HOW THE DISAPPEARANCE OF CLASSICAL RHETORIC AND THE DECISION TO TEACH LAW AS A "SCIENCE" SEVERED THEORY FROM PRACTICE IN LEGAL EDUCATION

Kristen K. Tiscione[*]

BACKGROUND

In October 2015, a group of law administrators, scholars, practitioners, and students convened at the 2015 Fall Symposium of the *Wake Forest Law Review*: *Revisiting Langdell: Legal Education Reform and the Lawyer's Craft.* The goal of the Symposium was to provide participants with a richer theoretical understanding of the intersection of legal education, legal scholarship, and the legal profession, with a focus on the inseparability of legal theory and law practice. Presentation topics ranged from the history of American legal education to law schools' ethical obligation to teach professional skills. This Article reiterates and expands on my remarks. Once again, I extend my thanks to our wonderful Symposium hosts: Christine Coughlin, Director of Legal Analysis, Research, and Writing and Professor of Legal Writing at Wake Forest University; Harold Lloyd, Associate Professor of Legal Analysis and Writing at Wake Forest University; and the entire editorial board of the *Wake Forest Law Review*, especially Don Morgan, Madison Benedict, and Lauren Emery.

INTRODUCTION

Although the privilege traditionally accorded theory in legal education is well known among members of the legal academy and fiercely guarded by some, the financial crisis of 2008 caused even the popular press to take notice.[1] The resulting public scrutiny of

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* Professor of Legal Practice, Georgetown University Law Center. The author teaches legal writing in both the J.D. and LL.M. programs. Her scholarship focuses on, among other things, rhetorical theory and legal education.

1. *See, e.g.*, BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS, at ix–x (2012); TASK FORCE ON THE FUTURE OF LEGAL EDUC., AM. BAR ASS'N, REPORT AND RECOMMENDATIONS 1 (2014), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf ("At present, [law schools] face[] considerable pressure because of . . . . damage to career and economic prospects of many

American law schools has been a mixed blessing. Since then, many law schools have rushed to develop "practice ready" programs to attract applicants,[2] and the American Bar Association now requires law students to take (and law schools to provide) one or more experiential courses totaling at least six credit hours.[3] But the magnitude of the change in legal education that we have witnessed in the last few years is difficult to absorb, particularly when it is the result of external pressure. Understandably, the rapid response of law school administrators to widespread criticism has been met with some internal resistance.

On its website, the Association of American Law Schools ("AALS") now has a link to an article, *On Legal Scholarship*, stating that "[t]he scholarly mission of the legal academy is under attack from all corners" and defending the importance of legal scholarship.[4] Recently, the American Academy of Arts and Sciences sponsored a program, *The Crisis in Legal Education*,[5] to address the value of legal scholarship and the dramatic changes in the structure of legal services, declining enrollments, and unremitting pressure to provide graduates who are "practice ready."[6] The entrenchment of positions on both sides within the legal academy is both curious and disturbing. There is no question, in my mind at least, that legal scholarship is critical to the mission of the legal academy as well as to the profession and that law students who want to practice law must learn more than how to "think like lawyers." The question is one of balance for our *students*: To what extent are theory and practice severable in legal education, and to what extent is severing them desirable? Does promoting one necessarily diminish the other?

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recent graduates, and diminished public confidence in the system of legal education."); Katherine Mangan, *Law Schools Revamp Their Curricula to Teach Practical Skills*, CHRON. HIGHER EDUC., Mar. 4, 2011, at 1, 1–3, http://law2.wlu.edu/deptimages/news/thirdyearchronicle.pdf; David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1, http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html.

2. Kristen K. Tiscione & Amy Vorenberg, *Podia and Pens: Dismantling the Two-Track System for Legal Research and Writing Faculty*, 31 COLUM. J. GENDER & L. 47, 47 (2015); Jacob Gershman, *Study: Law School's Practice-Ready Program Produced Better Grads*, WALL STREET J.: L. BLOG (Jan. 5, 2015, 10:47 AM), http://blogs.wsj.com/law/2015/01/05/study-law-schools-practice-ready-program-produced-better-grads/.

3. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2015–2016 § 303(a)(3) (AM. BAR ASS'N 2015). Experiential courses include simulation courses, clinics, and field placements. *Id.*

4. Robin West & Danielle Citron, *On Legal Scholarship*, ASS'N AM. L. SCHS., http://www.aals.org/current-issues-in-legal-education/legal-scholarship/ (last visited Apr. 18, 2016).

5. *See The Crisis in Legal Education*, AM. ACAD. ARTS & SCI. (Dec. 4, 2015), https://www.amacad.org/content.aspx?i=22042.

6. Invitation from Am. Acad. of Arts & Scis. to author on *The Crisis in Legal Education* (Dec. 4, 2015) (on file with author).

As partial inspiration for this Symposium and in his 2014 article on the inseparability of theory and practice, Professor Lloyd intones Immanuel Kant: "Thoughts without content are empty; intuitions without concepts are blind."[7] As Lloyd explains, "[T]heory by definition seeks to explain practice. To remove practice from theory would therefore leave theory empty with nothing to explain."[8] Kant was certainly not the first to recognize that theory cannot exist without its application or that knowledge is a function of experience. Sir Francis Bacon, for example, an English philosopher and lawyer, wrote early in the seventeenth century that theories "perfect nature, and are perfected by experience."[9] But the notion that theory and practice should be taught together dates back to classical rhetoric and its greatest champion, Aristotle.

