

QUINTILIAN'S CURRICULUM

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A lawyer in a free country, should have all the requisites of Quintilian's orator. He should be a person of irreproachable virtue and goodness. He should be well read in the whole circle of the arts and sciences. He should be fit for the administration of public affairs, and to govern the commonwealth by his councils, establish it by his laws, and correct it by his example.

James Kent, Professor, Columbia University School of Law, 1794¹

This Article argues that modern legal educators should revisit Quintilian, the quintessential law professor, by intentionally implementing his recommended pedagogical strategies in the law school classroom and curriculum. In recent decades, while the literature of law school teaching and learning has been casting about to find new paradigms for legal education in the face of widespread critique of impracticality and ineffectiveness, examination of the philosophies of the great Roman rhetors, and in particular, Quintilian and his principal work *Institutio Oratoria*, has largely been limited to jurisprudential and rhetorical study. However, a perch in the best practices of law school teaching and learning is Quintilian's natural home. "Indeed, if we were to design the perfect course for training students to think and act like lawyers, it would be classical rhetoric, particularly from the Roman era."² And, among Roman philosophers, the most natural marriage of legal practice and training is to be found in Quintilian.

I. WHO WAS QUINTILIAN?

Marcus Fabius Quintilianus, known to posterity as Quintilian, was born approximately 35 AD in the province of Spain, a center for Roman culture.³ When he was sixteen, he moved to the Roman capitol to complete his education with the famed orator, Domitius Afer.⁴ At twenty-five, he returned to his natal Spain to teach and practice law with recognized excellence; in 68 AD, Galba, the Spanish provincial governor who subsequently became Emperor of Rome,

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¹ James Kent, Professor of Law, Columbia Coll., An Introductory Lecture to a Course of Law Lectures (Nov. 17, 1794), in 3 COLUM. L. REV. 330, 338 (1903).

² Kristen K. Tiscione, *How the Disappearance of Classical Rhetoric and the Decision to Teach Law as a "Science" Severed Theory from Practice in Legal Education*, 51 WAKE FOREST L. REV. 385, 387 (2016).

³ QUINTILIAN ON THE TEACHING OF SPEAKING AND WRITING xiii (James J. Murphy & Cleve Wiese eds., 2d ed. 2016).

⁴ *Id.*

selected Quintilian to join his entourage returning to the capital.⁵ In Rome, Quintilian continued his career as a teacher and advocate,⁶ representing prominent clients such as the Jewish queen, Berenice.⁷ Later, the Emperor Vespasian “established official professorships [with salaries] paid from the state treasury,”⁸ and Quintilian was the first occupant of the Chair for Latin Rhetoric, with a princely salary of 100,000 sesterces,⁹ reflecting the great esteem with which he was held. He was lauded by the great poet Martial as, “O Quintilian, supreme guide of unsettled youth, Glory of the Roman toga, O Quintilian.”¹⁰

Over the course of his career, Quintilian’s pupils included Pliny the Younger, the two grandnephews of the Emperor Justinian, and perhaps the famed Roman historians, Tacitus and Suetonius.¹¹ In 88 AD, state authorities placed Quintilian in charge of Rome’s first public school.¹² He retired in 90 AD, at which time the Emperor Domitian conferred consular rank upon him, the first rhetor to have ever been so honored.¹³ It was during his retirement, from approximately 92 AD to 95 AD, that he penned his magnum opus, “*Institutio [O]ratoria*, or *The Education of the Orator*.”¹⁴

II. QUINTILIAN: IN AND OUT OF RHETORICAL AND LEGAL VOGUE

The Roman rhetorical tradition which Quintilian epitomized survived in essentially the same form for more than 400 years, finding its foundations in the fifth century BCE in the teachings of Corax of Syracuse.¹⁵ Its teaching became standardized by the second century BCE as the core of the Roman educational system,¹⁶ though indeed it had also laid at the center of Greek education since at least 450 BCE, articulated by such rhetors as Isocrates, who had recognized writing as the core component of the classical curriculum,¹⁷ and Aristotle,

⁵ *See id.*

⁶ *Id.* In this, he was unique: “Quintilian was . . . a blend of Isocrates . . . (who did not practice law) and Cicero the lawyer (who did not formally teach), for Quintilian both taught and practiced law.” Eileen A. Scallen, *Evidence Law as Pragmatic Legal Rhetoric: Reconnecting Legal Scholarship, Teaching and Ethics*, 21 QUINNIPIAC L. REV. 813, 846 (2003).

⁷ QUINTILIAN ON THE TEACHING OF SPEAKING AND WRITING, *supra* note 3, at xiii.

⁸ *Id.* at xi.

⁹ *Id.* Roughly equivalent to a modern \$500,000. *Id.*

¹⁰ *Id.* at xiv, li.

¹¹ *Id.* at xiv.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at xv.

¹⁵ Michael Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage*, 8 S. CAL. INTERDISC. L.J. 613, 615 (1999).

¹⁶ QUINTILIAN ON THE TEACHING OF SPEAKING AND WRITING, *supra* note 3, at xi; Frost, *supra* note 15, at 615.

¹⁷ Richard Leo Enos, *Ancient Greek Writing Instrument*, in A SHORT HISTORY OF WRITING INSTRUCTION: FROM ANCIENT GREECE TO MODERN AMERICA 9, 34 (James J. Murphy ed., 2d ed. 2001).

who had embraced the importance of rhetoric as a subject.¹⁸ Thus, tracing a nearly 1,000 year history,¹⁹ rhetorical training would be preeminent among educational techniques “until the fall of the [Roman] Empire in 410 [AD],”²⁰ at which point any vestiges of democracy and free speech also fell, rendering the orators functionally unnecessary.²¹

What remained of the Roman rhetorical education peaking with Quintilian passed quietly into the middle ages, with his treatises housed in dusty monastic libraries.²² Indeed, as the old manuscripts were housed by the Catholic Church, rhetoric lost many of its original civic uses and took on an ecclesiastical association and flavor,²³ consulted by religious scholars to resolve disputes in canon, philosophy, and theology.²⁴ It was during this period that “law cease[d] to be a subdivision of rhetoric [and rose as] a subject in its own right,” with dedicated university departments.²⁵

