Legal reasoning is... but an argumentation aiming to persuade and convince those whom it addresses, that such a choice, decision or attitude is preferable to concurrent choices, decisions and attitudes.¹

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. One approach to this problem is to explore the intrinsic relationship of law to rhetoric. 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.²

This article discusses and applies heuristics from contemporary theories of argumentation to demonstrate how these models inform the study and practice of the law. My focus is on the practical nature and justificatory function of legal argument. Although theories of argumentation belong within the larger class of rhetorical theory, they are distinguished here because rhetorical theory lays the more general foundation for considering specific approaches to argument.

Traditionally, research on argument has followed two lines: normative and descriptive investigation. For the most part, normative theories of argument are treated in the area of formal logic and are concerned with internal correctness and validity.³ Instead, this article identifies the contributions of Stephen Toulmin and Chaim Perelman, two rhetoricians who explore argument not as norm-giving but as norm-descriptive. This is in keeping with

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² Editor's Note: At the time this article was written, Kurt M. Saunders was Adjunct Professor of Law at Duquesne University. He thanks Linda Levine and his research assistants, Amy Phillips and Marc Farrell, for their contributions to this article. He now is ....

my concentration on the rhetorical, practical, and culturally constructed nature and function of legal argument. First I consider legal argument as a particular form of practical argumentation. From there I investigate the ideas of Toulmin and Perelman and illustrate how they can be used in legal education.

**Legal Argument as Practical Argumentation**

Aristotle believed that most arguments in the real world were practical in nature and took place outside highly rigorous systems of logical and mathematical proof. Until recently, rhetorical theorists have paid little attention to practical argumentation and have concentrated on more formal models of reasoning. But contemporary theorists such as Toulmin and Perelman have returned to Aristotle's original concern with practical argumentation, believing that logic and mathematical models are inadequate to explain how people actually make arguments. Both Toulmin and Perelman use legal reasoning as the model for their theories because it is a form of practical argumentation.

Practical arguments proceed informally; they are not concerned with formal demonstration, internal validity, and objective correctness. While logical arguments are specifically designed to produce conclusions that are universal and absolute in their proof, practical arguments are designed to establish one claim as more probable or reasonable than another. Likewise, legal argumentation is not concerned with proof of absolute truths, but acknowledges that it is always possible to argue for or against a particular claim. Arguments that support one claim never entirely exclude those supporting the opposing claim. Strict logical consequence and certainty are never the result, because arguments depend upon language, and language always admits of ambiguity, equivocality, and multiple interpretation.

A legal argument is resolved when the audience, whether judge or jury, accepts one claim as more reasonable than another rather than as objectively and inherently valid. Similarly, the goal of practical argumentation is to gain the assent or adherence of the audience to a claim. The persuasiveness of an argument always depends upon what the relevant audience regards as persuasive. The audience decides when and to what extent a claim has been justified by the arguments.

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4 See Perelman, *supra* note 1, at 127. Aristotle refers to practical argumentation as dialectical reasoning. I use the term "practical" because "dialectical" is used interchangeably with "logical" in many texts.

5 See *id.* at 150.

6 Consider, for instance, that the literal interpretation of a statutory or common law rule may bear variance with notions of equity and fairness. Contrast this with a theorem of mathematics or an axiom of logic, which has a certain or conclusive meaning.

7 Demonstration, by contrast, transcends its immediate social and cultural context and is therefore field invariant. The conclusions of demonstration are objectively valid independent of their acceptance by any audience whatsoever.
Justification, according to John Rawls, "seeks to convince others, or ourselves, of the reasonableness of the principles upon which our claims and judgments are founded." In practical argumentation, justification involves a heuristic search; that is, the arguer searches among the many available arguments to find those that will most likely persuade the audience to accept the claim. Justification provides reasons for accepting the claim. Similarly, a lawyer must justify a claim by generating arguments based on the evidence and available legal authority.

Because law is a rhetorical activity and because legal argumentation is a form of practical argumentation, heuristics from the theories of Stephen Toulmin and Chaim Perelman may prove instructive to our students' learning and understanding.

Heuristics from Argumentation

Stephen Toulmin and the Layout of Argument

Stephen E. Toulmin's starting point in his theory of argumentation is the distinction between analytic and substantial arguments. Toulmin believes that analytic arguments, such as mathematics and formal logic, do not extend beyond the information contained in the premises, and that substantial arguments involve inferences from the evidence to the conclusion of the argument. He maintains that while absolute standards of formal validity do not explain everyday reasoning in the real world, neither do relativistic standards, which he believes constitute no standards at all. These concerns prompted Toulmin to investigate the reasoning process and what he calls the justificatory function of argument.

