

Philosophy v. Rhetoric in Legal Education: Understanding the Schism Between Doctrinal and Legal Writing Faculty

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I. Introduction

If we legal writing faculty¹ know one thing for sure, it is that what we teach is absolutely essential to our students' success, yet it continues to be grossly, even embarrassingly, undervalued in legal education. To the practicing bar, those attorneys educated by but now outside the academy, its inferior status often comes as a surprise. For the few who leave practice and return to law school to teach, surprise turns to outrage when they learn that legal research and writing is the stepchild of the law school curriculum. Judges and lawyers consider it the "single most important course in law school,"² and students immediately recognize its importance to their careers. Nevertheless, roughly thirty years after their inception, legal research and writing courses continue to be under-credited and under-staffed. The average number of credits per semester for a first-year legal research and writing course is two,³ as compared to three or four credits for a doctrinal course like torts or contracts. The number of students per legal writing class can range anywhere from thirteen to 120, with legal writing faculty reading up to 7,600 pages of student writing in one semester.⁴

Even more outrageous is the fact that legal writing faculty are eligible for tenure at only a handful of schools, and their salaries remain strikingly lower than those of their colleagues who teach doctrinal courses. Of the 178 reported law schools in a 2005 survey of legal writing programs conducted by the Legal Writing Institute (LWI) and the Association of Legal Writing Directors (ALWD), only thirteen percent have tenured or tenure-track teachers hired specifically to teach legal writing.⁵ Although women comprise just twenty-six percent of tenured or tenure-track positions in law school

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¹ This shorthand phrase includes legal writing faculty who teach research and legal writing faculty who coordinate the teaching of research with other faculty or law school librarians.

² Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools' Dirty Little Secrets*, 16 Berkeley Women's L.J. 1, 5 (2001).

³ See Assn. Leg. Writing Directors & Leg. Writing Inst., *2005 Survey Results* 7, <http://www.alwd.org> (accessed Apr. 9, 2006) [hereinafter *2005 Survey Results*].

⁴ *Id.* at 59.

⁵ See *id.* at 47.

faculties generally, they comprise roughly *seventy-three percent* of legal writing faculty.⁶ One of law schools' "dirty little secrets" is that female faculty earn less than male faculty,⁷ but women who teach legal writing earn even less than women teaching doctrinal courses. How much less is difficult to determine because salaries for male and female doctrinal faculty are also well-kept secrets. Of the 190 law schools surveyed by the Society of American Law Teachers for the 2004-05 academic year, ninety-six schools — fifty-one percent — refused to provide salary information,⁸ and thirty-nine of those schools are in the top fifty, according to U.S. News and World Report ratings.⁹

What we do know is that *median* salaries for full professors in the United States ranged from roughly \$78,000 (Inter-American University of Puerto Rico School of Law) to \$183,000 (University of Michigan) and perhaps higher. The median salary for legal writing faculty as of 2005 was somewhere between \$50,000 and \$59,999; the average was roughly \$57,000.¹⁰ Only *two percent* of the schools in the 2005 LWI/ALWD Survey pay their legal writing faculty more than \$100,000.¹¹ Stanchi and Levine estimate that in 1998, legal writing faculty earned "57% of the median salaries of assistant, tenure-track professors of doctrinal subjects, 51% of the median salaries of associate professors, and 40% of the median salaries of full professors."¹² In 1998, the salary difference between legal writing faculty and full professors in real dollars was roughly \$56,000.¹³ That difference is likely to be even greater today.

⁶ Stanchi & Levine, *supra* n. 2, at 4 n. 3.

⁷ *Id.* at 4.

⁸ See Society of American Law Teachers, *SALT Equalizer*, <http://www.saltlaw.org/EQ-Feb2005.pdf> (accessed Feb. 12, 2006).

⁹ See U.S. News and World Report, *America's Best Graduate Schools 2006: Top 100 Law Schools*, <http://www.usnews.com> (accessed Feb. 12, 2006).

¹⁰ See *2005 Survey Results*, *supra* n. 3, at 54. This is true without regard to the number of years the legal writing professor has been teaching. See Stanchi & Levine, *supra* n. 2, at 11.

¹¹ *2005 Survey Results*, *supra* n. 3, at 54.

¹² Ann C. McGinley, *Discrimination in Our Midst: Law Schools' Potential Liability for Employment Practices*, 14 UCLA Women's L.J. 1, 8 (2005) (citing Stanchi & Levine's survey and raising serious questions about these practices violating Title VII). As Professors Stanchi and Levine point out, a legal writing professor, receiving five percent annual increases would have to work eighteen years to earn the median salary of a full professor colleague. During that time of course, the full professor's salary would continue to increase, and the legal writing professor would be in the situation of "getting ever closer to her goal, but never reaching it." Stanchi & Levine, *supra* n. 2, at 11-12.

¹³ Stanchi & Levine, *supra* n. 2, at 11.

II. The Dual Bias Against Legal Writing: Discrimination on the Basis of Gender and Intellect

Given the increasing importance of legal research and writing to law students,¹⁴ how do we explain this ongoing disparity? At a minimum, the disparity reflects gender discrimination, pure and simple. As Stanchi and Levine state:

[L]aw schools have treated the teaching of legal writing as "women's work." While the high percentage of women found teaching legal writing may not always be the result of conscious discrimination, the gender disparity certainly reflects an institutional willingness to take advantage of the position of women lawyers.¹⁵

Stanchi and Levine explain that in the 1970s and 1980s, law schools were expanding, and there was public pressure to provide law students with more practical instruction. This need was met by the influx of highly skilled women in the legal profession, who were willing to take low-paying, low-status jobs for family reasons.¹⁶ As long as the women hired to teach legal writing were "not really faculty,"¹⁷ they posed no threat to the established order. More than twenty years later, the question is what enables this blatant discrimination to continue? How, in good conscience, can law schools — "the bastion[s] of

¹⁴ Recent studies indicate that the research and writing preparedness of matriculating law students is on the decline. As a 2003 Report of The National Commission on Writing in America's Schools and Colleges demonstrates, students are coming to law school with increasingly deficient writing skills. For example, the traditional senior research paper "is rapidly being abandoned" in American high schools, and "more than 50 percent of first-year college students are unable to produce papers relatively free of language errors." The Natl. Commn. on Writing in America's Schools and Colleges, *The Neglected "R": The Need for a Writing Revolution* 14, http://www.writingcommission.org/prod_downloads/writingcom/neglectedr.pdf (Apr. 2003) (accessed May 30, 2006).

A recent survey of law students at three high-ranking law schools indicates that incoming law students have deficient research skills. According to the survey, "students begin law school without basic research skills." Kathryn Hensiak et al., *Assessing Information Literacy among First Year Law Students: A Survey to Measure Research Experiences and Perceptions*, 96 L. Lib. J. 867, 868 (2004). Almost half of the 330 respondents were "unfamiliar with the library catalog," and many did not know that "everything is not online." *Id.* at 867-68.

For a recent report on the concurrent rate of decline in reading among American students, see The National Endowment for the Arts, *Reading at Risk: A Survey of Literary Reading in America*, <http://www.nea.gov/pub/ReadingAtRisk.pdf> (June 2004) (accessed May 30, 2006).

