

# A Call To Combine Rhetorical Theory and Practice in the Legal Writing Classroom

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*[I]n the field of . . . legal instruction a knowledge of theories and techniques is of the greatest importance.*<sup>1</sup>

## I. INTRODUCTION

The theory and practice of law have been separated in legal education to their detriment since the turn of the twentieth century. As history teaches us and even the 2007 Carnegie Report perhaps suggests, teaching practice without theory is as inadequate as teaching theory without practice.<sup>2</sup> Just as law students should learn how to draft a simple contract from taking Contracts,<sup>3</sup> they should learn the theory of persuasion from taking a legal writing course. In an economy where law apprenticeship has reverted from employer to educator, legal writing courses should do more than teach analysis, conventional documents, and the social context in which lawyers write. The legal writing professor's task is to impart to her students the intellectual ballast necessary to navigate complex analytical challenges in the workplace. By combining rhetorical theory and practice in the legal writing classroom, the professor can pique students' interest, hasten their learning, and help them develop transferable skills better than teaching by imitation alone. In addition, teaching the rhetorical nature of law in a legal writing course helps students debunk sooner the myth of "black letter law" in their doctrinal courses. Finally, as the Carnegie Report indicates, a more holistic approach to teaching can best "blend the analytical and practical habits of mind that professional practice demands . . . ."<sup>4</sup>

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1. Charles B. Nutting, *Training Lawyers for the Future*, 6 J. LEGAL EDUC. 1, 7 (1953).

2. When legal educators refer to The Carnegie Report, they refer to a recent study on legal education published by the Carnegie Foundation for the Advancement of Teaching's Preparation for the Professions Program. See WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS 15 (2007). Among other things, the report indicates that law schools responded to criticism in the 1950s that they were not providing "sufficient grounding in practice" by adding practical skills courses "with no attention to the relation of these practices with theory." See *id.* at 91–92.

3. "Legal writing" in this Article refers for convenience's sake to courses taught with or without a research component.

4. SULLIVAN ET AL., *supra* note 2, at 97.

This Article begins with a brief history of the separation of theory and practice in the law classroom and the impact that it has had on the quality and reputation of writing as its own subject. The Article argues that despite a wave of pedagogical advances, legal writing as its own subject has ample room to grow. For legal writing courses to achieve intellectual maturity, they must incorporate rhetorical theory. To ignore it is to confirm Plato's suspicion that rhetoric is a discipline without a subject matter and to enable the insidious undervaluing of our profession.<sup>5</sup> As detailed below, there are several advantages to teaching legal writing as rhetoric. Although not the focus of this Article, a corollary advantage may be to help legal writing faculty achieve academic equality, which benefits teacher and student alike. For a variety of reasons, this Article concludes that legal writing professors are responsible for teaching both practical skills as well as the theories that inform them.

## II. THE SEPARATION OF THEORY AND PRACTICE IN LEGAL EDUCATION

Since Christopher Langdell, the Dean of Harvard Law School from 1870 to 1895, introduced the idea that the study of law is akin to science, law school educators have taken a decidedly theoretical approach to teaching law.<sup>6</sup> Langdell's belief that true principles of law could be articulated by examining judicial decisions gave rise to the case and Socratic methods of teaching.<sup>7</sup> Although Langdell's students initially disliked his approach, they came to appreciate it.<sup>8</sup> The case method treated his students as excavators, as opposed to scribes, of the law, and the Socratic Method gave students permission to have opinions of their own. Langdell's methods turned out to be better for teaching students to "think like lawyers" than to discern legal principles.<sup>9</sup> Nevertheless, by the mid-1890s, law schools across the country began to adopt Langdell's methods.<sup>10</sup> More than 100 years later, the Socratic Method has fallen somewhat into disfavor and disuse for a variety of reasons, but the theoretical approach to teaching law remains firmly intact.<sup>11</sup>

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5. See *infra* Part III.A.1.

6. See, e.g., Charles R. McManis, *The History of First Century American Legal Education: A Revisionist Perspective*, 59 WASH. U. L.Q. 597, 633 (1981); Nutting, *supra* note 1, at 4 ("I venture to suggest that for law school . . . the most practical instruction possible is the most theoretical."); Patrick J. Rohan, *Some Basic Assumptions and Limitations of Current Curriculum Planning*, 16 J. LEGAL EDUC. 289, 291 (1964) ("Happily the plea for 'practice schools' spent itself in the legal publications."); David S. Romantz, *The Truth About Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 U. KAN. L. REV. 105, 116 (2003).

7. See Bruce A. Kimball, *Christopher Langdell: The Case of an 'Abomination' in Teaching Practice*, 20 NEA HIGHER EDUC. J. 23, 25 (Summer 2004); Amy R. Mashburn, *Can Xenophon Save the Socratic Method?*, 30 T. JEFFERSON L. REV. 597, 612 (2008); Romantz, *supra* note 6, at 105–06, 114–15 (2003).

8. See Kimball, *supra* note 7, at 32–33; Romantz, *supra* note 6, at 106, 114.

9. See Mashburn, *supra* note 7, at 610–11; McManis, *supra* note 6, at 633–34; Romantz, *supra* note 6, at 106.

10. See Kimball, *supra* note 7, at 34; Romantz, *supra* note 6, at 116.

11. See, e.g., Benjamin V. Madison, III, *The Elephant in Law School Classrooms: Overuse of the Socratic Method as an Obstacle to Teaching Modern Law Students*, 85 U. DET. MERCY L. REV. 293, 301 (2008) (citing ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP 132–41 (2007), available at [http://www.cleaweb.org/best\\_practices-full.pdf](http://www.cleaweb.org/best_practices-full.pdf)) ("[A]lthough the Socratic dialogue and case method still have their place in legal education, they are not alone sufficient to teach all law students the

Having replaced practitioners with scholars as law professors, law schools began to realize that despite the benefits of the case method, students would need to learn some practical skills too. As early as the 1920s, some law schools offered “bibliography” courses taught by law librarians that introduced students to legal research and sources of law.<sup>12</sup> Although writing may have been included in these courses, the focus was remedial and probably did not emphasize “finished legal writing.”<sup>13</sup> In 1938, the University of Chicago introduced the first modern skills course to combine legal research, analysis, and writing.<sup>14</sup> It was not designed to improve students’ writing but to address the gap in skills training that had resulted from the legal academy’s adoption of the case method.<sup>15</sup> Northwestern University, too, had a course that combined research and writing, but most schools did not follow the Chicago schools’ lead and continued to focus on research and remedial writing.<sup>16</sup> By 1939, about twenty-three law schools taught a course in how to find and use law books.<sup>17</sup>

Distinct courses in legal writing did not appear until sometime after World War II, when it became clear that students in general needed basic writing instruction.<sup>18</sup> As Professor Marjorie Rombauer has stated, the impetus for legal writing programs was the “substantial influx of older students into the law schools. When schools relaxed admission standards even more in admitting them, they discovered that the students’ writing was a serious problem.”<sup>19</sup> Given student deficiencies in basic writing skills, “law faculties grudgingly saw the necessity to become teachers of English grammar and composition.”<sup>20</sup>

At the same time, law schools began to recognize that in addition to writing instruction, students needed at least some training in the actual practice of law. The 1953 Report of The Association of American Law Schools (“AALS”) Curriculum Committee stated:

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skills and knowledge they need . . . .”); Mashburn, *supra* note 7, at 621–22 (explaining that since the 1970s, a combination of “sociological, political, and psychological forces appear to be putting tremendous stress on the dominance of the Professor Kingsfield paradigm”); Michael Vitiello, *Professor Kingsfield: The Most Misunderstood Character in Literature*, 33 HOFSTRA L. REV. 955, 956 (2004) (“Among the criticisms leveled at the Socratic method in the hands of professors like Kingsfield are that it results in poorly trained lawyers; it causes incivility between attorneys; it discriminates against women; and it causes law students to lose their ideals.” (footnotes omitted)).

