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Francis J. Mootz III
University of Nevada, Las Vegas -- William S. Boyd School of Law

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Perelman in Legal Education: Recalling the Rhetorical Tradition of Isocrates and Vico

Francis J. Mootz III*

Chaïm Perelman has a rich and enduring philosophical legacy. He had a particular interest in how his philosophy related to law and legal theory – regularly conducting seminars and discussion groups on the topic – and so it is fitting that we celebrate the fiftieth anniversary of the publication of *The New Rhetoric* by concentrating on the implications of Perelman's work for legal philosophy. Perelman's influence on legal philosophy has been real but not fully realized; there remains much work to bring his philosophy to bear on questions of legal theory.

In this paper I wish to contribute to Perelman's legacy by discussing the importance of his philosophy for legal education. Perelman wrote extensively about the rhetorical dimensions of the practice of law, but to my knowledge he did not discuss the means by which legal educators might impart this relevant knowledge to law students. This should come as no surprise. Perelman regarded himself as a philosopher rather than a legal scholar, even though legal practice provided an important context for his thinking. My goal is to expand Perelman's work by relating it to pressing questions about how we can improve legal education. Although I will discuss the very different system of legal education in the United

* William S. Boyd Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas, Jay.Mootz@unlv.edu. This paper was presented on October 14, 2008 as part of a panel to address "The Influence of Perelman in Legal Philosophy" at a conference hosted by the Perelman Center for the Philosophy of Law, Free University of Brussels.

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States – legal education is both a graduate degree and also grounded in the common law system – I believe that my assessment also applies generally to the European model of legal education.

Interest in legal education was renewed by last year's publication of the Carnegie Foundation report about legal education as part of its "Preparation for the Profession" series (Carnegie Report 2007). The Carnegie Report is an ambitious attempt to refocus the extensive literature about legal education into a pragmatic call for action that has theoretical depth. The centerpiece of the Carnegie Report's approach is the rejection of the false dichotomy between practical training and research that has arisen over the past century as law schools have become just another department of the modern research University, arguing that law schools should foster rich and interdisciplinary research into professional training and performance (Ibid: 1-20).[1] With respect to positivist accounts that separate research objectives from underlying practice, the Report wryly notes: "Whatever the merits of 'value-free' knowledge, they do not transfer well to the idea of 'value-free' professionals" (Ibid: 7).

Committed to the idea that the virtues and skills required of legal professionals are developed "through modeling, habituation, experiment, and reflection" as part of a tradition arising within a community of practitioners, but also drawing on the "insight from social

[1] The Carnegie Report (2007: 7) summarizes this trend:
Over the course of the twentieth century, legal scholarship would move further away from the concerns of judges and practitioners and closer to those of other academic fields. . . . In its quest for academic respectability, legal education would come to emphasize legal knowledge and reasoning at the expense of attention to practical skills, while the relations of legal activity to morality and public responsibility received even less direct attention in the curriculum.

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science and humanistic disciplines" (Ibid: 14), the Carnegie Report concludes that the central challenge facing contemporary legal education is

> how to draw on the genius of academic life, with its urge toward intellectual elaboration, without drifting away from the specific profession's defining focus. In the case of law schools, this focus is provided by engagement with the complexities of the law and its functions in the society in which lawyers must practice. The challenge is to align the practices of teaching and learning within the professional school so that they introduce students to the full range of the domain of professional practice while also forming habits of mind and character that support the students' lifelong growth into mature knowledge and skill (Ibid: 45).

The Carnegie Report contends that these professional goals can be achieved by bringing the scholarship of learning and teaching to bear on legal education.

The Carnegie Report emphasizes that there are no methodological rules – nor can there ever be such rules – for teaching professionalism because lawyers rely on judgment rather than calculation. Judgment is learned by receiving feedback while approximating the modeling done by an expert (Ibid: 26), which is aptly termed an "apprenticeship of professional identity" (Ibid: 129). This education is more than simply aping techniques: "Much more than 'rules of thumb' or the lore passed on in practice situations, today's best teaching of practice encourages students to develop an analytically sophisticated approach to practice situations" (Ibid: 11). Developing professional judgment requires a liberal education in "ethics" – in the broadest sense of the term as used by the ancient Greeks to

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mean an acculturation to a normative lifeworld[2] – but the Socratic case method that is legal education's "signature pedagogy" cannot accomplish this goal alone.

From this theoretical basis, the Carnegie Report offers specific recommendations to improve legal education. First, the Carnegie Report urges a reduction in the use of the case method of instruction. Because the Socratic case method is used in a very narrow manner to teach abstract legal doctrine, the Carnegie Report (Ibid: 56-57) charges that it obscures the ethical dimensions of legal practice by eliding the fact that clients are real people and legal arguments are never value-free. The tremendous growth in analytical skills during the first year of law school through the "cognitive apprenticeship" of the case-method is coupled with a disengagement from the full range of legal practice and a narrowing of vision.

