AGAINST THE GRAIN: THE SECRET ROLE OF DISSENTS IN INTEGRATING RHETORIC ACROSS THE CURRICULUM

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INTRODUCTION

Law and rhetoric have always been connected. Their roots go back to the Classical period wherein facility in law and rhetoric were necessary citizenship skills for advocacy in the polis.[1] As a result, instruction in rhetoric and law went hand in hand. Over time though that close connection began to wane as forces like religion began to replace rhetoric as a primary discourse source, which ultimately resulted in law and rhetoric viewed as separate rather than

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[1] Malthon Anapol, *Rhetoric and Law: An Overview*, 18 COMM. Q. 12, 12 (1970); *see also* GEORGE A. KENNEDY, CLASSICAL RHETORIC & ITS CHRISTIAN & SECULAR TRADITION *FROM* ANCIENT *TO* MODERN TIMES 4 (2d ed. 1999); Linda Levine & Kurt M. Saunders, *Thinking Like a Rhetor*, 43 J. LEGAL EDUC. 108, 110 (1993).

mutually informing disciplines.[2] Of late, there have been efforts to restore law and rhetoric's close connection in legal education.[3] A primary focus of these efforts was to provide lawyers tools and vocabulary to recognize the value and potential application of rhetoric in their work.[4] These efforts have been successful in establishing rhetoric's value in improving the development of lawyers' reasoning and writing skills, yet they do not offer a comprehensive account of rhetoric in law. More specifically, rhetoric has been brought back to law only in part through descriptive practice and application of well-known rhetorical concepts such as ethos, pathos, and logos as well as through efforts to articulate writing as a process and attend to audience, purpose, and context.[5] What has been missing from the restorative efforts is attention to some of rhetoric's more complex concepts that demonstrate rhetoric's constitutive capacity and how it creates and shapes conditions for action in everyday life. We argue that such attention to these complex concepts is an important step towards expanding and strengthening law and rhetoric's close connection.

In this Article, we make the case for dissent writing and reasoning as the vehicle for fully restoring rhetoric and law's connection. We see dissents as superior tools for talking about and examining the close relationship between law and rhetoric, because as a genre, dissents invite working with and closely scrutinizing law's systemic nature, its inherent instability and uncertainty, and the surpluses that emanate from legal texts as they work their way through law's system.[6] Rather than seeing such instability and uncertainty as barriers to effective communication, rhetoric sees these items as fruitful resources for developing reasoning and effective advocacy.[7] Put simply, dissents make visible rheto-

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[2] Anapol, *supra* note 1, at 15.

[3] *See* sources cited *infra* notes 10, 21, 23, 25, and 26.

[4] Kristen K. Robbins-Tiscione, *A Call to Combine Rhetorical Theory and Practice in the Legal Writing Classroom*, 50 WASHBURN L.J. 319, 319 (2011).

[5] Michael H. Frost, *With* Amici *Like These: Cicero, Quintilian and the Importance of Stylistic Demeanor*, 3 J. ASS'N LEGAL WRITING DIRECTORS 5, 9 (2006) [hereinafter Frost, *Stylistic Demeanor*]; Kristen Robbins Tiscione, *Aristotle's Tried and True Recipe for Argument Casserole*, 15 PERSPS.: TEACHING LEGAL RES. & WRITING 45, 48 (2006) [hereinafter Tiscione, *Aristotle*]; 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, 391 (2016) [hereinafter Tiscione, *Disappearance*].

[6] LIEF H. CARTER & THOMAS F. BURKE, REASON *IN* LAW 86–87 (9th ed. 2016); JAMES BOYD WHITE, THE LEGAL IMAGINATION 237 (Abridged ed. 1985); Marie-Claire Belleau & Rebecca Johnson, *Ten Theses on Dissent*, 67 U. TORONTO L.J. 156, 165 (2017).

[7] Kristine M. Bartanen, *The Rhetoric of Dissent in Justice O'Connor's* Akron *Opinion*, SOUTHERN SPEECH COMM. J. 240, 244 (1987); Linda L. Berger, *Studying and Teaching "Law as Rhetoric": A Place to Stand*, 16 J. LEGAL WRITING INST. 3, 7 (2010) [hereinafter Berger, *Studying*]; Robert L. Ivie, *Enabling Democratic Dissent*, 101 Q.J. SPEECH 46, 46 (2015); Erin J. Rand, *Fear the Frill: Ruth Bader Ginsburg and the Uncertain Futurity of Feminist Judicial Dissent*, 101 Q.J. SPEECH 72, 76 (2015).

ric's constitutive nature as a discipline that fundamentally creates and invents rather than merely adorns.[8]

Admittedly, working with dissents may seem counter-intuitive to readers; after all, dissents are legally impotent at the time of their composition. They represent anti-majority reasoning and work against the grain of the majority opinion. As such, in the moments following their creation, dissents have constrained potential as precedents for shaping law.[9] However, it is in this very space of working against the grain that dissents' promise lies for reestablishing rhetoric and law's close connection. When examining dissents, we argue that law students are exposed to the complex rhetorical concepts that create conditions for a dissent's future success. As such, dissents are unique discursive tools for heightening and making visible rhetoric and law's close connection across the law school curriculum.

I. WHY RHETORIC?

Although rhetoric seems to be at the heart of the lawyer's craft—after all, using communication to persuade is the lawyer's stock in trade—rhetoric often receives very little explicit attention in the law school curriculum. Modern legal educators often implicitly teach rhetoric but fail to do so intentionally or expressly.[10] This disconnect is not a new development; the relationship between rhetoric and legal education long has been a turbulent one. In the Classical period in Greece and Rome, lawyers studied rhetoric along with "law, politics, history, poetry, and oratory."[11] Indeed, "in Greece[,] theories of rhetoric were developed largely for speakers in the lawcourts . . . ."[12] Over the years, however, education in rhetoric shifted away from analyzing how to devise and construct a sound, logical argument and evolved instead to focus largely on style and delivery.[13]

Against this historical background, U.S. legal education faced a fork in the road at the end of the 1800s.[14] Curricula at many of the first U.S. law schools included explicit instruction in rhetoric.[15] Legal educators valued training in

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[8] *See* Amanda C. Bryan & Eve M. Ringsmuth, *Jeremiad or Weapon of Words?*, 4 J.L. & CTS. 159, 161 (2016).

[9] *See* Bryan & Ringsmuth, *supra* note 8, at 161; J. Louis Campbell, III, *The Spirit of Dissent*, 66 J. AM. JUDICATURE SOC'Y 304, 306 (1983); Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 4 (2010).

[10] *See* Leigh Hunt Greenhaw, *"To Say What the Law Is": Learning the Practice of Legal Rhetoric*, 29 VAL. U. L. REV. 861, 861 (1995); Levine & Saunders, *supra* note 1, at 109.

[11] *See* Tiscione, *Disappearance*, *supra* note 5, at 391–92.

[12] KENNEDY, *supra* note 1, at 4–5.

[13] Levine & Saunders, *supra* note 1, at 110 ("The separation of law from rhetoric occurred during the Middle Ages and the Renaissance at about the same time that rhetoric came to mean the *art* of oratorical eloquence distinct from the *science* of logic and dialectic.").

[14] *Id.* at 111.

[15] *Id.* at 110. Students at Columbia Law School, for example, read Plato, Aristotle, and Cicero. *Id.*

rhetoric, urging law students to become familiar with its principles and practices.[16] Notably, in the late 1800s, Yale Law School was moving toward a more practical model of legal education, animated by a rhetorical theory of lawyering.[17] At the same time, however, the Langdellian revolution hit Harvard; law schools began to see law as an empirical science comprised of concrete and certain rules susceptible to discovery through the rational, systematic analysis of court opinions.[18] Under the Langdellian model, rhetoric, with its focus on persuasion and probability rather than discovery of the one true law, became viewed as nonrational—a "failed science"—and antithetical to the goals of the method.[19] The "case method" quickly dominated legal pedagogy, and Yale's approach—and its explicit instruction in rhetorical theory and methods—virtually disappeared from law school curricula for the next hundred-plus years.[20]

In recent years, however, legal scholars—in particular, legal-writing scholars—have exhorted legal educators to revive explicit instruction in rhetorical theory and practices across the law school curriculum.[21] Teaching students to recognize the inextricable relationship between rhetoric and law can only enrich their understanding and appreciation of law and the lawyer's role. Law isn't, in fact, a hard science. "True law" is no concrete entity that students can discover through investigation but the product of fallible humans engaged in and influenced by persuasive techniques.[22] Making transparent the rhetorical nature of law can help dissolve many law students' fixed notions of some mythical "ball" of black-letter law that their doctrinal professors are somehow "hiding" through the Socratic method.[23] Rhetoric also can serve as a unifying theory that creates coherence in the law school curriculum and breaks down subject-matter silos by drawing clear connections between theory and practice, and thus responds to calls in the Carnegie Report and other critiques of contemporary legal education for more integrative teaching models.[24]

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[16] *Id.* at 110–11.

[17] *Id.* at 111.

[18] *Id.*; Tiscione, *Disappearance*, *supra* note 5, at 395–96.

[19] *See* Levine & Saunders, *supra* note 1, at 113–14.

[20] *Id.* at 111.

[21] *See, e.g.*, Berger, *Studying*, *supra* note 7, at 7; Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163, 164 (1993); Neil Feigenson, *Legal Writing Texts Today*, 41 J. LEGAL EDUC. 503, 506 (1991) (book reviews); Greenhaw, *supra* note 10, at 861–62, 865–67; Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 SW. L.J. 1089, 1092 (1986).

[22] *See* Tiscione, *Disappearance*, *supra* note 5, at 395, 397 (quoting Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 VAND. L. REV. 609, 636, 649 (2007)) ("The case method . . . perpetuates the idea that law exists 'out there' for [students] to discover. . . . Yet law—encompassing statutes, regulations, and judicial decisions—is a social construct, and the study of law is 'the study of human beings, with all the complexity, normativity, and subjectivity that this study necessarily implies.' ").

[23] *See* Robbins-Tiscione, *supra* note 4, at 319.

[24] *See* Tiscione, *Disappearance*, *supra* note 5, at 398–99.

