

# STUDYING AND TEACHING “LAW AS RHETORIC”:

## A PLACE TO STAND

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The first of these [attacks on rhetoric], the attack from above, argues for a politics of reason whose indisputable truths can only be obscured by the rhetorician’s passionate appeals. This is the position that Socrates defends. The second, the attack from below, insists that the rhetorician’s invocation of truth and justice is a sham, a technique for gaining power whose success requires that its practitioners either fail to understand what they are doing or deliberately conceal it. This is the line of attack forcefully pressed by Callicles, . . . . Gorgias stands between these two, between Socrates and Callicles, and the question is, does he have any ground on which to stand? Does the craft of rhetoric have a separate and legitimate place in human life, in between pure reason and pure power?<sup>1</sup>

### INTRODUCTION

As they begin law study, students “undergo a linguistic rupture, a change in how they view and use language.”<sup>2</sup> The change affects not only their understanding of language use, but also their ideas about how the law works and its place for them.<sup>3</sup>

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\* © 2010, Linda L. Berger. All rights reserved. Professor, Mercer University School of Law. Special thanks to Amy Sloan for sharing her materials; to Tom Cobb, Michael Frost, Jay Mootz, Terry Pollman, Jack Sammons, Jessica Slavin, and Karen Sneddon for being “good readers”; to Kevin Hembree for research assistance; and to Thomas Jefferson School of Law and Mercer University School of Law for supporting the development of the course and the writing of the Article. Most of all, thank you to my students.

1. Anthony T. Kronman, *Rhetoric*, 67 U. Cin. L. Rev. 677, 691 (1999).

2. Elizabeth Mertz, *The Language of Law School: Learning to “Think Like a Lawyer”* 22 (Oxford U. Press 2007).

3. *Id.* (“As in other forms of language socialization, new conceptions of morality and personhood are subtly intertwined with this shift to new uses of language.”).

Their ideas are influenced by pervasive legal conversations reflecting the positions of Socrates and Callicles: the law is all rules or all power. Against these versions of the legal conversation, I propose in this Article to offer law students a rhetorical place to stand, between reason and power.<sup>4</sup>

There are two grounds for this proposal: first, introducing students to rhetoric makes it possible for them to envision their role as lawyers as constructive, effective, and imaginative while grounded in law, language, and persuasive rationality.<sup>5</sup> Second, rhetoric, dealing with the “effects of texts,”<sup>6</sup> allows law professors to integrate their own scholarship and teaching as well as to develop a more nuanced understanding of the law school classroom as a rhetorical community.

For law students, rhetoric provides a strong counter to the constrained view of the life of lawyers offered by popular depictions of formalism or realism.<sup>7</sup> In the typical description, propo-

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4. The Carnegie Foundation, in a recent publication setting out an agenda for higher education generally, recommended “the old humanistic discipline of rhetoric” as a discipline for guiding the inquiry into context. According to the report, rhetoric can provide an often-missing intellectual connection from analysis of abstract concepts “to engagement with others in responsible relationships.” William M. Sullivan & Matthew S. Rosin, *A New Agenda for Higher Education: Shaping a Life of the Mind for Practice* 118 (Jossey-Bass 2008).

5. See Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* 279 (Oxford U. Press 2005) (“Rational legal argument . . . is not demonstrative argument. . . It is rationally persuasive, rather than rationally demonstrative.”).

6. Steven Mailloux, *Disciplinary Identities: Rhetorical Paths of English, Speech, and Composition* 40 (Modern Lang. Assn. of Am. 2006).

7. Although these depictions have been criticized by legal scholars, lawyers, and judges, they live on in the language of judicial opinions and in public debates, especially those surrounding confirmation hearings for Justices of the United States Supreme Court. See *Nomination of Sonia Sotomayor to be Associate Justice of the Supreme Court of the United States Before the Senate Committee on the Judiciary*, 111th Cong. (July 13, 2009) (opening statement of Sen. Jeff Sessions, “[O]ur legal process is based on a firm belief in an ordered universe and objective truth. The trial is the process by which the impartial and wise judge guides us to the truth.”) (available at <http://www.npr.org/templates/story/story.php?storyId=106540813>); *Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing before the Senate Committee on the Judiciary*, 109th Cong. 56 (Sept. 2005) (statement of John G. Roberts) (comparing the judge’s role to that of a baseball umpire, merely applying the rules to call “balls” and “strikes”) (available at <http://www.gpoaccess.gov/congress/senate/judiciary/sh109-158/55-56.pdf>).

Judge Richard Posner has defined nine theories of judicial behavior, including the one he favors, which he calls pragmatism rather than realism. Richard A. Posner, *How Judges Think* 13 (Harv. U. Press 2008). Judge Posner defines pragmatism as “basing a judicial decision on the effects the decision is likely to have, rather than on the language of a statute or of a case, or more generally on a preexisting rule.” *Id.* at 40; see David F. Levi, *Autocrat of the Armchair: Reviewing Richard A. Posner, How Judges Think*, 58 *Duke L.J.*

nents of legalism or formalism are said to believe that the meaning of legal rules can be "found," the true version of facts can be established, and logic can be applied to yield certain results. Contrasting their theory with this version of formalism, political realists argue that even though meaning is often indeterminate and facts are frequently ambiguous, judges must still decide. To do so, realists claim, judges will necessarily turn to their personal, political, or ideological beliefs.<sup>8</sup>

Set next to these depictions, rhetoric looks at how the law works by exploring a meaning-making process, one in which the law is "constituted" as human beings located within particular historical and cultural communities write, read, argue about, and decide legal issues.<sup>9</sup> Studying and teaching "law as rhetoric"

1791, 1796 (2009) ("There are a number of problems with Judge Posner's descriptions and prescriptions. Most fundamentally, much of what he asserts about how judges think is just assertion, lacking any factual support in empirical study or even anecdote."); Gerald B. Wetlauffer, *Systems of Belief in Modern American Law: A View from Century's End*, 49 Am. U. L. Rev. 1 (1999) (describing six different "operating systems" that he says are currently functioning in legal discourse—formalism, realism, legal process, law and economics, positivist, and contemporary critical theory). According to Professor Wetlauffer, the great divide is between the Grand Alliance of the Faithful (formalism, legal process, law and economics, and legal positivists) and the League of Skeptics (legal realists and contemporary critical theorists). Wetlauffer, *supra* n. 7, at 4, 59–77.

8. For both sides of the current debate about the "new legal realism," that is, the extent to which politics and ideology affect judicial decisions, see Posner, *supra* n. 7; Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 Duke L.J. 1895 (2009) (raising issues about the selection and coding of data in empirical studies of judicial decisions); Dan M. Kahan, "Ideology in" or "Cultural Cognition of" Judging: What Difference Does It Make? 92 Marq. L. Rev. 413, 413 (2009) (distinguishing between "values as a self-conscious motive for decisionmaking and values as a subconscious influence on cognition"); Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. Chi. L. Rev. 831 (2008) (setting forth the ideological or political thesis); Brian Z. Tamanaha, *The Distorting Slant in Quantitative Studies of Judging*, 50 B.C. L. Rev. 685, 686 (2009) (arguing that a determination to prove that judging is political "pervades the work of judicial politics scholars" and that instead of revealing something new, the results of quantitative studies "basically confirm what judges have been saying about judging for many decades").

9. On the concept of "law as rhetoric" generally, see James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. Chi. L. Rev. 684, 695 (1985) [hereinafter White, *Law as Rhetoric*] ("Like law, rhetoric invents; and, like law, it invents out of something rather than out of nothing. It always starts in a particular culture and among particular people. There is always one speaker addressing others in a particular situation, about concerns that are real and important to somebody, and speaking a particular language. Rhetoric always takes place with given materials.")

For discussion of the "rhetorical turn" in legal scholarship, for example, see Stanley Fish, *Rhetoric, in Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* 471, 485–494 (Duke U. Press 1989) (discussing disciplines in which rhetoric has been "on the upswing"); Francis J. Mootz III, *Rhetorical*

treats rhetoric not as tool or technique, nor even as the art or craft of persuasion, but instead as an interactive process of persuasion and argumentation that is used to resolve uncertain questions in this setting and for the time being. Such treatment rescues rhetoric from being viewed as a grab bag of literary devices, language tricks that put a gloss on legal reasoning but add little of substance. Instead, it focuses on the rhetorical process as being central to perception, understanding, and expression.<sup>10</sup>

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*Knowledge in Legal Practice and Theory*, 6 S. Cal. Interdisc. L.J. 491, 572 (1998) (“Legal practice is rhetoric all the way down, with rhetorical engagements layered upon rhetorical engagements in a dynamic and challenging confluence that cannot be constrained by pretenses of analytical certainty.”); Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 Vt. L. Rev. 681, 685–686 (1994) (“In the legal culture today one can discern the rhetoric of multi-vocality, empathy, and emotion playing out against a living backdrop of drama, myth, and metaphor.”); Gerald Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 Va. L. Rev. 1545, 1549 n.14 (1990) [hereinafter Wetlaufer, *Rhetoric and Its Denial*] (discussing a range of ideas related to the “epistemological consequences of rhetoric”); see also James Boyd White, *A Symposium: The Theology of the Practice of Law, February 14, 2002 Roundtable Discussion*, 53 Mercer L. Rev. 1087, 1090 (2002) [hereinafter White, *Roundtable Discussion*] (“[T]he minute we begin to think and talk about anything at all we live in the world of language, a world of contingent resources for thought and speech, and rhetoric is a perfectly good term for how we do that.”).

Elsewhere in the legal academy, the discussion of law and rhetoric centers on the difference between “mere” rhetoric and something the Author contends is “reality.” A search of Westlaw’s Texts and Periodicals database using the search terms “rhetoric” w/3 “reality” generated 2,871 results on February 2, 2010.

10. Professors who teach legal writing have championed inclusion of rhetoric in legal writing pedagogy for several decades. For the earliest articles, for example, see Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 Cornell L. Rev. 163 (1993); Neil Feigenson, *Legal Writing Texts Today*, 41 J. Leg. Educ. 503 (1991); Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 Sw. L.J. 1089 (1986); Jill J. Ramsfield, *Legal Writing in the Twenty-First Century: The First Images*, 1 Leg. Writing 123 (1991).

Several legal writing textbooks explicitly advocate the use of classical and contemporary rhetorical approaches: Kirsten Konrad Robbins-Tiscione, *Rhetoric for Legal Writers: The Theory and Practice of Analysis and Persuasion* (West 2009); Michael R. Smith, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* (2d ed., Aspen Publishers 2008). Similarly, Michael Frost has extensively applied classical rhetorical analysis to legal interpretation and composition. See Michael H. Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage* (Ashgate 2005) (collection of articles published between 1990 and 2003).

Others have proposed placing more emphasis on rhetorical teaching throughout the law school curriculum, see Leslie Bender, *Hidden Messages in the Required First-Year Law School Curriculum*, 40 Clev. St. L. Rev. 387 (1992) (arguing that the traditional focus on appellate cases and authority underscores the hidden message that specific facts, contexts, and people are nearly irrelevant); Elizabeth C. Britt et al., *Extending the Boundaries of Rhetoric in Legal Writing Pedagogy*, 10 J. Bus. & Tech. Comm. 213 (1996) (proposing a new conception of rhetoric’s role in the law school curriculum); Leigh Hunt Greenhaw, “To Say What the Law Is”: *Learning the Practice of Legal Rhetoric*, 29 Val. U. L. Rev. 861, 895–896 (1995) (suggesting that legal writing is “not something distinct from what is taught in

For law professors, rhetoric offers a way to bring together the objects of their study (the variety of legal "texts" that are the "objects of interpretive attention"<sup>11</sup>) with the subject matter of their teaching and the composition of their scholarship. For example, the professor who uses a rhetorical approach to analyze a judicial opinion will be better able to teach students how to interpret and construct legal arguments because the professor has taken apart the structure of an argument and evaluated the effectiveness of an author's rhetorical choices. Similarly, the law professor may directly apply rhetorical theory to the classroom conversation, treating the semester's work as a series of rhetorical transactions between student and teacher, reader and writer, inherited texts and current arguments, individuals and social contexts.<sup>12</sup> Viewing the classroom as a rhetorical community enables the teacher to tap into ongoing transactions in more effective ways.

Because of rhetoric's complexity and fragmentation,<sup>13</sup> I found it impossible to frame a single rhetorical approach that would be most effective in a law school class. Instead, my upper-level elective course in Law & Rhetoric<sup>14</sup> surveys a number of classical and contemporary rhetorical theories that seem particularly appropriate for interpreting and composing legal arguments. In developing the learning objectives of the course, I envisioned "rhetoric" as a study (of the effects of texts), a process (for composing texts), and a perspective (for invention in the classical rhetorical sense).<sup>15</sup> While rhetorical study has much in common with lite-

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other law classes" but instead that both doctrinal and legal writing courses "can and do teach the practice of legal rhetoric").

11. Mailloux, *supra* n. 6, at 40.

12. See e.g. Linda L. Berger, *A Reflective, Rhetorical Model: The Legal Writing Teacher as Reader and Writer*, 6 *Leg. Writing* 57 (2000).

13. See Robbins-Tiscione, *supra* n. 10, at 9–60.

14. The examples in this Article are drawn primarily from the 2007 and 2009 versions of the class. The Article's description of assignments and topics conflates the two years, and so it encompasses much more than any one-semester course should include. I taught the class in 2003, 2005, and 2007 at Thomas Jefferson School of Law; in 2009 and 2010, I taught the class at Mercer University School of Law. At Thomas Jefferson, my students were a mix of second- and third-year students enrolled in a three-unit elective. At Mercer, my students were sixth-semester students enrolled in a two-unit elective. I failed to appropriately adjust the reading assignments for a two-unit course, and so, in the words of one student evaluator, "there was an insane amount of reading."

15. See Anthony G. Amsterdam & Jerome Bruner, *Minding the Law* 14 (Harv. U. Press 2002) (Rhetoric encompasses "ways of winning others over to our views, and of justifying those views to ourselves as well as others, when the question of how things in the world ought to work is *contested* or *contestable*." (Emphasis in original)); Wetlaufer, *Rhe-*

rary criticism and interpretation, the course in Law & Rhetoric approaches “rhetoric” not only as a “stance for interpreting,” but also as a “guide for composing” and inventing.<sup>16</sup>

Part I of the Article explores the argument that the study of rhetoric is important to legal education. Part II provides the framework of the Law & Rhetoric course by describing the reading, writing, and oral presentation assignments; this part includes examples of student work. Part III explains the various rhetorical theories and approaches; it also illustrates how these are used by my students to interpret, compose, and invent. Part IV concludes with students’ thoughts about the course.

Most students say that the course is theoretically challenging but practically worthwhile: they have become better rhetoricians because they are more aware and adept legal readers and writers, and they believe that better rhetoricians become better lawyers. I think their conclusion that better rhetoricians become better lawyers carries within it an important realization: rhetoric recognizes students’ power and ability to affect outcomes in their rhetorical communities, both now, while they are law students, and later, when they are practicing lawyers. In their traditional guises, formalism and realism appear to doom lawyers to lives of “quiet desperation”<sup>17</sup>: if “rules” or “politics” compel outcomes, the work of lawyers will have little effect. Rhetoric recognizes a constructive role for law students and lawyers by acknowledging that the law is often being interpreted and that interpretations are often contestable. From the rhetorical point of view, law students, law teachers, and lawyers are human actors whose work makes a difference because they are the readers, writers, and members of

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*toric and Its Denial*, *supra* n. 9, at 1546 (“By ‘rhetoric,’ I mean the discipline . . . in which the objects of formal study are the conventions of discourse and argument.”); White, *Law as Rhetoric*, *supra* n. 9, at 684 (rhetoric establishes, maintains, and transforms the community and the culture).

16. Mailloux, *supra* n. 6, at 40 (“A production or performance model of rhetoric gives advice to rhetors concerning probable effects on their intended audiences. . . . [A] hermeneutic or reception model provides tools for interpreting the rhetorical effects of past or present discourses and other practices and products.”).

17. See Charles A. Bird & Webster Burke Kinnaird, *Objective Analysis of Advocacy Preferences and Prevalent Mythologies in One California Appellate Court*, 4 J. App. Prac. & Process 141, 149 (2002) (“The . . . lawyer’s life would be one of quiet desperation if the work consisted merely of delivering a list of issues and a record to a court that would decide cases without regard to the quality of advocacy.”).

interpretive and compositional communities who together "constitute" the law.<sup>18</sup>

But their power is not unrestrained. Unlike political realists, rhetoricians suggest that there are reasonable constraints on what lawyers argue and how judges decide and that the constraints come from the rhetorical process itself. These constraints emerge from language, history, and culture, and, in particular, from the norms and customs of judging and of law practice.<sup>19</sup> Although rhetoric does not promise certain answers, it can promise results that are, in Karl Llewellyn's term, reckonable<sup>20</sup>—they are certain enough that lawyers can make judgments about their likelihood and appellate lawyers can feel comfortable charging clients for their work.