I. CLASSICAL RHETORIC TAUGHT LAWYERS BOTH THE THEORY AND PRACTICE OF PERSUASION.

Classical rhetoric combined theory and practice to train lawyers and politicians for careers in public service.[10] Aristotle and other classical rhetoricians took a holistic approach to teaching analytical reasoning, reading, writing, and speech on a variety of subjects.[11] Rhetoric in the ancient world combined thought and action, theory and practice, and the creation of knowledge and its expression. Although the Greeks are often criticized for relying too heavily on theory, the Romans are not.[12] Indeed, if we were to design the perfect course for training students to think and act like lawyers, it would be classical rhetoric, particularly from the Roman era.

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7. IMMANUEL KANT, CRITIQUE OF PURE REASON 107 (Werner S. Pluhar trans., Hackett Publ'g Co. 1996) (1781).

8. Harold Anthony Lloyd, *Exercising Common Sense, Exorcising Langdell: The Inseparability of Legal Theory, Practice, and the Humanities*, 49 WAKE FOREST L. REV. 1213, 1216 (2014).

9. FRANCIS BACON, THE ESSAYS OF FRANCIS BACON (Clark Sutherland Northup ed., Houghton Mifflin & Co. 1908) (1625); *see also* WILL DURANT, THE STORY OF PHILOSOPHY: THE LIVES AND OPINIONS OF THE GREAT PHILOSOPHERS OF THE WESTERN WORLD 86 (1961) ("[Bacon] felt that studies could not be either end or wisdom in themselves, and that knowledge unapplied in action was a pale academic vanity.").

10. *See* EDWARD P.J. CORBETT & ROBERT J. CONNORS, CLASSICAL RHETORIC FOR THE MODERN STUDENT 16 (4th ed. 1999) ("Rhetoric . . . was the key to preferment in the courts, the forum, and the church."); *see also* Edward P.J. Corbett, *The Theory and Practice of Imitation in Classical Rhetoric*, 22 C. COMPOSITION & COMM. 243, 243 (1971) (explaining that classical rhetoricians taught by three means: theory, imitation, and practice).

11. *See* GEORGE A. KENNEDY, A NEW HISTORY OF CLASSICAL RHETORIC 39–49, 78–82 (1994) (discussing the methods for teaching rhetoric in ancient Greece and Rome).

12. *See* JAMES L. GOLDEN ET AL., THE RHETORIC OF WESTERN THOUGHT 10 (6th ed. 1997) ("Practicality dominated Roman thought.").

Aristotle, a student of Plato and the teacher of Alexander the Great, studied political, judicial, and ceremonial speech.[13] He articulated the art of persuasion, both to understand it and to teach it. His treatise, *Rhetoric*, explores the rhetorical process—now known as the canons of rhetoric—by examining how appeals to logic, emotion, and credibility work together to persuade, resulting in one of the first great psychological studies of motive.[14] Much of Aristotle's work on logic had already been written,[15] and *Rhetoric* incorporates his work on logic by reference.[16]

Although Aristotle limited *Rhetoric* to three forms of speech, I believe he would agree that the study of persuasion encompasses all forms of communication. Certainly modern rhetoricians like Chaïm Perelman and Andrea Lunsford would agree. These scholars argue quite convincingly that all discourse has a persuasive component. According to Perelman, lawyers and philosophers use rhetoric—appeals to logos, pathos, and ethos—to convince their audience, and for that reason, law and philosophy are part of the same process.[17] More recently, rhetoric professors Andrea Lunsford and John J. Ruszkiewicz have suggested that "*every* text is also an argument, designed to influence readers," even those intended to inform, convince, explore, and help us make decisions.[18] If Perelman, Lunsford, and Ruszkiewicz are right, and I believe that they are, law does not give rise to rhetoric. Rather, rhetoric gives rise to law, making the study of rhetoric in law school essential.

If classical rhetoric is such a perfect discipline for the modern law student, what happened to it? Why have most lawyers never heard of it? Those of us devoted to rhetoric love to tell this story. It has not one but two villains: Peter Ramus and Christopher Columbus Langdell. As Professor Linda Edwards has suggested at this Symposium and elsewhere, Langdell was not entirely opposed

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13. *See* ARISTOTLE, THE RHETORIC OF ARISTOTLE bk. 1, ch. 3, ¶¶ 1358a–1358b, at 16–17 (Lane Cooper trans., Appleton-Century-Crofts 1960) (c. 333 B.C.E.); *see also* KENNEDY, *supra* note 11, at 40.

14. *See* ARISTOTLE, *supra* note 13, bk. 1, chs. 1–2, at 1–16; *id.* bk. 2, at 90–181.

15. *E.g.*, 1 ARISTOTLE, THE ORGANON (Harold P. Cooke & Hugh Tredennick eds., 1955) (including Aristotle's essays *Categories*, *On Interpretation*, and *Prior Analytics*) (c. 350 B.C.E.); 2 ARISTOTLE, THE ORGANON (Hugh Tredennick & E.S. Forster eds., 1960) (including Aristotle's essays *Posterior Analytics* and *Topica*) (c. 350 B.C.E.).

16. *See, e.g.*, ARISTOTLE, *supra* note 13, bk. 1, ch. 1, ¶ 1355a, at 6; *id.* ch. 2, ¶¶ 1356a–1356b, at 10–11; *id.* ¶¶ 1357a–1357b, at 12–13.

17. *See* CH. PERELMAN & L. OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION 31–32 (John Wilkinson & Purcell Weaver trans., Univ. of Notre Dame Press 1969) (1958); CH. PERELMAN, THE REALM OF RHETORIC 161–62 (William Kluback trans., 1982).

