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A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason

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An ironic feature of the current revival of interest in rhetoric and narrative in American legal scholarship has been its relative neglect of the classical tradition of rhetoric.¹ This neglect is ironic for three reasons. First, the classical tradition of rhetoric was not understood as something foreign to law and therefore a possible subject of “interdisciplinary” study. On the contrary, the art of rhetoric was seen as organically related to the practice of law.² Indeed, what we would today regard as legal education was to a significant degree education in rhetoric.³ Second, many of the problems that fuel our contemporary interest in rhetoric—the importance of pathos or emotion, the significance of personal testimony and narrative, and the role of metaphor, figure, and fiction in shaping the persuasive impact of an argument and in assisting or misleading the audience—were all subjects of intense practical and scholarly concern in the ancient world.

Third and most important, the neglect of the classical tradition has led to a neglect of the substantive connections between rhetoric and reason. A familiar view of rhetoric holds that it is concerned primarily with style rather than substance, with persuasion rather than discovery of the better argument, with emotion rather than reason, with dazzling effect rather than rigorous analysis. Hence the dangers of rhetoric are the dangers of misplaced sentiment, fuzzy thinking, passion overbearing reason, and susceptibility to deceit and chicanery. Even the defenders of rhetoric [*212] have sometimes bought into the opposition between rhetoric and reason, assuming that the value of rhetoric and narrative lie in their ability to provide some alternative to sterile logic or to respond to some deficit in legal reasoning.

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Yet those who identify rhetoric primarily with ornament, passion, specious argument, and deceit, and even those who defend rhetoric as a desirable alternative or supplement to legal reasoning, fail to do justice to the signal importance of rhetoric in the ancient world as a means for public deliberation about public issues under conditions of uncertainty. Despite Plato's famous criticisms of rhetoric as mere flattery, the ancient world well understood that rhetoric had a substantive as well as a stylistic dimension; hence, the common association of rhetoric with the merely stylistic aspects of deliberation is entirely misleading. In this chapter I want to focus on the substantive aspects of rhetoric and show how they remain central to the contemporary work of lawyers, judges, and students of the law.

RHETORIC AS THE STUDY OF INVENTION

In the classical tradition, the study of rhetoric was composed of five canons, each involving the mastery of a particular skill. Given the epithets usually hurled at rhetoric, one might think that the first canon would be the development of style, but this is not so. The first canon of rhetoric is invention (*inventio* in Latin, *heurisis* in Greek).⁴ The skill of invention is concerned with discovering and formulating arguments on any subject, opinions on the resolution of any problem, or reasons for or against any proposed course of action. Thus, despite the usual associations between rhetoric and ornament, the art of invention is inherently a substantive art. Moreover it is essentially pragmatic in orientation, because it is directed to the solution of difficulties placed before the student.

The primacy of the skill of invention in the canons of rhetoric makes perfect sense. Before engaging in stylistic flourishes, one must have arguments upon which to hang them. To say something well, one must first have something to say. Indeed, having something to say is often the most difficult task that faces any orator or deliberator, whether ancient or modern.

Classical rhetoricians approached the problem of invention through the use of *topoi*, or "topics." Topics are things to talk about. The Greek word *topos* literally means "place." The spatial metaphor of place has a number of interlocking meanings and evocations. First, topics are places from which one can argue. Second, topics are "commonplaces," that is, concepts, subjects, or maxims that are widely shared in the culture or are associated with the wisdom that has been distilled into common sense. Third, topics are like pigeonholes or boxes into

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which situations and events can be placed, that is, located, categorized, and organized in their proper [*213] places. Fourth, Aristotle suggested that topics correspond to places in the mind from which different arguments might be fetched.⁵ Finally, just as things appear different from different places, one can think of topics as a perspective or as a way of looking at things.⁶

The point of identifying topics, making lists of them, and committing them to memory was to have at one's immediate disposal a checklist of things to talk about no matter what subject one was presented with and no matter what problem of analysis one faced. Thus, a frequent practice of rhetoricians was the composition and organization of catalogs of topics, which could be memorized and employed by the student. In theory, one could mechanically employ a catalog of topics like a checklist to solve a problem or form an opinion, but in practice, the student of rhetoric hoped to internalize the different topics so that they became like second nature.