Together with a passion for classical art, architecture, and science,²⁶ rhetorical education was brought back into the light of day by the fifteenth and sixteenth century Humanist scholars of the Renaissance,²⁷ where it reigned again for nearly two centuries, freed from restrictive grasp of the Church and restored to prominence in civic life.²⁸ During this time, Quintilian also had no less a distinguished disciple than Protestant revolutionary Martin Luther, who lauded him “a model of eloquence . . . teach[ing] by a happy combination of theory and practice.”²⁹

However, opinion of rhetoric and Quintilian fissured again in the seventeenth and eighteenth centuries. On one hand, rhetorical education was the subject of critique by such scholars as the French philosopher and logician, Peter Ramus, who viewed Aristotle and his rhetor descendants to be inextricably linked with the Church and derided rhetoric as a field devoid of substance,

¹⁸ See Frost, *supra* note 15, at 615.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Tiscione, *supra* note 2, at 392.

Under the later emperors, . . . legal and political rhetoric became not civic duty, but rather grounds for imprisonment or death. Isocrates' rhetorical education maintained importance as the basis of Roman education, but during this “Second Sophistic,” opportunities to speak were increasingly relegated to ceremonial and trivial declamations, which focused on narrow matters of word choice and delivery, with topics far removed from the political and legal issues of the times, such as mythology.

Scallen, *supra* note 6, at 845.

²² See QUINTILIAN ON THE TEACHING OF SPEAKING AND WRITING, *supra* note 3, at xii.

²³ Frost, *supra* note 15, at 621.

²⁴ *Id.* (quoting RICHARD MCKEON, RHETORIC: ESSAYS IN INVENTION AND DISCOVERY xvi (Mark Backman ed., 1987)).

²⁵ Frost, *supra* note 15, at 621.

²⁶ Tiscione, *supra* note 2, at 392.

²⁷ QUINTILIAN ON THE TEACHING OF SPEAKING AND WRITING, *supra* note 3, at xii.

²⁸ See Frost, *supra* note 15, at 625; Tiscione, *supra* note 2, at 392–93.

²⁹ QUINTILIAN ON THE TEACHING OF SPEAKING AND WRITING, *supra* note 3, at xxxvii.

good only for education in expression, style, and delivery.³⁰ The study of rhetoric continued to be divorced from the study of law and relegated to university English departments.³¹ Protestant and Puritan settlers of the American colonies, including, ultimately, the founders of Harvard University, bore the skeptical Ramian view to the New World.³²

On the other hand, rhetorical study would also find new champions in the seventeenth century, like Giambattista Vico, who reasserted that rhetoric was integral to the uncovering of knowledge.³³ Quintilian's philosophies and teachings persisted, battered but alive, through the Enlightenment,³⁴ were embraced in the London Inns of Court,³⁵ and went on to deeply influence the Independence-era American Founding Fathers³⁶ "as the law professors of our earliest citizen-lawyers: John Adams, Alexander Hamilton, and James Madison."³⁷ John Quincy Adams lauded:

A subject, which has exhausted the genius of Aristotle, Cicero, and Quintilian [*sic*], can neither require nor admit much additional illustration. To select, combine, and apply their precepts, is the only duty left for their followers of all succeeding times, and to obtain a perfect familiarity with their instructions is to arrive at the mastery of the art.³⁸

The resurgence of rhetoric as integral to legal education was dealt a body blow in the late nineteenth century by the advent of Christopher Columbus Langdell and the Socratic Method.³⁹ Langdell's "legal science"⁴⁰ transformed law school into a primarily theoretical endeavor. Just as Ramism severed logic

³⁰ See Tiscione, *supra* note 2, at 392–93.

³¹ *Id.* at 393.

³² *See id.*

³³ *Id.* at 394.

³⁴ See Winifred Bryan Horner & Kerri Morris Barton, *The Eighteenth Century, in THE PRESENT STATE OF SCHOLARSHIP IN HISTORICAL AND CONTEMPORARY RHETORIC* 114, 120 (Winifred Bryan Horner ed., 1990). Although the Classical rhetors still endured Ramian criticism from such Enlightenment philosophers as Descartes who found the discipline shallow. Andrea Bianchi, *International Adjudication, Rhetoric and Storytelling*, 9 J. INT'L. DISP. SETTLEMENT 28, 40 (2018). John Locke criticized traditional rhetoric as an "instrument of error and deceit." GEORGE A. KENNEDY, *CLASSICAL RHETORIC AND ITS CHRISTIAN AND SECULAR TRADITION FROM ANCIENT TO MODERN TIMES* 270–71 (2d ed. 1999).

³⁵ James Etienne Viator, *Legal Education's Perfect Storm: Law Students' Poor Writing and Legal Analysis Skills Collide with Dismal Employment Prospects, Creating the Urgent Need to Reconfigure the First-Year Curriculum*, 61 CATH. U. L. REV. 735, 757 (2012).

³⁶ *See* Scallen, *supra* note 6, at 847.

³⁷ *Id.* at 818.

³⁸ Frost, *supra* note 15, at 613 (quoting 1 JOHN QUINCY ADAMS, *LECTURES ON RHETORIC AND ORATORY* 28–29 (Russell & Russell, Inc. 1962) (1810)).

³⁹ Tiscione, *supra* note 2, at 394–95.

⁴⁰ Christopher C. Langdell, Dane Professor and Dean, Harvard Law School, *Teaching Law as a Science* (1886), in *HARVARD UNIVERSITY 1636–1886: A RECORD OF THE COMMEMORATION, NOVEMBER FIFTH TO EIGHTH, 1866 ON THE TWO HUNDRED AND FIFTIETH ANNIVERSARY OF THE FOUNDING OF HARVARD COLLEGE* (John Wilson & Son, 1887), *reprinted in THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES* 514, 515 (Steve Sheppard ed., 1999).

from rhetoric, Langdell severed theory from practice and elevated it to the sole matter of import within legal education.

