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Gábor Tahin

Heuristic Strategies in the Speeches of Cicero



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Gábor Tahin

Heuristic Strategies in the Speeches of Cicero

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*Nearly every philosopher likes necessity,
but not chance; they want peace. But even
philosophers need chance.*

Hannes Böhringer,
Immer kommt etwas dazwischen

Preface

In the following work, I will be introducing a concept of strategic and probabilistic reasoning called *heures* in order to describe the argumentation of speeches in classical oratory. After the discussion of theoretical considerations, these forms of arguments I will explain these forms of arguments through the analysis of four speeches from Attic orators and six from the Roman orator M. Tullius Cicero.

At the start of my research in classical oratory, I asked the question to what extent analytical tools provided by ancient rhetorical theory could be used successfully in the argumentative analysis of classical speeches. After the study of several speeches with the help of classical terminology, I concluded that in many respects classical handbooks did not give an in-depth and comprehensive view of the argumentation of Greek and Roman forensic and political speeches. It seemed that the elaborate terminology of classical rhetoric does not take into account the variety of argumentative strategies in forensic oratory. Somehow, rhetoric as a scholarly subject appeared to have been developing independently of practical oratory for centuries and built up a highly specific terminology, which does not necessarily reflect the most complex forms of persuasive reasoning in Greek and Roman courts.

Therefore, building on the results of classical scholarship on Attic and Ciceronian oratory, I decided to move beyond the extant terminology and create a concept influenced by the notions of uncertainty in sophistic rhetoric and heuristic reasoning in the psychology of decision-making and in mathematical problem solving. In the detailed analyses of the speeches, I identified different forms of heuristic reasoning, all of which represent a form of probabilistic argumentation which aims at manipulating the mental decision-making processes of the jury. These analyses concentrate on the detailed interpretation of passages where the nature of evidence requires probable reasoning.

In the first two chapters, I will outline the process which led me from classical scholarship to the application of rhetorical *heures*. I attempt to explain as briefly as possible the complex relationship between classical rhetoric, informal logic, cognitive psychology and *heures*. I will also provide a description of each individual *heure*. In the third chapter, I will present a detailed introduction to

the meaning of probability in Greek and Roman oratory and the early history of arguments from probability, which could be considered the precursors of heuristic arguments.

In Chap. 4, I will offer short analyses of Greek forensic speeches which I believe will shed light on the question how Cicero could (in part) find models for forms of heuristic reasoning. In Chaps. 5–10, I will give detailed descriptions of six Ciceronian speeches, *Pro Flacco*, *Pro Sulla*, *Pro Murena*, *Pro Sex. Roscio Amerino*, *Pro Milone*, *Pro Cluentio*. The speeches represent some of the best examples of Ciceronian oratory from his early and mature period. What is common in these cases is that they all argue about questions of fact and therefore rely to a greater or lesser extent on probabilistic reasoning. The order of the speeches is not chronological, but it indicates an increasing level of complexity in their argument. The conclusion will bring together some of the theoretical observations which arise during the analysis as well as provide some suggestions about the further applicability of the concept.

Introduction

The analysis of M. Tullius Cicero's forensic oratory has gradually become a field of intense study, after a number of scholarly works¹ identified strategies which ancient rhetorical handbooks did not account for. Inspired by these works, I initially planned to give an analysis of selected speeches firmly rooted in classical theory whilst taking into account the development of rhetorical analysis in recent decades. However, in the course of my research, I realised that although modern studies try to move beyond or extend the scope of classical theories, they still rely on its divisions and assumptions in most areas, such as parts of speech or forms of arguments.

This phenomenon is indicative of both the positive and the negative aspects of the enduring appeal of classical rhetoric. On the one hand, it shows that classical terminology established elements of persuasive oratory and that these may possess universal validity. On the other hand, the same terminology may condition the mind of modern researchers in a way that could make the discovery of certain forms of arguments difficult. Thus, a close reading of certain speeches presented me with problems related to argumentation which I could resolve neither with the help of ancient terminology nor by consulting modern reference works on rhetoric or argumentation theory. It seemed that classical treatises offer comprehensive practical advice on the production of a speech for would-be orators and excellent theoretical discussions on the nature of rhetoric, yet, in some respects, they do not give a detailed overview of extended forensic argumentation. Furthermore, although modern studies on Greek and Ciceronian oratory did refine the categories of classical systems, these developments were still, for the most part, guided by the conceptual framework of ancient rhetoric. As a result, they mostly failed to notice a major aspect of forensic arguments in Greek and Roman speeches – their exposure to the contingency of rhetorical situations. Argumentation theory also proved to be useful in identifying elements of logical reasoning and schemes of arguments, but its results are not

¹To name only a few, and the most recent ones, we can cite Alexander (2002), Craig (1993), Dominik and Hall (2006), May (ed.) (2002), Porter (1997), Powell and Paterson (eds.) (2004), Riggsby (1999), Steel (2001), Vasaly (1993).

completely adaptable to the specific circumstances of classical oratory, which is embedded in a social, legal and political environment very different from our own.²

As a result, I tried to find a practical framework which offers a description of complex argumentative strategies based on probabilistic reasoning. I assumed that it might also be possible to give an alternative account of Cicero's rhetorical practice if I changed some of the presumptions of ancient rhetorical theory, which still provides the basis of modern analyses. Throughout my work I acknowledged traditional rhetorical categories, but I also drew inspiration from the results of other disciplines, such as psychology, informal logic and mathematical reasoning, to establish a further means of revealing the persuasive force of individual orations.

The purpose of the present work is thus to provide an alternative method of analysing ancient oratory from a viewpoint which is fundamentally different from the methods of contemporary research. In particular, I aim to show that neither the application of classical rhetorical rules nor the methods adopted by scholars working in the fields of classics or argumentation theory can give a comprehensive account of arguments in speeches without taking into account the contingent and unpredictable nature of rhetorical demonstration in a real-life courtroom performance. Such an account should focus on the arrangement and evaluation of individual and often less conspicuous probabilistic arguments. I will also show that a broader interpretation of the reasoning which ancient theorists called *argumentum probabile*, or probable argument,³ could be applied as a basic argumentative unit to uncover some underlying strategies in forensic debate. Lastly, building on the ancient notion of probable arguments, I try to develop an experimental concept to give a comprehensive framework of how speeches could attain originality and effective persuasion.

I should add a note about the evolution of this work. Although I developed the analytic method for a long time through several stages, this book marks only the outlines of the concept. The present work started as my PhD thesis at Royal Holloway College. In the original version, I referred to probabilistic strategies, or heuremes, as rhetorical heuristics. In the following years, I presented my findings in a concise form as an article, clarifying a number of problems with the concept.⁴ At the same time, I worked on a case study in which I applied the method to a speech by the Greek orator Antiphon and also on the question of contingency in rhetorical presentation in connection with the rhetoric of Alcidas. This research as well as criticism from anonymous reviewers gradually changed my views on the nature of the strategies.

In the present work, I made several changes to the concept of heuremes in comparison with my thesis and follow-up article. Most importantly, I decided to rename the strategies I had called rhetorical heuristics as heuremes. The reason for creating an entirely new name for the method was a conceptual one. It has become

²This is one reason why modern discussions of legal argumentation such as Feteris (2010) can only have a restricted use in the study of classical forensic arguments.

³In its simplest form (e.g. *Rhet. Her.* 2.3), the *argumentum probabile* describes an argument by which we prove the *likelihood* of a proposition relying on direct evidence, plausible motives or on the life of a person involved in the case.

⁴Tahin (2011, 1–21).

increasingly clear to me that readers with knowledge of different types of heuristic reasoning will be confused if I claim that cognitive heuristics have influenced my approach to analyse complex arguments. I also assigned a more prominent role to contingency in the use of probabilistic strategies, which will explain much more clearly the dynamic nature of heuristic reasoning. I also included a more thorough (but by no means comprehensive) discussion of classical and modern theories of reasoning to emphasise the distinctive elements of my approach. However, despite these results, further research is required to clarify the theoretical assumptions behind strategies in probabilistic reasoning, their relationship to other theories of argumentation, their areas of applicability in other forms of non-forensic reasoning and their effectiveness.

Finally, I would like to add that with a young family to support and a full-time school teaching position, I was only able to devote a fraction of my time to the preparation and writing of this manuscript. However, I believe that with sufficient time for further research into the application of the heuristic model in classical oratory and areas beyond it, this concept could bring about a fundamental change in our thinking about persuasive argumentation. Such a view would acknowledge that for any advanced form of argumentation, in rhetoric or elsewhere, to succeed, it must confront the constantly changing demands of contingent conditions which surround any rhetorical or dialectical situation.

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Any remaining errors are my own.

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Chapter 1

Introduction

1.1 Decision-Making and the Analysis of Ciceronian Speeches

In a classical forensic case where the facts or the interpretation of laws are disputed the main task of the orator is to draw inferences from the available evidence to support the credibility of his case. Whatever his sources are for constructing a line of argument, he has to create a strategy to make his conclusion appear more probable than that of the opposing party. His case should also look plausible enough to comply with the jury's notion of a justified claim. He has two aims: to lead the jury gradually towards a conclusion favourable to his client and to have them actually make the intended decision at the time of judgement.

It is crucial to state that a Greek or Roman orator was not bound by any modern standard of rationality, logic or rhetorical measure unless the circumstances of a particular case demanded it in order to win the case. Forms of argument (such as personal abuse, distortion or omission of facts, malicious slander, irrelevant details or sequences of narrative, logical non *non sequitur*, counter accusations) which today are considered fallacious or inadmissible elements of reasoning in any rational discourse (e.g. court hearings) were widely accepted tools of persuasion so long as they served the purposes of the orator. This is one fundamental reason why modern theories of argumentation, which aim at establishing standards of rational reasoning and debate, have only limited relevance to classical oratory.

To achieve his aims, an orator needed to be familiar with certain forms of reasoning which the listeners were likely to find acceptable when they arrived at a conclusion. He needed a well-arranged, yet flexible set of probable inferences which resembled those used by the audience when judging the validity of opposing claims. Applying such inferences in a speech can influence the decision-making processes in the audience's mind so that they reach the conclusion preferred by the orator and reject the opposite side's claims. Finally, he should also be aware of the contingent elements

of the rhetorical situation which may require him to make unplanned changes during the presentation of his argument, in reaction to chance events such as a sudden change in the attitude of the audience.

In the introduction I will outline the theoretical background of probabilistic strategies in relation to ancient rhetoric and modern argumentation theory. At the end of the chapter, I will also provide a partial and tentative list of the ‘heuremes’ I identified in Attic and Ciceronian oratory.

A pragmatic approach to rhetorical strategies should at first confront the question of how an orator could have learned the art of argumentation present in his speeches. If rhetorical education did not simply comprise learning from the *rhetor* the rules of creating and delivering an argument, then we need to assume that the orator developed strategies after his studies and that these were not necessarily part of the school curriculum. One answer to this question is that the observation and reading of outstanding orators could provide such a source of learning, even if that process of imitation was not always a conscious one.¹ However, the imitation of literary models cannot fully explain unique persuasive arguments.² It is more reasonable to assume that complicated and highly variable probabilistic strategies arose from several sources (e.g. model speeches, rules on the *partes orationis*, argument schemes such as *topoi*, observation of court practice) in response to the contingencies of an individual case.

The way orators acquired a stock of rhetorical strategies can be modelled partly on how chess-players reach the level of a master. Players start learning chess by studying and using the most basic rules of the game, in a similar way that students in rhetorical schools begin with elementary precepts and develop their techniques by applying them at different stages of their studies. Through years of observation and practice chess players develop highly complex strategies, which they also learn to use more independently. At master level, players have an enormous collection of strategies at hand, which they combine in an abstract, intuitive way as the game develops unpredictably. Thus, the process of reaching the highest level in chess or in other fields can explain how the most effective probabilistic strategies would have evolved in the practice of oratory. A key feature of this process is randomness which no systematic collection of rules or strategic schemes can fully reflect.

To introduce the concept of probabilistic strategies in detail, I will need to discuss the methods ancient and modern scholars applied in their analysis of Greek and Roman speeches in order to bring to light some of the assumptions behind rhetorical theory in modern research. I do not intend to provide a mechanical ‘Forschungsbericht’ of what has been done already in the field of rhetorical scholarship. In many respects,

¹On the importance and form of *imitatio* in Roman rhetoric see Fantham (1978, pp. 12–16), Weische (1972).

²First, because *imitatio* was generally considered as the stylistic imitation of eminent models (cf. the example of Sulpicius in Cic. *De Or.* 2.85–88). Second, Cicero nowhere describes in detail in what way *imitatio* is supposed to work.

I am indebted to previous scholarship, especially to the approach of C. J. Classen and W. Stroh, yet my critical remarks will reveal considerable differences and make my position clear.

1.2 Ancient Rhetorical Systems and the Analysis of Speeches

There has long been a widespread agreement among scholars that classical rhetoric, as outlined by Aristotle, the *Rhetorica ad Alexandrum*, Cicero, the anonymous author of the *Rhetorica ad Herennium* and Quintilian, provides by far the most useful tool to judge the effectiveness of any work in ancient oratory.³ It is also generally accepted that although classical systems do not give a full account of every technique of persuasion, one can nevertheless build on them and supplement them with new research, just as commentators did with the works of Cicero and Quintilian in late antiquity, the Middle Ages and the Renaissance.⁴

Today, the usual method of analysing a speech involves presenting the results of modern historical and legal scholarship and exploring ancient sources to draw up a full picture of the rhetorical situation surrounding each case, in the hope of correcting some of the distorted and deliberately misleading facts presented by the orator. A tacit belief exists that a careful balance between ancient theory and modern scholarship will help explain why classical speeches were or were not successful, or why they were regarded as masterpieces from antiquity onwards. I shall try to decide how far this belief is tenable by looking at the theoretical assumptions modern scholars borrow from ancient rhetorical schools, while setting out to explore the complexities of Ciceronian arguments.

To understand the presumptions of modern studies, an important point needs to be made first about the function of rhetorical precepts. Classical rhetoric was originally designed for young students wishing to acquire the art of speaking persuasively before an assembly, a court, or any kind of audience gathered for a definite purpose.⁵ If we turn to the practice of ancient Greek or Roman oratory and contrast it with the nature and intention of rhetorical precepts on how to write and present a speech, it becomes clear that ancient rhetorical handbooks, the so-called *artes orationis*, were not created with the aim of helping the analysis of a speech *already* presented under real circumstances. This remains true despite the fact that published versions of the speeches were studied by those who wished to acquire the art of persuasion. This observation, if one takes its possible implications seriously, has far-reaching consequences for the way one appreciates classical oratory. Once we accept that the

³That was the prevailing idea in nineteenth century scholarship, which was questioned seriously only in the last 50 years. Cf. Preiswerk (1905), Rohde (1903).

⁴See Mack (2007, pp. 91–104).

⁵On the place of rhetoric in the ancient education system see Dominik (1997), Clarke (1953), Jaeger (1934), Marrou (1982).

system we use for analysis was not originally intended for this purpose, we may start to have doubts about whether it will completely fulfil its function.

A similar point is made by M. Antonius in Cicero's *De Or.* 2.74-84. He says that the inadequacy of contemporary technical training and forensic practice caused problems for those who considered the merits of Graeco-Roman rhetorical theory. Antonius criticises Greek rhetoricians for teaching highly elaborate rules, which look obvious even for a moderately intelligent student, whereas they fail to teach what makes a speech persuasive in a particular situation.⁶ He does not completely dismiss the whole system of educating an advocate or a politician in schools of rhetoric, yet he thinks that a true art of oratory focused on practice would have a different structure from the standard rhetorical training of his day. Such a practical *ars* would functionally differ from mediocre declamatory exercises. Putting it metaphorically, the former type of *ars rhetorica* would be studied by those young men who want to excel in the battlefield, whereas the latter would bring merit only for those who train as fighters in the Campus Martius.

Quintilian, the first century teacher of rhetoric, addressed the same problem. He discusses in *Inst. Or.* 2. 11-3 the question whether someone can be a good orator without thoroughly learning the rules of the art. In the argument the rhetor attempts to dispel the widely-held notion that a natural talent without the constraints of theory would become a livelier and more appealing speaker than another one who trained for long in a rhetorical school. In Quintilian's opinion, the rules of rhetoric have their role in leading the student towards an understanding of the what makes a message persuasive and in teaching him how to present an argument to a less-than-sympathetic audience.

On the other hand, in the following passage he speaks out against the vulgar practice of preparing would-be orators by teaching them rigid rules from handbooks which do not at the same time prepare students for the sensible and independent application of precepts.⁷ The *suprema lex* for the orator must be prudence in recognising what the nature of the case requires and adapting the rules according to the necessities of the trial. The formality of the system is an obstacle in daily practice. Quintilian, however, fails to give any more specific hints on how one can acquire the prudence that bridges formal education and the practice of forensic oratory. He could probably have mentioned imitation in this place, but he did not.

It seems therefore that we face an important problem when we try to understand the function of classical rhetoric in relation to oratory. Both Quintilian and Cicero were aware of the conflict between teaching rules supposedly derived from practice to help students of rhetoric take part in forensic or political oratory whilst understanding that the same rules do not necessarily lead them to the professional level of argumentation which we can observe in extant Greek and Roman speeches. Consequently, one should ask what answers classicists have been able to give to this pressing question.

⁶Cf. *De Or.* 79 and also 80. It remains, however, a critical point of Antonius' suggestion whether he considered it important to integrate his ideas into the present system or he was thinking, instead, about a new and more practical form of education.

⁷*Inst. Or.* 2.13.1-3.

1.3 *Topos, Enthymeme* and the Argument in Classical Rhetoric

The problem of how to analyse speeches in order to give a comprehensive view of argumentation is discussed in many modern treatises on Ciceronian oratory. The general assumption that the starting point of any analysis has to be based on one of the standard ancient systems such as that of Aristotle or Quintilian justifies to a large extent the application of classical rhetorical categories today. In order to justify an alternative method of analysis proposed in this book it is necessary to find out what specific reasons support the use of these treatises in modern rhetorical analysis and whether they fully accomplish the aim they were created for.

The analysis of an individual speech generally starts with considerations on how the orator would have set about constructing persuasive arguments in support of his side, a major part of rhetoric called *inventio/heuresis*. The ultimate aim of the *inventio* is to teach orators how to make their case believable and acceptable for the audience before they make a legal or political decision based on two or more different versions of a *causa*, case.⁸ The arrangement of arguments can be described by following the rules on the *partes orationis*, especially the *argumentatio* and the *argumentorum loci* (Quint. *Inst. Or.* 5.10.20).⁹

The most specific part of the *inventio* that deals with the method of finding the *argumenta* is called *ratiocinatio/syllogismos* and *loci/topoi*.¹⁰ These forms of rational argument cover every element of any conceivable issue and provide a quasi-logical frame to draw a conclusion favourable to one of the two competing sides. In general, the *ratiocinatio* can be defined as the method of syllogistic or enthymematic reasoning through which the orator makes probable inferences about how things are or could have been in the past.¹¹ According to Quintilian the material for these probabilistic arguments should be taken from general life experience (*Quint.* 5.10.17 *vis et natura omnium rerum*) based mostly on human psychology or sociology.

The precise nature and terminology of enthymematic/syllogistic reasoning shows a puzzling variety in classical rhetoric and it is not possible here to give even

⁸ Cf. *Rhet. Her.* 1.3 *Inventio est excogitatio rerum verarum aut veri similium, quae causam probabilem reddant.* Cf. Quint. *Inst. Or.* 3.3.1.

⁹ Interestingly, the rules about the *argumentatio* focus more on the summary of different arguments, including the *signa*, *argumenta* and *exempla*, rather than on the actual layout of the arguments. The only scheme that Quintilian suggests (*Inst. Or.* 3.9.1) is the division of arguments into *probatio*, the proof of your conclusion, and *refutatio*, the refutation of the opposite side. The question, however, would remain how we categorise the long sequences of affirmative or refuting arguments that appear outside their assigned places.

¹⁰ According to Lausberg (1990) § 366, *ratiocinatio* and *loci* describe arguments in the first case with respect to their form, in the second to their content. The first term defines syllogistic and enthymematic forms of reasoning (cf. Cic. *Inv.* 1.57, Quint. *Inst. Or.* 5.14.25), whereas the second describes those general issues out of which one may create arguments (cf. *Rhet. Alex.* 1428a-b, Arist. *Rhet.* 1397a7-1400b25, Quint. *Inst. Or.* 5.10.20).

¹¹ Cf. Cic. *Inv.* 1.57 *ratiocinatio est oratio ex ipsa re probabile aliquid eliciens, quod expositum et per se cognitum sua se vi et ratione confirmet.*

an outline of different positions.¹² I would like to make only two points about the potential relationship between enthymemes and the probabilistic arguments outlined in this book. First, one should be aware that the concept of enthymeme most commonly used by rhetorical theory and argumentation analysis today is taken from Aristotle's rhetoric.¹³ For him enthymemes describe plausible inferences based on propositions which are true for the most part but not universally. Thus the notion of probability becomes a common feature for enthymemes and *heuremes*.

A common example of such an enthymematic argument comes from Aristotle *Rhet.* 2.19.18-19. If a person was able and wished to carry out an action, then that person most probably carried out that action. Modern argumentation theory describes these arguments as defeasible. This means that they hold only tentatively but they can be refuted if new, contrary evidence turns up. As Quintilian remarks, the propositions are mostly based on common sense experience (the *vis et natura omnium rerum*), which may be fallible as a result of cognitive biases affecting individual judgements.

A highly important but barely mentioned feature of enthymemes is the fact that in rhetorical arguments the likelihood of an enthymeme depends not simply on the inherent probability of its propositions but also on the contingent elements of the case, which are often unpredictable. The variety of these contingencies could be almost endless. They may affect the reaction of the audience (e.g. unforeseen prejudices against the orator), the delivery of the speech (e.g. the orator forgets an argument or makes a blunder) or the argument itself (the appearance of arguments not anticipated by the opposite side). As a result, they have a direct influence on how the probability of an enthymeme is regarded in a real life situation.

It is important to emphasise this because in classical oratory the value of an enthymeme (or any other form of argument) is judged by how it affects the judgement of the jury and not by how well it conforms to any external standard of rationality or rhetorical appropriateness. As far as I am aware no classical or modern theory of argumentation has discussed whether or in what way enthymemes could be adapted to sudden contingencies. Moreover, another ambiguous feature of enthymematic reasoning is whether enthymemes are arguments used locally in certain sections of a speech or are adaptable to extended sequences of argument. This same question can also be asked about the arguments called *topoi/loci*. The argument schemes outlined in this book will try to address both problems, namely the resistance of arguments to unexpected contingencies in the rhetorical situation and the problem of complex arguments, which extend through the whole speech.

The other (and better known) group of argument forms are called *loci* or *topoi*. If Cicero's claim in *Brut.* 46 is correct, then we can say that these patterns or schemes of arguments have been an element of rhetorical theory from Protagoras onwards. They were first summarised in a systematic way by Aristotle in his *Rhetoric* and *Topics* and became standard models of reasoning in later Hellenistic rhetoric, in the

¹² Heath (2001) 113 and n 60.

¹³ Cf. Burnyeat (1994, pp. 3–55), Macagno and Walton (2009, pp. 39–56).

works of Cicero, the anonymous *Rhetorica ad Herennium* and Quintilian.¹⁴ Even more than the field of enthymemes, rhetorical topics has become a vast area of research from mediaeval to modern times; I naturally can give neither a historic nor a systematic summary of topics in this study.

It is nevertheless worthwhile to mention an important point concerning ‘topical’ reasoning. The *topos* originally served as a quasi-logical tool for dialectic, “machines for finding premises”.¹⁵ They could also be applied to fields of study where the use of formal, deductive reasoning was not practicable, such as ethics, politics and natural philosophy.¹⁶ The analysis of topics in Aristotle *Rhet.* B 23 suggests that topics were not originally designed for rhetorical use. If this is the case then it is possible to assume that topics are not the only means to supply arguments for oratory. They are particularly useful in cases with rational arguments where the premises are based on *endoxa*, human knowledge, universally shared by the audience. The strictly rhetorical use of topics, some of which are specially adapted for use in a forensic environment (e.g. the *loci a persona*), appears to be a later development in classical rhetoric.¹⁷ In the following, I would only like to address the question to what extent the topics could be regarded as part of enthymematic reasoning and the probabilistic strategies presented here.

In their simplest form, the topics or places are ‘seats’ or types of readily available and commonly accepted forms of arguments which the orator may apply to draw inferences for his case. Some of these inferences could be based on logical relations (e.g. the *topos* from opposites: Arist. *Rhet.* B 23, 1397a 7–19; *Top.* B8, 113b 27–114a 6) and some could be applied to human relationships relevant for a forensic or political argument (e.g. the *topos* of implausible things which are nevertheless thought to have taken place: Arist. *Rhet.* B 23, 1400a 5–14). Aristotle states in *Rhet.* A 2, 1357a 22–1357b 25 that the material for enthymemes comes from signs (*semeia*) and probabilities (*eikota*). Further on in 1358a 10 he claims that the *topoi* are about rhetorical syllogisms. These two claims, in line with modern research on the topics,¹⁸ confirm that topics which describe probabilistic inferences could indeed be regarded as enthymematic.

For Aristotle, enthymemes provide ‘the body of persuasion’. This means that he regards the elements of rhetorical proof or as demonstration central to the persuasive process. Therefore, it is reasonable to conclude that topics could be a major source of arguments in rhetorical teaching. In fact, Aristotle mentions explicitly in *Rhet.* 1403a18–19 that a *topos* is a heading under which many enthymemes fall. The

¹⁴ The standard discussion of the topics is Reinhardt (2002), Rubinelli (2009), both of which I used in the following passages.

¹⁵ Brunschwig (1967, p. xxxix).

¹⁶ For examples of topics in Aristotle *EN* and *Phys.* see Rubinelli (2009, pp. 44–46).

¹⁷ An intricate question is the discrepancy within the list of rhetorical topics in Aristotle *Rhet.* B 23 and the authenticity of the passage, the discussion of which is found in Rubinelli (2009, pp. 59–90).

¹⁸ The most extensive, if not fully comprehensive, summary of research, which emphasises the relationship between topics, enthymemes and probability, is Macagno and Walton (2009, pp. 39–56).

examples in Aristotle *Rhet.* B23 1398a 3-1399a 9 show that topics (in line with enthymemes) mostly provide a short inference as part of a sequence of arguments. However, they can also outline an argument scheme applicable to a whole speech. The main issue at stake is whether topics are in themselves enough to provide us with analytical tools to create an argument or whether there are other means to outline the elements of persuasion in a speech. To answer this question we need to look at other parts of the rhetorical invention which deal with the arrangement of arguments which topics generate.

It seems from standard systems of classical rhetoric that no separate rules were given on how to construct extended arguments. The allocation and arrangement of arguments was specifically dealt with in the *inventio* under the headings of the *status quaestionis*, the identification of issues constituting the case, the *partes orationis*, parts of the speech (illustrated for the most part by speeches of the *genus iudiciale*), and the *argumentorum loci*, the topics, general patterns to construct arguments from the available evidence.¹⁹ The combined application of these elements within the *partes orationis* was supposed to enable the students of rhetoric to construct arguments for each section of the *oratio*, as the necessities of the case would demand.

Each part of the speech was assigned an individual function which contributed in a different way to the final conclusion. The purpose of the argumentation (comprising amongst others the enthymemes and topics) was to present the proof (*pistis/probatio*) for the truth of the case. The argumentation was prepared by the *exordium* and the *narratio*, followed by the *peroratio*. The problem however, is that this theoretical plan does not necessarily take into account the purpose of forensic oratory (i.e. persuading the audience), which requires that each part of the speech be subordinated completely to the principal argument (consisting of *pisteis* or *probationes*), which in turn may be made up of several supporting sub-arguments scattered all over the speech.

The major argument of the speech usually extends beyond the *argumentatio*. I only need to refer to some well-known examples of Ciceronian oratory, the *Cluentiana*, the *Rosciana*, the *Miloniana* or the defence of Sulla, where the orator complies only superficially with the general teaching on the *exordium*²⁰ and immediately cuts into the heart of the argument. It is also a commonplace that Ciceronian narratives can often barely be separated from the *argumentatio*. Again, the fact that the *argumentatio* and the argument are rarely coterminous suggests that the precepts and structures of Hellenistic systems in the age of Cicero and Quintilian did not fully take into account actual practice.

The problem with the structure and rules of the *inventio* outlined above can also be approached from a different viewpoint, one that explains why topics are not necessarily the only or even the best alternative to provide a comprehensive analysis of rhetorical arguments. As I have already mentioned, topics are traditionally

¹⁹ For the *status quaestionis* see Heath (1995), Lausberg (1990, §§ 79–138), for the *argumentorum loci* see Lausberg (1990, §§ 373–399), Mortensen (2008, pp. 31–56), Reinhardt (Oxford, 2002).

²⁰ Quint. *Inst. Or.* 4.1.

assigned to the *argumentatio* or *pistis*, designed to demonstrate the truth of the case. Within the *argumentatio* the topics normally provide formal patterns or schemes for the premises of a single conclusion. According to Aristotle, enthymemes or rhetorical arguments derived from topics are usually shorter and less precise than dialectical or strictly deductive arguments because members of an audience in a rhetorical situation are usually not intellectually capable of following an extended line of formal reasoning.

The consequence of this is that topics in themselves cannot help to devise a *strategy* of argumentation where several lines of arguments have to be coordinated and arranged to provide the most plausible line of reasoning. Moreover, *topoi* or *loci* are set patterns and schemes which need to be 'filled out' with elements of a particular case during the preparation of the speech. Therefore, they may not work well in situations where the structure of the argument cannot be fully planned ahead of delivery or that may change as a result of unforeseen contingencies. Finally, the arguments provided by the topics are assumed persuasive *per se*, yet there is no evidence that applying them in a particular case will win the support of the audience.

This is again the same problem of the adaptability of arguments to contingencies mentioned above. Rhetorical handbooks may provide a detailed set of topics on persons and events, but they do not explain how they can best be applied to the highly individual circumstances of a case. These features of the topics do not of course mean that they are not perfectly adequate tools to supply or analyse an argument. It only shows that from a strategic point of view, which takes into account several variables of the case (e.g. the arguments from the opposite side or the reactions of the audience), they are not the most appropriate method to guide the orator in creating complex arguments to affect the judgement of the listeners.

1.4 Modern Analyses of Ciceronian Oratory

Seeing some of the inadequacies of ancient rhetorical systems with regards to giving an account of arguments in oratory, one needs to ask whether other scholars have also realised these problems and what solutions were provided to overcome the difficulties. Although it is possible to give, at least in part, an affirmative answer to this question, this answer does not necessarily mean that the gap between theoretical precepts and actual oratorical practice has been bridged. As several attempts have been made to harmonise the discrepancies of theory and practice in different ways, I need to discuss studies on Ciceronian oratory in a somewhat more detailed way. The main purpose of this is to show how much the present work is related to previous scholarship and what the fundamental differences are. Although I will focus on Ciceronian studies, this overview will also be helpful to see how classical scholars in general approach the question of argumentative analysis in comparison with modern studies.

The pioneer study that addressed the problem of analysis in oratory was the work of R. Heinze on Cicero's *Pro Caelio*.²¹ He was the first scholar in modern times to lay down the principle that an authentic description of Cicero's persuasive techniques has to be achieved by a comprehensive analysis of individual speeches. Understanding the whole context of the *inventio* in specific cases requires that we provide a detailed discussion of historical and legal circumstances, identify the forms of arguments and techniques advised by teachers of rhetoric and explain what function they serve in their own place and in the whole strategy. Heinze's approach thus recognises the value of classical rhetorical invention, but emphasises a less dogmatic application of rules in line with particular circumstances of the case – an idea more in accordance with Cicero's and Quintilian's concept of rhetoric.

Solmsen suggested a similar approach in his analysis of Cicero's first speeches.²² He stressed Cicero's indebtedness to Greek theoreticians and Roman oratory, but he conceded that one might find several instances where Cicero's argument diverges from the precepts of contemporary theory. Despite Solmsen's acknowledgement that non-standard forms of arguments may arise during practice, his view of rhetorical analysis can still be considered traditional, for he assigns a dominant role to the application of rules in the study of oratorical practice as described in Hellenistic treatises of rhetoric. In his opinion, the purpose of analysis should be to reveal the extent to which Cicero follows rhetorical theory, as well as the extent to which he goes beyond it.

For Solmsen, the ultimate purpose of analysis is to give a summary of the techniques applied in speeches, indicating which could be Cicero's genuine invention and which might have originated from Greek or earlier Roman theory. The weakness of Solmsen's approach becomes clear when someone uses Greek (or Roman) rhetorical theory as the ultimate reference point for the description of persuasive techniques. His view thus assumes that every type of argument should be measured according to classical theoretical categories, possibly because they give a more authentic picture of the means of persuasion. The problem with this approach is that our view of argument forms can be reduced by the possibilities a rhetorical system would permit. However, the question of method becomes acute once we discover the limitations of the ancient system. Thinking as Solmsen does would presuppose that our knowledge of contemporary Greek and Roman rhetorical theory is fully adequate to describe arguments preserved in Cicero's extant speeches. It will become clear later in the analysis of complex probabilistic arguments that this is far from being the case.

Heinze's approach was first taken up by Neumeister in post-war scholarship. He claimed in his study of Cicero's forensic rhetoric that theory has only a restricted role in the evaluation of persuasive techniques.²³ Neumeister postulates two basic

²¹ Heinze (1925, pp. 193–258). Both Classen and Stroh consider this study the seminal work for the subsequent research on Cicero's art of persuasion.

²² Solmsen (1938, pp. 542–56).

²³ Neumeister (1964). See esp. the introduction pp. 9–10 and p. 82. For similar views on the use of a 'purely rhetorical approach' see Steel (2001, pp. 9–11).

principles which guide the understanding of the argumentative strategy. Firstly, in the analysis of forensic speeches one has to realise that any plan of a speech, which may become apparent at first reading or hearing, may turn out to be greatly misleading. This may happen if one is all too ready to accept that the premises of rhetorical theory offer a straightforward and informative guideline to interpret the orator's statements on the case. In many instances, the apparent arrangement only disguises a hidden plan which is created to win over the approval of the jury even at the cost of completely distorting the facts. Secondly, a genuine appreciation of a speech requires the reader to see it as one organically united persuasive procedure, in which the function of every section becomes clear when taken together as part of an overall strategy. Neumeister's view on the necessity to search for strategies, which are not necessarily conspicuous at first sight, had thus an influence on my quest to identify complex probabilistic strategies in Ciceronian oratory.

W. Stroh's seminal work on Ciceronian rhetoric²⁴ attempts to go well beyond the tenets of ancient rhetoric when he approaches the orator's forensic techniques by the study of *dispositio*. He assumes from the outset that by applying a creatively misleading arrangement of facts and arguments within the conventional framework of a forensic speech Cicero is able to develop his version of the story while ignoring or destroying the claims of the other side. The covert strategy of a particular speech can thus be revealed if someone focuses on Cicero's statements about the case in different parts of the argument. These statements might, when compared with each other, uncover hidden inconsistencies or the orator's outright falsification of facts in the pursuit of a favourable verdict.

Having an empirical approach that is not fully determined by the categories of the traditional *dispositio*-scheme could show that in many instances Cicero deliberately moves certain *partes orationis* to places not explicitly advised by theory, but always in line with his manipulation of facts. His study shows that a rigorous and comprehensive examination of internal and external proofs of the case, as well as the propositions based on them, frequently requires one to put rhetorical precepts aside to get a clear view of the entire argumentation.

Despite his innovative approach, Stroh does not attempt to place strategies not described by ancient theory beyond the boundaries of classical rhetoric, which prevents him from considering *all* the details of a particular argumentative strategy, especially when arguments fall outside the scope of the *inventio* or the *dispositio*. One can see this clearly, for example, in the analysis of the *Sex. Rosc.*, where he does not discuss how arguments like the focus on Chrysogonus and the *venditio bonorum* at the beginning contribute to the *probability* of Cicero's conclusion.

²⁴ Stroh (1975). From him see also (2000, pp. 43–63). In the second study, however, Stroh advises for educational purposes the more traditional *inventio-dispositio-elocutio* system to understand why so many of Cicero's speeches were able to succeed. However, such an approach seems not to comply fully with the results of his first book, which showed that one cannot rely merely on the schoolbooks of Hellenistic rhetoric to discover a complex strategy, unless we distinguish between rhetorical analyses used at different levels of education.

If taken to their logical conclusion, Stroh's analyses can nevertheless point towards a new approach to rhetorical arguments. He explains the departure from rhetorical rules either in terms of the rules themselves or as a matter of common sense. However, neither approach gives a truly satisfying explanation of (a) why the rhetorical rules work in the first place, and at the same time (b) why it is so often necessary to depart from them. Only a more comprehensive approach to oratorical argumentation can do that. Stroh's analyses show that such an approach is greatly desirable, but they stop short of fulfilling the need.

C. J. Classen's works on Ciceronian oratory²⁵ describe numerous techniques while accepting the general validity of classical rhetoric. To see how it is possible to extend the use of the traditional system, one should take a look at what kind of assumptions Classen uses in studying Cicero's art of persuasion. Following Heinze and Neumeister, he holds that a speech has to be considered as an organic process, which was created to persuade the audience in one specific occasion. It follows then that the extant speeches, even if we have them in written form, were not meant to be reread, dissected and explained in smaller parts,²⁶ but they need to be evaluated in a comprehensive manner, assigning every part its function in the persuasive discourse.

In the analysis, therefore, one has to concentrate primarily on the speech itself (i.e. not exclusively on the legal or political circumstances) and find those elements with which the orator attempts to realise his purpose of persuading the audience. Every element of the rhetorical system should be subordinated to the sole object of persuasion, making the jury accept a certain proposition favourable to the orator and his client. The reader needs to exercise caution so as not to end up criticising the truth of various statements and judging the value of a speech by its adherence to the facts of the case. Classen's work tries to distance itself gradually from the traditional framework with a more empirical approach to persuasion. However, reading his analyses, one may observe the same phenomenon as we encountered in Stroh's work. Novel techniques in Cicero's speeches are treated as part of the classical system, which makes it difficult to evaluate the *argumentation* of a speech in its full complexity.

A somewhat original offshoot of rhetorical analysis can be seen in the work of C. P. Craig,²⁷ who collected and categorized examples of a particular form of argu-

²⁵ Classen (1985). A great advantage of this book is to make use of a hitherto forgotten source of rhetorical analysis, the works of Renaissance commentators such as P. Manutius or F. Sylvius, who show a masterly grasp of all the orations and often make incisive remarks on the argumentative significance of particular passages. See also *ibid.*, (1982, pp. 149–92).

²⁶ Some objections might be raised against this view, if we accept Stroh's assumption that classical speeches were published mainly for the use of rhetorical schools. The fact of publication itself, and the necessary modifications that such a procedure brings, can strengthen the notion that written speeches were indeed meant to be studied by experts. Classen's view nevertheless points to an inherent problem of the rhetorical system, namely, that even the creative application of rules and categories brings along the danger of viewing a speech as a conglomerate of different techniques.

²⁷ Craig (1993) and (1979). For the definition of dilemma see Cic. *Inv.* 1, 45; Quint. *Inst. Or.* 5.10.70 and Hermog. *Inv.* 4.6.

ment, the dilemma in Cicero's speeches. The study showed how often Cicero applies this relatively simple form of argument in a great variety and complexity of ways. Dilemmas provided an effective tool to refute a claim of the opposite side with the result that the opponent had no chance of proper defence without a cumbersome discussion of the dilemma's presuppositions. Acknowledging the orator's fondness for dilemma structures, one could realise that a thorough introduction to the rhetorical situation of an individual case, including the reconstruction of the opposite side, together with a catalogue of dilemmas, would reveal something about the overall persuasive strategy of a speech, of which that particular form is a part. However, concentrating on individual elements of the argumentative structure solely may lead someone to a formalistic approach to oratory that fails to recognise irregular forms of persuasion, which could be disguised by a seemingly formal use of prescribed techniques.

Putting Craig's common rhetorical approach aside, his interesting assumption²⁸ on Cicero's treatment of *inventio* is worth mentioning. He maintains that a rhetorically educated group in the Roman audience had clear expectations about what kind of arguments can be used on the *rostra*. We may learn about the range of these expectations partly from Cicero's own speeches, which indicate what kind of arguments were advisable to bring forward in order to get credit before such a weighty part of the audience. The audience's expectations manifest themselves partly in contemporary rhetorical teaching,²⁹ as well, which restricted the orator in terms of what kind of argument he can or cannot use in the speech. Although it may seem appealing, Craig's suggestion is based on facts that are difficult to validate in a historical or political context. It is hard to see what are those expectations which Cicero's speeches reflect. The notion of audience expectations assumes first that we need to possess a thorough and sociologically accurate knowledge of the attitudes of the average member of the Roman jury,³⁰ so we can match these attitudes against the assumptions the orators have in their arguments.

The same problem applies to studies that investigate different aspects of the speech in relation to what we find in Hellenistic rhetorical handbooks.³¹ They usually take a particular element or technique of the theory, for example the *exordium*, the *narratio* or the *peroratio* in isolation and fail to recognize that similar, often dis-

²⁸ Craig (1993, p. 1).

²⁹ As, for example, in Cicero's youthful work, the *De Inventione* or the anonymus *Rhet. ad Herennium*, the precepts of which the sophisticated Romans were likely to come across in their rhetorical curriculum. But what about those sources of rhetorical studies, e.g. readings from Greek and Roman orators or attendance at the political and legal business of the Forum, of which we know very little, but may have contributed more to the audience's expectations?

³⁰ We also need to ask what Craig means by 'audience'. How should we treat the expectations of the rhetorically educated Romans and that of the others? It is difficult to believe that the number of educated Romans exceeded that of the common people, who were easily manipulated anyway. If we assume that Cicero followed the expectations of other sophisticated orators, one can hardly say that these people could have been easily misled.

³¹ To mention only the most notable ones, Berger (1978), Köhler (1968), Loutsch (1994), May (1988), Narducci (1997).

guised, forms of argument also support the overall structure of arguments and render it highly complex. Moreover, the variety of approaches makes it very difficult to find a scheme that would allow scholars to apply diverse results in a coherent scheme of argument. To account for such arguments one needs to have an approach that looks at the whole speech and takes into account all the major elements of reasoning which combined will contribute to the conclusion of the speech.

Chapter 2

Cicero and Heuristic Arguments

2.1 Ciceronian Oratory and Informal Logic

The preceding survey of studies on ancient rhetoric strengthens the assumptions that neither the classical *artes rhetoricae*, nor modern analyses of classical scholarship based on them provide us with a fully adequate framework to evaluate arguments in extant Greek and Roman political or forensic speeches. This is not to say that rhetorical handbooks or scholarly works are not useful for many aspects of rhetorical studies. However, I wanted to demonstrate the need for a framework that would extend beyond the scope of rhetorical analysis, as we know it today and give a better insight into the strategies of arguments in practical oratory. To build such a framework, I sought inspiration from both classical and modern argumentation theory, which provides tools to assess and analyse arguments in natural languages. The following brief survey of modern approaches is intended to help position the concept of heuremes within modern research and highlight key differences.

There are many ways to discover the persuasive appeal of a speech besides using the toolkit of classical rhetoric. One could map different parts of the argument, premises and interim conclusions. The purpose of this approach is to assess the strength of the evidence the orator brings forward, to see whether the premises support the conclusion and whether the orator presents an acceptable or fallacious form of reasoning. Such a modern account of argument will naturally be different from a description of the four or five *partes orationis* outlined by Cicero or Quintilian,¹ or the legal or historical account of the speech. However, the question remains whether

¹One may rightly object that ancient rhetoricians had already acknowledged the presence of argumentation in the structure of the speech, which ...*argumentando nostrae causae fidem et auctoritatem et firmamentum adiungit...* (Cic. *Inv.* 1.34). Furthermore, it can be added that rhetoric offered both a formal (*ratio*) and a material (*loci*) classification of different arguments, as we discussed in 1.2. The problem with this objection lies in the interpretation of *argumentatio*. Although it does offer techniques of how to create an effective argument, it does not describe the types of arguments as exhaustively as a detailed analysis would require.

such a reconstruction of the argument would really provide an answer to what makes the argument persuasive.

Following Aristotle's account of rhetoric, we can analyse three means of persuasion, described as *ethos*, *pathos* and *logos*. These encompass the character of the orator, the emotions aroused in the audience and the deductive or inductive forms of argument (e.g. the *enthymeme* and the *paradeigma*) which demonstrate that something is the case.² Following Plato's and his own criticism of earlier (sophistic) rhetorical handbooks which favoured emotional persuasion, Aristotle places great emphasis on rational demonstration which, in his view, will appeal to the rational capacities of listeners and allow them to make an informed and reasonable decision. In fact, modern handbooks of critical argumentation and argument analysis still share the same assumption.

However, modern studies of the persuasive effects of arguments, such as Petty and Cacioppo's Elaboration Likelihood Model, proved that members of the audience may follow different cognitive processes to form a judgement about a proposition.³ Depending on the circumstances of the persuasion, these mental processes may also be affected by cognitive biases, which could distort the rationality of decision-making. Petty and Cacioppo suggested that in making a judgement the listeners might follow one of two routes processing information, a central and a peripheral. Central route processes focus on a detailed and careful assessment of the logically relevant aspects of a persuasive argument to make a rational judgement about its acceptability. In contrast, the peripheral route will involve mental shortcuts, such as heuristics, which often arrive at a conclusion through accepting fallacious or irrelevant forms of reasoning.

Without going into the details of this area of research, I only want to make the point that from the perspective of classical oratory it is not at all self-evident that rational forms of arguments, such as enthymemes or topics will automatically gain the approval of the audience. Moreover, to be successful in a case the orator has to focus not simply on the strength of his arguments in themselves, but also on how their arrangement and presentation will win the assent of his audience. In fact, it seems that not only Aristotle and Hellenistic rhetorical handbooks but orators also were aware of these different routes of analysing a speech when they discussed arguments with a rational or emotional appeal. In the following, I briefly introduce two modern theories of evaluating an argument. The first one is argument schemes within informal logic and the second strategic manoeuvring. My main purpose will be to explain whether and in what ways they may or may not help assessing arguments in classical oratory and thus justify the need for a different approach.

² Arist. *Rhet.* 2.11378a1ff, 2.2 1378a31–33, *An. Post.* 1.1, 71a5ff, *Rhet.* 1.2, 1357b25ff.

³ Petty and Cacioppo (1986). Since their study, there has been extensive empirical research on factors such as message variations and characteristics of communicators, which influence persuasive effects of arguments. A good summary is O'Keefe (2002).

A set of tools for the analysis of everyday, including rhetorical, arguments is provided by informal logic,⁴ which deals mainly with arguments where we do not find strict logical connection between the premises and the conclusion. There are several ways to define informal logic. For Johnson and Blair informal logic designates that branch of logic whose task is to develop non-formal standards, criteria, procedures for the analysis, interpretation, evaluation, critique and construction of argumentation in everyday discourse.⁵ A more general view is proposed by Eemeren. According to him, informal logic comprises a “collection of normative approaches to the study of reasoning in ordinary language that remain closer to the practice of argumentation than formal logic”.⁶ In a recent article on the definition of informal logic, Walton and Godden describe a shift to a dialectic approach in the field, which occurred in the 1980s.⁷ This approach acknowledges that argumentation is a dialectical process that takes place between individuals in a dialogue form.

The dialectic approach to informal logic suggests that the evaluation of arguments is focused on the process of reasoning which develops through different stages until the goal of the dialogue is realised. Walton’s dialogue model has been incorporated by several theories of argumentation analysis. We find amongst these pragma-dialectics, which later gave rise to the rhetorical approach of strategic manoeuvring. The dialogical model of argumentation could provide insights into classical oratory in that it shows how the strength of an argument depends on standards which a certain community of listeners finds reasonable and how the orator has to respond to the assumptions, beliefs, values, standards of judgement and mental processes of the audience in proving his case.

One of the tasks of inductive logic is to provide general criteria of acceptability for various types of arguments, such as inductive and non-defeasible, but not for deductive ones. Although deductive arguments are mostly used in logical, mathematical and scientific reasoning, they may also appear in everyday contexts like rhetorical reasoning.⁸ Deductively valid arguments provide necessarily true conclusions if the premises are true. The truth of inductive arguments is determined by probability or statistics. In this case, true premises make the conclusion only likely. The strength of inductive arguments can be judged by the standard of cogency. A good argument does not require the premises to be true, but they have to be acceptable. Moreover, the premises have to be relevant for the conclusion. Finally, in a good argument the premises provide sufficient support for the acceptability of the conclusion.

Defeasible arguments make up the third form of reasoning. In terms of reliability this is the weakest of the three forms of argument, yet it is the most

⁴Informal logic is a vast and fast growing discipline. Some of the main trends can be reconstructed in van Eemeren, Grootendorst and Henkemans (2002), Hamblin (1970), Margitay (2004), Seech (1987), Walton (1989).

⁵Johnson and Blair (2000, pp. 94–108).

⁶van Eemeren (2009) 117.

⁷Walton and Godden (2007, pp. 3–17).

⁸For a more detailed description of these arguments see Walton (2006, pp. 49–54).

common in everyday situations and thus it is shared by the largest proportion of people. In the case of defeasible arguments, true premises render the conclusion only plausible, which means it may be accepted as provisionally true unless new evidence refutes it. Such arguments are often based on common values, knowledge or experience (as in the case of enthymemes), which may of course be affected strongly by lack of certain information and cognitive biases. However, in practice defeasible arguments often lead to true conclusions, and people rely on and use them widely. A good orator had to recognise the importance of defeasible arguments, especially because they can be easily manipulated in favour of or against a given proposition. To achieve persuasion the classical orator had to look for premises which are generally accepted as true by the largest proportion of the audience.

An example for defeasible reasoning could be taken from Cicero's defence of his protégé M. Caelius Rufus. The prosecution charging M. Caelius Rufus with murder in a Roman court might argue that the young politician was frequently seen in the company of notorious young Roman playboys and infamous women. He could add that everyone knows in what sorts of criminal activities such people usually take part. His conclusion would therefore be that it is likely that the defendant had committed the crime he is accused of. It is to be noted that in the analysis of classical speeches the tools of informal logic cannot on their own give a sufficient account of arguments. In his speech, Cicero relies on his own personal (and distorted) experience of Roman playboys being aristocratic criminals and assumes that the audience would share and approve similar experience. Such an argument may be regarded as strong, although we cannot be sure whether any of the propositions are true or not, until the orator argues about the plausibility of all his premises. If he also proves that the premises of the above argument are true in most cases, and especially in the present one, then he can make the argument so strong as to attain the highest possible degree of certainty available in such forms of reasoning.

In a forensic case, the question of conducting an argument becomes more complicated by the fact that one is inevitably facing an opposing side. The orator is bound to exchange claims and counter-claims and bear in mind at every step that the jury will deliver an instant judgement, however flawed that may be, on the comparative strength of both arguments. In a rhetorical situation, it is therefore essential for the orator to have a critical overview of the most important counter-arguments of the other side, which may provide a stronger and more plausible conclusion than his own reasoning.

It is also crucial to see that the orator was not trained in any formal way about how to assess and argue about the certainty of a claim. He applied common sense reasoning based on experience, a few basic rhetorical rules and the available evidence. As I said earlier, rhetorical studies on the creation of arguments did not provide such a high level of training that was required to master the complex real-life cases we get from the extant speeches. The case with Cicero (or others with similar interests and studies, e.g. Hortensius, Caesar, Marcus Antonius) is different, as his attachment to the sceptical Academy, coupled with his experience in philosophical

reasoning, might have given him an understanding of probabilistic argumentation that was most probably not very common among practising orators.⁹

Strongly related to the field of informal logic is the theory of fallacies, which provide tools to identify patterns of faulty reasoning. Walton, who published extensively on fallacies, identifies them as typical kinds of arguments or moves in argumentation that appear to be reasonable, but are often erroneous and sometimes even deceptive, used with the purpose of defeating unfairly one's partner in a debate.¹⁰ A somewhat modified view of fallacies was proposed by van Eemeren and Grootendorst in line with their pragma-dialectical approach to argumentation, which views fallacies as violations of the rules of critical discussion that prevent a critical resolution of difference of opinion.¹¹

One of the most common examples of fallacies is the *ad hominem*.¹² Normally, it is a form of argument which attacks a person's motivations, character or circumstances, rather than the argument. From the viewpoint of pragma-dialectics, *ad hominem* fallacies prevent the resolution of a dispute by not allowing one party to advance its arguments through unfair and often irrelevant attack.¹³ Some studies on *ad hominem* arguments now acknowledge that they could be used in a relevant and appropriate way, when legitimate criticism of a person is used to cast doubt on the truth of his position.¹⁴ Rightly applied and understood an *ad hominem* argument may reduce the probability of a proposition, but it cannot prove it to be false.

Classical oratory abounds in *ad hominem* arguments; attacks against persons were regarded as a legitimate form of argument. In fact, when Aristotle talks about *ethos*, character, as a means of persuasion he implies that the credibility of the speaker does legitimately contribute to rhetorical arguments. Cicero uses *ad hominem* arguments ubiquitously, in many cases viciously, unfairly and in a very irrelevant way. They are mostly fallacious and prevent rational deliberation. For a

⁹ It is therefore necessary to ask whether the strategies applied allow us to infer anything about the general practice. To be rigorous, we could be entitled to talk about Ciceronian practice only, as his speeches represent Roman practice exclusively. However, if we could establish connections between the extant Greek speeches and those of Cicero, it may be permissible to make some guarded suggestions on the practice in general. On the philosophical and rhetorical practice of the Academics, see Cic. *De Or.* 3.107-21 and Brittain (2001, pp. 296–343). In fact, Philo's practice of teaching the *thesis* together with *hypothesis* in his school (which Cicero attended) offers some clues about how the *probabile* as an epistemological criterion could be applied and practised in the judgement of different arguments. The method was the well-known *in utramque partem disputare* (*Tusc.* 1.8; *Or.* 46), which was established as a mode of inquiry and a way of rhetorical practice by the Sophist Protagoras. Arguing both sides of a *thesis* and a *hypothesis* allowed the orator to see the available opposing probabilities of a case from a detached point of view, which was preliminary to taking on any kind of argument. As for his training, Cicero had studied with a number of leading scholars of his time. Among others, he studied style and probably delivery with Molo in Rhodes, dialectic with the Stoic Diodotus and sceptical philosophy under Philo of Larissa.

¹⁰ Walton (1995).

¹¹ van Eemeren and Grootendorst (1992).

¹² For a more detailed treatment of the fallacy see Walton (1998).

¹³ van Eemeren and Grootendorst (2004, p. 177).

¹⁴ See especially Tindale (2007, pp. 81–97).

classical scholar it is a challenge to decide in the analysis of oratory whether these arguments should be treated as fallacies and dismissed as empty *topoi* or whether they could be accepted as a kind of practice different from our standards of rationality and so treated as an integral part of probabilistic reasoning. In this book, I will follow the second path and discuss *ad hominem* and other fallacies as genuine and legitimate means of persuasion in classical times which may reveal useful information about the underlying strength or weakness of the case and the probabilistic strategies used by the orator, as Cicero's defence of Sulla will prove.

An approach, similar in many ways to the classical theory of topics, was developed in informal logic to analyse fallacies and evaluate arguments in classical and professional, such as legal or medical reasoning, called argument schemes.¹⁵ The schemes describe general patterns of deductive, inductive and defeasible forms of arguments such as expert opinion, argument from sign, argument from example, argument from analogy and various slippery slope arguments.

The evaluation of argumentation schemes can be carried out through a dialectical procedure. Each argument scheme is matched by a group of critical questions which set out the requirements for the correct use of a scheme. To evaluate a particular example of a scheme and judge its strength or weakness, one has to ask each critical question to judge whether the argument fulfils the requirements set out by the questions. The evaluation happens in the context of a conversation between proponent and respondent. This allows a flexible yet rigorous assessment of a particular argument and a rational resolution of a critical debate. It is clear that argument schemes are essential parts of classical oratory as well. Therefore applying the method of critical evaluation may help judge an appropriate use of an argument in a particular case. However, due to the constraints of rhetorical delivery and the problems with analysing the truth of individual statements in classical oratory, it is doubtful whether argumentation schemes would ever provide a comprehensive method to describe strategic reasoning.

Van Eemeren and Houtlosser have developed another major approach to argumentation analysis, called strategic manoeuvring since 1996.¹⁶ This approach was born out of the pragma – dialectical theory of argumentation proposed by van Eemeren and Grootendorst. This theory aims at providing an 'analytic' reconstruction of argumentative discourses in order to clarify the differences of opinion and the positions of the opposing parties. It surveys speech acts and their combinations to map the various stages of resolving a difference in opinion. Pragma-dialectics identifies different premises at the beginning of the debate, examines the arguments and criticisms, the argument schemes and structures used and determines the conclusion. In this way, the theory of pragma-dialectic provides a heuristic and analytical tool to reconstruct the development of the resolution process.

Strategic manoeuvring builds on the dialectical tools of pragma-dialectics and extends it to include rhetorical considerations in an attempt to overcome the artificial division between the rhetorical aims of persuasive effectiveness and the dialectical

¹⁵ Walton (1996). Walton et al. (2008).