¹⁵ Stanchi & Levine, *supra* n. 2, at 23. See also Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. Pa. L. Rev. 537 (1988); Pamela Edwards, *Teaching Legal Writing as Women's Work: Life on the Fringes of the Academy*, 4 Cardozo Women's L.J. 75 (1997); Mary Ellen Gale, *Legal Writing: The Impossible Takes a Little Longer*, 44 Alb. L. Rev. 298 (1980); McGinley, *supra* n. 12, at 3-4.

¹⁶ Stanchi & Levine, *supra* n. 2, at 6-9.

¹⁷ *Id.* at 7.

liberalism"¹⁸ — shortchange students and treat their legal writing faculty like second-class citizens?

There is a concomitant and even more insidious form of discrimination at work here for which there is no obvious suspect class. It is discrimination on the basis of perceived intellect. It's not just that most of us are women; it's that we are women who *aren't that smart* teaching a course *that's not that hard*. Although the majority of doctrinal, primarily male, law professors would agree that legal writing is a valuable skill, it is only a skill; and frankly, it is too much work to teach it. Legal education is about more intellectual pursuits, *their* pursuits. If we were as smart as they, we would still be practicing law, teaching doctrinal courses, or writing books. This powerful assumption helps explain why female deans and female faculty with tenure can look the other way¹⁹ or discourage legal writing faculty from pushing for tenure because it is "too soon." Even the American Bar Association, which continues to mandate more and more professional skills education in accredited law schools,²⁰ has refused to require that law schools afford legal writing faculty job security reasonably similar to tenure.²¹

¹⁸ McGinley, *supra* n. 12, at 3.

¹⁹ See Stanchi & Levine, *supra* n. 2, at 5.

²⁰ The ABA Standards require that accredited law schools provide substantial instruction in "professional skills generally regarded as necessary for effective and responsible participation in the legal profession" as well as substantial instruction in legal analysis and reasoning, legal research, problem solving, oral communication, and writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year. See ABA, *2005–2006 ABA Standards for Approval of Law Schools, Standard 302: Curriculum*, 26-27, <http://www.abanet.org/legaled/standards/2005-2006standardsbook.pdf> (accessed May 15, 2006).

²¹ In 2003 and 2004, the Legal Writing Institute and the Association of Legal Writing Directors urged the ABA (1) to eliminate Standard 405(d), which permits schools to use short term contracts to attract and retain legal writing faculty, and (2) to include full-time legal writing faculty within Standard 405(c), giving legal writing faculty the same level of job security that clinical faculty enjoy. The ABA rejected that proposal both times.

The ABA now requires that clinical faculty have job security reasonably similar to tenure but not because it was convinced of clinicians' academic worthiness. Clinical programs were formed in the late 1960s in response to unrelenting pressure from students and the practicing bar. See Richard A Boswell, *Keeping the Practice in Clinical Education and Scholarship*, 43 *Hastings L.J.* 1187, 1187-88 (1992). Clinical faculty were not included in Standard 405(c) until 1996, some thirty years later.

In March 2006, the American Law Deans Association (ALDA) filed a public comment in response to the ABA's application for reaffirmation as a law school accrediting agency. In its comment, ALDA objected to the ABA's efforts to require tenure or tenure-like status for deans (how politically correct) and clinical faculty. As for legal writing faculty, ALDA stated it does "not believe that ABA should require any specific terms and conditions of employment." American Law Deans Association, *Public Comment On The Application Of The American Bar Association ("ABA") For Reaffirmation Of Recognition By The Secretary Of Education ("Secretary") As A Nationally Recognized Accrediting Agency In The Field Of Legal Education* (available at <http://www.nyu.edu/classes/siva/archives/alda.doc> (accessed May 15, 2006)). At this writing, a public hearing on the ABA's application is scheduled for June 2006.

III. Tracing the Roots of Intellectual Discrimination to Philosophy's Victory over Rhetoric as the Sole Path to Truth and Knowledge

The prevailing view among law school administrators and doctrinal legal faculty is that although teaching writing may be time-consuming, it is not really that hard. Legal writing teaches a process, not a substantive area of law. The belief that writing is simply a vehicle for ideas acquired outside of the writing process is so entrenched that it is difficult to challenge the assumptions behind it.²² Indeed, it is thousands of years old and rooted in the power struggle between philosophy and rhetoric that began in ancient Greece. As early as the fifth century, B.C., the Sophists, who were courtroom advocates as well as teachers of rhetoric, had already damaged rhetoric's reputation.²³ Some of the Sophists were known for trying spurious lawsuits, and thus, "sophistry" soon became associated with clever but false argument.²⁴

Plato, one of the earliest philosophers whose written work survives, was a contemporary of the Sophists. Plato lived a contemplative life, devoted to discovering universal truths and rejecting falsity. As far as Plato was concerned, rhetoric was manipulative and could not lead to truth.²⁵ Only dialectic, a reasoned exchange of ideas between two scholars, could elicit truth, an absolute truth that existed outside of man. Political and legal rhetoric were merely speechmaking, designed to persuade the audience about a particular point of view. Since rhetoric served only to persuade, it could be neither true nor false; at best, it was opinion.²⁶ Plato especially despised politicians, who curried favor by appealing to base pleasures, and lawyers, who argued false points of view that could result in juries acquitting guilty men.²⁷ Thus did Plato articulate a prejudice against rhetoric and legal argument that survives today in the legal academy in the form of discrimination against legal writing and its faculty.

Most damaging to rhetoric as a discipline, however, was Plato's view that it lacked intellectual substance. In *Gorgias*, one of Plato's famous dialogues, Socrates challenges Gorgias, a Sophist, to articulate the subject matter of rhetoric.²⁸ Socrates states that all art forms (what today we call sciences), such as medicine, arithmetic, and astronomy, exercise their influence through persuasive speech, and therefore, to say that rhetoric is about persuasion is to

²² See e.g. Lisa Eichhorn, *Writing in the Legal Academy: A Dangerous Supplement?*, 40 Ariz. L. Rev. 105 (1998) (explaining the perceived difference between legal writing and doctrinal courses as a "skills/substance dichotomy").

²³ James L. Golden et al., *The Rhetoric of Western Thought* 7 (6th ed., Kendall/Hunt Publ'g. Co. 1997).

²⁴ See e.g. *The Oxford Compact English Dictionary* 1098 (Catherine Sloanes ed., 2d ed., Oxford U. Press 2003).

²⁵ See e.g. Golden, *supra* n. 23, at 16.

²⁶ See e.g. Plato, *Phaedrus* in *Complete Works* 539, § 262c (John M. Cooper ed., Hackett Publ'g. Co. 1997).

²⁷ See *id.* at 536-38, §§ 259e-261d.

