“Trump is sure talking like someone hiding something”

Richard Cherwitz, For the Express-News

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It never ceases to amaze me how many of the ways we argue about topics in politics and law have their roots in antiquity — and specifically in classical theories of rhetoric.

While we think our discourse today is unique to the times and circumstances in which we live, the reality is that patterns of thinking and talking are inherent in the human condition and therefore may be time invariant.

Case in point. I am a college professor who teaches argumentation and advocacy, a class comprised of dozens of students who eventually become lawyers. In this course, I present the Roman concept of “stasis” — a theory delineating all of the issues attorneys in Roman times drew upon to determine whether someone is guilty.

As I tell my students, while the Romans couldn’t have predicted the specific content about which we argue in the 21st century, their notion of stasis is applicable and informative. It perfectly anticipated how we argue today.

Consider the three major points of stasis detailed by the Romans. First are “questions of fact.” This question asks: Did the accused commit the act or do the deed? This is a factual, not a legal question.
Second are “questions of definition or interpretation.” Here attorneys ask: Does the act or deed constitute and meet the definition of the crime? This is a legal question. Finally are “questions of quality or justification.” Put differently, is there partial or absolute justification explaining why the accused may have committed the deed?

The Romans made clear that several sub-issues help answer the first point of stasis, questions of fact. For example is there circumstantial evidence (the place, time and duration of the act) or motives that implicate the accused? In addition, is there past proof (what the accused did or said prior to the act), contemporaneous proof (what was done or said simultaneous to the act) or subsequent proof (evidence such as blood, fingerprints obtained after the act occurred) suggesting the accused did the deed?

But there is one sub-issue I find particularly enlightening in 2017. It was called “argument from consequence.” Roman lawyers often asked: Does the accused person’s behavior show signs or consequences of guilt?

In the case of recent allegations made about President Donald Trump, argument from consequence is telling and a paradigmatic example of the applicability of the Roman theory of stasis.

In the past few months, Trump has admitted that he fired FBI director James Comey because of the Russian investigation. In his tweets, there are numerous examples of inconsistency in which Trump contradicted what members of his own administration said.

Recent revelations are perhaps the most curious. Trump asked his advisers about the rules pertaining to presidential pardons and doubled down on his efforts to undermine the investigation of the special prosecutor.

Although some find all of this innocuous, many people wonder whether Trump’s actions and words expose a person who did things that are wrong and perhaps illegal — someone who shows the “consequences” of guilt.

Many legal observers and members of the media reasonably ask: If Trump isn’t guilty of wrongdoing and subsequently covering it up, why would he say and do the things he does? After all, as the Romans knew, only a guilty person would behave that way? To be clear, I am not arguing that this is a prima facie case for President Trump’s guilt.

But it certainly is relevant and probative. At minimum, it indicates why we should remind ourselves and our students that the ways we think and argue are deeply rooted in the human condition and are explained by philosophers thousands of years ago.

Richard Cherwitz is the Ernest S. Sharpe Centennial Professor in the Moody College of Communication at the University of Texas. He is founder and director of Intellectual Entrepreneurship Consortium in the university’s Office of the Vice President for Diversity and Community Engagement.