Both the benefits and the means of intentional instruction in rhetoric seem clearer in the context of the legal-writing classroom. Law students often learn persuasive legal writing in their second semesters, and many legal-writing texts and curricula incorporate at least some explicit discussion of rhetoric, even if just a glancing mention of logos, ethos, and pathos.[25] Introducing students to Cicero's six-part arrangement prepares students for the common components of a legal brief.[26] Instruction in Aristotle's canons of composition provides students with a process for researching, brainstorming, writing, and arguing an appellate brief.[27] Lacing rhetorical theory throughout the traditional legal-writing instruction in constructing legal arguments and preparing legal documents couches best practices in a context, which likely enhances transfer of learning.[28] An understanding of deductive reasoning and syllogism helps students accept more quickly the IRAC/CREAC organizational paradigm taught in most legal writing courses, helping erode students' usual resistance to the constraints of what they initially see as a stifling formula, and this acceptance can only lead to better, more coherent writing.[29] Students likely expect to encounter instruction in rhetorical theory in this context,[30] and introducing it makes legal writing instruction more intellectually stimulating for both professor and student.[31]

But rhetoric instruction—like writing instruction—truly belongs "across the curriculum" in legal education.[32] Imagine a Professional Responsibility

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[25] *See, e.g.*, Barbara P. Blumenfeld, *Rhetoric, Referential Communication, and the Novice Writer*, 9 LEGAL COMM. & RHETORIC: JALWD 207, 207 (2012) ("Classical rhetoric is a useful and integral part of legal writing instruction at many law schools."); Robbins-Tiscione, *supra* note 4, at 325 ("My course is structured around Aristotle's canons of rhetoric."). For example, a number of legal-writing professors across the country routinely use Dr. Martin Luther King, Jr.'s Letter from Birmingham Jail to introduce law students to Aristotle's Modes of Persuasion and other principles of Classical rhetoric when they introduce persuasive legal writing. *See, e.g.*, Mark DeForrest, *Introducing Persuasive Legal Argument via the Letter from a Birmingham City Jail*, 15 J. LEGAL WRITING INST. 109, 110 (2009); Suzanne Rabe, Presentation at the Twelfth Biennial Conference of the Legal Writing Institute: From Aristotle to Martin Luther King: Using Letter from Birmingham Jail to Teach Aristotle's Three Modes of Persuasion (Atlanta, Ga., June 8, 2006) (on file with author).

[26] *E.g.*, Frost, *Stylistic Demeanor*, *supra* note 5, at 9 ("the Greco-Roman six-part structure of legal argument has survived virtually intact to the present day."); Tiscione, *Aristotle*, *supra* note 5, at 48 (noting that the Rhetorical ad Herennium, a well-known Roman treatise on rhetoric, divided argument into six parts that mirror the parts of a typical modern legal memorandum or brief, and that Cicero and Quintillian adopted these parts as well).

[27] *See, e.g.*, Levine & Saunders, *supra* note 1, at 118–21; Robbins-Tiscione, *supra* note 4, at 325–37.

[28] *See* Robbins-Tiscione, *supra* note 4, at 319.

[29] *Id.* at 329.

[30] *See id.* at 324 ("I find my first-year law students expect me to teach them about logic and emotional appeals—two aspects of rhetoric with which they are rarely familiar—because they intuit their relevance to legal education.").

[31] *See id.* at 327–28.

[32] *See, e.g.*, Levine & Saunders, *supra* note 1, at 109 (arguing that "[l]egal education will benefit by taking a rhetorical approach to teaching students to think like lawyers."); James

class animated by a discussion of ethos, of Cicero's conception of the effective orator as first and foremost a "good man," and of Quintilian's recognition that the best advocate is the "good and even-tempered person." Or imagine a doctrinal class where the professor transparently addressed the legal texts as responses to particular rhetorical situations. Many law students struggle with critical reading, a skill essential to their success in the classroom and the profession.[33] Early class or orientation sessions animated by the principles of New Rhetoric could welcome new law students to this new discourse community and make explicit the connections between legal reading and legal communication, perhaps helping students read legal authorities more skeptically rather than being "seduced" by them.[34]

Moreover, weaving explicit instruction in rhetoric throughout the law school curriculum can only enhance law-student and lawyer well-being across many dimensions.[35] Introducing law students to Cicero's conception of the effective lawyer as a well-rounded human being encourages students to nurture the interests that they brought with them to law school and to develop new ones. But perhaps most importantly, encouraging students to see law as a rhetorical practice rather than a quest for some essential, definable legal truth empowers them and gives them agency. In contrast with the fatalistic views of legal formalism and legal realism, which in their traditional forms suggest that "rules" or "politics" inevitably dictate the results of any case, and thus lawyers serve as mere conduits for those preordained outcomes, a rhetorical point of view sees lawyers as "human actors whose work makes a difference because they are the readers, writers, and members of interpretive and compositional communities who together 'constitute' the law."[36] Instruction in New Rhetoric allows students to see their writing not just as a means to communicate information, but as a mode for creating knowledge and for deepening their own un-

Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 685 (1985) ("How can it be that law was ever regarded as anything but rhetoric?"); *see also* sources cited *supra* note 21.

[33] *See* Debra Moss Curtis & Judith R. Karp, *"In a Case, in a Book, They Will Not Take a Second Look!" Critical Reading in the Legal Writing Classroom*, 41 WILLAMETTE L. REV. 293, 294 (2005) (observing that, although critical reading is a "core lawyering skill," many law students fail to engage actively with the material they read); Jane Bloom Grise, *Critical Reading Instruction: The Road to Successful Legal Writing Skills*, 18 W. MICH. COOLEY J. PRAC. & CLINICAL L. 259, 261–62 (2017) (noting that many incoming law students "have not been exposed to the critical reading skills that are necessary for law school success," although studies suggest that "critical reading skills may be key to law school success."); Carolyn V. Williams, *#CriticalReading #WickedProblem*, 44 S. Ill. U. L.J. 179, 181 (2020) (characterizing the lack of critical reading skills among incoming law students as a "wicked problem" that all stakeholders in legal education—not just legal-writing professors—must recognize and address to promote student success in law school and in the profession).

[34] *See* Fajans & Falk, *supra* note 21, at 163.

[35] Exploring this thesis in more depth is outside the scope of this article but fruitful ground for a future piece.

[36] Berger, *Studying*, *supra* note 7, at 8–9.

derstanding.[37] Increasing student comfort with the appropriateness of emotional appeals—Aristotle's pathos—may help mitigate some of the ills associated with the otherwise logos-dominated legal reasoning in which law students are typically indoctrinated.[38] Rhetoric arms students with weapons to lawyer "outside the box," and supplies them with tools to challenge and dismantle unfavorable precedent to craft solutions for their clients and advocate for changes in unjust or outdated legal rules.[39] And deepening law students' understanding of rhetoric—enabling them to see it as more than a collection of stylistic tricks and instead as the very definition of "thinking like a lawyer" in all its transformative complexity—allows students to rediscover and deploy talents, interests, values, personal experiences, and other parts of themselves that traditional legal education often stifles and devalues.[40] Indeed, teaching law as rhetoric welcomes law students into a distinctly human endeavor that connects individuals across the boundaries of time and culture.[41]

A. Rhetoric in the Law School Classroom Now

Increasingly—and particularly with the explosion of legal-writing programs in the last twenty-plus years—explicit instruction in rhetoric has found its way back into at least some law school classrooms.[42] Many legal-writing texts, particularly more advanced ones focused on persuasive technique, incorporate explicit references to the lessons of Classical rhetoric.[43] And, unsurprisingly, some legal-writing texts introduce students to various rhetorical devices and illustrate them with examples from contemporary legal briefs.[44]

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[37] *See* Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. LEGAL EDUC. 155, 156–57 (1999) [hereinafter Berger, *Applying New Rhetoric*].

[38] *See* Berger, *Studying*, *supra* note 7, at 8 ("In their traditional guises, formalism and realism appear to doom lawyers to lives of 'quiet desperation': if 'rules' or 'politics' compel outcomes, the work of lawyers will have little effect. Rhetoric recognizes a constructive role . . . [f]rom the rhetorical point of view, . . . lawyers are human actors whose work makes a difference . . . .").

[39] *See id.*

[40] *See id.* at 63–64 ("Students appreciate being able to draw upon the things they carried with them into law school that they thought were unwelcome in law school.").

[41] *See id.* at 64 ("Rhetorical analysis shows us that 'law is a *human* exercise; that it is driven neither by immutable truths . . . nor by arbitrary whims.' Isn't it ironic that after teaching students how to think like lawyers, we must remind them that they will be practicing law as human beings?") (citations omitted).

[42] Blumenfeld, *supra* note 25, at 207 n.1 (observing that "there is a movement to heavily integrate rhetoric as the primary focus and structure of legal writing courses."); *see also supra* text accompanying notes 21 and 32.

[43] *See, e.g.*, MICHAEL R. SMITH, ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING 9 (2d ed. 2008); KRISTEN KONRAD ROBBINS-TISCIONE, RHETORIC FOR LEGAL WRITERS: THE THEORY AND PRACTICE OF ANALYSIS AND PERSUASION 17 (2d ed. 2009).

[44] *See, e.g.*, ANNE ENQUIST & LAUREL CURRIE OATES, JUST WRITING: GRAMMAR, PUNCTUATION, AND STYLE FOR THE LEGAL WRITER 160 (2d ed. 2005).

Arguably, principles of New Rhetoric have animated the curricula of most legal writing programs since their earliest days; legal-writing professors have implemented a process-over-product approach since at least the early 1980s and explicitly focus on audience, purpose, and convention.[45] Select law schools even include entire courses in Law as Rhetoric, often taught by a legal-writing professor.[46] But, at this point in the history of legal education, any explicit instruction in rhetoric seems to remain almost exclusively in the legal-writing classroom.[47]

B. Dissents in Law and Rhetoric

Historically, dissent writing produced much anxiety within the legal community due to expressed concerns about the anticipated costs that dissent writing would have on legal practice, such as an increase in politicization of courts and their decisions, the creation of uncertainty and indeterminacy in law, and a diminishment of collegiality between judges sitting on multi-member courts.[48] The fact that dissents are of no legal consequence only underscored much of this anxiety.[49] Dissents were "loser law," after all, and were believed to unnecessarily disrupt the stability and legitimacy of the legal system.[50] However,

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[45] Berger, *Applying New Rhetoric*, *supra* note 37, at 165–66; Robbins-Tiscione, *supra* note 4, at 324 ("Legal writing pedagogy today typically accounts for the individual writer's process, the legal audience, and, to some extent, the generative aspects of writing.").

[46] *See, e.g.*, Berger, *Studying*, *supra* note 7, at 7, 15–21 (describing the upper-level elective "Law & Rhetoric" course Berger developed and has taught at two different law schools). Notably, Berger has the students read and analyze at least one dissent in her course; it appears that she primarily uses it to illustrate how differing rhetorical choices in the dissent and majority opinion enable different outcomes.

[47] Perhaps, as Kristin Tiscione posited back in 2006, this reflects the propensity of doctrinal law professors to see themselves as engaged in a search for "truth," and that they "conceptualize the search for truth as an exclusively philosophical endeavor" rather than at least partially a rhetorical one. Kristen Konrad Robbins, *Philosophy v. Rhetoric in Legal Education: Understanding the Schism Between Doctrinal and Legal Writing Faculty*, 3 J. ASS'N LEGAL WRITING DIRECTORS 108, 125 (2006).

[48] Peter W. Hogg & Ravi Amarnath, *Why Judges Should Dissent*, 67 U. TORONTO L.J. 126, 134–36 (2017); *see also* Jeffrey L. Courtright, *"I Respectfully Dissent": The Ethics of Dissent in Justice O'Connor's* Metro Broadcasting, Inc. v. FCC *Opinion*, *in* WARRANTING ASSENT: CASE STUDIES IN ARGUMENT EVALUATION 125 (Edward Schiappa ed., 1995); 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, 173 (2002–03) [hereinafter Frost, *Rhetoric of Dissent*]; Rand, *supra* note 7, at 81; Melvin I. Urofsky, *Mr. Justice Brandeis and the Art of Judicial Dissent*, 39 PEPP. L. REV. 919, 920 (2012); Diane P. Wood, *When to Hold, When to Fold, and When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court*, 100 CAL. L. REV. 1445, 1461–63 (2012).