The pendulum is in the process of swinging again. The late twentieth and early twenty-first centuries have seen the spark of a renewed interest in rhetoric by legal scholars: “[L]awyers are rhetors. They make arguments to convince other people. They deal in persuasion.”⁴¹ The renowned rhetorical scholar James Boyd White asserts, “law is a branch of rhetoric. Who, you may ask, could ever have thought it was anything else?”⁴² The virtues of the classics have again been urged by such modern masters of legal argument as Bryan Garner and Justice Antonin Scalia.⁴³ This spark coincides with a campaign of serious consideration within legal education to again consciously promote skills training, such as that encompassed in rhetorical education, which promoted the rise of clinical legal education in the late 1960s and the discipline of legal writing in the 1970s and 80s.⁴⁴

This Article joins the call for renewed recognition of what already is: practice and theory are linked; content and delivery of legal argument form an inseparable whole. The reintroduction of the study of classical rhetoric into legal education could be assigned reading for law students themselves with rhetorical techniques intentionally implemented in the law school classroom and moot courtroom, nourished by professors’ robust consideration of Quintilian’s ideas through the scholarship of law school teaching and learning. The study of classical rhetoric could be invaluable in healing the breach that began with Ramus, culminated in Langdell’s Socratic Method, and which persists through the publication of the germinal Carnegie Report,⁴⁵ which condemns the fractured foundation of legal education and urges its repair once and for all.⁴⁶

III. QUINTILIAN’S CURRICULUM: FROM THE FORUM TO THE LAW SCHOOL OF TODAY

Rhetoric, in its essence, “is the art of persuasion: the use of the analytical process to invent and arrange arguments, choose an appropriate speaking style, and deliver a convincing speech.”⁴⁷ It considers persuasion in both theory and

⁴¹ Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 YALE J. L. & HUMAN. 155, 177 (2006).

⁴² James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 684 (1985).

⁴³ David F. Herr, Book Review, FED. LAW. 58, 61 (Feb. 2009) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* (2008)).

⁴⁴ Tiscione, *supra* note 2, at 398–400. And, even in the face of pointed concern, the theory/practice hierarchy in law school is still promoted to this day with the lesser status frequently accorded clinic and legal writing in the legal academy. *Id.* at 399.

⁴⁵ WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 6, 8 (2007) [hereinafter *The Carnegie Report*].

⁴⁶ *See id.* at 12.

⁴⁷ *Id.* at 390.

practice and recognizes that knowledge's acquisition and expression were inextricably intertwined,⁴⁸ each enriching the other.⁴⁹ The rhetorical curriculum envisioned by Quintilian imparted “detailed instruction[] for discovering” and delivering legal argument, both spoken and written, “in almost any [situation] and to almost any audience.”⁵⁰

The rhetorical education began and ended with the subject that “ma[kes] all other learning possible”—the use of language.⁵¹ Not all Roman citizens⁵² completed the full program of study, but most students of rhetoric completed much of the ten-to-twelve-year curriculum, beginning at age six or seven with alphabet exercises and continuing through a dozen years of experiential classroom exercises to craft adult rhetors capable of conducting themselves publicly and effective in improvising in a multiplicity of circumstances.⁵³ The boys would begin by studying grammar,⁵⁴ “the art of inventing symbols and combining them to express thought,”⁵⁵ then progress to logic and rhetoric as they got older.⁵⁶

Quintilian diverged from his predecessors, the Greek Isocrates and the Roman orator Cicero, by insisting that education, as much as native ability, could produce rhetors of the highest order of excellence.⁵⁷ “For facility is mainly the result of habit and exercise”⁵⁸ Indeed, “[w]e must study, not only that every hearer may understand us, but that it shall be impossible for him not to understand us.”⁵⁹

A. *Imitation, Memorization, and Recitation*

Quintilian recognized the key role memorization played in rhetorical education, where, following in the footsteps of Aristotle and Cicero, the young advocate engaged in a program of memorization techniques in order to master the

⁴⁸ *Id.* at 400.

⁴⁹ *Id.*

⁵⁰ Frost, *supra* note 15, at 616.

⁵¹ QUINTILIAN ON THE TEACHING OF SPEAKING AND WRITING, *supra* note 3, at x.

⁵² Note, of course, that the term Roman citizen referred almost exclusively to rich, white men, a subject this Article will revisit.

⁵³ James J. Murphy, *The Key Role of Habit in Roman Writing Instruction*, in *A SHORT HISTORY OF WRITING INSTRUCTION FROM ANCIENT GREECE TO MODERN AMERICA* 36 (James J. Murphy ed., 2d ed. 2001).

⁵⁴ Tiscione, *supra* note 2, at 389.

⁵⁵ SISTER MIRIAM JOSEPH, *THE TRIVIUM: THE LIBERAL ARTS OF LOGIC, GRAMMAR, AND RHETORIC* 3 (Marguerite McGlenn ed. 2002).

⁵⁶ Tiscione, *supra* note 2, at 389.

⁵⁷ Scallen, *supra* note 6, at 846 n.137.

⁵⁸ 4 *THE INSTITUTIO ORATORIA OF QUINTILIAN* bk. X, at 137 (H.E. Butler trans. 1961).

