

# INTRODUCTION TO CLASSICAL LEGAL RHETORIC: A LOST HERITAGE

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*A subject, which has exhausted the genius of Aristotle, Cicero, and Quintilian [sic], can neither require nor admit much additional illustration. To select, combine, and apply their precepts, is the only duty left for their followers of all succeeding times, and to obtain a perfect familiarity with their instructions is to arrive at the mastery of the art.\*\**

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In 400 A.D. if an ordinary Roman citizen of the educated class had a legal dispute with another citizen, he usually argued his own case before other Roman citizens and did so without the advice or help of a lawyer. Even so, he analyzed and argued his case with a near-professional competence and thoroughness. In preparing his case, he first determined the proper forum for his argument and identified the applicable law. He then determined which facts were most important, which legal arguments were meritorious, and which arguments his adversary might use against him. When choosing his strategies for the trial, he also decided how he would begin, tell the story of the case, organize his arguments, rebut his opponent, and close his case. Before actually presenting his arguments, he would carefully evaluate the emotional content of the case and the reputation of the judges. And finally, he would assess how his own character and credibility might affect the judges' responses to his legal arguments. In effect, he was analyzing and preparing his case in a lawyerly fashion.

In making these preparations, he was not depending solely on native intelligence or good instincts. Instead, he was relying on a

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\*\* 1 JOHN QUINCY ADAMS, LECTURES ON RHETORIC AND ORATORY 28-29 (Russell & Russell, Inc. 1962) (1810).

lengthy, highly structured, formal education in the art of rhetoric which featured the most comprehensive, adaptable, and practical analysis of legal discourse ever created. In fact, the art of rhetoric was originally created as a flexible technique for training advocates to present cases in Greek and Roman law courts. Moreover, for nearly 1,000 years, the study of rhetoric was at the core of both Greek and Roman education and, in one form or another, has been part of most formal education since that time.

However, in the years since its creation in 450 B.C.,<sup>1</sup> classical rhetoric has continuously transformed itself in response to dozens of social, political, educational, religious, and philosophical forces. In the course of these transformations, rhetoric has lost its close identification with legal discourse. Instead of being regarded as the most coherent and experience-based analysis of legal reasoning, legal methodology, and argumentative strategy ever devised, the term rhetoric is now usually associated with meaningless political exaggeration or mere stylistic embellishment. Although this association is unfair and reductive, it is not unpredictable. Throughout history classical rhetoric has always suffered from misunderstandings concerning its meaning, value, scope, and purpose.

But because classical rhetoric is an adaptable and, above all, a practical discipline, it always manages to survive and re-establish its original identity as an extremely effective tool for analyzing and creating legal discourse. In fact, with some adaptations for modern stylistic taste and legal procedures, Greco-Roman rhetorical principles can be applied to modern legal discourse as readily as they have been to legal discourse in any other period.

However, to understand how classical principles apply to modern legal discourse, it is first necessary to understand their original form and how, by virtue of several important historical transformations,

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1. Corax of Syracuse is generally credited with inventing rhetoric in the fifth century B.C. None of Corax's handbooks on rhetoric have survived although "[t]here are references in Plato, Aristotle, Cicero and Quintilian to the part that Corax . . . played in formulating rhetorical theory." EDWARD P.J. CORBETT, *CLASSICAL RHETORIC FOR THE MODERN STUDENT* 595 (2d ed. 1971). See also GEORGE A. KENNEDY, *CLASSICAL RHETORIC AND ITS CHRISTIAN AND SECULAR TRADITION FROM ANCIENT TO MODERN TIMES* 8 (1980) (observing that "Corax and Tisias . . . are traditionally described as 'inventors' of rhetoric").

these principles are connected to modern rhetorical theories and practice. Fortunately, for the past three decades interest in classical rhetoric has been growing, and with it an interest in its application to contemporary legal discourse.<sup>2</sup>

## I. RHETORIC AND GRECO-ROMAN EDUCATION

Much of the historical and current interest in classical rhetoric springs from its origins as a pedagogical tool. The Roman rhetorical education system, which survived in substantially the same form for more than 400 years, was based on an art of rhetoric first formulated in the fifth century B.C. by Corax of Syracuse<sup>3</sup> and developed more fully by Aristotle,<sup>4</sup> Cicero,<sup>5</sup> and Quintilian.<sup>6</sup> The study of rhetoric was central to the Roman education system from the first century B.C.<sup>7</sup> until the fall of the Empire in 410 A.D. Before that, rhetorical education had also been a key component in Greek education from at least 450 B.C.<sup>8</sup> Thus, the formal study of rhetoric, especially as reflected in Aristotle's *Rhetoric*,<sup>9</sup> Cicero's *De Oratore*,<sup>10</sup> and Quintilian's *Institutio Oratoria*,<sup>11</sup> had a virtually continuous 1,000 year history in the Greco-Roman world. Although all Roman citizens did not complete the full course of study, most completed a substantial part of the ten-

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2. "During the 1960s, enthusiasm mounted for a reexamination of the full rhetorical tradition of classical times for what it could offer to the teaching of English composition." Jean Dietz Moss, *The Revival of Practical Reasoning*, in *RHETORIC AND PRAXIS: THE CONTRIBUTION OF CLASSICAL RHETORIC TO PRACTICAL REASONING* 1, 8 (Jean Dietz Moss ed., 1986). Most generalizations about "recent" developments in a 2450 year old intellectual discipline are necessarily broad. The resurgence of interest in classical rhetoric in the 1960s must be viewed in terms of dozens if not hundreds of similar resurgences which dot rhetoric's history. Moreover, previous resurgences often spanned centuries, not mere decades.

3. See CORBETT, *supra* note 1, at 595.

4. See *id.* at 598. Aristotle (circa 384-322 B.C.) was a Greek philosopher and scientist. See 1 *THE NEW ENCYCLOPEDIA BRITANNICA* 556 (Philip W. Goetz ed., 15th ed. 1991).

5. Marcus Tullius Cicero (circa 106-43 B.C.) was a Roman statesman, lawyer, and teacher whose major works on rhetoric include *De Oratore*, *Brutus*, and *Orator*. See 3 *THE NEW ENCYCLOPEDIA BRITANNICA* 313-15 (Philip W. Goetz ed., 15th ed. 1991).

6. Marius Fabius Quintilian (circa 35-96 A.D.) was a Roman teacher of public speaking and rhetoric whose major work on rhetoric is *Institutio Oratoria*. See 9 *THE NEW ENCYCLOPEDIA BRITANNICA* 863 (Philip W. Goetz ed., 15th ed. 1991).

7. See James J. Murphy, *Roman Writing Instruction as Described by Quintilian*, in *A SHORT HISTORY OF WRITING INSTRUCTION FROM ANCIENT GREECE TO TWENTIETH-CENTURY AMERICA* 19,20 (James J. Murphy ed., 1990).

