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Forensic Rhetoric and Irving Younger

John E. Simonett*

Rhetoric, as part of our vocabulary, has fallen into disuse, even disrepute. The word has a musty, pedantic sound to it. To characterize an argument as "mere rhetoric" is to dismiss it.

Yet well into the eighteenth century rhetoric was considered a necessary accomplishment of the public citizen and the lawyer. Early American lawyers considered Cicero, the great rhetorician, their role model. Rhetoric was part of the classical educational curriculum of the Middle Ages, tracing its roots back to ancient Greece and Rome. The classicists recognized rhetoric as the "faculty of observing in any given case the available means of persuasion;"¹ but they recognized it as much more than that, too. Rhetoric was also eloquence in public, persuasion employed in the public forum on issues of public moment.² Rhetoric, fully understood, was the process by which the commonweal conversed with itself.

Ideas of eloquence have changed, of course. The ornate oratory of yesteryear, with which we frequently identify rhetoric, sounds, to the modern ear, ludicrously inflated. But this is only an accident of style easily remedied. The essence of rhetoric as persuasive public discourse remains valid. Indeed, if anything, rhetoric is even more needed in today's public forum. Forensic rhetoric, perhaps to distance itself from the excesses of modern political rhetoric, chooses to speak of the art of persuasion and the art of advocacy. These are perfectly good terms, but they lose, it seems to me, the added dimension of honorable public service inherent in the more traditional term. As a consequence, the lawyerly art of persuasion tends to be downgraded in legal education as well as in the eyes of the public, to the impoverishment of the profession.

When asked to explain rhetoric, Irving Younger, in one of

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1. ARISTOTLE, RHETORIC AND POETICS, Book 1, Ch. 2, 24 (F. Solmsen ed. 1954).

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his columns, quoted Claudio speaking of his sister Isabella in Measure for Measure:

She hath prosperous art
When she will play with reason and discourse,
And well she can persuade,  

For Professor Younger, rhetoric was the “prosperous art” that ennobled the profession of law.4 “[T]he word ‘rhetoric,’” he wrote, “properly used, denotes qualities both honorable and indispensable to lawyers.”5

Note the qualifying phrase, properly used. In many ways, it seems to me, Irving Younger’s career represents an effort to refurbish and restore rhetoric to its classical meaning and rightful importance. In so attempting, he did much to instill in the trial bar standards of excellence and pride in its calling. This essay explores briefly Professor Younger’s contributions to legal education as a forensic rhetorician.

I. RHETORIC

Rhetoric, it bears repeating, is a public activity. It takes place in a public forum and the courtroom represents the most important public forum for resolving public issues. “‘I have no wish to shine as an orator,’ said K., having come to this conclusion, ‘nor could I if I wished. The Examining Magistrate, no doubt, is much the better speaker, it is part of his vocation. All I desire is the public ventilation of a public grievance.’”  

Although K.’s fate was otherwise, Kafka’s point was that once a grievance reaches the courtroom, even the faceless state acquires a face and the individual’s concern becomes the public’s concern. In the United States, with its traditional dependence on the law, not only private disputes but all great public issues sooner or later become courtroom issues. Richard Kluger, in his book on Brown v. Board of Education,7 writes:

American society thus reduces its most troubling controversies to the scope—and translates them into the language—of a lawsuit. In no other way has the nation contrived to frame these problems for a definitive judgment that applies to a vast land, a varied people, a whole

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4. Id.
5. Id.
In the courtroom, then, we conduct a public search for justice, but truth is never exhausted and justice is never disinterested. If we as a people must judge, the assistance of the lawyer as rhetorician is indispensable.

The courtroom trial creates a world of its own, its meteorology dependent on the highs and lows of the contesting forces of persuasion. On the bench is the judge; close by, the court reporter. In the witness stand sits, paradoxically, the witness; in the jury box sit the jurors. Counsel are at the counsel table with the parties nearby, and behind the rail are observers, including that surrogate of the public, a news reporter. The lawyers have the task of orchestrating the proof and the argument.