Finally, rhetoric may help prepare law students to move more effectively between the law and life, between the legal language of abstraction and their future clients' words describing individual human conflicts and dilemmas. If law school pedagogy carries the message that the "law's key task is effective translation of the 'human world' using legal categories," law students may find themselves poorly prepared for the realities of legal practice.<sup>21</sup> The language of law school may even distance law students from individual voices they will need to be able to hear.

To sum up, studying the "law as rhetoric" allows students to take part in the many-voiced and open-ended rhetorical process through which the law is made. When students study the law as

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18. Discussing law and its differing interpretations is the way we constitute community: rhetoric is "the central art by which community and culture are established, maintained, and transformed." White, *Law as Rhetoric*, *supra* n. 9, at 684; see also Richard Rorty, *Consequences of Pragmatism (Essays: 1970-1980)* 166 (U. Minn. Press 1982) ("Our identification with our community—our society, our political tradition, our intellectual heritage—is heightened when we see this community as *ours* rather than *nature's*, *shaped* rather than *found*, one among many which men have made." (Emphasis in original)); Austin Sarat, *Crossing Boundaries: Teaching Law in the Liberal Arts*, in *Teaching What We Do: Essays by Amherst College Faculty* 61 (Amherst College Press 1991) ("When the indeterminacy of legal language is . . . exposed, students confront law as something more than a system of rules. They see it as a system of human choices and moral or political judgments shaped, constrained by, and constructed out of social institutions and practices.").

19. See Jack L. Sammons, *The Radical Ethics of Legal Rhetoricians*, 32 Val. U. L. Rev. 93, 99 (1997) ("[Legal rhetoric] is not unbridled because this particular form of rhetoric is located . . . within a particular rhetorical community with a particular rhetorical culture.").

20. Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 4 (Little, Brown, & Co. 1960).

21. Elizabeth Mertz, *Inside the Law School Classroom: Toward a New Legal Realist Pedagogy*, 60 Vand. L. Rev. 483, 505 (2007).

rhetoric, they are encouraged to bring in pluralistic and complicating forces, including their own experiences, values, and senses of themselves. Studying legal arguments as rhetorical performances helps law students become more aware of the effects of language and symbol use and meaning frames. This growing awareness makes them more rhetorically effective speakers and writers. Beyond improving their skills, engaging in law as rhetoric may help conjure and channel students' natural ability to imagine and invent, and it may enable them to better listen to alternative views and to speak in their own voices.<sup>22</sup>

### I. WHAT'S THE PLACE OF RHETORIC IN LEGAL EDUCATION?

The answer to this question appears obvious: "Simply put, lawyers are rhetors. They make arguments to convince other people. They deal in persuasion."<sup>23</sup> Proposing "that the law is a branch of rhetoric," James Boyd White wrote, "Who, you may ask, could ever have thought it was anything else?"<sup>24</sup> Others give the equally obvious, contrary answer: simply put, rhetoric is not reality; it is based on emotion, not reason; on word tricks, not logic.<sup>25</sup>

Why should legal educators see and teach the law "as" rhetoric? That is, why should we engage students in learning not only the art or craft of persuasion, but also "the art of thought called for where scientific or mathematical forms of thought won't work, where we live in necessary uncertainty?"<sup>26</sup> First, we should do so because rhetoric reminds us that in "hard cases," the legal language rarely "fits" and the legal rules rarely compel the result. Moreover, it may be the advocate's role to make a case seem "hard" to avoid having it be categorized as falling within a well-

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22. "The arrogance that accompanies the closed linguistic system of law can contribute to the alienation of lawyers and the legal system from the people they are supposed to serve. Ironically, learning the apparently universalizing language of law may actually block those speaking the language of law from truly hearing alternative points of view." *Id.* at 513.

23. Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 *Yale J.L. & Hum.* 155, 177 (2006).

24. White, *Law as Rhetoric*, *supra* n. 9, at 684.

25. See Steven L. Winter, *A Clearing in the Forest: Law, Life, and Mind* 6–12 (U. Chi. Press 2001) (discussing the "ideology" of rationalism).

26. White, *Roundtable Discussion*, *supra* n. 9, at 1089.



settled legal principle.<sup>27</sup> To read and to argue hard cases, students need to interpret, and interpretation is complex: "[l]ike all human language, legal language is embedded in a particular setting, shaped by the social contexts and institutions surrounding it. It does not convey abstract meaning in a legally-created [sic] vacuum, and thus cannot be understood without systematic study of the contextual molding that gives it foundation in particular cultures and societies."<sup>28</sup> Studying the law as rhetoric is essential to begin the complex task of legal interpretation.

Rhetoric also is essential for legal composition, perhaps even more naturally so because rhetoric is the historical site of the tools and implements of persuasion and argumentation. Moreover, the outcome of a legal argument is inherently rhetorical. That is, it is rhetorical because any agreement with the conclusion rests upon the ability of one proponent to persuade another, or to persuade an authoritative decision maker, to read a document or to understand a situation in a certain way.

Finally, studying the law as rhetoric immerses students in an imaginative human endeavor that may be capable of bringing about change. The rhetorical approach to imagining how things would look in different lights and from different angles offers the opportunity to effect change when "reality" favors the status quo. Looking into how reality is constructed makes it possible for the lawyer to shape arguments about individual circumstances that depart from the accepted narratives and existing frameworks. Recognizing that the law is constructed by human beings as they interpret, compose, and interact makes it possible for the law student to imagine a voice and a place to fit within the legal rhetorical community.

What would it mean to study and teach the law "as" rhetoric? I will mention a few general principles here; my version of the answer to the broader question is in the description and evaluation of the Law & Rhetoric course in Parts II and III. Rhetorical theorists agree that rather than being engaged in a search for "truth," in the sense of a universal principle, rhetoric's goal is the

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27. This concept that it is sometimes the lawyer's job to make a case "hard" derives from Douglas M. Coulson, *Sophistic Historiography and Advocacy: Making Hard Cases and Bad Law*, presentation to the Association for the Study of Law, Culture, and Humanities, Boston, Massachusetts, in April 2009 (copy on file with Author).

28. Mertz, *supra* n. 21, at 513.

meaning that emerges from a contingent interaction among the reader and the writer, the speaker and the audience, the language and the context.<sup>29</sup> From the rhetorical standpoint, words do not “fit” nor do they “represent” the world: instead, they are ways of interacting with it.<sup>30</sup> Further affecting their stance toward persuasion and argumentation, rhetorical theorists also agree that law is not science, a discipline that assumes the ability to prove that a result is compelled by a reasoning process, either by logical demonstration or because of empirical data.<sup>31</sup> Even though lawyers and judges claim otherwise in legal briefs and opinions, rhetoricians assume that the result of a lawsuit is not “compelled” by the application of the rules and that what advocates mean, and what they are understood to mean, is not fully revealed by the words they choose. If we recognize that legal conclusions are not compelled by law, logic, or language alone, we are free as interpreters to consider historical, cultural, and social factors and to substitute the web of context for the ladder of the rules.<sup>32</sup> As a result, rhetoric is able to accommodate diversity and imagine change, based in human experience, sensitive to middle grounds, and in opposition to all-or-nothing judgments.

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29. For example, Richard Rorty differentiates between two ways of thinking: “The first [what Stanley Fish labels as foundationalist] . . . thinks of truth as a vertical relationship between representations and what is represented.” Rorty, *supra* n. 18, at 92. The second is the rhetorical view, which “thinks of truth horizontally—as the culminating reinterpretation of our predecessors’ reinterpretation of their predecessors’ reinterpretation. . . . [I]t is the difference between regarding truth, goodness, and beauty as eternal objects which we try to locate and reveal, and regarding them as artifacts whose fundamental design we often have to alter.” *Id.*

30. Winter, *supra* n. 25, at 88–89.

31. Science, many argue, is not science either, at least not in the sense of perfect knowledge and absolute certainty. See White, *Law as Rhetoric*, *supra* n. 9, at 687–688; see also Winter, *supra* n. 25, at 9.

32. Amsterdam and Bruner describe this idea as follows:

Our objective, then, has been to increase awareness, to intensify consciousness, about what people are doing when they “do law.” We have emphasized that the framing and adjudication of legal issues necessarily rest upon *interpretation*. Results cannot be arrived at entirely by deductive, analytic reasoning or by the rules of induction. . . . There always remains the “wild card” of *all* interpretation—the consideration of context, that ineradicable element in meaning making. *And the deepest, most impenetrable feature of context lies in the minds and culture of those involved in fashioning an interpretation.*

Amsterdam & Bruner, *supra* n. 15, at 287 (emphasis in original); see Paul J. Spiegelman, *Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake’s Ladder in the Context of Amy’s Web*, 38 J. Leg. Educ. 243 (1988) (re-telling Carol Gilligan’s description in the law school context).

## II. FRAMING A COURSE IN LAW & RHETORIC

In the classical sense, rhetoric is *the* practical art for lawyers: it helps advocates discern and use techniques and methods for persuading audiences with different backgrounds and levels of education and experience.<sup>33</sup> Beginning with Aristotle's definition of rhetoric as "the faculty of observing in any given case the available means of persuasion," the emphasis is on exploring and testing all the available means of persuasion.<sup>34</sup> Early recognition of the close relationship between rhetoric and law came from Gorgias, the most famous of the Sophists. Rhetoric, he said, was "the art of persuading the people about matters of justice and injustice in the public places of the state."<sup>35</sup> Contemporary rhetoric's definition is broader: "the human use of symbols to communicate."<sup>36</sup> Because symbols and signs<sup>37</sup> filter and focus, as do metaphors and narratives, contemporary rhetoric sheds light on the inherently

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33. For the authors of the classic rhetoric text, "[r]hetoric is the art or the discipline that deals with the use of discourse, either spoken or written, to inform or persuade or motivate an audience." Edward P. J. Corbett & Robert J. Connors, *Classical Rhetoric for the Modern Student* 1 (4th ed., Oxford U. Press 1999).

34. Aristotle, *The Rhetoric of Aristotle* 224, bk I, ch. I, 1355b, line 26 (Lane Cooper trans., D. Appleton & Co. 1932). The Rhetoric continues

It is clear, then, that rhetoric is not bound up with a single definite class of subjects, but is as universal as dialectic; it is clear, also, that it is useful. It is clear, further, that its function is not simply to succeed in persuading, but rather to discover the means of coming as near such success as the circumstances of each particular case allow. In this it resembles all other arts. For example, it is not the function of medicine simply to make a man quite healthy, but to put him as far as may be on the road to health; it is possible to give excellent treatment even to those who can never enjoy sound health. Furthermore, it is plain that it is the function of one and the same art to discern the real and the apparent means of persuasion, just as it is the function of dialectic to discern the real and the apparent syllogism. What makes a man a "sophist" is not his faculty, but his moral purpose.

*Id.* at 23-24, bk. 1 ch. 1, 1355b, lines 7-21.

35. See White, *Law as Rhetoric*, *supra* n. 9, at 684 (quoting Plato's dialogue of the same name).

36. Sonja K. Foss et al., *Contemporary Perspectives on Rhetoric* 1 (3d ed., Waveland Press, Inc. 2002).

37. A symbol "stands for or represents something else by virtue of relationship, association, or convention." *Id.* at 2. It is not the thing itself, but merely a symbol that stands for it. Symbols are distinguished from signs by the degree of connection between the thing and its representation. *Id.* at 2-3. A sign has a direct relationship: "Smoke is a sign that fire is present," while a kitchen is a symbol for a place where food is prepared. *Id.*

persuasive act of choosing the symbols and stories that affect our perceptions, actions, and reactions.<sup>38</sup>

Despite their long and close relationship, one of the most remarkable features of the rhetoric of law is the law's continuing denial that it is rhetoric.<sup>39</sup> Based on their reading of Professor Gerald Wetlaufer's description of the discipline-specific rhetoric of law,<sup>40</sup> I ask my students during the first class of the semester to consider whether the rhetoric of closure and certainty is the most appropriate choice for lawyers:

Should the rhetoric of law always be "clear, orderly, linear, and paraphrasable"?<sup>41</sup> Students say, "Yes, I should be able to easily determine what the author wants me to know."

Should the author speak in an impersonal voice, in "objective and authoritative tones"?<sup>42</sup> Now the response is more mixed; for some, a personal voice is more interesting, true objectivity seems unlikely, and authoritativeness forecloses response.

Should the arguments rely heavily on authority, speak as if texts have one true meaning, and use a highly rational style?<sup>43</sup> At the beginning of the semester, most students cannot imagine any other way to construct a legal argument.

When stories are told, should they be told in a manner that makes it appear they simply reveal the objective truth?<sup>44</sup> This concept bothers students; when you tell a story, students say that you should acknowledge that it is "just a story."

Should the truth be subordinated to effectiveness?<sup>45</sup> Here, we have a difference of opinion. Some students argue that the judicial system is a search for truth and so the advocate has an independent obligation to find and speak the truth;

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38. *Id.* at 2.

39. Wetlaufer, *Rhetoric and Its Denial*, *supra* n. 9, at 1555.

40. *Id.* at 1550–1552.

41. *Id.* at 1558.

42. *Id.*

43. *Id.* at 1559.

44. *Id.*

45. *Id.*

others argue that the judicial system is an arena from which the truth (or at least the better argument) will emerge from a competition among effective lawyers.

When we return to these questions late in the semester, they have become broader: if a lawyer acknowledges in a legal argument that what a specific legal text means is up for grabs and that the legal interpretation he is arguing for is contestable, can he still be effective? If a lawyer explicitly pursues the values of openness, diversity, and truth in writing to or speaking before the court, can she be as effective as the lawyer who argues that there is only one right answer, the one that benefits her client? How can we reconcile the lawyer's rhetorical claim that there is one right answer with the rhetorician's position that instead of providing right answers, we are developing arguments that are designed to gain more adherents among audience members?<sup>46</sup>

#### A. Rhetorical Reading

Law & Rhetoric meets twice each week; the first class introduces the weekly topic while the second class encourages hands-on engagement with the assigned readings through concrete examples (often audio or video clips), demonstrations, and collaborative or individual exercises. For most of the semester, beginning the third or fourth week, students teach the second class of each week.

The first challenge for students is to adapt to rhetorical analysis. By their second or third year of law school, many students have learned legal analysis so well that they automatically narrow their vision to what they regard as the only relevant questions: What's the rule? What facts are relevant under the rule? Given the rule and the facts, what arguments could you make? What's the right answer? In contrast, rhetorical analysis asks them to take into account questions that might be considered wholly irrelevant in legal analysis: What is the historical and cultural context of this argument? What language did the author inherit? How did the author work with and change the inherited language? How do the author's language choices work in this argument at this time? What is going on in the minds of the author

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46. See Wetlauffer, *Rhetoric and Its Denial*, *supra* n. 9, at 1554–1555.

and the audience as they write and read this argument? Some students adjust to rhetorical analysis quickly; more are able to make the change over the course of the semester; a few find it almost impossible to abandon “legal” analysis and its emphasis on clear and certain answers.

To help students make the shift, I frame the course with “model” rhetorical analyses from *Minding the Law* by Anthony Amsterdam and Jerome Bruner.<sup>47</sup> Amsterdam and Bruner apply different rhetorical lenses with a goal of “making the already familiar strange,”<sup>48</sup> thus revealing new interpretations and compositions. Their rhetorical analyses—examining the effects of particular language uses and meaning frames such as categories and stories—provide scripts that help my students read and analyze judicial opinions in unfamiliar ways.<sup>49</sup> At the end of the course, we return to *Minding the Law*, using the text’s discussion of the interplay of culture, ethics, and rhetoric to tie the semester’s themes together.<sup>50</sup>

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47. Amsterdam & Bruner, *supra* n. 15, at 113–114.

48. *Id.* at 1 and throughout the text.

49. Amsterdam and Bruner rely on cognitive, linguistic, and narrative analysis of controversial opinions; the authors are consciously transparent in their own use of rhetorical moves, and they provide thought- and discussion-provoking models of the reading and writing of rhetorical analysis. In the early chapters, Amsterdam and Bruner apply theories of categorization to Justice William Rehnquist’s opinion in *Missouri v. Jenkins*, 515 U.S. 70 (1995), a school desegregation case, and then analyze, through category and narrative perspectives, Justice Antonin Scalia’s opinion in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (concluding that the relationship between a natural father and his child is not a protected liberty interest when the child is born during the marriage of his mother to another man). Amsterdam & Bruner, *supra* n. 15, at 19–109. The narrative analysis continues through comparison of *Prigg v. Pennsylvania*, 41 U.S. 539 (1842) (holding that Congress has exclusive power to regulate rendition of runaway slaves and striking down Pennsylvania’s law punishing abduction into slavery), and *Freeman v. Pitts*, 503 U.S. 467 (1992) (holding that federal judges should no longer supervise pupil assignment in school systems where racial imbalance results from demographic shifts rather than official state policy). *Id.* at 110–164.