> Despite the undeniable value of intellectual rigor, law schools' imbalance toward the cognitive aspects of professional apprenticeship and the associated emphasis on analysis serve to color, and can even undermine, the apprenticeship into professionalism and purposes. As we have seen, a concentrated focus on the details of particular legal cases, disconnected from consideration of the larger purposes of the law, begins very early in law school

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[2] This is elaborated as follows:

> Professional education is, then, inherently ethical education in the deep and broad sense. The distillation of abilities and values that define a way of life is the original meaning of the term *ethics*. It comes from the Greek *ethos*, meaning "custom," which is the same meaning of the Latin *mos*, *mores*, which is the root of "morals." Both words refer to the daily habits and behaviors through which the spirit of a particular community is expressed and lived out. In this broad sense, professional education is "ethical" through and through. Even to disparage any ethical intent is to declare one: the purely instrumental view of education as the acquisition of a set of tools by means of which to enhance one's competitive advantage in life. Ethics in a professional curriculum ought to provide a context in which students and faculty alike can grasp and discuss, as well as practice, the core commitments that define the profession. It can also be a place where the alternative, instrumental view just described can be squarely reckoned with. For lawyers, just as for other professionals, the practices they learn give them extraordinary powers. But the meaning of the practices – and therefore the object to which the powers are directed – is never morally neutral. Ethics rightly includes not just understanding and practicing a chosen identity and behavior, but, very importantly, a grasp of the social contexts and cultural expectations that shape practice and careers in the law (Ibid: 30-31).

(Ibid: 141).

. . . .

> Inasmuch as professionals require facility in deploying abstract, analytical representations (symbolic analysis), school-like settings are very good environments for learning. At the same time, however, professionals must be able to integrate, or re-integrate, this kind of knowledge within ongoing practical contexts. But in this area, students learn mostly by living transmission, through pedagogies of modeling and coaching. For law schools, as for all professional schools, re-integration of the now-separated parts is the great challenge (Ibid: 79).

The case method is seen as an overused tool for teaching black letter doctrine in the first year of law school that actually deadens the necessary imaginative capacities of students and therefore requires a correction in the final two years of law school. "The danger for second- and third-year students is that the analytic blinders they have laboriously developed may never come off when they deal with the law or with clients" (Ibid: 142).

The second proposal is the corollary of the first: that law schools should employ the "complementary pedagogy" of clinical and simulation training to a greater degree (Ibid: 23-24). Framed as creating a bridge from the academic skill of thinking like a lawyer to the professional skill of lawyering (Ibid: 87-125), the Carnegie Report offers theoretical and practical grounds in support of more and better skills training, at long-last striving to answer the call by Karl Llewellyn and the legal realists.[3] To be effective, this new pedagogy must be grounded theoretically and empirically in an appreciation of how students can learn professional skills through modeling by professors in clinics, simulations and writing

[3] The Carnegie Report notes that medical schools have experimented extensively along these lines, and concludes that the "proposals first essayed by legal-realist icons such as Llewellyn and [Jerome] Frank still await their Langdell [to implement them]" (Ibid: 94).

courses.

> Although it looks so to the outsider or novice, experts do not simply act intuitively. Expertise is judgment fully realized. This is not a cognitive either-or. Experts reflect and deliberate, especially when confronting difficult or strikingly novel cases and situations. . . .
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> The expert's knowledge is well grounded in subtle, analogical reasoning achieved through a long apprenticeship to more expert practitioners. In this process of learning, formal models and rules play an essential role . . . but the formal models are themselves based on practice. Put another way, in the teaching and learning of expertise, practice is often ahead of theory. Formal knowledge is not the source of expert practice. The reverse is true: expert practice is the source of formal knowledge about practice. Once enacted, skilled performance can be turned into a set of rules and procedures for pedagogical use, as in the cognitive apprenticeship. But the opposite is not possible: the progression from competence to expertise cannot be described as simply a step-by-step build-up of the lower functions. In the world of practice, holism is real and prior to analysis. Theory can – and must – learn from practice (Ibid: 118).

The Carnegie Report suggests that theory, as a reflective assessment of practice, plays a vital role in understanding professionalism and determining how best to guide students to become professionals. The supposed clash of cultures between university research and legal professionalism is not just false; the effect of this bifurcation renders the former impotent and the latter prone to decay.

My thesis is that Perelman's new rhetoric can play a vital role in correcting legal education in the manner envisioned by the Carnegie Report. I begin my argument by recalling Perelman's repeated insistence that legal argumentation and practice illuminate his rhetorical philosophy. As he emphasized, philosophers can learn from lawyers because the practical activity of lawyers exemplifies the nature of moral and philosophical argumentation.