8. See CORBETT, *supra* note 1, at 596. See generally Murphy, *supra* note 7, at 38.

9. ARISTOTLE, *THE RHETORIC OF ARISTOTLE* (Lane Cooper trans., 1932).

10. MARCUS TULLIUS CICERO, *DE ORATORE* (E.W. Sutton trans., 1942).

11. MARIUS FABIUS QUINTILIAN, *INSTITUTIO ORATORIA* (H.E. Butler trans., 1954).

twelve-year rhetoric course<sup>12</sup> which “carried boys from beginning alphabet exercises at six or seven through a dozen years of interactive classroom activities designed to produce an adult capable of public improvisation under any circumstances.”<sup>13</sup> Designed for use by all members of the educated classes, the rhetoric course included, among other things, detailed instructions for discovering and presenting legal arguments in almost any context and to almost any audience. A student’s rhetorical education prepared him to meet all his public speaking obligations, especially his legal obligations.<sup>14</sup>

From its very inception in fifth-century Syracuse, forensic or judicial discourse has been one of the primary rhetorical topics:

[c]ertain political and social changes taking place at the time prompted [Corax] to establish some system of rhetoric. When Thrasybulus, the tyrant of Syracuse, was deposed and a form of democracy established, the newly enfranchised citizens flooded the courts with *litigations to recover property* that had been confiscated during the reign of the despot. The “art” that Corax formulated was designed to help *ordinary men plead their claims in court*. Since, understandably enough, no documentary evidence was available to prove their claims they had to rely on inferential reasoning and on the general topic of probability . . . to establish their proprietary rights. Perhaps the chief contribution that Corax made to the art of rhetoric was the formula he proposed for the parts of a *judicial speech*—proem, narration, arguments (both confirmation and refutation), and peroration—the arrangement that becomes a staple of all later rhetorical theory.<sup>15</sup>

## II. PRINCIPAL FEATURES OF GRECO-ROMAN FORENSIC RHETORIC: THE CANON

While their analysis of the controlling principles of legal discourse was by no means absolutely uniform, even a brief (and necessarily simplified) summary reveals that most Greek and Roman rhetoricians

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12. See Murphy, *supra* note 7, at 20.

13. *Id.* at 19-20.

14. The ancients taught all voting citizens, who, without lawyers or federal forms to complete, had to argue for the restoration of their property in open court. Both new democracy and a new technology—writing—made the individual responsible for mastering the rhetorical habits we now so sorely miss, from “thinking on your feet” to “good delivery.” Citizens in Greece also had to be critical thinkers, ready for service on juries that numbered five hundred or as members of the executive council, elected monthly.

Susan Miller, *Classical Practice and Contemporary Basics*, in *THE RHETORICAL TRADITION AND MODERN WRITING* 52-53 (James J. Murphy ed., 1982).

15. CORBETT, *supra* note 1, at 595 (emphasis added).

nevertheless agreed about legal rhetoric's fundamental features. They all divided legal rhetoric into five parts: invention, arrangement, style, memory, and delivery.<sup>16</sup> (Memory and delivery are primarily useful in oral, as opposed to written, advocacy.)

Understandably, classical rhetoricians focused first on systematic methods for discovering or "inventing" all the available legal arguments in a given case.<sup>17</sup> To aid in the factual analysis of the case, they provided detailed checklists and inventories of common *types* of legally significant facts.<sup>18</sup> Following this they listed and analyzed dozens of commonly used lines of argument called *topoi* or topics of invention. Their classification system was based on the "characteristic ways in which the human mind reasons or thinks. . . . [They were a] codification of the various ways in which the human mind probes a subject to discover something significant or cogent that can be said about that subject."<sup>19</sup> As they discussed arguments from definition, precedent, ambiguity, legislative intent, etc., they frequently provided numerous illustrations drawn from real and hypothetical cases. They also described rebuttal techniques, logical fallacies, common counter-arguments, and various problems frequently associated with particular types of argument.

At the invention stage of the rhetorical process, they simply wanted to ensure that important facts and arguments were not overlooked. Nevertheless, comprehensive as their analysis was, Greco-Roman rhetoricians never regarded their suggestions as anything more than starting points for discovering the available arguments in a given case. Based on their own practical experience, they were

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16. See MARCUS TULLIUS CICERO, *RHETORICA AD HERENNIUM* 9 (H. Caplan trans., 1954). See also CORBETT, *supra* note 1, at 600 (noting that authorship of the *Rhetorica ad Herennium* is questionable). "[W]ritten probably between 86 and 82 B.C., . . . [it is] the earliest extant Latin work on rhetoric and the earliest treatment of prose style in Latin. . . . Although virtually unknown in the ancient world, the *Ad Herennium* enjoyed wide currency in the Middle Ages and the Renaissance." *Id.*

17. For an extended discussion of how classical analytical techniques apply to modern legal discourse, see Michael Frost, *Greco-Roman Legal Analysis: The Topics of Invention*, 66 *ST. JOHN'S L. REV.* 107 (1992).

18. See MARCUS TULLIUS CICERO, *DE INVENTIONE* 71 (H.M. Hubbel trans., 1949). "All propositions are supported in argument by attributes of persons or of actions. We hold the following to be the attributes of persons: name, nature, manner of life, fortune, habit, feeling, interests, purposes, achievements, accidents, speeches made." *Id.*

19. KATHLEEN E. WELCH, *THE CONTEMPORARY RECEPTION OF CLASSICAL RHETORIC: APPROPRIATIONS OF ANCIENT DISCOURSE* 60-61 (1990) (quoting Edward P.J. Corbett, *The Topoi Revisited*, in *RHETORIC AND PRAXIS: THE CONTRIBUTION OF CLASSICAL RHETORIC TO PRACTICAL REASONING* 43, 47 (Jean Dietz, ed., 1986)).

acutely aware, and repeatedly reminded their readers, that advocates must be creative, resourceful, and flexible in devising arguments.<sup>20</sup>

The second stage of the rhetorical process concerned the arrangement or organization of arguments.<sup>21</sup> Building on Corax's teachings regarding the standard organization of legal argument and their own observations regarding the practice of experienced advocates, they divided legal arguments into five parts: introduction (*exordium*), statement of the case (*narratio*), argument summary (*partitio*), argument (*confirmatio*), and conclusion (*peroratio*). Their treatises offered detailed explanations regarding the function of each part and the relationships among the parts. They also provided examples drawn from their own and others' experience and discussed strategies for effective presentation.

Classical rhetoricians devoted almost as much attention to rhetorical style as they did to the discovery and organization of arguments. Their conviction that style was inseparable from the substance of argument can be seen in Cicero's observation that distinction of style is impossible to achieve without worthy ideas; conversely, ideas remain lifeless without stylistic distinction.<sup>22</sup> They distinguished three different levels of style—the plain style, the middle style, and the grand style—and identified where each was appropriate.<sup>23</sup> They frequently equated figures of speech with figures of thought. In their view, style was a technical means of reinforcing or embellishing important argumentative points. They even singled out specific rhetorical devices, such as antithesis and parallelism, as especially suitable

20. See Frost, *supra* note 17, at 127.

21. For an extended discussion of how classical organizational strategies apply to modern legal discourse, see Michael Frost, *Brief Rhetoric—A Note on Classical and Modern Theories of Forensic Discourse*, 38 KAN. L. REV. 411 (1990).

22. See 3 MARCUS TULLIUS CICERO, *DE ORATORE* at vi.24 (H. Rackham trans., 1942); S. Michael Halloran & Merrill D. Whitburn, *Ciceronian Rhetoric and the Rise of Science: The Plain Style Reconsidered*, in *THE RHETORICAL TRADITION AND MODERN WRITING* 61 (James J. Murphy ed., 1982).

23. For a fuller discussion of the range of emotions classical rhetoricians considered, see S. Michael Halloran & Merrill D. Whitburn, *Ciceronian Rhetoric and the Rise of Science: The Plain Style Reconsidered*, in *THE RHETORICAL TRADITION AND MODERN WRITING*, *supra* note 22, at 61:

In Aristotle's view style is simply a *matter of genre*; distinguishable styles are appropriate for different speaking situations . . . [By contrast] Cicero associates the three styles with three *effects* a speaker must work on the audience: the plain style instructs, the middle style delights, and the grand style moves to belief or action. A well-wrought speech will use all three to *orchestrate* the audience's response according to the speaker's aim. Plain, middle, and grand styles are *levels of embellishment* and *emotional concentration* rather than generically distinct modes of language.