50. In the final chapters, Amsterdam and Bruner explicitly discuss “rhetorics” (from my point of view, the entire book is about rhetoric, but Amsterdam and Bruner view rhetoric as more narrowly confined to specific language uses) in the context of “the various linguistic processes by which a speaker can create, address, avoid, or shape issues that the speaker wishes or is called upon to contest, or that a speaker suspects . . . may become contested.” *Id.* at 165. In light of these rhetorical processes, the authors then analyze *McCleskey v. Kemp*, 481 U.S. 279 (1987), in which the Supreme Court rejected claims that the death penalty constituted cruel and unusual punishment because it was imposed pursuant to a pattern of racially discriminatory capital sentencing in the State of Georgia. *Id.* at 165–216. The book ends with analysis of race and culture as affecting Supreme Court decisions from *Plessy v. Ferguson*, 163 U.S. 537 (1896), through *Brown v. Board of Educa-*

In the middle of the course, students read explanations and analyses based on classical and contemporary rhetoric from a variety of sources. First, students read several law review articles about the relationship between law and rhetorical analysis.<sup>51</sup> To introduce students to classical rhetoric, I assign substantial excerpts from the definitive text, *Classical Rhetoric for the Modern Student* by Edward P. J. Corbett and Robert J. Connors.<sup>52</sup> To introduce students to contemporary rhetoric, I assign substantial portions of a collection describing contemporary rhetoricians and their contributions to rhetorical theory and practice, *Contemporary Perspectives on Rhetoric*.<sup>53</sup> Finally, I assign articles that demonstrate rhetorical analysis or that explain, propose, or apply specific rhetorical approaches.<sup>54</sup>

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tion, 347 U.S. 483 (1954), to *Freeman v. Pitts*, 503 U.S. 467 (1992), and *Missouri v. Jenkins*, 515 U.S. 70 (1995). Amsterdam & Bruner, *supra* n. 15, at 217–291.

51. These might include one or more of the following: Wetlaufer, *Rhetoric and Its Denial*, *supra* n. 9; White, *Law as Rhetoric*, *supra* n. 9; James Boyd White, *Reading Law and Reading Literature: Law as Language*, in *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (U. Wis. Press 1985) [hereinafter White, *Reading Law and Reading Literature*]; Francis J. Mootz, III, *Rhetorical Knowledge in Legal Practice and Theory*, 6 S. Cal. Interdisc. L.J. 491, 572 (1998); Kronman, *supra* n. 1; Kate O'Neill, *Rhetoric Counts: What We Should Teach When We Teach Posner*, 39 Seton Hall. L. Rev. 507 (2009).

52. Corbett & Connors, *supra* n. 33.

53. Foss et al., *supra* n. 36. I followed the advice of Amy Sloan in assigning these texts rather than primary sources; she correctly predicted that they would be more accessible and readable for most law students.

54. I have in the past selected a handful of specific articles each semester, choosing from among the following, but many other choices are possible.

- Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y. L. Sch. L. Rev. 55 (1992) (applying a range of rhetorical analyses to closing arguments).
- Linda L. Berger, *What Is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ALWD 169 (2004) (applying metaphor theory to analyze the briefs filed in the Supreme Court in a case raising First Amendment corporate speech issues).
- Lloyd F. Bitzer, *The Rhetorical Situation*, 1 Phil. & Rhetoric 1 (1968) (proposing that rhetoric is a response to a rhetorical situation).
- Elizabeth Fajans & Mary R. Falk, *Shooting From the Lip: United States v. Dickerson, Role [Im]morality, and the Ethics of Legal Rhetoric*, 23 U. Haw. L. Rev. 1 (2000) (examining the ethics of "role-differentiated rhetoric").
- Michael Frost, *Brief Rhetoric—A Note on Classical and Modern Theories of Forensic Discourse*, 38 U. Kan. L. Rev. 411 (1990) [hereinafter Frost, *Brief Rhetoric*] (applying classical rhetorical analysis to briefs filed with the U. S. Supreme Court).
- Michael Frost, *Justice Scalia's Rhetoric of Dissent: A Greco-Roman Analysis of Scalia's Advocacy of the VMI Case*, 91 Ky. L.J. 167 (2002).
- John Leubsdorf, *The Structure of Judicial Opinions*, 86 Minn. L. Rev. 447 (2001) (examining structure made up of stories, voices, and relationships).

## B. Rhetorical Writing

Students practice rhetorical analysis, interpretation, and criticism throughout the course by reading arguments and discussing them in class. To help them practice rhetorical composition, I assign several papers. In the most recent versions of the course, I have assigned as practice two short rhetorical analyses of arguments that I select, followed by a final paper containing a rhetorical analysis of an argument that the student chooses.<sup>55</sup> The objective of the short papers is to acquaint students with the approach and technique of rhetorical analysis and to require them to practice some specific techniques; only a final version is turned in for evaluation, and the comments are designed primarily to suggest ways to improve the next written analysis. For the final paper, students report their progress at each step in their own rhetorical process of composition, including a topic proposal and a series of drafts accompanied by writer's memos.<sup>56</sup> We discuss and agree upon a grading checklist before each assignment is turned in;<sup>57</sup> we also discuss and agree on page limits and deadlines.

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- Linda Levine & Kurt M. Saunders, *Thinking Like a Rhetor*, 43 J. Leg. Educ. 108 (1993) (applying classical rhetoric and Bitzer's rhetorical situation to legal argument).
  - Laura E. Little, *Characterization and Legal Discourse*, 46 J. Leg. Educ. 372 (1996) (suggesting ways to use framing to improve legal arguments).
  - Jack L. Sammons, *The Radical Ethics of Legal Rhetoricians*, 32 Val. U. L. Rev. 93 (1997) (suggesting that ethical rules grow out of the practice of lawyering).
  - Kurt M. Saunders, *Law as Rhetoric, Rhetoric as Argument*, 44 J. Leg. Educ. 566 (1994) (applying Toulmin's and Perelman's approaches to legal argument).

For other choices, see Michael R. Smith, *Rhetoric Theory and Legal Writing: An Annotated Bibliography*, 3 J. ALWD 129 (2006). Because students sometimes want to explore particular rhetoricians or rhetorical approaches in more depth, I also post a bibliography containing a number of additional sources, legal and non-legal.

55. Together with the class presentation, the first two papers account for between 20 and 25 percent of the grade. The remainder of the grade is based on the final paper.

56. Students receive feedback at each stage, but only the final draft is graded. In the writer's memos, students are asked to reflect on their own progress and ask questions.

57. The checklist emerges from a "start from scratch" discussion with each class, but has so far contained similar concepts. A typical checklist follows:

### Reasoning (50%)

Is the analysis rhetorical?

Is the analysis properly framed?

Does the author demonstrate understanding of the language uses and rhetorical strategies being analyzed?

Is the author creative in developing the analysis?



Because writing a rhetorical analysis is so different from writing a legal analysis, we also spend one, and sometimes two, classes walking through the process in preparation for the practice writing assignments. For this walkthrough, I usually ask students to read *Frank v. Mangum*,<sup>58</sup> focusing on Justice Holmes's dissent to the majority's conclusion that due process had been provided during the trial of Leo Frank, the Jewish manager of an Atlanta pencil factory who was convicted in 1913 of the murder of a 13-year-old girl.<sup>59</sup> After sentencing and imprisonment, Frank was kidnapped by a mob, taken from the state prison, and hanged.<sup>60</sup>

The words of the majority opinion, which found that Frank had no due process claim, describe one view of the process:

[Leo] Frank, having been formally accused of a grave crime, was placed on trial before a court of competent jurisdiction, with a jury lawfully constituted; he had a public trial, deliberately conducted, with the benefit of counsel for his defense; he was found guilty and sentenced pursuant to the laws of the state; twice he has moved the trial court to grant a new trial, and once to set aside the verdict as a nullity; three times he has been heard upon appeal before the court of last resort of that state, and in every instance the adverse action of the trial court has been affirmed; his allegations of hostile public sentiment and disorder in and about the court room, improperly influencing the trial court and the jury against him, have been rejected because found untrue in point of fact upon evidence presumably justifying that find-

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As a whole, is the analysis reasonably supported?

As a whole, is the analysis effective?

As a whole, is the analysis credible?

As a whole, is the analysis sufficiently in-depth?

Organization (15%)

Is the analysis easy to follow?

Is the analysis presented in an understandable order?

Is the organization appropriate for this analysis?

Writing (35%)

Is the writing free of grammatical and typographical errors?

Are the style, word choice, and tone appropriate to this analysis?

Are proper citations included?

Does the paper meet technical requirements?

58. 237 U.S. 309 (1915).

59. *Id.* at 311–312, 345.

60. Yolanda Rodriguez, *Honoring Leo Frank*, *Atl. J.-Const. JF2* (Aug. 18, 2005).

ing, and which he has not produced in the present proceeding; his contention that his lawful rights were infringed because he was not permitted to be present when the jury rendered its verdict has been set aside because it was waived by his failure to raise the objection in due season when fully cognizant of the facts.<sup>61</sup>

As a result, the majority concluded, "he has been convicted, and is now held in custody, under 'due process of law' within the meaning of the Constitution."<sup>62</sup>

This concluding section of the majority opinion reflects the rhetorical choice of describing only the abstract form of the process being challenged. No facts gleaned from the defendant's actual process through trial and conviction are now allowed to intrude on the majority's depiction that the appropriate forms had been observed: the court had jurisdiction, the jury was lawfully constituted, the trial was public, the defendant had the benefit of counsel, and so on.

A much different process of law is described by Justice Holmes in dissent:

The trial began on July 28, 1913, at Atlanta, and was carried on in a court packed with spectators and surrounded by a crowd outside, all strongly hostile to the petitioner. On Saturday, August 23, this hostility was sufficient to lead the judge to confer in the presence of the jury with the chief of police of Atlanta and the colonel of the Fifth Georgia Regiment, stationed in that city, both of whom were known to the jury.<sup>63</sup>

Justice Holmes went on to point out that the members of the press had asked the court not to continue proceedings that evening because of the potential danger, and the court adjourned until the following Monday morning.<sup>64</sup> "On that morning, when the solicitor general entered the court, he was greeted with applause, stamping of feet and clapping of hands," and the judge advised Frank's counsel that it would be safer if not only Frank but also

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61. 237 U.S. at 344-345.

62. *Id.* at 345.

63. *Id.* (Holmes, J., dissenting).

64. *Id.* at 345-346.

his lawyer were not present in the courtroom.<sup>65</sup> Holmes continued: "When the verdict was rendered, and before more than one of the jurymen had been polled, there was such a roar of applause that the polling could not go on until order was restored."<sup>66</sup> As a result of these circumstances, Frank argued, unsuccessfully in the majority's view, that "the trial was dominated by a hostile mob and was nothing but an empty form."<sup>67</sup>

From Holmes's opinion, the reader learns not only that the trial was public, but also that the court was packed with hostile spectators who clapped their hands and stamped their feet with approval when the solicitor general entered and then applauded again when the verdict was rendered.<sup>68</sup> From Holmes's opinion, the reader learns not only that Frank had the "benefit of counsel for his defense," but also that his counsel was advised that it would be safer for both him and Frank to be absent from the courtroom when the verdict was returned.<sup>69</sup> Through concrete details from the individual circumstances, Holmes provided substance for the claim that even if the process coincided with the appropriate form, the form was "empty."

To provide context for the students' analysis, I assign excerpts from a law review article about Justice Holmes's judicial opinions,<sup>70</sup> as well as a news article recounting the lynching of Leo Frank four months after the Supreme Court decision.<sup>71</sup> We walk through the steps of rhetorical analysis together: What is the historical and cultural context, including the inherited language, of the opinion? What is the author's background and experience? How has the author used rhetorical strategies? How effective is the rhetoric?

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65. *Id.* at 346.

66. *Id.*

67. *Id.*

68. *Id.* at 344-346.

69. *Id.* at 344, 346.

70. Robert A. Ferguson, *Holmes and the Judicial Figure*, 55 U. Chi. L. Rev. 506 (1988).

71. From the article *Honoring Leo Frank*,

Frank was kidnapped on Aug. 16, 1915, from the state prison in Milledgeville by a group of prominent Mariettans after his death sentence was commuted to life in prison by Gov. John M. Slaton.

The next morning, the men threw a rope over the branch of an oak tree and tossed its noose over Frank's neck. They kicked a table from beneath his legs and watched as he died. No one was ever prosecuted for his murder.

Rodriguez, *supra* n. 60, at JF2.

As for the practice written analyses, Justice Jackson's majority opinion in *West Virginia State Board of Education v. Barnette*<sup>72</sup> was the subject of the first short paper I assigned during a recent semester. The context, the period between 1940 and 1943 when the United States was entering World War II; the abrupt shift in the Court's reasoning from a decision rendered only three years earlier; and the language of Justice Jackson's opinion lend themselves to rhetorical analysis.

In *Barnette*, decided in 1943, Justice Jackson and a majority of the Court overturned a ruling that had upheld a compelled flag salute in *Minersville School District v. Gobitis*,<sup>73</sup> decided in 1940. Reversing itself, the *Barnette* Court found unconstitutional a resolution of the West Virginia Board of Education ordering that the flag salute become "a regular part of the program of activities in the public schools," and requiring all teachers and pupils to participate, with "refusal to salute the Flag [to] be regarded as an Act of insubordination."<sup>74</sup>

Here is Justice Jackson's description of those challenging the State Board of Education and of the consequences of the resolution:

The [Jehovah's] Witnesses are an unincorporated body teaching that the obligation imposed by law of God is superior to that of laws enacted by temporal government. Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them." They consider that the flag is an "image" within this command. For this reason they refuse to salute it.<sup>75</sup>

In this paragraph, Justice Jackson described the challengers in a way that allowed the audience to view them as the reasonable followers of an understandable religious belief, rather than as posing any threat to the loyalty and security of the country. He

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72. 319 U.S. 624 (1943).

73. 310 U.S. 586 (1940).

74. 319 U.S. at 626, 642.

75. *Id.* at 629.

explained that their objection to the flag salute stemmed from a literal interpretation of Bible verses that were familiar to many; he made the objection seem a simple and logical result of applying the Biblical language prohibiting "any graven image" to the flag as an image.

Justice Jackson continued,

Children of this faith have been expelled from school and are threatened with exclusion for no other cause. Officials threaten to send them to reformatories maintained for criminally inclined juveniles. Parents of such children have been prosecuted and are threatened with prosecutions for causing delinquency.<sup>76</sup>

In this paragraph, Justice Jackson again portrayed the challengers as playing sympathetic and familiar roles: they are schoolchildren and their parents. In contrast, it is the unnamed "officials" whose actions are alarming; they have expelled and threatened the children "for no other cause" than their religious beliefs, and they have prosecuted and threatened their parents as well.

After a step-by-step rebuttal of the reasoning of the *Gobitis* decision, Justice Jackson ends with language that has become "part of what we are as a polity[,] . . . a central part of our civic constitution."<sup>77</sup>

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with

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76. *Id.* at 630.

77. John Q. Barrett, *Closing Reflections on Jackson and Barnette*, 81 St. John's L. Rev. 793, 796 (2007) (one essay in a collection of essays: *Recollections of West Virginia State Board of Education v. Barnette*, 81 St. John's L. Rev. 755 (2007)).

here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.<sup>78</sup>

Here, Justice Jackson seemed to acknowledge that some will disagree with the decision because “the flag involved is our own.” He asked those who disagree to consider the more complex argument that protecting freedom of thought is worth the costs. And finally, he concluded,

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.<sup>79</sup>

At the time of the *Barnette* opinion, the Supreme Court had not yet “fixed” a Constitutional interpretation that protected against the prescription of orthodoxy. But Justice Jackson’s eloquent statement that this interpretation already constituted a “fixed star” with no exceptions that “now occur to us” seemed to express confidence that given these principles and this explanation, audience members would agree. In part, the *Barnette* opinions reward rhetorical reading because they “invite you to work through to your own judgment. . . . [B]oth justices [Jackson in the majority; Frankfurter in the dissent] evidently believe that it matters a great deal what they say and how they say it.”<sup>80</sup>

To provide context for this analysis, I asked students to read a biographical sketch of Justice Jackson as well as the discussion of *Barnette* in *Constitutional Law Stories*<sup>81</sup>; the chapter describes

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78. *Barnette*, 319 U.S. at 641–642.

79. *Id.* at 642.