¹⁶ In the discussion of strategic manoeuvring I follow van Eemeren and Houtlosser (2009, pp. 1–24).

standards of effectiveness. Such an objective is all the more interesting as it tries to bridge the centuries old (and rather damaging) gap between on the one hand rhetoric perceived as the theory of often unreasonable public persuasion and on the other hand dialectic as the art of rational debate, which is seen as the privilege of educated minds. Most importantly, strategic manoeuvring takes into account the strategic function of argumentative moves and thus gives a more realistic assessment of fallacies.

In strategic manoeuvring, the dialectical framework of argument analysis (i.e. the four stages of resolving a difference of opinion critically) is extended by rhetorical goals. Such extension may happen through choices made (1) from the “topical potential” of each stage, (2) in “adjustments” of argumentative moves directed at the audience, (3) in the use of linguistic “devices” in presenting these moves. Thus, the concept of strategic manoeuvring provides models for rational but rhetorically oriented discussions in certain domains of argumentative practice, such as legal, political, medical, scientific or scholarly discourse.

The question from our viewpoint is how the approach of strategic manoeuvring can be related to the concept of rhetorical *heuresmes*. A clear point of connection is provided by the fact that the rhetorical devices for strategic manoeuvring are taken from the theory of *loci*, the topics, orientation towards the audience and the catalogue of stylistic devices used by classical oratory. These areas of classical oratory indicate clearly that an orator may build his strategy through a selection and appropriate linguistic presentation of argument schemes provided by the *loci*, taking into account the actual expectations of the audience. It will be obvious from the notion of *heuresmes* that strategic argumentation adjusted to the views of the audience also lies at the heart of my approach.

In fact, *heuresmes* aim at overcoming the restricted view of oratory provided by the system of *loci*, to find argument schemes which give a more authentic and comprehensive account of the art of rhetoric in classical times. Students of rhetoric sometimes forget that rhetorical handbooks compiled, at least in theory, the topics from speeches which were presented in actual practice, therefore it is conceivable that they were not the only possible forms of arguments and a different approach to these same speeches may bring up new ways of strategic reasoning. It is for this reason that the notion of *heuresmes* may contribute in some fundamental ways to strategic manoeuvring, namely to extend the range of strategic schemes of arguments which orators used effectively in complex forensic cases. *Heuresmes* could thus provide innovative models for the study of persuasive reasoning in modern areas of argumentation.

2.2 Heuristic Reasoning and Oratory

The analysis of arguments in classical rhetoric in previous chapters showed that treatises from the sophists onwards provided schemes of argument (e.g. rhetorical *topoi*) for the preparation of speeches. Whilst rhetoricians focused on patterns of arguments with a persuasive appeal, they did not specifically deal with how

complex arguments can be planned and adapted to real-life cases. The measure of success in classical oratory was not simply how well a speech displayed standard forms of rhetorical theory, but how well the argument actually worked when the jury made its decision. Therefore, one may ask how an orator knew if certain patterns of argument were more successful in persuading the audience in a legal case or political debate. An answer for this question cannot be found in systems of classical rhetoric, because their task is to provide an internally consistent set of general rules with no direct connection to actual practice. Therefore, they can identify certain patterns or schemes but they cannot tell how these should be joined together and adapted to individual circumstances. Only the study of oratorical practice can explain what strategies of arguments can be applied successfully to the demands of a certain rhetorical situation.

Although different approaches in informal logic, such as argument schemes, fallacies and strategic manoeuvring provide useful tools to formalise the structure of probabilistic reasoning, we would still need to show how argument schemes can be most effectively adapted to specific cases where contingencies require constant adjustment of set patterns. Therefore, to find out how a case could be presented in a plausible form in practice, I looked beyond traditional schemes and searched for sequences of arguments based on a probabilistic strategy flexible enough to be adapted to contingencies of the situation and to appear more plausible than the argument of the opposite side. This is the point where a heuristic approach to rhetorical arguments cannot simply bring new insights into the process of analysis, but fundamentally change the starting point of rhetorical analysis. Such an approach assesses a speech primarily through reconstructing as far as possible how the applied argumentative strategies, together with other rhetorical devices, serve the goal of persuasion by making the case likely for the audience while adjusting the argument to multiple contingencies arising in that particular situation. I called this essentially asystematic and practice-oriented approach to creating and presenting a speech ‘heuristic’.

A heuristic approach to oratory attempts to explain probabilistic strategies within long and intricate forensic or political arguments. The word ‘heuristic’ suggests several features of the approach. Firstly, the concept does not follow algorithmic sequences to identify patterns of arguments such as topics, fallacies or argument schemes. Instead, it focuses on the actual practice of oratory to provide a non-systematic view of real-life probabilistic strategies in their context and to show how these gradually advance an argument in a certain case. This idea is built on the assumption that orators at an advanced level did not mechanically follow the rules of rhetoric but devised individual strategies from a set of argument schemes in an arrangement they considered the most appropriate in a certain case. Secondly, the concept of heuristic reasoning implies that patterns of argument have to be adaptable not only to new cases but also to evolving contingencies during the presentation of the case as changing circumstances may demand. In this sense, patterns are ‘discovered’ constantly to suit the contingent elements of each case, both during preparation and delivery. ‘Discovery’ means a choice between different alternative strategies, based on observation, experience or learning. However, finding a strategy

does not mean that it is completely new. Rather, it uses elements of other strategies found in oratorical tradition.

I will call the set of complex and flexible strategies based on probabilistic reasoning in forensic and political speeches ‘heuremes’. From a practical perspective, heuremes provide a description of strategies which could be successful in certain cases and therefore give models of how to *discover* and analyse argumentative strategies which are adaptable to a variety of circumstances. It follows that these strategies do not prescribe in any way what must be said in a particular case and do not give a systematic and comprehensive description of strategies applicable to any situation. Instead, they show a possible way of probabilistic argumentation in an individual instance which may be used as a model and adapted through certain changes to new cases, where the structure and plausibility of the available evidence shows a similarity to the original context.

As such, heuremes cannot be described by the usual descriptive/prescriptive antinomy – any more than classical rhetoric can. It is clear from what I have said previously that the concept of heuremes is not prescriptive in any form, although they may suggest to orators models of reasoning in practice. It is possible to view heuremes as descriptive in some ways, yet this characterisation itself does not do full justice to the concept. Studying heuremes does not simply create objective categories which serve as templates in another systematic account of classical rhetoric. If anything, one can say that the discovery of heuremes is an ascriptive procedure. It looks at common patterns of rhetorical reasoning to establish broad classes and arrange certain types of arguments accordingly, but the ultimate purpose of such a procedure is not classification but to help identify strategies and assess how they are adapted in certain instances.

Heuremes can also be understood as a procedure for finding arguments without necessarily involving a formulaic application of rhetorical rules. The emphasis of heuristic invention is on how well a certain strategy can be adapted to the necessities and uncertainties of rhetorical situations. Since rhetorical reasoning is often based on incomplete or manipulated evidence, the reaction of the audience is not always predictable and the argument of the opposite side may not be entirely known before the delivery of the arguments. All these circumstances together can create a situation for the orator which he cannot fully predict so he should be prepared to make adjustments as he proceeds with the delivery.

Another fundamental feature of rhetorical heuremes is strategic orientation and the emphasis on the plausibility of the argument in a specific case. A speech could be successful only if it had available plans to adequately address all the contingent elements of a case and present the jury with a credible proposition. There were many ways an orator could influence the decisions of jurors. He could use *topoi*, emotional arguments or rely on the strength of his own character. Whichever tools he used, an orator created probabilistic arguments which were designed to influence the heuristic decision-making procedures the listeners applied in arriving at a judgement.

Using patterns of arguments or strategies with inferences which appear familiar and recognisable for the audience would make them prone to accept the conclusion.

As I mentioned earlier the orator was not bound to adhere to any objective norm of rationality in his reasoning, except when this was useful to persuade a particular audience. Creating seemingly plausible forms of probabilistic argument could make the audience approve conclusions which look credible on the surface, but contain inferences which would be rejected when made logically explicit. This is one major difference which separates the concept of heuremes from other theories of argumentation, which insist on certain standards of rationality in reasoning.

An important element of heuremes in comparison with *topoi* and argument schemes is their length. While *topoi* and argument schemes prescribe in detail appropriate forms of mostly shorter arguments, heuremes usually extend to a large part or even the whole of the speech and include several sequences of arguments. Partly because of their length and complexity, heuremes cannot be described in a very detailed and precise formula. In the case of heuremes the emphasis is on the strategic arrangement or moves they use to manipulate the argument and to adjust the probabilistic reasoning appeal to the mind of the audience.

As I mentioned before, a key feature of the concept of heuremes is that strategies should be well adapted to the contingency of rhetorical situations. Interestingly, neither classical rhetoric, nor modern theories of argumentation seem to consider unpredictability or uncertainty a vital element of practical arguments. This is probably because they assume that the internal consistency of arguments and their compliance with normative standards would ensure that listeners judging the information rationally would accept them. However, the creation and presentation of an argument may not necessarily follow a set algorithmic procedures since considerations about the evidence, the audience, the delivery and the opposite side could override the necessity of providing a clear and logical argumentation.

The fourth century Greek rhetorician and pupil of Gorgias, Alcidamas appears to be the only one who emphasised that the orator needs to take into account several variable elements of the rhetorical situation and present his speech in such a way that he could respond to sudden contingencies, such as loss of memory. In his treatise entitled, *On Those Who Write Written Speeches or On The Sophists* he argued for the superiority of speeches which are spoken without a script prepared beforehand, precisely because written speeches cannot respond to *kairoi*, critical times or moments which may have a decisive effect on the outcome of a speech.¹⁷ Alcidamas is not very precise about how an orator should prepare for a speech without a written argument. It is nevertheless clear from what he says that he thought of certain unspecified argument forms, possibly *topoi* or similar schemes which the orator can use in preparing a strategy in his mind. The strategy, as well as the argument patterns which are part of it, can change flexibly as the circumstances of preparation and delivery require. Alcidamas most likely did not think about heuremes as probabilistic strategies, but his contribution to rhetorical theory is still vital to raise awareness of the unpredictability of rhetorical situations and the possible methods to respond to these.

¹⁷ Muir (2001), Mariss (2002).

The fact that heuremes as probabilistic strategies enable the orator to address the contingent elements of a rhetorical situation also means that they can be adapted to new cases, despite the fact that they are determined by the specific circumstances and set of evidence relevant to a particular forensic or political case. It follows from this that when it comes to understanding the structure of a particular heurme, their host argument, the speech itself, should be studied in full detail, including the reconstruction of the legal case, the evidence and any legal, political, historical or sociological circumstance which could affect the outcome of the argument. For those who are more interested in the theoretical aspects or practical applicability of heuremes such a detailed treatment of the case would seem an unnecessary philological distraction. However, it is clear from what I said above that only a meticulous reconstruction of the facts could reveal why the orator chose a particular course of argument, as well as the potential strengths and weaknesses of probabilistic reasoning in an unpredictable situation.

It also follows from the above that heuremes are based on a form of analysis independent of classical rhetoric and modern theories of argumentation, although one may make use of tools provided by those fields. For example, ancient rhetorical handbooks taught different aspects of making a speech from preparation to delivery. Heuremes, on the other hand, enable the strategic analysis of individual speeches in an attempt to identify patterns of probabilistic reasoning. They explain extended argumentative strategies based on probabilistic reasoning to influence the final decision in the case at hand. However, it would be wrong to assume that the different systems are incompatible. It will be clear from the analysis of Ciceronian speeches that the orator used techniques described by rhetorical handbooks. I have also used a variety of technical terms and argument schemes described by classical rhetoric and modern argumentation theory. Therefore, it is better to say that classical rhetoric, modern argumentation theory and heuremes are complementary systems of argumentative analysis and each can be applied for the benefit of the other.

2.3 Heuristics in Psychology and Rhetoric

Heuremes focus on the adaptability of forensic and political arguments to the mind of the audience which must come to a decision after listening to opposing arguments. They can achieve this by providing probabilistic strategies which readers find more credible than the argument of the opposite side. Such credibility can be achieved if the argument advanced by a heurme shows similarities to the reasoning processes or arguments which the audience is likely to use in everyday situations where they have to make a decision based on an incomplete set of facts within a limited amount of time. The question is whether I have evidence to support the assumption that orators were consciously aware of forms of heuristic reasoning in the mind of their audience and whether they applied strategies which imitate the probabilistic inferences the audience may use in their decisions. Providing direct evidence for such an assumption would naturally be very difficult, in fact almost

impossible, as the evidence relates to psychological phenomena shared by members of the audience in classical times, which we cannot verify. Moreover, it is not the purpose of the study to prove that such a link existed. It is nevertheless possible to say that during the study of rhetorical argumentation I have discovered that certain forms of heuristic reasoning described by modern scholarship show some similarities to strategies found in classical oratory.

This similarity between modern theories of heuristic reasoning and ancient practice led me to create the concept of *heuresmes* to give a more dynamic view of classical oratory. Naturally, this similarity is not in any way proof that ancient orators had a conscious and explicit knowledge of cognitive heuristic processes. It is nevertheless possible to maintain that orators were aware of the fact that they had to adjust their argument to the thinking of the audience and they conscientiously used techniques for that purpose. *Heuresmes* may thus reflect common forms of human reasoning which were only made explicit by modern psychology and argumentation research. We cannot measure the persuasive effect of these techniques, neither can we identify modern heuristics with *heuresmes*. The purpose of my study is to show that the complex application of reasoning techniques represents clear patterns which can be described by the concept of heuristic reasoning.

The primary evidence for complex strategies would come from the speeches themselves. Besides, writers of classical rhetoric also give advice on how orators could adjust their arguments to gain the approval of the audience. One of the clearest examples is the anonymous author of the *Rhet. ad Alex.*, who suggests that the orator needs to observe in his practice examples or patterns (e.g. the *paradeigmata* in 1428a–29a) of mental inferences that members of the audience would use in decisions based on likelihood. Therefore, one may argue that by observing what arguments usually induce people to come to a certain decision in contingent circumstances using a set of probabilistic inferences the orator could intuitively develop from models or patterns of probabilistic reasoning extended argumentative strategies for a particular case.

Approaching *heuresmes* from a modern perspective one would come across the term heuristics in several disciplines. A brief overview of these applications would help understand what inspired me to form a similar concept applicable to classical oratory. The notion of heuristic reasoning is used widely from psychology to computer-science to describe methods of discovery, learning, problem solving and reasoning without the use of strict analytical or logical procedures. For example, in mathematics Polya collected several heuristic methods of problem solving based on (among other things) analogy, generalization, induction, specialisation and backward chaining.¹⁸ What is common in these kinds of heuristics is that they provide alternative strategies to solve an unknown mathematical problem with the help of a constructive but not mechanical plan. To develop the skill of choosing the most appropriate heuristic strategies the student of mathematics has to solve a large number of problems. Mathematical intuition learns through experience which strategies could best be applied to uncertain variables in a problem. The

¹⁸ Polya (1973).

idea behind these mathematical or other types of scientific heuristics is that they may involve a set of intuitive and probabilistic yet often incomplete or even false inferences, which may nevertheless be useful and lead to the understanding and solution of a problem.

A different kind of heuristics emerged in psychology from the 1970s which aims to describe the types of inferences which people use in everyday reasoning. These cognitive heuristics in everyday decision-making were described first by D. Kahneman and A. Tversky.¹⁹ They proposed that people with bounded rationality have to use simple yet effective mental decision-making tools to make judgements and solve problems in situations where vital information is incomplete or vague. People often fail to see the complexity of a problem, and allow the combination of irrational thinking with rule of thumb mechanisms. Such decisions are often based on a false perception of probability and thus lead to a number of cognitive biases with the result of major errors. However, heuristic decisions can give good results in many (especially uncomplicated) cases. As such, a number of arguments which use or imitate heuristic processes can be manipulated by someone who is aware of them.

Critics of D. Kahneman and A. Tversky, such as G. Gigerenzer, found that research on heuristics and biases focused too much on systematic errors of reasoning seen as violations of the laws of probability. It placed too much emphasis on human irrationality and described ordinary people as incapable of using much information and thus estimating probabilities and risks. In reaction to this Gigerenzer and his colleagues developed computational models of reasoning which would offer a set of simple and task specific cognitive decision-making strategies which would work fast in making judgements and solving problems.²⁰ These 'fast and frugal' heuristics can be used easily as they employ a minimum of time and knowledge, limit information search and do not involve much computation. The decisions which employ these 'fast and frugal' heuristics may involve logical inconsistency (and are thus considered as fallacious forms of reasoning by logicians or argumentation theorists), but they could nevertheless adapt successfully to the actual requirements of the environment.

An example of these 'fast and frugal' heuristics is the recognition heuristic.²¹ In an experiment Goldstein and Gigerenzer asked students from Germany and the United States which city has more inhabitants, San Diego or San Antonio. Paradoxically, although many of the German students did not even know that San Antonio is an American city, all the students chose the right answer, as opposed to just two-thirds of their American counterparts. The explanation of this result could be that German students had an advantage due to their lack of knowledge. They used the recognition heuristic, which says that 'If one of two objects is recognized and the other is not, then infer that the recognized object has the higher value with respect to the criterion.' The recognition heuristic can be an effective

¹⁹ Mero (1990), Kahneman et al. (1974, pp. 1124–1131), Michalewicz and Fogel (2000).

²⁰ Gigerenzer et al. (1999), Reimer and Rieskamp (2007, pp. 346–348).

²¹ Goldstein and Gigerenzer (2002, pp. 75–90).

tool of reasoning in environments where recognition is systematic, for example in guessing the sizes of cities, performances of tennis players in major tournaments or productivity of authors.

This brief survey shows that there is a great variety of cognitive heuristics in psychology, computing and argumentation theory. Nevertheless, what seems to be common in all is that they work on the basis of simple, not necessarily algorithmic and logical rules or procedures and thus allow people to respond to problems or questions in simple every-day or more complex situations. For this reason, it seems that they can be used in part as models for strategies in rhetorical arguments. A rhetorical situation is in many respects similar to everyday environments where judgements need to be based on heuristic reasoning.

Most importantly, listeners hear two opposing sides of a case, which may involve a complex set of arguments and evidence. To make a judgement, listeners, who were mostly ordinary citizens with no special logical, mathematical, rhetorical or philosophical training, had to compare and analyse this complex set of contrasting information in a limited amount of time. It is reasonable to assume that they did not use any specialist tool to balance the likelihood of opposing arguments. Therefore, listeners and decision-makers would have more likely made a decision favourable to the orator if an argument at least broadly reflected the reasoning they themselves would use in judging the relative probability of opposing claims. Only the orator who had learnt intuitively how his arguments affect the heuristic thinking of his audience could have made his own conclusion look more plausible than that of his opponent.

The assumption that probabilistic strategies were intended to influence the minds of the jury is a crucial element of the concept of *heuresmes*, despite the fact that there is no direct evidence of how such a process could have worked. Together with the idea that arguments have to be highly adaptable to unpredictable contingencies in a rhetorical situation, this is what most clearly sets apart *heuresmes* from other theories or systems of rhetoric and argumentation. Therefore, it is important to see clearly what this link between strategies and cognitive processes means. Most importantly, I do not say that orators knew exactly what went on in the minds of the jury during deliberation and thus created an argument which directly influenced this process. What I do say however is that a good orator would have observed during his practice what probabilistic arguments would most affect how people arrived at certain conclusions. Thus they built argumentative strategies out of *topoi*, analogies, examples, narratives and other probabilistic argument schemes which could best respond to unforeseen contingencies during preparation and delivery and would probably have turned the mind of the audience towards a favourable decision. In sum, instead of using algorithmic procedures suggested by rhetorical handbooks, successful orators followed more independent, practically-oriented heuristic methods for arguing their case.

It is also important to note that individual cognitive heuristics do not explain fully how rhetorical *heuresmes* can be developed as part of a complex argumentation. They can nevertheless provide simple models to understand the structure of more complex probabilistic strategies. Understanding the differences between them will help to clarify the way *heuresmes* provide an overview of rhetorical arguments.

Heuristics in cognitive psychology are understood as short mental shortcuts to make quick inferences without a systematic study of available evidence. On the other hand, rhetorical heuresmes are complex strategies which describe often lengthy rhetorical (i.e. spoken or written) arguments based on a weak or incomplete set of evidence. They can be made up of a series of arguments, *topoi* and narratives, which together form a strategy in support of the probability of the conclusion and bring forward a case which appears logically consistent, plausible and credible. The main difference between the two types of reasoning can be explained by their dissimilar sphere of application and be roughly described by the short/long, mental/verbal and simple/complex dichotomies.

To understand in one way how heuresmes may function in rhetorical arguments, we need to look at the three most important cognitive heuristics originally described by Kahneman and Tversky, the ‘anchoring and adjustment’, the ‘availability’ and the ‘representativeness’. These mental algorithms belong to our most developed reasoning strategies. They could be rules, principles, modes of reasoning and analyses which may function well in practice and bring true conclusions in most situations, but not invariably. They could be used effectively in everyday situations when decisions have to be made quickly, but we either do not possess a sufficient amount of information necessary for a sound judgement, or we do not have valid formal syllogisms. Rhetorical situations are usually of this kind. It should be noted however that heuresmes are not simple short-cuts like cognitive heuristics. They are often complex and extended strategies, which may nevertheless show certain characteristics of heuristic shortcuts in their arrangement of evidence and argument, the way they make inferences and arrive at a conclusion, for example by ignoring facts which may appear complicated or disadvantageous.

2.4 Examples of Heuresmes in Cicero

The strategy which bears some similarity to the ‘anchoring and adjustment’ cognitive heuristic is the ‘initial adjustment’ heureme. In a highly uncertain situation people tend to orientate themselves according to the facts already known or the way the problem is expressed. Sometimes the results of a few initial calculations are projected onto the final solution and the decision is based on them. In rhetoric, similar elements of the ‘initial adjustment’ heureme can be observed both in the *inventio* and the *dispositio*. To direct or turn away the audience’s attention, the orator can set a number of probable premises, which determine the issues to be handled or left out. In addition, the order of issues might be given in the *partitio*, a way of covertly manipulating audience expectations about relevant and irrelevant topics.

According to Classen, Cicero uses a similar tactic when he treats persons, facts and cases not connected directly to the issue. He introduces general considerations, but omits crucial details or fails to ask the appropriate questions.²²

²²Classen (1982, pp. 142–3).

He often chooses carefully the most important premises in the beginning of his speech and so determines the intended conclusion in advance. It is not by chance that Cicero always preferred to speak last. This gave him a better opportunity to control the way the audience worked on the information offered by both the defence and the prosecution.²³

A short analysis of the defence speech for Sex. Roscius Amerinus will make it clear how the ‘initial adjustment’ *heureme* can appear as a strategic element to direct the jury’s reasoning to the probabilities set out by the defence. In the opening sections of the speech (5–14) Cicero makes a tactical move, a masterstroke, nowhere described in contemporary rhetorical literature. He takes the conclusion of the *argumentatio* out from its proper place, well after the *narratio*, and puts it at the very beginning of the speech, right after the initial appeal to the judges. The key sentence reveals that Chrysogonus, the supposed mastermind behind the case, bought the estates of Roscius Senior at very low price as: *bona patris huiusce Sex. Rosci ... duobus milibus nummum sese dicit emisse adulescens vel potentissimus hoc tempore nostrae civitatis L. Cornelius Chrysogonus*.

This decisive statement alleges that the primary aim of the prosecution is not having the young Sex. Roscius condemned for killing his father, but rather to get hold of his huge inheritance, the estate of his deceased father. Thus, the narrative, taken together with the introduction presents a compact heuristic scheme, putting forward all the information necessary for a preliminary conclusion in 32. Sextus Roscius claims here that the prosecutors would have never started these proceedings, had the prosecutors possessed his father’s estates without any fear of legal dispute from the true heir: *patrem meum, cum proscriptus non esset, iugulastis, occisum in proscriptorum numerum rettulistis, me domo mea per vim expulistis, patrimonium meum possidetis....etiamne ad subsellia cum ferro atque telis venistis ut hic aut iuguletis aut condemnetis Sex. Roscium*.

By providing a definite conclusion, Cicero can pretend that he has already proved his case and so he does not need to present any further evidence. The forthcoming argument defends Sex. Roscius not against the charge of parricide, which is treated as an important adjunct, but as a victim of proscription fraud. We need to realise the thesis switch, otherwise the whole *anticategoria*, attack against the people behind the prosecution, from 83 onwards becomes an excessive, irrelevant attack on Magnus, Capito, and Chrysogonus, the suggested masterminds, whose direct involvement in the murder had not been proved beyond doubt by the orator.

The heuristic reasoning needs to establish a degree of credibility in advance of the parricide charge. By the end of 36 the jury can already form a probable opinion as to whether they accept Cicero’s case or not. In fact, if we look at the whole speech, the defence proper is shuffled between the initial heuristic argument from 1 to 36 and the *anticategoria*, which deals in detail with members of the conspiracy in 83–123. Putting the property sale and the *cui-bono* argument at the forefront, Cicero

²³ In a single *actio* trial, where the witnesses and testimonies came after the prosecution and defence speeches, the orator naturally had a limited influence on how the jury treated the evidence. Cf. the attack on Erucius in *Rosc.* 98–123.

does not blindly attack the suspected real culprits, but consciously presents an alternative argument that focuses the attention on probabilities which prove the innocence of Roscius in a smarter way than direct defence.

The second type of cognitive heuristic is called 'availability'. People use it to predict the probability of a fact or event by searching for examples and analogies in their memory. The probability of an event depends on how easily one may recall an analogy. As a result, strongly imprinted personal memories can override the analytical processes required by an appropriate assessment of the case, which results in irrational decisions. The degree of availability depends on how favourably and easily we retrieve a particular memory. Shopping habits are often supported by availability reasoning, when the influence of impressive advertisements or the opinion of friends cut short a lengthy argument over real product value, or the necessity of possessing it.

Decisions of this type are rarely reliable because unstable experience prevents the consideration of key issues which need a more thorough reflection. The vividness of a particular memory may also influence accessibility, which might be affected by rhetorical amplification or credible presentation. The direct evidence of the speaker has invaluable persuasive force. Cicero uses a strategy similar to the 'availability' heuristic in *Man.* 60. The orator gathers a careful selection of memorable examples which the listeners may recall easily to prove that extraordinary powers had been given to commanders in earlier times as well, so the same thing can be done in the case of Cn. Pompeius, on whose behalf he is speaking.

The military successes of famous Roman commanders like P. Scipio Aemilianus and Marius may appear vividly in the audience's mind and prove effectively that in special situations such as they have now may require measures not fully complying with existing laws. However persuasive the examples may appear, the proof does not address the main contention of the opposition's argument that previously such measures were initiated by the senate as a body and not by individual senators. Historical anecdotes, fables in digressions, rumours have thus a powerful effect in raising the probability of an otherwise weak argument.

The third type of heuristics, called 'representativeness', searches for a probable answer about a particular person or fact by looking into commonly held views or beliefs, in other words, categories, about the type of person or fact and by seeing how much the particular person or fact fits into preconceived categories. The problem with representativeness arises from the fact that the person judging the probability of whether the given fact or person fits into a category does not take into account the initial probabilities of a specific case (i.e. whether the circumstances warrant our inference based on probability). He may also ignore whether the sample size is large enough to justify one's conclusion.²⁴

The 'representativeness' heuristic should not be mistaken for a primitive kind of analogy, as it requires considerable mental effort to analyse the conformity in cases where no clear-cut types exist. Orators necessarily influence these probable

²⁴That is, people are unable to apply the rule of large numbers and believe that a small number of examples will produce the same result.

inferences by setting up analogies and stereotypes, but we must see that these would not work on their own unless they are based on reliable evidence and argument, because the majority of the jury could have easily developed immunity to the more obvious simplifications.

As with the other heuristics, the emphasis here is on how easily we can retrieve a probable proposition and make a seemingly rational inference out of it. In oratory, arguments based on representativeness appear mainly in identifying individual people as certain characters, the most obvious of which is the introduction of Sex. Roscius in Cicero's *Rosc. Am.* 39 as a simple countryman who embodied all the traditional values connected with rural life.²⁵ A notorious example of collective representation is the Gaulish tribe of the Allobroges who in Cicero's *Sull.* 17 receive the praise of *verissimi iudices*, whereas in *Font.* 26 the same orator asks the deploring question of *vos Volcarum atque Allobrogum testimoniis non credere timetis*.

The examples presented above show how forms of reasoning display similarities to certain cognitive heuristics in shorter pieces of arguments. However, looking at these descriptions, someone may argue that it is very difficult to give precise criteria for the identification and reconstruction of more complex heuristic strategies, which extend over a whole speech. As a result, the assessment of heuristics would inevitably lead to the inclusion of subjective criteria into the process of analysis. That seems a valid objection and indeed provides a great challenge to the concept. It is clear from the arguments outlined above that there are no simple or clear-cut rules for the identification of specific rhetorical heuristics, even if they do not exhibit great complexity. Diverging assessment of inadequate evidence or the nature and arrangement of a particular argument could enable scholars to arrive at different explanations about individual argumentative strategies.

However, the possibility of differing (but not necessarily conflicting) descriptions of particular strategies does not have to be regarded as a weakness of the concept. The presence of several (overlapping) heuristics in one argument may actually be the sign of highly intricate strategies woven into the structure of the speech. Although someone may theoretically be able to apply different heuristics to the description of the same argument, that process cannot merely be based on subjective insights.

There could be objective criteria of argumentation analysis borrowed from such fields as informal logic or the system of *topoi*, which could be applied in the process of describing heuristic strategies. Heuristics are always embedded in arguments about real-life cases, based on various forms of evidence. To identify a certain heuristic, one has to justify his/her choice by examining every element of the argument structure (including premises and conclusions, the evaluation of evidence, its strength or probability) and explain how details of that description match the definition of the heuristic presented in the analysis of other forensic cases. Only thus can we avoid a wholly arbitrary and indiscriminate application of the concept.

In the following analyses of Cicero's speeches my aim is to prove that it is possible to find in extensive legal or political arguments elaborate strategies of

²⁵ See also Vasaly (1993, pp. 156–172).

reasoning called heuresmes which often represent logically faulty, legally inadmissible, yet highly persuasive forms of probable reasoning. Some of these heuresmes reflect cognitive heuristics, but others have entirely different formal characteristics. What is common in all types is the – often disguised – reliance on probabilities drawn from the ‘facts’ of the case, and their versatility and adaptability to different cases. A detailed description of rhetorical heuresmes in an individual case is likely to provide the fundamental argumentative plan of a speech, even if our knowledge of the facts is heavily biased and scanty.

As I mentioned before, one of the crucial elements of the concept of heuresmes is their adaptability to various situations and contingencies which render the outcome of the whole rhetorical situation essentially uncertain and unpredictable. This feature can best be highlighted by what I would call the Contingency Thesis of Rhetoric. This states that every speech made before a public audience is subject to several contingent factors. These determine in a fundamental way the cause(s) which initially gave rise to the speech, the preparation of the speech (such as gathering evidence and the construction of the argument), the delivery of the speech itself before the audience and the decision made by the listeners after deliberating on the opposing sides. Only the speech which takes into account these contingencies can win the assent of the audience.

The purpose of rhetorical analysis should therefore be the reconstruction of such contingencies as far as this is possible and establishing how a speech responded to these in an attempt to secure the assent of the listeners. It seems to me that classical rhetoricians were in some ways aware of this problem (though in a very restricted form, with the exception of Alcidamas and probably Gorgias) yet the fact that its primary aim was to pursue a systematic view of the means of rhetoric prevented it from addressing the question. The rhetorical tradition in Western thought inherited the approach of classical rhetoric and for two millennia adhered to its basic principles of formalisation. The concept of rhetorical heuresmes tries to address this shortcoming of classical rhetoric and introduce an approach that was probably not very different from the idea of rhetoric promoted by some of the sophists in Classical Greece.

Heuristic arguments in ancient oratory can partly be grouped according to their sphere of application. Some are used in combination with other arguments that lead to an interim conclusion or contribute to the final decision. These therefore have a less extended application, although their length can increase considerably in the case of an argument disguised as a long narrative, for example in Cic. *Clu.* 11–49.²⁶ To these belong the varieties of the *probabile e vita* and *probabile e causa* arguments described by classical handbooks. Other types of heuresmes have a global outreach and their plausibility determines the speech as a whole sequence of reasoning.

²⁶ Although, in the case of such long narratives, the orator himself can break up a long story to add variety and aid comprehension, and the sections then may themselves be understood as independent arguments.

We must always bear in mind that the orator had to adjust his argument to the common beliefs and forms of reasoning which the jury was likely to use, as well as other specific views related to a smaller group of people, for example, political factions or clientship. Then they had to present a plausible and forceful case in line with these views. The ultimate criterion of heuristic reasoning is how successfully it can appeal to the mind of the jury. Evidently, if the orator's argument contained many apparent faults or weak probabilities, the opposition could take advantage of this or the audience might notice them and reject the case. The orator thus had a very difficult task in preparing a case. As Cicero said, he had to hold three cases in his mind at a time, that of his own, the opposition and the jury, balancing out all their respective probable propositions.²⁷

In the analysis of selected Greek and Roman speeches, I will identify and describe several heuremes which may function as strategic elements of specific legal or political arguments. Naturally, the heuremes outlined in the analyses do not give a complete overview of the speeches where they are found. They only indicate one method which reveals the argumentative plan of an intricate legal case. One should remember again that each individual heurème must be mapped out in detail in its host argument. Giving a simple list or description does not reveal their complex structure, that is, how they evolve in the progress of arguing and presenting evidence.

Someone might raise the objection that very little is known about the actual practice of Greek and Roman oratory, so it is not possible to tell to what extent the strategies described in these speeches were widespread. Focusing on only a small number of Ciceronian (and Greek) speeches could raise doubts about the general applicability of the concept. To reply to this objection I should reiterate that I never claimed that rhetorical heuremes could or should be universally applicable to every type of argument in ancient oratory. Moreover, my aim was to demonstrate a type of argumentative analysis through the detailed discussion of individual cases. The success of the concept therefore depends on the practicability of the method in individual cases and not on whether it was tested on all the available Greek and Roman rhetorical material. The scope of the method is an important question, but I cannot reflect on it here.

Some would also criticise heuremes on the grounds that no ancient orator or rhetorician ever mentioned or discussed heuristics as specific devices of persuasion. The objection might seem justified, yet the assumption that Cicero or any other ancient orator had a theoretically explicit awareness of using rhetorical heuremes is not necessary in order to maintain that such strategies existed. Just as speakers of a particular language can use intricate grammatical or stylistic structures without being able to give a technical description of such constructions, there is no need to assume that orators had to be able to give an explicit description of complex strategies in order to use them in their arguments.

²⁷ Cf. Cic. *De Or.* 102 *Equidem soleo dare operam, ut de sua quisque re me ipse doceat et ut ne quis alius adsit, quo liberius loquatur, et agere adversarii causam ut ille agat suam et, quidquid de sua re cogitarit, in medium proferat. Itaque quum ille discessit tres personas unus sustineo summa animi aequitate, meam, adversarii, iudicis.*

Perhaps the gravest objection against the identification of heuresmes would be that it appears unreasonable and unnecessary to expect the reader to follow a detailed historical analysis of speeches in order to understand heuresmes. This is a justified criticism which I will nevertheless try to address briefly. It is true that some of the following chapters, especially the analysis of the *Pro Milone* or *Pro Cluentio* will be difficult to follow without a detailed knowledge of the speeches themselves. However, I do think that everyone who tries to understand the concept of heuresmes would benefit immensely from reading both the speeches and my analyses. The reason for this is clear. In line with the Contingency Thesis, each strategy manoeuvres between a host of highly specific and often unpredictable factors which cannot simply be ignored to give a theoretic account of the speeches. Individual heuristic strategies are inherently tied to the arguments and contexts in which they appear. Therefore, only a detailed understanding of the circumstances will allow the student to see in what ways a certain heuristic strategy addresses the often very complicated circumstances of the case to raise the likelihood of the conclusion proposed by the orator. I have nevertheless tried to reduce the number of footnotes on philological questions to a minimum so that only those would remain which contribute to the *argumentative* analysis of a case.

Moreover, an expert on modern argumentation theory or classical rhetoric will expect a constant comparison between heuristic strategies and other elements of rhetorical or argumentation theory, such as *topoi* or fallacies. This is a reasonable expectation and I have tried to add references to classical rhetoric and modern argumentation theory where it was necessary. However, the concept of heuresmes is a view of oratory independent of these disciplines so the main task of this study is to demonstrate that such schemes exist and that they work in practice. Sometimes the reader would miss references to scholarly works on classical speeches, which is simply due to the fact that they approach their subject differently whilst my task was demonstrating different types of heuresmes rather than dispute the results of scholars which may otherwise be justified, but not relevant to my analysis.

Although I will treat this question in detail in the concluding chapter, I would like very briefly to mention another problematic aspect of heuresmes. There may be considerable debate about the provenance and potential use of heuristic strategies in rhetoric in various fields of Classics and beyond. Many scholars will regard heuresmes only as a very specialised and narrow approach to classical oratory, which has limited or simply no use in other fields such as classics, philosophy, argumentation theory or law (in other words, wherever reasoning cannot follow the path of absolute deductive certainty). At this point, I cannot provide any proof that this is not the case. The only comment I would like to make is that in the examples I have just mentioned that the study of arguments often arises from a systematic method such as the topics or argument schemes, where the internal consistency of the system is a priority. Therefore, these methods rarely, if at all, confront the problem of how arguments can be applied in situations with a large number of uncertain elements, for example, scanty evidence or pressures of time. If anything, the concept of heuresmes draws attention to the fact that the study and use of arguments never takes place in a laboratory environment. Quite the opposite; in real life cases those external factors

which a systematic treatment of arguments normally ignores actually matter the most, as is indicated by the Contingency Thesis.

I will give a short systematic list of heuremes at the end of this chapter, which indicates their relationship and basic character. I should note that in the original version of the concept I identified 17 heuristic strategies each with its own name for classification. In the course of revision, I decided to get rid of these individual categories with their names. Instead, I established groups of strategies based on common characteristics. This was a bold and risky move and I cannot at this moment decide whether it will in the long run benefit the concept. At the moment, it seems to me that such a concentration of strategies will ultimately lead to a much more simplified view of characteristics which define each category. Moreover, an emphasis on groups of strategies with common features reflects more genuinely the fundamental nature of heuremes, and their adaptability to individual situations. One may argue that retaining the original strategies as subcategories within each group would make better sense. This is possible, but I will need to do more research to decide which alternative is ultimately preferable.

One should be aware that heuremes from different groups may overlap in actual speeches, as in the case of the ‘thematic replacement’ heurme in *Clu.* 1-9 and the ‘initial adjustment’ heurme in *Clu.* 11-8. ‘Simplification’ heurmes use various, narrative or explanatory, strategies to streamline a complex case which would otherwise be difficult to manage with detailed rhetorical demonstration or which contains a large amount of damaging evidence the orator would wish to ignore.

Different forms of the ‘thematic replacement’ heurme are, in broad terms, akin to each other in that they distort the order of importance of relevant evidence in the argument. The difference, however, is that in one case it is developed almost unnoticeably by gradually providing irrelevant evidence through the argument, whereas in the second case the key misleading proposition is pushed to the front right at the beginning and all further evidence is put forward along the lines the heuristic determines.

‘Contrastive heurmes’ form another group of related strategies. The common denominator in these is setting opposing or alternative probabilities alongside each other in the argument in order to suggest a choice between them. The opposing probabilities may be real or deliberately irrelevant. However, even if the probabilities can be judged irrelevant to the case, they might still have to be presented in order to cover up missing or incomplete evidence. It may frequently be the case that only through probable inferences can someone investigate the validity of a charge, so this approach can be fully justified.²⁸ In the second case, irrelevant alternatives are clearly set against each other to disguise the available evidence.

²⁸ As is the case in *Antiph.* 5., where the charge against Euxitheus, the Mytilenean, for killing the Athenian Herodes rests almost completely on arguments from likelihood. The confession of the slave under torture and a suspicious message by Euxitheus could prove the involvement of the defendant. The speaker, however, did not have firm counter-evidence to prove his alibi (although he pretended to have it), so he had to attack the certainty of the charge with probability arguments.

The next set of heures, called ‘parallel probabilities’, is based on the idea of dividing up an issue into several lines of probabilistic reasoning; to argue these separately makes a complex case manageable and plausible, especially in the face of a strong counter-argument. One type determines in advance several lines of probable argument that are considered as giving the most substantial support to the final conclusion, while disregarding the order of arguments advanced by the opponents. Another one argues against a series of related items of evidence by breaking them up into a number of seemingly independent arguments and thus decreasing the probability of their original combination.

The strategies that use an initial proposition as the point of comparison all stem from the ‘initial adjustment’ heureme. Various forms are common in Ciceronian oratory²⁹ as the speeches frequently open with a surprise claim that will be used later as a focal point for the following argument. The main point in understanding these heures is how the principal proposition is introduced and to what extent the rest of the argument is adjusted to it. In one case, the first major proposition unequivocally governs the probability of all the other arguments, even if that is not mentioned explicitly. The notion of ‘*auctoritas*’ in the case of the *Pro Sulla* is a good example of that. In a different type of this heureme the initial proposition is argued over a period of time and gains momentum gradually. In another instance the heureme can be best understood as a form of ‘begging the question’ fallacy, as it argues at the beginning for a proposition seemingly related to the major issue, while it subtly assumes that the probability of that issue is already proved.

| Groups of heures | Definition | Example |
|--------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------|
| Initial adjustment | Most or all of the argument is adjusted to an initial probable assumption, which may result in a biased and distorted proof | <i>Pro Sulla</i> ; <i>Pro Sex. Rosc. Amerino</i> ; <i>Pro Cluentio</i> |
| | A marginal probable proposition is arbitrarily introduced at the beginning as the key issue, and it later determines the whole argument | <i>Pro Sex. Rosc.</i> |
| | A probable proposition is introduced as the starting point of an argument, the probability of which neither depends on, nor influences the probability of the principal argument, but may take its place, if the latter fails | <i>Pro Milone</i> |
| Representativeness | The probability of a proposition about a person is argued on the basis that the person is in some way representative of group B | <i>Pro Sex. Rosc. Amerino</i> ; <i>Pro Sulla</i> ; <i>Pro Murena</i> |

(continued)

²⁹ Cicero used that technique from early on, as the *Sex. Rosc.* proves. The immediate attack on Chrysogonus and the illegal sale of Sex. Roscius senior’s properties works seemingly through the power of revelation, but it can be better understood as the strongest proposition overpowering all the other, less consistent and weaker arguments.

(continued)

| Groups of heuremes | Definition | Example |
|---------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------|
| Thematic replacement | The argument on the major probable proposition of the case gives way to a seemingly relevant, but actually misleading auxiliary probability | Lysias, <i>In Defence of Mantitheos</i> |
| | The major probable proposition is deliberately changed to an irrelevant one at the very beginning of the speech, usually without giving any notice | <i>Pro Sulla; Pro Cluentio</i> |
| Contrastive probabilities | Matching each opposing probable argument with an another, equally plausible one to arrive at the opposite conclusion | Antiphon <i>First Tetralogy 2nd Speech</i> |
| | Matching up and weighing arguments based on probability against each other, ones which are drawn from inadmissible or false evidence | <i>Pro Murena</i> |
| | A deliberately distorted presentation of possible probabilities in order to judge the case by only two opposing alternatives | <i>Pro Milone</i> |
| Parallel probabilities | Parallel arguments made up of several correlating, but not necessarily relevant probable propositions that all converge into the final conclusion | <i>Pro Cluentio</i> |
| | Breaking up a unified probable argument of the opposing side into separate sub-arguments, which arrangement greatly decreases the probability of the overall conclusion | <i>Pro Sulla</i> |
| Simplification | The probability of the conclusion depends not on the inductive force of the evidence and the arguments based on it, but on the consistency and plausibility of the narrative of the evidence presented | Demosthenes, <i>On the False Embassy</i> (p. 187) |
| | An argument based on probability that seems persuasive not because of its inductive strength, but because it offers a simple explanation of a number of other probable propositions | <i>Pro Sex. Rosc. Amerino</i> |

Chapter 3

The Origins of Heuristic Argumentation: Probabilistic Arguments in Ancient Rhetoric

3.1 *εἰκός, πιθανόν, probabile and veri simile* in Rhetorical Theory

In the previous chapters, I showed which modern theories of argumentation influenced the concept of heuremes. I also referred to Alcidamas as a classical orator whose focus on ‘speaking without a script’ influenced my thoughts about the role of contingency in rhetorical situations. However, he was not the only one from classical rhetoric who had novel ideas or innovative techniques for speaking publicly. Therefore, it would be grossly unfair to ignore how another key component of heuristic reasoning, the notion of probability and its use in creating arguments, evolved in Greece and Rome. A discussion of the concept of *eikos*, likelihood, again does not serve the purpose of providing evidence for a direct link between ancient rhetorical theories and the idea of heuremes.

My objective is to show that classical oratory was aware of likelihood as a key component of reasoning to provide a plausible argument for the audience and that this knowledge contributed to the creation of more complex strategies which I call heuremes. The main difference between these classical forms of arguments and rhetorical heuremes is that the former were studied and classified in isolated units and were not considered as part of an argument sequence or a complex strategy. Despite its seemingly narrower application, the notion of *eikos* in classical rhetorical argumentation could nevertheless lead us to have a more in-depth understanding of several key features of heuremes.

Firstly, the classical concept of likelihood helped orators to see the direct connection between the plausibility of their arguments and the judgment made by the audience. Secondly, they learnt to manipulate various contingencies in their case and turn to their advantage apparent weaknesses by carefully balancing facts and probabilities. This is the reason I view *eikos*-arguments as the precursors of heuremes. Although this chapter will not make frequent references to heuremes, it does not mean that during the treatment of *eikota* I lose sight of them. Quite the contrary; the better we understand the variability and potential strength of arguments drawn from

probability, the more we can appreciate the presence and role of likelihood in longer sequences of arguments. This chapter can thus be read as a basic historical and theoretical introduction to later developments in classical oratory.

The concept of argument based on probability as a means of persuasion appeared first in our evidence in Greek rhetorical theory, although the idea itself must have been known long before.¹ It was subsequently refined to be a major form of persuasion in forensic oratory.² However, as the extant Roman handbooks attest, the concept of probability gradually narrowed down to one of the proofs of the conjectural *stasis*, to make facts plausible where proof was scarce. As part of his Hellenistic rhetorical education³ Cicero must have studied Greek handbooks and the Attic orators, and his early work *De Inventione* proves that he also knew about different forms of argument based on probability.⁴

Modern rhetorical commentaries⁵ study probability arguments in the extant Greek and Roman rhetorical handbooks, especially the *Rhetoric* of Aristotle, the *Rhetorica ad Alexandrum*, Cicero's *De Inventione* and the *Rhetorica ad Herennium*.⁶ Sources often reveal great differences in their approach, whether they see *eikos* as an element of rational argumentation or as patterns found in the minds of the audience. However, the variety of probable arguments should not necessarily be viewed as a negative phenomenon. It shows that the concept allows several interpretations. Such a semantic variety also makes it easier to view the essential role of probability in the creation of *heuresmes*.

A key assumption in the concept of *heuresmes* is that the probability of an argument should always be understood in terms of its persuasiveness. This means that probabilistic reasoning has value in oratory only if it helps to make the conclusion acceptable for the listeners. Such a distinction between the two semantical fields of probability, likelihood and persuasiveness (represented by *εἰκός* and *πιθανόν*) was well-known in ancient rhetorical theory. It appears most clearly in Aristotle's *Rhetorica* 1355b

¹ See earliest known example, the *Hymn to Hermes*. People are using the concept of probability in everyday inferences, and that use is simply common sense. However, creating an argument based entirely on probability, as the young Hermes did, requires a conscious rhetorical application, which is far from being evident. Cf. also Wendland (1905).

² On the rhetorical use of *εἰκός* in early Greek literature see: Kennedy (1963, pp. 30–31 and 39–41). It is not always clear in what sense he interprets probability. See also Usher (2000, pp. 3–16). A very thorough summary of *eikos*-arguments can be found in Kraus (2007, pp. 1–11).

³ On Cicero's rhetorical education, see Clarke (1953), Weidner (1925).

⁴ The definition of *inventio* in Cicero's *De Inventione* and the *Rhetorica ad Herennium* expresses to some extent the idea of contingency in reasoning, which can be best described by the notion of probability. Cic. *Inv.* 1.9 *Inventio est excogitatio rerum verarum aut veri similibum, quae causam probabilem reddant*. The collection of material for the argument should consider those true or seemingly true elements of the case which would render the conclusion probable. One needs, however, to remain cautious not to equate the sense of probability completely with that of *probabile*.

⁵ A typical example of such a commentary would be Clark (1895) or Webster (1931).

⁶ *Rhet.* 1357a34–37; 1391b8–1393a21, 1402a1–29, 1402b12–1403a2, *Rhet. Alex.* 1428a–29a, *Inv.* 1.46., *Rhet. Her.* 2.3–5.

and 1357a. A similar distinction is found in *Inv.* 1. 9. and *Rhet. Her.* 1. 3.⁷ The important question is whether what appears to be probable would make (and, if yes, how) the argument plausible.

To Cicero and the author of the *Rhetorica ad Herennium*, it seems that there is a direct connection between the two, and that is reflected in Cicero's definition of *probabile*.⁸ It says that *probabile* is what generally is the case (*quod fere fieri solet*) or what is usually people's opinion or belief as well, or things that are similar to these two. Again, 'likeness', 'appropriateness', similarity, a kind of imitating what people think plays a crucial role here.⁹ By reproducing popular attitudes and beliefs that support his case, the orator can make the audience believe the arguments, as long as he also proves that these resemble what people usually expect as an argument. Aristotle's remark in 1356b28-1357a2 implies that too, where he says that persuasiveness is always taken in relation to somebody, to whom it is persuasive. Kraus (2007) argues that arguments from probability can express common ground in many ways, for example through reference to the physical environment, to human knowledge or to the accepted actions and values in human society. The result, the assent of the audience, comes immediately, or through plausible (*πιθανόν*) and credible (*πιστόν*) proofs.

The theoretical approach of Aristotle, which distinguishes between various genres of proof drawn from logical, ethical and emotional arguments, gives a rather well-defined role to the *eikos*-arguments as one of the two basic elements of the enthymemes. For Aristotle, *eikos*-arguments are based on *endoxa*, opinions which most people accept as true. The strong relationship between *eikos* and *endoxa* in Aristotle suggests that Greeks indeed viewed *eikos*-arguments from the viewpoint of audience acceptance, that is, plausibility.¹⁰ The relative closeness between the plausible and the probable in Aristotle's *Rhetoric* is also proved by the fact that character projection and playing on the emotions also have to be presented in a credible way so that they bring about the required effect.¹¹

The most obvious connection between persuasiveness and probable arguments is to be found in the so-called *Rhetorica ad Alexandrum*, usually attributed to Anaximenes.¹² The author here gives a unique definition, which emphasises the speaker's effort to find out those notions and sensations that appear in the audience's mind, which could really bring home one's case. He realised that people want to hear what confirms their own values, and believe those who are ready to pay lip

⁷Cf. Glucker (1995, pp. 115–143). For the definition found in the *De Inventione* and the *Rhet. ad. Herennium* see above in Ch.1. Aristotle's definition is more subtle, as it takes into account tools of persuasion outside the speeches and reasoning is based on systematic logical foundations.

⁸*Inv.* 1. 46-7 *Probabile autem est id, quod fere solet fieri aut quod in opinione positum est aut quod habet in se ad haec quandam similitudinem, sive id falsum est sive verum.* Cicero here seems to mingle Aristotle and the *Rhetorica ad Alexandrum*.

⁹For the various approaches in interpreting the meaning of *eikos* see Kraus (2007) 5–6.

¹⁰See Grimaldi (1996, pp. 19–43), Kraus (2007) 5.

¹¹Cf. the article πιθανός in *TLG* Vol. VII. 1069.

¹²*Rhet. Alex.* 1428a. On *eikos* in the *Rhet. Alex.* Goebel (1989, pp. 41–53). Schmitz (2000, pp. 47–77).

service to them.¹³ Two things should be noted here. The author almost turns Aristotle's definitions upside down by subordinating the three main divisions of the artificial proofs to the argument from probability.

Furthermore, he merges fully the concept of persuasiveness with probability, which comes closest to the corresponding meanings of the Latin adjective *probabilis*. Interestingly enough, he does not seem to consider probability as a fixed part of rational argumentation, thereby suggesting that persuasiveness can be attained by any means available, that is not simply by a (apparently) logical demonstration. One might also add a similar idea here from Cicero's *De Inventione* where plausibility appears in two forms, as the quality of the *argumentatio* and the persuasive *narratio* (*πιθανή διήγησις*).¹⁴ The difficulty of precise distinction reminds rhetoricians that rational or quasi-rational arguments could be found throughout a speech, not just in the *argumentatio* where it is usually placed by Hellenistic handbooks.

3.2 Types of *εἰκός* Argument in the Rhetorical Handbooks

My discussion of the meanings of *eikos/probable* underlined the twofold interpretation of probabilistic reasoning. Arguments based on likelihood rely on the available evidence to put forward a credible case, which achieves its credibility only through the approval of the audience. This interpretation of likelihood will later become an integral part of any extended heuristic strategy as well. We must now look at the building blocks of such probabilistic arguments which will later evolve into more complex strategies in Ciceronian oratory.

In Aristotle's rhetoric, rational argumentation is realised by rhetorical syllogisms or enthymemes.¹⁵ These cannot provide conclusions with the epistemological certainty of demonstrative sciences. Enthymemes can be made up of probable statements, *eikota*, which draw their inferences from everyday life, where things are capable of being other than they seem, *ἐνδεχόμενα δὲ καὶ ἄλλως ἔχειν*. Nevertheless *eikota* retain a kind of regularity, *ὥς ἐπὶ τὸ πολὺ γιγνόμενον*, which renders it possible to make claims about their truth, *ὁμοῖον τῇ ἀληθείᾳ*, but not necessarily so.¹⁶ The ordinary listener takes generally true and therefore probable statements as valid, a fault which the skilled orator may use to conceal the insufficiency of his claims.

The anonymous, possibly sophist author of *Rhetorica ad Alexandrum* also reflects upon arguments from probability arguments. To him *eikos*, likelihood, itself reflects people's opinions and expectations.¹⁷ The author would call these

¹³ On the conformity of values see Smith and Mackie (1995).

¹⁴ *Inv.* 1. 29., 44.

¹⁵ Cf. *Rhet.* 1355b7. For a detailed discussion of the enthymeme see Grimaldi (1980, pp. 383–398). Sprute (1982).

¹⁶ Cf. Gaonkar (2006, pp. 5–21), Walton (2001, pp. 93–112).

¹⁷ *Rhet. Alex.* 1428 a-b; cf. Gagarin (1997, p. 21) 'It is characteristic of Athenian forensic oratory... to pretend that certain terms or concepts designate an objective reality, when in fact their primary value lies in their availability to forensic manipulation.'

arguments patterns or models, *παράδειγματα*, which one can group into categories understood in a rather loose sense. Kraus also points out that in the case of *παράδειγματα* which made up *eikos*-arguments the audience possesses the knowledge required for the understanding of the argument. This allows the orator to make the audience infer the conclusion that is most suitable for his case. The idea that arguments based on probability should somehow reflect thoughts or values present in the mind of the listeners seems very innovative. It raises the awareness of the orator to the fact that the plausibility of the arguments do not per se depend on the evidence at hand but on whether it can come close to what people in general would think about the evidence and how it coincides with their judgements. This again can be regarded as an early view of how complex probabilistic reasoning can win the assent of the audience.

The anonymous rhetorician distinguished between emotional patterns, to which speakers appeal most frequently, patterns that are connected with basic dispositions of human nature such as love, hate and profit, which can be considered a very common motive in criminal cases. It is clear that the psychological patterns listed in the *Rhet. Alex.* are far from being comprehensive. One could, for example, think of ethical paradigms reflected by the moral values of a society. This early categorisation of arguments built on *eikota* thus shows a clear engagement with the problem of how best to secure the judgement of the audience. It also gives rise to the question of whether it is expedient for an orator to focus on establishing the truth from the available evidence in order to win the case. The narrow range of categories nevertheless reveals uncertainties about what constitutes probable arguments, which will develop further in later rhetorical theory.

The forms of probable reasoning which we find in the two earliest extant Roman rhetorical handbooks look less original than the Greek concepts, yet they still continue to emphasise that arguments appealing to generally accepted ideas based on probability were considered useful for earning the approval of the audience. The discussion in the *Rhet. Her.* 2. 3–5 could be considered as the more elementary of the two. The author places probability within the conjectural stasis (*causa coniecturalis*), which aims at proving an issue of fact.

Without providing any further explanation on the nature of probability, the rhetorician gives a very simple functional definition. *Rhet. Her.* 2.3 *Probabile est per quod probatur expedisse peccare et ab simili turpitudine hominem numquam afuisse*. The division of probability into motive (*causa*) and manner of life (*vita*) seems to follow the (sophistic) tradition of the *Rhet. Alex.*, taking *φύσις* and *ἥθος* as one category and identifying *κέρδος* as the prime motivation behind human actions, while interpreting it in the widest possible sense.