⁵⁹ 1 HUGH BLAIR, *LECTURES ON RHETORIC AND BELLES LETTRES* 214 (1817).

extensive body of Roman law.⁶⁰ Like his fellow Roman rhetorical instructors, Quintilian recommended the further step of imitation as a path to excellence,⁶¹ as “the whole conduct of life is based on the desire of doing ourselves that which we approve in others.”⁶²

Through learning to recognize great writing, the fledgling advocate's own writing could not help but to improve.⁶³ This process of memorization and imitation would be facilitated by regular, rigorous recitation and declamation on the part of the student through regular engagement in Quintilian's fourteen *progymnasmata*, which were a regimen of basic exercises functioning as building blocks toward the creation and execution of entire performances of practice oratory.⁶⁴

These exercises included “descriptions, . . . narrative amplification, [the memorization of] maxims and fables, encomium,”⁶⁵ vituperation,⁶⁶ and, ultimately, staking out and justifying positions of law.⁶⁷ These acts of declamation served multiple ends, including “alerting students' ears to the pronunciation, rhythms, vowel lengths, and meters of a work. . . . Through this technique, students learned to recognize, remember, and imitate the metrical harmonies of language.”⁶⁸

By following this regimented process, the fledgling orator could endeavor to “surpass what ha[d] already been done,”⁶⁹ for “[i]t [was] dishonorable even to rest satisfied with simply equaling what [was] imitate[d].”⁷⁰ Similar imitative processes have been recommended by legal writing professors of today:

We might consider beginning with a short piece the student can duplicate. Replicating work was often seen as a vehicle for careful and detailed critique of well-regarded writing. By carefully reproducing, by hand, each capital letter,

⁶⁰ KRISTEN KONRAD ROBBINS-TISCIONE, *RHETORIC FOR LEGAL WRITERS: THE THEORY AND PRACTICE OF ANALYSIS AND PERSUASION* 101–02 (2009); Gabriel H. Teninbaum, *Spaced Repetition: A Method for Learning More Law in Less Time*, 17 J. HIGH TECH. L. 273, 311 (2017) (citing *ENCYCLOPEDIA OF RHETORIC* 113 (Thomas Sloane ed., 2001)).

⁶¹ See Giancarlo F. Frosio, *Rediscovering Cumulative Creativity from the Oral Formulaic Tradition to Digital Remix: Can I Get a Witness?*, 13 J. MARSHALL REV. INTELL. PROP. L. 341 350 (2014).

⁶² 2 QUINTILIAN'S INSTITUTES OF ORATORY: EDUCATION OF AN ORATOR 278 (John Selby Watson trans., 1895).

⁶³ See Ronald J. Waicukauski et al., *Ethos and the Art of Argument*, 26 LITIG. 31, 31 (1999).

⁶⁴ Gideon O. Burton, *The 14 Progymnasmata*, <http://rhetoric.byu.edu/Pedagogy/Progymnasmata/Progymnasmata.htm> [<https://perma.cc/73YZ-EEXZ>] (last visited Feb. 9, 2020).

⁶⁵ Jennifer Kruse Hanrahan, *Truth in Action: Revitalizing Classical Rhetoric as a Tool for Teaching Oral Advocacy in American Law Schools*, 2003 B.Y.U. EDUC. & L.J. 299, 312 (2003) (“in which the speaker praises his subject by developing details from his background and personal characteristics.”).

⁶⁶ *Id.* (“in which the author criticizes his subject by the same means.”).

⁶⁷ *Id.*

⁶⁸ *Id.* at 311.

⁶⁹ *Id.*

⁷⁰ 2 QUINTILIAN'S INSTITUTES OF ORATORY, *supra* note 62 at 278–79.

each comma, and each word, the student is obliged to spend more time with the text than he might otherwise, gradually furthering his understanding of the writer's plan, framework, and approach to the topic while simultaneously developing in himself a broader reservoir of effective writing techniques.⁷¹

These effective writing techniques remain ones invaluable to modern law students:

Composing encomiums . . . and vituperations . . . alert the law student to tone and audience. Amplifying a quotation, as one would when practicing a chreia, proverb or maxim, aid the law student in learning how to persuasively develop an idea. Description teaches the law student to give greater attention to facts and details and improves storytelling abilities.⁷²

B. Delivery

Quintilian thought oral delivery integral to the art of persuasion, rather than a desultory matter, unworthy of notice by a learned man, as discussed in Part II of this Article. Furthermore, Quintilian's concept of delivery was equally concerned with not only what was said, but the physical manner in which it was said.⁷³ The young Roman rhetor advised, among other suggestions, to avoid distracting gross motor activities, like pacing and foot tapping,⁷⁴ much as modern moot court students are advised today.⁷⁵ Likewise, both Quintilian's students and law students of the modern era have been warned against "[a]ny frenetic movements . . . or wild gesticulation."⁷⁶ Quintilian's intricate exegesis of demeanor merits study by law professors charged with teaching lawyering skills, moot court, and trial advocacy.

Of course, as will be discussed further at the end of this Article, modern law students still struggle against, and can be marginalized by the ideal of a "vigorous and manly attitude," which was very much embraced by the great

⁷¹ Antonette Barilla, *Inspiring Great Writing in Law Students*, 49 U.S.F. L. REV. F. 47, 49 (2015). Professor DeForrest relays:

In law school, one common way of educating future lawyers about persuasive argumentation is the "learn by example" method. This method involves a professor guiding students through various persuasive writing techniques via the examination of literature, sample briefs, oral arguments, or court decisions in the expectation that the students will learn which rhetorical techniques to embrace or avoid. While the "learn by example" method does have certain weaknesses when it comes to helping students to grasp the process of legal writing, it is a tried and true method, and is an effective method for teaching the particular format and structure of drafting legal arguments.

Mark DeForrest, *Introducing Persuasive Legal Argument via The Letter from a Birmingham City Jail*, 15 J. LEGAL WRITING INST. 109, 110 (2009).

⁷² Hanrahan, *supra* note 65, at 312 (emphasis removed).

⁷³ See Daphne O'Regan, *Eying the Body: The Impact of Classical Rules for Demeanor, Credibility, Bias, and the Need to Blind Legal Decision Makers*, 37 PACE L. REV. 379, 383 (2017).

⁷⁴ *Id.* at 395.

⁷⁵ *Id.*

⁷⁶ *Id.* at 396 (alterations in original).