[49] William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 429 (1986) ("dissent[s] [are] . . . a 'cloud' on the majority decision . . . ."); Courtright, *supra* note 48, at 130; Rand, *supra* note 7, at 73.

[50] Bartanen, *supra* note 7, at 244; Belleau & Johnson, *supra* note 6, at 165 (Belleau and Johnson write "[t]he tension between stability and change, between certainty and responsiveness, is one of the great and unavoidable tensions in law."); Rand, *supra* note 7, at 79.

over time, this anxiety began to wane due in part to shifts in the make-up of courts (i.e., more judges willing to dissent).[51] Furthermore, lawyers and scholars began reconceptualizing the kinds of work dissents perform (e.g., their being theorized as acts of institutional disobedience)[52] as well as the recognition that they can draw more attention, in particular from the media, and speak to broader public audiences than majority opinions.[53] In both examples, we see the legal community begin to recognize dissents as having untapped constitutive potential[54] as available means of persuasion, which for the purposes of this Article, demonstrates their value as an object of analysis for heightening law and rhetoric's close connection in the contemporary practice of law.

Before turning our attention to this potential, we want to provide background information about the "genre of dissent," or how dissents have been theorized and discussed in the fields of law and rhetoric.[55] In what follows, we discuss dissents' roles and purposes as well as the nature of dissents' voices and how they address multiple audiences.

1. Dissents' Roles and Purposes

Though they lack formal, legal significance at the time of their composition, dissents do important work that both affirms the rule of law yet simultaneously challenges the law to be better and more responsive to present day facts and circumstances. Legal scholars and practitioners have described dissents' work in terms of a duality or as a double gesture. That is, dissents both disrupt and affirm, and they serve as a balancing point between stability and change in the law.[56] To describe the complexity of this dual work in an accessible manner, scholars and practitioners have identified specific roles and purposes that dissents serve. For example, dissents have been recognized as playing a safeguard role, as holding judges accountable to the rule of law, and as making their reasoning and thinking transparent.[57] Key features of dissents' accountability role are their work in identifying errors,[58] demonstrating flaws in reason-

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[51] Ginsburg, *supra* note 9, at 1–2.

[52] Campbell, III, *supra* note 9, at 306 (noting that dissents appeal to controlling law).

[53] Bryan & Ringsmuth, *supra* note 8, at 174–75; Ginsburg, *supra* note 9, at 6.

[54] Berger, *Studying*, *supra* note 7, at 26; Maurice Charland, *Constitutive Rhetoric: The Case of the* Peuple Québécois, 73 Q.J. SPEECH 133, 141 (1987); Ivie, *supra* note 7, at 47; Rand, *supra* note 7, at 73.

[55] Bartanen, *supra* note 7, at 242 (noting that dissents have not received much scholarly attention).

[56] Ivie, *supra* note 7, at 46; Rand, *supra* note 7, at 73 (explaining that dissents are "of the law and in excess of the law . . . .").

[57] Bartanen, *supra* 7, at 247; Brennan, Jr., *supra* note 49, at 430; Sonia Sotomayor & Linda Greenhouse, *A Conversation with Justice Sotomayor*, 123 YALE L.J.F. 375, 376 (2014).

[58] CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS AND ACHIEVEMENTS: AN INTERPRETATION 68 (1928). Famously, Chief Justice Hughes wrote that dissents are "an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissent-

ing,[59] and emphasizing perceived limits of the majority decision.[60] A less visible feature of this accountability is how dissents function as "soft threats" during the period in which briefs are circulated internally between judges on multimember courts before a majority opinion is announced.[61]

Concurrent with their accountability function aimed at affirming the rule of law, dissents also point the way forward for changing the law and offer instruction to other courts for pursuing this path.[62] In such signaling work, dissents function as change agents. Specifically, they are invitations to revision that reframe the issue at hand and invite audiences to reimagine other future possibilities for the law.[63] The rhetorical force of a dissent's appeal to the future is its creation of discursive space for thinking and writing to occur over time. Such space holds open and creates conditions for conversation to remain open, for the points of contention to be publicized, and for other non-legal public participants to contribute to the framing and discussion of the issue at hand.[64]

In creating a holding space and maintaining legal uncertainty, dissents intentionally act against law's desire for stability by inviting into conversation the politics that law strives to exclude.[65] Through connecting law and policy, dissents seek to exploit the persuasive capacities of non-legal texts and ideas circulating outside of the law's closed discourse system. In particular, dissents draw on these extra-legal discursive resources as vehicles for pointing out incongruences or perceived variances between existing law and evolving societal

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ing judge believes the court to have been betrayed." *Id.*; Bartanen, *supra* note 7, at 247; Brennan, Jr., *supra* note 49, at 430; Catherine L. Langford, *Appealing to the Brooding Spirit of the Law: Good and Evil in Landmark Judicial Dissents*, 44 ARGUMENTATION & ADVOC. 119, 119 (2008); Wood, *supra* note 48, at 1454.

[59] Brennan, Jr., *supra* note 49, at 430; Frost, *Rhetoric of Dissent*, *supra* note 48, at 173.

[60] Brennan, Jr., *supra* note 49, at 430; Courtright, *supra* note 48, at 136; Wood, *supra* note 48, at 1455.

[61] Marsha S. Berzon, *Dissent, "Dissentals," and Decision Making*, 100 CAL. L. REV. 1479, 1484–87 (2012) (describing the use of soft threats in a process of "adversarial collaboration"); Edward McGlynn Gaffney, Jr., *The Importance of Dissent and the Imperative of Judicial Civility*, 28 VAL. U. L. REV. 583, 609 (1994); Ginsburg, *supra* note 9, at 3 (describing dissents as an invitation to majority writers "to refine and clarify").

[62] Bartanen, *supra* note 7, at 262; Brennan, Jr., *supra* note 49, at 430; Bryan & Ringsmuth, *supra* note 8, at 162; Courtright, *supra* note 48, at 136; Frost, *Rhetoric of Dissent*, *supra* note 48, at 173; Michael Kirby, *Judicial Dissent*, 12 JAMES COOK U. L. REV. 4, 8 (2005); Wood, *supra* note 48, at 1456.

[63] Belleau & Johnson, *supra* note 6, at 173–74; Campbell, III, *supra* note 9, at 307; Courtright, *supra* note 48, at 136 ("[D]issenting arguments function rhetorically to engage audiences in the consideration of propositions that the dissenter apparently deems worthy of public consideration.") (citations omitted); Katie L. Gibson, *In Defense of Women's Rights: A Rhetorical Analysis of Judicial Dissent*, 35 WOMEN'S STUD. COMM. 123, 129 (2012); Tiho Mijatov, *How to Use a Dissent*, 9 DISP. RESOL. INT'L 69, 76 (2015); Rand, *supra* note 7, at 82; Wood, *supra* note 48, at 1447 (referring to the process of reimagining as an act of "reshuffl[ing]").

[64] Belleau & Johnson, *supra* note 6, at 163; Bryan & Ringsmuth, *supra* note 8, at 160; Rand, *supra* note 7, at 78.

[65] Campbell, III, *supra* note 9, at 306; Rand, *supra* note 7, at 73.

norms and law's inability to respond to them.[66] Ultimately, in bringing politics within the realm of legal discourse, dissents function as a democratic supplement and promote the ideals set forth in the Constitution.[67]

2. Dissents' Voice and Audience Simultaneity

The defining feature of a dissent's voice is that it is the voice of an advocate.[68] Unconstrained by concerns of comporting with precedent or forwarding stability within the legal system, the voice of the dissent initiates change and begins a new conversation that sounds a "call for corrective action."[69] In initiating such change, a dissent's voice is decidedly deliberative and operates in its holding space with an eye to the future.[70] When addressing the future and the desirability of law's attendant change, the tone or style of a dissent's advocacy can take on a range of characteristics. For example, the voice has been described as emotionally laden,[71] yet heroic and prescient.[72] Furthermore, it has been noted as aspirational in its aim to carve out perceptions of what should be through adopting both a skeptical, stipulative position and committing itself to directed acts of questioning, interrupting, and advising.[73] Together, each of these ways of describing the advocacy of the dissent reveals the unique, idiosyncratic nature a dissent takes on through the motivated perspective of its author responding to the particular facts and circumstances underlying an unfavorable judicial outcome.[74] It is an open and resolute voice, one that does not require itself to be harmonized with the voice of the majority opinion.[75] However, to be successful, the advocate's voice must work to develop some form of

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[66] Brennan, Jr., *supra* note 49, at 430, 432; Campbell, III, *supra* note 9, at 307.

[67] CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 212–13 (2003); Bartanen, *supra* note 7, at 247; Rand, *supra* note 7, at 77.

[68] Berger, *Applying New Rhetoric*, *supra* note 37, at 173 (noting concerns with students developing their own voices and being able to initiate conversations in their writing); Campbell, III, *supra* note 9, at 308. Please note in the Implementation section of this article, we will discuss the opportunities dissents offer for helping students work through the challenge of developing a voice in their writing. Mijatov, *supra* note 63, at 74; *see also* Mark K. Osbeck, *What is "Good Legal Writing" and Why Does It Matter?*, 4 DREXEL L. REV. 417, 444 (2012).

[69] Ivie, *supra* note 7, at 50.

[70] Gibson, *supra* note 63, at 134; Hogg & Amarnath, *supra* note 48, at 138; Rand, *supra* note 7, at 77. Please note dissents also have an epideictic function in that they praise and/or blame a majority opinion.

[71] Bryan & Ringsmuth, *supra* note 8, at 161.

[72] ALAN BARTH, PROPHETS WITH HONOR: GREAT DISSENTS AND GREAT DISSENTERS IN THE SUPREME COURT 14 (1974); Langford, *supra* note 58, at 119–20; Mijatov, *supra* note 63, at 79; Rand, s*upra* note 7, at 76.

[73] Campbell, III, *supra* note 9, at 307; Gibson, *supra* note 63, at 135; Ivie, *supra* note 7, at 50; Langford, *supra* note 58, at 120.

[74] Bartanen, *supra* note 7, at 245.

[75] *See* Belleau & Johnson, *supra* note 6, at 160; Courtright, *supra* note 48, at 141; Frost, *Rhetoric of Dissent*, s*upra* note 48, at 174.

shared language with the public audiences to which it communicates.[76] That is, the dissent must deploy terms of convergence to legitimize the critical perspective set forth in the dissent and also reorient the audience to the dissent's desired ends.[77]

The challenge of providing vocabulary to a dissent's audience is the simultaneity of that audience. That is, a dissent writer composes a dissent with an eye towards addressing a variety of internal and external audiences who have potential influence over the mechanisms for forwarding a dissent's goals.[78] These audiences range from current and future judges, to lawyers working both within and outside of the case in which a dissent originates, to legislatures that can develop laws, to administrative agencies that can issue regulations, relative to the issue generating dissent, and to citizens who have a vested or potential interest in the issue at hand.[79] Dissent writers signal to all of these audiences simultaneously, working to cultivate them to the writer's proposition for the future by inviting them to overhear and bear witness to a disagreement.[80] Ultimately, because of this simultaneity, dissents are best understood as genres of public rhetoric, documents written for change that require broad engagement from a range of legal and non-legal stakeholders.[81] The holding space in which a dissent operates creates a public[82] forum for these stakeholders to unite, deliberate, and develop advocacy strategies for actualizing the dissent's goals.