According to the former, the *probabile e causa*, the hypothetical statement would look like that: if somebody is motivated by the prospect of winning particular advantages or avoiding disadvantages, he is likely to commit such and such an act. Once we find the motives in the person, we can infer with more or less likelihood that the person committed the act he is charged with. Yet there are obvious faults with this form of argument. On the prosecutor's part, it is not always possible to

ascertain a possible future gain at the time of the action. However, it is more difficult to point to one single motive in the person accused, which would give weak conclusive force to the final claim.¹⁸

The *probabile e vita* argument is one of the most widely accepted forms of reasoning in ancient oratory, yet its fallacy must have been clear even for at least part of the audience at the time.¹⁹ The long digressions on the opponent's life definitely proved to be effective in making claims plausible, apart from being first-rate entertainment. Their success depended largely on the reputation of the defendant, yet, as we see from the *Pro Caelio*, the fact that conflicting judgements of a person's life existed, meant that the effectiveness of the argument was limited.²⁰

Cicero's discussion of probability looks completely different from that of the *Rhet. Her.*, and more professional as well. He seems to follow Aristotle's terminology, if in some way confusingly. The main definition includes most of what Aristotle would have said, as well, yet the reference to how the general probable statement and the particular relate to each other is missing. *Probabile autem est id, quod fere solet fieri aut quod in opinione positum est aut quod habet in se ad haec quandam similitudinem, sive id falsum est sive verum.* Cicero here captures two essential notions of probability, regularity, which can serve well most of the time as predictions about events, and unwarranted but not necessary false beliefs of the public.

The passage in *Inv.* 1.46 provides another categorization of probability. *Omne autem – ut certas quasdam in partes tribuamus – probabile, quod sumitur ad argumentationem, aut signum est aut credibile aut iudicatum aut comparabile.* So the notion of probability includes signs, *signa*, which could be taken as part of the direct evidence (yet this does not carry much evidential weight), plausible opinion (like 'parents want to take care of their children'), *credibile*, previous judgements, *iudicata*, approved by legal or historical tradition, and comparison, *comparabile*, between individuals, characteristic features of things, events and historical examples.

This brief overview of arguments from probability in ancient rhetoric allows us to draw at least two conclusions. First, many teachers of rhetoric were conscious of the fact that arguments based on the concept of probability could appear in a great variety and have a leading role in bringing the audience over to one's side. Second, it can become clear that the arguments from probability do not simply serve as isolated units with restricted validity but could in fact provide the basic lines of reasoning in complex strategies. They could thus serve as starting points for a heuristic approach to rhetoric even if ancient rhetoricians did not account for them in greater detail.

¹⁸ The contingency of human actions with its radical consequences is recognized by Aristotle in the *Rhetoric*. See Most (1994, pp. 172–3).

¹⁹ It has become a standard element already in Greek oratory to refer to someone's life as a particular proof, sometimes in a very abusive manner. eg. *Dem.* 19. 192–201, 241–55, 285–7. However, a character was usually judged on the basis of social values (eg. patriotism), which could have little relevance to a particular case.

²⁰ On the role of characterization in Cicero's speeches, see May (1988), Riggsby (2007, pp. 35–68, 165–185), Vasaly (1993) and Wisse (1989).

3.3 Varieties of *εἰκός* Argument in Early Greek Rhetoric

Having discussed the forms of arguments from probability as they appeared in ancient theory, I would like to show some examples of how these arguments were used in Greek rhetorical and philosophical writings. I am bringing forward the conclusion made in the previous section to prove that in practice arguments based on probability are highly adaptable to a wide range of rhetorical situations, which is one of the key features of rhetorical heuristics described in Chap. 2.

In his criticism of sophistic rhetoric, Plato noted that the argument from probability carries the danger of being misused in a fallacious way. Such applications are capable of making the weaker argument look the stronger.²¹ There have been several discussions about Plato's unfair approach to rhetoric. The philosopher objects that rhetoric only operates with probable statements and so cannot give a true account of events and facts. As Gagarin explains Gorgias and Antiphon did not believe that probabilities were in any way better than true statements. Direct evidence is not always available in everyday cases so statements with absolute certainty can rarely be made.²²

The classic example of an *eikos*-argument is found in Plato's *Phaedr.* 273b and Aristotle's *Rhet.* 1402a in somewhat differing versions, which suggests that they share the same source.²³ The context of the two passages reveals much not only about the legitimate and illegitimate uses of probability, but also about the versatility of its deployment. The objections in both passages are directed against Corax and Teisias, who wrote rhetorical handbooks dealing with *εἰκός*, and probably assigned an important role to its reverse form. As Plato says in the passage, the *εἰκός* argument was well-known in rhetorical training of the time, but he might simply mean hackneyed school examples, which represent a very basic and mostly ineffective use of probabilistic reasoning.

Plato attacked Teisias on the grounds that he taught only about *εἰκός* and favoured arguments that appeal to the masses. According to Socrates, Teisias taught that probability is what most people think,²⁴ consequently we can easily persuade anyone by appealing to common beliefs. He supports his judgement by citing the case of the strong and the weak man, where the weak but brave man attacks and defeats the strong and coward. In the trial both man would lose if they told the truth.

²¹ The claim (Cf. Arist. *Rhet.* 1402a20 and Aristophanes *Nub.* 112-5) became perhaps undeservedly a catch-phrase against sophistic rhetoric. Protagoras' saying that two opposing arguments are possible about everything, was apparently distorted. Most probably he only refers to the importance of balancing probabilities in the judgement on contingent things.

²² Gagarin (2002, pp. 29–30).

²³ For a more thorough discussion of the two passages see Goebel (1989, pp. 49–53) and Kraus (2007, p. 2).

²⁴ *Phaedr.* 273b The definition can reflect a popular, if rather primitive, notion of probability, similar to what we find in the *Rhet. Alex.* 7.4.1. We must not, however, forget, that Plato attacks probability for specific epistemological reasons.

They can win the case only if they appeal to general, but false concepts, because people believe stereotypical notions for most of the time.

The role of the *eikos*-argument in the example is rather overstated. The weak man uses *eikós* to prove that he could not have been the attacker, if there were only two present. He has to prove that he was on his own and not with companions, as the strong man might claim. The strong man also has to come up with lies, because people will hardly believe that a weak man alone could hurt him. On its face value the argument based on *eikós* sounds persuasive, although only in a general sense. Probability cannot go against facts which are obvious to the audience, so Plato's criticism seems rather unfounded. To confirm the truth of a case one has to prove several other important circumstances as well.

The point Plato presses here is that to defend themselves, both the weak and the strong man have to resort to lies in order to establish the general probability that the strong prevails over the weak. For all the vividness of the example, the case could be resolved easily, if the strong man, in his desire to win, can point to the relative value of such descriptions as strong or weak by proving his own inability to fight and the capability of his opposite. The closing remarks of the story, made scornfully by Socrates, show clearly that the original version was in all likelihood distorted to fit into the general argument about the superiority of truth over what only seems to be.

The same account in Aristotle's *Rhetoric* 1402a probably represents the original version more faithfully and it includes the counter-argument as well. The example again is attributed to Corax. Aristotle's claims that a logical fallacy arises when a probable statement that is valid only in particular circumstances is represented as an absolute probability.²⁵ The distinction is necessary, because there are cases when the improbable, what is against the generally accepted expectations, is true. Such cases can only be supported by a detailed description of the circumstances. To clarify the point Aristotle brings forward the case of the weak and the strong man, where both of them are accused of assaulting the other one. The point here is that the defence of the weak person is legitimate on the grounds that in general, weak people cannot attack stronger ones.

The opposite case does not fit well into probabilities of that kind, because it requires a specific qualification that the strong man possibly thought well ahead of the consequences of the act. The general probability in his case is against the strong man, so he needs to build up a detailed argument, which therefore remains open to many objections. Aristotle might imply that it is possible to weigh the degree of probability in cases where arguments cannot be based on sound evidence. He does not criticise probability, when it conforms to a rational way of reasoning, only if it is drawn into extremes, where an improbable claim could appear the most probable as a result of faulty reasoning. This type of probabilistic argument points to another important element of rhetorical heuristics; in practice it is never enough to consider just one possible probable reasoning based on the available evidence, but one

²⁵ Arist. *Rhet.* 1402a 3-31. See also the Cope (1877) 318-22.

also has to look at other probabilistic arguments that might potentially weaken the original one.

We can see the influence of Corax and Teisias in the model speeches written by Gorgias, especially in the *Defence of Palamedes*, and Antiphon, in the *First Tetralogy*. The arguments in these speeches rely strongly on probable reasoning with the help of some direct evidence, so they represent well the limits of that kind of argumentation. Also, both authors apply the so-called reverse *eikós* arguments, which Plato and Aristotle judge as fallacious, yet they prove that it is possible to make valid inferences through the reverse form.

The first part of Palamedes' speech,²⁶ 1–12, answering the charges of treason brought up by Odysseus, enumerates the possible alternatives of secretly meeting the enemy. Throughout the section he maintains that there is no witness testifying against him, which makes it impossible that a third party, a go-between or an interpreter could have been involved in the secret negotiations. The remaining option that he was supposed to have acted alone is dismissed easily through the argument that such a complicated scheme could never have been accomplished without assistance. The section weighs the probabilities of realising the scheme and puts the prosecution in a difficult situation to provide firm evidence to allegations that are supported neither by facts nor by probabilities.

The second part of the speech 13–21 deals with the possible motives of a traitor, the drive to attain power, wealth, or to escape suffering. The weight of probabilities for such motives is diminished by a subtle self-characterisation, which suggests that a noble and patriotic hero would never risk sacrificing his fame by gains that are worth nothing compared to the glory one can win in his country. An interesting short section follows, the function of which is to discredit the opponents' charges as not substantiated by evidence. The key sentence of the speech is stated here in 24. Odysseus, not having a firm knowledge to support his charges, recurs to unwarranted opinion, while the defendant, being alone his own witness, could in reality claim himself innocent.

Then truth and opinion are opposed with the warning that one has to be weary of supporting judgement with unfounded opinion, which is a common fault with jurors. Instead, people have to listen to those who can honestly present the truth.²⁷ Palamedes' warning reflects the opinion of Plato and confirms that the philosopher has either misrepresented the sophistic notion of *eikos* or deliberately chosen a vulgar interpretation of it, which does not correspond to an authentic sophistic view. Reading the speeches with this warning in mind, we notice the importance of supporting probable arguments with evidence, or revealing the lack of it in negative demonstration, such as we find in the present speech. In addition, probable arguments should follow the same rigorous examination (not necessarily in the formal apagogic manner of *Pal.* 6–21) as well as include an evaluation of facts. Although the probabilistic reasoning

²⁶ Buchheim (1989), Cf. McComiskey (2002).

²⁷ The question remains open, how we can decide who tells the truth. Palamedes might have meant that a balanced examination of facts and the probabilities derived from them should be treated as likelier than the excessive use of probabilities or the presentation of unlikely evidence.

in the *Defence of Palamedes* seems somewhat artificial (it was after all a model speech), yet it certainly shows one of the first attempts to make probabilistic reasoning, adjusted to the minds of the listeners, dominant in an argument. It could therefore be regarded as one of the earliest forms of heuristic arguments in early Greek rhetoric.

The *Tetralogies* also provide ample information on the theoretical background and application of probable arguments. The imaginary case of the *First Tetralogy* is similar to that of Palamedes in the sense that we learn very little factual evidence, the most important of which is the last words of the murdered man's slave, who is said to have recognised the defendant as the murderer. In such cases probable inferences have to counterbalance the lack of direct evidence, whilst the priority of the former should be acknowledged.²⁸ The prosecution uses the apagogic mode of argumentation,²⁹ which can give the impression of comprehensiveness in order to effect persuasion. As with the Palamedes we can see here that probabilistic arguments have a major role in the proof of innocence or guilt, yet they have not yet been developed into comprehensive heuristic strategies.³⁰

The problem of the prosecution was that he had to reconstruct the case by negative induction, which could never be as complete and effective as a positive argument. Indeed, the defendant uses the weaknesses of his opponent's argument to provide an alternative explanation to the prosecution's eliminated possibilities. Whereas the prosecution had to give a complete version of the murder, the defendant only needed to refute one piece of argument in order to ruin his opponent's story, which he does eventually. However, the prosecution clearly recognizes the weakness of a one-sided negative argument, which makes him rely on a positive *eikos*, a very common motive, hatred arising from protracted litigation.

The defendant's strategy is to counter the accusation, not by claiming the impossibility of the charges, but by offering an alternative reconstruction that is meant to have the same degree of probability as its counterpart. The method shows the vulnerability of probable arguments in persuasion when opposed by an equally plausible set of propositions. We also see the reverse *eikós* argument playing an important part in the defence's speech.³¹ The prosecution warns the audience in the *proemium* of the first speech that the defendant had prepared the murder with greater care than ordinary people would do, which is the reason for the lack of direct evidence as well.

The reverse *eikós* arguments could, however, be used in a legitimate way, as well, when the object of the speaker is to point out the untenable fallacies in the opponent's argument. In the simplest form of this type of argument the defendant answers a probable accusation. This is usually supported by the claim that he already

²⁸ *Tetr.* 2.2.8, 10, 2.4.10. The limitations of the use of probable arguments is a central question of the *First Tetralogy*. See Gagarin (1997, p. 113).

²⁹ *Tetr.* 2. 1. 4-9. Gagarin (1997, p. 126). The method of setting forth and then rejecting all possibilities (or all but one) is called 'apagogic' after Aristotle, *An. Pr.* 29a5-6.

³⁰ One reason for this is the fact that the *Tetralogies* are not real life cases. Antiphon's *On the Murder of Herodes* develops a much more intricate heuristic argument.

³¹ *Tetr.* 2. 2. 3, 6.

foresaw the probability of the charge. Therefore he, being an honest, but calculating person who wants to avoid getting prosecuted, deliberately refrained from wrongdoing. That is not, on its own, enough, yet may give a firm support beside other motives.

The greatest weakness of the appeal to foresight lies in its reliance on double probability, namely the cumulative probability of the prosecutor's statement and its reverse. In order to prove his contention, the defendant has to show that there had been a likelihood of him being under suspicion before the murder took place, he was aware of that and attempted to avert it from himself. The fallacy of the argument could be demonstrated, if we show that the evidence pointing to the defendant was not available before the murder, so it was impossible to take it into account.

This very brief survey of *εἰκός* arguments in Greek rhetoric and oratory shows the complexity of the concept as well as its flexible use in a range of rhetorical situations. What seems quite remarkable is that the sophists used the concept of likelihood as a tool to increase the strategic potential of arguments especially in cases where factual evidence was meagre or unfavourable. Such a view of *eikos* greatly expands the range of arguments available and thus allows more space for manoeuvring. It is in this sense that we can say that *eikos* arguments are the predecessors of heuristic strategies. It also appears that the rhetorical application of probability has a more marked and sophisticated application in early Greek than in later rhetorical theory. It was more consciously based on the idea that any proposition gains probability, if it appeals to socially expected values or judgement by way of reflecting the ways of reasoning in the mind of the listeners.

Unfortunately, in Hellenistic theory that general concept of probability was narrowed down to only two possible forms of probable proof, the *e vita* and the *e causa*, as, for example, Cicero's *De Inventione* suggests. Interestingly, Cicero's speeches will show that in practice probability had a more prominent role, one that does not necessarily follow from the rules of Hellenistic handbooks. That oratorical application of probability has much more in common with both Greek rhetorical practice and my proposed notion of rhetorical heuristics.

Chapter 4

Cicero's Models: Heuristic Arguments in the Greek Orators

It is a commonplace in scholarship that Cicero's speeches are much indebted to Greek oratory.¹ Both his rhetorical training² and his readings suggest that the orator was well acquainted with works of several Greek orators. There is also evidence that Cicero not only had read at least two of the most famous Greek speeches, Demosthenes' speech *De Corona* and Aeschines' reply to it, the *Contra Ctesiphontem*, but he had even translated them into Latin. In the preface to this work, called *De Optimo Genere Oratorum*, he explains his reasons for making a translation of the two speeches which reflects more the 'spirit' of the argument than the exact wording of the text. In 9 he even mentions his efforts to imitate Lysias and his acute and clear style. His comments on the Greek orators in his work on the history of Roman oratory (e.g. *Brutus* 47–48) also show that Cicero not only read works of the most significant Greek orators but he studied them in great detail as well.

So far there have been only a limited number of comparative works on the topic, with the majority of studies focusing on stylistic or thematical similarities.³ To appreciate the development of rhetorical heuremes it is important to see that complex heuristic strategies based on probability could be found in Greek oratory as well. As I mentioned earlier, in the absence of clear guidelines on how to create strategies out of a systematic arrangement of arguments in classical rhetorical handbooks, the orator (as Cicero suggests in the *Opt. Gen.*) probably learnt such strategies through creative imitation, either through observation or reading.

A short survey on the practice of applying probabilistic arguments in the Attic orators will confirm that the concept of rhetorical heuremes is applicable to Greek

¹Cf. Chap. 1 n. 4. His translation of *Dem. 18* and *Aesch. 3* serves as a further proof for Cicero's esteem for his Greek predecessors. In the extant introduction to this work called the *De optimo genere oratorum*, he also mentions Lysias (10), Isocrates (17), Plato (16) and Thucydides (15) as models for imitation. We can be quite certain that Cicero in fact read widely these authors. However, it seems from his remarks (esp. 7–13) that Cicero is mainly concerned with stylistic features of the speeches and pays less attention to the study of argumentative strategies.

²In *Brutus* 316 he describes his training in Asia with the Greek rhetor Molon of Rhodes

³Wooten (1983), Stroth (1982, pp. 1–31).

rhetorical and forensic environment practice. It will also show that Roman rhetorical practice was indebted to the Greek orators and that Cicero could have met with heuristic strategies from studying the Attic orators. I will not be searching for examples of *heuresmes* which the Roman orator borrowed in exactly the same form. This would be futile, especially in view of the fact that the Athenian and Roman legal environments (especially procedural law) were considerably different. The main purpose of this chapter is to show that from the earliest examples of Greek oratory we found probabilistic strategies that cannot simply be explained by classical rhetorical theory. These strategies may not necessarily reach the complexity we see in Cicero's oratory, but they can be viewed as precursors to more extended heuristic arguments. It is also important to note that the selection is in no way representative of Greek oratorical practice so my purpose is not to give a comprehensive overview of heuristic strategies in the Greek orators. The criterion of selection was to choose speeches from prominent Attic orators, Antiphon, Lysias and Demosthenes, whom Cicero most likely read and where the nature of the evidence is such that the speaker had to rely heavily on probable arguments.

4.1 Antiphon *First Tetralogy*

I have already discussed in outline one of the earliest and most effective systematic application of probable arguments, Antiphon's First Tetralogy in the previous chapter. Although in *Brutus* 47 Cicero explicitly mentions Antiphon as an early master of Greek oratory besides Gorgias, it is not clear whether he himself read his works or only knew about him through Thucydides or rhetorical writers. In this short discussion I will concentrate on the structure of the prosecution's first speech and the answer to it by the defendant. The fact that the cases are imaginary means that they do not have specific reference to the contingent elements of a real life case (e.g. the adjustment of the reasoning to the audience). Therefore we cannot in real terms point out the marks of heuristic reasoning in either the defence or the prosecution speeches. However, as both speeches answer each other in turn they display a rather complex form of reasoning. Thus, they give a unique opportunity to see how arguments from probability developed from early on and how these could be set against each other in two alternate and coherent strategies, which is the precursor of more complex heuristic reasoning.

Interestingly, we do not learn about the case in a separate narrative, but we only find facts scattered in the argument.⁴ It becomes clear only gradually that the

⁴The lack of narrative poses several questions. Editions from Aldus onwards suggest a lacuna in 4. However, none of the four tetralogies contain a long narrative, so it may only be a few words missing here, as well. The easiest answer would be that model speeches should keep facts to a bare minimum and therefore go without a detailed story. More intricate would be the supposition that Antiphon tries to show that the orator can manipulate and re-evaluate facts by transposing factual details to places other than the beginning of the speech. In other speeches of Antiphon,

fictitious trial deals with a murder case in which an Athenian citizen, accompanied by his slave, was killed in a remote part of the city. By the time passers-by discovered the victims, the man had died already, whereas his slave had enough strength before dying to give testimony against the defendant. Normally, we would expect that the testimony of the slave against his master's murderer would provide direct evidence on which to build the charge of homicide. However, the prosecutor decided to supply further arguments to strengthen the probability of the murder charge. The reason for this could be that it realised that the slave's testimony in itself would not be accepted as a decisive proof of guilt.⁵

In his first speech, the prosecutor seeks to prove that no one else except the defendant was likely to have committed the murder. This was a probable proposition that had to agree completely with the testimony of the slave in order to secure a conviction for the defendant. The initial strategy of the prosecution seems in many ways unconventional. Instead of setting out the charges and the story, the speaker puts forward a preliminary consideration on the nature of his own argument. At first sight, it seems that he simply warns the audience about the intricacy of the crime and the religious consequences of an acquittal. However, on a closer look, we may discover that with the help of clever enthymematic self-defence he justifies the necessity of relying on probability arguments instead of presenting the unquestionable facts which lead directly to conviction. He says that an ordinary man is caught easily when he commits a crime, whereas an intelligent criminal leaves few traces behind, therefore his action is more difficult to detect. From these general propositions he concludes that, because the present case is exactly of this kind, he himself, as well as the jury, has to rely on whatever kind of probability may arise during the argument.⁶

One must think about these words carefully to find out what the prosecutor regards as valid evidence and argument. He assumes that in everyday cases one may find the truth (i.e. without the use of strict logical demonstration) even if the facts are few or vague. However, a complicated case such as the present one can only be solved through a line of inferences à la Sherlock Holmes or Hercule Poirot.⁷

such as in the *On the Murder of Herodes*, we also find similarly short narratives interspersed with argumentation.

⁵This is because slave testimony without torture was not considered admissible in Athenian courts, and also because the slave told his last words to strangers without the prosecutor being present. It seems curious that neither side discusses the credibility of the passers-by, who according to 2.1.9 will appear in the trial, although 2.2.7 suggests that they were the relatives of the murdered, which sounds like a somewhat improbable coincidence.

⁶It is very important to note the expression in 2.1.2. The words there may mean on the one hand that probability can be of any kind, implying that weaker probabilities should also be assigned great credit due to the difficulty of the demonstration. On the other hand, the expression may imply that the prosecution is allowed to look for probabilities outside the murder in strict sense, a justification for the inclusion of 5–8. The speaker pretends that in reality he does not present the probable inferences, but only propositions from which the jury should conclude whether or not the defendant committed the crime.

⁷What we should mean by 'ordinary cases' in 2.1.1 is of course not further defined. Perhaps we could think of crimes such as theft or adultery, which do not often go to court for the simple reason

The consideration in 2.1.1-2 also implies that in the absence of certain direct evidence one can safely trust in probabilities as substitute for factual proof. The justification in the proemium therefore underlines the difficulty of presenting an argument on the basis of only one piece of factual evidence, the last words of the slave. That way the prosecutor most probably attempted to cover up inadequacies of his evidence and determine the range of propositions, which should constitute the basis of the *iudicandum*.

Part of the reasoning in the prosecution's first speech is hypothetical probability, the sources of which are propositions drawn from the circumstances of the murder. The cloak of the murdered man was found on the spot, the murder happened in a deserted place, both the man and his slave were killed etc. These propositions seem to cover all aspects of the crime, they suffer from one major deficiency. Although they allow the prosecution to exclude possible perpetrators, yet they cannot in any way add to the plausibility of the slave's testimony or provide a positive proof of the killer's identity. From 2.1.4, where the prosecutor shows who cannot have committed the murder, we may only infer that the murder happened not by chance but on premeditation. From the defence's answer in 2.2.5-6 we will see that hypothetical probabilities of this kind can be extremely vulnerable to objections, if their factual basis is not firm enough.

The accuser then faces the question of how to link the improbability of an alleged murder caused by a violent thief, a drunken man, a quarrelsome person or a hit man making a mistake, with the probability of a premeditated killing by the defendant. To establish the link, the prosecution recurs to a more plausible form of probable inference to ask about motives, which could be gleaned from telling circumstances, such as enmity between murderer and victim, fear or gain. The defendant, having been defeated by the murdered man in serious legal disputes many times in the past, had recently been sued for theft of sacred property with the prospect of serious punishment. Therefore, he found no other way out from his troubles than killing his opponent. Such an allegation may provide at least *some* ground for explaining possible motivation, yet it has to be well argued to gain substantial attention.

Overall, there is one major question to be asked about the prosecution's strategy to build his argument on the *probabile e causa*. How does he strengthen the charge of murder with the probabilities drawn from the motive of avoiding loss, so that they earn enough certainty without substantial support from direct evidence? The answer will be found in the way the prosecution presents the trial that awaited the defendant before the murder. We may say that the speaker supplies auxiliary probabilities to prove that the motivation was in fact great enough to drive the defendant into desperate action. He says namely that in the long history of legal battles between the defendant lost all of his cases against his murdered enemy. Therefore, everyone expected that he would lose the latest trial as well. The prosecution's prediction

that laws give definite directions on how to settle them. But these possibilities cannot be true, as the speaker thinks about signs by which one can easily discover that a crime was committed. It seems more likely that 'ordinary' in this case is just a hypothetical opposite of the cunning machinations allegedly performed by the defendant.

about the result of the sacrilege-trial would have remained a future conjecture, were it not for the subtle presentation of the defendant's hopeless situation.⁸

Thus the persuasive appeal of 2.1.5-8 derives from the one-sided, yet vivid and therefore seemingly plausible reconstruction of the legal situation between murdered man and the defendant. The prosecution's analysis of legal events, interspersed with general psychological remarks, combine subjective probability from the viewpoint of a desperate but ingenious murderer with objective probabilities arising from the threatening legal case itself.⁹ In this way the prosecution tries to prove the likelihood of the crime¹⁰ not only from the circumstances of the murder (which would remain too general), but from the individual conditions of the accused. Therefore, even if the majority of probable statements look weak (as the defence tries to prove in 2.2), the comprehensive range of *eikos*-arguments could still raise the likelihood of guilt even without the support of eyewitnesses, whose testimony was nevertheless considered more trustworthy than probabilities.¹¹

The reader would naturally ask what in fact the core of a strategy was where the proof of guilt was built almost entirely on probabilities. The question can be made more precise by asking whether the argument in 4 about possible perpetrators complements the argument in 5-8, where the murderer is identified. The speaker validates his argument with a highly original move already at the beginning of the speech. He justifies the lack of witnesses and the almost exclusive use of probable inferences by the ingeniousness of the murderer, leaving it only until 9 to reveal that there still exists one testimony that points to the defendant as the culprit. Such an arrangement itself shows that in the present case the prosecution tries to make the jury reverse their expectations and accept that probabilities do not simply supplement witness testimony, but they have the same truth-value as testimonies.¹² The ingenuity of Antiphon's strategy lies in the timely justification of probable arguments. The speaker could get through the weakest points of his argument almost unnoticed, especially in 2.1.5, where he has to identify the accused, and in 2.1.9, where he has to cover up his lack of evidence. How effective that strategy proves to be will appear from the defence's answer.

Refuting the prosecution posed a challenge for two reasons. First, the accusers had direct (if not unassailable) evidence to argue for the guilt of the defendant.

⁸ See especially: 2.1.5. The subtlety of the formulation lies in the (unfounded) implication that the defendant had already considered himself guilty. That consideration is presented as if it were the defendant's self-confession (cf. 2.1.6.).

⁹ The argument in its details looks remarkable. The conclusion of the legal wrangles is drawn in the end of 6. Such an extreme choice may not be certain, so the speaker needs to go further and supply the premises based on psychological observation, which end in a positive dilemma as proof that the murder was necessary. He is going to score points regardless of whether or not the murderer would be discovered.

¹⁰ As the speaker expresses it in 9.

¹¹ Cf. Gagarin (1997, p. 129) and Arist. *Rhet.* 1376a17.

¹² The speaker still has to say that he would have preferred to present direct evidence, had he had more witnesses to come forward. Strangely, he does not count those witnesses who reported the words of the dying slave. Cf. 2.1.9.

Secondly, they provided rather firm circumstantial evidence to prove that the defendant had a strong motivation to carry out the killing. In this situation Antiphon chose a strategy which could have the strongest impact on the audience. Instead of providing an alibi against the slave's confession he decided to apply the same probabilistic reasoning as his prosecutor and reply to each probable claim with an equally plausible alternative. This way the audience would see not only that the prosecution's claims are at least debatable but also that a direct evidence could be questioned on grounds of probability.

He starts with a general reverse probability argument that attacks the seeming inconsistency of the prosecution's argument. It appears very much like an argument against 2.1.1, where the prosecution reminded the jury of his opponent's craftiness in concealing the traces of the crime. To avoid a potentially weak and worn-out form of reverse probability, the defence adds that having been aware of the fact that any suspicion of wrongdoing against the murdered man would fall on him in the first place, he would have tried to stop any attack against his opponent. This remark paves the way for the hypothesis in 2.2.6, that everyone, including the prosecution as well as the real murderers, could have taken advantage of the widely known enmity between the defendant and the murdered man first to avert suspicion from themselves and second to initiate a trial against an innocent citizen.¹³

By the end of the introductory section, the defence announces what he is going to discuss in his speech. He says emphatically in 2.2.4 that his task is nothing else but the refutation of the prosecution's allegations. This explanation, his *propositio*, is important as it gives an outline of his strategy. He says that if the possible suspects mentioned by the prosecution indeed appear with greater likelihood to have killed the murdered man, then his own innocence becomes justified.¹⁴ Therefore, he only needs to show that the prosecution's propositions are improbable and does not have to consider other arguments.

Why is this statement remarkable? The defence pretends that the prosecution's arguments are not only justified, but that they indeed cover all possibilities about the identity of the murderer. By acknowledging this, he narrows down the range of probabilities he has to consider and excludes other potential allegations which the prosecution failed to mention before.¹⁵ Also, the strict focus on proofs found in the prosecution's speech allows the defence to engage in a refutation solely and avoid answering the question who the real criminals could have been.

¹³ This hypothesis, however, does not suggest cooperation between the murderers and the prosecution, a line that Cicero pursues similarly with probabilities in *Rosc. Am.*

¹⁴ Maidment (1968) remarks about 2.2.4 that 'he (sc. the defence) too is obliged from the nature of the case to resort to proof by elimination.' In our view, however, the acknowledgment of the prosecution's line of argument is only seeming and tactical, because that will secure an easy elimination of the charges without the necessity of presenting other possible perpetrators, contrary to 2.2.2.

¹⁵ e.g. that he paid somebody else to carry out the murder (cf. 2.2.8, 2.3.5, 2.4.8) or that he associated with other enemies of the murdered man to get rid of him. It is clear from 2.3, the prosecution's second speech, that he is unable to present new proof but only answers to the defence's points, which suggests the weakness of his position.

In reply to the prosecution's speech the defence first treats probable arguments on the identity of the murderer. He shows that the case (i.e. someone killed in his coat together with his slave in a remote quarter of Athens) can be explained by other ('accidental') types of murder, such as robbery. The weakness of these probable inferences becomes clear when the opposition adds further assumptions to the hypothetical cases. His casual remark in 2.2.6 expresses well the futility of establishing the case based on hypothetical probabilities with little or no direct evidence support. The strongest point (which the accuser failed to consider properly) is that the murdered person had many enemies, who were clever enough to know about relative probabilities. This means that other suspects were aware who would be the first suspect so they could safely carry out any criminal act.¹⁶

The fact that the defence shuffles his answer to the slave's testimony between two hypothetical probabilities suggests that he does not consider it exceedingly important or that he wants to make it look insignificant between weaker propositions. The speaker brushes the testimony off with three swift remarks. They all discuss the credibility of the slave in murder cases, where a victim's confession may be influenced by the emotional or physical shock he suffered, and in judicial trials, where a slave's testimony is admitted only if he is submitted to a proper *basanos*, inquiry by torture.¹⁷ The general remark that follows the slave testimony expresses clearly how easy it is to destroy the prosecution's accusations by presenting equally plausible explanations to them.¹⁸

The effectiveness of this kind of strategy becomes visible in the refutation of the enthymeme in 2.1.8 with a dilemma-like form. There he proves that, considering the possible outcome of the impending sacrilege-trial and the present murder case, it was more advantageous for him to lose the former than risking a verdict of guilt in the latter. The defendant could in this way answer almost every point mentioned by the accuser without going into the relationship between him and the murdered man, thus avoiding the discussion of unnecessarily damaging direct evidence.

As I mentioned earlier, the defence's strategy is based on matching each probable argument with a likely opposite. In this way, the defendant gave the impression that he had effectively refuted every argument, as well as the direct evidence. As its structure is made up of directly opposing alternatives this strategy appears an early version of the 'contrastive probabilities' heurème.¹⁹ It is a form of refutation where the defence presents a sequence of probabilistic arguments to show that the

¹⁶ The defendant does not go into details about how much other enemies were involved in legal or other battles with the dead man, so we may suppose that others suffered similar troubles as he did. Probable inferences work better with less precision of proof.

¹⁷ This was, of course, impossible with a dead slave. However, the prosecution did not insist that the defendant has to be judged guilty on this account, but most probably applied it as a supportive proof with restricted validity.

¹⁸ Note that the speaker uses here the peculiar opposition of probabilities and truth, instead of the normal antinomy of probabilities versus facts (cf. 2.1.2, 2.3.8, 2.4.8, *Gorgias Pal.* 5, 24).

¹⁹ Although we said at the beginning of this analysis that we cannot really talk about heurèmes in our case as the audience and other elements of a real case are missing, the strategy itself is worth noting. For the 'contrastive probabilities' heurème see Sect. 2.3.

reverse of the other side's claims is equally (or more) probable. Cicero does not use this strategy in such form in any of his speeches. Yet his remark in *De Or.* 102 suggests that he was very much aware of the need to match up and weigh probabilities against each other to present the most plausible version of a case. Indeed, in one of his earliest speeches, the *Pro Sex. Roscio Amerino*, he applies an extended version of this strategy when refuting the charges in a similar way almost entirely based on probabilities.

4.2 Lysias *On the Olive Stump*

The orator Lysias was widely acclaimed for handling cases where the lack or weakness of direct evidence necessitated an argument strong in rational proof.²⁰ The seventh speech from the *Corpus Lysiacum*, usually called *On the Olive Stump*,²¹ was a case exactly like this. The defendant, who is accused of the sacrilegious act of removing a sacred olive-stump, does not have unequivocal direct evidence in proof of his innocence. Probably one of the major obstacles he faced was the fact that he was a wealthy man with several estates, who probably did not have an impeccable reputation in the city. Even more seriously, he could also have been suspected as one of the beneficiaries of confiscations during the reign of the Thirty in Athens (27); so it is likely that he did not enjoy the full sympathy of the audience. Lysias offers a typical example of probabilistic reasoning to overturn a weak and potentially damaging piece of direct evidence, the eyewitness testimony of the prosecutor. The orator uses a strategy similar to the 'contrastive probabilities' heuristics we encountered in the second speech of Antiphon's First Tetralogy. This strategy appears to be a fundamental type of probabilistic reasoning in classical oratory, found in Gorgias' *Defence of Palamedes* and in one of Cicero's earliest speeches in favour of Sex. Roscius.

The main purpose of Lysias' strategy is to refute probabilities associated with his status as a wealthy Athenian, which could easily raise suspicion against him amongst the audience. A verdict of acquittal must have been far from certain even if the accuser was a relatively weak and inexperienced Athenian citizen. Lysias addresses this problem in a complex way. He first presents direct evidence in favour of his client's innocence, then embarks on a long sequence of probabilistic refutation and proof. However, he advances his argument not simply in favour of the fact that he did not cut down the olive tree, but also to show that the weakness of the prosecutor's

²⁰ Dion. Hal. *Lys.* 15. (Usher 2000, p. 54). To describe a class of cases that Lysias preferred to choose, Dionysius uses the word *amarturoi logoi*, which does not necessarily mean that no testimony was available, but that these were inadequate for a proper demonstration. Dionysius's remark echoes the well-known phrase about the sophists' art 'to make the weaker case look the stronger'.

²¹ For a more detailed analysis of the speech, see Blass (1887–1898, p. 591), Bolonyai (2003, pp. 166–175), Heitsch (1961, pp. 213–218), Carey (1990, 117 ff.), Todd (2000), Usher (2000, pp. 89–91).

argument is proof of the trial being staged. This last strategic move is a fundamental part of Antiphon's speech *On the Murder of Herodes*.²²

In the first 11 paragraphs the accused presents the 'artless proofs' on the ownership of land from where the sacred olive-tree, was removed. These *entekhnōi pisteis* were strengthened by the testimony of the tenants. Then he devotes about 32 paragraphs to prove his innocence mainly with probabilistic arguments. One of the most intriguing questions of the speech is why the defendant had to spend so much time with mustering indirect evidence, if the testimony of the witnesses itself should suffice to clear him of wrongdoing. As I already mentioned, there is an explanation for the odd structure. Despite the direct evidence overwhelmingly in his favour (except for the 5 days between his purchase of the land and the beginning of the lease) his wealth and possible business dealings during the reign of the Thirty (26–27) made him vulnerable before a jury of common citizens.

The defendant appeared before the Areopagus, which was responsible for the supervision of sacred olive trees in Attica, sometime in 395. According to the speaker, the prosecution accused him of cutting down a sacred tree, *sēkos*, which was standing in his land. The accuser offered no witnesses to the crime (23), but claimed to have seen the illegal act himself. The man defending himself belonged to the wealthy class of Athenians, who provided many services to the city (31) and took part in several campaigns. At one point (39) he suggests that his young accuser Nicomachos is supported from the background by his enemies, and, indeed, he does not care about how weak and insubstantial evidence he can provide as long as he can make money out of *sycophantia*, overzealous (and possibly corrupt) prosecution of innocent citizens.

At the beginning, the speaker launches an immediate attack against the prosecution and charges him with gross inconsistency. The prosecution allegedly changed the subject matter of the charge just before the trial and therefore the defendant is at a loss about what exactly he has to prove in his speech.²³ The feigned bafflement serves two main purposes from the viewpoint of the strategy. First, it introduces one of the main propositions of the defendant's speech, that the accuser is a dishonest sycophant who is motivated either by greed or by malice. Second, if the defendant could pretend to be confused about the charge he was accused of, then he could also choose the proposition he argued for. That point proves to be decisive for Lysias' strategy. In 5 he sets himself a new proposition, which is not about whether he cut down the tree or not but whether he could show that there was not any kind of olive tree – sacred or not – on his land when he first took possession of it from Anticles in

²² For the analysis of the speech see G. Tahin, *On the Strategy of Antiphon 5* (forthcoming).

²³ The hesitation can be read as an ingenious variety of the *dubitatio*. It serves as a strong premise for the assumption that the prosecution ignored even the most basic probabilities in order to create a case out of nothing. According to Bolonyai (2003, p. 158), Lysias deliberately confuses the meaning of *elaa*, olive tree, *moria*, fruit-bearing sacred olives, and *sēkos*, dead sacred olive-stump to prove that the text of the indictment bears the mark of fabrication, whereas he knew clearly what he was charged with.

403.²⁴ This proposition stands in stark opposition to the actual charge, which says that the landlord cut the sacred olive tree down in around 397/6 (27).

The question why there is the discrepancy between the two dates may not seem important but it is essential if we were to understand Lysias' strategy. From the defence's point of view, putting the date of the alleged uprooting in chaotic times – the reign of the Thirty (cf. 9 'during the archonship of Pythodoros') and the preceding turbulent 8 years starting with the reign of the 400 in 411 – was an expedient proof of innocence. Political and social conditions were unstable in these years and it was more likely that a crime like this went on undetected. Making wartime ravages responsible for the act²⁵ could be all the more helpful, as the defence need not and could not offer witnesses for the acts. It was also safer for him to do so as he was unable to summon either Anticles, from whom he bought the land in 404/3, or Apollodoros from Megara, the last owner before Anticles. On the other hand, refuting the prosecution's charge based on a date after 403 was all the more advantageous as witnesses were at hand and the supervisors of sacred trees could also provide records.²⁶

On a closer look, it becomes clear that the story of the land ownership in 4–11, the supposed direct evidence, has a small but potentially serious gap, which raises suspicions about the defendant. In 403, when he bought the land, 5 days elapsed from the day of purchase until he rented it out to his tenant, Callistratos. During these 5 days he could easily remove the stump from his land (9). It is also evident from 10 that he did not offer witnesses for this time, which means that he could not prove that there was no olive tree on the land when he bought it. The only way to divert suspicion from this short period is to concentrate on the time when the land was indeed without owner and war destroyed parts of Attica.

After presenting his direct evidence, the defence first establishes the major premise of the argument in 12–14, that he could not have committed any wrongdoing for profit.²⁷ It is introduced with an original twist to conceal the fact that the defendant

²⁴ The statement is, of course, ambiguous, due to the vagueness of the term 'olive tree'. As it is, we cannot decide with absolute certainty whether the defence attempts to prove on the other hand that there was neither common olive tree (*elaa*) nor sacred in his land at all, or on the other hand that there was neither sacred olive tree (*moria*) nor sacred olive stump (*sēkos*) there. Cf. Todd (2000, pp. 77–78).

²⁵ Especially in the years 411–8, when the land had no owner for three years. (cf. 4 and Bolonyai 2003, pp. 159–160). The general argument on war damages of Attica in 5–9 is again vague enough to support any kind of assumption. It is important, however, that the defence does not make any certain claim that the uprooting took place in reality.

²⁶ It remains to be found out why the prosecution was so careless as to put the date of the uprooting to 397/6, when the landlord could easily offer a range of evidence for these years about the absence of any olive tree from his land. The defence suggests that the prosecution is a young and inexperienced sycophant. (23) Was Nicomachos really so foolish? This allegation may sound too simple to accept. After all, the landlord, a wealthy Athenian could as a last resort to bribing the tenants and the officials.

²⁷ This proposition may suggest that the prosecution based his argument on the motive of profit, as well. But this is just a hypothesis, and it may well be that it was only the defence who wanted to argue on the basis of profit and attempted to ignore other probabilities, e.g. that he cut the tree

cannot provide any certain evidence to support his claim that it is unlikely that he cut down the tree to gain something from the removal. Referring to a hypothetical objection about his character – namely that he would be shrewd enough to commit such an act – he turns this proposition to his advantage. He says that if the jury believes him to be like that, they should also suppose that he calculated the consequences of the act.²⁸ He also gets rid of further hypothetical objection related to the first one. Despite such calculation, it may still be plausible that he had to cut down the tree because of other external causes, which could impel him to disregard the consequences. Therefore, he excludes such causes, saying in 14 that even the prosecutor would not be able to show that such circumstances, like the devaluation of his land due to the presence of the olive stump, compelled him to act unreasonably.

Having removed possible objections to his probability arguments, the defence then goes on to another probabilistic argument to show how much he is aware of the ways he could be detected, so it is unlikely that he ever wanted to cut the tree down. Taking his reasonable conduct as a basic premise for the forthcoming argument, the jury would judge it highly improbable that a reasonable and considerate man such as he could have committed an act with serious legal consequences. In these paragraphs we also learn about the exact charge in the probable refutations. According to 15, 19 and 22, the prosecution himself saw in daylight, when no other witnesses were present, how the defendant instructed his slaves to cut down the tree, load it on the cart and carry it away immediately. To prove that such detection was impossible, in 16–9 he names those groups of people who could have easily reported this act to the authorities.

The presentation of probable proofs in 15–21 carefully decreases the plausibility of the charges by every step. Thus the defendant claims that it is wholly unreasonable to cut down a sacred tree in daylight, when the chances of detection are far higher than at night. His slaves, his tenants or one of his hostile neighbours could easily have noticed and reported the incident. Finally, if the uprooting was really witnessed by the prosecutor, it is unlikely that he did not summon the witnesses or one of the nine archons at once and deliberately left the case to be decided later in court where proving his case is much more difficult. The point of the whole probability argument becomes clear only from an incidental remark in 21, where the defendant tries to undermine the credibility of the prosecutor by suggesting how his accuser missed the correct ways of reporting the incident.

As Nicomachos was not willing to act right on the spot, he could rely only on his words as proof and claim that his witnesses remained away, because they feared the defendant's wealth and influence²⁹ or because they were bribed. If we accept

down simply to get rid of a nuisance. The assumption of profit itself sounds somewhat strange. What great profit could the man gain from removing a sacred tree from his land?

²⁸ Cf. 12 The assumption that the defendant acts shrewdly could, however, also imply that he not only knew well in what ways such a crime can come to light, but that he was also able to avoid being detected, for example by bribing the witnesses. To counter that suspicion, he also has to prove his integrity later in 24–9.

²⁹ cf. *Gor. Pal.* 22–3, 34. That seemingly unimportant remark gains relevance, if we remember that the speaker himself failed to provide witnesses for the crucial first 5 days, when he purchased, but

that either bribing or deterrence was a likely reason why no one dared to come forward as a witness, we may regard the alleged weaknesses of the prosecution's evidence as partly excusable. It is after all conceivable that he alone witnessed the crime, while the defendant bribed everyone who could have given damning evidence.

Probable arguments continue in 23–9, discovering separate angles from which to declare it unlikely that the defendant committed the crime. He refers to his farms elsewhere in Attica, where it would have been much easier to remove sacred trees without the danger of being detected. Despite that, he had never had any conflict with those who were entrusted to supervise the trees which were state property. The weakness of the first argument becomes clear from the fact that it is wholly irrelevant as to whether the farmer wanted to cut down the stump mentioned in the charge. There may be many reasons why it was important to leave the olive stumps in his other farms intact and cut down this one. Only if we read that argument as a proof of character, does it gain any weight in the final decision. However, one must bear in mind that the speaker is an influential Athenian citizen, who admits himself in 24 that he could remove sacred stumps, if he wanted to.³⁰ Therefore, the effect of this argument depends largely on whether the jury believes his character-projection as a patriotic law-abiding citizen (in 25–7).

The last section of the argument from probability in 28–9 deals with the unreasonableness of the charge with respect to the location of the farm and the allegedly consistent supervision of sacred olives by the Areopagus. The final probabilistic arguments round off the whole circumstantial evidence with two comprehensive statements. The central position of the land adds an important point to the argument in 15, 18–9 and confirms the alleged impossibility of removing the stump unnoticed. Yet this line of argument becomes meaningful only, if the jurors believe that the speaker most probably did not want to bribe the key witnesses. The reference to the authority of the Areopagus may also seem to be decisive, if the defendant can prove that its members properly recorded the tree on the land in their registry.³¹ The argument ends with an appeal to the defendant's past life, during which he had no collusion with the Areopagus on sacred olive trees.

To describe the strategy of Lysias' seventh speech, it is important to set aside the widely-held belief that the prosecution had in reality a weak case to prove,³² and it simply wanted to attack a wealthy Athenian on the instigation of his enemies. It may

had not yet rented out his land. Moreover, the majority of his speech consists of circumstantial probable arguments, so he might also believe that his case could not be decided except by 'words'.

³⁰ Which, after all, also means that it is in fact possible to avoid detection, depending on where the land lies etc., and that the registration of the trees may not have been flawless.

³¹ This claim may also be debated. Cf. 2; Carey (1990, p. 120) and Bolonyai (2003, pp. 173–174). With respect to the supervision of olive trees, the defence's argument is inconsistent. He pretends (esp. in 24–5) that the supervisors surveyed the dead olive stumps as well, whereas they kept a record of fruit-bearing olives only.

³² Cf. Carey (1990, pp. 116–118). and Bolonyai (2003, p. 169, 173–175). They admit that the case seems weak as presented, but concede that despite the weaknesses of the accusation (especially in dating the alleged crime) the speaker might nevertheless be guilty.

be the case that Nicomachos was a sycophant as Lysias openly claims in 23 and 39. However, we should not forget that Lysias suggests to us this view, which may therefore be distorted.

A simple summary of the speech will highlight the deceptively simple structure of the strategy. 1–3 prepares the way for refuting the accusation with the claim of inconsistency and the counter-charge of sycophancy. The narrative and presentation of direct evidence, vague as they are (esp. 5–8, which itself is a kind of probable proof), indicate that the probability of innocence can be greatly strengthened by proposing an alternative date for the time when the uprooting could have happened.³³ The probability arguments in 12–29 supplement the direct evidence to help the defendant avoid the impression of a wealthy businessman who can easily get away with a criminal act, thanks to his power to control the witnesses.

The strategy is best seen as fusion of two groups of heuristic strategies, the ‘thematic replacement’ and the ‘contrastive probabilities’ heuristics. Its main purpose is to refute the charge, to disguise possibly inconsistent direct evidence on the ownership of the land and to offer alternative and seemingly more plausible explanations of hypothetical probabilities, which may not have been mentioned by the prosecution but could figure prominently in the mind of the audience. The strategy also enables the defendant to ignore probabilities supporting the assumption of guilt. Accusing the defendant of sycophancy might be viewed as a simple *topos* but this explanation would fail to consider its strategic importance. The counter-charge helps to turn the jurors’ minds away from the actual charge (‘replacement’) and offers a powerful support for acquittal by assuming that the inconsistency, inherent weakness and improbability of the charge are the result of an artificially created and insubstantial judicial case. This strategy has also much in common with the ‘contrastive probabilities’ heuristic as it relies on providing alternative probabilistic explanations to disprove a piece of direct evidence. It is a form of probabilistic reasoning that is a central element of some of Cicero’s arguments e.g. in the *Sex. Rosc.*

4.3 Lysias *In Defence of Mantisheos*

The 16th speech of Lysias, usually called the ‘In Defence of Mantisheos’, presents in many aspects a similar case to that of the Seventh. The defence of the young Athenian against the charge of serving a tyrannical government looks just as straightforward as the uprooting of a *sēkos* during the reign of the Thirty. On the surface, it is a conjectural case (*casus conjecturalis*), based on a question of fact. However, the defendant spends most of the speech arguing with his character, which suggests that the key issue was how the audience perceive him and his career

³³ A technique which may explain Antiph. *Tetr.* 1.2.2. We may suppose that it was not expected of the accused to name someone whom he considers the real culprit, but his probability of innocence could gain a lot if he does.

history, as we saw in the *sēkos*-speech. Moreover, the defendant leaves one crucial point unclear in the narrative, his return to Athens 5 days before Thrasybulus' march on the Piraeus and his short service under the tyrannical government, which might have adversely affected the final decision. What interests us is whether Lysias applies the same strategy that we observed in the Seventh speech or whether he creates a different line of probabilistic argument adapted to the specific elements of this rhetorical situation.

The case, which came before the Athenian *boule* sometime between 393 and 89, belongs to Lysias' *dokimasia* speeches. The young Mantitheos, an ambitious young man, wanted to become a member of the Council of the 500. He had to appear before the Council for an examination whether he can officially qualify for the post. It happened there that some members of the outgoing body opposed Mantitheos' appointment and charged him with service in the cavalry during the reign of the Thirty in 404–3. The prosecution could lean on potentially strong direct evidence that Mantitheos' name appeared on the registry that listed those who served as cavalrymen during the Thirty.

Although such service in itself may not have been in strict legal sense objectionable,³⁴ any active service during the rule of the Thirty (especially in an aristocratic military body) could raise serious prejudice among those who returned from exile after the end of the tyranny. The defendant therefore faced a double task. He had to prove with certainty that the evidence provided by the prosecution is false or at least that it lacks any certainty. Furthermore, he had to disperse the suspicion that his life and character would disqualify him from the service of the state. The strategy adopted by Lysias is in many ways similar to that of the *sēkos*-speech. The key element of the strategy is the refutation of the charges as briefly as possible and then devoting most of the argument to proving a point, loyalty to the country, which is largely irrelevant to the main issue, and whether Mantitheos supported a tyrannical government with his service or not. The main purpose of the strategy is to quickly turn the jury's mind away from a weak refutation to a positive circumstantial proof which conflates the evidence and increases the likelihood of Mantitheos' innocence.

Lysias' strategy is introduced by an important statement in 3 which helps deflect the listeners' attention from the weakest element of the defence's case, his brief service under the Thirty. He asks the jury to consider not only his loyalty towards the present constitution (which should not, according to him, be a decisive point), but more importantly his past conduct. This is of course the standard topic of appeal to character, but again it must be viewed not as an individual scheme but an element

³⁴ The question whether the prosecution had any legal basis for the accusation is again debated. Most scholars, who assume that there was such a special law on testing the elected officials, refer to Lysias 26.9–10, where the speaker refers to a particular chapter of the law. Cf. Bolonyai (2003, pp. 309 and 417), MacDowell (1995, p. 168), Hansen (1983, pp. 188–189), Edwards and Usher (1985, p. 252). The hypothetical case in 26.10., however, may prove only that the members of the *boule* could, if they agreed, bar the prospective applicant from entering the council and there was no automatic refusal. Mantitheos appeals to this in 8, which may also be proof that members of the cavalry could indeed enter to the *boule* and even hold higher offices.

of a probabilistic strategy. If his private acts show him to be a moderate and thoughtful person, then the jurors should clear him of the charges and let him enter the council. This statement suggests that the prosecution found the greatest objection in his past conduct, whereas the charge of cavalry membership is added to it only as supportive evidence. Also, the defence advises the jury that the refutation of his service in the cavalry is to be taken as a proof of loyalty only,³⁵ and not as an issue of legal disqualification. To clear himself of the prejudice would therefore mean to get rid of the most serious obstacle in getting the membership. When we compare the refutation of the charge and the proof of character, it becomes clear that 3 reverses the order of importance of the two arguments to dedicate more space for the question of personal loyalty and service to the democratic city which the speaker has more evidence to prove.

As part of the reversal strategy for the defence he presents two arguments in 4–7 against his supposed involvement in the rule of the Thirty as a member of the cavalry. First, he claims to have been absent from Athens during the reign of the Thirty and returned only in the April of 403, 5 days before Thrasybulos entered Peiraeus on the eve of the battle of Munichia. As this claim would not entirely prove his innocence,³⁶ he applies an argument from probability based on the fact he returned to Athens only a little time before the final battle between the exiles and the Thirty. He says that it is unlikely that the Thirty would have entrusted any serious task to those who spent the time abroad while they were in power. The weakness of the probability argument comes from the unsupported presupposition that those who were absent, but not exiled, during the rule of the Thirty necessarily became suspect to the regime so they could not have performed any real service to tyranny. However, such a presupposition is all the more unlikely, as the returning Mantitheos was not asked, as he suggests, to take part in the government but to enrol for military service, in which he had already earned some distinction.

His second argument to rebut the charge deals with the evidence that his name appears on the list of those who served under the Thirty. Here Mantitheos attempts to discredit the validity of the list and provide a counter-proof that could secure his acquittal. According to him, the list his opponents are referring to cannot be completely trusted, as it does not contain all the names of those who really served in the army, whereas it includes many who were not present in Athens at the time. That would sound a strong proof, if these alleged mistakes were in any form supported by documents or witnesses.

Leaving the conscription list as it is, he compares to it three other lists which are allegedly more accurate. If the conscription list suffered from major shortcomings

³⁵ That would mean of course a reinterpretation of the original charge. Confirming one's loyalty is a vaguer issue and a much easier argumentative task than disproving a clear direct evidence of military service.

³⁶ He and his father most probably were not exiled, otherwise he could not have been on a serious business trip in corn-trading. Also, he fails to provide witnesses that he did not take part in the battle of Munichia against the returning democrats, which can be taken as an *argumentum e silentio* that he did support the Thirty.

in chaotic times, the chances are that the other documents were mistaken, as well. Interestingly, he does not give any direct evidence about the incorrectness of these lists, although we should suppose that they were accessible to the public. Instead, he explains that the list compiled by the phylarchs should be accepted as the decisive proof, as these officials were personally responsible for registering those who received allowances. The discussion of direct evidence ends with a forceful argument in the form of a hypothetical concession to ensure a failproof refutation of the direct evidence. Matitheos says that even if he served in the cavalry under the Thirty, he would not have committed any serious crime by that, as many sit among the jurors, who could have been accused on the same charge. The demonstration of innocence, together with the whole speech could end here. The rest of the speech, the account of personal virtues and military distinctions, is lengthy and superfluous. But why does Lysias spend nine long paragraphs with obviously irrelevant self-glorification?

The usual justification would be to point out the usefulness of an extended *probabile e vita* or 'biographical proof'.³⁷ However, this suggestion would fail to highlight the probabilistic value and strategic function of 9–19. The answer to the question is already clear from the thematic division of the speech in 3. The defendant claims both in 3 and in 20 that his opponents have sinister motives. The prosecution seems to have attacked his luxurious life and debauchery, and decried his fervent political ambitions. Moreover, the young age of the defendant could provoke many in the assembly, where he could appear too young to embark on public service. Moreover, his brief service under the Thirty, together with his wealthy status and potential Spartan sympathies, could raise suspicion and ill-will and thus jeopardise his application. If that is the case, then both the speechwriter and his client recognised the real issue and devised a strategy that addresses the motives in the background. Thus if the refutation of the military service under the Thirty will not convince the members of the Council, the proof that he lived a moderate life with distinction in the service of his country would still decrease the likelihood that his past life should disqualify him in the present case.