*Id.* (emphasis added).

to legal discourse where emotional as well as logical impact is desirable. They had a special regard for metaphors because of their subtle, natural emotional impact. They thought that metaphors were not only emotionally engaging, but that they also offered a unique wholeness to intellectual insights without any loss of logical integrity.

Although their analysis was systematic and in some ways dogmatic regarding which types of arguments, organization, and style were suitable to legal discourse, classical rhetoricians were also aware of various nonrational and sometimes imponderable factors at play in a given case. To accommodate for these factors, they analyzed legal arguments from three points of view: arguments based on logic (*logos*), arguments based on emotion (*pathos*), and arguments based on the credibility of the advocate (*ethos*).<sup>24</sup> Using numerous examples drawn from their own and others' experience, they discussed the principal features and effects of each type of argument. Even though they discussed these types of arguments under separate heads, classical rhetoricians stressed that they were closely interconnected with one another. They agreed that any well-framed and successful argument usually depended on its internal logic, the emotional content of the case, and the credibility of the advocate.

With characteristic thoroughness they analyzed judicial audiences as systematically as they did all other parts of the rhetorical process. Underlying all their observations regarding effective argumentation was their consistent emphasis on the importance of evaluating and playing on the sympathies of the judicial audience. Grounded as it was in basic human psychology, their assessment included advice on which types of arguments would have the greatest impact on a judge, what to do to avoid boring or confusing a judge, and how to appeal to a judge's sense of justice, self-interest, class, or emotions. Above all, they stressed that advocates must be flexible and sensitive to changes in the judge's moods or needs. As Quintilian observed, an advocate has three aims with respect to the judge: "[H]e must instruct, move, and charm . . . ."<sup>25</sup>

The comprehensiveness of the classical canon is demonstrated by the preceding brief summary. Mastery or even extended exposure to legal discourse analysis of this kind is what enabled even ordinary

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24. For an extended discussion of how the classical concepts of *pathos* and *ethos* apply to modern legal discourse, see Michael Frost, *Ethos, Pathos & Legal Audience*, 99 *DICKINSON L. REV.* 85 (1994).

25. *QUINTILIAN*, *supra* note 11, at 397.

Roman citizens to competently represent themselves in a legal dispute.

For nearly 1,000 years, Greek and Roman rhetoricians refined and extended their examination of legal discourse. The analytical techniques, classification systems, psychological assumptions, stylistic concerns, terminology, and purposes they described or created are both comprehensive and coherent. They are also the starting point of all subsequent approaches to analysis and creation of legal discourse.<sup>26</sup>

### III. MEDIEVAL RHETORIC

The virtually unbroken 1,000 year continuity of the Greco-Roman rhetorical tradition began to disintegrate with the collapse of the Roman empire in 426 A.D. Even though classical rhetoric remained an important component in educational systems throughout the medieval period (426-1416 A.D.), analysis and production of legal discourse played a much less important role than it had under the Greek or Roman legal systems.<sup>27</sup>

[Classical rhetoric] . . . almost succumbed to the collapse of its native environment as the cities of the [Roman] empire were destroyed or abandoned in the face of barbarian attack beginning in the early fifth century. With the end of orderly civic life there disappeared not only state support of education but most of the reasons for rhetorical education in its traditional form.<sup>28</sup>

Suffering from the same fragmentation and loss of coherence experienced by other Roman institutions and disciplines, classical rhetoric

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26. A few commentators reject or deemphasize the notion of a classical "canon." For example, Thomas P. Miller, *Reinventing Rhetorical Traditions*, in *LEARNING FROM THE HISTORIES OF RHETORIC: ESSAYS IN HONOR OF WINIFRED BRYAN HORNER* 26, 27 (Theresa Enos ed., 1993):

We have succeeded in making the [classical] rhetorical tradition something to be studied, taught, and tested. Perhaps we ought to ask if it *actually exists*, or at least if it is the only story we need to be telling ourselves about our past. If we can set aside the idea of a *unified* rhetorical tradition of canonical texts, we may be able to take a broader perspective that makes rhetorical processes like canonization the object of historical study.

*Id.* (emphasis added).

27. "If I can risk a grand cultural generalization, I would define two great breakdowns in the rhetorical tradition: the first, in the Middle Ages, was followed by the long process of rebuilding and rediscovery in the Renaissance. The second . . . started in the early nineteenth century . . ." BRIAN VICKERS, *IN DEFENCE OF RHETORIC* 215 (1988).

28. KENNEDY, *supra* note 1, at 173-74.

lost its intimate connections with the law and with other civic entities.<sup>29</sup> It began to undergo a series of transformations caused in part by the loss or only partial survival of the major rhetorical texts:

Medieval rhetoric is fragmented, first, in the obvious sense that many of the major rhetorical texts either disappeared or survived only in damaged form. Cicero's *Orator* and *Brutus* vanished altogether, and . . . *De Oratore* was known [only] to a few scholars . . . Quintilian's *Institutes* came down to the Middle Ages in a badly mutilated version . . .<sup>30</sup>

The greatest loss during this period, from the point of view of legal rhetoric, was the loss of a coherent and all-encompassing approach to legal discourse. In addition, the conceptual framework and terminology of legal rhetoric acquired new meanings as it was transformed or modified by strong religious, ideological, linguistic, geographical, and technological forces.

Naturally enough, because the Church was the main repository of medieval learning, all rhetoric, including legal or forensic rhetoric, acquired ecclesiastical overtones and lost many of its original secular and civic uses: "[Medieval] [r]hetoric informed methods for resolving conflicting assertions in canon law, theology, and philosophy. This facet of its medieval development is seen in the shift of rhetorical terms and concepts from questions of law to questions of faith."<sup>31</sup> Despite this shift of emphasis, there is still a persistent but highly selective interest in legal rhetoric throughout the period. In fact, only "in the early twelfth century did law cease to be a subdivision of rhetoric: then the study of law became a subject in its own right, and we witness the rise of law schools . . . as part of universities."<sup>32</sup>

Most medieval writers focus more on logic and argument than on other aspects of rhetoric because in hearings before an "ecclesiastical official, . . . both the official and the petitioner needed some knowledge of law . . . and of argumentation."<sup>33</sup> Although medieval writers occasionally mention other Greco-Roman rhetorical works, classical rhetoric survived mainly in two basic but imminently practical and

29. *See id.* at 173-74.

30. VICKERS, *supra* note 27, at 215.

31. RICHARD MCKEON, *RHETORIC: ESSAYS IN INVENTION AND DISCOVERY* at xvi (Mark Backman ed., 1987).

32. Richard J. Schoeck, *Lawyers and Rhetoric in Sixteenth-Century England*, in *RENAISSANCE ELOQUENCE: STUDIES IN THE THEORY AND PRACTICE OF RENAISSANCE RHETORIC* 274, 274 (James J. Murphy ed., 1983).

33. Kennedy, *supra* note 1, at 180.

teachable texts: Cicero's *De Inventione* and the *Rhetorica ad Herennium*.<sup>34</sup> Because both of these texts focus primarily on legal rhetoric, medieval encyclopedists, preachers, poets, manual writers, and other leading literary figures unavoidably, and perhaps unconsciously, preserved the analytical and organizational principles of legal argument even while they put them to new uses in ecclesiastical courts.