12. Romantz, *supra* note 6, at 128; Marjorie D. Rombauer, *First-Year Legal Research and Writing: Then and Now*, 25 J. LEGAL EDUC. 538, 539–40 (1972); see also Comm. Curriculum Ass’n Am. Law Sch., *The Place of Skills in Legal Education*, 45 COLUM. L. REV. 345, 352 (1945) (recognizing that the “use of the library” requires special teaching) (internal quotations marks omitted)).

13. See Rombauer, *supra* note 12, at 540.

14. Mary S. Lawrence, *An Interview with Marjorie Rombauer*, 9 J. LEGAL WRITING INST. 19, 21 (2003); Romantz, *supra* note 6, at 129; Rombauer, *supra* note 12, at 541.

15. Romantz, *supra* note 6, at 129.

16. *Id.* at 130.

17. Rombauer, *supra* note 12, at 539 n.7.

18. See Romantz, *supra* note 6, at 128–29; Rombauer, *supra* note 12, at 540.

19. Lawrence, *supra* note 14, at 21.

20. Rombauer, *supra* note 12, at 540.

[T]he question presses whether there were not virtues in apprenticeship training which need recapture and which can be recaptured even in the classroom. It is striking that other professions devote much schooling time to . . . the *applied arts* which the student is expected later to practice . . . . And whatever the deficiencies of the older apprenticeship instruction in law, it did have this value of bringing instruction in the craft-skills, in how to do legal jobs well and wisely.<sup>21</sup>

Consequently, some law schools developed courses in legal methodology that combined research, statutory interpretation, case analysis, synthesis, and legal reasoning.<sup>22</sup> By the early 1950s, at least forty-four schools offered a methods-type course.<sup>23</sup>

Marjorie Rombauer is considered the founder of the combined legal research and writing programs we are familiar with today.<sup>24</sup> Professor Rombauer started teaching at the University of Washington Law School in 1960.<sup>25</sup> Asked by the school's dean to develop a five-year plan, she was determined "to develop the legal writing program into something more substantial than it was."<sup>26</sup> In addition to the conventions of writing, Rombauer recognized that she was teaching students a complicated process: "[T]he whole, integrated sequence of thinking and developing" a legal issue involves research, synthesis, analysis, and writing.<sup>27</sup> Her book, *Legal Problem Solving: Analysis, Research, and Writing*,<sup>28</sup> demonstrated that legal writing involves "more than mechanics and grammar."<sup>29</sup> As Professor Lawrence has stated, Rombauer proved that legal writing "could be as academically demanding as any other law school course."<sup>30</sup>

Despite a growing awareness that law students needed skills training, law schools were generally reluctant to provide it. First, as legal writing faculty well know, there was—and continues to be—an "institutionalized contempt for legal writing" among top-tier law schools.<sup>31</sup> It is based on the assumption that good writing cannot be taught. If a student has made it all the way to law school and still cannot write, it is probably too late.<sup>32</sup> Second, because writing instruction was largely remedial, law faculties considered

21. Comm. Curriculum Ass'n Am. Law Sch., *supra* note 12, at 364.

22. Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP. L. REV. 117, 132 (1997); Romantz, *supra* note 6, at 129; Rombauer, *supra* note 12, at 541.

23. Rombauer, *supra* note 12, at 541 n.18.

24. See Lawrence, *supra* note 14, at 19.

25. *Id.* at 20.

26. *Id.* at 28.

27. *Id.* at 46-47.

28. MARJORIE DICK ROMBAUER, *LEGAL PROBLEM SOLVING: ANALYSIS, RESEARCH, AND WRITING* (5th ed. 1991).

29. Lawrence, *supra* note 14, at 19.

30. *Id.*

31. Pamela Edwards, *Teaching Legal Writing as Women's Work: Life on the Fringes of the Academy*, 4 CARDOZO WOMEN'S L.J. 75, 79 (1997).

32. *Id.* at 79-80; see, e.g., J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 40-48 (1994). In 1939, William Prosser stated that with respect to students' poor writing ability, "[T]here is very little that the law schools themselves can do. I am still quite certain that for the protection of the public these poor unfortunates should never be allowed to graduate from any law school; and that the professional gates should continue to be guarded well." Arrigo, *supra* note 22, at 130-31.

it boring and unintellectual.<sup>33</sup> Third, teaching skills courses required too much work.<sup>34</sup> Fourth, investing in legal writing programs promised to be expensive, and law schools were loath to pay the price.<sup>35</sup> Chicago, Northwestern, and Rutgers, for example, already had discovered that teaching legal research and writing was labor intensive, and it was obvious that writing programs were going to require hiring new faculty.<sup>36</sup> Some schools economized by offering a legal writing course but having upper-class students teach it under the supervision of a faculty member.<sup>37</sup> By the mid-1980s, however, judges, practitioners, and students had put sufficient pressure on law schools to provide better skills training, and a host of formalized research and writing programs taught by full- or part-time faculty finally emerged.<sup>38</sup>

Although early legal writing programs sought to teach both the substance of legal analysis and the mechanics of writing, they focused more on what to write than how or why, hindered, in part, by the prevailing writing pedagogy. Consistent with the view that writing cannot be taught, educators had assumed that writing is the natural result of a well thought-out thesis.<sup>39</sup> Teachers took little interest in the process writers use to create their finished products and focused on organization and style.<sup>40</sup> This was especially true in legal writing, where students were asked to reproduce conventional legal documents, such as opinion letters, memoranda, and briefs. In the 1980s, composition theorists started studying the writing process itself and learned there are significant differences between expert and novice writers.<sup>41</sup> Writing pedagogy was thus transformed. Writing teachers began to intervene in the individual writer's process, assigning multiple drafts of the same assignment,

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33. Edwards, *supra* note 31, at 84.

34. Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools' Dirty Little Secrets*, 16 *BERKELEY WOMEN'S L.J.* 3, 6–7 (2001).

35. See Arrigo, *supra* note 22, at 132; JoAnne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 *J. LEGAL EDUC.* 562, 565 (2000); Edwards, *supra* note 31, at 87–88.

36. See Arrigo, *supra* note 22, at 131.

37. See *id.* at 133–34. As a first-year law student at Georgetown, my legal writing instructor was a third-year law student. By the time I graduated in 1987, full-time faculty had been hired to teach legal writing.

38. See Arrigo, *supra* note 22, at 119; Durako, *supra* note 35, at 565; Edwards, *supra* note 31, at 87.

39. See, e.g., James A. Berlin, *Contemporary Composition: The Major Pedagogical Theories*, 44 *C. ENG.* 765, 765–67 (1982); Susan L. DeJarnatt, *Law Talk: Speaking, Writing, and Entering the Discourse of Law*, 40 *DUQ. L. REV.* 489, 492–94 (2002); Rideout & Ramsfield, *supra* note 32, at 49.

40. In the nineteenth century, Alexander Bain, an English rhetorician, divided writing into four types: description, narration, exposition, and argument. See generally ALEXANDER BAIN, *ENGLISH COMPOSITION AND RHETORIC* 153–256 (Scholars' Facsimiles & Reprints 1996) (1871). Bain's focus on arrangement led to the typical writing teacher's emphasis on large-scale organization, paragraph structure, and sentence construction. The "five-paragraph essay" also was conceived during this period. Ultimately, the four types fell into disfavor because they elevated form over substance. See Robert J. Connors, *The Rise and Fall of the Modes of Discourse*, 32 *C. COMPOSITION & COMM.* 444, reprinted in *THE WRITING TEACHER'S SOURCEBOOK* 24, 31–33 (Gary Tate & Edward P.J. Corbett eds., 2d ed. 1988).