Toulmin's chief contribution to argumentation theory is his model of the layout of argument. Based on legal reasoning, the layout of argument focuses on the movement of accepted data, through a warrant, to a claim. Toulmin's model is procedural, not static or spatial, and is based on an analog of motion. The following summary uses the analogy of taking a trip to illustrate Toulmin's approach to making an argument.

Toulmin's layout of argument involves six interrelated components. The first component is called a "claim." The claim is the conclusion of the argument that a person is seeking to justify or the destination of the trip. It is the answer to the question, "Where are we going?" Toulmin calls the second component of the argument "grounds."

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12 Id. at 118-19.
13 See id. at 7, 96.
The grounds of the argument are the facts or other information on which the argument is based. Grounds provide the answer to the question, "What do we have to go on?" The third component of an argument is called the "warrant." This is the portion of the argument that authorizes our movement from the grounds to the claim; it assesses whether or not our "trip" from grounds to claim is a legitimate one. It answers the question, "How do you justify the move from these grounds to that claim? What road [do] you take to get from this starting point to that destination."14

Toulmin recognizes three secondary elements which may be present in an argument: backing, qualifier, and rebuttal. Backing is the authority for the warrant; it provides credibility for the warrant and may be introduced when the audience is unwilling to accept the warrant at face value. A qualifier indicates the degree of force or certainty which a claim possesses; it converts the terms of the argument from absolute to probable.15 Finally, rebuttal represents certain conditions or exceptions under which the claim will fail; it anticipates objections which might be advanced against the argument to refute the claim.16 The complete layout of argument is pictured in Figure 1:

The data-warrant-claim model has multiple applications in legal argumentation and can be employed both before and after the commencement of a lawsuit. For instance, during an initial interview with a client the lawyer must determine whether the facts of the client's problem

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14 Sonja K Foss et al., Contemporary Perspectives on Rhetoric 87 (Prospect Heights, B1., 1985). Foss and colleagues refer to the second component as grounds. This is the term used by Toulmin in Stephen Toulmin et al., An Introduction to Reasoning, 2d ed. (New York, 1984). Instead, I refer to the second component as data, which was Toulmin's original term. Toulmin, supra note 11, at 94-141.

15 "Qualifiers" are sometimes referred to as "modal qualifiers" or "modalities" in discussions of Toulmin's model.

16 Toulmin, supra note 11, at 101. Toulmin's representation of rebuttal is ambiguous: rebuttal may mean the anticipation of a counterargument or the recognition of an exception to the general rule. In either case, the element of rebuttal in Toulmin's model underscores its necessity in legal argument.
reveal a cause of action. In essence, Toulmin’s model covers this entire process. The client informs the lawyer of the relief sought, or claim, that will redress the injury. The facts of the dispute constitute the data. Using both the data and the claim, the lawyer generates or discovers a warrant that links the two. Authority (backing) must be cited to support the rule (warrant). Defenses or exceptions (rebuttal) to the rule must be addressed, because the law admits of probabilities and rebuttable presumptions (qualifiers) rather than absolutes.

Consider the following scenario as an application of Toulmin’s model to the development of a case theory. A woman who has been dismissed from her managerial position meets with a lawyer to discuss a possible lawsuit. She explains that she has been terminated without an explanation of the cause, contrary to the conditions of her employment handbook. She would like to sue to recover money damages for her loss of income. In response, the lawyer suggests a cause of action for breach of employment agreement that links the relief sought with the facts of the woman’s case. The lawyer will support the cause of action with mandatory precedent, and will recognize that the employer may assert a defense based on the employment-at-will doctrine that may deny recovery. Figure 2 illustrates the layout of this argument:

Furthermore, the layout of argument allows us to model an argument based on analogy. As depicted in Figure 3, the data again represent the facts of the present case, while the warrant indicates the existence of a precedent

17 The warrant accounts for the inference from data to claim. Toulmin explains that the distinction between data and warrants “is similar to the distinctions drawn in the law-courts between questions of fact and questions of law.” Id. at 100.
which shares facts with the present case and which is binding because of stare decisis. The conclusion that the present case should be resolved in the same manner as the precedent is a claim that may be rebutted if another contrary case is more closely analogous or the precedent case is distinguishable.