As I noted in the introduction to the speech, the success of Lysias' sixteenth speech depends heavily on a strategy which devotes a relatively short space to the refutation of the charges while producing an extensive catalogue of personal merits. The idea behind that strategy is to leave the audience with an impression of positive proof and turn their minds away from potentially damaging evidence. This can be regarded as one of the early examples of the strategy³⁸ from the group of 'thematic replacement' heuremes. The Lysianic speech seems to stand on weak grounds with

³⁷ As Usher called it in 367. The argument can be summarised in one question. 'Is someone who has behaved in such a way throughout his life likely to have behaved in the (contrary) way described on the present occasion?' Cf. Antiph. 5. *Her.* 74–9, *Lys.* 21. 1–11, 26. 21–2, *Isocr.* 16. Although in a more restricted form, the argument is still accepted in present-day court practice.

³⁸ Cicero is very much fond of this type of heurme, although he never uses it in such a plain form as Lysias does. One of the finest examples in the Ciceronian corpus is the *Pro Cluentio*, where the major charge, the poisoning of the young Oppianicus, is presented by Cicero as an irrelevant accusation against his client compared with the prejudice created by the disgraceful *iudicium Iunianum*.

respect to direct evidence, therefore the proof of innocence gives way to the proof of suitability for the council membership.

The main argument may not lack any support from direct evidence, but the speaker still finds it necessary to produce an auxiliary argument. This is marginally relevant to the main argument, yet its stronger probability may make the final conclusion much more plausible. The point of the strategy is a gradual move from the major to the auxiliary argument, while the latter is discussed in such an exclusive way that the major issue is left out of sight. Heuristic arguments which belong to this group of heurèmes appear in a number of Cicero's speeches, such as in the *Pro Sulla* or the *Pro Cluentio*. Furthermore Cicero's *Pro Caelio* offers a very similar line of defence based on a seemingly irrelevant and extensive account of the young Caelius' past life in order to supply an auxiliary argument devised to turn the attention of audience away from the main proposition of the debate.

4.4 Demosthenes *On the False Embassy*

The last speech in the survey of probabilistic arguments in Greek oratory allows us only a very restricted study of a complicated judicial case. It is a speech where probability plays a crucial role in proving the opponent's guilt, albeit in an unusual form. Contrary to our expectations that reasons for the conclusion appear within the *argumentatio/pistis*, the refutation or demonstration, Demosthenes creates a strategy in which a sequence of events in the narrative provide circumstantial evidence as part of a probabilistic reasoning. The speech is thus an example of how a carefully planned narrative may serve as a likely proof in the argument. Later, our analysis of Ciceronian speeches will show that the orator relies on this strategy in several places, for example in the *Pro Cluentio* and *Pro Milone*.

Demosthenes' 19th speech, commonly called *On the False Embassy*,³⁹ arose from the protracted political and legal struggle between Aeschines and Demosthenes in the years when Philip II of Macedon was increasing his domination over Hellas. A sequence of trials began in 345 with Demosthenes' and Timarchos' *graphē* or criminal prosecution against Aeschines. It lasted until 330, when the vindictive politician finally defeated his enemy with his 20th oration, *On the Crown*. The legal battle started after the Athenian envoys had failed to obtain advantageous conditions for their city in the so-called Peace of Philocrates in 346. In particular, Demosthenes accused Aeschines and the other envoys with dilatoriness when they failed to follow Philip on to his campaign and obtain his oath quickly to ratify the already harsh treaty. It is very difficult to verify the historical events in the background as we learn about them almost exclusively from the two conflicting speeches. The present analysis thus concentrates on Demosthenes' intricate use of narrative as probabilistic

³⁹ The most recent commentaries of the speech are MacDowell (2000) and Yunis (2005).

reasoning in the main body of his argument in 9–177,⁴⁰ the purpose of which is to prove that Aeschines was bribed by Philip to persuade the Athenians to accept the Treaty with unfair conditions.

Yunis notes that a key feature of Demosthenes' argument is its simplicity. He makes Aeschines and Philocrates the hirelings of the Macedonian king, whose successful efforts in Philip's service are clear from Athens' present disastrous situation. This basic argument is supported by a lengthy narrative which is not chronological, but made up of units which are randomly and unexpectedly broken off by indignation at Aeschines' vileness and mockery of his character and life. Such a bold narrative technique was made possible by the fact that the audience had a broad knowledge of the facts. Demosthenes shows complete control of his narrative, which is essential to make the jury pass over inconsistencies, gaps and distortions.

The major objection against the defendants was their alleged subservience to Philip. As a result of their alleged venal conduct, Demosthenes made them responsible for Philip's expansion in Thrace immediately before the ratification of the treaty, his march through Thermopylae to extend his hold on central Greece, the destruction of Phocis and the saving of Thebes. The question Demosthenes sought to answer in the speech was whether Aeschines could be called to account for Athens' fate after the peace and whether his alleged dishonest conduct could be attributed to accepting money.⁴¹

The case provided a number of obstacles in proving the guilt of Aeschines. Most importantly, Demosthenes did not possess any direct evidence about the bribery, therefore he had to rely on certain 'signs' during the embassy to show that events could have happened only as a result of collaboration between Philip and the envoys. The lack of direct evidence thus determines the strategy of the speech and Demosthenes' reliance on probability arguments. Another problem that Demosthenes faced was how to attribute full responsibility to Aeschines. To direct the blame solely on his enemy, he needed to dissociate him from others, who may have had a share in the negotiations and make Philip appear less likely to be the person who is always the first to act.⁴² Demosthenes had to discredit a man who represented a peace policy, which was supported by numerous Athenian politicians. These people,

⁴⁰ Yunis gives an excellent summary of Demosthenes' art of narrative in his translation of the *Fals. Leg.* in Yunis (2005). 'Demosthenes' argument derives its punch from the quasi-historical narrative of events in which it is embedded. One would say quasi-historical, because, while the narrative comprehends a core of indisputable, commonly accepted facts, Demosthenes focuses not on objectivity or disinterested truth. Rather he makes the audience draw strong moral inferences. By depicting the protagonists in action – Aeschines colluding with Philip, Demosthenes resisting the attempts – Demosthenes supplies the basis for his fiercely expressed judgments condemning the traitor and defending himself.'

⁴¹ Aeschines' innocence is generally accepted today, e.g. by Harris (1995). Aeschines himself (2.118) throws the blame on Fortune and Philip, and claims that his just promises could not have been materialized as a result of political contingencies.

⁴² As he discusses Philip's *philopragmosyne*, meddlesomeness, in various places in *Phil.* 1. and *Olyn.* 1.4. Aeschines could have quoted these words with slight modification in his own defence, as well.

including Eubulos, Nausicles and Phocion, also appeared beside Aeschines to defend a person advocating their policy.⁴³

To avoid an all too general political argument and an unnecessarily long and detailed narrative, Demosthenes chose a small number of topics to establish the likelihood of wrongdoing by Aeschines. In 4 he determines those points by which he could prove both Aeschines' individual responsibility in the outcome of the negotiations, as well as his guilt in accepting money for his 'services'. These points include the report Aeschines gave after the second return from Macedonia, his advice to the Athenians, the proper fulfilment of instructions, the use of time and finally the bribe taken. This list already offers an insight into Demosthenes' strategy. Most importantly, the question of bribery is just one point in the argument, even if it appears in a prominent place, at the end of list. This suggests that there is a temporal/logical relationship between the points, so all the points preceding the bribery charge will provide an accumulated probability to it. However, we will see later that Demosthenes does not observe his plan throughout the speech but instead applies a more unpredictable form of narrative.⁴⁴ A neat division of points at the beginning of the speech will nevertheless create the impression that the audience is following an orderly plan, even if in reality the opposite is happening.

Aeschines is accused of two great crimes in his position as an official: advocating Philip's political propaganda and thereby causing the destruction of Phocis. Demosthenes tries to establish the probability of the former ambassador's guilt with two separate lines of argument. In 9–28 he points to the huge inconsistency in Aeschines' behaviour before the second embassy and the result of his belated and corrupt action during the ambassadors' attempt to get Philip ratify the treaty, which is said to have directly caused the surrender of the Phocians. The real problem in these matters was demonstrating Aeschines' individual responsibility. To achieve this, Demosthenes had to exclude alternative explanations of the defendant's conduct and eliminate other, equally plausible, causes of the destruction of Phocis. Inconsistent behaviour could be made punishable only if the orator can show that it was caused by bribery. Thus in the case of the Phocians, it had to be clear that Aeschines deliberately supported Philip to destroy Athens' former ally.

Demosthenes deliberately does not spend much time on the question of the inconsistency during the First embassy to Philip. He only devotes 7 paragraphs out of the 343 to the matter. The reason for this seems clear. His views before the first embassy were not much different from those of Aeschines, so a detailed narrative of his earlier views could have seriously decreased the likelihood of Aeschines performing a sudden *volte-face*. *Dem.* 19.12–16 and *Aesch.* 2.18–20,

⁴³ In the defence speech, Aeschines strikes back exactly with those arguments where his opponent left himself undefended. He claims that Demosthenes himself advocated the peace together with Philocrates after the first embassy. If his account of the first embassy (2.20–44) can be credited, it shows that the enemies shared much in their political objectives, and inconsistency was not a prerogative of any side.

⁴⁴ The argument has a clear dividing line in 181, by which Demosthenes presents all his major arguments concerning his plan in 4, therefore our analysis will go as far as that point.

two alternative accounts of the negotiations before sending the peace deputation to Philip, show exactly which details each orator preferred to leave out. Demosthenes fails to mention that he himself joined Philocrates in advocating the peace, whereas Aeschines viewed it with great distrust at first and only accepted it in the second round of talks. In fact, the Athenian politicians were unanimous at that point about making peace with Philip, and they wanted to realise it even if they had to sacrifice their former allies.⁴⁵ Moreover, he remarks in 57 that the first embassy had no effect on the fate of the Phocians.

The unexpected change of opinion may be suspicious,⁴⁶ but only if Demosthenes would have been against the treaty from the beginning, whereas he was not. Therefore, all the prosecutor could do is to find fault with Aeschines' peace proposal in 16. Demosthenes' reconstruction of events after the return from the first embassy seems all the weaker, as it presupposes that he denounced the Athenian peace negotiations then as he does now. His narrative becomes somewhat more persuasive only during the second embassy, when he started to oppose his fellow ambassadors openly. In a way, it was Demosthenes' behaviour which changed.

Aeschines obviously did not initiate the destruction of Phocis, and even his prosecutor admitted that in 30. Philip had already had plans to invade central Greece before the ratification of the peace in 346, and he only needed a little delay in the conclusion of the treaty to march southwards to Thermopylae. Demosthenes argues that on return from the second embassy Aeschines and Philocrates hoodwinked the Assembly by presenting Philip's magnanimous promises, whereas they knew that Philip deceived them, so that they would not be able to march out and defend Phocis. In the meanwhile, Demosthenes attempted to warn the Assembly, but he was prevented from doing so by the mouthpieces of Philip. As a result, the Assembly voted for the Treaty with the amendment that the peace and the alliance would be extended to posterity and that Athens will turn against Phocis, if it fails to surrender the Temple of Delphi to the Amphictyons, which at the time meant Philip, Thessaly and Thebes.

The line of events was probably not questioned by Aeschines. However, he strongly opposed the validity of Demosthenes' interpretation that Aeschines and Philocrates aided Philip's machinations. To allow such an interpretation Demosthenes radically changes the order of events in his narrative, whilst he includes episodes which are not relevant for the question of bribery, most importantly his ransom of the Olynthian prisoners in 166–173.

A key part of his strategy is to move the story of the delay in taking the oath from Philip during the Second Embassy to 150–181, whilst he had already recounted events after the second embassy in 17–97. Throughout the discussion of the second embassy and its aftermath, Philip's policy and actions are treated

⁴⁵ Cf. Pickard-Cambridge (2003).

⁴⁶ Demosthenes says in 13 that Aeschines must have been bribed by that time. But that is a mere hypothesis without any proof, which tells more about Demosthenes' construction of argument, rather than the establishment of a firm conclusion. In fact, he takes his conclusion forward before proving it.

very briefly as they would have made Aeschines' responsibility less obvious. Demosthenes also ignores the opinion of other ambassadors, whose attitude strongly affected the outcome of the embassy. Lastly, he forgets to talk about the responsibility of the Phocian generals Philomelus and Onomarchus, who could be the main reason for their country's fate after seizing Delphi and using its treasury to maintain a mercenary army.

Instead of presenting a broad overview of the political situation in Hellas to explain the complexities and uncertainty of the time, Demosthenes focuses on two contradicting letters by Philip, written before and after the Second Embassy. These are necessary to provide some form of direct evidence and to give the impression that the orator has proof to back up his interpretation of events. These letters supposedly reveal traces of Aeschines' manipulation in the background. Demosthenes also claims that the speeches of the two bribed ambassadors induced the Assembly to accept the treaty, which directly caused the surrender of the Phocians. His account is closed by a moving picture of the ruined Phocis (65).

A key feature of Demosthenes' strategy throughout 17–167 is maintaining narrative consistency by a hypothetical chain of causes between events that are mostly unconnected. This sequence of causes and effects ensures that the orator increased the likelihood of Aeschines' guilt by every episode he relates. Moreover, the rapid pace of storytelling, interrupted by diatribes about the necessity to punish Aeschines (as in 131–149) prevents the listener from establishing an independent view on the relationship between past events. He is therefore left to accept a distorted and much simplified interpretation of events and actions strengthened by unsupported hypotheses (e.g. the Phocians surrendered as a result of Aeschines' promises and Philocrates' peace treaty) and anachronistic presumptions (e.g. the Athenians could have blocked Philip's advance in central Greece, had Demosthenes spoken freely before the Assembly). The primary feature of the argument is the constant claim that Aeschines deliberately betrayed Athens. This fundamental assumption rests not on any kind of direct evidence, but on a particular causal interpretation of events, for which other, more plausible, explanations can be found. The orator ignores, for example, the possibility that Aeschines genuinely believed Philip's promises, which is a mistake, but not a crime, and held the view that making peace is worthwhile even at the cost of losing an ally.

In the last part of the analysis I will examine in some detail three seemingly relevant pieces of evidence which Demosthenes presents in his narrative to make the bribery charge against Aeschines probable. The purpose of taking a closer look at the evidence is to show that Demosthenes manipulates facts to align them with his overall proposition and introduces themes to establish temporal or causal relationships between events within the narrative. The first evidence comprises a reference to the fate of Philocrates, who was considered guilty of having been bribed by Philip after he went into voluntary exile in 343. Demosthenes says that Philocrates' guilt had already become manifest from his extravagancies, even before he was indicted. From this he concludes that it is impossible that Aeschines as the accomplice of Philocrates would have helped Philip without proper remuneration of his services. The argument suffers from the general weakness of Demosthenes' reasoning.

The assumption that Philocrates was bribed is based on his actions, which might indeed have been suspicious, but not conclusive.⁴⁷ Even if Philocrates was bribed, it may well be that Aeschines acted fairly and let himself be deceived by his comrade. This focus on Philocrates forms an integral part of the narrative strategy. For the majority of Athenians his exile was interpreted as an admission of guilt. Thus the association of Aeschines and Philocrates, which Demosthenes establishes in his discussion of the first embassy and takes for granted afterwards, provides not only very strong circumstantial evidence for the likelihood of Aeschines' guilt throughout his narrative, but also helps to establish a sequence of events which may otherwise appear random.

In the second proof,⁴⁸ Demosthenes returns to his original narrative of the three embassies and attempts to show that Aeschines' behaviour during the Third Embassy could manifestly prove his role in the alleged conspiracy. The orator complains that on the eve of the mission, Aeschines excused himself because of his sudden illness, but that was only a manoeuvre to stay behind and prevent his opponent make any proposals against Philip's interests. According to Demosthenes, the invading force could not have much chance to resist Athens, unless someone prevented the City from sending its fleet to stop corn shipping to Macedonia and moving troops to help Phocian cities.⁴⁹ Winning 5 or 6 days to destroy Phocis was all that Philip expected from his associates, and he got it.

Disregarding emergency preparations in the city, Aeschines travelled hastily to Philip to take part in the king's feast celebrating his victory. There he banqueted with Athens' enemy, prayed and sang with him, poured out libations and toasted to the success of the Macedonians. Such abominable behaviour seemed repulsive in the eyes of the jury and it could have caused Aeschines' banishment, even if the ambassador acted out of sincere devotion to the king. The short episode again exhibits all the hallmarks of Demosthenes' strategy. It provides clear narrative evidence of Aeschines' guilt as part of a large narrative, whose cohesion is ensured only by the initial assumption that the ambassador acted against the interest of the state to promote Macedonian power in central Greece. The individual episodes are told as if they all stood in causal relationship with each other, although such a relationship between the events can only be established by the vigorous assertion that Aeschines must be blamed heavily for Athenian credulity and indecisiveness.

⁴⁷ It seems from this statement that the indictment of Hypereides came after the trial of Aeschines. On the question of Philocrates' guilt see Hyp. *Eux.* 28, Dem. 20, 21, Aesch. 3.79-81. Aeschines gives an equally vague answer to this argument in 2.6.

⁴⁸ Introduced in the form of a *procataleipsis*, which addresses the most pressing point of Demosthenes' argument, the lack of direct evidence. Demosthenes' confident and sophistic answer circumvents the problem ingeniously. Should we conclude from this that facts and direct evidence are two different classes of proof?

⁴⁹ Crucial information is missing from 123 to 124. The ambassadors 'left' the ill Aeschines behind to check the 'saviour' of the Phocians. What measures did Demosthenes intend to propose and how did the sick ambassador prevent him from doing so? The fact that Aeschines remained at home proves nothing of any suspected treason.

The final proof of dishonesty during the subsequent embassies again disrupts the time sequence.⁵⁰ From the analysis of the third route to Philip Demosthenes returns to one specific point of the second embassy, the ambassadors' delay in getting Philip ratify the treaty before he seizes more territories in Athens' sphere of influence in Thrace and elsewhere. The orator wants to show that the ambassadors deliberately waited until Philip returned from his campaign and did not travel after him hastily to settle the status quo, all these as a result of bribery. He describes the wait for Philip as idle in order to make it probable that the delay in the ratification happened on Philip' instigation. The presumption is again the same, as well as the lack of proof. According to the orator, there was secret connection between the Athenian envoys and Philip and that connection in turn is proved by the delay, which is an almost perfect 'circulus vitiosus'. The fallacy, running through the whole narrative, is nevertheless concealed well by Demosthenes' self-assured claim that he noticed the dishonesty of his fellow ambassadors all the time and fought against it. The claim gives coherence to the otherwise weak charge of malpractice and treason.

The very short analysis of Demosthenes' embassy speech has revealed some crucial features of probable reasoning in a case where direct evidence was very weak, but the Peace of Philocrates and its consequences were widely seen as a disaster due partly to an 'internal enemy'. Most importantly, Demosthenes uses the audience's view on the events to make them accept his own arbitrary sequence of storytelling and interpretation. The narrative is simplified and manipulated in its details to fit the assumption that Aeschines was bribed and thus guilty of treason. The persuasive effect of the speech depends largely on whether the narrative gives the impression of coherence, agrees with the view of the audience about the events and provides a simplified interpretation and causal explanation of what happened during the embassies to Philip. The purpose of such narrative proof is to substitute a well-supported argument in the absence of much direct evidence. As the probability of the accusation depends predominantly on the internal consistency of the narrative and the uncomplicated causal view of events, I will treat it as one of the simplification heuristics. It will be clear from several Ciceronian speeches, for example from the Verrines or *Pro Cluentio*, that the Roman orator is very much indebted to Demosthenes for his ability to create a smoothly flowing narrative which increases the likelihood of a certain proposition better than any rational argumentation, especially in the absence of firm direct evidence.

⁵⁰ Confusing the narrative sequence is a convenient technique to distort facts, which would not look suspicious in a linear time scale. In the present case, it would become clear that it was Philip who left the ambassadors waiting; their hesitance could have been caused by forbearance, in order to avoid an arrogant encounter with the invader.

Chapter 5

Pro Flacco

5.1 The Initial Premises of the Defence: The Proof from the *Vita Ante Acta*

The *repetundae*¹ speech in defence of L. Valerius Flaccus² deals with a case of alleged abuses of power by the governor of Asia. From a legal perspective the speech offers a relatively uncomplicated case of embezzlement confirmed by a large number of witnesses. The case is nevertheless interesting from an argumentative perspective as it allows us to study the Ciceronian strategy of opposing and weakening a host of compelling evidence on corruption and extortion, based on the defendant's governance of Asian provinces in 62–1 BC.

Cicero knew all too well from his experience of prosecuting Verres in a similar *repetundae*-case that the task before Flaccus' advocate was a very difficult one. The vast amount of damning evidence established the probability of guilt so firmly that even a thorough refutation of individual charges may not have resulted in an acquittal. Moreover, it was not at all clear that the jury would look favourably at a rather insignificant former governor who had enriched himself through illegal means. The orator had to decide whether to concentrate on a selection of principal charges, and ignore the less important ones or to construct a strategy to demolish comprehensively the witness testimonies strengthened by evidence from the past life of the former governor and existing prejudice against Roman officials who used their tenure in rich provinces to secure their personal finances.

In my analysis I will concentrate primarily on how Cicero deals with the almost endless lines of very detailed and compelling witness testimonies. Because the testimonies provided such overwhelming evidence of guilt, Cicero could not simply rely on the conventional arrangement of the parts of the speech and the usual *topoi*

¹On the laws and proceedings of *repetundae*-cases cf. Lintott (1981, pp. 162–212), Venturini (1979), Riggsby (1999), Robinson (2001).

²Commentaries and studies on the speech: Du Mesnil (1883), Webster (1931), Classen (1985), Bergmann (1893), Alexander (2002, pp. 78–97), Kurke (1989), Steel (2001, pp. 53–72).

against foreign nations but he needed a more effective way to counter the sheer force of damning evidence. He addressed the complex and uncertain situation by devising a strategy which belongs to the 'parallel probabilities' group of heuristics. The point of the strategy in the *Pro Flacco* is to advance parallel lines of arguments (not necessarily all relevant) which refer to each other at certain key points to increase the likelihood of the main proposition, i.e. the innocence of the former governor.

In the course of the argument he establishes at least three different levels of reasoning which he gradually builds into his speech. The arguments all strengthen each other and contribute to the likelihood of Flaccus' acquittal. The first line of argument discusses political matters surrounding the case, as well as Flaccus' professional career, in support of his integrity. The second line of argument is fundamental for the refutation of the individual charges. It is a wholesale attack on the unreliability of non-Roman witnesses as a group. The third and longest line of argument uses the propositions established in the previous two arguments to provide a detailed narrative and refutation of testimonies given by the representatives of four Greek cities, Jews and individual Roman citizens. What interests us is how Cicero develops the three lines of arguments and ensures that they consistently strengthen each other.

As a descendant of the ancient and highly illustrious *gens Valeria*, the defendant earned a number of distinctions during his career as an official from 86 onwards, yet he made his most memorable achievement in the year 63, when as *praetor urbanus* he supported Cicero against the Catilinarian conspiracy. Cicero heaps praises on his client already in the exordium for assisting him as praetor in putting down the Catilinarian conspiracy, and suggests that this impeccable public and military career should outweigh any accusations even from the whole of Asia. The *topoi* of the endangered Republic turn the jurors' mind immediately to the sphere of politics.

A key sentence in 3 (*Non estis de Lydorum aut Mysorum aut Phrygum, qui huc compulsi concitatique venerunt, sed de vestra re publica iudicaturi...* 'You are about to pass a judgement not about the cities of the Lydians, Mysians and Phrygians, who were compelled and urged to come, but about your own state') introduces the first line of probabilistic argument, the relationship between Flaccus' services to the state and the interest of the judges in preserving the political establishment. Cicero thus insists that Flaccus should be considered not as a former governor of Asia Minor, but as one of the rescuers of the Republic, whereas those who attack him support indirectly the cause of Catiline by weakening the legal and political foundations of the state. The appeal to political necessities is a common Ciceronian technique,³ yet it has a strategic role in the argument of the present speech in addition to its usual function of raising pathos in the listeners.

An implicit distinction in 1–5 between the two groups of participants of the trial will allow Cicero to separate the addressees of the first two lines of reasoning, the senators, judges and other politicians on the one hand and their enemies, Flaccus' accusers on the other. Throughout the whole speech, the probability of the charges

³ Cf. Classen (1982, pp. 141–142).

will depend on how these groups are assessed in terms of reliability. The first group includes the consul of 63, Cicero himself, and his one-time colleagues, the 5 *socii consiliorum, ministri comitesque*, including the defendant, the former *praetor urbanus*. These politicians are now in danger of being punished for rescuing the state,⁴ and that is what Cicero calls the *fundamenta causae*, the basic proposition of the speech, from which the jury was supposed to judge the relevance of the charges.

To the opposite side belongs the group of the Roman *cives scelerati*, wicked citizens who felt remorse for the defeat of Catiline, and also the group of the *gentes Asiae*, who want to use the opportunity of the crisis in Rome to take revenge on a governor for the imaginary damage suffered under Flaccus.⁵ In the view of the defence advocate, the trial represents the deep conflict between these groups. The scheme described above may look utterly naive,⁶ but it provides an effective tool to set key premises for the third line of reasoning, the refutation of the particular charges. The premises include (a) the witnesses as a mixed group of Roman citizens and 'barbarians' who are unreliable and motivated by revenge and (b) Flaccus as an honest, virtuous and steadfast member of the political elite who is thus unlikely to have committed criminal acts for his own benefit when he was serving the state. The emphatic separation of conflicting political groups taken together with a reminder of the present crisis focuses the jury's mind on the *extra causam* issues. These may appear irrelevant but they nevertheless determine the final decision of the judges.

The first line of argument on Flaccus' probity and service to the state is used early on by Cicero to refute a seriously damaging attack on Flaccus' alleged debaucheries and troubles in his youth.⁷ The fragments of the speech preserved in the *Fragmentum Mediolanense* presents Cicero's objection against the prosecutor's argumentation strategy. Cicero most probably said that the prosecutor forgot that

⁴Although the concept is not completely explained (the text breaks off after *conservandam salutem...*) we can be almost sure that Cicero referred to the mounting criticism against him for putting the conspirators, Roman citizens, to death without trial. (cf. Fr. Sch. Bob. 1 *Strangulatos maluit dicere*) The claim about the mounting danger to him and his associates implies that Flaccus is attacked mostly because of his participation in suppressing the conspiracy, which is an obvious misstatement.

⁵It remains to be answered in which group one would put the main prosecutor, D. Laelius. Cicero talks about him with acknowledgment (cf. 2, 18), yet accuses him of doing service with the prosecution to the enemies of the state. However, Cicero does not venture to say that Laelius has sinister political motives.

⁶One needs only remember the recent concept 'the axis of evil', which determined American foreign policy for years, to see that such distinctions offer practical, if simplistic and misleading, categorization of otherwise complex political and social issues.

⁷Alexander considers the proof on Flaccus' character as the backbone of Cicero's strategy. In many ways this is a justified view, yet it fails to consider, equally important lines of argument, especially on the Greek cities. 'Cicero argues that even if Flaccus has committed some misdeeds as governor, it is wrong of the prosecutors to pass over the defendant's public service to Rome before his praetorship (Flac. 6) and the probity of his private life (7). Cicero maintains that any offences Flaccus committed in the brief period when he was praetor should not outweigh his accomplishments over his entire lifetime...' Alexander (2002, pp. 78–79).

evidence about public and private⁸ behaviour have to correspond, otherwise the whole evidence will lose its credibility. Cicero finds fault with the fact that Laelius, the prosecutor, deliberately left out from his argument the consideration of Flaccus' official career prior to the *propraetorship* in Asia. Instead, he presented unsupported rumours about the defendant's early private life spent in debauchery and then ignored the defendant's glorious public career as he moved on to the long line of unreliable witnesses from Asia Minor.⁹

Cicero uses the first line of argument against the allegations of both youthful vices and misconduct. Details of Flaccus' official career, which were ignored by the prosecutors,¹⁰ highlight a serious inconsistency in the charges. As Cicero points out, it is unreasonable and thus very unlikely that an upright servant of the state, whose previous career proved his honesty, will act otherwise as a provincial governor. Using this proposition, the orator can move on to argue in the next part of the speech about the worthlessness of the testimony against his client, which will make this inconsistency in the prosecution's argument even more apparent. In the second line of argument Cicero separates groups of witnesses by nationalities and prove their unreliability through a general argument based mostly on stereotypes and racial prejudices.

5.2 The General Attack on the Witness Testimonies

The first part of the defence argument ended with a conclusion that Flaccus had already proved himself for a long period before the Roman public, whose collective and individual testimony must be accepted as the authentic proof of Flaccus' innocence.¹¹ Moving on to the central charge of governmental corruption, Cicero decided to attack the credibility of the witnesses as a group first, before going on to refute the charges according to well-defined categories, such as the province of Asia as a body (27–33), individual communities (34–66), the Jews (66–9), and finally Roman

⁸We translated *externum* and *domesticum* as the public-private opposition, an interpretation which is supported by the following passage, where Cicero explicitly talks about the *privatarum rerum ruinae, domesticae labes et urbana infamia*, whereas he laments in 6 that *vox de quaestura missa nulla est*. For a similar antithesis of *res externae et domesticae*, see Cic. *Phil* 2.69. *Fuit enim ille vir...sicuti scitis, cum foris clarus, tum domi admirandus neque rebus externis magis laudandus quam institutis domesticis*.

⁹This seems to be what Cicero wants to say with *cum adolescentiam notaris... tum denique quid Tmolitae et Dorylenses de L. Flacco existiment audiemus*. Webster accepts this interpretation (57), yet fails to consider its significance for the whole argument.

¹⁰Cf. *Frag. Sch. Bob.* 6–12. The testimonies of weighty personalities could impress the audience by the *argumentum ex auctoritate*, but may have nothing to do with the *crimina Asiatica*. Decent official conduct does not necessary cancel out unacceptable private behaviour. Hypocrisy was not a modern invention.

¹¹Cicero's description of the Greeks has been often discussed by scholars, yet its function in the probabilistic scheme of arguments is rarely mentioned. For a recent analysis see Vasaly (1993, pp. 198–205).

citizens (70–93). The precise division suggests both that the defence counsel took the charges seriously and that Cicero wants to make the impression of striving for completeness.¹²

The forthcoming charges will be measured not only in themselves and in relation to Flaccus' suggested positive image but also in their relation to the attack on the 'barbarous people' in 9–29. Discrediting the Greek witnesses one by one was not enough in case of such an overwhelming mass of damaging evidence; that is why Cicero advanced his first argument on Flaccus' personal integrity and now turns with his second argument against the general credibility of the Greeks and other nations.

The second main line of argument starts with a vehement attack on the trustworthiness of the testimonies supplied by the Greek witnesses. A present day reader will consider the section as an irrelevant, empty and even repulsive invective based on irrational prejudices. Such an observation may be justified, yet we have to regard 9–26 as an integral part of the Cicero's probabilistic strategy.¹³ The orator does not simply brandish meaningless commonplaces on mendacious Greeks. Quite the opposite, the orator *argues* about the unscrupulousness of the Asiatic people through seven paragraphs, as if it were a claim that has to be proved by evidence.

Cicero brings forward his proof from various sources. He talks about his personal experience in the courts, about historical examples, general observations and describes how Flaccus dealt with those witnesses whom he invited to testify against the defendant. Such a variety of arguments suggests that considering Greek witnesses liars was not simply proverbial (cf. 10 *unde illud est*: 'da mihi testimonium mutuum?'), but the proposition could stand firmly in a Roman court, where perjury was not a rare issue.

A close reading of 9–26 will show that the so-called *locus communis contra testes*, the topic against the witnesses involves a more thorough argumentation than a simple frontal attack on the baseness of the witnesses present at the court. The proper appeal to national stereotypes comes first in 9–12, with the proposition that the Greeks never respected the weight and importance of testifying in court: 9 *testimoniorum religionem et fidem numquam ista natio coluit, totiusque huiusce rei quae sit vis, quae auctoritas, quod pondus, ignorant*.¹⁴ The proof of this claim is brought forward from Cicero's judicial experience. In his opinion Greek witnesses often do not get to the point, but use evasive tactics with the aim of causing harm

¹² The neatness can, of course, mislead the jury, if they expect not only a precise division, but a comprehensive and relevant refutation of every charge that appears in the division. The collective *argumentum ad hominem* (or one may call it with Aristotle an ethical argument) in 9–26 should warn the reader that factual refutation is not to be expected all through the speech.

¹³ On the *locus communis contra testes* in rhetorical theory see Quint. *Inst. Or.* 5.7.3 *Est hic communis locus, cum pars altera nullam firmiorem probationem esse contendit quam quae sit hominum scientia nixa, altera ad detrahendam illis fidem omnia per quae fieri soleant falsa testimonia enumerat*. In Flaccus' case, an *interrogatio testium* was out of question, hence the general attack.

¹⁴ The stereotypical argument rests on an idealistic view about the trustworthiness of Roman witness testimony. It presupposes that the average Roman behaves submissively before the court in order that his evidence could fit the highest standards of objectivity. This is well attested in 12 and 19.

to whomever they are testifying against. Such a weak generalisation cannot, of course, be used as a strong premise in the present case,¹⁵ therefore Cicero has to show that his general claim is applicable even in the case of Flaccus' defence.

The next proof for the worthlessness of testimonies is derived from the governmental practices of Greek states. Cicero complains that the Greek assemblies usually work with demagogic proceedings and thus it cannot be expected that a resolution made on the request of the prosecutor can be trusted by a Roman court. The brief summary of Greek political and judicial practices in 15–21 shows major differences between the Roman and the Greek systems, which makes it almost impossible to apply the foreign evidence in Flaccus' trial. At this point, Cicero sets out to attack Laelius' method of collecting evidence. As the practice of securing foreign witnesses was well established, the defence could only attack the forceful and patronising conduct of the prosecutor by alleging that the evidence was gathered either by bribery or by unacceptable exercise of power.

The argument on the credibility of the key evidence ends with the conclusion that the testimonies presented in the previous hearings must not be considered seriously due to multiple weaknesses. It was not enough to discredit the witnesses as mere liars, but direct evidence had to be brought forward to prove that deep-seated prejudices against the Asian Greeks are thoroughly justified in the present case. The prosecution capitalised on the flaws of national stereotypes to support the proof that human weaknesses undermine the credibility of a concerted judicial attack on a virtuous Roman governor.

As I have already mentioned, such an apparently irrelevant and fallacious argument was necessary for Cicero's probabilistic strategy. The sheer number of witnesses made a thorough refutation (sc. the *interrogatio* or the *altercatio*) of each individual charge impossible.¹⁶ Moreover, even if the majority of the charges were refuted successfully (which they were not), the accumulated probability of all the testimonies could still produce a verdict of guilt. Thus the attack against the witnesses as a group suggests before the discussion of the individual charges that they cannot trust any testimony. It also brings out even more clearly the apparent inconsistency in the prosecution's argument: accusing an honest Roman official using a host of vengeful and untrustworthy witnesses. To reinforce the connection between the second and third line of probabilistic reasoning Cicero will emphasise at every step that the character of individual witnesses fits into the general scheme that he has just presented.

¹⁵ Partly because the prosecutor and the subscriptores were Romans and there were Jewish and Roman witnesses present, as well. In this sense, we cannot properly say that the probability offered by the *locus communis contra testes* is true for all the prosecution witnesses.

¹⁶ It should be noted that Cicero was speaking during the second *actio* of the trial, which meant that he not only answers the charges (11, 34, 39, 43) but prepares for a second hearing of witnesses (51 *qui quoniam testimonium <nondum> dixit, quidnam sit dicturus exspecto.*), as well. cf. Webster (1931, pp. 109–110). It is difficult to say whether Laelius had kept back any witness testimonies to the end, which would have given a fundamental turn in the trial. Perhaps, he concentrated the heaviest evidence to the end of the first *actio*, hoping to get the same result that Cicero reached in the Verres trial.

5.3 The Refutation of Individual Charges

The refutation of individual charges starts with the potentially most serious crime, the embezzlement of money ordered from Greek cities. Flaccus intended to set up and maintain a fleet to defend the Asian coast against those pirates not destroyed by Pompey in his campaign in 67. The charge was presented as a common complaint of the cities in Asia Minor, and thus it carried the greatest weight for the final decision. Flaccus himself admitted the fact that money was ordered from the cities, so he had to show that he made good use of public money. Cicero counters the accusation with clever, but very deceitful tactics. He says at the beginning (27), that *Classis nomine pecuniam civitatibus imperatam queruntur*, which could simply be interpreted that a complaint was made against a request to set up a navy. Such a complaint could sound awkward, as precedents from the previous years (30) showed the senate, including Cicero himself, giving authorisation to set up navies in the Mediterranean. Therefore, on the surface an order like that by Flaccus does not necessarily mean an arbitrary and illegal act.

From the extensive argument to justify Flaccus' decree, one would assume that the main objection of the Greek cities was that providing a fleet in peacetime was unnecessary. This objection could nevertheless be countered by precedent and the likelihood of danger from pirates. It is only in 33, the very end of the section dealing with the fleet, that Cicero mentions a further point of the charge, that Flaccus did not keep tax records and therefore cannot give an account of how he spent the money.¹⁷ The separation of the two parts of the complaint suggests that in its original form they belonged together as one accusation. It thus seems likely that the cities accused the governor of demanding money for a not-so-clear purpose *and* not keeping proper records of the taxation. Cicero suppressed the second and more uncomfortable part of the charge and went on to give a full-scale justification of military taxes. Thus the probability of Flaccus' rightful conduct in this case depends largely on how good are the reasons which Cicero offers for ordering the ships and not on whether he can account for the money used for that purpose.

Cicero brings forward several arguments to show that even if there was no urgent need to equip a fleet, he can still explain its rationale *afterwards*. An appeal to Roman imperial might (*ornandi imperi causa navigandum fuisse*), gives a completely irrelevant yet perfectly well-placed argument that plays upon patriotic emotions and prejudices, especially in relation to the perceived image of Rome in crisis, as described in the exordium. Cicero of course assumes that any action in the interest of the *res publica* will provide a certain degree of inviolability, especially if the defence advocate can explain the advantages of possessing a standing fleet in peacetime. From a strategic viewpoint, even if Flaccus' decree was reprehensible in many

¹⁷The very brief rejection of the charge in 33 is a sign of real difficulty. Cicero presupposes that justifying the need for the fleet would in turn clear the defendant in the matter of how he handled the money entrusted to him. But the main *repetundae* charge could not have possibly been based on a complaint of excessive and unnecessary taxation without any proof of corruption.

ways, the impression of consistent action would raise the likelihood of the governor's integrity.

The refutation of the charges made by individual cities continues in 34–66. The question here is how Cicero arranges the set of accusations and his replies to fit the conclusion of his second argument about the unreliability of witness testimonies. By pretending that the cases against Flaccus are isolated and unrelated, Cicero questions the probabilistic value of several individual testimonies showing a coherent pattern of criminal action. The defence had also a great advantage over the prosecution. Laelius and his *subscriptores* had to present as many complaints as possible together with documentary evidence.¹⁸ Such a procedure must have on occasion resulted in an unsatisfactory explanation of complex issues, which the defence could spot and object to without touching upon the exact charge, especially because he had the last word in the *actio*-procedure. The refutation of the *civitas Acmoensis* will exemplify the above mentioned technique.

The Greek state of Acmo was represented by Asclepiades alone. He was to testify for a large loan paid by him to Flaccus in the name of the city. The charge is not explained in any detail, so we may only conjecture that Flaccus did not pay the loan back. We only learn about one obscure detail that Asclepiades, acting in the name of the city, had to borrow himself the money from a certain Sextilius and his brothers. Asclepiades testified in person, but did not bring any other fellow witness or document by which he could prove the transaction. Cicero starts an immediate attack on the witness and the weak points of the charge. As Asclepiades was alone, Cicero questions the witness' position as an official representative of the state. Without any authorisation (34 *Prodeant ceteri ... Est enim, credo, is vir iste ut civitatis nomen sua auctoritate sustineat...*) it looks as if the loan had been a private transaction, and thus cannot be considered as part of a *repetundae* charge.

Having disassociated the accusation from the main charge, the defence goes on to speak about the criminal record of the witness in his home city. Cicero's claims were corroborated by the fact that the city did not send a deputation of witnesses and Asclepiades himself was unable to bring forward any official document to support his claim. Cicero however does not stop after inflicting such a crushing blow, but advances another *ad hominem* argument on the worthlessness of both Asclepiades' and the other Greek testimonies. Apparently, an official *laudatio* was sent to Flaccus on behalf of the citizens of Acmo, which was disparaged by Asclepiades as *temporis causa data*. Cicero takes this belittling remark of Asclepiades as an ill-timed self-refutation that agrees with his proposition about the unreliability of witnesses.

The charge of the Doryleans receives similar treatment in 39–41, although we do not exactly know whether the particulars of this case are similar to the preceding one.¹⁹ The attack on the carelessness of the legates questions not only their trust-

¹⁸ It is this that Cicero most probably referred to in 23. However, we cannot decide from this whether the incomplete evidence was due to haste or because the proof was missing.

¹⁹ The remark in 40 (*tantum dicit: 'dedi'*) suggests that even the witnesses were unable to say much about the circumstances. The word 'I gave him' must refer to a similar loan as in the case of Asclepiades.

worthiness, but also dissociates the members of the deputation from the community whom they are said to represent. As a further proof in defence of Flaccus and a device to raise prejudice, the defence advocate complains about the low standing of the Dorylean witnesses in 40–1. Behind the claim lies the presupposition that testimony against Flaccus can be admitted only if it comes from the nobility of the Greek states, because provincial people from the lower classes may be prejudiced towards the defendant as a result of financial constraints.²⁰

By the time Cicero starts talking about the charge presented by the people of Temnus, the whole refutation is turned into a direct personal attack against the witnesses, even before any detail is given about the charge. This repeats the pattern seen in the case of the Doryleans and Asclepiades. The whole refutation becomes a quasi-inductive argument, where each proof strengthens the likelihood of the general proposition on the unreliable Greek witnesses. We learn that all three deputies have criminal records and they even embezzled their travel money. Two of them were also affected by a legal dispute with Flaccus. The defence advocate clings to the inherent inconsistency of the charge. As the city was famous for keeping accurate records, it is difficult to imagine that they present such a serious charge without giving precise documentation. The representatives of the Temnites allege that they personally gave Flaccus a large sum, possibly in the name of the city, but certainly through the treasury (44 *Si praetor dedit, ut est scriptum...*). Cicero does not tell why the money was given, nor does he reveal the other circumstances under which the whole transaction was conducted. Thus we get the impression that the official and the private versions collude, therefore the real business, if there was any, must have gone on secretly.

The last major charge of the Asian cities comes from the Carian Tralles, a wealthy city with important connections to the Cicero brothers. These connections allow the orator to speak as an authority in the disputed questions, and perhaps this is the reason why he chose to put this accusation at the end of the *crimina Asiatica*. The main thread of the charge is clear, yet Cicero again did not wish to argue about the details, which could explain Flaccus' allegedly unlawful deed. We learn that Flaccus got hold of a probably very large sum, which was deposited by the Asian cities in Tralles for the honours of Flaccus' father. The money was entrusted to the city, which invested it in various ways so that it would bring some profit. The people of Tralles insisted that the money deposited in the city was taken by Mithridates, therefore no one could have rightly demanded it from them.²¹ But the younger Flaccus believed that the money was not used up after his father's death, so he

²⁰ Cicero attacks mob mentality in a similar way in 19 *Mementote igitur, cum audietis psephismata, non audire vos testimonia, audire temeritatem volgi, audire vocem levissimi cuiusque, audire strepitum imperitorum, audire contionem concitatam levissimae nationis*. Laelius takes advantage of the poor Asian witnesses, and yet Cicero blames the Asiatics for their venality.

²¹ 59 *neque tam fuerunt impudentes ut id quod Laelius dixit dicere auderent, hanc ab se pecuniam abstulisse Mithridatem*. That could have been the main reason why the Trallians protested against Flaccus' act. Cicero denied this vehemently and accused the Trallians of complicity with Mithridates during his conquest of Western Anatolia in 88, which could raise prejudices against them unfairly and suggest that the claim of the city was justified.

reclaimed it back as an inheritance. Tralles, together with others interpreted that act as a form of extortion.

Not being able to accuse Maeandrius, the deputy from the city, of any grave criminal act, Cicero attempts to discredit him by playing upon the social prejudices of the jury and accusing him of lack of dignity.²² The probability of the charge is judged in the first place by the city's willingness to send a suitable witness matching the seriousness of the case. If Maeandrius was really chosen by the Trallian assembly, it means that the city either did not trust in their case or did not consider it appropriate to pay respect to the Roman court with the most influential of the leading politicians. In either case, the jury may conclude that Flaccus was presumably right in taking away the disputed money.²³

The last part of that section contains a conclusion similar to the one at the end of 26. Cicero says in 66 that he has said more than enough about the Asian witnesses to prove their 'levity, inconsistency and their avarice': *...mihi iam satis superque dixisse videor de Asiatico genere testium; sed tamen vestrum est...omnia quae dici possunt in hominum levitatem, inconstantiam, cupiditatem...vestris animis et cogitatione comprehendere*. This appeal to the jury insists that they should judge the veracity of the testimonies in accordance with the second line of argument about the uselessness of the witnesses from Asia province, so it reinforces the connection between the second and the third lines of reasoning.

Moreover, the conclusion makes a remarkable point, which might easily escape the notice of the judges. In 9–26, Cicero drew a conclusion, the probability of which was based on general experience. It would appear that the conclusion of the second main argument is used as a premise to prove the falsity of individual accusations. However, in 66 Cicero declares that, taken as a whole, the successful refutation of each Asian charge proves the worthlessness of the testimonies presented by Laelius. This is a clear example of a 'circulus vitiosus' argument, which nevertheless works seamlessly in Cicero's probabilistic strategy where different lines of arguments increase each other's probability.

Finally, a reminder of how the Asian Greeks supported Mithridates in his war against Rome as well as the reference to their proverbial baseness are contrasted with the laudatory delegations from the Greek mainland and Massilia in 59–65. This graphic juxtaposition reinforces the contrast between continental Greeks and the Greek inhabitants of Asia Minor. More importantly, however, it marks a clear return to the highly prejudiced second argument, the *argumentum ad gentes* in 9–26. The two sections, though talking about different issues, belong firmly together and bring out the civilisational difference between the mainland and its 'colonies'.

²² 52 Trallianos Maeandrio causam publicam commisisse, homini egenti, sordido, sine honore, sine existumatione, sine censu? The sentence shows that it was not possible in every case to refer back to 9–26. The case thus reveals the weakness of the general proposition and the strategy based upon it, but also how Cicero avoids such obstacles as a trustworthy witness.

²³ Which is, of, course, a false dilemma. It may well be that Maeandrius had the most accurate knowledge on how the money was handled for many years after the elder Flaccus' governorship in 95–90, whereas the aristocratic families, having other interests, did not want to be involved in the matter. We learn later (54) that Maeandrius was the person who pressed for sending a deputy.

The probability of Flaccus' innocence is made dependant not only on how the jury judges the witness testimonies, but also on whether they acknowledge the fact that the cultural superiority of the Greeks and Romans affects the decision between true and false statements.

5.4 Special *Crimina*

Having finished the principal part of the argument, Cicero goes on to deal with charges brought forward by the Jews of Asia Minor. To appreciate Cicero's reply, one has to understand why the prosecutor brought a particular charge made by the Palestinian Jews. Seizing Jewish gold sent as tax to the Temple of Jerusalem²⁴ may not have constituted a serious issue in the portfolio of charges, as Cicero calls it in 66 *auri illa invidia Iudaici*. The word *invidia*,²⁵ ill-will, and the reference to the *gradus Aurelii* implies that the issue had already been known in Rome before the trial, and it probably earned some ill reputation. The accusation was probably mentioned not as a case of extortion in the strict sense, but in order to support the view of Flaccus as a rapacious official, who does not preserve the rights granted previously to foreign nations.

Flaccus decreed as propraetor that the Asian Jews would not be allowed to send any more the yearly religious tax from his province to Jerusalem. Acting swiftly to enforce his edict, he sent out officers to confiscate the money that had already been collected from four cities. Flaccus acted publicly all the way through, deposited the money in the *aerarium*, and left precise records in the accounts. The officers attested to the transparency of the procedure, which proves Flaccus to be a scrupulous official acting in the interest of the Roman government. The defence admitted the fact and showed that the decree was given in accordance with political decisions.²⁶ Cicero says that even the prosecution failed to prove that any sort of crime was committed during the confiscation. Therefore, the question remains why Cicero argues about a relatively insignificant issue when he has still got ahead of him several important accusations from Roman citizens to deal with.

²⁴For a historical study of the passage, see Marshall (1975, pp. 139–154). Cicero's remarks on the Jews of his time have been variously interpreted, yet one only has to see that the orator is arguing for his client and applies a similar pattern for discrediting the Jewish witnesses, as he did in the case of the Asians. Therefore, we can hardly talk about anti-semitism in the case of *Pro Flacco* any more than anti-asianism.

²⁵We can attribute a meaning to the word similar to how it is used in *Clu.* 1., so 'the argument on the Jewish gold, intended to raise ill-feelings and prejudices.' The 'invidia' is basically what Cicero did with the Asian witnesses.

²⁶67 *Quis est, iudices, qui hoc non vere laudare possit? Exportari aurum non oportere cum saepe antea senatus tum me consule gravissime iudicavit*. Cicero talks about an unambiguous case, yet is not clear, whether the Jews got exemption from this decree or kept sending the money despite the prohibition. For different opinions see Alexander (2002, p. 285, n. 81).

The answer is the word *invidia* Cicero used to describe the charge. There may not have been much to argue about facts and documents, but it was necessary to justify Flaccus' decree, just as he did in the case of the fleet in 27–33. If we are right about the prosecution's intention to use the case of the Jews as an auxiliary argument, we could also observe why Cicero needed to destroy the general probability of Flaccus' rapacity. Saying that Flaccus followed the senate's ruling, he maintains the consistent argument that in official decrees the governor never departed from the senate's practice, even in the face of such mounting pressure that came from the Jewish community.

After surveying the refutation of the individual charges, we might attempt to summarise the overall strategy of the *Pro Flacco*. The main task of the defence was to decrease the accumulated probability of the *repetundae* charges brought forward mostly by cities of Asia Minor. To achieve this, Cicero had to separate the charges into well-defined categories based on nationality. Moreover, he had to develop several lines of arguments to prove Flaccus' integrity, usefulness to the state and the worthlessness of the Greek witnesses. The success of the strategy depends largely on whether Cicero can show that the question of Flaccus' guilt can be examined by these simple formulas. In this sense, the three parallel arguments relate strongly to each other and form a coherent argument that make the charge of extortion in no way likely. As I mentioned at the beginning, this strategy, which also appears in the argument of the *Pro Cluentio*, belongs to the group of 'parallel probabilities' heuristics.

Cicero destroys the weightiest group of charges with a help of a general probability derived from national stereotypes and with the help of character assassination of individual witnesses. The case of the Jews seemed relatively easy. Having a strange and alien religion, the nation fought a bloody war with the Romans not long ago, so Cicero did not have to strive hard to eliminate any claim of the Jews for fidelity and justice. In the case of the Roman witnesses, Cicero talks about each case, as if they arose mostly from private feuds and have no such connection that would substantiate a *repetundae* charge in any way. To seal the argument in the end, the speech returns to the grand theme of Rome in danger, the conclusion of his first main argument, which is impossible to prove or refute with certainty but which provides an effective framework to judge the likelihood of the charges.

Chapter 6

Pro Sulla

6.1 The Charges Against Sulla and Cicero's *Auctoritas*

Cicero's defence of Publius Cornelius Sulla may be considered as an example of how an orator can combine three types of heuristic strategies, 'initial adjustment', 'thematic replacement' and 'parallel probabilities' to construct a clear defensive argument for an intricate case embedded in a highly uncertain political situation, the aftermath of the Catilinarian conspiracy. The complexity of the case arose from the fact that Cicero as a former defender of the state against the Catilinarian conspiracy was undertaking a defence of an alleged former ally of Catiline. From the prosecution's attack on Cicero's *auctoritas* it appears very likely that the orator used the full weight of his public reputation as proof of Sulla's innocence. The problem with Cicero's strategy was the fact that his unlawful treatment of certain leaders of the conspiracy tarnished his own authority so using his influence and first-hand knowledge as the basis of a strategy was a risky undertaking with an acquittal being far from certain.

In contrast to the traditional arrangement of the speech,¹ which regards the defence of Cicero's *auctoritas* within 1–36 as an irrelevant *extra causam* digression,

¹It is interesting to see that commentators relying on classical terminology do not agree on the plan of the speech, which suggests at least that the argument does not fit well to a classical model. For example Reid proposes in his commentary of the speech Reid (1886, pp. 28–33) 1–10 *exordium*, 10–14 *narratio/propositio*, 14–20 *confirmatio* I. 21–35 *digressio*, 36–68 *refutatio*, 69–77 *confirmatio* II, 78–80 *locus communis* on torture, 80–87 *confirmatio* III, 88–93 *peroratio*. In contrast Berry (1996, p. 48) suggests a different plan with a triadic structure (a) on Cicero: 1 *exordium*, 2–10 *digressio* I 11–14 *partitio*, 14–20 *digressio* II. 21–35 *digressio* III, (b) on the charges: 36–45 *reprehensio* I, 46–50 *digressio* IV, 51–68 *reprehensio* II, (c) on Sulla 69–79 *confirmatio* I, 80–85 *confirmatio* II, 86–93 *peroratio*. The important difference is of course that Berry identifies a number of digressions, which is a sign that he cannot explain with certainty the argumentative function of the passages. Berry takes *digressio* in the sense of Quint. 4.3.9–17. ...*frequenter utilis* (sc. est) *ante quaestionem praeformatio*.... Quintilian seems to advocate here a rather flexible view on digressions, which can include every inessential, yet useful section of the speech (*indignatio*, *miseratio*, *invidia*, *convicium*, *excusatio*, *conciliatio*, *maledictorum refutatio*, *similia his*, *quae non*

I will show that it is in fact the fundamental part of his heuristic strategy. Introducing the notion of *auctoritas* as a premise for Sulla's innocence ('I defend Sulla with my great public *auctoritas*, therefore it is unlikely that he committed the crime.') at the beginning allows Cicero to devise a strategy in which all subsequent evidence is judged by the question of whether the jury would find his own personal credibility plausible enough to counterbalance the weight of damning evidence. Cicero's defence of Sulla runs on two distinct and occasionally interrelated routes. The dominant argument (2–35 and 80–5) tries to prove that Cicero and the consulars have indeed the authority he claims, and this authority can earn enough credit to substantiate Sulla's innocence. The second line of argument (36–79) aims at disproving the direct charges of complicity in the conspiracy.

Right from the start the orator spends much time arguing the apparently irrelevant point that his *auctoritas* has a substantial value in deciding the likelihood of Sulla's guilt. In this way he turns the jury's attention away from details of the accusation to a question which could not, from an argumentative or legal point of view, be allowed to decide the guilt or innocence of the defendant. Of course, standards of reasonable argumentation and legal proof in Roman legal cases were considerably different from the required standards of a modern continental or English court. With this focus on his authority Cicero combines two heuristic strategies of 'initial adjustment' and 'thematic replacement' heuremes in 1–36, while in the latter part of the speech, during the actual refutation of the charges, Cicero uses a form of the 'parallel probabilities' heurème to break up the accusation into smaller sections and thereby weaken the cumulative likelihood of the charges. In my analysis I spend considerable time on the detailed analysis of the argument in 1–36. This is necessary to uncover how Cicero manages to turn an apparently insignificant and potentially self-destructive argument into a strong one, which will later dominate the refutation of the charges.

In modern argumentation theory such use of authority in reasoning will most likely be treated as a fallacious use of the *argumentum ex auctoritate*. However, such an interpretation of Cicero's appeal to his *auctoritas* would run the risk of

sunt in quaestione), that contributes to the fair appreciation of one's arguments (*est hic locus...ad conciliandum probationibus nostris iudicem*). Berry argues in 44–5 and 131–3 that Cicero used digressions in 2–35 and 46–50 mainly to defend his *auctoritas* against the attack from the prosecution. Although he concedes that one can give *digressio* any name, as long as the special sense of 'supporting argument' (a kind of *adiumentum orationis*) is preserved (distinguished from the more general meaning of *ornamentum*, which has become a hackneyed topic of declamations by the time of Quintilian), he still claims (44) that 'the overall structure is distorted by the long stretch of material ... in which the matters discussed are strictly speaking irrelevant to the question at issue...'. The problem also appears elsewhere in the speeches of Cicero, but is largely left unnoticed, as they do not fit into the regular rhetorical pattern and the Romans had a different standard of relevance from ours. The notion of 'distorted structure' is justified as long as one clings to an ordinary scheme of *partes orationis*. But that should not be necessarily so. One can also defend the long *digressio* at 2–35 as a necessity demanded by the attack on the defence, but even this explanation fails to reveal the argumentative significance of the passages and how they dominate the defence of Sulla.

reading modern concepts of expert opinion into a Roman social/political tradition.² When Cicero uses the word *auctoritas* he does not precisely mean that 'I am the professional expert whose personal testimony will add certainty to Sulla's innocence', although it is one sense in which Cicero uses the term. *Auctoritas* is a much more complex notion in Roman thinking which encompasses the ideas of dignity, legal or political authority and influence which emanates from one's acknowledged position in the political establishment. A person with *auctoritas* can guarantee the validity of an official decree or in our case the innocence of a former consular politician.³

P. Sulla, a wealthy descendant of the famous patrician *gens Cornelia*, nephew of L. Sulla, the dictator, and beneficiary of his uncle's proscriptions,⁴ was charged with participation in the alleged first and the second conspiracy of Catiline in 66 and 63,⁵ under the *lex Plautia de vi*. Cicero successfully undertook his defence which most probably took place between May and October 62. He spoke after Hortensius and his argument helped his client win the case. The extant speech is likely to have been published after Sulla's acquittal.⁶ The prosecution was led by L. Manlius Torquatus, one-time political rival and enemy of the defendant, with the help of his *subscriptor*, Cornelius, son of C. Cornelius, a condemned supporter of Catiline. The prosecutor, Torquatus had already prosecuted and defeated Sulla, the elected consul, in 66 with the charge of *ambitus*, illegally influencing the outcome of an election.