C. The Opportunity for Dissent Pedagogy in Law

Beyond Belleau and Johnson's "Ten Theses on Dissent,"[83] there is limited scholarship directly addressing the pedagogical promise of dissents. Much scholarship about legal pedagogy focuses on the use or usefulness of the Socratic method, or both.[84] Yet, as has been noted repeatedly, the Socratic method

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[76] For discussions of the importance of shared language development in professional contexts see Mark A. Hannah, *Objects of O2: A Posthuman Analysis of Differentiated Language Use in a Cross-Disciplinary Research Partnership*, *in* POSTHUMAN PRAXIS IN TECHNICAL COMMUNICATION 217 (Kristen R. Moore & Daniel P. Richards eds., 2018); Ariel D. Anbar et al., *Bridge the Planetary Divide*, 539 NATURE 25, 27 (2016); Mark A. Hannah & Christina Saidy, *Locating the Terms of Engagement: Shared Language Development in Secondary to Postsecondary Writing Transitions*, 66 C. COMPOSITION & COMM. 120, 122 (2014); Mark A. Hannah & Chris Lam, *Patterns of Dissemination: Examining and Documenting Practitioner Knowledge Sharing Practices on Blogs*, 63 TECH. COMM. 328, 329 (2016).

[77] Frost, *Rhetoric of Dissent*, *supra* note 48, at 173; Ivie, *supra* note 7, at 52.

[78] Bartanen, *supra* note 7, at 243; Brennan, Jr., *supra* note 49, at 432; Bryan & Ringsmuth, *supra* note 8, at 162.

[79] *See* Michael Warner, *Publics and Counterpublics*, 14 PUB. CULTURE 49, 49 (2002).

[80] Courtright, *supra* note 48, at 130.

[81] *See* Ellen Cushman, *The Rhetorician as an Agent of Social Change*, 47 C. COMPOSITION & COMM. 7, 7 (1996).

[82] Warner, *supra* note 79, at 50.

[83] Belleau & Johnson, *supra* note 6, at 156.

[84] Jamie R. Abrams, *Reframing the Socratic Method*, 64 J. LEGAL EDUC. 562, 562–63 (2015); Christie A. Linskens Christie, *What Critiques Have Been Made of the Socratic*

often stifles dissent.[85] As a result, students are left with little opportunity to imagine the role and purpose of dissent in the development of the law in general or, more importantly, its potential influence on the development of their reasoning and writing abilities.

Ultimately, we argue that dissents are superior tools for providing law students with a vocabulary for seeing and understanding rhetoric and its complexity more broadly. While existing scholarship is useful for its description of dissents' characteristics—in particular in its attention to foundational rhetorical concepts such as purpose, voice, and audience—the scholarship lacks a critical vocabulary for assessing the rhetorical nature of dissents more broadly.[86] In the next Part of this Article, we demonstrate how dissents offer legal educators unique opportunities to introduce across the law school curriculum more complex rhetorical concepts that can heighten law students' nascent understandings of law's close relationship with rhetoric.

II. RHETORIC AND ITS COMPLEXITY

To help students think beyond the genre of dissent and build a critical vocabulary for assessing rhetoric more broadly and accounting for its complexity, we discuss in this Part unique pedagogical opportunities that dissents offer for heightening law students' understanding of the close connection between law and rhetoric. In particular, we note how dissents make visible and advance more complex understandings of four foundational rhetorical concepts: (1) the rhetorical situation, (2) rhetorical circulation, (3) intertextuality, and (4) kairos. Through focusing on these concepts, law students will develop an appreciation for the essence of law's relationality and the effect of contingency on legal practice. That is, through studying dissents and these concepts more intentionally, law students will bear witness to how law is most properly captured in its relations and uncertainties rather than its outputs and representations of black letter law.[87]

Method in Legal Education: The Socratic Method in Legal Education: Uses, Abuses and Beyond, 12 EUR. J.L. REFORM 340, 340 (2010); Jeffrey D. Jackson, *Socrates and Langdell in Legal Writing: Is the Socratic Method a Proper Tool for Legal Writing Courses?*, 43 CAL. W. L. REV. 267, 267–68 (2007); Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113, 115 (1999); Anthony Kronman, *The Socratic Method and the Development of the Moral Imagination*, 31 U. TOL. L. REV. 647, 647 (2000).

[85] Christie, *supra* note 84, at 348; Jackson, *supra* note 84, at 302; Kerr, *supra* note 84, at 118; Kronman, *supra* note 84, at 649.

[86] *See* Christie, *supra* note 84, at 345.

[87] Belleau & Johnson, *supra* note 6, at 172. Here, we draw from Belleau and Johnson's recognition of dissents as useful tools for emphasizing law's processes over its outputs. For a useful discussion about contingency in rhetoric and "the social contingency of meaning[,]" see Paul M. Dombrowski, Challenger *and the Social Contingency of Meaning: Two Lessons for the Technical Communication Classroom*, 1 TECH. COMM. Q. 73, 73 (1992).

A. Rhetorical Situation

The concept of rhetorical situation was introduced by Lloyd Bitzer in 1968 to answer his question regarding the nature of the contexts in which speakers or writers create rhetorical discourse.[88] In response, Bitzer defined a rhetorical situation "as a complex of persons, events, objects, and relations presenting an actual or potential exigence[,] which can be completely or partially removed if discourse, introduced into the situation, can so constrain human decision or action as to bring about the significant modification of the exigence."[89] Through this definitional work, Bitzer casts rhetorical situations as bounded units or contexts that exist out there in the world waiting to be perceived by rhetors and addressed through their discourse.[90]

Bitzer's work is foundational for its attempt to locate how discourse arises to address perceived imperfections in the world,[91] yet not long after its publication, Bitzer's bounded conception was challenged for being too limited and constraining. For example, Richard Vatz argued that rhetorical situations do not simply exist out there waiting to be perceived but instead are created by rhetors through the choices they make when articulating a context of events.[92] Vatz's argument shifted agency over to the rhetor, endowing that person with a capacity to create conditions for discourse through creating rhetorical situations and therefore freeing the rhetor from the constraints of a pre-determined, bounded situation.

Though important for its recognition of a rhetor's agency, Vatz's work established a dissatisfying binary for evaluating rhetorical situations—an already-formed situation versus a to-be-determined situation—that rhetorical scholars have been working earnestly to think beyond for nearly half a century. Examples of this critical work include calls to find a middle ground in the binary and see rhetoric as an art;[93] to emphasize multiplicity or the reality of multiple audiences, exigences, and constraints that influence rhetorical situations;[94] to challenge the presumptions that audiences are fully formed and unified and that rhetorical situations are identity producing events;[95] to recognize that rhetorical situations are not a collection of single situations but instead are part of an eco-

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[88] Lloyd F. Bitzer, *The Rhetorical Situation*, 1 PHIL. & RHETORIC 1, 1 (1968).

[89] *Id.* at 6.

[90] *Id.* at 5, 9.

[91] In rhetoric and communication scholarship, Bitzer's rhetorical situation analysis is generally the standard citation for defining this concept and is the foundation upon which subsequent theorizing builds. *See infra* notes 94–99 for some examples of subsequent theorization.

[92] Richard E. Vatz, *The Myth of the Rhetorical Situation*, 6 PHIL. & RHETORIC 154, 154, 156 (1973). There is some precedent in legal scholarship for acknowledging the capacity of exp ert writers to construct rhetorical situations. *See* Berger, *Studying*, *supra* note 7, at 61–62.

[93] Scott Consigny, *Rhetoric and Its Situations*, 7 PHIL. & RHETORIC 175, 185 (1974).

[94] Craig R. Smith & Scott Lybarger, *Bitzer's Model Reconstructed*, 44 COMM. Q. 197, 197 (1996).

[95] Barbara A. Biesecker, *Rethinking the Rhetorical Situation from Within the Thematic of* Différance, 22 PHIL. & RHETORIC 110, 110 (1989).

logical network of exchanges and communications that bleed between and inform each other;[96] and finally to acknowledge that discourse circulates through our everyday activities and thus does not exist in one place but instead exists as passing through and thus never located.[97] Across each of these extended retheorizations of the rhetorical situation, we see increasing appreciation for the complexity and fluidity of conditions that give rise to discourse, conditions that are potentially both constraining and generative and work across time and space rather than bound up in a location.

With this background in mind, we are led to ask how rhetorical situations are presented in the law school classroom via the case method. In that method, rhetorical situations are the selected cases that arrive for students predetermined—prepackaged if you will—in a textbook. Those cases are constrained to a particular fact pattern and application of law that led to a specific legal outcome, which the students try to discern through principles of legal reasoning. In this scenario, students are directed to look at the case in a Bitzerian fashion, as found.[98] They are invited to think through how the exigence, the audience, and the constraints within the case work together and lead to the eventual holding. Admittedly, there is some connection to other rhetorical situations or cases through discussions and acknowledgements of precedent or other historical cases that influence the holding in a case. However, the acknowledgement of a rhetorical situation's complexity is tacit. Students generally work through case history, or rhetorical situation history, and are often not prompted to consider the range of other factors—political, social, economic, interpersonal, etc.—that influenced the production of discourse in the case initially selected for review. Rather, usually they are asked to distinguish cases on fine, nuanced grounds, thus reifying the isolated conception of the Bitzerian rhetorical situation.

Dissents help law students think beyond the limits of the Bitzerian rhetorical situation before them, the case in which they are working and developing legal discourse on behalf of a hypothetical client. Specifically, as change agents, dissents naturally and intentionally look beyond the rhetorical situation in which their authors' positions have lost and seek, through discourse, to create a new rhetorical situation for their ideas to operate and thrive.[99] Of note in

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[96] Jenny Edbauer, *Unframing Models of Public Distribution: From Rhetorical Situation to Rhetorical Ecologies*, 35 RHETORIC SOC'Y Q. 5, 19 (2005).

[97] Catherine Chaput, *Rhetorical Circulation in Late Capitalism: Neoliberalism and the Overdetermination of Affective Energy*, 43 PHIL. & RHETORIC 1, 20 (2010).

[98] As an example, in her discussion of the schism between doctrinal and skills courses, Kristen Konrad Robbins-Tiscione cites Bitzer as her initial scholarly source for rhetorical situation awareness. ROBBINS-TISCIONE, *supra* note 43, at 83.

[99] We acknowledge here that the Vatzian conception of creating rhetorical situations that we are positing for dissent writing is not without its limits. That is, dissent authors are not entirely free to create a rhetorical situation in any way they see fit, or as Clarke Rountree described in his keynote address at the Classical Rhetoric and Contemporary Law Symposium, you just can't "Vatz your way out of a situation." *See* Clarke Rountree, Address at the University of Nevada, Las Vegas, William S. Boyd School of Law Symposium: Classical Rhetoric as a Lens for Contemporary Legal Praxis (Sept. 27, 2019) (on file with author). However, we are

the move to look beyond is how dissents restore law students' connections with the law's relationality, which is severed by the Bitzerian impulse to look only to address the motivating exigence of the pre-existing rhetorical situation. More specifically, when thinking through the law's relationality, students are compelled to look beyond the defined rhetorical situation at hand and assess the potential influence of other nonlegal factors, circumstances, exigences, and actors circulating beyond it. Ultimately, in looking beyond the isolated rhetorical situation, a dissent creates the necessary discursive holding space for the dissent and its attendant ideas to interact and grow and create the kinds of conditions that are necessary for the corrective action called forth in the dissent to occur. For such change to happen though, lawyers must also look beyond a newly created rhetorical situation and assess how it can work in tandem with discourse from other situations and contexts to affect a change in the law. Such a collaborative perspective on rhetorical situations requires an ecological perspective and a shift in many students' rhetorical imaginations towards the movements of rhetorical circulation.