18. ANDREA A. LUNSFORD & JOHN J. RUSZKIEWICZ, EVERYTHING'S AN ARGUMENT 4 (4th ed. 2007).

to skills instruction per se.[19] Indeed, his case and Socratic methods teach a valuable form of analytical reasoning.[20] Although there is evidence to suggest this was more by accident than by design, it may be unfair to demonize a talent as great as that of Langdell and his education-reforming colleague, Charles Eliot.[21] But this is the rhetoricians' version of the story, and we intend to stick to it.

II. FROM THE CLASSICAL PERIOD THROUGH THE MIDDLE AGES, STUDENTS TRAINING FOR CAREERS IN LAW AND POLITICS WERE TAUGHT RHETORIC ALONGSIDE LOGIC AND THE HUMANITIES.

To answer the question of what happened to rhetoric, we must go back in time to ancient Greece (circa fourth century B.C.E.), where rhetoric was born. At that time, young boys started their education by studying grammar—"the art of inventing symbols and combining them to express thought."[22] As they got older, the students moved on to logic and rhetoric. Picture the Lyceum, a large, open space encircled by a covered walkway near a grove of trees in Athens. Here, Aristotle taught as his students strolled with him up and down the walkway. Unlike Plato, who had criticized rhetoric as an empty subject that was incapable of producing

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19. *See, e.g.*, Linda H. Edwards, *The Trouble with Categories: What Theory Can Teach Us About the Doctrine-Skills Divide*, 64 J. LEGAL EDUC. 181, 191–92 (2014) (explaining that Langdell believed the case method teaches crucial lawyering skills by shifting the focus of legal instruction from doctrine to legal reasoning).

20. *See id.*21.*See, e.g.*, STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE 92–93 (2000) (describing Eliot as being "at the forefront of the movement to create a new type of university" in the late nineteenth century); Joseph H. Beale, *Langdell, Gray, Thayer, and Ames: Their Contribution to the Study and Teaching of Law, reprinted in* 1 THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES 522, 522–524 (Steve Sheppard ed., 1999) (1931) (discussing Langdell's accomplishments as the first dean of the Harvard Law School).

21. *See, e.g.*, STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE 92–93 (2000) (describing Eliot as being "at the forefront of the movement to create a new type of university" in the late nineteenth century); Joseph H. Beale, *Langdell, Gray, Thayer, and Ames: Their Contribution to the Study and Teaching of Law, reprinted in* 1 THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES 522, 522–524 (Steve Sheppard ed., 1999) (1931) (discussing Langdell's accomplishments as the first dean of the Harvard Law School).

22. SISTER MIRIAM JOSEPH, THE TRIVIUM: THE LIBERAL ARTS OF LOGIC, GRAMMAR, AND RHETORIC 3 (Marguerite McGlinn ed., Paul Dry Books 2002) (1937).

truth,[23] Aristotle taught rhetoric alongside logic, believing strongly in the value of both.[24]

Logic is the art of reasoning: the analytical process used to deduce knowledge.[25] If one's premises are indisputably true and one's reasoning is valid, the resulting conclusion is similarly indisputable.[26] Aristotle was not a scientist as we think of scientists today. However, his powers of observation and his efforts to classify all animal and plant life make him the father of science,[27] and logical thinking is considered the "method of every science, of every discipline and every art."[28]

Rhetoric, on the other hand, is the art of persuasion: the use of the analytical process to invent and arrange arguments, choose an appropriate speaking style, and deliver a convincing speech.[29] Rhetoric cannot produce certain truth or knowledge, but it leads to the best truth in human affairs—probable knowledge—and has a distinct value of its own.[30] For example, we cannot know if a defendant committed a crime with certainty, but the adversary system produces the best possible answer to that question.

Rhetoric involves a five-step process: invention, arrangement, style, memory, and delivery.[31] Invention is the initial phase when the orator discovers or creates arguments—making appeals to logic, emotion, and credibility—to motivate an audience to act in his favor.[32] This requires the orator to be familiar with all forms of reasoning, how to motivate audiences, and how to demonstrate good character and credibility. The next step is arrangement, in which

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23. *See, e.g.*, PLATO, *Gorgias* ¶¶ 449d–450e, 465e–466a, *reprinted in* COMPLETE WORKS 791, 795–96, 809 (John M. Cooper & D.S. Hutchinson eds., Hackett Publ'g. Co. 1997) (c. 380 B.C.E.).

24. *See* ARISTOTLE, *supra* note 13, bk. 1, ch. 1, ¶ 1354a, at 1 (stating that "[r]hetoric is the counterpart to [d]ialectic," meaning logic); *id.* ¶¶ 1354b–1355b, at 4–6 (noting that logic and rhetoric are useful because they both lead to a form of truth).

25. *See, e.g.*, WAYNE A. DAVIS, AN INTRODUCTION TO LOGIC 1 (2007) (setting forth the concept that only logical and rational reasoning produces knowledge); JOSEPH, *supra* note 22, at 3 (describing logic as "the art of thinking").

26. *See, e.g.*, CORBETT & CONNORS, *supra* note 10, at 48, 50.

27. DURANT, *supra* note 9, at 51, 54–56.

28. *Id.* at 48.

29. *See* ARISTOTLE, *supra* note 13, bk. 1, ch. 3, ¶ 1355b, at 6 (defining the function of rhetoric as "discover[ing] the available means of persuasion in any given case").

