THE ROLE OF REASONING AND PERSUASION IN LEGAL WRITING

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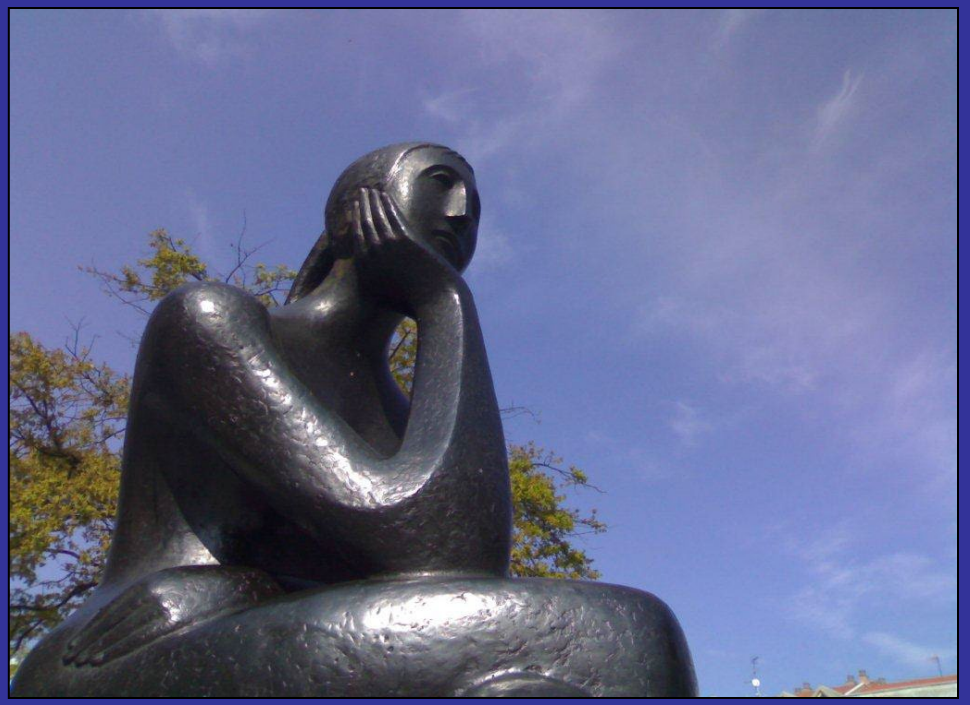
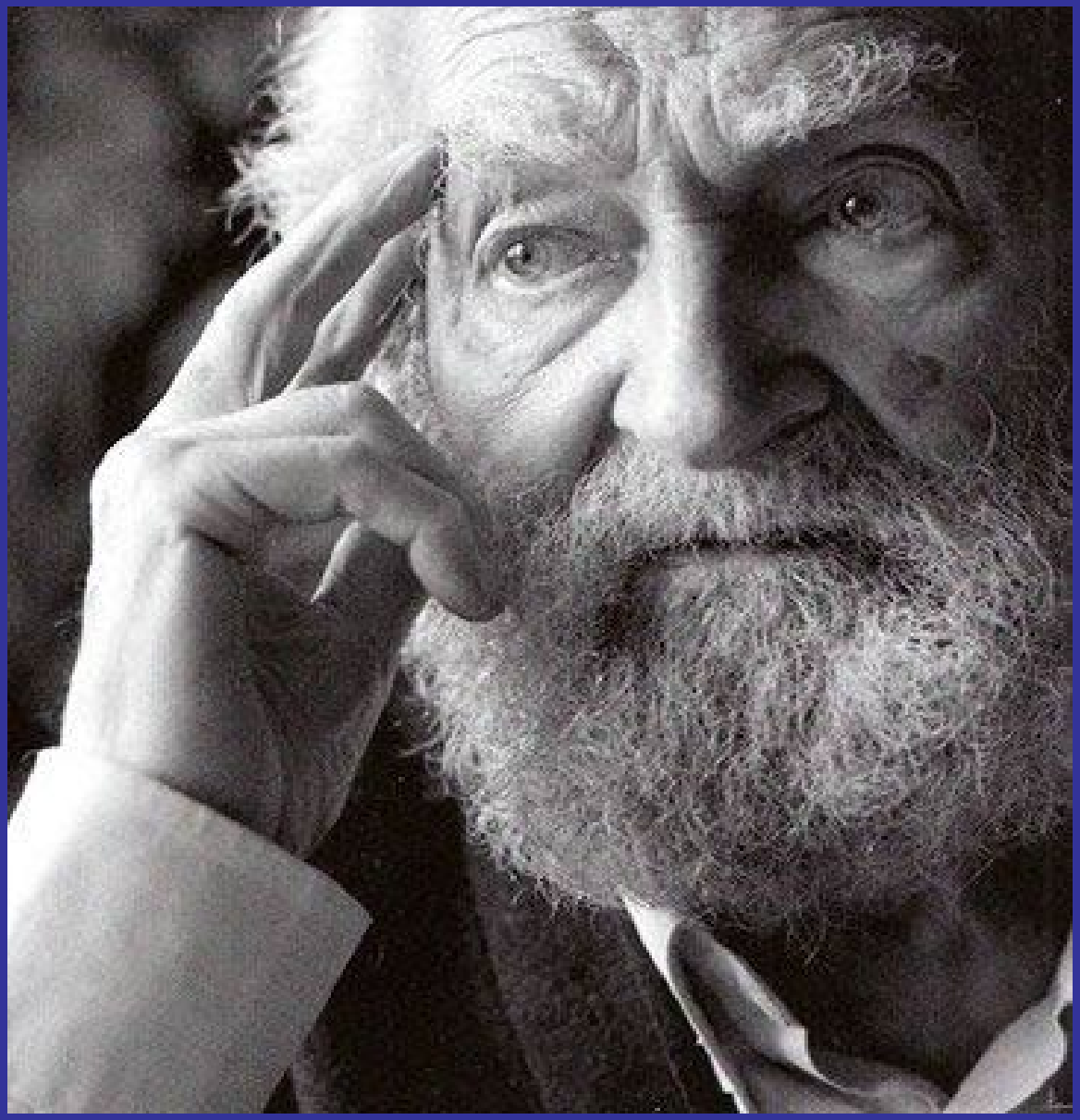
Reasoning



Emotion



How

Do

We

Think?

HYPOTHESIS: TWO TYPES OF THINKING

QUICK

- Fast
- Intuitive
- Emotional
- Associative
- Pragmatic
- Unconscious
- Uncontrollable
- Heuristic

DELIBERATE

- Slow
- Analytical
- Rational
- Sequential
- Logic-based
- Rule-bound
- Conscious
- Controllable

MUCH OF REASONING IS CATEGORIZATION

Categorization is one of the most basic functions of living creatures. We live in a categorized world – table, chair, male, female, democracy, monarchy – every object and event is unique, but we act towards them as members of classes.

Eleanor Rosch
University of California, Berkeley

CATEGORIES OF LAW

- Property Law
- Contract Law
- Tort Law
- Family Law
- Criminal Law
- Tax Law
- Environmental Law
- Trial Procedure
- Appellate Procedure
- Evidence Law

FOR CATEGORIES TO WORK

Categories work best when –

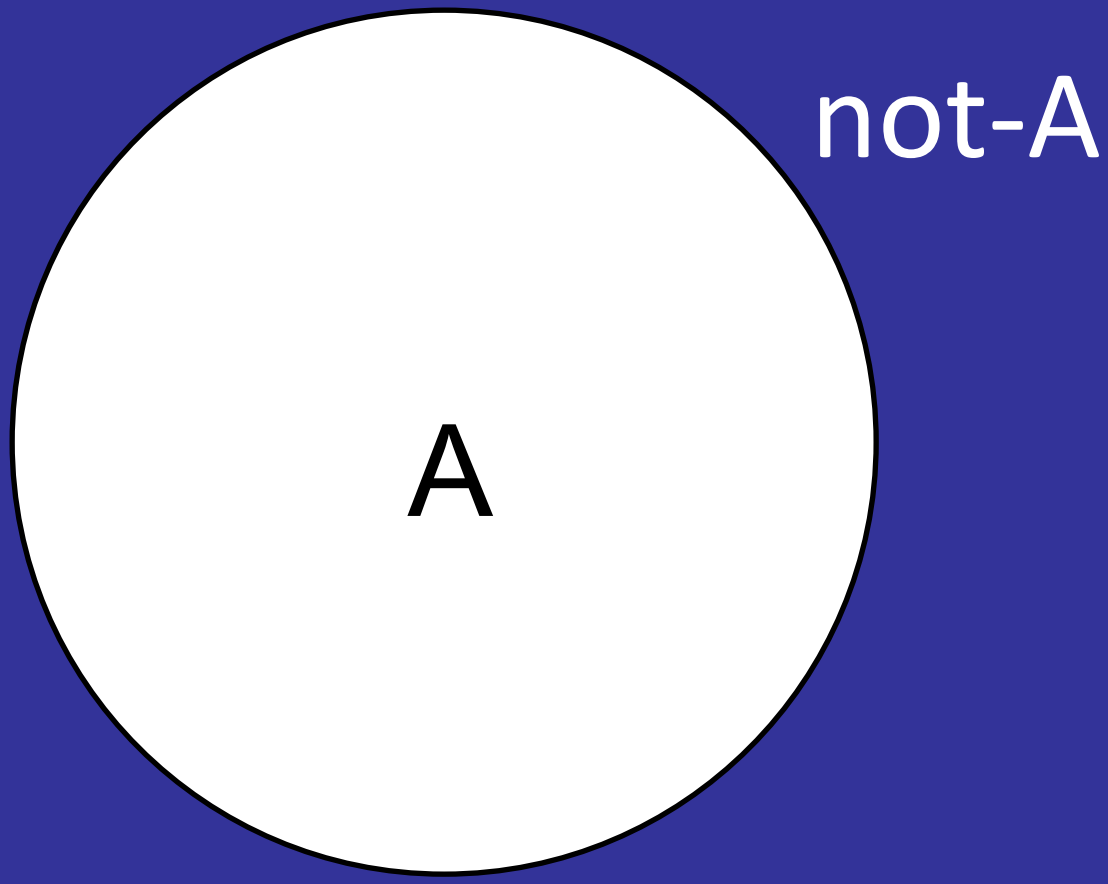
- the things inside each category are ***homogeneous***
- the ***boundaries*** of the categories are ***clear***
- the categories are ***mutually exclusive***