41. See, e.g., JANET EMIG, *THE COMPOSING PROCESS OF TWELFTH GRADERS* (1971); DeJarnatt, *supra* note 39, at 501–03; Linda Flower & John R. Hayes, *The Cognition of Discovery: Defining a Rhetorical Problem*, 31 *C. COMPOSITION & COMM.* 21, reprinted in *THE WRITING TEACHERS SOURCEBOOK*, *supra* note 40, at 92–102.

commenting on their drafts, and conferencing with students between drafts.<sup>42</sup> A growing interest in communities of writers led to an interest in how one becomes an acculturated member of the legal discourse community.<sup>43</sup> In more recent years, rhetoricians have explored knowledge as the product of rhetorical activity within a given community of discourse.<sup>44</sup>

Legal writing pedagogy today typically accounts for the individual writer's process, the legal audience, and, to some extent, the generative aspects of writing. But because legal writing courses aim to prepare students for practice, they also emphasize "finished legal writing."<sup>45</sup> Accordingly, they tend to rely primarily on simulated litigation and transactional settings, writing models, and imitation to prepare law. However, as Professor Rombauer recognized, legal writing courses should engage in "the whole integrated sequence of thinking and developing" legal arguments.<sup>46</sup> Just as legal writing courses needed to add analysis to mechanics in the 1960s, they now need to add the theory that informs good analysis to analysis itself in the twenty-first century. Students may learn to "think like lawyers" in their doctrinal classes, but they need "to both act and think well" in legal writing classes.<sup>47</sup>

### III. COMBINING RHETORICAL THEORY AND THE PRACTICE OF LEGAL WRITING

I hasten to add that the scholarship of legal writing faculty on rhetorical theory, both classical and contemporary, has increased dramatically since I started teaching in 1994.<sup>48</sup> This interest has engendered and inspired my own scholarship, but only recently have I tried earnestly to incorporate rhetorical theory directly into my teaching, and I suspect I am not alone. Anecdotally, I find my first-year law students expect me to teach them about logic and emotional appeals—two aspects of rhetoric with which they are rarely familiar—because they intuit their relevance to legal education. Over the

42. See Daniel L. Barnett, *Triage in the Trenches of the Legal Writing Course: The Theory and Methodology of Analytical Critique*, 38 U. TOL. L. REV. 651, 656–57 (2007); Rideout & Ramsfield, *supra* note 32, at 51–52.

43. See, e.g., Patricia Bizzell, *Cognition, Convention & Certainty: What We Need to Know About Writing*, reprinted in ACADEMIC DISCOURSE AND CRITICAL CONSCIOUSNESS 75 (1992); DeJarnatt, *supra* note 39, at 503–04; Joseph Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 J. LEGAL WRITING INST. 1 (1991).

44. See, e.g., Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. LEGAL EDUC. 155 (1999); Richard E. Young & Alton L. Becker, *Toward a Modern Theory of Rhetoric: A Tagmemic Contribution*, reprinted in CONTEMPORARY RHETORIC: A CONCEPTUAL BACKGROUND WITH READINGS 123 (W. Ross Winterowd ed., 1975).

45. See Rombauer, *supra* note 12, at 540.

46. See Lawrence, *supra* note 14, at 19.

47. SULLIVAN ET AL., *supra* note 2, at 9.

48. See, e.g., Linda A. Berger, *Studying and Teaching "Law As Rhetoric": A Place to Stand*, 16 J. LEGAL WRITING INST. 3 (2010); Michael Frost, *Legal Writing Inst. Conf. at Seattle U. School of Law: Introduction to Classical Legal Rhetoric: A Lost Heritage* (July 1996); Terri LeClercq & Anthony Pelasota, *Legal Writing Inst. Conf. at U. of Tenn. College of Law: Let's Argue About Argumentation* (May 2002); Suzanne Rabe, *Legal Writing Inst. Conf., Georgia State U.: From Aristotle to Martin Luther King: Using Letter from Birmingham Jail to Teach Aristotle's Three Modes of Persuasion* (June 2006); J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 J. LEGAL WRITING INST. 53 (2008).

years, my students often expressed disappointment when they realized that my course did not yet include rhetorical theory per se, which makes it possible to teach not only what is effective but why. Thus equipped, students feel better able to move beyond the legal writing classroom and into the legal writing profession.

### A. Teaching Law Through the Lens of Classical Rhetoric

Contemporary rhetorical theories are invaluable to law students as budding storytellers and wordsmiths, but classical rhetoric provides the most natural framework for teaching legal analysis and argument as a whole. My course is structured around Aristotle's canons of rhetoric.<sup>49</sup> Aristotle did not claim to invent rhetoric but to observe it, and the process he described is as relevant today as it was in ancient Greece. According to Aristotle, there are three types of persuasive speech based on the nature of the audience to which it is addressed: political, ceremonial, and legal argument.<sup>50</sup> Each is the product of the same five canons or principles of composition: invention, arrangement, style, memory, and delivery (the latter two applying only to oral rhetoric).<sup>51</sup>

Invention is the most time-consuming and difficult part of the process. At this stage, the writer invents supporting arguments known as artistic appeals.<sup>52</sup> A writer may rely on inartistic appeals as well, such as confessions, oaths, or contracts, but she does not invent these in any creative sense.<sup>53</sup> Aristotle further divided artistic appeals into appeals to reason (*logos*), emotion (*pathos*), and credibility (*ethos*).<sup>54</sup> Next, the writer must arrange or organize her arguments, and Aristotle's idea of arrangement was simple and straightforward: first, a statement of the relevant facts and then the argument.<sup>55</sup> He acknowledged that orators often add an introduction and a conclusion to their speeches, and Roman orators added a statement of the issue, an outline of the argument, and counter-arguments to the traditional Greek arrangement.<sup>56</sup> As

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49. See ARISTOTLE, *THE RHETORIC OF ARISTOTLE* (Lane Cooper trans., Prentice-Hall, Inc. 1960) (c. 333 B.C.E.). First-year students tend to underestimate the complexity of the analytical process and the number of concepts they must learn before they even can begin to write. Despite my struggle to present a cornucopia of material in a way beginning law students understand, they often complain that the course is unorganized and confusing. Confusing, yes, but unorganized? Hardly. Using Aristotle's canons as the framework for teaching the analytical process—from identifying the legal issue to conducting research to polishing a document—has helped. It has made it easier for me to put each seemingly disparate task into a larger and more authoritative context.

50. See *id.* at 16–17.

51. See generally *id.* at 143–241. The great Roman rhetoricians embraced Aristotle's canons and expanded on them. See, e.g., [CICERO], *RHETORICA AD HERENNIUM* 7 (Harry Caplan trans., 1954) (c. 84 B.C.E.); 2 CICERO, *DE INVENTIONE* 19 (H.M. Hubbell trans., 1968) (c. 87 B.C.E.); 2 QUINTILIAN, 3 *INSTITUTIO ORATORIA: THE ORATOR'S EDUCATION* 23 (Donald A. Russell ed. & trans., Harvard U. Press 2001) (c. 85 B.C.E.).

52. See ARISTOTLE, *supra* note 49, at 8.

53. See *id.*

54. See *id.* at 8–9.

55. See *id.* at 220.

56. See *id.*; [CICERO], *supra* note 51, at 9.

for the canon of style, Aristotle said the legal writer must choose an appropriate style with which to arrange her arguments: the overall effect should be clear, and the words should seem to come naturally to the speaker.<sup>57</sup>

### 1. Teaching Legal Analysis and Argument as Invention

Early in the fall semester, first-year students tend to think that their role as legal writers is to report the law they find and that they have no authority to characterize it. In the latter case, a typical student will say, "I thought that might be the rule of law, but I could not find a case that specifically said that." One advantage to teaching analysis and argument as beginning with "invention" is to signal the creative aspect of the lawyer's process. Unfortunately, the idea that lawyers invent arguments as opposed to simply marshal them has been lost to the Western world since the turn of the twentieth century. Until then, rhetoric was taught as the counterpart to philosophy (or dialectic, as the ancient philosophers called it).

