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MOVING TOWARD STASIS: THE DESIRABILITY OF A RHETORIC REVIVAL IN
CONTEMPORARY AMERICAN LEGAL TRAINING

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TABLE OF CONTENTS

Abstract	v
INTRODUCTION.....	1
1. Rhetoric & Law: Historical Relationship	4
Introduction.....	4
Definitions	5
History	7
The Language Link	14
Rhetorical Situation	15
Invention	17
Conclusion	18
2. Stasis Theory and Declamation in the Graeco-Roman World	20
Introduction	20
Background	21
Declamations	25
Virtues	27
The Papyri	29
Implications for the Professional Arena	32
Conclusion	33
3. Making the Case for a Rhetoric Revival	35
Introduction	35
American Legal Studies: Evolution and Current State	35
Casebook Analysis	39
Rhetoric: A Remedy for the Case Method Problem	42
Future Implications	44
Restoring Rhetoric in the Classroom	46
Conclusion	47
CONCLUSION	48
BIBLIOGRAPHY.....	50
BIOGRAPHICAL SKETCH	55

ABSTRACT

This work evaluates and compares the ancient rhetorical method and the modern case method of legal training. Further, it diagnoses an apparent problem with the modern method: lawyers are graduating from law schools without an understanding of the fundamental principles of argumentation. In advocating for a return to the rhetorical method, I propose that modern legal institutions abandon their inductive teaching methods and revive the deductive methods of old. This work explains how forensic rhetoric (courtroom oratory) is most useful to law students. Ultimately, this work achieves its goals in three ways: (1) by analyzing the historical relationship between ancient rhetoric and law, (2) by discussing specific heuristics ancient rhetorical/legal educators used to prepare students, specifically stasis theory and *declamatio*; and (3) by analyzing the methods and texts modern institutions use and offering ways to implement the return to a deductive and rhetorically based legal education.

INTRODUCTION

Because contemporary American law schools have shifted from a curriculum based on rhetoric to one based on case analysis, their students are often unaware of basic principles of argumentation. This thesis offers a remedy for this problem, but first I should define basic terms important to this discussion. “Law” has three main components: legal theory, legal training, and legal practice. Legal theory is concerned with knowledge of the rule-based body of law. “Legal practice” is the day-to-day application of the law in a real world-setting. “Legal training” or “legal pedagogy” is the method by which educators prepare advocates for legal practice. Rhetoric has similar categories: rhetorical theory, rhetorical practice, and rhetorical training. “Rhetorical theory” includes abstract textbooks addressing the nature of oratory. “Rhetorical practice” is getting up in front of juries or assemblies and speaking. “Rhetorical pedagogy” is the methods teachers employ to train people in advocacy. This thesis argues that contemporary legal pedagogy can successfully borrow from ancient rhetorical pedagogies used to train forensic orators. Legal educators should revive ancient rhetorical training as a major component of contemporary American legal training.

Several articles, mostly in the area of legal studies, champion ancient rhetoric and advocate its return to contemporary legal education. Several contemporary argument theorists have even recommended teaching stasis theory in particular as a training tool. This thesis, however, advocates a whole-hearted legal education reform. It critiques the modern legal training methodology and offers a solution to the identified problems. Ultimately, it challenges the established and reigning legal pedagogy. This proposal does not aim to restore rhetorical training in legal education out of a sense of nostalgia. This proposal aims to improve the integrity of our legal training institutions, our legal system as a whole, and, ultimately, our idea of justice.

My argument relies quite specifically on pedagogical differences between the case method and the rhetorical method. The case method teaches inductively, and the rhetorical method teaches deductively. The case method requires students to analyze specific examples of cases and work outward to derive general principles. The rhetorical method, on the other hand, begins with general principles and teaches student to apply them to specific examples. I argue

that the inductive case method is much less effective and that the rhetorical method has a greater capacity for teaching students general patterns of argumentative reasoning.

Because I am advocating a return to a deductive legal training method, I feel compelled to follow a similar line of reasoning in this thesis. Therefore, I have purposely structured this argument to move from general knowledge, principles, and concepts to more specific information. I first establish some general history of rhetoric and law as academic and pragmatic disciplines. I address the relationship between the two disciplines and some basic concepts of each that are important to this thesis. Next, I narrow the scope and explore in more detail the most successful training method used in rhetorical schools of the early Roman Empire—stasis theory. Finally, I zero in on the crux of this paper with an analysis of modern legal training’s case method, and I look at specific ways we could change the curriculum to improve the quality of a modern American legal education.

In advocating a return to a rhetorically based legal studies curriculum, I am asking for a return to oratory. More specifically, I ask that the rhetorical method focus on one of three types of oratory. Rhetoricians speak of the “*tria genera carsarum*,” which refers to the three types of oratory: forensic, epideictic, and demonstrative. Forensic rhetoric is courtroom oration, and is the area of rhetoric most useful to law students. Admittedly, some types of attorneys stand to benefit more than others from the rhetorical method. For example, litigators spend much of their time in the courtroom, on their feet giving oral arguments. Yes, Litigators write briefs and motions, but they spend much of their time engaged with others in speech. For example, they talk to judges, persuade juries, and interview clients and witnesses to name a few of their daily verbal tasks. A wills, estates and trusts attorney does much of his work with pen and paper, and does not have quite the interest in oratory as a trial attorney. Though the non-litigator may focus on written communication rather than oral communication, as council he still must orally convince his clients or employer of the best course of action, and such arguments are rarely submitted in polished written documents. The rhetorical method is relevant even to those who primarily use written communication. Nonetheless, the inductive case method, though admirable for certain characteristics mentioned below, has run its course. I maintain that the deductive rhetorical method of legal training more effectively teaches the basic principles of argumentation, and, therefore, it has the most to offer regardless of an attorney’s area of specialization.

Chapter One discusses the history of the relationship between ancient rhetoric and law, and establishes that they once closely related disciplines. Furthermore, though a connection between rhetoric and law will always exist, the concrete relationship between ancient rhetoric and legal training decayed. Next, the chapter explores the theoretical connections that will always exist between the two disciplines. This chapter (1) sets forth preliminary definitions, (2) discusses historical and evolutionary aspects, (3) discusses the theoretical similarities—the language link and the rhetorical situation, and lastly (4) addresses invention.

Chapter Two discusses specific heuristics used during the early Roman Empire in order to show the intimate link between the two disciplines. In particular, it assesses stasis theory concomitantly with *declamatio* (declamation) in the educational and professional contexts in which they were used. This chapter provides a basic explanation of stasis and its rhetorical roots and identifies its close relationship to declamation. This chapter goes on to evaluate stasis' usefulness in the Roman legal order and beyond. Ultimately, I show that stasis and declamation training not only provided young students with methods and structures for developing their arguments, but these rhetorical exercises also cultivated in them a sense of morality and promoted agile minds, in turn producing well-rounded individuals capable of performing many different roles in the Roman professional setting.

Chapter Three makes the case for a return to a rhetorically based curriculum in American law schools. I address the predominant contemporary method of legal training: the case method. I discuss specific reasons why American law schools use the case method and propose what I believe are advantages and disadvantages of this model. I also discuss the idea that graduates of law schools today are more one-dimensional than the graduates of the rhetorical schools of the early Roman Empire. Furthermore, I examine the casebook style textbooks used in today's law schools, and I illustrate how these materials reflect case method problems. However, merely saying that contemporary American law schools should return to classical rhetoric is not enough. I feel a responsibility to offer my ideas about how to best reintegrate classical rhetoric into contemporary law schools. In the end, my goal is to persuade the reader that classical rhetoric has the potential to greatly enhance modern legal training.

With this thesis, I intend to make a positive contribution to the area of legal training scholarship in hopes of forging the most effective and useful methods for training and producing competent advocates.

CHAPTER 1 – RHETORIC AND LAW: HISTORICAL RELATIONSHIP

1. Introduction

The task at hand is to articulate how classical rhetoric can once again make a positive contribution to legal training. In their efforts to produce the best lawyers possible, legal educators need not reinvent the wheel; they just need to reunite ancient rhetoric and legal studies. Levine and Saunders echo this tenet: “Legal educators need not start from scratch in their attempt to understand the process of thinking like a lawyer. Rather, they might adopt the perspective of rhetoric, wherein lie the roots of law” (108, 1993). To better understand how best to accomplish this task, it would help to explore the nuances of the relationship between rhetoric and legal studies.

Legal training in antiquity included both imitation of models (Declamation) and study of general rhetorical principles (eg. stasis theory). I discuss both tools in detail in chapter two, but basic definitions will be useful. Declamation is “case study” using hypothetical or historical cases. Stasis theory is a systematic method of arriving at the critical issues of a case, thereby allowing one to develop an argument quickly and comprehensively. Students first learned the general rhetorical principles (stasis) and then applied them to the declamations or fictive cases. In modern American law schools, students begin with case study and stick with case study throughout their legal education. They are left to discover general principles of argumentation on their own. As an inductive teaching method whereby students derive general principles from more specific information, auto-didacticism is an unfortunate but natural side effect of the case method. The current curriculum teaches the law but is inefficient at teaching students principles of argumentation. Legal education should retain its training in legal theory and knowledge, but it should add back the speaking/composing training based on general rhetorical principles from antiquity.

Substantial healing and convincing must occur, however, before ancient rhetoric is reinstated into the contemporary legal curriculum. Much like the founding of Rome, modern legal training was founded in fratricide. Law and ancient rhetoric are the Romulus and Remus of

the arts and sciences.¹ Just as Romulus slew Remus, legal studies have metaphorically done the same to ancient rhetoric by pushing it to the margins, at least in the context of training advocates. Legal studies have enjoyed titan status in modern universities while ancient rhetoric has slowly faded, only to be kept on life support by the occasional humanities course. Before advocating the reunion of ancient rhetoric and legal training in contemporary law schools, I will establish definitions, history, and the theoretical similarities shared by rhetoric and law.

2. Definitions

Ancient rhetoric and law are distinct and self-governing entities. In other words, one can study rhetoric without studying law, and vice versa. Our understanding of “rhetoric,” “law,” and “legal studies” will influence our understanding of this argument. Some preliminary definitions will allow the borders between law and rhetoric, and the blurring and intersection of those borders, to become apparent.

Rhetoric exists as a discipline and also as a practice. Though this distinction may appear inconsequential, I assure you it is not. I define the *discipline* of rhetoric as “ancient rhetoric.” Specific notions come to mind when one thinks of rhetoric as a discipline: invention exercises, arrangement, the *topoi*, the structured rhetorical situation, style, elocution, and argumentation theory. Rhetoric as *practice* is best described in more general terms. The practice of rhetoric is more appropriately aligned with a generic understanding of rhetoric as persuasive discourse. George Kennedy states: “*Rhetoric*, in the most general sense, is the energy inherent in emotion and thought, transmitted through a system of signs, including language, to others to influence their decisions or actions” (7, 1991).

In these pages rhetoric is spoken of in terms of its specific devices and their applications, rather than in terms of its general definition as persuasive discourse. Attempting to define, in a general sense, what rhetoric is, presents problems because there is no real consensus on rhetoric’s definition. For this argument, I do not rely on a general definition of rhetoric. Because I raise issues about pedagogical strategies necessary to teach people more efficiently how to argue, approach rhetoric as a specific type of persuasion necessary for students to learn

¹ Romulus and Remus, twins suckled and raised by a she-wolf, resolved to establish their own city. They could not agree on a site for the new city’s location, and the disagreement resulted in a fatal argument. Romulus murdered his brother Remus and erected Rome on the Tiber river. See *World Mythology*, ed. Cotterell, Arthur. (London: 1999) p 69.

the skills required for certain tasks they will perform as practicing lawyers. These tasks include but are not limited to orally defending or prosecuting in court, briefing a judge, persuading a jury, examining a witness, interviewing or providing council to a client, and interacting with opposing council.