²⁸ See Plato, *Gorgias*, in *Complete Works*, *supra* n. 26, at 795, §§ 449d-e.

say it has no subject matter of its own.²⁹ Gorgias replies that rhetoric is the art of persuasion in courts of law and other assemblies.³⁰ Socrates declares that rhetoric is not an art form at all; it is merely the imitation of one because rhetoric has no subject matter of its own and deals only with what is "likely" to be true. Socrates concludes this part of the dialogue by stating that rhetoric is the counterpart to cookery, the false art of medicine. Just as cookery appeals to the base pleasures of the body, rhetoric appeals to the base pleasures of the soul. In Socrates' view, rhetoric confuses the soul, making it difficult to distinguish that which is true and just from that which is false and unjust.³¹

Aristotle was Plato's best student, but he could not have disagreed more with Plato about the value of rhetoric as an independent art form. At the age of seventeen, Aristotle moved to Athens to study at Plato's Academy, where he remained for twenty years. Unlike Plato, Aristotle was interested in reality as man perceived it as much as he was in absolute truth. In fact, he devoted his career to systematic observation and classification of all aspects of life. He wrote on a myriad of topics, including logic, rhetoric, philosophy, history, politics, ethics, astronomy, physics, and psychology.³² His most famous works include *The Organon* (a collection of treatises on logic)³³ and *Rhetoric*;³⁴ and together, they embody Aristotle's views on the subject and practice of rhetoric. Aristotle defined rhetoric as "the faculty of discovering in the particular case what are the available means of persuasion."³⁵ According to Aristotle, a rhetorician attempts to persuade by appeals to logic (i.e., reason) as well as to emotion and the speaker's character.³⁶ He criticized the Sophists for relying too heavily on emotional appeals and stressed appeals to logic.³⁷ Unlike Plato, Aristotle thought rhetoric *served* justice because the consideration of opposing viewpoints could lead to truth in the courtroom.³⁸ Echoing Socrates in Plato's *Gorgias*, Aristotle described rhetoric as the counterpart to dialectic — Plato's philosophical exchange of ideas leading to truth.³⁹

Doctrinal legal faculty are like Plato: they take a philosophical, truth-seeking approach to the study of law. Although they do teach law students,

²⁹ See *id.* at 796-97, §§ 450d-451d.

³⁰ See *id.* at 798, § 452c.

³¹ See *id.* at 806-09, §§ 462a-465e.

³² See e.g. Aristotle's *Physics* (Hippocrates G. Apostle ed. & trans., Peripatetic Press 1980); Aristotle, *The Nicomachean Ethics* (Hugh Tredennick ed., J.A.K. Thomson trans., Penguin Books 2004); Aristotle, *Politics* (C.D.C. Reeve trans., Hackett Publ. Co. 1998).

³³ See e.g. Aristotle, *The Organon* (Harold P. Cooke & Hugh Tredennick eds., Harv. U. Press 1960). *The Organon* includes *Categories*, *On Interpretation*, *Prior Analytics*, *Posterior Analytics*, *Topics*, and *On Sophistical Refutations*.

³⁴ See e.g. Aristotle, *The Rhetoric of Aristotle* (Lane Cooper trans., D. Appleton & Co. 1932).

³⁵ See *id.* at 7.

³⁶ See *id.* at 8.

³⁷ See *id.* at 3.

³⁸ See *id.* at 5-6.

³⁹ See *id.* at 1. According to Aristotle, neither dialectic nor rhetoric was a science with its own subject matter; both were "faculties for providing arguments." *Id.* at 9-10.

many prefer writing to teaching and harbor a certain disdain for the practice of law.⁴⁰ These educators believe that "coming to a comprehensive understanding of the law is best accomplished through logic," not experience.⁴¹ This identification with Plato is evidenced by their use of the combative teaching method Plato learned from Socrates. The typical law professor engages in a conversation with a student that challenges the student to articulate her position and then defend it against attack. Often the goal is to discover some sort of perceived truth about the rule of law or the policies that drove a particular court's decision. Little or no attempt is made to relate these truths to their application in practice. The only chance students get to apply their knowledge is on an exam at the end of the semester.

In contrast, legal writing faculty are more like Aristotle: we take a practical approach to the study of law, and we recognize that truth can differ based on the circumstances (i.e., a given memo or brief problem). Typically, we love to teach, and our goal is to expose students to the tools of persuasion: identification with the client's purpose, thorough research, articulate analysis, and effective speaking and writing. We are less concerned about the "correctness" of an argument than its effectiveness. Students have a tough time making the transition from the "right and wrong" of doctrinal courses (as in the professor is right and the student is wrong) to the "works and does not work" of legal writing. Convinced that there must be an ideal answer to their hypothetical client's question, students often think we are hiding it from them. Although we too expect our students to defend their positions against attack, we rarely take a position on the "best" argument. In teaching our students to become self-evaluators and self-editors of their writing, we teach them to judge for themselves what is right or best. Like Aristotle, we adhere to the view that the value of rhetoric lies in its ability to lead to truth, but we do not presume to teach what "truth" is in a given context.

The intellectual struggle between philosophy and rhetoric that began with Plato has continued throughout all of recorded history in a variety of disciplines. By and large, philosophy has triumphed over rhetoric, and to the victor belong the spoils. In the field of legal education, philosophy and its quest for truth (i.e., doctrinal courses) are valued above rhetoric and a lawyer's facility with language (i.e., clinical and legal writing courses). The reason for philosophy's ascendancy has been its claim to logic and reason. Although Aristotle thought that the invention of reason-based arguments fell within the province of rhetoric, philosophy claimed logic as its own. This left rhetoric with the study of expression and style, which is today perceived to be the domain of legal writing. The effect has been to gut rhetoric's intellectual heft. Consequently, we legal writing faculty are perceived to teach students the process of expressing the knowledge they get from doctrinal faculty. In plain terms, doctrinal faculty teach "the law," and we teach grammar, punctuation,

⁴⁰ See Stanchi & Levine, *supra* n. 2, at 21 n. 94.

⁴¹ Boswell, *supra* n. 21, at 1187.

and citation format. Legal writing is thus considered an intellectually inferior pursuit, and we who teach it acquire that inferiority by association.

In ancient Greece, where social interaction revolved around the spoken word, rhetoric was a respectable art form in spite of Plato. Greek politicians made public appeals through speechmaking, and citizens represented themselves in court. The Romans embraced and improved upon rhetoric, particularly legal argument. However, its primacy was short-lived; its status as a separate and substantive discipline was in serious jeopardy before the Empire began to fall in 410 A.D. As free speech became less available to Roman citizens and professional orators were hired for courtroom use, the need to train citizens in rhetorical skills declined rapidly.⁴² By the first century, A.D., the art of rhetoric was confined almost exclusively to the classroom, and its focus shifted from the substance of argument to how argument should be delivered.⁴³ Professional Roman orators, the "second sophists," began to deliver speeches designed to entertain and amaze audiences rather than to persuade them, and their style was deliberately ornate and excessive.⁴⁴ As is true today, not only was rhetoric considered insincere and manipulative, it became associated with exaggerated and flowery language.

The birth of Christianity contributed even more to rhetoric's fall from grace. Although Christians believed they had been called to proclaim the news of Christ, they rejected much of Roman culture, including the art of rhetoric.⁴⁵ The early leaders of the Latin Church had been trained in classical rhetoric, but they refused to adopt a form of preaching that had its roots in paganism. As a result, they adopted a plain teaching style that contained none of the rhetorical devices with which they were familiar.⁴⁶ In the fifth century, A.D., however, Augustine of Hippo attempted to revive the art of classical rhetoric by advocating an elegant preaching style grounded in the teachings of the great Roman orator, Cicero.⁴⁷ Augustine was concerned with truth, but not Plato's form of truth. Augustine believed that the only truth was the word of God. Undaunted by the fact that rhetoric encouraged opposing points of view, Augustine believed God's word needed the power of rhetoric behind it to compete fairly with false prophets.⁴⁸ Although he was instrumental in reviving interest in classical rhetoric, Augustine did nothing to reunite logic

⁴² See George A. Kennedy, *Classical Rhetoric & Its Christian & Secular Tradition from Ancient to Modern Times* 49 (2d ed., U.N.C. Press 1999); James J. Murphy, *Rhetoric in the Middle Ages: A History of Rhetorical Theory from Saint Augustine to the Renaissance* 35-36 (U. Cal. Press 1974).