Aristotle believed that both philosophy (the quest for knowledge) and rhetoric (the art of persuasion) involve the process of invention. The difference is that philosophy produces truth in an absolute or scientific sense, whereas rhetoric yields only probable or best truths in the context of human affairs.<sup>58</sup> Aristotle's teacher, Plato, despised rhetoric for this reason. He claimed rhetoric was a discipline without a subject matter. An orator simply took knowledge acquired by philosophers and presented it in the way most likely to manipulate his audience.<sup>59</sup> During the Middle Ages, rhetoric was divided into separate subjects: logic, grammar, letter writing, poetry, and preaching.<sup>60</sup> During the Renaissance, a renewed interest in the ancient world led to renewed interest in Aristotle. Peter Ramus, a French philosopher, rejected Aristotle's view that invention and arrangement belong to philosophy and rhetoric. Because philosophy alone leads to truth, he argued, rhetoric is confined to style and delivery.<sup>61</sup> In the eighteenth century, the focus of rhetorical theory shifted from persuasive writing to language and literary criticism due, in part, to Ramus' view.<sup>62</sup> Writing was thus restricted to

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57. See ARISTOTLE, *supra* note 49, at 185–86.

58. See *id.* at 3.

59. See, e.g., Plato, *Gorgias*, in PLATO, COMPLETE WORKS 803-09 (John M. Cooper ed., 1997) (c. 380 B.C.E.) (in which Socrates tells Gorgias that oratory is a "shameful" form of "flattery," a "knack" without subject matter, used to achieve just and unjust results); *Phaedrus*, reprinted in PLATO, *supra* at 537-38 (in which Socrates tells Phaedrus that orators "artfully make the same thing appear to the same people sometimes just and sometimes unjust).

60. See JAMES J. MURPHY, RHETORIC IN THE MIDDLE AGES: A HISTORY OF RHETORICAL THEORY FROM SAINT AUGUSTINE TO THE RENAISSANCE 89–355 (1974).

61. *Id.*; see, e.g., GEORGE A. KENNEDY, CLASSICAL RHETORIC & ITS CHRISTIAN & SECULAR TRADITION FROM ANCIENT TO MODERN TIMES 250–51 (2d ed. 1999).

62. See, e.g., HUGH BLAIR, LECTURES ON RHETORIC AND BELLES LETTRES xv (Linda Ferreira-Buckly & S. Michael Halloran eds. 2005) (1833). Blair's Lectures were devoted to topics such as Taste, Style, and Structure of Sentences. See *id.* at 2, 99, and 110.



organization and style, which led to the division between literature and composition courses at all educational levels in the United States.<sup>63</sup>

At the turn of the twentieth century, legal writing was considered unintellectual and boring for teacher and student. The belief that writers do not invent ideas or arguments made it possible for law schools to jettison the apprenticeship approach to teaching law. Two hundred years earlier in 1620, Francis Bacon introduced the scientific method as a substitute for Aristotle's logic as the source of knowledge, and in the late 1800s, a curriculum based on the scientific pursuit of law seemed to make sense.<sup>64</sup> At that time, the focus of legal education had become knowledge of the law, not its expression. It was assumed that good writing would follow as a natural consequence of good thinking, and any remaining problems law students had were simply a matter of mechanics.<sup>65</sup>

In sharp contrast to Plato and Ramus, Greek and Roman rhetoricians conceived of invention as a two-step process. First, the orator identified the issue to be resolved, and then he consulted the common topics—a range of generic types of ideas—to create the best available arguments.<sup>66</sup> For example, an argument could be based on the definition of an object or idea, the comparison of two objects or ideas, and the relationship between them.<sup>67</sup> In addition to the common topics, special topics or arguments were used in particular types of speech. Legal argument, for example, relies heavily on the special topics of justice and injustice.<sup>68</sup> The increasingly complicated process of conducting legal research online and in print is akin to consulting the topics. Once a legal issue is identified, the legal writer consults primary and secondary sources of law to find and invent various lines of argument.<sup>69</sup> Learning to access and use a countless variety of legal sources in combination is often frustrating to first-year students. This seemingly random process can be understood as part of invention as a whole, which the experienced legal researcher learns inevitably comes full circle. I remind students that the process of reading, selecting, and sorting the law they find is itself creative in that it involves individual choice.

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63. Ramus' influence can be seen today in the allocation of subjects among U.S. college departments: invention or the acquisition of knowledge still belongs to philosophy, and style and delivery are divided among English, speech, and communications departments.

64. See *infra* Part III.A.1.a.i.

65. See *supra* Part II.

66. See, e.g., ARISTOTLE, *supra* note 49, at 15–16; 3 CICERO, 2 DE ORATORE 315–23 (E.W. Sutton & H. Rackham trans., Harvard U. Press 1967) (c. 55 B.C.E.).

67. See ARISTOTLE, *supra* note 49, at 15–16, 19, 143, 163, 170; ARISTOTLE, 4 TOPICA 421–80 (Hugh Tredennick ed. & trans., Harvard U. Press 1960) (c. 350 B.C.E.).

68. ARISTOTLE, *supra* note 49, at 18.

69. The Roman rhetoricians were very interested in the nature of legal issues and how to define them. Cicero, for example, said that legal issues involve questions of law, fact, or both. See 2 CICERO, *supra* note 51, at 21–25; see also, e.g., 2 QUINTILIAN, *supra* note 51, at 157–59 (expanding on Cicero's ideas relating to the nature of legal issues).

a. Appeals to Reason (Logos)

The lawyer's first and foremost tool is logic, which includes deductive and inductive reasoning.<sup>70</sup> Students have an intuitive sense of what it means to be logical, but unless they majored in philosophy or the classics, most do not know what that really means. Once students learn the nature, goals, and limitations of both forms of reasoning, they can use them together to create effective analysis and argument.

i. Deduction

I have taught always deductive reasoning by encouraging students to organize their analysis of a given issue based roughly on the traditional acronym, IRAC: identify the issue, state the rule of law, apply it to the facts, and then conclude. What I since have come to understand is that IRAC and its more recent iterations, such as CREAC and TREAT,<sup>71</sup> are not organizational but analytical schemes that properly belong to the canon of invention. Each of these acronyms is a kind of shorthand for the categorical syllogism, which Aristotle wrote extensively about in *Prior Analytics* and *Posterior Analytics*.<sup>72</sup> The idea behind the syllogism is that if you know something about the relationship between *A* and *B* (the major premise), and something about the relationship between *C* and *A* (the minor premise), you may be able to draw a valid conclusion about the relationship between *B* and *C* (conclusion).<sup>73</sup> In order for the conclusion to be valid, both premises must be indisputably true, and the reasoning must be logical. Only three terms can be compared at a given time, and there is a set of rules for determining the validity of the reasoning itself.<sup>74</sup>

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70. In legal analysis, deduction usually involves the application of a general rule of law to a specific set of facts to reach a conclusion, whereas induction involves using a series of observations to generate a hypothesis or general rule from a series of outcomes. See, e.g., RUGGERO J. ALDISERT, *LOGIC FOR LAWYERS* 45–50 (3d ed. 1997); EDWARD P.J. CORBETT & ROBERT J. CONNORS, *CLASSICAL RHETORIC FOR THE MODERN STUDENT* 32–33 (4th ed. 1999).

71. See, e.g., MICHAEL D. MURRAY & CHRISTY DESANCTIS, *OBJECTIVE LEGAL WRITING AND ANALYSIS* 95–117 (2006); RICHARD K. NEUMANN, JR., *LEGAL REASONING AND LEGAL WRITING* 100–03 (5th ed. 2005).

72. See generally ARISTOTLE, *PRIOR ANALYTICS* (Hugh Tredennick ed. & trans., Harvard U. Press 1962) (c. 350 B.C.E.); ARISTOTLE, *POSTERIOR ANALYTICS* (Hugh Tredennick ed. & trans., Harvard U. Press 1962) (c. 350 B.C.E.).