In the works of fifth-century encyclopedists like Cassiodorus<sup>35</sup> and Isidore of Seville,<sup>36</sup> some parts of classical legal rhetoric survived, especially those concerning issue identification and analysis (commonly referred to as *stasis* theory) and rhetorical argument. Cassiodorus' *Institutiones Divinarum et Humanarum Lectionum*, or *Introduction to Divine and Human Readings*, was a "basic reference work and educational handbook for centuries and was to be found in almost every medieval library."<sup>37</sup> Citing Cicero's *De Inventione* and *De Oratore*, Cassiodorus' discussion of rhetoric is "chiefly devoted to summaries of *stasis theory* and *rhetorical argumentation*. Thus its *logical side* is emphasized."<sup>38</sup>

Another encyclopedist, Isidore of Seville, was the author of a vast work entitled *Origines* or *Etymologiae*, which served as an encyclopedia throughout the following centuries . . . . [Its] longer chapters are on *stasis theory, the syllogism, and the figures of speech and thought*. A chapter on *law* . . . is inserted between the discussion of the syllogism and that of style and is *important in suggesting that rhetorical invention was useful in the courts of the time*.<sup>39</sup>

Not only did medieval rhetoricians regard legal rhetoric as useful in the ecclesiastical courtroom, they also thought it was important in the classroom, especially as an analytical tool. Rulers such as

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34. In [any] event, the medieval rhetorician's knowledge of classical rhetoric texts was largely confined to those *introductory* and extremely *practical* school texts, Cicero's *De Inventione* and the anonymous *Ad Herennium*, often found combined in manuscripts, of which John Ward estimates that "between 1,000 and 2,000 copies" survive, "making them the major works of Latin antiquity for the Middle Ages" and "arguably the most widely used classical Latin writings of all time."

VICKERS, *supra* note 27, at 216 (emphasis added).

35. Flavius Magnus Aurelius Cassiodorus (circa 490-585) was a Roman historian. He founded the monastery of Vivarium in Apulia, Italy for the purpose of translating and preserving both ancient and Christian manuscripts.

36. Isidore of Seville (circa 560-636) was a Spanish theologian and archbishop. In his *Etymologiae*, Isidore of Seville attempted to compile all secular and religious knowledge. The *Etymologiae* was a standard reference and textbook throughout the medieval period.

37. KENNEDY, *supra* note 1, at 177.

38. *Id.* at 178 (emphasis added).

39. *Id.* at 180 (emphasis added).

Charlemagne saw the value of rhetorical education. For example, Charlemagne invited rhetoricians to help effect his mandate on verbal education, *De Litteris Colendis*, by providing “instruction in grammar and rhetoric so that each individual in the realm could attain his own full capacity of verbal skills and thus be able to read the holy writ with full understanding.”<sup>40</sup> Thus, analytical techniques which were once exercised to understand and create legal arguments were adapted to close reading of religious texts.

Legal rhetoric’s practical applications are also evident in the medieval disciplines of letter-writing and sermon-writing. In twelfth-century Italy, for example, the rhetorical art of letter-writing was a university-taught and highly conventionalized discipline. Most diplomatic and legal correspondence was modelled after the *exordium*, *narratio*, *partitio*, *confirmatio*, and *peroratio* structure of classical legal argument:

In the twelfth century, dictamen, like law, was taught in the University of Bologna. Dictamen (from Latin *dictare*, to write a letter) is a derivative of classical rhetoric, reflecting especially the figures of speech and the parts of the oration, which were adapted into a standard five-part epistolary structure: the *salutatio*, or greeting, the *captatio benevolentiae*, or exordium, which secured the good will of the recipient; the *narratio*; the *petitio*, or specific request, demand, or announcement; and a relatively simple *conclusio*. The dictamen was strongly influenced by the conventions of diplomatic and legal correspondence, both civil and ecclesiastical, in medieval courts.<sup>41</sup>

And, in thirteenth-century England, legal rhetoric was adapted to suit the needs of preachers who, like the Italian letter-writers, modified the format and terminology of legal rhetoric as they became more logical and systematic in writing their sermons:

In the early thirteenth century handbooks of thematic preaching began to appear, perhaps first in England with the manuals of Alexander of Ashby and Thomas Chabham of Salisbury. These works adapt the parts of the [judicial] oration as described in the *Rhetorica ad Herennium* to the needs of preachers. They reflect an interest in form and technique of sermons, rather than just the contents, and foreshadow the “thematic” preaching which became popular at the University of Paris and elsewhere in a few years. By “thematic preaching” . . . is meant a systematic, logical form of preaching, as

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40. *Id.* at 182.

41. *Id.* at 186 (emphasis added).

opposed to the informality and lack of structure of the homily or of the simple preaching of Saint Francis.<sup>42</sup>

Both of these adaptations also signal a change in rhetorical emphasis from oral to written eloquence. Although both Cicero and Quintilian recognized the importance of writing as an essential first step in the creation of effective argument, their ultimate goal was always face-to-face oral presentation of their points to a judicial (or ceremonial or legislative) audience.<sup>43</sup> However, as the written word began to assume more and more importance, the sense of audience changed: "Rhetoric was reduced from a two-way to a one-way system. The energies that would otherwise go to elaborating a reciprocal relationship turns inwards, away from a concern with a living context, individuals or institutions susceptible to change, to an intellectual structure."<sup>44</sup>

As these examples illustrate, legal rhetoric survived throughout the medieval period because it provided a flexible, teachable, and useful analytical framework and because of its many practical applications. Even so, it was removed from its moorings in a larger rhetorical scheme and from widespread use in secular and civic life.<sup>45</sup> Selected parts of legal rhetorical conventions are emphasized, but its sense of wholeness was eroded. This pattern of selectivity and fragmentation pervades the medieval period and continues, with variations, into the Renaissance and the modern periods.

#### IV. RENAISSANCE RHETORIC

Sparked by the rediscovery of the full rhetorical treatises of Quintilian, Cicero, and Aristotle, classical rhetoric had a substantial

42. *Id.* at 191.

43. "In *writing* are the roots, in *writing* are the foundations of *eloquence*." This judgment, written in A.D. 95 by Marcus Fabius Quintilianus in his *Institutio Oratoria*, was not unique to him. It was an idea pervasive in Roman culture over many centuries. Quintilian himself quotes Cicero as saying a century and a half earlier that the *pen* is "the best modeler and teacher of eloquence."

Murphy, *supra* note 7, at 19 (emphasis added).

