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## RHETORIC AND ITS DENIAL IN LEGAL DISCOURSE

Gerald B. Wetlaufer\*

**L**AW is serious business, sometimes deadly serious. It is, in the words of Robert Cover, conducted on a field of “pain and death.”<sup>1</sup> Among other things, it is the business of deciding hard cases, resolving serious disputes, and deploying the awesome coercive powers of the state.

What we lawyers and law teachers<sup>2</sup> try to bring to that business is clarity, objectivity, rigor, and toughmindedness. We work hard to find the right answer, to prove one claim and disprove another. Our arguments are, at their best, both powerful and convincing—more convincing, we generally believe, than the arguments we might have made had we not been trained in law. Moreover, our ability to think, speak, and write “like lawyers” appears to support the legitimacy of the legal system itself. To that degree, we are custodians of the possibility that this nation might be governed not by men but by law. For all these reasons, we commonly take pride in thinking, speaking, and

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\* Associate Professor, University of Iowa College of Law. A.B., 1967, Princeton; J.D., 1972, Yale. I wish to express my appreciation to Wilbur Samuel Howell, my first teacher of rhetoric; to Huston Diehl, Barry D. Matsumoto, David M. Trubek, and James Boyd White; to Patrick B. Bauer and William G. Buss; and to the participants in the University of Iowa Project on the Rhetoric of Inquiry. [*Rhetorical note*: According to the rhetorical conventions of legal scholarship, the “author’s note” sets out certain information that may help to establish the author’s credibility before the author has, it would seem, even begun to speak. See Aristotle, *Rhetoric*, in *Rhetoric and Poetics*, Bk. I, Ch. 2 (W. Roberts & I. Bywater trans. 1954) (c. 330 B.C.) (the first mode of persuasion arises from the person of the speaker). It is also a small enclave, removed from the text, in which the author is sometimes permitted to make a short statement about his personal relationship to the subject at hand. See *infra* section I.B. (regarding the personal voice in legal scholarship). My use of rhetorical notes is explained in the text accompanying *infra* notes 33-35.]

<sup>1</sup> Cover, *Violence and the Word*, 95 *Yale L.J.* 1601 (1986). Cover focuses on the decisional dimension and the coercive consequences that distinguish legal interpretation from, for instance, the interpretation of literature.

<sup>2</sup> [*Rhetorical note*: On the rhetorical significance of “us” and “we” in legal scholarship, see Scheppele, *Foreword: Telling Stories*, 87 *Mich. L. Rev.* 2073, 2077-84 (1989); see also K. Burke, *A Rhetoric of Motives* (1950) (on the rhetoric of identification); Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 *Harv. L. Rev.* 10, 15 (1987) (on the importance of “we” in focusing the reader on the human components of judicial decisions).]

writing "like lawyers." Further, we who teach law are deeply, authentically committed to teaching these skills to our students.

Yet certain prizes elude us. The public has less regard for our profession than we might like. Our style of argument is not uniformly effective. Sometimes, surprisingly, our arguments elicit not assent but, instead, distrust, resistance, and even resentment. We seem better equipped for confrontation than for other less costly means of resolving disputes. Those lawyers who are particularly successful in persuading juries, in selling legal services, and in "doing deals" seem sometimes to succeed precisely in the degree to which they do *not* think and speak like a lawyer. Some teachers worry that we may not be teaching some of the skills that matter most to practicing lawyers. Others express concern that, through our particular style of teaching, we may be *disempowering* our students. More generally, there is an awkward but persistent tension between, on the one hand, what we know as the rule of law and, on the other, our commitments to justice and democracy. There is also a growing and equally awkward tension between the ways that lawyers typically conduct their business and the insights, now fully acceptable in related disciplines but still resisted in law, of Saussurian linguistics, of structuralism, post-structuralism, and semiotics, and of various forms of pragmatism and contemporary philosophy.

I propose in this Article to examine this matter of thinking, writing, and talking "like a lawyer" and to conduct that examination through use of the tools of rhetoric. By "rhetoric," I mean the discipline, sometimes the metadiscipline, in which the objects of formal study are the conventions of discourse and argument. As a discipline, rhetoric has its roots in the classical world of the pre-Socratics, Aristotle, Cicero, and Quintilian.<sup>3</sup> In the last half century, this discipline has been

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<sup>3</sup> See generally G. Kennedy, *Classical Rhetoric and Its Christian and Secular Tradition from Ancient to Modern Times* (1980) (survey of the history of rhetoric); G. Kennedy, *The Art of Rhetoric in the Roman World* (1972) (history of rhetoric in the classical age of Rome); G. Kennedy, *The Art of Persuasion in Greece* (1963) (history of Greek rhetoric); W. Howell, *Logic and Rhetoric in England, 1500-1700* (1956) (using theories governing rhetoric during the English Renaissance to illuminate the basic nature of classical thought); see also Fish, *Rhetoric*, in S. Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* 471 (1989) (essay on rhetoric and antirhetoric as the fundamental antipodes of human discourse). For specific rhetoricians, see, e.g., Aristotle, *supra* note \*; M. Cicero, *De Oratore* (E. Sutton & H. Rackham trans. 1942) (c. 55 B.C.); Plato, *Gorgias* (W. Hamilton trans. 1960) (c. 427-347 B.C.); M. Quintilian, *Institutio Oratoria* (H.

carried forward by Kenneth Burke,<sup>4</sup> Stephen Toulmin,<sup>5</sup> Chaim Perelman,<sup>6</sup> Wayne Booth,<sup>7</sup> James Boyd White,<sup>8</sup> and others both inside and outside the legal academy.<sup>9</sup> Rhetoric has long had strong connections with advocacy and the study of law.<sup>10</sup> It also has other equally strong connections with a number of decidedly contemporary scholarly

Butler trans. 1920) (c. 100 A.D.). For modern studies of the rhetoricians, see Gronbeck, *Gorgias on Rhetoric and Poetic: A Rehabilitation*, 38 *S. Speech Comm. J.* 27 (1972); Hunt, *Plato and Aristotle on Rhetoric and Rhetoricians*, in *Studies in Rhetoric and Public Speaking in Honor of James Albert Winans by Pupils and Colleagues* 3 (A. Drummond 1962); King, *The Perfect Orator in Brutus*, 33 *S. Speech J.* 124 (1967); Wauger, *The Rhetorical Theory of Isocrates*, 8 *Q.J. Speech Educ.* 323 (1922).

<sup>4</sup> See K. Burke, *Permanence and Change: An Anatomy of Purpose* (1984) [hereinafter K. Burke, *Permanence and Change*]; Burke, *Language as Symbolic Action* (1966) [hereinafter K. Burke, *Language*]; K. Burke, supra note 2; Burke, *A Grammar of Motives* (1945); Burke, *Interaction: Dramatization*, in *7 International Encyclopedia of the Social Sciences* 445 (1968).

<sup>5</sup> See S. Toulmin, *The Uses of Argument* (1958); S. Toulmin, R. Reike & A. Janik, *An Introduction to Reasoning* (1979); Toulmin, *The Construal of Reality: Criticism in Modern and Postmodern Science*, 9 *Critical Inquiry* 93, 93-100 (1982).

<sup>6</sup> See Ch. Perelman, *The Realm of Rhetoric* (1982); Cl. Perelman, *Justice, Law and Argument* (1980); Ch. Perelman, *The New Rhetoric and the Humanities: Essays on Rhetoric and its Applications* (1979); Ch. Perelman, *The Idea of Justice and the Problem of Argument* (1963) [hereinafter Cl. Perelman, *Idea of Justice*]; Cl. Perelman & L. Olbrechts-Tyteca, *The New Rhetoric* (1969).

<sup>7</sup> See W. Booth, *Modern Dogma and the Rhetoric of Assent* (1974); W. Booth, *A Rhetoric of Irony* (1974) [hereinafter W. Booth, *Irony*]; W. Booth, *The Rhetoric of Fiction* (1961) [hereinafter W. Booth, *Fiction*]; W. Booth, *The Revival of Rhetoric*, in *New Rhetorics* (M. Steimmann ed. 1967).

<sup>8</sup> See J. White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (1990); J. White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (1985); J. White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (1984); J. White, *The Legal Imagination* (1973) [hereinafter J. White, *Imagination*]; White, *What Can a Lawyer Learn from Literature?* (Book Review), 102 *Harv. L. Rev.* 2014 (1989) (reviewing R. Posner, *Law and Literature: A Misunderstood Relation* (1988)) [hereinafter White, *Book Review*]; see also Sherwin, *A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling*, 87 *Mich. L. Rev.* 543 (1988) (a commentary on White's *Heracles' Bow*).

<sup>9</sup> Within the legal academy, see, e.g., Frug, *Argument as Character*, 40 *Stan. L. Rev.* 869 (1988); Getman, *Voices*, 66 *Tex. L. Rev.* 577 (1988); *Legal Storytelling*, 87 *Mich. L. Rev.* 2073 (1989). Outside the legal academy, see, e.g., the work of the Project on the Rhetoric of Inquiry at the University of Iowa including, D. McCloskey, *The Rhetoric of Economics* (1985); *The Rhetoric of the Human Sciences* (J. Nelson, A. Megill & D. McClosky eds. 1987) [hereinafter *Human Sciences*]; K. Hayles, *Eroticism in Language, or Argument is Not All*, Paper presented at *Rhetoric of the Disciplines: The Next Steps*, a Colloquium sponsored by the Project on the Rhetoric of Inquiry, University of Iowa (Mar. 1988) (copy on file with the Virginia Law Review Association).

<sup>10</sup> Rhetoric as the art (in Aristotle's word) or craft (in Plato's) of persuasion entails advocacy of a kind that is, as a practical matter, synonymous with lawyering. Moreover, rhetorical analysis, i.e., the understanding of arguments, is one of the good lawyer's central

investigations.<sup>11</sup> Rhetoric offers us a set of tools for thinking about the discursive conventions within which we work.<sup>12</sup> Just as important, it also offers us a series of specific insights.

It teaches us, for instance, that there exists a range of rhetorics, by which is meant a range of unified sets of discursive conventions; that these rhetorics differ one from another; and that, at any given time and place, particular rhetorics will be embraced by particular disciplines. It also teaches us that, through our particular rhetorical conventions and commitments, we constitute our selves, our communities, and, perhaps, our world. Thus, the rhetorical conventions to which we commit ourselves are both contingent and important. Those commitments bear not just upon how we say the things we say but also upon *what* we say, on what we are able to *see*, on what we are able to think, on what we are able to know and believe, and on who we are able to be. Furthermore, and this is a point that we lawyers may resist, the consequences of any particular rhetoric, including our own, are not uniformly positive. This is the insight that Paul Carrington invoked when he cited Mark Twain's writings about his education as a riverboat pilot for the proposition that learning to think like a lawyer involves losses as well as gains, that it entails the acquisition of blindnesses as well as acuties.<sup>13</sup> Carrington's appreciation for Twain's insight reflects, I think, the lawyer's roughhewn understand-

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skills. Thus, Chaim Perelman's interest in argumentation is a part of his larger interest in the law. See, e.g., Ch. Perelman, *Idea of Justice*, supra note 6, at vii.

<sup>11</sup> See infra note 14.

<sup>12</sup> Those who study rhetoric are constantly generating names for and distinctions among the elements of discourse or the forms of argument. For a contemporary example of such a taxonomy, see Ch. Perelman & L. Olbrechts-Tyteca, supra note 6. Other works, such as K. Burke, supra note 2, are less encyclopedic but no less generative of usable distinctions.

<sup>13</sup> The particular passage in which Carrington, like so many of us, takes such pleasure is the one in which Twain complains that his training as a riverboat pilot had, in Carrington's words, "deprived him of the capacity to appreciate the river for what it is to laymen: 'I had lost something,' [Twain] complained, 'that could never be restored to me . . . All the grace, the beauty, the poetry, had gone out of the majestic river!'" Carrington, *Of Law and the River*, 34 *J. Legal Educ.* 222, 223 (1984) (quoting M. Twain, *Life on the Mississippi*). Where once there had been the rapture of a beautiful sunset, now there was merely so much usable information.

No, the romance and beauty were all gone from the river. All the value any feature of it had for me now was the amount of usefulness it could furnish toward compassing the safe piloting of a steamboat. Since those days, I have pitied doctors from my heart. What does the lovely flush in a beauty's cheek mean to a doctor but the "break" [a name for one of the river's signs] that ripples above some deadly disease? Are not all her visible charms sown thick with what are to him the signs and symbols of hidden decay? Does he ever see her beauty at all, or doesn't he simply view her professionally,

ing of what I shall call the epistemological, and perhaps the ontological, consequences of rhetorical conventions.<sup>14</sup>

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and comment upon her unwholesome condition all to himself? And doesn't he sometimes wonder whether he has gained most or lost most by learning his trade?

Id. (quoting M. Twain, *Life on the Mississippi*). This essay became famous for Carrington's suggestion that the proponents of Critical Legal Studies had "an ethical duty" to leave the law schools. Id. at 227.

The idea that the law school experience and learning to think like a lawyer may have epistemological consequences, similar to those Twain described, is commonplace among those who have been through the experience. A great many law teachers, beginning perhaps with James Boyd White, have provoked their students' recognition of this point through the use of Twain's text. See J. White, *Imagination*, supra note 8, at 10-13.

<sup>14</sup> Beyond this commonplace recognition, ideas bearing upon what I am calling the epistemological consequences of rhetoric are central to a large number of the most interesting scholarly projects of the last half century. See, e.g., S. Fish, supra note 3. Most, but not all, of these projects are centered outside the discipline of law. Much as I would like to, I cannot provide a satisfactory catalogue of these projects or a satisfactory ordering among them. What follows, then, is unsatisfactory but perhaps nonetheless useful:

(1) Kenneth Burke's writings about "terministic screens," "occupational psychoses," and "trained incapacities" provide useful metaphors for understanding the ways in which the rhetoric of a particular discipline might shape our capabilities of seeing, knowing, believing, and imagining. See K. Burke, *Permanence and Change*, supra note 4, at 7-8, 237-40; K. Burke, *Language*, supra note 4, at 44-62; id. at 189 (as to "terministic screen"); K. Burke, supra note 2, at 133 (as to "occupational psychosis"); K. Burke, *The Philosophy of Literary Form: Studies in Symbolic Action* 315 (1941).

(2) Within the legal community, James Boyd White and his students will be heard to say that we constitute ourselves and our communities through our rhetorical commitments. See texts cited supra note 8. In one recent and representative book review, White argues that "forms of language" are "forms of life," White, *Book Review*, supra note 8, at 2036; that texts create or constitute "experiential and ethical reality," id. at 2034; that "our languages and our habits of thought . . . are . . . what we see with," id. at 2036; that through "our talk we define ourselves [and] our audience," id. at 2037; and that "[e]conomics and law are both ways of imagining the world, ways for which we are responsible," id. at 2038. See also the work of Wayne Booth, supra note 7.

(3) White's argument is also embodied in what I understand to be a long tradition among the teachers of writing. See, e.g., W. Coles, *Composing II: Writing as a Self-Creating Process* (1974); W. Coles, *The Plural I* (1974). J. White, *Imagination*, supra note 8, is probably best understood as a part of this tradition.

(4) In sociology, we find these ideas in Karl Mannheim's writings about ideology. See, e.g., K. Mannheim, *Ideology and Utopia* (1936). In writing out of this tradition, John Griffiths has used the concept of ideology to refer to

that set of beliefs, assumptions, categories of understanding, and the like, which affect and determine the structure of perception (not only of physical phenomenon, like causation, . . . but also . . . of social facts, relationships and possibilities). Ideological beliefs are pre-logical because they determine the structure of perception and consciousness and therefore are enmeshed in the factual and linguistic premises of argument.

What I will suggest is that there is, as we all on some level already know, a discipline-specific rhetoric of law, and that this rhetoric shapes our advocacy, our judicial opinions, our scholarship, and our

Griffiths, *Ideology in Criminal Procedure*, 79 *Yale L.J.* 359, 359 n.1 (1970).

(5) In the philosophy of language and linguistics, see, e.g., J. Austin, *How to Do Things with Words* (1962); J. Derrida, *Of Grammatology* (1976); F. de Saussure, *Course in General Linguistics* (1983); G. Lakoff & M. Johnson, *Metaphors We Live By* (1980); *Language, Thought and Reality: Selected Writings of Benjamin Lee Whorf* (J. Carroll ed. 1956); *Philosophical Perspectives on Metaphor* (M. Johnson ed. 1981); L. Wittgenstein, *Philosophical Investigations* (G. Anscombe trans. 1958).

(6) In literary scholarship, Stanley Fish and a great many others have argued that the meaning of texts is constituted through what are essentially a set of rhetorical commitments. This perspective is common to virtually all forms of post-structuralist critical theory including, among others, semiotics, deconstruction, psychoanalytic criticism, reception theory, reader-response theory, feminist theory, and the new historicism. See, e.g., Fish, "Interpreting the *Variorum*," 2 *Critical Inquiry* 465 (1976); J. Culler, *The Pursuit of Signs: Semiotics, Literature, Deconstruction* 47-54 (1981); C. Norris, *Deconstruction: Theory and Practice* (1982); *Reader-Response Criticism* (J. Tompkins ed. 1980); R. Scholes, *Semiotics and Interpretation* (1982); *Twentieth-Century Literary Theory* (K. Newton ed. 1988); Howard, *The New Historicism in Renaissance Studies*, 16 *Eng. Literary Renaissance* 13 (1986).

(7) Anthropologists, informed both by Burke and by the semioticians, have extended the definition of "texts"—and the assertion that their meaning is constituted through what I am calling rhetorical commitments—to include just about everything. See, e.g., C. Geertz, *Local Knowledge* (1983); C. Geertz, *The Interpretation of Cultures* 3-30 (1973) [hereinafter C. Geertz, *Interpretation*]; *Writing Culture: The Poetics and Politics of Ethnography* (J. Clifford & G. Marcus eds. 1986).

(8) Michel Foucault has created elaborate rhetorical (or discursive) structures sometimes identified as "epistemes" that he argues comprise the set of relations that unite discursive practices, schemes of perception, structures of thought, and the conditions for the production of knowledge. See, e.g., M. Foucault, *The Archaeology of Knowledge* (1972); M. Foucault, *The Order of Things: An Archeology of the Human Sciences* (1970); *After Foucault: Humanistic Knowledge, Postmodern Challenges* (J. Arac ed. 1988); S. Foss, K. Foss & R. Trapp, *Contemporary Perspectives on Rhetoric* 189-211 (1985) (regarding the specifically rhetorical dimension of Foucault's contribution).