30. *See id.* ¶¶ 1354b–1355b, at 4–7.

31. *See id.* bks. 2–3, at 90–241 (focusing on the first three canons of rhetoric—invention, style, and arrangement); *see also* CORBETT & CONNORS, *supra* note 10, at 17–23 (explaining that the five canons of rhetoric came to be known as invention, arrangement, style, memory, and delivery).

32. ARISTOTLE, *supra* note 13, bk. 1, ch. 15, ¶¶ 1377a–1377b, at 88–89; *id.* bk. 2, ch. 1, ¶¶ 1377b–1378a, at 90–92; *see also* CORBETT & CONNORS, *supra* note 10, at 77–84 (describing emotional appeals).

the orator organizes the speech.[33] Aristotle said, "A speech has two parts. Necessarily, you state your case, and you prove it."[34] To Aristotle's concept of arrangement, the Romans added a statement of the issue, an outline or preview of the argument, and anticipated counterarguments.[35]

The third canon of rhetoric is style—choosing the right words based on the nature of the audience.[36] As Aristotle put it, "it is not enough to know *what* to say—one must also know *how* to say it."[37] The Romans divided style into three types: low, middle, and high.[38] The low or simple style was considered the most effective for teaching or proving, the middle style was considered appropriate for delighting or moving an audience, and the high or grand style was reserved for persuasion.[39] Cicero was well known and even criticized for his high style and ornate speech.[40] Although Aristotle did not study memory or delivery—the last two canons of rhetoric—in great detail, delivery was a critical part of an orator's education in ancient Greece and Rome.[41]

The Romans were even more interested in studying and teaching legal analysis and argument than the Greeks. Marcus Tullius Cicero, the great Roman lawyer and politician, studied rhetoric and wrote several books on the subject.[42] In *de Oratore*, he explained that to be effective, an orator must be well educated: "[N]o man can be an orator possessed of every praiseworthy accomplishment, unless he has attained the knowledge of everything important, and of all liberal arts . . . ."[43] Students of rhetoric also studied law, politics, history, poetry, and oratory, and

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33. *See* CORBETT & CONNORS, *supra* note 10, at 20.

34. ARISTOTLE, *supra* note 13, bk. 3, ch. 13, ¶ 1414a, at 220.

35. *See* GOLDEN ET AL., *supra* note 12, at 47–48.

36. ARISTOTLE, *supra* note 13, bk. 3, ch. 1, ¶¶ 1403b–1404a, at 182–84 (explaining that style affects the impression a speech makes on its audience); *see also* GOLDEN ET AL., *supra* note 12, at 44, 48–49.

37. ARISTOTLE, *supra* note 13, bk. 3, ch. 1, ¶ 1403b, at 182.

38. *See, e.g.*, ANONYMOUS, RHETORICA AD HERENNIUM bk. IV, ch. VIII (Harry Caplan trans., 1954) (c. 84 B.C.E.), *reprinted in* THE RHETORICAL TRADITION: READINGS FROM CLASSICAL TIMES TO THE PRESENT 252, 258 (Patricia Bizzell & Bruce Herzberg eds., 1990); 5 CICERO, ORATOR chs. v–vi, ¶¶ 20–22, at 319–21 (H.M. Hubbell trans., 1971) (c. 46 B.C.E.); 3 QUINTILIAN, THE ORATOR'S EDUCATION bk. 8, ch. 3, ¶ 12, at 344–47 (Donald A. Russell ed. & trans., 2002).

39. ANONYMOUS, *supra* note 38, at 258; CORBETT & CONNORS, *supra* note 10, at 21.

40. *See* THE RHETORICAL TRADITION: READINGS FROM CLASSICAL TIMES TO THE PRESENT, *supra* note 38, at 195–97.

41. CORBETT & CONNORS, *supra* note 10, at 22–23.

42. *See, e.g.*, 2 CICERO, DE INVENTIONE (H.M. Hubbell trans., 1976) (c. 87 B.C.E.); CICERO, DE ORATORE, *reprinted in* CICERO ON ORATORY AND ORATORS 142 (J.S. Watson ed. & trans., 1855) (c. 55 B.C.E.); 5 CICERO, *supra* note 38. 2 CICERO, *supra*, and ANONYMOUS, *supra* note 38, were the two most popular books on rhetoric in the ancient world.

43. CICERO, *supra* note 42, bk. 1, ¶ VI, at 148.

they developed their language and argumentation skills through debates, writing, translation, imitation, and memorization.[44]

With the birth of Christianity and the fall of the Roman Empire in the fifth century A.D., the study of rhetoric changed dramatically. As democracy and free speech disappeared in Rome, so did the need to train orators.[45] By the Middle Ages, growing populations had moved out of urban centers, and writing had become the primary mode of communication.[46] Scholars and teachers of rhetoric shifted their attention from content to expression. They focused on style, literary composition, and the management of day-to-day affairs, such as letter writing.[47] Despite these changes, classical rhetoric survived, as universities continued to teach rhetoric to students in conjunction with logic and grammar.[48] This trio of courses became known as the *Trivium*—a prerequisite to taking the *Quadrivium*, which consisted of arithmetic, geometry, music, and astronomy.[49] Together, these courses made up the seven liberal arts.

III. DURING THE RENAISSANCE, PETER RAMUS CONVINCED EDUCATORS THAT RHETORIC WAS INFERIOR TO AND A SUBSET OF LOGIC. AS A RESULT, RHETORIC WAS REDUCED TO THE STUDY OF STYLE AND DELIVERY.