Let me give a simple example of how one might use the classical *topoi*. An example of a topic is "part and whole." Suppose one is asked to give a speech about a particular subject, say, elephants. One can apply the topic to this subject in several ways. First, one can discuss the various parts of an elephant and their relation to the whole. Conversely, one can discuss the relation of the elephant to the larger units of which it might form a part: a herd of elephants, the species of elephants, the category of all mammals, the class of all animals, and so on indefinitely. Although this particular topic does not produce very elaborate arguments, it may act as a spur to further invention, and it does give the speaker a number of directions in which to improvise and analyze. And this is the whole point of the topical approach: to use topics to spur imagination and organize analysis. A contemporary version of this technique is the journalist's injunction to ask "who, what, when, where, why, and how" in composing a story.

The topic of part and whole is so general and abstract that it can apply to almost any subject matter. Aristotle called such topics "general topics." He distinguished them from "special topics," which were relevant to a particular subject matter, a specific body of knowledge, or a professional practice.⁷ Medicine has special topics, as does law. Indeed, as we will see presently, any theoretical enterprise tends to develop its own set of special topics as soon as it creates its own set of distinctive concepts and approaches. Metaphorically speaking, special topics have more meat on their bones than do general topics:

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they tend to direct analysis and argument more clearly, and they tend to have more substantive consequences. The trade-off is that they are relevant to many fewer types of problems and situations.

Aristotle wrote a famous treatise on topics in which he tried to give a systematic philosophical discussion of what he regarded as the essential general topics. Unfortunately, Aristotle's *Topics* is pitched at such a high level of abstraction that it is [*214] virtually useless for an advocate. By contrast, Cicero wrote his *Topics* and his earlier treatise *De inventione* for the benefit of advocates. Not surprisingly, many of Cicero's topics—as well as his examples—intersect with the legal categories of his time. This connection is not accidental; indeed, it is exemplary of the important connections between the topical approach and the demands of legal practice. Cicero's goal in providing a topic catalog was to enable an advocate to do two things. The first was to analyze a factual situation as a legal problem; the second was to devise arguments for interpreting the law and applying it to a case in one way rather than another.

These tasks have been the bread and butter of lawyers' work from Cicero's day to our own. Thus, it is not surprising that when scholars like Chaim Perelman in Belgium and Theodor Viehweg in Germany sought to revive the classical tradition in rhetoric, they focused on the canon of invention and, in particular, on the topics.⁸ For example, large parts of Perelman's *New Rhetoric* read very much like an old-fashioned topic catalog.⁹ Viehweg and his followers in the Mainz school made a name for themselves by insisting that legal analysis is a form of topical reasoning.¹⁰ Viehweg's argument was especially controversial in Germany, because the civil code creates the appearance of a systematic, deductive structure. In fact, Viehweg's point is much easier to see in a common-law jurisdiction like the United States, in which the topical structure of argument is laid bare in the development of doctrine through precedent.¹¹

Like these scholars, I also believe that there is a deep connection between legal reasoning and rhetoric, and I also believe that the key to understanding this connection lies in an understanding of how topics assist the reasoning process. Topics are heuristics; they provide a roadmap, or starting point, for the discussion of problems and the resolution of difficulties. They are both a method of problem recognition and a means of problem solution. Invention uses topics to identify and analyze difficulties placed before an actor.¹² Hence invention and topical

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reasoning are essentially pragmatic in nature, for they are directed to the solving of problems about what to do.

When one is stuck for something to say, one turns to a catalog of arguments or approaches. When one wants to know how to solve a problem, one turns to a checklist or a troubleshooting guide. The catalog of arguments and the troubleshooting guide are both examples of topical reasoning: they offer a ready-made path to pursue, a place from which to begin one's investigations. Although they do not predetermine the result of the investigation, they shape the nature of the inquiry, just as the place from which one begins a journey shapes the subsequent development of the journey.