(9) In that branch of philosophy that is antifoundational and not chiefly linguistic, see, e.g., R. Bernstein, *Beyond Objectivism and Relativism* (1983); A. MacIntyre, *Whose Justice? Which Rationality?* (1988) [hereinafter A. MacIntyre, *Whose Justice?*]; A. MacIntyre, *After Virtue* (1981); R. Rorty, *Contingency, Irony, and Solidarity* (1989) [hereinafter R. Rorty, *Contingency*]; R. Rorty, *Philosophy and the Mirror of Nature* (1979).

(10) Feminists, both inside and outside the legal academy, have argued that gender, together with its consequences, is socially constructed. See, e.g., C. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987) [hereinafter C. MacKinnon, *Feminism Unmodified*]; C. MacKinnon, *Toward a Feminist Theory of the State* (1989) [hereinafter C. MacKinnon, *Toward a Feminist Theory*]; Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 *J. Legal Educ.* 3 (1988); Donovan, *Beyond the Net: Feminist Criticism as a Moral Criticism*, 17 *Denver Q.* 40 (1983); Minow, *Feminist Reason: Getting It and Losing It*, 38 *J. Legal Educ.* 47 (1988) [hereinafter Minow, *Feminist Reason*]; Minow, *supra* note 2; Phinney, *Feminism, Epistemology, and the Rhetoric of Law: Reading Bowen v. Gilliard*, 12 *Harv.*

teaching. I will identify the rhetoric of law in terms of a linked set of

Women's L.J. 151 (1989); Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 Yale L.J. 1373 (1986).

(11) Elsewhere within the legal academy, others have made similar arguments based on the contingency and the social construction of reality in law. See, e.g., Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 Tex. L. Rev. 1563 (1984); Gordon, *Critical Legal Histories*, 36 Stan. L. Rev. 57 (1984); Peller, *The Metaphysics of American Law*, 73 Calif. L. Rev. 1159 (1985); Tushnet, *An Essay on Rights*, 62 Tex. L. Rev. 1363 (1984). Cf. R. Posner, *The Problems of Jurisprudence* 465 (1990) (making the remarkable if not fully persuasive claim that the author now embraces, and speaks for, the antifoundationalist, antipositivist tradition that I am here describing as rhetorical; note in particular the second full sentence on 465).

(12) In the history of science, see, e.g., T. Kuhn, *The Structure of Scientific Revolutions* 113, 150 (2d ed. 1970).

(13) In the sociology of knowledge, see, e.g., P. Berger & T. Luckmann, *The Social Construction of Reality* (1966).

(14) In the sociology of scientific knowledge and the "strong programme," see, e.g., B. Barnes, *About Science* (1985); H. Collins & T. Pinch, *Frames of Meaning: The Social Construction of Extraordinary Science* (1982); K. Knorr-Cetina, *The Manufacture of Knowledge: An Essay on the Constructivist and Contextual Nature of Science* (1981); B. Latour & S. Woolgar, *Laboratory Life: The Social Construction of Scientific Facts* (1979); M. Mulkey, *The Word and the World: Explorations in the Form of Sociological Analysis* (1985); *Science in Context: Readings in the Sociology of Science* (B. Barnes & D. Edge eds. 1982); *Science Observed: Perspectives on the Social Study of Science* (K. Knorr-Cetina & M. Mulkey eds. 1983); Manicas & Rosenberg, *Naturalism, Epistemological Individualism and "The Strong Programme"* in the *Sociology of Knowledge*, 15 *J. for Theory Soc. Behav.* 76 (1985).

(15) In history, these ideas have been carried forward by such investigators as Hayden White and Dominick LaCapra. See, e.g., D. LaCapra, *Rethinking Intellectual History: Texts, Contexts, Language* (1983); H. White, *The Content of the Form: Narrative Discourse and Historical Representation* (1987); H. White, *The Tropics of Discourse* (1978); H. White, *Metahistory: The Historical Imagination in Nineteenth-Century Europe* (1973); LaCapra, *Culture and Ideology: From Geertz to Marx*, in *The Rhetoric of Interpretation and the Interpretation of Rhetoric* (P. Heruadi ed. 1989) [hereinafter *Rhetoric of Interpretation*].

(16) Finally, see W. Stevens, *The Idea of Order at Key West*, in *The Collected Poems of Wallace Stevens* 128-30 (1955).

The alternative perspective against which all of these voices are speaking can be described in terms of positivism, if one understands that term as it is used in philosophy, science, and linguistics, but not as it is used in jurisprudence. It is a position associated with the assumed "transparency" of language and the noncontingency of textual meaning, knowledge, truth, and fact. See, e.g., C. Brooks & R. Warren, *Moderu Rhetoric* 3 (2d ed. 1958) (on how language shapes thought, if language is transparent and "the normal workings of the mind" are noncontingent); White, *Book Review*, supra note 8 (regarding Richard Posner's assumptions concerning the transparency of language). Within this perspective, rhetoric quickly becomes a matter of mere ornamentation or of the improper exploitation of passions and prejudices.

What is perhaps most interesting about the idea that different cultures and subcultures (including the subcultures of law and literature) adopt and employ different rhetorics, and that one's choice and mastery of a particular rhetoric makes a difference, is an idea that, in one form or another, is shared by those who are politically conservative as well as those who are most deeply committed to reform, by the guardians of disciplinarity as well as the shock troops

rhetorical commitments. These include commitments to a certain kind of toughmindedness and rigor, to relevance and orderliness in discourse, to objectivity, to clarity and logic, to binary judgment, and to the closure of controversies. They also include commitments to hierarchy and authority, to the impersonal voice, and to the one right (or best) answer to questions and the one true (or best) meaning of texts. Finally, the rhetoric of our discipline reveals our commitment to a particular conception of the rule of law.<sup>15</sup> In identifying the discipline-specific rhetoric of law, I will sometimes draw comparisons between the rhetorical practices of law and literature, each a discipline devoted to the understanding of written texts. The picture that I draw will be filled with qualifications, exceptions, and discontinuities. In the end, though, I think it will also be reasonably clear.<sup>16</sup>

I believe this inquiry to be interesting and potentially important for the degree to which it may help us solve, or at least understand, a series of persistent and seemingly unrelated problems. These include the matter of voice that has been raised by Jack Getman;<sup>17</sup> the urge to reduction and certainty with which Grant Gilmore and Arthur Leff

of interdisciplinarity, by the ethnographers as well as the theoreticians, and by the Marxists as well as the Aristotelians.

<sup>15</sup> While a particular set of rhetorical commitments can be specific to a particular discipline, such rhetorical sets can also be specific to particular *cultures*. Thus, for instance, socially elite Protestant reformers of sixteenth-century Germany sought to suppress a form of popular culture that it associated with folk rites and rituals, magic, superstition, folk healing, dance, and idolatry. The principles which the Protestant elite sought to substitute for this culture of imagination were

first, order, then reason, next the orderly and reasonable conditions of uniformity and orthodoxy and the authority of the written word, finally, and underlying all of these, an unquestioned faith in the objective existence of truth coupled with the conviction that this truth can be known and can be formulated as laws of belief and conduct.

Strauss, *How to Read a Volksbuch: The Faust Book of 1587, in Faust through Four Centuries: Retrospect and Analysis* 27, 29 (P. Boerner & S. Johnson eds. 1989).

<sup>16</sup> [*Rhetorical note*: Note, first, that one might or might not privilege "clarity" as a criterion of good writing and, second, that we lawyers cannot really imagine its not being privileged in that way. See Fish, *supra* note 3, at 482 (on the antirhetorical virtue of rhetorical clarity); Jay, *The Rise of Hermeneutics and the Crisis of Ocularcentrism, in Rhetoric of Interpretation*, *supra* note 14(15), at 55 (on the contingency and significance of ocular metaphors); Jay, *In the Empire of the Gaze: Foucault and the Denigration of Vision in Twentieth-Century French Thought, in Foucault: A Critical Reader* 175 (D. Hoy ed. 1986) (demonstrating the cultural and historical contingency of ocularcentrism).]

<sup>17</sup> See Getman, *supra* note 9; see also, e.g., Rodell, *Goodbye to Law Reviews—Revisited*, 48 Va. L. Rev. 279 (1962) (a good-natured denunciation of the style and voice in which most law review articles are written).

struggled;<sup>18</sup> the sufficiency and consequences of our narrative practices;<sup>19</sup> James Boyd White's implicit complaint about how we lawyers constitute ourselves through our rhetoric;<sup>20</sup> and the persistent debate over nihilism.<sup>21</sup> Analyzing the rhetoric of our discipline may also shed light on the reputation of our profession and the limits of our skills. It may help us to understand the idiosyncratic ways in which we privilege certain academic disciplines while shunning others<sup>22</sup> and the further ways in which we transform those disciplines to which we grant our attention.<sup>23</sup>

It may also help us address a series of important questions about legal pedagogy. These are questions about whether we are preparing our students for the full range of roles they will play in their professional careers; about the effects of legal training on their nonprofessional lives; about the alienation and the resignation that is reported among our students; and about whether we are, in our teaching, shortchanging the possibilities of justice, democracy, and virtue.<sup>24</sup>

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<sup>18</sup> In G. Gilmore, *The Ages of American Law* (1977), Gilmore spoke against what he saw as the persistent reductionism of our discipline. Thus, for instance, he said that "[t]he quest for the laws which will explain the riddle of human behavior leads us not toward truth but toward the illusion of certainty, which is our curse." *Id.* at 100. For Leff's views, see, e.g., Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 *Va. L. Rev.* 451 (1974); Leff, *Law and*, 87 *Yale L.J.* 989 (1978). See also Minow, *supra* note 2, at 16 (the "yearning for simple and clear solutions is part of the difference problem").

<sup>19</sup> See, e.g., *Legal Storytelling*, *supra* note 9.

<sup>20</sup> See *supra* note 8.

<sup>21</sup> See, e.g., Carrington, *supra* note 13, at 227 (suggesting that many proponents of Critical Legal Studies are "nihilists" who owe an ethical obligation to leave the legal academy); "Of Law and the River," and of Nihilism and Academic Freedom, 35 *J. Legal Educ.* 1 (1985) [hereinafter "Of Law and the River"] (correspondence provoked by Carrington's essay); Fiss, *The Death of the Law?*, 72 *Cornell L. Rev.* 1 (1986).

<sup>22</sup> What I have in mind is the law's predisposition to listen more closely to economics than to ethnographic anthropology, to the reductionist forms of neoclassical economics than to the institutionalist forms that preceded it, to foundational philosophies than to their nonfoundational competitors, to those who speak about the possibility of objectivity in language than to those who speak about the limits of that possibility. For a more thorough explanation, see *infra* text following note 73.

<sup>23</sup> See, e.g., Friedman, *The Law and Society Movement*, 38 *Stan. L. Rev.* 763 (1986); Sarat & Silbey, *The Pull of the Policy Audience*, 10 *Law & Pol'y Q.* 97 (1988); Silbey & Sarat, *Critical Traditions in Law and Society Research*, 21 *Law & Soc'y Rev.* 165 (1987); Trubek & Esser, "Critical Empiricism" in *American Legal Studies: Paradox, Program, or Pandora's Box?*, 14 *Law & Soc. Inquiry* 3 (1989).

<sup>24</sup> See, e.g., Brest, *On My Teaching*, 14 *Stan. Law.* 23 (1979) (suggesting all of these problems); Halpern, *On the Politics and Pathology of Legal Education*, 32 *J. Legal Educ.* 383 (1982) (describing legal pedagogy as authoritarian and needlessly disempowering); Kennedy,

All of these matters are, I think, implicated in the larger pattern which is the law's deeply ironic resistance to rhetoric and the perspective it entails—a resistance that Stanley Fish has captured in his description of the competing, incommensurable universes of rhetoric and philosophy.<sup>25</sup> The irony is in the fact that, on the one hand, law is the very profession of rhetoric. We are the sons and daughters of

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Legal Education as Training for Hierarchy [hereinafter Kennedy, Legal Education], in *Politics of Law* 40 (D. Kairys rev. ed. 1990) (arguing that students are disempowered and adversely transformed by conventional legal pedagogy); Kronman, *Foreword: Legal Scholarship and Moral Education*, 90 *Yale L.J.* 955 (1981) (expressing concern over effects that law teaching may have on our students' character and moral judgment); Pickard, *Experience as Teacher: Discovering the Politics of Law Teaching*, 33 *U. Toronto L.J.* 279 (1983) (exploring sources and consequences of power and hierarchy in legal education); With the Editors, 84 *Harv. L. Rev.* vii (Nov. 1970) (expressing concern over the loss of esthetic and emotional capacities and spirit); see also M. Mayer, *The Lawyers 76-77* (1966) (quoting Dean Mentchikoff advising the wives of incoming law students that their husbands' personalities were about to become "more aggressive, more hostile . . . more impatient"); Auerbach, *What Has the Teaching of Law to Do with Justice?*, 53 *N.Y.U. L. Rev.* 457 (1978) (stating that legal education was largely divorced from the social consequences of lawyering); Bok, *A Flawed System of Law Practice and Training*, 33 *J. Legal Educ.* 570 (1983) (suggesting that law school's emphasis on conflicts leaves students unprepared for the realities of legal practice); Carrington & Conley, *The Alienation of Law Students*, 75 *Mich. L. Rev.* 887 (1977) (study reporting a significant alienation among University of Michigan law students); Feinman & Feldman, *Achieving Excellence: Mastery Learning in Legal Education*, 35 *J. Legal Educ.* 528 (1985) (criticizing the legal academy's pedagogical assumptions and arrogance with regard to what we might not know about teaching); Himmelstein, *Reassessing Law Schooling: An Inquiry into the Application of Humanistic Educational Psychology to the Teaching of Law*, 53 *N.Y.U. L. Rev.* 514 (1978) (suggesting a need to instill humanist values); Kennedy, *How the Law School Fails: A Polemic*, 1 *Yale Rev. L. & Soc. Action* 71 (1970) (arguing that the Socratic method promotes hostility among law students); Savoy, *Toward a New Politics of Legal Education*, 79 *Yale L.J.* 444 (1970) (criticizing conventional legal pedagogy); Stone, *Legal Education on the Couch*, 85 *Harv. L. Rev.* 392 (1971) (assessing the consequences of conventional legal pedagogy); Tomain, *False Idylls of Lawyering*, 35 *J. Legal Educ.* 157 (1985) (arguing that professors need to discuss lawyering as a moral enterprise). For a range of related readings, see the texts and commentary in E. Dvorkin, J. Himmelstein & H. Lesnick, *Becoming a Lawyer: A Humanistic Perspective on Legal Education and Professionalism* (1981).

<sup>25</sup> His distinction is between "rhetorical" and "serious" (i.e., philosophical) man. Fish, *supra* note 3, at 482-83. Serious man lives in a world in which selves have irreducible identities, worlds are "out there," and language is a potentially transparent medium in which *selves* may convey information (including *facts*) about *the world*. *Id.* at 482 (quoting R. Lanham, *The Motives of Eloquence* 1 (1976)).

What serious man fears—the invasion of the fortress of essence by the contingent, the protean, and the unpredictable—is what rhetorical man celebrates and incarnates. In the philosopher's vision of the world rhetoric (and representation in general) is merely the (disposable) form by which a prior and substantial content is conveyed; but in the world of *homo rhetoricus* rhetoric is *both* form and content, the manner of presentation

Gorgias himself.<sup>26</sup> But if law is, at its core, the practice of rhetoric, the *particular* rhetoric that law embraces is the rhetoric of foundations and logical deductions. And that particular rhetoric is one that relies, above all else, upon the denial that it is rhetoric that is being done. Thus, the rhetoric of foundationalism is the essence of philosophy and the antithesis of rhetoric.<sup>27</sup> If, as I suggest, law *is* rhetoric but the particular rhetoric embraced by the law operates through the systematic *denial* that it is rhetoric, then it should come as no surprise that difficulties sometimes confront us.

I do not suggest that this preliminary investigation will somehow solve all of our problems. Rather, I simply invite you to consider whether the approach I am suggesting offers an understanding of the source, the interrelatedness, the embeddedness, and the persistence of these problems.<sup>28</sup> If it does, that understanding may prove useful both in dealing with our day-to-day affairs and, in the longer run, in sustaining legal discourse in a scholarly universe in which the episte-

and what is presented; the "improvising power of the rhetor" is at once all-creating and the guarantee of the impermanence of its creations . . . .

Which of these views of human nature is the correct one? The question can only be answered from within one or the other, and the evidence of one party will be regarded by the other either as illusory or as grist for its own mill. . . . That is to say, for rhetorical man the distinctions (between form and content, periphery and core, ephemeral and abiding) invoked by serious man are nothing more than the scaffolding of the theater of seriousness, are themselves instances of what they oppose. And on the other side, if serious man were to hear *that* argument, he would regard it as one more example of rhetorical manipulation and sleight of hand, an outrageous assertion that flies in the face of common sense, the equivalent in debate of "so's your old man." And so it would go, with no prospect of ever reaching accord, an endless round of accusation and counteraccusation in which truth, honesty, and linguistic responsibility are claimed by everyone: "from serious premises, all rhetorical language is suspect; from a rhetorical point of view, transparent language seems dishonest; false to the world."

And so it *has* gone; the history of Western thought could be written as the history of this quarrel.

Id. at 482-84 (quoting R. Lanham, *The Motives of Eloquence* 1 (1976)).

<sup>26</sup> Gorgias was a sophist and a teacher of rhetoric in the age of Socrates. Plato's dialogue bearing his name is a conversation between (Plato's) Socrates on the one hand and, on the other, Gorgias and a number of his students. Plato, *supra* note 3. Socrates is clearly the voice of philosophy, Gorgias the voice of advocacy.

<sup>27</sup> See, e.g., R. Bernstein, *supra* note 14(9); A. MacIntyre, *Whose Justice?*, *supra* note 14(9); R. Rorty, *Contingency*, *supra* note 14(9); Fish, *supra* note 3, at 472-84.