In the early fifteenth century, an explosion of creativity in the arts and sciences occurred in Europe. The Renaissance revived the classical interest in writing, painting, sculpting, architecture, and science.[50] As the works of Aristotle, Cicero, and Quintilian became popular, Europeans renewed their interest in rhetoric as well.[51] For roughly two centuries, the study and practice of rhetoric was once again valued as it had been in ancient Rome.[52]

Enter now our first villain: Peter Ramus. Ramus was a French logician and philosopher interested in educational reform.[53] A convert to Protestantism, he criticized the medieval university system because it focused on Aristotelian philosophy, which he considered antiquated, and was dominated by the Christian

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44. *See* GOLDEN ET AL., *supra* note 12, at 44.

45. *See id.* at 56.

46. *See id.* at 63; JAMES J. MURPHY, RHETORIC IN THE MIDDLE AGES: A HISTORY OF RHETORICAL THEORY FROM SAINT AUGUSTINE TO THE RENAISSANCE 194–195 (2001).

47. *See* GOLDEN ET AL., *supra* note 12, at 62–64; MURPHY, *supra* note 46, at 202–03.

48. *See* GOLDEN ET AL., *supra* note 12, at 62–64.

49. *See* MURPHY, *supra* note 46, at 44.

50. *See* GOLDEN ET AL., *supra* note 12, at 64.

51. *See* GEORGE A. KENNEDY, CLASSICAL RHETORIC & ITS CHRISTIAN & SECULAR TRADITION FROM ANCIENT TO MODERN TIMES 226–29 (2d ed. 1999).

52. *See id.* at 226–27.

53. *See* GOLDEN ET AL., *supra* note 12, at 65–66; KENNEDY, *supra* note 51, at 249–52.

Church.[54] He was also troubled by the theoretical overlap between logic and rhetoric in education.[55] He argued it made no sense for two different subjects to teach the same thing (i.e., logic).

According to Ramus, the creation of knowledge was a function of logic, and the expression of knowledge was a function of rhetoric.[56] The result, "Ramism," had an enormous impact on the teaching of rhetoric. Like Plato, Ramists considered rhetoric to be devoid of substance, teaching only expression.[57] Accordingly, the focus of rhetoric in education turned to style and delivery.[58] By the end of the nineteenth century in the United States, the study of style had evolved into the study of literature and literary criticism, and the study of delivery was divided among speech and communication departments in university education.[59] The settlers of the New World, as well as the founders of Harvard University, were very familiar with and heavily influenced by Ramus's views.[60]

IV. IN THE SEVENTEENTH CENTURY, THE SCIENTIFIC METHOD REPLACED LOGIC AS THE SOURCE OF KNOWLEDGE.

In the seventeenth century, a major shift in thinking occurred regarding how knowledge is acquired. Bacon argued that Aristotle's version of logic—primarily deduction—can explain only the relationship among things already known.[61] Although the syllogism is important to rhetoric, it is not a source of new knowledge.[62] Instead, Bacon argued, knowledge is acquired by induction: a systematic method of careful observation that leads from particular observations to more general conclusions about the nature of things.[63] But because human perception is flawed, these conclusions must be tested.[64]

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54. *See generally* Norman E. Nelson, *Peter Ramus and the Confusion of Logic, Rhetoric, and Poetry*, *in* 2 CONTRIBUTIONS TO MODERN PHILOLOGY 1–22 (1947).

55. *See* PETER RAMUS, LOGIKE 17–18 (Scholar Press Ltd. 1970) (1574).

56. *See* CORBETT & CONNORS, *supra* note 10, at 504–05; KENNEDY, *supra* note 51, at 250–51.

57. *See* PLATO, *supra* note 23, ¶ 465e–466a, at 809 (describing rhetoric as a form of flattery and not a substantive art).

58. *See* GOLDEN ET AL., *supra* note 12, at 66; KENNEDY, *supra* note 51, at 249–51; Nelson, *supra* note 54, at 1.

59. *See* GOLDEN ET AL., *supra* note 12, at 66.

60. *See* KENNEDY, *supra* note 51, at 251–52.

61. *See* FRANCIS BACON, *The New Organon* bk. 1, ¶¶ XI–XIV, *in* THE NEW ORGANON AND RELATED WRITINGS 39, 41 (Fulton H. Anderson ed., 1960).

62. *See id.*

63. *See id.* ¶¶ XI–XIV, CV–CVI, at 41, 98–99; FELDMAN, *supra* note 21, at 52–53.

64. BACON, *supra* note 61, ¶¶ XXXVIII–LXII, at 47–60; *see also* GOLDEN ET AL., *supra* note 12, at 90 (discussing Bacon's "four idols" for testing sense perceptions).

Throughout the seventeenth and eighteenth centuries, philosophers struggled to understand what knowledge is and how to define it. For example, René Descartes, a French philosopher, mathematician, and physicist, also rejected logic as the source of knowledge but argued that reason produces truth.[65] And Giambattista Vico, an Italian rhetoric professor, believed that all knowledge is subjective.[66] Just as Perelman would do centuries later, Vico argued that rhetoric leads to the discovery of knowledge.[67] Bacon thus ushered in the Scientific Age, which, in turn, had a profound effect on education in the United States, particularly at the turn of the nineteenth century.

V. IN THE LATE NINETEENTH CENTURY, LANGDELL AND ELIOT DECIDED TO TEACH LAW AS A SCIENCE USING THE CASE AND SOCRATIC METHODS. PRACTITIONERS AND THE HUMANITIES WERE EXCLUDED FROM LEGAL EDUCATION.