This specific type of persuasion referenced above is one of the three parts that make up the “*tria genera causarum*.” The three types of oratory in ancient rhetoric are as follows: (1) *Deliberative* oratory was also known as *political*, *hortative*, and *advisory* oratory. This form involved discussion and deliberation about public affairs, issues relating to politics—going to war, levying taxes, creating allegiances with foreign countries, building public buildings, etc. (2) *Forensic* oratory is sometimes identified as legal or *judicial* or *legal* oratory. This was the discourse of the courts and lawyers, and it was used anytime someone wanted to defend or condemn someone else’s actions. (3) Epideictic oratory had numerous aliases: demonstrative, declamatory, panegyric, and ceremonial. Epideictic oratory is for display and attempts to please or inspire.² For this paper, “reviving rhetoric” means “reviving forensic oratory.”

Joseph Toumain also recognizes that the more general understanding of rhetoric is not narrow enough. In doing so, he reveals the intimate connection between rhetoric and law:

Beginning with a definition of rhetoric from the Socratic dialogue *Gorgias* as the “craft of persuasion,” we quickly learn that the definition is too broad and happily for us as lawyers, at least for this inquiry, rhetoric is more specifically intended as the craft of persuasion “in jury courts and in other mobs . . . and about things that are just and unjust. (2, 1999)

Though he does not place as much restriction on the term’s meaning, he does make the important point that rhetoric finds its application in the legal arena. Wetlaufer also acknowledges the intersections between rhetoric and law when he states: “Rhetoric has long had strong connections with advocacy and the study of law [. . .]. Rhetoric offers us a set of tools for thinking about the discursive conventions within which we work” (1, 1990). This discussion depends on the viability of these connections. Simply put, to engage in the practice of law is a rhetorical endeavor predicated on rhetorical activity. And to the contra, so much of rhetoric has its grounding in the ancient legal setting.

² See *On Rhetoric*, George A. Kennedy’s introduction to Aristotle’s *Rhetoric*.

In the early Greco-Roman, the disciplines of rhetoric and law overlapped. They still overlap today despite efforts to eschew the rhetorical tradition and the ancient rhetorical component of law. This overlap has more than two dimensions—one theoretical, the other practical. The theoretical overlap concerns the area where rhetoric and law come together as systems of language, understanding, and meaning-making in a rhetorical situation. The overlap with the most significance for this discussion, however, is pragmatic by nature. The pragmatic overlap deals with “invention” in regard to its practical application in legal training. In *De Inventione* Cicero defines invention as “the discovery of valid or seemingly valid arguments to render one’s cause plausible” (I, 9., 1949). Invention, specifically stasis theory, and the role it plays in the rhetorical situation, serves a practical function common to both rhetoric and law, and it will serve as the focus of chapter two.

This argument depends heavily on these connections between law and rhetoric, and on the dissolution of the connections. Law seems to have a history of tense relationships with other academic disciplines.³ Law has been no more accommodating in regard to rhetoric. Since antiquity, several major shifts have occurred in the area of rhetorical/legal training. These shifts have created a fissure between these areas of study, negatively impacting both ancient rhetoric and law. As a result of these shifts, rhetoric has assumed a reputation of wickedness and licentiousness, while legal studies suffer from an imbalanced curriculum. We can remedy this situation by convincing legal educators that ancient rhetoric can help bring the current legal studies curriculum to a state of equilibrium with regard to inductive and deductive methods.

Over the past 2000 plus years, many changes in legal training have occurred. To see how modern legal training arrived at its current state and to determine which of the abandoned methods legal educators should revive, we need to briefly review the history of rhetorical/legal training.

3. History

Modern law and contemporary rhetoric are descendents of ancient rhetorical theory and, more precisely, forensic rhetoric, one of three primary forms of ancient persuasive discourse.

³ Wetlaufer observes that, “There is 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.” See Gerald Wetlaufer, “Rhetoric and its Denial in Legal Discourse,” 76 *Va. Law Rev.* 1545.

Ancient rhetorical theory was born in Greece in the late fifth and fourth centuries BC. In a work called *Synagoge Technon* Aristotle surveyed the history of rhetoric in Greece before his time. He collected (*synagoge*) material from available handbooks (*technai*), thus the title. Though this work did not survive, we have accounts of its contents. He identified several of the inventors of rhetoric such as Corax and Tisias of Sicily. Aristotle conducted one of the first fully developed studies of persuasive discourse appropriately entitled *Rhetoric*. He maintained that *forensic rhetoric* used *accusation* and *defense* to cater to the ideas of justice and injustice. In fact, Aristotle devotes six chapters in *Rhetoric* to the subject of judicial (forensic) rhetoric. In Chapter Three, Aristotle states: “In the Law court there is either accusation [katēgoria] or defense [apologia]; for it is necessary for the disputants to offer one or the other of these” (48, 1991). Texts like Aristotle’s *Rhetoric* help us to see more clearly the area of overlap between rhetoric and law. (Kennedy, 11, 1994)

Many changes occurred, however, in the Greek world that led to a cultural revolution, which allowed rhetoric to take center-stage. Philip of Macedon permanently changed the Mediterranean map when he initiated the Macedonian conquest and the battle of Chaeronea in 338 BC. The expanding Roman Mediterranean Empire resulted in the decay of the Hellenistic world. With the fall of Corinth in 146 BC, what once were triumphant Greek kingdoms now were under Roman rule. Rome permitted Greek intellectuals, however, to continue their lifestyle, traveling abroad, educating, and receiving recognition. These changes opened the floodgates for the adoption and development of rhetoric in the early Roman Empire. (Anderson, 1-3, 1993)

Rhetorical theory develops in the Hellenistic period before the Romans adapted it for use in the legal system. Forensic oratory was the discourse practiced in the courts, and lawyers used this persuasive oratory for defense and accusation. As forensic oratory and public speaking increased in importance, rhetorical training became more popular. Rhetorical training increased in demand and was extremely expensive. Few could afford this training. Many students were of the Graeco-Roman financial elite. Citizens not of the elite class who were fortunate enough, however, to receive legal training ascended the rungs of the social ladder. In reference to fourth century AD lawyers, Honoré states: “Lawyers tended to be drawn from the urban middle or lower-middle classes. The study of law had always attracted members of less prominent families and the later empire was, as the desperate attempts to restrict it show, a period of social mobility”

(8, 1988). The increased interest in law was not merely a strategy to improve one's social status; it was a response to a demand that resulted from a specific series of changes in Greek and Roman society and, in particular, the Roman legal arena.

The emerging demand for rhetorical experts, the development of the legal code, and the ever-increasing importance of the courts allowed a new profession to surface—the lawyer. Saunders and Levine are even more specific in their statements regarding this emerging professional role: “As forensic rhetoric emerged as a discipline, so emerged the lawyer as one versed in the discipline who was called on to represent those who were not” (109, 1993). It is important to note that here that “lawyer” refers to one versed in forensic rhetoric, as opposed to one versed in the law. The terminology used to describe those versed in rhetoric as opposed to law is important and has further implications addressed below.

A succession of fine rhetoricians followed Aristotle. Cicero was a rhetorician, lawyer and politician in the Roman Republic. Known more for his practice than his theory,⁴ Cicero did more to preserve older works than to embark on new treaties of his own; for example, Hermagoras' work on stasis theory. Though much of Cicero's import is due to his not having been just a theorist, he did author *De Inventione*, an important work on the nature of invention.

Quintilian, on the other hand, was an outstanding early Graeco-Roman orator who dedicated much of his effort to a treatise on education entitled *De Institutione Oratoria* or *On the Education of the Orator*. The *Institutio* is a collection of ancient theories on rhetoric and education. In *Quintilian*, Kennedy maintains that no other work “tells us as much about what went on in ancient schools or about the objectives at which ancient education aimed” (11, 1969). Quintilian is also intriguing because of his goal as a teacher. He strived to produce the perfect teacher orator and keep him at peak performance. His ideal is evident in his pedagogy, for he provides instruction spanning from the time one initiates studies to retirement. In his work on ancient rhetorical pedagogy, Quintilian was also important in preserving earlier works on stasis theory. Thus, his contribution to rhetoric warrants his mention in this discussion. (Kennedy, 11, 1969)

⁴ Whately observes that, “Cicero is hardly to be reckoned among the number; for he delighted so much more in the practice, than in the theory, of his art, that he is perpetually drawn off from the rigid philosophical analysis of its principles, into discursive declamations, always eloquent indeed, and often highly interesting, but adverse to regularity of system, and frequently as unsatisfactory to the practical student as to the Philosopher” (7).

Hermogenes was a rhetorician of the second sophistic who provides us with the most comprehensive and systematic handling of stasis theory. Hermogenes main biographer was Philostratus, a fellow second sophistic rhetorician. His treatment of stasis provides the foundation for chapter two of this discussion. I will say much more about his life and work in the following pages, but for now, it is only important to know that his translation is the “fullest surviving systematic treatment of stasis theory” (Heath, 2, 1995).

Libanius is a notable sophist of late antiquity who made significant contributions to stasis theory through his teaching and declamations, and, the second chapter, in addressing stasis theory, examines one of his stasis-structured declamations, of which we have several. Many of the works of ancient rhetoricians have disappeared—notable for the purpose of this discussion are Hermagoras’ works—along the way, and it is probable that we have access to only a fraction of the material generated by ancient scholars. Despite the losses, we have the works of the primary scholars. The extant works of Aristotle, Cicero, Quintilian, Hermogenes and Libanius make this discussion possible.

It is important to address the difference between the Aristotelian and Ciceronian eras of advocacy, and, more specifically, between advocacy in Athens and Advocacy in Rome. This difference was the catalyst for the changes that led the estrangement between ancient rhetoric and legal studies. In Roman courts litigants had advocates who represented them; in Athens, the litigants were required to appear before the court and offer their oral argument on their own.⁵ Crook sums up this difference: “What we find the Athenian doing, in fact, is delivering by heart a speech written for him, for a fee, by a rhetorical expert: the Vicarious Pen, one might say, instead of the Vicarious voice” (30, 1995). This vicarious pen—also known as a logographer—enabled one lacking oratorical eloquence to present a convincing case.

The rules of Athens did not mandate that a litigant procure the services of a logographer. The ghost writing of the Athenian legal system resulted from structural features that strongly encouraged litigants to turn to an aristocratic, educated patron for his verbal arsenal. Legal proceedings took place not before one judge, but before a massive audience of decision makers⁶,

⁵ See J. A. Crook’s Legal Advocacy in the Roman World Ithica: Cornell UP, 1995: p.30.

⁶ I use the terminology “decision makers” as opposed to “judges” because judges did not exist in Athens. In the intro to his translation of Aristotle’s *Rhetoric*, Kennedy states: “Not only were there no professional lawyers in Greece, there were no professional judges. Juries (in Athens made up of 201 or more citizens chosen by lot) decided cases.. Litigants had a limited time to make their cases in formal speeches, convincing the jury that they

and the everyday litigant ran the risk of being ridiculed if he failed to put forth a sound, respectable, and effective defense. Furthermore, the court's decision was determined by a vote immediately after the litigant's speech, without any discussion of the case. Logography dramatically mitigated the intimidating nature of these conditions, giving the litigant a fighting chance at least. (Crook 31, 1995)

As the Roman legal system developed, it did not retain the ventriloquism of the Athens. The core difference between the Athenian and Roman legal system was idealistic in nature. Crook states:

The mentality of classical Athens was profoundly populist, and that entailed adherence, at least as an ideal, to the concept that a citizen ought to say his own say before his peers. That of the Romans was oligarchic and characterized, at best, by a vast sense of *noblesse oblige* that inculcated the protection of the lower in status by the higher (32, 1995).

The concept of *noblesse oblige* serves as the origin for Roman advocacy. This relationship is more appropriately termed "*patronus* and *cliens*," which goes "back to the days of the freeborn *clientes* who were, though Roman citizens, in certain respects 'second-class citizens'" (Crook 32, 1995). The *cliens* provided clientage to the *patronus*, which entitled him to aid in the form of legal service.