The data-warrant-claim model is useful in two ways. First, it can be used to identify the component parts of pretrial case development: determination of the desired relief, collection of facts, and generation of a supporting legal theory. Second, the model helps us to understand that this process is often reverse-engineered: using the remedy or relief sought, the lawyer works backward to arrive at a supporting legal theory that is grounded in legally relevant facts.

Toulmin's model can be used as a heuristic for teaching students how to construct arguments at various stages of litigation. In particular, the model works for legal argument because it is accurate, flexible, and effective. The notions of warrant and backing accurately incorporate the lawyer's dependence upon authority—both precedential and statutory. The data-warrant-claim model is more flexible than the syllogism because, by recognizing qualifiers, it accounts for the place of inference and uncertainty in judicial reasoning and decision-making. Finally, an effective argument must include the element of rebuttal; it must meet the court's expectation that the lawyer will attempt to refute the counterarguments.

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18 For other applications of Toulmin's layout of argument to legal argumentation, see, e.g., Fred E. Jandt, Effective Interviewing and a Profitable Practice 89-95 (Cincinnati, 1990) (application to client interviewing); Ronald J. Marion, Communication in the Legal Process 83-84 (New York, 1988) (exploring use of Toulmin's model to pretrial case building and theme development); Toulmin et al., supra note 14, at 281-311 (application to legal reasoning); see also Paul T. Wangerin, A Multidisciplinary Analysis of the Structure of Persuasive Arguments, 16 Harv. J.L & Pub. Pol'y 195 (1993).
Toulmin developed data-warrant-claim to demonstrate that the criteria for evaluating arguments varied from field to field and from discipline to discipline. It is important to recognize that his model was not intended or designed to serve as a heuristic for analyzing argument. When the model is used for this purpose, uncertainties as to interpretation may result. For instance, distinctions between data and warrant may blur, particularly when data are implicit and warrants are explicit. Nevertheless, the Toulmin model provides a useful and easily mastered foundation on which to construct a legal argument.21

Chaim Perelman and the New Rhetoric

For Chaim Perelman, the "object of the theory of argumentation is the study of the discursive techniques allowing us to induce or to increase the mind's adherence to the theses presented for its assent."22 Like Toulmin, Perelman observes that formal logic or demonstration fails to account for value judgment in everyday argument, implying that arguments based on value judgments are nonrational. And like Toulmin, he is concerned with the justificatory function of argument, though he extends Toulmin's position and argues that neither absolute truth nor validity exists in practical argument.23 Appeals to reason are appeals to the adherence of the audience; a sound argument is an effective argument.24

Perelman suggests adaptations of rhetoric to law by focusing on practical argument, which he calls the new rhetoric.25 Perelman's theory rests on the idea that gaps exist between reason and justice. Rhetorical argument motivates the justification of legal decisions and judicial reasoning. In reaching legal conclusions, the judge must choose among probabilities, not certainties, while

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19 According to Toulmin, the layout of argument is field invariant but the criteria by which arguments are evaluated are field dependent. Field-dependent features include degree of precision, degree of formality, and mode of resolution. Toulmin et al., supra note 14, at 271-74. Toulmin's notions of field dependence and field invariance stem from his belief that universal principles alone cannot be used to judge arguments. Instead, we must use the criteria from the particular field in which the argument is made to judge the parts of the argument. Though the subject matter of the argument may differ from field to field, its structure remains the same. For Toulmin, the field equals the audience to which the argument is addressed. Id. at 11-38.


21 Moreover, the use of diagrams and concept maps is a useful learning tool in that it helps students to visually represent arguments and to understand the process of constructing arguments. See Charles W. Kneupper, On Argument and Diagrams, 14 J. Am. Forensic Ass'n 181 (1978).