Put more generally, people attempting to solve a problem need a preexisting [*215] framework to get started. They need a way of characterizing a problem and a way of approaching the problem once it is identified. The most convenient way to do this is through a set of intellectual tools that can be readily adapted to a number of problems and that lie readily to hand. The need for preexisting tools and frameworks does not undermine the creativity of the process but informs and enables it, in the same way that all invention and improvisation require materials to build on. In like fashion, topics undergird invention and discovery; they are commonly shared tools of understanding (hence "commonplaces") that simultaneously frame problems and assist in their solution.

No tool is perfect for all occasions, and sometimes the intellectual tools one is bequeathed may be only awkwardly adapted to the problem at hand. Indeed, because intellectual tools are used both for solving a problem and for recognizing that a problem exists in the first place, a badly adapted or limited set of topics may lead one to overlook important features of a situation, just as a troubleshooting checklist that is too brief may lead one to miss the most important problem that needs to be resolved. Thus, the value of a system of topics lies in their comprehensiveness and adaptability, as well as their being ready to hand.

We can think about much of the work of legal analysis by judges, lawyers, and students of law as a kind of problem solving.¹³ When I say that the work of legal reasoning is problem solving, I do not merely mean the solution of intellectual puzzles. After all, trying to decide on the right thing to do, the most persuasive argument before a tribunal, or the proper advice to offer a client is also a quest for a solution to a difficulty. In any case, the idea of lawyers as problem

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solvers is a familiar one. Lawyers analyze legal problems, form legal opinions, interpret statutes, reconcile and distinguish cases, offer policy justifications for doctrines, predict the actions of legal decisionmakers, advise clients, and develop persuasive arguments for legal positions. These different activities, these different forms of problem solving, are not in all respects identical, but they are interrelated. For example, when we try to justify a particular rule of law to another person, we must find arguments that justify it, and to do this we ourselves must analyze the situation and determine the most plausible arguments for and against the position that we are taking. So the tasks of persuasion and analysis go hand in hand. One should also note that the tasks of legal analysis for the advocate, the judge, and the law student may differ because of their differing roles and purposes. Nevertheless, those tasks, too are interrelated.

When we think about what lawyers and judges do as the identification and solution of problems, we begin to see how lawyers actually use topics and topical styles of reasoning in many different aspects of their work, how topics help lawyers, judges, and law students perform the various tasks of legal analysis and argument. [*216] To vary Holmes's famous maxim, we begin to see that the life of law has not been logic—it has been problem solving.

At the same time, this highly pragmatic description of legal reasoning is fully consistent with the techniques of deduction and logical inference. Deduction is an important feature of legal reasoning, but deduction is always in need of premises. Invention is the means by which premises can be produced so that deduction can proceed. Deduction is formal, and form is always in need of substance. Topics help provide that substance. Thus, topical reasoning is not necessarily opposed to deductive reasoning; it is often its aid and ally.

USING TOPICS IN LEGAL ANALYSIS

To show how topics work in legal analysis, I am going to draw a connection between what I am calling topical argument and an area of legal theory that has come to be known as legal semiotics. As its name implies, legal semiotics is the study of the law as a system of signs and methods of signification. The variety of legal semiotics that I am concerned with, however, is generally associated with the American critical legal studies movement and the newly emerging category of postmodern jurisprudence. It studies and classifies the recurring forms of

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argument used to justify legal doctrines. The practice of justification involves two interrelated tasks. The first is offering arguments for why the law should adopt one rule rather than another. The second is discovering policy justifications that underlie existing legal rules and arguing for extensions or applications of these rules on the grounds that they are most consistent with the principles and policies undergirding the law.¹⁴ Legal semioticians like Duncan Kennedy, Jeremy Paul, Jamie Boyle, and myself argue that lawyers tend to justify legal positions in terms of recurring categories of arguments.¹⁵ Moreover, there are standard pro and con responses for each form of argument that can be applied repeatedly in many different doctrinal settings.