The prosecution initiated a two-pronged attack, which formed a coherent strategy. The first argument pursued the demolition of Cicero's credibility as the main source of Sulla's assumed innocence. The second presented the evidence supporting the probability of Sulla's involvement in the conspiracy. For the prosecution the second argument was the more important, whereas Cicero focused his argument more heavily on whether his personal testimony would make the accusations.

Cicero asserts his dominant propositions in the introduction (1). These propositions focus the argument on the issue relevant for Cicero's strategy. Cicero suggests at the start that the whole case should be decided on the merit of his *auctoritas* and each individual charge should be weighed in proportion to the probability (in other words, the *fides*, or trustworthiness) of the speaker's reputation. The reason for this is that Sulla once belonged to the same political establishment which Cicero represents today (1 ...*amplissimo honore...everteretur*) and only lost his position due to fate (ibid. *ita tulit casus infestus*) and the ill-will of his enemies (ibid. ...*singulari*

²There are several modern discussions of argument from expert opinion as an admissible or fallacious scheme of argument. One of the most detailed study is Walton (1997).

³A detailed analysis of the term is provided by Heinze (1925, pp. 348–366).

⁴Cf. *Off.* 2.29 and Cicero's reaction to his death in *Fam.* 9.10, and 15.17. He does not elsewhere acknowledge Sulla as highly as he does in this speech, which may show that he was not morally too scrupulous in choosing his client.

⁵For the general sentiment and accusations after the Catilinarian conspiracy see Dio Cassius 37. 41. 3–4. For the so-called 'first Catilinarian conspiracy' see Seager (1964, pp. 338–347).

⁶On the date of the trial and the publication see Berry (1996, p. 14, 55–56).

Autroni odio).⁷ Therefore, he deserves the support of Cicero who can reassert his personality as the merciful supporter of the unjustly accused (ibid. *oblatum mihi tempus esse in quo boni viri lenitatem meam misericordiamque notam...agnoscerent...*). The use of *auctoritas*⁸ in the argument also means that the case is kept floating between the political and the judicial while the charges are contrasted with the personal evidence of the former chief investigator. Cicero has to argue about his personal authority precisely because the audience knows that his orders as consul in 63 BC for the illegal execution of conspirators, who were Roman citizens, will jeopardise his claim and thus reduce the likelihood of Sulla's innocence.

In 2 Cicero says plainly that the defence of his *auctoritas*⁹ serves argumentative purposes, and not solely his personal interests. Torquatus, according to Cicero, thinks that the more he attacks (and thus decreases) the influence of the defence *patronus*, the more effectively the prosecution's argument increases the likelihood of Sulla's guilt (2 *sed ut ille vidit, quantum de mea auctoritate deripuisset, tantum se de huius praesidiis deminuturum...*). Cicero therefore considers it necessary to explain why he undertook the defence. Although it seems *prima facie* that Cicero at this point evades the direct answer to the charges (which would then start only in 36), he does in fact consider his excursus on *auctoritas* as part of the defence in 2¹⁰ (...*sic hoc ego sentio, si mei facti vobis rationem ... probaro, causam quoque me P. Sullae probaturum*).

Cicero himself is aware of the problem that the jury will not simply believe in Sulla's innocence because of his consular authority. (84 '*quid ergo? Hoc tibi sumis' dicet fortasse quispiam 'ut, quia tu defendis, innocens iudicetur?'*) However, Cicero could use his *auctoritas* to support the probable proposition that it must be very unlikely that he, who suppressed the Catilinarian conspiracy, would now defend someone who was the least suspected of involvement. Thus Cicero may appear to replace the question of Sulla's guilt with the problem of his credibility at the beginning, but it will be clear from 85 that the strategy of replacement also contributes to the refutation of the charges in 36–85.

⁷The careful wording allows Cicero to lay down two other important propositions. First, P. Sulla was not personally responsible for the *ambitus* charges that led to his downfall in 66. Second, Autronius should be blamed not only for the loss of their consulship, but for other charges associated with Sulla, as well (cf. 36–8, 51–3, 66–7).

⁸Cicero seems to be careful not to use the word *auctoritas* right at the beginning, which would mean that he wants to assert his position directly to the judges, a move that could easily have been considered aggressive. It is interesting to note that he attributes the treatment of *auctoritas* first to Torquatus (2 *Et quoniam L. Torquatus...offici mei.*), and his answer is shown only as a reaction to the attack.

⁹Scholars discuss Cicero's use of *auctoritas* in *Pro Sulla* (e.g. the most recent and exhaustive study: May (1988, pp. 69–79)) yet they assign it to *ethos* in the Aristotelian triad of persuasive means. Such treatment of *auctoritas* usually fails to explain how orators apply their personal dignity or influence to supply their arguments. The *Sull.* gives a good example of how *ethos* can be a type of proof.

¹⁰Using the word *digressio* for 2–35 therefore sounds slightly misleading, as it suggests that the passages fall outside the argument of the speech, whereas they seem to form the core of the defence.

There is also ambiguity in the use of *auctoritas* which arises from the fact that Cicero deliberately promotes his persona as a former consul with memorable achievements, as the chief investigator in the conspiracy and as a defence lawyer of a criminal case. In this way the credibility of his words as the former investigating consul would be stronger than as a mere defence advocate.

6.2 The Attack Against Cicero's *Auctoritas*

To understand the full force of *auctoritas* in Cicero's probabilistic strategy as a reply to Torquatus' attack on Cicero's authority it is necessary to look at 2–20 and 21–35. 2 describes Torquatus' alleged intention to harm the friendship between him and Cicero in order to destroy the reputation that Cicero enjoys as a former consul and suppressor of the Catilinarian conspiracy. ...*existimavit* (sc. Torquatus), *si nostram...necessitudinem familiaritatemque violasset, aliquid se de auctoritate meae defensionis posse detrahare....*¹¹ Cicero does not want to reply to this accusation specifically so he pretends to have misunderstood Torquatus' manoeuvre as a personal attack, a violation of friendship, something that Torquatus does not really want to do. However, Torquatus had a concrete argument against Cicero in connection with former consul's alleged falsification of the testimony of the Allobroges (40, 44).

A much closer description of Torquatus' attack follows in 3. ...*cur me a ceteris clarissimis viris ac principibus civitatis in hoc officio atque in defensionis iure secernas*. That is, Torquatus is said to have attempted to dissociate and isolate Cicero from Hortensius and the consular supporters of P. Sulla. The key word of the sentence, *secernas*, explains Torquatus' technique. Its meaning is clarified in the following question. Torquatus allegedly fell into inconsistency when he rebuked Cicero for undertaking the defence and allowed Hortensius to do the same. We need to ask whether it is possible at all to trace back from Cicero's answer how exactly Torquatus brought about the separation of Cicero from the supporters of Sulla. From 3 to 8, it seems that the charge of inconsistency meant simply that Cicero appeared as a defence lawyer of a suspected conspirator, after he himself cleared up the same conspiracy. Torquatus possibly said that Cicero, a former investigator in the Catilinarian conspiracy, cannot presuppose the innocence of a suspected criminal (3 'ita,' *inquit* (sc. Torquatus) 'tu enim investigasti, tu patefecisti coniurationem.'). especially when he ordered the execution of conspirators without letting them undergo a fair trial.¹² Cicero understands the charge as a fallacious form of *ad*

¹¹ A more detailed answer to this attack (or, possibly, complaint) is delayed until 48. Here, it seems, that it was Torquatus who felt remorse that Cicero is defending an enemy of the Torquati. *neque vero quid mihi irascere intellegere possum*. The answer in 48 could invalidate what Cicero assumed in 2, but he could hope that the judges would have forgotten what he said at the start.

¹² This argument could have been reverted. Cicero ordered the conspirators to be killed exactly because he knew that they were involved in the plot, whereas he could not do the same with Sulla.

hominem argument against him and attempts to clear up the inconsistency which would have ruined his strategy based on one of the fundamental values of *auctoritas*, consistency through time.¹³

In his reply Cicero not only asserts his own *auctoritas*, but that of Hortensius and all the consular supporters of Sulla, as well. With this move he avoids the danger of looking arrogant¹⁴ and further raises the probability of his version of the case by assuming that his belief in Sulla's innocence rests on the common consensus of other respectable men with similar *auctoritas*. In other words, the evidence in favour of Sulla rests not only on his own personal admission, but also on the silent testimony of other politicians.¹⁵ (5 *intelleges et de hoc et de aliis iudicium meum et horum par atque unum fuisse.*)

It is now rather obvious that Torquatus did not in fact want to separate (*secernere*) Cicero from other members of the defence team. The following passages reveal, albeit fragmentarily,¹⁶ further details of Torquatus' objection. In 7 and 10, Cicero says that Torquatus objected to his controversial behaviour when he appeared as a witness against Autronius, the consular candidate with P. Sulla in 66 and convicted conspirator in 63, whereas now he undertakes the defence of Sulla. Cicero suggests that the jury should look at the two acts not as contrary to each other ('You testified against Autronius, *whereas* you defend Sulla') but as parallel and supplementary ('I gave evidence against Autronius *and* I also defend Sulla').

The careful listener could discover that Cicero again obfuscates the charge of inconsistency by saying that his decision was not directed by personal considerations, but by the general opinion prevalent in the senate. (9 *...necesse est, quod mihi consuli praecipuum fuit praeter alios, id iam privato cum ceteris esse commune.*) However, Autronius' question referred not to the issue whether his opinion on the guilt of conspirators agreed with that of common belief, but whether it is justifiable to convict and execute supporters of a conspiracy and then defend someone under the same charge, an inconsistency in fact, not in opinions.

A detailed self-defence against the inconsistency charge follows in 14, which will take Cicero up to 35, where his answer to the specific charges starts. In these two places, at the beginning of 14 and the end of 85, Cicero uses almost identical

¹³ Cf. Walton provides a detailed discussion of justified and fallacious uses of *ad hominem* arguments and how they can be countered in Walton (1998). His analysis throws much light on the fallacious nature of Cicero's attack on Torquatus.

¹⁴ He is at pains to avoid the blame of being arrogant again at the end of the speech in 83–5.

¹⁵ Cf. 20. However, Cicero is not very keen on mentioning at least some of them by name, or at least the nature of the evidence they might be able to provide. Vagueness is a very effective rhetorical strategy.

¹⁶ Cf. Berry (1996, p. 138, 3.11 n). We cannot unfortunately have any guarantee that the use of *oratio recta*, either in single instances, such as in 11, or in an *altercatio*, like in 21, would reproduce the authentic words or even the opinion of the orator. It is even more difficult to reconstruct the prosecution's argument from such scattered remarks. In many cases, like *Rosc.* 92 or 94, it is just a fictitious dialogue, which nevertheless appears genuine. Such use of the *oratio recta* gives an excellent opportunity to the orator to misinterpret the charges of the prosecution. The remark of Torquatus in 10, however, seems authentic.

phrases to reveal the core notion of his defence. He says that as consul he never encountered any suspicious trace of information, document or person, which would have suggested to him Sulla's involvement. Although he stresses the fact that he acted as consul during the conspiracy, his testimony counts not as an *ex officio* statement. Rather it can be regarded as any other witness testimony that appeared during the trial of the Catilinarians. Torquatus, on the other hand, was fully aware of the danger that members of the jury may not take notice of such fine distinctions and believe what Cicero said not only because he was the most trustworthy witness, but because he held the highest office in the state at the time.¹⁷ This recognition must have impelled Torquatus to attack Cicero's consulship, probably with the aim to discredit Cicero's appeal to his glorious achievement of saving the state, which could have been easily equated with the evidence of a key witness.

The previous analysis has uncovered Cicero's initial strategy based on his consular *auctoritas*. It is important to see that Cicero's aim to push his *auctoritas* to the forefront was probably dictated by an unforeseen necessity, that the prosecutor raised serious objections against him. Torquatus however did not make a frontal attack, as Cicero's answer in 2–35 suggests, but instead brought forward allegations of inconsistency and falsification of evidence.

This unexpected attack prevented Cicero from setting the probability of Sulla's innocence as the central proposition of his argument. Cicero chose to focus on his own credibility, to show himself as one of those who knew as insiders what happened during the suppression of the conspiracy. Even if his political achievements remain controversial, he can still say that he was in the best position to judge the innocence of an alleged conspirator. Starting with a rather general self-justification (that is, one separated from the actual charges), he 'adjusted' the problem of his own trustworthiness in the jurors' minds, and at the same time 'replaced' the proposition of Sulla's innocence with it. Thus the jury would evaluate the rest of the argument on the basis of how probable they found the defence of Cicero's consistency in taking up the case. Cicero achieved this by the intricate combination of the 'initial adjustment' and 'thematic replacement' heuristics, strategies that could completely confound the decision-makers about the nature of the forthcoming direct evidence.

6.3 The *Refutatio Criminum Sullae*

The answer to the charges follows in 36–68, arranged in two groups separated with an emotional tirade on the alleged insolence of the young Torquatus who did not refrain from damaging their friendship by calling into question Cicero's integrity. Cicero's strategy in this section will build on the premises established in 1–36. It will aim at breaking up the prosecution's straight line of reasoning into two main sections, one on the question of Cicero's *auctoritas* and his personal evidence on the Catilinarian conspiracy and the other on the direct evidence against Sulla.

¹⁷Cf. 21 ...*in quos testimonia dixisti,* inquit '*damnati sunt; quem defendis, sperat se absolutum iri.*

These sections do not appear in themselves convincing when separated, because the weakness of any direct evidence against Sulla is closely linked with the strength of Cicero's testimony which he can give as the main witness of events in the Catilinarian conspiracy. Only a high degree of credibility of his personal authority could make the judges believe that his refutation of the charges stands firm. The orator also uses some special techniques, such as obfuscation, to decrease the likelihood of individual pieces of direct evidence. Cicero starts his refutation with the strongest argument against Sulla, the testimony of the Allobroges. His refutation of the evidence works through a combination of obfuscation, detailed examination of the language used in the testimonies and the presentation of likely interpretations of the Allobroges' words. The purpose of these techniques is to show the vulnerability of the prosecution's conclusions and to create doubt in the mind of the jurors.

Although he pretends to report exactly the content of the *indiciu*m against his client, it never becomes clear what the Allobroges really said about Sulla. Already the opening proposition contributes much to the obscurity 36 *Ab Allobrogibus nominatum Sullam esse dicis*.¹⁸ Cicero says *nominatum*, mentioned, which is not necessarily as damaging as *indicatum*, reveal, disclose or declare, so we and the jury can only surmise whether, first, the Allobroges mentioned or charged Sulla, and, second, whether Torquatus simply talked about this piece of evidence (as *dicis* would suggest), or whether he intended this as the weightiest proof of Sulla's guilt.¹⁹

The obscurity becomes greater by the highly complicated argument that Cicero brings forward. Torquatus seems to have argued that the fact that Cassius, one of the Catilinarian conspirators, pleaded ignorance concerning Sulla does not exclude the possibility of Sulla's guilt. First, ignorance does not amount to acquittal (38 *non purgat*), second, he might have genuinely not known about Sulla's inclination

¹⁸ On Cicero's play with the trustworthiness of the Allobroges see 17 (*Allobroges...verissimi iudices*.) and *Font.* 26. An important problem arises in the speech itself about this piece of evidence. First, Cicero seems to contradict himself in 17 (*Sullam...nemo nominavit*) and 36. If we suppose that Cicero does not want to get into such inconsistency the audience could easily detect, we may explain the contradiction with the comparison of the two contexts. In 17, Cicero uses *nominare* as the opposite of *coarguere* (in the sense 'expose' or 'prove guilty'). It is easy then to understand 17 saying 'no one accused Sulla' (although this meaning of *nominare* is post Augustan), which does not exclude the possibility of the Allobroges talking about Sulla. The required sense in 36 would then be: the Allobroges (just) mentioned (cf. also *L. Cassium...commemorasse*) Sulla (as if passing, without suggesting any involvement).

¹⁹ A more intricate difficulty appears when we compare *Sal. Cat.* 40–2, 44–5 and 36. Sallust says that during the first meeting between the Allobroges and the Catilinarians, Umbrenus, a freedman (cf. *Cicero Cat.* 3, 14) led the discontented Gauls to P. Gabinius Capito, where *eo* (sc. Gabinio) *praesente coniurationem aperit, nominat socios, praeterea multos quousque generis innoxios, quo legis animus amplior esset* (*Sall. Cat.* 40). The event Cicero describes in 36 resembles more *Sal. Cat.* 40. Also, Cassius was involved in the negotiation at a later stage. By that time the Allobroges must have known the principal members of the conspiracy, so there was no need to inquire about them any more. In addition, the Allobroges talked to Cassius only after Cicero directed them to approach other prominent conspirators to ask for an oath, so an event like 36 is unlikely to have taken place. But even if it was Cassius who revealed Sulla, it seems probable that Cicero made some modifications (an abridgement?) on the testimony of the Allobroges, which could have been one reason for the charges of falsification.

(*nesciit videlicet*).²⁰ Throughout his refutation Cicero uses an argument based on a few factual assertions and an array of probable assumptions to discredit the suspicion of Sulla's involvement.

The initial argument is based on the fact that Cassius did not mention Sulla's name on his own, but only after the Allobroges inquired about Sulla's view. He treats this fact as a most favourable detail from which he can extract a direct proof of innocence. Cassius could have named Sulla as one of the conspirators, but even this one assertion would not necessarily amount to a true proposition, as Cassius could simply have wanted to increase the confidence of the Gauls with the claim of a wide support. In addition, it is unlikely that Sulla was seriously involved in the preparations, if Cassius named him at the instigation of the Allobroges.

It is also highly unlikely that Cassius forgot about Sulla, as he remembered a less prominent member, Autronius, whose name must have prompted him to mention Sulla as well. Circumstantial probabilities thus seem to support Cicero's claims exclusively. However, we have to bear in mind that this is the case where an almost equal number of probabilities can be brought forward in support of Sulla's participation. One only has to argue in a way that the probabilities be set on one side so consistently that they do not prompt the mind of the listener to search for an opposing set of probabilities.

In the next part of the refutation Cicero argues against the falsification of records written during the interrogation of the Allobroges. The charge of forging the documents does not seem to concern Sulla's case directly, yet Cicero treats it with equal seriousness and greater vehemence as it relates both to the defence of his *auctoritas* and the reliability of his testimony in favour of Sulla. 40 ... *Torquatus rursus in me inruit, me accusat*.... These words signal a return to his argument in 2–35, the defence of his *auctoritas* and consistency. They indicate strongly that Torquatus conducted a two-way prosecution strategy, one against the defendant and the other against the defence counsel to create the impression before the jury that Sulla's case is so weak that he would certainly lose it without Cicero's patronage.²¹

The charge of falsification can only be understood in conjunction with the previous argument. There Cicero argues with probabilities that the testimony of the Allobroges contained nothing damaging against Sulla, whereas here Torquatus insists that Cicero recorded the testimony not in the precise form as it was given (40 *ait me aliter ac dictum sit in tabulas publicas rettulisse* or 44 *me commutati*

²⁰ The answers of Torquatus nevertheless imply that he was aware that the evidence of the Allobroges cannot be used as direct evidence. Because of this, it is difficult to say that this was intended to be the weightiest evidence of the prosecution.

²¹ Cf. 22 *nisi tu causam recepisses, numquam mihi restitisset, sed indicta causa profugisset*. Torquatus' assertion sounded all the more likely as Sulla had already withdrawn voluntarily from politics in 65 when he settled in Naples after his disastrous defeat at the consular election contests in 66. The rumours of an alleged association with Autronius and Catiline to seize the consular power in 65 must have warned him, as well. Despite his cautiousness in 65, the prosecution could still associate his name with Catiline in 63.

indici coargueris).²² The issue most probably depends on what sense we apply to the word *aliter*. Cicero, of course, does not help the readers in explaining what he means by the phrase. It may, as is usually taken, refer to outright falsification of the senatorial *commentarii*.

However, as Cicero remarks in 44, Torquatus knew how carefully the records were prepared and had access to these documents before they were edited and sent round the whole empire. It seems therefore unlikely that Torquatus would accuse Cicero and the whole senate of producing and approving false *tabulae publicae*. Rather, we should assume that with the words *aliter ac dictum sit* Torquatus objected to how the testimony of the Allobroges on Sulla was worded. The question at issue might have been whether Cicero wanted to interpret the Allobroges' report on the words of Cassius as incriminating, neutral or clearing the defendant of any involvement.

If this assumption is correct, then Cicero's whole defence of his consular procedure against the conspirators and the outburst of anger in 46–50 can be taken as an argument based on distorted and irrelevant premises. Its purpose was to conduct an effective defence against the pseudo-proposition that the prosecution based his argument on the evidence of the Allobroges and its alleged falsification by Cicero. Torquatus knew that Cicero's treatment of the conspirators was widely regarded as illegal, so he could weaken the former consul's testimony by adding a number of objections similar to the popular opinion that disapproved Cicero's handling of the conspiracy.

The following six 'minor' charges all deal with specific incidents that can either be linked to participation in the conspiracy or to an action that can be subsumed under the *lex Plautia de vi*. Although these incidents seem to lend much weight to the prosecution's charges, Cicero assigns them a relatively subordinate place in his defence.²³ It is important to see how Cicero could go through charges at such a speed and spare a number of very detailed refutations without losing the credibility of his own principal argument of *auctoritas*. One observation can already be made in advance. In his discussion of the individual charges, Cicero nowhere says how these charges were linked together by the prosecution and what exact conclusion should be drawn from them.

Most of the specific charges were designed to prove that Sulla prepared to support the Catilinarian conspiracy with measures ranging from political manipulation to outright military preparations. This is important to understand, because the accumulative probability of the *crimina minora* could render the judgement of guilt

²² Berry is right (217, 40n) that the scholiast mistakenly says that 'fit enim coniectura incidens an P. Sullae nomen subtraxerit Cicero et id egerit ne in tabulas publicas referretur'. However, we cannot say that 'the issue to be treated is simply whether falsification occurred...'. Despite his pretended indignation, Cicero never explains what kind of falsification Torquatus thought of and how he turned the allegation against Sulla.

²³ Even if we take 36–45 as belonging to the refutation of charges, this is still 30 sections out of the total 90, whereas the number of sections dealing with the issue of *auctoritas* is 51. Everyone has to decide whether to consider these 'digressive' passages irrelevant or important for the whole argument.

likely even if some of the charges prove to be weak. The prosecution's idea might have been to prove that the defendant was inclined to and capable of supporting the political disturbances with a devious scheme. From Cicero's speech we can only infer that the charges appeared serious on their own, but we do not get the impression that they formed a complex plan.²⁴

The evidence of the Allobroges cannot be taken as a separate charge, as we do not know either its specific content or how it supported the *crimina minora*. Therefore, we need to look at one example of the minor charges, the first of which comes in 51–3. It is alleged that Sulla took part in the armed band of Catiline and Autronius, which attempted to kill the consular candidates and the presiding consul, Cicero, at the Campus Martius in 63.

In his introduction to the minor charges, instead of the usual *in medias res* discussion of individual accusations, Cicero makes an ironic point which will affect his treatment of the following *crimina minora*. 51 *at accusat <C.> Corneli filius et id aequae valere debet ac si pater indicaret*.²⁵ We know from 6 that this C. Cornelius was one member of the conspiracy, and he was considered guilty with such certainty that no one had thought of defending him. We also learn slightly later that Cornelius felt uncertain about disclosing his information, therefore he instituted his son to make the accusations. Now Cicero says that C. Cornelius was stupid enough if he reported the involvement of Sulla and yet missed the reward that was offered for the informer.²⁶ Cicero would not have placed this remark at such an emphatic position, had he not intended to suggest something that refers to the whole evidence given by Cornelius against Sulla. With this remark, and the one at beginning of 54, Cicero suggests that the young Cornelius (and probably Torquatus, as well) is accusing on the instigation of either Cornelius the elder, or someone, who is interested in the political annihilation of P. Sulla. (54 *Quid ergo indicat aut quid adfert aut ipse Cornelius aut vos qui haec ab illo mandata defertis*.).

Cicero uses this point as a major proposition for the refutation of the *crimina minora*. It claimed that almost all of the specific charges were based on the undercover report of C. Cornelius,²⁷ a former conspirator, who was not willing to give

²⁴ This may be the answer to the problem why one cannot discover a certain plan in the order of refutation in 51–68. (cf. Berry *Sulla* 232 'The overall impression, then, is that the order chosen by Cicero is not strategic.'). The strategy cannot have been solely to refute the charges in decreasing importance, but to rid them of any coherence.

²⁵ It is difficult to infer anything from this passage about the distribution of the charges among Torquatus and Cornelius. Cicero's remark here does not want to indicate precisely which charge belonged to whom (cf. Berry 20–1), but to show that the bulk of the most incriminating evidence could have come from a former conspirator.

²⁶ Cicero deliberately leaves the conclusion that Cornelius did not know Sulla to be involved open, so that he could lead the jurors to that conclusion without stating it.

²⁷ Of course, Cicero remains unclear about what information Cornelius could have given about Sulla. It is improbable, for example, that he could provide so much information about Sulla's activities outside Rome (e.g. the purchase of gladiators or the dissension at Pompei). But Cicero deliberately wants to keep the jury in the dark, so that one may believe that each charge has originated from one single unreliable source, a conspirator.

public testimony during the trial. The implications of the claim are far-reaching. Cicero can assume afterwards that one major source of evidence on the prosecution's side, C. Cornelius' testimony, was discredited by the revelation of his identity. Therefore, he does not need to labour much to explain the individual charges. The unreliability of the source would alone make the following line of evidence improbable.²⁸

Thus to refute the *crimina minora* in 51–68 Cicero uses a strategy similar to the 'initial adjustment' *heureme* in the defence of his *auctoritas* in 1–35. One obvious difference is that the strategy here has a narrow scope, whereas in the first case the *heureme* extends to the argument of the whole speech. In 51 the orator focuses the attention on a central proposition about the improbability of C. Cornelius' testimony and then adjusts the forthcoming refutation to the probability of the initial claim.

We test the working of the 'initial adjustment' *heureme* on two of the weakest refutations, the intended massacre at the consular elections of 63 (51–3) and the dissensions at Pompeii (60–2). In the first case, Cicero confirms his argument with two claims. He emphasises what he himself saw while others were unaware of the events (51 *ego vidi...vos enim tum, iudices, nihil...suspocabamini...*). Among the conspirators he noticed only Autronius' presence, consequently, Sulla could not have been part of the events. Of course, this conclusion can only be valid, if Cicero interprets the charge as referring to Sulla's immediate presence at the Campus Martius, excluding the possibility of taking part in the preparations.²⁹ Cicero also breaks out in a fierce *ad hominem* attack against Cornelius and talks about events which appear completely irrelevant in order to focus on the fact that Sulla was not at Rome during the main outbreak of the revolt.

It is essential to see that at this point the orator relies on the 'initial adjustment' *heureme* both in terms of his own personal evidence as key witness of the events (*auctoritas*) and in terms of his critique of C. Cornelius' testimony in 51. His *auctoritas* as former head and saviour of the Republic discredits the testimony of a convicted conspirator, who intended to kill Cicero as consul. It also reinforces the fact that Sulla, while in exile, was in Naples during the most serious events in November 63. Therefore, he most probably could not have been part of earlier events either. The emotional evocation of the conspirators' plan and Cornelius' role in it makes it seem completely unlikely that Sulla as a leading figure would have ever actively supported the movement.

On the dissension at Pompeii Cicero advances a different line of argument, which nevertheless uses similar presuppositions to those in the previous instance. The source of the charge is assumed to be Cornelius (a fact damaging in itself), and Cicero's question at the beginning of 60 suggests that in this case even the

²⁸Cf. 78 Cicero's plea about the worthlessness of torturing Sulla's slaves. There the passage appears completely disconnected from the individual charges, so that the jury would not assume that the slaves can add anything new to the accusations, and even that cannot have any probability due to the distorting effect of the whole procedure.

²⁹This role would nevertheless have suited his position better in the conspiracy. The nature of the charges also suggests someone working behind the scenes and avoiding open conflict.

prosecution was at a loss to present a coherent accusation.³⁰ To reduce the probability of the argument, Cicero separates the two corresponding claims of the charge, which as a result become somewhat incomprehensible to us. The prosecution could have possibly maintained that Sulla created disagreement between colonists and inhabitants, and also that he wanted to use this scheme to turn away the inhabitants from Rome and support Catiline.

The second part of the charge he answers with a faulty inference, that the Pompeians have never been suspected of the conspiracy, so it is unlikely that Sulla attempted to change their allegiance. The problem with this is, of course, that Sulla may not have succeeded in convincing them, and Cicero excludes this possibility from consideration. As for the dissension, Cicero describes it as a civic disagreement of an ordinary nature, which was carefully managed and settled by the patrons of the city, with Sulla among them. In such a way, the responsibility of the defendant is shared by others and the whole dissension would have never seem to have been used to foster political objectives. In the meantime, less rigorous members of the jury could easily forget that Cicero dispels the probability of the charge in general, while he is unwilling to answer to the suspicion how such a charge could have emerged at all.

The last major passage of the defence argument comprises the *probabile e vita* in 69–77. Interestingly, Cicero puts this argument last in the speech, whereas it is usually placed at the beginning.³¹ The argument from the defendant's previous life appears in a comparison with conspirators, Catiline and Autronius. Thus, Cicero applies this argument not solely for the defence of Sulla, but also to dissolve the charge of inconsistency against himself which he already started in 14. The *probabile e vita* suffers from many weaknesses, of which one deserves fuller attention.³² Throughout the comparison Cicero describes Sulla as if his innocence has been

³⁰ This assumption, however, does not necessarily have to be true. Cicero could have ignored some information, which he himself thought unnecessary, as he does sometimes, or he could simply pretend that the charge lacks basic coherence. *Iam vero quod obiecit... id cuius modi sit intellegere non possum*. As for the subject of the sentence, one can only surmise that it is the same as in the question (*Quid ergo indicat...?*) in 54. However, one might think of Torquatus, as well. The form of the question can also allow two different interpretations. First, Cicero cannot understand how Sulla, as a patron of the city, could have impelled the city to take part in the conspiracy (*probabile e vita*). Second, Cicero cannot imagine on the basis of the information given by the prosecution how Sulla could have had a whole town revolt against Rome (*probabile e causa*).

³¹ Cf. *Sex. Rosc.* 39, *Mur.* 11–4, *Cael.* 3–22, *Mil.* 36, *Deiot.* 16. Also, Berry 274, 69, n. 1. However, one can also say that Cicero has already prepared in a shorter form in 14–20 the *probabile e vita* (to be correct, Cicero compared the two different *causae* in 14–20), when he explained why he gave evidence against Autronius and now defends Sulla. This passage also explains the comparison in 69–75. The reason is, namely, that Cicero set as one cornerstone of his defence the opposition of Sulla and Autronius (71) *...quoniam eius nomen finitimum maxime est huius periculo et crimini...*

³² For the explanation of the inconsistency why other consulars, including the elder Torquatus, did not discover Catiline's true nature, when they all testified in favour of him, see 80–2 and Berry 276, n. 70.

proven,³³ just as Catiline and Autronius are held guilty beyond doubt. One can only discover that the passage does not, strictly speaking, talk about the *vita ante acta* in both cases, but restricts itself to how the two sides were supposed to behave during the events mentioned by the prosecution. In this way the comparison (strengthened by Cicero's *auctoritas* as a personal witness) makes the point that given Sulla's character and action after his first trial and conviction it is unlikely that he ever joined Catiline.

After the analysis of the major arguments we can now summarise briefly the overall strategy Cicero uses in the speech. Cicero laid great emphasis on *auctoritas* both during his initial argument in 2–35 and in his conclusion to the speech in 80–5. It seems therefore that the principal element of Cicero's strategy was proving that the consistent behaviour of Sulla's supporters can substantiate the probability of the defendant's innocence. Cicero played down the importance of the charges and reinterpreted the notion of *auctoritas*, so that occasional political lapses (like the elder Torquatus' support of Catiline in 65) would not completely destroy his credibility. Cicero stresses that in retrospect (due to ignorance) *constantia* may occasionally collide with the formal duty of friendship, and in such cases no one can be held responsible for supporting a future enemy of the state.

The prosecution sought to undermine the probability of the defendant's innocence on two fronts, providing an accumulated evidence for multiple charges under the *lex Plautia de vi* (against armed violence) in 36–9 and 51–68, and the inadmissibility of Cicero's personal evidence in 2–35 and 40–45. For the prosecution, these two arguments must have inherently belonged together, whereas Cicero insists that they are essentially independent and not related to each other. Cicero first applies the 'initial adjustment' and 'thematic replacement' heuristics to make the question of his 'auctoritas', consistency and credibility the focus of his speech. In this way he divides an essentially single line argument about Sulla's guilt to break the backbone of the prosecution's case.

Slicing up the evidence against Sulla even further, Cicero managed to decrease the value of probabilities each testimony would provide when taken together. This second strategy belongs to the group of 'parallel probabilities' heuristics as it creates analogous, but seemingly unrelated arguments out of a single line of reasoning which reduces the likelihood of each evidence being true and thus makes their refutation easier. Cicero applies this strategy frequently in forensic cases (e.g. in *Flac.*), where a number of charges are linked together and together provide great persuasive force.³⁴

³³ Cf. 69 *Iam...criminibus omnibus fere dissolutis....* That statement naturally means that those arguments have been refuted which Cicero considered relevant. One should also note that the assurance of the claim relies very much on the *auctoritas* Cicero promoted all through the speech.

³⁴ In connection with this question one should remember Classen's remark (1982, p. 148) on the art of Ciceronian persuasion. 'Cicero die Trennung von Zusammenhörigem oder die mehrfache Behandlung eines Gegenstandes nicht nur nutzt, um seine Gegner wirkungsvoll zu widerlegen, sondern auch das Gewicht seiner eigenen Argumente nachdrücklich zu verstärken.' The technique is slightly different here, yet the result is the same. The opposition's arguments look an incoherent group of loosely related evidence.

Chapter 7

Pro Murena

7.1 The Case Against Murena and the Structure of the Speech

The *ambitus*-speech¹ in support of L. Licinius Murena in 63 reveals a number of peculiar features of Roman litigation, politics and the Roman social network which could heavily determine (or, perhaps, derail) even such a seemingly simple argument as the one that was directed against the defendant, the *consul designatus* for 62. The case shows certain similarities to Cicero's defence of Sulla discussed in the previous chapter, especially on the problem of whether an advocacy of political *auctoritas* is admissible as a legal proof in support of the likelihood of a proposition.

In the analysis I will show that Cicero's strategy cannot be viewed simply as an ordinary form of a principally 'ethical' (i.e. based on *ethos*, character) and *ad hominem* argument based on consular and praetorian *auctoritas*, *dignitas* and *gratia*. Rather the speech displays creative heuristic reasoning (especially in sections 5–53) capable of diverting the jury's attention away from the relevant accusations to arguments that are based on plausible, but unacceptable probable propositions. The plan of the speech reveals two types of probabilistic strategies, the first one from the group of 'contrastive probabilities' heuremes, the second from the 'representativeness' heuremes. These two strategies allow Cicero to concentrate as little as possible on the actual charges of electoral bribery and instead use several *extra causam* (in many ways contingent elements) of the case to argue for the acquittal of his client.

The 'contrastive' heurème is focused on the so-called *contentio dignitatis* part of the speech in 15–53. In this section Cicero compares the personal qualities and merits of Murena, the successful winner of the election, with that of Servius Sulpicius, the unsuccessful candidate and main accuser. The purpose of this strategy is to contrast and weigh against each other two sets of probabilistic arguments that

¹ A modern commentary on the speech exists, which I used occasionally: Adamietz (1989). Other studies on the speech: Alexander (2002, pp. 121–127), Ayers (1950), Riggsby (1999, pp. 47–48).

are drawn from inadmissible evidence, in our case an *ex post facto* conjecture on who had a greater chance to win the election.

The 'representativeness' heurème is directed at a rather irrelevant and highly contingent element of the case, the Stoic beliefs of one of the principal accusers, Marcus Porcius Cato. Cicero argues this apparent *ad hominem* argument so well, that it actually looks like a major proof in deciding the bribery case. Some scholars may object that the attack on Cato's Stoicism needs to be treated either just as an entertaining *digressio* designed to draw attention of the listeners away or as a wholly fallacious *ad hominem* argument which is inadmissible in a reasonable legal case. I will argue that while these two interpretations may be justified, the argument over Cato's Stoicism is a sophisticated form of circumstantial *ad hominem* which in fact avoids attacking Cato in person (as this would have been counter-productive) and instead makes him a representative of Stoic views, which ultimately prevents him from judging reality in a reasonable manner. The argument, although irrelevant and fallacious, is nevertheless an integral part of Cicero's probabilistic strategy designed to decrease the likelihood of Cato's argument.

The strategy of the speech is determined by the position of these two dominant heurèmes. They demonstrate how an orator may use random elements of the rhetorical situation, e.g. the views of a prosecutor or the outcome of a political battle as probabilistic proof. Cicero uses the first heurème to prove that Murena was more likely to have won the consular contest, so it was unlikely that he used bribery. The second heurème is applied in case the jury would still believe that Murena acted improperly. Its purpose is to show that certain electoral practices would only appear to be acts of bribery if someone like Cato uses unreasonably high standards of integrity in contrast with common Roman traditions.

A complicated and highly uncertain historical situation in Rome helped Cicero much in devising a plan which pushed the legal side of the case into the background and emphasised the political necessities under the present circumstances. In 81 Cicero alludes to a serious political crisis, with Catiline threatening the capital with military intervention from outside, and his allies planning to get hold of the government by violent means.

The defendant, L. Licinius Murena, was an aspiring Roman politician with a good record of military service in the First, Second and Third Mithridatic Wars. After a popular praetorship in 65, he became a candidate for the highest office in the turbulent year of 63, during the consulship of Cicero and C. Antonius Hybrida. He stood together with important politicians, such as the famous jurist Ser. Sulpicius and L. Sergius Catilina, who was viewed suspiciously by many optimates as a likely revolutionary. Having won the consular seat with D. Junius Silanus, Murena was charged by the unsuccessful Servius Sulpicius, supported by three *subscriptores*, M. Porcius Cato, Cn. Postumius, and another Serv. Sulpicius, the younger. The defence counsel consisted of Q. Hortensius, M. Licinius Crassus and the current consul, M. Tullius Cicero. The central issue of the charge was bribery, which apparently manifested itself in the allegedly unlawful means of obtaining votes for the *comitia centuriata*.

According to 54,² Murena was charged with the employment of hired men to distribute money among the *tribus*, as someone in his service was said to have been caught with the money destined for such purposes. The young Serv. Sulpicius accused Murena with illegal canvassing among the *equites*, while Cato criticised Murena for utilising means of voting, like the provision of seats on the gladiatorial games, which may not have qualified as *crimina* in a strict legal sense. The prosecution most probably tried to make the key point of *ambitus*, the distribution of money (*de deprehensis pecuniis*), probable by using suspected forms of *ambitus* as circumstantial evidence.

To understand the heuristic reasoning applied in the speech, we need to see in the first place why Cicero deals so little with the actual *ambitus*-charges. A brief overview of the speech reveals how Cicero arranged the different accusations and answered them. In 1–10, after the *exordium*, Cicero answers the criticisms levelled at him by Cato for accepting the case. In the main section, the defence is divided into a triadic form, each part refuting a collection of arguments directed against the defendant. In 11–14, he briefly deals with a few accusations (*reprehensio vitae*) against the past conduct of Murena as a commander during Lucullus' campaign in Asia. In the second, and longest, section (the *contentio dignitatis*), 15–53, Cicero compares the two candidates' chances for the consulship in order to show that in every respect, Murena was more likely to have won the election. The refutation of the actual charges (the *crimina ambitus*) comes only in the last triad, 54–83, where Cicero answers a number of accusations that he considered serious enough to repeat after Lucullus and Hortensius. The peroration in 83–90 returns to the political side of the trial and reminds the jury that their decisions will seriously affect not only the life of the defendant but the whole Republic.³ It is already clear from this arrangement that Cicero wants the case to be decided partly on *extra causam* probabilistic reasoning (e.g. is it likely that the defeated candidates would have won against Murena or the state would be ruined if Murena were to be convicted?).

The defence speech begins with an answer to Cato, who criticised Cicero, the consul in office for accepting such a politically sensitive case, especially as he had taken part in legislation against bribery. It is relatively clear that we face a straightforward *ad hominem* attack against Cicero, as in the Pro Sulla, pointing out the inconsistency between the orator's previous record as a strict lawmaker against bribery and his present conduct in defending someone on the same account. Cicero

²The paragraph poses numerous questions with respect to the charge of *ambitus* and the strategy of the prosecution. One would like to know, first of all, why Cicero did not here mention Ser. Sulpicius, the major prosecutor, in his answer to the *accusatores*. Should we suppose that he did not speak about the charges personally at all? Also, it is not clear whether Cicero mentions (*retrac-tare*) all the charges that were advanced against Murena, or selects only those that he himself judged crucial for the final decision. One would be keen to know the distribution of the refutation among the defence counsel, so that we could see the extent to which the actual charges have been refuted. Such information could clarify several points of Cicero's argument, especially the high proportion of *extra causam* material. Cf. Adamietz (1989, pp. 28–30).

³This kind of 'dilatation' is a common tactic in Cicero, who is likely to have learnt it from Demosthenes, for example from his Embassy-speech.

avoids answering the core of the criticism, the question of inconsistency and the unfair promotion of consular authority. The orator achieves this by interpreting the case as part of the procedure of the consular election, not as independent judicial action. This claim will strongly affect Cicero's strategy, because it allows him to consider political and other extra-judicial factors, most importantly the authority and influence of two principal prosecutors, Cato and himself.

In such a situation, he as consul has the right to offer his authority as a guarantee that the *consul designatus* would perform his duty for the benefit of the state. The argument on the admissibility of personal authority appears on both sides, so it seems that both relied to some extent on the argument drawn from personal credibility. The rebuttal of Cato's charges can be linked with a response to a similar accusation brought forward in 60–62. There, Cicero warns the jury not to view the appearance of Cato as a form of proof, *praeiudicium*, pre-judgement. The rhetorical situation therefore looks more complicated, as both sides seemed to have relied heavily on their personal authority to stress their opposing claims of bribery or innocence.

7.2 The Charges Directed Against Murena

Cicero's summary of the charges in 11 introduces his major arguments to mark the structure of his reasoning to decrease the probability of Murena's alleged *crimina ambitus*.⁴ The short and pedantic explication of the *tres totius accusationis partis* in 11 reveals a crucial point of the defence strategy. The threefold arrangement of (1) the defendant's private life, (2) the merits of the candidates (*contentio dignitatis*), and (3) the *crimina ambitus*, bribery, suggests that the prosecution thought these points demonstrate effectively the likelihood of the guilt of the defendant. Cicero decided to make a summary of the previous prosecution and defence speeches, answering those points of direct evidence in 54–83, the *ambitus* charge, which gave the impression of a comprehensive and relatively effortless refutation. That summary he presented under the name of *crimina ambitus*. Putting the *ambitus* argument last raises its importance and suggests that the preceding arguments with their frequent irrelevant evasions affect its likelihood.

The bulk of the speech however is directed towards Cato and Sulpicius to balance the moral and political authority of the former and the legal authority of the latter. It remains questionable, whether such priority given to the *ad hominem* arguments in 15–53 represented in reality the personal weight of the two major representatives of the prosecution, or whether it is only a strategic evasion aimed at supporting the likelihood of the innocence of the defendant. Whatever the case, I will regard the *extra causam contra auctoritatem* arguments as integral parts of the whole defence strategy.

⁴For a detailed assessment of the charges and the prosecution team see Alexander (2002, pp. 121–127).

The first group of accusations in 11–13 deals with the previous career and the personality of Murena. The short *reprehensio accusationis*, refutation of the accusation, concentrates on three issues, Murena's stay in Asia, the question whether he deserved the merits he earned in military service during the campaign of his father and Cato's scurrilous attack, calling the defendant a *saltator* or dancer. According to Cicero, this part of the argument should be regarded as the weightiest of the three main lines of reasoning, yet the so-called *probabile e vita* seems to be the weakest of them according to Cicero so he replies to them for the sake of convention rather than as a necessity.⁵

The point of the whole section becomes meaningful, if we regard it as evidence that forms the basis of the probabilistic reasoning presented in 15–53. That is, Cicero wants to prove that Murena's previous career as a virtuous soldier made it likely that he would win the consular post in a contest with Catiline and Serv. Sulpicius. In other words, it is unlikely that a candidate with such a distinguished military and political service would have needed illegal means to secure his success on the elections. As the argument proceeds to the *contentio dignitatis* that covert proposition will also be brought to the front of the argument.

The prosecution wanted to discredit the defendant by alleging his love of luxury. Proving Murena's corrupt morals would have enabled the prosecution to support the claim that the defendant was likely to have committed unlawful acts to get hold of the consular position.⁶ Cicero's answer most probably simplifies the charge, which could have been directed not so much against the character of Murena, but his abuse of military command. However, the refutation of any wrongdoing in Asia sounds so vague that it looks impossible to find out what the exact charge could have been originally.

From an argumentative point of view, the most remarkable part of the speech is found in 15–53, the so-called *contentio dignitatis*, or the comparison of merits or in other words, their likelihood of being elected.⁷ This is the place where Cicero presents his heuristic reasoning as proof that Murena had a much greater chance of winning the election in the first place, and therefore there was no need at all for him to use illegal means of winning over the electorate. A detailed analysis of the argument

⁵*Atque harum trium partium prima illa quae gravissima debebat esse ita fuit infirma et levis ut illos lex magis quaedam accusatoria quam vera male dicendi facultas de vita L. Murenae dicere aliquid coegerit.* Cf. Adamietz (1989, p. 104). The fundamental question about this remark should be the same as before. We do not want to know whether Cicero answers the *vita ante acta* as prescribed (if there exists any such prescription, a *lex quaedam accusatoria*), but what sort of evidence he considers it. Moreover, the narrow range of topics from the *vita ante acta* would make us question whether we should talk about a proper *probabile e vita* argument.

⁶One only has to consult the Verrines to see how the proof of luxuriousness could support a charge of extortion, embezzlement and abuse of power.

⁷Referring to *Planc.* 7–30 and 58–67, Adamietz (1989, pp. 110–111) says that the comparison of the candidates' distinctions was a standard element of the *ambitus*-speeches. It nevertheless doubtful statistically to say, based just on these two speeches, that 'dieser kritische Vergleich der Würdigkeit sc. für das Amt war... ein fester Bestandteil des Plädoyers'.

is needed here to show how the different probable propositions on both candidates' chances are weighed against each other.

The argument is presented in the form of a comparison, to show that Murena had similar credentials in his political career as Sulpicius and that the defendant was more qualified for the consulship. Although Cicero repeats several accusations made by Sulpicius,⁸ it seems difficult to reconstruct what exactly the leading accuser could have said. Cicero alleges rather skilfully that Sulpicius was motivated by spite and resentment.

It is only later in 21 that we learn that the jurist must have also talked about Murena's unsuitability for holding a serious political position.⁹ Sulpicius most probably argued that Murena did not possess the necessary experience for undertaking the consulship after such a long military service abroad, whereas he as a jurist stayed throughout in the middle of civic life. When he used *dignitas* as the term forming the basis of comparison between the two candidates must have meant 'worthiness or competency for the job'.

Cicero, on the other hand, distorted Sulpicius' interpretation and made it appear as if Sulpicius deplored his defeat by an opponent with a less distinguished ancestry and a profession not in itself relevant for a governmental job. Cicero thus argues along the more common meaning of *dignitas* as 'merit or dignity by which one deserves to attain a position' and attributes this sense of the word to Sulpicius' accusation. The jurist's immense learning, legal expertise and intelligence was widely acknowledged, therefore Cicero had to find a way to prove his client's superiority over Sulpicius without personally harming him.

If this assumption is correct, the long *extra causam* argument on the relative value of professions can not only be integrated coherently into the defence strategy, but may indeed turn out to be the most important element of Cicero's persuasive scheme. The likelihood of innocence in the *contentio dignitatis* depends thus mostly upon the attempt to establish Murena's 'dignity' against that of Sulpicius based on personal qualities and professional expertise. The comparison of the two candidates allows Cicero to ignore the relative chances of the other two candidates, Catiline and Silanus, which could have counted heavily in the final result. It may have also been appropriate to investigate how much Silanus was worthy of the position and in what ways the candidature of Catiline affected the victory of Murena.

The rigid contrast between the two politicians also enables Cicero to ignore the original charge of electoral malpractice and direct the argument towards a less relevant issue. According to this argument, the election was ultimately decided by a rational deliberation of merits and chances, similar to what Cicero presents in front of the jury. Concentrating solely on what Cicero argues would also make us forget that Sulpicius had prepared to prosecute the suspected candidates even before the

⁸ The number of references (cf. 15, 18, 19, 21) suggests that Sulpicius mostly talked about the suitability of the candidates and the election, whereas he left the detailed *ambitus* charges to his younger *subscriptores*.

⁹ 'Apud exercitum mihi fueris' inquit (sc. Sulpicius); 'tot annos forum non attigeris; afueris tam diu et, cum longo intervallo veneris, cum his qui in foro habitant de dignitate contendas?'

elections (cf. 46–47), therefore the starting point of the *contentio*, the injured vanity of the jurist, is completely anachronistic.

In 15–17, the argument focuses on the defence of Murena's ancestry against Sulpicius' belittling remarks. Cicero goes on to argue that the praetorian office of both his grandfather and great-grandfather earned his otherwise plebeian family enough respect to make Murena's candidature acknowledged by the members of the senate. In 15, Cicero quotes Sulpicius' contemptuous comparison of his and Murena's family. *Contempsisti L. Murenae genus, extulisti tuum*. From this proposition Cicero draws the conclusion that considers only the descendants of patrician families worthy of election to consulship. *Quo loco si tibi hoc sumis, nisi qui patricius sit, neminem bono esse genere natum...*

Is it justified to advance such a comparative argument based on such a disdainful remark by Sulpicius? Having a look at what Sulpicius said in his speech¹⁰ will prompt a negative answer. Even if Sulpicius ventured to value the greatness of their families, it does not follow that he made an argument out of it. Such an *argumentum ex antiquitate* would have been all the more adverse to his own proposition, as on the same count Catiline, descendant of one of the oldest Roman consular families,¹¹ could also have been accepted as a suitable person once elected.

The creation of the ancestry argument had an implication for the arrangement of the speech. It allowed Cicero to follow up the *probabile e vita* argument and provided a comfortable start for the comparison of the two candidates. In fact, the unexpected proof in 15–17 marks unequivocally that the *contentio dignitatis* is a separate and completely independent argument, which in itself should persuade the jury of the legitimacy of Murena's election and the preservation of the status quo.

The basic premise of the defence is the equal acknowledgment of the two consular candidates. In Cicero's view, both deserve the same praise, which he would be ready to impart, had he not been prevented by Sulpicius' unjust remarks. Sulpicius is said to have attacked (*agitat*) the military profession in general and the worth of Murena's service in particular, whereas he extolled his long-term experience obtained in the day-to-day administrative work in the Forum.

Nevertheless, why should Sulpicius have had to deal with the military profession at all, if such an excursus added so little to his aim, the proof of Murena's illegal electoral machinations? The answer can be found in the presumably original remark of Sulpicius, in which he questions the suitability of Murena's candidature, after spending so many years away from Rome and the imperial administration. The objection can be understood in many ways. Clearly, the problem was not Murena's service as soldier, still less the military profession in general, but his apparent

¹⁰ Provided that Cicero quotes his opponent faithfully, which is almost never the case. One may also start wondering whether the two claims of *contempsisti...* and *extulisti...* refer to one and the same place in Sulpicius' argument. I would be inclined to say no, but that is just sceptical intuition. The two remarks might have simply been made on two passing and marginal occasions, something like *Mur.* 17, which probably very few jurors would have counted as an argument to weigh in their decision.

¹¹ For Sergestus, the friend of Aeneas and ancestor of the gens Sergia see Verg. *Aen.* 6.288.

inexperience in governmental affairs, especially in contrast with Sulpicius.¹² In this regard, Sulpicius could have been right, yet it is not entirely clear in what context his rebuke appeared.¹³

One thing nevertheless looks quite certain. Sulpicius did not weigh the merits of the candidates' professions against each other on such a general level as Cicero does, because such an argument would not have served him at all. If the prosecution found fault with the defendant's military career, it was most probably for the reason that Murena used it as an excuse for his not completely explicable success at the elections. In a relevant argument, Cicero would have had to show that Murena had personally proved his leadership qualities so far, and therefore it was likely that he would have won the election.

The defence found an argument whereby he could show that the defendant gained enough leadership skill and military reputation to counter the jurist's reputation for legal expertise and administrative experience. Moreover, the jury had to see that Murena's greater capability gave him such an advantage over Sulpicius that his victory could be regarded as almost certain. Therefore, the alleged criminal activities have very little likelihood from a rational, calculating point of view. Extolling Murena's outstanding individual qualities was not enough; otherwise, Cicero must have dwelt on that topic for much longer than he did in the proof *vita ante acta* in 11–13. The possible lack of distinctive personal material must have prompted a general argument on the relative merits of the two (or, rather, three, oratory included) professions, which allowed him to ignore the less favourable aspects of Murena's personality and career.

The weightiest argument in favour of the military profession is drawn from its utility. The existence and enlargement of the Roman Empire depends entirely on the effectiveness of its commanders and armies, which also entails that jurisprudence be dependent upon it, as well.¹⁴ The naivety of the argument could be easily laid bare by the reversal of the presupposition. An empire supported by a perfectly functioning army would still suffer from a major handicap without the help of a stable legal system. An objection like this might also have been furnished by the jury without effort, therefore a more persuasive argument had to be supplied. That is where ridicule becomes helpful to complement the fading superiority of the military man.

Cicero makes the vitriolic attack on *iuris prudentia* to reduce the *dignitas* of the legal profession and thus the likelihood of Sulpicius getting elected. It is not simply a case of a fallacious *argumentum ad hominem*, but it is a supplementary argument to weigh the initial probabilities at the consular election. Throughout 25–29, the

¹²One can also add that not only could Murena's political and administrative experience be doubted, but even his military accomplishments were questionable, as Cato's attacks on him in 31 prove. It is noteworthy that Cicero dispenses with Cato's objection in the same argument, the proof of the military's overall superiority.

¹³If Sulpicius used his argument to evaluate the initial probabilities of the consular election, then he was obviously wrong, as Cicero could point out in 35–6.

¹⁴Expressed eloquently in 22 *omnes urbanae res, omnia haec nostra praeclara studia et haec forensis laus et industria latet in tutela ac praesidio bellicae virtutis*.

orator presses the point that legal science must be considered as a less effective vehicle to attain the necessary dignity in a consular election. The almost absurd criticism of an obsolete archaic legal formula¹⁵ thus belongs to the core of the probability argument in defence of Murena. A legal expert like Sulpicius, so estranged from public interests as to use an incomprehensible technical vocabulary, could never have had hopes of surpassing a soldier who took a successful part in the expansion of Rome's territories. Therefore, if the jury considers the initial probabilities of the two candidates before the election, they too have to come to the conclusion that Murena never wanted to promote his interests by illegal means.

An interim conclusion of the comparison is drawn in 43, which acknowledges Sulpicius' skills as a formidable prosecutor, but stresses his inability to win an election. *Petere consulatum nescire te, Servi, persaepe tibi dixi...tibi solitus sum dicere magis te fortem accusatorem mihi videri quam sapientem candidatum*. Most importantly, Sulpicius is personally responsible for his own defeat, as he did not do everything he could to improve his *dignitas*, and thereby increase his chances of being elected. On the contrary, he did everything to cause his own downfall, while political fortune also stood on his opponent's side. The defence could argue that Sulpicius being well aware of his chances was motivated not by civic courage to reveal electoral malpractice, but by the need to compensate for his weaker position by revenge.¹⁶

The detailed analysis of arguments from probability in the *contentio dignitatis* shows that the comparison of the two candidates' *dignitas* can be regarded as a core argument of the speech from the defence's point of view. The *contentio* allows Cicero to present the principal probabilities regarding Murena's chance of the consulship as proof of his innocence without the need to refer to direct evidence against him. Supposing that the relative strengths of the candidates' *dignitas* made crystal clear who had the greatest chance of winning the election, Cicero weighed the probabilities on each side and concluded that the greater likelihood of Murena becoming consul made it unnecessary and even unreasonable for the candidate to bribe anyone. The strategy appears very persuasive although it relied on an inadmissible *ex post facto* view of the initial probabilities. It is therefore wholly fallacious to judge the candidates' chances during the canvassing for votes on the basis of probabilities that could become fully justified *only* after the election took place.

