm but not meter; for the latter will be a poem. The rhythm should not be exact; this will be achieved if it is [regular] only up to a point."[114]

Aristotle provides the first and last word about organizing any argument: "There are two parts to a speech; for it is necessary [first]

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110 *See, e.g.*, ANNE ENQUIST & LAUREL CURRIE OATES, JUST WRITING: GRAMMAR, PUNCTUATION, AND STYLE FOR THE LEGAL WRITER (2001); TERRI LECLERCQ, GUIDE TO LEGAL WRITING STYLE (2d ed. 2000); JOSEPH M. WILLIAMS, STYLE: TEN LESSONS IN CLARITY AND GRACE (6th ed. 1999).

111 *See* Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 T.M. COOLEY L. REV. 1 (1992); Joseph Kimble, *Writing for Dollars, Writing to Please*, 6 SCRIBES J. LEGAL WRITING 1 (1996–1997).

112 *Rhetoric*, *supra* note 1, 3.2.4, at 222 (second alteration in the translation).

113 *Id.*, 3.2.8, at 223.

114 *Id.*, 3.8.3, at 237 (second alteration in the translation).

to state the subject and [then] to demonstrate it."[115] Or, as my Advanced Rhetoric teacher in college said it: "State your case and prove it." For the written word as well as the spoken, the audience wants to know, right up front, where you are going. In longer works, a road map is commonly provided.[116] Legal-writing teachers today concur: state your conclusion first, then prove it.[117]

Conclusion

One of Aristotle's most profound insights — one easily forgotten or missed or misunderstood or misapplied — is that people are persuaded by reason because people value reason. Reason can be clouded, manipulated, subverted, and overcome, but the truth remains: people value reason and find reasoned arguments persuasive.

But merely using the forms of reasoning is not enough. The persuasiveness of your argument depends in large measure on how well your reasoning corresponds to what the audience values. What matters most is the connection between the values of the audience and the speaker's rhetoric. This is true for briefs to the court as well as for the opinions of judges. It is what we teach today. And over 2,300 years ago, it is what Aristotle taught Alexander the Great.

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[115] *Id.*, 3.13.1, at 258 (alterations in the translation).

[116] *See* Bradley G. Clary & Deborah N. Behles, *Roadmapping and Legal Writing*, 8 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 134 (2000).

[117] *See, e.g.*, NEUMANN, *supra* note 18, at 96.