80. James Boyd White, *Living Speech: Resisting the Empire of Force* 47 (Princeton U. Press 2006).

81. Vincent Blasi & Seana V. Shiffrin, *The Story of West Virginia State Board of Education v. Barnette: The Pledge of Allegiance and Freedom of Thought*, in Michael C. Dorf, *Constitutional Law Stories* 433 (Thomson/West 2004). For additional background on the case, see Barrett, *supra* n. 77. Among other things, this compilation tells us that the plaintiff’s name, Barnett, was misspelled by the courts. Gregory L. Peterson, *Welcoming Remarks*, 81 St. John’s L. Rev. 755, 755 n. 1 (2007) (one essay in a collection of essays:

the holding in *Gobitis* and the context as the *Barnette* decision was handed down in "June of 1943 as American troops were engaged in combat in North Africa and the South Pacific."<sup>82</sup> The chapter recounts "hundreds of violent attacks against Witnesses and their property"<sup>83</sup> in the wake of the *Gobitis* decision and characterizes the *Barnette* opinion as "obviously correct . . . and yet so difficult to justify."<sup>84</sup>

In their constitutional law textbook, students will come across the central paragraphs of *Barnette* quoted above, but they usually see (and hear) nothing about *Gobitis* or the circumstances that contributed to its abrupt overruling. Opening the lens broadens and deepens their understanding of the context and the language used to justify the Court's seemingly sudden change of mind.

Here is a portion of one student's narrative analysis of Justice Jackson's opinion:

Jackson's *Barnette* opinion is cast in a journey narrative. He summons the concepts of route, shortcuts, collision, beginnings, ends, and navigational beacons to guide the way. He tells a story in which society (from which the cast is composed) seeks an end: national loyalty. But along the way there is confusion, loss of direction, and the temptation of shortcuts. Throughout, Jackson assumes the role of tour guide. . . .

The steady state maintains a very brief existence. Jackson begins by citing *Gobitis* and an ensuing West Virginia statute requiring courses of instruction in Americanism—this illustrates the attempt at loyalty. From here, trouble is immediately introduced: the Board of Education adopts a reso-

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*Recollections of West Virginia State Board of Education v. Barnette*, 81 St. John's L. Rev. 755 (2007). In addition, the compilation notes that the Supreme Court issued twenty-three opinions between 1938 and 1946 addressing issues raised by the Jehovah's Witnesses, a time when the Witnesses were involved in hundreds of cases addressing issues including freedom of speech, freedom of religion, freedom of assembly, and freedom of conscience. Shawn Francis Peters, *Prelude to Barnette: The Jehovah's Witnesses and the Supreme Court*, 81 St. John's L. Rev. 758, 758 (2007) (one essay in a collection of essays: *Recollections of West Virginia State Board of Education v. Barnette*, 81 St. John's L. Rev. 755 (2007)).

82. Blasi & Shiffrin, *supra* n. 81, at 433.

83. *Id.* at 443.

84. *Id.* at 434.

lution requiring all pupils to participate in the pledge of allegiance or be expelled. Jackson then expends considerable energy (efforts) to prove that stepping in this direction of compulsion is a shortcut leading to a disastrous slippery slope.

As our guide through the trouble, Jackson informs of the dangers awaiting a society that compels loyalty. He says, “[s]truggles to coerce uniformity . . . have been waged by many good as well as by evil men.” Then he warns that “[c]ompulsory unification of opinion achieves only the unanimity of the graveyard” as those of dissenting views are eventually exterminated. Jackson’s effort to guide from this unwanted end is an appeal to his chief navigational instrument: the First Amendment; he says it was “designed to avoid these ends [death] by avoiding these beginnings [coerced belief].” He then diverts society from disaster and restores the status quo by declaring “no official, high or petty, can prescribe what shall be orthodox . . . or force citizens to confess by word or act their faith therein.”<sup>85</sup>

Another student analyzed the opinion’s use of reframing and images:

Another example of Jackson reframing the issue is in his fourth point regarding the *Gobitis* opinion. Jackson adds to his credibility when he recognizes that national unity is an important factor for national security when he says, “National unity as an end which officials may foster by persuasion and example is not in question.” By choosing not to argue over whether national unity is desirable or important for national security, he avoids attempting to win a losing argument. And by refocusing specifically on the lawful means of achieving national unity, Jackson creates a new framework for resolving the issue . . . .

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Jackson also portrays the Court as the reluctant lawgiver,<sup>86</sup> a long-used rhetorical strategy in which a Justice exhibits

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85. Paper on file with Author (citations omitted).

86. See Robert L. Tsai, *Sacred Visions of Law*, 90 Iowa L. Rev. 1095, 1099 (2005) (discussing *Marbury v. Madison* as a symbol that has “spawned a set of catechisms and tropes repeated to spread the myth of the judge as a reluctant lawgiver”).



reluctance to wield judicial power in order to cultivate social trust and social acceptance of the Court's judgment. Regardless of whether the Court is competent in a specialty such as public education, Jackson wrote, "We cannot . . . withhold the judgment that history authenticates as the function of this Court when liberty is infringed." By portraying the Court as reluctant and reticent, Jackson softens the blow for those people who will dislike the Court's ruling and also helps instill respect for and trust in the Court for everyone.

When advocating against upholding the flag salute statute, Jackson uses a parade of horrors in which he lists similar episodes in history where attempts to compel cohesion have failed: "the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means of Russian unity, down to the last failing efforts of our present totalitarian enemies." This list is effective in eliciting the emotions of the readers . . . , but it is a logical fallacy . . . .<sup>87</sup>

After providing feedback on the first paper, usually followed by some in-class discussion of brief examples drawn from the students' work, I assign a second short paper. In the same semester as the assignment of the *Barnette* opinion, the second assignment was to write a classical rhetorical analysis of one of the opinions from *Walker v. City of Birmingham*.<sup>88</sup> There, a 5–4 majority upheld the arrests of civil rights demonstrators because they failed to use proper judicial procedures to test the validity of an injunction that was struck down as unconstitutional two years later.<sup>89</sup> Even though Justice Stewart acknowledged the shortcomings of the injunction and its application, he wrote for the majority that disobeying the injunction was illegitimate as "no man can be judge in his own case . . . however righteous his motives."<sup>90</sup>

Like the *Barnette* decision, the *Walker* opinions struggled with how far to protect free speech at a time of social and cultural disruption. Like the *Barnette* decision, the *Walker* opinions revealed marked disagreement among the justices. And like the

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87. Paper on file with Author (citations omitted).

88. 388 U.S. 307 (1967).

89. *Id.* at 320–321; *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 158–159 (1969).

90. *Walker*, 388 U.S. at 320–321.

*Barnette* decision, some of the *Walker* opinions seemed irreconcilable with precedent. Finally, like the *Barnette* decision, the *Walker* opinions raise provocative and important rhetorical questions; reading the statements of facts in the majority and dissenting opinions is enough to change the minds of anyone who believes that judicial opinions merely “state the facts.”<sup>91</sup>

Although students were much more familiar with the civil rights demonstrations of the 1960s than they were with the 1940s context of *Barnette*, the *Walker* setting seemed remote to many students. To help them analyze the rhetoric of the opinions in the context of the times in which they were decided, we explored a range of background materials, collected by me and the students, including excerpts from films, photographs from archives, participant and witness histories, contemporaneous news accounts, and even the oral arguments heard by the Supreme Court.<sup>92</sup>

As an example, here is an excerpt from one student’s analysis of the opinions’ use of *pathos*, or appeals to the audience’s values, beliefs, and emotions:

Shortly after Justice Stewart begins his opinion, he quotes the bill of complaint filed by Birmingham officials. This complaint frames our vision of the petitioners for the majority opinion; the complaint refers to the petitioners as trespassers, as congregating mobs, as unlawful picketers, as violators of numerous ordinances, and as people trying to provoke breaches of the peace; moreover, all of these activities were expected to continue. While Stewart mentions the holiday dates of the demonstrations, primarily in passing, he

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91. See Shaun B. Spencer, *Dr. King, Bull Connor, and Persuasive Narratives*, 2 J. ALWD 209 (2004) (providing an in-class exercise involving the contrasting fact statements of Justices Stewart (for the court) and Brennan (in dissent)).

92. See e.g. *Eyes on the Prize*, <http://www.pbs.org/wgbh/amex/eyesontheprize/about/index.html> (accessed Feb. 2, 2010); John Kaplan, *Powerful Days: The Civil Rights Photography of Charles Moore*, <http://www.viscom.ohiou.edu/oldsite/moore.site/Pages/index2.html> (accessed Feb. 2, 2010) (documenting Moore’s vivid photography of the violence of segregation, with links discussing how his photojournalism in *Life Magazine* galvanized public outcry); *The Library of Congress, Prints and Photographs Online Catalog*, <http://www.loc.gov/rr/print/catalog.html> (accessed Feb. 2, 2010). The many other resources available include the oral argument before the United States Supreme Court, [http://www.oyez.org/cases/1960-1969/1966/1966\\_249/](http://www.oyez.org/cases/1960-1969/1966/1966_249/); David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. Rev. 645 (1995); David Benjamin Oppenheimer, *Martin Luther King, Walker v. City of Birmingham, and the Letter From Birmingham Jail*, 26 U.C. Davis L. Rev. 791 (1993).

does not refer to the religious nature of the demonstrations, nor did he refer to the commendable political reasons—to publicize the plight of African Americans in the south. With only this information, the reader will likely be disinclined to whatever the petitioner wants accomplished in this case.

Contrast this to Justice Brennan immediately explaining who the petitioners are (ministers) and why they wanted to demonstrate ("peaceably to publicize and dramatize the civil rights grievances of the Negro [P]eople"). Moreover, Brennan offers an emotional context to the circumstances in which the petitioners were convicted of violating the injunction: "These were the days when Birmingham was a world symbol of implacable official hostility to Negro efforts to gain civil rights, however peaceably sought."

Justice Stewart discusses the demonstrations in a way that appeals to our need for safety . . . .

Justice Brennan, on the other hand, emphasizes the peacefulness of the demonstrations . . . .<sup>93</sup>

For the final paper, students select both a rhetorical approach (described in Part III *infra*, these approaches include frameworks for rhetorical reading, interpretation, and criticism suggested by classical and contemporary rhetoricians) and an argument (legal, political, historical, or cultural) to which they will apply it. During most semesters, almost every rhetorical approach discussed in class is applied by at least one student.<sup>94</sup> Students research and select the arguments that they will use as the topics for their final papers; in addition, they often research the rhetorical approach they have selected beyond the class materials. Their argument selections have ranged from well-known Supreme Court opinions, such as *Korematsu v. United States*<sup>95</sup> and *Marbury v. Madison*,<sup>96</sup> and much-analyzed models of oral rhetoric, such as the summa-

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93. Paper on file with Author (citations omitted).

94. Students rarely choose the readings from James Boyd White or bell hooks as the basis for their analyses. I think this reluctance is because these readings are less "lawyer-like" than the other approaches we study. For example, see Gerald Wetlauffer's discussion of his initial frustration with White's essays because they violated "certain of the legal academy's conventions." Wetlauffer, *Rhetoric and Its Denial*, *supra* n. 9, at 1576 n. 89.

95. 323 U.S. 214 (1944).

96. 5 U.S. 137 (1803).

tion of Justice Robert Jackson at the Nuremburg War Crimes Trial<sup>97</sup> and President Lincoln's Inaugural addresses,<sup>98</sup> to less-analyzed speeches including Malcolm X's speech entitled *The Ballot or the Bullet*,<sup>99</sup> Winston Churchill's *Sinews of Peace* address,<sup>100</sup> and Chilean President Salvador Allende's final radio address delivered on September 11, 1973, while he was barricaded inside his presidential residence.<sup>101</sup>

To illustrate their work, I have included excerpts below from two final student papers. The first is from an analysis based on *logos*, *ethos*, and *pathos*, the classical rhetorical modes of persuasion; the analysis is of a closing argument by William M. Evarts in the prosecution of defendants who had been indicted for piracy in 1861 for commandeering the ship, the *Savannah*:<sup>102</sup>

Evarts's speech begins with an ethical appeal. Evarts shows his respect for the court and the jury by beginning with the traditional "May it please your honors, and gentlemen of the jury." Evarts then shows more good will towards the court, the jury, the counselors, and the Union itself, when he gives them all high praise:

I know no better instance of the distinction between a civilized, instructed, Christian people, and a rude and barbarous nation, than that which is shown in the assertions of right where might and violence and the rage of

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97. Robert H. Jackson, *Closing Address before the Int'l Military Tribunal* (July 26, 1946) (available at <http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/closing-address-before-the-international-military-tribunal/>) (accessed Feb. 2, 2010).

98. Abraham Lincoln, *First Inaugural Address*, in *Inaugural Addresses of the Presidents of the United States from George Washington 1789 to George Bush 1989*, at 133 (Bi-centennial ed., Govt. Printing Office 1989) [hereinafter *Inaugural Addresses*]; Abraham Lincoln, *Second Inaugural Address*, in *Inaugural Addresses*, *supra* n. 98, at 142.

99. Malcolm X, *The Ballot or the Bullet* (Apr. 12, 1964) (available at <http://www.americanrhetoric.com/speeches/malcolmxballotorbullet.htm>).

100. Winston Churchill, *The Sinews of Peace* (Mar. 5, 1946) (available at <http://www.americanrhetoric.com/speeches/winstonchurchillsinewsofpeace.htm>). This was the first speech by Churchill after his electoral defeat in 1945, delivered at Westminster College in Fulton, Missouri.

101. Salvador Allende, *Last Words* (Sept. 11, 1973) (available at <http://www.monthlyreview.org/mrzine/allende110906.html>).

102. William M. Evarts, *For the Prosecution in the Case of the "Savannah Privateers," Indicted for Piracy*, in William Lamartine Snyder, *Great Speeches by Great Lawyers: A Collection of Argument and Speeches before Courts and Juries* 374 (William L. Snyder ed., Fred B. Rothman & Co. 1981) (originally published 1881).

passion in physical contest determine everything, and this last sober, discreet, patient, intelligent, authorized, faithful, scrupulous, conscientious investigation, under the lights of all that intelligence with which God has favored any of us . . . .

Evarts praises the court and jury in several ways in this sentence. First, Evarts uses three specific adjectives which are most likely to appeal to his jurors. Evarts says the jurors are civilized, instructed, and Christian, all qualities which were doubtless important to people at that time. Recognizing these important qualities serves to increase the credibility of the speaker and argument. Second, Evarts uses comparison to further recognize the importance and uniqueness of the court, the jurors, and the judicial process when he contrasts a civilized Christian nation with a rude and barbarous nation. This comparison also serves to appeal to the pathos of the audience by implying that the defendants are essentially part of a rude and barbarous "nation" of the South. Finally, Evarts heaps on more praise for the judicial process with a long list of adjectives. By opening his speech with such praise and demonstration of good will towards the court and jury, the jury being especially important as it is the jurors whom it is Evarts's job to convince, Evarts impresses his audience and has increased his chances of convincing the jury with the rest of his speech.<sup>103</sup>

The second example is from a rhetorical reading of *Varnum v. Brien*,<sup>104</sup> the Iowa Supreme Court opinion recognizing the right of same-sex couples to marry:

The opinion began by characterizing the plaintiffs and the controversy sympathetically through categorizing the plaintiffs as everyday Iowans:

This lawsuit is a civil rights action by twelve individuals who reside in six communities across Iowa. Like most Iowans, they are responsible, caring, and productive individuals. They maintain important jobs, or are retired, and are contributing, benevolent members of their communities. They include a nurse, business manager, in-

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103. Paper on file with Author (citations omitted).

104. 763 N.W.2d 862 (Iowa 2009).

urance analyst, bank agent, stay-at-home parent, church organist and piano teacher, museum director, federal employee, social worker, teacher, and two retired teachers. Like many Iowans, some have children and others hope to have children. Some are foster parents. Like all Iowans, they prize their liberties and live within the borders of this state with the expectation that their rights will be maintained and protected—a belief embraced by our state motto.

\* \* \*

Casting the situation in this light orients the reader/audience to view the situation compassionately. The plaintiffs are immediately taken outside of the category of “different” or “unnatural” and are re-categorized as your average Iowan trying to get by. One of the major functions of category systems is to promote cohesiveness within cultural groups—giving the group a cognitive solidarity and a powerful bond. This technique in effect puts the reader in the plaintiffs’ shoes for the rest of the opinion, and the reader can more easily imagine the plaintiffs’ strife. Compare *Varnum*’s opening of its statement of facts to a more clinically detached opening of an opinion [in another case] that was decided against the plaintiffs . . . : “The trial courts in these consolidated cases held that the provisions of Washington’s 1998 Defense of Marriage Act (DOMA) that prohibit same-sex marriages are facially unconstitutional under the privileges and immunities and due process clauses of the Washington State Constitution. King County and the State of Washington have appealed. The plaintiffs-respondents, gay and lesbian couples, renew their constitutional arguments made to the trial courts, including a claim that DOMA violates the Equal Rights Amendment.”