Perelman's characterization of legal argument connects directly to the ideal of professionalism promoted by the Carnegie Report. In the next section I recall how Isocrates and Vico – rhetorical philosophers who shaped the field that Perelman inherited and advanced – addressed in detail the educational implications of their philosophy of rhetoric. Finally, I connect Perelman's philosophical initiatives to the educational insights of Isocrates and Vico. I conclude that Perelman's philosophy provides ample resources for improving contemporary legal education.

I. Perelman on Legal Argumentation.

Perelman spent his career addressing the epistemic dilemma posed by modernity: "The imperialism of rationalistic dogmatism finds its counterpart in the nihilism of positivistic scepticism. Either each question is resolved by finding the objectively best solution and this is the task of reason, or truth does not exist and every solution depends upon subjective factors: reason can be no guide to action" (Perelman 1979: 112). Perelman recovered the notion of the "reasonable" as an antidote to the endless battle between the rational and the irrational. Joining the truth value of dialectic to the performance of rhetorical persuasion, Perelman contends that the practice of reasoning about matters of justice has an epistemological status between formal deduction and fanatical, irrational adherence. The shared assumptions from which we reason have presumptive authority because they are unavoidable, even if they remain subject to revision on a relatively localized basis by working from the undisturbed features of our shared understandings.

Perelman's description of reasoning about justice leads him to investigate the characteristics of legal argumentation as shaped by the demands of legal practice. The legal system provides a unique setting for reasoning about justice because the advocate and the judge must act; they do not have the luxury of withholding judgment until a definitive solution can be demonstrated with certainty. Rejecting both formalist jurisprudence and the demystifying hubris of some forms of critical legal theory, Perelman argues that the reasonableness embedded in legal argumentation is a model of philosophical inquiry, and particularly moral philosophy (Perelman 1980: 114-19, 146, 174). He writes: "Legal reasoning is thus a very elaborated individual case of practical reasoning, which is not a formal demonstration, 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. . . . From this perspective, legal theories do not have the task of stating the truth but of preparing and justifying decisions" (Ibid: 129). Perelman contends that legal reasoning is exemplary because the demands of legal practice generate the kind of engaged practical reasoning that must be employed when considering questions of justice (Ibid: 78).

Perelman did not offer a pedagogy of legal education; instead, he drew on the practices of a mature legal system to emphasize his philosophical themes. As a result, Perelman's high regard for legal reasoning poses a challenge for legal educators by begging the question – How can we educate law students so that they acquire and develop this

argumentative capacity? – without offering definitive guidance. In one of his essays, Perelman juxtaposes the procedural regularity of law as a means of channeling the argumentation of contested notions of justice on one hand with the open discourse of philosophy and politics on the other. Perelman suggests that philosophical and political discourse must be structured by the "realm of rhetoric" because they do not operate within the strictures of legal practice that bring debate to an end (Ibid: 105). He concludes: "It is through the study of argumentational, rhetorical and dialectical procedures that we will learn to distinguish acceptable reasoning from sophistic reasoning, to distinguish reasoning in which one seeks to persuade and to convince from reasoning in which one seeks to deceive and lead into error. This is the reason, moreover, that I consider the teaching of rhetoric to be included as a principal element of any liberal education" (Ibid: 105-06). I extend Perelman's claim by arguing that lawyers will be far more likely to achieve the argumentative success in the manner he describes if they too are inculcated with the classical lessons of rhetoric as part of a liberal legal education. The press of legal practice forces lawyers to abandon the hopeless quest for certainty determined by means of deductive reasoning, but we can maximize this effect by shaping legal education to this end.

II. The Pedagogy of Rhetorical Knowledge.

I consider the pedagogical implications of Perelman's philosophy by turning to classic sources in the rhetorical traditional. Isocrates and Vico are both towering figures in the history of rhetorical philosophy, and both of them were focused on the educational

implications for rhetoric. Isocrates wrote in ancient Greece as the era of the polis was fading and the need to develop a pan-Hellenic culture became more pressing. One of his principal concerns is the educational development of citizens to deal with the literate culture that was replacing the oral traditions of the polis. Two thousand years later, at the dawn of the modern era, Vico urged his contemporaries to preserve ancient rhetorical wisdom. He discusses specifically the educational program necessary to accomplish this task in the face of Cartesian rationalism. Despite these very different contexts, Isocrates and Vico share a passion for outlining the education necessary to produce citizens with rhetorical competence, and they place great importance on the civic significance of rhetorical argumentation. Building on this foundation we can understand the role of rhetorical education for contemporary lawyers and develop a framework for understanding how Perelman's philosophy can contribute to this vital endeavor.