<sup>28</sup> [*Rhetorical note*: Notice the difference between this invitation and the more customary claim that "this Article will show" or "argue" or "demonstrate" or "seek to prove." Consider what difference, if any, this distinction may make. Consider also, if you have not already, the possibility that this lawyer, when he says "invite," really means prove.]

mological assumptions on which we have historically relied are now being cast in serious doubt.<sup>29</sup>

I am, through an inescapably rhetorical text, seeking to reflect upon the discipline-specific rhetoric of law. After some failed attempts to do otherwise, I have chosen to write *within* the rhetorical conventions about which I am writing.<sup>30</sup> In that sense, this text is *self-exemplary*,<sup>31</sup> both in ways of which I am fully conscious and in other ways that seem decidedly beyond my control. It is also *reflexive*.<sup>32</sup> Thus, in addition to the usual footnotes, the bottom of the page will also contain occasional "rhetorical notes" in which I shall identify and sometimes reflect upon the rhetoric of the article that you are reading.<sup>33</sup> You, too, are invited to reflect upon my rhetoric—and, of course, upon your own. This approach permits me simultaneously to explain myself and to illustrate my explanation. Similarly, it promotes self-consciousness, mine as well as yours, about the rhetorical conventions within which we work.<sup>34</sup> I hope that it may also demonstrate that we can conduct useful and constructive investigations without either

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<sup>29</sup> [*Rhetorical note*: Note that there are virtues in writing other than "utility," including, for example, reflection and pleasure, but that we lawyers are chiefly committed to utility.]

<sup>30</sup> [*Rhetorical note*: I found in the course of those earlier efforts that, to the degree I departed from the conventions of my discipline, the audience I most wanted to reach—my colleagues—responded to my text with confusion, frustration, disappointment, and anger. Perhaps I should have known better. According to the rhetorician Kenneth Burke, "[y]ou persuade a man only insofar as you can talk his language by speech, gesture, tonality, order, image, attitude, idea, identifying your ways with his." K. Burke, *supra* note 2, at 55.]

<sup>31</sup> A self-exemplary text is one in which "what is said is exemplified by the way in which it is said." M. Ashmore, *The Reflexive Thesis* 76 (1989).

<sup>32</sup> As I am using this term, it applies to my text in the degree to which it is self-aware and consciously self-referential. See, e.g., M. Ashmore, *supra* note 31 (exemplifying a reflexive text; defining reflexivity at, e.g., 30-32); Pickard, *supra* note 24 (a reflexive text within the literature of law).

<sup>33</sup> My use of the *rhetorical note* may be compared to the use of the author's voice in fiction. See W. Booth, *Fiction*, *supra* note 7, at 169-266 (on the author's voice in fiction); L. Sterne, *The Life and Opinions of Tristram Shandy, Gentleman* (1760) (the Shandean commentary); M. Cervantes, *Don Quixote* (1615) (the commentary of Cid Hamete Benengeli); and my personal favorite V. Nabokov, *Lolita* (1955) (the commentary of Humbert Humbert). Even in 1961, Booth observed that there was a "great outburst of self-conscious narrators in the twentieth century." W. Booth, *Fiction*, *supra* note 7, at 234. Certainly this is true in literature. Just as certainly, it is not true in law. He also points out that an "author's voice" can be more or less reliable. *Id.* at 239.

<sup>34</sup> Jolm Griffiths describes ideology as a "set of beliefs, assumptions, categories of understanding, and the like, which affect and determine the structure of perception." Griffiths, *supra* note 14(4), at 359 n.1. Ideology is, he says, "pre-logical because [it] determine[s] the structure of perception and consciousness and therefore [is] enmeshed in the factual and

denying or suppressing the fact that, from beginning to end, our discourse is wholly, inevitably rhetorical.<sup>35</sup>

## I. THE DISCIPLINE-SPECIFIC RHETORIC OF LAW<sup>36</sup>

### A. *The Rhetoric of Advocacy and Judicial Decisions*

The first subject we shall examine is the lawyer's rhetoric of advocacy and, more particularly, the rhetoric of formal legal argument of

linguistic premises of argument." Id. Then, and this is the part in which I am interested, he says:

It is only self-consciousness concerning the existence and nature of ideology which permits an appreciation of the extent to which it determines the contents of the world of experience and possibility. Self-consciousness is therefore the primary intellectual virtue. The analytic rigor appropriate to logical discourse is relatively less important, because the very content of the concepts to be used is at stake, and the latent propositions involved do not submit themselves to the sort of empirical or logical refutation that is possible once the ideological structure of a domain is set.

Id. From another perspective, Elizabeth Meese has written that "[t]he principal task of feminist criticism, in providing a necessary re-vision of the politics of 'truth,' is to make its own ideology explicit. If we seek to transform the structures of authority, we must first name them, and in doing so, unmask them for all to see." Meese, *Sexual Politics and Critical Judgment*, in *After Strange Texts: The Role of Theory in the Study of Literature* 99 (G. Jay & D. Miller eds. 1985). Her object, she explains, is to "stay clear of a hegemonic role reversal that results from unending deconstructions of oppositions like male/female and insider/outsider where the second term simply replaces the first in an infinite regression within an economy of oppression." Id. at 99-100.

<sup>35</sup> [Rhetorical note: This ends the introduction. Within the conventions of our discipline, these introductions serve several purposes. One of those purposes, surely, is to persuade the reader that the matter about which we are writing is interesting or, this being law, important. Another is to create the belief that what we have to say on the subject is worth the effort required in reading the piece or, this being a law review, in scanning through our captions in search of something useful.

[Both of those purposes are promoted if the author can establish his personal credibility in speaking about the matter at hand. See Aristotle, *supra* note \*. Our practices with regard to the number, size, and location of our footnotes are clearly designed to aid in the establishment of that credibility. See *infra* text accompanying notes 64-69.

[Further, the introduction allows us to summarize our argument, so that you will know where we are headed. See M. Cicero, *supra* note 3. This is part of our larger strategy of telling you what we are going to tell you (the introduction), then telling you (the part between the introduction and the conclusion), and then telling you what we told you (the conclusion). In connection with this aspect of the rhetoric of introductions, it is customary to conclude the introduction with a paragraph comprised of a series of parallel sentences explaining that "Section II is about . . ." "Section III then examines . . .," and "Section IV addresses . . ." All of these conventions serve the purposes of linearity, clarity, the bottom line, paraphrasability, and the efficient "read."]

<sup>36</sup> [Rhetorical note: This is a heading. It will be followed by a number of subheadings. If this were an especially weighty piece, there would also be sub-subheadings. The ones that

the kind that one finds in a brief or in oral argument to a court. This rhetoric is highly predictable: the lawyer is always right and his adversary is always wrong. Moreover, the lawyer's rightness and his adversary's wrongness are not a matter of opinion, nor is it one way of looking at the matter. The lawyer *is* right and his adversary *is* wrong. The lawyer offers certainty, closure, and the one right answer to the question at hand. If the argument is effective, it quietly and perhaps respectfully coerces its audience.<sup>37</sup> It "follows" like the night follows the day. There is no getting away from it.

In producing these effects, the good lawyer will operate within a number of quite specific rhetorical conventions:

1. The lawyer's exposition will be clear, orderly, linear, and paraphrasable. His audience will never be "lost" and will never need to ask "what's the point?" or "what is he driving at?" or "where is he going?" According to one old saw, the lawyer will K.I.S.S., or "keep it simple, stupid." According to another, he will tell you what he's going to tell you, then he will tell you, and then he will tell you what he has told you. It is not his purpose to provoke thought but rather to provoke closure. What the judge will understand, remember, and internalize is a short, paraphrased paragraph which proves that the lawyer's side wins.

2. The lawyer will do everything within his power to suppress his personal voice and to speak in the objective and authoritative tones of "reason," "science," "logic," and "the law." He will do whatever is necessary, even when it means violating the conventions of good writing, to avoid the use of "I" as the subject of his sentences and to hide

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appear in this Article are here both because I believe they help the reader to understand the linear march of argument and because a number of my legal academic readers said that they were disoriented by the absence of headings in earlier drafts. Headings reveal, in outline form, the structure of the Article. Captions are also an aid to scanning and thus to efficient reading. In that sense, they are similar to the system of "key" numbers with which reported cases are indexed against one another and with which the competent lawyer can confine his reading to exactly the paragraph in the text that suits his needs. Headings will also be found in legal briefs, but in that genre they are still more controlling. In our briefs, captions appear as paraphrased sentences, not as topics. If this Article were a brief, this "caption" might read: "I. There Is a Discipline-Specific Rhetoric of Law that Manifests Itself in Our Advocacy, Our Judicial Decisions, Our Scholarship, and Our Teaching."]

<sup>37</sup> I will use the word "coercive" at a number of points in my argument. I am using it in the sense in which it is used in Nelson, Megill & McCloskey, *Rhetoric of Inquiry, in Human Sciences*, supra note 9, at 9, and in White, *Book Review*, supra note 8, at 2014, 2017-18, 2028.

the fact that there is an author who is speaking. His purpose, of course, is to enhance the apparent authority of his text.

3. The lawyer will speak about texts as if their meanings were clear and uncontroversial and as if they had, and could only have, one true meaning.

4. The lawyer will rely as heavily as he can upon authority, whether it is the authority of previously decided cases or the authority of a highly qualified expert witness. He will do so because it is his job to overcome his adversary and to overwhelm the judge so that she is "compelled" to decide in accordance with the lawyer's argument.

5. The lawyer will engage in a style of argument and proof that is highly rational and that is made in the spirit, and where possible the form, of deductive, syllogistic logic. His reason for adopting this form of argument is that it serves the purposes of coercion and closure.

6. The lawyer will tell a story, weave a narrative, that he is likely to recognize as his own creation.<sup>38</sup> It will be his purpose, in generating this narrative, to enhance the intelligibility and the persuasiveness of his argument.<sup>39</sup> He will make every effort to disguise the fact that this story is his creation and to present it, instead, as a simple revelation of the objective truth.

7. Finally, as Plato's Socrates has shown us, the lawyer's commitment to his client will inevitably subordinate truth to instrumental effectiveness.<sup>40</sup> Even the supposedly benign practice of putting matters of fact or of law "in the best light" is an attempt to create in our audience some particular belief that is different from—and strategically more to our advantage than—the belief that we hold.<sup>41</sup> In this sense, overclaiming is central to advocacy.

This picture is a little too stark and requires some qualification. First, good lawyers are, by definition, not stupid about these matters. To be effective, the lawyer must confine his<sup>42</sup> overclaiming in order to

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<sup>38</sup> See, e.g., L. Bennett & M. Feldman, *Reconstructing Reality in the Courtroom* (1981); *Legal Story Telling*, *supra* note 9.

<sup>39</sup> The relationship that these stories have to the truth is complex and sometimes troubling. See Wetlauffer, *The Ethics of Lying in Negotiations*, 75 *Iowa L. Rev.* — (1990) (section on "putting matters in the best light").

<sup>40</sup> See Plato, *supra* note 3; Kronman, *supra* note 24.

<sup>41</sup> See Wetlauffer, *supra* note 39.

<sup>42</sup> [*Rhetorical note*: I am acutely aware that my lawyer is male. In fact, most of them are. Indeed, the rhetoric I am describing may, at least in some degree, be both discipline-specific and gender-specific. Cf., e.g., C. Gilligan, *In a Different Voice* (1982) (demonstrating the

preserve his credibility. Thus, when he writes his statement of facts he will “lawyer” those facts, but he will do so gently enough that his reader will accept his statement as “the facts.” The standard by which lawyers consistently measure their rhetoric is a standard of effectiveness. To pursue any of these conventions so far as to render them counterproductive is to fail in our rhetorical purpose. Second, so long as it may serve our purposes, we lawyers have nothing against the truth. Indeed, under such circumstances, we are quite prepared to put it to good use. Third, and this actually illustrates my point about the truth, lawyers—or at least good lawyers—tend to *read* texts differently than they speak about them. Thus, if, in the good lawyer’s *speaking*, texts tend to have one true and objectively ascertainable meaning, that same lawyer is likely to read and think about those texts as if they were highly indeterminate pots of rhetorical possibilities that could be put to work in the service of his various projects. Finally, good lawyers understand, at some level, that persuasion requires more than the simple application of the principles of deductive logic and narrowly rational argumentation. This broader understanding of rhetoric is most evident in those lawyers who are particularly effective in dealing with juries, in selling legal services, in transactional negotiations, and in politics. It is not my point that all lawyers have suffered some kind of truncation of their rhetorical capacities. I mean only to say that those who do not suffer such a truncation have somehow transcended (or failed to achieve) the relatively narrow rhetoric that we recognize as thinking and speaking “like a lawyer.”

What is true of the lawyer as advocate is also generally true of the judge.<sup>43</sup> The first thing we notice is that many of the rhetorical conventions of advocacy are still to be found in judicial decisions. In certain respects, of course, judges are different from the lawyers who

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gender-specificity of certain forms of moral discourse). There will be women in this text. But they will not appear so often or in such circumstances as would suggest that the rhetoric of law may not be a male rhetoric.]

<sup>43</sup> [*Rhetorical note*: I am turning the argument from one subject to another, but I am doing it in a way that is calculated to suppress your awareness that there is an author who is making a rhetorically important choice. The suppression of the author is, in this passage, even more thorough than if I were to speak in the passive voice. You should be wondering to whom and for what purpose it is appropriate to make this move. I, in the meantime, shall stay behind my curtain and do my best to create the illusion that what you are seeing is not something I have constructed but is, instead, a transparent revelation of “what is.”]

argue before them. For instance, they are different because they have the obligation to decide contested cases. Judges may also be different because they have a higher level of duty to the judicial institutions within which they operate and, more generally, to the rule of law. Thus, unlike the lawyers whose arguments they hear, judges must struggle directly with the problem of legitimacy. What remains to be seen is whether, for the purposes at hand, these differences are very important.

Indeed, once the judge has decided the case before her,<sup>44</sup> she may assume a role as advocate that is in certain respects indistinguishable from the role that was played by the lawyers who argued the case. As was earlier true of the lawyers-with-clients, she has a position to defend. Like the lawyer-advocate, the judge has a number of audiences she must persuade that she is right and that the losing party's lawyer is wrong. These audiences include the appellate courts, the legal community, the losing party (who the judge hopes will leave the courtroom quietly and decide not to appeal the case), and the public at large. At this point, the judge has a series of client-like commitments—to her own decision, to her reputation for getting matters right, to the winning party, and to the reputation of the courts and the rule of law. The reputation of the courts and the rule of law, of course, will be sustained or enhanced by decisions that are perceived as fair, right, and legitimate—and diminished by those that are not.

It should come as no surprise, then, that the judge-cum-advocate normally writes her opinions within the same rhetorical conventions that are the trademark of the lawyer-with-client. What she reveals to us is the right answer to the question at hand. The judge's voice is even more impersonal than the lawyer's. Her vantage point is neutral and objective.<sup>45</sup> Her arguments are highly rational. They are backed

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<sup>44</sup> My concern is with the rhetorical conventions with which lawyers and judges conduct their discourse. My concern is not, at least in the first instance, with the process by which judges decide the cases with which they are presented. For purposes of this paper, I am prepared to assume that they decide those questions in a way that we would find entirely satisfactory.

<sup>45</sup> Some will say that neutrality, objectivity, and the impersonal voice are the very essence of judging and that they are central to the rule of law. See, e.g., Fiss, *Objectivity and Interpretation*, 34 *Stan. L. Rev.* 739 (1982). With particular regard to the impersonal voice, my colleague Arthur Bonfield has argued in conversation that the practice of using passive constructions ("It may be argued . . .") instead of the personal voice ("I . . .") is a practice that promotes objectivity and rationality. [*Rhetorical note*: Under a rhetorical convention of

by as many authorities as circumstances require. Whenever possible, they take the form of deductive, syllogistic proofs. Thus, the judge announces the one true state of the facts and the one true meaning of the relevant texts. The argument is coercive in that it seeks to compel the assent of its audience. The intended and actual effect is closure: the matter has been decided and the right answer has been found. In doing all of this, of course, the judge is repeating and perhaps improving upon the rhetorical moves that have already once been made by the winning lawyer in his now-successful arguments *to* the judge.

Like good lawyers, good judges are attentive to a range of persuasive possibilities broader than that here identified as the discipline-specific rhetoric of law. Thus, for instance, Supreme Court justices have sometimes set aside their syllogisms and written with a passion

legal scholarship that is a cognate to the rule against "I," I would replace "my colleague Arthur Bonfield argues" with "one might argue." I know Arthur would.]

Others will argue that the impersonal voice is a rhetorical subterfuge, that perspective is always contingent, that stories always leave something out, and that neutrality and objectivity are illusions. They would further argue, I assume, that all this may be true notwithstanding the fact that it erodes a particular vision of the rule of law or that it undermines certain claims we might like to make concerning the legitimacy of judicial decisions. Much of the work of the feminists, both inside and outside the legal academy, can be understood as an effort to demonstrate that neutrality and objectivity are an illusion and to reconstruct discourse so that otherwise marginalized voices may be heard. See, e.g., C. MacKinnon, *Feminism Unmodified*, supra note 14(10); C. Mackinnon, *Toward a Feminist Theory*, supra note 14(10); Estrich, *Rape, 95 Yale L.J. 1087* (1986); Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 Mich. L. Rev. 2099 (1989); Meese, *Sexual Politics*, supra note 34; Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989); Minow, supra note 2; Minow, *Feminist Reason*, supra note 14(10); Scales, supra note 14(10); Showalter, *Towards a Feminist Poetics*, in *Women Writing and Writing About Women* 25 (M. Jacobus ed. 1979); Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 Mich. L. Rev. 2128 (1989); see also Getman, supra note 9 (on the loss of the human voice); Rodell, supra note 17 (same); Wald, *Disembodied Voices—An Appellate Judge's Response*, 66 Tex. L. Rev. 623 (1988) (same). But see Yudof, "Tea at the Palaz of Hoon": *The Human Voice in Legal Rules*, 66 Tex. L. Rev. 589 (1988) (responding to Getman and Wald; defending abstract rules as useful and not wholly inconsistent with Getman's "human voice").