¹⁵ The attack is of course not simply absurd but completely unjust, as well, and even contradicts what Cicero thought of the utility of legal studies. Cf. *De Or.* 1.18 *Neque legum ac iuris civilis scientia negligenda est; Part. Or.* 100 *Cuius (sc. iuris civilis) scientia neglecta ab oratoribus plerisque nobis ad dicendum necessaria videtur*. But one must see that he talks in a persuasive discourse about the relative utility of the legal science in the consular candidature. He nowhere says that *iuris scientia* as such would be in general useless. On the relationship between Cicero and legal science: Gasguy (1887), Tomulescu (1968), Hamza (1983, pp. 59–70). Cf. *Cic. Top.* 51.

¹⁶ Cicero's claim about Sulpicius' mistaken campaign seems to stand in contradiction with that of *Plut. Cat. Min.* 21.3, where it is Cato who promises to prosecute those whom he thought to have won their seats by bribery. (Plutarch takes bribery for granted.) The defence nevertheless leaves it unclear whether Sulpicius wanted to take revenge or attempted to win the consular seat by getting Murena sentenced. The *argumentum e silentio* suggests that the prosecution did not necessarily want to see Sulpicius in the consular seat.

7.3 Adherence to Stoicism as Probable Proof

The prosecution team had good reason to believe in winning the case, because Cato seemed to have acted against his own interests in the present trial after supporting Cicero as *tribunus plebis* in 63 to crush the Catilinarian controversy. His seemingly objective view of events could thus enhance the probability of guilt. However, if we accept Cicero's utilitarian argument on why the state needs more than anything Murena's consulship in 62, it would seem as if Cato had turned against his country. However, attacking Cato's moral authority could be a very deceptive strategy, one that even the prosecution could find difficult to neutralise. The emphasis on moral and political authority could make the jury believe that the prosecutor intentionally played his trump card with the appearance of Cato, whereas they themselves did not fully trust in the strength of the charges.¹⁷

It becomes clear from 3 to 6, 54, and 60–73, that Cato included substantial charges in his prosecution speech. He accused Cicero of inconsistency for supporting an allegedly dishonest candidate after passing a law against bribery. He brought forward scenes from Murena's public campaign, which were acknowledged by the defence. It could be argued that these bordered on illegitimate forms of canvassing, or rather, campaign strategies, which were susceptible to allegations of bribery. Cicero is also accused of having acted unfairly when he introduced the *lex Tullia*, and now defends someone against his own law. The content of the accusations concerning the Republic is not entirely clear. We can only presume that Cato warned Cicero not to act solely on his own impulse, as inconsistent actions could create dangerous precedents in governing the Republic. It seems therefore that Cato undertook a major part of the prosecution, and planned by no means to rely simply on his reputation as the 'champion of justice'. The great challenge before Cicero was not how to neutralise Cato's moral authority, but how to question the objectivity and disinterestedness, with which the former quaestor was known to have conducted his cases.¹⁸

Assuming the role of the pragmatic defence advocate, Cicero turns with a surprising move against Cato's Stoic views, and concludes that without the influence of rigid philosophical principles, he would not have undertaken the task of the prosecution.¹⁹ The conclusion sounds plausible, yet it suffers from a major flaw. It presupposes that Cato's decision to prosecute Murena was motivated solely by Stoic moral precepts and the charge of bribery was born out of moral censure, rather than any proper criminal findings. The probability of Cato's charges thus had to be decided ultimately in a legal context on the validity of such Stoic maxims as (62)

¹⁷ Cf. 59 *Nolo accusator in iudicium potentiam adferat, non vim maiorem aliquam, non auctoritatem excellentem, non nimiam gratiam*. That statement sounds all the more absurd, as Cicero allows himself to deploy the full force of his consular authority. Cato could have argued for Cicero's inconsistency in this respect, as well.

¹⁸ Cf. Plut. *Cat. min.* 19.4–5.

¹⁹ Cf. 63 *Non accusares nullis adductus inimiciis....*

*nefarium est facinus ignoscere, omnia peccata sunt paria, or, perhaps the most extreme of all, sapiens nihil opinatur.*²⁰

By adhering to Stoic morality, Cato could have been accused of losing his sense of independence, which gave him credit before the trial. Cato's accusations were based on Stoic standards of morality, which would stand only if the jurors accepted those Stoic tenets. Yet the jurors with common sense cannot believe that any traditionally Roman form of canvassing can be evaluated in a Roman court by the standards of Stoic ethics, therefore they can disregard Cato's judgement as an objective prosecutor. Consequently, it seems likely rather that those activities of Murena, which Cato judged to be crimes, in fact conform to Roman political standards. The defendant in turn has to be cleared of the wrongdoing he was accused of by Cato. As opposed to the traditional *ad hominem* argument, which is a direct attack on someone's personal qualities or actions being inconsistent with their views, the argument used against Cato attacks the plausibility of his claims by weakening the validity of his convictions, that is, by casting doubt on his standards of judgement.

In an attempt to reveal the weakness of Cato's argument, Cicero tries to take the force out of the bribery-legislation that arose during the consular campaign in 63. He claims that the *senatus consultum* was unnecessary, as the *lex Calpurnia* offered enough protection against the illegal forms of campaigning. Moreover, the intention of the law remained unclear, as neither its beneficiaries nor the suspected culprits were sufficiently defined. If the law, to which the accusers referred, itself looked imprecise and unsound, then the likelihood that Murena's activities fall under the *senatus consultum* greatly decreased. In addition, if Cato refers constantly to the SC and not the *lex Calpurnia*, it means that the better and long-standing bribery law cannot really be valid against the defendant.

Yet Cicero may still want to distort Cato's argument to make it look like a forced application of not entirely relevant legislation. Cato could have said that the law forbade the existing practice, because it was used constantly to give opportunity to distribute bribery money. It was therefore not necessary to document how the money reached the voters. Such practices as meeting the candidate en masse, following him, offering places in the gladiatorial games or distributing dinner, must be regarded criminal *in themselves*. That is why Murena could be sentenced, even if no direct incriminating evidence was produced. Cicero had to fight against this interpretation of the law, that is why he demands proof of the bribery money and defends the voting practices as acclaimed by the *maiorum instituta*.

The refutation of individual accusations is cut short abruptly. In each case Cicero admits that the disputed event took place, but confirms that nothing was done contrary to the existing practice. Without any proof of bribery, Cicero could say that the

²⁰Despite his claim in 61 *audacius paulo de studiis humanitatis quae et mihi et vobis nota et iucunda sunt disputabo*, Cicero presents a rather vulgar summary of Stoic ethical principles, which deliberately sound harsh and paradoxical. The orator must have known well that these maxims were professed mostly by philosophers of the early Stoa, and were not completely shared by such contemporary thinkers, such as Panaitios or Poseidonios. Moreover, Cicero himself shared a number of Stoic beliefs.

whole accusation amounts to nothing else than a fastidious and highly idealistic reproach of ancient and well-established electoral practices. Cicero suggests in 74 and 78²¹ that Cato initiated the trial ultimately to guard the integrity of Roman voting system. That assumption could be verified before the jury by Cato's renown as the most honest of Roman politicians. Although Cicero does not draw the conclusion explicitly, the jurors may still infer it for themselves.

If the importance of the trial for Cato lies in the defence of voting fairness, and he wants to make an example of the corrupt politician whatever the truth is, then one could also see the case as a paradigm of bribery trials and not as an individual problem argued for its own sake. This being the case, the defence can argue in turn that the Republic has far more important interests in the present crisis than creating a deterrent against voting practices involving bribery. The weighing of competing interests could thus induce the jury to favour Murena's consulship over his punishment.²²

²¹ 74 *At enim agit mecum austere et stoice Cato, negat verum esse adlici benivolentiam cibo, negat iudicium hominum in magistratibus mandandis corrumpi voluptatibus oportere*; 78. *At enim te ad accusandum res publica adduxit.*

²² The argument in 78–85 does not presuppose that there is another opportunity of supplying the missing consul unless the jury acquits Murena.

Chapter 8

Pro Sex. Roscio Amerino

8.1 The ‘Facts’ of the Case

One of Cicero’s earliest defence speeches, the *oratio pro Sex. Rosc. Amerino*, deals with a parricide case in a dangerous and uncertain political situation during the dictatorship of Lucius Cornelius Sulla in 80 BC. Cicero defended his young client, Roscius from the provincial town of Ameria against the charge of parricide. The prosecutor was Erucius who was not related to the Roscius family. In his speech Cicero insinuates strongly that the trial was staged by a powerful freedman and favourite of Sulla called Chrysogonus, who used two of Sextus Roscius’ relatives, Magnus and Capito to get rid of the murdered man’s sole heir and get hold of his vast estates. Although the odds were firmly against him, Cicero won the trial and young Roscius was acquitted.

The legal case is based almost entirely on circumstantial evidence and probabilistic reasoning, as none of the parties had decisive direct evidence that the defendant did not kill his father. The speech demonstrates how the combined use of three heuristics, the ‘initial adjustment’, the ‘representativeness’ and the ‘simplification’ helps Cicero avoid potentially damaging evidence (e.g. the relationship between father and son) and establish a seemingly firm conclusion in a highly intricate forensic case. I have already explained in Chap. 2¹ how the application of the ‘initial adjustment’ heuristic in 5–14 allowed Cicero to place his key evidence (as yet unproven) about the illegal purchase of Roscius senior’s estates at the beginning of the speech and to make the rest of his argument depend on the probability of that proposition.

Strongly related to the ‘initial adjustment’ heuristic is the ‘simplification heuristic’, which comprises a set of several shorter and longer arguments throughout the speech, directed at the careless prosecutor Erucius, Chrysogonus, the mastermind behind the case and his two associates Magnus and Capito. The purpose of this heuristic is to show that the actions of the prosecutors offer a clear explanation of the legal

¹ See Chap. 2.4 pp. 30–31.

procedure. This simplified reasoning about a complex set of probabilities on both sides was intended to demonstrate that the likelihood of a staged trial was stronger than the likelihood of the defendant's guilt. Finally, the 'representativeness' *heureme* supports the conclusion to be drawn from the 'simplification' *heureme* in that it shows through many stages that it is very unlikely that a simple and honest young farmer, the embodiment of Roman virtues, would ever have been capable of carrying out the crime he is accused of. We will see that the three *heuremes* connect with each other seamlessly and use several types of rhetorical arguments, *probabile e vita* or *digressiones* to strengthen the likelihood of the conclusion.

The speech has been analysed by many scholars in an attempt to demonstrate the weaknesses and evasions of Cicero's arguments,² and to reconstruct the legal and political background of the case. It is usually agreed that the structure of the oration, due to the fact of its being one of the earliest in the Ciceronian corpus, conforms almost perfectly to handbook rules on the *partes orationis*, as well as on the various *argumenta probabilia*.³ However, we will see that a simple description of the speech with classical rhetorical termini will not reveal the complex probabilistic reasoning behind the relatively clear and orderly arrangement of certain sections. One purpose of the present analysis is to show that, although Cicero applies traditional rhetorical techniques mentioned in the handbooks, he manipulates these apparently regular forms as dictated by the necessities of the case. The other purpose is to show, that, despite its seemingly regular structure, the speech presents a complex probabilistic strategy, which is the result of an independent and masterly use of rhetorical techniques and experience.

The explicit argument of Roscius' defence can be summarised briefly without following the *dispositio* of the speech. The defendant is a simple, honest farmer from a well-established municipal aristocratic family, who had managed his father's estates all his life, not taking part in Roscius senior's metropolitan social life. Contrary to the prosecution's charges, he had a good relationship with his father and was happy to work on the farm, which he did diligently, according to his father's wish (47–49). Life in the countryside nurtures the virtues inherent in hard-working people, most importantly the sense of duty, love of family, honesty and modesty. The young Roscius has all these virtues in him, his father had no intention of excluding his son from the inheritance. Moreover, the natural affection between father and son makes such a strong bond, that it takes a human monster to destroy it. If the young Roscius was so content with living in the country, where people still live their life in its ancient and authentic environment, it is highly unlikely that such a grossly unnatural thing would ever happen. It is clear that this line of defence depends heavily on the assumption that the young Roscius represents the simple virtues of Roman farmers. Cicero develops this argument with the 'representativeness' *heureme*.

²The most important studies *commemoratione digna* on the speech are: Berry (2004, pp. 80–87), Gruen (1968, pp. 265–271), Heinze (1960, pp. 87–140), Kinsey (1966, pp. 270–271, 1981, pp. 149–150, 1985, pp. 188–196), Landgraf (1914, pp. 59–141), Stroh (1975, pp. 55–79), Alexander (2002, pp. 149–172), Dyck (2003, pp. 235–246).

³For that traditional view see: Solmsen (1938, pp. 542–556).

To strengthen the likelihood of this 'Roscius-the-honest-and-virtuous-farmer-and-exemplary-son' image, he advances several probabilistic arguments that the defendant did not kill his father. First, he had no reason to kill him. Then, even if he had, being such a simple person as he is, he could never have had a chance to mastermind and carry out the plot he is charged with. Moreover, the fact that the young Roscius lost all his possessions to those who now support the prosecution renders it improbable that he planned a murder from which he benefited the least. On the other hand, two members of the Roscius family, who happened to be on bad terms with Roscius senior and learnt first about the murder, became rich after the event. Both played an active role in seizing the property of the deceased Roscius and procuring the condemnation of the defendant. It is therefore more probable that the trial was staged as a result of a conspiracy between Chrysogonus and the two relatives.

The length of the speech shows that Cicero relied on probabilities other than the ones he drew from the case itself and the main characters. A major probabilistic argument is derived from the authority of the supporters. A simple explanation of this argument would point out that it was a straightforward case of the *topos argumentum ex auctoritate* in order to strengthen the position of a relatively unknown orator. However, the problem with such an answer is that it ignores the strategic function of the argument, that is, how it fits into one of the major heuristic strategies outlined above. Most importantly, the appeal to influential politicians at the beginning prepares the initial adjustment *heureme* and thus indirectly contributes to the simplified explanation of the legal case as a conspiracy. The implicit argument runs roughly as follows. Sex. Roscius enjoys the background support of Roman nobles, the friends of his father. Is it likely that *patroni* of such high standing would ever consider offering their moral and political credit to a minor figure who apparently killed his father? The question, to which the answer is an obvious one, cuts deep into the power relationships of the time.⁴

The hesitant start in the *exordium* underlies the difficulty of relying on the *argumentum ex auctoritate*. The basic problem Cicero had to explain was the absence of powerful *patroni* as advocates, the *summi oratores hominesque nobilissimi* (1). This fact could seriously undermine the credibility of the assertions on Roscius senior as *fautor nobilitatis*. After all, Sulla aimed at restoring the political equilibrium, hence the traditional role of the *nobiles*. Therefore the aristocratic supporters need not, in theory, worry about an insignificant murder case. Yet, Cicero maintains that the young Roscius is actively supported by *patroni nobiles*, particularly a certain Messala.⁵

The supporters actually appear at the trial (1), demonstrate with their presence, but are prevented by danger and fear of Sulla or his reckless subordinates (*qui iste*

⁴On the political implications of the trial see Gruen (1968, Chap. 8), Alexander (2002, pp. 169–170), Seager (1982, pp. 10–12), Kinsey (1982, pp. 39–40).

⁵Two people are actually mentioned who actively supported the defendant, Caecilia Metella three times (27, 147, 149), and a certain Messala, whose identity cannot be decided with absolute certainty (see Landgraf 20 ad loc., and Münzer 'Valerius', no. 266, *RE* 28:163., Alexander (2002, p. 157).

terror sit et quae tanta formido).⁶ Roscius and his supporters, however, commissioned Cicero to take up the case, as the person with the minimum risk factor. Although their fear is attributed to the influence of Chrysogonus, described as *adulescens vel potentissimus hoc tempore nostrae civitatis*, it is hardly conceivable that he alone could cause such a threat that they all stepped back from the defence, while only Cicero appears to be ready to sacrifice his career for a minor figure.

Revealing a powerful freedman in the background is a key element of the ‘initial adjustment’ *heureme*. It allows Cicero to turn the jury’s attention to the details of the supposed conspiracy between Chrysogonus and the two Roscii, thus providing a strong premise for a variety of probable arguments that follow, above all the thesis of conspiracy. Listeners could, however, notice the delicate treatment of Chrysogonus behind the criticism. This was important to avoid dire political consequences, and yet to achieve a high degree of certainty that the trial was staged. Cicero does not want to link him with the planning and commissioning of the crime, but attacks him on grounds not directly connected with the parricide. He mentions the illegal sale of Roscius senior’s properties (6, 125–126) and the retention of Roscius senior’s slaves (77–78).

Therefore not only the support of patrons is conditional upon the involvement of Chrysogonus, but his role as a mastermind rests on probable grounds, as well. We could think of the *exordium* of the *Pro Milone*, where Cicero tries to secure the support of the jury in the face of the hostile presence of Pompeius. In that speech, as here, the *praeiudicia* were not all favourable to the defendant, and the speaker had to address this question to eliminate inherent fears of supporting a possible murderer in a politically cold climate. The improbability of the murder charge stands in reverse proportion to the probability of support from the *patroni*, so the hesitation at the beginning might be due to the uncertainty whether the aristocratic members identify themselves as one with the defendant.

The first major argumentative section spans from 37 to 82. The so-called *refutatio accusationis* is dedicated to proving the innocence of young Roscius, or more correctly, the improbability that he actually committed the crime. In this section Cicero uses the ‘representativeness’ *heureme* to enhance the positive proof of Roscius’ innocence, making his persona synonymous with the *par excellence* virtuous farmer and model son. To clear the young Roscius of the murder charges, Cicero concentrates on two important assertions of Erucius, which provided the jury with a motive for the crime: the father did not like the son and he wanted to disinherit him. (48) *Patri non placebat; nam istum (sc. filium) exheredare volebat*. The argument for the defence turns, in classical terminology, on the *probabile e causa*, with other supportive arguments, the *probabile e vita*.

The most curious feature of the section is the large number of *excursus*, *digressiones*, and *exempla*, which most commentators regard as superfluous and irrelevant

⁶The *iniquitas temporum* seems to be a deliberately vague expression, which cannot simply imply, as Cicero professes in 5–6, that the patrons fear the presence of Chrysogonus. It may cover up more important reservations on behalf of the nobility about defending Roscius personally.

to the task of *persuadere*.⁷ Cicero might have wanted to exhaust the jury, but such a tactic could easily backfire, and could anger or bore the audience. Instead of regarding these parts as superfluous, we should understand the long sequence of stories, anecdotes and appeals as elements of the probabilistic reasoning behind the 'representativeness' *heureme*.

Cicero advances the argument on the probability of Sex. Roscius' innocence in the *refutatio criminis* in 37, which is traditionally labelled as *probabile e vita* and *e causa*. However, for reasons I have already mentioned I try to avoid using the technical terms, as they do not fully describe how the argument works throughout the section. The argument draws its conclusions from a hypothetical inference which is presented in such a way as to cover all possible motives for committing a parricide. We find a neat division between on the one hand the characters of inveterate criminals and on the other avaricious, but not necessarily guilty, citizens.⁸ A simple syllogism builds on two supposed cases. First, usually the well-known murderers are likely to commit such crimes. (But even they might spare their relatives.) The prosecutor admits that the defendant had had no such reputation. As for the vices nurtured by luxury, debt or unrestrained desires, simple farmers like Roscius tend to be free from such temptations, due to their typical, low-profile way of life. Therefore, Roscius is unlikely to have ever conceived such a plan in his life, let alone put it into action.

However, Cicero deliberately left out one motive mentioned by the prosecution, namely, *pater filium exheredare volebat*, the father wanted to disinherit his son. This claim should originally have been included in the second set of premises, together with *luxuries*, *aes alienum*, and *cupiditates*. The reason for separating it may be to suggest that even if the father planned to do so, Roscius, for his part, would have lived on peacefully without looking for a redress. In addition, the shortness of the *probabile e vita* could be due to lack of information about the character of the defendant. Cicero might have also wanted to avoid the association of *ferus incultusque victus* with *rustici mores*, which could undermine the whole *laus vitae rusticae*. Instead, Cicero preferred to disperse the incriminating information among other arguments, where its importance would diminish.⁹

In 40, the orator lays down an important principle of probable argumentation for the case. Considering the improbability of a son killing his father without serious

⁷The *communis opinio* is best exemplified by Stroh (1975, p. 72): 'Hier (sc. 40–73) bewegt sich Cicero frei auf rasch gewonnenem Terrain, und die üppigen Exkurse über *loci communes* – 'Bauerntum hat Rom groß gemacht', 'die Macht des bösen Gewissens' etc. – dienen sicherlich nicht dazu, Schwächen der Beweisführung zu vertuschen, sondern einem Publikum zu schmeicheln, das offenbar noch in dieser Zeit an solcherlei Dingen Freude hatte.' See also Tac. *Dial.* 22.3.

⁸39 'qui homo? adolescentulus corruptus ...vetus videlicet sicarius, homo audax et saepe in caede versatus; luxuries igitur hominem nimirum et aeris alieni magnitudo et indomitae animi cupiditates ad hoc scelus impulerunt.'

⁹Note for example the character defence in 74, which replies to Erucius' *probabile e vita* arguments with the somewhat oversimplified, but lofty and expressive argument: '...in rusticis moribus, in victu arido, in hac horrida incultaque vita istiusmodi maleficia gigni non solere.'

reasons, it should be equally improbable that a father would hate his son without similarly compelling reasons.¹⁰ Following this principle could help Cicero determine which arguments he is willing to consider as relevant and therefore worthy of being answered. To put *odium* as the main possible cause of the murder allows Cicero to play down the importance of the charge, the opposite of which could actually have been very difficult to prove.

The *argumentatio* in 40–51 moves smoothly from the personality of Roscius junior to the central part of the defence, the refutation of the father's alleged banishment of his son (the *relegatio*), as part of the *probabile e causa*.¹¹ Although rhetorical theory would take this argument separate from the *probabile e vita* in 37, it would clearly make better sense to take them together. The 'representativeness' *heureme* which started in 37 with its premises on Roscius as the ideal Roman country aristocrat gains further momentum here. The jury would only believe that Roscius had no reason to kill his father, if they had already accepted the idea that his impeccable character would originally have precluded any attempt to murder his father.

The section starts with the assumption that the causes of an alleged parricide must be obvious for the observer (40). The analysis of parental-filial relationship therefore concentrates on that criterion, weighing the plausibility of the prosecution's claims¹² against what Cicero mentions at 45 as the *rerum natura*, *consuetudo hominum*, and *opinionones omnium*. The terms must deliberately remain vague, so that the specific details of the case, like the father's treatment of his other son, should not contradict them. The refutation of the charge is also supported by the conclusion of the previous character examination, where the son was introduced as a virtuous person. Consequently, Roscius senior must have acted against his reason, reputation (15), and social tradition (44 'certis fundis patre vivo solitum esse') to keep his beloved son in a humiliating position.¹³

Therefore, assuming that Roscius' stewardship of the farms was the sign of parental esteem, the listener can infer that the separation of father and son cannot be in itself the cause of strife. Yet, having a respected position does not rule out the possibility that the young Roscius did resent his father before and after the death of his brother. Cicero again talks from the father's point of view, which certainly correlated with the traditional notion of *auctoritas*, a covert focus on the argument

¹⁰ 40 'nam et illud incredibile est, mortem oblatam esse patri a filio sine plurimis et maximis causis, sic veri simile non est odio fuisse parenti filium sine causis multis et magnis et necessariis.'

¹¹ Landgraf, following Heinze and Lincke, supposes at this point (97 ad loc.) that a possible reason for the deteriorating relationship was the father's and the son's different lifestyle. Again, such a supposition reintroduces the urban/rural dichotomy in a slightly different disguise. However idealistic the opposition sounds, the prosecution might have used it as a powerful weapon. Cf. *Schol. Gron.* 39.

¹² According to Cicero, Erucius claimed the *relegatio* as *novum*, *odio factum*, *supplicii causa* (sc. *factum*).

¹³ Unfortunately, no further details are revealed about the exact status of the son in the farms, e.g. whether he only managed the estates or had also possessions in them. Although Cicero here (44) refers to general practice again, that remark only interprets the charge without effectively disproving it.

shared by the majority of the jury. When Cicero blames Erucius for not understanding reality (*res*), and truth (*veritas*), he appeals to the strength of such values as benevolence and honour, which the jury most probably accepted, even if they were not necessarily supported by the facts of the case.

Here Cicero uses the opportunity to turn the argument back to the prosecutor with the help of a vicious *argumentum ad hominem*.¹⁴ The point he tries to prove here is again part of the 'representativeness heurème'. He refers to the attack in 44 on Erucius' ignorance about the case and the social values that determine it. Yet, we should not take it merely as a personal attack. The appeal to Erucius' ignorance attempts to weaken the argumentative force of his speech, saying ultimately that someone not experienced in the psychology of a typical father-son relationship and with no understanding of Roman values and traditional practices, such as farming, cannot draw firm conclusions from his analysis of the evidence.

An analogical argument based on a story from Statius Caecilius (46–47) and the farming practice in Umbria (48) serves a double purpose as part of 'representativeness' heurème. It stresses, in a condescending tone, the alleged misrepresentation of the younger Roscius by the prosecutor and underlines the strength of the argument on farming as the bedrock of virtues. The argument on the ignorance of Erucius is thus extended further to the fields of literature and local culture, where common sense is manifested the same way as the strength of social traditions in 44.¹⁵ Again, the conclusion drawn here in the form of a quasi-inductive argument is the same as in 42–45.

The dispositional role of the comic example is to build a topical bridge towards the *laus agri culturae* in 50–51 through the antithesis of *vera* and *conficta*. The introduction of examples from Umbria, the *ager Veiens* and personal experience brings out that contrast only to reassure the audience that general opinion and psychological observation prove true in both the real and the literary world. Therefore, the orator, together with the jury, can safely assume that any reasoning based on the virtuous nature of farming and traditional life would achieve a high degree of probability. The prosecution failed to recognize the nature of traditional family relationships, which severely reduced the validity of his charges, and also his personal credibility.

The end of 49 summarizes strikingly the conclusion drawn from the refutation of the *relegatio*. It highlights Erucius' completely distorted view of life in the countryside (49 '*...et quod ea* (sc. *praedia*) *studiose coluit, id erit ei maximae fraudi...*') according to which the more Roscius junior worked on his father's estate, the greater suspicion he created and the more he exposed himself to attacks by Chrysogonus. Cicero describes the defendant not as a person fighting against the loss of fortune,

¹⁴ On the strategy of reversal as general form of argument see Riggsby (1995, pp. 245–256).

¹⁵ The scholiast (ad loc.) understands the argument in a similar way, and as strongly ironical. If Erucius was not so fortunate as to experience parental love, he should at least have had to inform himself about it from other sources, comedy for example. Cicero, however, could not play with irony a lot, as too much literary education was seen as suspicious in Roman courts, and also because he might have been younger than Erucius.

but as one who put up with injustice for the sake of preserving his life (49 ‘quod tametsi miserum et indignum est, feret tamen aequo animo’) which is in line with the young Roscius’ (argumentative) persona as a meek, humble, honest and innocent Roman farmer. Such character delineation is also important to prepare the move away from the murder charge to the counter attack in 83–123.

The question of *relegatio* remains unresolved, as no new evidence is brought to light about the relationship of father and son.¹⁶ Cicero clearly evades referring to particular details of the prosecution charges on the family feud, interpreting them in a general enough way to suit his premises based on common sense. What makes his argument seem more plausible than the charge of Erucius is the constant reference to the strength of natural law, human behaviour and traditional Roman values (which, as a result, become somewhat too idealistic), and how much the life and actions of the young Roscius correspond to the ‘normal’, what is accepted by the Roman audience.

Surely, the Roman jury would have accepted that farming is an occupation that nurtures virtues in general, and that such an observation was proven right by many Roman statesmen.¹⁷ But how does Cicero get to the conclusion that a farmer who worked on his father’s estates is less likely to commit a murder, because some others before him emerged from the same place to become heroes in Roman history? Truly, the jury could understand that the comparison was intended to highlight the importance of farming and the beneficial influence of hard work on one’s character, and thereby to oppose the presumably derisory remarks on the defendant made by Erucius. However, such incongruent arguments help to blur the line between real issues and irrelevant ones.

50–51 serves as the closing paragraph for the long argument on the relegation. It seems fair to say that Cicero could not prove entirely that the murdered man did not in fact banish his son to the countryside and that the young Roscius did not in fact feel resentment against his father. The auxiliary point he tried to prove throughout is that the public regards farming as a highly acclaimed profession, so everyone working as a farmer must feel privileged to do so. Cicero might have assumed that extolling farming would decrease the likelihood that the relationship between father and son split as a result of the latter’s maltreatment.

The arguments in support of farming (not of the relationship!) came from alleged contemporary practice (43–44, 47–48), literature (46–47), and history. The purpose of Cicero’s strategy here was to make the jury believe in the ideal values of farming, so that they could not doubt that the son felt grateful towards his father and had no grounds whatever to hate him, let alone to kill him. The place of probability in the

¹⁶The only thing we know from Cicero about the relationship is what we read earlier in 18 ‘...cum hic filius assiduus in praediis esset, cumque se voluntate patris rei familiari vitaeque rusticae dedisset...’ But we cannot be sure whether the *voluntas patris* refers to an existing practice of the son or whether Sex. Roscius the elder sent his son out to the farm. What remains important is that the narrative tells hardly anything about the activities of the young Roscius, which fact itself remains suspicious.

¹⁷Other names that could have been mentioned by Cicero are L. Quincius Cincinnatus, M. Curius Dentatus, and C. Fabricius. See Landgraf (1914, pp. 114–115).

'representativeness' *heureme* is clear. The better Cicero can argue the idealistic thesis on farming and that the case of Roscius offers an example of righteous and honourable Roman farmers, the more likely he could make it seem, no matter how fallacious it is, that the defendant is innocent.

The complete analysis of disinheritance returns to the same (unstated) conclusion that Cicero arrived at in 51. The accuser possesses no substantial evidence to prove that the young Roscius had any reasons to commit the parricide. Not only that, but his arguments lack any coherence and validity, so they are unable to lead to a conclusive end to any kind of investigation. Furthermore, the prosecutor had no personal involvement (family, or patron-client relationship) in the affair, which suggests that he acted upon motives other than the obligation to find the perpetrators of an atrocious crime.

The refutation of the opponent's argument thus led Cicero to another conclusion, (besides the innocence of the defendant) on the intentions of the opponent himself. The constant criticism of the opposing argument is directed not only against the charges, but against the credibility of the person who advances them. This attack on the carelessness and inconsistency of the prosecutor fits well into Cicero's strategic plan and it marks a steady transition between the 'representativeness' *heureme* and the major part of the 'simplification *heureme*'. On the one hand, Erucius' actions and inconsistent arguments point to the fact that the trial was indeed put together hastily by those who wished to get rid of the young Roscius. This lends support to the 'simplification *heureme*'. On the other hand Erucius' ignorance about Roman values and traditional forms of social life, such as farming, underline the truth of the young Roscius' persona created by the 'representativeness' *heureme*.

The sections 55–73 lead up to the conclusion on the innocence of Roscius junior. Cicero advances a string of supporting arguments to add to the criticism of the prosecution's charges. The following four sections present an array of highly charged emotional arguments against Erucius and in favour of the defendant. The forthcoming digressions will show how the conduct of the prosecution decreases the probability of the accusation. They also amplify the magnitude of the parricide charges, providing additional proof for the 'representativeness' *heureme* based on traditional virtues of Roman farmers. Furthermore, by depicting parricide as a monstrosity, Cicero reinforces the high standards of proof that are required to establish such a charge.¹⁸ The prosecution fails to prove its case, because it does not realise these standards, at least according to Cicero. Erucius did not address properly the motive of the murder, which could have been clearly recognised in the defendant's character.

The short digression on Erucius' performance in 59–61 might seem a vivid and entertaining portrayal of a careless prosecutor to arouse the ill-will of the judges, but it contributes to the defence with major explicit and implicit arguments. The narrative technique of the passage combines *oratio obliqua* with asyndetic style that

¹⁸ 68 'haec magnitudo maleficii facit ut, nisi paene manifestum parricidium proferatur, credibile non sit...'

intensifies the image and thereby adds plausibility to the underlying argument¹⁹ to expose the ostentatious nonchalance of the opposition. Cicero continues with a circumstantial argument on the core proof revealed in 6 and briefly taken up in the previous passage. In 58, he presented the expectations of Erucius in hypothetical form and in *oratio recta*. Now, he expands and proves the *falsa opinio* in a blend of ethical and logical arguments. The initial nonchalant behaviour and the subsequent annoyance (*pepugisset*, cf. 6) uncovers the belief that he came to the court to see a criminal act taking place, not a judgement...*huc ea spe venisse quod putares hic latrocinium, non iudicium futurum*.

The standard features of a parricide are reiterated after 39 with an additional move towards the proof of insanity. It should again be noted that the argument can best be interpreted within the framework of the ‘representativeness heurme’. It implies that the question the jury should ask is whether it was likely that such an honest and virtuous character as Roscius would ever be capable of carrying out such a monstrous crime. Words describing the mental state of the parricide play an important role in the last two digressions. Cicero sets these terms as universally accepted criteria by which one can measure the parricide cases like that of the young Roscius. The words *maleficia*, *vita perditissima*, *singularis audacia*, *summus furor*, *amentia* describe an utterly corrupt and incorrigible criminal driven by irrational fury to destroy, an unnatural behaviour that is best called *portentum atque monstrum*, a portent and monstrosity. The argument establishes a sharp contrast between these qualities and the ideal features of Roscius’ persona to bring out the improbability of the charges.

After talking about the inhuman qualities of a supposed parricide, to establish the final criteria, the prosecution is required to present the 62 *expressa sceleris vestigia*, *ubi, qua ratione, per quos, quo tempore maleficio sit admissum* in order to prove with certainty the likelihood of the crime. Thus the orator adopts a much more stringent standard of proof for the parricide charge, in proportion to the seriousness of the crime. The prosecution should prove the motive of the murder from explicit character traits, like *audacia*, *temeritas* or *insania* and present a detailed examination of the supposed act which has to be in line with the character of the criminal. Only such an argument can be acceptable for the jury. Now the implied conclusion is that he failed to demonstrate any of these criteria, so his argument cannot be accepted as proof of young Roscius’ guilt. In this way the final part of the refutation of Erucius fits the strategic sequence of the ‘initial adjustment’ heurme (based on the *cui bono* argument), the ‘representativeness’ heurme (‘the virtuous Roman farmer and obedient son’) and the ‘simplification heurme’. The weakness of Erucius’ performance increases the likelihood that he stood to benefit from young Roscius’ conviction as part of a conspiracy to destroy the last heir to the Roscius estates. This conclusion leads up to the last part of the speech (the so-called *anticategorica*) which focuses entirely on the conspiracy thesis with an elaborate version of the ‘simplification’ heuristic.

¹⁹ We might ask here whether the oral version of that passage had the same impact on the listeners as the written one, which could have seemed too copious in front of a jury that had already heard and seen Erucius.

8.2 The Counter-Attack on the Prosecution

Having claimed in 82 that Erucius' accusation is manifestly baseless,²⁰ the defence advocate turns to the last major section of the speech. This part comprises an attack against the two relatives of the defendant, Sex. Roscius Magnus and Capito, and the alleged mastermind of the trial, Chrysogonus. One may believe at first reading, or hearing, that we have here an adventurous frontal attack against the possible culprits in staging the trial. It would however be more reasonable to view the entire section as part of the whole sequence of probabilistic argument in support of Sex. Roscius's innocence rather than as an independent unit to divert the attention of the jury away from the real issue.²¹ The more likely the involvement of these people in the trial, the more certain the conspiracy thesis and the innocence of young Roscius become.

The justification for 83–142 lies in the need to reveal an alternative and more plausible version of the murder of Sex. Roscius' father. Despite the self-confident assertion about the completion of his refutation in 83 ('iam intelleges, Eruci, certum crimen quam multis suspicionibus coarguatur, tametsi neque omnia dicam et leviter unum quidque tangam.'), Cicero himself has so far failed to bring forward any direct evidence of the guilt of the two Roscii. Instead, he presents a narrative of what Magnus and Capito did after the murder as a circumstantial proof of their involvement,²² strengthened by repetitive allusions to the motive of gain, thereby referring to the conclusion of the 'initial adjustment' *heureme* at the beginning of the speech. The orator leaves it to the audience to draw the conclusion that the relatives should be blamed for the murder, yet he requires that inference *only* as far as it is connected with an accompanying conclusion on the innocence of Roscius junior. Thus he can allow himself to insinuate the conclusion without providing a detailed proof of it.

The first argument concerning T. Roscius Magnus investigates the probability of guilt by hypothetically assessing the motives of Sex. Roscius' relative by the principle of *cui bono*. Two pieces of evidence, which were meant to suggest Magnus' complicity (or his leading role), are his poverty and his disputes with Roscius senior over family property.²³ The whole purpose of 83–123, and indeed of 37–82 becomes clear with the comparison of Roscius junior and Magnus. The crucial sentence in

²⁰ 82 'Eruci criminatio tota ut arbitror dissoluta est.' It does not matter here whether this claim is warranted by the sheer length of the so-called *confirmatio*, or the belief in its logical validity.

²¹ Cicero pretends that he attacked Chrysogonus and the two Roscii only to submit himself to his sense of duty and obligation to protect his client. However, that high-minded claim may conceal the fact that it is argumentative necessity that compelled him not to stop at the refutation of Erucius. If he alluded to some intriguing in 6, he could not have left this line unfinished.

²² It would, of course, have been decisive to reveal his exact sources, especially on Mallius Glauca and Magnus. Without that, we can suppose that these were not so creditable as to introduce them personally.

²³ We call the two claims proof, yet Cicero does not in any place indicate their exact nature or seem to be willing to support them with evidence. As it is, we can hardly say that such a crucial piece of information can be held valid. The question is whether the Roman jury had the same view, as well.

88²⁴ summarises the ‘facts’ found out about both persons, a mixture of *vaticinationes ex post facto*, irrelevant circumstances and character traits to show that *if* a murderer should be found, one can find likelier suspects than the defendant. All this, of course, is presented without declaring who the murderer could have been in reality.²⁵

The positive proof for a likelier suspect, and not necessarily for the guilt of Magnus, is offered through the survey of circumstances of the murder and the events after it in 92–102. The orator presses ahead with the comparison of probabilities started in 88. Cleverly, he provides information not yet mentioned, which makes it unclear whether he investigates anew the circumstances of the murder or simply deliberates on the chances of the two possible perpetrators.²⁶ What we learn is that Magnus appeared frequently in Rome and had connections with criminals. That may, of course, suggest that Magnus could have a share in it, but only if Cicero adduces other, more precise evidence about how the murder took place. Instead, we hear facts only about the aftermath of the murder, the report of Mallius Glaucia and the role of Capito in the delegation of Amerians to Sulla.²⁷

The potentially most serious proof of fraud or crime was put at the end of the argument against Magnus and Capito, the refusal to hear the slaves who accompanied the elder Sex. Roscius.²⁸ That piece of evidence might indeed give rise to suspicion, mostly because Cicero wants the jury to have this impression. The sequence of argument over the proof in 119–123 suggests that Magnus is responsible for the refusal (119 *Tu semper, T. Rosci, recusasti*), yet we learn a little later in 122 that it is Chrysogonus who decides over the issue. The reason for this seeming inconsistency can be explained by the function of the section. First, the refusal to hear the slaves could be used as the weightiest indirect evidence for the complicity of Magnus in the murder. Therefore, a link, however weak it may be, has to be established between the slaves who were present at the murder and the person who is accused of it. Second, the argument over Chrysogonus as mastermind can also be introduced most conveniently by showing that it is he who controls the most important evidence and Magnus is his agent.

²⁴ 88 ‘Restat, iudices, ut hoc dubitemus, uter potius Sex. Roscium occiderit, is ad quem morte eius divitiae venerint, an is ad quem mendicitas, is qui antea tenuis fuerit, an is qui postea factus sit egentissimus ... postremo, iudices, id quod ad rem mea sententia maxime pertinet, utrum mimicus potius an filius.’

²⁵ No one should be deceived by 98–99, where Cicero comes closest to suggesting the conspiracy of Magnus and Capito to murder Sex. Roscius senior. It is a hypothetical reconstruction of the murder set in a series of questions, the purpose of which is to stop temporarily the comparison of probabilities between the defendant and Magnus.

²⁶ He carries on with the comparison, but also wants to give the impression of a knowledgeable defence advocate.

²⁷ The role of Capito seems to be even more insignificant in the whole process. All that we can suppose is that he was enticed by Chrysogonus and Magnus to deceive the deputation of Amerians and he got a reward for that. But that has more to do with how the estates were expropriated illegally than with the murder itself.

²⁸ The slaves are said to have been with the elder Sex. Roscius while he was murdered. 120 ‘Cum occiditur Sex. Roscius ibidem fuerunt.’

At the end of 123, the jury can come to various conclusions depending on how far they give assent to Cicero's revelations on Magnus and Capito. In general,²⁹ they could say that we did not learn anything decisive about Magnus having committed the murder, yet the likelihood according to the defence argument points in some way to the complicity of the two Roscii. They might also say that Cicero's argument went only as far as proving that the two relatives learnt about the murder at a very early stage and were clever to exploit the situation to get the estates of the deceased.³⁰ Finally, it remains for them to conclude both that Roscius could not have been the likely murderer *and* that the trial was staged. But to reach this final conclusion they have to see how the two separate conclusions about Roscius can be connected. The answer is Chrysogonus.

The wholesale attack on Chrysogonus completes Cicero's probabilistic strategy to clear his client of any wrongdoing by offering a simple and seemingly very plausible explanation for the murder charges. He describes the freedman of Sulla right at the beginning of 124 as *sub quo nomine tota societas latuit*, the mastermind behind the conspiracy against young Roscius. That is, he does not speak of the murder any more, but deals with the persons whom he charges with conspiring to defraud and put on trial the young Sex. Roscius. The members of the jury are prepared from 83 onwards to ignore the suspicions surrounding the defendant and concentrate wholly on the theory of conspiracy. They may therefore not even notice by now that Cicero is arguing about a completely different proposition, an alternative reconstruction of the murder case. Instead of showing that Roscius junior could not reasonably have been the murderer, or even that Magnus could have been the likelier killer, he argues from the fact that Chrysogonus owns the Roscius estates that it is highly likely that the powerful freedman of Sulla staged the whole trial in order to get rid of a potentially troubling claimant.

The collaboration of the three suspected criminals provides the basic probable proposition that explains the obscurity in both the murder and the trial.³¹ However weak the connection between the three events, and, consequently, however low their likelihood, it provides a more extensive probability, which reaches far beyond the probability of the murder charges. The conspiracy theory, therefore, becomes more credible not on account of its inherent probability, which is just as unlikely as that of the murder charges, but because three separate puzzles can be solved by one

²⁹That is, accepting Cicero's argument at its face value and not going into crucial details of his reasoning, which most probably was the case with the majority of the jurors. Cf. Cicero's admonition in 123 'Quae praeteriri nullo modo poterant, ea leviter, iudices, attigi, quae posita sunt in suspicionibus ... ea vestris ingeniis coniecturaeque committo.'

³⁰The question is whether the likelihood of a conspiracy to get hold of the estates of Sex. Roscius senior would substantiate to a considerable degree the likelihood of a plot to murder him. Cicero gives the *facta post rem* undue weight (*probabile ex consequentiis*), which means that according to him the case is really so.

³¹We may believe Cicero, when he says in 143 that Roscius does not want to reclaim his property. It is, nevertheless, difficult to prove that the inquiry into the legality of the sale in 124–149 was presented to support Roscius' demand for restitution. The question of legality could be connected with the argument on the staged prosecution.

solution, which people would believe on the grounds of economy. This is the argument of the ‘simplification’ *heureme*.

To summarise Cicero’s speech, one can say that a deliberately complicated reasoning has been put forward by the defence, not only to overcome the seemingly strong probability of the prosecution’s propositions, but also to advance his own alternative account while concealing the lack of hard evidence on the defence’s side. It is not enough to say that the masterstroke of Cicero’s strategy consisted in the revelation of Chrysogonus’ illegal purchase, which I viewed as a form of the ‘initial adjustment’ *heureme*. A substantial part of the subsequent argument focused on the probability that the young Roscius embodied traditional Roman virtues and so was highly unlikely to have killed his father. That argument lacked hard evidence to prove its conclusion, which is why Cicero relied so much on romantic ideas about Roman farming and traditional social values, such as obedience to the *pater familias*. It utilised a strategy based on what we described as a variety of the ‘representativeness’ *heureme*. The numerous digressions appear essential in destroying the prosecution’s charges built on weak, but deep-seated, popular beliefs about father-son conflicts. In the latter part of the argument the orator makes a close analysis of the immediate circumstances of the murder in an attempt to shift responsibility onto three people thought to be associated with the prosecution.

Chapter 9

Pro Milone

9.1 The Question ‘*quis quidque fecerit?*’

Any attempt to bring to light the argumentative strategy of the *Pro Milone* has to take into account the chaotic political, judicial and procedural circumstances of the trial. The legal issue appeared uncomplicated. The defendant T. Annius Milo was accused of killing Publius Clodius Pulcher on the Via Appia at Bovillae on the 18th of January 52 BC. Cicero’s task was to prove either that Milo had not killed Clodius, or if he had, that it had been in legal self-defence. Following the death of Clodius political riots by his supporters broke out, so the trial had to be held under very tight security measures by the soldiers of Pompey to maintain public order. Asconius, the late Roman commentator of the speech, suggests that Pompey’s presence signified his expectation that Milo had to be condemned. On the last day of the trial, after a host of very damning witness testimonies against Milo, Cicero presented his speech.

The situation outlined above indicates clearly that it was almost impossible to prepare for the occasion in the regular way advised by handbooks. Both sides had to build strongly upon the contingencies that accumulated up to the last day of the trial. Cicero’s defence strategy had to reckon with a number of fluctuating probabilities arising from the murder itself, the violent upheaval afterwards, the power game behind the scenes and the events on the day of the trial. Cicero was almost paralysed by these pressures and delivered a very weak performance and in the end Milo was convicted. The speech we read today is not the original one, but an ideal version of what could have been said on the day to achieve Milo’s acquittal.¹ This information is important because we can see what kind of strategy Cicero devised on reflection,

¹Asc. 42. ‘scripsit ... ita perfecte, ut iure prima haberi possit’. The problems relating to the delivered speech and the one we read today (an *Ausarbeitung* as Neumeister says) are too complicated and must be left unresolved, as we simply do not know either what Cicero said or what he wanted to say, had he not been paralysed by the inimical atmosphere of the Forum, as Plutarch says. The expression *ita perfecte ut ...* can be interpreted in different ways, but it seems that *perfecte* refers not to the perfection with which Cicero adheres to the rules, but to the likeness of the present speech to a hypothetical original one which the orator could have spoken.

which would have best responded to the overwhelming strength of damning evidence against Milo and the uncertainties of the case.

The present analysis will focus on two key elements of the defence strategy. In the so-called *praeiudicia* in 7–23, Cicero uses a form of the ‘initial adjustment’ *heureme* to establish pre-emptively a general framework for judging Clodius’ killing as a legal self-defence in case the jury believed that Milo shared some responsibility for his death. The second part of the analysis will focus on Cicero’s strategy called the ‘contrastive probabilities’ *heureme* which is based on a detailed yet heavily biased and manipulated examination of the fatal event from the viewpoint of the alleged facts and the probabilities which can be drawn from the actions of the two men.

To understand the complex set of probabilities of the case and the difficulties Cicero faced in his defence, it is necessary to outline different reconstructions of what actually happened on the Via Appia on the 18th of January 52 BC. In the case of the *Pro Milone* we are lucky enough to be able to reconstruct three different versions of the story, those of the prosecution, of Cicero, and of the late disinterested commentator, Asconius, who could read the prosecution and the defence speeches, had copies of the testimonies, consulted the *Acta diurna* and historians like Livy and Fenestella. For our purposes the most important assumption of that later Roman scholar is that on the day of the murder none of the enemies expected to see each other outside Rome, and the retinues of Clodius and Milo met accidentally on the Via Appia.² The two enemies passed each other and restrained themselves from insulting each other.³ The fatal strife was caused by the provocation of Milo’s slaves, Eudamus and Birria, who lagged behind the main group.⁴

In what followed, both parties could easily proclaim that they acted in self-defence, as such opposing claims do not contradict the fact that neither Clodius, nor Milo was personally responsible for the outbreak of the dispute. We may also believe Asconius that after putting Clodius’ escort to flight, Milo ordered his slaves to drive out the wounded Clodius from the roadside inn and kill him. However, the value of Asconius’ report can at this crucial point be questioned because of the fact that he ascribes thoughts to Milo, which can at best be regarded as conjecture.

²Asc. 31. *Occurrit ei* (sc. Miloni) *circa horam nonam Clodius paulo ultra Bovillas...* Someone could however object that Asconius deliberately used the neutral verb *occurrit* to avoid giving his judgement in a question which he himself could not decide. To defend Asconius, we may answer that he possessed such detailed information on other aspects of the murder (the place, the time, the participants, and other witnesses) that we can trust him in his verdict.

³Appian in *B.C.* 2. 21. says that ‘they merely exchanged hostile scowls and passed along’, but his account contains several mistakes concerning the time, so we had better remain cautious towards him.

⁴Cf. Asc. 42. *...nam forte illa rixa commissa fuerat...* cf. also Quint. *Inst. Or.* 6.5.10. If we accept this assertion as being true, it shows that Milo was at least indirectly responsible for the outbreak of the clash. He should have warned his slaves to avoid any direct provocation, had he been so considerate as Cicero makes out in 38–41. For Cicero’s version see *Mil.* 29, and the *Scholia Bobiensia* ad loc. To judge the probability of an event, it is usually held to be important to see the amount of details each version provides. But how do we judge their quality?

Asconius says that Milo thought it would be a great relief for him if he killed his enemy (Asc. 33 ...*occiso autem magnum solacium esset habiturus...*). The problem with this view is that it focuses on the personal preferences of Milo, whereas it disregards the political implications of such a decision, a point which Cicero makes every effort to emphasize in 34 and 42–43. We could thus safely assume from Asconius that the encounter could have happened by chance and in the course of the fight Milo simply could not restrain himself from revenging the past wrongs inflicted on him by Clodius.

It seems that both prosecution and defence alleged that the other party had set the trap. Interestingly, none of them maintained that the roadside quarrel broke out incidentally and it developed to be a bloody fight only after one of the slaves wounded Clodius on his shoulder. In the case of the defence, we know that Milo and M. Caelius claimed well before the trial took place that Milo’s entourage was waylaid by Clodius’ band.⁵ On the other side, the prosecution could lean on testimonies which described in horrific details the outcome of the fight, the cruelty of which could in itself suggest an intentional act on behalf of the defendant. The question set before the trial therefore was *uter utri insidias fecerit*, a *constitutio coniecturalis*.

The case looks nevertheless far more complex. If we accept Asconius’ report as true, then both prosecution and defence have most likely stated the ‘wrong’ point at issue. The presumption behind both strategies was that one of them must have intentionally laid a trap to kill the other. According to rhetorical theory, the question of an unbiased *causa coniecturalis* would have been simply *quis quidque fecerit*. From Cicero’s defence we can assume that the trial was directed from the beginning to inquire not simply about how Clodius was killed, but about who laid the trap for whom. In an objective investigation of fact there could have been theoretically four different results of the inquiry. Milo laid a trap for Clodius, Clodius laid a trap for Milo, none of them laid a trap, and both laid a trap. It seems that both sides believed that an argument could have been effective only in the first two cases, so they must not in any case consider the last two options. Moreover, as the facts had become known on the hearing of the evidence, the prosecution gained advantages in at least two of the four possible cases.

Assuming the tacit general belief of Milo’s guilt, the greatest problem that the defence faced – once they could prove that his enemy trapped Milo – was offering a proper reason why it was necessary for him to kill Clodius while defending himself. In other words, why he could not remain content with fighting off his attackers. The event around the roadside inn suggests that at some point Milo gave an explicit command to kill the helpless Clodius and therefore bore direct responsibility for killing his enemy.⁶ The prosecution did not need to prove that Clodius was trapped. It was enough for them to show that Clodius was not directly

⁵ Cf. Asc. 34 *Dicebant uterque* (sc. M. Caelius et Milo) *Miloni a Clodi factas esse insidias*. The event is the contio Caeli, which happened a few days after the 19th of January, when the Curia was burned down.

⁶ See Sch. Bob. *Argumentum: quem* (sc. Clodium) *secuti non sua sponte ... sed iussu domini ... servi Milonis interemerint*. Although the details are narrated in a different way, both later historians,

responsible for the outbreak of the fight and Milo pursued and ordered the murder of his wounded victim.

As the question of who laid the trap could have been ignored in the verdict (viz. the jurors could sentence Milo *de vi* while reaching a different conclusion about who trapped whom), the prosecution got the upper hand in proving the guilt of Milo. Cicero on the other hand could reach an acquittal only if he proved with more or less certainty that Clodius was the aggressor and then showed that it was necessary to kill the attacker. It seems then that the probabilities weighed heavier against the defendant. Cicero, however, had to take the risk of defending his client not only against the charge of intentional killing, but also of turning the probabilities the other way round and make Clodius the victim of his own plot.

9.2 The Principal Probabilities

In the *Pro Milone* we find three major sections where Cicero is wrangling with the probabilities for and against his client. These sections make up the core of his strategy. The first section is found in 7–23 and is usually labelled as an answer to the *praeiudicia* or the views and opinions of the jury developed before to the trial, which could disadvantage Milo.⁷ In the second section in 24–29 Cicero tries to reconstruct the clash as he thinks it happened and to establish the likelihood that Milo was not responsible for killing his enemy when Clodius ambushed him. The third section in 32–56 deals with probabilistic arguments drawn from the life and actions of Milo and Clodius which support the conclusion reached in the *narratio*, that due to the fact that Clodius was responsible for the attack, Milo had done nothing wrong in killing him in defence.

The purpose of the so-called *praeiudicia* in 7–23 is to answer three arguments of the prosecution, which the accusers kept repeating in informal meetings and in the trial itself with a view to influencing the future members of the jury in favour of a verdict of guilt. These arguments were the following: First, everyone who admitted killing somebody should be punished for his deed. Second, the senate decreed that the killing of Clodius and the disturbances afterwards were acts *contra rem publicam*, against the interests of the state. Third, they alleged that the Pompey's proposals to hold an inquiry about the murder were directed personally against Milo. The three claims in this form do not seem relevant from a legal point of view. However,

Appian (*B. C.* 2. 21.) and Dio Cassius 40.48 agree that Milo gave the deadly command, which may be true, but we cannot, of course, be certain that their evidence is reliable.

⁷ Cf. Quint. *Inst. Or.* 6. 5. 9–10. *Quid pro Milone? quod non ante narravit quam praeiudiciis omnibus reum liberaret?* Comparing this remark with 5.2.1 from the same work, it appears somewhat puzzling what Quintilian (and, following him, Clark in LI), means by *praeiudicia*. Cf. also Lausberg, (1990, §353) or Martin (1974, p. 98). If Cicero is right in his argument, we cannot in the strict sense talk about the prosecution's claims as something decided or confirmed by a legal authority before the Milo trial. Neumeister (1964, p. 89) was therefore right when he did not regard the section as something prescribed by contemporary rhetorical theory.

the special political and legal circumstances of the procedure made it necessary for Cicero to consider these claims as statements influencing heavily the probability of a decision of guilt, even if they say little about the probability of the act of intentional killing.

Cleverly, Cicero says that these arguments are not directly connected to the trial (*non sunt propria quaestionis*), but had to be dealt with before he goes on to treat the genuine questions. With this remark he separates a set of the prosecution's arguments, which he claims to be incompatible with the present trial, yet all the more important for the clarification of the issue.⁸ The proper name for the preliminary propositions according to Cicero is *error*, which can be translated as delusion, mistake, misconception or prejudice. As the orator deals with them in the first place, he must have considered them essential to reduce the hostility of the jury towards Milo. However, as the arguments advanced against Milo are labelled as *error*, the jurors could understand that they themselves might have already shared these false propositions. They are therefore implicitly warned to set the *errores* aside in a rational deliberation, *even if* they contain claims relevant for the final decision.

The first *error* and its presentation give several clues (or, one is tempted to say, 'predictions') on how Cicero will conduct his defence in the speech.⁹ Going through a variety of examples of legal self-defence, the orator arrives at the conclusion in 11, that *...insidiatorem interfici iure posse*, one is legally allowed to kill an attacker who lies in wait to ambush his victim. Throughout his first argument, which is an inductive analogic reasoning from *exempla*, Cicero already presupposes what he has to prove in the end, that Clodius laid the trap for Milo. But this is not enough. He distorts the prosecution's statement by ignoring what they most probably mentioned in their argument, that everyone should pay the penalty for killing somebody *illegally*, even in self-defence.