EULER CIRCLES

Leonhard Euler
(1768)

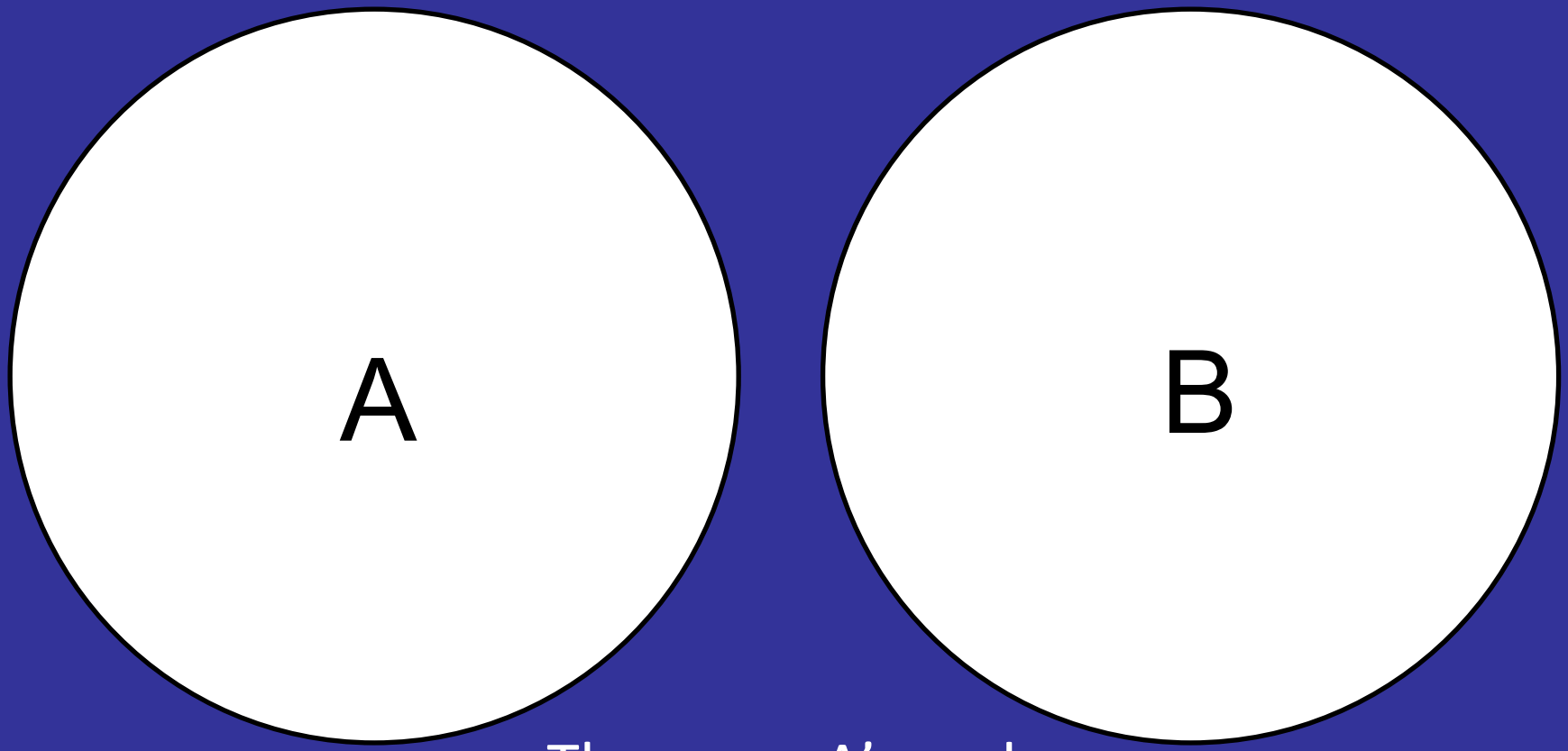
An easy way to visualize categories was developed by Swiss mathematician Leonhard Euler in 1768 – Euler Circles