The verdict, it is said, announces the truth of this courtroom enterprise. But how can this be? Facts are kept from the jury either by counsel coaching the witness ("don't volunteer anything") or by the judge ruling on evidence ("objection sustained"). The jury is told it need only find a claim more likely

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9. "... justice is like silver, and must be assayed by the judges, if the genuine is to be distinguished from the counterfeit." ARISTOTLE, supra note 1, at 83-84.
10. "Judge Taylor was on the bench, looking like a sleepy old shark, his pilot fish writing rapidly below in front of him." H. LEE, TO KILL A MOCKINGBIRD 175 (1960).
11. "Bryan took his seat on the hard, spindle-legged pedestal, began fanning himself and faced his inquisitor." I. STONE, CLARENCE DARROW FOR THE DEFENSE 457 (1941).
12. "Judge Coates said, 'A jury has its uses. That's one of them. It's like a—a—he paused. 'It's like a cylinder head gasket. Between two things that don't give any, you have to have something that does give a little, something to seal the law to the facts. There isn't any known way to legislate with an allowance for right feeling.'" J. COZZENS, THE JUST AND THE UNJUST 427 (1942).
13. "The advocate must acquire the art of being passionate with detachment and persuasive without belief . . . . Indeed belief, for the advocate, is something which is best kept in a permanent state of suspension. There is no lawyer so ineffectual as one who is passionately convinced of his client's innocence." J. MORTIMER, CLINGING TO THE WRECKAGE 95-96 (1982).
14. "'You may try, and try, and try again, Messrs. Dodson and Fogg,' said Mr. Pickwick vehemently, 'but not one farthing of costs or damages do you ever get from me, if I spend the rest of my existence in a debtor's prison.'" C. DICKENS, PICKWICK PAPERS 535 (J. Kinsley ed. 1986).
15. "... But they also poke their noses into what concerns everybody. This nose-poking isn't something you can turn on and off like electricity. If you want the benefit of what journalists do, you must put up with some of the annoyance of what they do, as well." R. DAVIES, LEAVEN OF MALICE 132 (1954) (quoting the character Mr. Ridley).
true than untrue. Even if told it must find beyond a reasonable
doubt, the jury also is told that absolute certainty is not re-
quired. And throughout the trial and on appeal, the court bal-
ances competing interests, seemingly comparing plums and
pears. Consequently, as James Boyd White observed, rhetoric
often is perceived either as cynical manipulation, an “ignoble
art,” or “failed science.”

Rhetoric always has been suspect as a conjuring art. Law-
yers, it is said, twist facts, although they may be calling atten-
tion only to the different inferences legitimately to be drawn
from the facts. But merely because the art of persuasion can be
misused is no reason not to use it properly. Indeed, rhetoric is
intended to be used on both sides of a question, says Aristotle;
not to make people believe what is wrong, but to clarify the is-
issues and to refute what is false.

The perception of rhetoric as failed science is understanda-
ble. Science seems so sure of itself, translating knowledge into
precise, quantifiable terms. Only when exact knowledge is un-
obtainable is the problem turned over to the rhetoric of law for
a less than perfect answer. Science diagnoses a patient as men-
tally ill. Is the patient, if released, dangerous to others? Sci-
ence does not know and refers the matter to law. “[R]hetoric,”
says Professor White, “is thought of as what we do when sci-
ence doesn’t work.” But, of course, scientific knowledge also
is based on its own set of contingencies and hypotheses. The
truth is never quite pinned down, whether in science or law,
but at times we must act as if it is. Although a simple mathe-
matic proof shows that parallel lines do meet, observes Profes-
sor Younger, the architect builds the skyscraper on the
assumption that they do not. He notes that: “Thus we learn
to adopt a conventional certitude, to act as though all were light
by blinking the shadow.” Rhetoric, if properly used, no less
than science, provides us with the “conventional certitude”
needed to get the world’s work done.

Rhetoric properly used means, first of all, that it is compe-
tently used. The lawyer must know how to winnow the facts,
how to cross-examine, how to use the rules of evidence, how to
sum up, how to do many things. It is not very difficult for the

16. White, supra note 2, at 684.
17. Aristotle, supra note 1, at 23.
18. White, supra note 2, at 687.
19. Younger, Professional Responsibility, 43 Brooklyn L. Rev. 863, 864
(1977) [hereinafter Professional Responsibility].
20. Id. at 863-64.
lawyer to learn what these "how tos" are. Professional journals and seminars pour forth an endless stream of advice on trial tactics. Most of the advice is nothing new. Aristotle pretty much said it all centuries ago. To impeach a witness, he tells us, we should determine if "he is a friend or an enemy or neutral, or has a good, bad, or indifferent reputation, and any other such distinctions ..."21 or in oral argument, he tells us, the orator must "put his hearers, who are to decide, into the right frame of mind."22