There are ample reasons for a lawyer or a judge to adopt these rhetorical conventions without regard to the truth of the objections that I have enumerated. These reasons have primarily to do with the purpose of persuading that is common to lawyers and judges. Thus, these conventions all tend to enhance the authority and the legitimacy of our pronouncements. These conventions may also reflect a desire that lawyers and judges might have to put some distance between themselves and "the human aspects of their endeavors." Wald, supra, at 627; see also A. Freud, *The Ego and the Mechanisms of Defense* (C. Baines trans. 1946) (explaining ego defense as a motive underlying human behavior). One need not accept the impossibility of objectivity in order to grant that *claims* of objectivity are powerful rhetorical moves.

that sounds more like the rhetoric of politics than what I am describing as the rhetoric of law.<sup>46</sup> Such writing is to be found in opinions, especially dissents, dealing with such politically sensitive matters as race discrimination, the scope of the first amendment, proper respect for the flag, the death penalty, or rights with regard to privacy, abortion, and homosexuality.<sup>47</sup> My understanding of these passages is that they *are* the rhetoric of politics and *not* the rhetoric of law. Even to those for whom law is quite separate from politics, these cases and these occasions are points of intersection between the two. Thus we find the dissenting justice speaking directly to the people, Congress, and the lawyers of the future, speaking against closure, and seeking to cause people to identify with his position and to change what is now the law. Or we find the Court's majority seeking an additional means of securing popular assent to a potentially unpopular decision, the justice making his speech to his jury under circumstances where such a speech may be useful or necessary. In speaking to this jury, the good judge, like the effective trial lawyer, will depart from the customary rhetoric of law.

One can begin to appreciate the degree to which the rhetoric of advocacy and judicial decisions is discipline-specific by comparing the

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<sup>46</sup> See, e.g., *Texas v. Johnson*, 109 S. Ct. 2533, 2548-52 (1989) (Rehnquist, C.J., dissenting, quoting extensively from the poetry of Emerson, Key, and Whittier; citing the music of Sousa; identifying the flag as an object of "almost mystical reverence").

<sup>47</sup> See, for instance, Chief Justice Rehnquist's dissent in *Johnson*, 109 S.Ct. at 2548 (in which the court held flag burning to be protected by the first amendment); Justice Marshall's dissent in *City of Richmond v. J. A. Croson Co.*, 109 S. Ct. 706, 739 (1989) (in which the majority held an affirmative action plan to be unconstitutional); Justice Marshall's dissent in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 387 (1978) (same); and Justice Jackson's dissent in *Korematsu v. United States*, 323 U.S. 214, 242 (1944) (in which the majority approved the wartime detention of U.S. citizens of Japanese descent); see also Justice Blackmun's dissent in *Webster v. Reproductive Servs.*, 109 S. Ct. 3040, 3067 (1989) (in which the majority upheld the constitutionality of a statute limiting the availability of abortions); Justice Blackmun's and Justice Stevens's dissent in *Bowers v. Hardwick*, 478 U.S. 186, 199, 214 (1986) (in which the majority held that a state statute criminalizing sodomy was constitutional); Justice Jackson's majority opinion in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (in which the majority held that a mandatory pledge of allegiance was unconstitutional); Justice Holmes's dissent in *Abrams v. United States*, 250 U.S. 616, 624 (1919) (in which the majority held that defendants' conviction under the Espionage Act did not violate their first amendment rights); Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (in which the majority approved a state statute requiring racially segregated railway accommodations); and Justice Harlan's dissent in *Civil Rights Cases*, 109 U.S. 3, 26 (1883) (in which the majority held that Congress lacked power to prohibit private discrimination in public accommodations).

rhetorical conventions of law with the conventions embedded in the texts of other disciplines. The other texts that I will use as a point of comparison are the stories, poems, and plays that comprise what we know as literature. Admittedly, these texts serve quite different purposes than the legal texts with which I will compare them—differences that will bear on the rhetorical conventions in which they are written. That is the point. No one will be surprised to hear that judicial decisions are different from lyric poems. What is interesting, though, is the specific *nature* of those differences.

If the purpose of a judicial decision is to close what has been open, the motive behind literature is likely to be the desire to open what has been closed. Thus, literature is likely to celebrate and explore the problematic, the uncertain, the ambiguous, the subjective, the irrational, the insoluble.<sup>48</sup> It will, at least usually, acknowledge and examine the multiplicity of perspectives and the personal contingency of reality. Though it may tell some story in a way that renders the truth, it will rarely claim to reveal the one true meaning of things. Indeed, it will confront the limits of knowledge and reason, often casting the rational and logical man not as the hero but as the fool.<sup>49</sup> It strives to preserve the problems that have not been solved—problems that may require preservation precisely because of our instinct to look away or to embrace feigned solutions. It is the place for what reason leaves out.<sup>50</sup>

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<sup>48</sup> Even the New Critics emphasize such qualities as paradox and ambiguity in literature. See, e.g., C. Brooks, *The Well Wrought Urn* (1947) (paradox is the essence of poetry); W. Empson, *Seven Types of Ambiguity* (1930) (exploring ambiguity). Counterexamples may be found in the realm of detective novels, in which, of course, the characters are themselves committed to a search for the one right answer. Even here, though, the best detectives are likely to be the best semioticians. See, e.g., U. Eco, *The Name of the Rose* (1983); T. Sebeok & J. Umiker-Sebeok, "You Know My Method": A Juxtaposition of Charles S. Peirce and Sherlock Holmes 38 (1980). For a rare exception to this rule, see M. Jevons, *Murder at the Margin* (1978) (a murder mystery, written pseudonymously by two academic economists, Kenneth G. Elzinga and William Breit, solved through the application of elementary principles of microeconomic analysis).

<sup>49</sup> Consider, for example, Malvolio in W. Shakespeare, *Twelfth Night* (1623); Polonius in W. Shakespeare, *Hamlet* (1604); the Logician in E. Ionesco, *Rhinoceros* (1960); and the British man in white in J. Conrad, *Heart of Darkness* (1899).

<sup>50</sup> See, e.g., J. Conrad, *supra* note 49. For those who favor explicit statement—and this group presumably includes most lawyers—Conrad writes in his letters that "a work of art is very seldom limited to one exclusive meaning and not necessarily tending to a definite conclusion." Letter from Joseph Conrad to Barrett H. Clark (May 14, 1918), *reprinted in* J. Conrad, *Heart of Darkness* 231 (Norton Critical Edition, R. Kimbrough ed. 1988). On

Corresponding to these differences in the purposes of the subject texts are a series of differences in the rhetorics of those texts. What one sees most clearly at the outset is that legal and literary texts are meant to achieve different effects upon their readers. In pursuit of those effects, quite different means are employed. In law, assent is secured through an appeal to reason and logic, through a strong claim to objectivity and certain knowledge, through a voice that claims objectivity and authority. In literature, the author is likely to speak through a multiplicity of voices and to accomplish her purpose not through linear, deductive proof based on appeals to the rational faculties but through the indirect rhetorics of identification and recognition,<sup>51</sup> the rhetorics of paradox and irony,<sup>52</sup> and the juxtaposition of competing perspectives<sup>53</sup>—strategies that appeal to the emotions and

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another occasion, in a letter to a critic, he complained of the treatment afforded "everything that I have, of set artistic purpose, laboured to leave indefinite, suggestive, in the penumbra of initial inspiration . . ." Letter from Joseph Conrad to Richard Curle (April 24, 1922), reprinted in J. Conrad, *Heart of Darkness* 232 (Norton Critical Edition, R. Kimbrough ed., 1988). He went on to write:

Explicitness, my dear fellow, is fatal to the glamour of all artistic work, robbing it of all suggestiveness, destroying all illusion. You seem to believe in literalness and explicitness, in facts and also in expression. Yet nothing is more clear than the utter insignificance of explicit statement and also its power to call attention away from things that matter in the region of art.

Id. Those who are disposed to favor explication would do well to compare the power of Conrad's letters on this subject with the considerably greater power of his short novel.

The fact that Richard Posner is able to reduce a piece of literature to its "holding" [*Rhetorical Note*: For nonlawyers, this is the short, paraphrased, bottom-line meaning that we assign to a case.] tells us something important about Richard Posner, and perhaps lawyers in general, as a *reader* of literature. See R. Posner, *Law and Literature: A Misunderstood Relation* (1988). The most that it might tell us about literature is that literature can sustain an extraordinarily wide range of readings, so wide even as to include Judge Posner's. I ought not, however, be too dismissive of the way Judge Posner reads literature. It is quite possible that the entire argument I am making in this Article could be built out of a careful examination of the ways in which his discipline-specific rhetorical commitments bear upon his ability to read and understand literature. Indeed, some may say that James Boyd White has already done just that in White, *Book Review*, supra note 8; see also Fish, *Don't Know Much About the Middle Ages: Posner on Law and Literature*, in S. Fish, supra note 3, at 294 (essay originally published in 97 *Yale L.J.* 777 (1988) (responding to the article that became the central essay in Posner's book)).

<sup>51</sup> See, e.g., Aristotle, *Poetics*, in Aristotle, supra note \*; K. Burke, supra note 2.

<sup>52</sup> See, e.g., W. Booth, *Fiction*, supra note 7; W. Booth, *Irony*, supra note 7; C. Brooks, supra note 48; W. Empson, supra note 48.

<sup>53</sup> See, e.g., F. Dostoevsky, *The Grand Inquisitor*, in *The Brothers Karamazov* bk. 5, ch. V (1880); L. Durrell, *The Alexandria Quartet* (comprised of *Justine* (1957), *Balthazar* (1958), *Mountolive* (1959), and *Clea* (1961)); W. Faulkner, *The Sound and the Fury* (1929); C.

the imagination.<sup>54</sup> The voices in literature are not only multiple but also contingent, both to the culture and to the person.

There is then a coherence to the rhetorical conventions of literature that is similar in kind to, and may help to clarify, the coherence of the rhetorical conventions of advocacy and judging. These two sets of conventions are assuredly different one from the other, but there is a consistency to their differences. And in each case there is a close relationship between purposes and rhetorics.

### B. *The Rhetoric of Scholarship*

Our focus now shifts to the rhetoric of legal scholarship and, at the outset, to the relationship between that rhetoric and the rhetoric, already examined, of legal advocacy and judicial decision-writing. Here again we will be well served by beginning with the question of purpose. One could fairly say that the primary purpose of conventional legal scholarship<sup>55</sup> is to generate usable solutions to problems that exist within the legal arena. Those problems can be of various kinds. Some will be quite similar to the problems that are presented to judges. As to these, the legal scholar will seek to decide and prescribe how, within the realm of law, the state ought to conduct itself and how it ought to organize and deploy its coercive powers. For this purpose, we are likely to deploy our energies to identify, describe, and analyze the problem, to identify the range of possible solutions, and then to argue—perchance to prove—the superiority of one of these

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LaClos, *Les Liaisons Dangereuses* (1782); V. Nabokov, *Pale Fire* (1962); D.M. Thomas, *The White Hotel* (1981); see also *supra* note 33 concerning the intrusion of the author's own voice in fiction.

Drama provides an even stronger example in the degree to which, operating without a narrator and relying exclusively on the voices of the characters, it is inherently dialectic. Even the least virtuous characters speak for themselves, often convincingly. See, e.g., H. Ibsen, *An Enemy of the People* (1882); W. Shakespeare, *Julius Caesar* (1623); W. Shakespeare, *King Lear* (1623); W. Shakespeare, *Macbeth* (1623).

In the realm of poetry, this dialectic quality may also be found in Satan's speeches in John Milton's *Paradise Lost* (1667).

<sup>54</sup> See Aristotle, *supra* note 51; N. Frye, *The Educated Imagination* (1964).

<sup>55</sup> By this term, I mean to exclude, without meaning to marginalize, the newer forms of legal scholarship that are being developed by the proponents of Critical Legal Studies, feminist jurisprudence, and law and humanities. For purposes of this distinction, conventional legal scholarship includes positivist social science.

possible solutions.<sup>56</sup> We may also seek to solve the problem of disarray and thus to clarify, integrate, and essentially codify a body of cases. Not all of the problems that we conventionally address are problems of doctrine. Some are problems of economics or social science or moral philosophy. But in all events, what we seek is a solution, one single answer that recommends itself above all others. Thus, while we spend a great deal of time interpreting and explaining written texts, we generally do so in aid of the larger purpose of finding the one right (or best) answer to the question at hand.

Conventional legal scholarship has at least a three-fold relationship with what might be described as the purpose of legitimating the state and the rule of law. First, some scholars have taken as their purpose—as the problem to be solved—the problem of demonstrating and perhaps enhancing the legitimacy of the system.<sup>57</sup> Next, there is a large group who regard themselves as under a prior commitment, a preexisting obligation, to preserve and promote a particular vision of the “rule of law.”<sup>58</sup> If this perspective does not entail support for each of the decisions and rules that have been rendered by our legal system, it at least entails support for the system as a whole, for the possibility of finding legitimate judicial solutions to the problems that are presented to the courts, and for the possibility of developing a system that is governed by laws, not men. Finally, the enterprise of

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<sup>56</sup> See, e.g., Gjerdingen, *The Future of Legal Scholarship and the Search for a Modern Theory of Law*, 35 *Buffalo L. Rev.* 381 (1986); Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 *Yale L.J.* 1205 (1981).

<sup>57</sup> Professor Burton has written:

In U.S. society, the ideal of legal reasoning reflects a set of values called the rule of law or a government of laws, not of men. . . . The rule of law requires that all . . . deprivations [of life, liberty, or property] occur only in accordance with the law—not arbitrarily or because an individual government official, such as a judge, might for whatever nonlegal reason think it is a good idea under the circumstances.

S. Burton, *An Introduction to Law and Legal Reasoning* 2 (1985). While Professor Burton acknowledges that this ideal is “unrealizable,” *id.* at 4, it is nonetheless clear that one of his objectives is to fashion a model of legal reasoning that “contributes to the contextual legitimacy of the U.S. legal and political system as a whole.” *Id.* at 7.

<sup>58</sup> See, e.g., Carrington, *supra* note 13, at 226-27 (noting that the legal academy cannot abide the presence of those who do not have “some minimal belief in the idea of law,” a standard that Carrington appears to believe would exclude the proponents of Critical Legal Studies); “Of Law and the River,” *supra* note 21 (reprinting letter from Paul D. Carrington to Robert W. Gordon); *id.* at 24 (reprinting letter from Paul D. Carrington to Owen M. Fiss); see also Fiss, *supra* note 21 (suggesting that the judiciary has a responsibility to generate public values).

solving problems within the legal arena itself entails the proposition that law can or does work, that there are answers available to us within the existing legal system, and that those answers are right and good.

Corresponding in some rough way to these purposes—and corresponding exactly to the rhetorical conventions we have seen in advocacy and judging—the legal scholar adopts a voice that is objective,<sup>59</sup> neutral, impersonal,<sup>60</sup> authoritative, judgmental, and certain.<sup>61</sup> It is a disembodied voice that implicitly denies any contingency upon the

<sup>59</sup> The legal scholar's claim to objectivity is different from that of a judge or an advocate. Both in the case of the advocate and of the judge-cum-advocate, the claim to objectivity may be understood in terms of a desire to enhance the authority of the text. Additionally, in the case of the judge, it may also be understood as an attempt to enhance the rule of law and, more particularly, the legitimacy of the courts. It may also be understood in terms of what Anna Freud would call an ego-defense mechanism. See A. Freud, *supra* note 45.

The legal scholar is—or would appear to be—neither an advocate, nor a judge, nor a judge-cum-advocate. The truth, of course, is that he may be all three of these. But, for whatever reason, the objective voice—and, through it, the claim of objectivity—is central to what we recognize as conventional legal scholarship. See, e.g., Fiss, *supra* note 45.

As it applies to the meaning of texts, this claim of objectivity is at odds with virtually all forms of contemporary literary theory. Even apart from texts, it is at odds with the full range of scholarly projects enumerated in *supra* note 14, including the work of feminists working within the legal academy. See, e.g., Minow, *Feminist Reason*, *supra* note 14(10); Minow, *supra* note 2.

Paul Carrington may have spoken for the hard core of the legal academy when he denounced this antiobjectivism as applied to texts as “the sort of philosophy that has given bullshit a bad name.” “Of Law and the River,” *supra* note 21, at 12 (attacking a position that sounds very much like that of his soon-to-be-colleague Stanley Fish). If that is his view of those who dispute the possibility of there being an objective meaning of a text, one can only speculate as to what he would say about those who argue that knowledge, facts, and even truth itself are socially constructed.

<sup>60</sup> Judge Wald writes of “[t]he young student editors [who] conscientiously changed every active ‘I’ in my manuscript to the passive (‘It is argued,’ ‘It may be said’).” Wald, *supra* note 45, at 627. Though Judge Wald changed them all back, she argues that the incident shows that

somehow law schools instill in students from day one the notion that they must disengage themselves from personal involvement in the human aspects of their endeavors. Most learn the lesson; some unlearn it in order to practice, while those who go on to clerkships, teaching, scholarship, and appellate judging too often remain taught.

Id.

Arthur Bonfield defends the students' practice as promoting the objectivity and rationality of scholarly discourse. See *supra* note 45. My colleague Richard Matasar has suggested in conversation that this situation is changing. He supports his claim by explaining that, since being tenured, he—like Judge Wald—has resisted the student editors on this point. That evidence, though, seems to be wholly consistent with Judge Wald's claim. [*Rhetorical Note*: If I end up replacing these names with passive constructions (“Some defend . . . . A colleague

cultural or personal circumstances of the author.<sup>62</sup> It is the voice of reason itself. If we anywhere acknowledge our personal relationship to the problems about which we are writing, we do so not in the text, not even in a note to the text, but in the author's note. And if such an acknowledgment appears, it is almost never more than a single sentence. By this avoidance of the personal voice, we preserve the rhetorical integrity of our implicit claim that what we say in the text is objective, neutral, noncontingent, and wholly rational.

Our scholarship is not just written in the voice of objective reason, it is buttressed by sometimes awesome claims of authority. The first of those claims arises from the journal in which the article is published and its position in the hierarchy of journals. The second claim of authority comes from the author's personal credentials that appear

suggests . . ."), I will do so out of respect for a convention that is the third-person equivalent of the first-person convention about which I am speaking.]

Wald's point has a counterpart in the moot court maxim that a good lawyer must minimize the number of "I" statements, presumably because they erode the speaker's implicit claim to speak on behalf of the common law or of science or of *some* authority greater than the single individual.

<sup>61</sup> The scholar's claim of certainty probably reflects, in addition to a rhetorical convention that permits us to overclaim in our arguments, the scholar's ensnarement in what Richard Bernstein has called "the Cartesian anxiety." R. Bernstein, *supra* note 14(9), at 18 ("Either there is some support for our being, a fixed foundation for our knowledge, or we cannot escape the forces of darkness that envelop us with madness, with intellectual and moral chaos."). Compare, e.g., G. Gilmore, *supra* note 18, at 100 ("The quest for the laws which will explain the riddle of human behavior leads us not toward truth but toward the illusion of certainty, which is our curse."), with Carrington, *supra* note 13 (exhibiting a nihilophobia consistent with Bernstein's Cartesian anxiety).