B. Rhetorical Circulation

Generally speaking, rhetorical circulation is understood as the ways in which texts and discourse move through time and space. More specifically, rhetorical circulation attends to the ways rhetoric moves, unanchored, through our everyday, situated lives.[100] An emphasis on movement within rhetorical circulation draws attention to the constitutive nature of rhetoric, as rhetoric being a living environment[101] in which various rhetorical situations come together and collaborate to produce some kind of change through discourse.[102] An outcome of the continuous change spurred by rhetorical circulation is that dialogue remains open and resists closure through new articulations that are created in communicative exchanges.[103] Of note in these exchanges is that old articulations do not die off and disappear. Rather, they retain some form of discursive energy and remain available to be drawn into future circulation and participate

drawn to Vatz's recognition of a rhetor's agency in creating rhetorical situations and hope through our proposed dissent pedagogy to cultivate in students an awareness of the different authoring roles potentially available to them as practitioners.

[100] Chaput, *supra* note 97, at 20. Chaput also notes that circulation asks rhetors to think of rhetoric as continuously moving through and connecting different instantiations within a complex world. *Id.* at 6; *see also* Jason Edward Black, *Native Authenticity, Rhetorical Circulation, and Neocolonial Decay: The Case of Chief Seattle's Controversial Speech*, 15 RHETORIC & PUB. AFF. 635, 636 (2012). Black also notes how "fragmented discourse circulates says much about a public that interprets it and the ideologies that underscore that particular public's civic imaginary." *Id.* Black's argument here has significant implications for how dissents reintroduce politics into legal discourse that the legal system sought to exclude.

[101] Black, *supra* note 100, at 636; Edbauer, *supra* note 96, at 13.

[102] *See* Black, *supra* note 100, at 640; Chaput, *supra* note 97, at 6–7 (discussing Louis Althusser's articulation of rhetoric as an overdetermined practice).

[103] *See* Black, *supra* note 100, at 637.

in the accrual and evolution of meaning over time.[104] A distinctive feature of rhetorical circulation and its influence on meaning making and knowledge production is that it operates independent of formal reasoning processes and requires no structural framework or planning for its effects to take shape.[105] That is, rhetorical circulation is an always- and already-emergent phenomenon, and through understanding such structureless emergence, rhetors begin to appreciate that discourse cannot be bound by situations.[106] By extension, rhetors also then realize that they are not bound by situations. They realize they "are never outside the network[] . . . of forces"[107] and will therefore create the kinds of rhetorical energy that drives rhetorical circulation through their decision-making.

Dissents operate on a logic of rhetorical circulation. As forward-looking, deliberative compositions, they depend on the accrual of energy and evolution of meaning over time to achieve the desired changes in law that they offer as propositions for readers to consider.[108] Specifically, as change agents, dissents are connective events that work to draw in traces of legal and nonlegal texts and discourses to create new articulations in light of their expressed proposition, the primary aim of which is to increase communicative exchanges and the dissemination of positive affective discursive energy[109] through the discursive holding space they create. Of note for their desires to keep dialogue open via new articulations, dissents work against the grain of law's closed discourse system.[110] That is, they draw on the structureless nature of circulation to combat the organizing force of law, which is governed by logical ordering schema and the principles of legal reasoning—rationality, objectivity, hierarchy, precedent, etc.[111]

By developing an awareness of the opportunity for and power of working against the grain of law's organizing schema, law students are better able to see that law does not exist in a location, in a box of black-letter law. Rather, the law exists in its relations that manifest through students' own decision-making processes when developing and communicating a legal argument for a dissent

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104 *Id.*

105 Chaput, *supra* note 97, at 11.

106 *Id.* at 8.

107 *Id.* at 12.

108 Campbell, III, *supra* note 9, at 307. Campbell acknowledges law's transcendence, specifically, that law encompasses more than the present in its spread. *Id.* Put simply, law creates surpluses that carry forward and shape future legal decision-making processes. It is this surplus from which rhetorical circulation draws its force and energy from for shaping the production of discourse across time and space. For a useful discussion of surplus, see generally EUGENE GARVER, FOR THE SAKE OF ARGUMENT: PRACTICAL REASONING, CHARACTER, AND THE ETHICS OF BELIEF (2004); *see also* Francis J. Mootz, III & Leticia M. Saucedo, *The "Ethical" Surplus of the War on Illegal Immigration*, 15 J. GENDER, RACE & JUST. 257, 257–58, 262 (2012).

109 Chaput, *supra* note 97, at 8.

110 Gibson, *supra* note 63, at 125.

111 *See* CARTER & BURKE, *supra* note 6, at xiv.

or any other legal context. Rhetorical circulation invites students to witness this existence. An extension of the heightened awareness of law's relationality that develops through examining rhetorical circulation in the context of dissents is that students are encouraged to see that meaning is not tied to situations or locations but instead will develop through accrual and collaboration between situations and locations over time.[112] A reversal of a majority decision, which is the ultimate aim of the written dissent, requires a passing of time and attendant accrual. The reversal will not just appear out of nowhere. Instead it will emerge and pop up from some nexus of circulating factors and be flavored historically by the predominant events, ideologies, and attitudes that shaped public perceptions of the issue at hand. As such, rhetorical circulation makes clear dissents' important roles as genres of public rhetoric that activate the kinds of change that are necessary to realign the democratic ideals of law with present day facts and circumstances.

C. Intertextuality

Intertextuality is a concept that describes the relationships that exist between and among texts, examples of which include connections established by "citations, quotations, allusions, borrowings, adaptations, appropriations, parody, pastiche, imitation, and the like."[113] In this definition, it is easy to recognize the close relationship between rhetorical circulation and intertextuality and the overlap in the kinds of work they do. Foremost among their similarities are their both being constitutive, relational concepts[114] that establish new articulations that create changes and reshape communities.[115] Intertextuality, in particular, is constitutive for the ways it reactivates a text and gives it new discursive life by connecting it to another text and drawing off or borrowing from its ideas.[116] Furthermore, intertextuality has a Vatzian quality in that it can create its own contexts or rhetorical situations that invite readers to consider a new perspective.[117]

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[112] *See* Kristen K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 VT. L. REV. 483, 488 (2003) [hereinafter Robbins, *Paradigm Lost*].

[113] Frank J. D'Angelo, *The Rhetoric of Intertextuality*, 29 RHETORIC REV. 31, 33 (2010). D'Angelo discusses Julia Kristeva's development of intertextuality as a concept in her Revolution in Poetic Language. *Id.*

[114] *See* Belleau & Johnson, *supra* note 6, at 156; James E. Porter, *Intertextuality and the Discourse Community*, 5 RHETORIC REV. 34, 40 (1986).

[115] Porter, *supra* note 114, at 41; *see also* Heinrich F. Plett, *Rhetoric and Intertextuality*, 17 RHETORICA 313, 325 (1999) (discussing how intertextuality alters community commonplaces that have lost decorum or are no longer in accordance with generally acknowledged social norms).

[116] Plett, *supra* note 115, at 317. For a useful discussion about how law is activated via connections in the French legal system, see Mark A. Hannah, *Flexible Assembly: Latour, Law, and the Linking(s) of Composition*, *in* THINKING WITH BRUNO LATOUR IN RHETORIC AND COMPOSITION 219, 224–25 (Paul Lynch & Nathaniel Rivers eds., 2015).

[117] D'Angelo, *supra* note 115, at 33.

Despite these similarities, intertextuality is distinguishable from rhetorical circulation in one small, but significant way: they differ in terms of the level at which they operate. Rhetorical circulation is a macro concept attuned to discourses, texts, events, actors, ideologies, and so forth that operate outside the scope of the immediate case at hand, whereas intertextuality is a micro concept that explicitly functions at the local level in a specific case. More specifically, as a micro concept, intertextuality recognizes that circulation is mediated by localized community, disciplinary factors, or both. In law, examples of mediating factors include legal reasoning principles, precedent, court types, hierarchy, and objectivity, to name a few.

The significance of this distinction may seem small; however, there is something fundamental regarding the scale at which the two concepts operate. Specifically, it is the way in which constraints function. As noted previously in this Article, rhetorical circulation operates independent of formal reasoning processes and requires no structural framework or planning for its effects to take shape.[118] Intertextuality, on the other hand, is highly constrained, structured work. Intertextual success is defined as having the ability to know what can be presupposed in discourse and knowing how to borrow and link items effectively.[119] Viewing success in this way casts authors as assemblers, as rhetors who must extend their analyses of audience beyond human agents and their attitudes, ideologies, dispositions, and the like, to the community expectations and standards that condition and predispose those agents' day-to-day actions.[120]

Shifting our look to dissents with this background about intertextuality in mind, it is clear that dissents are intentionally intertextual. They participate as a genre of revitalization in the larger legal discourse community that is interested in pursuing truth and meaning about a particular legal issue whose value is being questioned.[121]

Certain members of the legal community are searching for potential ways to innovate the law and forward a new articulation about the topic in question.[122] When composing, dissent authors assemble a range of legal and nonlegal texts and draw connections between them to shift the public imagination regarding a new proposition for forwarding law and justice.[123] The aspiration of the dissent is to alter or change the constitution of the legal community through intentional acts of questioning and doubting, while simultaneously affirming the values of the rule of law.[124] The desired change likely will not materialize quickly. But the on-the-ground conditions have been modified by the dissent,

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[118] Chaput, *supra* note 97, at 6.

[119] *See* Porter, *supra* note 114, at 34.

[120] *Id.* at 40.

[121] *See* sources cited *supra* notes 61–63.

[122] Porter, *supra* note 114, at 38.

[123] *Id.* at 34.

[124] Belleau & Johnson, *supra* note 6, at 160; Courtright, *supra* note 48, at 141; Frost, *Rhetoric of Dissent*, *supra* note 48, at 173.

and though the initial change may be small and perhaps even indiscernible, those newly emergent, on-the-ground conditions will serve as incipient infrastructure upon which activated legal and nonlegal discursive resources can be combined to build new articulations.

As part of their intertextual character, dissents also provide useful opportunities for law students to consider the role of constraints in their writing and reasoning processes. Constraint is arguably the key defining feature of the practice of law or what it means to think and communicate like a lawyer.[125] Being intentional about directing more attention to dissents and their intertextual nature brings the issue of constraint to the fore in a new way: not simply in terms of the constrains inherent in the practice of law, but also in regard to the constraints of a community, its assumptions and presumptions that will determine the success of an intertextual articulation.[126] Thinking through intertextuality in the context of dissents prompts law students to consider legal constraint and community or social constraint as hand-in-hand or simultaneous features of argumentation. Learning how to operate freely and have some authorial control over what discursive artifacts and traces are assembled between these different types of constraints can be challenging for law students, and engaging dissents can be a useful way for them to practice how to exercise such authorial control and account for both law and societal or community norms. Put differently, dissents provide law students with opportunities to learn how to leverage intertextuality and create conditions for change by authoring both in and outside of the law.