⁸The curious reader might ask Cicero on what grounds he judges that the three propositions do not in any sense belong to *quae veniat in iudicium*, that is the question to be decided. The answer is probably given in the clause (7) *...quae et in senatu ab inimicis saepe iactata sunt et in contione ab improbis....* The propositions should not be considered as part of the argument on Milo, because they appeared in the scandalmongering campaign and were therefore discreditable in an objective inquiry.

⁹Neumeister (1964, p. 87) assumes that in 7–11 Cicero is preparing secretly for his 'unsachliche Argumentation', which he presents only at the end of the speech in full form. That would be a plausible assumption, if his initial propositions were tenable, but they are not. His opinion seems to us gravely mistaken (and widely accepted), so we need to quote him more extensively. He says that 'die Schuld Milos galt also in der öffentlichen Meinung als ziemlich ausgemacht...eine sachliche Verteidigung war deshalb verhältnismäßig aussichtslos; wenn irgendeine Hoffnung bestand, dann lag sie in der unsachlichen, auf die Vorurteile und das Gefühl der Richter berechneten Überredung.' That opinion decreases the value of the logical argument conducted in 32–56 and suggests that only a so-called ethical and pathetical argument could work for the jury in our case. But no one, especially not Cicero, said that a rational defence is hopeless, just because the majority of the populace does not believe in the innocence of the defendant. The best counter-examples could be the speeches *Sex. Rosc.* or *Clu.* Also, the painstakingly elaborate argument in 32–71 speaks against Neumeister's suggestion.

What is even more interesting is that the examples he brings forth suggest that even if the charges against Milo were true, the jury could still acquit Milo on other justifiable grounds. It seems that the facts alone would have made Milo's conviction highly probable. To avoid that outcome Cicero brought other issues into consideration, which could decrease the probability of sentencing his client. He had to accomplish two different things with his argument. First, he had to prove that the charges are improbable (*aut negari solere...esse factum...* sc. Milo did not lay a trap to Clodius and he did not murder his enemy on purpose while fighting off the attack) and, second, to show that one has to consider other factors in judging this case (*...aut recte et iure factum esse...*¹⁰). As we will later see, Cicero does not make great efforts to distinguish between these two (or three) separate issues, but is interested in alternating them, so that the less likely issue (i.e. the question of who did what) gains greater credibility from the issues with stronger probability (i.e. he was right in doing what he did).

The set of recent historical examples in 7–14 surveys events related to murdering enemies of the state, providing justification for Cicero's thesis that it is just to kill the enemy if he is considered a threat to the state. The most notable examples are the killing of Ti. Gracchus and the Catilinarian conspirators. In both cases the legality of the acts was highly contestable¹¹ and one would certainly debate whether it was accepted even by the contemporary Roman public as the right way of getting rid of political enemies. The examples are intended as precedents for justifiable murder, where justification is not self-defence, but expediency. However, even that conclusion is not stated explicitly, because at this point the defence wants to prove only that it *is* possible to acquit Milo, whatever the circumstances of the murder, and the basis for appeal for mercy.

One could ask what purpose these *extra causam* examples and theoretical considerations in 7–11 serve, while they reflect only a relatively small, and subordinate, part of the whole argument. In this short passage, Cicero collects a large variety of examples, ostensibly, to prove that the prosecution was wrong in saying that no one who had killed somebody should have the right to live unpunished; something allowed by the archaic law of revenge. However, by the end of his reasoning, Cicero arrives at another, related conclusion, which will be used later as a central premise for the final conclusion, together with the facts established in the course of the narrative. That conclusion says that everyone has the natural right to defend himself when attacked unjustly. This simple claim will play an important part in the initial strategy, as well as in the conclusion of the speech. Cicero offers a legal defence in favour of Milo to pre-empt objections in case his proof of the facts will not convince

¹⁰The expression *recte et iure* should, in our opinion, not be understood as synonyms, but as two separate concepts. *Iure* can refer to the act of legal self-defence, *recte* to the service Milo rendered to the Republic by killing a public enemy.

¹¹But Cicero never says that the responsibility of the murderers cannot be contested. Even P. Africanus says that 8 '(sc. Ti. Gracchum) *iure caesum videri*'. The *argumentum ex auctoritate* works behind the examples. But one has to assign the same importance to the death of Clodius as to Ti. Gracchus.

the jury. The key feature of this short argument is that it does not presuppose that the facts are proven. Avoiding an argument based on evidence, the orator implicitly suggests that Milo should be acquitted whether or not the facts themselves support him.

The next two *errores* deal with how the prosecution interpreted the motions of the senate and Pompey after the murder of Clodius and the following insurrection. One may be tempted to say that these objections are designed to remove existing prejudices against Milo in the jury. The prosecutors most probably emphasised repeatedly that both the senate and Pompey refused to back the defendant (12 ...*a Milonis inimicis saepissime dicitur*...). An appeal to popular hatred against Milo could enhance the probability of guilt in the mind of the judges more strongly than any witness to the event. Cicero therefore had to counter such incriminations, even if the prosecution's appeal may not necessarily represent the general opinion. The interpretation of the *senatus consultum* about the killing of Clodius thus seemed all the more important, as its wording allowed different conclusions to be drawn.

On the 28th of February the senate decreed that the killing of P. Clodius, the burning of the *curia* and the attack against the house of M. Lepidus were against the interests of the state.¹² According to a further proposal, brought forward by Q. Hortensius, the killing should have been investigated *extra ordinem*. However, this second proposal was prevented from being accepted on the interjection of Q. Fufius, a friend of Clodius. Cicero pretends that the decree was intended simply to put things back in order, without implying any judgement on personal responsibilities. Cicero is right in saying that the *senatus consultum* does not carry much weight in deciding the innocence of the defendant, but may increase the probability of a verdict of guilt, if it is interpreted in the wrong way.

What Cicero aimed at was diminishing completely Milo's role in the SC on the *caedes Clodi*. He could do that all the more freely as the SC was made before any official *quaestiones*, so the senate could not point directly to a verdict of guilty in the case of Milo. Even if some senators (e.g. the *furiosus ille tribunus pl.*, Plancus, Sallustius, or T. Munatius, see Asc. 44) were prone to harsher condemnation, Cicero was still entitled to say in 14 that *crimen iudicio reservavi, rem notavi*, implying an objective decision without any such legal validity that the prosecution may use as proof for his own advantage.

The last and most delicate argument in the three *praeiudicia* attempts to dissolve the possible assumption that Pompey had already decided the fate of Milo with his proposal of special laws *de vi* and *de ambitu*. Cicero again reverts to a delicate technique which takes the substance out of the prosecution's insinuation and so reduces its probability. What one has to see initially is that the second and third *praeiudicia* belong in fact together. The link between them is the refusal of Hortensius' proposal for a *quaestio extraordinaria*, an extraordinary inquiry into the events, which made

¹² For the exact wording of the decree, see Asc. 44. It is important that the decree referred only to particular events, and does not deal with all the rioting that followed the murder of Clodius. Milo's name was also left out from the text, which helped Cicero apply the condemnation to both parties.

it possible for Pompey to bring in his two *rogationes*, proposals.¹³ Cicero could have at least two reasons to suppress the link between Hortensius' and Pompey's proposal. An assumption that Pompey in reality expected Hortensius' plea to be rejected would have made it impossible to claim that it is highly unlikely that Pompey was interested in a verdict of guilt. Moreover, a disjointed treatment of both events made it easier to argue for the likelihood of *independent* support from both the senate and Pompey, an assumption the prosecution most probably wanted to discredit.

The argument to dispel the suspicion about Pompey's ulterior motives required great confidence, as his seclusion before the *interregnum* (Asc. 50.) all but suggested a hostile attitude towards Milo. Cicero cleverly refuses to talk about personal motivation and treats Pompey as an elected judge and head of government, who has the duty to practise self-control and to conduct a fair trial. One way to decrease the suspicion and probability of a partial inquiry is to prove the insignificance of the death of Clodius and the trial of Milo, in comparison with other similar notable cases from Roman history. A number of infamous murder cases are therefore cited, where no special commission was created to inquire about the facts.

The detailed analysis of 7–23 proves that the section, far from being a collection of irrelevant legal and political ramblings, is crucial for the understanding of the argumentative strategy. In 7–23 Cicero ostensibly prepares his defence with a pre-emptive argument against several damaging claims made by the prosecution. How far the prosecution could accept these alleged claims we cannot be sure, but Cicero most probably changed them – their wording and arrangement – to suit his refutation. He pretends that the claims were irrelevant to his final conclusion and therefore separates his refutation markedly from other parts of the speech. In other words, the defence holds that the so-called *errores* argue about Milo's guilt not from the facts of the murder, but from the *communis opinio*, which means legal tradition (in the first case) and opinion of prominent leaders of Rome (in the second and third).¹⁴

Therefore in 7–23 Cicero makes an attempt to dispel the *praeiudicia*. Through the seeming rectification of the *errores* he wants the jury to balance the probabilities not on their previous, misjudged, concepts, but on reappraisal of the facts. This view may not appear entirely plausible, yet it does explain the very detailed and offensive (and not, as we would expect, purely defensive) argument in that section. The orator could have another reason to start with a long and detailed excursus on a subject not directly relevant to decide a question of fact. With an apparent *extra causam* and

¹³ Cicero avoids the assumption that Pompey had any role in the refusal of Hortensius' proposal. However, it is plausible to think that Pompey encouraged or at least silently approved the *divisio sententiae*. Cf. Clark XXIV–XXV, *Mil.* 67–71. and *Asc.* 50–1. One has to bear in mind that it was Pompey who summoned the senate on the 27th of February and both the rejection of Hortensius and the proposal of Pompey happened on the same day.

¹⁴ One may include the opinion of the masses, which was most probably unbecoming for the orator. What he could do in this case was to identify those who have an adverse popular opinion with the Clodiani (cf. 3 *unum genus est adversum infestumque nobis...*) and reject it out of hand as not worthy of refutation. He can support his rejection with Pompey's choice to the head of the *quaestio*, L. Domitius Ahenobarbus.

unexpected refutation of the *errores* Cicero pretends that in 7–23 he does not have to adhere to the rigorous proof of the 'sachliches Argument' required in 23–60. In this way he could introduce by stealth and maintain the assumption of Milo's innocence by the painstaking legal clarification of the case.

It is thus possible to say that 7–23 pre-empts (and in fact substitutes) the major arguments of the speech. Formally, 7–23 is an *extra causam* refutation of prejudices and misconceptions surrounding the trial. It provides alternative probable arguments not just against the prosecution's misjudgements and criminal charges, but also in favour of the possibility of giving a verdict of innocence, even if the central argument in 23–60 fails to persuade the jury. Throughout the whole argument Cicero takes it for granted that Milo was assaulted, before providing any positive proof of it after the *narratio*. It induces the jury to accept Milo's innocence, regardless of how plausible the forthcoming proof of facts would sound. This technique bears the mark of the 'initial adjustment' *heureme*, where Cicero directs the jury to the notions of legality and expediency as the main criteria to judge the events whilst assuming what he needs to prove. This move allows more manoeuvring space in his argument for an acquittal in case his probabilistic reasoning based on the evidence fails to achieve it.

9.3 A Plausible Version of the 'Attack'

Having set forth the foundations of his defence strategy, Cicero proceeds to the second part of his strategy which is a version of the 'contrastive probabilities' *heureme*. The strategy extends both to the narrative and argumentative sections of the speech. The purpose of the *heureme* is to narrow down the argument on Milo's innocence to the question of which party ambushed the other, (23) *uter utri insidias fecerit*, and to avoid any other probable scenarios which could be damaging for Milo. I have already mentioned that the scope of the inquiry was restricted to the question who set the trap for whom. This restricted choice means that the possibility that the parties met accidentally on the 18th of January is excluded from the start. The reason for this is clear. Cicero stood on weak grounds in defending against the charge of murder, as the witnesses to the event could testify that neither of the parties planned the fight in advance. A scrutiny of the details of the confrontation would have made obvious that Milo was the aggressor. In this case the best Cicero could do was to consider only those two possibilities which allowed a distorted analysis of the ambush, with the conclusion that Milo was innocent.

At the start of the *narration* in 23–26, Cicero relates how Clodius intended to acquire the praetorship in 53 to 'tear the Republic apart', and found that Milo was the only person to have stood in the way of his aspirations. The political wranglings of the year 53 are thus depicted in rather simplistic terms as the final stage before the inevitable clash of the two leading figures, with the result of Rome becoming the battle-ground of fighting street gangs. In a significant, yet vaguely expressed and unproven claim (26 *significavit hoc saepe in senatu...*) Cicero lays great emphasis

on the remark made by Clodius,¹⁵ that he would kill Milo if he prevented him from getting the consulship.

The reader educated in the standards of modern judicial proof would ask immediately why such an irrelevant introduction is needed to the story of the murder. Cicero gives the answer in 32 by referring to the well-known argument on who is interested in a crime. ...*illud Cassianum 'cui bono fuerit' in his personis valeat...*¹⁶ This statement makes it clear that Cicero frames his narrative in such a way as to make Clodius' intention to murder his political enemy likely from the antecedents. It is needless to say that the accidental meeting on the Via Appia is described in the most antagonistic terms, taking it as already proven (27 *quod re intellectum est*) that Clodius intended to lay a trap for Milo. Interestingly, Cicero does not devise an extended *narratio*,¹⁷ as he does for example in the *Pro Cluentio*. Despite the fact that he had the first-hand witness Milo at his disposal, he devotes very little space to the fight between Clodius and Milo in 29–30, hardly more than to the political introduction in 23–26.

The composition of the narrative betrays how Cicero wants to save the probability of the central proposition (27) that in all likelihood (sc. Clodius) *Miloni insidias collocaret*, Clodius set the trap to his enemy. The plan to murder Milo appears a logical development in Clodius' plans to achieve the praetorship. It is nevertheless difficult to believe that Clodius would have rationally taken the risk of political suicide by killing Milo. Had he succeeded in his plan, he must have undergone the same judicial procedure according to the *lex Cornelia de sicariis et veneficiis* or the *lex Plotia de vi*, which would most probably have prevented Clodius from achieving his ambition.¹⁸ To avoid that assumption, he suggested that the murdered politician had larger revolutionary plans, to attain which Clodius would not have refrained from any available means. 34 *Quis enim erat civium, qui sibi solutam P. Clodi praetura sine maximo rerum novarum metu proponeret?*¹⁹

To keep the story of the clash within the framework of the 'contrastive probabilities' *heureme*, Cicero constructs the narrative in such a way as to avoid the likelihood

¹⁵ Cf. the statement in the neat comparative argument of probabilities in 52: *mortem ab illo* (sc. Clodio) *Miloni denuntiatam et praedicatam palam...* We may perhaps say that the statement must have been understood as a threat, which few would have taken very seriously. However, that particular threat may provide an additional argument for the defence in case the jury does not believe Cicero's version and finds Milo responsible.

¹⁶ Cf. Asc. ad loc., *Rosc. Am.* 84, and *Clu.* 107. Cicero cleverly assumes that motives of political gain work similarly in criminal situations as in, let us say, the motives of material gain or the avoidance of getting prosecuted. That is another example of how Cicero includes otherwise irrelevant, and rather distorted, political considerations in a strictly speaking criminal reasoning.

¹⁷ Cf. the definition of Quintilian given in *Inst. Or.* 4.2.31; also Lausberg, (1990, §§294–296). Cicero tried to keep himself to all the three *virtutes narrandi*, but the difficult task of attaining *verisimilitudo* meant the sacrifice of *perspicuitas*. cf. the *Sch. Bob.* ad 29.

¹⁸ Interestingly, Cicero advances the same argument, that made Clodius' murder plan unlikely, in favour of the defendant in 34: *Non modo igitur nihil prodest, sed obest etiam Clodi mors Miloni.*

¹⁹ The conclusion was most probably drawn from the 'revolutionary' measures of Clodius as *tribunus plebis* from the year 58. On the *leges Clodiani* see Cicero *Sest.* 34, 55; *Pis.* 9 (with Asc. ad loc.), Velleius Paterculus 2. 45. See also: Benner (1987).

of an accidental meeting, and also to avoid the suspicion that Milo could have any responsibility in killing Clodius. We know from Asconius (33) that Clodius was followed by 30 servants, whereas Milo was escorted by a large troop (*magnum servorum agmen*), including gladiators. Clodius was also accompanied by three notable Romans, one of them a knight. Cicero leaves out all these details, which on their own could suggest Clodius' military inferiority or show the unlikelihood of pre-meditation. The missing information would make it clear that even if Clodius had any intentions to murder Milo, he most probably had not risked an attack from such a position. The details found in Asconius were nevertheless revealed during the hearing of the witnesses, so Cicero had to find realistic evidence to prove a planned attack.

On the crucial issues of the place and time of the fight Cicero postpones his argument until 45–54. He only reports the hour and location of the incident, but gives no indication whether the prosecution disputed the information or not. Up until this point, Cicero talks about facts that can only be used for circumstantial argumentation. As I have noted earlier, he devotes only a few lines to describing how the clash actually happened, and even that part of the narrative sounds unclear.

There is one crucial inconsistency in the narrative which goes right to the heart of the strategy. According to Cicero's main thesis, Clodius laid an ambush for Milo, who was about to pass Clodius' villa on his way back to Rome. From Cicero's account it seems that when the two companies passed each other, a third group lying in wait attacked Milo. But why was it necessary for Clodius to appear on the scene and risk the outcome of his plan with an unnecessary and premature conflict between the two groups? He should have avoided being seen, especially if he was to be the most likely suspect of the attack. It does not make much sense to pretend that the two groups met accidentally, when Clodius wanted to kill everybody, anyway. A simple camouflaged ambush could have been sufficient to get the intended results. Of course, Cicero does not emphasise this detail because it would make the idea of Clodius' ambush debatable. Instead, he swiftly moves to the end of his story to describe how Clodius was murdered during the attack.

The jury learnt earlier from the prosecution that Clodius escaped the scene and was pursued by Milo's slaves until he found a temporary refuge in a roadside inn. Not surprisingly, Cicero ignores that detail as well and makes it appear as if the slaves of Milo killed Clodius on the road without the knowledge of their master (29 ...*nec imperante nec sciente nec praesente (!) domino*.... Finishing the narratio this way allows Cicero 'having his cake and eating it'. He showed that Clodius set up the trap in accordance with his plans he made public in the senate, but he also absolved Milo both on account of legal self-defence and on account of his ignorance about his slaves' actions in a chaotic incident. This is a key interim conclusion of his heuristic strategy in the second part of the speech.

The *narratio* is followed by a neat *propositio thematis* in 30–31, which is supposed to state with absolute clarity what the orator is about to prove in his argument.²⁰ The problem in this section is caused by the statement in 31 which

²⁰As Quintilian says in *Inst. Or.* 4.4.1 *omnis confirmationis initium*. Cf. Lausberg (1990, §§346–347).

claims that it is clear that an ambush took place, and it was this that the senate's decree condemned. The question which needs to be resolved is who set the trap for whom: *insidias factas esse constat, et id est, quod senatus contra rem publicam factum iudicavit; ab utro factae sint incertum est*. We know from Quint. *Inst. Or.* 6.3.49 and Asc. 42 that the prosecution alleged that Milo wanted to set a trap for Clodius.²¹ Perhaps, it is this and the *senatus consultum* on the 28th of February that Cicero refers to with *constat*, meaning that the public agreed on the question of what must have happened *in general*, despite the fact that the opinion on crucial particulars was divided. But even if that assumption were true, he could not have affirmed that the fact that an ambush took place was accepted by everyone, as it was precisely what happened that was debated and not only who did it. Furthermore, the orator again distorts the senate's decree by saying that the assembly condemned the ambush, as it was the killing of Clodius that the *senatus consultum* referred to. Why then is Cicero making the claim that *insidias factas esse constat*? And what about 57, where it seems that the argument is on whether Milo rightly killed Clodius?

In a weak case, such as that of Milo, the defence could get the upper hand over the prosecution only if it created the greatest confusion about the issues, in which the defendant appeared to stand on weak ground. In such a confusion, the appearance of certainty may help to destroy the likelihood of the opposite side's reasoning. Cicero appears to be doing exactly the same thing here. Arguing about an accidental event which turns out to become a deadly conflict with Milo's considerable responsibility (as reported by Asc. 32–33), would have required a longer and rather complicated discussion of several divergent facts (the escape and pursuit of the wounded Clodius etc.) and would have made it hard to establish a coherent probability of innocence. Following the prosecution's accusations made it possible to devise a strategy about a much simpler *status* where only two likely statements were contrasted. The fundamental strength of the 'contrastive probabilities' *heureme* arises from the fact that it makes Milo's defence easier by considerably simplifying the situation.

The question who laid the ambush presupposes that certain facts are already proven. Both parties namely accepted the weaker version that a trap was devised by someone, in other words, either one of them. That version offers a narrow enough proposition to disregard many weak points of the fight and offers a more straightforward line to present the probabilities about innocence. The original version of an accidental meeting contained a contingent element (i.e. the parties met by chance) that would have made it impossible to argue about the most salient point of the trial, intentional homicide. Thus the 'contrastive probabilities' *heureme* deliberately distorts an argument based on complex and related probable propositions in favour of a more straightforward argument that simplifies and reduces the number of initial probabilities.

²¹ Note that it must also have been more difficult for the prosecution to prove that Milo set a trap to ambush Clodius than the supposedly real case, that after the accidental quarrel Milo chased the wounded Clodius and hunted him down.

Another important issue of the *propositio* is why Cicero stresses many times that he is arguing only about the *constitutio iuridicialis* (i.e. whether the defendant did it lawfully or not) after having admitted the fact that Milo killed Clodius.²² One has to see that Cicero has already proved in 7–11 the legality of homicide in the case of justifiable self-defence, so there is no need to deal with this anymore. However much he argues about questions of fact later in the *narratio* and *argumentatio*, the principal criteria for the final decision for the jury – if they followed properly the order of Cicero’s argument – remains the question of legality.

Cicero told in 24–29 his version of what had happened on the Via Appia, so he could assume that the facts became clear at this point. In fact, he could have stopped here, if he had had credible witnesses to support his claim. When he says repeatedly that the present *quaestio* is about the legality of the homicide, it does not mean a legal argument. Rather, he urges an investigation to make it clear that not only did it actually happen, but that it was the only possible scenario. According to Cicero, it was inevitable that Milo fell into Clodius’ trap, where he had to defend himself from his attacker.

9.4 Questions About the *Argumentatio*

The subsequent *argumentatio* tries to prove from the viewpoint of probabilities that Milo was ambushed. It follows the main lines of the ‘contrastive probabilities’ heuristics in that it examines the likelihood of only two possible versions of an ambush and excludes other possibilities such as the option that events happened by chance. In this way Cicero restricts speculation about what could really have happened and uses probabilistic reasoning to confirm the facts he has presented in the *narratio*. The structure of the following *argumentatio* has a remarkable feature. Instead of analysing probabilities about the clash itself (*tempus, locus, facultas*) he focuses on probable arguments drawn from the situation and the life of the two politicians. Such reversal of arguments has an important strategic function. In the *narratio* Cicero started his account with seemingly irrelevant verbal threats during Clodius’ attempts to seize the *praetura*. Only then did he talk about the Via Appia affair. The reason for this was to establish a likely causal relationship between Clodius’ *intention* to kill Milo and Milo’s travelling on the Via Appia as an

²² Clark’s solution to the problem of *status* in the speech is utterly confused and confusing. He says (1895, p. lii) that ‘although the status of the case is *iuridicialis*, the *constitutio causae* is *coniecturalis*.’ Clark seems to suggest here that *status* and *constitutio* are two independent concepts, whereas they are one. Cf. Lausberg, (1990, §§ 80–81). If one still wants to cling to the *status* of the *Pro Milone*, we can say that Cicero pretends as if no *status* existed between the *coniecturalis* and the *qualitatis*. In fact, he should have asked the question *quid fecerit Milo*, an issue which could then have been categorised as *status finitionis*. Cf. Lausberg, (1990, §§166–170). See also the magnificent claim in 31 ...*Pompeius de iure non de facto quaestionem tulit*.

opportunity to complete his plan. In the *argumentatio* he follows the same pattern.²³ The purpose of the argument is to show above all that the interest of political gain determined Clodius' choice of action against his enemies. However, 32–33 does not go further than the claim that Clodius could not have realized his revolutionary plans with Milo elected as consul.²⁴ It is more likely that due to the lack of evidence of Clodius' specific plans against his adversary, Cicero again preferred conjectures about Clodius' future praetorship to remind the jury what Rome gained in getting rid of a seditious tribune.

In the circumstantial argument Cicero focuses on the question who had more interest in killing the other politician, which follows the structure of the 'contrastive probabilities' *heureme*.²⁵ A major principle is again the Cassian rule of *cui bono*, which the orator prefers as a standard rule to balance opposing probabilities of guilt and innocence.²⁶ The reconstruction of hypothetical benefits, however, does not weigh much in the investigation of a real crime, when the speaker is unable to show that these benefits are at least potentially attainable for one side. The *cui bono* principle has the advantage of offering a simple rule of thumb that may actually work in a transparent criminal case. However, in the political context of the Milo case there are too many uncertainties to allow a straightforward conclusion about who could have been the winner.

Cicero says that Clodius was unable to exert his political influence while Milo was alive, and that was the reason why the evil tribune had to get rid of his enemy. Remembering the political career of Clodius, that assumption sounds somewhat weak and overconfident with regards to Milo.²⁷ On Milo's side of the comparison, Cicero presents an ingenious and deceptive argument in favour of the defendant. Whereas Clodius could have only gained from a successful murder, Milo profited nothing, but nearly ended his life as a politician even after killing his attacker. The flaw of one-sided reasoning is detectable here. To make a proper comparison, Cicero

²³ If we can attribute the assertion *Obstabat in spe consulatus Miloni Clodius* to the prosecution, that would suggest that they also deduced Milo's motives from political expediency, and Cicero followed that pattern also.

²⁴ The weakness of the argument becomes clear from its presupposition that had Clodius remained alive, both politicians could still have reached the positions they intended to get. Also, the argument suggests throughout that it was only Milo who could thwart Clodius' *popularis* aims, which is yet another sign of extreme polarization in the argument. Cf. 34 *eum Milonem unum esse*....

²⁵ Clark (30) cites Victorinus' summary of Cicero's argument ...*si, inquit, doceo causas fuisse Clodio ut occideret Milonem, probo insidiatorem*.... That may be the syllogistic form, but the suspected lacuna before ...*fuerit occidi* conjectured by Peyron (1824) conceals some of Cicero's arguments on the intention of Clodius. However, in the projected 4 or 5 missing lines Cicero must have elaborated what he had already postulated in 32.

²⁶ Cf. Asc. 46, *Rosc.* 84, 86, *Clu.* 107. However, the order of arguments is again not absolutely clear. Does Cicero search for the motives (*causa*) which had induced Clodius to commit the crime, or, rather, balance the advantages to both parties? Does he view these two arguments as essentially the same? The question is which line of argument can bring the greater persuasive force. In my view it is the latter that provided firmer and more substantial evidence for the guilt of Clodius.

²⁷ On the life and achievements of Clodius, see Tatum (1999), Spielvogel (1997, pp. 56–74), Moreau (1982).

had to ask what could have happened, if the death of Clodius had not brought about the indictment of Milo. The weakness of the comparison becomes visible, if we ask whether it would have been possible to make Cicero's present claims on the 18th of January. The answer is most probably negative.

The notoriety of both sides in violent affairs²⁸ required the inclusion of the probabilistic argument from character, or more precisely, from both men's propensity to settle differences with the help by illegal means. In fact, if we look closely at the way Cicero selects the examples, we can discover that the classical *probabile e vita* argument appears in a distorted form. It was a difficult task to point to Clodius as the only extremist politician using violent gangs in canvassing. To avoid an unwelcome comparison of the two, Cicero again turns to a deceitful technique applied not long ago in 32–34. Talking about Clodius, he recalls mainly the turbulent events of the year 57, and presents Clodius as the sole destructive force against those who now support Milo at this trial.

On the other side of the comparison, Milo had to be described as the victim of Clodian aggression, who only used force for the sake of defending himself. Such a proposition could nevertheless sound too simplistic to get a favourable hearing. Cicero's solution to this problem was to present numerous cases where Milo could have killed his enemy with impunity, yet refrained from doing so. Yet one has to see that all the examples are hypothetical and would require a detailed demonstration of actual circumstances, so that the jury might accept them as probable inferences.²⁹ Without this, the jury could accept the claim only as a hypothesis. To create a fair comparison, Cicero could have simply said that Milo refrained from applying force in confrontations, whereas Clodius was held liable by the public.

Despite the distortion of the *probabile e vita*, the conclusion will still sound convincing, because it is different from what we would have expected at the beginning of 36, i.e. the more violent of the two, Clodius is the likely initiator of the ambush. Instead, we are supposed to infer that, it is unlikely that Milo, having lost so many opportunities for justified killing, had deliberately set an ambush at a time when the circumstances were unfavourable to him. To underline this conclusion, Cicero provides another probable argument in 41–43, based on pragmatic political considerations. In view of Milo's aspiration to the consulship, it would have been fully unreasonable that a major candidate deliberately destroyed his chances by exposing himself to criminal accusations and thereby alienated himself from the voters.

Such considerations sound plausible as long as one does not assume that Clodius could have had similar views before he was murdered. Cicero does not forget about the balance; this is the weakest element of the argument. The defence presupposes

²⁸ One only has to think of the judicial and physical struggles fought around the recall of Cicero in 57, and during Clodius' aedileship in 56. Cicero does not forget that Milo was heavily backed by Pompeius at the time, hence the effect of the argument. Cf. Gruen (1974) and Lintott (1999).

²⁹ Despite Cicero's claim in 38 that *quantae quotiens occasiones, quam praeclarae fuerunt!*, which naturally presupposes that the members of the jury acknowledged the opportunities as Cicero did. A detailed argument on the events had to be avoided, as it could have destroyed the persuasive effect created by the smokescreen of virtuous self-restraint.

that had Milo killed his enemy, he must have undergone the same standard criminal procedures *de vi* as he does now, despite his innocence.³⁰ On the other side, Clodius could have hoped for immunity if he had succeeded, as he could have obtained prerogatives and powers similar to those of tyrants or imperators (43 ... *in Clodio non dubitandum, qui se ipse interfecto Milone regnaturum putaret*).

Cicero now turns to the last set of probable arguments concerning the immediate circumstances of the clash. He goes through the points of fact in a seemingly logical manner to prove the guilt of Clodius in laying the trap and the innocence of Milo in his inability to avoid it. In line with the heuristic strategy in the *narratio* and the *argumentatio*, the convenient defence strategy remains the comparison of the two travellers, with a mixture of hypothetical propositions and evidence from the witnesses. The starting point is Clodius' apparent claim 3 days before the fight broke out. He promised to kill Milo after 3 days, which Cicero could say is exactly what Clodius intended to do on the Via Appia, when they met.

It seems that Cicero intended this to be the decisive argument and added further conjectures that could strengthen that assertion. The greatest problem with Clodius' statement however seems to be exactly what Cicero claims to be his greatest asset in 44 *Cum ille non dubitarit aperire quid cogitaret, vos potestis dubitare quid fecerit?* As Clodius confessed openly his plans with regard to Milo, the jury should also believe that he carried them out. If Clodius was brave and foolish enough to reveal his secret intention publicly, why did Milo not take any preventive measures to avoid the confrontation?

That objection in such a form is not raised in the speech, yet the following hypothetical proof seems to provide a direct answer to them. Cicero asserts that Milo had an obligation to fulfil in Lanuvium on the 18th of January, which he could not miss, whereas Clodius had no special motive to leave Rome. On the contrary, he was supposed to stay after the turbulent *contio* in the senate on the 17th.³¹ Also, Milo could have no knowledge of Clodius' whereabouts, whereas Milo's trip could have been known to everyone. Furthermore, Cicero allegedly shows that the evidence of the prosecution on why Clodius had to return to Rome swiftly on the 18th is groundless, as Clodius had known well before about the dying Greek architect.

The reader would certainly miss the point of the argument, if he tried to show one by one why each argument in 32–56, the core of the *argumentatio*, is untenable. The task of the defence was to create a coherent and plausible argument that supplies the probable proof of Milo's innocence. Some of the information reconstructed by Asconius *post eventum* could have been well known for Cicero,³² too, and we must bear this fact in mind. The presence of Pompey's troops meant that the

³⁰ The devil's advocate can ask a further question. Why is it that Milo did not behave extremely cautiously and prohibit his servants from killing Clodius during an armed conflict in order to avoid unnecessary litigation that could hinder his prospects for the consulship?

³¹ 45 *nisi ad cogitatum facinus approperaret, numquam reliquisset*. The question is, of course, what was that grave reason why Clodius had to stay after the meeting? It is because he was the rabble-rouser? But that is a vicious circle.

³² Although we cannot certainly know which were those 'facts'.

jury was less likely to make an unbiased judgement. Cicero could not have hoped to secure an acquittal by an objective presentation of what happened on the 18th of January. Therefore, the only way out was to show that it was possible *at all* to present probable arguments advantageous to the defendant. As I mentioned earlier, Cicero's strategy followed the prosecution's line of argument and tried to argue that (a) Clodius ambushed Milo and (b) it was right for Milo to kill his enemy in self-defence. In an intricate arrangement of the 'initial adjustment' and the 'contrastive probabilities' heuristics he first proved that legal self-defence is a natural right, especially if it involves an enemy of the state. The argument on the legality of the killing presupposed that Milo was ambushed, so it could strongly suggest the likelihood of Milo's innocence without any positive proof. The subsequent part of the speech worked on the basis of a simplified and manipulative reconstruction of events, which helped Cicero ignore damaging evidence and include a framework (built upon the previous actions and hypothetical expectations of the two antagonists). In the end Milo was defeated, but at least we know what Cicero regarded as an ideal strategy *after* considering all the contingent aspects of the case.

Chapter 10

Pro Cluentio

10.1 The Point of the Argument in 1–18

The longest speech in the Ciceronian corpus brings forward a plethora of alleged evidence and arguments to prove the innocence of the defendant, A. Cluentius Habitus. The complexity of the speech arises from the fact that Cicero decided to clear up a misunderstanding about a trial that happened years before the present one, before moving on to discuss charges in the actual case before him. Therefore he expected the jury to judge the likelihood of not one but two complicated cases in order to acquit his client, who was charged with various counts of murder in a trial under the *lex Cornelia de sicariis et veneficiis* in 66 BC. The intricacy and quantity of details was overwhelming to the jurors, who had to struggle to keep up with the complex of narrative and argument in only one hearing.¹

The analysis of the speech focuses on how Cicero manages to argue persuasively about several sets of supporting and damaging evidence with the help of three probabilistic strategies, the ‘initial adjustment’, ‘thematic replacement’ and ‘parallel probabilities’ heuristics. The first two strategies are applied at the beginning of the speech to help frame the jury’s mind in judging the very lengthy and complex *narratio*. The ‘initial adjustment’ heuristic serves a similar purpose to that of Cicero’s discussion of *praeiudicia* at the beginning of the *Pro Milone*. It focuses on the common views on the earlier Oppianicus case, which could negatively affect the jury’s judgement on the present case. The ‘thematic replacement’ heuristic establishes the involvement of Sassia, the defendant’s mother, in the case, whose constant machinations throughout the case provide a convenient standard by which to judge the likelihood of the events told in the narrative. To hold together the different lines of probabilistic arguments throughout the speech Cicero applies an intricate form of

¹We suppose that most of the evidence presented by Cicero, especially in 10–58, sounded completely new to the jury, or at least was not mentioned by Attius, even if the speaker regards them as essential to the understanding of the present case. Cf. 18 ‘mihi ignoscere non deberitis si tacerem’. That is, Cicero makes it clear right from the start that his defence cannot be regarded as a *direct* reply to the prosecution.

the ‘parallel probabilities’ *heureme*. This strategy enables him to establish a direct link between the actual charges and his long and apparently irrelevant excursus on the prejudice against his client, the defendant’s scheming mother and the infamous trial, which Cluentius launched against his stepfather Oppianicus 8 years before. Instead of following the complicated traditional rhetorical arrangement of the speech, I use the ‘parallel probabilities’ *heureme* to explain from a strategic viewpoint how the seemingly unnecessary arguments which dominate the speech from the beginning contribute to the refutation of the charges, which Cicero completes in a surprisingly short time in the end.

Several previous studies² have dealt with the inventional or dispositional aspects of the case and the legal technicalities of the speech. We will concentrate more on the forensic argument instead of the rhetorical structure and try to find out how Cicero could argue such highly complicated legal case clearly, consistently and persuasively. I will deduce Cicero’s strategy from the way he supports both his interim and the final conclusions on the necessity of acquittal.

A plain reading or hearing of the speech makes it difficult to say exactly what the argument in favour of Cluentius is about. The direct charges are mentioned and treated only at the end of the speech, preceded by several lines of complicated arguments. This makes it almost impossible to establish the link between the different lines of reasoning. Statius Albius Oppianicus junior charged Aulus Cluentius Habitus with *criminibus veneni* (164), multiple poisoning. Cluentius was first accused of poisoning C. Vibius Cappadox in Rome, in the house of L. Plaetorius, a senator (165). He also said to have attempted to poison Oppianicus junior in a wedding ceremony in Larinum (166).

Finally, Cluentius was alleged to have compelled M. Asellius to poison Oppianicus senior, in exile at that time, in Falernum in the house of L. Quinctius (175). Oppianicus died a few days later, in Rome. Of the first two charges we learn almost nothing. On the death of Oppianicus, Cicero claims that either it shows no signs of suspicion or something must have happened to Oppianicus privately 175 *intra parietes*, for which only his wife Sassia can be held responsible.³ Cicero goes into great detail about the events *post mortem Oppianici* – the machinations of the desperate and revengeful wife –, but even the treatment of these events remains inferior to the argument centred on the *iudicium Iunianum* in 74.

²For studies and commentaries on the speech see Classen (1965, pp. 104–142, 1972, pp. 1–17, 1985, pp. 15–119), G. S. Hoenigswald (1962, pp. 109–123), Fausset (1887), Kirby (1990), Kroll (1924, pp. 174–184), Pugliese (1970, pp. 155–181), Stroh (1975, pp. 195–22, Alexander (2002, pp. 173–88), Riggsby (1999, pp. 66–78).

³On reading the charges, one can see how loosely Cicero treats the facts, especially their relative chronology, which makes it impossible to establish any connections between the cases. Neither does Cicero exert himself to explain why Cluentius could have any interest in the murder attempts. That does not mean that Attius did not provide any explanation for possible motives, as Cicero could have simply ignored it.

In the exordium Cicero pretends to be in doubt about what the exact charges are and what he needs to prove.⁴ He declares that he follows the bipartite division of the prosecutor's speech. This statement implies that his argument deals with the two major charges, the *invidia...iudicii Iuniani* and the *rationem veneficii criminum* (1).

Most modern commentators⁵ see the basic argumentative strategy in the reversal of *crimen*, poisoning as stated in the fifth chapter of the *lex Cornelia*, and *invidia*, judicial murder, the sixth chapter of the same law.⁶ The reversal is said to have allowed Cicero to shift the jurors' attention to a charge that could affect the outcome of the trial more strongly than all the others, despite the fact that the *iudicium Iunianum* most probably appeared only as a subordinate issue in the indictment. It seems therefore that Cicero's main contention was to prove that it was not Cluentius who bribed the jury in 77 BC, but Oppianicus senior. Once he proved this, all the other charges can be dismissed as insubstantial. In this way, the initial reversal affects the outcome of the *whole* argument, including the lengthy narrative on the *iudicium Iunianum*.

The observation on the importance of the reversal thus seems wholly true, yet it cannot on its own explain the whole strategy of the speech. One only has to look at 89–102, 115–36 and 160–91 to see that Attius tried to provide enough evidence for the conviction of the defendant. It was Cicero who picked the two charges on which to focus his argument and refused out of hand to discuss those which *he* regarded as poorly argued. Moreover, Cicero leaves us in the dark about the exact wording of the indictment and the *lex Cornelia*, so we never know how these two relate to each other.

An effective tool to create obscurity about the exact nature of the main argument in 10–164 is to call the prosecution's charges *invidia*, prejudice or ill will.⁷ This is the main element of the 'initial adjustment' *heureme* which helps focus the juror's mind on a matter which Cicero judges to be the key issue in judging the likelihood of the defendant's innocence. It is important to note that Cicero *does not* propose to prove the innocence of Cluentius, but to dispel the deep prejudice against his client, the result of the *iudicium Iunianum*. The word prejudice is further explained through

⁴On the different views about the legal background see Fausset (1887), Classen (1965, pp. 120–121). The latest suggestion by Alexander (2002, p. 184), seems to provide the most appropriate solution so far by changing the initial question so as to take into account the rhetorical situation. The suggestion offers a flexible view with a 'portfolio' of charges that aims at building up cumulative force and allowing an ample field for argumentative manoeuvring.

⁵Classen (1985, p. 31), Stroh (1975, pp. 199–200), Alexander (2002, p. 188). The authors assign different functions to the reversal respectively, but they all consider it as the fundamental strategy.

⁶One the fifth and sixth chapter of the *Lex Cornelia de sicariis et veneficiis* see *Digesta* 48.8, *Iustiniani Institutiones*, 4.18 and *Clu.* 144, 148, 157. It is very difficult to say whether Cluentius was in fact charged with judicial murder under the sixth chapter. The deliberate vagueness of Cicero shows that, whether or not Cluentius was charged with judicial murder, he wanted to secure his acquittal in both ways.

⁷*Invidia* is not a charge but the effect of the charges, so it cannot properly be refuted. So how exactly do we need to understand it?

its conjunction with *atrocitas*, relentlessness, in 9, or *infamia*, dishonour, in 7, 22, 26, 61, or *error*, mistake, in 8, 9, 31. In 9 Cicero makes clear what he means by prejudice in opposition to *veritas*.⁸ Through its association with *error*, prejudice gets close to mean falsity, which is not the result of simple ignorance, but of manipulation.

The remark on the *causa* at the beginning of 7 further elaborates the problem of prejudice dominating the mind of the jurors. The passage offers a description of how prejudice works in legal or political cases. Prejudice could only creep into people's minds, because they listened only to the opposite version of the case for a long time, and already gave their silent assent to it.⁹ As Cicero makes it appear, Attius' arguments count for little, because they simply build on ground well prepared by years of desperate haranguing. 7 also presupposes that people only know one version of the story and base their opinion on their unreflecting acceptance of manipulated information. That seems to be the way how Cicero justifies that he has to embark on the long narrative in 11.

The purpose of that extended interpretation of *invidia* serves the original purpose of discrediting the charges in 164–91 as lacking any serious substance. The near equation of *invidia* with the opposite of *veritas* or *ipsa res* could spread the notion of false manipulation further than 160. To prove that, one should only look at the logically strange distinction in 1. In proper terms, it can only be the *ratio veneficii criminum* which is part of the accuser's speech, *oratio accusatoris*. As for the other part, we do not know exactly what it was about, only that it *magno opere confidere videbatur invidia iam inveterata iudicii Iuniani*. This second part presumably built on the prejudice that the previous trial created. The assumption seems to go perfectly well with the charges that are treated *obiter dicta* in 161–4 so it is possible to say that the Oppianicus trial originally belonged to the group of the minor charges mentioned by Attius, except for its effect, which had an overwhelming influence the negative interpretation of later charges. This is the reason why Cicero had to focus his initial strategy on the *invidia* created by the previous trial of Oppianicus and later on the complicated background of the trial itself.

The *iudicium Iunianum* is thus treated as the cause of the *invidia*, and *invidia* as the real psychological obstacle for a fair judgement of the charges in 160–94. The audience can therefore take the argument in 10–160 as both a rational and comprehensive rebuttal of the actual charges and the prejudice. Cicero must have known that the refutation of the judicial murder charge will not automatically remove the prejudice. He devised an argument where prejudice stands as the main proposition

⁸ *Faciamque ut intellegatis in tota illa causa quid res ipsa tulerit, quid error adfinxerit, quid invidia conflarit*. Also cf. 5 *Etenim sicut aliis in locis parum firmamenti et parum virium veritas habet, sic in hoc loco falsa invidia imbecilla esse debet*. One should compare these lines with the distinction between truth and opinion as criteria for decision-making for jurors in Gorgias's *Pal.* 5,22,35 or *Hel.* 2,11.

⁹ Naturally, we do not know what the people were told during this time, whether they heard only about the *iudicium Iunianum* or the other charges. It seems from 79, 83, 89, 175 that Quinctius agitated only against the condemnation of Oppianicus and did not insist on a trial of Cluentius.

that can be refuted, if the probabilities attached to the *iudicium Iunianum* charge are shown to be groundless.

The psychological need for that double argument seems clear. If Cicero gives a rational basis for the *invidia*, he will make it accountable and open to falsification. One might also add that Cicero announces his intention to remove prejudice, which he does as if he had refuted the sixth chapter of the *Lex Cornelia*. The orator pretends to adhere to strict standards of proof required by the trial (and earns more credit for that), whereas he can grant himself allowances by the logically less demanding task of fighting a prejudice. Moreover, the emphasis on *invidia* for the sake of a fair judgement makes it appear as if the plausibility of Cluentius' innocence would depend on the plausibility of the prejudice.

In this way the first part of his heuristic strategy allows Cicero to replace the charge of multiple poisoning with *invidia* as the major proposition of the speech, with the intended result that it would reduce the probability of the original charge of poisoning to such an extent that it looks completely improbable. This is the strategic technique which I call the 'initial adjustment' heurème, where the probability of an apparent proposition is put arbitrarily and unexpectedly in the place of a real and relevant one right at the beginning of the argument, thereby confusing the listener about what constitutes the evidential basis of the final judgement.

In 3 Cicero makes some further comments on the initial division of the major *crimina*. He advises the jurors that in a case where the accused faces an unfair trial due to ill will, they need to supply considerations not mentioned in the defence speech.¹⁰ This is because the jurors had already heard other accusations against Cluentius from hearsay, which might have been brought forward by Attius. Despite its vagueness, the interpretation of this claim clarifies the understanding of the strategy. First, it reaffirms our previous contention that *invidia* appears as an issue on the level of the charges, so an irrational emotion can be refuted with rational arguments. Second, the jurors have to be aware of *invidia* as an element potentially more dangerous than the actual charges and supply their own arguments to make up for the weakness of the defence, and that as an obligation (*debetis*), not an instance of *benevolentia*.

At first it may appear difficult to see why Cicero spends so much time on Oppianicus' infamous trial in 74 BC, the result of which was nevertheless beneficial for his client. Cluentius' first trial against his stepfather was widely rumoured to have been corrupt, with several judges bribed, although it was not clear which of the two parties acted illegally (or perhaps both). Many in Rome believed that it was Cluentius who paid the judges and this was the reason for the ill will (*invidia*) against him. Therefore Cicero had to confront the jury's negative perception of the trial and the *invidia* that resulted from it, which could have huge negative influence on the decision in the present trial. Cicero assumes that the decision made at

¹⁰The variants *vos* and *nos* are interesting. At present, the accepted reading (following Classen's 1831 edition) is *vos*, which creates some difficulty, as the process of secret ballot would hardly allow any official discussion before the votes are taken. The variant *nos* would better emphasize the adversarial nature of the trial.

the previous trial was based on sound evidence, which he demonstrates in 19–59. He argues that his audience should also accept it as judicially valid, despite the frauds that surrounded the process. Oppianicus' alleged manipulation could have invalidated the trial, if all the jurors had taken part in the scheme. But in 75–76 Cicero works hard to make it clear that the majority of the jurors, including those who voted 'non liquet', acted honestly.

The circumstances of the *iudicium Iunianum* trial gives Cicero justification to reconstruct the arguments that the jury could have heard in 74, although they bear no direct relevance to the present case.¹¹ The claim of 8 years' one-sided manipulation presupposes that information in favour of Cluentius might have been lost between the two trials, otherwise L. Quinctius would have had no easy task in his agitation against the *iudicium Iunianum*. With that presupposition of ignorance, Cicero could start his speech as if he had conducted Cluentius' defence in 74 BC. He claims, referring to antecedent events, that the present argument could not be fully comprehensible without inductive completeness 11 *principiis enim cognitis multo facilius extrema intellegatis*. Understanding 11–160 is a necessary condition¹² for a proper decision about the charges mentioned in 160–8. Not only that, but the exhaustive enumeration of past crimes and trials will spare a long argument about the present charges.

An important question is what exactly we should understand in 11 by the need to go back a little further in the past to demonstrate his case, *exordium rei demonstrandae paulo longius petere*. What connects the two distinct sets of arguments in the previous trial against Oppianicus and the present one, the latter of which he can dismiss as having been proven by the former? A rather vague claim in 164 explains that his lengthy demonstration of the previous trial was necessary to disperse all the malicious rumour which the accusers were able to collect against him following 8 years of careful considerations. *Habetis iudices, quae in totam vitam de moribus A. Cluenti, quem illi invidiosum esse reum volunt, annos octo meditati accusatores collegerunt*.¹³

In the transition to the 'thematic replacement' heuristic Cicero's main purpose is to suggest that Cluentius' mother, Sassia, played a hideous key role in the events that led up to the trial of Oppianicus and prepared the present trial out of revenge. In fact, the orator sets his main task to make Sassia's role as the mastermind of the events probable and treat the question of Cluentius' innocence as subordinate to the former. He performs that task by drawing up an adversarial scheme of four sets of arguments based on personal relationships, which involves, amongst others, mother and son.

¹¹ 10 *vobis breviter illa, quibus Albius est condemnatus, exponam*; 20 *pauca vobis illius iudicii crimina exponam*. One must notice here the emphasis on brevity, which shows that the orator himself noticed the slight irrelevance of his argument and needed to reassure the audience about that.

¹² 160 *atque ut existimetis me necessario de his rebus, de quibus iam dixerim, pluribus egisse verbis, attendite reliqua: profecto intellegetis ea, quae paucis verbis demonstrari potuerint, brevissime esse defensa*.

¹³ We cannot be sure, however, whether that statement refers strictly to the allegations in 160–3 or to the whole trial of Oppianicus.

Before we discuss elements of the strategy that focus on Sassia's role we need to explain briefly how these four arguments determine the structure of the speech.

The appeal to *invidia*, the campaigning of the prosecution and the role of Sassia mark off the main propositions of the speech in the *exordium*. We can divide them up into four major probabilistic arguments that roughly cover the whole speech, always bearing in mind how inextricably they are linked to each other. The first main argument, which includes the 'initial adjustment' *heureme* is directed against the prejudice that surrounds the defendant. Cicero never describes this prejudice in precise terms. He assumes that the *iudicium Iunianum* created the notion that Cluentius was always ready to get rid of his enemies either by judicial murder or by poisoning. Cicero's task here is to prove that the *invidia* against Cluentius is unfounded and that Cluentius always acted upon necessities, while he never intended to harm anyone. A benevolent personality, the defendant is unlikely even to have attempted a murder against both his stepfather and his son. The most specific part of the speech, which presents the proof of that proposition, is 90–137.

The second probable argument, connected closely to the previous, tries to prove that it is unlikely that Cluentius could have been charged with judicial murder in the previous trial. On the contrary, the real criminal must have been Oppianicus, who was convicted rightly and legally in 74, although he attempted to bribe members of the jury. Not taking Oppianicus' previous crimes and the aftermath of the trial into account, the section that deals with the second proposition stretches from 43 to 87.¹⁴ The third argument, which is inextricably linked to the 'thematic replacement' *heureme*, is devoted to the role of Sassia to prove that it was she in all probability who prepared and carried through the whole trial in revenge for the deceased Oppianicus senior. This argument conspicuously frames the speech in 11–18 and 169–202. However, it cannot prove on its own Cluentius' innocence.¹⁵ The fourth one deals with the charges in the present case, presented as a probable refutation of the attempted poisoning of several people in 160–94, especially Oppianicus senior.

It seems clear that the first and the third propositions, which involve the 'thematic replacement' and the 'initial adjustment' *heuremes* are meant to complement each other. The question, however, remains open whether Cicero meant that proving Oppianicus's guilt in the previous trial as part of the second main set of arguments would alone dispel the prejudice against the young Cluentius and prove his innocence in the poisoning charges. Most probably not, otherwise he would have remained content with the events of the trial and the miscalculations of Oppianicus. A reasoning based on facts in the second argument could have helped to eliminate the prejudice, but even here Cicero uses the *retorsio criminis* as part of his probable

¹⁴We can be even stricter and exclude the plot against Cluentius in 43–56 from the second argument as irrelevant, since Cicero needed to prove only that Oppianicus bribed the jury, not upon what grounds he could have been convicted.

¹⁵On the supposed involvement of Sassia, see Stroh (1975, pp. 204–207). He tries to prove that Cicero put Sassia on the stage from relative obscurity. That may be right, but the reason he gives for that, the *retorsio criminis*, sounds too simple. Furthermore, the fact that Sassia nowhere before appears before the jury does not mean she cannot have played her part, and her obscurity can easily be attributed to her secret job as the wire-puller.

reasoning, that Oppianicus was more likely to bribe the jury. The third and the fourth argument show that weaknesses in his defence of the poisoning charges require the redirection of the prejudice, which we could call a *retorsio invidiae*.

It is also important to note that the enumeration of Oppianicus' misdeeds belongs to the proof of not only the second, but of the third proposition, as well, since we know that Oppianicus married Sassia before the *iudicium Iunianum*. In fact, Sassia is mentioned in 44 as the instigator for the attempted poisoning of Cluentius.¹⁶ The first and the third arguments rest largely on the conjectural basis of the second and the fourth, whereas these two latter respectively need to rest on probabilities. The four corresponding probable arguments build up the probability of Cluentius' innocence individually, while at the same time they are linked to each other and mutually offset each other's weaknesses. Each has its own distinct conclusion, and the connection between them becomes evident only at the end of the speech, when they converge into the final conclusion. That comprehensive form of probable reasoning, which we will discuss later, is a type of 'parallel probabilities' heureme.

10.2 Proof of Cluentius' Innocence in the *Narratio Cum Argumentatione*

The lengthy *argumentatio* begins at 11 with an early scene from the history of the Cluentius family, one that does not clearly fit into the responses to the charges. The short narrative passage nevertheless offers a clue to comprehending the complex of narrative and argument that reaches through the whole speech.¹⁷ The story begins in 88 with the death of A. Cluentius Habitus, the defendant's father. Of the two children left behind by the deceased Cluentius, his daughter, Cluentia, married her cousin, A. Aurius Melinus, Sassia's sister's son. The marriage ended in divorce, as Sassia fell in love with her son-in law, induced him to separate from Cluentia and marry herself instead. The scandal remained in relative obscurity, because, according to Cicero, the young woman wished that other people did not learn about her plight: (13) *ceteros sui tanti mali ignaros esse cupiebat*. The argumentative purpose

¹⁶ 44 ...*incendebat eius amentiam infesta atque inimica filio mater Habiti. Magni autem illi sua interesse arbitrabantur a causa martialium removeri*. On the notion of shifting the responsibility to the wife, one may think of the archetypal story in *Gen.* 3. 1–13. We should also ask why it was so much in Oppianicus' and Sassia's interest to get rid of Cluentius in their defence of the Martial priests. Cicero swiftly goes over such questions in his obvious inability to ascribe motives for the proposed murder.

¹⁷ In the case of the *Pro Cluentio* narrative and argument seems to be inseparable. See Stroh (1975, pp. 210–211). One may wonder whether Cicero follows here the requirements of the *narratio probabilis* (*Inv.* 1.20 and 28; in details see (Lausberg 1990, pp. 179–181) and simply prepares for the argument in 160–194, or the complexity of the family and legal narratives forced him to drop the neat division, which he seems to follow scrupulously e.g. in the *Sex. Rosc.*, *Mil.*, *Quinct.* or the *Leg. Man.* We may even say simply that in the *Clu.* facts and arguments *could not* be practically separated, therefore the requirement of such clarity appears meaningless. It is interesting to read on the development of *narratio* in early Greek speeches in Usher (2000, pp. 23–4).

of this short story would not be intelligible at first, were it not for 12 and 15–16, which state in an emotionally charged attack that the mother lacks any natural human prudence, affection or self-control 12 *Neque umquam illa ita de suo scelere et immanitate audiet ut naturae nomen amittat*. Such a personality explains that she was able to assist Oppianicus in an attempt to poison her son and later initiate a murder trial against Cluentius.

We need to ask what the irrelevant story in 11–18 could prove not only for the introduction of the *iudicium Iunianum*,¹⁸ but for the whole legal case.¹⁹ Cicero claims in 17 that the feud between mother and son has relevance to the whole case, which will be clear once he can tell the rest of the story. *Initium quod huic cum matre fuerit simultatis audistis. Pertinuisse hoc ad causam tum, cum reliqua cognoveritis, intellegitis*.²⁰ We can infer from this statement, together with 43–45 and 169 that it was in fact Sassia, and not Oppianicus, who instigated the murder attempts and the legal action against Cluentius. Her reason for doing so stems from a family feud between mother and son. However, at this point, Cicero does not say that the argument about the role of Sassia would be decisive for the final conclusion. He merely focuses the attention on to that argument, even if he lets it slip for the moment.