The development of the *patronus/cliens* relationship was accompanied by several important shifts that had a profound effect on the landscape of the legal arena from the courtroom to the classroom. (1) Rome abandoned the inquisitorial characteristics of the Athenian legal system. (2) The advocacy of the Roman Legal system fostered a sense of opposition, not between the litigants and the judges, but rather between the two opposing advocates. This defining characteristic of the Roman courts is the progenitor of the pervasive adversarial spirit attributed to the Anglo-American legal system. (3) The Roman legal order moved away from florid language and placed more emphasis and, consequently, more value on the "facts of the case". This last shift seems to have had the greatest effect on the evolution of legal studies.

were trustworthy persons, persuading them of the truth of what they were saying, and arousing in them the motivation to share their views and take the decisions they wanted" (8).

The schism between “language” and the “so called facts” is clearer when examined from the perspective of the two Roman legal professions—advocacy and jurisprudence. The role of the advocate was to deliver the performance in the courtroom. The advocate was an expert speaker; he was not necessarily an expert on details of the law. The jurist’s primary function, on the other hand, was not oration, but rather to provide technical legal advice to judges, pleaders and litigants. Of course, scholars have noted instances of professionals dipping hands in both pots. Although Crook observes that, “By the time of Cicero’s middle age there was a virtually complete separation: advocates *versus* jurists,” he follows with mention that there were, to be sure, professionals who could wield both swords (40, 1995). Nonetheless, the burgeoning focus on textual language, as opposed to verbal language or oral argument, dramatically influenced the legal arena as a whole—practice and training.⁷

Fine-tuning Rome’s various legal roles provided for the emergence of specialized schools, which catered specifically to the needs of these professions. One could now study law at a school that ignored rhetoric and focused solely on the technical aspects of law. Though many students studied rhetoric before going to these law schools, the separation had a profoundly negative and lasting impact on the relationship between rhetoric and legal training.

The fissure between law and rhetoric surfaced long before our modern legal institutions existed. Libanius, a rhetorician and educator during late antiquity, alludes in his autobiography to this major shift that began to establish rhetorical and legal studies as separate domains:

Rhetoric that in the past used to flash like lightning, is now under a cloud: it used to attract young students from far and wide, but now it is considered a mere nothing. It is held to be like the stony ground on to which the sower scatters seed and then is enraged to lose his crop also. It is from other sources that the yield comes—from Latin, by all that is holy, and law. (35, 1992)

It would be an understatement to say that that Libanius was displeased with the competition provided by the development of specialized schools, particularly ones devoted to the study of law. Libanius believed these schools had purloined his students by developing a reputation as being “stepping-stones to office.”⁸

⁷ For more, see Murphy, *Rhetoric in the Middle Ages*.

⁸ See *Libanius’ Autobiography (Oration 1)*, Ed. A. F. Norman, Oxford University Press (London: 1965) p193.

The fissure Libanius acknowledged in late antiquity became a canyon during the Middle Ages. The split continued during this period with the growth of *ars notariae* and *ars arengandi*. *Ars Notariae* was a movement concerned with the “art of notation,” and it primarily addressed the documentation used in the legal profession. *Ars arengandi* was a movement concerned with the “art of pleading.” Both movements developed specialized schools providing students with training explicitly devoted to these topics.⁹

Levine and Saunders maintain that “[t]he separation of law from rhetoric occurred during the Middle Ages and the Renaissance at about the same time that rhetoric came to mean the *art* of oratorical eloquence distinct from the science of logic and dialectic¹⁰” (110, 1993). Some viewed rhetoric with disdain, accusing its proponents of sophistry, and this position increased in popularity. Many eschewed rhetoric, even those who practiced it, as it came to be viewed as a vehicle of manipulation, obfuscation, and trickery.

Resistance to rhetoric intensified during the sixteenth century, and it came to a zenith in the late nineteenth century. Rhetoric had all but disappeared from the college curriculum.¹¹ Jacob maintains that during this time, “Rhetoric came to be conceived of primarily as a form of aesthetic and literary analysis at the level of word-play and, in 19th century America, almost a form of elocutionary dance” (2, 1995). By this point in time, most universities and law schools had walked off the dance floor.

It is extremely difficult, however, to disown something partially. In line with this precept, law has, for the most part, rejected the discipline of ancient rhetoric whole-hog. There is, of course, the occasional hopeful scholar who recognizes ancient rhetoric’s intrinsic value and its potential to reconnect legal studies to its dialectical roots. In its neglect of ancient rhetoric, though, law and legal training forfeit access to a great wealth of training heuristics that have a

⁹ To do these movements justice calls for much more discussion than I can justify by the scale of this paper. For more on *ars notariae* and *ars arengandi* and their separation from the verbal arts, see James Murphy’s *Rhetoric in the Middle Ages*, University of California Press (Berkeley: 1974).

¹⁰ Whether rhetoric’s reputation changed because it was alienated from legal training, or whether legal training alienated rhetoric because rhetoric altered its subject matter is debatable to my mind. Levine and Saunders maintain that the writings of Rasmus and Descartes precipitated the split in the sixteenth century. Rasmus claimed invention and arrangement of ideas belonged to dialectic, not rhetoric as proposed by Aristotle. Descartes made further objections and “the classical conception of rhetoric grew apart from the study of logic, philosophy, and law in the medieval and Renaissance academies” (110).

¹¹ See Bernard E. Jacob, *Ancient Rhetoric, Modern Legal Thought, and Politics: A Review Essay on the Translation of Viehweg’s “Topics and Law”*, 89 *Nw. U. L. Rev.* 1622.

consistent history of producing morally responsible and mentally agile advocates and professionals.

It would be futile to embark on a discussion regarding the benefits of such heuristics before identifying the foundation of the overlap between ancient rhetoric and legal training. Although I have identified the constituent parts of the aforementioned overlap, there exists a foundation upon which they rest, a common organ without which the relationship would perish—language.

4. The Language Link

Rhetorical legal training and non-rhetorical legal training both depend on language. Both methods stress interpretation of language. Both stress composition of language. Ultimately, both stress language as a medium for communication. Rhetorical training's deductive methods are more effective at teaching these aspects of legal training. Doubtless, interpreting the language of laws and composing are major components of the contemporary law school curriculum. I contend that they are not so much taught directly but rather they are emphasized and left in the rough for the student to discover. In chapter three I illustrate how Ancient rhetorical principles and, more specifically stasis, can positively influence both language interpretation/analysis and language composition.

To be even more specific than merely saying rhetoric and law are grounded in language; one could say that both are grounded in an oral tradition. The printing press was not invented until the fifteenth century¹², and until then, written discourse was subordinate to oral discourse. When one thinks of rhetoric, the notion of manipulating words is what typically comes to mind. Kennedy observes that, "*Rhetorikē* in Greek specifically denotes the civic art of public speaking as it developed in deliberative assemblies, law courts, and other formal occasions under constitutional government in the Greek cities, especially the Athenian democracy¹³" (3, 1991).

Although legal studies have a strong oral tradition, the current state of the curriculum fails to stress the traditional dialectic model. Legal studies made a decision to

¹² See Edward P. J. Corbett, *Classical Rhetoric for the Modern Student* 31 (New York, 1971).

¹³ Kennedy, *A New History of Classical Rhetoric*

value one kind of language more than another—written code over oral argument, leading to the ascension of abstract written language over dialectic in the legal arena. In chapter three I go into greater detail about how the increasing number of precedents in part precipitated legal educators’ abandonment of the rhetorically based curriculum. There simply was too much written law to address in a limited amount of time, so they cut out rhetoric. This preference for the written law over oral argument is part of the reason for the departure from the rhetorical model.

One could write an entire thesis on the codification of law, and though such detail is beyond the scope of this paper, it is important to at least acknowledge this development. The language of the rules gradually achieved a more weighty position in the legal arena than previously held by oral argument. With every new emperor came a new code. And with each new code, the language became less clear, so that an advocate’s argument became less a matter of how one did or did not break a law, and more a matter interpreting what the abstract language really meant.

5. Rhetorical Situation

To say language is the only theoretical connection between ancient rhetoric and law or legal training would be jettisoning the context of argumentation. What frames the argument? On many levels, the argument of forensic rhetoric is no different than argument of the modern-day legal classroom or courtroom. Argument, regardless of where or when it is being employed, has one consistent component—the rhetorical situation.

Lloyd Bitzer describes the rhetorical situation with the following terminology. For Bitzer, the terms exigency, audience, and constraints are most useful. Exigency is something that needs resolution, modification, or removal; it is something that needs to be done or that is awaiting some sort of action. The rhetorical audience is the group exposed to the discourse and potentially influenced by the discourse. A constraint is any variable—person, event, relation, object, fact, tradition, image, interest, or motive—that

may influence or shape the rhetorical discourse.¹⁴ These terms appear more appropriate for describing the rhetorical situation in the context of a legal discussion.

In her article “To Say What the Law Is: Learning the Practice of Legal Rhetoric,” Leigh Hunt Greenshaw echoes this sentiment. Greenshaw utilizes Bitzer’s description of the rhetorical situation to show the similarity between the practice of law and the practice of rhetoric. The terms exigency, audience, and constraints, along with their definitions, would be much more helpful in providing understanding about the similarities between law and rhetoric if we could see them grounded in a legal context. Greenshaw provides several helpful examples:

- Exigency: “Injurious acts capable of repetition specify a change: restraint by injunction” (6, 1995).
- Audience: “[. . .] the senior partner who can file a law suit after reading a memorandum, the legislative committee that can recommend a bill following hearings, the judge who can grant relief or hear the appeal, and the administrator who has discretion to act to the fullest extent of his or her statutorily granted powers” (6, 1995).
- Constraints:¹⁵ “They include documents, legal authorities, and factual impediments to, or predicates of, one legal response or another. Values and norms, both those commonly held by the audience and the rhetor, are constraints. Prior precedent, especially a case “on all fours,” constrains a judicial response” (7, 1995).

So, there is a strong theoretical link between law and rhetoric, but what about the pragmatic, utilitarian reintegration this paper seeks? How do we get from theoretical connection with language and the rhetorical situation to acceptance of ancient rhetoric as an effective tool that can help to cultivate modern-day lawyers?

¹⁴ See Leigh Hunt Greenshaw, “‘To Say What the Law Is’: Learning the Practice of Legal Rhetoric,” Valparaiso University Law Review 29 (1995): 861.

¹⁵ Greenshaw observes that there are two categories of constraints, which are in line with Aristotle’s classes of proofs or forms of argumentation. “The first are those originated and managed by the rhetor and his or her method: the technical or artistic proofs. These include the example and the enthymeme, argumentative strategies, and rhetorical figures. The other class of constraints is the inartistic or nontechnical proofs. These are constraints in the situation that are external to the rhetor, which do not need to be invented or crafted. They may include law, statutory and case decisions, and documents such as contracts, witness statements, and oaths” (7).

The rhetorical situation always presents an occasion for response. In fact, the rhetorical situation always elicits a response. Greenshaw observes that, “Rhetoric functions ultimately to produce action or change. It must perform some task. It responds to complex and structured situations—rhetorical situations” (6, 1995). It is in the *response* that rhetoric finds practical common ground with law and legal training. In this common ground lay the seeds for response. These seeds are the seeds of invention.

6. Invention

Structured situations require structured responses. A facility with language and an understanding of the rhetorical situation are good to have, but without certain tools that allow one to effectively implement language in the rhetorical situation, the powerful effect of pre-existing knowledge and linguistic skill is drastically mitigated. This is the place where theory meets practice, where language and the rhetorical situation meet invention.

Invention is the area of practical overlap between rhetoric and law, and, therefore, harbors the most potential to influence the advocate in his day-to-day activities. An invention heuristic is a tool that rhetoricians, advocates, and students use to discover and organize their arguments. Like the hammer or the saw, invention has been around for centuries and is just as useful and effective today as it was two thousand years ago.

Traditionally, invention exercises have been used in the context of fabricated, hypothetical situations, which provided students the opportunity to present an argument. Geoffrey and Anne Mangum have written: “Where public speech is important (as in the Greco-Roman world), it is important to train people in its skills. What better way than by inventing situations and giving one’s pupils parts to play” (43, 1993). More specifically, invention exercises are heuristics that guide the student in discovering what he has to say and reveal the best way to organize and deliver the message.