⁴³ See Murphy, *supra* n. 42, at 35-37; James J. Murphy & Richard A. Katula, *A Synoptic History of Classical Rhetoric* 230-33 (3d ed., Lawrence Erlbaum Assoc. 2003).

⁴⁴ See Murphy, *supra* n. 42, at 35-37; Murphy & Katula, *supra* n. 43, at 230-33; Golden, *supra* n. 23, at 56-57.

⁴⁵ See e.g. Golden, *supra* n. 23, at 58-60; Kennedy, *supra* n. 42, at 168; Murphy, *supra* n. 42, at 48-50.

⁴⁶ Murphy, *supra* n. 42, at 51.

⁴⁷ Saint Augustine, *De Doctrina Christiana* 118, §§ 4.2.3-4.3.4. (D.W. Robertson, Jr., trans., Liberal Arts Press 1958).

⁴⁸ *Id.* at 118-19.

and rhetoric. Because truth was the unassailable word of God, Augustine saw no need for logic to evince truth and develop supporting arguments.⁴⁹ All Augustine needed was a vehicle for the expression of God's truth.

The predominance of Christian rhetoric signaled the death of classical rhetoric as a coherent discipline in the Middle Ages. Rhetoric was fractured into several discrete subjects, such as logic, grammar, poetry, preaching, and letter writing.⁵⁰ Although some interest in classical rhetoric survived, it took the primary form of an interest in Aristotle's treatises on logic in *The Organon*.⁵¹ Aristotle's *Rhetoric* was virtually ignored until its translation into Latin in the thirteenth century.⁵² As a result, logic continued to be severed from rhetoric in a way that Aristotle did not envision. When university education became available throughout Europe in the eleventh and twelfth centuries, students were required to take separate courses in logic, grammar, and rhetoric.⁵³ This *trivium* became the traditional curriculum for undergraduate education.⁵⁴ Due to the separation of logic and rhetoric as well as the obscurity of Aristotle's *Rhetoric*, logic dominated the *trivium*.⁵⁵ Although Aristotle's logic was useful to lawyers, medieval scholars assumed it was more helpful to philosophers in answering general questions about man's knowledge of the world.⁵⁶ In this way, logic became a part of philosophy, leading the way for doctrinal faculty to claim "the law" for themselves.

During the European Renaissance, the subjects of classical antiquity were reunited with their original form.⁵⁷ Like painting, sculpture, and architecture, rhetoric was reborn, and once again, it was valued in judicial and other forms of oratory.⁵⁸ Not surprisingly, the Renaissance humanists were largely responsible for rhetoric's revival. They were interested primarily in human language and interaction, and they viewed rhetoric as a noble art that showcased "human beings at their best."⁵⁹ Although Aristotle's *Rhetoric* had been translated into Latin more than 200 years earlier, it did not become popular until the Renaissance.⁶⁰ The works of Roman rhetoricians as well, such as Cicero and Quintilian, were re-discovered during this period.⁶¹ With the invention of the printing press, these re-discovered works could be quickly reproduced and distributed throughout Europe.

⁴⁹ See Kennedy, *supra* n. 42, at 180-81.

⁵⁰ See e.g. Murphy, *supra* n. 42, ch. 3-6.

⁵¹ See *id.* at 90.

⁵² See *id.*

⁵³ *Id.* at 73.

⁵⁴ See *id.*

⁵⁵ See *id.* at 97 n. 27.

⁵⁶ See e.g. Kennedy, *supra* n. 42, at 201-03; Brian Vickers, *In Defence of Rhetoric* 222-24 (Clarendon Press 1990).

⁵⁷ Jean Seznec, *The Survival of the Pagan Gods: The Mythological Tradition and its Place in Renaissance Humanism and Art* 211-13 (B.F. Sessions trans., Pantheon Books 1953).

⁵⁸ See Kennedy, *supra* n. 42, at 227-28.

⁵⁹ *Id.* at 227.

⁶⁰ *Id.* at 228-29.

⁶¹ *Id.*

Unfortunately, the revival of a coherent rhetoric was short-lived. In 1549, the French logician and humanist, Peter Ramus, wrote a thesis criticizing Quintilian for failing to understand that the study of rhetoric was restricted to style and delivery.⁶² As a teacher of both rhetoric and philosophy, Ramus was frustrated by the overlap between rhetoric (an art form appealing to logic, emotion, and character) and philosophy (the science of knowledge acquired primarily through logic).⁶³ Unlike the Italian humanists, Ramus had no interest in promoting rhetoric; he wanted to teach students to write in a clear and simple style, distinctly unlike that of Cicero.⁶⁴ He decided, therefore, that logic, the source of knowledge and argument, should forever belong to philosophy, while style and delivery should belong to rhetoric.⁶⁵ "Ramism" had little influence in Italy and Germany, but influenced education in England, France, and Spain.⁶⁶ The Puritans brought Ramist beliefs to the New World, where they quickly took hold.⁶⁷ Harvard College, for example, founded in 1636, modeled its curriculum on Ramism.⁶⁸ Ramus's influence can be seen today in the allocation of subjects among various college departments: logic still belongs to philosophy, and style and delivery are divided among English, speech, and communications departments.⁶⁹ Aristotle's rhetoric as a comprehensive discipline is no longer taught in Western colleges and universities. In fact, students coming to law school with an undergraduate major in the classics are so few that law schools do not even keep track of them.

The seventeenth century was marked by the development of epistemology, the study of how man acquires knowledge. The epistemologists rejected logic as the path to knowledge.⁷⁰ They also rejected the medieval university system, with its emphasis on Aristotelian logic and the Catholic Church. Instead, they sought knowledge using inductive methods. Francis Bacon, for example, articulated a method of careful observation that led from particular to more general conclusions about the nature of things. Since human perception was not necessarily reliable, those conclusions then had to be tested.⁷¹ As for logic, the practice of moving from general principles to particular conclusions, Bacon thought it could only demonstrate the

⁶² See *id.* at 251.

⁶³ See *id.* at 250-51; Edward P.J. Corbett, *Classical Rhetoric for the Modern Student* 556 (3d ed., Oxford U. Press 1990).

⁶⁴ Kennedy *supra* n. 42, at 251; Vickers *supra* n. 56, at 283.

⁶⁵ See Kennedy, *supra* n. 42, at 250-51; Corbett *supra* n. 63, at 556; Golden, *supra* n. 23, at 65-66 (discussing Ramus's *Dialectique* published in 1555).

⁶⁶ Kennedy, *supra* n. 42, at 251.

⁶⁷ *Id.* at 252.

⁶⁸ *Id.*

⁶⁹ Golden, *supra* n. 23, at 66.

⁷⁰ See e.g. Francis Bacon, *Selected Philosophical Works, The New Organon* bk. I, 91 (Rose-Mary Sargent ed., Hackett Publ. Co. 1999); John Locke, *An Essay Concerning Human Understanding* 679 (Peter H. Nidditch ed., 1979).