A. Rhetorical Education as a Philosophy of Experience: Isocrates.

Perhaps no figure has garnered as much acclaim for developing a theory of rhetorical education as Isocrates, who operated a school that competed with Plato's philosophically-oriented Academy. Isocrates charts a course between the relativism of the itinerant sophists and the certainty of Platonic dialectics (Poulakos, Takis 2004: 52-57).[4] He conceives rhetoric

[4] As Kathryn Morgan summarizes, Isocrates charted a course between the "sterile teaching of Plato and other eristics on the one hand, and to the tawdry training in rhetoric purveyed by the sophistic pretenders" (Morgan 2004: 135). More colorfully phrased, David Depew describes how Isocrates developed a deliberative understanding of discourse by distancing "himself from ambulance-chasing logographers, whom he conceded to fall under the weight of Plato's harsh criticism of Sophists," and attempting to "seize back the term *philosophia* from the word-wrangling dialecticians" (Depew 2004: 160). Gene Garver notes that Isocrates carefully sought "to locate himself in relation to the positions of Plato and the Sophists," in contrast to Aristotle, who chose to ignore these traditions in an effort to define the internal

as more than a bag of verbal tricks that can be used to decorate an argument or to inflame the audience's emotions so as to overcome their reason. Isocrates develops a substantive rhetoric that relies upon, and contributes to, the political knowledge that comprised the community. As John Poulakos notes, sophistic techne

> left the question of the proper use of rhetoric unanswered. But unlike Plato's decidedly moralistic response, Isocrates' answer took a more practical turn. Committed to the proposition that the art of persuasion must be put to beneficial uses, he introduced two new requirements to rhetorical education: the thematic and the pragmatic. The thematic requirement asked that rhetoric concentrate on significant themes while the pragmatic demanded that it make a positive contribution to the life of the audience (Poulakos, John 2004: 76).

This approach was constructive rather than descriptive, inasmuch as Isocrates sought to bring into being a pan-Hellenic community through his rhetoric as a response to the political and cultural challenges of his day. Rhetoric is not a means of persuading a given audience, Isocrates stressed, as much as it is the art of constituting a community. "Isocrates approaches his audience as a community to be called into existence rather [than] as something purely given, because for him logos is etiologically prior to the community" (Haskins 2004: 87). Isocrates did not just promote a theory of rhetorical education; he regarded rhetoric as educative.

Isocrates defends "a broad conception of discursive education over and against a narrow Platonic-Aristotelian notion of rhetoric" (Haskins 2004: 3). Plato's *Republic* promotes an intensive educational system to facilitate the rule of philosopher-kings on the

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standards of reasonableness of rhetorical activity (Garver 2004: 189).

basis of the truth, retreating to certainty in the face of turbulent times. In sharp contrast, Isocrates seeks to educate citizens to enable them to be capable of democratic governance given the inevitable uncertainty of human affairs.[5] As Michael Leff summarizes,

> Political virtue is found in the character of people who exercise proper judgment in the face of mutable circumstances and who preserve the conditions needed to sustain effective deliberation. The political tradition, therefore, is not a fixed set of norms but a living organism whose identity is constantly created, altered, and recreated; the tradition, from this perspective, is itself a rhetorical construction built up over time through the deliberative action of the community. The values in the tradition have a certain degree of stability, but they assume meaning only as they make contact with actual, constantly changing events, and so they are always subject to rhetorical adjustment (Leff 2004: 241-42).

Isocrates recognized that education was necessary to develop these rhetorical competencies.

Isocrates propounds an educational theory grounded in his philosophical conception of rhetoric. His innovations in rhetorical education are designed to connect knowledge with action, seeking to prepare students to act in the world of practical affairs. Toward this end he revises the sophistic practice of memorizing the great speeches by instructing his students in rhetorical principles to enable them to adjust the great exemplars of the past to meet the needs of the present situation (Jarrett 1969: 102-03). *Kairos* is the cornerstone of his approach; he rejects the idea that rhetoric can be learned from a handbook or otherwise

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[5] A vast gulf separate the Isocratean and Platonic visions of education. Isocrates associates the rhetoric he teaches with the benefits that have accrued to Athens from a long tradition of orators starting with Solon and ending with Pericles. . . . Unlike Socrates/Plato, Isocrates dismisses the possibility that we might obtain scientific knowledge about what we should say and do. Instead, we should use our powers of conjecture (*doxa*) to arrive at what is best. It is important that one's learning be given a practical application. This approach clearly repudiates the Platonic withdrawal from democratic politics as practiced (Morgan 2004: 131).

formalized (Haskins 2004: 72). Rhetoric is not just a toolbox of techniques with which to embellish a dialectical demonstration; rather, rhetorical ability is cultivated through an educational program that is best conceived as experiential. "Wisdom (*sophia*) for Isocrates is neither a divine gift nor a scientifically precise art. Rather, it is an intelligence acquired through habituation and trial by concrete circumstances. . . . A student coming to Isocrates for instruction should expect not only to memorize poetry and prose for the sake of gaining facility in speech but also to gradually become a public person whose actions are worthy of being praised in similar discourses" (Haskins 2004: 41). Takis Poulakos argues that *Panegyricus*, styled as a speech to participants in a pan-Hellenic festival, embodies Isocrates' rhetorical philosophy by focusing on the demands of the present rather than hewing to a rigid repetition of the classical forms of speech. Isocrates draws upon past cases as flexible guides for surviving the turbulent times confronting the Greek city states, promoting deliberation that works from prevailing opinions (*doxa*) to generate wise judgments (*phronesis*) (Poulakos 1997: 87).