Although invention has been effectively utilized in hypothetical situations, it is more or less a systematic tool for fleshing out thoughts in a productive, forward-moving, structured way. Various rhetoricians have proposed different theories of invention over the years. The theory most appropriate for this discussion and most widely accepted comes from the Ciceronian school of invention and is often characterized in terms of

pro/con thinking.¹⁶ Thomas O. Sloan maintains that, “. . . *invention* is dialogic and it must be pursued pro con, prosecution and defense, affirmation and negation. One must, that is, debate both sides—or, for that matter, all sides—of any case or one’s *inventio* will remain not fully invented” (462, 1989). This system of thinking pro con allows one to see all arguments that can be utilized to his advantage and disadvantage, and, ultimately, guides him in building his argument.¹⁷

The type of invention I address aids students in pro/con thinking, which is critical when going through the heads. Sloan makes the following observation:

As pro and con argumentation, Ciceronian *invention* is essentially an analytical process, for which Cicero revived a certain lawyerly doctrine of the Greeks. At first he called this doctrine *constitutio* and then preferred the Greek term *stasis*. It simply means, put the subject (whether it’s an idea or an accusation) into a debate, as Antonius does, argue it pro con, and then find the *stasis*—that is, as Antonius says, “the issue in doubt,” the precise point on which the dispute seems to turn. (466, 1989)

Although Cicero mainly addresses topical invention, which is not exactly the same as stasis, his pro/con, yes/no thinking is the same type of systematic thinking that fuels stasis. The following chapter provides a thorough examination of stasis theory and declamation, and their relationships to the ancient advocate.

7. Conclusion

In review, several points important to the remainder of the discussion. (1) Modern legal training does not efficiently teach general principles of argumentation. (2) Many years ago forensic rhetoric training was the closest thing to what we know as legal training. (3) Naturally, this discipline taught deductive principles first and encouraged students to apply them to specific examples of fictive cases. (4) Law and ancient rhetoric experienced an institutional separation. (5) The separation resulted in an increasing

¹⁶ At 19 years of age, Cicero wrote a handbook on invention entitled *De inventione*. He would eventually consider this a crude and incomplete handling of the topic. Years later he would write *De oratore*, his masterpiece on Rhetoric, which he considered a completion of his original, unfinished text.

¹⁷ Regarding discovering ideas through the topics, Sloane states that the topics are more than a list to which one looks for ideas, they are “an armamorium of flexible, responsive debating tactics, a series of argumentative wrestling holds” (465).

emphasis on fact, code, and nomination, clearly evident in the increasing number of precedents. (6) Ultimately, the relationship experienced the ascension of abstract written language over dialectic. (7) In an effort to keep up with the increasing body of written law, legal training has abandoned ancient rhetorical models.

If there is an absolute one could state about the disciplines of rhetoric and law or legal training, it is that they were once closely related, and, in fact, quite dependent on one another. In ancient Rome, they were employed in the public forum, but the relationship dissolved during the sixteenth century. Their theoretical links—language and the rhetorical situation—still exist, despite the tension and resistance that appear to define their current relationship. It is the practical connection, however, that is going to bridge the chasm and provide some sort of healing between the disciplines. Stasis theory is given the distinct opportunity to reunite ancient rhetoric and legal training.

CHAPTER 2 – STASIS THEORY AND DECLAMATION IN THE GRAECO-ROMAN WORLD

1. Introduction

Scholars of rhetoric have produced important works on stasis theory, but the extent and scope of this commentary has been limited.¹⁸ Because we have failed to give stasis its deserved attention, many modern scholars do not have a full and accurate understanding of stasis, despite its weighty position in the rhetorical tradition. Dieter observes that “[a]s a rhetorical concept stasis may be almost as ancient as the physical *ta atoma*, or the concept of atoms, but modern rhetoricians seem to have been less successful in understanding and utilizing stasis than have modern scientists in exploiting the atom” (345, 1950). Stasis theory is not only as ancient as the theory of the atom, but also as intricate a theory. We find several different versions of stasis theory in antiquity, and this thesis uses the Hermogenean model because it is the most complete extant stasis manual and most influential in the Third Century and on.

By assessing stasis theory concomitantly with *declamatio* (declamation) in the educational and professional context, we get a glimpse into their scope of influence in the Greco-Roman professional setting. Stasis theory is the systematic classification of the different issues of a case that can be debated. Declamation is the practical application of stasis theory to fictitious or hypothetical cases, somewhat reminiscent of modern case analysis. It will be useful to provide a basic explanation of stasis and its rhetorical roots and identify stasis’ close relationship to declamation.

In this chapter, I clarify the extent to which rhetoricians and students applied stasis theory Roman Empire during the Second Sophistic. Similar to present-day courts, the Roman courts had their high-profile O.J. cases and their low-profile disputes over the 150-dollar security deposit. The type of case, important or trivial, impacted the effectiveness of stasis and declamation. These rhetorical exercises not only prepared students to enter the Roman legal

¹⁸ Much of the major work in the field has been done by classicist and Biblical scholars. There have also been a few essays written on stasis in the composition classroom. This work has been very valuable but does not address the use of stasis for contemporary legal training.

order as advocates, but they also prepared students on more than one level to enter a wide range of professional activities. Stasis and Declamation training did more than provide young students with methods and structures for facilitating their arguments; these rhetorical exercises cultivated their minds, taught them morality, and promoted maturity. For these reasons, stasis and declamation should supplement modern legal training.

2. Background

Stasis theory was the predominant argumentation theory in the Graeco-roman world. I have already defined stasis as the systematic classification of the different issues relating to forensic oratory. We see the first treatment of the different type of issues found in legal oratory in the fourth century BC, “but their systematic classification seems to have begun in the second century BC” (Heath, 19, 1995). Stasis is a standardized method of developing an argument for an advocate to use in a court of law. Though many definitions of stasis exist, Hermogenes describes his own text on stasis as a “discussion [that] deals with the division of political questions into what are known as heads.”¹⁹ He goes on to remark that “[t]his subject is almost identical with the theory of invention, except that it does not include all the elements of invention” (28, 1995). Hermagoras did tremendous work on stasis, but none of his texts survived. Hermagoras did have competition, as we have evidence that rival rhetoricians also produced work on stasis theory. Furthermore, Hermagoras did not invent stasis theory, but we know he improved it significantly. What we know of his theory comes from what other rhetoricians have preserved. The foundation for Hellenistic issue theory is extrapolated from two important Latin texts: Cicero’s *On Invention* and the pseudo-Ciceronian *Rhetorica ad Herennium*.²⁰ (Heath, 19, 1995).

Stasis theory has the most potential to contribute to contemporary legal studies in the area of issue identification. An issue is a critical point in an argument that both sides can debate pro/con.²¹ The practice of *stasis* enabled one to identify the major issues of a legal dilemma in a

¹⁹ See Malcolm Heath’s *On Issues* p28.

²⁰ *Rhetorica ad Herennium*. Translation by Harry Caplan. Cambridge: Harvard University Press (1954).
Cicero. *On Invention*. Translation by H. M. Hubbell. Cambridge: Harvard University Press (1949).

²¹ Nadeau observes that “[i]n modern rhetoric an issue is a question that acts as a focus or center for opposing contentions in a controversy Issues, whether principal or secondary, come into being as a result of conflict arising in the course of debate or discussion” (369, 1958).

small amount of time, enhancing the advocate's efficiency. Stasis focused intensely on organization and enabled an advocate to quickly establish his argument and the order in which he would present it. This tremendously practical feature is in part what made stasis theory so dominant in the rhetorical schools, for it was quite possible that advocates waited "in the vicinity [of the courts] like boats for hire" (Crook 63, 1995).²² Did the Romans possibly have a term equal to the pejorative "ambulance chasers?" Doubtless, it would have been "*Chariot Chasers*." In such cases, advocates may have had only a few minutes to prepare the argument. Because compressed cases called for rapid argument development, stasis theory was doubtless a tremendous help, for it provided the advocate with a strategy for developing an argument that he could employ quickly.

Stasis theory as we know it today, the elaborate system of issues and their division, has a relatively clear history, yet its rhetorical roots, as with all roots, are under the surface. In other words, it is not entirely clear which ancient schools of rhetoric led to the development of stasis theory. Walter Jaeneke has shown that Plato, Aristotle, and the Peripatetic school provided much of the basis for stasis-theory. Although some scholars have speculated that stasis developed from certain elements of Aristotelian rhetoric and logic, and perhaps even Plato's method of division, the evidence is uncertain as to what specific school of thought birthed rhetoric.

Many Hellenistic rhetoricians wrote on stasis theory in textbook or manual format. These authors built upon each others work, rather than creating entirely new and different theories. Consequently, stasis theory, while maintaining a focus on issues, gradually increased in complexity, a result of the theorists including more issues with every new variant of the theory. This evolution culminated in a thirteen-issue system. Though a fairly mature system of stasis probably existed before Hermagoras, he was the first to produce a formal identification of the four issues of conjecture, definition, quality, and objection. Lollianus and Theodorus taught a five-issue system. It is not clear who established the thirteen-issue system, but Heath notes that "there is no doubt that Minucianus was for some time the system's most influential exponent" (20, 1993). Most of what we know of Minucianus, we derive from Hermogenes' manual of

²² Crook observes that "there is some speculative case, not for advocates salaried from the public purse but for the presence about the *contuentus* of advocates ready to take on clients as they appeared [. . .]" (63, 1995).

stasis entitled *On Issues*. Hermogenes brought stasis theory to its most developed level of the second sophistic, and, therefore, his theory will be the example we will inspect.

Hermogenes of Tarsus was a prominent Greek rhetorician who lived and wrote in the latter part of the second century A.D. His work became the bedrock of Byzantine rhetoric and was of considerable import during the European Renaissance. One of his major works, entitled *Concerning Ideas*, analyzes seven ideas of style: Clarity, Grandeur, Beauty, Speed, Ethos, Verity, and Gravity. His work of most importance to this study is entitled *On Issues*, written about 176 A.D. when he was only sixteen years of age.²³ Whereas Hermagoras and other Hellenistic and Graeco-Roman rhetoricians concentrate mainly on theory in their manuals, Hermogenes concentrates on the more practical problem of division of the issues.²⁴ He identifies thirteen issues: conjecture, definition, counterplea, counterstatement, counteraccusation, transference, mitigation, practical, objection, letter and intent, conflict of law, assimilation, and ambiguity. In the beginning of his treatise, Hermogenes defines the issues:

- (1) **Conjecture** is a proof of the existence of an act that is unclear from a sign that is clear; e.g.: A man is apprehended burying a recently slain corpse in a remote place; he is charged with homicide. On the basis of the burial, which is clear we investigate an act that is unclear, i.e. who committed the homicide?
- (2) The issue of **definition** is an enquiry into the description of an act that is partially performed and partially deficient with regard to the completeness of its description. E.g.:- A man steals private property from a temple; the legal penalty for temple-robbery is death, while the legal penalty for theft is twofold repayment; the man is prosecuted as a temple-robber, but claims to be a thief. If one adds that the property is sacred the man is clearly a temple-robber.

²³ Nadeau remarks that “[h]e lived at a time when Greek was again the language of letters; and, even as a very young man, he won great popularity and counted the Emperor Marcus Aurelius (d. A.D. 180) among his admirers” (363, 1964).

²⁴ Once an advocate had identified an issue, he would then divide it according to Hermogenes’ system. A certain act may be divided into “justified” or “not justified.” Once this division has been made, the student would then examine the different heads for that choice. “For example, in the case of the artist who placed a painting of a shipwreck in the harbor entrance, a student could elect to plead that the act was not forbidden (plea-of-justification). His next step would be to consult Hermogenes’ *On Stasis*, where he would find the following heads (with accompanying examples and suggestions) for possible use as topics for his speech: review of the circumstances as he seems them; discussion of the propriety of bringing judgment to bear on something not specifically forbidden; the status of the person charged; justification of the act itself; a counterposition that good was intended; a general thesis of service to the state; and a discussion of quality of the act and of the intention with which it was done.