44. VICKERS, *supra* note 27, at 227.

45. A few commentators reject the preceding generalizations about the medieval period. For instance, in *The Teaching of Writing in Medieval Europe, A SHORT HISTORY OF WRITING INSTRUCTION FROM ANCIENT GREECE TO TWENTIETH-CENTURY AMERICA* 77, 81 (James J. Murphy ed., 1990), Marjorie Curry Woods finds an "extraordinary coherence in the school texts on which literacy was based during the Middle Ages. The books that formed the basis of rhetorical education in composition at the beginning of the Middle Ages continued to be taught more than a thousand years later." *Id.* at 81.

resurgence in the Renaissance.<sup>46</sup> The recovery of these works, especially those of Cicero and Quintilian, liberated legal rhetoric from the narrow and compartmentalized forms that evolved in the medieval period,<sup>47</sup> and reintroduced it into the broad and creative context of civic life. Once again rhetoric “occupied a privileged position in the school curriculum, being reserved to the higher classes, forming the climax of a pupil’s education.”<sup>48</sup> Its ascendance is exemplified by the practice in English grammar schools and universities, where rhetoric became one of the primary academic disciplines in a widespread and standardized educational system.<sup>49</sup> At the university level, “[w]here logic [had] held the main place [in medieval educational systems], rhetoric and grammar . . . now shared it with logic. . . .”<sup>50</sup> Even kings took the standard rhetoric course. Like any ordinary schoolboy or university student of the period, King Edward VI wrote Latin compositions using the classical methodology; “[f]irst he collected all his main arguments (*inventio*), also listing similes and examples which he intended to use; then he divided the material up in the form of the five parts of speech (*dispositio*); lastly he wrote the whole thing out, neatly using up all his quotations.”<sup>51</sup> Not only were the classical texts recovered and used in schools, but rhetoric was reintegrated into civic life, albeit with more emphasis on its practical uses in civic and social matters than on the forensic or judicial uses which were emphasized during the Greco-Roman or medieval period.<sup>52</sup>

In fact,

the stress on *practicality* is perhaps the most distinctive feature of the Renaissance rediscovery of classical rhetoric. In Italy, George

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46. Poggio, hunting through the abbey of St. Gall in 1416, found a complete Quintilian “safe and unharmed, though covered with mould and filthy with dust” in a cell at the foot of a tower, together with a manuscript of Asconius’ commentaries on Cicero’s speeches . . . . [I]n 1421, Gerardo Landriani, bishop of Lodi, found a complete manuscript of Cicero’s *De Oratore*, *Orator*, and *Brutus*, the last totally unknown, the other two known only from mutilated versions.

VICKERS, *supra* note 27, at 254-255.

47. [Renaissance scholars learned] that rhetoric was the discipline which had created the forms, disposed the contents, and ornamented the pages which they admired and sought to imitate. Rhetoric proved to be not the arid study of the medieval trivium or the technical teachings of *De Inventione* and the *Rhetorica ad Herennium*, but a noble and creative art, characteristic of man at his best.

KENNEDY, *supra* note 1, at 196-197.

48. VICKERS, *supra* note 27, at 256.

49. *See id.* at 257.

50. *Id.* at 265.

51. *Id.* at 263.

52. “The decline of *forensic* and deliberative eloquence, the continuing shift from primary rhetoric (spoken, often in face-to-face confrontation) to secondary (written, at a distance), left more space for epideictic [or ceremonial rhetoric] . . . .” *See id.* at 285 (emphasis added).

of Trebizond cited the traditional definition of rhetoric as “the civil science by which we speak in civil questions with the assent, as much as possible, of the listeners”—a mosaic of passages from *Ad Herennium*, *De Inventione*, and later texts—the concept of civil questions, which survives in medieval rhetoric without any real understanding of its meaning, is now interpreted as referring to rhetoric’s role in society and especially the *vita activa*.<sup>53</sup>

And, in England, Francis Bacon<sup>54</sup> noted that “profoundness of wisdom will help a man to name or admiration, . . . [but] it is eloquence that prevaieth in an active life.”<sup>55</sup> As an experienced advocate and legislator, Bacon was both a theoretician and practitioner of rhetorical eloquence. In his *De Augmentis Scientiarum* (an analysis and criticism of both Aristotle and Cicero), Bacon echoed classical observations regarding legal argument when he expounded on (among other rhetorical matters) the classic conflict between the letter and the intent of the law and listed forty-seven different arguments on the subject.

Throughout England, classical rhetoric was frequently linked with both the study and the practice of law.

[S]ixteenth-century lawyers learned some rhetoric at the universities (which increasing numbers of them attended before beginning their legal studies at an Inn of Chancery or Inn of Court), and some seem likely to have begun some kind of study of rhetoric first in an Inn of Chancery and then in an Inn of Court; others, we know, deepened their command of rhetoric by private study.<sup>56</sup>

Sir Edward Coke, one of England’s most famous jurists and the author of *Institutes of the Laws of England*, “had in his library Aristotle’s and Quintilian’s rhetorics . . . some Cicero, and a book of elocution . . . .”<sup>57</sup> Thomas Wilson, an eminent sixteenth-century scholar, wrote *Arte of Rhetorique* which was an “extremely influential” synthesis of law and rhetoric “for young noblemen who did not have time

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53. VICKERS, *supra* note 27, at 270-71. See also KENNEDY, *supra* note 1, at 199 (noting that “[o]f the Greek emigrants to Italy, the most important for the history of rhetoric is George Trebizond (1395-1472), who introduced Hermogenes and the Byzantine Greek rhetorical tradition to the West”). George Trebizond’s greatest work is *Rhetoricorum Libri V*, or *Five Books of Rhetoric*, published in 1433 or 1434.

54. “Francis Bacon (1565-1621), lord chancellor of England . . . was a distinguished orator in the House of Commons and the lawcourts.” *Id.* at 215. In his *De Augmentis Scientiarum*, he discusses Aristotle’s rhetoric.

55. VICKERS, *supra* note 27, at 276.

56. SCHOECK, *supra* note 32, at 275.

57. *Id.* at 278.

and patience to master rhetoric from the Latin textbooks.”<sup>58</sup> George Puttonham, a lawyer himself and from a family of lawyers, frequently refers to Cicero and to Quintilian in his *The Arte of English Poesie* which contains numerous “anecdotes relating to the law courts and lawyers . . . . The legal anecdotes, perhaps a dozen in number, in general illustrate the effects of rhetoric . . . .”<sup>59</sup>

Even though rhetoric had a large sphere of influence during the Renaissance period, much of that influence was turned in the direction of literature, not the law. Most importantly for later perceptions of rhetoric, the *expressive* function of rhetoric received much greater attention than it had in the classical and medieval period: “The writings of the ancients were read in the original Greek and Latin and were appreciated first of all for their *beauty of expression* and then for their relevance to contemporary life.”<sup>60</sup> Renaissance rhetoricians regarded the classical canon as a source of both eloquence and wisdom.<sup>61</sup> Consequently, while rhetoric’s practical applications in civic life were always recognized, its analysis and suggestions regarding stylistic excellence received greater and greater attention. In its most extreme forms, “Renaissance rhetoricians in reasserting the human role in judging all things retained the *stylistic* machinery of earlier eras, [but] found courtliness an adequate replacement for assured [religious or philosophical] Truth.”<sup>62</sup>

Their concern with style reflected an increased interest in how the emotional effects of style and eloquence persuade audiences to the writer’s point of view. They also concentrated on the aesthetic and poetic dimensions of classical figures and tropes because they were convinced that “the ultimate power of rhetoric in written communication [resided] in the figures and tropes, the last stage of elaboration of persuasive composition.”<sup>63</sup> Drawing heavily on the legal rhetoric techniques of Quintilian and of the *Rhetorica ad Herennium*, Renaissance rhetoricians analyzed the persuasive value of figures and

58. *Id.* at 284-86.

59. *Id.* at 288.

60. Moss, *supra* note 2, at 5 (emphasis added).

61. “[Renaissance scholars] were intoxicated with the language and literature of antiquity and sought to recover all possible knowledge of it and to make that knowledge the basis of the twin ideals of *wisdom* and *eloquence* in the culture of the times . . . .” KENNEDY, *supra* note 1, at 196 (emphasis added).