Students must experience the world in which they live in order to learn how to size up the moment correctly and to draw prudently from their tradition to meet the challenge of the case confronting them. "Isocrates integrates discursive training with civic education, which he regards as a lifelong pursuit not reducible to a set of procedures and commonplaces," (Haskins 2004: 130) which is to say that he views rhetorical education as uniting eloquence with wisdom. "Rhetorical excellence requires self-restraint and a

cultivated sense of the common good, and hence, it is not simply the result of technical skill but must also reflect and manifest virtues intimately connected with moral character . . . Given Isocrates' theory of knowledge, such principles must have their origin within the experience of the political community" (Leff 2004: 237). Plato's fear that rhetoric could be deployed to gain the adherence of the populace to false beliefs gains no traction against Isocrates, who regarded rhetoric as "deliberation about ethical and expeditious choices . . . the art of making sound choices about the politically possible and the ethically available" (Poulakos 1997: 68).

Isocrates recognizes that rhetorical competence is a combination of natural ability, knowledge of the art, and experience.

> Isocrates assigns the least importance to learning, since acquisition of knowledge does not amount to anything much if it remains unsupported by natural talent or experience. And while he considers the latter two to be equally important, he does associate natural talent with luck and the insight that results from one's natural make-up with an ability that can only be accidental. . . . [but] even though natural talent may be the most important asset for eloquence, it cannot yield the kind of discerning ability that deliberation demands and practical wisdom requires.
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> Instead, it is practice and experience that sharpen the reasoning process and develop good insight and sound judgment. . . . Yet experience does not merely sharpen intellectual faculties; it additionally cultivates and improves the capacity to imagine. Learning how to apply one's knowledge of the art to living situations is most difficult and most arduous. The demands of application, Isocrates underscores, "are the task of a vigorous and imaginative mind" (Poulakos 1997: 87-88).

Isocrates recognizes that it is important to instruct students in the forms of argument, but he emphasizes that this knowledge remains impotent unless joined to experience gained in

making arguments to address new situations in which the contingencies require more than recourse to past speeches or to application of a method of argumentation. "Rather, Isocrates questions the general premises of education and contests the dominant trends in educational activities of his times: the emphasis on acquisition of knowledge over its use, mastery of a field of study over its practical application, expertise over experience. His disagreement with other educators extends beyond the particulars of a given area of instruction, across disciplines, to general issues about learning – its pertinence to everyday practices, its value to human activity in the polis" (Ibid: 97-98).[6]

B. Rhetorical Education as Argumentation: Vico.

Two thousand years after Isocrates founded his school, Vico promoted the humanist tradition as an antidote to the incipient Cartesian rationalism that was sweeping the West. Rhetoric had blossomed in ancient Rome and formed part of the trivium of education in the Middle Ages, but it was declining in influence as the modern era began. In his famous oration in 1708 at the commencement of the academic year at the University of Naples, Vico emphasizes the necessity of an education in rhetoric to develop the virtues of citizenship by

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[6] Poulakas (1997: 104) elaborates:

> Isocrates' antagonism toward contemporary educators was directed, then, against prevalent notions of education as expertise and of instruction as mastery of knowledge. Placing these notions within the context of lived practices at the individual, social, and political realms of existence, Isocrates supplemented existing views, demanding that knowledge he applied to lived experience and that expertise be made pertinent to everyday practices. The relation of his educational views to those of his contemporaries is best understood, then, in terms of a supplement, at once an addition and a change. Training in the application of knowledge is for Isocrates an advanced stage in the process of learning, an extension of a subject matter. Understood in terms of a sequence and a progression, instruction in the application of knowledge emerges as a more advanced level of instruction, and Isocrates can be seen as charging preexisting methods of instruction with an added educational objective. Yet the process of applying knowledge to lived practices necessitates one's entrance into the domain of opinion, a domain wherein all cultural activity revolves.

contrasting the abilities of philosophers and lawyers to deal with practical problems that arise in civic life.

> Nature and life are full of incertitude; the foremost, indeed, the only aim of our "arts" is to assure us that we have acted rightly. . . . Those who know all the *loci*, i.e., the lines of argument to be used, are able (by an operation not unlike reading the printed characters on a page) to grasp extemporaneously the elements of persuasion inherent in any question or case. . . . In pressing, urgent affairs, which do not admit of delay or postponement, as most frequently occurs in our law courts . . . it is the orator's business to give *immediate* assistance . . . Our experts in philosophical criticism, instead, whenever they are confronted with some dubious point, are wont to say: "Give me some time to think it over!" (Vico 1990: 15).