Roman rhetors.⁷⁷ Modern legal educators must examine such advice through the lens of historical and cultural relativism:

[A] proper masculine voice is achieved through walking, massage, abstinence from sex, easy digestion of foods, that is, “frugalitas.” These are regimes of an athlete, a warrior, and a philosopher, scaled down to a more attainable level. Those who fail run the risk of “the ‘feeble shrillness’ that characterizes the voices of ‘eunuchs, women, and invalids.’”⁷⁸

For the ancient rhetors, urging the cultivation of a masculine affect was untroubling in a world where the practice of rhetoric was forbidden to women:

It is prohibited to women to plead on behalf of others. And indeed there is reason for the prohibition: lest women mix themselves up in other people's cases, going against the chastity that befits their gender.⁷⁹

Women are still chastised by these speaking conventions in the present day. For instance, higher pitched voices in our culture have been deemed to signify a lack of gravitas and dismissed as excessively emotional.⁸⁰ Thus, those of us with high pitched voices are admonished to try “to speak slowly and . . . lower the pitch,”⁸¹ lest we be viewed “incontinent.”⁸² But the modern legal skills educator, while taking advice from Quintilian, can also consider him an object lesson in the persistence of truly antique cultural norms. Ancient advice cannot be coopted wholesale.

C. Liberal Arts Education for Law Students

Cicero told us that in order “to be effective, an orator must be well educated,”⁸³ having acquired knowledge of “everything important, and of all liberal arts . . .”⁸⁴ Quintilian and his predecessors, Cicero and Isocrates, believed “a liberal arts education as the best preparation for such civic leadership,”⁸⁵ its breadth aiding the orator in effectively arguing across the spectrum of sub-

⁷⁷ See CICERO, ORATOR 349 (H. M. Hubbell trans., 1962).

⁷⁸ O'Regan, *supra* note 73, at 391 n.54 (quoting 4 THE INSTITUTIO ORATORIA OF QUINTILIAN, *supra* note 58, at 19).

⁷⁹ C. Jan Swearingen, *A Lover's Discourse: Diotima, Logos, and Desire*, in RECLAIMING RHETORICA: WOMEN IN THE RHETORICAL TRADITION 25, 26 (Andrea A Lunsford ed. 1995). Naturally, it goes without saying that the aspiring rhetor was a free, white man: “Conventional markers of . . . servitude [were] fatal to credibility.” See O'Regan, *supra* note 73, at 394, 401.

⁸⁰ Kathryn M. Stanchi, *Resistance is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices*, 103 DICK. L. REV. 7, 48 n.206 (1998).

⁸¹ *Id.* (citation omitted).

⁸² See MAUD W. GLEASON, MAKING MEN: SOPHISTS AND SELF-PRESENTATION IN ANCIENT ROME 83 (1995).

⁸³ Tiscione, *supra* note 2, at 391.

⁸⁴ CICERO, DE ORATORE, *reprinted in* CICERO ON ORATORY AND ORATORS 48 (J.S. Watson ed. & trans. 1855).

⁸⁵ Scallen, *supra* note 6, at 819.

jects.⁸⁶ For instance, the orator must have command of “rhetoric, poetics, history (from which to draw examples), and moral philosophy.”⁸⁷ Both Cicero and Quintilian acknowledged the significance of familiarity with great literature in order to effectively employ metaphor and simile, which are important instruments to emotionally engage an audience.⁸⁸

Many modern legal educators agree. For instance, Professor Scallen states: “My students tend to come with liberal arts educations, although my law school, like most, does not require any particular type of undergraduate degree. The better their liberal arts education in terms of rigor, breadth, and depth, the more they will engage in my class.”⁸⁹ She also asserts that a broad and effective liberal arts education in preparation for legal studies can be the best equalizer in a law school classroom that aspires to embrace diversity, as Quintilian’s classroom explicitly did not.⁹⁰ Professor Tiscione informs us that the essential subjects of liberal arts include “law, politics, history, poetry, and oratory”⁹¹ and goes on to say, “the social sciences, such as political science, sociology, and psychology ‘provide the most useful analogies for the academic study of law’”⁹² Liberal arts education teaches “flexibility, creativity, critical thinking, and communication skills, as well as skills in analysis and written communication.”⁹³ Professor Clark suggests:

Persuasion . . . should not be understood as an exercise in argument and counter-argument, as if it were a tennis match—won by hitting shots an adversary is unable to return. Instead, persuasion is best thought of as a process of making or finding space for a given outcome in another person’s world view. Rather than looking for arguments an adversary will be unable to deny, we should look for arguments an adversary will be able to affirm. This in turn depends upon devel-

⁸⁶ See *id.* at 842.

⁸⁷ Donald Phillip Verene, *Vichian Moral Philosophy: Prudence as Jurisprudence*, 83 CHL.-KENT L. REV. 1107, 1110 (2008). In the twentieth century, Justice Felix Frankfurter concurred in the necessity of the liberal education: “[T]he best way to prepare for the law is to come to the study of law as a well-read person.’ Why so? One answer may be that well-read lawyers will, on the whole, be able to argue more persuasively.” Sherman J. Clark, *Literate Lawyering: An Essay on Imagination and Persuasion*, 30 RUTGERS L.J. 575, 575 (1990) (quoting Letter from Felix Frankfurter, Assoc. Justice, U.S., to M. Paul Claussen, Jr. (May 1954)).

⁸⁸ Michael Frost, *Justice Scalia’s Rhetoric of Dissent: A Greco-Roman Analysis of Scalia’s Advocacy in the VMI Case*, 91 KY. L. J. 167, 190 (2002).

⁸⁹ Scallen, *supra* note 6, at 890.

⁹⁰ *Id.*

⁹¹ Tiscione, *supra* note 2, at 385, 391.

⁹² *Id.* at 396 (quoting Edward Rubin, *What’s Wrong with Langdell’s Method, and What to Do About It*, 60 VAND. L. REV. 606, 636 (2007)).