24 Id. at 9-10.

focusing on the societal audience. These probabilities, Perelman claims, clarify the role of rhetoric in law.26 The role of rhetoric in the classical tradition, he maintains, is to instill the abstract standards of law within the public "mind" or audience in order to insure that it reasons correctly.27

Perelman's thesis that argumentation proceeds informally rather than according to logical forms and theorems makes his theory particularly well suited to the study of legal argument. Perelman agrees that legal claims cannot be formally or empirically proved. Instead, they must be judged to be reasonable by the adjudicator; the lawyer must gain the adherence of the audience to the client's position. A second point of contact between Perelman's theory and legal argument is his notion that ambiguity is never entirely avoidable because the language that must be used is always open to multiple interpretations. Ambiguity in law typically arises in four contexts: when there is no applicable rule because the case is one of first impression;28 when the applicable rule is subject to more than one meaning; when an otherwise applicable rule is claimed to be invalid;29 and, finally, when a conflict exists between two potentially applicable rules.30 Because legal reasoning is largely rule-based and rule-directed, most issues of law involve the interpretation of legal rules.31

While Perelman's theory of argumentation is suggestive and has numerous applications to the study of legal argument, it is not possible here to do justice to his complex theory. This article treats only those elements of Perelman's new rhetoric that are most directly linked to understanding legal argument.

Starting Points: The Real and the Preferable

The starting points of an argument include the analysis of the audience and the points of departure.32 In Perelman's theory, there must be some initial common ground between those involved in an argument before it can proceed. Arguments must be based on premises that the audience accepts, or considers reasonable, because the adherence of the audience is the measure of validity.33 These premises, sometimes referred to as the "starting points," are divided into two classes: the real and the preferable.34 Facts, truths, and

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26 Perelman, supra note 23, at 9-11.
27 Id.
28 See Perelman & Olbrechts-Tyteca, supra note 22, at 59-60, 131.
29 Id. at 59.
30 Id. at 196-97, 200, 414-15.
31 See Chaim Perelman, The Idea of Justice and the Problem of Argument, trans. John Petrie, 61-65 (New York, 1963). This statement is not meant to exclude the importance of case-based arguments founded on analogy. Rather, I use the term "rule" in the broad sense to include the interpretation or application that follows the choice of an analogous case.
32 See Perelman, supra note 23, at 21. Perelman identifies universal and particular audiences including the specialized, elite, single interlocutor, and self. Id. at 30.
33 Id. at 21.
34 Id. at 23. Perelman does not explicitly address the source for the starting points of agreement. He presumes that the speaker and the audience arrive on common ground, but he
presumptions make up the real; values, hierarchies, and lines of argument relate to the preferable. As to the starting points of the real, a fact achieves its status as a fact on the basis of audience consent. Truths are larger principles, theories, or conceptions made up of linked facts. Presumptions retain their status as presumptions if they are not successfully challenged. By contrast, the starting points bearing on the preferable include abstract values (such as truth, faith, or justice); hierarchies of value, where one value is described as superior to another (such as freedom over fairness, justice over usefulness, honesty over benevolence); and the loci, or headings under which arguments may be classified.

For the lawyer, the starting point of a dispute is always an issue of fact or law. The starting points of the real, as they relate to fact and presumption, help us to understand the sometimes subtle distinctions between a legally relevant fact and a legal presumption. Recall that a proposition achieves its status as a fact on the basis of audience consent. Similarly, the role of the lawyer at trial is to persuade the fact finder, whether judge or jury, to accept the client's evidence as fact in order to find in the client's favor. Legal presumptions are conclusions of law drawn from facts that relate to liability. "[T]he most immediate effect of a presumption is to impose the burden of proof upon the person who wants to oppose its application." The starting points of the preferable refer to the way that values are arranged according to their order of importance. Perelman identifies abstract and concrete hierarchies, as well as homogeneous and heterogeneous hierarchies. In homogeneous hierarchies, similar values such as mildness and severity are compared, making measures of degree and intensity crucial factors. In heterogeneous hierarchies, different values come into conflict; for example, honesty may conflict with kindness, or goodness may conflict with truth. Most often in legal argumentation, policy arguments involve the use of hierarchies and debates about the arrangement of values within those hierarchies. Examples of such policy arguments include individual rights.

does not directly address how this occurs. He observes: "Someone who prophesies without troubling himself with the reactions of those who hear him is quickly regarded as a fanatic, the prey of interior demons, rather than as a reasonable person seeking to share his convictions." Id. at 16. Finally, he hints that certain theses and beliefs are specific to particular disciplines and fields of discourse. These theses, beliefs, and values constitute the points of departure. Id.