D. Kairos

Generally understood as the opportune moment for action, kairos is a widely discussed and foundational component of rhetorical theory.[127] In fact, some rhetorical scholars have cast kairos as rhetoric's linchpin (i.e., "[r]hetoric is the art which seeks to capture in opportune moments that which is appropriate and attempts to suggest that which is possible.")[128] The duality that operates in kairos—identifying not only the opportune moment but also that which is possible in that moment—requires rhetors to engage in a nuanced balancing act. They must have a capacity to discern and evaluate rhetorical factors such as

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[125] CARTER & BURKE, *supra* note 6, at 86–87; WHITE, *supra* note 6, at 237; Belleau & Johnson, *supra* note 6, at 174.

[126] Porter, *supra* note 114, at 43.

[127] *See generally* RHETORIC AND KAIROS: ESSAYS IN HISTORY, THEORY, AND PRAXIS (Phillip Sipiora & James S. Baumlin eds., 2002); Michael Carter, Stasis *and* Kairos*: Principles of Social Construction in Classical Rhetoric*, 7 RHETORIC REV. 97 (1988); James L. Kinneavy & Catherine R. Eskin, *Kairos in Aristotle's Rhetoric*, 17 WRITTEN COMM. 432 (2000); Carolyn R. Miller, Kairos *in the Rhetoric of Science*, *in* A RHETORIC OF DOING: ESSAYS ON WRITTEN DISCOURSE IN HONOR OF JAMES L. KINNEAVY 310 (Stephen P. Witte et al. eds., 1992).

[128] John Poulakos, *Toward a Sophistic Definition of Rhetoric*, 16 PHIL. & RHETORIC 35, 36 (1983).

audience, context, and purpose as well as more expansive influences such as effects spread by rhetorical circulation and intertextuality. If successful in their balancing work, rhetors will perceive an opening for action, an opening that calls forth discourse to address a perceived imperfection in the world.

In law, perception of the opportune moment is complicated by additional constraints operating within the legal system, ranging from legal reasoning principles and their thrust of rationality and objectivity, to the ways that legal roles (e.g., prosecutor vs. defense attorney), shape and precondition legal decision-making, to jurisprudential ideology (e.g., originalism and legal realism), to who is sitting on a multi-member court that will evaluate a dissent and determine whether the time is right for a change in the law to occur.[129] Balancing these legal constraints along with the previously mentioned rhetorical and social constraints poses unique rhetorical challenges for law students in the processes of learning to think like a lawyer. Unfortunately, while in this process, law students do not have many opportunities to practice this balancing act. Specifically, law students are given cases to study and fact patterns to respond to. The opportunity to determine when is an appropriate time to respond is seldom, if ever, at issue for law students. They simply respond when called upon. Admittedly, this is a bit of an oversimplification, but in general, identifying the opportune time or opening to respond within is not a part of the decision-making apparatus for law students. As such, the "when" of kairos is not obvious in legal education.

Dissents directly ask law students to respond to the question of "when" in legal contexts, as they are created in a perceived opening created by an adverse judgment. To act in this kairotic opening, dissent authors write to create the discursive holding space for rhetorical circulation and intertextuality to set in. Within this holding space, new articulations and textual relations are activated and reactivated to generate the necessary discursive energy for circulating the dissent conversation that has as its express aim the altering of the community whose acceptance is necessary for realizing the proposed change in law.

Beyond asking students to respond to the general question of "when," dissents also are useful for expanding law students' understandings of the potential influence of kairos in legal communication. Simply put, because dissents require time to take effect, they add a quantitative or chronos aspect of time to kairos.[130] As such, identifying the opportune moment for composing a dissent requires a shift away from a moment to an ecological, collaborative view of

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[129] Berzon, *supra* note 61, at 1485–87; Kirby, *supra* note 62, at 7–8; Mijatov, *supra* note 63, at 80.

[130] *See* James S. Baumlin & Tita French Baumlin, *Chronos, Kairos, Aion: Failures of Decorum, Right-Timing, and Revenge in Shakespeare's Hamlet*, *in* RHETORIC AND KAIROS: ESSAYS IN HISTORY, THEORY, AND PRAXIS 165–66, 175, 179 (2002); Ashley Rose Kelly et al., *Considering Chronos and Kairos in Digital Media Rhetorics*, *in* DIGITAL RHETORIC AND GLOBAL LITERACIES: COMMUNICATION MODES AND DIGITAL PRACTICES IN THE NETWORKED WORLD 229–31 (2014).

multiple kairotic moments as accumulating and accruing through time. In this ecology, such moments circulate and work together to create the kairotic opening for the dissent's ultimate success in achieving the change in the law the dissent initially set forth propositionally.

Deciphering what has made this opening the opportune and appropriate moment requires judgment informed by notions of rhetorical circulation and intertextuality. Such judgment sifts and sorts through history, events, ideologies, attitudes, and the like that circulate in the macro context of the dissent issue. Furthermore, such judgment evaluates the competing yet mutually informing dimensions of the issue, e.g. the political, social, economic, institutional, religious, that create multiple discursive traces that animate discourse about the issue in question. Such judgment requires patience and flexibility to identify and assess a range of circulating factors that inform on the decision to write or not to write.[131]

Ultimately, studying dissents leads us to ask: When is the right time to dissent? What is the appropriate opening for dissent? What is possible to achieve with the dissent? Or, asked together, is now a time in which there is a favorable, wider context for accepting the dissenting argument? Encouraging students to think critically about these questions and seek answers in a collaborative fashion with the professor will help students develop the kind of kairotic judgment that is essential to the contemporary practice of law.

III. IMPLEMENTATION IN THE DOCTRINAL CLASSROOM

Most doctrinal professors already have students read and discuss dissents, particularly those dissents that advance arguments or theories that ultimately became law.[132] Seldom, if ever, however, do professors in doctrinal classrooms explicitly discuss the dissents in terms of the rhetorical principles they might employ or illustrate. Although creative professors could devise various imaginative approaches to introducing advanced rhetorical concepts by using dissents in the doctrinal classroom, this paper offers two suggestions: having the students draft a dissent to one of the cases discussed in class or assigning supplemental and nonlegal readings along with a dissent to support an in-class discussion of the relevant rhetorical concepts. And, although professors could introduce various different advanced rhetorical concepts using these approaches, this paper focuses on four: the rhetorical situation, rhetorical circulation, intertextuality, and kairos. Each approach involves three main steps: selecting the dissent, identifying content for pre-class preparation, and designing an in-class activity or out-of-class assignment (or both).

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[131] The implementation sections of this article offer examples of cases like *Delling v. Idaho* to illustrate the challenge of balancing considerations of kairos and chronos when working to identify the opportune moment for writing a dissent.

[132] Greenhaw, *supra* note 10, at 893–94; *see also* Levine & Saunders, *supra* note 1, at 108.

Assigning students to write a short dissent to one of the cases discussed in class may be attractive for a few reasons. First, it advances the goal of incorporating writing across the law school curriculum[133] without requiring the professor to devise a complicated hypothetical or simulate real-life law practice and without requiring the students to conduct outside research. If the professor imposes a short enough word count, reading and providing brief feedback on the assignments should not pose a significant burden, and the professor could even delegate that effort to teaching assistants or fellows. Second, it requires students to engage with the cases and legal concepts in a way that encourages them to identify and question potentially faulty assumptions on which a line of legal reasoning is based. Third, and perhaps most importantly, it allows many students to reclaim the knowledge, experiences, and values they brought with them to law school, which law school often encourages students to stifle in order to better exercise the dispassionate reasoning "required" to "*think like a lawyer*" and "*discover*" the "*true law*."[134]

Selecting the case probably presents the greatest challenge. The ideal case or cases would present opportunities for the students to consider other texts that might inform or influence the decision and the cultural, political, and jurisprudential climate in which the decision was written or in which the central legal dispute arose. The optimal case would also enable students to trace thoughts and ideas through various texts, including briefs from the parties or amici, through to the dissent. In selecting the case, the professor has three primary options: to assign all students the same case, to assign individual students different cases, or to allow the students to select a case from among the ones covered in course readings and class discussion. Assigning all the students the same case has some advantages. The professor can better compare student papers to one another. The professor can focus in-class discussion around the single case. The professor has richer options in identifying content for pre-class preparation and can require students to read or view some of the materials that could inform student understanding of how the advanced rhetorical concepts come into play. Perhaps most significantly, selecting a single case makes it easier for the professor to ensure that the case presents ample opportunities to explore the key rhetorical concepts the professor wishes to cover. On the other hand, assigning individual students different cases relieves some of the monotony of reading papers on the same topic. Although allowing students to choose their own cases makes it significantly more difficult to ensure that the cases facilitate the objectives of the exercise, it has the advantage of enabling students to respond to a case or issue that provokes strong feelings or opinions in them.

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[133] *See* Pamela Lysaght & Cristina D. Lockwood, *Writing-Across-the-Law-School Curriculum: Theoretical Justifications, Curricular Implications*, 2 J. ASS'N LEGAL WRITING DIRECTORS 73, 99 (2004) (proposing that a "comprehensive writing-across-the-curriculum program in the law school context . . . offers a solution[]" to improving student writing and educating competent new lawyers).

[134] *See* Berger, *Studying*, *supra* note 7, at 63–64 (emphasis added).

Content for pre-class preparation could include something as simple as having the students read short descriptions of the rhetorical situation, circulation, intertextuality, and kairos from texts on rhetoric or even from web sources like Wikipedia.[135] If the professor assigns a single case or a limited selection of cases, the professor should also assign texts that help to put that case or those cases in a cultural, political, social, and jurisprudential context. Texts could include news articles or opinion pieces, artistic pieces like short stories, film clips, or selections from novels, or even print or television advertisements or public-service announcements, along with excerpts from the parties' briefs and any influential amicus briefs.

The in-class activity could begin with a brief discussion of the rhetorical concepts at issue and how they might affect a dissent. The professor could use the key case to guide students through identifying the exigence, the audience, and the constraints. The professor could then invite students to talk about the ideas, texts, and arguments covered in the assigned reading that might cause an author to frame the legal analysis differently and support or justify a different outcome. Then, after and informed by this class discussion, the students would write a short dissent outside of class, focusing less on case law and more on challenging the majority opinion through arguments shaped and informed by the rhetorical concepts at play.

Alternatively, a professor might teach these advanced rhetorical concepts by assigning supplemental and nonlegal readings along with a dissent to support an in-class discussion of those concepts. Along with the dissent, the professor could assign newspaper articles or opinion pieces that shed light on the social, political, and cultural environment in which the case was decided or in which the law being challenged arose, or texts that otherwise inform the dissent or a reader's understanding of the dissent. The professor could also assign excerpts from relevant briefings in the case, including any influential amicus briefs.