An education founded on the radical doubt of Cartesian rationalism disables imagination and practical reasoning, capacities that literally permit one to "grasp" appropriate arguments in a particular situation in a manner not unlike directly perceiving them by sight. Rhetoric is necessary just because life is uncertain. One who is capable of determining the relevant arguments "for and against" a proposed course of action based on the probabilities of the given circumstances and is then able to persuade others as to the best approach exhibits a wisdom that is superior for this task than the much more limited scope of dialectically-proved definitive truth.

Building on the oration he delivered in the previous year (Vico 1993), Vico insists that students must develop their rhetorical skills before being introduced to philosophical criticism to prevent them from losing the capacities of ingenuity, imagination and eloquence. He argues that law is not truly a distinct system of precepts that can be mastered through technical manipulation, and instead regards law as an exemplary practice of practical

reasoning (Mootz 2008: 1283-87). These considerations lead directly to Vico's recommendations for organizing education. He promotes the use of an "ingenious method," arguing that students should study the topics and practice persuading others in conditions of uncertainty through the apt use of metaphors.[7] Exercising the imagination through topical argumentation is necessary because there is no substitute for the accumulation of experience. One cannot become prudent by deducing answers to practical problems; one becomes prudent through the exercise of judgment based on insight, which actually is a way of apprehending the world by cultivating a rhetorical engagement with it. Vico stresses that education in rhetoric can develop this capacity.[8]

Vico's defense of rhetoric defended the early development of creativity and critical

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[7] Ernesto Grassi (1976: 562) explains: "The ingenious faculty assumes the important function of supplying arguments which the rational process itself is not capable of "finding" . . . But it is exclusively on the basis of revealing common elements that a transfer can be made, and that is why Vico defines the ingenious faculty as a requisite for metaphorical thought."

[8] Michael Mooney (1976: 151, 153) makes this point vividly:

> Ingenuity, Vico says repeatedly, is the "faculty of bringing together things that are disparate and widely separated." It lays no claim to thoroughness or method, but is a capacity, as Petrarch had said of it, which is quick and decisive, penetrating and acute, ready and adaptive. One does not need to call on ingenuity; one either has it or does not, see connections or misses them utterly. Vico was a child of acute ingenuity, he claimed, and so, too, are children generally, if only we will recognize it and train them accordingly. For ingenuity depends on the images of fantasy, a faculty most vivid and robust in youth, and on the power of memory, fantasy's twin, and they in turn take their start in sensations, the images of sense. But the point is more subtle than it seems, for sense and memory are not to be thought of as mere passive capacities, receiving and retaining impressions that imagination and ingenuity subsequently work through; sense, memory, imagination, and ingenuity are four virtually indistinguishable aspects of the single, prediscursive action of the mind.
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> Ingenious perception is truly an invention, an assembling and arranging of images that produces a genuinely novel vision. . . . [In] oratory and law, it is a vision of how things should be, a course of action that will set things right or avoid their deterioration, a vision that joins past to future through current expectations, thus achieving plausibility, but one that does so through images that are familiar and foreign alike, thus opening to us new ways. Such images are those of metaphor, language that is sententious and acute (Mooney 1976: 151, 153).

insight through argumentation and argued that educators should delay more abstract studies to a later point in the student's career. In the eighteenth century Vico already perceived that law's insularity would lead to an instrumental view of legal argumentation as advancing self-interest, separated from the eloquence and practical wisdom that infused law in ancient Rome (Vico 1990: 69-70). Vico's rhetoric is "not a literary but judicial rhetoric – rhetoric as argumentation, a process of reasoning" (Mooney 1985: 82-83), and it is a practical engagement in argumentation that Vico promoted as an "ingenuous method" for educating lawyers.

> In conclusion: whosoever intends to devote his efforts, not to physics or mechanics, but to a political career . . . as a member of the legal profession or of the judiciary . . . should not waste too much time, in his adolescence, on those subjects which are taught by abstract geometry. Let him, instead, cultivate his mind with an ingenious method: let him study topics, and defend both sides of a controversy, be it on nature, man or politics, in a freer and brighter style of expression. Let him not spurn reasons that wear a semblance of probability and verisimilitude. Let our efforts not be directed towards achieving superiority over the Ancients merely in the field of science, while they surpass us in wisdom; let us not be merely more exact and more true than the Ancients, while allowing them to be more eloquent than we are; let us equal the Ancients in the fields of wisdom and eloquence as we excel them in the domain of science (Vico 1990: 41).

Vico believed that the "ingenious method" of argumentation spurs creativity and insight that cannot be learned from a handbook.