In tort law, for example, a standard defendant's argument is "No liability without fault." A standard plaintiff's rejoinder is "As between two innocents, let the person who caused the damage pay."¹⁶ In this case, the defendant talks about fault, while the plaintiff emphasizes causal responsibility. But the plaintiff can also argue that the defendant was at fault ("One who is at fault should be liable"), and the defendant can also deny causal responsibility ("No liability without causation"). Thus, there are fault-based and causation-based arguments for both sides. These stereotypical arguments recur constantly in tort law; indeed, they normally appear whenever a choice between two possible rules would change a tort defendant's responsibility (or potential liability) toward a plaintiff. [*217]

Consider the famous case of *Vosburg v. Putney*, in which the defendant, a young schoolboy, playfully kicked his classmate in the leg.¹⁷ Because of a preexisting condition the plaintiff unexpectedly developed a serious disease in the leg that eventually resulted in his becoming permanently disabled. The issue before the court was whether the defendant had to pay all of the damages caused by the kick, no matter how unforeseeable, or only those reasonably foreseeable from the defendant's perspective. This is a classic situation in which the rule of law chosen affects the defendant's potential responsibility toward the plaintiff, hence the standard tort law arguments apply.

The defendant might make the following arguments (among many others).

1. The defendant gave the plaintiff a harmless kick on the leg. He did nothing wrong, or if he did some wrong, it was completely out of proportion to the damages that resulted. It is unjust to impose

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enormous and burdensome damages on the defendant because of an unforeseeable freak accident. (No liability without fault.)

2. Moreover, the real cause of the unfortunate accident was the plaintiff's preexisting condition. (No liability without causation.)

The plaintiff can respond in kind.

1. The defendant kicked the plaintiff without his consent and therefore acted wrongfully. (One who is at fault should be liable.)

2. Moreover, even if the defendant was without moral fault, the plaintiff was also entirely innocent. The plaintiff was no less injured because the defendant meant no harm. Someone must bear the loss from this accident, and it is better that the loss fall on the person who occasioned it. (As between two innocents, let the person who caused the damage pay.)

In this example I have arranged the plaintiff's and defendant's arguments so that they directly respond to each other. The plaintiff argues fault, the defendant denies fault. The defendant denies casual responsibility, the plaintiff asserts it. In real life, of course, the plaintiff might respond by changing the subject. When the defendant pleads lack of fault, the plaintiff might assert the defendant's causal responsibility, or the plaintiff's rights, or the bad consequences that would flow from the defendant's proposed rule, and so on, because the defendant's fault-based argument might be more plausible than any fault-based argument that the plaintiff can think of. Thus, each type of argument is formally available to both sides, but not all formally available arguments within the rhetorical system are equally strong or equally plausible.

With sufficient time and patience, one can go through the whole of tort law and catalog the various kinds of policy arguments that lawyers and legal academics [*218] make, showing the typical pro and con responses made by plaintiffs' and defendants' counsel. I have done this for a number of fields of law (tort, contract, criminal law).¹⁸ This collection of recurring argument forms has considerable practical significance for lawyers as well as students of the law. If students know the basic forms of policy argument, they can apply them to virtually any tort law issue that comes before them. Moreover, if they are asked to

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defend or justify a particular rule of law, they have at their fingertips a list of available arguments of justification that can be invoked at a moment's notice. Finally, because they can generate an opponent's likely arguments as well as their own, they can more easily generate counterarguments and fine-tune their original claims for maximum force and plausibility. After teaching the law of torts in this fashion for over a decade, I can report that all of these benefits do accrue to law students when they learn to master the recurring forms of legal justification.