73. JAMES A. GARDNER, *LEGAL ARGUMENT: THE STRUCTURE AND LANGUAGE OF EFFECTIVE ADVOCACY* 6–7 (1993).

74. These rules involve the proper use of distributed and undistributed terms, which, for example, prevent conclusions being made about all Cs based on the evidence relating to only some Cs. See, e.g., CORBETT & CONNORS, *supra* note 70, at 43–46. Although a bit foreboding at first, they are not difficult to master, and Venn diagrams can be used to illustrate the same concepts. In fact, if all first-year students learn about syllogistic reasoning is that no more than three terms can be compared at one time and both premises must be reasonable, they will have learned a great deal. Most law students sense when their reasoning is “off” or invalid. For a more detailed discussion of valid and invalid deductive reasoning, including typical fallacies in legal writing, see Kristen K. Robbins-Tiscione, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 VT. L. REV. 483, 493–531 (2003) and KRISTEN K. ROBBINS-TISCIONE, *RHETORIC FOR LEGAL WRITERS: THE THEORY AND PRACTICE OF ANALYSIS AND PERSUASION* 114–18, 150–70 (2009).

In legal analysis, the major premise is often a general rule of law (*If a person makes a false statement that damages the reputation of another (A), that person is liable for defamation (B).*). The minor premise is usually a statement of the relevant facts (*Charles (C) made a statement that injured the reputation of another (A).*). The conclusion is the result of applying the major premise to the minor premise (*Charles (C) is liable for defamation (B).*). Here, even though there are only three terms of comparison, and the reasoning is valid, the conclusion is only probably true.<sup>75</sup> In contrast to categorical syllogisms, legal syllogisms are rarely, if ever, based on indisputably true premises. Advocates for opposing parties rarely agree on the nature of the legal rules (the major premise), and as long as both rules are reasonable, one cannot be truer than the other. The parties even may disagree about the facts (the minor premise). Although legal syllogisms produce probable conclusions, they are the most powerful form of legal reasoning. If the audience accepts the truth of the stated premises, and the writer's reasoning is valid, the audience will accept the writer's conclusion as sound.<sup>76</sup>

Legal writing faculty often debate the value of using analytical shorthand to teach deductive reasoning. Opponents claim that acronyms such as IRAC reduce legal analysis to formulaic thinking and mislead students into thinking legal analysis lacks complexity.<sup>77</sup> To me, this debate misses the point. Each of these acronyms is designed, in its own way, to teach students to reason as syllogistically as possible. First-year law students are often reluctant to embrace what they perceive to be the organizational dictates of their particular writing professor. They have been highly successful in their writing thus far, and they are reluctant to change their basic approach. Making explicit the link between the acronym and the nature and power of the syllogism is thus paramount. When students understand these "dictates" are a heuristic for syllogistic reasoning and why it is effective, they are more likely to embrace the use of the acronym and write better.

As an alternative or in addition to formal logic, students can read the work of informal logician-philosophers, Stephen Toulmin or Chaim Perelman. Toulmin and Perelman recognized that in everyday life, people pay no attention to the number of terms being compared and whether they are using distributed or undistributed terms. Focusing on legal argument, Toulmin set out to determine what connection formal logic has to the way people make and assess arguments in everyday life. In *Uses of Argument*,<sup>78</sup>

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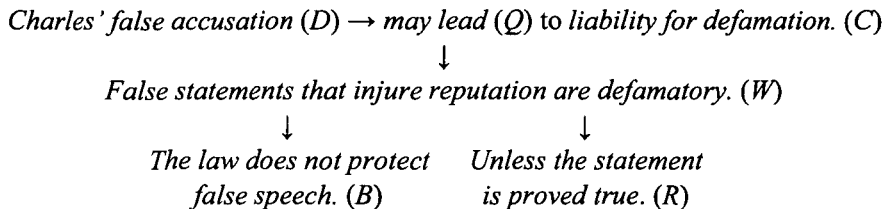
75. Because a legal syllogism can establish probable truth only, a logician would consider this inductive reasoning. See, e.g., WAYNE A. DAVIS, AN INTRODUCTION TO LOGIC 42 (2007). However, since all forms of proof in legal reasoning lead only to probable truth, lawyers tend to use deduction to mean the application of general rules to a set of facts and induction to mean generalizing a rule from a set of specific outcomes.

76. See, e.g., CORBETT & CONNORS, *supra* note 70, at 38–43; GARDNER, *supra* note 73, at 6.

77. See generally Legal Writing Inst., 10 SECOND DRAFT, Nov. 1995, available at <http://www.lwionline.org/publications/seconddraft/nov95.pdf> (publishing a series of essays on the questionable value of using IRAC to teach legal writing).

78. STEPHEN E. TOULMIN, THE USES OF ARGUMENT: UPDATED EDITION 90 (2003).

Toulmin concluded that an argument usually begins with evidence or data used to back up a claim ( $D \rightarrow A$ ). In order to support the claim, one often relies on a warrant ( $W$ ) to explain why the claim is valid.<sup>79</sup> When the warrant is not absolute, a qualifier ( $Q$ ) is used, and rebuttal arguments ( $R$ ) often are anticipated.<sup>80</sup> Where the warrant is not convincing, one often includes a backing ( $B$ ).<sup>81</sup> In Toulmin's terms, the legal syllogism above would be diagrammed as follows:<sup>82</sup>



Chaim Perelman and his partner, Lucie Olbrechts-Tyteca, also focused on legal argument to determine if it is based on some form of traditional logic. In *The New Rhetoric: A Treatise on Argumentation*,<sup>83</sup> they concluded that all forms of reasoning, including jurisprudence and judicial decisions, are rhetorical.<sup>84</sup> Because legal scholars and judges often disagree about what the law should be or what is fair in a given case, they must use informal methods of reasoning to convince their audience of the rectitude of their position.<sup>85</sup> As soon as a philosopher “tries to influence one or more persons, to orient their thinking, to excite or calm their emotions, to guide their actions, it belongs to the realm of rhetoric.”<sup>86</sup> Perelman found that argument usually begins with a meeting of the minds—a series of premises on which the parties do agree.<sup>87</sup> The scholar or judge then selects which premises to emphasize and which arguments to advance.<sup>88</sup> Once he establishes his arguments, he must create a convincing link between them either by association (by analogy) or

79. *Id.* at 91–93.

80. *Id.* at 93–94.

81. *Id.* at 95–96. In 2002, Professors Terri LeClercq, from the University of Texas School of Law, and Anthony Pelasota, from the Thurgood Marshall School of Law, gave an interesting presentation on Toulmin's work and how to use it in the legal writing classroom. See LeClercq & Pelasota, *supra* note 48.

82. See *supra* III.A.1.a.i.

83. CHAIM PERELMAN & LUCIE OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* (1969).

84. See *id.* at 45–47 (1969); see also CHAIM PERELMAN, *THE NEW RHETORIC AND THE HUMANITIES* 13 (1979); CHAIM PERELMAN, *THE REALM OF RHETORIC* 162 (1982); James Berlin, *Rhetoric and Ideology in the Writing Class*, reprinted in *THE WRITING TEACHER'S SOURCEBOOK* 9 (Edward P.J. Corbett, Nancy Myers & Gary Tate eds., 4th ed. 2000) (explaining that rhetoric can “never be a disinterested arbiter of the ideological claims of others because it is always already serving certain ideological claims”).

85. See PERELMAN, *THE NEW RHETORIC AND THE HUMANITIES*, *supra* note 84, at 14.

86. PERELMAN, *THE REALM OF RHETORIC*, *supra* note 84, at 162.

87. See PERELMAN, *THE NEW RHETORIC AND THE HUMANITIES*, *supra* note 84, at 15–17; PERELMAN & OLBRECHTS-TYTECA, *supra* note 83, at 65–83.