In 1870, Charles Eliot, the president of Harvard University, hired Christopher Columbus Langdell—enter now our second villain—to be the dean of the law school.[68] Both Eliot and Langdell were interested in reforming legal education because there were no admissions or attendance requirements, exams, or grades.[69] When Langdell arrived at Harvard Law School, Eliot had already introduced a classroom laboratory method of teaching in lieu of lecture and recitation.[70] Together, they established a law school entrance exam, annual exams at the end of each academic year, a three-year curriculum, and the obligation that law faculties conduct research.[71] To these curricular advances, Langdell added both the case and Socratic methods we know today.

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65. *See* RENÉ DESCARTES, A DISCOURSE ON THE METHOD OF CORRECTLY CONDUCTING ONE'S REASON AND SEEKING TRUTH IN THE SCIENCES 16–17 (Ian Maclean trans., Oxford Univ. Press 2006) (1637); *see also* GOLDEN ET AL., *supra* note 12, at 92.

66. GIAMBATTISTA VICO, THE NEW SCIENCE OF GIAMBATTISTA VICO bk. 1, § 2, ¶ 137, at 62–63 (Thomas Goddard Bergin & Max Harold Fisch trans., Cornell Univ. Press 1984) (1744); *see also* GOLDEN ET AL., *supra* note 12, at 93–96.

67. VICO, *supra* note 66, at 63–65; *see also* KENNEDY, *supra* note 51, at 272.

68. FELDMAN, *supra* note 21, at 92.

69. John O. Sonsteng et al., *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 WM. MITCHELL L. REV. 303, 324–25 (2007).

70. David S. Clark, *Tracing the Roots of American Legal Education—A Nineteenth-Century German Connection*, 51 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RABEL J. COMP. & INT'L PRIV. L.] 313, 318–19 (1987) (Ger.).

71. Sonsteng et al., *supra* note 69, at 325; *see also* Christopher C. Langdell, *Teaching Law as a Science, reprinted in* 1 THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES 514, 514–15 (Steve Sheppard ed., 1999) (1886) (explaining "that law is a science" and "that all the available materials of that science are contained in printed books").

Langdell's motivation in introducing these methods is attributed partly to a declining belief in natural law after the Civil War (since natural law had been used to ostensibly legitimize slavery).[72] This decline contributed to the rise of legal positivism—the idea that law is not handed down by God but created by man.[73] Positivism, in turn, led to the need to justify the fairness and objectivity of the law.[74] Although the authority for legislation arguably comes from electing lawmakers, the authority for common law is less clear. "Why should judges possess the authority to articulate legal rules that the legislature has not enacted?"[75] Langdell's answer to this question was that the common law is a coherent system of objective and enduring principles that judges use to make their decisions.[76]

To discover these enduring principles, Langdell adopted a scientific method for teaching law akin to that first laid out by Bacon.[77] He replaced textbooks with appellate opinions and practitioner-teachers with scholars, who had little, if any, practice experience.[78] The idea was that the professor and students together would induce the enduring principles of each area of the law by reading and examining the cases.[79] Once discovered, these legal principles could be applied to legal disputes in a logical and systematic way.[80] "[L]aw is a science," Langdell stated, and "it must be learned from books."[81] He conceived of the law library as akin to the laboratories of chemists and the natural history museums of zoologists.[82]

Teaching law as a science meant that only the law was relevant to a good legal education. "Ethical, sociological, historical, and like concerns were simply outside the discipline."[83] The sole focus on law was radical: traditionally, judges had relied more broadly on justice,

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72. *See* FELDMAN, *supra* note 21, at 90.

73. *Id.* at 90–92.

74. *See id.* at 91–92.

75. Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 VAND. L. REV. 609, 623 (2007).

76. *See id.* at 632.

77. *Id.* at 634–35 (describing Langdell's view of science as "'Protestant Baconism': inductive reasoning from empirical observation to known principles").

78. FELDMAN, *supra* note 21, at 92; Clark, *supra* note 70, at 319.

79. FELDMAN, *supra* note 21, at 92–95.

80. *Id.* Although Langdell's approach to applying the law relied on syllogistic reasoning, I have not encountered any indication that he taught his students formal logic as part of the case method nor expected them to employ it in any writing assignments.

81. Langdell, *supra* note 71, at 515.

82. *Id.*

83. FELDMAN, *supra* note 21, at 92.

fairness, and public policy concerns in making their decisions.[84] According to Langdell, though, these could be manipulated to reach a decision either way.[85]

> The [legal] scientist makes no judgments about what the law ought to be, so he separates the fundamental legal doctrines from the normative justifications given by judges and others, and "purifies" those doctrines by technical, objective analysis of their true meaning. This purification is simply a rational determination of what the law is.[86]

Since law was a scientific endeavor, Langdell also believed that "[w]hat qualifies a person . . . to teach law is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes, . . . but experience in learning law."[87]

Langdell was criticized, even then, for his novel methods. To give the man his due (which I threatened not to), the desire to "scientize" law was consistent with the prevailing view that "science was the model for all human inquiry,"[88] and the concept of social science did not really exist at the time.[89] There was also a host of factors driving Eliot and Langdell to improve the rigor of legal education. Nonetheless, there were and continue to be significant flaws in Langdell's method. First, it focuses exclusively on judicial decisions (and only *select* judicial decisions)[90] to the exclusion of statutes and administrative law, which make up the bulk of law in the United States today. Keeping in place the traditional first-year curriculum has forced law schools to offer first-year electives and upper-level courses to fill this major gap.[91]

Moreover, most legal scholars agree that the social sciences, such as political science, sociology, and psychology, "provide the most useful analogies for the academic study of law in the sense, that they, like law, are 'human sciences' . . . [and] the insights of these fields can be applied directly to extensive areas of law, which is not true for the natural sciences."[92] On this, law faculty on both sides of the theory-practice divide can agree. The development of

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84. *See id.* at 94; Patrick J. Kelley, *Holmes, Langdell and Formalism*, 15 RATIO JURIS. 26, 37 (2002).