⁷¹ See e.g. Bacon, *supra* n. 70, at 89-96.

relationship between things that were *already* known.⁷² Like Plato, Bacon's primary concern was in discovering truth, but he disagreed with Plato that a contemplative life devoted to dialogue and reason could produce knowledge.⁷³

Although early epistemologists like Bacon, Descartes, Locke, and Vico agreed that logic could not produce knowledge, they did not agree on the value of rhetoric. Bacon had been a successful lawyer and judge, and as a result, perhaps, he knew the value of persuasive speech. Accordingly, Bacon believed that reason alone was not enough to convince people of the truth: rhetoric was needed to appeal to the emotions as well.⁷⁴ On the other hand, Descartes, the French philosopher and mathematician, had little interest in rhetoric.⁷⁵ Like Bacon, he had a law degree, but he never practiced law. Descartes believed that "eloquence," his word for rhetoric, was a gift, not a serious subject of study; one's ability to persuade had little to do with one's training.⁷⁶ Like Plato, Descartes thought rhetoric dealt only with probabilities, and therefore, it could not lead to truth.⁷⁷ Locke, an English philosopher, thought rhetoric was a "powerful instrument of Error and Deceit,"⁷⁸ whereas Vico, an Italian rhetoric professor, thought rhetoric could actually produce knowledge.⁷⁹ With the exception of Vico, even those epistemologists who championed rhetoric's worth assumed that its function was to communicate the truths that philosophy (by that time, an inductive process) discovers. In this way, they perpetuated the division of rhetoric that began with Ramus: the discovery of knowledge remained with philosophers, leaving rhetoricians with the sole task of delivering that information.

The epistemologists of the eighteenth and nineteenth centuries were far more enamored of rhetoric than their predecessors, but they did little to advance its standing as a coherent and substantive discipline. George Campbell, a Scottish minister, was interested in observing and articulating principles of argument. His *Philosophy of Rhetoric*, published in 1776, combined the best theories of the ancient and contemporary philosophers.⁸⁰ However, he too believed that knowledge was used in but acquired outside the rhetorical process. He too rejected logic as the source of knowledge and urged rhetoricians to use experience, analogy, testimony, and statistics to establish

⁷² See *id.* at 91.

⁷³ See *id.*

⁷⁴ Francis Bacon, *The Advancement of Learning* 127 (Michael Kiernan ed., Clarendon Press 2000).

⁷⁵ See Kennedy, *supra* n. 42, at 269-70.

⁷⁶ Rene Descartes, *Discourse on Method and the Meditations* 14 (John Veitch trans., Prometheus Books 1989).

⁷⁷ See e.g. Golden, *supra* n. 23, at 92.

⁷⁸ Locke, *supra* n. 70, at 508.

⁷⁹ See Golden, *supra* n. 23, at 95; Giambattista Vico, *The Art of Rhetoric* 7 (Giorgio A. Pinton & Arthur W. Shippee eds. & trans., Value Inquiry Book Series 1996).

⁸⁰ George Campbell, *The Philosophy of Rhetoric* (Charles Ewer 1823).

the existence of facts.⁸¹ Although Campbell was not troubled by rhetoric's probabilities as Plato was, he did hold a certain contempt for lawyers. Campbell observed that even in his day, lawyers' explanations of the law had become so complicated and convoluted as to become "distinguished by the name *chicane*."⁸² Richard Whately, another of rhetoric's devotees, was an English priest in the Anglican Church. Like Campbell, he was interested in rhetoric and its ability to defend Christian beliefs in an age of growing secularism. Whately published *Elements of Rhetoric* in 1828, which explored in detail the nature of evidence, presumptions, and burdens of proof.⁸³ Although his text became the precursor to modern argumentation theory, Whately too viewed the art of rhetoric as the process of putting together arguments acquired elsewhere.⁸⁴ However, he disagreed with Campbell on the value of logic, criticizing Campbell's "ignorance and utter misconception" of its nature and object.⁸⁵

By the end of the nineteenth century, the interest in rhetoric had shifted from argument to literature. Stripped of the task of inventing argument, rhetoric evolved into the study of expression and style. Known as the Belle Lettres Movement, this shift was led by Hugh Blair, a Scottish minister and professor of rhetoric.⁸⁶ Influenced by *On the Sublime*,⁸⁷ an ancient Roman treatise which attempted to define taste, beauty, and sublimity, Blair and other belletristic scholars searched for taste, beauty, and sublimity in poetry, prose, and argument.⁸⁸ Their study of all types of literature ultimately transformed rhetoric from the study of argument into the study of literature generally. Blair's *Lectures on Rhetoric and Belle Lettres*,⁸⁹ published in 1783, continued to be used in English and American schools until nearly the end of the nineteenth century.⁹⁰ The impact of the Belle Lettres Movement was to eliminate rhetoric from most college curricula and replace it with courses in literary interpretation and composition. The discovery of knowledge — the substance of argument — was left entirely to philosophy departments.

Blair acknowledged rhetoric's reputation as a "contemptible art,"⁹¹ but like Campbell and Whately, he believed it was useful, primarily for defending

⁸¹ James L. Golden & Edward P.J. Corbett, *The Rhetoric of Blair, Campbell, and Whately* 187-97 (Holt, Rinehart & Winston, Inc. 1968).

⁸² See *id.* at 231.

⁸³ Richard Whately, *Elements of Rhetoric* (Douglas Ehninger ed., S. Ill. U. Press 1963).

⁸⁴ See Golden & Corbett, *supra* n. 81, at 14.

⁸⁵ *Id.* at 284.

⁸⁶ See *id.* at 24-25.

⁸⁷ See e.g. Longinus, *On The Sublime* (James A Arieti & John M. Crossett trans., E. Mellen Press 1985). Longinus was an unknown Roman author, who published this treatise sometime during the first century, A.D. At that time, the goal of the second sophists was to amaze, not to persuade. See *supra* nn. 43-44 and accompanying text.

⁸⁸ See Golden, *supra* n. 23, at 75-76.

⁸⁹ Hugh Blair, *Lectures on Rhetoric and Belle Lettres* vol. I, II (Harold F. Harding ed., S. Ill. U. Press 1965).

⁹⁰ Golden & Corbett, *supra* n. 81, at 25.

⁹¹ Blair, *supra* n. 89, at vol. II, lecture XXV, 2.

Christian beliefs. According to Blair, an effective rhetorician was the "most eloquent man,"⁹² and in his view, there was always room for eloquence. With regard to legal argument, he believed that a lawyer's goal was to persuade judges about truth and justice in a particular case, and a lawyer should appeal primarily to reason.⁹³ Although these later epistemologists revived interest in the construction of legal arguments, they perpetuated the schism between logic, reason, induction and the expression of argument. That schism is represented today in the notion that doctrinal courses teach substance, while legal writing courses teach composition and grammar.

IV. The Adoption of a Philosophical Rather than Practical Approach to Legal Education

As rhetoric evolved into the study of literature, law schools were forming in the United States. Tapping Reeve, a practicing lawyer in Litchfield, Connecticut, opened The Litchfield Law School in 1775,⁹⁴ and in 1779, William and Mary College in Virginia hired its first law professor.⁹⁵ These early schools took diverse approaches to teaching law. Litchfield, for example, focused on teaching legal principles and their application to any situation,⁹⁶ while William and Mary offered a broader range of studies in law, politics, history, and science.⁹⁷ In 1817, Harvard formally adopted a professional model for legal education and offered the first post-graduate degree for the practice of law.⁹⁸ By the early 1870s, however, rationalism was all the rage, and legal educators became convinced that law should be taught more as a science than an art. In 1873, Charles Eliot, then President of Harvard University, stated in his annual report for academic year 1873-74 that "[a] false analogy between medical education and legal education . . . had led many to believe that practitioners would make the best teachers of law."⁹⁹ Medicine, Eliot said, could be learned from the bodies of the sick and wounded; law, on the other hand, "is to be learned exclusively from the books in which its principles and precedents are recorded, digested, and explained."¹⁰⁰ Christopher Langdell, then Dean of Harvard Law School, articulated his vision of the ideal law professor:

[A] teacher of law should be a person who accompanies his pupils on a road which is new to them, but with which he is well acquainted

⁹² *Id.*

⁹³ *Id.* at vol. II, lecture XXVIII, 74-76.