EULER CIRCLES



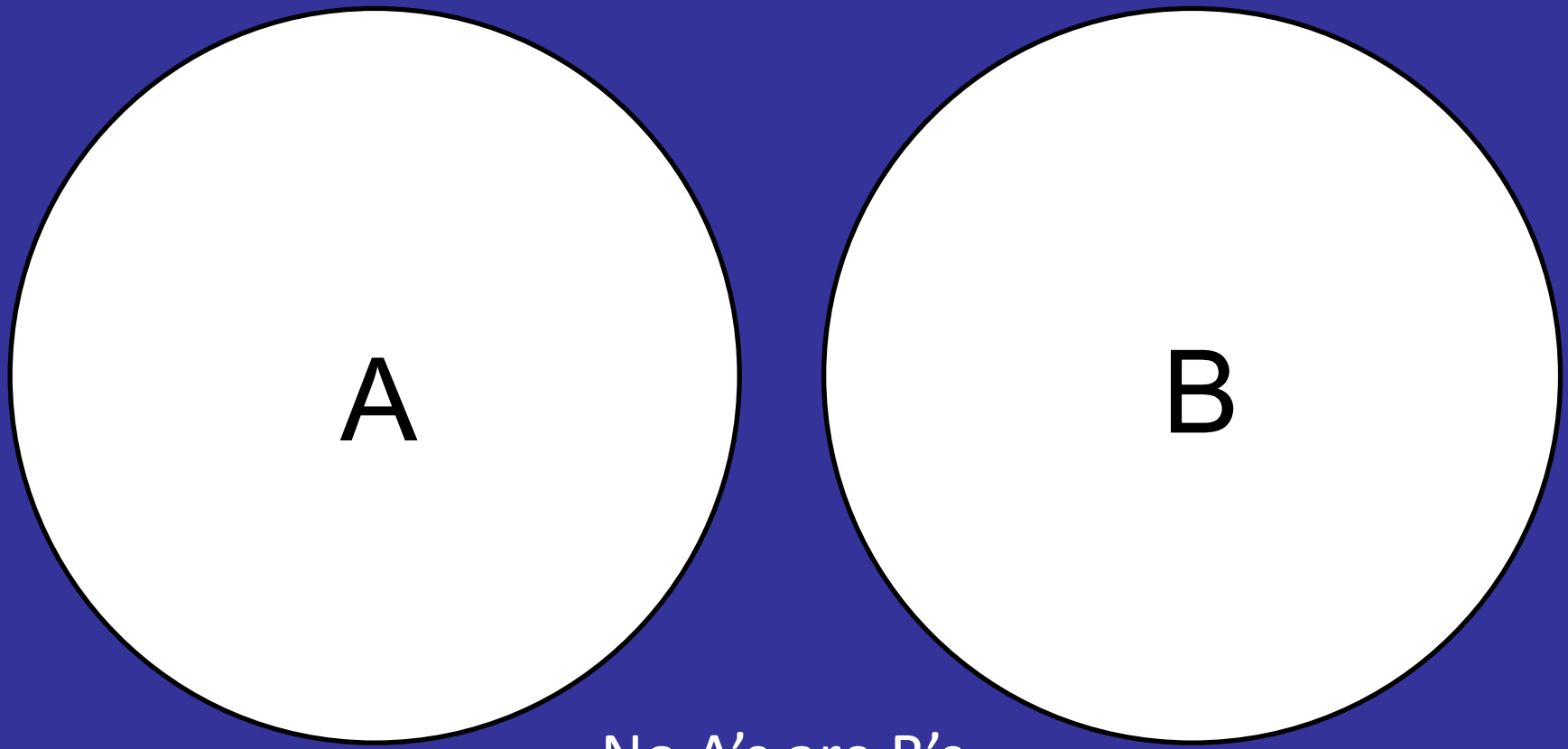
A thing is either A or it is not-A

EULER CIRCLES



There are A’s and
there are B’s

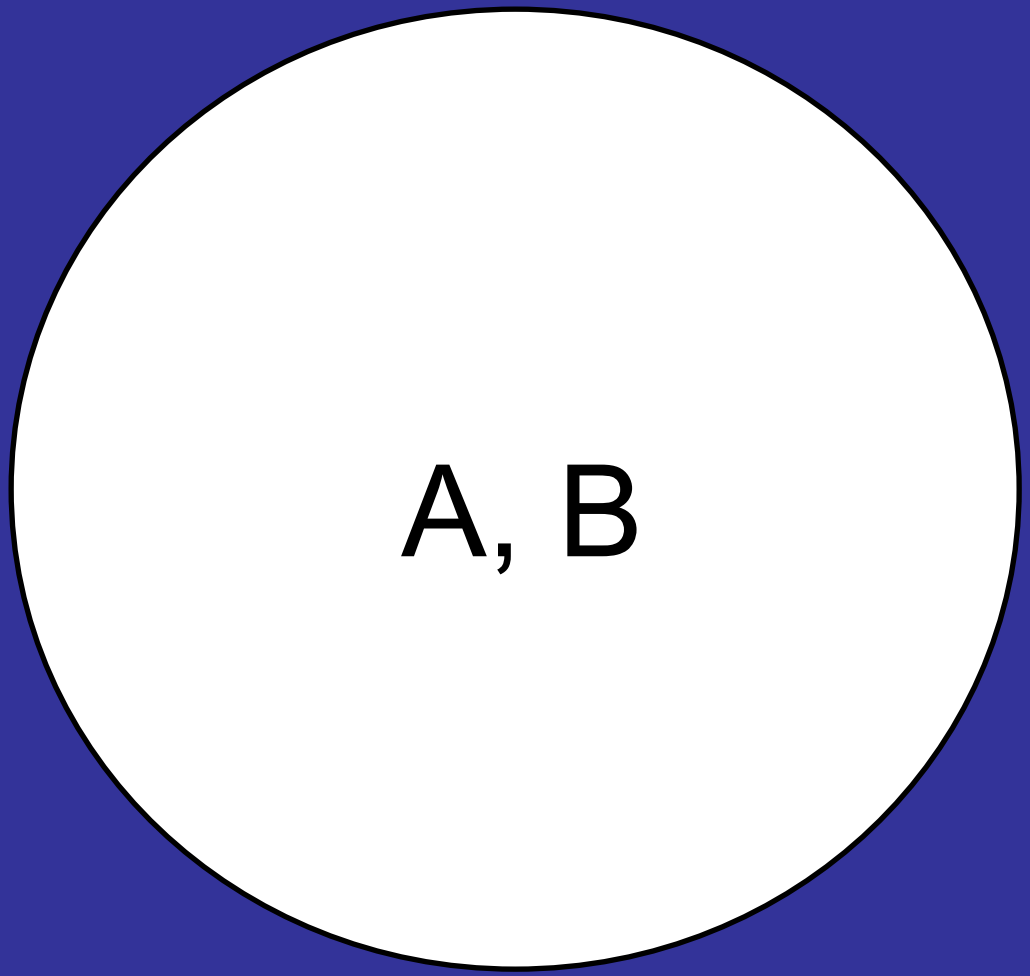
EULER CIRCLES



No A’s are B’s

No B’s are A’s

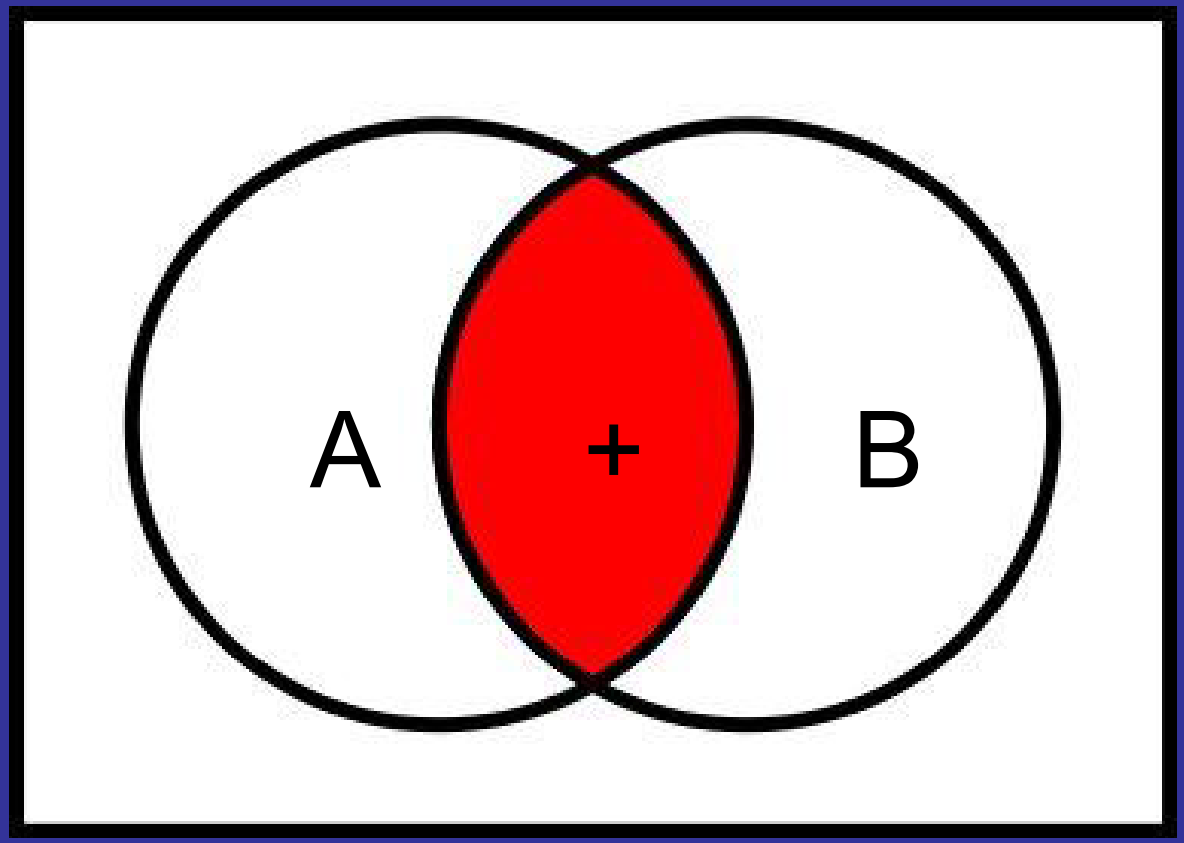
These A’s & B’s are “disjoint”



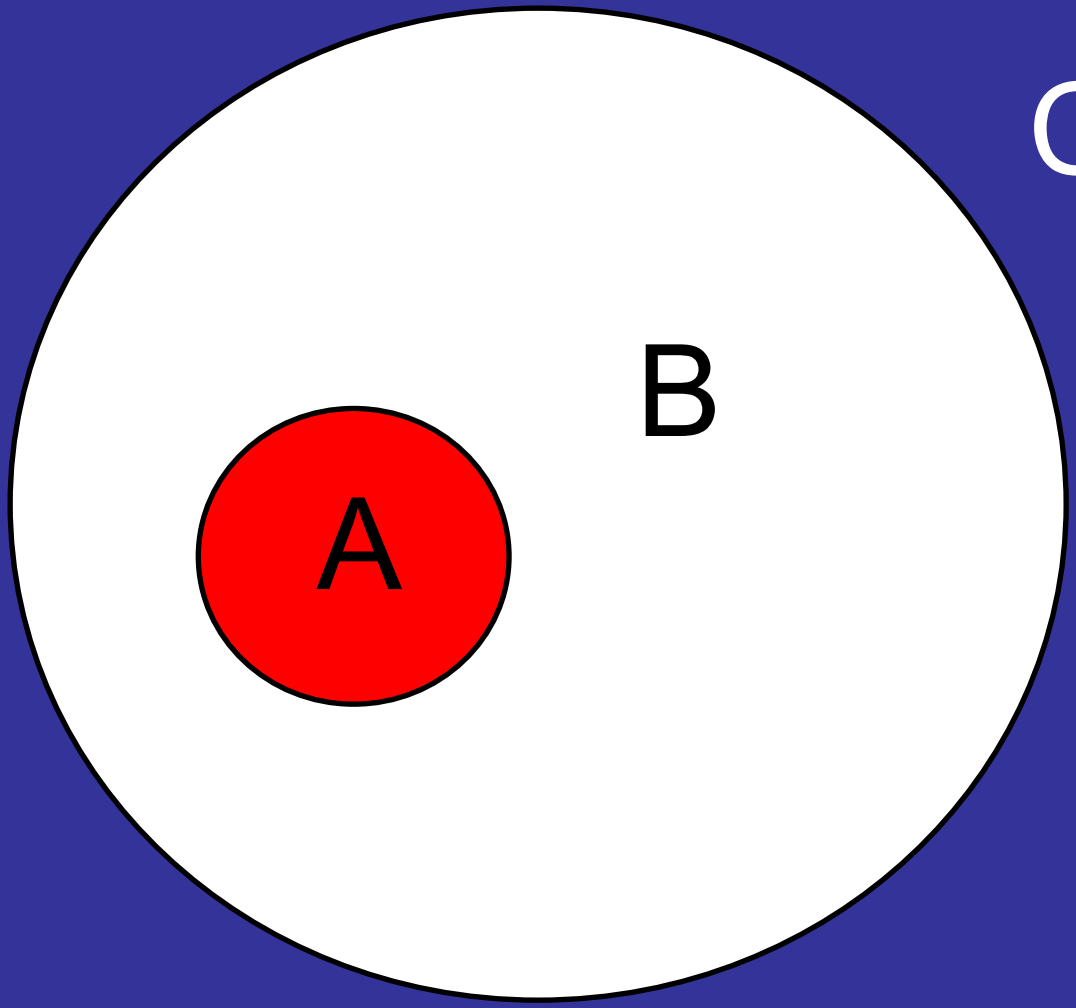
All A’s are B’s

All B’s are A’s

These A’s and B’s are “Conjoint”