The point I wish to emphasize here, however, should by now be obvious from the description of legal semiotics just offered. *The recurring forms of argument that are the subject of legal semiotics are topics in the classical sense.* The plaintiff's argument that one who is at fault should pay and the defendant's rejoinder that there should be no liability without fault are two opposed versions of the same basic topic, which is fault. Similarly, causal responsibility, harm, action (versus inaction), and intention are all topics relevant to tort law issues. Each topic gives both the plaintiff and the defendant something to talk about, a starting point for analysis of the situation. Each is a source for the invention of new arguments. Each can give rise to subtopics—for instance, the idea of foreseeability as an articulation of the concept of fault. Finally, each can be combined with other topics to produce increasingly complicated and sophisticated forms of argument.

Legal semiotics has generally been concerned with one of the central tasks of legal analysis and argument—the justification and application of legal doctrines. But my point is more general: what is true of the work of justification is also true of other tasks of legal analysis. We can find topics and topical reasoning employed in other kinds of legal reasoning and legal problem solving.

Take, for example, the interpretation of statutes. It is not accidental that Duncan Kennedy's original formulation of legal semiotics was inspired by Karl Llewellyn's famous article on statutory construction.¹⁹ Llewellyn listed many of the familiar canons of statutory construction and showed how they could be lined up in pro and con fashion. For each canon of interpretation, Llewellyn argued, there was a contrasting canon that argued in the opposite direction. Llewellyn's argument has often been viewed as showing the indeterminacy and hence uselessness of reasoning by canons. But a better interpretation of what Llewellyn demonstrated can be stated in terms of topics. [*219] Canons of statutory

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interpretation are topics for discussion of the meaning of statutes and their reconciliation with other statutes (including the Constitution).

Canons of interpretation are starting points, like a troubleshooter's checklist, that give the interpreter a way in to the discussion of statutory and constitutional problems.²⁰ Like the topic of fault in tort law, canons of interpretation are necessarily general and cannot determine the scope of their own extension. Nor can they be dispositive in every case, even though they may be persuasive in any particular case. Indeed, the problems for canons of interpretation arise precisely when too much is demanded of them. It is at that point that they produce a sterile formalism that inhibits imagination rather than stimulates it. If we begin to think of canons of interpretation as heuristics rather than formulas, as methods of getting started in the discussion of problems rather than solutions in themselves, we will better understand both their usefulness for generations of lawyers and their inherent limitations.

Precedential argument also makes use of topics, but in a slightly different way. To begin with, there are familiar techniques of doctrinal manipulation, which Llewellyn also cataloged in his *Common Law Tradition*.²¹ With a little practice, one can learn the relatively standard ways in which lawyers distinguish and connect cases, broaden and narrow precedents, distinguish and construct lines of authority. These techniques become second nature to lawyers, and Llewellyn merely took it upon himself to categorize and classify the techniques that he found in the common law. Thus, the common-law tradition of which Llewellyn spoke is not simply a tradition of precedents; it is a tradition of intellectual tools and approaches that can be brought to bear on legal problems even as they help to construct the very nature of these problems. Lawyers sometimes call these techniques "craft." Whatever term we use to describe it, this craft consists in significant part in the use and mastery of topics whose very existence helps constitute our shared legal culture.

The various techniques of precedential manipulation can form a topic catalog of their own. Yet topics are already built into the structure of precedents. Doctrinal categories and distinctions are topics woven into the fabric of the law.

As I noted previously, topics are places; they are places where one can place things. They are intellectual pigeonholes for the organization of experience. Legal doctrines and distinctions are also pigeonholes of this kind. Legal doctrines

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constitute laws, but for this reason they simultaneously become a template for the organization of legal experience and a framework for the discussion of legal problems. Thus, legal doctrine has a dual nature, both as authority and as topos. Because legal doctrines and distinctions are backed by the authority of the state, they help constitute what a legal problem is in a given legal culture.

The structure of the law school exam provides an excellent example of the topical nature of legal doctrines. Most law school exams are organized around the [*220] skill of issue spotting. Students are presented with an elaborate factual situation; they are then asked to discuss the probable legal consequences of the hypothetical and the best legal arguments on both sides. The exam is, of course, a quintessential exercise in problem solving. It requires students to recognize a factual situation as a legal problem and argue for the best application of legal categories. Yet students cannot do this unless they understand the basic doctrinal pigeonholes relevant to the problem. They must have ready to hand a set of distinctions and a framework of doctrines that allow them to characterize the problem and set in motion their discussion of the legal consequences.