For example, Justice Harlan's dissent in *Miranda v. Arizona*[136] asserts concerns about increased crime, criminals escaping justice, and depriving law enforcement of essential tools—all themes prevalent in popular culture and media in the ensuing years.[137] A professor having students read the majority opinion and dissent in *Miranda v. Arizona* might also have students watch portions of the movie *Dirty Harry* or urban dystopian melodramas like 1972's original

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[135] *See, e.g.*, *Intertextuality*, WIKIPEDIA.COM, https://en.wikipedia.org/wiki/Intertextuality [https://perma.cc/ACV3-WA9D] (last visited Mar. 22, 2020); *Kairos*, WIKIPEDIA.COM, https://en.wikipedia.org/wiki/Kairos [https://perma.cc/XK3H-78FP] (last visited Mar. 22, 2020); *Rhetorical Circulation*, WIKIPEDIA.COM, https://en.wikipedia.org/wiki/Rhetorical_circulation [https://perma.cc/Z8WC-46SB] (last visited Mar. 22, 2020); *Rhetorical Situation*, WIKIPEDIA.COM, https://en.wikipedia.org/wiki/Rhetorical_situation [https://perma.cc/9YKP-WK77] (last visited Mar. 22, 2020).

[136] Miranda v. Arizona, 384 U.S. 436, 504–24 (1966) (Harlan, J., dissenting).

[137] *Id.* at 517, 524.

Death Wish.[138] Students could also read news articles about the ballooning of the U.S. crime rate in the 1970s, about Richard Nixon's "War on Crime" and how Nixon used fear of crime to his political advantage, and about local news's overwhelming shift in focus from public-affairs journalism to sensationalist scene-of-the-crime "breaking news," even after the crime rate began to fall in the 1990s.[139]

Alternatively, a professor teaching antitrust law or sports law could have the students read Justice Marshall's dissent in *Flood v. Kuhn*,[140] the decision that upheld Major League Baseball's antitrust exemption. In his dissent, Justice Marshall compared baseball's reserve clause to involuntary servitude.[141] Along with the dissent, the professor could assign selections from books and articles about the reserve-clause controversy or about racial issues in baseball and in sports in general in the middle of the twentieth century, or even poetic pieces waxing lyrical about America's "national pastime" (as indeed Justice Blackmun waxed in his majority opinion).[142]

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[138] I now realize that my law school "Film and the Law" class taught by the incomparable Professor Terry K. Diggs, was implicitly about rhetorical circulation, intertextuality, and kairos.

[139] *See, e.g.*, Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 3, 14–16 (2013) (discussing the rise of "tough on crime" politics in the late 1960s and 1970s); *Law and Order (Politics)*, WIKIPEDIA.COM, https://en.wikipedia.org/wiki/Law_and_order_(politics) [https://perma.cc/WT2Z-2XQZ] (last visited Mar. 22, 2020) (discussing Richard Nixon's "law and order" campaign in the 1968 election); Jeremy Lipschultz, *The Origins of Crime News on TV*, OXFORD RES. ENCYCLOPEDIA OF CRIMINOLOGY (Apr. 2017), https://oxfordre.com/criminology/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-57 [https://perma.cc/T3SR-XC9K] ("In the United States in the 1970s, local 'action news' formats, driven by live broadcast technologies and consultant recommendations designed to improve ratings, changed the nature of television news. Specifically, industry watchers perceived a shift from public affairs journalism about politics, issues, and government toward an emphasis on profitable live, breaking news from the scene of the crime."); Yeoman Lowbrow, *Alarmed and Dangerous: A Look at Crime in 1970s–80s America*, FLASHBAK (Nov. 12, 2014), https://flashbak.com/alarmed-and-dangerous-a-look-at-crime-in-1970s-80s-america-25282/ [https://perma.cc/74SJ-BKW3] (describing the perception of rampant crime in the 1970s and detailing some of the manifestations of that obsession in popular culture); Terence McArdle, *The 'Law and Order' Campaign that Won Richard Nixon the White House 50 Years Ago*, WASH. POST (Nov. 5, 2018), https://www.washingtonpost.com/history/2018/11/05/law-order-campaign-that-won-richard-nixon-white-house-years-ago/ [https://perma.cc/M999-FMDE]; Barbara Millhausen, *1968 Nixon Law and Order*, YOUTUBE (Sep. 26, 2016), https://www.youtube.com/watch?v=cEdtwQ8OguY [https://perma.cc/K68P-6CJN] (video of television ad for Nixon in 1968 campaign); *Richard Nixon Campaign '68*, APM REPORTS, https://features.apmreports.org/arw/campaign68/b1.html [https://perma.cc/57V5-L337] (last visited Mar. 22, 2020).

[140] Flood v. Kuhn, 407 U.S. 258, 288 (1972) (Marshall, J., dissenting).

[141] *Id.* at 289.

[142] *Id.* at 264; *see also* BRAD SNYDER, A WELL-PAID SLAVE: CURT FLOOD'S FIGHT FOR FREE AGENCY IN PROFESSIONAL SPORTS 130–31 (2006); Mary Craig, *Chained to the Game: Professional Baseball and the Reserve Clause, Part Two*, SBNATION (June 10, 2017, 1:00 PM),

Or a professor teaching the insanity defense in criminal law could have students read the dissent to the denial of certiorari in *Delling v. Idaho*,[143] a case involving a state statute essentially abolishing the traditional insanity defense.[144] In the wake of the *Hinckley* verdict in 1982,[145] a number of states enacted similar statutes narrowing the insanity defense, shifting the burden of proof, or abolishing the defense outright and instead requiring defendants to assert that their mental illnesses deprived them of the requisite mens rea for the underlying offenses.[146] In his dissent to the denial of certiorari in *Delling*, Justice Breyer makes a point about culpability through a hypothetical comparing a murder defendant who asserts that he is not responsible because he believed his human victim was a wolf, on the one hand, with a murder defendant who asserts that he is not responsible because he believed that a wolf ordered him to commit the crime, on the other.[147] The Breyer dissent went on to be cited in the briefing and the Kansas Supreme Court's opinion in another case, *State v. Kahler*,[148] involving another state statute essentially abolishing the traditional insanity defense,[149] and in the briefing when the Supreme Court of the United States granted certiorari in 2019.[150] During the SCOTUS oral arguments, Jus-

https://www.beyondtheboxscore.com/2017/6/10/15766702/curt-flood-mlbpa-reserve-clause-free-agency [https://perma.cc/8FZS-U4Y2]; Allen Pusey, *June 19, 1972: Curt Flood Loses 'Reserve Clause' Challenge*, A.B.A. J. (June 1, 2018, 12:35 AM), http://www.abajournal.com/magazine/article/curt_flood_loses_reserve_clause_challenge [https://perma.cc/UT59-KTM9] (recounting the background of the Flood case).

[143] Delling v. Idaho, 568 U.S. 1038, 1039 (2012) (Breyer, J., dissenting).

[144] *Id.*

[145] In 1981, John W. Hinckley, Jr. attempted to assassinate Ronald Reagan, then the President of the United States. *See* United States v. Hinckley, 407 F. Supp. 2d 248, 251 (D.D.C. 2005); United States v. Hinckley, 525 F. Supp. 1342, 1345 (D.D.C. 1981). At the resulting criminal trial, Hinckley was found not guilty by reason of insanity and confined to a psychiatric hospital instead of prison. *Hinckley*, 407 F. Supp. 2d at 252.

[146] Public outrage in the wake of the verdict led to calls to abolish the insanity defense altogether. *See* Kimberly Collins et al., *The John Hinckley Trial & Its Effect on the Insanity Defense*, UMKC, http://law2.umkc.edu/faculty/projects/ftrials/hinckley/hinckleyinsanity.htm [https://perma.cc/8WCC-DFQ4] (last visited Mar. 22, 2020); Judi Hasson, *Hinckley Verdict Backlash Decried*, UNITED PRESS INT'L (Oct. 27, 1982), https://www.upi.com/Archives/1982/10/27/Hinckley-verdict-backlash-decried/3724404539200/ [https://perma.cc/2ST4-PV2P]; Natalie Jacewicz, *After Hinckley, States Tightened Use of the Insanity Plea*, NAT'L PUB. RADIO (July 28, 2016, 10:20 AM), https://www.npr.org/sections/health-shots/2016/07/28/486607183/after-hinckley-states-tightened-use-of-the-insanity-plea [https://perma.cc/24NH-3XP2].

[147] *Delling*, 568 U.S. at 1040 (Breyer, J., dissenting).

[148] State v. Kahler, 410 P.3d 105, 125 (Kan. 2018).

[149] *Id.*

[150] Brief for Petitioner at 41–42, Kahler v. Kansas, 139 S. Ct. 1318 (2019) (mem.) (No. 18-6135).

tice Breyer even posed the same hypothetical to the attorney for the State of Kansas, changing the wolf in both parts of the hypothetical to a dog.[151]

A professor using *Delling* would assign the usual background reading on the key rhetorical concepts, along with the *Delling* dissent, portions of the briefing in *Kahler* at the Kansas Supreme Court level, portions of the majority opinion from the Kansas Supreme Court in *Kahler*, portions of the briefing before SCOTUS in *Kahler*, and key portions of the SCOTUS oral argument transcript (notably the colloquy between Breyer and the attorney for the State of Kansas). Along with these legal readings, the professor could assign articles on the John Hinckley trial and the public reaction to the verdict as well as the legislative response.[152] Finally, in light of Breyer's curious choice of hypothetical, and particularly the shift from wolf to dog between the written dissent and the oral-argument colloquy, a professor should strongly consider assigning readings on the Son of Sam crimes, David Berkowitz's initial assertion that a demon—speaking through his neighbor Sam's dog, "Harvey"—ordered him to commit those crimes, and Berkowitz's subsequent recantation of that story.[153]

In class, the professor could then lead a discussion—or moderate small-group discussions—of how an understanding of the advanced rhetorical concepts might deepen an understanding of the dissent itself and the area of law in general, and how rhetorical concepts explain why an argument that is the dissent in one case may become the majority opinion in a later era. After the class discussion, the professor could then assign a short, low-stakes reaction paper encouraging the students to reflect on how these outside readings and explicit considerations of the rhetorical situation, rhetorical circulation, intertextuality, and kairos might deepen their understanding of the dissent and how they might apply these tools to their reading of other cases in the future.

IV. IMPLEMENTATION IN THE LEGAL WRITING CLASSROOM

In the first semester of a first-year legal writing, research, and analysis (LRA) course, most schools teach the building blocks of legal writing and

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[151] Transcript of Oral argument at 38–40, Kahler v. Kansas, 139 S. Ct. 1318 (2019) (mem.) (No. 18-6135). Interestingly, the attorney for the State of Kansas did not seem to have a well-prepared response to the hypothetical. *See id.* at 40.

[152] *See, e.g.*, Hasson, *supra* note 146; Jacewicz, *supra* note 146; Douglas O. Linder, *John Hinckley, Jr. Trial (1982)*, FAMOUS TRIALS https://famous-trials.com/johnhinckley [https://perma.cc/K2X3-YXKF] (last visited Mar. 22, 2020).