35 Id. at 23.  
36 Id. at 23-24.  
37 Id. at 25.  
38 Perelman & Olbrechts-Tyteca, supra note 22, at 80-85. Perelman's loci of the preferable include: quantity, quality, order, cause, essence, autonomy, among others. The loci of argument resemble Aristotle's topoi. He notes that "[l]oci have accordingly been defined as storehouses for arguments. Aristotle made a distinction between the loci communes, or 'commonplaces,' which can be used indiscriminately for any science and do not depend on any, and the special topics, which belong to a particular science or a particular type of oratory." Id. at 83. The loci are sometimes referred to as lines of argument.

39 Perelman, supra note 23, at 25.  
40 Id. at 26.  
41 Id. at 29.
versus state regulation, fair competition versus free competition, and caveat emptor versus caveat venditor.

Perelman's starting points based on the real and his loci of the preferable help the lawyer to identify the claim, or issues of fact and law that are in dispute. As such, the starting points link the exigence --- the first element of the rhetorical situation --- with stasis. Together, the starting points provide an expansive scheme to separate what is in agreement from what is in disagreement and to classify types of argument.

Liaison: Techniques of Association and Dissociation

Once a claim has been identified through use of the starting points, the claim can be systematically developed by liaison. The concept of liaison is characterized by the creation of association or dissociation among premises. Perelman emphasizes that "[t]he two techniques are complementary and are always at work at the same time; but the argumentation . . . can stress the association or the dissociation which it is promoting without making explicit the complementary aspect." 43

"By processes of association we understand schemes which bring separate elements together and allow us to establish a unity among them, which aims either at organizing them or at evaluating them, positively or negatively, by means of one another." 44 According to Perelman, three techniques are used to create association: quasi-logical argument, argument based on the structure of reality, and argument based on establishing the structure of reality. 45

Techniques for creating liaison frequently overlap with others. In legal argument, inference can make a liaison between facts and a conclusion of law, as illustrated by the following example. Assume that the victim of an automobile accident consults a lawyer about a possible lawsuit against the driver of the other car. He explains that a witness to the accident observed that the other driver was tilting his head back to drink a beverage immediately before the collision. Using the technique of liaison, the lawyer can infer that the driver was not observing the road and was therefore negligent, and can

42 See Levine & Saunders, supra note 2, at 112, 114-16, see also Perelman & Olbrechts-Tyteca, supra note 22, at 83.
43 Perelman & Olbrechts-Tyteca, supra note 22, at 190.
44 Id.
45 Id. at 191. The first technique for creating liaison, quasi-logical argument, draws upon logical and mathematical relations -- contradictions, identity, whole-part associations--that are not formal demonstrations. Quasi-logical arguments are patterned after the processes of formal logic without the presumption of intrinsic validity. The second technique, argument based on the structure of reality, includes associations of succession and coexistence. Associations of succession refer to arguments of cause and effect, or antecedent and consequent, whereas associations of coexistence rely on making a link between a person and an act, or between an act and an essence. For example, arguments of authority are arguments of coexistence which establish a bond between the individual and the act. The third technique of liaison, argument based on establishing the structure of reality, involves two classes: (1) arguments by example, illustration, and model; and (2) arguments by analogy and metaphor. Id. at 193-95.
create an argument of succession (of cause and effect). In addition, this argument also suggests an association of coexistence, as it establishes a bond between an act (of looking away from the road) and an essence (of negligence).

While arguments by association create successive or coexistent links between the starting point and proposition, the technique of dissociation seeks to drive a wedge between ideas. Usually arguments by dissociation divide a concept into two parts in order to resolve an incompatibility. "This dissociation into phenomenal reality (reality as it appears) and into noumenal reality (of things in themselves) is a typical instance of using the pair appearance/reality . . . ." In the following illustration, Perelman clarifies:

At first sight, appearance is nothing but a manifestation of reality: it is reality as it appears, as it presents itself to immediate experience. But when appearances are incompatible—when, for example, the oar is plunged into the water and appears broken to our sight and straight when we touch it they cannot represent reality as it is, since reality is governed by the principle of noncontradiction and cannot simultaneously, and in the same relationship, have and not have a given property. It is therefore essential to distinguish between appearances which correspond to reality and those which do not and are deceptive.

The process of dissociation is often invoked in arguments of statutory interpretation, where the literal text of a statute is asserted to be incompatible with its legislative purpose. Consider for instance a possible argument for a client who has been charged with violating a statute that reads: "No vehicle may be driven on the curb of a sidewalk." Assume that the legislative purpose behind the statute was to insure pedestrian safety. Assume further that the client drove her vehicle onto the curb to avoid hitting a child who had dashed into the street. While the client has violated the text of the statute, the argument can be made that its purpose was not violated because pedestrian safety was actually insured by her driving over the curb. Such an argument makes a dissociation between the letter and the spirit of the law in order to urge a fair interpretation of the statute and to justify a finding of no liability.