62. Richard Lloyd-Jones, *Using the History of Rhetoric*, in *LEARNING FROM THE HISTORIES OF RHETORIC: ESSAYS IN HONOR OF BRYAN HORNER* 20 (Theresa Enos ed., 1993).

63. VICKERS, *supra* note 27, at 294.

tropes,<sup>64</sup> they were convinced that rhetorical figures represented “not just forms of language but states of feeling . . . .”<sup>65</sup> In fact, they regarded rhetorical figures as “deriving originally from life.”<sup>66</sup> For example, they observed that “[i]n anger human beings will cry out, appeal to some stander-by, to God, or to part of the scenery to bear witness to their sufferings: this gesture came to be known as *apostrope* or *exclamatio*.”<sup>67</sup> Like classical rhetoricians, they knew that the “effectiveness of rhetoric derived . . . from its power over the emotions.”<sup>68</sup> And, like all rhetoricians, they “offer a classification of verbal devices. Particular structures are identified, named, their function discussed, and rules given concerning their use and abuse.”<sup>69</sup>

Unfortunately, subsequent critics and commentators, including modern commentators, have misunderstood the purpose and underlying rationale for Renaissance interest in verbal devices. Instead of focusing on their persuasive powers, these commentators focused on how the rhetorical figures and devices were abused and characterized them as frivolous, tedious, and mechanistic.<sup>70</sup> These misunderstandings, as much as any other criticisms of rhetoric, account for rhetoric’s present-day associations with florid, stilted exaggerations in language.

## V. ENGLISH NEOCLASSICAL RHETORIC

Rhetorical style was also important to seventeenth and eighteenth-century English rhetoricians, but they focused as much of their attention on oral delivery style and “elocution” as they did on written style. Rhetorical training in grammar schools still focused on studying Latin and writing theses based on Greco-Roman rhetoric, thereby fostering a receptive climate for the works of Cicero and Quintilian. But at the university level, the focus turned to the oral delivery or presentation of rhetorical compositions because a “major function of British universities . . . was the training of the clergy. Attention to preaching was thus very appropriate in courses on rhetoric.”<sup>71</sup> In effect, this emphasis on oral delivery re-established an important part of classical

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64. See *id.* at 316. Quintilian lists dozens of figures of *thought* such as the rhetorical question, apostrophe, insinuation, and dissimulation, and divides figures of *speech* into four types: variations of syntax, modes of iteration, word-play, and balance and antithesis.

65. *Id.* at 239.

66. *Id.* at 296.

67. *Id.*

68. *Id.* at 276.

69. *Id.* at 295.

70. See *id.*

71. KENNEDY, *supra* note 1, at 228.

rhetorical training. But instead of concentrating on civic, legislative, or legal rhetoric, the neoclassical focus was on religious rhetoric.

In addition, with the advent of a growing interest in empirical science and in formal logic, rhetorical reasoning, dependent as it is on emotional arguments and probabilities rather than on objective scientific or mathematical certainties, caused neoclassical critics to question its intellectual validity. John Locke, a one-time lecturer on rhetoric at Oxford, criticized traditional rhetoric in his *An Essay Concerning Human Understanding* as “an art of deceit and error” and “wanted to exclude figures of speech and other rhetorical devices from serious discourse.”<sup>72</sup> The topics of invention, a staple of Greco-Roman legal analysis and methodology, were dismissed by other critics as useless in discovering the “truth or in demonstrating it, and the five traditional parts of [legal] rhetoric are a form of deception.”<sup>73</sup> Legal rhetoric was also neglected because changes in the legal system and in law practice limited the opportunities for legal oratory. In his essay, *Of Eloquence*, the Scottish philosopher David Hume explains legal rhetoric’s diminished relevance as due to modern legal procedures and rules of evidence which restricted opportunities for legal oratory.<sup>74</sup>

Two eighteenth-century rhetoricians, George Campbell and Hugh Blair, wrote influential and widely read rhetorical treatises in which the authors acknowledged their indebtedness to classical rhetoric but which, in fact, departed significantly from classical precepts. Campbell’s *The Philosophy of Rhetoric* was an attempt to “think out a new theory of rhetoric on the basis of the work of the British Empiricist philosophers, and especially the work of David Hume.”<sup>75</sup> He wanted to “explore human nature and find therein the principles which underlie and explain the art of rhetoric.”<sup>76</sup> While acknowledging classical rhetoric’s importance and stating that the rhetorical principles of “Aristotle, Cicero, and Quintilian have been for the most part only translated by later critics, or put into a modish dress and new arrangement,”<sup>77</sup> Campbell nevertheless thought that Hume’s philosophical

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72. *Id.* at 227.

73. *Id.* at 222.

74. *See id.* at 230.

75. *Id.* at 232.

76. GEORGE CAMPBELL, *THE PHILOSOPHY OF RHETORIC* xxviii (Lloyd F. Bitzer ed., 1963).

77. *Id.* at li.

and psychological works provided critical insights into the art of persuasion that were unknown to and therefore unexamined by the classical authors. He concentrated much of his attention on these insights to supplement his classical sources.

Hugh Blair, a contemporary of Campbell's and a professor of Rhetoric and Belles Lettres at the University of Edinburgh, focused his attention on rhetorical style rather than on philosophy or psychology. He has been described as the British Quintilian and it is his work, more than Campbell's, that has affected modern perceptions of rhetoric. He too based his work on classical rhetoric. Although he discusses all the classical principles in his *The Lectures on Rhetoric and Belles Lettres*, he is most influential for his observations on rhetorical taste, criticism, sublimity, and beauty,<sup>78</sup> that is, on style. Because of his belief that close examination of great literature is essential to understanding and producing oratorical excellence, much of his work is devoted to comparing the literary merits of various classical and modern works. He provided a very influential model "for using literature to teach writing."<sup>79</sup> Despite both men's indebtedness to classical sources, neither Campbell nor Blair devotes much attention to legal rhetoric and in this they typify the neoclassical neglect of the subject.

## VI. CLASSICAL RHETORIC IN NINETEENTH-CENTURY AMERICA

Initially, seventeenth and eighteenth-century Americans' interests in rhetoric simply reflected the British interests.<sup>80</sup> The empiricist-inspired works of George Campbell and the belletristic works of Hugh Blair were as popular and widespread in America as they were in Britain. But, like a few of their English counterparts, some American educators focused their attention on traditional classical rhetoric. For example,

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78. See KENNEDY, *supra* note 1, at 235.

79. JAMES A. BERLIN, *WRITING INSTRUCTION IN NINETEENTH-CENTURY AMERICAN COLLEGES* 27 (1984).

80. "Before the publication of Theremin's *Eloquence a Virtue* (1844), Day's *Elements of the Art of Rhetoric* (1850), and Hope's *Princeton Textbook in Rhetoric* (1854), rhetorical education in American colleges was generally dominated by the extremely popular English rhetorics of Hugh Blair, George Campbell, and Richard Whately." Nan Johnson, *Three Nineteenth-Century Rhetoricians: The Humanist Alternative to Rhetoric as Skills Management*, in *THE RHETORICAL TRADITION AND MODERN WRITING* 106 (James J. Murphy ed., 1982).

