

The Five Types of Legal Argument

The Five Types of Legal Argument

FOURTH EDITION

Wilson Huhn

DUQUESNE UNIVERSITY



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for Nancy, Jesse, Anika, Merilys, and Robin

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Online Materials

Additional content for *The Five Types of Legal Argument* is available on Carolina Academic Press's *Core Knowledge for Lawyers* (CKL) website.

Core Knowledge for Lawyers is an online teaching and testing platform that hosts practice questions and additional content for both instructors and students.

To learn more, please visit:

coreknowledgeforlawyers.com

Instructors may request complimentary access through the “Faculty & Instructors” link.

Preface to the Fourth Edition

The principal changes to the fourth edition of this book are the addition of two new chapters. The new Chapter 9 uses bar graphs to illustrate the underlying purposes of six of the affirmative defenses to contract formation, and Chapter 27 offers advice to law students about how to answer essay questions on law school examinations.

Over the years the basic framework of the five types of legal argument has not changed, but oh, how society has changed and how the law has changed with it! When this book was first published *Bowers v. Hardwick* was the law. Statutes that made gay sex a crime were still enforceable. Today, those laws are unconstitutional, same-sex couples have a constitutional right to marry, and federal law prohibits discrimination in employment on the basis of sexual orientation or gender identity. The “Me Too” movement has worked a revolution in attitudes towards sexual violence and sexual harassment, and unjustified killings spurred nationwide demonstrations against police violence.

Whatever area of law you pursue — civil rights or corporate law, patent law or personal injury — the five types of legal argument can help you to become a more effective advocate. It offers a method of analysis that applies to every area of law.

Law student and Research Assistant Rachel McTernan helped immensely with the preparation of the fourth edition. I also wish to thank my colleagues at Duquesne University School of Law for their brilliant commentary and their enduring friendship, and my oldest brother William for his wise advice.

The pandemic has required us to teach online and separated us from our students, but it has brought our family together, and I am continually grateful to my wife and children for their love, support, and inspiration.

Preface to the Third Edition

The principal change that is made in the third edition of this book is the addition of a new chapter (now numbered Chapter 24) describing how reasoning by analogy is the bridge between formalism and realism. The material in this new chapter will assist lawyers and judges to construct legal arguments in increasingly difficult cases. This chapter is a condensed version of the jurisprudential theory set forth in the article *The Stages of Legal Reasoning: Formalism, Analogy, and Realism*, 48 VILLANOVA LAW REVIEW 305–380 (2003). I wish to acknowledge and thank the editors of the Villanova Law Review for their technical assistance and editorial advice that made many valuable improvements to that article, and hence to the new chapter of this book.

Other changes and clarifications are sprinkled throughout this new edition, yet the essential theme remains intact. Lawyers, judges, legal educators and law students construct legal arguments that follow certain patterns and that draw on characteristic types of data. These types of arguments may be classified under the categories of text, intent, precedent, tradition, and policy. This paradigm helps us both to understand the law and to practice the profession of law.

As always, I am grateful to my wife, Dr. Nancy Wollam-Huhn, for her love and support all these many years.

WILSON HUHN

Preface to the Second Edition

Among other changes, this edition of *The Five Types of Legal Argument* adds a new chapter, Chapter 23, setting forth a logical demonstration of the theory of the five types of legal arguments. This chapter demonstrates that the “brief” of a case takes the form of an argument of deductive logic, but that the different types of legal arguments are not the creatures of logic, but rather are the assumptions upon which all legal reasoning is based. This new chapter is based upon research originally published in the article *The Use and Limits of Syllogistic Reasoning in Briefing Cases*, 42 SANTA CLARA LAW REVIEW 813 (2002). I again wish to acknowledge the fine work of the editors and staff of the Santa Clara Law Review for their assistance in bringing that article to publication.

The most significant substantive change to the theory is contained in Chapter 10 of this edition where I have added two additional types of “intra-

type” attacks on legal arguments. The first change is that I have identified another method of attacking intent arguments, and it is exemplified in two speeches by Abraham Lincoln. In addition, I have described another way of attacking tradition arguments that was employed by Justice Anthony Kennedy in the case of *Lawrence v. Texas*.

This edition updates references to *Regents v. Bakke* and *Bowers v. Hardwick* in light of the 2003 decisions of the Supreme Court in *Grutter v. Bollinger* and *Lawrence v. Texas*. In particular, the newer cases make contributions to our understanding of how to make and attack arguments based upon precedent and tradition.

I am grateful to the many law students, law professors, lawyers, and judges who have found this book to be useful in their pursuit of a deeper understanding of and facility with legal reasoning, as well as to those many persons who have made helpful suggestions for improving this book.

WILSON HUHN

Preface to the First Edition

This book was written for students entering law school, so that from the first day they might appreciate what makes legal reasoning so fascinating and so difficult. I have presumed that the reader has a general knowledge of the American system of government and court system. I have used a sprinkling of specialized terms that are either defined in the text or that may be clarified by reference to a legal dictionary. It is my hope that this volume will also prove useful to attorneys and judges who may wish to consciously reflect upon the analytical skills that have become second nature to them.

This book is principally based on the article *Teaching Legal Analysis Using a Pluralistic Model of Law*, published at 36 GONZAGA LAW REVIEW 433 (2000/01) (copyright © 2001 Gonzaga Law Review Association). It also contains substantial material from *The Use and Limits of Syllogistic Reasoning in Briefing Cases*, 42 SANTA CLARA LAW REVIEW 101 (2002). The editors of the Gonzaga Law Review and the Santa Clara Law Review made important contributions that improved the clarity and the accuracy of this work.

I would like to thank my editor, Melissa Ulrich, Assistant Professor and Lead Faculty, Paralegal Studies, at The University of Akron for her many improvements to the text. I am also grateful to Judge Sam Bell and to several of my colleagues at The University of Akron School of Law, including Dean

Richard L. Aynes, Associate Deans Elizabeth Reilly and Malina Coleman, and Professors Jane Moriarty, Samuel Oddi, Richard Cohen, Tracy Thomas, William Jordan, and Lloyd Anderson, for their valuable substantive and editorial suggestions. Finally, I would like to thank my research assistants, Matthew Hudson and Patrick Walsh, for their invaluable assistance. All errors and material omissions are, of course, my sole responsibility.

Above all, I am indebted to my wife and children for their love and support, and I dedicate this book to them.

WILSON HUHN