- (3) If he [defendant] denies altogether that the act was forbidden, the issue is **counterplea**; for counterplea arises out of the prosecution of some act not generally held to be actionable as if it were actionable; e.g.:- A farmer disinherits his son for studying philosophy.
- (4) If the defendant concedes that the act in question was wrong, the generic name is **counterposition**. This issue can be divided into counterstatement and counteraccusation.
- (5) If he accepts responsibility for what happened himself he makes a **counterstatement**; a counterstatement arises when the defendant, while conceding that he has done some wrong, sets against that some other benefit achieved as a result of that same wrong.
- (6) If he transfers responsibility to some external factor, it may be to the actual victim, or to a third party. If to the victim, it is a **counteraccusation**; a counteraccusation arises when the defendant admits that he has done some wrong, but in turn accuses the victim of deserving to suffer what he did.
- (7) If responsibility is transferred to a third party, a division can again be made: the defendant, while admitting that he has done some wrong, transfers responsibility either to an act or person capable of being held to account, which is a **transference** [. . .] An ambassador is to set out within thirty days on receipt of 1,000 drachmas from the treasurer for traveling expenses; he does not receive them, and for this reason does not set out; he is brought to trial.
- (8) If responsibility is transferred to a third party [. . .] one not capable of being held to account, but wholly unaccountable [. . .] is a plea of **mitigation**:- The ten generals who fail to recover the bodies after a sea-battle because of a storm, and are brought to trial.
- (9) If the enquiry is concerned with a single instrument (either about its single intent, or with one of its sections), the issue is one of **letter and intent**; letter and intent occurs when one party (usually the prosecution) advances the letter of the law while the other appeals to its intent; e.g.:- It is a capital offence for an alien to ascend the city walls; during a siege an alien ascends the city wall and fights heroically; he is prosecuted under the law.
- (10) [. . .] **assimilation** is the comparison of an act not made explicit in writing with what is explicit, where someone equates what is not explicit with what is. E.g.: The son of a (female) prostitute may not speak in the assembly; an injunction is sought to prevent the son of a man who has prostituted himself from speaking.

- (11) A *conflict of law* arises when two or more verbal instruments or one divided into two parts, which are not inherently contradictory come into conflict because of special circumstances. In general this is a double-inquiry into letter and intent; e.g.:- A disinherited son shall not have a share in his father's property; a man who remains on board a ship abandoned during a storm shall become the owner of the ship; a disinherited son remains on board a ship abandoned during a storm, but his title is contested on the grounds that the ship belongs to his father.
- (12) *Ambiguity* is a dispute concerning a verbal instrument arising from accentuation or syllabification. [Outcome determined by placing emphasis on a specific accent or syllable of a particular word in a law.] (Heath's translation of Hermogenes' *On Issue*, my brackets)
- (13) [. . .] *objection* is different, and arises when the enquiry is about whether the case should be allowed to come to trial.

Each of these heads has an accompanying framework designed to guide the orator in developing an oration for the issue in question. He derives this large number of issues through a sub-division of issues. This sub-division marks the peak of intricacy in stasis theory of the Second Sophistic and is what makes it so complex.²⁵ Later I offer an example of one of Libanius' declamations in which this technique of division is evident and ideas about how modern lawyers could use the same patterns of reasoning.

3. Declamations

Declamation was an exercise performed in ancient rhetorical schools. Declamation includes the composition and delivery of speeches concerning fictive or historical court cases and debates.²⁶ It is no coincidence that one should find a prime example of the division of issues in a declamation. Russell states that "[w]hat is really specific to declamation, rather to other forms of rhetorical exercise, is its firm organization" (2, 1983). Stasis provided this organization and, consequently, was a staple in the repertoire of rhetorical exercises. The main reason rhetoricians taught stasis in the schools was so that students could use the theory to practice

²⁵ Hermogenes' writing style does little to alleviate the confusion one experiences when reading his treatise. Sullivan claims that "The treatise is poorly composed, pursues its subject in a highly compressed fashion, is devoid of any artistic relief, and must stand as one of the more dreary reads in the cannon" (1, 1996).

²⁶ Declamation was "[t]he most common exercise in the advanced portion of elite rhetorical training . . . dominat[ing] rhetorical training from the first century B.C. to the sixth century A.D." (Poster 1).

composing declamation speeches. Declamation benefited greatly from the structure of stasis. Russell observes the following:

What is really specific to declamation, rather than to other forms of rhetorical exercise is its firm organization. What the young men learned at this stage in their education was how to shape the effective elements of a case into a planned whole, in which descriptions and *loci communes* did indeed have a place but a determinate one which they were not supposed to exceed (2, 1983).

Declamations development occurred in three stages: (1) pre-Ciceronian, (2) Cicero and his contemporaries' privately rehearsed declamations, and (3) the *controversia*. Around 150 B.C., about the time of Hermagoras, the term was consistently used in the rhetorical schools. In Roman professional society, orators executed three types of declamations: forensic (*controversiae*), deliberative (*suasoriae*), and epideictic. Of these, students practiced forensic declamation, evoking would-be court cases, more than any other form. Of these, we have many extant examples including works of Cicero, Quintilian, and Libanius. (Bonner, 3, 1949)

Many ancients criticized declamation training in the educational setting for the nature of the themes. Despite Quintilian's open acknowledgement that declamation was the most useful exercise, he still found reason to critique the teachers and their themes. He states the following:

[. . .] the actual practice of declamation has degenerated to such an extent owing to the fault of our teachers, that it has come to be one of the chief causes of the corruption of modern oratory; such is the extravagance of our declaimers. (Inst. II.ix.3)

Parks notes: "Quintilian's development of this highly improbable theme, with a systematic analysis of the possible pro and con arguments, is a clear indication of his attitude toward the value of employing fiction" (100, 1945). The only logical conclusion has to be that Quintilian did not disagree with the use of declamation and fictitious themes, but rather the exploitation of the themes. Quintilian is not the only ancient writer to have criticized declamation. Cicero, Tacitus, and Petronius join Quintilian in his critique to name a few (Poster 3).

Critics claimed the themes were fantastical, outrageous, and removed from the reality of roman society. Poster is on the mark when she remarks that "[t]he themes for declamation often

were extravagantly lurid, and the more preposterous the theme or indefensible the claim, the more it provided an occasion to demonstrate rhetorical virtuosity” (2). An example of such a theme is the “The Crippled Beggars.” This theme is about a man who crippled children who had been abandoned by their parents. He then forced them to be beggars and took a commission on their earnings. At first glance this theme does appear to go beyond what one would expect to find in a typical court case. But is our world free of child extortion? Have we eradicated child pornography and prostitution? Another example of this type of theme is the case of the adulterous eunuch. Roman law allowed a man to kill another man if he was found having an affair with the husband’s wife. If the adulterer is a eunuch, can he truly have an affair? Would the husband be guilty of murder? Some scholars would argue that these cases were not far from reality after all. Despite the criticism, the proponents of declamation pressed on. Russell points out that “[a]bused by philosophers, ridiculed by practical men, a favourite butt of satirists, they went on displaying their art and advertising its virtues” (14, 1983).

4. Virtues

The only virtue I have mentioned has been stasis and declamation’s ability to train advocates who can effectively organize, and argue a case. Are there any other virtues associated with this rigid rhetorical training? Though many scholars support the idea that stasis and declamation found their niche in preparing students to argue a solid court case, this training goes beyond such a practical purpose. Declamation training requires students to engage the themes on multiple levels. As we have already seen, it requires the student to engage the material on an intellectual level of organization and logic, but we should be cautious not to overlook that it also requires them to engage the material on the levels of morality and ethics.²⁷

In *The Roman Rhetorical Schools*, Parks identifies some themes that must have had a moral influence on the students: (1) a priestess should be chaste of the chaste and pure of the pure, and (2) children should obey their parents or be imprisoned. She remarks: “The moral sentiment expressed throughout these and the other *Controversiae* cannot but have had a wholesome effect on those engaged” (78, 1945). These themes exposed students to moral dilemmas and were important in helping the students develop the requisite sense of right and wrong for negotiating the ethical and moral tensions inherent in these problems. Libanius would

²⁷ Bonner observes that declamations “represent the major problems of the world and its meaning [. . .] (3, 1949).

have agreed with Parks because “. . . the moral and practical excellences of his profession still remained for him beyond question: rhetoric must be good *per se*, and its training inevitably directs the student towards virtuous character and conduct in society” (Parks xxi, 1945).

Although others before Libanius delivered important declamations for the sake of brevity lets move forward to Libanius’ 44th declamation because it is a prime example of how rhetoricians and students used stasis theory and declamation. This hypothetical case concerns the first issue of conjecture (simply, did he or did he not commit the crime?). A Roman law states that if a foreigner enters the assembly, the General must execute the foreigner. In this case, the general arrested a foreigner who entered the assembly. Before the man was executed, he claimed he had a secret to tell. The general proceeded to execute the man, denying him the opportunity to reveal his secret. It seems as if the general committed no crime because he simply followed the letter of the law. Shortly after the killing, however, a tyranny took control, and the general was charged with complicity. The "issue" here is whether or not the general killed the foreigner with the marked intention of keeping the secret silent. If he did, the killing is a criminal act. This is the issue of conjecture, because only the general knows for sure if the act was criminal. Libanius’ declamation hinges on one main point: the General was upholding the letter of the law. The text reads as follows:

‘You killed the foreigner,’ he says, ‘although he was bringing us a secret.’ Add that the law required it. And ask these people here who it is that sets up a tyranny: those who think the existing laws should be upheld, or those who bring to court the upholders of the law? Could there be anything more peculiar than this? The indictment says that I was an accomplice in tyranny; the proof is that I obeyed the laws. They call the same person an ally of the tyrant and a guardian of the law. I could reasonably have been charged, I would rightly have been hated, if knowing the law and seeing the foreigner I had given what he said precedence over the law. What is the point of making laws at all, if we casually override them when faced with the situation for which they were passed? Is it not absurd that in the same court some should be punished for neglecting the laws and others for adhering to them. (156, 1995)

The prosecution counters by claiming that this law was designed to protect the safety of the state and was not to be used in a situation like this. Heath notes: “Libanius’ declamation follows the

standard division of conjecture very closely” (157, 1993). We have arrived at a crucial point in our discussion, the point where stasis, declamation, and professional application meet.

Libanius’ declamation was just that, a rhetorical exercise. One must wonder, though, if court cases of the time fit the archetypal mold where the advocate proffered a brilliant argument he developed using stasis theory. Scholars more notable than myself have provided evidence that suggest this was not always true. It is important to bring such acknowledgement to light if we are to determine the extent to which rhetoric and, in particular, stasis and declamation could be reincorporated into modern legal training. The case described in the above paragraph is a high-profile case with a high-profile advocate and a high-profile defendant. This must have influenced the degree of formality of the case, for a formal declamation executing stasis to a "T" would have been expected. Furthermore, such a performance would have given an advocate the opportunity to demonstrate his rhetorical prowess, in turn, attracting more students or legal clientele. I suggest, however, that advocates' stasis-generated arguments did not always influence the outcome of a court ruling, assuming they even had an opportunity to make a full argument.

5. The Papyri

When examining the papyri records of court cases from Greco-Roman Egypt, we find a startling difference in the protocols that govern these proceedings. Interruptions, interrogations from the judge, bantering and name calling between advocates, among other disruptions, altered the court atmosphere. An advocate rarely had the opportunity to complete a full oration without interference. Judges frequently made decisions based not on the declamations, but rather on other factors. The following cases from the Papyri scraps are two examples in which stasis and the court speeches have no influence on the judge’s final decision, which is more often than not a “passing of the buck.”²⁸

Case 1 (AD 49) This case concerns the custody of an alleged foundling. The plaintiff is a man claiming to be its owner, and the defendant is a wet nurse who

²⁸ The law courts of this period were notorious for not making a final decision on a case. The Prefect might pass the case on to another court or order an investigation, delaying a final decision. Crook notes that “[o]ne can well infer from these texts a very delay-ridden system of justice in Roman Egypt, whereby recalcitrance of parties and indecisiveness of judges can keep an issue on the docket, shuttling from court to court, for years; and sometimes the defendants have just simply not complied with judgment when given, and a year or so later petitioners are back starting the whole issue again and quoting earlier judgments in their favour” (68).

claims rightful ownership and has current custody of the child. “The judgment bears no relation to the advocates’ argument but is based on an inspection of the child and its likeness to the defendant, and is in any case a repetition of what the prefect has already decided.