Some A's are B's
Some B's are A's
Some things are both A & B (+)



All A’s are B’s
Some B’s are A’s
No A’s are C’s; no C’s are B’s

LOGICAL REASONING

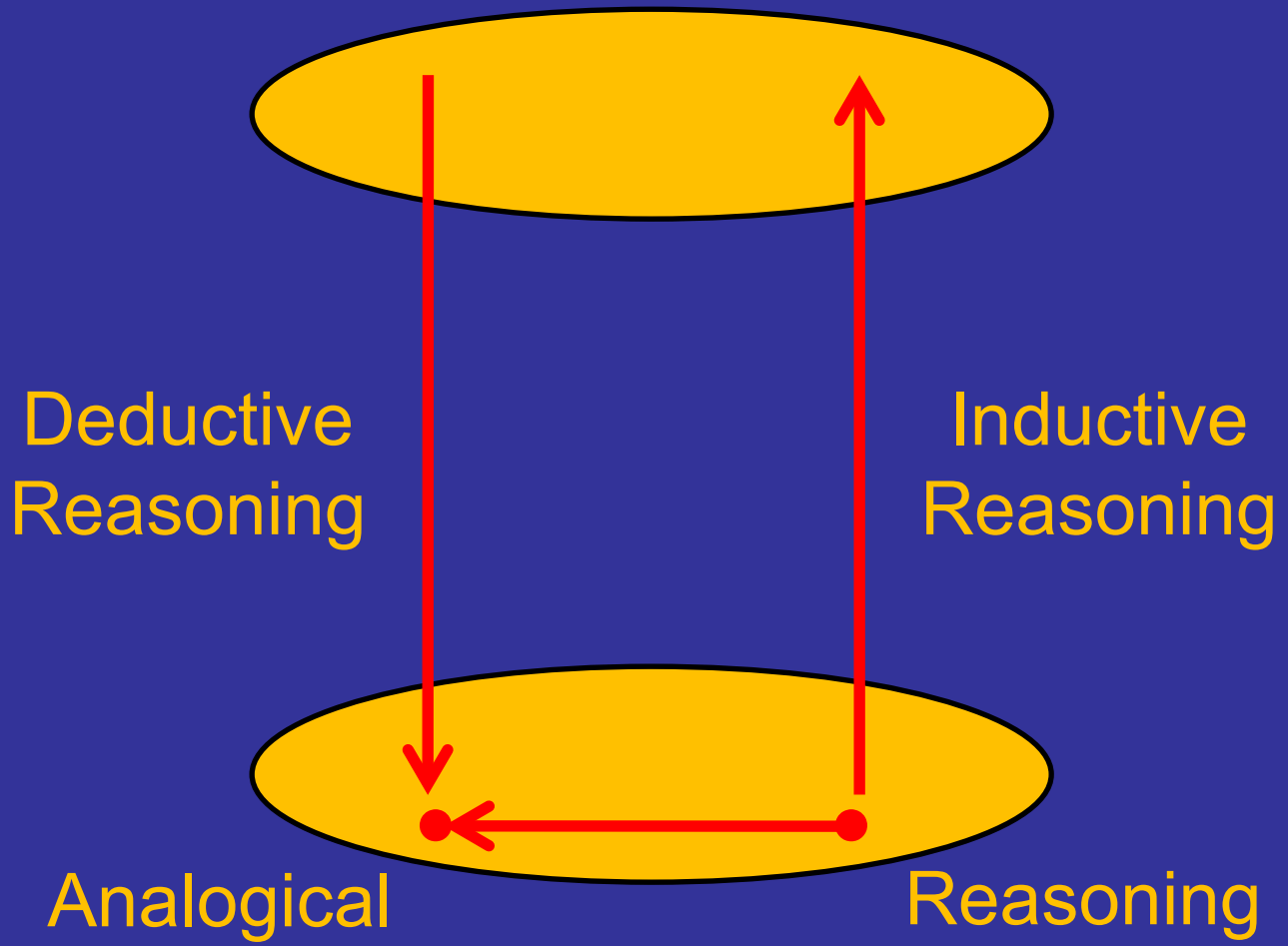
There are three types of logical reasoning:

Deductive – where two overlapping Premises lead by necessity to a Conclusion

Inductive – where multiple instances suggest a unifying principle which is identified and then tested to determine its validity

Analogical – where something unfamiliar is compared to things familiar until the greatest similarity is determined; after that, the new thing is placed in the category of the old, and is treated like the old

General

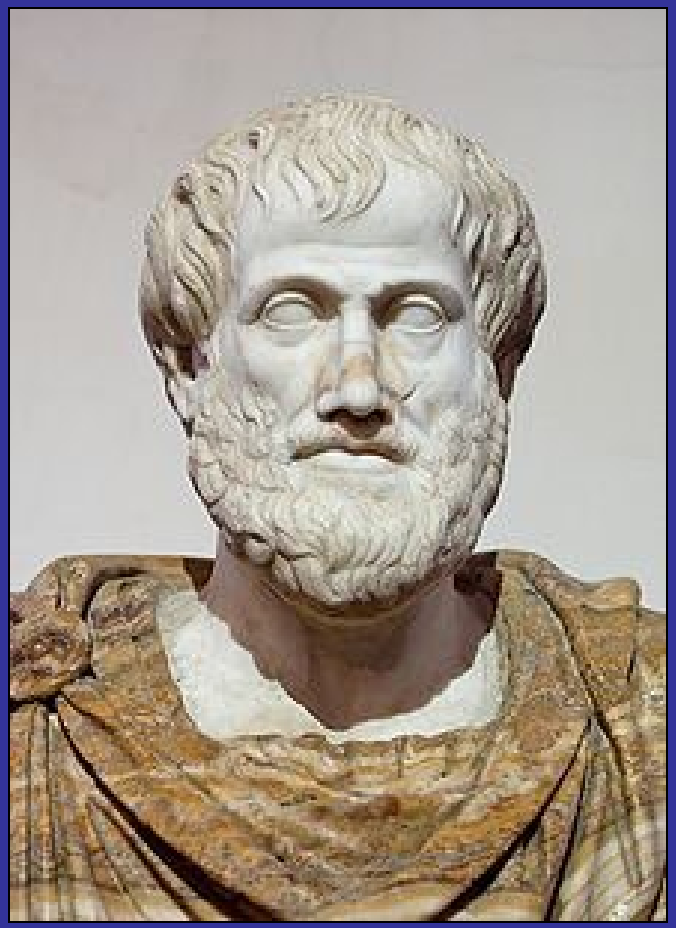


Specific

STRENGTH OF TYPES OF LOGICAL REASONING

TYPE	PREMISES	CONCLUSION
Deductive:	True →	Certain
Inductive:	True →	Probable
Analogical:	True →	Sufficient

DEDUCTIVE REASONING (AS ENVISIONED BY ARISTOTLE)



Syllogism & Implication

ARISTOTLE'S DEDUCTIVE REASONING
THE CATEGORICAL SYLLOGISM

All men are mortal.

Socrates is a man.

Therefore, Socrates is mortal.

General

Specific

ARISTOTLE'S CATEGORICAL SYLLOGISM
(showing the three propositions)

All men are mortal. (Major Premise)

Socrates is a man. (Minor Premise)

Therefore, Socrates is mortal. (Conclusion)

ARISTOTLE'S CATEGORICAL SYLLOGISM
(showing the three Terms)

All men are mortal.

Socrates is a man .

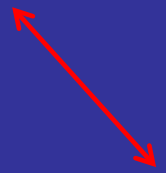
Therefore, Socrates is mortal.

Categorical Syllogisms have three "Terms":
The Major Term, the Minor Term, the Middle Term

ARISTOTLE'S CATEGORICAL SYLLOGISM
(with Minor Term marked)

All men are mortal.

Socrates is a man.



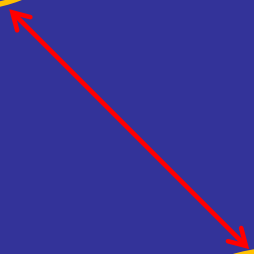
Minor Term

Therefore, Socrates is mortal.

The Minor Term links the Minor Premise to the Conclusion

ARISTOTLE'S CATEGORICAL SYLLOGISM
(with Middle Term marked)

All men are mortal.



Middle Term

Socrates is a man.

Therefore, Socrates is mortal.

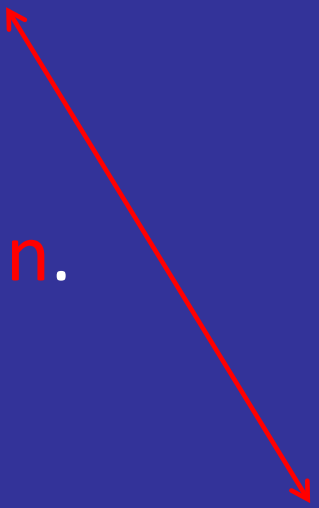
The Middle Term links the Major Premise to the Minor Premise

ARISTOTLE'S CATEGORICAL SYLLOGISM
(with Major Term marked)

All men are mortal.

Socrates is a man.