John Quincy Adams, the first holder of the Boylston Professorship of Rhetoric and Oratory at Harvard [observed], "A subject which has exhausted the genius of Aristotle, Cicero, and Quintilian, . . . can neither require nor admit much additional illustration. To select, combine, and apply their precepts, is the only duty left for their followers of all succeeding times, and to obtain a perfect familiarity with their instructions is to arrive at the mastery of the art."<sup>81</sup>

Grounded as it was in the classical tradition, Adams' *Lectures on Rhetoric and Oratory* offered a unique opportunity in America's formative years for a legal rhetoric based in a civic and legislative context resembling that of the classical period. But "Adams' rhetoric had little impact even in his own time. Initially published in 1810, it did not see another printing for 150 years. . . [primarily because it] was associated with an [Aristotelian] epistemology that was being assaulted on all fronts in America and abroad in the nineteenth century."<sup>82</sup> So instead of using Adams' Greco-Roman model, American rhetoricians and educators modelled themselves after Campbell or Blair. They divided themselves into two camps: "One group emphasized Campbell, presenting rhetoric as a scientific body of principles, grounded in human nature. The other saw rhetoric as an art, deriving its impulse from Blair's belletristic position."<sup>83</sup>

Even while these principles were being taught, classical rhetoric was losing its central place in the curriculum of American colleges and was being relegated to speech departments, rhetoric departments, and English departments; "rhetorical theory became an aspect of belles lettres and English composition. In the course of the century the Boylston Professorship, despite the founder's intention, was converted first into a chair in belles lettres and ultimately into a professorship of poetry."<sup>84</sup> These changes at Harvard and at most nineteenth-century American colleges and universities were linked not only to changes in

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81. KENNEDY, *supra* note 1, at 240. In addition, Berlin states that:

Nicholas Boylston had provided 1,500 pounds for a chair of rhetoric at Harvard in 1771, but the endowment was not used until 1806, when John Quincy Adams was appointed the first Boylston Professor of Rhetoric. The statute of the endowment specifically stipulated that the instructor in rhetoric was to follow the classical model in theory and in classroom practice . . . . Instruction was to focus on invention, disposition (arrangement), elocution (style), and pronunciation.

BERLIN, *supra* note 79, at 14.

82. *Id.* at 17.

83. *Id.* at 35.

84. KENNEDY, *supra* note 1, at 240.

rhetorical philosophy but also to a rapid growth in college populations. As the student populations increased, colleges adopted curricular and classroom strategies—most notably the system by which students select or elect certain specialized courses—to accommodate the increased numbers.<sup>85</sup> Educators gravitated toward more efficient teaching methods and away from the time-consuming approaches that characterized traditional rhetorical training. The fragmentation that periodically overwhelmed classical rhetoric once again divided what was originally a comprehensive and coherent whole into a number of discrete and essentially unconnected departments and disciplines.

Another significant and related change at the university level was an increased emphasis, based on Hugh Blair's work, on written, as opposed to oral, discourse.<sup>86</sup> At Harvard, for instance, "[T]he composition class [was] the sole course required of all students in an otherwise elective curriculum."<sup>87</sup> Legal rhetoric was likewise affected by this increased emphasis on writing:

[T]he forensic system [at Harvard] continued the old tradition of debate in the final years of the curriculum, but it was a *written* adaptation of the oral debate. During the 1870's, students attended lectures and recitation on rhetoric in the last three years (freshmen took elocution), but the catalogue also specifically prescribed "themes once every four weeks" for sophomores, "once every three weeks" for juniors, and "four forensics" for seniors . . . . At least at their inception, the requirements were thus a kind of *written* continuation of the ancient tradition of rhetorical.<sup>88</sup>

While there was an increased interest in written rhetoric, this new approach did not retain close connections with classical rhetoric principles which provide a clear sense of audience, a clear methodology

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85. In the eighties and nineties, the elective system at the new American university . . . divided the entire academic community into discrete parts, leading to an assembly-line conception of education. As far as rhetoric is concerned, this meant that persuasive discourse—the appeal to the emotions and the will was now seen to be possible only in oratory, and concern for it was thus relegated to the speech department. Discourse dealing with imagination was made the concern of the newly developed literature department. The writing course was left to attend to the understanding and reason, deprived of all but the barest emotional content.

BERLIN, *supra* note 79, at 9.

86. *See id.* at 34 ("As the nineteenth century progressed, college rhetorics increasingly came to focus on written language . . . . America was changing from an oral culture to a print culture . . . . The ability to write effectively was becoming more important than the ability to speak at public gatherings.")

87. *Id.* at 60.

88. DAVID R. RUSSELL, *WRITING IN THE ACADEMIC DISCIPLINES* 88 (1991) (emphasis added).

for discovering what to say, and a clear sense of how emotion, style, and personal credibility contribute to effective argument. Instead, it was based in part on George Campbell's empiricist theories and in part on the demands of the business and scientific communities who were interested in efficient ways to manage or organize pre-existing technological or scientific information.<sup>89</sup> This new rhetoric, commonly referred to as current-traditional rhetoric,<sup>90</sup> emerged during the last two decades of the nineteenth century. Under this quasi-scientific system,

the writer's duty is to rid himself of the trappings of culture that distort his perceptions. He is to be objective, detached, in observing experience. The purpose of writing is to report, not to interpret, what is inductively discovered . . . . Invention (discovery of arguments or subject matter) is not necessary: after all, the scientist does not invent meaning, he discovers it through the correct use of his method.<sup>91</sup>

Current-traditional rhetoric is also characterized by an emphasis on the forms of discourse, discussions of usage and grammar, and style as reflected in concepts of unity, coherence, and emphasis. Coupled with this emphasis on "superficial correctness"<sup>92</sup> was an almost exclusive emphasis on expository writing.<sup>93</sup> Consequently, very little attention was given to argument generally or to legal argument in particular.

## VII. CLASSICAL RHETORIC IN TWENTIETH CENTURY AMERICA

Current-traditional rhetoric predominated in the American educational system until the late 1930s and the early 1940s. Then,

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89. See BERLIN, *supra* note 79, at 28. Richard Whately's *Elements of Rhetoric* provided "a new *inventio* of management to replace the classical *inventio* of discovery. Whately provides specific advice on how material appropriated elsewhere is to be managed in composition. . . ." *Id.* See generally Miller, *supra* note 14, at 53 (stating that in current-traditional textbooks "[w]e teach 'patterns of organization' for 'material' somehow already discovered rather than the original inventive *topoi* that find and recall content pertinent to a writer's purpose. For example, instead of suggesting that students may find something to say by comparing one thing to another, we teach them how to organize the details of comparisons they have derived from prior observations and good luck.").

90. See W. ROSS WINTEROWD, *A TEACHER'S INTRODUCTION TO COMPOSITION IN THE RHETORICAL TRADITION* 31 (1994).

91. BERLIN, *supra* note 79, at 63.

92. See *id.* at 73.

93. See WINTEROWD, *supra* note 90, at 34.

prompted by student demand for practical training for business contexts, speech departments and English departments began emphasizing a combination of speaking, writing, listening, and reading skills in ways that restored "basic rhetorical principles into composition classrooms."<sup>94</sup> In effect, they were restoring classical coherence and completeness to the teaching of rhetoric. Soon, they returned to the classical texts for inspiration and guidance.

Most modern rhetoricians who draw on the classical texts concentrate on a single topic like "invention" or the discovery of arguments;<sup>95</sup> sometimes they attempt to apply all the classical principles to modern topics. Occasionally, classical rhetoric is used as a starting point for a "new" rhetorical theory loosely based on classical principles. Kenneth Burke, for example, seeks to discover a "generating principle" for discovering the available arguments using a methodology that differs from but echoes the classical topics of invention. Burke's "dramatistic" principle uses five "master terms": Act, Scene, Agent, Agency, Purpose. By systematically employing these terms, a writer or advocate will discover "what is being done (the Act); under what circumstances or in what situation (Scene) the act takes place; what sort of person (Agent) does it; by what means (Agency) he does it, and for what end or Purpose."<sup>96</sup> Burke's "master terms" provide a shorter list, but serve a similar purpose to Cicero's list in *De Inventione* which examines a topic in terms of: name, nature, manner of life, fortune, habit, feeling, interests, purposes, achievements, accidents, and speeches made.