Case 2 (AD 124) This case is about the responsibility and maintenance of documents in the public records office of the Arsinoite nome, and three parties are involved in these proceedings. After the advocates presented their speeches, the judge merely demands a reading of a prior ruling of “certain previous protocols” and proceeds to pass judgment without reason based on this precedent rather than the advocates' arguments.

Case 3 (AD 150) The participants in this case are two bankrupts. In this case the advocate for each makes a brief statement such as “He is bankrupt: he cedes” or “he totally used up his property.” The Prefect ordered an investigation into the matter, so no ruling was made. No evidence suggests the advocates made long speeches for their clients.

It seems as if rationality was not an ingredient in the recipe for decision in these cases.²⁹ Paul Freund points out four elements in judicial reasoning: logic, precedent, history, and social utility (111). In the cases proffered above, the prefects neglected the first element of logic, basing their rulings mainly on prior hearings and social circumstance. Despite this occasional impotence of anything short of being the Judges friend, stasis still enabled lawyers select the heads of their arguments very quickly amidst the pressure of the court. Crook recalls the chaotic nature of the courts:

The course of legal proceedings in these documents is governed by their being in speeches as would have been found in Rome (where more high-profile cases would have been conducted). There are *exordia*, *narratives* and *perorations*, but the magistrate poses questions, interrogates witnesses, consults his *consilium* now and then; interruptions, by one advocate or another, are common, and the

²⁹ John Ladd talks about what a rational decision is in his article “The Place of Practical Reason in Judicial Decision.” He states: “By a ‘rational decision’ I mean a decision for which the agent can give good reasons. A nonrational decision would be one for which the agent has no reasons, whereas an irrational decision would be one for which he has only bad reasons, that is, one which, though ostensibly rational, actually violates the norms of rationality and thus conflicts with rationality.

proceedings sometimes develop into an informal general wrangle, into which all present seem to step as the inclination takes them. (66-67, 1995)

A case from 85 A.D. exemplifies the chaotic nature of the courts. The case involves a lowly plaintiff who brings charges against an affluent person regarding an unpaid debt of wheat. The judge asks a question to which the plaintiff responds “I do not know.” The judge retorts sarcastically, “That which you do not know, neither do we . . .”. When the judge asks the plaintiff why he has not pursued this claim before, the defendants’ advocate interjects quickly, “That is a very pertinent question: but I put the general point to you: there is a traditional five to ten year limit to debt claims: the Prefects have laid it down”. At this point the plaintiff’s advocate speaks no more, and the plaintiff attempts to explain what has happened. The defendant’s advocate Aristonikos then begins to use sophisticated rhetoric when he states: “If you succeed in this, thousands of people will bring forward (alleged) receipts by my client’s father; and my client is an orphan.” The Prefect ends the ordeal by saying he will be reasonable with the plaintiff. He states: “You produce a forty-year-old receipt: I’ll make you a present of half that time. Come back in twenty years.” He then ordered the receipt to be destroyed. What is important here is the lack of structure and organization, and the back-and-forth nature of the proceeding (Heath 70-71, 1993).

Discrimination and prejudice also curtailed the usefulness of stasis and declamation in the Roman legal order. It is possible that certain people had what were called *declarations of status*.³⁰ Such documents would have brought privilege to their owners and they indicate the weight which Roman society placed on status. Garnsey observes that, “The Roman Respect for status is more clearly reflected in the actions and attitudes of judicial officials than in legal theory” (2, 1970). Lowly and humble plaintiffs often had to endure satire and violence when bringing a case against a person of higher social rank. Garnsey points out the following:

In General, it can be said that judges and juries were suspicious of, if not resentful towards, low-status plaintiffs who attacked their ‘betters’ in court, and were

³⁰ In regard to status declarations, Carroll A. Nelson states: “About a hundred papyrus documents dated in the first three centuries A.D. refer to processes of examination in Egypt to determine an individual’s right to a particular status. These processes were called *epikrisis* and *eiskrisis*. The examination in each of these processes was initiated on behalf of the person who sought the new status by himself or by someone (parent, guardian, or in the case of slaves, owner) acting on his behalf” (1). This is evidence of the degree to which status was prized in Roman society. “That status was eagerly sought and rigidly controlled is documented by the frequent mention of it in *Gnomon of the Idos Logos (BGUVI)*. Again and Again this document reveals how important proper status was for claiming an inheritance or receiving other rights of citizenship” (2).

prepared to believe the worst of low status defendants, while the pleas of high-status plaintiffs or defendants, who in any case were likely to be more coherent principle magisterial *cognitions*. There is, thus, not as set a form for advocates' and better versed in the law, were given more credence (100, 1970).

One advocate intervenes for his client at the beginning of a court hearing when he states: "We beg that he will not suffer a flogging for this, and, in any event, here is his case" (Heath 70-71, 1993). It is evident that stasis theory and declamation did not always have the effect the advocates intended it to have.

It seems as if this line of argument discredits stasis and declamation. I am arguing that these rhetorical exercises were extremely useful and facilitated professional life, yet the above commentary seems to contradict my argument. Pointing out these apparent instances of impotence is a necessary maneuver in order to realize the full scope of stasis theory and declamation's influence in the Roman professional society. If these rhetorical exercises were sometimes not efficacious in effecting their design, there must have been some other reason they continued to dominate rhetorical training. We cannot approach this dilemma or begin to understand the scope influence until we acknowledge that stasis and declamation were not 100 percent effective in their practical design.

6. Implications for the Professional Arena.

Then why was stasis and declamation training so prominent in the rhetorical schools? I mentioned earlier that this training had a positive moral influence on the students. They focused students' thoughts on moral and ethical issues going on in the world around them. Because of this, I contend that these rhetorical training devices went beyond merely training advocates for the legal order. They were a rational training of sorts that produced a well-rounded individual capable of participating in a variety of professional activities such as the civil service and professional administration. Furthermore, if one could afford legal training, it meant that you were of the social status that was preferred for the positions. This sentiment is evident in some of Libanius' letters of recommendation for administration positions. They believed that these

special skills contributed to a persons overall competence (Pedersen, 1976). Advocates were often recruited to fill administrative positions.³¹

Sophists and people with rhetorical training were preferred for administrative posts because, as Libanius suggests, they were likely to have had a more developed sense of morality. Moreover, stasis and declamation training would have developed in them a mind capable of making sound decisions. They would have been expected to be more rational and polished than the average citizen. Such traits were desirable for any of the Professional administrative positions. Students who went through these exercises developed agile minds and the ability to quickly supply or refute arguments. They also cultivated a slight of tongue that was quite amazing. It was precisely this degree of sophistication and competence that made the orators so well rounded and capable of performing a variety of duties other than advocacy.

If advocacy were not the course a sophist would take, he would likely fill posts that required good rhetorical skill. There were posts in the civil service for which an orator may not have been well suited. Orators more than likely would not have made the best financial officers, not because they were poor at math (let us not forget that many rhetoricians were also mathematicians), but because they would have been averse to this type of position where they did not need the rhetorical skills they labored to learn. Rhetorical education did lead to other administrative and civil service careers. Many sophists were appointed to state subsidized teaching positions, and several sophists achieved the high position of Imperial Secretary.³²

7. Conclusion

The role of the advocate in the Roman legal order is minor compared to the dominance of stasis and declamation training exercises in the rhetorical schools. Furthermore, their execution in the law courts was not always effective. Despite the evidence in this discussion that

³¹ Parks notes the following: Mamertinus stresses as a fact that Julian preferred for posts active soldiers, orators, jurists and anyone else who had proved diligent administrators. Though being a commonplace, as mentioned, this is borne out by the laudatory remarks of Libanius, and the scathing ones by Gregory of Nazianzus, to the effect that orators were preferred. (33, 1945).

³² Poster notes that, “Despite these criticisms, however, rhetorical schools focusing on declamations did, in fact, successfully prepare students for and place them in positions as professional advocates and sophists skilled in declamation not only achieved fame and wealth as performers of epideictic displays and holders of state funded rhetorical teaching positions (which frequently were accompanied by tax exemptions), but several sophists, by giving impressive declamations, managed to achieve the important position of Imperial Secretary. Rhetorical education was often a path towards a variety of administrative positions with little connection to advocacy” (5).

demonstrates how stasis and declamation training had an inconsistent effect on actual court cases in the Roman legal order, it still played an important role in the broader professional setting. Parks points out that, “Although of a particular nature, the declamations prepared the young men for all walks of life . . . , and their development of a well-ordered mind, so necessary in court debate cannot be denied . . .” (101, 1945). It is clear that though *stasis* and the declamations that it supported served to produce competent advocates for service of the courts, they also cultivated morally responsible and mentally agile professionals capable of performing adequately in a variety of administrative and civil service positions. Today’s law schools display a similar pattern in regards to the various disciplines graduates enter. Yes, most enter the legal arena, but some also accept other posts, and stasis and declamation can have a positive influence on them.

CHAPTER 3 – MAKING THE CASE FOR A RHETORIC REVIVAL

1. Introduction

Chapter 3 makes the final case for reviving rhetoric and restoring stasis theory to a prominent position in legal studies. (1) I examine the evolution of American legal studies and the defining characteristics of its current state. I focus on the case method and point out its advantages and disadvantages, and identify the problems it poses. (2) I provide a thorough analysis of the casebooks used in contemporary law schools. I point out some similarities and differences to the rhetorical manuals used in antiquity, and I identify casebook problems. (3) I offer rhetoric as a solution to the problems of the current legal curriculum. (4) I propose a few ideas for how best to integrate the various aspects of ancient rhetoric into the law school curriculum. And (5) I acknowledge some of the Implications this thesis may have for future studies, or for a continuation of this study.

2. American Legal Studies: Evolution and Current State

Contemporary law schools are in the business of preparing advocates to stay afloat in the treacherous waters of the legal profession. They have become a profit making venture. More law schools open every year, producing record numbers of lawyers. Such hyper-growth is not problematic so long as there is enough demand for lawyers to keep them employed, and the education neophyte lawyers receive must not be compromised. I see evidence that suggests this. Contemporary law schools are not failing to prepare lawyers who can function at a reasonably competent level. Every day, recent graduates are drafting documents, conducting research, writing briefs, providing council, and delivering closing speeches. Rather, they are ignoring training sources and tools that have the potential to enhance and improve legal training, ultimately producing a more well rounded advocate. Legal educators should recognize ancient rhetoric's potential to have a positive impact on contemporary legal training and take action to reunite these long lost brothers.

The curriculum of American law schools has not always been a picture of balance and solidarity. The leaders of these institutions have made great strides to provide their students with a useful legal education to satisfy their changing needs and demands, and in doing so they have

been pulled in more than one direction. Reed identifies “three component parts to an ideally complete preparation: practical training, theoretical knowledge of the law, general education” (276, 1921). Practical training addressed the day-to-day demands of working in a law office. This subject was usually addressed first because it was considered to be a prerequisite for gaining theoretical legal knowledge, which seemed to dominate the training. And the general education or training “in all such additional sciences or arts as cannot be brought within any definition of law” was also considered useful to the future lawyer.³³ The breadth of the future advocate’s educational demands presented an almost insurmountable challenge for the early law schools. Reed’s following remark indicates that the schools were often unable, probably most of the time, to meet all the demands. So they did what lawyers do well, convince and cover up. Reed states:

If they could not satisfy all his demands, they must at least convince him that such portions of an ideally complete training as they as they failed to provide were non-essentials that he could ignore or make up in other ways, and that such training as they did provide was directly related to his own object in attending the law school. (277, 1921)

Legal educators merely flirted with practical training, while they devoted the bulk of their efforts to helping students master the theoretical knowledge of the law, which has always carried so much weight in the American legal system.