[153] *See, e.g.*, David Abrahamson, *Unmasking Ion of Sam's'*, N.Y. TIMES (July 1, 1979), https://www.nytimes.com/1979/07/01/archives/unmasking-son-of-sams-demons.html [https://perma.cc/2DWJ-DLFX]; Eugene S. Robinson, *Meet the Serial Killer Who Took His Orders from a Demon Dog*, OZY (May 15, 2018), https://www.ozy.com/flashback/meet-the-serial-killer-who-took-his-orders-from-a-demon-dog/86398/ [https://perma.cc/P28L-HXQ8]; *David Berkowitz*, WIKIPEDIA.COM, https://en.wikipedia.org/wiki/David_Berkowitz [https://perma.cc/Z66C-GHHW] (last visited Mar. 22, 2020); *The "Son of Sam" Trial: 1978*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/law/law-magazines/son-sam-trial-1978 [https://perma.cc/32DU-3B7D] (last updated Feb. 8, 2020).

analysis—the organizational paradigm, synthesizing a rule from multiple sources, and using case illustrations to explain how a legal rule operates in practice—through some form of predictive legal writing.[154] In teaching rule synthesis in that first semester, professors often struggle to get new law students to move beyond simply quoting the rule a court states in deciding a case and read the case more closely and critically to identify the perhaps-more-nuanced rule that courts are actually applying in a certain area of law.[155] To do this, students must be able to identify the dispositive facts—the facts that a court relies on in reaching a particular resolution.[156]

In the second semester, many if not most students have mastered reading cases to identify the key dispositive facts and analyzing how they affect the outcome and inform the overall legal rule.[157] Students may still struggle, though, to identify opportunities for analogical argument when no cases seem to address their facts or situation squarely.[158] And even students who show greater aptitude for making analogies do not always recognize larger patterns in case law or common assumptions or narratives that run through different areas of the law.[159] The next step, then, is encouraging students to read cases at an even deeper level to identify the undercurrents and thematic threads that allow lawyers to make creative, persuasive, and even world-changing legal arguments that remain tied to precedent, even where precedent seemingly on point is missing, unhelpful, or adverse. Explicitly teaching this handful of advanced rhetorical concepts in the legal writing classroom can arm students with the vocabulary to see a case as more than a vessel for holding, facts, and reasoning and allow them to identify patterns, analogies, and strategies for making more sophisticated and compelling legal arguments.

An LRA professor might use a dissent to introduce these advanced rhetorical concepts by having the students read and analyze a short dissent and then engage in a class discussion regarding the rhetorical concepts and how they

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[154] ASS'N OF LEGAL WRITING DIRS. & LEGAL WRITING INST., REPORT OF THE 2017–2018 INSTITUTIONAL SURVEY 25 (2017–18).

[155] *See* Fajans & Falk, *supra* note 21, at 163–64 (students are "seduced by the text[,]" and "fail to see how another author 'worked' the text on them.").

[156] Greenhaw, *supra* note 10, at 883 ("A . . . lawyer needs to be able to discern the facts . . . to which a legally authoritative writing responded. Only then can the lawyer critically evaluate it as a resource in the situation presented for analysis and give it the weight it deserves in his or her composition.").

[157] *See* Stephanie Roberts Hartung & Shailini Jandial George, *Promoting In-Depth Analysis: A Three-Part Approach to Teaching Analogical Reasoning to Novice Legal Writers*, 39 CUMB. L. REV. 685, 686 n.7 (2009).

[158] *See id.* at 686 ("While students are generally able to compare facts from precedent cases to their own set of facts, using these comparisons to effectively support a legal argument is a far more elusive skill."); Robbins, *Paradigm Lost*, *supra* note 112, at 535 ("Weak and/or incomplete analogies are most common among novice legal writers who struggle, without adequate foundation, to mimic analogy within deduction.").

[159] *See* Fajans and Falk, *supra* note 21, at 163 ("Even the best and brightest students too often scan judicial opinions for issue, holding, and reasoning and call that 'reading.'").

manifest in that dissent. Outside of class, the students could then apply this analysis to one of their major writing assignments and write a short, low-stakes paper analyzing those concepts in the context of that assignment and reflecting on how those concepts might influence how they approach the assignment. The ideal time to conduct this exercise would be after the students have become familiar with the facts and law at issue in the major writing assignment so that they can more readily see how the rhetorical concepts that manifest in the dissent might also manifest in their major writing assignments.

In selecting the dissent, like the professor in the doctrinal classroom, the LRA professor should select one that presents opportunities to talk about rhetorical circulation, intertextuality, and kairos.[160] Short dissents are ideal because they allow the professor the time in class to walk the students through a close, critical reading of the dissent with the rhetorical concepts in mind. The professor should also give some thought to how the concepts might come into play in the major writing assignment, or even design the major writing assignment around opportunities to discuss those concepts.

To prepare for class, students should read short selections describing the four advanced rhetorical concepts.[161] In addition, just as in the doctrinal classroom, the professor would also assign some legal—or more likely nonlegal—texts that arm the students to recognize the arguments, assumptions, and ideas circulating in the culture at the time of the opinion that also pop up in the dissent.

In class, then, the LRA professor can either lead the entire class through a critical reading of the dissent to identify the rhetorical concepts at play and the texts or ideas that pop up, or she can moderate smaller-group discussions. The professor might even assign the groups to jointly draft a short rhetorical analysis of the dissent in class.

After discussing the concepts in class and exploring them through a close reading of the dissent, outside of class, the students would then turn to exploring those concepts in the context of one of their major legal writing assignments, such as a trial or appellate brief. The professor would assign students a short, low-stakes writing assignment where the students would explore the advanced rhetorical concepts at play. The students would first identify the components of the rhetorical situation for their briefs—the exigence, the audience, and the constraints, including an analysis of the artistic and inartistic proofs on which the students as rhetors will rely. The students would also identify ideas, assumptions, and texts that pop up in the case law and reflect the cultural and political contexts in which the relevant law arose and how changes to that context might change which arguments and strategies work best before different courts at different times.

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[160] Presumably every case presents the opportunity to discuss the rhetorical situation.

[161] A professor who plans to use a similar assignment year after year might create a short video lecture introducing the concepts.

Conducting this exercise when the students are thoroughly familiar with the facts and law at issue, but before they have written a full first draft of their legal argument, may help the students engage with the legal texts on a deeper and ultimately more effective level by encouraging them to recognize the implicit assumptions and reasoning as well as the explicit facts, rationale, and holding. The exercise may also help the students formulate legal arguments that are ultimately deeper, more accurate, and more compelling.

LRA professors should also seriously consider explicitly teaching students how to cite and discuss dissents effectively in written legal advocacy. If, indeed, many dissents ultimately become law—or at least influence the shape of the law in some way—certainly the wise advocate should be skilled in writing about them and using them as persuasive tools. One method for approaching this nicely dovetails with some practical research instruction: An LRA professor could select one of the well-known influential dissents—like Justice Harlan's dissent in *Plessy v. Ferguson*,[162] Justice Brandeis's dissent in *Olmstead v. United States*,[163] or Justice Stone's dissent in *Minersville School District v. Gobitis*[164]—and then have the students use law-updating tools on legal research software to identify briefs that cite that dissent and trace the dissent's influence through the ultimate court opinion. Once the students settle on briefs and opinions to analyze, they could write a short paper analyzing the rhetorical situation and the techniques the brief writers used to deploy the dissent to their advantage. The students could also reflect on kairos—considering both why the dissent's reasoning, which did not hold sway in the original opinion, was better timed when reasserted later, and why it was effective where and how it was used in a given brief. Of course, this exercise requires the LRA professor to do significant research and legwork at the outset to identify briefs that seem to use the dissent effectively and opinions influenced by the dissent, but it could be a powerful teaching tool and, of course, a way to explicitly explore rhetorical situations, rhetorical circulation, intertextuality, and kairos.

V. DISSENT IMPLICATIONS

Using dissents as a pedagogical tool for introducing law students to the complex rhetorical concepts of rhetorical situation, rhetorical circulation, intertextuality, and kairos has tremendous implications for legal education and for heightening law students' understanding of the close relationship between law and rhetoric. Most notable among these implications is that thinking through the constitutive capacity of these rhetorical concepts positions law students to see and understand how meaning making and knowledge creation in law are not processes far removed from their lives. Instead they are processes available at their hands and ready to be leveraged to support both the kinds of work they

[162] Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).
[163] Olmstead v. United States, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).
[164] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 601 (1940) (Stone, J., dissenting).

want to perform as lawyers and the kinds of lives and identities they want to cultivate as professionals. Also, thinking about the connection between law and rhetoric in ways discussed in this Article raises important questions regarding the training of lawyers for the contemporary practice of law.

First, we are interested in imagining lawyers as public citizens, individuals not just engaged in the traditional practice of law.[165] Using dissent and rhetoric principles, can we shift law students' imaginations about what it means to take on responsibilities of both client advocacy and public citizenship? What are the implications to legal writing pedagogy of teaching law students not just to write for the law but for social change? Is it appropriate to teach them to write for social change?

Second, dissents expand understandings of lawyers as authors. Dissent pedagogy demonstrates that lawyers have authoring potential beyond just developing arguments in support of a client's case. They are authors of rhetorical situations and of new intertextual articulations that create conditions for innovating on the law. Ultimately, can broadening notions of authoring provide lawyers with agency and enable them to envision themselves as more than just passive conduits of predetermined outcomes?

Third, so much controversy in law today is about the role of values in argumentation.[166] However, "[e]xpressing the law is inescapably a process shaped by values."[167] Is it possible through dissent pedagogy to slow the exclusion of values that law's systematicity enacts and help students account for and embrace the rhetorical potential of values in legal argumentation?

Fourth, as we move the meter toward public citizenship, new authoring roles, and values, can we more intentionally address lawyer well-being? Do nuanced understandings of rhetorical situation, rhetorical circulation, intertextuality, and kairos developed through dissent pedagogy help students identify new pathways for cultivating more autonomy and developing sustainable connections between their professional and personal lives?

Explicitly addressing questions like these will help law students become better strategic thinkers and help them see their writing in a larger context of a case, of a litigation strategy, or of a larger movement of social change. Furthermore, framing legal discourse in terms of the discussed complex rhetorical concepts might make it easier to have the difficult, inevitably political, and sometimes emotional conversations that arise when law is placed in the larger context in a less charged, safer way.

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[165] For a discussion of the concept of lawyer as public citizen, see Robert W. Gordon, *The Citizen Lawyer—A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169, 1169 (2009); Irma S. Russell, *The Lawyer as Public Citizen: Meeting the Pro Bono Challenge*, 72 UMKC L. REV. 439, 439 (2003); Robert E. Scott, *The Lawyer as Public Citizen*, 31 U. TOL. L. REV. 733, 733 (2000).

[166] For example, there is much criticism of originalism's attempt to keep values out of legal argumentation and decision-making. *See* ERIC J. SEGALL, ORIGINALISM AS FAITH 3 (2018).

[167] Kirby, *supra* note 62, at 5; *see also* SEGALL, *supra* note 166, at 3.

Admittedly, the prospect of adding complex rhetorical concepts to law school curriculum may seem daunting. However, law faculty are already there. They are actively working to integrate rhetoric and note its relevance to law.[168] This Article presents dissent pedagogy as a kairotic opening before faculty. It is time to act in that opening and rearticulate dissent pedagogy as a necessary complement to the training of lawyers for the contemporary practice of law, which necessarily engages law, rhetoric, and politics.

[168] *See* sources cited *supra* notes 10, 21, 23, and 25–26.