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[The Iowa court’s] continuing characterization of same-sex couples as regular-people-making-normal-life-decisions would not be possible if the court did not take the time to include these nonessential, nonlegal facts. The inherited culture is one in which the public is against same-sex marriage, particularly in the Midwest, and the majority of the inherited language of caselaw treats same-sex couples more or less as faceless litigants on the short end of public policy

choices. By categorizing same-sex couples as people other Iowans can empathize with, the Iowa Supreme Court “tr[ie]d . . . to add or to drop a distinction [to the language of the law], to admit a new voice, to claim a new source of authority.”<sup>105</sup>

### C. Constructing the Class as a Rhetorical Community

As my students and I study the legal rhetorical community, we construct a rhetorical community of our own.<sup>106</sup> One component of this construction is an “exchange” between teacher and students. When the students become the teachers, they inject energy and imagination; the experience builds a sense of shared responsibility for the community of the classroom. A second component is in the interchange between students. When the students focus on how their classroom discussions can best enhance learning and teaching, they share responsibility for considering how language use affects understanding.

For their oral presentations, students choose the topic and the date that they wish to teach a class, and they decide whether they wish to teach individually or as part of a team. I provide no formal structure other than the subject matter, a requirement that they post their lesson plans and handouts in advance,<sup>107</sup> and a request that their goal be “to expand our understanding of a particular subject by engaging your fellow students in some method of active learning. . . . [T]hink of some way that you can explain or illustrate the subject with a concrete example and some way that you can involve us in using and deepening our understanding of the subject.”

Almost all students followed some variation of the same general lesson plan: a brief overview of the topic at the beginning (spoken, written, visual); fuller explanation using concrete examples (usually visual); and application in hands-on exercises (usually involving some collaborative component or group discus-

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105. Paper on file with Author (citations omitted).

106. I suppose it is not surprising that every class constructs its own rhetorical community, with its own conventions and rules, but I never thought about it in this way before I taught this class.

107. Students were required to post their lesson plans and handouts on the TWEN Course Page twenty-four hours in advance. To encourage improvement and revision, students were allowed to bring in revisions on the date of their presentations.

sion). Students were uniformly creative; most demonstrated substantial in-depth understanding of the concepts they presented, and most presentations actively engaged other students. Their concrete examples have ranged from large pieces of an unknown object that had fallen from the sky (constructed by the student) to print and television advertisements, Calvin and Hobbes cartoons, Monty Python movies, and *The Simpsons* television show; they have used audio and video clips from law-related movies and television shows, newsworthy addresses, and unscripted videotaped excerpts featuring lawyers, judges, and talk show hosts.<sup>108</sup>

Letting a student take over “your” classroom requires a surrender of control and a reciprocal gift of trust. Because students turn in their lesson plans before class, I have on occasion questioned a student about a proposed example, usually because I am concerned that a sensitive topic will not be handled with care. In each instance, the student has explained the reasoning for using the example, used the example, and treated the topic and the class members taking part in the discussion with respect. During class, I almost always let the student “teacher” control the experience; on a few occasions, I have responded to a comment, usually by a student other than the “teacher,” that I thought needed to be corrected. In retrospect, I doubt that I will respond similarly in the future because these teacher-like interventions change the classroom dynamic so that both teacher and students revert to their pre-exchange role.

Both teacher and students learn from the exchange; to understand the material well enough to teach it, students have to research and study more than they otherwise would, and teachers read, see, and hear new explanations and applications. There are less-obvious gains as well; when a student has to guide a classroom discussion, listen to student questions and concerns, struggle with explanations and answers, decide what examples and exercises will illuminate and engage as well as entertain, the student becomes more aware of what the teacher experiences. Sitting in the classroom as a student, I become more aware of how the classroom conversation feels from the perspective of a less-autonomous participant.

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108. Students rely on YouTube and Google images to find most of these examples.



During one of the last few class sessions of the semester, informed by our exchange of roles and our reading about lawyering ethics, we discuss the ethics of classroom rhetoric.<sup>109</sup> We try to determine what "rules of the game" have made the classroom work most effectively for the greatest number of participants:

Should speakers be required to treat listeners respectfully, no matter how they are behaving? Should speakers be required to be adequately prepared and to have something pertinent to say? Should speakers be required to respond to questions and concerns? Should speakers assume that audience members are acting in good faith?

Should listeners be required to be open to receiving new information? Should listeners be required to pose relevant questions and concerns? Are there limits to requiring audience members to listen respectfully? Should listeners assume good faith by speakers?

How does an expectation of class participation affect the "feel" of the classroom? How is the classroom environment affected by comments based on personal characteristics, gender, sexual orientation, religion, race, or ethnicity?

The extent to which a law school classroom can establish a rhetorical community became clear to me when I received an e-mail from a student late one semester, shortly after a classroom exchange between two students that had been polite, but tense. Following class, I had expressed some concern to another student about the students' willingness to continue the conversation later in the week. Several hours after class, I received this e-mail from one of the students involved in the exchange: "FYI, I heard you were concerned about [the other student and me]. I am pleased to report that despite our differences, we remain 'family.' We are thankful for the forum that is the law school classroom."<sup>110</sup>

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109. Much of this discussion is based on the evolving rules of the game as discussed in Sammons, *supra* n. 19, at 100 (part of what keeps the practice ethical is "an ongoing inquiry into the nature of the practice itself").

110. The student e-mails, student evaluations, and writers' memos from which the quoted comments are taken are on file with the Author, as well as excerpts from student papers.

### III. RHETORIC AS A STUDY, A PROCESS, AND A PERSPECTIVE

My goal in developing the course in Law & Rhetoric was to try to engage students in the study and process of law as a rhetorical activity, by helping them interpret and compose legal texts, and by suggesting rhetoric as a way of thinking about how the law works and as a portal for invention and imagination. As noted earlier, we begin and end the classroom conversation with two questions: (1) will engaging in “rhetoric” make you more or less effective as a lawyer? and (2) will engaging in “rhetoric” make you more or less ethical as a lawyer?<sup>111</sup> Most students agree from the start that acquiring rhetorical skills will help them be more effective advocates; becoming a better advocate is one of their reasons for enrolling in the course. Early on, many students think the second question has an easy answer—the adversary system has built-in safeguards that will take care of any ethical questions involved in the use of rhetoric. This discussion is taken up again at the end of the semester, as discussed below.<sup>112</sup>

#### A. Rhetoric as the Study of Legal Texts

The course begins the study of legal texts, the products of legal rhetoric, by introducing various ways to read, analyze, interpret, and criticize legal arguments. I ask students to apply a mode of rhetorical reading and analysis suggested by James Boyd White; to read to discover the interpretive meaning frames of metaphor, narrative, and categorization; and to use Lloyd Bitzer’s approach to analyzing a rhetorical situation. Through their study of legal arguments as rhetorical performances, students become better readers of legal texts; this experience also helps them learn how to make more effective use of language, symbols, stories, and frameworks when they compose their own arguments.

Rhetorical reading and interpretation is different from what first-year law students seem to absorb, based on classroom dialo-

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111. These questions match up with two of the three “apprenticeships” described in the recent Carnegie Foundation report. See William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* 28 (Jossey-Bass 2007). The report uses different names for the three apprenticeships: legal analysis, practical skill, professional identity, *id.* at 13–14; cognitive, practical, and ethical-social, *id.* at 194–197.

112. See *infra* nn. 224–230 and accompanying text.

gue, about how to read legal texts. In the first year of law school, law students read to find "the meaning" of a text by focusing primarily on the language with very little reference to history, culture, or the author's background or intentions. They learn to read in this way through a process that includes Socratic dialogue about the texts they read:

[w]hen students attempt to tell the stories of conflict embodied in the cases assigned for their courses, they typically start by focusing on the content of the story. First-year law professors insistently refocus the telling of these stories on the sources of authority that give them power within a legal framework. What was the court authorized to decide? If it writes about hypothetical situations other than the one before it, students learn, this part of the story is to be separated from the "holding"—the authoritative part of the case. The holding is valid only if uttered by the correct authority, following the correct procedure, delivered in the correct form. This is a new and very different sense of where to look when we decide what counts as a "fact," how to construct valid accounts of events, and where to demand accuracy . . . .<sup>113</sup>

Although students are taught to focus precisely and in depth on "form, authority, and legal-linguistic contexts," their comments on "content, morality, and social context" are often treated as not important enough to challenge.<sup>114</sup>

In contrast to this mode of reading for authority, the Law & Rhetoric class emphasizes the rhetorical mode of reading and analysis of legal texts<sup>115</sup> first suggested by James Boyd White:

•First, examine the inherited context underlying the text: what is the language or culture within which this writer is working? What is the writer's role and background? How

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113. Mertz, *supra* n. 21, at 494–495.

114. *Id.* at 496. Mertz suggests that a similar dichotomy can be found in law review requirements of very precise checking of citations for format and accuracy and very little checking of the validity of the texts being cited. *Id.*

115. For a series of suggestions for rhetorically reading the texts in any law school course, see Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 Cornell L. Rev. 163, 193 (1993) (reading for jurisprudential and interpretive posture, reading for context, reading for style, reading for narrative, reading for omission).

does that affect the kind of language, authority, values, arguments, and materials the writer will use?

•Next, study the art of the text: how has the writer used, modified, or rearranged the language or culture that was inherited? What effect does the reworking have? Is the writing internally coherent? Is it externally coherent?

•Finally, describe the rhetorical community created by the text: what kind of person is speaking here? To what kind of person? What kind of voice is used? What kind of response is invited or allowed? Where do I fit in this community?<sup>116</sup>

These questions require outside research, understanding of culture and history, and knowledge of language and law. The final question is especially difficult: I suggest that students “imagine” the rhetorical community created by a text by looking at concrete examples. At a colleague’s suggestion, we recently compared the Bible—a text that creates a distinctive rhetorical community out of our understanding of “who” is speaking, who is listening, and what kinds of responses are being invited—with other distinctive texts and their rhetorical communities (a law school applicant’s personal statement, a Fox News special).

For rhetorical reading and interpretation, students must go beyond semantic understanding of legal language.<sup>117</sup> To do so, they should understand the frames and processes that help construct legal meaning, especially metaphor and narrative. The symbols and stories that we acquire from culture and through experience come to serve as embedded knowledge structures as well as ideological baggage carriers: that is, they provide mental blueprints that help us sort through and understand new things, and they help us persuade others about the paths that events should follow and the frameworks into which things should fit.

### 1. *Metaphor*

Metaphoric thinking structures and influences the way that an audience reads and reacts to a legal argument. If the audience

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116. White, *Law as Rhetoric*, *supra* n. 9, at 701–702.

117. One author refers to “the study of the symbolic systems through which legal culture is constructed” as the discipline of “constitutional iconography.” Tsai, *supra* n. 86, at 1101.

accepts the metaphor that copyrights constitute "property" like real estate, it will transfer inferences and rules from one concept to the other and certain consequences will follow: like real estate, copyrights can be bought and sold, divided, leased, and even protected against trespass.

By helping us make the imaginative leap of seeing one thing "as" another, metaphor is most obviously necessary to understand new and unfamiliar concepts and abstractions. For example, metaphor is used to classify and reason about technological advances; years after the introduction of the Internet, metaphor still pervades the way that we talk about it. Through the Internet, you receive electronic "mail" on your "desktop"; because of these images, it seems appropriate to treat a legal issue concerning the delivery of an e-mail the same way that you would analyze an issue involving a letter written on paper, deposited in a mailbox, and delivered to your physical desk. While using the Internet, you "browse" for information as you might in a bookstore, and you set "bookmarks" as you might keep your place in a book. Depending on the results they want, lawyers may characterize Internet providers of information as publishers or distributors or as newspapers, radio or television stations, and even bulletin boards. The choice of metaphor determines legal consequences.

Conceptual metaphor is equally effective for understanding and reasoning about the often-abstract concepts at issue in legal arguments. These metaphors are not the kinds of vivid images or attention-getting comparisons that most people envision when they think about metaphors: "he cowered at the brink of an abyss of criticism," "her career has become a train wreck." Instead, conceptual metaphors such as the "marketplace of ideas" or the "courtroom as arena" lie mostly beneath the surface, influencing audiences more subtly and pervasively, by providing an unseen structure.

Conceptual metaphor's quiet presence supports its persuasive power, in part because it goes unquestioned but also because these metaphors are unconsciously and automatically acquired simply through living in the world.<sup>118</sup> According to cognitive me-

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118. For background on cognitive theory and research about metaphor, see George Lakoff & Mark Johnson, *Metaphors We Live By* (U. Chi. Press 1980) [hereinafter Lakoff & Johnson, *Metaphors We Live By*]; George Lakoff & Mark Johnson, *Philosophy in the Flesh: The Embodied Mind and Its Challenge to Western Thought* 128 (Basic Bks. 1999) [herei-

taphor theorists, conceptual metaphors grow out of our bodily experiences, the images we see in the world, and the stories we are told. They are learned so gradually and embedded so deeply that their application to a new experience or concept will appear seamless and unremarkable.

To introduce metaphor theory, I ask students to discuss the origins of a series of metaphoric examples (visual images, bodily experience, cultural stories) and the implications, or entailments, of their use. We might begin with a list drawn from metaphor theorists George Lakoff and Mark Johnson: Good is Up, Argument is War, Life is a Journey, Knowing is Seeing, Nation is a Family.<sup>119</sup> We also identify and examine more specifically legal examples, including some that structure legal reasoning (viewing the corporation as a person, treating ideas as property, applying the First Amendment within a marketplace of ideas, or addressing Establishment Clause issues in light of the wall of separation); some that emanate from war and sports and describe legal procedure (doing battle, serving as your client's champion, seeking to dominate your opponent, aiming to level the playing field); and some that shape legal decision making (assessing the weight of the evidence, applying balancing tests, watching out for slippery slopes, using privileges as swords and shields).<sup>120</sup>

## 2. Narrative

Like cognitive metaphor theory, narrative theory reflects a shift away from formalism and toward agreement that what we see and think is always being filtered through and affected by interpretive frameworks.<sup>121</sup> As a story unfolds, it filters and focuses, helping us make sense out of a series of chronological events that would otherwise lack coherence and consistency.<sup>122</sup>

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nafter Lakoff & Johnson, *Philosophy in the Flesh*]; Winter, *supra* n. 25.

119. See e.g. Lakoff & Johnson, *Metaphors We Live By*, *supra* n. 118, at 4–6 (argument is war), 16 (good is up).

120. I sometimes suggest that students study excerpts from opinions to identify their metaphorical influences; for example, the opinions in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), contain contrasting metaphorical and metonymical perspectives on the use of corporate money to finance election campaigns. See Linda L. Berger, *Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation*, 58 Mercer L. Rev. 949 (2007).

121. Sherwin, *supra* n. 9, at 717.

122. Amsterdam & Bruner, *supra* n. 15, at 30–31.

Stories make it easier for us to communicate our experiences, and they also help us predict what will happen and what we will need to do when we find ourselves entangled in a particular plight.<sup>123</sup> While metaphor serves as a template, narrative becomes a path; narrative forms can become "recipes for structuring experience itself, for laying down routes into memory, for not only guiding the life narrative up to the present but directing it into the future."<sup>124</sup>

Metaphor theorists suggest that narrative is understood because of metaphor; that is, we have constructed a framework that serves "as a kind of genetic material or template for a wide variety of stories in which the plot structure follows a protagonist through an agon to a resolution."<sup>125</sup> To explain its persuasive power, some scholars theorize that narrative is inherent in the nature of our minds or our language. Others claim that narrative persuades because it provides a structure for the characteristic plights of humans. By doing so, narrative makes experiences understandable and allows the observer to roughly predict the result.<sup>126</sup>

In class, as an introduction to narrative analysis, students first follow the lead of Amsterdam and Bruner, who use "story seeing" to examine the apparently rule-based reasoning in Justice Scalia's decision in *Michael H v. Gerald D.*<sup>127</sup> There, Justice Scalia rejected the claim of a natural father and child that due process protected their relationship even though the child was born during her mother's marriage to another man.<sup>128</sup> Amsterdam and Bruner compare Justice Scalia's opinion with classic stories in which adultery is depicted as a combat myth, add linguistic analysis, and assess Justice Scalia's use of other rhetorical techniques.<sup>129</sup>

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123. *Id.* at 117.

124. Jerome Bruner, *Life as Narrative*, 71 Soc. Res. 691, 708 (2004).

125. Winter, *supra* n. 25, at 106–113.

126. Amsterdam & Bruner, *supra* n. 15, at 114–117.

127. 491 U.S. 110 (1989).

128. *Id.* at 111–112, 131–132.