⁹³ Rebecca Flanagan, *The Kids Aren’t Alright: Rethinking the Law Student Skills Deficit*, BYU EDUC. & L.J. 135, 148 (2015) (quoting Carol T. Christ, *Myth: A Liberal Arts Education is Becoming Irrelevant*, 2012 AM. COUNCIL ON EDUC. 29, <https://www.smith.edu/docs/president/Spring2012Christ.pdf> [<https://perma.cc/ZDS8-MAYX>]); Steven Brint et al., *From the Liberal to the Practical Arts in American Colleges and Universities: Organizational Analysis and Curricular Change*, 76 J. HIGHER EDUC. 151, 152 (2005).

oping as full and nuanced as possible an understanding of that adversary's view of the world. Thus, persuasion depends upon imagination, and in particular upon a certain imaginative capacity to see the world from the perspective of others. Reading may be the best way to develop that capacity.⁹⁴

Those grounded in an understanding of the human experience, as taught by history and literature, will be the most effective advocates.⁹⁵ Furthermore, the liberal disciplines shed light on particular aspects of jurisprudence: the natural sciences impact evidence and criminal burden of proof; sociology and economics elucidate our legal processes and institutions.⁹⁶ These imperatives coincide with an era in which commentators lament the lack of classical liberal arts education most law students receive in high school and college.⁹⁷ Legal education should engage in grassroots efforts to encourage liberal arts study in its student pipeline and value such study, by rewarding it in the admission process. Perhaps, more importantly, law professors can work to fill the gaps in students' knowledge base by encouraging consideration of humanistic, scientific, and social scientific principles in classroom discussion and in student assessment instruments, rather than opting, as they might, to consider these tangential matters to a Langdellian dialogue or legal analysis.

D. *Writing Across the Curriculum*

Writing is a necessary companion to any legal thought, and it is everybody's baby. Hence, its instruction takes a village, and herein is born the idea of Writing Across the Curriculum (WAC), where the teaching and development of student writing skills is situated in a variety of educational subjects, rather than siloed exclusively in its own classroom as an independent subject.⁹⁸ This was Quintilian's pedagogical ideal and one increasingly embraced by modern educators. Professor Andrew Bouelle posits that WAC's "ultimate goal is to have students do a lot of writing, in many classes, and in every major" so that writing and rhetoric itself become—in Quintilian fashion—an integral part of learning at every level.⁹⁹

WAC is gaining momentum in prominent contemporary critiques of legal education as an antidote to compartmentalized, myopic legal thought:

⁹⁴ Clark, *supra* note 87, at 575.

⁹⁵ Waicukauski, *supra* note 63, at 31.

⁹⁶ Kara Abramson, "Art for a Better Life:" *A New Image of American Legal Education*, 2006 B.Y.U. EDUC. & L.J. 227, 241 (2007). James Boyd White expounds on the law student "as an artist" who is "as free" as the sculptor or painter in what she or he does as a lawyer." *Id.* at 252 (quoting JAMES BOYD WHITE, *THE LEGAL IMAGINATION* xxv (abr. Ed., I. Chi. Press 1985)).

⁹⁷ Viator, *supra* note 55, at 753 (2012).

⁹⁸ Andrew Bouelle, *Lessons from Quintilian: Writing and Rhetoric Across the Curriculum for the Modern University*, 1 CURRENTS TEACHING & LEARNING 28, 29 (2009).

⁹⁹ *Id.* at 29, 32.

The . . . movement embraces the idea that thinking and writing are inseparable, that students must think clearly to write clearly. Despite resistance in much of the doctrinal law curriculum, many legal writing texts and first-year writing courses have followed WAC theory and moved from focusing on the written product to the writing process that creates knowledge.¹⁰⁰

Thus, as many law schools are increasingly recognizing, and as is increasingly enshrined in the legal education standards promulgated by the American Bar Association, legal education should broaden students' opportunities for writing across all its learning venues.

E. *Relationship of Teacher to Student*

Quintilian espoused the cultivation of a trusting and supportive teacher-pupil relationship, which he felt should be that of "a loving father [to a] devoted son," as essential to an effective learning process.¹⁰¹ "[L]earning is best inspired by love, not fear."¹⁰² Quintilian would have been horrified by versions of the Socratic Method conducted through degrading, trial-by-fire ministrations.¹⁰³ A return to the Quintilian ethic in this area would be commensurate with the burgeoning movement to humanize legal education.¹⁰⁴

F. *Quintilian's Take on the Aristotelian Tripecta*

Lessons in classical rhetorical theory often begin with Aristotle's *Rhetoric* dividing theoretical analysis "into three categories: logical argument (*logos*), emotional argument (*pathos*), and ethical appeal or credibility (*ethos*)."¹⁰⁵ These were the three *pisteis*, or means of persuasion.¹⁰⁶ Logos has always been the beating heart of modern legal education. But, as the upstart that he was, logos was not Quintilian's focus.

1. *Pathos*

"[T]he power of eloquence is greatest in emotional appeals," and "this emotional power . . . dominates the court[;] it is this form of eloquence that is queen of all."¹⁰⁷ Professor Murray has noted that Quintilian gives significant

¹⁰⁰ Barbara J. Busharis & Suzanne E. Rowe, *The Gordian Knot: Uniting Skills and Substance in Employment Discrimination and Federal Taxation Courses*, 33 J. MARSHALL L. REV. 303, 307–08 (2000).

¹⁰¹ Scallen, *supra* note 6, at 846–47.

¹⁰² *Id.* at 847.

¹⁰³ *Id.* at 847 n.141.

¹⁰⁴ See Michael Hunter Schwartz, *Humanizing Legal Education: An Introduction to a Symposium Whose Time Came*, 47 WASHBURN L.J. 235, 235 (2008).

¹⁰⁵ Michael Frost, *Ethos, Pathos & Legal Audience*, 99 DICK. L. REV. 85, 86 (1994) (citing ARISTOTLE, *THE RHETORIC OF ARISTOTLE* 8 (Lane Cooper trans., 1932)).

¹⁰⁶ ARISTOTLE, *ON RHETORIC: A THEORY OF CIVIC DISCOURSE* 31 n.11 (George A. Kennedy ed. & trans., 1991).