85. Kelley, *supra* note 84, at 38.

86. *Id.*

87. Langdell, *supra* note 71, at 515.

88. Kelley, *supra* note 84, at 28.

89. Rubin, *supra* note 75, at 636.

90. Kelley, *supra* note 84, at 39.

91. *See* Rubin, *supra* note 75, at 654.

92. *Id.* at 636; *see also* George L. Priest, *Social Science Theory and Legal Education: The Law School as University*, 33 J. LEGAL EDUC. 437, 437 (1983) ("[T]he legal system can be best understood with the methods and theories of the social sciences.").

the "law and society" and "law and economics" movements in the 1960s was the first indication that "the legal world is not to be understood on its own terms, but requires the application of some method or substance provided by other disciplines."[93] Yet there continues to be resistance to these "law and" movements as not being a proper part of legal education.[94]

The case method is also confusing to students. It perpetuates the idea that law exists "out there" for them to discover.[95] It is the mythical black letter law that students so often believe professors are hiding from them. Yet law—encompassing statutes, regulations, and judicial decisions—is a social construct, and the study of law is "the study of human beings, with all the complexity, normativity, and subjectivity that this study necessarily implies."[96] Ultimately, the law, like all human endeavors, is the product of persuasion. Rhetoric does in fact give rise to law, not the other way around.

Nor can the law be reduced to the mechanical application of objective rules, as Oliver Wendell Holmes recognized in 1881 (about ten years after Langdell joined Harvard Law School):

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy . . . have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[97]

Judges must consider public policy in making their decisions because the law alone can lead to absurd and unfair results.[98] It may be important to know the common law on torts, but it is equally important "to know how lawyers interpret that law, how the law and the lawyers' interpretations affect businesses and private actors, and what effects are best for society as a whole."[99]

Finally, and perhaps most important to this story, Langdell's "legal science" transformed law school into a primarily theoretical endeavor. Just as Ramism severed logic from rhetoric, Langdell severed theory from practice and focused on theory in legal

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93. Marc Galanter & Mark Alan Edwards, *Introduction: The Path of the Law* Ands, 1997 WIS. L. REV. 375, 375–76.

94. *See, e.g.*, Roderick A. Macdonald, *Curricular Development in the 1980s: A Perspective*, 32 J. LEGAL EDUC. 569, 575–76 (1982) (noting that the initial resistance to "law and" courses in the 1980s was due to the belief that they were not relevant to legal education); West & Citron, *supra* note 4 (acknowledging that "interdisciplinary legal studies take the brunt of the beating" in the criticism of legal scholarship).

95. Rubin, *supra* note 75, at 649.

96. *Id.* at 636.

97. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (revised ed. 1991) (1881).

98. *See* Kelley, *supra* note 84, at 29, 39.

99. Rubin, *supra* note 75, at 640–41.

education. It has been argued that even if Langdell's method does not really induce law in a scientific sense, its value is in teaching students how to "think like lawyers."[100] However, the case and Socratic methods teach only one form of analytical thinking.[101] Peter Elbow has described it as a form of methodological doubting that seeks truth by seeking error: to find answers by the process of elimination.[102] As Elbow explains, it can produce precision, certainty, and closure, but it is often detached, aggressive, and rigid as well.[103] And as many have noted, particularly in the law classroom,[104] it can be overly "reductive and deflating."[105] In real life, lawyers are called upon to think more multidimensionally and diversely. They must be both doubters and believers, zealous yet able to compromise for the good of their clients, and tough but empathetic as well. No one can seriously argue that Langdell's methods teach these skills.

VI. IN THE LATE TWENTIETH CENTURY, MODEST CHANGES WERE IMPLEMENTED TO INCORPORATE SKILLS TRAINING IN LEGAL EDUCATION, BUT WITHOUT THE THEORY THAT INFORMS SKILLS (I.E., LOGIC, RHETORIC, OR THE HUMANITIES).

With rhetoric reduced to the canons of style and delivery—considered an unintellectual pursuit—and logic replaced with science, classical rhetoric ultimately disappeared. Practical skills training did not seriously appear in legal education until the late 1960s.[106] Responding to pressure from law students and the practicing bar to provide legal services to underrepresented populations, law schools began to develop in-house clinical

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100. *See* Larry O. Natt Gantt, II, *Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind*, 29 CAMPBELL L. REV. 413, 419–20 (2007).

101. *See* DURANT, *supra* note 9, at 107 (describing the goal of Socratic dialogue as "analysis—the definition and discrimination of words and ideas," rather than "induction—the gathering of data").

102. PETER ELBOW, WRITING WITHOUT TEACHERS 148 (2d ed. 1998) (characterizing what he calls "the doubting game" as the rhetoric of propositions, not experience, and attributing its success in Western culture to the success of natural science in the seventeenth century).

103. *Id.* at 178–79.