129. Amsterdam & Bruner, *supra* n. 15, at 77–109. They conclude that judges acquire "limitless license . . . when they pretend [they are not interpreting but simply] sorting the objective facts of cases into the objective categories of objective rules." *Id.* at 108 (emphasis in original).

Assigned to uncover stories that appear to underlie other judicial opinions,<sup>130</sup> students first find the “bones”—the characters; the setting; the plot, including the initial steady state of ordinariness, the disruption by Trouble, the efforts at redress or transformation, and the restored or transformed steady state; and the moral of the story.<sup>131</sup> Then they decide how and whether the uncovered stories provided a means for the author to characterize some actions as ordinary and legitimate, but to characterize others as related to the Trouble; to sketch characters as heroes, helpers, and victims; and to shape the plights of the parties in ways that affect their resolution.<sup>132</sup>

While most narratives are structured to begin with a “canonical . . . steady state, which is breached, resulting in a crisis, which is terminated by a redress, with recurrence of the cycle an open possibility,”<sup>133</sup> Kenneth Burke proposed that a narrative also can be analyzed by assessing the relationships among the elements of Act, Scene, Agent, Agency, and Purpose.<sup>134</sup> The Trouble that drives the drama often emerges from an imbalance among the elements or a breach of cultural expectations.<sup>135</sup>

Burke, who defined rhetoric as “the use of language as a symbolic means of inducing cooperation in beings that by nature respond to symbols,”<sup>136</sup> proposed the pentad as a system for ana-

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130. Cultural narratives and images are easily spotted in child custody decisions. See Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. Cal. Interdisc. L.J. 259 (2009).

131. Amsterdam & Bruner, *supra* n. 15, at 113–114.

132. *Id.*

133. Jerome Bruner, *Actual Minds, Possible Worlds* 16 (Harv. U. Press 1986).

134. Kenneth Burke, *A Grammar of Motives*, at xxii–xxiv (World Publ. Co. 1962) (describing dramatism, which treats language and thought as modes of action); Foss et al., *supra* n. 36, at 191–204.

135. Bruner, *Life as Narrative*, *supra* n. 124, at 697 (discussing Victor Turner, *From Ritual to Theater* (Arts J. Publications 1982)).

136. Foss et al., n. 36, at 191 (emphasis omitted). Burke believed that the process of identification is the primary way of inducing cooperation. *Id.* at 192–193. Through Burke’s process of identification, individuals form their identities through physical objects, work, family, friends, activities, beliefs, and values; they share “substance” with people and things with whom they associate, and they separate themselves from other people and things. *Id.* The shared substances forge identification, and persuasion results: “You persuade a man only insofar as you can talk his language by speech, gesture, tonality, order, image, attitude, idea, *identifying* your ways with his.” *Id.* at 192 (emphasis in original). According to Burke, identification can work in several ways: as a means to an end (we have the same interests); through antithesis (we have the same enemies); and through identification at an unconscious level (we have the same unspoken values). *Id.* at 192–193.



lyzing language as a mode of action.<sup>137</sup> The pentad examines the inter-relationships or tensions among the elements that constitute the dramatic action.<sup>138</sup>

To use pentadic analysis, students first identify the elements in a particular argument or speech, and then they determine the relationships, or ratios, between the elements. The ratios suggest which elements are dominant, which allows the interpreter to understand the rhetor's motive: for example, the scene/act ratio measures whether the scene or the act is more in control (in some scenes, for example, a church setting, only certain acts are appropriate or fitting). Similarly, the act/agent ratio measures whether certain acts shape or control agents; the agent/act ratio assesses how a person's character affects the performance of particular acts. Once all the ratios are determined, the analysis is used to identify a pattern in which one or more of the terms is controlling.<sup>139</sup>

We have used the pentad to compare the internal dramas portrayed in Senator Edward Kennedy's speech after Chappaquiddick<sup>140</sup> with those depicted in one of President Bill Clinton's speeches during the Monica Lewinsky investigation.<sup>141</sup> The resulting analysis pointed to the Scene (an unlit road, a narrow bridge built at an angle to the road, no guard rails, a deep pond, cold waters, strong and murky current) as the predominant element in the Kennedy speech, controlling the actor and the act. Similarly, pentadic analysis of the Clinton speech pointed to the Purpose of protecting his family as the predominant element in the Clinton rhetoric, controlling all the other elements in the pentad. In both cases, emphasis on another element in the drama was used to shift attention away from the Actor.

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137. *Id.* at 197–200. Pentadic analysis can help the reader understand the rhetor's orientation, discover alternative perspectives, and detect and correct for bias.

138. *Id.* at 200–202.

139. *Id.* at 202–203.

140. Sen. Edward Kennedy, televised broadcast (July 25, 1969) (reprinted in *American Rhetoric from Roosevelt to Reagan* (Halford Ross Ryan ed., 2d ed., Waveland Press 1987) (available at <http://www.americanrhetoric.com/speeches/edkennedychappaquiddick.htm>)).

141. President Bill Clinton, Televised Address (Aug. 17, 1998) (available at <http://www.cnn.com/allpolitics/1998/08/17/speech/transcript.html>).

### 3. *Category*

When a lawyer or judge defines a category and decides that a disputed object falls within or without its limits, the process of categorization appears to be syllogistic and the results inevitable. According to cognitive research, however, our perception that a category is a “box” or container with clearly defined boundaries derives from metaphor, not empirical observation. We see ideas as objects and categories as physical containers. We gather up ideas, group them together, and “contain” them; objects fit “inside” or fall “outside” the boundaries of the container.<sup>142</sup> In this way, the process of categorizing items takes on the aura of literal, concrete truth.

In class, we discuss research results that suggest that rather than being box-like, categories are radial: because categories radiate out from a prototype at the center, the “fit” of two items that fall into the same category can be significantly different.<sup>143</sup> For example, the category of bachelors includes the Pope, George Clooney, and Harry Potter, but surely one of them is a much better fit than the others. Further eroding confidence in categorical certainty is greater understanding of the imperfection of scientific knowledge, as shown by Pluto’s de-classification as a planet more than seventy years after its discovery;<sup>144</sup> and of the effects of changing times, as shown by a library classification system for religion that allocated 90 percent of its slots to Western religions and divided the remaining ten percent among the religions practiced by the rest of the world.<sup>145</sup>

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142. Lakoff & Johnson, *Philosophy in the Flesh*, *supra* n. 118, at 124–125, 338.

143. Winter, *supra* n. 25, at 69–103.

144. Dennis Overbye, *Pluto Is Demoted to “Dwarf Planet”*, N.Y. Times (Aug. 24, 2006) (available at [http://www.nytimes.com/2006/08/24/science/space/25pluto.html?\\_r=1&emc=etal](http://www.nytimes.com/2006/08/24/science/space/25pluto.html?_r=1&emc=etal)).

145. See Dewey Decimal Classification System, <http://www.oclc.org/dewey/about/default.htm> (accessed on Feb. 2, 2010). When it was developed, Dewey’s system “represented ‘thinking that truth lies in figuring out the single correct way of ordering our categories,’ said David Weinberger, a fellow at Harvard University’s Berkman Center for Internet and Society. ‘Now we seem to pretty much agree that any single ordering of categories is going to express cultural and political biases, and that’s exactly where truth cannot lie.’” Motoko Rich, *Crowd Forms against an Algorithm*, N.Y. Times (Apr. 18, 2009) (available at <http://www.nytimes.com/2009/04/19/weekinreview/19rich.html?emc=eta1>).

#### 4. *The Rhetorical Situation*

Another approach to rhetorical reading is to identify the trigger for the rhetoric, or the rhetorical situation that prompts the response; different prompts impose different constraints on the rhetorical response. In class, we apply Lloyd Bitzer's approach to analyze rhetorical responses. Differentiating it from the "mere craft of persuasion," Bitzer viewed rhetoric as a discipline that "provides principles, concepts, and procedures by which we effect valuable changes in reality."<sup>146</sup> These changes take place when rhetorical situations prompt speakers or writers to engage in rhetoric.

The rhetorical situation is "a natural context of persons, events, objects, [and] relations" surrounding an "exigence which strongly invites utterance."<sup>147</sup> Analysis of a rhetorical situation using the Bitzer approach requires students to find the exigence, "an imperfection marked by urgency . . . a defect, an obstacle, something waiting to be done, a thing which is other than it should be."<sup>148</sup> Bitzer believed that some exigences, such as earthquakes and wildfires, are not rhetorical because rhetoric cannot bring about a resolution. An exigence is rhetorical when it invites the speaker or writer to intervene to influence an audience.<sup>149</sup>

After identifying the exigence, a Bitzer analysis examines the relevant audience, "those persons who are capable of being influenced by discourse and of being mediators of change,"<sup>150</sup> what responses are appropriate,<sup>151</sup> and what constraints exist: what "persons, events, objects, and relations [that] are parts of situation . . . have the power to constrain decision and action."<sup>152</sup> Constraints can emerge from the situation or from the orator's personal character and style; situational constraints might include prior precedent, other actors, cultural taboos, and contemporaneous or historical events.<sup>153</sup>

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146. Bitzer, *supra* n. 54, at 14.

147. *Id.* at 5.

148. *Id.* at 6.

149. *Id.* at 7.

150. *Id.* at 8.

151. *Id.* at 6.

152. *Id.* at 8.

153. *Id.* Richard Vatz criticized Bitzer's approach on the grounds that no rhetorical situation has a nature independent of the perception of its interpreter or independent of

We have applied the Bitzer analysis to both legal and non-legal rhetoric. For example, I have asked the class to analyze the rhetorical situation in *Walker v. City of Birmingham*,<sup>154</sup> an opinion in which the justices had very different views of the “imperfection” that triggered a response. For Justice Stewart, the imperfection was the marchers’ disobedience of an injunction; for Justice Brennan, the imperfection was the unconstitutional city ordinance under which the injunction was issued. Thus, Justice Stewart described one incident that occurred during the Easter Sunday civil rights march as follows: “Some 300 or 400 people from among the onlookers followed in a crowd that occupied the entire width of the street and overflowed onto the sidewalks. Violence occurred.”<sup>155</sup> Justice Brennan wrote about the same incident: “[t]he participants in both parades were in every way orderly; the only episode of violence, according to a police inspector, was rock throwing by three onlookers.”<sup>156</sup>

A student presentation engaged the class in a comparison of the rhetorical situations that triggered Franklin Delano Roosevelt’s speech on December 8, 1941, one day after the attack on Pearl Harbor,<sup>157</sup> with George W. Bush’s speech on the evening of September 11, 2001.<sup>158</sup> Students’ initial reaction was that the exigence that triggered the rhetoric in both cases was an act that caused the death of many Americans. After some students argued that rhetoric was not a fitting response to that act, the discussion changed to whether the exigence to which these Presidents were responding was the need to reassure the American people, the need to call them to arms, or the need to forewarn them about hardships. Depending on their identification of the exigence, students raised differences in the situational and speaker-centered constraints faced by the two Presidents and how those differences affected their rhetorical responses.

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the rhetoric with which he chooses to characterize it. Richard Vatz, *The Myth of the Rhetorical Situation*, 6 *Phil. & Rhetoric* 154, 154 (1973).

154. 388 U.S. 307 (1967).

155. *Id.* at 310–311.

156. *Id.* at 339–342 (Brennan, Douglas & Fortas, JJ., dissenting).

157. Franklin Delano Roosevelt, *Pearl Harbor Address to the Nation* (Dec. 8, 1941) (available at <http://www.americanrhetoric.com/speeches/fdrpearlharbor.htm>).

158. George W. Bush, *9/11 Address to the Nation* (Sept. 11, 2001) (available at <http://www.americanrhetoric.com/speeches/gwbush911addresstothetation.htm>).

## B. Rhetoric as the Process of Composition

For rhetorical approaches to the process of composition, the putting together of legal arguments, I draw from New Rhetoric composition theory and from classical rhetoric's modes of persuasion and canons of invention, arrangement, and style. I also introduce students to argumentation structures suggested by contemporary rhetoricians, including the layout of argument developed by Stephen Toulmin and the New Rhetoric theory of argumentation suggested by Chaim Perelman and Lucie Olbrechts-Tyteca.<sup>159</sup> By using these rhetoric-based approaches to critique and construct arguments, students gain better understanding of argument structure and audience response.

The classical rhetorical period of Aristotle and his successors is the starting point for using rhetoric as a process for composing legal texts. But the heart of the rhetorical process of composition is best described by the New Rhetoric of the 20th Century:

New Rhetoric believes that writing is a process for constructing thought, not just the "skin" that covers thought. The process of making meaning is messy, slow, tentative, full of starts and stops, a complex network of language, purposes, plans, options, and constraints. Its outcome is uncertain . . . .<sup>160</sup>

Students gain better understanding of current disagreements about how the law works by studying the historic division between rhetoric and anti-rhetoric.<sup>161</sup> Plato believed that dialectic, the "science" of human reasoning, could lead to knowledge that corresponded with fixed truth, but that rhetoric, the persuasive use of language, led away from truth and that rhetoricians were more concerned with appearance than with substance.<sup>162</sup> For

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159. See *infra* nn. 180–206 and accompanying text.

160. Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 *J. Leg. Educ.* 155, 155 (1999) (citations omitted).

161. See Kronman, *supra* n. 1, at 691 (providing an account of the two attacks on rhetoric). Students read a condensed history of rhetoric in Corbett & Connors, *supra* n. 33, at 489–543; Foss et al., *supra* n. 36, at 4–14; see also Michael H. Frost, *Greco-Roman Rhetoric: The Canon and Its History*, in *Introduction to Classical Legal Rhetoric: A Lost Heritage* 1–15 (Ashgate 2005); Kristen Konrad Robbins, *Philosophy v. Rhetoric in Legal Education: Understanding the Schism between Doctrinal and Legal Writing Faculty*, 3 *J. ALWD* 108, 112–122 (2006).

162. See James Boyd White, *Plato's Gorgias and the Modern Lawyer: A Dialogue on the*

Gorgias and other Sophists, because absolute truth was unknowable, persuasion did not mislead, but instead was a way for society to come to consensual knowledge.<sup>163</sup> Although a student of Plato, Aristotle organized and codified rhetoric into a system of argument and presentation. He distinguished syllogistic (formal) reasoning from enthymemic (informal) reasoning; delineated the rhetorical bases of persuasion (*logos*, *ethos*, *pathos*); and developed the use of the *topoi*, or topics, as ways to invent or discover an argument.<sup>164</sup> In the twentieth century, New Rhetoric sought to re-discover the importance of rhetoric and the central role of persuasion and argument in building understanding.<sup>165</sup>

### 1. *Classical Rhetoric's Modes of Persuasion and Invention*

In class, we explore three of classical rhetoric's canons: invention, arrangement, and style.<sup>166</sup> Because the new ways of seeing necessary for argumentation come about through imagination, I emphasize invention. The purpose of *inventio* or heuristics (invention or discovery) is to find arguments to support whatever case or point of view the speaker supports. Aristotle's category of artistic proofs relies especially on the three modes of persuasion—*logos* (rational appeal), *pathos* (emotional appeal), and *ethos* (ethical appeal).<sup>167</sup>

My students say that the step-by-step process of invention outlined by classical rhetoricians is tedious, but surprisingly helpful, whether they are critically reading an opinion to examine how the arguments were constructed or generating arguments in support of a given position. As Aristotle pointed out, some *topoi*, or topics for argument, are certain. In legal reasoning, advocates

*Ethics of Argument, in Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* 215, 215 (U. Wis. Press 1985).

163. For discussion of the Sophists and Isocrates, the most influential Sophist teacher of his times, see Corbett & Connors, *supra* n. 33, at 491–492.

164. See Aristotle, *supra* n. 34. The Romans, especially Cicero, Quintilian, and the unknown author of the *ad Herennium* further elaborated and developed the canons of rhetoric. See Marcus Tullius Cicero, *Cicero De Oratore (Loeb Classical Library)* (E.W. Sutton & H. Rackham trans., Harv. U. Press 1942); Marcus Fabius Quintilianus, *Institutio Oratoria (Loeb Classical Library)* (H. E. Butler trans., Harv. U. Press 1921); *Rhetorica ad Herennium (Loeb Classical Library)* (Harry Caplan trans., Harv. U. Press 1954).

165. Corbett & Connors, *supra* n. 33, at 537–543.

166. The study of rhetoric was divided into five parts, these three plus *memoria* and *pronuntiatio* (addressing memorization and delivery of speeches). *Id.* at 17–23.

167. *Id.* at 17–19.

know in advance that they must make certain moves: arguing that a particular situation falls within the language of a statute or rule (plain meaning or legislative intent), that this situation is analogous or distinguishable on the facts or the reasoning from a precedent case, or that applying the rule to this situation would further or undermine the policies underlying the rule.