88. See PERELMAN, *THE NEW RHETORIC AND THE HUMANITIES*, *supra* note 84, at 17–18; PERELMAN & OLBRECHTS-TYTECA, *supra* note 83, at 115–20.

disassociation (by distinguishing cases or situations).<sup>89</sup> Legal audiences, in particular, are quick to point out any relevant information that has been left out.

## ii. Induction

Sir Francis Bacon (1561-1626), a philosopher and practicing attorney, was the first to reject logic as a major source of knowledge. He argued that categorical syllogisms demonstrate the relationship between existing things but do not create anything new.<sup>90</sup> He urged scientists to reject Aristotelian logic and substitute induction: the careful observation of a series of particular outcomes that leads to a more general conclusion about the nature of something.<sup>91</sup> Induction occurs at two critical points in the students' analytical process. The first takes place during the pre-writing or research stage. For each new assignment, students search statutes, cases, administrative regulations, or other relevant materials for applicable rules of law. As they piece them together, they form a unique and general conclusion about the law. Lawyers tend to call this process case or rule synthesis.<sup>92</sup> However, as the eighteenth-century philosopher David Hume argued, even a rule based on induction is only probably true because one cannot be sure that the rule will not change in the future.<sup>93</sup> In the context of law practice, for example, opposing parties often disagree on the applicable "rule," because they tend to phrase it from their particular point of view.

The second point at which induction occurs is with analogical reasoning. Our common law system and the doctrine of *stare decisis* require that like cases be treated alike. Therefore, to predict or argue for a certain outcome, the legal writer compares the facts and circumstances of a cited case to the case at hand to predict the outcome in her case. As the number of similarities between the cited case and her case increases, the more likely it is that the cases are similar and should be treated similarly.<sup>94</sup> Comparing factual and circumstantial similarities resembles induction because it mirrors the process of piecing together specific information to form a general rule or prediction.<sup>95</sup>

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89. PERELMAN, *THE NEW RHETORIC AND THE HUMANITIES*, *supra* note 84, at 22-24; PERELMAN & OLBRECHTS-TYTECA, *supra* note 83, at 190.

90. *See, e.g.*, FRANCIS BACON, *BOOK I OF THE ADVANCEMENT AND PROFICIENCY OF LEARNING*, reprinted in *SELECTED WRITINGS OF FRANCIS BACON* 191 (Hugh G. Dick ed., 1955); *THE NEW ORGANON*, APHORISM VIII, reprinted in *BACON*, *supra* at 462.

91. *See, e.g., id.*; APHORISMS XIV and XIX at 464-65.

92. *See, e.g.*, LINDA H. EDWARDS, *LEGAL WRITING AND ANALYSIS* 36-43 (2d ed. 2007).

93. *See* DAVID HUME, *AN ENQUIRY CONCERNING HUMAN UNDERSTANDING* 29 (Tom L. Beauchamp ed., 2000).

94. *See, e.g.*, CORBETT & CONNORS, *supra* note 70, at 93-96.

95. They differ in that rule synthesis involves piecing law together to form a rule to explain past case outcomes, and analogy involves piecing together facts and circumstances to predict outcome in the writer's case.

b. Appeals to Emotion (*Pathos*)

Aristotle taught that appeals to reason alone are often insufficient to convince an audience. One also must get the audience “into the right state of mind.”<sup>96</sup> Because lawyers must convince their audience to make a favorable decision, Aristotle said appeals to emotion are more important to legal than other types of speech. He said lawyers should study the range and complexity of human emotion so they could arouse that emotion in others, particularly in judges.<sup>97</sup> Most of *Rhetoric* explores human emotion, and Aristotle incorporated by reference his work on syllogistic reasoning in *Prior* and *Posterior Analytics*.<sup>98</sup> Convinced that emotion holds the key to persuasion, classical and modern rhetoricians have been intrigued with Aristotle’s interest in *pathos* ever since. Quintilian, for example, said that the rhetoric that reigns supreme in the courtroom is that which moves men to tears or anger.<sup>99</sup> Bacon said the goal of rhetoric is to “apply [*r*]eason to [*i*]magination for the better moving of the will.”<sup>100</sup> John Locke, an empiricist like Bacon, agreed that to stir a person to uneasiness and action requires arousal of emotion.<sup>101</sup> Contemporary theorists, too, have explored the power of poetic appeals to bridge the inadequacy of language, spark emotion or the imagination, and ultimately persuade.<sup>102</sup>

Legal writing programs already teach students to appeal to emotion in a number of concrete ways. Several of these techniques are best grouped together and identified as such. For example, they teach students common persuasive techniques such as formulating a theory of the case; characterizing legal issues, facts, and rules of law from the client’s point of view; and adding non-legal and policy-based arguments. Each of these techniques tries to put the audience in the right state of mind and motivate it to act. The “theory of the case” is the Occam’s razor of persuasion. It expresses in simple terms the essence of the advocate’s logical, emotional, and ethical appeals and is often dominated by emotion. For example, there is a critical difference between a case characterized by the prosecution as premeditated murder and by the defense as an abused spouse’s desperate escape. Differing theories and rules of

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96. ARISTOTLE, *supra* note 49, at 91.

97. *Id.*

98. See ARISTOTLE, *PRIOR ANALYTICS*, *supra* note 72; ARISTOTLE, *POSTERIOR ANALYTICS*, *supra* note 72.

99. 3 QUINTILIAN, 6 INSTITUTIO ORATORIA: THE ORATOR’S EDUCATION 47 (Donald A. Russell trans., Harvard U. Press 2001) (c. 85 B.C.E.).

100. BACON, *supra* note 90, at 309.

101. See 1 JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 304–07 (Dover Pubs., Inc., 1959) (1690).

102. See, e.g., GEORGE CAMPBELL, THE PHILOSOPHY OF RHETORIC 89–112 (Lloyd F. Blitzer ed. 1988) (demonstrating that metaphor and its inherent appeal fill a gap created by the inadequacy of language); RICHARD M. WEAVER, LANGUAGE IS SERMONIC 225 (Richard L. Johannesen et al. eds., 1970) (explaining that sincere emotional appeals are both powerful and ethical because they can move men toward noble ends). Indeed, much of legal writing’s current pedagogical interest in metaphor and storytelling can be viewed as a continued interest in the rhetorical power of emotional appeals. See generally Berger, *supra* note 48; Rideout, *supra* note 48.

law may be reasonable in a given case, but the most persuasive ones are those that resonate best with the audience. Even arguments based on public policy or non-legal evidence help put audiences in the right frame of mind because they explain how a particular outcome will best achieve justice or a *feeling* of fairness.<sup>103</sup>

In recent years, I have had a small number of students equate the use of persuasive techniques with manipulation. I would not have identified their reluctance as discomfort making emotional appeals. The instinct to tell stories, put facts in context, and seek sympathy seems so natural, I was surprised to hear law students say it makes them uncomfortable. I now ask students directly about their views on emotional appeals. A small group of students usually indicates that to characterize facts and the law from their client's point of view feels wrong somehow. When asked why they feel that way, students often say appealing to emotion feels dishonest or they do not believe it will affect the decision maker. Putting the latter reason aside (as it involves an entirely different issue), I suggest that without realizing it, these students have adopted Plato's view—still alive and well—that rhetoric is an evil tool of manipulation and deceit. They also may suspect, as Plato did, that legal argument lacks value, in part, because it does not prove anything with certainty.<sup>104</sup> These students understandably find themselves in an ethical dilemma. I suggest, however, that if rhetoric produces a form of best truth in human affairs, then each party's perspective is both valuable and essential to the rhetorical process. Our legal system is premised on the assumption that juries sort out arguments and counter-arguments to find truth. Any point of view that strains credibility or borders on the unethical is likely to be rejected by a judge or jury. Obvious exaggerations of fact and misstatements of law are rejected outright. Even if truth in law is only probable, it may be the best we can do.