⁹⁴ See Charles R. McManis, *The History of First Century American Legal Education: A Revisionist Perspective*, 59 Wash. U. L.Q. 597, 617 (1981).

⁹⁵ *Id.* at 609.

⁹⁶ See *id.* at 617-18.

⁹⁷ See *id.* at 609-12.

⁹⁸ See *id.* at 607, 627.

⁹⁹ William P. LaPiana, *Logic & Experience: The Origin of Modern American Legal Education* 15 (Oxford U. Press 1994)

¹⁰⁰ *Id.*

from having often traveled it before. What qualifies a person, therefore, to teach law, *is not experience in the work of a lawyer's office*, not experience in dealing with men, not experience in the trial or argument of causes, not experience, in short, in using law, but experience in learning law.¹⁰¹

Accordingly, Harvard made dramatic changes to its law school, including the establishment of a full-time faculty, whose qualifications for teaching were their scholarship potential as opposed to their success in practice.¹⁰² In Platonic fashion, Harvard claimed "to provide the only true method" for training lawyers and thus converted the process for training lawyers from an apprenticeship system to an academic system "dominated by a new division of the profession — full-time teachers of law."¹⁰³

Then a major shift in legal pedagogy cemented the schism between the teaching and practice of law. Legal treatises, which had been used to train practitioners, were set aside in favor of judicial opinions, which were chosen to discover the true law.¹⁰⁴ Like Eliot, Langdell believed that law should be taught as a science that yields predictable results.¹⁰⁵ Langdell had been a successful lawyer in New York, and he was familiar with the case method of teaching law that had been introduced at New York University.¹⁰⁶ In the early 1870s, Langdell convinced Eliot that Harvard should adopt it. Like the early epistemologists, Langdell believed an inductive method could lead to the discovery of truth (i.e., the true principles of law).¹⁰⁷ Indeed, one of Langdell's own students said that "his earnest endeavor was to lead his pupils to be as unerring as possible in their search for the truth."¹⁰⁸

Up until then, law had been taught through lecture or recitation (the practice of quizzing students on definitions and rules from their assigned reading such as treatises). Langdell's new method was Socratic; he questioned students about the cases they had read for class and encouraged them to think for themselves — to articulate and critique the court's reasoning. At first, students were opposed to Langdell's method because he was not teaching

¹⁰¹ Christopher C. Langdell, *Teaching Law as a Science*, 21 Am. L. Rev. 123-24 (1887) (Langdell's after-dinner speech to the Harvard Law School Association) (emphasis added). See also Robert Stevens, *Law School: Legal Education from the 1850s to the 1980s* 38 (U.N.C. Press 1983).

¹⁰² Stevens, *supra* n. 101, at 38-39; McManis, *supra* n. 94, at 630.

¹⁰³ LaPiana, *supra* n. 99, at 7.

¹⁰⁴ See McManis, *supra* n. 94, at 630.

¹⁰⁵ See *id.* at 633; Langdell, *supra* n. 101, at 123 ("[L]aw is a science, If law not be a science, a university will consult its own dignity in declining to teach it. If it be not a science, it is a species of handicraft [recall Plato's analogy to cookery], and may best be learned by serving an apprenticeship to one who practices it.").

¹⁰⁶ McManis, *supra* n. 94, at 633.

¹⁰⁷ See *id.*; Bruce A. Kimball, *Christopher Langdell: The Case of an 'Abomination' in Teaching Practice*, 20 NEA Higher Educ. J. 23, 25 (Summer 2004).

¹⁰⁸ Kimball, *supra* n. 107, at 28.

them black letter law.¹⁰⁹ Despite these complaints, Langdell won his students over, and the case method gradually became accepted. By the mid-1890s, several law schools, including Columbia, Northwestern, Cornell, and Stanford had switched to the case method.¹¹⁰ The nineteenth century's formal adoption of a truth-seeking, Socratic approach to legal education was monumental; it forever changed the conception of law school as a trade school, practical and Aristotelian, to an ivory tower, theoretical and Platonic.

Once the scientific approach to teaching law took hold, the "art of rhetoric" became irrelevant. Law school was about discovering principles of law, and these principles were the province of legal scholars, not practitioners. Langdell's successors soon realized that the Socratic method was better for teaching legal reasoning than independent principles of law.¹¹¹ Nevertheless, the Socratic method of teaching persists, and doctrinal faculty still act as truth finders, striving to mold minds that can participate meaningfully in their quest for truth, with little or no regard for the students' ability to practice law. Clinical programs did not appear until the late 1960s in response to political pressure, and legal writing programs appeared some ten to twenty years later.¹¹² Although critical to the modern law student's education, these practical courses are seen as *different*. They allow students to practice applying legal principles or truths in a given context, but they are not perceived to teach any sort of independent truth. In rhetorical terms, they teach students solely expression and style.

V. Modern Rhetoric's Continued Treatment as a Discipline Without Substance Despite Its Contribution to Understanding the Nature of Truth

At the turn of the twentieth century, there was a resurgence of scholarly interest in rhetoric that went far beyond literature. Particularly in the United States, non-legal scholars began to explore the nature of human communication in all contexts, not just legal argument. Since then, the study of rhetoric has expanded to include, for example, the study of the meaning of language,¹¹³ language as a system of signs,¹¹⁴ the impact of situation and culture on forms of communication,¹¹⁵ the influence of modern media on modes of communication,¹¹⁶ the ethical choices inherent in forms of

¹⁰⁹ See *id.* at 31.

¹¹⁰ *Id.* at 34.

¹¹¹ See McManis, *supra* n. 94, at 633-34.

¹¹² See Boswell, *supra* n. 21, at 1187-88; Stanchi & Levine, *supra* n. 2, at 7.

¹¹³ See e.g. I.A. Richards, *The Philosophy of Rhetoric* (Oxford U. Press 1936); C. K. Ogden & I.A. Richards, *The Meaning of Meaning* (Harcourt, Brace & World, Inc. 1972).

¹¹⁴ See e.g. Roland Barthes, *Elements of Semiology* (Annette Lavers & Colin Smith trans., Hill & Wang 1968); Umberto Eco, *A Theory of Semiotics* (Ind. U. Press 1976).

¹¹⁵ See e.g. Lloyd F. Bitzer, *The Rhetorical Situation*, 1 *Phil. & Rhetoric* 1 (1968); Kenneth Burke, *A Grammar of Motives* (U. Cal. Press 1969); Kenneth Burke, *A Rhetoric of Motives* (Prentice-Hall, Inc. 1950).