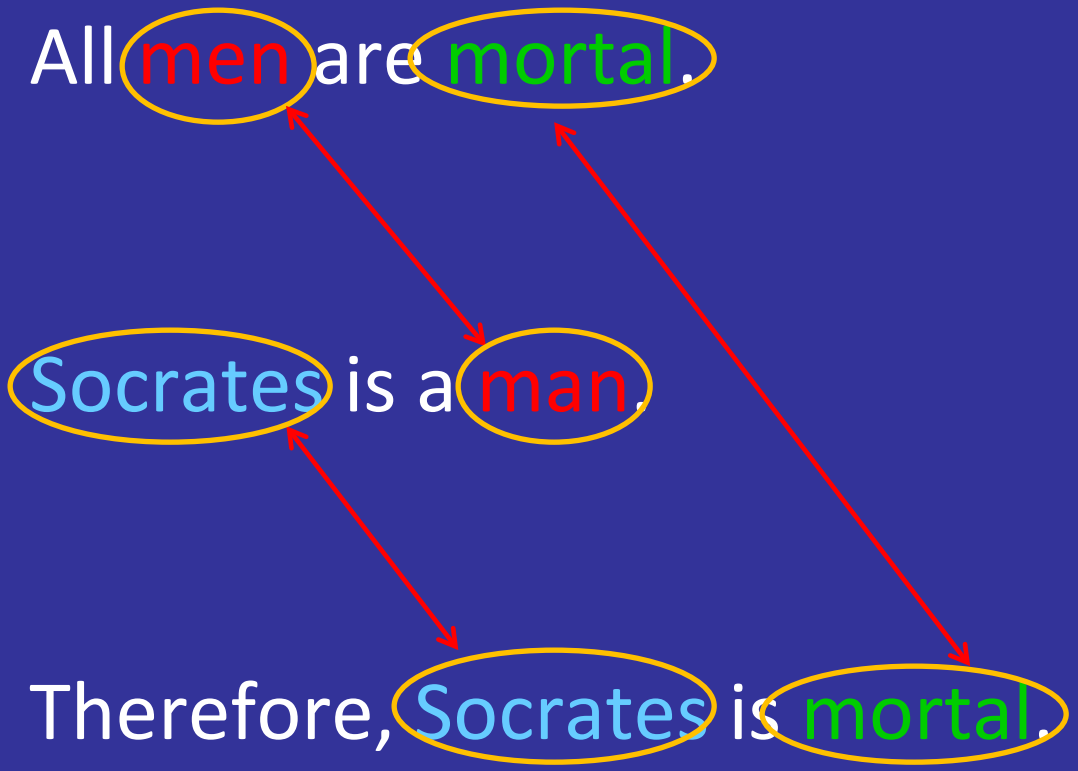
Therefore, Socrates is mortal.



Major Term

The Major Term links the Major Premise to the Conclusion

ARISTOTLE'S CATEGORICAL SYLLOGISM
(all Propositions and Terms marked)

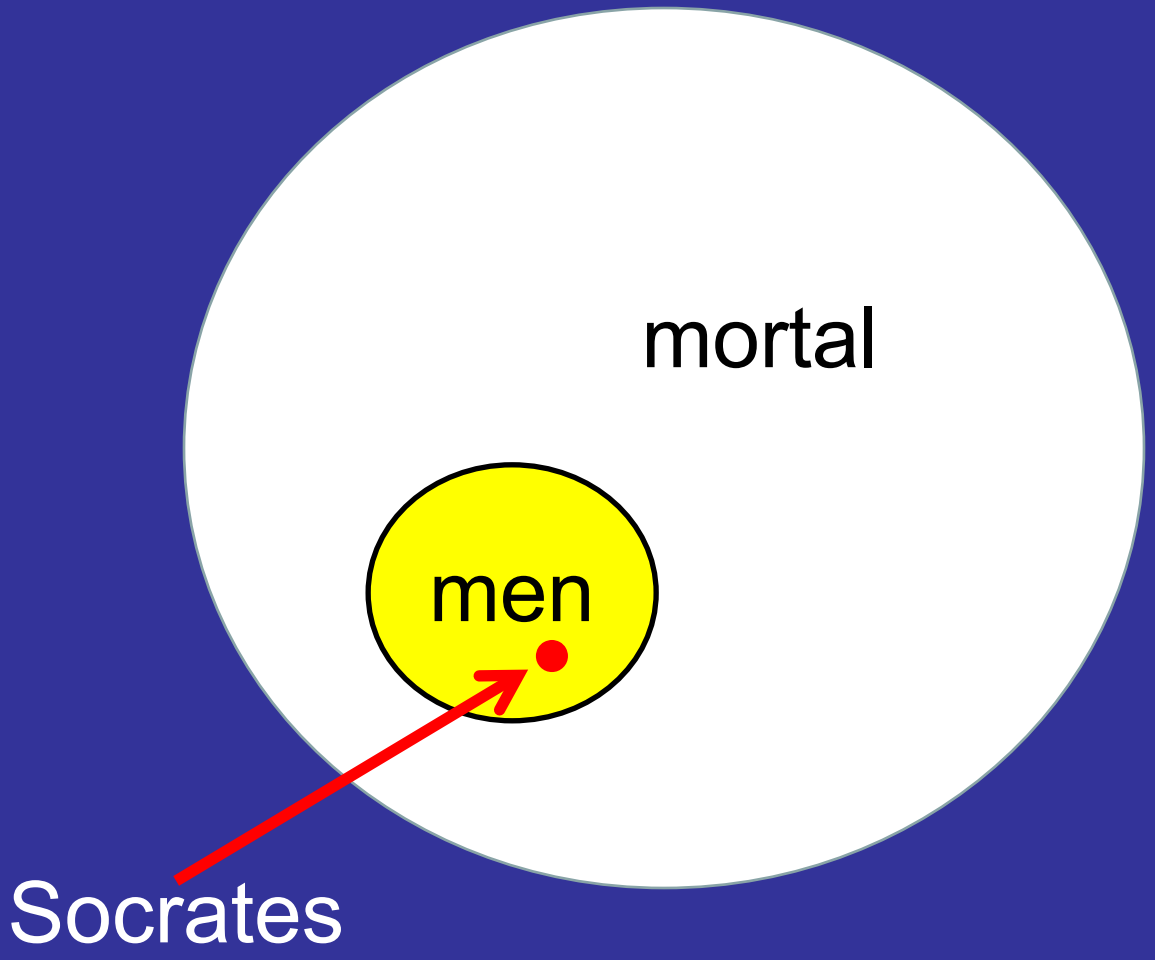


Major Premise

Minor Premise

Conclusion

Depicting the Categorical Syllogism using Euler Circles



ARISTOTLE'S CATEGORICAL SYLLOGISM

[stated abstractly]

All B's are C's

A is a B

(therefore)

A is a C

(Aristotle invented variables)

ARISTOTLE'S CATEGORICAL SYLLOGISM

B's C's
All men are mortal.

A B
Socrates is a man.

A C
Therefore, Socrates is mortal.

All B's are C's
A is a B

A is a C

DEDUCTIVE REASONING - IMPLICATION
Rule #1

P implies Q

If P then Q

$P \rightarrow Q$

$P \supset Q$

[the Antecedent] implies [the Consequent]

a “conditional proposition”

Modus Ponens

DEDUCTIVE REASONING - IMPLICATION
Rule #2

Not-Q implies Not-P

If Q is false, then P is false

Not Q → Not P

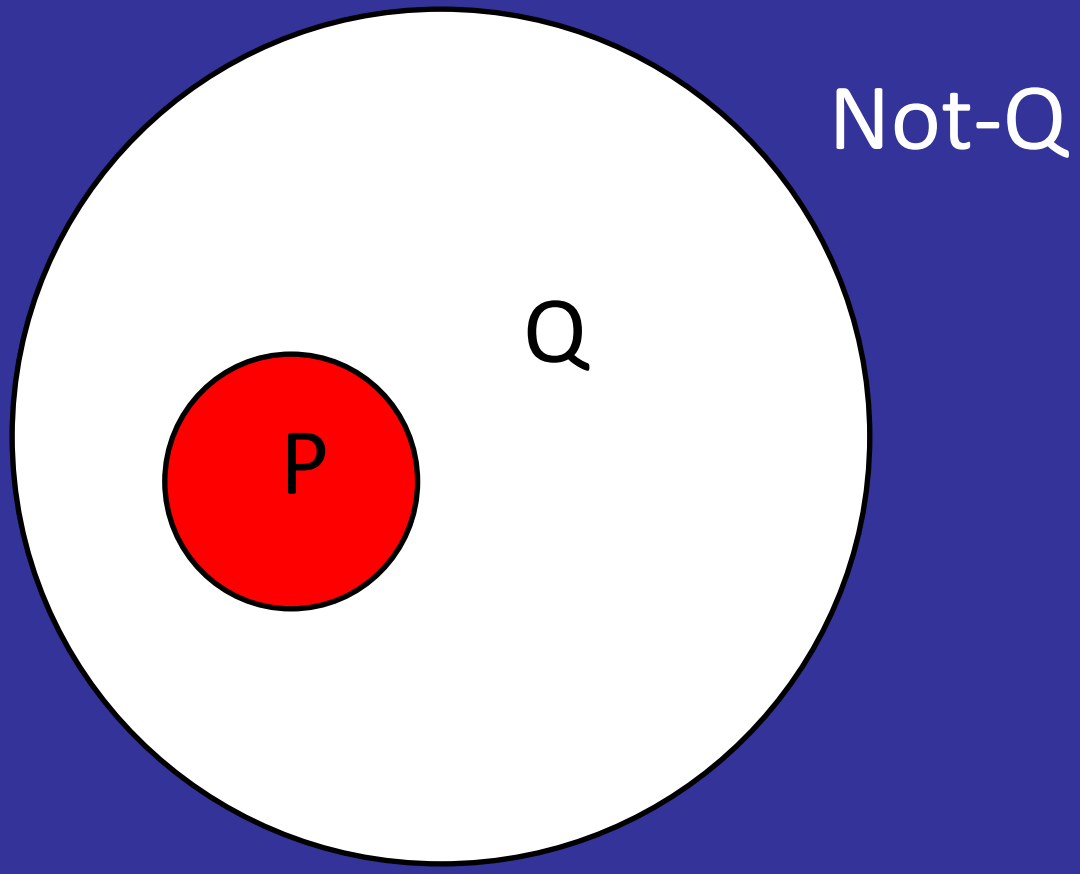
Not Q ⊃ Not P

Denying the Consequent negates the Antecedent

Modus Tollens

Contrapositive

Deductive Reasoning – Implication Expressed as Euler Circles



"P implies Q"