### *c. Appeals to Credibility (Ethos)*

Much of what legal writing students are already taught about ethics and professionalism falls into the category of appeals to credibility. Aristotle said that to be persuasive, a speaker must be trustworthy.<sup>105</sup> A speaker who exudes virtue appears trustworthy, and a speaker who appears to care, among other things, about justice, courage, temperance, and wisdom, exudes virtue.<sup>106</sup> According to Aristotle, trust "should be created by the speech itself, and not left to depend" on the speaker's reputation.<sup>107</sup> Cicero said a speaker must choose "the style of oratory best calculated to hold the attention of the

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103. For a more detailed discussion of emotional appeals in legal writing, including non-legal and policy arguments, see ROBBINS-TISCIONE, *supra* note 74, at 179–201.

104. See *supra* Part III.A.1.

105. See ARISTOTLE, *supra* note 49, at 8, 91.

106. *Id.* at 46–47.

107. *Id.* at 8–9.

audience.”<sup>108</sup> Quintilian developed an even broader view of ethical appeals. He said a speaker must be credible in life as well as in the courtroom in order to persuade. Quintilian’s ideal, “a good man, skilled in speaking,” was a man free from vice, a lover of wisdom, a believer in his cause, and a true servant of the people.<sup>109</sup> Today, legal writers often rely on written argument to persuade the audience, which is trained to question and doubt them. Everything about their argument must evince character and integrity: the law must be authoritative, accurate, and comprehensive, and the facts must be stated accurately—supported and without exaggeration. A lawyer’s credibility often is judged from the outside in, and for that reason, the document itself must look professional. Finally, the legal writer must be mindful of ethical constraints and obligations as a member of the practicing bar.

Legal writing faculty already teach students these techniques. They stress the need to cite adequate supporting law, avoid exaggeration or speculation as to facts, speak the language of the legal community, pay attention to detail and the mechanics of writing, consult procedural rules and citation manuals, and conform to page limits. Invariably, law students resist instruction in some of these areas. Identifying them as techniques necessary for credibility puts them in a broader, more authoritative context. Teaching law using Aristotle’s canons also makes it natural to examine the ethical rules relating to written advocacy. For example, Rule 1.7 of the Model Rules of Professional Conduct prohibits a lawyer from making arguments that advance a client’s position at the cost to another client,<sup>110</sup> and Rule 11 of the Civil Rules of Federal Procedure requires lawyers to certify their arguments are well grounded and their facts supported by evidence.<sup>111</sup> More importantly, Rule 3.3 of the Model Rules requires lawyers to disclose to the court any contrary authority that is not disclosed by opposing counsel.<sup>112</sup>

## 2. Teaching Conventional Legal Documents as Arrangement

Aristotle said that once a speaker invents his argument, he must arrange it.<sup>113</sup> He identified traditional speech as having an introduction, statement of facts, argument, and conclusion.<sup>114</sup> Aristotle said the introduction “paves[s] the way for what follows[,]”<sup>115</sup> and Quintilian said its function is to “prepare the hearer to be more favourably inclined towards us for the rest of the

108. 4 CICERO, 3 DE ORATORE 77 (H. Rackham trans., 2004) (c. 55 B.C.E.).

109. 5 QUINTILIAN, 12 INSTITUTIO ORATORIA: THE ORATOR’S EDUCATION 197–99 (Donald A. Russell ed. & trans., 2001) (c. 85 B.C.E.).

110. MODEL RULES OF PROF’L CONDUCT R. 1.7(a) (2008).

111. FED. R. CIV. P. 11(b)(1)–(4).

112. MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(2).

113. ARISTOTLE, *supra* note 49, at 220.

114. *See supra* Part III.A.

115. ARISTOTLE, *supra* note 49, at 221.



proceedings.”<sup>116</sup> The statement of facts in a law court should be “brief, clear, and plausible . . . . [O]ne must refrain no less from an excess of superfluous facts than from an excess of words.”<sup>117</sup> Roman orators often included next a statement of the issues and an outline of the arguments to follow.<sup>118</sup> The argument itself is the focal point of the speech. Aristotle said that individual arguments function like proofs (either inductive or deductive), and the choice of arguments depends on the nature of the issues involved.<sup>119</sup> To prevent logic from overwhelming the audience, he advised speakers to weave in appeals to *pathos* and *ethos*.<sup>120</sup> Roman orators addressed counter-arguments separately and inserted them next. According to Quintilian, it is harder to rebut an argument than to make one because “wounding is easier than curing the wound.”<sup>121</sup> Finally, a speaker concludes to make the audience “well-disposed,” emphasize his most favorable arguments, put the audience in the right frame of mind, and refresh the audience’s memory.<sup>122</sup>

Contemporary legal documents are derived from these principles of classical rhetoric. Indeed, the traditional legal memorandum mirrors almost exactly traditional Roman legal argument: Question Presented, Statement of Facts, Brief Answer, Discussion (including a preliminary outline of the arguments to follow), and Conclusion. Students often complain about the redundancy inherent in the traditional memorandum, questioning the need to master each of its components. It helps students to understand that the traditional memorandum is a direct descendent of classical speech, designed to entertain and persuade live audiences through emphasis and repetition. To the extent these redundancies cease to make sense today, legal writers deviate from the norm and often use shorter, more efficient forms for conveying legal advice such as informal memoranda and e-mail.<sup>123</sup>

### 3. Teaching the Legal Community’s Expectations as Style

Teaching style to law students is never easy. Style is the one aspect of their writing that students cling to after a few months in a legal writing course. However, as Aristotle recognized, stylistic choices must be grounded in the audience’s expectation, and one should speak clearly and appropriately under the circumstances.<sup>124</sup> Aristotle said clarity is achieved using ordinary words

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116. 2 QUINTILIAN, 4 INSTITUTIO ORATORIA: THE ORATOR’S EDUCATION 181–83 (Donald A. Russell ed. & trans., Harvard U. Press 2001) (c. 85 B.C.E.).

117. 2 CICERO, *supra* note 51, at 57–59.

118. *See, e.g.*, 2 CICERO, *supra* note 51, at 63.

119. ARISTOTLE, *supra* note 49, at 232–33.

120. *Id.* at 234.

121. 2 QUINTILIAN, 5 INSTITUTIO ORATORIA: THE ORATOR’S EDUCATION 469 (Donald A. Russell ed. & trans., Harvard U. Press 2001) (c. 85 B.C.E.).

122. ARISTOTLE, *supra* note 49, at 240.

123. For a more detailed discussion of arrangement in legal writing, including large- and small-scale organization, see ROBBINS-TISCIONE, *supra* note 74, at 213–57.

124. ARISTOTLE, *supra* note 49, at 185.

and simple, straightforward sentences.<sup>125</sup> In contrast, Roman audiences preferred a more literary, ornate style. Cicero said the choice of style should vary, depending on the speaker's goal: a plain style should be used for conveying information, a middle style for entertaining, and a high or vigorous style for persuasion.<sup>126</sup> Cicero's own high style was distinguished by complex sentence structures and the use of figures of speech, known as schemes (*alliteration*) and tropes (*metaphor*).<sup>127</sup>

During the Middle Ages, the focus of rhetoric shifted from legal argument to Christianity, and a plain, simple style was considered appropriate for preaching because it distinguished it from Roman rhetoric.<sup>128</sup> During the Renaissance, the humanists (teachers and scholars of grammar, rhetoric, poetry, history, and philosophy) studied the style of the great classical orators, particularly Cicero. Lorenzo Valla, an Italian humanist, argued that the early Christians need not have rejected pagan eloquence, only its teachings.<sup>129</sup> As Bacon ushered in the Scientific Age, he advocated the return to a plain and simple style of speaking and writing in science and law.<sup>130</sup> By the nineteenth century, the focus of rhetoric shifted once again from Christianity to literature,<sup>131</sup> and rhetoricians spent years cataloguing a multitude of schemes and tropes, several of which are common today in legal writing.<sup>132</sup>