There are clear connections between Vico's defense of the humanist tradition and the educational themes first sounded by Isocrates (Perkinson 1976: 754). Vico's philosophical premises seat knowledge in man's creative adaptation of what is given by existing knowledge

and institutions, and so he concludes that if educators are employing educational methods merely designed to socialize the student to accepted knowledge they are seriously misguided. Both traditionalists (who seek to impart knowledge to students) and pragmatists (who promote the active participation of students in the learning process) fail for the same reason: they ignore the vital role of critique in knowledge formation (Ibid: 757).

> If we apply Vico's theory to the teaching process, the content of the curriculum is not lost, nor is it imposed on the student either (as it was in the old receptor classrooms). The teacher merely presents the curriculum content as something to be criticized and improved. Through these continual critical encounters the student is initiated into the process by which knowledge, human knowledge advances. The main task of the teacher is the Socratic one of helping students discover the contradictions within their own thought and between their thoughts and the thoughts of others. As a result of the teacher's critical probings, the students are encouraged to modify or refine their theories in order to overcome the contradictions. In this way students advance knowledge (Ibid: 763).
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> . . .
>
> The teacher must understand (and, in time, help students to understand) that certain beliefs, customs, institutions, and the like are human creations intended to restrain people from behaving in ways that adversely affect others. Since these are human creations, they are not perfect but are improvable. Yet they are the best we've got; they have developed, over time, and have undergone modifications in the light of human experience (Ibid: 765).

Rhetorical knowledge is not just the memorization of certain techniques; rather, it is a recognition of the non-methodological means of knowledge-creation within law and a commitment to an apprenticeship to learn how to participate in this knowledge creation.

III. The New Rhetoric and Legal Education.

With the guidance provided by Isocrates and Vico we can return to the task of rethinking legal pedagogy through *The New Rhetoric*. The Carnegie Report persuasively

identifies the deficiencies in contemporary American legal education: it is too simplistic, conceptual, and positivistic. Professionalism cannot be formalized and taught as an analytical skill in the classroom because it is a rhetorical practice rather than a dialectical exercise. Perelman's rhetorical philosophy of legal argumentation describes the capacities that legal education must develop in order to respond to the Carnegie Report's diagnosis.

Perelman conveys a wealth of philosophical knowledge about argumentation in *The New Rhetoric* (1969) and he connects this knowledge to legal practice in a number of essays (1980, 1979). It is important for lawyers to understand that their practice occurs in the realm of rhetoric, but this understanding alone is not sufficient. As Isocrates emphasizes, natural ability and knowledge of the art are both important, but standing alone they cannot educate a *phronimos*. The student must gain experience by deliberating and arguing in concrete circumstances, acquiring professional knowledge through habituation to the forms of argument rather than simply learning about the law by cognitive means. Knowledge of the lines of argumentation is useless without the ability to *see* the argument that *fits* the rhetorical situation.

Students can fully appreciate the notion of a rhetorical situation[9] only if they experience it by arguing both sides of an issue by drawing on commonplaces in response to a pressing question. Clinical placements are designed to provide just this kind of experience

[9] The concept of the rhetorical situation is complex and contested (Bitzer 1968, Vatz 1973, Brinton 1981, Grant-Davie 1997). I use the term here in a general sense, referring to the circumstances (audience(s), historical setting, available resources, and other social exigencies) addressed by the rhetorical event.

to advanced students, but these placements must embody reflective rhetorical knowledge if they are to have the maximum effect. It is one thing for a student to mimic a teacher while playing a role, even if this role takes place in the real world of lawyering; it is another thing altogether for the student to be taught the rhetorical character of the activity, the commonplaces of argument, and a means of engaging in argumentation in a self-reflective manner. This is even more true in classroom instruction where it is all too easy for the dialogue to lapse into a lecture on legal doctrine or for student responses to devolve into the abstract manipulation of legal formulae as if they were speaking only to an abstract universal audience.

Perelman's philosophy brings clarity to the role of rhetoric in legal education. In Part One of *The New Rhetoric*, he and Olbrechts-Tyteca provide an invaluable introduction to the framework of argumentation. Understanding the nature of argumentation clarifies the practical task facing the legal advocate: to identify his or her audience and to seek to persuade, if not convince, that audience. The catalogue of argumentative schemes collected in the book is invaluable, but also easily misunderstood. Students cannot approach the catalogue as a list of arguments from which to draw in any situation, assuming that each argument can be deployed in any given situation. Instead, they should regard the catalogue as an analysis of the principal lines of argument found in the tradition in which they practice. Too often, students run through a checklist of arguments indiscriminately as if they all were of equal value to the situation. This is anathema to Perelman's philosophy and

counterproductive for practicing lawyers.