The technique of dissociation offers a mechanism for understanding and resolving incompatibilities between notions of reality. It is useful in training students to analyze and construct arguments where two competing but tenable interpretations of reality exist. That reality may involve either an

46 Perelman, supra note 23, at 126.
47 Id. at 126-27.
48 See Perelman & Olbrechts-Tyteca, supra note 22, at 4. The technique of dissociation is not limited to distinctions between appearance and reality. The technique can also be used to distinguish between other philosophical pairs, including act and person, theory and practice, individual and universal, and subjective and objective. For further discussion, see id. at 420-26.
interpretation of a rule or an interpretation of a set of facts. In Cardozo's words: "The reconciliation of the irreconcilable, the merger of antitheses, the synthesis of opposites, these are the great problems of the law." As Perelman explains:

The effort to resolve incompatibilities is carried on at every level of legal activity. It is pursued by the legislator, the legal theorist, and the judge. When a judge encounters a juridical antinomy in a case he is hearing, he cannot entirely neglect one of the two rules at the expense of the other. He must justify his course of action by delimiting the sphere of application of each rule through interpretations that restore coherence to the juridical system. He will introduce distinctions for the purpose of reconciling what, without them, would be irreconcilable.

**Presence**

In justifying a claim, the arguer must determine how to give significance to the premises and relationships expressed in the argument. Choosing to single out or to emphasize certain characteristics in an argument draws the attention of the audience to those characteristics and thereby gives them a presence that prevents them from being overlooked. Presence acts directly on the sensibility of the audience through the selection of features for both inclusion and exclusion in an argument. Presence has a positive as well as a negative dimension: the deemphasis of information can also be used strategically. In the context of the law, presence can be exhibited in the forms of proof introduced into evidence at trial and in the statement-of-facts section of a brief.

The material facts in the trial of a lawsuit are determined by various forms of proof presented to the trier of fact. One form of proof, known as real proof, is specifically directed to the senses and perceptions of the fact finder as a basis for reaching a conclusion. For instance, the exhibition of a photograph of the victim's body in a murder prosecution, or the child in a paternity suit, or the plaintiffs disfigured limb in a personal injury action, can effectively create a presence that moves the finder of fact.

Similarly, the techniques of presentation can be used to create presence in the statement of the facts in a brief to the court. Although the court will ultimately decide the case on the basis of the law, the statement of the facts can engender a sense of fairness or sympathy about which party ought to prevail. The careful choice of descriptive terms, the arrangement of words and dependent clauses, the use of active and passive voice, and the degree of detail and abstraction can lend presence to facts that are favorable to a client's position. For example, the statements "Plaintiff was injured while using the

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51 Perelman, supra note 23, at 35.
machine” and "The defendant was in possession of less than an ounce of a controlled substance” are imbued with a presence that is different from that effected by the statements "Plaintiff injured himself while using the machine" and "Twenty-five grams of crack cocaine was discovered on the defendant’s person." As these examples suggest, the impact and connotation of facts can be enhanced by characterization and arrangement that is mindful of the element of presence.

Although this article has barely sketched Perelman’s complex theory, it should be clear that the new rhetoric offers an expansive audience-based theory of argument and a taxonomy for understanding legal argument.52

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Legal argument is a practical argumentation which takes place within the context of a legal dispute and which depends on the evidence and available legal authority to justify the acceptance of a claim by the judge or jury.53 The theories of Stephen Toulmin and Chaim Perelman suggest heuristics for use in legal argumentation. Their heuristics are field-invariant: they can be used in any area of doctrinal law. Toulmin’s layout of argument incorporates the components of a complete argument and provides a basic structure on which to build a legal argument. Perelman’s new rhetoric furnishes a set of tools and a taxonomy for use in building the argument. Together, their theories may be particularly useful in clinical and advanced courses in trial and appellate advocacy, where the focus is on case building, fact analysis, and the construction and use of proof.54 Most important, however, the theories of Toulmin and Perelman offer a conceptual framework for making the study of legal argumentation explicit and systematic to students.


53 Perelman, supra note 1, at 120-21.

54 See also Levine & Saunders, supra note 2, at 121-22.