¹¹⁶ See e.g. Marshall McLuhan, *Understanding Media: The Extensions of Man* (MIT Press 1996).

communication,¹¹⁷ the teaching of English composition, the processes of argumentation in all aspects of life,¹¹⁸ and the psychology of social movements, such as the Civil Rights Movement.¹¹⁹

The common thread among these established disciplines is the profound shift in thinking on the nature of knowledge and truth. As early as the 1950s, Stephen Toulmin and Chaim Perelman began to contribute significantly to the contemporary philosophers' view that truth is indeed relative. In *Uses of Argument*, Toulmin borrowed principles from legal argument to help explain how people reason and acquire knowledge.¹²⁰ Recognizing that people do not reason using formal, Aristotelian logic in everyday life, Toulmin advanced a new model of argument, now referred to as "informal logic."¹²¹ In Toulmin's view, informal argument leads to the discovery of knowledge, but no knowledge is absolute; at best, it is *probable*.¹²² Like Toulmin, Perelman believed that appeals to reason lead only to probable truths. In 1970, he wrote:

[W]e must recognize that the appeal to reason must be identified not as an appeal to a single truth but instead as an appeal for the adherence of an audience which can be thought of . . . as encompassing all reasonable and competent men.¹²³

By the twentieth century, Plato's quest for absolute truth had become obsolete. Not only had truth become relative, it had become the product of a rhetorical process.

This shift in understanding about the nature of truth has had a profound impact on the teaching of doctrinal law and legal scholarship, but ironically, it has had virtually no impact on the intellectual status of rhetoric, writing, or writing faculty. In the 1920s and 1930s, for example, Langdell's theory that law could be taught as a science — that the application of law to fact yields predictable results — gave way to a more practical understanding of how judges decide individual cases. As early as 1897, Justice Holmes had criticized the notion that "the only force at work in the development of law is logic."¹²⁴ Speaking nearly a generation before the scholars known later as realists,

¹¹⁷ See e.g. Richard M. Weaver, *The Ethics of Rhetoric* (Henry Regnery Co. 1953).

¹¹⁸ See e.g. Stephen E. Toulmin, *Uses of Argument* (updated ed., Cambridge U. Press 2003); Chaim Perelman, *The Realm of Rhetoric* (William Kluback trans., U. Notre Dame Press 1982); Chaim Perelman & L. Obrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* (John Wilkinson & Purcell Weaver trans., U. Notre Dame Press 1969).

¹¹⁹ See e.g. Golden, *supra* n. 23, at ch. 17.

¹²⁰ See Toulmin, *supra* n. 118.

¹²¹ See *id.* at 94-134, where Toulmin sets out his model of argument consisting of data, a claim, warrant, qualifier, rebuttal, and backing.

¹²² See Golden, *supra* n. 23, at 210.

¹²³ Chaim Perelman, *The New Rhetoric: A Theory of Practical Reasoning*, Great Ideas Today (Ency. Britannica, Inc. 1970), reprinted in Golden, *supra* n. 23, at 234-52.

¹²⁴ Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 465 (1896-97).

Holmes rejected the "science" of law, stating that judges decide cases by resolving competing and relative interests, and that the judicial process necessarily involves subjective judgment.¹²⁵ By 1930, Holmes' view that case outcomes are determined by a host of factors had taken firm root in legal scholarship. Karl Llewellyn, a then-young law professor at Columbia University, used to tell his students that rules of law were helpful only insofar as they helped lawyers predict what judges will do.¹²⁶ In *The Bramble Bush*, Llewellyn demonstrated that precedent could be read either narrowly or broadly, and neither logic nor precedent could provide certainty as to outcome; they merely demonstrated the range of *possible* outcomes.¹²⁷ Most important, Llewellyn demonstrated that the truth about the law is relative.

In the wake of Llewellyn and later realists, modern legal scholars' interest in understanding "the truth" about law and its ability to serve justice exploded. In the latter half of the twentieth century, legal scholars formed social movements that seriously questioned deep-seated assumptions about the "rule" of law and the fairness of our legal system. In the late 1970s, the Critical Legal Studies Movement took Llewellyn's range of possible outcomes, the "indeterminacy of law," as a sign of an essentially corrupt system.¹²⁸ The invitation to the first conference on Critical Legal Studies (CLS) in 1977 declared that "law is an instrument of social, economic, and political domination, both in the sense of furthering the concrete interests of the dominators and in that of legitimating the existing legal order."¹²⁹ Principles of law thus reflect the power of certain social groups, not universal truths. Law is essentially politics and, as Plato thought, not to be trusted. In Plato's terms, law is the product of a political process; it constitutes opinion only, currying favor by appealing to those groups with the most economic power.¹³⁰

Soon thereafter, a host of legal theories developed which are also based on a belief that law is not an independent source of truth; it simply reflects truth as it is viewed and imposed by different social groups. Critical race theorists, for example, argue that our society is still racist, despite the law's ostensible effort to create equal rights.¹³¹ From their point of view, neutral rules of law serve to perpetuate the entrenchment of the white majority's

¹²⁵ See *id.* at 466-68.

¹²⁶ Karl N. Llewellyn, *The Bramble Bush* 4 (Oceana Publications 1930).

¹²⁷ *Id.* at 66-67. See also Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules Or Canons About How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395 (1950).

¹²⁸ See e.g. Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (N.Y.U. Press 2004); Mark V. Tushnet, *Critical Legal Studies: A Political History*, 100 Yale L. J. 1515 (1991); Roberto Unger, *Knowledge and Politics* (Free Press 1975).

¹²⁹ See e.g. Louis B. Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 Stan. L. Rev. 413, 417 (1984) (quoting *Invitation to First Conference on Critical Legal Studies*, Jan. 17, 1977).

¹³⁰ See *supra* nn. 26-27 and accompanying text.

¹³¹ See e.g. Derrick Bell, *Race, Racism and American Law* (Little, Brown & Co. 1973); Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 Stan. L. Rev. 317 (1987); Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. Civ. Rights-Civ. Libs. L. Rev. 323 (1987).

power.¹³² Feminist legal theorists also question the existence of a neutral legal order, arguing that individual rights have evolved from the male perspective, thus suppressing the female voice and denying equality for women.¹³³

Modern rhetoric has thus enabled a relativistic view of truth that is widely embraced today in the legal scholarship of doctrinal faculty. This enlightened view might have had an effect on the importance of teaching legal writing as part of a rhetorical process that defines cultural "truths," but it has had exactly the opposite effect. In order to maintain the existing power structure, doctrinal faculty must keep "truth finding" for themselves. The only way to do that is to conceptualize the search for truth as an exclusively philosophical endeavor. Only then does the view of legal research and writing as a course in style and citation format continue to make sense. From a legal feminist's point of view, the male-dominated legal academy suppresses the voices of female legal writing faculty in order to preserve the status quo. Moreover, we can be characterized as teaching students how to engage in the process that enables domination and injustice to persist. As a mere purveyor of social, economic, and political domination, legal writing is not only tainted, it lacks independent substance. The irony, of course, is that legal scholars themselves engage in the rhetorical process for discovering truth — a process that they formally eschew. In the marketplace of ideas, their opinions vie for legitimacy, and thus, like Aristotle, legal scholars implicitly recognize that the clash of differing viewpoints may lead to the best form of truth.

While doctrinal faculty view legal writing as a course primarily about *process*, some have serious doubts about whether the process can actually be taught. This Cartesian view blinds them to the possibility that one can learn to write well and that writing can generate knowledge. Most tenured faculty teaching for more than twenty years did not have a legal writing course in law school, and therefore, on some level, they doubt the need for it. There is a certain inchoate belief that either one can or cannot write: if a student has made it all the way to law school and still cannot write, it is probably too late. Descartes articulated this view more than 350 years ago:

Those in whom the faculty of reason is predominant, and who most skillfully dispose their thoughts with a view to render them clear and intelligible, are always the best able to persuade others of the truth of what they lay down, though they . . . be wholly ignorant of the rules of rhetoric.¹³⁴

¹³² See e.g. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. Pa. L. Rev. 561 (1984); Duncan Kennedy, *Frontier of Legal Thought III: A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 Duke L.J. 705 (1990).