Legal education grounded in Perelman's philosophy should start by examining the nature of rhetoric as a quest for the reasonable response to a situation rather than as a rational solution to a problem. Perelman provides ample resources for this education, as does the larger rhetorical tradition stretching from Isocrates to Vico to the present. This basic understanding of rhetoric must be supplemented by an appreciation that all rhetorical exchanges are defined by the situation in which they occur – are called forth, as is often said – such that the task of the *rhetor* is to see the available lines of argument that address the question or problem in issue. This capability involves understanding the different roles of audience. In legal practice one is always seeking to persuade a concrete and existing audience, but this persuasion can sometimes be accomplished by calling on the existing audience to reconstitute itself as the universal audience and then arguing that one's position is convincing. In a given rhetorical situation there might be a need to address multiple audiences, as occurs in a trial when lawyers are at once addressing the twelve jurors and the trial judge, but might also be calling forth the jury to reconstitute itself as the universal audience competent to do justice, while simultaneously attending to a potential audience of appellate judges who might consider the case on appeal.[10] This level of sophistication ordinarily is deployed only by a rhetorical critic who can carefully deconstruct a rhetorical event and analyze it after the fact, but lawyers should understand, even if only vaguely, this

[10] Jack Selzer (1992) provides an excellent overview of the many different senses of audience, building on Henry Johnstone's differentiation of the "audience addressed" and the "audience invoked."

level of sophistication in the notion of audience in order to be effective. But there is more. The rhetorical situation extends beyond audience, and involves the ability of the lawyer to read the historical, social, and institutional constraints on her ability to shape the situation: rhetoric does not wholly create reality, it is a creative response to a stubborn reality.

These lessons are cognitive lessons, ways of understanding the task of lawyering. Perelman's texts are unsurpassed for providing this education in the modern world. But legal educators must also attend to the experiential elements of training emphasized by Isocrates and Vico. Traditionally, students would study exemplars of rhetorical performances to learn from them. In the United States, the dominance of the case method of instruction might be defended on this basis, as well-chosen appellate opinions (often a majority and dissenting opinion) provide exemplars of legal argumentation from which the students can learn. Without a grounding in rhetorical philosophy, however, students too often parse cases to find the blackletter legal principle that they can add to their notes. It is necessary for the professor to stress that the cases are read as rhetorical exemplars and not as a vehicle to explain doctrine. In my casebook on Sales I strive to do this by including a brief textual introduction to a section that contains the blackletter law, provide a case that offers models of argumentation, and then present a problem that the students must attempt to solve by utilizing the argumentative strategies displayed in the case or by understanding how those particular strategies do not work in the new rhetorical situation of the problem. Despite my best efforts, however, it is difficult to persuade the students that the case opinions are rhetorical

exemplars rather than static vessels containing legal doctrine.

The lecture format, even if punctuated by occasional student contributions in class, undermines a rhetorical education. Students must practice arguing from exemplars in more than a cursory manner. Many first-year students are troubled by what they perceive to be the wide freedom of judges to decide cases on personal whim and then later to supply adequate legal justification for their decision, which is to say that they have a shallow understanding of legal reasoning as "mere rhetoric." It is no surprise to me that these same students have difficulty formulating a coherent argumentative essay for the final exam. It is easy enough to believe that the law is "just rhetoric" when reading a case, but the tremendous challenge of confronting a specific legal dispute and arguing on behalf of a client quickly demonstrates to students that a rhetorical exchange is epistemic and not just ornamental. Only by repeatedly engaging in argumentation will students learn this dimension of legal practice and acquire competence.[11]

In the beginning of their career students are able only to transfer an argument from one setting to another, with appropriate modifications. The goal, of course, it so foster in students the capacity for creative adaptation of *loci* to new situations. Vico's ingenious method of arguing both sides of a case is not designed to foster nihilism but rather to cultivate imagination. An imaginative student will begin to "see" the lines of argument without having to work through a checklist or to think about it methodically. The clinical

[11] I defend an epistemic approach to legal rhetoric in (Mootz 2006).

experiences praised by the Carnegie Report will be most effective if the previous classroom instruction has provided students with an understanding of rhetorical reason, the dimensions of a rhetorical situation, experience in working with rhetorical exemplars, and the experience of creative argumentation in response to novel situations. As Vico warned, it is difficult to build rhetorical competence after students have been instructed in an abstract and methodological manner, and so the first year of law studies is critically important for success in educating students about the rhetorical dimension of legal practice.

Conclusion

The Carnegie Report issues a commonsense call for American legal educators to connect the theory of learning to practical engagement, rejecting a simple-minded deductive approach to legal doctrine in favor of cultivating creative capacities that can't be formalized. This challenge can be met by integrating the principles of the new rhetoric into legal education. Although Perelman wrote on a philosophical plane, by recalling the lessons of Isocrates and Vico regarding rhetorical education we can develop a pedagogy of legal rhetoric for the twenty-first century. In this way, we can appreciate Perelman's vital contribution to the contemporary assessment of legal education.

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