Supposing that the Sassia episode carries at least some argumentative relevance, it must contain references to the *reason* why the divorce of Cluentia and A. Aurius Melinus marked the beginning of a long hostility and how 11–18 connects its argument to 19–168. We get an interesting answer in 16 *Tulit hoc commune dedecus familiae...graviter filius...Statuit tamen nihil sibi in tantis iniuriis ac tanto scelere matris gravius esse faciendum, quam ut illa matre ne uteretur....* From this place and 13, we can infer that both Cluentius and Cluentia accepted their fate and neither of them wanted an open war with their mother.²¹ They must have felt remorse, so

¹⁸ Where it clearly belongs according to 10: *Hoc loco faciendum mihi, iudices, est, ut vobis breviter illa, quibus Albius est condemnatus, crimina exponam*.

¹⁹ Again, we cannot simply say with Classen (1985, pp. 34–35), that Sassia's manipulative personality allowed Cicero to turn away from the right path and make an emotional attack to divert the attention from the relevant legal issues. That notion downgrades the argumentative importance of the Sassia passages, which aim in the end to reveal the motivation and scheming behind the charges and eliminate them as sham.

²⁰ The answer to this statement is given in 169, at the point where the defence proper against the charges begins. *Unum etiam mihi reliquum eius modi crimen est, iudices, ex quo illud perspicere possitis, quod a me initio orationis meae dictum est: quicquid mali per hosce annos (a very tricky expression: should we mean the time between 74 and 66 or include the events before the *iudicium Iunianum*?) A. Cluentius viderit, quicquid hoc tempore habuerit sollicitudinis ac negotiis, id omne a matre esse conflatum*.

²¹ Cluentius was only (11) *annos XV natus* at that time, so he could not obviously do anything about Cluentia, except listen to her daily lamentations. But Cicero says something different in 16: *statuit tamen nihil sibi...esse faciendum*. Such a way of speaking suggests that Cluentius in fact could have done something, had he wanted to (*statuisset*). Another important fact is missing from the expression *ut illa matre ne uteretur*. Does that mean that Cluentius remained in the same house with Sassia or did he leave? 14 suggests (*expulsa atque exturbata filia*) that Cluentius stayed with his mother, but his sister must have left (not too far, probably to relatives, otherwise he could not

they could have had a reason for revenge (though they did not do anything). And what about Sassia? In the small section we cannot find any hint that she had any serious reason to start a mutual feud with her son.

We are left to say that neither Sassia nor Cluentius could have had such a grave reason at that time which could have resulted in an attempt to murder Cluentius. That event has therefore no direct bearing on later family events²² and does not prove Sassia's motivation to get rid of her son.²³ But what does then 11–18 prove? Should we say that the small section adds information to the *probabile e vita* against Sassia, which later continues in 169? That may be true partly, but Cicero did not need to prove that Sassia committed crimes comparable with those of Oppianicus, only that she instructs the prosecution from behind the scenes.

In 11–18 Cicero presses the importance of his third proposition that Sassia initiated the charges, and it was she who stood behind Oppianicus in his previous endeavours to get rid of her son, Cluentius. The argument could be understood in an *e minore ad maiorem* form. If Sassia was able to ruin her daughter, who did nothing wrong to her, how much more is it likely that she waged a judicial war against her own son, who previously caused her husband's exile and, possibly, murdered him? Cicero wanted to show not only that Sassia was capable of carrying out such an act, but that she was ready to do so as well, if she was given the chance. 11–18 is proof of her ability to go against even her natural instincts as mother, while later paragraphs give actual examples of atrocious acts, especially the torture of Strato and Nicostratus in 182–5.

We must look again at the order of arguments at the beginning of the speech. First, Cicero uses the 'initial adjustment' *heureme* to focus the jury's mind on *invidia*, the prevailing prejudice against his client which is an issue not directly related to the present charges yet has enormous indirect influence on the actual judgement. He treats that argument as more important than the actual poisoning charges. Then he applies the 'thematic replacement' *heureme* to put the issue of his third main proposition, the character and actions of Sassia, the defendant's mother, into the centre of his argument. Thus the third proposition stands in comparison with the first, *invidia*, but outweighs it with respect to its greater strength to prove

listen to her daily cries). Cicero remains silent about that, which suggests that the young Cluentius might have accepted 'the way of the world'.

²² Which is also indicated by the unusually long excursus in 17–18, where he includes a number of conventional, and irrelevant, arguments on how children should bear their parents' injustices (17 *Facile intellego non modo reticere homines parentum iniurias, sed etiam aequo animo ferre oportere*). That should not mislead the listeners on the main point, which is shifting responsibility to the other side through Sassia's morally unacceptable, yet lawful action.

²³ Nor does the sentence in 18 *praesto est mulier audax, pecuniosa, crudelis* prove unequivocally that Sassia is present at the trial. Stroh says in (1975, p. 206): 'Mit *praesto est* kann Cicero nichts beschreiben, was die Richter lebhaftig vor Augen hätten ... er ruft vielmehr ein Bild hervor, das sie sich vorzustellen haben.' (The other side is presented by Boyancé, Classen etc.). How does he prove that? Even if he could, the question of Sassia's Anwesenheit (presence) would remain unimportant. The only thing Cicero wants to prove is that Sassia had long intended to put Cluentius on trial and she succeeded in doing so with the present trial.

Cluentius' innocence. If the jurors suspected that the trial was staged by the enemy of the defendant, they would have been less likely to decide in favour of the prosecution.²⁴

Looking for a more specific argumentative model of the Sassia episodes in 11–18 and 169–200, one may explain them as a technique based on the 'thematic replacement' *heureme*. The basic function of the two episodes is to focus the mind of the readers on a seemingly key probabilistic argument in a complicated decision-making situation, where a great deal of information and several intricate lines of argument make objective judgement almost impossible. The sections on Sassia's involvement in the trial indirectly create a plausible counter-argument against the murder charges. That argument insists that the fundamental issue of the inquiry should be whether it is likely that the trial was staged at her demand. If Cicero manages to prove that this is likely to be the case, then the improbability of all the other charges would become clear.

The first and third propositions were more difficult to prove than the poisoning charges, because they are not precisely questions of fact. Therefore, Cicero applies a form of proof which consists of an exhaustive, loosely connected list of major and minor crimes before and after the trial of 77.

We can also establish the connection between the first and the third propositions, and the rest of the speech. The first proposition, the argument on *invidia*, prejudice, comprises what we may call the exordium in 1–9, the long section on Oppianicus' crimes before and during the *iudicium Iunianum*, and the repercussions of the trial, 49–160. Throughout that section Sassia's role remains obscure, only in 44, 52 and 86 do we get incidental remarks that remind the jury of the close association between Oppianicus and Sassia.²⁵ Sections 10–18 and 161–194 present the proof that Sassia organised the present trial as a revenge for her deceased husband and the refutation of the alleged trumped-up charges. These sections explain why Sassia's role and the charges link to each other so closely. The more probable Cicero can prove the woman's guilt the less likely the charges would seem.

²⁴ It is not quite clear whether Sassia had any role in keeping the *invidia* alive between the two trials. Even if we believe 190–4, we should not suppose that Sassia worked actively long before the present trial.

²⁵ Each place has crucial importance in maintaining the coherence of the speech. 44 suggests that Oppianicus could have been neutral to his stepson initially, and it was only Sassia who planted enmity in him against Cluentius. Nothing further is said, however, about the *magni autem illi sua interesse arbitrabantur hunc a causa Martialium removeri*, despite the fact that this event triggered the long-standing feud between Cluentius and his parents. The other reason for poisoning Cluentius, e.g. getting hold of his possessions, seems just a conjecture to give a better explanation of why Oppianicus wanted to *poison* his stepson. The expression *a causa removeri* would not necessarily entail such a drastic measure. 43–45 could also be a good example for the association of factual and conjectural evidence to strengthen probability. 52 assumes that Oppianicus' plan to acquire the *bona Habiti* appeared already as an argument in the Scamander trial. But that may again be a *vaticinatio ex eventu*. 86 tells nothing new, except that no reconciliation was possible between Cluentius and his parents by the time of the Oppianicus trial.

The strategic function of 19–48, a detailed list of Oppianicus' crimes, nevertheless remains problematic. According to 19 (*Nunc iam summam exponam quibus criminibus Oppianicus damnatus sit*) the crimes committed by Oppianicus prove beyond doubt that no one could have fairly absolved him,²⁶ a claim which comes under the first and second main arguments. However, the direct evidence for the *iudicium Iunianum* starts only in 43 with the attempt to poison Cluentius. Sassia's character and the 'thematic replacement' heurème could explain this problem. She had a great responsibility for inciting Oppianicus, first to kill his three sons from previous marriages, then to poison her own son, Cluentius, so 19–48 serves to prove not only Sassia's active role in Oppianicus' past crimes, but also that she is most likely to be responsible for the present charges as well.

Reading 19–48 one would immediately spot the lack of evidence in Cicero's narrative.²⁷ The crimes listed here would therefore qualify only as a weak *probabile e vita*, or an even weaker *probabile e causa*. Also, it seems that Sassia was not charged with murder in the *iudicium Iunianum*, which may prove that 19–48 was not presented in the same form in 74 as we read it now.²⁸ Cicero could use 19–48 as a probable argument with a general scope. That is, it served all his four major arguments as a preliminary argument for the more substantial charges. The section creates the notion that both husband and wife had equal responsibilities in every action against Cluentius. So the present trial with its counter-attack could somehow be viewed as the continuation of the Oppianicus trial.

²⁶ Again, we have here two separate issues, which Cicero seems to mix up (deliberately?) all the time. The first issue at the *iudicium Iunianum* was whether Oppianicus could have been condemned on the ground of an attempted poisoning of Cluentius. To explain this, the previous crimes of Oppianicus are at best irrelevant, unless Cicero relies solely on his proposition that *hoc uti initio ac fundamento defensionis, Oppianicum sceleratissimum et nocentissimum esse damnatum*. The second issue pertains better to the present argument. That is, seeing how bad his case stands, Oppianicus had no other chance of getting away with the charge than bribing the jury. We find a similar argument in the *Mur*. The comparison of the candidates' chances showed that Murena was bound to win the election. It follows from this that there was no need for him to bribe anyone. The conclusion then is that he is not guilty of bribery.

²⁷ According to Stroh (1975, pp. 222–226), Cicero applies the *ordo Homericus* in his narrative to cover up the weaknesses of his evidence. With a conscious manipulation of the chronology, he puts those crimes first which are better attested (e.g. the murder of M. Aurius, and A. Aurius), leaving the uncertain ones (the murder of his first wife Cluentia, and his brother C. Oppianicus) until later. Cf. Quint. *Inst. Or.* 4.2.35.

²⁸ Cf. 29 *Auditis non ab inimico, auditis sine testibus, auditis, cum ea, quae copiosissime dici possunt, breviter a me strictimque dicuntur...illi...audiebant ab accusatoribus, audiebant verba multorum tetium, audiebant, cum una quaque de re a P. Cannutio, homine eloquentissimo, graviter et diu diceretur*. The questions remain unanswered, however interesting it would be to know in what way 19–48 resembles the speech of Cannutius. The former prosecutor most probably did not keep Sassia on stage prominently, otherwise he would have weakened the responsibility of Oppianicus. Another problem (Stroh 1975, p. 222) with reference to the 74 trial is that we do not know how thoroughly Cannutius proved the charges. The fact that Oppianicus was condemned does not on its own prove that the charges were well-founded, as Cicero suggests.

10.3 The *Crimina* in 161–201

Assuming that the core of the defence is not found in the long *narratio cum argumentatione* in 49–160,²⁹ we can set that part of the speech aside and concentrate more on the last section, 161–201. That section compresses various arguments against the ‘original’ charges of poisoning.³⁰ If the jury paid full attention to the remarks made throughout the speech (e.g. 11, 18 or 160) they should have realized that this was the point where the actual defence started. To make the demarcation line clear in the argument, understanding the last sentences (starting with *Perpauca sunt...*) of 160 is crucial. They mark the transition from the arguments on the *iudicium Iunianum* to the specific answer to the charges. The reason for its importance lies in the fact that it explains the connection between the lengthy and complicated ‘pre-history’ of the trial in 11–160 and the actual refutation in 160–91.³¹

Cicero claims here again that the prosecution brought forward the case of the *iudicium Iunianum* not to provide evidence for the poisoning charges, but to manipulate the jury with the existing prejudice against Cluentius (*invidiam affere Cluentio*). Consequently, the prosecution relied on the *iudicium Iunianum* and the prejudice it created as its principal argument to support the probability of guilt, and introduced the poisoning and other charges as formalities, *ne omnium turpissimi reperientur*.³² Cicero naturally leaves it unclear whether the prosecution intended the argument on prejudice (i.e. judicial murder and the *crimina minora*) as *extra causam* emotional manipulation or the substantiation of the poisoning charges. In the second case, the

²⁹ I do not, of course, say that the trial against Oppianicus is not important for the defence, only that it is misleading to concentrate on it solely. Cicero could not have spoken about a seemingly irrelevant issue, the *iudicium Iunianum*, if he had not linked it to propositions that belong to the present charges. But that link is far from being conspicuous, and I want to trace the whole argument back to the arguments on *invidia* and Sassia.

³⁰ The status of the charges in 161–4 is questionable. Alexander (2002, p. 183) ‘... complaints that the prosecution had made against his client to bring *invidia* against him...’. That is naturally just a hypothesis, as we do not know what exactly Attius wanted to prove with these charges. It should not mislead us that Cicero answers them in such short form. However, it seems rather likely that these charges were not simply intended to raise *invidia*. They might just as well have served as criminal evidence to emphasise Cluentius’ aggressive character, as opposed to the meek personality that Cicero promotes (cf. 16, 43, 48).

³¹ A controversy may arise from the expression *Reliqua perpauca sunt, quae quia vestrae quaestio- nis erat...* 160, as compared with *cognoscite nunc id, quod ad vestrum ius iurandum pertinet, quod vestri iudicii est...* Where does then 160–4 belong? The charges of bribing the jury or the poisoning charges? Classen (1985, pp. 88–89) dealt with the question, and he seems to have got closest to an answer. We should not assume an inconsistency on Cicero’s part. The six *crimina minora* in 161–4 make the forthcoming poisoning charges probable, so even if they were not intended as part of the bill of charges, it was essential to treat them first and immediately before the actual charges. We would of course get the best answer, if we knew how Attius positioned the *crimina minora* in relation to the *iudicium Iunianum* and the three poisoning charges.

³² This little phrase again gives a fine example of how vaguely Cicero expresses his opinion when it comes to an important statement on the plans of the opposite side (here: the intention of those who stand behind the prosecution), which somehow requires a more elaborate demonstration. One would, for example, like to know the reference of *omnium* and the exact meaning of *turpissimi*.

whole Oppianicus trial could be regarded as a subordinate part of the prosecution's speech, which was introduced as only one probable proof of Cluentius' guilt.³³

That statement in 160 brings back again the initial division of *invidia* and *crimina*. It becomes evident that the prejudice may not have been alive among members of the jury, but the prosecution attempted to reinforce it with false and irrelevant accusations (160 *illi statuerunt fingenda esse sibi et proferenda*). Also, Cicero's remarks suggest that the prosecution did not possess enough solid evidence to launch a trial, which is why they made up new ones. All these suggestions would weaken the status of the forthcoming arguments as proof of guilt before Cicero faced the task of proving their falseness.

Attius' argument, which Cicero seems to answer in 43–76 and 164–94 could have run like this.³⁴ The defendant had long hated his stepfather, partly due to his mother's marriage to Oppianicus. He disguised his hatred for a long time, but after a number of quarrels it became evident that Cluentius could no longer live together with his family. The defendant had also fears of being poisoned by Oppianicus, so he charged his stepfather with murder and procured his condemnation by bribing the jury. Beside this trial, he was widely known as an arrogant and violent landowner, who had conflicts with many of his neighbours. Furthermore, he used various tricks to increase his property with inheritance fraud and illegal ownership. Such a person feared that his property could in some way get into the possession of the family he had deserted, so he decided to poison both Oppianicus senior and his son.

However hypothetical the reconstruction is, it shows that Attius could have possibly relied just as heavily on the balancing of opposite probabilities as Cicero. He had to prove, as Cicero did with Oppianicus in 18–42, that Cluentius was the person who most likely committed such crimes and that he had every reason to get rid of his enemies. Cicero however remains silent about what kind of evidence the prosecution would bring forth, but we can be more or less sure that Sassia figured as the core witness.

Cicero might have attacked Sassia exactly for this, even if he did not want to picture her as the mastermind behind the trial. It is also easy to see that the prosecution was able to provide an argument without referring with a word to *invidia* and

³³ On the possibility of packing a number of diverse *crimina* in the indictment under the *lex Cornelia de sicariis et de veneficiis*, see Alexander (2002, pp. 184–185 and 310 n. 24). We may nevertheless maintain that the Oppianicus trial figured prominently among the circumstantial evidence. 112 (*tu, qui iudicia facta commemoras...*) could suggest that even Attius dealt with the *iudicium Iunianum* in great detail. However, Cicero's analysis of the eleven convictions should not suggest to us that Attius presented each case with so many particulars. As for 161–164, Cicero had to leave out many details to be able to compress the cases into just a few sentences. But even the present form of the charges suggests that Attius must have provided more information to make them intelligible. In the presentation of the speech, Cicero only needed to rely on the memory of the jury.

³⁴ For a slightly different reconstruction of the prosecution's case, see Stroh (1975, pp. 195–197). One must be careful not to base one's reconstruction solely on what Cicero makes out to be the major charges. We have left out in our reconstruction those parts of the defence's argument, which seemed irrelevant (e.g. Oppianicus' crimes against other people in 19–42), and therefore most probably did not appear in Attius' speech.

Cicero might have interpreted part of Attius's argument as an appeal to widespread prejudice. Whatever Attius said, the jury most probably knew Cluentius before the trial, and the prosecutor did not need to labour much to gather enough evidence for a conviction. 161–4 proves that.

It seems also possible that the prosecution's speech offered a far more balanced demonstration of the charges than what we can infer from Cicero. The question how balanced the charges were in the opposite speeches could be crucial in understanding the strategy of Cicero. Attius could suppose that a diverse argument with several distinct charges, as in 161–4, could raise the overall probability of guilt better than concentrating on one single charge. Cicero, on the other hand, chose a heavily focused argument and assigned a subordinate place to those charges which could not be directly connected to the *iudicium Iunianum*.³⁵

An apparent prejudice against his client may not be the only reason why Cicero treated the *iudicium Iunianum* at such length. For the jury, the likelihood of Cluentius' guilt or innocence might have been equal on both sides. To work against the cumulative probability of the prosecution's argument, Cicero decided to pick one possible charge and exaggerate it to such an extent that its relative probability seems to have dominated Attius' argument. Cicero made a clever move with his reinterpretation of the opposite argument, especially if Attius simply presented his evidence and arguments without qualifying their relative importance.³⁶ Also, the argument on *invidia* might have been the only point to which Cicero could attach a long, coherent narrative with a long array of irrelevant events.

Cicero gives clues to his overall strategy with one word in 160, something which the superficial listener could easily fail to notice or assign any importance to. He claims as an apology that the refutation of the charges would make clear why it was necessary for him to spend so much time on the Oppianicus trial and other related issues. *Atque ut existimetis me necessario de his rebus, de quibus iam dixerim, pluribus egisse verbis, attendite reliqua....* The reader could ask himself immediately

³⁵ Cf. Cic. *De Or.* 2.102. *Qui locus est talis ut plus habeat adiumenti quam incommodi, hunc iudico esse dicendum; ubi plus mali quam boni reperio, id totum abiudico atque eicio.* (According to Wilkins, *locus* is 'line of argument', but that argument should include the presentation of evidence as well.) This principle sounds simple enough, yet the *Clu.* shows how difficult it is to apply it in practice, if one cannot simply reject the treatment of damning evidence.

³⁶ Alexander (2002, p. 174) quotes Cicero's opinion on Attius' speech from *Brut.* 271. *...T. Attium Pisaurensem, cuius accusationi respondi pro A. Cluentio, qui et accurate dicebat et satis copiose, eratque praeterea doctus Hermagorae praeceptis....* Although I would be careful of drawing the conclusion from this one passage that (175) 'Cicero's evaluation tells us something about its content' (anything new, that we cannot learn from Cicero's speech?), we may still infer something on the main features of Attius' argument. Attius must have relied on individual *status* in his prosecution speech, which seemed *accurate...et satis copiose*, giving the general line of his argument. The two major *status* here could have been *coniectura* and *translatio*, which helped the speaker to find the arguments suitable for the case. However, these only suggest a rough division of charges, without any guidance as to their relative position and probability. That is something which Cicero's presentation in 161–164 suggests, providing at the same time an easy line of counter-attack. This might be what Cicero refers to in the Brutus passage *quibus (sc. praeceptis) etsi ornamenta non satis opima dicendi...tradantur*.

what *necessario* means in the context of the whole argument. Does the word entail strict logical validity³⁷ or is it a mere rhetorical excuse for the long evasion in 11–160? We suggest that with the word ‘necessity’ Cicero refers back to the alleged incompleteness of Attius’s argument.

Attius most probably talked about the *iudicium Iunianum* at some length, but perhaps laid emphasis on the conviction of individual jurors present at the condemnation of Oppianicus and the subsequent *senatus consultum* on the trial. The exhaustive treatment of each case in 89–136, the longest single argument of the speech, shows that Cicero took the convictions seriously, and his systematic treatment may have followed Attius’ line of argument (cf. 112 *tu, qui iudicia facta commemoras...*).

Cicero could argue in turn that a detailed narrative of Oppianicus’ crimes and family conflict was essential to give a realistic and trustworthy account of the present trial as opposed to simply offering a direct answer to the charge of judicial murder. A new account of the Oppianicus trial could include new facts that raised the likelihood of Oppianicus bribing the jurors. Therefore the word *necessario* refers back to the conclusion of the ‘initial adjustment’ *heureme* and underlies Cicero’s attempt to obtain a fair hearing by clearing his client of the *invidia*.

In the last part of our analysis we look at how Cicero refutes the actual charges in 160–94. A detailed assessment is necessary at this point to see how the previous three lines of arguments about the *invidia* against Cluentius, Sassia’s plotting against her son and the *iudicium Iunianum* all contribute to the likelihood of the defence proper as part of the ‘parallel probabilities’ *heureme*, and allow Cicero to complete his refutation swiftly. The orator divides the last part of the speech into three major sections. The first, 160–4, collects misdeeds for which Cluentius can allegedly be held responsible. The second, 164–8, summarises the first two of the poisoning charges, the death of Vibius Cappadox and of a certain Balbutius, who died accidentally from the poison supposed to be prepared for Oppianicus junior. The third section, 169–94, is devoted to a fierce attack on Sassia in connection with a highly dubious procedure that helped Sassia to obtain information on Cluentius’ share in the murder of Oppianicus senior.

The first seven minor charges in 161–4 occupy not more than three paragraphs. The audience should have asked themselves whether a proper demonstration of each charge is possible at all at such a length, seeing that they belong to quite different judicial categories (violent attack, a hereditary case, slavery, illegal ownership) and each could have a rather complex story with many details to be clarified.³⁸ The

³⁷ That is, the long line of evidence in the previous argument should be understood as defeasible reasoning, and an implicit probable conclusion drawn from it will explain why Cicero finishes off his defence the way he does, namely, without providing a detailed proof against the poisoning charges.

³⁸ Let us simply take the case of Cn. Decidius the Samnite in 161. Cicero seems to ignore the most elementary precepts of establishing a conjectural issue in presenting the case. Cf. *Rosc.* 62. We learn nothing about who Cn. Decidius was, how he came to be proscribed, when, where, how and why the slaves of Cluentius caused him injuries, how Cluentius treated him generously. There seems to be a complete disagreement between the claims of Attius and Cicero, so it seems that they

brevity of the cases looks striking. No proper introduction is attached to the section to explain how the minor charges are integrated into the rest of the argument, how they supply the poisoning charges and what evidence Attius brought forward to support them.³⁹

In most cases the facts are presented so unclearly that it is hardly possible to judge some of them even tentatively (e.g. the allegation that the slaves of Cluentius had taken the property of Ennius, the blackmailer). Because of their shortness, assessing the likelihood of the charges appears very problematic. This may exactly be the strategic reason why Cicero chose the unusually concise form of defence. He suggests to the audience that the cases had already been cleared through the long discussion of the Oppianicus trial, the invidia and Sassia's machinations, so refuting the present charges against Cluentius is a mere rhetorical formality. The jury heard more about the *crimina minora* from the prosecution. The disorganised and vague list of these minor accusations in 161–4 conveys the idea that in all likelihood they are also the result of Sassia's manipulation, so they do not merit serious attention.

We can infer from the range of charges that Attius and his legal team tried to gather evidence for the crimes that emphasise the violent and unscrupulous behaviour of the defendant. Cicero, on the other hand tries to dissociate his client from any wrongdoing in several ways. He suggests with the first, second and seventh case that it was either his slaves (*familia, servi*) or bailiffs (*vilici*) who undertook a violent attack, for which Cluentius cannot be held responsible directly. In the third, fourth and fifth cases Cluentius is depicted as a benevolent, reasonable and just person, who is keen on resolving disputes without trial (e.g. 162 *sine iudicio controversiaque discessum est*). Cicero lays the emphasis on the fact that his patron always acted consistently, that is, he never willingly got entangled in disputes or initiated a trial without compelling reason.⁴⁰ This behaviour is in line with what the jurors heard about Cluentius in 13–14, 43–45, 56–57 or 155.

In 160, Cicero claims that the charges can be disproved in the shortest possible way, because the they were invented (*illi statuerunt fingenda esse sibi et proferenda*) by the prosecution, which means Sassia by proxy. After the short, staccato list of charges, he proclaims in 164 that these accusations were in fact unworthy of much response, *levia genere ipso...falsa re...brevia responsu*, which is proof of his strategic plan by a blatant *circulus vitiosus*. The jury should now have noticed that

are talking about two completely different cases or two things happened on two distinct occasions. Cicero's vague reference to an evidence, *hoc cum ipse, tum eius amici necessariiue cognoverunt*, sounds as if it was given in the trial of Oppianicus and by no means amounts to a proper proof against this charge. Most importantly, we do not learn what Attius wanted to prove with this case. The only certain thing we can say is that both Cicero and the jury knew more about this case than we do now, and Cicero judged that *he* did not need to deal more with the charge. The reason for his procedure is left for the audience to find out.

³⁹The complexity of the cases (see previous note) and the problems of proving the other charges suggest that even Attius might have been rather liberal in presenting evidence for such a number of allegations, as we can infer from 161–191 and Cicero's other claims.

⁴⁰The same lesson is drawn from 42 *...nihil tam remotum ab accusatione quam Cluentius, et natura, et voluntate et instituta ratione vitae*.

the refutation of the poisoning charges starts in earnest in 165. Cicero appends a little notice in 164 to mark the new start, quite similar to the introductory excuse in 160, except for one important claim which asserts that he created the disproportionately long section on the Oppianicus trial on his client's wish. 164 *ut omnes intellegant...quam multa a me dicta sint, quae ad huius voluntatem maxime, ad vestrum iudicium minime pertinerent*. Therefore, it was in fact Cluentius who determined the course of the argument and not any other strategic considerations. Cicero could easily give his assent, because he knew (164) that the present case could be dealt with a few words (*quam paucis verbis haec causa perorari potuerit*). Cicero again leaves out the most interesting explanation, that is, what his intention with the long discussion of the *iudicium Iunianum* was. Anyone would have been keen to hear about it, as it would have justified Cicero's lengthy and irrelevant defence in 11–160, and revealed what Cluentius himself considered the most probable argument of his own defence.⁴¹ What is nevertheless important from this statement is that Cicero demonstrates the rationale for the strategy we described as 'parallel probabilities' heuristics by an appeal to an external necessity, which is a clear example of rhetorical concealment.

Another similar claim about the overall strategy of the defence in 166, in the refutation of the second poisoning charge, reiterates the previous view: *hoc* (sc. alterum veneficii crimen) *ego si sic agerem, tamquam mihi crimen esset diluendum, haec pluribus dicerem, per quae nunc paucis percurrit oratio mea*. This statement explains two other passages in 160 and 164 mentioned earlier. Both Cluentius and Cicero could decide to ignore the criminal charges, because they know not only that the charges are false,⁴² but that they are not even worth refuting. However, a question remains to be answered. Does the *iudicium Iunianum* have such a strong demonstrative value in balancing probabilities related to the past and the present cases (which is the main strategy of the speech) or was it a deliberate tactic on the prosecution's part to exaggerate its importance so as to look like the decisive argument? In the first case, the question of innocence depends simply upon the jury's ability to admit the falsity of the prejudice against Cluentius.⁴³ In the second, the probability

⁴¹ It could be interesting to ask about the claim in 164, how genuinely Cicero tries to represent Cluentius. The importance of the *crimina minora* in 161–164 lies in the fact that it reveals much more about Cluentius in such a short section than the rest of the speech. We would suppose from 16 that Cluentius had a meek character and knew almost nothing about his own financial position. In 161–164 even Cicero admits that Cluentius was involved in violent attacks (e.g. the most telling case, in the tavern of Ambivium), he possessed slaves, bailiffs, shepherds, most probably large estates in Apulia, and belonged to the aristocracy of Larinum. This information suggests a wealthy, strong-minded, and tough landlord.

⁴² A similar idea found already in Gorgias' *Pal.* 5. Cicero does not explicitly say that either he or Cluentius knows exactly what happened, only that the argument on the Oppianicus trial makes it evident who should be charged with false accusation.

⁴³ It is again important to see here a distinction. Cicero nowhere explicitly says that the jury shares the (1) *invidia inveterata iudicii Iuniani*. He only suggests that the prejudice is widespread and that some members of the jury could be affected by it (cf. 6 and 142). He remains cautious to keep the distinction between the jurors, whose duty is to judge the case with reason, and the masses who can be influenced by such demagogues as L. Quinctius.

of Cluentius' innocence depends very much on how likely Cicero makes the external evidence on Oppianicus' and Sassia's life and actions. The answer is probably both and Cicero is more interested in keeping both interpretations in play, so when he announces an easy defence for the poisoning charges, he could proceed with a gross misrepresentation of the indictment.

The first charge asserts in 165 that Cluentius procured the murder of Vibius Cappadox through poisoning. The man lay sick and died in the house of L. Plaetorius, a Roman senator. His possessions went to Numerius Cluentius, Cluentius' nephew. Nothing else is known except that L. Plaetorius is present in court, allegedly in support of Cluentius. Also, we can surmise that Cluentius's sister, Cluentia, and her son were in some way related to Cappadox.

What would strike us in the laconic narrative is that Cicero remains silent throughout about the way the poisoning charges are connected to Cluentius. But that may only be a clever evasion. It is more important that a charge presented so vaguely and incompletely requires hardly any proper defence, and this is exactly what Cicero aims at by being economical with important details. Even if the jurors had heard about the case before, Cicero does not seem to build on their knowledge. He shows himself to be the person with a superior command over the facts, who decides what amount of information is sufficient to prove his case.

Mentioning inheritance can also suggest that the possible motive for the present charge could be the same as in the case of Publius Aelius in 162, but even that is left for conjecture. If we compare the refutation of the poisoning of Vibius Cappadox with that of Oppianicus junior in 166–8, we notice a major difference in the amount of evidence presented for the argument. As Cicero had witnesses for both cases, he definitely did not lack proof to provide details in 165. Again, the reason for his silence can be deduced from one of his major propositions, repeated in 160, that the charges were invented (by Sassia and Attius). Therefore, devoting more argument to an allegedly irrelevant charge on Cappadox would weaken this proposition. Also, 166–8 shows that Cicero can, if *kairos* serves him, provide a brief and concise defence, which combines probability argument based on circumstantial evidence and the direct evidence of close witnesses.

We should consider again the key sentence in 166 (*hoc ego si sic agerem...*), the statement about the strategic reason why Cicero argues the charges so briefly in 160–94, with an additional remark from 167 (*Multa sunt, quae dici possunt: sed non committam ut videar non dicendo voluisse dicere: res enim se ipsa defendit*).⁴⁴ Again, we need to remember what Cicero assumed right from the start.⁴⁵ He deals with the charges not qua criminal allegations, but as instances of *ficta crimina* created by the defendant's mother and years of rumours fed by invidia against

⁴⁴ Another enigmatic phrase. What exactly does Cicero say by not saying anything? Does it mean that he is not willing to say anything, or that he does not *need* to say anything? What does the following evidence mean then, if he did not want to say anything about this specific allegation? In what way does the *res ipsa* defend itself?

⁴⁵ Cf. 2 *altera pars et ea, quae propria est iudicii vestri et legitimae veneficii quaestionis, per mihi brevis et non magnae in in dicendo contentionis fore...*

Cluentius. Therefore he does not have to prove that Cluentius did not commit the charges he is accused with, but that they were invented, which requires a completely different form of argument.

The gist of the main poisoning charge is summarised in one sentence. On the marriage of Oppianicus junior, someone prepared and administered a cup full of poison to the groom.⁴⁶ A certain Balbutius intercepted the cup and drank its contents by chance. The boy died in an instant. The subsequent refutation assesses probabilities in an ordered series of questions. The major question Cicero faces concerns Cluentius' motives. Is it likely that Cluentius prepared the poison when he had never had any motives for killing young Oppianicus? As we read it, the circumstances of the marriage do not create any suspicion, except that we do not meet with Sassia. Cicero knew that the slightest association of Sassia with Oppianicus junior would immediately raise suspicion, so he keeps silent about any possible relationship between the two. The range of probabilities is also extended to avoid any suspicious thoughts. Cicero concentrates on minor details of the murder attempt, leaving the more general questions of family relations aside.⁴⁷

The defence is also aware of the psychological effects of a long inquiry, therefore he cuts the speculation on probabilities short by presenting a single trustworthy witness. The testimony of Balbutius' father in 168 discredits the whole charge. Balbutius went to the banquet dyspeptic, possibly overate and died a few days later after lying sick in bed. Cicero treats this particular charge, where he could disprove the incrimination with one single testimony, as if it were a mere instance, a model, of all the other accusations. The testimony, however, refutes only the actual charge, but does not render the probability of other charges unlikely. Cicero tries to maintain the impression that his client lacked any such shrewdness or calculation (one can add, like Oppianicus) to complete such a murder plan as the charge presupposes. The probabilities mentioned by Cicero in 167 serve as accessory arguments to remove the suspicion that the testimony on its own is unable to dispel.

Cicero follows a similar but more extended line of defence against the charge of poisoning Oppianicus senior. The jury would expect that the argument would again start with the brief description of the *crimen*. Instead, Cicero returns to one of his initial propositions, the involvement of Sassia in the whole trial, and he proves this proposition with the refutation of the particular poisoning charge (169 *ex quo illud perspicere possitis, quod a me initio orationis dictum est...*).⁴⁸ This ploy again

⁴⁶As we would by now expect, very important details are missing from the story. First and foremost, we get no hints on when the marriage took place. We learn nothing about the previous relationship of Cluentius and young Oppianicus. It would be wise to know whether Oppianicus or Cluentius was present at the feast, so that we could guess that the attempt would have had any connection with the alleged poisoning of Oppianicus. Cicero works hard so that the jury would not discover any links with other incidents concerning Cluentius.

⁴⁷Only in 190 do we learn that it was Sassia who urged Oppianicus junior to marry her daughter, to oblige him and prepare a revenge on her son Cluentius. Also, the phrase *spe hereditatis obstrinxit* gives us the clue why Cluentius could have been interested in getting rid of his stepbrother.

⁴⁸One would be curious to ask why Cicero has not appended this claim at the beginning of 160 or 165? Is it not because Sassia could not be linked to charges in 160–168?

points to Cicero's main strategy, in which he subordinates the poisoning charges to the proof of conspiracy against his client.

The charge again is presented in a highly compressed and obscure form, which hardly makes any reasonable inference or verification possible. Oppianicus senior was said to have been killed with the poison administered to him by M. Asellius, an intimate of Cluentius. Cicero provides up to this point no further details on the particulars of the alleged murder (*locus, tempus, facultas*), and suggests that Attius might have failed to do so, as well. That may, of course, not be the case, yet any misrepresentation provides Cicero open space for destroying the charges. He examines first a range of motives, which leaves the audience in no doubt about the absolute improbability of a murder attempt. The ease of creating so many hypothetical motives comes from the fact that Cicero could ignore a number of details in Attius' speech, apparently without the need to sacrifice the consistency of his defence.

Cluentius had certainly had no fear of being brought to trial by Oppianicus, once he defeated his stepfather. Hate again could not have played a major role, since the conviction, exile and separation of Oppianicus could more than anything else fulfil Cluentius' desire for revenge. Cicero happily discourses on one point, that Oppianicus' exile was worse than death, so Cluentius was in fact interested in keeping Oppianicus alive. Such a narrow interpretation of exile obscures other, more plausible motives, which could be linked with material (e.g. inheritance) or other interests (e.g. fear of legal or physical interests).⁴⁹

The next two probable arguments in 172–4 discuss the agent of poisoning, Asellius, and the method, how the poison was administered. What we learn about Asellius does not allow us to infer anything more than Cicero is willing to impart. Asellius was known to be on excellent terms with Oppianicus and hostile to Cluentius. The credibility of such meagre information depends largely on several assumptions (e.g. Attius had already spoken about Asellius to the jury), which we cannot in any way ascertain. Therefore, we cannot decide, what weight this evidence has in the charge. All we can say is that other stories, like that of Scamander, warn us not to exclude the possibility that Asellius could be bought by Cluentius. Cicero simply says what was *commonly* known about the relationship of Cluentius and Asellius.

The method of poisoning supplies Cicero with a string of further probable arguments, which he summarises in one indignant exclamation.⁵⁰ The proposition that can be derived from the exclamation connects the concept of probability with novelty and commonness. The orator implicitly assumes that only a foolish person

⁴⁹ Cicero's narrative again causes some chronological obscurity. It seems from 179 that young Oppianicus married Auria, daughter of Sassia, after 72 BC, the death of Oppianicus. However, in 166–168, it is still not clear whether Cicero keeps to the chronological order in the narrative of the poisoning charges. As a result, the listener cannot be sure whether the marriage feast falls between 74 and 72 BC, when Oppianicus was alive in exile, or already dead. Cicero is interested in maintaining the first option, because Cluentius would in that case have fewer motives to avert revenge from his stepbrother.

⁵⁰ 173 *Iam vero illud quam non probabile, quam inusitatum, iudices, quam novum, in pane datum venenum.*

would use a new and uncommon method of murder, hence its improbability. Poison in bread may not work so well as poison in liquid, and it can also be detected easily. However, Attius would reply that the novelty of method would work for its advantage, viz. the person hardly suspects anything harmful, even if he detects something strange in his bread. The discrepancy between the time of the alleged poisoning and the death again proves nothing, knowing that a poison may be absorbed only slowly. In addition, an immediate death could have been caused by many other reasons than poisoning, for example, Oppianicus had other enemies to fear from.

Cicero again compresses in this small section many assumptions, which could have only been cleared by a much longer narrative and a host of evidence. In his strategy the orator first attacks the attempt of poisoning as a possible method *in general* and claims its improbability on the basis of effectiveness compared to the usual method. Ignoring other plausible explanations for poison administered in bread, he proceeds to the actual case (174) and admits that even if Oppianicus died unexpectedly, that could rather have been caused by other things, as many examples would attest.⁵¹

To weaken the plausibility of Cluentius' involvement even more, he adds that even if murder appears to be the real cause of death, there are other people more likely to be suspected than the defendant. Naturally, we get no further guesses about who else could be accused of poisoning Oppianicus.⁵² The conclusion sounds all the more surprising. He does not say that all his probable conjectures prove beyond any doubt the impossibility of Cluentius' murdering his stepfather. Instead, Cicero assumes that the weaknesses of the charges point to the charges having been fabricated by the prosecution, and he wants to reinforce this claim with the real account of Oppianicus's death.

A striking deficiency of his whole argument on Oppianicus' death is that Cicero postpones the evidence for his conjectures in 174 until later, where the narrative continues without any indication how Cicero intends to support his story with proofs. Even the first phrase *cum vagus et exsul erraret* belies Cicero's uncertainty about the last days of Oppianicus.⁵³ Cicero suggests two likely causes of his death, that Oppianicus had long been suffering from some illnesses and also that he fell off his horse near Rome. The narrative also introduces L. Quinctius, an otherwise

⁵¹ A crucial statement is again worded so vaguely that the jury could think whatever it wants. *quod si esset ita factum, tamen ea res propter multorum eius modi casum minimum firmam veneni suspicionem haberet*. The question is what he means by *multorum eius modi casum* (he only mentioned Cappadox before) and *why* poisoning would be the least suspicious explanation for what happened.

⁵² That is a conspicuous weakness (or, possibly, a deliberate strategy) in Cicero's strategy of defence and counter-attack. He gives no indication who else could have committed the murder. Only in the end of 175 does he give a sinister suggestion, which gets its momentum from being attached to the 'factual' account of Oppianicus' death. *Mortis ratio ... eiusmodi est, ut aut nihil habeat suspicionis, aut, si quid habet, id intra parietes in domestico scelere versetur*.

⁵³ Cicero does not even seem to be completely aware of the exact sentence of Oppianicus. It might have been a kind of *relegatio*, which probably forbade him from entering Rome and the township of Larinum, while he might as well have retained his possessions in his home town.

unknown person, as their intimate friend, and possible lover of Sassia. The unexpected and unqualified appearance of a stranger seems to serve no other purpose in the narrative than strengthening the suspicion that Sassia had an interest in the murdering of Oppianicus.

One might also claim that Cicero *had to* say something so as not to appear completely ignorant about what happened to Oppianicus. A possible source of information is, of course, not revealed, so it seems again that it is Cicero's imagination that rounded off this particular narrative. Such evidence is missed all the more dearly as 175 answers the most crucial point of the charge and it must have been treated with primary care. That Cicero assigns only one passage to this crucial moment shows either how little information he could have about the background of the charges or that he deliberately reduced this part of the narrative to leave enough space for his real point, the blackening of Sassia.

There follows in 176–194 a colourful narrative of enforced torture and machinations by Sassia, depicted as a monster. The most telling feature of the story, in line with the 'thematic replacement', *heureme* is the precise nature of details with which Cicero proves Sassia's dominating influence over the whole investigation about Oppianicus' death. That precision stands in stark contrast with the vague outline of her husband's death. It occurs even to the superficial reader that the story gives too much information about the tortures and Strato's theft. These unduly long sections appear in an argument which in itself is irrelevant to judging the question of innocence.⁵⁴ But Cicero worked hard to present a plausible alternative, or rather, a substitute for the murder story, hence the completeness of 176–194.

A detailed analysis of the poisoning charges might look unnecessary but this contributes to our understanding of Cicero's strategy in two important ways. Firstly, it shows how weak the evidential basis of Cicero's refutation is and how many details remain unclear about Cluentius' actions and intentions. Secondly, we can now understand that the vagueness of the defence proper can be an indication as to why Cicero's case stood on weak grounds *and* why he needed a comprehensive strategy to establish the likelihood of the charges.

By the end of the argument Cicero streamlined the evidence of the four major probabilistic arguments in such a way that he could concentrate on proving the likelihood of Sassia's direct involvement in the trial and consequently the weakness of the charges. The scheming of his mother (the focus of the 'thematic replacement' *heureme* at the beginning) lends much weight to the improbability of Cluentius' wrongdoing in the *iudicium Iunianum* by 160. But the argument over Sassia's role in the past and present affects not only the jury's judgement on the *iudicium Iunianum*.⁵⁵ The success of upholding the result of the *iudicium Iunianum* demol-

⁵⁴ Do we need to know how Strato stole Sassia's treasure-box, how it came to light, or how the two separate investigations proceeded? Perhaps Cicero judged these details essential to make his Sassia narrative understandable, and entertaining.

⁵⁵ This is underlined clearly by Cicero's claim in 169, before the refuting the charge of poisoning Oppianicus *Unum etiam mihi reliquum eius modi crimen est, iudices, ex quo illud perspicere possitis quod a me initio orationis meae dictum est: quicquid mali per hosce annos A. Cluentius*

ishes the *invidia* directed against Cluentius, and thus achieves the purpose of the ‘initial adjustment’ heureme.

Finally, the proof of Sassia’s involvement helps the orator to disprove his last argument against a number of (apparently) minor charges in 161–4 where the defence seemed to lack much evidence in Cluentius’ favour. By the end of the speech the likelihood of Sassia’s actions become one of the most dominant issues of the trial (which is the result of the ‘thematic replacement’ heureme), whereas the role of the charges central to the present trial would appear insignificant. The strategy which I called the ‘parallel probabilities’ heureme allows Cicero to advance several lines of probabilistic arguments at the same time, which by the end of the speech converge onto the issue of Sassia’s involvement. The likelihood of that conclusion directly affects the jury’s decision on whether to acquit Cluentius, which they did eventually, and this marks the success of the combined use of three distinct heuremes in a highly complicated case.

viderit, quicquid hoc tempore habeat sollicitudinis ac negotii, id omne a matre esse conflatum. We need to see, however, that the final piece of evidence, besides discrediting the charge of poisoning Oppianicus, yields one of the principal conclusions of the speech. It postulates the active involvement of Sassia not only in the present trial, but in all the preceding events.

Conclusion

The analysis of selected Roman speeches has revealed several rhetorical strategies called heurèmes with similar patterns of reasoning, which all displayed some form of argumentation based on probabilities. It is clear that an assessment of the arguments based on probabilistic reasoning yields a view of rhetorical persuasion which classical rhetoric would never have been able to provide. These heuristic strategies extend to a larger section of a speech and even explain the fundamental strategy of the whole argument. Since the strategies appear in complex cases where the orator cannot predict every eventuality which will affect the outcome of the decision, a heurème can only be explained through a detailed exposition of the argument as well as the legal or political context which surrounds the case. It has also become clear that heuristic strategies which share common patterns are much more flexible than traditional rhetorical schemes, so a simple rule or definition cannot in itself give a proper account of it.

As the overview of heuristic schemes in Chap. 1 showed, heurèmes, which share similar characteristics, can be grouped according to certain argumentative principles. It is nevertheless important to emphasise again that the description of heurèmes in various groups is not prescriptive, but the groups should be considered open-ended. Each heurème should be treated as an individual piece of argument in its setting. To understand how heuristic schemes work, it is better not to look at a group as a polymorphic pool of strategies that share similar characteristics. New schemes can be created from old ones by applying the same argumentative principles to a case with a different set of probabilities.

As I said, heurèmes are usually linked by principles which determine how the argument manipulates the available probabilities. In the course of the analyses I showed that the heuristic view of rhetorical arguments is concerned with strategic elements of persuasion which can easily be adjusted to the contingencies of the case and affect the views of the audience, for example by setting a new agenda before them, one that may appear unexpectedly and surprisingly. As a result, the audience may be compelled to re-evaluate the probabilities set by the opposing side and make their judgement on the basis of a completely new understanding of the evidence.

I need to emphasise once again the fact that the concept of *heuremes* is not a detailed prescriptive theory similar to those found in ancient rhetorical handbooks, or even to some modern theories of argumentation. It is an independent analytic tool that builds on the practice of ancient oratory, but goes beyond it in the explanation of complex argumentative strategies which had to be modified constantly and adapted to the contingencies of each case. Such a heuristic view of speeches can make the argumentative practice of Greek and Roman oratory more explicit than it was before and describe strategies that ancient rhetorical theories did not explain as a result of their different approach, which was primarily educational. The heuristic method may nevertheless use classical *topoi* or other rhetorical schemes as well as the results of the psychology of decision-making, informal logic, argumentation theory and the theory of probability. It is devised to give a functional description of strategies found in real life cases. *Heuremes* do not have set rules as such for individual applications, as these would distort the nature of heuristic strategies as creative forms of reasoning. They help to evaluate the (often manipulative) arrangement of evidence and arguments in an attempt to win over the audience.

Rhetorical *heuremes* can help understand not only argumentative strategies in classical oratory that have so far remained hidden, but they may also provide clues about the highest levels of oratorical performance an effective Greek or Roman orator could display. A good speech could never simply rely on a mechanical application of rules and the fulfilment of common expectations about how an orator could and should present his argument. If the orator wanted to win a case, his argument had to present all probabilities that could be drawn from the available evidence in a form that would go beyond the expectations of the audience. Rhetorical *heuremes* provide proof of how oratory at master level required complex innovation in an attempt to surprise the audience and outdo the opponents.

The use of probabilistic strategies also indicates that an orator had to have strategies to control all the contingent elements of a case. As forensic speeches from classical antiquity show, the available evidence was rarely enough to make the conclusion certain beyond reasonable doubt. In order to succeed the orator had to consider all the probabilities that could have appeared in his own or in the opponent's argument and in the minds of the audience and take them into account in a persuasive argument. Rhetorical *heuremes* demonstrate strategies which the orators could use to bring the judges to their side with a probabilistic, plausible and persuasive argument.

At this point, the reader trained in the art of classical rhetoric or modern argumentation theory would rightfully ask what makes the concept of *heuremes* an approach universally applicable. In other words, is there any guarantee that the method applied here to a handful of Cicero's speeches will have any explanatory value to ancient oratory as a whole, or even to the modern practice of reasoning? Classicists and argumentation theorists who have not yet met the concept of *heuremes* may have certain objections to the theory. Most importantly, the heuristic approach presented in this book does not belong to any mainstream theory on rhetoric or reasoning, so its effectiveness has not yet been tested by the wider scholarly community. Secondly, the fact that the notion of *heuremes* was partly inspired by

modern disciplines as well as different areas of classical rhetoric could raise suspicion among classicists about its consistency, authenticity and provenance. Thirdly, the fact that this book provides an in-depth analysis of only a handful of speeches from a single orator would potentially raise questions about whether its conclusions could really sustain the universal character of the method. To answer these objections I would briefly like to justify my claim that heuremes can be applied to oratory beyond the speeches of Cicero and the Attic orators.

I will present four key features of the theory – contingency, probability, instrumentality and strategic orientation – which I believe will ensure that heuremes can achieve a high degree of explanatory value necessary for any approach to reasoning within and beyond Roman oratory. However, I would like to add two caveats beforehand. First, the groups of heuremes presented in this book might give the impression that the strategies they outline are capable of describing any argumentative strategy in classical or modern oratory. Such an assumption is misleading. The ultimate purpose of this book is to show that a heuristic approach to a certain selection of speeches with intricate arguments can uncover a host of complex strategies which other approaches had not discovered before. This means that the same approach, if used in the right way, should be able to describe strategies for other speeches, which may be similar to or different from the ones presented in this book. Understanding the theoretical foundations and the basic practice of the heuristic approach to oratory is as important as appreciating the complex legal and historical background of Attic and Ciceronian oratory.

Secondly, I must stress once again that the concept is still in an evolving form. As I mentioned in the Foreword, in more recent years I have not had the opportunity to extend this heuristic research to a much wider field. Therefore, one of the main tasks for anyone interested in this approach is to undertake a much more comprehensive analysis of speeches in Greek and Roman oratory and beyond. The purpose of such an undertaking is to find out to what extent the strategies outlined in this book are characteristic of Ciceronian and Attic oratory as a whole. It is also necessary to ascertain whether other strategies applied by ancient orators could be uncovered with the same heuristic approach in order to appreciate even more profoundly the art of complex reasoning in ancient oratory. A very interesting question, which leads away from the narrow field of Classics, is whether heuristic techniques based on the principles mentioned above (perhaps in very different form) appear in modern areas of reasoning, be it law, politics or even the practice of marketing. Finally, it remains to be seen whether heuremes as a method of reasoning, be it law, politics, based on either classical or modern examples, can be transferred to teaching the art of rhetoric in modern higher education.

I shall now return to the key features of heuristic reasoning which explain why it can be applied universally for the analysis of arguments. The presence of contingent elements in any form of reasoning is inevitable, given that it takes place in an environment and uses a method of argument which can never be completely determined in advance. As I mentioned at the beginning of the book, the ability to handle multiple contingencies arising through the whole rhetorical procedure is an essential skill for any aspiring orator. Therefore, any argumentative strategy which aims at

persuading the listeners has to take into account and respond to unforeseen circumstances. Although it may not be always possible to know in ancient speeches what were the precise contingencies which the orator had to face, it is safe to assume that the preparation and delivery of the speech could rarely be determined beforehand. The use of flexible strategies such as *heuremes*, as opposed to a schematic application of rhetorical rules, offered one way in which an orator could ensure that he could deal with such unexpected difficulties.

The second key element of the concept of *heuremes* is probability, which ensures that any strategy which evolves through an argument has to be directed by the necessity to make the conclusion as likely as possible in the minds of the listeners. Probability does not simply mean the plausibility of the evidence or the likelihood of the conclusion. It is a complex idea which takes into account every element of the argument, from evidence, forms of proof, possible expectations and thoughts of the audience and finally the conclusion which has to incorporate all these components to make a credible, cohesive and plausible proposition acceptable to the listeners.

The principle of instrumentality ensures that *heuremes*, as complex strategies, may use a variety of different argumentative methods in the service of persuasion. This could involve topics, argument schemes, fallacies or elements of *heuremes* themselves, so an understanding of various rhetorical, informal logical or argumentative schemes is necessary to analyse sections of a heuristic strategy. The key point of instrumentality is that *heuremes* need to remain flexible in order that they might be adaptable to the contingencies of the situation. Therefore, in identifying the constituents of the argument, one should never lose sight of the fact that the purpose of the analysis is to outline the structure and development of the argument and not to satisfy any rhetorical or argumentative framework.

The strategic orientation of *heuremes* involves all the features mentioned so far in order to arrange every part of the speech to gain the assent of the listeners. The most challenging aspect of heuristic analysis is to look beyond the topics, schemes and techniques of rhetoric and establish an individual strategy which incorporates all or most elements of persuasion in a speech. Heuristic strategies described in this book may give a model of how one can establish and outline a certain strategy, but there may be other approaches in identifying an argumentative plan.

The last question to be discussed briefly is the scope of application of the heuristic method outlined in this book. The primary field of application for *heuremes* is the argumentative analysis of classical legal or political speeches based on probabilistic reasoning. However, the concept of *heuremes* could be applied in other areas as well, where the teaching of rhetoric and strategic reasoning is paramount. Therefore I regard the heuristic analysis of Ciceronian speeches to be only the beginning of developing a more systematic approach to the study of texts which involve some form of argumentation based on probability. For example, the study of contemporary forensic and political speeches, inasmuch as they argue about questions of fact, may provide models for heuristic strategies.

The study of rhetorical *heuremes* could be used as a tool not just for analysing persuasive discourses. The collection of strategies may help to produce persuasive arguments, which are adaptable to specific fields. Therefore, just as in the case of

classical rhetoric, the scholarly use of the method can be transferred to the area of education, in particular, where students need to learn advanced forms of rhetorical reasoning. To achieve that goal they should be taught to identify and apply independently heuristic strategies that could be recognised and applied successfully when complex argumentation is to be presented to an audience which may not necessarily have specialist scientific or other kinds of knowledge.

It is not possible to outline in detail how the concept of heuristic reasoning could be taught as an advanced stage of rhetorical education, but I can very briefly suggest certain criteria which such studies need to involve. As preparation, it should certainly incorporate a thorough study of elementary rhetoric, especially the areas of *argumentatio* and *dispositio*. It would also need to take into account modern results of argumentative analysis, so a good knowledge of informal logic is also necessary. These preparatory studies can be naturally extended to other areas, for example cognitive psychology or a practical theory of probability. At its main stage, the teaching of strategic analysis should use a handful of carefully selected speeches from Greek or Roman oratory, reflecting different themes and degrees of complexity. The key to any study should be striking a balance between the depth and extent of the analysis and its strategic orientation. Students should not only be able to identify different techniques of persuasion, but they should also see how all these could appear and evolve within a complex and often unpredictable argumentative situation. The purpose of the whole study should be the development of a skill which can recognise the interplay and evolution of the elements of persuasion directed towards a strategic goal. At its highest level, students could actually be able to present forms of heuristic reasoning in simulated exercises, somewhat similar to the teaching of oratory in ancient schools of rhetoric.

Teaching heuristic reasoning through Greek and Roman speeches can achieve the rehabilitation of Classical oratory as a mainstream subject in the fields of Classics, Argumentation Theory, Rhetoric, Communication Studies, Law or Politics. In the past decades, the teaching of rhetoric has become a relatively narrow field concerning mostly Classical scholars or those interested in the Theory of Argumentation, confined to Departments of Classics, Communication or Rhetoric mostly in the United States and to a lesser extent, Europe. The heuristic approach would again enable us to use these speeches for their original purpose, to learn how to argue persuasively at a masterly level or to assess critically complex forms of arguments. It is for this reason that I disagree with those who say that the concept of heuremes should be confined to a highly restricted field of advanced studies in Rhetoric, Argumentation Theory or Classics. Naturally, this book could serve only as an introduction to such studies. Yet, if the method were developed further and refined, it would bring benefits to a wider academic audience. The field of application could then be extended to include other practical fields in the humanities or social sciences, where probability and (rational) argumentation are put into the service of persuasion.

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