In almost all cases, modern rhetoricians are primarily interested in applying classical rhetorical techniques to meet the many practical requirements of modern discourse. Their applications depend on their theoretical point of view or purpose. Thus,

[t]o the composition [or legal writing] teacher, rhetoric is an "art" of writing which focuses the student's attention on the strategic nature

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94. ROBERT J. CONNORS, ET AL., *The Revival of Rhetoric in America*, in *ESSAYS IN CLASSICAL RHETORIC AND MODERN DISCOURSE* 8 (Robert Connors, Lisa Ede, & Andrea Lunsford, eds., 1984).

95. See *LANDMARK ESSAYS ON RHETORICAL INVENTION IN WRITING* (Richard Young & Yameng Liu eds., 1994) (displaying series of essays by various authors, beginning in 1943 and ending in 1986, which surveys the classical topic of "invention" or discovery of arguments from different modern philosophical, ethical, epistemological, esthetic, and organizational perspectives).

96. Kenneth Burke, *The Five Master Terms: Their Place in a "Dramatistic" Grammar of Motives*, in *LANDMARK ESSAYS ON RHETORICAL INVENTION IN WRITING* 1 (Richard Young & Yameng Liu eds., 1994).

of communication. To the literary [or legal] scholar, it is a critical “apparatus” that covers all the techniques by which a writer establishes rapport with the reader. To the philosopher of language [or the law], it is a “study” of misunderstanding and its remedies. To the self-described rhetorician [or legal advocate], it is a “method” of argumentation which looks to an audience to discover the means of persuasion.<sup>97</sup>

Only rarely, however, do modern rhetoricians or scholars devote much attention to how classical rhetoric applies to modern judicial or legal discourse. One exception is Chaim Perelman, a widely respected, legally trained Belgian philosopher, whose *The Idea of Justice and the Problem of Argument*<sup>98</sup> analyzes judicial uses of legal precedent in order to illuminate connections between classical and modern methods of legal argument. Perelman’s *The Idea of Justice* and his *The New Rhetoric: A Treatise on Argumentation*<sup>99</sup> emphasize, in ways that are reminiscent of the classical techniques of legal argument, modes of “nonformal logic which [can] ‘induce or increase the mind’s adherence to theses presented for its assent.’”<sup>100</sup> Perelman’s work, however, is a notable departure from the general neglect of the topic of legal discourse.

Despite this neglect, a growing number of modern lawyers, judges, and legal academics have begun employing classical rhetorical principles in their analyses of legal discourse. For example, Robert F. Hanley refers to the classical concepts of *ethos* (an advocate’s credibility) and *pathos* (the emotional aspects of a legal argument) when making recommendations regarding courtroom argumentative strategies.<sup>101</sup> In his treatise on legal logic, Ruggero Aldisert examines modern legal arguments using the classical rhetorical concept of enthymetic proofs (an *enthymeme* is a syllogism in which the major

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97. McKEON, *supra* note 31, at vii.

The essays in this volume (RHETORIC AND PRAXIS: THE CONTRIBUTION OF CLASSICAL RHETORIC TO PRACTICAL REASONING) were composed with one common aim: to retrieve from the classical age of rhetoric some methods of practical reasoning—methods of stimulating and ordering thought about matters of common concern—that might inform our teaching of writing today.

Moss, *supra* note 2, at 1.

98. CHAIM PERELMAN, *THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENTATION* (John Petrie trans., 1963).

99. CHAIM PERELMAN & L. OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* (John Wilkinson & Purcell Weaver trans., 1969).

100. CORBETT, *supra* note 1, at 629.

101. Robert F. Hanley, *Brush Up Your Aristotle*, *LITIG.*, WINTER 1986, at 39.

premise is only probable, or in which one term is omitted).<sup>102</sup> Richard Posner's treatise on law and literature contains a section on judicial "style as persuasion" in which he states that "it is an open question whether the style of judicial opinions is better studied from the standpoint of linguistics and rhetoric or from that of literary criticism . . . ."<sup>103</sup> Anthony G. Amsterdam and Randy Hertz' analysis of the rhetorical structure of closing arguments includes quotes from Aristotle, Cicero, and Quintilian.<sup>104</sup> Most of these commentators are interested in how classical rhetorical principles help discover or explain the internal logic and persuasive value of legal discourse. Understandably, given their limited purposes, these commentators rarely call much attention to the larger context from which these classical principles were drawn. That is, they apply the classical principles without referring to the overall classical system, in part because such references are unnecessary. As seasoned lawyers and judges, they can rely on their own experience for much of the information and advice that is contained in the classical sources.

But inexperienced lawyers and law students do not have that background to draw on and could certainly benefit from a greater familiarity with the comprehensive, coherent, and experience-tested classical system, which offers detailed advice for handling a legal case from the initial issue and fact determinations to the final courtroom techniques and strategies. As this essay demonstrates, rhetoric has always been an educational tool geared to meet the practical demands of the legal profession. For 2,450 years it has survived and adapted to those demands and can certainly do so again.

Some of these adaptations have already been made in a series of articles which analyze the connections between classical rhetoric and modern practice.<sup>105</sup> Set in the larger context of the entire classical

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102. RUGGERO J. ALDISERT, *LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING* 54 (1989).

103. Posner explains that

[a]s used by Aristotle and his successors, "rhetoric" ran the gamut of persuasive devices in communication, excluding formal logic. It thus embraced not only style but much of reasoning. Since the Middle Ages the word has come more and more to mean just the eloquent or effective use of language, and that is the approximate sense in which I shall use the word "style." The broader signification of "rhetoric" has its adherents, though.

104. RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 270-71.

Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55 (1992).

105. See Michael Frost, *Brief Rhetoric—A Note on Classical and Modern Theories of Forensic Discourse*, 38 U. KAN. L. REV. 411 (1990); *Greco-Roman Legal Analysis: The Topics of Invention*, 66 ST. JOHN'S L. REV. 107 (1992); *Ethos, Pathos & Legal Audience*, 99 DICK. L. REV.

rhetorical system, these articles examine modern applications of the classical topics of invention or discovery, factual analysis, argumentative strategies, legal reasoning, organizational patterns, audience analysis, stylistic conventions, and lawyer credibility.<sup>106</sup> These articles provide a good starting point for the creation of a more comprehensive and systematic understanding of how classical rhetoric can benefit the modern lawyer.

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85 (1994); and *Greco-Roman Analysis of Metaphoric Reasoning*, 2 *LEGAL WRITING: THE JOURNAL OF THE LEGAL WRITING INSTITUTE* 113 (1996).

106. See Richard J. Schoeck, *The Practical Tradition of Classical Rhetoric*, in *RHETORIC AND PRAXIS: THE CONTRIBUTION OF CLASSICAL RHETORIC TO PRACTICAL REASONING* 28 n.3 (Jean Dietz Moss, ed., 1986) ("It is a token of the lastingness of the symbiotic relations between law and rhetoric that in most Anglo-American jurisdictions *discovery* has meant . . . that early stage in the examination of evidence by parties to an action at law, or their attorneys . . .").