These constitute an additional set of motives underlying legal discourse. These motives include deciding cases, promoting the rule of law, solving the problem of legitimacy, avoiding responsibility for our actions (e.g., a judge's desire to believe that he is not personally responsible for taking someone's child or sending someone to their death), colonizing our collective or individual futures, bringing unity to an ununified universe, and so on. See Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 *Tex. L. Rev.* 1563, 1569 (1984) (describing law as a defense mechanism intended to colonize the future). Many of these motives, other than simple persuasion, obviously shed considerable light on certain of the phenomena that I am describing as rhetorical conventions.

<sup>62</sup> The exception to this rule, and it still stands almost alone, appears in Estrich, *supra* note 45. Professor Estrich introduces her article with a recounting of a personal episode in which she was the victim of rape. Her first sentence is "Eleven years ago, a man held an ice pick to my throat and said: 'Push over, shut up, or I'll kill you.'" *Id.* at 1087. Estrich's departure from the rhetorical conventions of the discipline is, while sometimes praised, often criticized in conversation as undermining the seriousness and credibility of her project. [*Rhetorical note*: Some who are not entirely within the thrall of the conventions of our discipline would regard this criticism as an implausible and ironic invocation of the virtues of objectivity.]

in the first footnote in the article.<sup>63</sup> The third, and sometimes most dramatic, involves our practices with regard to footnoting.<sup>64</sup> Our notes are not at the end of the article but at the bottom of the page, where they can have an immediate effect upon the reader.<sup>65</sup> They are, by the standards of other disciplines, unspeakably long,<sup>66</sup> unbelievably numerous,<sup>67</sup> and massively overregulated.<sup>68</sup> It is not unusual to see a page consisting of two lines of text followed by an enormous block of

<sup>63</sup> See the author's note, and the rhetorical note to the author's note, at the beginning of this Article.

<sup>64</sup> On the general question of the rhetoric of styles of citation, see Bazerman, *Codifying the Social Science Style: The APA Publication Manual as a Behaviorist Rhetoric*, in *Human Sciences*, supra note 9, at 125.

<sup>65</sup> As a reader, I also find it convenient that the notes are at the bottom of the page. It is a practice that, compared to some others, is relatively reader-friendly. This is not, of course, inconsistent with my claim that our practices enhance what Aristotle would call the ethos of the author.

<sup>66</sup> See supra note 64. [*Rhetorical Note*: See, e.g., supra note 14].

<sup>67</sup> See Jacobs, *An Analysis of Section 16 of the Securities Exchange Act of 1934*, 32 N.Y.L. Sch. L. Rev. 209 (1987) (containing 4,824 footnotes).

<sup>68</sup> Consistent with this pattern is what can only be described as an obsession with the exact form in which authority is to be handled in our footnotes. Our "Bluebook"—formally titled *A Uniform System of Citation* (14th ed. 1986) [hereinafter *Bluebook*—is now in its fourteenth edition and is 255 pages of detailed instruction concerning the form of footnotes. See Benton, *Developments in the Law—Legal Citation* (Book Review), 86 Yale L.J. 197, 198 (1976) (reviewing the twelfth edition of the *Bluebook*; comparing the *Bluebook* to "totalitarian regimes throughout history" in its "quest to impose uniformity"; welcoming relief from the eleventh edition's "draconian code of typeface strictures" governing book titles, a regime that relegated those without "sophisticated printing paraphernalia . . . to the ignominy of civil disobedience" whenever they might wish to show that they had read a book); Posner, *Goodbye to the Bluebook*, 53 U. Chi. L. Rev. 1343 (1986) (predictably favoring less regulation); see also Coombs, *Lowering One's Cites: A (Sort of) Review of the University of Chicago's Manual of Legal Citation*, 76 Va. L. Rev. 1099 (1990) (suggesting, among other things, variety of alternative signals to introduce citations in law review footnotes).

The *Bluebook* may be the best possible example of a gratuitously authoritarian rhetoric of closure. To give you the flavor of the regime, I will tell you that Rule 16.2 provides an alphabetical list of abbreviations for about 285 "periodical titles" and for many "words commonly found in periodical titles." *Bluebook*, supra, at 93. If the list contains the title of the periodical we wish to cite, our task is simple. But if it doesn't? Then we are told to

determine the proper abbreviation by looking up each word in the periodical's title on this list and on the list of geographical abbreviations found on the inside back cover. Put together the abbreviations for each word to form the full abbreviated title. Omit the words "a," "at," "in," "of," and "the" from all abbreviated titles. If any other word is listed neither here nor on the inside back cover, use the full word in the abbreviated title unless an abbreviation would both save substantial space and be completely unambiguous.

*Id.* at 94. [*Rhetorical note*: That little opportunity for discretion that we're granted at the end is a real breath of fresh air, isn't it?]

tightly packed footnotes. Indeed, you have already seen such pages within this very Article. One possible effect, of course, is to overwhelm the reader with our mastery of the subject and with our exhaustion of the available resources. We may, in a single sentence, speak in the voice of a hundred judges whose cases we have massed in a string cite at the bottom of the page. We may bring to bear on a single point of argument everyone from the pre-Socratics to Derrida. If we handle the bottom of the page correctly, we demand that our readers grant us attention and authority.<sup>69</sup>

In keeping with our objective and acontextual stance, we treat other people's texts as if they too were objective and acontextual. And in pursuing our purpose of finding the one right answer to our questions, we tend to approach other people's texts—or at least to write as if we approached other people's texts—as if they had one and only one true meaning. Thus, our rhetoric on the subject of texts is usually, at least implicitly, a rhetoric of exclusivity, of judgment and closure, and of one objective and ascertainable meaning.

In addition to these characteristics of the author's stance (objective and noncontingent) and assumptions concerning the meaning of texts (objective, noncontingent, and singular), the rhetoric of legal scholarship is also distinguished by the style of its argument and proof. Our arguments are highly rational. They are made in the spirit—and sometimes even the form—of deductive, syllogistic logic. They aspire to the linearity of a geometric proof, and they are almost always highly paraphrasable. We use them to control our reader at every point and essentially to compel her assent. Thus, we seek to prove, to a high level of certainty, that ours is the one right—or in any event the best—answer.

Here we might take as an interesting and archetypal example what Robert Bork calls "reasouing by elimination,"<sup>70</sup> an argumentative

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<sup>69</sup> I do not mean to suggest that our footnotes serve no purposes other than coercion. I, for one, find it inconvenient and often frustrating to have to go endlessly searching for endnotes. I also believe that long, substantive footnotes are a potentially interesting genre that may provide a useful dialogue with the main text. Having practiced for twelve years, I also learned to appreciate the value of an original and well-compiled string cite. In addition to all that, footnotes are rhetorically powerful and, as should by now come as no surprise, theirs is the rhetoric of authority.

<sup>70</sup> R. Bork, *Antitrust Paradox* 122-23 (1978). Others have identified the strategy as an argument by exclusion or, for those whose tastes run in this direction, an *argumentum ad ignorantium*. Ch. Perelman & L. Olbrechts-Tyteca, *supra* note 6, at 238.

strategy that is particularly popular among the proponents of the Chicago school of law and economics. The form of the argument is: (a) the answer to some question must be *A*, *B*, or *C*; (b) the answer is not or cannot be *B* or *C*; (c) therefore, the correct answer is *A*. In Chicago school antitrust analysis, the part of *A* is almost always assigned to "the behavior in question is efficiency-enhancing and therefore ought not be regulated." Mr. Bork's justification for this argument is tightly logical. Thus he quotes with approval Sherlock Holmes's dictum that "[w]hen you have eliminated the impossible, whatever remains, however improbable, must be true."<sup>71</sup> To the objection implicit in the words "however improbable," Bork argues that Holmes "did not have the advantage of the tight, logical system provided by price theory. If he had, his method of deduction would have been perfectly practical."<sup>72</sup> Practical, in a certain way; fool-proof, certainly not.<sup>73</sup>

Similarly, in our choice of the other disciplines that we consult, we choose to rely on those that offer the kinds of determinate, exclusive answer that the business of "deciding" requires. Thus, conventional legal scholarship looks primarily toward, in my terms, the disciplines of closure and away from the disciplines of openness. Among the disciplines that may be said to facilitate closure are neoclassical economics, empirical social science, game theory, deductive logic, and foundational (e.g., Kantian) and analytic philosophy. The disciplines of openness, for their part, include rhetoric, cultural anthropology, psychoanalysis, Saussurian linguistics, literary theory, and various pragmatic and Continental philosophies. Thus, the choice of whom we consult is driven by the question of what is to be gained; that ques-

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<sup>71</sup> R. Bork, *supra* note 70, at 122 (quoting A. Doyle, *The Sign of the Four* (1890)). He might also have cited *The Beryl Coronet* (1892), *The Blanched Soldier* (1926), or *The Bruce-Partington Plans* (1908). For these additional citations, I am indebted to T. Sebeok & J. Umiker-Sebeok, *supra* note 48.

Bork might also have cited Pascal's proof of the infinite divisibility of space: "Whenever a proposition is inconceivable, we must suspend our judgment and not deny it for that reason, but examine its contrary; and if we find that this is manifestly false, we may boldly affirm the original statement, however incomprehensible it may be." Ch. Perelman & L. Olbrechts-Tyteca, *supra* note 6, at 239 (quoting Pascal, *On Geometric Demonstration*, in Pascal 436, in 33 *Great Books of the Western World* (R. Hutchins ed. (1952))).

<sup>72</sup> R. Bork, *supra* note 70, at 122-23.

<sup>73</sup> What Mr. Bork fails to take into account is not the improbability of the remainder which is declared to be true, but the utter dependence of such an argument upon the completeness of the list of possible explanations with which the analysis was begun.

tion is, in turn, governed by the question of purpose. Our primary purposes being the closure of controversy and the solution of problems, we look to disciplines that offer answers of that kind. In doing so, we turn a blind eye on some of the richest and most interesting scholarship that has ever been produced. We give new meaning to blind justice.

Once again, we can highlight the rhetoric of law by comparing law with literature, this time in the realm of scholarship. Literary scholars are, like their legal counterparts, students of language and texts. They are highly trained in the very activities, understanding and speaking about texts, that are central to the discipline of law. Nevertheless, in their scholarly writing, they march to different rhetorical drummers than do their counterparts in law. Thus, the rhetoric of literary scholarship differs from that of legal scholarship, both in terms of purposes, though these are still closely related, and in terms of conventions. As is true at least in part of law, the purpose of literary scholarship is the interpretation, perhaps the illumination, of texts.<sup>74</sup> Thus, the scholar may work to help others understand the subject text or, as it is sometimes put in literature but never in law, to “open up” those texts. In addition to the interpretation and illumination of texts, literary scholars may also seek to assess or to contextualize their subject texts or simply to provide pleasure to their readers. These purposes, though they overlap to some degree with the traditional purposes of legal scholarship, do not include deciding contested cases<sup>75</sup> or prescribing solutions for society’s problems.

While scholars in law and literature share an interest in the interpretation of texts, they are likely to have quite different ideas about what that might entail. Literary scholarship is a realm in which the illumination of a text does not involve the identification of its one true meaning. This is clearest with regard to contemporary scholars who are grounded in Saussurian linguistics.<sup>76</sup> But even the New Critics—that group of literary scholars, dominant in the 1950s, who were most

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<sup>74</sup> See, e.g., R. Scholes, *Textual Power* (1985); R. Scholes, *supra* note 14(6).

<sup>75</sup> There are a few examples—*Billy Budd* is one—in which literature is, at least in part, concerned with deciding cases. See *supra* note 50 regarding what may be the lawyer’s discipline-specific propensity to reduce literary works to their short, paraphrased holding.

<sup>76</sup> This view concerning the multiplicity of meanings is broadly held by those who would identify themselves as, among other things, deconstructionists, semioticians, and reader-response critics. While New Critics regard the indeterminacy of language as the identifying characteristic of literature, see, e.g., those sources cited *infra* note 78, post-structuralists are far

strongly committed to the objective, decontextualized reading of presumably “unified” texts<sup>77</sup>—argue that literature is defined by such counterdeterministic characteristics as paradox, irony, ambiguity, and the impossibility of paraphrase.<sup>78</sup> While the New Critics would regard these as characteristics that distinguish literature from other texts, those who have now displaced them in the literary academy regard the openness and contingency of meaning as something that is true of all texts, whether they be literary, legal, historical, or whatever.

There are also corresponding differences between law and literature in the realm of the scholar’s “voice.” Literary scholars seem less likely to speak in the impersonal voice and somewhat more likely to use words like “I” and “me.”<sup>79</sup> They seem much less inclined to speak in the voice of neutrality and objectivity.<sup>80</sup> They are much

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more likely to hold this view with regard to all uses of language. See, e.g., R. Scholes, *supra* note 14(6).

<sup>77</sup> See, e.g., W. Wimsatt, *The Affective Fallacy*, in *The Verbal Icon* 3 (1954); W. Wimsatt, *The Intentional Fallacy*, in *id.* at 21; see also G. Graff, *Professing Literature: An Institutional History* 232-33 (1987) (describing the New Critics’ commitment to the organic unity of texts).

<sup>78</sup> See, e.g., C. Brooks, *supra* note 48; J. Ellis, *The Theory of Literary Criticism: A Logical Analysis* 104-54 (1974); W. Empson, *supra* note 48; J. Ransom, *The New Criticism* (1941); I. Richards, *Principles of Literary Criticism* (1925); Brooks, *My Credo: The Formalist Critics*, 13 *Kenyon Review* 72 (1951); see also W. Wimsatt, *supra* note 77, at 3-39 (essays concerning the “intentional” and “affective” fallacies).

For present purposes, the New Critics may be distinguished from their successors by a lower level of commitment to the multiplicity and contingency of the “meanings” of texts and by their inclination to confine this commitment to the realm of literature. See, e.g., C. Brooks & R. Warren, *supra* note 14, in which the authors, both distinguished New Critics, describe expository writing in terms that appear to accept what are now regarded as formalist assumptions concerning the objectivity of language.

<sup>79</sup> Literary scholars seem to be more likely than their legal counterparts to write in the first person active voice. See, e.g., C. Brooks, *supra* note 48, ch. 1. It is also true that literary scholars are more likely to speak in what might be described as a more intimate, less “professional” voice. That voice will privilege what is personally contingent to the author, including, for example, his interests, assumptions, occasion for speaking, and physical circumstances. See, e.g., Beer, *Representing Women: Re-presenting the Past*, in *The Feminist Reader: Essays in Gender and the Politics of Literary Criticism* 63 (C. Belsey & J. Moore eds. 1989); Tompkins, *Me and My Shadow*, 19 *New Literary Hist.* 169 (1987). Practices in the legal academy are described in Getinan, *supra* note 9.

<sup>80</sup> See, e.g., *Reader-Response Criticism*, *supra* note 14(6), at x (“The objectivity of the text is the concept that these essays . . . eventually destroy.”). For the mainstream legal perspective, see, e.g., Fiss, *supra* note 45, and, for a freewheeling expression of the same view, see Gordon, *supra* note 58, at 12, and note 59. For a literary scholar’s response to Fiss’s claims regarding objectivity, see Fish, *Fish v. Fiss*, in S. Fish, *supra* note 3, at 120 (originally published in 36 *Stan. L. Rev.* 1325 (1984)); see also Fish, *supra* note 50.

more likely to acknowledge the contingency of their own personal,<sup>81</sup> cultural,<sup>82</sup> and historical<sup>83</sup> perspective—and to do so in the text.<sup>84</sup> The multiplicity of perspectives is not a problem to be solved but a working assumption and a condition to be understood.<sup>85</sup> The meaning of a text is far more likely to be seen as open, contingent, multiple, elusive, subjective, and indeterminate, and far less likely to be seen as objective, determinate, and paraphrasable. This more personal voice, this self-consciousness, this attention to contingency of texts and interpretations, to the multiplicity of perspectives and meanings, to the difficulties of translation and paraphrase are all of a piece. More to the point, they are all recognizably distinct from the rhetorical conventions of law.

Finally, as to the nature of argument and evidence, literary scholarship is less likely than its legal counterpart to appeal only to the narrowly rational faculties, more likely to depend upon inductive than deductive reasoning,<sup>86</sup> and far less likely to resemble a syllogism or a geometric proof. Thus, it is less “coercive” in that it is less likely to exercise the kind of step-by-step control over the reader that characterizes legal argument. The axiom “show don’t tell”—applied origi-

<sup>81</sup> See, e.g., Beer, *supra* note 79; Reader-Response Criticism, *supra* note 14(6); Tompkins, *supra* note 79; see also C. Geertz, *Interpretation*, *supra* note 14(7), at 412-53 (from the perspective of cultural anthropology).

<sup>82</sup> See, e.g., C. Geertz, *Interpretation*, *supra* note 14(7), at 3-30; R. Scholes, *supra* note 14(6).

<sup>83</sup> For the work of the New Historicists, see, e.g., *Representing the English Renaissance* (S. Greenblatt ed. 1988); Howard, *supra* note 14(6); Montrose, *Renaissance Literary Studies and the Subject of History*, 16 *Eng. Literary Renaissance* 5 (1986).

<sup>84</sup> See, e.g., C. Geertz, *Interpretation*, *supra* note 14(7); Beer, *supra* note 79; Tompkins, *supra* note 79.

<sup>85</sup> In literature, the multiplicity of perspectives has, itself, a multiplicity of meanings. There is frequently, as in drama, a multiplicity of perspectives within the literary text. Further, the multiplicity of perspectives will often be a subject of the literary text. Finally, literary scholars and teachers will normally take account of the multiplicity of perspectives that readers may have on the literary text. It is the last of these three forms with which we are chiefly interested. See N. Holland, 5 *Readers Reading* (1975); see also *supra* note 45 (regarding the marginalization of women’s voices); *supra* note 76 (regarding the multiplicity of meanings); *supra* notes 81-84 (regarding the contingency of perspective).