¹⁰⁷ Frost, *Ethos, Pathos & Legal Audience*, *supra* note 105, at 91.

focus to knowledge of audience and of the judge and to tempering the use of logic with an appropriate emotional appeal.¹⁰⁸ Quintilian also spoke of charm and personal appeal, the “well-timed smile, a laugh, a courteous bow.”¹⁰⁹ In short, “rhetorical ornament[s] contribute[] not a little to the furtherance of our case For when our audience find[s] it a pleasure to listen, their attention and their readiness to believe what they hear are both alike increased”¹¹⁰ Law school professors should teach their students that artful and sophisticated appeal to emotion in their legal arguments is not a tangential frivolity, but rather a co-equal in Aristotle’s persuasive triumvirate, for “hate, love, pity, anger, impatience, boredom, and inattentiveness affect a judge or jury’s reasoning abilities and legal decisions.”¹¹¹

2. *The Lawyer as a Good Person—Ethos as a Pillar of Advocacy Education*

“A good man, skilled in speaking”¹¹²

The perfect orator “is in the very nature of things the greatest and most important, that is, he must be a good man.”¹¹³ Flying in the face of the modern trope of lawyer as shark, Quintilian is perhaps best remembered for his insistence that the concept of “‘legal ethics’ was not an oxymoron”;¹¹⁴ Quintilian represents the apotheosis of the Isocratic and Ciceronian ideal, in service to the client and society, that eloquence and ethics are inseparable.¹¹⁵

For it is impossible to regard those men as gifted with intelligence who on being offered the choice between the two paths of virtue and of vice choose the latter, nor can we allow them prudence, when by the unforeseen issue of their own actions they render themselves liable not merely to the heaviest penalties of the laws, but to the inevitable torment of an evil conscience.¹¹⁶

Moreover, the orator could be trained in ethics, but, when he speaks, he must also personally embrace the truth of what he is saying.¹¹⁷ Harkening

¹⁰⁸ Michael D. Murray, *Visual Rhetoric: Topics of Invention and Arrangement and Tropes of Style*, 21 J. LEGAL WRITING INST. 185, 198 n.55.

¹⁰⁹ PAUL M. SANDLER, *THE ART OF PERSUASION: ESSAYS ON RHETORIC IN THE COURTROOM* 11–12 (n.d.) (ebook) <https://www.shapirosher.com/img/headers/The-Art-of-Persuasion-Sandler.pdf> [<https://perma.cc/GZM4-DFYB>] (last visited Feb. 25, 2020).

¹¹⁰ 3 QUINTILIAN, *INSTITUTIO ORATORIA* bk. VIII 213 (H.E. Butler trans., 1966).

¹¹¹ Frost, *Ethos, Pathos & Legal Audience*, *supra* note 105, at 89.

¹¹² 4 *THE INSTITUTIO ORATORIA OF QUINTILIAN*, *supra* note 58, bk. XII at 355. Quintilian attributed the origins of the phrase to Marcus Cato. *Id.*

¹¹³ *Id.*

¹¹⁴ See Scallen, *supra* note 6, at 846, 848.

¹¹⁵ *Id.* at 846.

¹¹⁶ 4 *THE INSTITUTIO ORATORIA OF QUINTILIAN* bk. XII, *supra* note 58, at 357.

¹¹⁷ Jennifer Fowler-Hermes, *Improving Persuasive Effects in the Courtroom: An Application of Rhetorical Theory*, 24 AM. J TRIAL ADVOC. 313, 315–16 (2000).

back to Aristotle, Quintilian lauds moral character as the “first kind of proof”¹¹⁸ in any argument.

His conviction in this dovetails nicely with the latter day clarion call of the Carnegie Report.¹¹⁹ One of its prescribed core tasks of professional education in the Carnegie Report is to instruct law students in the process and importance of ethical decision-making, particularly under “conditions of uncertainty.”¹²⁰ “[T]he law school years constitute a powerful moral apprenticeship.”¹²¹ Competency in ethical decision-making is also enshrined in the American Bar Association’s Model Rules of Professional Conduct,¹²² as well as the landmark work, *Best Practices for Legal Education*.¹²³ Thus, even where law schools center their pedagogy in logical arguments, morality is fundamental to persuasion, and any attempt to exclude or marginalize its discussion in law school classrooms is likely to prove futile.¹²⁴ Normativity provides “the interface between facts and values.”¹²⁵ The Carnegie Report praises integrative teaching methods precisely because they unite Aristotelian ideals.¹²⁶

The development of judgment should not be divorced from the cultivation of morality.¹²⁷ Not unlike what modern legal ethicists would argue, Quintilian intended rhetoric to be the servant of public virtues, such as “defending the truth, protecting the innocent, and deterring criminal activity.”¹²⁸ The great Roman rhetors took as read that the principle vehicle through which an orator can influence his audience is his active participation in the processes of gov-

¹¹⁸ Thora Ilin Bayer, *Vico’s Principle of Sensus Communis and Forensic Eloquence*, 83 CHI. KENT L. REV. 1131, 1153 (2008). Professor Christopher Rideout asserts: “Indeed, for many rhetoricians, the role of character in persuasion is primary.” J. Christopher Rideout, *Ethos, Character, and Discoursal Self in Persuasive Legal Writing*, 21 J. LEGAL WRITING INST. 19, 19 (2016). “[I]t leads to the best truth in human affairs.” Tiscione, *supra* note 2, at 390.

¹¹⁹ See William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law Summary*, The Carnegie Foundation for the Advancement of Teaching 3, 5, 7 http://archive.carnegiefoundation.org/pdfs/elibrary/elibrary_pdf_632.pdf [<https://perma.cc/4WZN-49RG>] (last visited Feb. 25, 2020) (describing the background, importance, and major findings of the Carnegie Report).

¹²⁰ *The Carnegie Report*, *supra* note 45, at 22.

¹²¹ *Id.* at 139.

¹²² MODEL RULES OF PROF’L CONDUCT, pmbl Par. 4 (AM. BAR ASS’N 2019).

¹²³ See ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP* 45 (2007).

¹²⁴ Clare Keefe Coleman, *Teaching the Torture Memos: “Making Decisions Under Conditions of Uncertainty”*, 62 J. LEGAL EDUC. 81, 88 (2012).

¹²⁵ Ty Alper et al., *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLINICAL L. REV. 1, 6 (2005).

¹²⁶ *The Carnegie Report*, *supra* note 45, at 12–14.