A student's legal analysis has three interrelated components. First, it involves pattern and problem recognition. Second, it demands arguments about the best match between different possible patterns and the facts at hand. Third, it requires a reinterpretation and redescription of the facts in light of the available doctrinal pigeonholes. Law students work with legal materials backed up by the authority of the state, but this does not change the fundamentally problem-solving nature of their task. On the contrary, it is precisely the authoritative nature of the materials that determines the kind of problem being set before them.

In sum, the topical structure of law is built into its nature as law. Every doctrinal category or distinction can function as a special topic for the formulation and discussion of legal problems. What looks like the development of doctrine from one perspective can be seen as the use of topics from another. We can redescribe the techniques of precedential manipulation, reconciliation, subordination, distinction, and exclusion in this light. Precedential argument involves the use of preexisting topics or the creation of new ones. For example, a new topic is created when a salient factual difference is made the basis for a doctrinal distinction that will control the application of the law in succeeding cases. More generally, whenever law creates a new distinction or a new category, it also creates a new topic for the analysis and resolution of legal problems.

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I am not arguing that the legal categories we find in statutes and legal decisions are nothing more than rhetorical topics. I am merely pointing out that they can and do function as topics. Conversely, I am not arguing that doctrinal categories and distinctions are the only topics involved in legal analysis and reasoning. Many scholars argue that principles and policies underlying legal doctrines should be considered part of legal analysis and reasoning even if they are not explicitly codified in doctrinal materials. These principles and policies are the particular concern of legal semiotics. As the previous discussion of legal semiotics shows, these principles and policies are organized into recurring forms of argument that also function as topics. So the claim that legal reasoning has a topical structure is [*221] entirely consistent with an expansive view about the materials of the law that includes not only statutes and legal decisions but also principles and policies.²²

STUDYING LEGAL CULTURE THROUGH THE TOPICS

Why should we be interested in topics today? There are at least three different sets of reasons: practical, sociological, and critical.

First, thinking about law in terms of topics has practical value for both lawyers and law students. Obviously, learning doctrine involves learning the topics contained within it. However, it is equally useful to understand and recognize the recurring forms of policy argument. Knowing the standard forms of legal justification helps advocates to discover new arguments and to frame existing ones more persuasively, particularly because they can figure out what arguments an opponent is likely to make. Moreover, knowing the common topics of justification not only helps advocates to justify existing legal doctrines and persuasively argue for their proper extension and application but also enables advocates to criticize legal doctrines. Recognizing that legal doctrines have recurring forms of justification helps lawyers to discover hitherto-unacknowledged tensions between the justifications for existing doctrines in the same area of law or in different areas. Practicing this skill can sharpen lawyers' critical faculties, stimulate legal creativity, and advance the critical refinement of legal doctrines.

Because of its practical advantages, the systematic study of the topics of legal justification is an excellent way to approach the study of law and can easily

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form part of the first-year curriculum. I have taught my first-year torts classes in precisely this way. I require students both to master doctrine and to recognize and practice recurring policy arguments in order to discuss and debate problems in the law of accidents. The study of the law through topics was an important part of legal education in antiquity, and perhaps it could be so again.

Second, the study of legal topics is the study of legal culture. Recall that one of the meanings of the word “topoi” was “commonplaces.” The study of topics is the study of the commonplaces that bind together a practice of reasoned argument. It is the study of a shared social practice of argumentation and thus the study of a shared form of social life. Legal topics are shared tools of understanding that characterize legal practice. Some legal topics are shared because they involve categories and distinctions woven into the fabric of positive law that has binding force on a community. Other topics—for example, those that concern underlying legal justifications—are shared by the members of a community whether or not they are explicitly written into positive law. The recurring topics of policy justification—[*222] like fault, causal responsibility, and efficiency—show the fundamental acceptance within the legal community (and the larger community outside it) of certain basic ideas through which disputes will be framed and debated.