Aristotle's canon of style teaches that regardless of subject matter, the reader's stylistic preference matters, not the writer's. Although students may have perfected "their own writing style" as undergraduates, that style is rarely appropriate for a legal audience. Today's legal audience is no less demanding than Isocrates' or Cicero's. First, legal readers demand clarity and conciseness. Clarity most easily translates to plain English, and law students must learn the complicated task of translating convoluted legal concepts and restating them in simple terms, avoiding Latin phrases, jargon, and redundancy. Being concise has the dual advantage of saving the reader time and intensifying meaning. Saying no more than necessary forces the reader to make intentional choices and reduces the likelihood of being misunderstood. Second, like any discourse community, the legal profession has its own way

125. *Id.* at 185–86. The "ten Attic Orators" were native Greeks from Attica in the fourth and fifth centuries B.C.E. THE OXFORD CLASSICAL DICTIONARY 212 (Simon Hornblower & Antony Spawforth eds., 3d ed. 1996). They were well known for their pure and simple writing style. *See, e.g.*, ISOCRATES, *Against the Sophists*, in 1 ISOCRATES 62 (Michael Gagarin ed., David Mirhady & Yun Lee Too trans., 2000) (c. 392 B.C.E.) (one of the ten Attic orators). Aristotle's assumption that clarity is easily achieved reflects his interest in invention and his belief that words follow as the natural result of logical thinking. *See supra* Part II.

126. *See, e.g.*, 5 CICERO, ORATOR 357 (H.M. Hubbell trans., 1971) (c. 46 B.C.E.).

127. *See, e.g.*, CICERO, *For Aulus Licinius Archias, The Poet, reprinted in SELECT ORATIONS 57–70* (C. D. Young trans., 1957) (c. 63 B.C.E.).

128. *See* KENNEDY, *supra* note 61, at 156; MURPHY, *supra* note 60, at 51.

129. *See, e.g.*, Lorenzo Valla, *From The Refinements of the Latin Language, reprinted in RENAISSANCE DEBATES ON RHETORIC 40* (Wayne A. Rebhorn ed. & trans., 2000) (1440).

130. BACON, *supra* note 90, at 181.

131. *See, e.g.*, BLAIR, *supra* note 62.

132. *See, e.g.*, RICHARD SHERRY, A TREATISE OF SCHEMES AND TROPES (1550).

of speaking and writing. Law students must learn these conventions and conform to rules of grammar and punctuation to be credible.<sup>133</sup>

### *B. The Advantages to Teaching Law as Rhetoric*

The Carnegie Report endorses integrative teaching models because they unite the cognitive, practical, and ethical-social aspects of law.<sup>134</sup> Combining rhetorical theory and practice in the legal writing classroom is integrative because it treats each aspect of law as inseparable from the other. Using classical rhetoric, the cognitive, practical and ethical aspects of each assignment can “be linked so seamlessly that each contributes to the strength of the others, crossing boundaries to infuse each other.”<sup>135</sup> Although the case method challenges students to think critically, it often ignores the practical, ethical, and social implications of a given case. As the Carnegie Report states, students often are confused about when and where their moral concerns and compassion are relevant.<sup>136</sup> Depending on the nature of the assignment, legal writing students may or may not be asked to consider the social or ethical implications of their client-based arguments. More importantly, students may not be taught why certain forms of argument are more persuasive than others, where they come from, and how to choose among them. The combined approach makes it easy to incorporate the logic, psychology, emotion, language, and ethics of persuasion.

This approach also helps students better appreciate the rhetorical nature or uncertainty of law and understand the similarities between their doctrinal and skills courses. Students enter law school assuming they will learn what they come to call “black letter law.” Taking a course in torts, for example, and learning the law of one state or the majority rule in the United States tend to reinforce that assumption. The case and Socratic teaching methods combine to encourage students to think of the law as abstract—existing outside the context of a given case.<sup>137</sup> Despite classroom discussions about weaknesses in judicial reasoning and different points of view, students persist in believing theirs is a simple task: to learn what the law “is” in order to apply it, especially on an exam.

Legal research and writing is the outlier. It is different, and students admittedly do not know what to expect from it. Surely, they know how to write, so they assume legal writing will not be substantive or challenging. They think it may involve learning legal lingo or citation format. Within

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133. For a more detailed discussion of the importance of style and mechanics in legal writing, see Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers*, 31 SUFFOLK U. L. REV. 1, 5 (1997); ROBBINS-TISCIONE, *supra* note 74, at 259–302; Kristen K. Robbins-Tiscione, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 J. LEGAL WRITING INST. 257, 275–84 (2002).

134. SULLIVAN ET AL., *supra* note 2, at 191.

135. *Id.*

136. *Id.* at 187.

137. *See id.*

weeks, however, they realize legal writing is not as straightforward as it seemed. They struggle to induce their first synthesized rules of law (usually in the context of a simple objective memo problem) and choose the “right” cases to discuss. It becomes clear that in legal writing, at least, the rule of law is not fixed; it can be articulated in a number of ways. As students observe colleagues citing different cases in support of the same legal rules and analogizing to different cases to predict the outcome in the same case, their task becomes complicated, confusing, and uncertain.

Teaching law as rhetoric, however, allows students to reconcile the seeming inconsistency between torts, for example, and legal writing. Despite institutional indications to the contrary, not even torts professors believe they can discern true principles of torts law; indeed, the law is no more fixed in torts than it is in legal writing. As Perelman and modern and post-modern legal philosophers have demonstrated, the law is co-extensive with legal argument.<sup>138</sup> In Ramus’ terms, invention may belong to philosophy, but philosophy belongs to rhetoric. Even a cursory exposure to the legal rhetoric of realism, critical legal studies, and critical race theory, for example, demonstrates the indeterminacy of law in doctrinal as well as legal writing courses. The thrust of these theories is that law is judged as right or wrong, fair or unfair, based on one’s particular point of view. Karl Llewellyn, one of Realism’s great scholars, said to his students, “It will be [the judges’] *action* and the available means of influencing their action or of arranging your affairs with reference to their action which make up the ‘law’ you have to study.”<sup>139</sup> Critical legal studies went further to say the law is never neutral because it represents only one point of view, and it is usually the majority view. Duncan Kennedy, for example, said, “Teachers teach nonsense when they persuade students that legal reasoning is distinct, *as a method for reaching correct results*, from ethical and political discourse in general . . . .”<sup>140</sup> Charles Lawrence, a distinguished scholar of critical race theory argues that the law is inherently racist because racism pervades the majority’s worldview.<sup>141</sup> As legal writing students become familiar with the concept of law as indeterminate, they are able to generalize that concept to the law of torts and their other first-year classes.

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138. See *supra* Part III.A.1.a.i.

139. KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 5 (1960).

140. Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW* 40, 47 (David Kairys ed., 1982).

141. Charles R. Lawrence III, *The Id, The Ego, and Equal Protection Reckoning with Unconscious Racism*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 235, 238 (Kimberlé Crenshaw et al. eds., 1995).

## IV. CONCLUSION

Teaching legal writing as the practice of specialized skills and “the relation of these practices with theory” has multiple benefits.<sup>142</sup> Classical rhetoric provides a natural framework for teaching the complicated process of persuasion in the legal context. It makes legal writing more substantive and interesting to students because it relies on more than imitation to teach. It allows students to consider all the modes of appeal—logical, emotional, and ethical, their ability to persuade, and why. Rhetorical theory hastens students’ understanding of the law as indeterminate in and out of the legal writing classroom. The combination of theory and practice in legal writing is integrative, as The Carnegie Report recommends, because it encourages students to consider the cognitive, practical, ethical and social aspects of lawyering. Finally, it helps fulfill Professor Rombauer’s goal that legal writing be “as academically demanding as any other law school course.”<sup>143</sup> As such, it may be even more so.

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142. SULLIVAN ET AL., *supra* note 2, at 92.

143. Lawrence, *supra* note 14, at 19.