¹³³ See e.g. Kathryn Abrams, *Hearing the Call of Stories*, 79 Cal. L. Rev. 971 (1991); Catherine A. MacKinnon, *Graduation Address: Yale Law School, June 1989*, 2 Yale J.L. & Feminism 299 (1990); Catherine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (Yale U. Press 1979); Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 Va. J. Soc. Policy & L. 75 (1994).

¹³⁴ Descartes, *supra* n. 76, at 14.

In the end, there is a suspicion that to devote any more time and energy to legal writing than we already do would be a waste. The problem, of course, is that knowing the law is not the same as knowing how to apply it. Moreover, not all of our students are born writers. As the report of the National Commission on Writing indicates, when schools stop teaching writing, the quality of student writing declines.¹³⁵

VI. Conclusion and Recommendations

Doctrinal legal faculty perpetuate the view that legal education is a philosophical endeavor that focuses on the "truth" about the nature of law and, in the twenty-first century, on the law's ability to serve justice in a multicultural America. Because of their political power, however, doctrinal faculty are able to preserve the task of truth finding for themselves. Since the nature of truth is independent of its practical application, those of us who teach legal writing are simply not part of the academy's intellectual enterprise. At best, we teach a process for conveying truth, and at worst, we teach students how to engage in the process of manipulation and domination. Because most of us are women, and because we teach a process that lacks substance and perhaps even value, we are discriminated against. The reality is that we both teach "truth": doctrinal faculty teach students "the truth" about a specific body of law and its evolution, while legal writing faculty teach students how to interpret and apply that same truth in a specific context. Like Stanchi and Levine, we should not "rest until [legal writing faculty] are considered full, participating members of the legal academy and our students receive the training they deserve."¹³⁶

I do not presume to have all the answers on how to achieve these goals. However, first and foremost, we need to say it like it is. Not just in law review articles but also to ourselves, our colleagues, doctrinal faculty, deans, alumni, and students: we are discriminated against because we are perceived as women who teach an intellectually inferior and unworthy subject. This is absurd, outrageous, and unacceptable. We teach a complex and sophisticated art form that combines the acquisition of knowledge — the law itself — *and* its application — persuasive technique. In researching and writing a memo or brief, students find and synthesize controlling law to invent the major premises for their conclusions. In applying these premises to the facts of their case, students often engage in analogy and distinction, using the facts and policies of case decisions to predict or argue for a certain outcome. At the same time, students must anticipate their audiences' needs in the way they construct documents, frame issues, characterize facts, reason, and cite to authority. They must first suppress some of their writing instincts in order to learn the discourse of the legal community and, once they assimilate it, draw again on their own creativity. Then, and only then, do students and legal writing faculty focus on grammar, punctuation, and spelling. In sum, we teach

¹³⁵ See The Natl. Commn. on Writing in America's Schools & Colleges, *supra* n. 14.

¹³⁶ See Stanchi & Levine, *supra* n. 2, at 20.

legal *reasoning* as much as doctrinal faculty do, and as twentieth century legal scholarship demonstrates, that process not only seeks knowledge, it *generates* knowledge. We know these things, but we must speak them out loud. We gain absolutely nothing by standing on the sidelines waiting to be recognized. We work as hard as or harder than doctrinal faculty, struggling to keep up with heavy course loads and to publish at the same time. We are major contributors to our students' success but earn a fraction of our colleagues' salaries. That is unfair, and we must say so.

Second, we must not make the same mistake we accuse doctrinal faculty of and believe that all we really teach is process. Instead of settling for composition and grammar, we must reclaim the substance of rhetoric and teach it. The topics to choose from are as varied as our imaginations: Aristotle's theories on logic, rhetoric, and poetry; the Romans' contributions to rhetoric in the works of Cicero and Quintilian; the views of the eighteenth century epistemologists on argument and their interest in defining beauty and sublimity; the informal logic of Toulmin and Perelman; and the post-modern struggle for "best truths" in legal scholarship, to name a few. Some or all of these subjects would give our teaching the intellectual cornerstone that Aristotle envisioned for rhetoric, truly making it the counterpart to dialectic in the doctrinal classroom. The "how to" approach to legal writing (e.g., formulas and samples) that we all use is a necessary part of our teaching. However, we cannot be afraid to teach legal analysis explicitly and tread on the territory of our doctrinal colleagues. Finally, we should resist pressure to write about "substantive law" (i.e., doctrinal subjects). Our scholarship, too, should explore the substantive aspects of rhetoric, and the rich world of modern rhetorical theory is our oyster.¹³⁷

Third, as history teaches us, we are not going to elevate the status of legal writing on its merits alone. Law schools must now afford clinical faculty a tenure equivalent, but not because the academy opened its arms to them. Like theirs was and to some extent still is,¹³⁸ ours is a political problem. Simply asking doctrinal faculty to elevate the status of legal writing, without more, is a lot like asking a partner to take less of the firm's profit for the same amount of work. Therefore, our strategy must include motivating students, alumnae, and local law practices to pressure law school administrators to allocate more time and resources to legal writing. The annual ALWD/LWI survey provides excellent information on trends in legal writing programs, and schools like Mercer University and Seattle University have demonstrated how progressive legal writing programs can be. We may need to advocate for more credits,

¹³⁷ See e.g. Linda L. Berger, *What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ALWD 169 (2004); Michael Frost, *Greco-Roman Analysis of Metaphoric Reasoning*, 2 Leg. Writing 113 (1996); Laurel Currie Oates, *Beyond Communication: Writing as a Means of Learning*, 6 Leg. Writing 1 (2000); Kristen K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 Vt. L. Rev. 483 (2003); Anita Schnee, *Logical Reasoning "Obviously,"* 3 Leg. Writing 105 (1997); and the articles published in this issue on rhetoric and argumentation.

¹³⁸ See *supra* n. 21.

increased teaching time, smaller classes, the hiring of full-time faculty, increased writing requirements for graduating law students, or more upper-class courses. For ourselves, we may need to advocate for the same rights as our doctrinal colleagues: salaries based on merit and experience, voting rights, reduced course loads, sabbaticals, and summer grants for research.¹³⁹

When I first started teaching, I was thrilled to return to legal education even though my sense was that the second-class status of legal writing seemed a bit elitist and out of touch with the demands of actual practice. Once I realized the prejudice extends beyond legal writing to its faculty, I was both furious and crushed. In the early 1990s, our number seemed too few and our profession too young and unformed to effect any significant change. However, things have changed a great deal since then, and now is the time to seize opportunity and make more change. Political struggles such as these are painful, frightening, and isolating. That alone has prevented most of us from speaking out against what we know to be unfair. But we cannot expect to be treated with respect unless we first respect ourselves. And that's just true.

¹³⁹ I would like to acknowledge here the efforts of Georgetown's new dean, Alex Aleinikoff, to improve the status of legal writing courses at Georgetown. In April 2006, at his urging, the law faculty approved a proposal to double the size of our legal writing faculty and to reduce class size from 120 to thirty. An increase in credits, from three to four, is expected within the next academic year. Unfortunately, no changes to the status of Georgetown's legal writing faculty were proposed.