As common tools of legal understanding, topics offer us a glimpse into the background assumptions that we share in understanding and dealing with legal problems. We can study changes in legal culture by noting the entry of new topics into legal discourse. We can tell that our background culture is changing when the topics we use to formulate and discuss legal problems change. A good example is the rise of economic analysis in the legal academy. Many law professors now routinely employ such concepts as efficiency maximization, the Coase theorem, transaction costs, and agency problems. These concepts, borrowed from economics, become new topics for the framing, recognition, and discussion of legal problems. Other interdisciplinary movements, such as critical legal studies, feminism, and critical race theory, have also introduced new ways of thinking about law and, with them, new topics.²³ These new frameworks for problem solving have led in turn to the recognition of problems not previously recognized as such. Thus, we can think of each new jurisprudential movement as an attempt to inscribe new rhetorics and new topics into the language of law and legal justification.

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It may seem surprising at first to think about law and economics as a body of topics. But any systematic body of study, including social science, will necessarily develop its own set of special topics and thus produce its own substantive rhetorical categories. The fact that these concepts may act as rhetorical topics in no way undermines their usefulness. To the contrary, it is precisely because they are useful for framing and solving many different kinds of problems that they function as topics. Once again we must free ourselves from the pernicious confusion of rhetoric with mere style or deception. Rhetoric, in the form of topics, undergirds the substantive reason of the law.

If a legal culture is defined by its characteristic topics, then different legal cultures may be distinguished by differences in their commonplaces for argument. For example, the self-conscious adoption of sophisticated economic concepts has occurred much more slowly and in more limited or specialized areas in legal practice than in the world of the legal academy. The increasing divergence in the topics employed in legal practice and in the legal academy is yet another a sign of the increasing divergence between these two subparts of legal culture.

Finally, in addition to practical and sociological reasons, we should study the topics for critical reasons. Focusing our attention on recurring topics in legal discourse helps us critically examine the ways we talk about and hence think about legal problems. To begin with, we can study the kinds of arguments that people with different [*223] interests or social positions tend to make and the different ways they tend to characterize situations and evaluate them. For example, we can compare how causal responsibility is characterized in products liability cases as opposed to cases involving freedom of speech.²⁴ We can examine how members of different political and social groups tend to frame questions of benefit and burden, equal or differential treatment, fault, causal nexus, or personal responsibility. Much critical race theory and feminist legal theory has been implicitly concerned with these questions.²⁵

We can also study how the tools of understanding we use to frame and discuss legal questions might limit the way we understand and evaluate the social world. As heuristics for analysis, topics both empower and limit our legal imaginations. Just as no tool is equally good for every purpose, no set of topics is equally useful for recognizing and addressing all problems. Confining ourselves to one set of topics may lead to an impoverished conception of the situation, which serves the interests of neither truth nor justice. When we are limited in the

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topics we employ, we limit not only our legal imaginations but our ability to recognize our own limitations. As the old saying goes, When all that you have is a hammer, everything starts to look like a nail.

To be critical about legal topics, we need to play various topical approaches off against each other; for example, we might play off the language of efficiency and transaction cost reduction against the language of moral responsibility and desert. That is because we can often see the limitations of topics only by means of other topics that we bring to bear. A critical approach to legal topics also suggests the continual need to borrow new topics from areas of social life outside legal discourse. In fact, we do this all the time: we constantly borrow topics from other areas of life and fashion them to the needs of legal problems. And when we import these topics, we also subtly change the nature of legal argument and legal analysis. Thus, the critical approach to the study of topics reminds us that the boundary between legal topics and other topics is always permeable, even if at any point in time there are some special topics that are distinctly legal.