When the topics were not certain, Aristotle devised an organized list of topics as a method for discovering arguments.<sup>168</sup> The common topics include such categories as definition, comparison, relationship, circumstance, and testimony.<sup>169</sup> Aristotle also described special topics for certain categories, including judicial discourse: whether something happened (evidence); what that something is (definition); and the quality of what happened (motives or causes of action).<sup>170</sup> In class, we apply the special judicial topics to a current lawsuit, and we use the common topics to develop arguments on a current, controversial issue such as international human rights violations, law school affirmative action programs, or application of the Second Amendment.

While exploring the modes of persuasion in class, we pay particular attention to *logos*, but we also debate whether appeals to reason alone are enough to support persuasion in the sense of "establishing belief in uncertain truths."<sup>171</sup> Students easily understand appeals based on the speaker's *ethos* and the audience's *pathos*, but they have more difficulty with the rules for syllogisms and enthymemes. A student presentation may begin by comparing the three modes; for example, one presentation asked students to identify which modes were being used in a series of videotapes produced by People for the Ethical Treatment of Animals (PETA).<sup>172</sup> In a videotape showing a bodybuilder vegetarian touting the health benefits of his diet, students found syllogisms, enthymemes, and logical fallacies, all appeals based on *logos*. In

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168. *Id.* at 84–126.

169. *Id.* at 87–120.

170. *Id.* at 123–126.

171. Kronman, *supra* n. 1, at 680 (discussing a necessary "boundary between politics and law, where the passions must be engaged for the sake of establishing belief in uncertain truths, and mathematics, where the passions need to be neutralized so that truths of perfect certainty may be discovered").

172. See *People for the Ethical Treatment of Animals (PETA)*, <http://www.peta.org/about/index.asp> (accessed Feb. 2, 2010) (public service announcements available at <http://www.petatv.com/psa.asp>).

a videotape showing the evolution from a live cow to a grilled steak, the students identified *pathos*, and in a third video, featuring the Rev. Al Sharpton on “Kentucky Fried Cruelty,”<sup>173</sup> the students identified *ethos* and speculated that the choice of the speaker was part of PETA’s overall *ethos*-based strategy.

For discussions of *logos*, student presentations often focus on the differences between a logical syllogism, the primary tool of dialectics, and its rhetorical equivalent, the enthymeme.<sup>174</sup> Working with syllogisms helps students detect logical fallacies, allowing them to attack an opposing argument based on the validity of the reasoning rather than having to prove the falsity of facts.<sup>175</sup> Similarly, students are better able to point out flaws in opposition claims when they recognize that the most common form of “syllogism” in legal argument is an enthymeme. Because an enthymeme contains a conclusion and only one premise, the other premise being implied and both premises being only presumably true, the enthymeme cannot lead to certainty, but only to a tentative conclusion from probable premises.<sup>176</sup>

Our discussion of the canons of arrangement and style is brief. Arrangement in classical rhetoric was a discipline; an appropriate arrangement might depend on the nature of the speaker, the subject, the speech, the audience, or the situation.<sup>177</sup> As Michael Frost has noted, court rules and common practice for appellate briefs specify the same organizational requirements as those first formulated by Corax of Syracuse.<sup>178</sup> Our practice in class with classical “style” has sometimes included purposefully writing in “bad” style and more often emphasizes how to recognize specific schemes and tropes in formal legal writing, informal writing, and visual venues such as Calvin and Hobbes cartoons (“AARRGH! AAIEEE! AAUGHH!”; “His train of thought is still

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173. *Kentucky Fried Cruelty*, <http://www.kentuckyfriedcruelty.com/c-alsharpton.asp> (accessed Feb. 2, 2010).

174. Corbett & Connors, *supra* n. 33, at 32, 38–52; see Kristen K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 Vt. L. Rev. 483 (2003) (providing additional suggestions for teaching syllogisms).

175. See Corbett & Connors, *supra* n. 33, at 62–71 (describing fallacies). Student presentations highlighting fallacy detection have featured Supreme Court opinions, newspaper and magazine articles, and website collections. See e.g. *Stalking the Wild Fallacy*, <http://www.fallacyfiles.org/examples.html> (accessed Feb. 2, 2010).

176. Corbett & Connors, *supra* n. 33, at 53.

177. *Id.* at 20, 256–292.

178. Frost, *Brief Rhetoric*, *supra* n. 54, at 411–413.



boarding at the station.”; “Calvin eats one bite too many! He begins to swell! Inflating like a raft, he grows bigger and bigger! Oh! No! How much larger can he get? Oooh, I think I’m going to explode.”).<sup>179</sup>

## 2. Toulmin’s Layout of Argument

From Stephen Toulmin’s contributions to contemporary rhetoric,<sup>180</sup> we concentrate in class on the layout of practical argument and the “good reasons” approach to ethics.<sup>181</sup> Like the distinction between syllogisms and enthymemes, Toulmin distinguished theoretical from practical arguments:<sup>182</sup> a practical argument requires an inferential leap from data or evidence to reach a reasonable conclusion, and the leap must be justified by claims that fit the context of a specific situation.<sup>183</sup> In contrast, a theoretical argument requires no such inferences because the conclusion is certain; it goes no farther than the data in the pre-

179. These examples are taken from Bill Watterson, *The Complete Calvin and Hobbes* (Andrews McMeel Publ. 2005). In classical rhetoric, once arguments had been invented, selected, and arranged, they were put into words. Classical rhetoricians identified a number of figures of speech, schemes being a deviation from the ordinary pattern of words, and tropes being a deviation from the ordinary meaning of a word. Corbett & Connors, *supra* n. 33, at 377–379. Among the schemes are schemes of balance, such as parallelism and antithesis; schemes of unusual or inverted word order, such as anastrophe (inversion of the natural or usual word order), parenthesis, and apposition; schemes of omission, such as ellipsis, asyndeton (deliberate omission of conjunctions), and polysyndeton (deliberate use of many conjunctions); and schemes of repetition, such as alliteration, assonance, anaphora (repetition of the same word or group of words at the beginning of successive clauses), epistrophe (same but at the end of successive clauses), climax (arrangement in order of increasing importance), antimetabole (repetition of words, in successive clauses, in reverse grammatical order), and so on. *Id.* at 380–395. The classically identified tropes include the related ones of metaphor, simile, synecdoche, and metonymy; puns; antanaclasses (or repetition of a word in two different senses); paronomasia (use of words that sound alike but have different meanings); periphrasis (substitution of a descriptive word for a proper name or of a proper name for a quality associated with the name); personification; hyperbole; litotes (deliberate use of understatement); rhetorical question; irony; onomatopoeia; oxymoron; and paradox. *Id.* at 395–409.

180. Toulmin is “perhaps the pre-eminent modern figure in the field of argumentation theory.” Paul T. Wangerin, *A Multidisciplinary Analysis of the Structure of Persuasive Arguments*, 16 Harv. J.L. & Pub. Policy 195, 203 (1993).

181. See Foss et al., *supra* n. 36, at 117–153; see also Saunders, *supra* n. 54, at 568–572.

182. Foss et al., *supra* n. 36, at 123–125. The difference is reminiscent of classical rhetoric: Plato’s logical ideal leads to absolute truths regardless of the individual situation while Aristotle’s enthymemes deal with probabilities and their persuasiveness depends on context. *Id.* at 121.

183. *Id.* at 120.

mises and is based on universal principles.<sup>184</sup> Toulmin concluded that theoretical arguments were rare for several reasons: the subjects of arguments are rarely governed by a single principle, knowledge changes over time, and probabilities are more frequent than certainties.<sup>185</sup>

To help construct justifications, the basis for practical arguments, Toulmin developed a layout of argument that is more similar to legal argument than to formal logic.<sup>186</sup> Like lawyers, those who advance practical arguments often produce their reasoning after they arrive at their claims; rather than inferring claims from evidence, they justify their claims retrospectively. To succeed at justification, the arguer must be able to critically test and sift ideas;<sup>187</sup> an argument is successful when it can survive criticism from experts in the field.<sup>188</sup>

Toulmin's layout of practical argument can be used both to critique and to generate legal arguments.<sup>189</sup> The layout is based on a metaphor of movement along a path: "an argument is *movement* from accepted *data*, through a *warrant*, to a *claim*."<sup>190</sup> The *claim* is "the conclusion of the argument that a person is seeking to justify[,] . . . the answer to the question, 'Where are we going?'" The *data* are "the facts or other information on which the argument is based[, answering] the question, 'What do we have to go on?'" The *warrant* "authorizes movement from the grounds to the claim and answers the question[ ], 'How do you justify the move from these grounds to that claim?'"<sup>191</sup>

In addition to these primary elements—movement from data through a warrant to a claim—three additional elements account for the context of the particular argument. The first is the *backing*, which provides support for the warrant; if "the warrant answers the question, 'What road should be taken?,' the backing an-

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184. *Id.*

185. *Id.* at 124–125.

186. *Id.* at 129–134.

187. *Id.* at 129 (quoting Stephen Toulmin et al., *An Introduction to Reasoning* 10 (2d ed., MacMillan 1984)).

188. *Id.* at 130.

189. See Saunders, *supra* n. 54, at 568–572.

190. Foss et al., *supra* n. 36, at 131 (quoting Wayne Brockriede & Douglas Ehninger, *Toulmin on Argument: An Interpretation and Application*, *Quarterly J. Speech* 44 (Feb. 1960)).

191. Foss et al., *supra* n. 36, at 131.

swers the question, "Why is this road a good one?" In addition, there is a *modal qualifier*, indicating the strength of the leap from the data to the warrant and answering the question, "How certain are we of arriving at our destination?" Finally, Toulmin's layout of argument includes the *rebuttal*, that is, the specific circumstances when the warrant does not justify the claim, answering the question, "Under what circumstances are we unable to take this trip?"<sup>192</sup>

For law students, Toulmin's layout is similar to argumentation structures that they already know; the layout clarifies the levels of inference and support necessary to justify movement and the importance of individual circumstances. In their presentations, students have used the model to analyze the positions taken by women seeking the right to vote, the claims made in advertising testimonials, and the arguments made in a variety of movies and television shows (*A Few Good Men*, *X-Files*, Homer Simpson's lawsuit for false advertising against The Frying Dutchman All-You-Can-Eat Seafood Restaurant).

As for ethical decisions, Toulmin suggested that they should be guided by analysis of "good" reasons from paradigm cases.<sup>193</sup> Unlike the argument model, the ethics model works prospectively; it moves toward reaching the claim or conclusion, not retrospectively.<sup>194</sup> The paradigm cases create an initial presumption about what actions would be ethical; the individual circumstance is then compared and contrasted with the paradigm case (a process much like analogy). Several problems may occur: the paradigm case may fit ambiguously, two or more paradigm cases may apply in conflicting ways, or the individual case may be unprecedented.<sup>195</sup> For such decisions, Toulmin's proposed model of practical argument is slightly different from his layout of argument.<sup>196</sup> So, for example, if the question is whether a person should return a borrowed pistol to a friend, the data might include the friend's statement that he will shoot someone when he gets the pistol

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192. *Id.* at 132–133.

193. *Id.* at 136–140.

194. *Id.* at 139.

195. *Id.* at 136–137.

196. The *data* apply to the *warrant* as well as the *claim*, eliminating the need for backing; *modality* has been incorporated into the claim with the phrase "presumably so," and the *rebuttal* can be phrased "absent exceptional circumstances." *Id.* at 138–139.

back; the warrant would be a general rule developed from paradigm cases that borrowed property should be returned; the provisional claim would be that the pistol presumably ought to be returned but the rebuttal would consider the differences between the paradigm case and this case.

In class, we apply the Toulmin ethical decision model to everyday questions of conduct as well as to lawyers' ethical dilemmas. For example, we discuss questions such as whether a student should repeat damaging allegations about another student, what an individual should do when a family member says she was the driver in a hit-and-run accident, and how a lawyer should respond when a client asks how to keep assets secret from an opposing party.

### 3. *New Rhetoric's Starting Points*

Like Toulmin, Chaim Perelman and Lucie Olbrechts-Tyteca suggested a theory of argumentation based on a metaphor of movement: an argument is designed to move the audience from agreement about premises to agreement about some conclusion.<sup>197</sup> This theory, set forth in *The New Rhetoric: A Treatise on Argumentation*,<sup>198</sup> was based on extensive study of the arguments made about values in legal settings, political discourse, philosophical discourse, and daily discussions.<sup>199</sup> The authors concluded that traditional rhetoric overemphasized style and that arguments about values were primarily rhetorical, not logical.<sup>200</sup>

While logic compels a conclusion based on deductive reasoning, Perelman and Olbrechts-Tyteca found that argumentation seeks audience adherence to a claim through persuasion. Beginning with premises the audience accepts, the aim of argumentation is a probable outcome, not a certain one. As premises with which to begin, the New Rhetoric authors distinguished starting points dealing with reality from those dealing with the preferable.<sup>201</sup> Starting points dealing with reality include such premises

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197. *Id.* at 90; see generally Ch. Perelman & L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* (John Wilkinson & Purcell Weaver trans., U. Notre Dame Press 1969).

198. Perelman & Olbrechts-Tyteca, *supra* n. 197.

199. Foss et al., *supra* n. 36, at 84-85.

200. *Id.* at 85-86.

201. *Id.* at 90-94.

as facts that are already agreed to; truths that enjoy universal agreement (principles that connect facts to one another such as scientific theories or philosophical or religious conceptions); and presumptions about what is normal and likely.<sup>202</sup> Starting points dealing with the preferable include values; hierarchies of values; and ways in which value hierarchies can be organized, including quantity, quality, and order.<sup>203</sup>

Perelman and Olbrechts-Tyteca suggested ways that speakers might focus attention on, or give presence to, the right elements in an argument. Liaison, for example, transfers agreement from the premises to the conclusion through quasi-logical arguments, which are persuasive because they are similar to logic, or through arguments based on the structure of reality.<sup>204</sup> Dissociation gives presence by separating elements that language or a recognized tradition have tied together; starting with a single concept, dissociation splits it into two independent, but related, concepts, such as appearance and reality.<sup>205</sup> To illustrate this approach, I have asked students to use New Rhetoric's starting points to generate arguments about current controversial issues such as the constitutionality of specific gun control laws.<sup>206</sup>

### C. Rhetoric as a Perspective on How the Law Works

As for rhetoric as a perspective, a way to develop a rhetorical "gaze," I suggest to students that effective legal interpretation and composition will sometimes depend on their ability to see with new eyes and to observe from different vantage points. In this portion of the course, students explore different rhetorical approaches to invention and imagination: approaches that can help them adopt different lenses,<sup>207</sup> make the familiar strange,

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202. *Id.* at 90–92.

203. *Id.* at 92–94.

204. *Id.* at 97–103.

205. *Id.* at 103–104.

206. The gun control argument exercise occurred before the United States Supreme Court's decision and while a petition for rehearing was pending before the Court of Appeals in *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007), *aff'd*, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). Given the unresolved questions left by *Heller*, the exercise still seems workable.

207. For example, to use metaphor to resolve problems, Donald Schön suggested that the problem solver must attend to new features and relationships of the situation, and then rename the pieces, regroup the parts, reorder the frameworks, and try to "see" one

look from the outside in and the inside out, and link abstractions to concrete images and stories.<sup>208</sup>

Toward the end of the semester, I also ask students to focus again on how rhetorical awareness will affect their study and practice of law, bringing together Amsterdam and Bruner's discussion of the interaction of rhetoric and culture with bell hooks's cultural critique and Jack Sammons's views on the ethics of legal rhetoricians.<sup>209</sup> Recalling Gerald Wetlaufer's description of legal rhetoric as being marked by claims of one right answer, Amsterdam and Bruner suggest that rhetorical strategies are often used to conceal the contestability of legal interpretations.<sup>210</sup> They apply this suggestion to Justice Powell's opinion in *McCleskey v. Kemp*,<sup>211</sup> where the United States Supreme Court turned down a claim that imposing the death penalty on the defendant was unconstitutional because it was part of a pattern of racially discriminatory capital sentencing in Georgia.<sup>212</sup> Amsterdam and Bruner argue that Justice Powell constructed a narrative in which the important value that needed to be protected was sentencing discretion, not racial equality.<sup>213</sup> Flowing from this narrative, Justice Powell was able to create an either-or choice, making it appear that the Court could not vindicate McCleskey's claims without

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situation "as" other situations. Donald A. Schön, *Generative Metaphor: A Perspective on Problem-Setting in Social Policy*, in *Metaphor and Thought* 137, 150-161 (Andrew Ortony ed., 2d ed., Cambridge U. Press 1993). Schön's advice echoes the metaphor-generating advice of Kenneth Burke: "If we are in doubt as to what an object is . . . we deliberately try to consider it in as many different terms as its nature permits: lifting, smelling, tasting, tapping, holding in different lights, subjecting to different pressures, dividing, matching, contrasting, etc." Burke, *supra* n. 134, at 504 (discussing metaphor, metonymy, synecdoche, and irony in connection "with their role in the discovery and description of 'the truth'"); see also John Dewey, *Human Nature and Conduct: An Introduction to Social Psychology* 196 (Henry Holt & Co. 1922) ("The elaborate systems of science are born not of reason but of impulses at first sight and flickering; impulses to handle, move about, to hunt, to uncover, to mix things separated and divide things combined, to talk and to listen.").