104. *See, e.g.*, Duncan Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION, Spring 1970, at 71, 72–73 (describing the Socratic method at Yale Law School as hostile and contemptuous); Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 117 (2002) (describing the Socratic process of teaching students to think like lawyers as "critical, pessimistic, and depersonalizing").

105. ELBOW, *supra* note 102, at 150.

106. *See* Richard A. Boswell, *Keeping the Practice in Clinical Education and Scholarship*, 43 HASTINGS L.J. 1187, 1187–88 (1992).

programs.[107] Soon thereafter, in response to pressure to provide students with even more practical instruction, legal writing programs developed in the 1970s and 1980s.[108] The majority of traditional law faculty had no interest in teaching these programs, in part because they were too time consuming and in part because the faculty questioned their value.[109]

At first, legal research and writing positions were filled primarily by upper-level students, young law graduates, and adjunct faculty based on the theory that no one would want to make a career of teaching these courses.[110] Then, with the dramatic increase in law students and women law graduates at that time, it became necessary and possible to create a "cadre of low-pay, low-status positions" for teaching practical skills.[111] The resistance with which skills faculty have been received in the legal academy is evident: the overwhelming majority of clinical and skills faculty are ineligible for tenure and earn substantially less than their traditional faculty counterparts.[112]

In this hierarchy, we see the reification of the theory-practice divide and the influence of both Ramus and Langdell. First-year students learn "the law"—knowledge—in their traditional casebook courses using the case and Socratic methods. Then, they learn style and delivery—how to express that knowledge—in their experiential courses, such as legal research and writing, advanced legal writing, internships, externships, and clinics. The net effect is to keep theory separate from practice and to perpetuate a hierarchy, primarily within the legal academy, that values one over the other. Because those who teach skills like legal writing have lesser status than those who teach traditional casebook courses, "students view it as a course of secondary importance, and therefore the skill itself becomes undervalued and underappreciated."[113]

Equally troubling is the absence of a defining theory such as rhetoric that brings together the two kinds of training students receive in law school. We do not do a good job explaining to students

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107. *See id.*; Sonsteng et al., *supra* note 69, at 331.

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

109. *Id.* at 7–8.

110. Jan M. Levine & Kathryn M. Stanchi, *Women, Writing & Wages: Breaking the Last Taboo*, 7 WM. & MARY J. WOMEN & L. 551, 553–55 (2001).

111. Stanchi & Levine, *supra* note 108, at 7.

112. *See* Tiscione & Vorenberg, *supra* note 2, at 51 (finding that legal research and writing faculty earn fifty-five cents for every dollar that traditional faculty earn). Clinical and legal research and writing faculty are also overwhelmingly female, roughly sixty-three and seventy-one percent respectively. *Id.* at 50–51.

113. Nora V. Demleitner, *Curricular Limitations, Cost Pressures, and Stratification in Legal Education: Are Bold Reforms in Short Supply?*, 44 SETON HALL L. REV. 1014, 1025 (2014).

the goals of the case and Socratic methods or making explicit connections between what they learn in casebook courses and what they learn in experiential courses. To students, the theory may very well seem "empty" and the practice may appear "blind."[114] Clinical and other skills courses feel "awkwardly tacked on" to the traditional curriculum,[115] and many of the practice-ready programs law schools have hastened to put in place feel "haphazard" because they are not related to "an overall larger strategic change."[116] Thus far, the kind of change necessary to implement a truly coherent curriculum has been hampered by American Bar Association regulations, state bar requirements, and law schools' "internal structures."[117]

CONCLUSION

Classical rhetoric taught the theory and practice of the art of persuasion. Both the acquisition of knowledge and the expression of knowledge were viewed as inseparable, each informing and refining the other. Students of rhetoric were well versed in logic as well as the humanities, developing their language and communication skills through a variety of oral and written exercises. When Ramus assigned Aristotle's canons of invention and arrangement to logic and then style and delivery to rhetoric, he severed theory from practice. In so doing, he relegated rhetoric to its lesser status and paved the way for Langdell to focus on theory in legal education.

By the nineteenth century, logic as the source of knowledge had been replaced by Bacon's "science"—the rejection of Aristotelian deduction in favor of induction. Langdell's decision to teach law as a natural science meant that law students no longer needed to learn logic, be well rounded in the humanities, or learn practical skills. All they needed to do was study the law. Like geologists studying rock formations, law students studied judicial decisions. In Kantian terms, Langdell deprived thought of content, rendering it "empty."[118]

I believe our students crave what rhetoric provides. It is what they expect to learn when they arrive for their first year of law school. Teaching rhetoric today would mean teaching epistemology, the philosophy of law, classical and contemporary theories of persuasion, the canons of rhetoric, modes of reasoning (induction, deduction, analogy, narrative, and inferential), argumentation theory, the psychology of human behavior, and the ethics of persuasion. Too often, skills faculty feel the need to teach more and more of this material in the same amount of time with too few

114. KANT, *supra* note 7, at 107.
115. Rubin, *supra* note 75, at 649.
116. Demleitner, *supra* note 113, at 1017.
117. *See id.* at 1017–19.
118. *See* KANT, *supra* note 7, at 107.

credits and little support. Teaching the history and philosophy of rhetoric could provide the context and perspective students need to be inspired legal scholars or practitioners. Finally, rhetoric would work well as an organizing principle for legal education. As Perelman explains, legal scholars and practitioners alike use rhetoric to convince their audience of what the law is, requires, or ought to be.[119]

119. *See supra* note 17 & accompanying text.

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