¹²⁷ See Angela Olivia Burton, *Cultivating Ethical, Socially Responsible Lawyer Judgment: Introducing the Multiple Intelligences Paradigm into the Clinical Setting*, 11 CLINICAL L. REV. 15, 18 (2004).

¹²⁸ Robert W. Scholla, *Fides Quarens Iustitiam Socialem: A Jesuit Law School Perspective*, 37 LOY. L.A. L. REV. 1209, 1219 n.50 (2004).

ernment, putting the interests of the body politic over his own.¹²⁹ Likewise, Professor Perelman argues that, into modernity, we want both legal scholars and practicing lawyers to be engaged with what the law ought to be.¹³⁰

Quintilian was steadfast in his assertion that ethics is a matter for education; moral judgment is not fixed and immutable.¹³¹ Modern social sciences research corroborates that students commence their legal studies on par with the general population in their moral development, but that morality can grow from that point,¹³² “nurtured and inspired by example and reflection.”¹³³ Legal educators could intentionally integrate the very rigors of Quintilian’s exacting rhetorical education to train the character of our own young rhetors. Quintilian was a Cassandra, clinging to “rhetoric, ethics, and civic responsibility in the face of a crumbling society.”¹³⁴ He could be an avatar in a modern society similarly accused.

IV. “O QUINTILIAN, SUPREME GUIDE OF UNSETTLED YOUTH”!¹³⁵

Quintilian was an oxymoron incarnate, a liberal lauded by an incipiently imperialist society. The tradition of Roman rhetorical education was a social equalizer and stepping stone of opportunity, “the primary vehicle for changes in status by those not part of the Roman elite,”¹³⁶ intended to “promot[e] acquisition of mental and physical practices that were conceptually and practically standard, regardless of the speaker’s origin.”¹³⁷ However, as previously discussed in Part II of this Article, Quintilian’s broadness of mind was, per force, encumbered by the cultural imperatives of his time.¹³⁸ His pupils were the social climbing *nouveau riche* like Cicero or provincials like himself, always, at minimum, “members of the educated classes.”¹³⁹ The notion that the mores and affects of the elite were to be aped by those aspiring to be them was deeply ingrained in Classical Roman society, and deviation from this advice would be

¹²⁹ Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 AM. U. L. REV. 1717, 1729 (1995).

¹³⁰ See Tiscione, *supra* note 2, at 388 (citing CH. PERELMAN & L. OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* 31–32 (John Wilkinson & Purcell Weaver trans., Univ. of Notre Dame Press 1969)).

¹³¹ See O’Regan, *supra* note 73, at 419.

¹³² See Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1396–97 (1997).

¹³³ Scallen, *supra* note 6, at 819.

¹³⁴ *Id.* at 845–46.

¹³⁵ QUINTILIAN ON THE TEACHING OF SPEAKING AND WRITING, *supra* note 3, at li n.16.

¹³⁶ See O’Regan, *supra* note 73, at 418.

¹³⁷ *Id.*

¹³⁸ *Supra* Part II.

¹³⁹ Frost, *supra* note 15, at 616, 625.

met with “remark[], ridicule[], and punish[ment] at every level of Roman education and practice.”¹⁴⁰

We may yet argue over what has changed. This embrace of the primacy of homogenizing acculturation persists into the modern legal education and is well-nigh all-encompassing: “Just as learning to think like a lawyer involves jettisoning languages of social class, ethnic origin, and so forth, learning to act like a lawyer involves jettisoning previous methods of non-verbal communication.”¹⁴¹

Opportunities to partake in Quintilian’s panacea have historically been limited. The receipt of a liberal education and training in the classics, on which the entirety of rhetorical education is premised, was, until very recently, only available to white, male graduates of elite universities.¹⁴²

Indeed, we still celebrate the remaking of our students, as they learn to “think like a lawyer,”¹⁴³ and to act and appear like one too: “Law colleges affirm in practice and pedagogy the surviving, ancient link between rationality and elite decorum, and, more covertly, between irrationality and other forms of non-verbal communication.”¹⁴⁴ We therefore are urging a homogeneity among fledgling lawyers,¹⁴⁵ now garbed in navy blue suits instead of togas.

But even as modern commentators begin to question this norm, perhaps the visionary and revolutionary Quintilian’s progressive vision for social advancement would also have evolved, were he living today:

As Isocrates would be the first to acknowledge, the times do change. My students are neither all men nor all young. We now admit women and older (“returning”) students to law school. Scholars and teachers . . . should try to become better citizen-lawyers in the tradition of Isocrates, Cicero, and Quintilian, and should try to help their audiences, whether students or readers, become better citizen-lawyers too.¹⁴⁶

As legal scholars and educators call for new, more inclusive, and integrated models for legal education,¹⁴⁷ an understanding of Quintilian—tempered by a sober understanding that liberalism must take different forms in different eras—proffers a paradigm that merits our modern consideration and exploration in the law school classroom.

The good man speaking well that we legal educators seek to mold may no longer look as Quintilian envisioned (or even be a man), but would still, in the

¹⁴⁰ O’Regan, *supra* note 73, at 419. Indeed, Quintilian himself mocked orators through the ages who overstepped and embraced a too-folksy or populist demeanor or persona. 4 THE INSTITUTIO ORATORIA OF QUINTILIAN bk. XI, *supra* note 58, at 311, 313.

¹⁴¹ O’Regan, *supra* note 73, at 418.

¹⁴² See Flanagan, *supra* note 93, at 137. “[A]lmost all liberal arts majors come from families of higher mean socioeconomic status.” *Id.* at 151.

¹⁴³ See O’Regan, *supra* note 73, at 418.

¹⁴⁴ *Id.* at 421.

¹⁴⁵ *Id.* at 426 n.216.

¹⁴⁶ Scallen, *supra* note 6, at 891.

¹⁴⁷ See STUCKEY, *supra* note 123, at 1; *The Carnegie Report*, *supra* note 45, at 45.

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end, benefit from the conscious imparting, in the classroom and in the courtroom, of the wisdom of two millennia, as told by history's first true law professor.

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