"Not-Q implies Not-P"

DEDUCTIVE REASONING – IMPLICATION

Rule #1

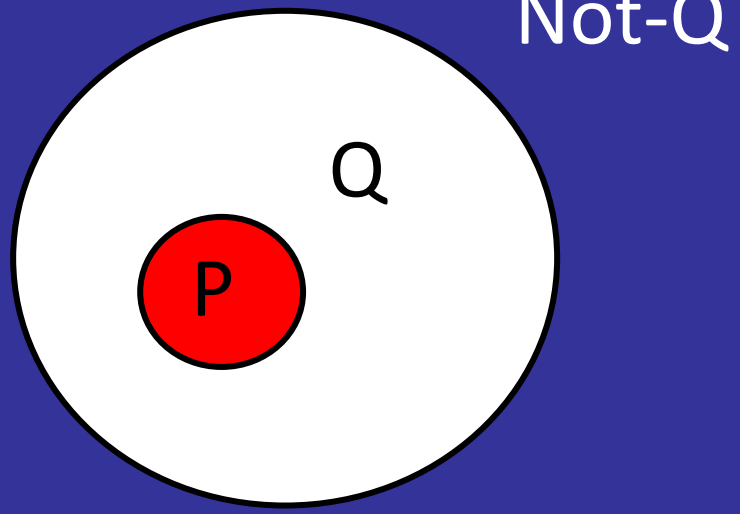
Modus Ponens

(The way that affirms by affirming)

(1) P implies Q.

(2) P.

(3) Q.



"P implies Q"

DEDUCTIVE REASONING – IMPLICATION

Rule #2

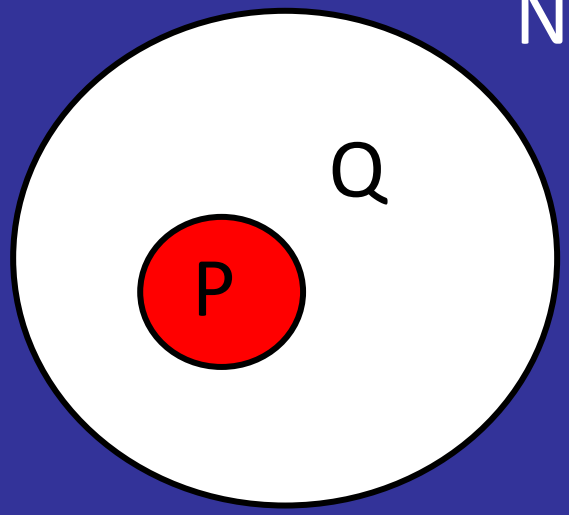
Modus Tollens

(The way that denies by denying)

(1) P implies Q.

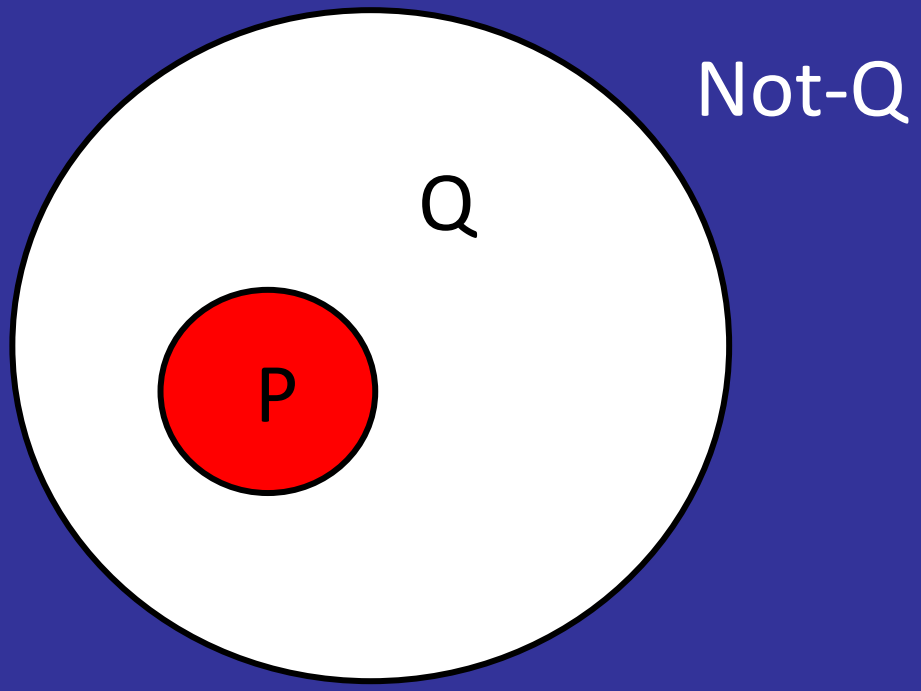
(2) Not-Q.

(3) Not-P.



"Not-Q implies Not-P"

DEDUCTIVE REASONING - IMPLICATION



Of the four possible implications:

Valid	Invalid
$P \longrightarrow Q$	$Q \longrightarrow P$
$\text{Not-}Q \longrightarrow \text{Not-}P$	$\text{Not-}P \longrightarrow \text{Not-}Q$

DEDUCTIVE REASONING – IMPLICATION EXAMPLE 1

Modus Ponens (Affirming the Antecedent)

(1)If it rained last night, then the sidewalk is wet.

(2) It rained last night.

(3) The sidewalk is wet.

Valid Reasoning

DEDUCTIVE REASONING – IMPLICATION
EXAMPLE 2

Modus Tollens
(Negating the Consequent)

(1)If it rained last night, then
the sidewalk is wet.
(2) The sidewalk is dry.
(3) It did not rain last night.

Valid Reasoning

DEDUCTIVE REASONING – IMPLICATION
EXAMPLE 3

Negating the Antecedent

(1)If it rained last night, then
the sidewalk is wet.
(2) It did not rain last night.
(3) The sidewalk is dry.

DEDUCTIVE REASONING – IMPLICATION
EXAMPLE 3

Negating the Antecedent

(1)If it rained last night, then
the sidewalk is wet.
(2) It did not rain last night.
(3) The sidewalk is dry. X

Invalid Reasoning – a Fallacy

DEDUCTIVE REASONING – IMPLICATION
EXAMPLE 4

Affirming the Consequent

(1)If it rained last night, then the sidewalk is wet.

(2) The sidewalk is wet.

(3) It rained last night.

DEDUCTIVE REASONING – IMPLICATION
EXAMPLE 4

Affirming the Consequent

(1)If it rained last night, then
the sidewalk is wet.
(2) The sidewalk is wet.
(3) It rained last night. X

Invalid Reasoning – a Fallacy

Robinson vs. DuPont, 923 S.W.2d 549 (Tex. 1995)

(1)Benlate causes Brown Leaf Disease.

(2) After spraying trees with DuPont's fertilizer, Plaintiff's trees exhibited Brown Leaf Disease.

---

(3) DuPont's fertilizer contained Benlate.

This is Modus Ponens: Benlate → BLD

Fallacy of Affirming the Consequent

However, Benlate is a *possible* cause

INDUCTIVE REASONING - GENERALIZATION

Swan A is white

Swan B is white

Swan C is white

All swans are white

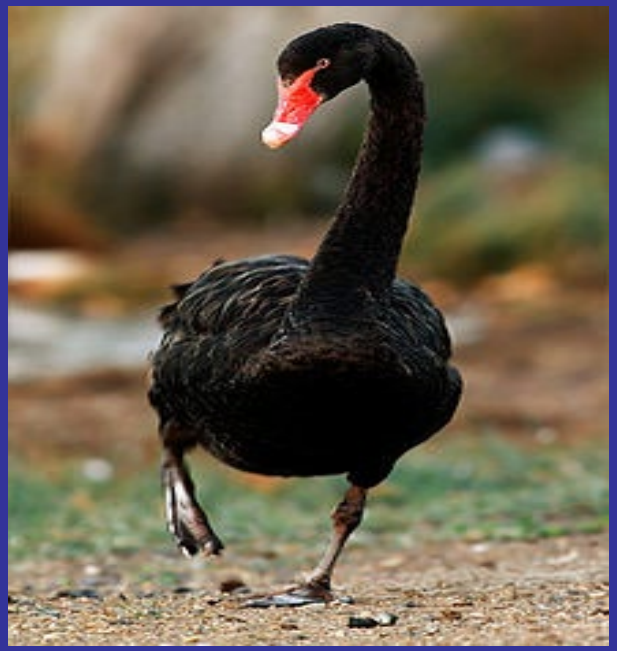
INDUCTIVE REASONING - GENERALIZATION

Swan A is white

Swan B is white

Swan C is white

All swans are white



A Black Swan

Fallacy of Hasty Generalization

INDUCTIVE REASONING – STATISTICAL GENERALIZATION

(1) A representative sample is selected.