There is, however, a wide gap between knowing what is to be done and doing it. The American Bar Association's Conference on Enhancing the Competence of Lawyers, in its 1981 report, pointed out that there is a difference between competence and performance.23 A lawyer may know what to do but do it poorly. It was the profession's good fortune that Irving Younger early on saw this gap between competence and performance and applied his remarkable talents to effecting a remedy. In lectures to law students, and in demonstrations before the practicing bar across the country, he insisted that competence be wedded to performance. It was true, he thought, that all the world was a stage. In his talk on the "Ten Commandments for Cross-Examination," Professor Younger not only told how to cross-examine, he showed how. In teaching the rules of evidence, he employed vignettes showing that the purpose of the rules was not to "keep evidence out," but to let the truth in.24 In analyzing cases, he went behind the reported opinions of the appellate courts. He went to the trial records and even to personal interviews with trial participants to show how the performance of counsel in imposing order on the facts and defining the issues influences the final result.25 In short, Profes-

21. ARISTOTLE, supra note 1, at 86.
22. Id. at 90.
25. See (even better, listen to), e.g., I. Younger, The Trial of Alger Hiss (1988) (available in audio or video tape from the Professional Education Group, Inc.); I. Younger, What Happened in Erie? A Probing Examination of Erie v. Tompkins, (available in audio or video tape from the Professional Education Group, Inc.). For Hiss, Professor Younger read the voluminous record of both trials, including pretrial depositions. He tells the story based on the record and quoting the participants. The lecture, among other things, is a penetrating study of how forensic rhetoric shapes a welter of facts and inferences into proof that persuades. In Erie, Professor Younger relies on the pleadings, record, and briefs, as well as his correspondence with the plaintiff's lawyer.
Professor Younger taught that rhetoric shapes law and that competence depends on performance.

Rhetoric properly used must also be fairly used. In quoting Dr. Johnson's pronouncement that "[a] lawyer is to do for his client all that his client might fairly do for himself, if he could," Professor Younger stressed the word fairly. How can one represent a guilty client? One can, of course, because society believes the better good is for the guilty to be represented. "The moral basis of advocacy," wrote Professor Younger, "lies in the lawyer's obligation to speak for anyone or anything, but always, I perceive, consistently with his own honor, for the imposition of a moral obligation presupposes some sort of moral worth in the subject of the obligation." For the advocate, then, in weighing the moral imperatives, a "personal honor compels him to draw a line beyond which he will not go in supporting the client's cause."

Not only is a personal sense of honor essential in advocating a client's case, but it governs, too, the advocate's relationship with other lawyers. The lawyer-to-lawyer relationship is not so much governed by prescribed rules but by something much more binding to a person of honor, namely, good manners, or what Professor Younger tentatively called "etiquette." Ultimately, then, rhetoric competently and fairly

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28. Id. at 867.
29. Id. at 867-68.
30. The word etiquette, wrote Professor Younger, though "inadequate to convey the importance of the subject," nevertheless subtly suggests the relationship lawyers should have with each other. Professional Responsibility, supra note 19, at 867 n.22. By etiquette, Professor Younger does not mean deportment, nor even proper ethical behavior, but, I think, something more that expresses itself in civility. Compare Justice Frankfurter's thought that: "Morals are three-quarters manners." H. PHILLIPS, FELIX FRANKFURTER REMINISCES 12-13 (1960). I have always been struck by how well Cardinal Newman's definition of a gentleman describes what should be the lawyer-advocate: He is never mean or little in his disputes, never takes unfair advantage, never mistakes personalities or sharp sayings for arguments, or insinuates evil which he dare not say out. . . . If he engages in controversy of any kind, his disciplined intellect preserves him from the blundering discourtesy of better though less educated minds; who, like blunt weapons, tear and hack instead of cutting clean, who mistake the point in argument, waste their strength on trifles, misconceived their adversary, and leave the question more involved than
used depends on the advocate's good character (not to be confused with belabored "sincerity").

We have not yet rounded out the full concept of forensic rhetoric. One other aspect remains.

II. RHETORIC AND THE PUBLIC GOOD

The law library of the early American lawyer consisted of a few books on the shelf. There might be Blackstone's Commentaries and not much else. The lawyer had no case reports, no statutes, no hornbooks. Consequently, lawyers turned to classical Greek and Roman writers and the eighteenth century political philosophers, and they relied in argument primarily on first principles and effective rhetoric. To refer to a colleague as learned counsel meant not that counsel was particularly learned in legal matters but learned generally. Advocates patterned their approach after Cicero, who taught that citizenship has public responsibilities and that lawyers, for whom rhetoric is a professional prerequisite, had an obligation to exemplify and to promote the public good. The trial bar during the first decades of our country's history also had the stimulating opportunity to explain and to justify the country's new form of republican government to the people. Professor Ferguson quotes Chancellor Kent, who declared that lawyers were "ex officio natural guardians of the laws" and 'sentinels over the constitutions and liberties of the country.' Lawyers took these responsibilities seriously. They considered themselves, noted Albert Beveridge, to be statesmen and publicists of the government as well as lawyers, "having deep in their minds the well-being of their Nation even more than the success of their clients."