<sup>86</sup> In the literature of the New Criticism, see C. Brooks, *supra* note 48. Brooks’s first chapter, for instance, is a short assertion—poetry is paradox—that is then “argued” through a long litany of illustrations. That is also the structure of the book as a whole, with each chapter constituting a series of illustrations that are then taken to warrant the generalizations drawn in the final chapter.

nally to distinguish the rhetoric of fiction<sup>87</sup>—describes the rhetoric of literary scholarship equally well. This linkage between the rhetorics of literature and literary scholarship manifests itself in the scholar's reliance on inductive argumentation and in a ratio of illustration to proposition that is, by the standards of law, distinctly high.<sup>88</sup> Moreover, argument in literary scholarship is also likely to be less linear. This quality of literariness manifests itself not only in an attention to the pleasures of language and metaphor in the scholarly text but also in a willingness to move in a crooked or even discontinuous "line," discussing things beyond what we lawyers might call the bottom line. Accordingly, literary scholarship may be less easily paraphrased.<sup>89</sup> The answers it generates are less likely to claim to be the one right answer.<sup>90</sup> Furthermore, the other disciplines to which it looks—and

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<sup>87</sup> See W. Booth, *Fiction*, *supra* note 7, at 211-40.

<sup>88</sup> It is, of course, true that practitioners of post-structuralist literary theory will sometimes spend less time in illustration and demonstration than their more text-centered predecessors the New Critics. It is also true that certain of the footnotes found in legal scholarship, especially string citations, constitute a kind of illustration.

<sup>89</sup> This Article had its origin in my attempt to understand the frustration I felt when I confronted what seemed to be the opacity of the scholarly writings of James Boyd White. Professor White is a teacher of law and English who has both the wit and determination necessary to speak across the divide that separates these two disciplines. What I finally realized is that White's scholarly essays violate certain of the legal academy's conventions regarding the linearity, the clarity, and the paraphrasability of the scholar's argument taken as a whole. On its largest scale, that convention of legal scholarship is—as we tell our students and associates—"tell them what you're going to say, then say it, then tell them what you said." There are, then, corresponding rules for the construction of sections, paragraphs, and sentences. In the end, we mean our readers to be able, perhaps even compelled, to recite our entire argument in a single breath.

An example of a less linear argument is found in *Twelve Angry Men* (United Artists 1957), a Hollywood film involving a jury deliberation. Henry Fonda begins the deliberation standing alone for acquittal and, piece by piece, brings the entire jury to his side. He persuades E.G. Marshall by reciting the prosecution's theory concerning the murder weapon, a singularly ornate switchblade knife, and by securing his adversary's assent to the propositions that this is the key to the prosecution's case and that it is persuasive because the knife is unmistakable and one-of-a-kind. Only once the hook is set does he pull from his pocket—and stick into the table—an identical knife purchased during his lunch hour from a pawn shop in the neighborhood in which the crime took place.

<sup>90</sup> "I might say to you, for example, 'what you have just said is obviously false for the following indisputable reasons' (this is, in fact, my style), or I might say, 'I see your point, and it is certainly an important one, but I wonder if we might make room for this other perspective'. . . ." Fish, *Introduction: Going Down the Anti-Formalist Road*, in S. Fish, *supra* note 3, at 1, 21. My assertion is that Fish is the exception that proves the rule—and that it is no accident he takes such pleasure in jousting with lawyers. What I find supportive of my proposition (that scholars of literature are predisposed toward arguments of his second kind) is

we see evidence of this everywhere—are not the disciplines of closure (economics, empirical social science, analytic philosophy) but such disciplines of openness as cultural anthropology, history, psychoanalysis, and Continental philosophy.<sup>91</sup>

At the end of our consideration of the rhetorics of scholarship, we again find a difference between law and literature. It is not so great, admittedly, as the difference between the rhetorics of a lyric poem and a legal brief, but it is all the more surprising because we are dealing with two varieties of scholarship. It is at least interesting, perhaps important, that the differences we find between the rhetorics of scholarship in law and literature are the same differences we found between the rhetoric of legal advocacy on the one hand and, on the other, the rhetoric of poems and novels.

### C. *The Rhetoric of Teaching*

Similar differences may exist between the rhetorics of teaching law and literature. Here again, the categories across which these distinctions might be drawn are closure, certainty, objectivity, toughmindedness, control of the audience's response, the one true meaning of texts, the one best solution to problems, authority, and hierarchy.

The law school classroom is historically famous for the tough, authoritarian teacher—call him Kingsfield if you like.<sup>92</sup> Indeed, there is within the legal academy a strong tradition according to which effective teaching is a tough, almost brutal, business. In the first instance, of course, teaching students to think like lawyers is widely understood as requiring us to exorcise their subjectivity, their fuzzy thinking, and their soft-mindedness.<sup>93</sup> Beyond that, one spokesman

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that Fish can even imagine arguments of the second kind. Members of the legal academy may be hard pressed to identify any of their colleagues who would fit Fish's second model.

<sup>91</sup> See, e.g., *Twentieth-Century Literary Theory*, supra note 14(6), and any history or compilation of contemporary literary theory.

<sup>92</sup> Kingsfield is the authoritarian pedagogue in J. Osborne, *The Paper Chase* (1971).

<sup>93</sup> Duncan Kennedy has captured this in his description of the "hot case" that is a central part of the first-year law student's experience. Such a case, he reports,

usually involves a sympathetic plaintiff—say, an Appalachian farm family—and an unsympathetic defendant—say, a coal company. On first reading, it appears that the coal company has screwed the farm family by renting their land for strip mining, with a promise to restore it to its original condition once the coal has been extracted, and then renegeing on the promise. And the case should include a judicial opinion that does something like award a meaningless couple of hundred dollars to the farm family rather than making the coal company perform the restoration work. The point of the class

for the tradition of Kingsfieldian pedagogy, Professor D'Amato, recently has written that our students need to have their minds "probed,"<sup>94</sup> "assaulted,"<sup>95</sup> "operated upon,"<sup>96</sup> "changed,"<sup>97</sup> "improved,"<sup>98</sup> "manipulated,"<sup>99</sup> and "interfered with."<sup>100</sup> He has further asserted that they must be "forced"<sup>101</sup> and "shocked"<sup>102</sup> into overcoming their innate "resistance to growth";<sup>103</sup> that they must be stripped of their "sloppy ways of thinking"<sup>104</sup> and their "lazy mental attitudes";<sup>105</sup> and that they must be rendered mentally and psycholog-

discussion will be that your initial reaction of outrage is naive, nonlegal, irrelevant to what you're supposed to be learning, and maybe substantively wrong into the bargain. There are "good reasons" for the awful result, when you take a legal and logical "large" view, as opposed to the knee-jerk passionate view; and if you can't muster those reasons, maybe you aren't cut out to be a lawyer.

Kennedy, *Legal Education*, supra note 24, at 43-44..

Paul Brest reports that "[t]he modes of legal discourse invite us to put distance between 'the law' and our own feelings and ideals—an invitation we are often eager to accept." Brest, supra note 24, at 24; see also supra note 60 (citing Wald on disengagement). He then discusses his struggle to integrate "subjective" responses in the teaching of law. *Id.* at 23-25.

<sup>94</sup> D'Amato, *The Decline and Fall of Law Teaching in the Age of Student Consumerism*, 37 *J. Legal Educ.* 461, 478 (1987) (arguing that students will have "their minds open to new pathways suggested by [the professor's] *probing*s"). The quotation marks in my text indicate that the verb is Professor D'Amato's, not mine. The particular form of the verb has sometimes been changed to permit parallel construction. Where I have done so, the footnote will set out the author's exact language.

I do not mean by my treatment of his article that Professor D'Amato is somehow out of line. Rather, I believe his article is important precisely because he speaks for a significant number of his colleagues and because he has committed to writing a set of views that are widely held and widely spoken among legal academics.

<sup>95</sup> *Id.* (students may fail to understand the pedagogical virtues of the professor's "assault on their minds").

<sup>96</sup> *Id.* at 475.

<sup>97</sup> *Id.* at 470.

<sup>98</sup> *Id.* at 475.

<sup>99</sup> *Id.* at 465 ("[O]thers were engaged in manipulating and changing my mind, creating wholly new pathways for thought and legal analysis.").

<sup>100</sup> *Id.* at 462 ("Teaching . . . is a deliberate form of interference with how the student thinks. The student is likely to resist."); *id.* at 470 ("[The professor] tried to interfere with existing pathways and create new ones. Suddenly, teaching was going on.").

<sup>101</sup> *Id.* at 466 (arguing that we must "force the student to shake up" his existing ways of thinking); *id.* at 474 (arguing that they must be "forced to learn").

<sup>102</sup> *Id.* at 465.

<sup>103</sup> *Id.* at 462 (suggesting that students are "likely to resist" real teaching); *id.* at 474 (suggesting that their minds "resist growth").

<sup>104</sup> *Id.* at 473.

<sup>105</sup> *Id.*

ically insecure<sup>106</sup> and, thus, deprived of their "mental moorings."<sup>107</sup> He has assured us that learning is by its nature "alienating," "frustrating," and "upsetting,"<sup>108</sup> and, if it is to occur, our students must be subjected to "sharp" challenges,<sup>109</sup> to "continued confrontation,"<sup>110</sup> to "relentless" invalidation<sup>111</sup> and the withholding of praise,<sup>112</sup> to "antipleasure experiences,"<sup>113</sup> to "the humiliation" of "not knowing the answer,"<sup>114</sup> and to something called "catastrophic humor."<sup>115</sup> If we are to judge it by its language, this is, in its best light, a pedagogy of assault.<sup>116</sup>

Many in the legal academy might criticize this model of teaching for its harshness or for the extravagance with which it has been ren-

<sup>106</sup> *Id.* at 474 (arguing that what students "need" is to be left "mentally insecure"; that professors must instill "psychological insecurity," which is "simply a natural artifact of the learning process"); *id.* at 471 (suggesting that "mental" and "psychological insecurity" is the price students must pay for "creativity, imagination, and the ability to deal with new and unexpected problems" and for "[t]he vaunted lawyer's ability to 'think on one's feet'").

<sup>107</sup> *Id.* at 471 (the "feeling of having lost one's intellectual moorings").

<sup>108</sup> *Id.* at 465.

<sup>109</sup> *Id.* at 466.

<sup>110</sup> *Id.* at 473 (suggesting that "continued confrontation" is the "highest compliment" we can pay to students with particularly "good minds").

<sup>111</sup> *Id.* at 473 (noting that the good teacher "is relentless; the better the student's answer, the more he is personally challenged to find something wrong with it").

<sup>112</sup> See *id.* at 472-73.

<sup>113</sup> *Id.* at 464 (suggesting that, if we want to learn, "we have to accept an antipleasure experience").

<sup>114</sup> *Id.* at 474.

<sup>115</sup> *Id.* at 461; see also *id.* at 466 (noting that an "effective way" to challenge conclusions is through "satire").

<sup>116</sup> The language of the D'Amato article may provide support for the view that the Socratic method is a particularly male activity and that it is sometimes comparable to a kind of sexual assault. The effective teacher is understood to be hard. He humiliates and probes the student, forcibly and relentlessly. If she (the name given her is Ms. Brown) knows what is best for her, she will "trust" her assailant, a male professor identified as Smith. Moreover, a good student will learn to appreciate the stimulation provided by this "mental exercise." *Id.* at 473. The bad teacher, also a male, is soft, nurturing, and ineffective. He is a spoonfeeder, surely a maternal metaphor, who is well liked because he "gives good notes." *Id.* at 469.

D'Amato's example of classroom proficiency is also embedded in metaphors of potency and sexual identity. Thus Professor Smith traps Ms. Brown in elaborate confusions concerning a barren cow which turns out to be a *pregnant* cow, which the good teacher then transforms, in what is described as a pedagogical masterstroke, into a pregnant *bull*. *Id.* at 467-68.

A similar point has previously been made, though without reference to the D'Amato article, in Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School,"* 38 *J. Legal Educ.* 61 (1988). Note also that Halpern, in his criticism of legal pedagogy, describes it as one in which "[t]he student is stripped naked, so to speak, so that he may be remade a lawyer." Halpern, *supra* note 24, at 389.

dered. The strongest criticisms, however, will come from teachers in other disciplines. To many of these teachers, the assumptions underlying this model of teaching are simultaneously ridiculous and offensive. One such observer, a tenured professor of political science before he became a law student, describes law teachers in a way that conforms almost perfectly with Professor D'Amato's statement of the Kingsfieldian ideal.<sup>117</sup> From his perspective as a student, legal pedagogy was authoritarian, manipulative, demeaning, intentionally intimidating, and prone to subject students to unpleasantness, embarrassment, and psychological insecurity.<sup>118</sup> Where he parts company with D'Amato, however, is in his assessment of the effects of this pedagogy. He does not speak of its improving their minds. Rather, he says, it "inhibits curiosity and genuine intellectual interest" and tends to make students "fearful, passive, intellectually uninteresting, and uncreative."<sup>119</sup> It makes it "unlikely" that students will engage in "independent and critical thinking," it teaches them to "stifle the impulse" to participate in class, and it makes them "intellectually pliant and malleable."<sup>120</sup>

But whatever its deficiencies, Professor D'Amato's description of the Kingsfieldian ideal expresses a vision of teaching that we in law will recognize, and that we and others associate particularly with the teaching of law. In its own terms, it may no longer be representative of the legal academy. Indeed, it appears to have been written for the express purpose of protesting the erosion of a set of practices that once were dominant and now are not. That does not mean, however, that we can disregard the Kingsfieldian tradition, or that it is not a further manifestation of what I am describing as the discipline-specific rhetoric of law. Even if this Kingsfieldian were the very last of an otherwise extinct breed, and clearly he is not, this would still be a

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<sup>117</sup> Halpern, *supra* note 24, at 389.

<sup>118</sup> *Id.* at 388-89.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* Consistent with Halpern's argument concerning the effects of legal pedagogy, other law students report that law school "warp[s] students' personalities, causing excessive anxiety stress, boredom, cynicism, and the development of psychological defenses incompatible with later ethical practice," and that it "inculcate[s] a mindless obedience to authority." Pipkin, *Legal Education: The Consumers' Perspective*, 4 *Am. B. Found. Res. J.* 1161, 1163 (1976), and reports cited therein. But see Reisman, *Law and Sociology: Recruitment, Training, and Collegueship*, 9 *Stan. L. Rev.* 643, 649 (1956) (an earlier and more sanguine assessment of legal education by a lawyer-turned-sociologist in which law school is said to foster a higher level of independence and toughness than does graduate school in sociology).

breed that had, and deserved, a particularized association with the teaching of law. In terms of my argument concerning discipline-specific rhetorical conventions, I would argue that it is no accident that the Kingsfieldian tradition is more strongly associated with law than it is, say, with literature. Moreover, it seems clear that there are still, and perhaps always will be, a significant number of unreconstructed practitioners of this pedagogy within the legal academy. Evidence of this lingering tradition is to be found in D'Amato's article and in the wide approval with which it was received within the legal academy. Evidence is also to be found in the reports of highly qualified observers,<sup>121</sup> in the accounts of our students,<sup>122</sup> in the persistence of the Kingsfieldian stereotype in a generally well-informed popular culture,<sup>123</sup> in the consistency with which we report and worry over the effects that one would expect from such a pedagogy (e.g., alienation, anxiety, boredom, cynicism),<sup>124</sup> and in the paucity of alternative pedagogies.

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<sup>121</sup> See, e.g., Brest, *supra* note 24, at 24; Carrington, *supra* note 13, at 226-28; Kennedy, *Legal Education*, *supra* note 24; Menkel-Meadow, *supra* note 116.

<sup>122</sup> See *supra* notes 117-20 and accompanying text dealing with Halpern's first-hand report and with the reports of other students as characterized by Pipkin; see also *infra* note 123 (accounts from popular culture).

<sup>123</sup> In addition to J. Osborne's *The Paper Chase*, *supra* note 92, see M. Levin, *The Socratic Method* (1987); S. Turow, *One L* (1977); *L.A. Law: When Irish Eyes Are Shining* (N.B.C. television broadcast, November 16, 1989). Turow and Levin were writing from their first-hand experience as law students. *L.A. Law* has a staff of young lawyers whose job it is to assure the accuracy of what is said about law and lawyering. Orey, *Sex! Money! Glitz!*: In-House at *L.A. Law*, *The Am. Law.*, Dec. 1988, at 32.

<sup>124</sup> See *supra* notes 117-20 and accompanying text; Kronman, *supra* note 24 (suggesting that legal education may generate a cynical indifference to the truth); Silver, *Anxiety and the First Semester of Law School*, 1968 *Wis. L. Rev.* 1201 (describing an intense fear of failure among a small sample of first-year students); Stevens, *Law Schools and Law Students*, 59 *Va. L. Rev.* 551, 640-45, 652-59 (1973) (reporting anxiety, boredom, frustration, avoidance of participation in class, declining student involvement); Stone, *supra* note 24 (describing the negative psychological effects of legal education on student activists); Taylor, *Law School Stress and the "Deformation Professionnelle,"* 27 *J. Legal Educ.* 251 (1971) (examining evidence that law students are subject to an "unusual" amount of stress, as compared with students in other professions); see also Beck & Burus, *Anxiety and Depression in Law Students: Cognitive Intervention*, 30 *J. Legal Educ.* 270 (1979) (offering a model for faculty members who wish to counsel mildly troubled law students); Patton, *The Student, the Situation and Performance During the First Year of Law School*, 21 *J. Legal Educ.* 10 (1968) (presenting results of student interviews concerning the first year of law school); Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education and the "Deformation Professionnelle,"* 37 *U. Cin. L. Rev.* 93 (1968) (describing psychological impact of legal education on students).

There is also the broader sense in which the Kingsfieldian tradition continues to have great force within the legal academy. I think almost all of us are more Kingsfieldian than we may care to admit or even to know. Some of us are unrepentant and unreconstructed, some are repentant (or critical) but unreconstructed,<sup>125</sup> and some are repentant (or critical) *and* reconstructed. But even that last group is comprised of repentant and reconstructed *Kingsfieldians*. This situation appears to be analogous to the ways in which those who are driven to resist their parents are no less dominated by those parents than those who can only submit, and to Alice Miller's work concerning the perpetuation of authoritarian child-rearing practices.<sup>126</sup> Accordingly, most of us who reject this vision of Kingsfieldian practice will nevertheless accept, at some level, the assumption that the basic range of choices is between the pedagogy of "rigor" and "assault" and that of "spoonfeeding."<sup>127</sup> Both of these pedagogies are consistent with what I have described as the discipline-specific rhetoric of law. One simply places authority and hierarchy in the foreground while the other emphasizes the one true meaning of the rules. As we lawyers have learned to see the world, the possibility that there may be alternatives outside this hard-soft continuum can hardly be imagined.<sup>128</sup> To the degree it is available to us, this possibility has been either imported from other academic arenas or developed through a series of slow,

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<sup>125</sup> Criticisms of the Kingsfieldian tradition have come from, among other places, the proponents of Critical Legal Studies and feminist legal scholars. Duncan Kennedy's critique of the law school classroom as a vehicle for the perpetuation of hierarchy has, for instance, become a part of the canon of CLS—or at least a part of the canon as I teach it. See Kennedy, *Legal Education*, *supra* note 24. At least in conversation, however, many have said that the classroom conduct of some critics, especially those who are not also feminists, still contains certain of the elements of hierarchy and authority that I have associated with Kingsfieldianism. It is, of course, entirely possible to employ authoritarian rhetoric in the service of political views that are progressive or even radical. Indeed, if I am right about the constitutive and epistemological effects of rhetoric, it will be extraordinarily difficult to do otherwise.