(2) Sample is 70% green

---

(3) Population is 70% green

1948 Presidential Election

(1) Surveys of sample groups

(2) Majority of samples supports Dewey

(3) Majority of Americans support Dewey

Dewey defeats Truman!

1948 Presidential Election

(1) Last survey 30 days before the election

(2) Majority supports Dewey

(3) Dewey defeats Truman X

Fallacy of Non-Representative Sample

REASONING BY ANALOGY

ANALOGICAL REASONING

If it walks like a duck,

quacks like a duck,

looks like a duck

It's probably a duck.

REASONING BY ANALOGY

Comparing *common features* vs. *essential characteristics*.

- Homology – comparison based on common features.

- Shared Abstraction - comparison based on essential characteristics.

Comparing *items* is simpler than comparing *relationships.*

Example: “Hand is to fingers as foot is to ____.”

Example: “Hand is to palm as foot is to ____.”

REASONING BY ANALOGY

(1) A belongs in Category Y

(2) B is like A

(3) B belongs in Category Y

REASONING BY ANALOGY

(1) A belongs in Category Y

(2) B is like A in some respects

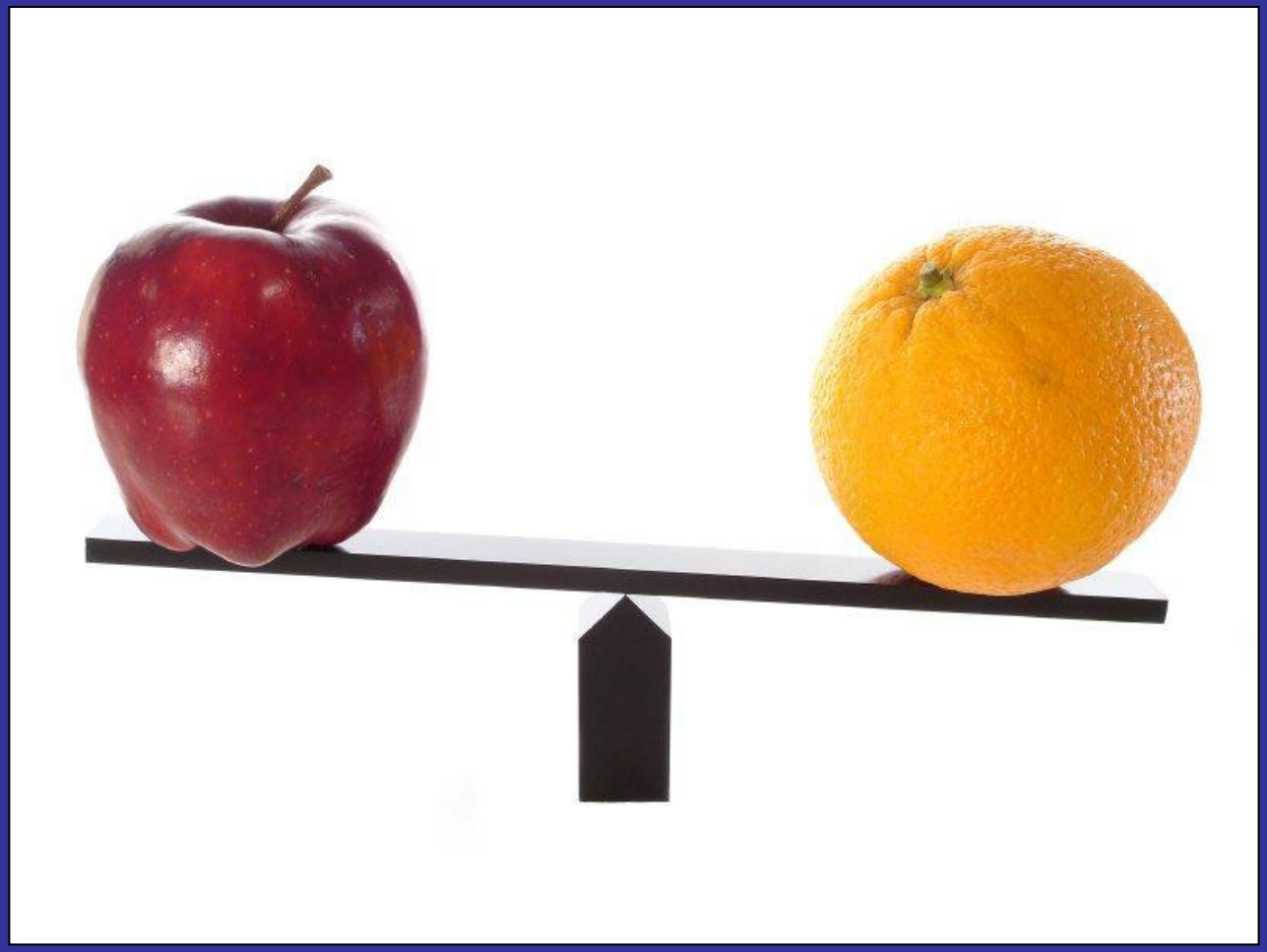
(3) B is unlike A in other respects

(4a) B belongs in Category Y

or

(4b) B does not belong in Category Y

Fallacy of False Analogy



DEDUCTIVE REASONING (LAW)

(1) Innkeepers are liable for theft of property.

(2) The defendant is an innkeeper.

---

(3) The defendant is liable for theft of property.

Innkeeper Category

DEDUCTIVE REASONING (LAW)

(1) Ferry operators are not liable for theft.

(2) The defendant is a ferry operator.

---

(3) The defendant is not liable for theft.

Ferry Operator Category

"CLOSE CASE" DOESN'T FIT WELL INTO ESTABLISHED CATEGORIES SO USE ANALOGICAL REASONING

(1) Innkeepers are liable for theft.

(2) Ferry operators are not liable for theft.

(3) Defendant's ferry provides overnight lodging; purse stolen from private cabin

---

(4a) Defendant is liable for theft.

or

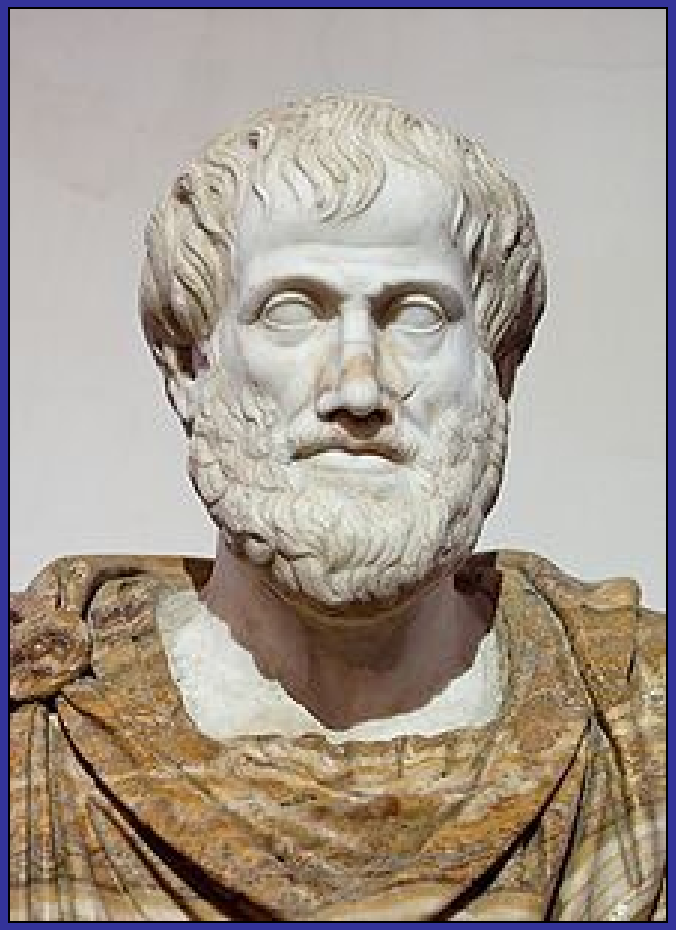
(4b) Defendant is not liable for theft.