During the first phase of American legal instruction, professors attempted to instill this coveted theoretical knowledge through a dogmatic pedagogical method. A professor marched into a class and lectured for the entire period, stopping only to catch his breath, while the students vigorously took notes. This dogmatic approach was a result of the burgeoning body of legal decisions. In regard to the effect this growth had on legal education, Reed states: “The large and increasing number of decisions necessarily forced law teachers, from the beginning, to simplify for their students the undigested material of the law” (376, 1921). He goes on to add: “it had been universally assumed that this simplification must take the form of dogmatic pronouncements, spoken or written, as to what the principles of these decisions were” (376, 1921). This approach to teaching the law had a serious problem; it lacked practical application.

³³ Examples of such subjects would be medicine for health related and personal injury cases, science for patent and technology law, or any other subject that may promote an acute mind or be useful to a lawyer. See Reed p278.

The activities in which the students were engaged, or the lack thereof, did not resemble the practice they would find themselves doing after graduation. The schools were producing vectors for theory, not fully competent lawyers.

In the 1870's, Christopher Langdell, Dean of Harvard Law School, recognized the inadequacies of the dogmatic method, and he set out to alter the course of American legal education. He, too, was interested in simplification, just not the type of simplification that reduced principles of law to "dogmatic pronouncements." Langdell's originality, uniqueness, and effectiveness lay in "having the ingenuity to devise and the courage to put through a method of presenting the law in its sources that should be practically effective, in view of the now enormous bulk of these sources" (Reed 373, 1921). Langdell called this new, ingenious pedagogy "Case Method."

Langdell believed that "the scientific method could be adapted as an instructional model for legal education" (Levine, Saunders 111, 1993). Langdell and some of his contemporaries, especially those who endorsed the case method, thought of the study of law as a science, rejecting "all nonrational methods of persuasion and judicial decision-making" (Levine, Saunders 111, 1993). Langdell abandoned the notion that it was necessary to address a massive collection of decisions. Rather, he preferred "a critical selection of those that seemed to him to embody the essential doctrines of the governing law" (Reed 378, 1921). More importantly, Langdell cast aside the practice of lecturing and turned to the Socratic Method. He wanted students to engage the cases on a more intimate level; he wanted them to grapple with the nuances of the case and come to class prepared to answer questions about the cases. He longed for a method that required the students to exercise their critical and analytical faculties, not just their skills at shorthand. Langdell felt case method was a much more effective and practical approach to teaching the principles of law. He thought it would allow him to "send out into practice, and ultimately on to the bench, lawyers that had mastered a workable system of legal principles" (Reed 379, 1921).

Although the case method took hold of contemporary legal training and has not let go since, events could have shaped up much differently for American Law Schools. At the time when Langdell and Harvard's case method was beginning to receive attention, professors at Yale Law School were using a pedagogical philosophy more in line with what this thesis proposes. Yale had been catering to the student's more practical needs, as opposed to the more theoretical

principles of the law, by grounding their pedagogy in the rhetorical theory and the study of rhetoric.³⁴ It should be noted that the case method's goal remained "mastery of legal principles," a theoretical endeavor. Levine and Saunders ruminates about what could have been: "As the Langdellian model became the cornerstone of American legal education, the study of rhetoric and rhetorical theory was abandoned. We can only speculate about the shape of modern American legal education had the Yale approach predominated (111, 1993). It is quite possible that students would spend more time using rhetorical heuristics such as stasis and declamation, and that more emphasis would be placed on eloquence and soundness of argument, rather than firing off facts and precedents, with the person firing the most and the fastest winning. Case method does, however, have its limitations, to which I will return later in this chapter. For now, though, it is only important to note that Langdell's case method has withstood the test of time. Since shortly after the Civil War, the case method has reigned the hallowed halls of American law schools. In fact, all 186 ABA approved law schools³⁵ endorse and use Langdell's method to cultivate their advocates.

I do not contend that the case method is more practical in application than its predecessor, for it was much more effective than the dogmatic method. But this does not necessarily mean that the case method is the pinnacle of practicality. Let us take a closer look at the method and ask some important questions. How practical is case method? Students have the opportunity to answer an occasional question in the classroom, but probably not as many as we would assume, especially with the ever-growing number of students and the increasing student-to-teacher ratio. How often are students given the opportunity to construct an argument on a given issue or topic? Yes, the moot court competition provides this opportunity once a semester, but every student does not have the opportunity to participate in the hypothetical court case. In short, law students experience a watered down version of the Socratic Method that offers a weak challenge at best.

On one level, the case method pedagogical approach is not all that different than the pre 1870's dogmatic approach. The dogmatic method and the case method simply use different means to achieve the same end—a thorough knowledge of legal principles. The end for both

³⁴ See Linda Levine and Curt M. Saunders, *Thinking Like a Rhetor*, 43 J. Legal Educ. (1993) p111.

³⁵ In his 1921 account *Training for the Public Profession of Law*, Alfred Reed comments on the explosive growth of law schools after the Civil War. Twenty-two schools conferred degrees before the war. By 1870, there were thirty-one schools, double what there had been twenty years before. By 1890, this figure had doubled, and by 1910 the total had doubled again. Reed observes that we reached a saturation point, but since 1921, when he wrote this account, the number has continued to increase at a rapid pace.

pedagogical methods is heavily theoretical. One can hardly admit that answering an occasional question on a particular case that was assigned for reading sheds light on the rhetorical aspects of constructing an argument and prepares a student for the rhetorical activity he will encounter upon entering the legal community. I do not mean to detract from the importance of the theoretical component of the law because a thorough understanding of the principles is a prerequisite for a successful career in the legal profession. But, what of the practical skills the future advocates will need upon entering the legal community.

Rhetoric and its devices have the capability to provide these skills and tools and should be reincorporated into the modern American law school curriculum. The study of rhetoric and rhetorical theory should not entirely replace the case method, for Langdell's approach is an efficient and effective method for teaching the theoretical component of legal principles. It should, however, be allowed to enhance the complexity of the curriculum and add to the repertoire of the neophyte advocate.

3. Casebook Analysis

The changes that have occurred in legal education have been no more evident than in the materials used to provide instruction to aspiring advocates. The most tangible evidence of the shift away from a rhetorically based curriculum is the casebook style textbook used in contemporary law schools. The materials that aided them in their studies were rhetorically based textbooks that were composed in a manual format. These texts addressed the five major categories of rhetoric—invention, arrangement, style, memorization, and delivery—and were highly categorized, and indexed. In regard to organization, contemporary legal studies textbooks are on par with the ancient texts. The content, however, is the issue being targeted. Casebooks reflect the inductive curriculum and , therefore, lack instruction on general principles of argumentation and law for that matter.

The most defining characteristic of the casebook is evident in its title. As mentioned above, the evolution of the legal system has created a perceived need for textbooks that teach one how to functions in the legal arena by using precedent as opposed to rhetorical skill. Casebooks reflect this perception and their contents aim to convey legal knowledge through a repetition of case analysis. An examination and analysis of the set-up and structure of an actual casebook and its contents will shed light on current legal training and allow for the completion of the case for

the revival of rhetoric in today’s legal training institutions. The casebook under examination is *Contracts: Cases and Materials*, by John Edward Murray, Jr., President and Professor of Law at Duquesne University. This book has been chosen not because of the subject matter, author, title, or any other potential influence. This book was chosen for no other reason than the fact that it was available, and its random selection gives credit to the claim that this style textbook pervades the contemporary legal curriculum.

The organizational structure of *Contracts: Cases and Materials* follows a unified and consistent pattern—one of case after case after case. The textbook begins with a brief introduction to the subject of contracts that covers several topics: (1) the concept of a contract, (2) the meaning of the word “contract,” (3) sources of the law of contract, (4) the universal commercial code—United Nations Convention, (5) electronic contracts, (6) beginning the study of contract law, and (7) an introduction to contract remedies. From here the book begins the series of cases. To put things in perspective, the actual monologue of the introduction is included between pages one and 15, before the first case is listed. In other words, in a book that is 1072 pages, 15 pages are dedicated to setting the foundational knowledge of contracts.

The book is divided into ten chapters, followed by an Appendix, Table of Cases, Tables of Citations, and Index. Each chapter addresses a specific aspect or issue of contract law. For example, chapter one addresses “The Agreement Process.” Below is a summary table of contents identifying the issues in each chapter:

Preface	iii
Acknowledgments.	v
Table of Contents	ix
Chapter 1. Introduction.	1
Chapter 2. The Agreement Process	47
Chapter 3. The Validation Process	235
Chapter 4. Operative Expressions of Assent	373
Chapter 5. Abuse of the Bargaining Process	525
Chapter 6. Conditions, Breach and Reputation	619
Chapter 7. Risk Allocation: Impossibility, Impracticability and	

Frustration of Purpose	715
Chapter 8. Remedies	761
Chapter 9. Third Party Beneficiaries	859
Chapter 10 The Assignment of Rights and Delegation of Duties	907
Appendix: Uniform Commercial Code – Articles 1, 2, and 9	955
Table of Cases	1047
Tables of Citations	1065
Index	I-1

Each chapter is further broken down into sub-sections designed to address even more specific issues. For example, Chapter 2 (The Agreement Process) is sub-divided into (A) Intention to Be Legally Bound, and (B) The Anatomy of Agreements. These sub-sections are further broken down to an even greater level of specificity, and the cases selected to represent each sub-section have characteristics that effectively illuminate the section’s particular issue at hand. Although the content of the legal textbook has changed, its tendency toward organization, classification, and indexing has remained intact.

Each example case also follows a unique and consistent structure. The proverbial “plaintiff v. defendant” identifies the cases. For example, the first case begins: MCA TELEVISION LTD. v. PUBLIC INTEREST CORP. A case identification number such as “171 F.3d 1265 (11th Cir 1999)” follows. The cases have up to five components: (1) the case description, (2) a “notes” section that provides supplementary information that is helpful in understanding the case, (3) occasionally a “problem” section that may present one or more problems inherent in the case and then ask for a result of that problem, and (4) a “comment” section that also provides supplementary information, and (5) a “question” section that may pose one or more questions regarding the case. The case description, however, is the largest component of each case example and often there is nothing more than the case description and the notes section.

Despite the highly organized and structured nature of casebooks, there are problems that arise when one considers factors other than substantive knowledge of the law. Just because a student reads and even understands a case does not mean he or she has acquired the skills needed

to determine what should be said in an argument and to know how to say it. The first major problem the casebook and the case method for that matter is a lack of didactic instruction in the area of argument construction and arrangement. Ancient rhetorical texts consisted of well-defined rhetorical rules that had to be mastered. Lawyers are in the business of arguing, yet the primary instructional tool is a method by which students read case after case and prepare to deflect a few verbal darts the next day in class. Contemporary textbooks promote class discussions that meander around the issues of several related cases. This leads to the second major problem which casebooks and the case method promote: they fail to provide students with rhetorical practice that could greatly enhance their ability to do their jobs. More specifically, by focusing on conveying substantive knowledge of the law through repetitive case analysis, they deny students the opportunity to practice inventing and arranging arguments. What good is a lawyer who knows the law but cannot utilize it when needed because he or she never received the more practical side of legal training—instruction in argumentation? Ultimately, casebooks and the case method fail to teach students general patterns of reasoning, shortchanging them on a legal education that could be easily attained by reversing the current trend in legal studies.

This problem would not be an issue worth tackling if it were not a generalized and pervasive problem. Unfortunately, alternative teaching methods are not welcomed to the extent that they are in other disciplines. The case method is the standard for American legal training, and any deviation from this standard is frowned upon. As was noted, all 186 American Bar Association approved law schools utilize the case method and graduate over 100,000 students each year, most of whom lack any knowledge of the helpful rhetorical heuristics such as stasis theory.