208. The concept of making the familiar strange comes from Amsterdam and Bruner, *supra* n. 15; the concept of looking from the outside in and the inside out comes from bell hooks, *Feminist Theory: From Margin to Center*, at preface (S. End Press 1984).

209. Amsterdam & Bruner, *supra* n. 15 at 217-291; bell hooks, *supra* n. 208, at 26-29; Sammons, *supra* n. 19, at 99.

210. Amsterdam & Bruner, *supra* n. 15, at 173-176.

211. 481 U.S. 279 (1987).

212. *Id.* at 282-283, 319.

213. Amsterdam & Bruner, *supra* n. 15, at 205-210.

destroying judicial discretion and concealing interpretations that would have made other choices seem possible.<sup>214</sup>

Reacting to this reading, student presentations have addressed the ethics and the effectiveness of similar rhetorical moves that conceal differing interpretations of law and facts. For example, one student illustrated the techniques used by the prosecution and defense arguments in the movie version of *A Time to Kill*,<sup>215</sup> pointing out differing concrete details and coded meanings in the two sides' closing arguments and the presupposition by the defense attorney of his own shortcomings. Another student highlighted techniques in Amsterdam and Bruner's own rhetorical analysis of *McCleskey v. Kemp* that the student suggested were aimed at concealing the challenges that could be made to the authors' own interpretations.

From rhetorical analysis of arguments about racial discrimination in criminal sentencing and prosecution, the class moves to discussion of other links between rhetoric and culture, beginning with Amsterdam and Bruner's analysis of race and culture<sup>216</sup> in decisions about public education and continuing with the advocacy rhetoric of bell hooks.<sup>217</sup> Consistently cited by students as the course's most provocative author, hooks challenges students to think about how an outsider's perspective might affect interpretation.<sup>218</sup> In class, we discuss her argument that race, class, and gender affect our creation and understanding of rhetorical and cultural products; as an example, I use an article in which hooks discusses gangster rap.<sup>219</sup> We also work through hooks's proposal

214. *Id.* at 210–216.

215. *A Time to Kill* (Warner Bros. Picture 1996).

216. Amsterdam & Bruner, *supra* n. 15, at 246–281 (discussing *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Missouri v. Jenkins*, 515 U.S. 70 (1995)).

217. See Foss et al., *supra* n. 36, at 265–298. bell hooks was the name of her great grandmother; she chose to use the name as a reminder that she was not her ideas; the lowercase spelling was a sign that readers should focus on substance, not on who is writing the words. *Id.* at 270.

218. One student sent me an e-mail after a class discussion of whether hooks was a feminist (one young woman in the class suggested that the class's hostile reaction to the work was because hooks was an "old school" feminist): "I am . . . going to send a copy to my Mom and Aunt and ask them is this the feminism that they fought for."

219. To examine hooks's claims, we discuss an article that hooks wrote in 1994, in which she argued that "gangsta rap does not appear in a cultural vacuum, but, rather, . . . [t]he sexist, misogynist, patriarchal ways of thinking and behaving that are glorified in gangsta rap are a reflection of the prevailing values in our society." bell hooks, *Sexism and*

that the best standpoint for the rhetoric is in the margins, especially when rhetoric is linked to struggles against dominant structures.<sup>220</sup> This is so, hooks claims, because those in the margins are able to look “both from the outside in and the inside out,”<sup>221</sup> equipping them with a “radical perspective from which to see and create, to imagine alternatives, new worlds.”<sup>222</sup>

After discussing these interactions of culture and rhetoric, the class again takes up the ethics of classroom rhetoric,<sup>223</sup> reacting to Jack Sammons’s suggestion in *The Radical Ethics of Legal Rhetoricians* that good rules emerge from good practice,<sup>224</sup> and then students respond in writing to the challenge posed by an imagined Socrates in James Boyd White’s *A Dialogue on the Ethics of Argument*.<sup>225</sup> Speaking as Socrates, White tells two young lawyers that

by reason of your training and natural capacities you have what is commonly called a great power, the power of persuading those who have power of a different kind, political and economic power, to do what you wish them to do. . . .

Your professional aim is to present your case, whatever its merits, so that those with control over economic and political forces will decide for your client, and you must succeed when

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*Misogyny: Who Takes the Rap? Misogyny, Gangsta Rap, and the Piano*, Z Mag. 26 (Feb. 1994). hooks’s article was written in response to a New York Times article that had castigated gangsta rap for fostering the myth “that middle-class life is counterfeit and that only poverty and suffering, and the rage that attends them, are real.” Brent Staples, *The Politics of Gangsta Rap: A Music Celebrating Murder and Misogyny*, N.Y. Times A28 (Aug. 27, 1993).

220. Foss et al., *supra* n. 36, at 282–284.

221. *Id.* at 272 (quoting bell hooks, *supra* n. 208, at preface).

222. *Id.* at 273 (quoting bell hooks, *Yearning: Race, Gender, and Cultural Politics* 149–150 (S. End Press 1990)).

223. See *supra* nn. 109–112 and accompanying text.

224. In addition to Sammons, *supra* n. 19, at 93, see Jack Sammons, *A Symposium: The Theology of the Practice of Law, February 14, 2002 Roundtable Discussion*, 53 Mercer L. Rev. 1087 (2002). This article provides further discussion of the ethics of rhetoric:

[W]hen rhetoric is appropriately located within its own tradition it is never unbridled in the way we tend to think of it. It is almost always instead a craft with constitutive restraining rules located in a particular rhetorical culture that carries within it a certain understanding of the virtues and vices based upon ideals of character for both rhetoricians and for their particular audiences. . . . And, what is more, while rhetoric is not only about persuasion—the beauty of the argument on the other side can be appreciated—it is always about persuasion as opposed to force, isn’t it?

*Id.* at 1088–1889.

225. White, *supra* n. 162, at 215.



you most prevail. You use your mind, as we used to say of the Sophists, to make the weaker argument appear the stronger. . . . [But] neither the power of money nor the power of persuasion is a good thing of itself; that depends upon whether it is used to advance or injure one's interest, and that is no concern of yours, with respect to your client or apparently to yourself.

You say you are your client's friend, but you do not serve his interests; in truth you are not his friend . . . . Likewise, you are no friend to the law . . . .

In all of this you are least of all friend to yourself . . . . You never ask yourself in a serious way what fairness and justice require in a particular case, for to do that would not leave time for what you do.<sup>226</sup>

White imagines the lawyers' responses in the dialogue as well. In one of them, he makes the case that practicing law has a tendency "not to injure but to improve the character," a tendency "greatly affected by the nature of the ethical community that one establishes both with one's clients and with other lawyers and judges."<sup>227</sup> He claims that Socrates misunderstands the lawyers' enterprise, which is to "preserve and improve a language of description, value, and reason—a culture of argument—without which it would be impossible even to ask the questions that you think are most important, questions about the nature of justice in general or about what is required in a particular case."<sup>228</sup>

By understanding the process in which the lawyer takes part, the lawyer's life can be justified:

the lawyer's task will always be to make the best case he can out of the materials of his culture in addressing an ideal judge. By its very nature, this is to improve his materials, both by ensuring their congruence with the world of facts outside the law and by moving them toward greater coherence, fairness, and the like.<sup>229</sup>

This view provides an answer as well to ethical questions:

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226. *Id.* at 218–219.

227. *Id.* at 223.

228. *Id.*

229. *Id.* at 227.

while I am in a sense “insincere” when I say to a judge, for example, that “justice requires” or “the law requires” such and such result, this insincerity is a highly artificial one, for no one is deceived by it. . . . But at the same time I am implicitly saying something else, with respect to which I am by any standard being sincere: that the argument I make is the best one that my capacities and resources permit me to make on this side of the case.<sup>230</sup>

At the beginning of the semester in Law & Rhetoric, most of my students respond to ethical questions by citing their belief that the adversary system automatically protects against any ethical problems that might otherwise be caused by “rhetoric” (in the sense of making the weaker argument seem the stronger). By the end of the course, their understanding of law as rhetoric is much more nuanced, and some students are counting not only on the adversary system but also on themselves to act as knowledgeable and responsible practitioners within it.<sup>231</sup> Following are some excerpts from their responses to White’s imagined dialogue:

Justifying my study of rhetoric is easy. . . . [W]hen I enrolled I had no idea that I would be gaining such a “great power.” It’s like asking Link from the Nintendo game Legend of Zelda: “you have found the Sword of All Power, you can destroy the universe, how can you live with yourself?” Of course Link replies “hey man, give me a break, I was just walking in the woods, now I have a sword, it’s not like I’m instantly evil. . . .”

My thoughts on [the reading]: I think I see myself as an intermediary between the abstract and the real. I am the conduit that brings words of law and words of life together.

As I struggle with the personal decision whether or not I want to be a lawyer I am constantly confronted with [arguments against lawyers] . . . so my defense of rhetoric here is really a metaphor for my defense of the legal profession as a whole. . . .

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230. *Id.* at 225.

231. White concludes that the dialogue teaches us “that we cannot help speaking a language that is made by others, yet forms our mind; that we are responsible for how we speak and who we are; [and that] self-conscious thought on these questions is among the most important tasks of a mature mind. . . .” *Id.* at 237.

## IV. HOW STUDENTS VIEW THE COURSE

"[If you hurt her,] I swear to God, I will tear you to pieces with my bare hands. Or vicious rhetoric."<sup>232</sup>

The study of "law as rhetoric" provides illumination and warmth, a respite from the cold comfort of the forms of legal reasoning that are said to be governed only by rules, politics, or power. For at least some students, rhetorical study seems to avert the total eclipse that legal argumentation casts on the "full story" and that norms of law school discourse cast on student views of right and wrong, justice and injustice, and what it means to be a good person and a good lawyer.<sup>233</sup> Encouraging students to experience law as a rhetorical activity gives them a chance to think through the professional roles they will play and to more fully engage their left and right brains, their heads and their hearts, their pasts and their futures.

Through their reading and writing, students acquire knowledge, skills, and attitudes that deepen their responses to the rhetorical efforts of others and improve their own rhetorical effectiveness. In comments taken from anonymous student evaluations, writers' memos accompanying papers, and e-mail responses to specific questions, students credited the reading, analysis, critique, and discussion that they are required to do in Law & Rhetoric with enabling them to read more critically and encouraging them to read more reflectively. For example, one student wrote that the class "has helped remind me that I understand things best when I can look at the essence/foundation of what they are. I know that after taking this course I will never again read a Supreme Court opinion and think 'wow that chief justice had a lot of really good points,'" rather than reading and analyzing the opinion in more depth.<sup>234</sup>

Students also become more aware of the influence on legal texts of the historical, social, and cultural context within which

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232. Pete (Topher Grace) in *Win a Date with Tad Hamilton* (DreamWorks SKG 2004) (quoted by a student in response to the final essay assignment).

233. See bell hooks, *Outlaw Culture: Resisting Representations* 9–10 (Routledge 1994), for the source of the ideal classroom conversation as "a place of radical openness of recognition and reconciliation where one could create freely."

234. The student e-mails, student evaluations, and writers' memos from which the quoted comments are taken are on file with Author.

they are produced; the backgrounds of their authors; and the ways in which those authors construct arguments and use language. As one student wrote, "This is a course that . . . gets to the 'heart' of the law and unavoidably compels the student to reflect on the meaning of it and what is really underlying judicial opinions."<sup>235</sup> As discussed earlier, a particularly good example is Justice Jackson's majority opinion in *West Virginia State Board of Education v. Barnette*.<sup>236</sup> Opening the lens more widely shifts students' gaze from the often-quoted and evocative "words" to the rhetorical choices made by Justice Jackson to explain the Court's departure from precedent, in the middle of World War II, to protect school children who refused to salute the flag because their religion barred them from worshipping graven images.

Similarly, through rhetorical analysis, students who have been critical of the results reached by particular judges in specific lawsuits reach a more nuanced understanding of how those judges' opinions emerged. For example, one student who analyzed Justice Clarence Thomas's dissent in *Grutter v. Bollinger*<sup>237</sup> said he had reconciled the author's use of specific language within the context of the particular controversy: "I am satisfied because I stuck to my guns with analyzing a controversial topic written by a reticent man."

By the time students are in their third year of law school, many say they are reading cases with only one goal: "finding" the rule they need to extract from the cases. But in Law & Rhetoric, they read cases with the specific purpose of understanding how the law is made: "I really value that this class has shown me that to . . . understand law you have to read behind and between the lines of legal text."

In addition to more reflective reading, students consistently comment that they have acquired skills and approaches that have helped them become more rhetorically effective as writers.<sup>238</sup> These tools and techniques range from methods for more fully

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235. Student evaluation on file with Author.

236. 319 U.S. 624 (1943).

237. 539 U.S. 306 (2003).

238. Positive comments from students are the norm, but they are not universal; one student in the 2007 class wrote that "[t]he class had very little practical application to being a lawyer. Too much academic theory, not enough practical advice. Instead of 'surveying' the whole field of rhetoric, why not focus on a few principles of rhetoric that can be used by a practicing lawyer?"

developing logical arguments, to discovery of embedded stories and metaphors, to use of heuristics to imagine the full range of arguments. Comments included this from one student: "I am still amazed at how just understanding the rhetorical techniques can make my writing so much tighter." Another wrote that "I never expected that one of the real skills I would get from this class is finally learning to slow down and plan before I write. I am not sure if this is a result of understanding argument better . . ."

Studying law as rhetoric may also help students recognize and work through the tension they will encounter as lawyers between abstract categories and individual stories. In her study of law school discourse, Elizabeth Mertz concluded that her findings, like the Carnegie Report, had "identified a tacit message in legal education's signature pedagogy: that law's key task is effective translation of the 'human world' using legal categories."<sup>239</sup> As Mertz puts it, "There is without question a certain genius to a linguistic-legal framework that [appears to] treat[] all individuals the same, in safely abstract layers of legal categories and authorities, regardless of social identity or context." But, like other critics, she contends that the abstraction of categories conceals a good many things, including power dynamics and "closes in on itself at the point where any challenge to its underlying system of reasoning arises."<sup>240</sup>

In addition to discovering ways to shape legal arguments to accommodate diversity and individual circumstances that depart from the norm and the form, students find that Law & Rhetoric allows them to draw on personal experiences, interests, talents, beliefs, and values that law school often seems to ask them to leave at the door. They are grateful to be able to discuss their views of how practicing lawyers should deal with justice and injustice, right and wrong. As one student put it, the class was able "to open up and engage in real . . . dialogue" about beliefs and values. Another student said that she appreciated the opportunity to discuss the reality of law practice: "I hear all the time how it isn't that hard to place your personal feelings about justice and fairness aside in 'zealously representing' someone. Maybe everyone is just afraid to say how hard it really is."

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239. Mertz, *supra* n. 21, at 505 (citations omitted).

240. *Id.* at 507 (citations omitted).

Students appreciate being able to draw upon the things they carried with them into law school that they thought were unwelcome in law school. One wrote: "I . . . infused [in the paper] a few poetic nuggets for you!" Another comment was similar: "I am sure you have heard the saying 'Law school is where creativity goes to die'; this class is proof that this doesn't have to be true. It gives me hope for my place in a profession that, on the surface, seems so rigid."

My students and I agree: what law school needs is more immersion in the rhetorical process, accompanied by more awareness of it and more reflection about it. Rhetorical analysis shows us that "law is a *human* exercise; that it is driven neither by immutable truths . . . nor by arbitrary whims."<sup>241</sup> Isn't it ironic that after teaching students how to think like lawyers, we must remind them that they will be practicing law as human beings? In the first year of law school, most teachers find some students who "just don't get it"; these students are unable to focus on "the issue," and they insist on bringing up "irrelevant" information.<sup>242</sup> Engaging in "law as rhetoric" reminds us that there is more to the issues we face than "legally relevant" information, that practicing law is a rhetorical activity undertaken by individuals using inherited language and symbols to build and transform their culture and community.

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241. Amsterdam & Bruner, *supra* n. 15, at 291.

242. The Carnegie Report points out that the signature pedagogy of law school leads students "to analyze situations by looking for points of dispute or conflict and considering as 'facts' only those details that contribute to someone's staking a legal claim on the basis of precedent." Sullivan et al., *supra* n. 111, at 187. "By contrast, the task of connecting these conclusions with the rich complexity of actual situations that involve full-dimensional people, let alone the job of thinking through the social consequences or ethical aspects of the conclusions, remains outside the method." *Id.*