PERSUASION
(EFFECT OF SPEAKER ON AUDIENCE)

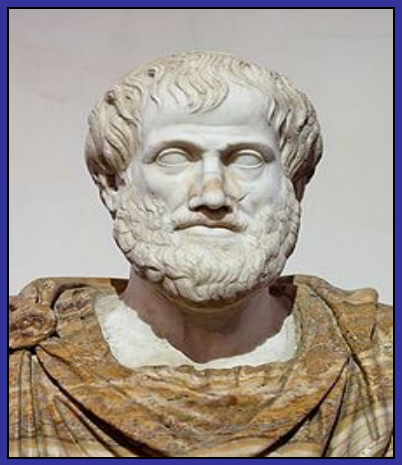
THE AUDIENCE IN A LAWSUIT

- Parties
- Jury
- Trial Judge
- Appellate Panel
- Supreme Court
- Public
- History

ARISTOTLE'S RHETORIC



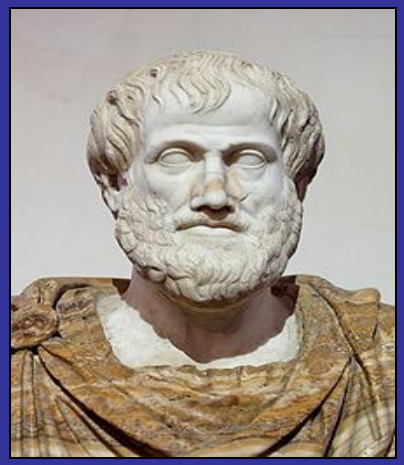
ARISTOTLE'S RHETORIC



Rhetoric--

"may be defined as the faculty of observing in any given case the available means of persuasion."

ARISTOTLE'S RHETORIC

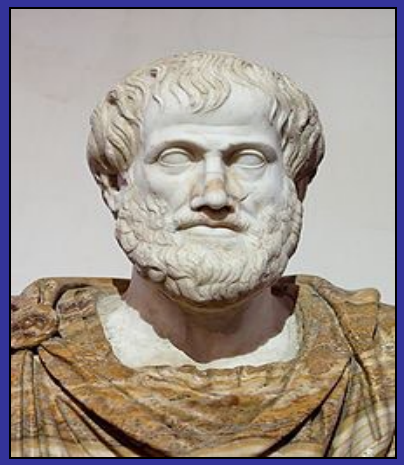


Ethos

Logos

Pathos

ARISTOTLE'S RHETORIC

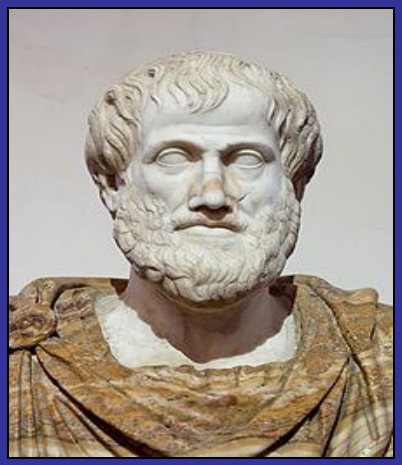


Ethos - Character

Logos - Rational

Pathos - Feelings

ARISTOTLE'S RHETORIC: ETHOS

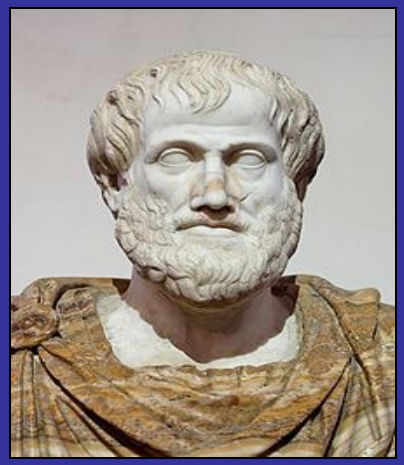


Ethos --

"[There is persuasion] through character whenever the speech is spoken in such a way as to make the speaker worthy of credence. . . . And this should result from the speech, not from the previous opinion that the speaker is a certain kind of person."

Aristotle

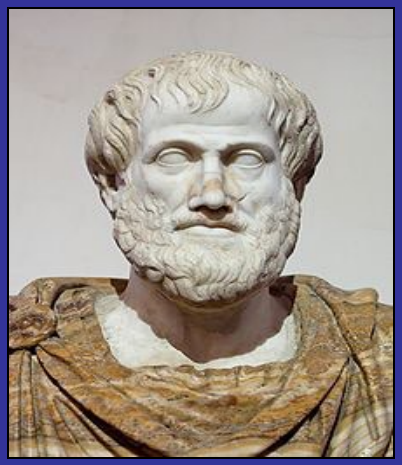
ARISTOTLE'S RHETORIC: LOGOS



Logos --

is an argument that persuades through reasoning, often sequential steps, and often arguing from premises to conclusions. This reasoning is usually in the form of a partial Syllogism, which Aristotle called an "Enthymeme," that invokes themes familiar to the audience.

ARISTOTLE'S RHETORIC: PATHOS



Pathos --

is influencing the audience by emotional appeal, rather than logical argument. Emotions might include love, fear, patriotism, guilt, hate, joy, pity, attraction, etc.

Done by using words in a way that their emotive meaning affects the audience independently from their logical meaning.

ETHOS

- The impression you create with the audience
- The personal character you project
- Good sense
- Goodwill
- Fairmindedness
- Trustworthiness
- Knowledgeability
- Careful preparation
- Poise

ETHOS

"To earn credibility, the speaker has to build a speech with excellent sources that is tailored to meet the specific needs of the audience, and then deliver that speech with confidence and excellent presentation skills"

LOGOS

- Deductive reasoning (syllogism; enthymeme; implication)
- Inductive reasoning (generalization)
- Analogical reasoning (comparison)
- Fallacious reasoning (illogical arguments)
- Indirect argument (negating the premise leads to logical contradiction)

LOGOS: PERSUASION THROUGH DEDUCTIVE REASONING

- Syllogism (overlapping Premises lead with certainty to Conclusion)
- Enthymeme (Syllogistic argument, usually with an unstated Major Premise, using themes that will resonate with the audience; Conclusion not certain but believable)
- Implication (P → Q; or not-Q → not-P)
- Chained arguments (P → Q; Q → R; R → T)

LOGOS: PERSUADING THROUGH INDUCTIVE REASONING

- Generalization (drawing general principles from particular instances)
- Statistical Generalization (samples and surveys)

LOGOS: PERSUADING THROUGH REASONING BY ANALOGY

- Showing the problem at hand is like another, more familiar problem, and should be treated the same way.
- Comparing your case to a familiar case
- Connecting your story to a familiar narrative

PATHOS

- Sympathetic facts
- Antagonistic facts
- Narration (arrangement of facts)
- Emotive words
- Similes
- Evocative symbolism

PATHOS

Obama uses the flag for Pathos

PATHOS

Reagan used the flag for Pathos

Conservatives now use Reagan for Pathos

Five Canons of Rhetoric
(A Roman contribution)

- *Invention* – designing the argument
- *Arrangement* – placing in an effective order
- *Style* – how things are said
- *Memory* – memorize (and practice)
- *Delivery* – voice, posture, dress, gesture

The First Canon of Rhetoric: Invention

In designing an argument, you must consider:

(1) the audience's needs, desires, thoughts, prejudices, etc.

(2) available evidence (facts, testimony, statistics, maxims, examples, laws)

(3) appeal to the audience (Ethos, Pathos, Logos)

(4) topics (commonplaces that will synch with the audience); and

(5) timing and opportunity, coupled with accurate targeting (Kairos)

Fallacies of Argumentation

- Accident
- Ambiguity
- Amphiboly
- Appeal to Authority
- Appeal to Belief
- Appeal to Emotion
- Appeal to Fear
- Appeal to Flattery
- Appeal to Novelty
- Appeal to Pity
- Appeal to Ridicule
- Appeal to Tradition
- Argumentum ad Hominem

ADDING COLOR TO ARGUMENTS

COLORING TOOLS

- *Humor*--biased vs. neutral
- *Narrative* –clock time vs. story time; Grand Narratives
- *Sequence*—climactic vs. anti-climactic
- *Comparisons*—similarities vs. contrast
- *Invocations*—quoting Jefferson, Lincoln, Constitution
- *Emphasis*—voice modulation, gesturing
- *Figures of Speech*—allusion, anaphora, hyperbole, innuendo, juxtaposition, metaphor, paradox, personification, simile, repetition, rhetorical questions, understatement, etc.
- *Rhetorical Fallacies*—arguments traditionally said to be improper but that are nonetheless effective

MODERN ARGUMENT THEORY

DEFEASIBLE ARGUMENTS

Professor John L. Pollock championed defeasible arguments:

- In deductive logic, arguments are not defeasible (subject to defeat).
- In life, arguments are almost always defeasible.
- *Defeasible arguments* are taken as true until they are disproved.
- A defeasible argument is our best judgment based on the information we have received so far. We remain open-minded to revision.
- Pollock describes defeasable argument "defeaters," either "*undercutting defeators*" or "*rebutting defeaters*."

ARGUMENT SCHEMES

Canadian Professor Douglas Walton has developed syllogistic patterns of common *Argument Schemes* (including fallacies) with matching *Critical Questions*.

The Argument Scheme for Argument From Expert

Major Premise: Source E is an expert in subject domain S containing proposition A.

Minor Premise: E asserts that proposition A in domain S is true (false).

Conclusion: A should be accepted as true.

ARGUMENT SCHEMES
Argument from Expert

Critical Questions

1. *Expertise Question*: How credible is E as an expert source?
2. *Field Question*: Is E an expert in the field that A is in?
3. *Opinion Question*: What did E assert that implies A?
4. *Trustworthiness Question*: Is E personally reliable as a source?
5. *Consistency Question*: Is A consistent with what other experts assert?
6. *Backup Evidence Question*: Is E's assertion based on evidence?

KAIROS

This is the way Carl Glover put it:

The archer must exercise 'due measure and proportion' in aiming the arrow and drawing the bow string; he must hit a 'vital part of the body' to fell his prey; he must release the arrow at the 'exact or critical time' to strike a moving target.

The End