4. Rhetoric: A Remedy for Case Method Problems

The solution to the problems that result from totally relying on instructional methods such as the case method can be found in ancient rhetoric. Undoubtedly, ancient rhetoric's contribution to legal studies has diminished since the early Roman Empire, but several scholars have been very adamant about its potential to positively influence students' ability in legal argument and analysis. As we have seen with stasis, ancient rhetoric can aid in analyzing and structuring concepts, ideas, and arguments. Many more areas exist in which ancient rhetoric can assist students in improving their performance; for example, diction, eloquence, style, and

delivery, But these subjects are outside the scope of the current discussion and are better suited for another occasion. Levine and Saunders recognize students' needs for help with structure and organization, and domains of argument: "Usually, when students analyze such a problem, the discussion is not structured or complete. Some arguments may be overlooked, others over emphasized or underdeveloped. Frequently, there is no overarching structure to guide the discussion" (117, 1993). The remainder of this chapter will comment on ancient rhetoric's potential for improving how law students are taught to analyze problems, and structure and organize their arguments.

It is a matter of certainty that American law schools face a formidable challenge in regard to the breadth of material they are responsible for teaching their students. As has already been noted, the schools place more emphasis on and spend more classroom hours on the theoretical principles of the law. After all, students are there to learn "the law." But what good is that theoretical foundation if you don't have the skill set to apply that knowledge?

In light of the current imbalance of contemporary legal education, it may be justifiable to incorporate more training on argumentation. In his article "Law as Rhetoric, Rhetoric as Argument," Kurt Saunders states: "Many lawyers lack a basic understanding of the structure and process of legal argumentation. Their limited understanding, which often leads to less than effective advocacy, stems from legal education's failure to make the structure and process of legal argument explicit and systematic" (566, 1994). Argumentation theory, which falls under the realm of rhetorical theory, may be better suited as the foundation of legal studies, as opposed to case analysis. The analogy of brick and mortar works particularly well here. The bricks are the theoretical knowledge, and the mortar is practical argumentative strategy. One can have all the bricks in the world and attempt to put them together into some semblance of a building, but without the mortar to bind those bricks, give them support, and hold them together, the bricks are rendered useless. Similarly, in a legal context, theoretical knowledge needs an effective argumentative framework to provide support. Argument theory and, more particularly, stasis theory can provide this framework.

In recalibrating the scales of contemporary legal education, we should be sensible and fair. It is not realistic to think that we can incorporate every aspect of rhetoric into the curriculum. Such a situation would prevent students from acquiring the requisite knowledge of the law that enables them to be effective advocates. I propose that for now we sidestep the issues

of style, turns of phrase, and rhetorical eloquence. Those students who are ambitious enough to engage in these noble pursuits on their own will reap the rewards. Keep in mind law schools produce lawyers, not rhetoricians. One does not have to be another Cicero to be an effective advocate. One must, however, be competent at constructing an argument.

Stasis is the most promising approach to reintegrating rhetoric into the legal studies curriculum and to reforming legal training in general. As was discussed in Chapter 2, Stasis was the most long-lived and successful Graeco-Roma approach to legal argument. Thus, it is the most relevant and reasonable approach to law training. Furthermore, all of the reasons that stasis was useful in antiquity still apply in today's legal arena. It enables advocates to work up cases quickly, to find the central issues in each case, and to effectively structure the argument. Furthermore, upon graduation, American advocates enter the legal arena and find themselves declaiming with out any training. Reviving rhetoric and particularly stasis will allow advocates to do their jobs more effectively and efficiently.

5. Future Implications

Although I have identified stasis theory and its practical utility as the catalyst for legal training reform in the United States, this is only the beginning—a stepping-stone to a renewed sense of identity for legal studies. This thesis should lead to an even broader exploration of argumentation theory in general. Moreover, this study will lead to further explorations regarding the evolution of legal reasoning, the role of rationality in law, and the American sense of justice. A few notable scholars maintain that argumentation theory has the distinct capability to contribute to legal education and law. Saunders comments on argumentation theory's potential to assist legal studies:

Because law and rhetoric have a common cultural and historical heritage, classical and contemporary rhetorical theory offer conceptual frameworks for understanding and learning legal argumentation [. . .]. Although theories of argumentation belong with the larger class of rhetorical theory, they are distinguished here because rhetorical theory lays the more general foundation for considering specific approaches to argument. (566, 1994)

Saunders hones in on the crux of this paper with these remarks. The case method allows students to grapple with legal principles, but it does not necessarily introduce to them the nuts and bolts of legal argument. Legal educators cannot assume that students have had such training.

Chaim Perelman suggests that rhetorical argument strongly influences justice by affecting judicial decisions. For Perelman, “Rhetorical argument motivates the justification of legal decisions and judicial reasoning” (Saunders 572, 1994). His theory of argumentation claims that ultimate truth does not exist in a legal decision, nor does it exist in the argument that moved the judge to decide one way or the other. The judge has options; he has the prerogative to decide which argument is more forceful or probable. Saunders maintains: “In reaching legal conclusions, the judge must choose among probabilities, not certainties, while focusing on the societal audience” (572, 1994). Argument lacks the certainty of a mathematical science, at least for Perelman. Although a device like stasis theory appears formulaic, it is simply a tool that an advocate can use to guide him through an argument. It is not a formula that will allow one to arrive at the empirical answer to the issue at hand because the empirical answer to an argument does not exist.

If one reaches an empirical answer to a problem, he does not have to read into a situation or between the lines to arrive at that answer. Let us look at a simple math problem, for example. $2 + 2 = 4$. The answer is not debatable, and to put a value judgment on this proof would be a futile effort. The answer is 4 and no other number will do. The same cannot be said, however for many legal decisions. The judge bases his decision on reason. He evaluates the opposing arguments and then asks the ultimate determining question: “Which of these two arguments is the more reasonable one?” But in a system where decisions are based on prior decision instead of patterns of reason and logic, our idea of justice becomes compromised.

To change the legal studies curriculum is to change more than just materials and methods: it is to change how lawyers do their jobs; it is to change how we arrive at justice; and it is to change our concept of justice. Because I believe this change would be a positive one, I propose we create the opportunity for law students to acquire rhetorical training. Let us not, as Gerald Wetlaufer puts it, “shortchange” our justice and our students. He alludes to several important questions:

These are questions about whether we are preparing our students for the full range of roles they will play in their professional careers; about effects

of legal training on their nonprofessional lives; about the alienation and the resignation that is reported among our students; and about whether we, in our teaching, shortchanging the possibilities of justice, democracy, and virtue. (2, 1990)

By exposing future advocates to various argumentation theories and practical exercises such as stasis heuristics, we can provide them with skills they can apply throughout their careers, while at the same time engendering justice.

These are the types of issues that should be tackled in a follow-up study. The works of Chaim Perelman and Stephen Toulmin, two of the most prominent argumentation theorists, would be prime components of an extended study about how argumentation theory in general could contribute to legal studies.

6. Restoring Rhetoric in the Classroom

The potential application of Stasis and argumentation theory to contemporary legal training indicates that Ancient rhetoric still has an indispensable value to contemporary legal studies—practical and theoretical. Acknowledging this fact is simple; the difficult task is successfully integrating these topics into an already brimming curriculum. This task presents a significant challenge for legal educators, who should approach this challenge very carefully because too much too soon will not be accepted. They must integrate slowly, testing the waters before jumping in all the way, and several potential avenues exist for such an effort.

Stasis and argumentation theory should be introduced early on in a law student's education because they will constitute part of his practical and theoretical foundation upon which he will build his knowledge of the law. One possible route would be to incorporate ancient rhetoric into the legal writing courses, which are taught during the first two semesters. A second option would be to conduct a voluntary, intensive two-week course at the before the start of the actual semester. A third option would be to include it as an elective, possibly titled *Applying Ancient Rhetoric to Law*. A fourth option would be to incorporate stasis theory in the casebooks and add a section after each case called "Stasis Analysis." Ideally, this section would break down the issues for each case. Lastly, legal educators could include all of these proposed options. Such a change would result in a radical reform that would change the entire landscape

of American legal studies. All of these approaches have advantages and disadvantages, but they seem to be reasonable ways to reunite ancient rhetoric and legal studies.

7. Conclusion

Had the legal education community adopted Yale's rhetorically based curriculum, there would be no need for this thesis. It is also possible that our legal system could have developed quite differently. Legal decisions might be based on patterns of reasoning as opposed to precedent. A more practical and rational process that places emphasis on legal argument could determine our ideas of justice.

All of this, however, is speculation that should be addressed once we have taken the first steps toward legal education reform. Contemporary legal studies ignore valuable resources that have a proven track record of successfully training advocates to perform in the legal arena. Instead, it has chosen to employ a methodology that is organized and efficient—something needed for the rapidly growing body of law and students—but that fails to provide instruction in one of the most important areas—legal argument. The case method and casebook problems identified in this chapter can be corrected by rhetoric and, more specifically, stasis theory. The study of ancient rhetoric should be reunited with its siblings legal studies and law because it offers potent resources for advocates.

CONCLUSION

Our legal system is one of the most highly developed and refined systems of justice in the world. It ensures that everyone receives a fair trial—at least in theory. But as long as legal decisions are based on factors other than reason, rational, and logic, we aren't living up to that ideal. This thesis has taken steps to (1) account for the historical and evolutionary aspects of the relationship between ancient rhetoric and law, (2) discuss stasis theory and the role it played in the early Roman Empire, and (3) make the case for the revival of rhetoric and, specifically, stasis theory in contemporary American legal training.

In short, contemporary American legal training uses, for various reasons, an inductive method for training advocates known as the case method. This method is inefficient for several reasons, the most important of which is that it fails to teach general principles of argumentation. It focuses nearly all of its energy and resources on specific case analysis and processing fact patterns, and students are expected to learn general principles of argumentation on their own. The rhetorical methods of forensic rhetoric, on the other hand, are based on deduction. They begin with the general principles, and then apply them to more specific information. Legal educators would greatly improve legal training if they would return to a rhetorical model to provide a more balanced curriculum.

In antiquity, forensic rhetorical training prepared students for delivering speeches in court. Eventually, however, specialized schools that catered to specific legal functions developed, and they lured students away from rhetorical endeavors. This precipitated a split between the disciplines of legal training and rhetoric training. Institutions of higher learning eventually cast rhetoric aside. Modern legal training adopted the case method based on induction, which is problematic when examining the efficiency of the model at teaching general principles of argumentation.

Stasis theory was the most long-lived and successful Graeco-roman approach to legal argument and, therefore, is the most relevant to legal training. Stasis did more than provide young students with methods and structures for developing their arguments; it, in conjunction with declamation, cultivated in them a sense of morality and promoted an agile mind, in turn

producing well-rounded individuals capable of performing many different roles in the Roman professional setting. Legal educators can borrow from these ancient exercises and principles to restore argumentation training to contemporary legal education.

Contemporary American law schools are ready for a curriculum change. Our legal training institutions should return to a rhetorically based curriculum. Though not all lawyers see the courtroom—some primarily do research, draft contract, and act as administrators—most have a real need for skills pertaining to argumentation. Even non-litigators must be convincing at times. Students do not receive fully developed training; they are at the mercy of a training method of convenience. The reigning method of legal training, despite its advantages, has serious drawbacks that present problems to neophyte advocates and our legal system as a whole. These problems are evident in the casebook style textbooks used in today's law schools. I have proposed several methods for reincorporating ancient rhetoric into the contemporary legal training curriculum. And, lastly, I have noted implications for future studies.

To conclude, there is no reason why we cannot remedy the current state of affairs of contemporary American legal training. The problems associated with the case method will negatively impact our graduating lawyers. We currently teach advocates the law without teaching them how to argue it. The result is that legal decisions are based less on general patterns of reasoning, rational and logic, and more on variables such as precedent, and even whim at times. We can restore a sense of identity to our legal institutions based on methodologies grounded in a 2000-year tradition of persuasive discourse and forensic oratory. We can revive ancient rhetoric and breathe new life into our current methods of training advocates. More than anything, though, we have a responsibility to refine our legal educational system until we are producing the most ethical, capable, and prepared advocates possible. We should return to the deductive methods of ancient rhetorical training.

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