<sup>126</sup> See A. Miller, *For Your Own Good: Hidden Cruelty in Child-Rearing and the Roots of Violence* (1983).

<sup>127</sup> Professor D'Amato identifies two options. The good teacher practices a pedagogy of assault. The bad teacher is nothing more than a dispenser of information. He feeds it, sugar-coated, to his students who favor him as a teacher according to the tastiness of his product. D'Amato, *supra* note 94, at 465, 472.

<sup>128</sup> I can offer an example of a closely comparable situation from the history of our effort to understand negotiations. For over a generation, it was customary for students of the process to describe it according to a single continuum of possibilities that ran from "competitive" to "cooperative." Like the continuum from Kingsfield to the spoonfeeders, this ran from "hard"

painfully incremental acts of transcendent imagination, primarily by the feminists.<sup>129</sup>

Our students have an interesting and complicated relationship to the Kingsfieldian tradition. They may well resent the victimization that is characteristic of the hard Socratic method, but they respect the authority which makes it work. Indeed, within a range of circumstances and victims, the assault is approved, even revered. Many students have, after all, come to law school to learn how to dominate others through their speaking, and, in this, Kingsfield is a master. Where the students differ from their Kingsfieldian teachers is in their demand for a particular *kind* of authoritative speaking—for clarity, closure, certainty, and the one true meaning of the text.<sup>130</sup> Even in criticizing certain aspects of our Kingsfieldian rhetoric, they invoke the norms of authority, hierarchy, clarity, the one right answer, and closure.

It is a convention of the Socratic method that our students are required to read cases that may be understood to say all sorts of different things and that we then, in their language, “hide the ball” and

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to “soft.” Unfortunately, however, this continuum was never entirely satisfactory. There was something that it did not give us the means to talk about—or even to see.

In the last ten or fifteen years, our understanding of negotiations has been transformed by the explicit recognition that the continuum from competitive to cooperative is radically incomplete. Now we understand there to be two fundamentally different types of negotiations, distributive (zero-sum) and integrative (non-zero-sum). Moreover, we now understand the tactics that are appropriate to each. See, e.g., D. Lax & J. Sebenius, *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain* (1986). Talk about the old hard-soft continuum now seems archaic and remarkably insufficient.

I believe we will one day regard the distinction between hard and soft pedagogies, between Kingsfield and the spoonfeeder, as equally archaic. My hope is that it might be displaced by the quite different distinction between the pedagogy of empowerment and the pedagogy of disempowerment.

<sup>129</sup> See, e.g., Cain, *Teaching Feminist Theory at Texas: Listening to Difference and Exploring Connections*, 38 *J. Legal Educ.* 165 (1988); Hantzis, *Kingsfield and Keunedy: Reappraising the Male Models of Law School Teaching*, 38 *J. Legal Educ.* 155 (1988); Menkel-Meadow, *supra* note 116; Menkel-Meadow, *Portia in a Different Voice*, 1 *Berkeley Women's L.J.* 39 (1985); Minow, *Feminist Reason*, *supra* note 14(10); Minow, *supra* note 2; Pickard, *supra* note 24; *supra* note 24; Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation*, 38 *J. Legal Educ.* 147 (1988); see also Brest, *supra* note 24 (discussing efforts to integrate “subjective” responses into the teaching of law).

<sup>130</sup> D'Amato's article, already relied upon as illustration of the conventional discourse of legal pedagogy, also succeeds in capturing what it is that the students want—and only sometimes get—from their teachers. They want the answers to the questions, they want to be told what the law is, they want clear exposition and “good notes,” they want closure. See D'Amato, *supra* note 94, at 468.

require them to find it. The “ball” in question is the clear and unifying statement of the rule. Except with the help of illicit study aids, the only way to win the game is to read our minds. Some of us win their affection and admiration by giving them the day’s ball at the end of every class; some never give it to them at all. In either event, they know both that we’ve got it and that they’ll be tested on it. They are right on both counts.

It is appropriate at this point to speak as precisely as I can about the relationship between our teaching and the notion that texts carry within them one, and only one, true meaning. This is a complicated, sometimes ambiguous, relationship, and some of my colleagues insist that good law teachers, by which they usually mean the Kingsfieldians, teach their students to appreciate the multiplicity of meanings that may be embedded in a text. These teachers, we are told, know that the ability to generate alternative interpretations of a text is an essential part of lawyering. And they point to the fact that a Kingsfieldian will spend a great deal of time interacting with his students in a way that is clearly meant to undermine any notion that those students might have had that their understanding of a particular case is sufficient or even defensible. As the traditionalist would put it, a teacher improves his students’ minds by relentlessly invalidating their initial (and subjective) response to the case at hand.

I do not think, however, that the Kingsfieldian means in these moments to be teaching the indeterminacy of texts—any more than the drill sergeant, as he shouts down his recruits, is teaching a lesson in moral complexity, the sin of arrogance, or the multiplicity of perspectives.<sup>131</sup> In both cases, what is being taught through invalidation

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<sup>131</sup> Some of my colleagues may want to dismiss this analogy, perhaps even to dismiss it as defamation. I think it is more interesting than that. I went to boot camp a few months after I finished my first year in law school. As a skinny kid, a reservist, a Princeton/Yale Law man, and as a visible opponent both of the war and of the military culture, I received what I like to think was my fair share of abuse. But, whatever else may be said about my drill instructors, they were no more masochistic and no less committed to teaching than Kingsfield himself. They sincerely believed that a great deal was at stake, including the personal survival of their recruits, in the wholesale transformation of individuals in which they were engaged. One doesn’t get up at five in the morning and spend the whole day shouting without a fairly high level of commitment. And the pride that they felt at the end of eight weeks was not unlike the pride that Kingsfield must have felt at the end of three years. [*Rhetorical note*: This is a violation of the rule concerning the use of personal experience, mitigated perhaps by its being “below the line.”] See Halpern, *supra* note 24, at 389 (“the underlying dynamic” of the legal

is respect for authority<sup>132</sup> and, perhaps, a certain kind of willingness to do battle. This view finds support in the fierceness with which some within the legal academy have resisted, not just as wrong but also as bad, the proclamations of indeterminacy that have come from the proponents of Critical Legal Studies.<sup>133</sup> Additional support is to be found in the fact that our students are right when they observe that we know the answer, that they don't, and that many of us are "hiding the ball." For most of us, our answers exist, for any particular area of law, in a highly unified, highly coherent understanding of the law that is different only in detail from the commercial outlines to which our students resort.<sup>134</sup> Despite the disarray of the cases in the casebooks we assign, and despite our refusal to lay it out through lectures, almost all of us are nonetheless engaged in *teaching a treatise*, albeit a treatise that may exist only in our head. This surtext is what we are ultimately asking them to learn. It is the body of answers that they charge us with having and hiding, and on that question they are largely right. They are also right in assuming that they usually will be tested on their mastery of that surtext.

All this can, again, be contrasted with literature. At some risk of idealizing a community to which I do not belong—though it is revealing that most of my colleagues in law would not regard what follows as an idealization—the pedagogical norm in literature appears to be quite different. The nonauthoritarian teacher and the relatively democratic classroom are far less likely, for those reasons, to be presumed ineffective. Teachers of literature are not likely to assert that theirs is an enterprise that requires confrontation, invalidation, humiliation, or the shock of catastrophic humor. They are far less likely to assert the presumptive invalidity of the student's personal response to

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classroom "parallels the highly structured, controlling, emotionally intense initiatory rites used by the church or the military in the indoctrination of their neophytes").

<sup>132</sup> See Halpern, *supra* note 24; Kennedy, *Legal Education*, *supra* note 24; Pipkin, *supra* note 120.

<sup>133</sup> Though these may now be of chiefly historical interest, see, e.g., Carrington, *supra* note 13; Fiss, *supra* note 21; Fiss, *supra* note 45.

<sup>134</sup> This unified and coherent understanding—this surtext—will occasionally appear in the classroom. Those of us who provide our students with closure at the end of the hour through the practice of "summing up" are, for that brief period, speaking our surtext. We do the same when we identify the "better reading" of a particular case or offer our preferred solution to some problem that occupies the law.

the text under consideration.<sup>135</sup> They are likely to invoke “objective truths” and “right answers” across a much narrower range of questions than in law.<sup>136</sup> Other people’s texts are less likely to be treated as if they were reducible to a single meaning.

Thus, in the literature about teaching literature, we find one article providing strategies for “collaboratively . . . engag[ing] a class,” for offering “routes of access” to the text—note the plural—and for overcoming “dependent passivity.”<sup>137</sup> In another, we find talk about raising “stimulating discussion,” about empowering the students “to engage directly” the critical literature, about teaching our students to “celebrate” the texts they study, and about how there is always room for a different approach to the texts.<sup>138</sup> A third author speaks of guiding students until they have learned to choose for themselves; of teaching the multiplicity of points of view; of a concern that teachers “neither circumscribe the poem’s boundaries in advance nor delineate its spaces too clearly”; in delighting, exciting, and entrancing the students; in empowering them to choose an interpretation or construct their own understanding of the text.<sup>139</sup> Another article on pedagogy is comprised of nothing—absolutely nothing—but a list of “opening questions,”<sup>140</sup> while yet another celebrates the students acquisition not of knowledge or answers but of something called “positive ignorance.”<sup>141</sup>

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<sup>135</sup> See, for instance, Norman Holland’s treatment of the personally contingent ways in which literature students respond to the texts with which they are presented. N. Holland, *supra* note 85.

<sup>136</sup> I also assume that, in teaching secondary and undergraduate students, teachers of literature will distinguish between the kinds of student responses that are in the ball park and the kinds that are not. To that degree, they are distinguishing between right and wrong answers. It is not my position that this never happens in graduate classes in literature, only that it happens far less frequently there than in law school.

<sup>137</sup> Hartman, *We Ribs Crooked by Nature: Gender and Teaching Paradise Lost*, in *Approaches to Teaching Milton’s Paradise Lost* 126 (G. Crump ed. 1986) [hereinafter *Teaching Milton*] (one of a series of such books published under the auspices of the Modern Language Association of America).

<sup>138</sup> Rapaport, *Paradise Lost and the Novel*, in *Teaching Milton*, *supra* note 137, at 135.

<sup>139</sup> Moore, *Moments of Delay: A Student’s Guide to Paradise Lost*, in *Teaching Milton*, *supra* note 137, at 86.

<sup>140</sup> Nelson, *Problematising Interpretation: Some Opening Questions*, in *Theory in the Classroom 3* (C. Nelson ed. 1986).

<sup>141</sup> Thus Barbara Johnson announces that “[t]he question of education . . . is the question . . . of how to suspend knowledge. . . . [P]ositive ignorance, the pursuit of what is forever in the act of escaping, the inhabiting of that space where knowledge becomes the obstacle to

In saying all this, I do not mean to suggest that there are no teachers of literature who are authoritarian, or who know some right answer that they demand their students embrace, or who might intimidate or humiliate their students. I merely assert that the pedagogical norms of literature are now different, at least in degree, from those of law. Moreover, these are essentially the same differences we saw earlier when comparing the rhetoric of legal advocacy with that of literature<sup>142</sup> and, again, when comparing the rhetorics of legal and literary scholarship.<sup>143</sup>

## II. CONSEQUENCES AND EFFECTS

The pattern is thus reasonably clear. Within the discipline of law, there are systematic similarities between the rhetorical conventions of advocacy, judging, scholarship, and teaching—just as there are, within the discipline of literature, systematic similarities between the rhetoric of their subject texts, of their scholarship, and of their teaching. And as between law and literature, there is a consistent set of differences. To a lawyer, this comparison highlights the law's distinguishing commitments to objectivity, certainty, closure, analysis, reason, clarity, and judgment, as well as to authority, hierarchy, intellectual unity, the impersonal voice, coercive argumentation, appeals to the narrowly rational faculties, the one right answer, the best solution, the disciplines of closure, and the one objective and ascertainable meaning of texts. Finally, such a comparison from a lawyer's perspective emphasizes his commitment to the extinguishment of contingency, to acontextuality, to the one objective perspective, to an audience that is assumed to be perfectly rational and thus perfectly undifferentiated, to our ideas of toughmindedness and rigor.

This structure of similarities and differences also highlights the fact that these discipline-specific rhetorics are cultural artifacts and are not simply different positions in a single, unified hierarchy of rigor. It suggests that they are the products of circumstances and purposes and that in a certain way they have a life of their own. Further, this struc-

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knowing—that is the pedagogical imperative we can neither fulfill nor disobey.” Johnson, *Teaching Ignorance: L’Ecole des Femmes*, 63 *Yale French Stud.* 165, 182 (1982).

<sup>142</sup> See *supra* Section I.A.

<sup>143</sup> See *supra* Section I.B.

ture suggests that we may be blind to certain choices we have made and to certain consequences associated with those choices.

Some in the legal community may, when confronted with these possibilities, argue that things are as they are because that is the nature either of law or of legal discourse. Within certain limits, this argument has some appeal. But unless this response is totally persuasive—which I think it is not—it is worth pursuing the question a little further. This pursuit seems particularly worthwhile if, as we have seen, we have a tendency to carry our rhetorical conventions from one arena to another and if, as I argue, there are some arenas in which we are called on to act and to which the rhetoric of law is not well suited. This possibility that a rhetoric may be better suited to some purposes than to others is, of course, the essence of Carrington's reading of Twain,<sup>144</sup> and of the assertion that rhetorics shape not just how we speak but also how we see, how we think, and what we know. By their nature, they empower us to see, think, and say some things while disempowering us, at least as a relative matter, from seeing, thinking, and saying other things.

The first thing I would note is that the lawyer's attention to clarity, order, and relevance in discourse at least sometimes appears to be an unmitigated virtue. We can, of course, quarrel over the particular rules of relevance that will be applied in any conversation,<sup>145</sup> but many of us believe that the lawyer's attention to these matters is what makes meetings among lawyers somehow better than meetings among nonlawyers. There is a general sense that, though we may sometimes be contentious, we are less likely to wander or to waste time attending to matters that are irrelevant or to questions that do not need to be answered. It is an orderly and efficient discourse. The problem, if there is one, arises when we confront the possibility that the "order" we impose may be neither neutral nor objective nor value free, that our simplifications may not do full justice either to our clients<sup>146</sup> or to the world in which we live, and that our rules of relevance exclude

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<sup>144</sup> See Carrington, *supra* note 13.

<sup>145</sup> See, e.g., Getman, *supra* note 9.

<sup>146</sup> Our commitments to the discipline-specific rhetoric of law may have complex and, in certain ways, contradictory effects upon our clients. At the outset, those commitments lead us to transform our clients' stories into the language and categories of the law. This transformation may provide them with access to power that they would not otherwise have had. At the same time, however, it can represent a kind of appropriation of their story in which we take that story from them, transform it according to the practices of our discipline,

material that ought to be taken into account.<sup>147</sup> Thus, there may be, even here, a possibility that all this efficiency may have come at some price.

The discipline-specific rhetoric of law also seems well suited to the purposes of advocacy or, more precisely, at least to certain kinds of advocacy. If successful, its rhetoric enhances our ability to persuade some external audience that our answer to some question is right, and that other contending answers are wrong. At the very least, these forms of advocacy include the writing and speaking by which lawyers seek to persuade judges that their cause is right and their adversary is wrong. This adversarial speech would also seem to include the writing by which judges seek to persuade their audiences (the appellate courts, the losing party) that the case in question has been fairly heard and rightly decided.

In this way, the rhetoric of law is well suited to the closure of cases and to the promotion of a particular rule of law. If successful, that rhetoric enhances the likelihood that the relevant audiences will accept the twin claims that particular cases have been fairly and rightly decided and that the system as a whole is objective, impersonal, neutral, perhaps scientific, and ultimately legitimate. The audiences to whom this speech is directed include, among others, the losing litigant in the individual case, the citizenry as a whole, and, a little more narrowly, that part of the citizenry that is least advantaged by the status quo. To the degree that our rhetoric serves these purposes, it promotes the perception that ours is a system of "laws not men." It also promotes acceptance of and obedience to the commands of the "law," acceptance of the status quo, and the stability of the system.

The rhetoric of law serves these three purposes—advocacy, closure, and the rule of law—precisely in the degree to which it allows us to *overstate* certainty, objectivity, and the rightness and legitimacy of our chosen outcome. Thus, our rhetoric operates by predisposing us to

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and leave it diminished. See, e.g., Getman, *supra* note 9; Pickard, *supra* note 24; see also *supra* note 45 (on the law's transformation and marginalization of human voices).

<sup>147</sup> On the contingency and consequences of our (or anyone else's) rules of relevance, see Getman, *supra* note 9; Scheppele, *supra* note 2, at 2081 n.28, 2083; Matsuda, *supra* note 45; Williams, *supra* note 45; see also B. Ackerman, *Reconstructing American Law* 46-71 (1984) (noting the legal consequences that flow from rhetorical conventions concerning the point at which the story begins).

render as black and white that which is gray. However, our rhetoric of certainty and closure, while always *useful*, is rarely *necessary*. It serves, perhaps falsely, to enhance the claim that we are right and they are wrong. But a system of legal discourse in which one presented positions without overclaiming certainty (e.g., about the one true meaning of texts) could function reasonably well. What would be different in such a system is that the advocate—the lawyer and then, in his turn, the judge—would assume a less controlling and more vulnerable relationship to his audiences. Further, lawyers and judges would have a harder time sustaining the claim that they are not personally responsible for the positions they take, the judgments they make, the results they produce. Further still, we would have a harder time claiming that ours is a system of laws, not men.