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31. ARISTOTLE, supra note 1, at 24-25.
33. Id. at 65-84.
34. Id.
35. "In the generations from Hamilton to Webster general erudition overrode technical expertise as the primary source of professional identity." Id. at 66.
36. Id. at 74-77.
37. Id. at 25.
38. Id.
We see, then, that the art of forensic persuasion, when placed in its classic traditional setting, acquires its legitimacy, purpose, and authoritative force from its connection to the law. This connection, however, has tended over the years to become attenuated. The law library shelves are more than full now, and as a consequence, forensic rhetoric has become more legalistic, relying more on the weight or bulk of legal authority and less on first principles and general reasoning. Much law is now practiced outside the public forum of the courtroom, thereby leaving lawyers less aware of their Ciceronian obligations. There is the danger that lawyers will settle into the role of being mere technicians, becoming tradespeople rather than counselors at law, and leaving the public dimension of the law to the six and ten o'clock television news bites. When forensic rhetoric loses its true moorings—when it is no more than an adjunct to business and politics—it deteriorates into polemics, the art of disputation for its own sake.

Irving Younger sensed, I think, that any malaise affecting practitioners of the law was not a problem of economics or technology but of the spirit. And how is the practitioner's spirit to be revived? Burke said a lawyer sharpens his mind by narrowing it. Irving Younger disagreed; the narrower the mind, the duller. Advocates, if they are to be true to their calling, if they are to give voice to the community's aspirations, must, he thought, be familiar with literature, art, music, history, and philosophy; they must think through to first principles. Lawyers must cultivate lucidity, candor, aesthetics, efficacy, and elegance.

Professor Younger quotes with approval Paul Freund's remark "that a course in legal ethics be supplemented by visits to the symphony and to the art museums." Appellate judges, he thought, would profit in writing their opinions by reflecting on a Verdi opera or a Gogol short story. If a Younger lecture was unabashedly alive, it was because the law is unabashedly

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40. Thus, on freedom of speech, Professor Younger asks what if there were no first amendment free speech guaranty? On what basis might free speech then be defended? After reviewing the ideas of Milton, John Stuart Mill, Bagehot, Dostoevsky, and Socrates, Professor Younger arrives at the idea of sanctuary, a personal space where the state may not intrude. See Younger, The Idea of Sanctuary, 14 Gonzaga L. Rev. 761, 761-783 (1979).
41. I. Younger, In Praise of Simplicity (1988) (available on audio or video tape from the Professional Education Group, Inc.).
42. 52 ALI PROCEEDINGS 569 (1975), quoted in Professional Responsibility, supra note 19, at 866.
human in its impact. Every law makes an “environmental impact statement” on the human condition with forensic rhetoric drawing out and delineating that impact.

James Boyd White has proposed a most fruitful thesis. He suggests that law itself may be described as rhetoric, what he calls “constitutive rhetoric.” Law can be thought of, not as a set of rules, but as a particular culture of argument, of people talking to and about each other, making and remaking the community. Thought of in this sense, forensic rhetoric is not a matter of technique; rather, “law is an art of persuasion that creates the objects of its persuasion.” Law then becomes an aspect of legal rhetoric, and legal rhetoric is an activity creating culture and community. “And the view of law as constitutive rhetoric,” says Professor White, “should define the lawyer’s own work as far less manipulative, selfish, or goal-oriented than the usual models, and as far more creative, communal, and intellectually challenging.” Irving Younger, I think, would applaud.

III. CONCLUSION

Aristotle pointed out that rhetoric has no subject, but rather is the means by which any subject is presented. This elusiveness explains why rhetoric is difficult to teach. It also suggests, it seems to me, why so often legal education has difficulty deciding what it should be.

In music education there has long been a tradition of “master classes.” Students of piano, voice, or the cello, once having achieved a measure of competence, take master classes from an accomplished pianist, singer, or cellist, a master performer who is able to portray and convey the chemistry that turns competence into artistry. Irving Younger’s classes in forensic rhetoric were master classes in the law.

44. White, supra note 2, at 688. This Essay can only touch on Professor White’s intriguing thesis as described in his law review article, which, in turn, is part of his forthcoming book Heracles’ Bow: Essays on the Rhetoric and Poetics of the Law. Id. at 694 n. 1.
45. Id. at 690.
46. Id. at 691.
47. Id.
48. Id. at 697.
49. ARISTOTLE, supra note 1, at 24.