If, as has been suggested, there are purposes that are well served by the rhetoric of law, there are other important purposes that are not.<sup>148</sup> For instance, our rhetorical commitments may predispose us to be ineffective readers of texts—not ineffective in some absolute way but ineffective in terms of our own purposes. We are, as has been seen, predisposed to operate on the assumption that texts have one true and timeless meaning. While this assumption may enhance the certainty with which lawyers advance their arguments, it also operates to diminish their capacity to read texts as what they really are—pots full of different and often conflicting possibilities that can be put to work for a wide range of purposes. Thus, Professor Kennedy's exceptionally useful description of this sort of "reading for possibilities" is, for the very reason that makes it useful, outside the mainstream of legal scholarship.<sup>149</sup> That description celebrates the indeterminacy or the "plasticity" of legal texts.<sup>150</sup> Those of us who are experienced in the practice of arguing clients' cases recognize the importance and utility

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<sup>148</sup> In saying things such as this, it is not my claim that the rhetorical conventions of literature are "true" and that those of law are not. I know of no metadiscourse, including philosophy, that would allow me to make that claim. My claim, then, is a more limited one about effectiveness. I anticipate that objections to my argument might be raised either through claims that the rhetoric of law is true, that I am wrong in asserting that it is relatively ineffective in the particular realms that I will discuss, that I am wrong in my assertion that we carry over our rhetorical conventions from one realm to another, or that the position I am taking is right but unethical.

<sup>149</sup> Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. Legal Educ. 518 (1986).

<sup>150</sup> *Id.* at 562.

of what is being said. That does not, however, save this view from being condemned as a serious, perhaps dangerous, violation of the rhetorical conventions of law.<sup>151</sup> I will not deny that there are many in law who understand that reading for possibilities is a skill that is central to lawyering, who do it reasonably well, or who teach a certain amount of it to their students. My point is that this skill in reading is fundamentally at odds with certain core elements of the rhetoric of law. Accordingly, if, in one breath, we speak it to our students, we will likely take it back in the next. While we are in the profession of rhetoric, our chosen rhetoric is the antirhetoric of foundations, logical deductions, unification, objectivity, and closure.

If law's rhetorical commitments work to disempower lawyers as readers of texts, they may also render lawyers relatively ineffective as advocates outside the three-part, win-lose universe of the courtroom. As a general matter, lawyers are predisposed to understand power as the ability rationally and conclusively to prove that they are right and their adversary is wrong, that some specific person is someone else's victim, that one side is playing by the rules and the other is not.<sup>152</sup> Correspondingly, lawyers tend to understand argument and persuasion quite narrowly: it is the process of making these rational and conclusive proofs about what the rules are and about who is right and who is wrong. Moreover, because we are disposed to see discourse as objective and to deny the multiplicity of perspectives, we tend to disregard the particularities and the contingencies of our audiences. Argument is argument. "Eye contact" is useful not because we might

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<sup>151</sup> The attack on indeterminacy, and on Kennedy, has come from various quarters within the legal academic establishment. Dean Carrington's attack on the indeterminists as "nihilists" who have no place in law schools is only the most strident. Carrington, *supra* note 13, at 227.

<sup>152</sup> Even within the legal community, there are other ways of understanding power. Professor Reich distinguishes power from force and explains that by power he means "human faculties exercised to the largest possible degree." Reich, *Power and the Law, in Power, Its Nature, Its Uses and Its Limits* 162 (D. Harvard ed. 1979). Thus,

skiing is power, sex appeal is power, the ability to make yourself heard by your congressman is power, anything that comes out of you and goes out into the world is power and in addition to that, the ability to be open, to appreciate, to receive love, to respond to others, to listen to music, to understand literature, all of that is power.

*Id.*

receive useful information but because it enhances the "power" and "impact" of our speaking.<sup>153</sup>

Outside the courtroom, the consequences of these predispositions upon the effectiveness of our speech are often negative. The rhetoric of law is, for instance, a truly terrible rhetoric in which to sell, whether one is selling vacuum cleaners or legal services. Similarly, while the lawyer's proofs concerning rights and wrongs may have a place in the discourse of social and political movements, they are not well suited to moving people or to transforming the conditions of discourse. Martin Luther King, in his speech at the 1963 March on Washington, spoke of rights, though not in the way that we lawyers might. But what moved people were the ways in which, to use James Boyd White's term,<sup>154</sup> he constituted his audience and, to use Kenneth Burke's term,<sup>155</sup> he engaged in the rhetoric of identification.<sup>156</sup> When, in *To Kill a Mockingbird*, Atticus Finch (played by Gregory Peck in the film) had clearly exhausted the possibilities of legal rhetoric, his eight-year-old daughter Scout disbanded a lynch mob through an inadvertent rhetoric that lacked a word of argument, or even a

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<sup>153</sup> I am referring here to a maxim that is a part of the oral tradition by which law students are coached in connection with moot court arguments.

<sup>154</sup> See *supra* note 14(2).

<sup>155</sup> K. Burke, *supra* note 2, at 55-59.

<sup>156</sup> King began by speaking about the Declaration of Independence as "a pronissory note" on which "America has defaulted . . . in so far as her citizens of color are concerned." Speech by Martin Luther King, Jr., March on Washington (Aug. 28, 1963), *reprinted in A Testament of Hope: The Essential Writings of Martin Luther King, Jr.* 217 (J. Washington ed. 1986) [hereinafter *Speech*]. But instead of demanding payment, he simply "refuse[d] to believe that there are insufficient funds" and announced that "we've come to cash this check." *Id.* at 217. "Now is the time," he said, "to make real the promises of democracy. . . and to make justice a reality for all God's children." *Id.* at 218. Thus, in James Boyd White's terms, he "constituted" white America as a group that is ready, willing, and able to make good on its promises. See *supra* note 14(2).

The last half of the speech turns wholly to the rhetoric of identification. Black Americans had been subjected to "unearned suffering" but had held to a faith that such suffering is "creative" and "redemptive." *Speech, supra*, at 219. White Americans recognized "that their destiny is tied up with our destiny." *Id.* at 218. His dream—"the American dream"—of injustice rededuced, of black children and white children joining hands "as sisters and brothers," of our hearing "freedom ring" throughout the land, even from Stone Mountain of Georgia, of a time when "all of God's children—black men and white men, Jews and Gentiles, Catholics and Protestants—will be able to join hands and to sing in the words of the old Negro spiritual, 'Free at last, free at last; thank God almighty, we are free at last.'" *Id.* at 220. King constituted his audience, and he brought forth a vision of community which white Americans could not help but identify as their own. Thus, the nation was, if only for a time, transformed by rhetoric. And the rhetoric of transformation sounded more like literature than like law.

breath of rights and wrongs.<sup>157</sup> But these nonlegal rhetorics are not just the province of preachers and children. Indeed, there is strong reason to believe that, even inside the courtroom, far fewer judges are coerced by a lawyer's proof than will claim to have been as they, in their turn, repeat that proof in order to persuade the audiences to which they, as judges, are speaking. And the stories of juries being impervious to "legalistic" arguments are, of course, legion. It is unquestionably true that, as with inventive reading, there are those within the legal community who are highly effective at political speech, at moving juries, and at two-party persuasion; yet their success comes in the degree to which they master rhetorical strategies foreign to the discipline-specific rhetoric of law.<sup>158</sup>

Another important arena in which we may be poorly served by our rhetorical commitments is in negotiations. Here our problems with two-party work-it-out persuasion are compounded by our truncated understanding of differences, our distaste for compromise, and our relative inability to "dance" with language.<sup>159</sup> Because of our instinct to objectify discourse and to deny the multiplicity of perspectives, we

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<sup>157</sup> H. Lee, *To Kill A Mockingbird* (1960). Scout never understands what is going on. At first, the men are all strangers to her. Then she recognizes and speaks to Mr. Cunningham, a man whom Atticus has evidently been helping with a legal problem. "Hey, Mr. Cunningham. How's your entailment gettin' along?" No response. "Don't you remember me, Mr. Cunningham? I'm Jean Louise Finch. You brought us some hickory nuts one time, remember?" Still nothing. "I go to school with Walter . . . He's your boy ain't he? Ain't he, sir?" A faint nod from Cunningham. "He's in my grade . . . and he does right well. He's a good boy . . . a real nice boy. We brought him home for dinner one time. Maybe he told you about me, I beat him up one time but he was real nice about it. Tell him hey for me, won't you?" After some more talk from Scout about how "entailments are bad an' all that," Cunningham squats down and takes the girl by the shoulders: "I'll tell him you said hey, little lady." "Then he straightened up and waved a big paw. 'Let's clear out,' he called. 'Let's get going, boys.'" *Id.* at 155-57.

<sup>158</sup> The rhetoric in which legal services are sold and client relationships are established and maintained appears to have more to do with the rhetorics of courtship and friendship than with the rhetoric of law. It also seems that lawyers who are successful politicians have succeeded for reasons unrelated to their capacity, in the language of lawyers, to slice the bologna thin. Indeed, there sometimes seems to be an inverse relationship between a lawyer's determination to think like a lawyer and his success in rainmaking (marketing legal services) or in politics. In this connection, we have all heard the old saw that those who get A's in certain law schools teach, those who get B's become judges, and those who get C's become rich.

<sup>159</sup> There is, of course, clear evidence that most lawsuits settle. I think, however, that this cannot stand as evidence that lawyers are good compromisers unless we have some indication as to what proportion of suits would settle if they were handled not by lawyers but, for instance, by real estate brokers.

understand conflicts and disagreements in terms either, on the one hand, of factual or analytical “misunderstandings” or, on the other, of bad faith. This understanding of differences, particularly when combined with our belief that power and persuasion are a matter of proving that we are right and they are wrong, adds fuel to the fire of difference and tends to deepen division. Differences are not simply something to be managed; they are manifestations of the other person’s error or bad faith. After all is said and done, we *are* right and they *are* wrong.

Closely related to this view is the fact that, for reasons that appear to be related to our rhetorical commitments, we are measurably predisposed against compromise and collaboration. Compromise, for instance, is not a matter of splitting the difference and coming together; rather, it is a matter of giving up one’s principles and surrendering to illegitimate force.<sup>160</sup> Even when agreement is reached, self-righteousness and division survive and are likely to be compounded by resentment. Finally, with regard to negotiations, our rhetorical commitment to clarity and linearity leaves us relatively disabled with regard to certain of the more subtle uses to which language is put, particularly in negotiation. These include the dance of ambiguous, partially committed speech that lies at the heart of negotiations.<sup>161</sup>

The rhetoric of law may also present problems with regard to some, though perhaps not all, of our scholarly purposes. Insofar as legal scholarship is a matter of advocacy, decisions, and promoting the rule of law, the law’s rhetoric of objectivity, certainty, and closure may be well suited to its purposes. But if what we are after is the disinter-

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<sup>160</sup> See Slade, *Law Degree Wanes as a Passport to Business Job*, N.Y. Times, Jan. 27, 1989, at 5, col. 3, in which David Traversi, a lawyer turned real estate developer, stated:

In law, you’re often an advocate trying to convince a third party—a judge or jury—of the rightness of your case. . . . In business you’re trying to strike a deal directly with someone else and you’re competing with others to get that deal done. No one is going to deal with you if you’re argumentative or threatening, and many companies feel that’s what lawyers are.

*Id.* This is consistent with my own experience. Moreover, when I have administered to my law school negotiations class a questionnaire that assesses their predispositions with regard to conflict, compromise, collaboration, and avoidance, I find that my students score higher than the general population on both conflict and avoidance while scoring lower on compromise and collaboration. As I have come to understand these results, they suggest that we lack the disposition to compromise and collaborate. This would be entirely consistent with what I have identified as the discipline-specific rhetoric of law.

<sup>161</sup> See Wetlaufer, *supra* note 39.

ested pursuit of truth, our rhetorical commitments may create a certain number of problems.<sup>162</sup> Assume, for instance, that one wants to learn all that can be learned from and about some text. Our commitments to objective meanings and our aversion to rhetorical perspectives will cut us off from the most valuable insights of the semioticians, the post-structuralists, the social constructionists, and the feminists. It will undoubtedly simplify our work if we continue privileging "objective" theories of interpretation, assumptions concerning the transparency of language, the simple deductions of neo-classical economics and foundationalist philosophy, and the fear of complexity that periodically speaks the charge of nihilism. But to think that the distribution of our convenience has anything to do with who is right on these matters is to put the cart very much before the horse.<sup>163</sup> There is, at the very least, a tension between the single-minded pursuit of truth and the rhetorical commitments of our discipline. The rhetorical predispositions of our discipline are always drawing us toward certainty, simplification, the sufficiency of the answer at hand, the objective meaning of texts, and closure. To the degree we can move in these directions, we have enhanced the supposed manageability of the world, but only if all these reductions are warranted. Notwithstanding our convenience, the search for truth seems to call us in the other direction, away from closure and out in the direction of complexity, contingency, uncertainty, and rhetoric.

Apart from this particular difficulty, there is also, still in the realm of scholarship, another related tension between the law and the search

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<sup>162</sup> In Kronman, *supra* note 24, Anthony Kronman is extraordinarily lucid in his demonstration that advocacy and argumentation entail an "indifference to truth" and that immersion in those arts can have unfortunate effects upon the "soul" or "character" of the person who has been immersed. *Id.* at 961, 963-64. His expressed concern, however, is with the moral character of our students. *Id.* at 963-64. But if he is right about the risks to our students, then we who have been so thoroughly immersed as to be able to *teach* these arts must be at least as much at risk as are our students. When he turns his attention to our scholarship, however, he seems to see it as the unproblematic pursuit of truth and as the untainted opposite of advocacy. *Id.* at 967-68. My argument is that Kronman is right about the arts of advocacy and argumentation, that he is right that a commitment to these arts will have an effect upon our character, but that he is wrong if he assumes that legal academics and the scholarship they produce may be somehow immune to these effects.

<sup>163</sup> Stanley Fish tells of a linguist, Ruth Kempson, of whom he says the following: "Her reasoning is that since speaker-relative presupposition, if taken seriously, would create grave (indeed, insurmountable) difficulties for a semantic theory, we cannot take it seriously." Fish, *supra* note 90, *in* S. Fish, *supra* note 3, at 2-3.

for the truth. Law is both an arena of inquiry and itself a solution that we may offer to certain of the problems that we face. Thus, for instance, many of us are moved by a marked preference for the rule of law over the rule of force. But if we are consistently to advance the law as a solution, we need consistently to speak in a way that advances the interests of law. Law becomes our client. And insofar as law is our client, there is an unavoidable tendency to put other things, truth among them, in a secondary position. Thus, the legal academy is periodically preoccupied with problems of relativism and of "nihilism," by which is meant a range of practices, including talk about indeterminacy, that are thought to diminish the stature of the law. It is in some quarters impermissible for legal scholars to speak in ways that might diminish the law's claims to legitimacy, objectivity, and neutrality because, whatever may be the truth-value of what has been said, such speaking may adversely affect the interests of our client the law.<sup>164</sup>

Outside the legal academy and its realm of scholarship, we have also seen that the rhetoric of law may operate to overstate the legitimacy of the system and the rightness of existing solutions. In this measure, our rhetorical commitments work to disempower the already powerless, to reinforce the existing distribution of power and wealth, to prove wrong those who question the legitimacy or neutrality of the existing system, and to marginalize the voices of opposition. If the rule of law is our client, then so is the status quo.

In the arena of teaching, the discipline-specific rhetoric of law may, whatever its other virtues, be problematic in several respects. First, it inclines us to accept much too quickly the notion that the only choices lie along the axis between supposedly effective "assault" and

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<sup>164</sup> Owen Fiss, in Fiss, *supra* note 21, charged that the proponents of Critical Legal Studies are politically irresponsible nihilists, *id.* at 10, who pose a threat to the very existence of law, *id.* at 1. He argued that their claim of indeterminacy is unwarranted and that, in our legal culture, judges are substantially constrained. *Id.* at 10-11. He then declared, however, that his own claim that judges are constrained rests on an empirical assumption and concedes that the assumption may not be warranted. *Id.* at 11-12. However, instead of then withdrawing or qualifying his argument, he stood by his claim that judges are constrained and explains that, in doing so, he may be "guided more by a duty to see the best in life rather than by a tough assessment of the facts." *Id.* at 12 (emphasis added). Truth, in this argument, is expressly subordinated to duty. Duty, in its turn, requires that we condemn nihilism not because it is false, but because it constitutes a threat to the law.

ineffective but popular “spoonfeeding.”<sup>165</sup> Moreover, it may incline us to conceive of the possibilities of teaching in a way that disempowers our students—as readers of texts, as rhetoricians, as resolvers of conflicts, as actors with regard to the law and the world in which they live, as moral agents, as servants of justice and democracy, and as effective human beings.

We lawyers, and here I mean all of us, are predisposed by our rhetorical commitments in the direction of objectivity, rationality, rights and wrongs, coercive argumentation, certainty, closure, and the one true meaning of texts. Ours is a discursive world of authority and hierarchy. Walt Whitman, admittedly an extremist on these matters, is very clear in his view that all manifestations of hierarchy and authority are the enemies of democracy.<sup>166</sup>

Whitman may be wrong about democracy, or what he is saying may have no relevance to the rhetoric of law. But these are interesting and potentially important questions. What *is* the relationship between the discipline-specific rhetoric of law and the possibility of democracy? And what, for instance, is the relationship between the rhetoric of law and the depth of the divisions that separate us one from another? Between the rhetoric of law and the possibilities of compassion, reciprocity, and community? And the personal lives of lawyers? And the truth? And the possibility of justice?<sup>167</sup>

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<sup>165</sup> See text following *supra* note 126.

<sup>166</sup> Whitman’s vision of democracy is of a world that embraces all things except hierarchy and discrimination. “No specification is necessary . . . to add or subtract or divide is in vain. Little or big, learned or unlearned, white or black, legal or illegal, sick or well, from the first inspiration down the windpipe to the last expiration out of it, all that a male or female does that is vigorous and benevolent and clean is so much sure profit to him or her in the unshakable order of the universe and through the whole scope of it forever.” Whitman, Preface to the 1855 edition of *Leaves of Grass*, in *Walt Whitman: Complete Poetry and Collected Prose* 22 (Library of America edition 1982).

<sup>167</sup> [*Rhetorical note*: You will recognize, of course, that it violates the rhetoric of law to end an article with a series of questions. But it is my object to open a conversation, not to close one—and to leave you, the reader, engaged and empowered. Those purposes may be better served by questions than by answers.]