Like any other form of ideological analysis, the critical study of topics is potentially self-referential. It involves recognizing limitations and problems in the legal discourse we are studying. Yet the discourse in which we examine legal discourse can also be understood in terms of its own recurring topics, its own distinctive modes of problem recognition and solution. The ways we classify and criticize existing topics may therefore have their own limitations. So when we study the rhetoric of the law critically, we do not abandon topics or escape rhetoric. We do not finally engage in some more authentic or pure form of discourse that cannot itself be studied and criticized rhetorically. Nevertheless, this recognition does not make the [*224] task of critical analysis or critical reflection impossible. It merely helps us to see the conditions under which it occurs. This brings me back to my central theme: the use of the rhetorical art of invention is not a hindrance to reason but part of its *modus operandi*.

Topics are key elements in any pragmatic—that is, action oriented—approach to knowledge. I believe, in fact, that there are deep connections between a topical approach to legal reasoning and the recent revival of legal pragmatism, although I cannot discuss the matter fully here. What I do hope to have shown is how rhetorical invention through topics is fully integrated into the substantive reason of the law. The familiar opposition between rhetoric and reason

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misunderstands their appropriate relation, for rhetoric does not take the reason of the law on holiday, but to its true home in the topics.

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Notes

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My thanks to Jim Whitman for our many discussions, to Sanford Levinson for his comments on a previous draft, and to Stanley Fish, who originally spurred my interest in these matters.

1. The notable exception is the work of Stanley Fish, who came to the legal academy from the study of rhetoric and literary criticism. See, e.g., Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Legal and Literary Studies* (Durham, N.C.: Duke University Press, 1989), pp. 471–502.

2. The art of rhetoric was developed in part in response to the legal demands of these societies. In ancient Greece, citizens were required to make speeches in the assembly and in the law courts; in ancient Rome, an advocate or patron would often speak on behalf of a client. See George A. Kennedy, *A New History of Classical Rhetoric* (Princeton, N.J.: Princeton University Press, 1994), p. 103. J. A. Crook puts the matter succinctly: "Ancient advocates employed and were masters of rhetoric: for some observers that is the most important and obvious fact about them. Rhetoric was then regarded as the theoretical foundation of forensic practice." J. A. Crook, *Legal Advocacy in the Roman World* (London: Duckworth Press, 1995), p. 3.

3. In saying this, one should understand that in ancient Greece there was no organized legal profession to speak of and hence no organized form of legal education. Citizens studied rhetoric in order better to defend their interests in the courts and in the assembly. In ancient Rome, one must distinguish between jurists who wrote about law and advocates who represented clients, usually in their capacity as patrons. Education in rhetoric (and hence legal advocacy) was thought of as part of general education but was nevertheless useful for the patron in his advocacy in courts of law as well as in political life.

Even after classical times, law's organic connections to the art of rhetoric continued in medieval schools that were the forerunners of the university. Indeed, as Richard Schoeck points out, it was not until the twelfth century that law ceased to be regarded as a subdivision of rhetoric and became a university subject in its

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own right. See Richard J. Schoeck, “Lawyers and Rhetoric in Sixteenth Century England,” in James Murphy, ed., *Renaissance Eloquence: Studies in the Theory and Practice of Renaissance Rhetoric* (Berkeley: University of California Press, 1983), pp. 274–91. After the development of law schools, rhetoric continued to be an essential part of legal education both in England and on the Continent. During the development of the early common law in England, the classical tradition of rhetoric was enormously important and heavily influenced the education of lawyers. *Id.* at 275.

4. The other canons of rhetoric were arrangement (*dispositio, taxis*); style (*elocutio, lexis*); memorization (*memoria, mnémé*); and delivery (*pronunciatio, hypokrisis*).

5. A position attributed to him by Cicero. See Cicero, *Topica*, II, 6–8, in Cicero, trans. H. M. Hubbell, Loeb Classical Library Edition, 28 vols. (Cambridge: Harvard University Press, 1976), 2:386–87 & note b.

6. Here we might compare the spatial metaphor of “topic” with the concept of a “horizon” as used in hermeneutic theory. Obviously, the nature and limits of one’s horizon depend on the place where one stands.

7. Aristotle, *Rhetoric*, 1358a, 1396a–1397a.

8. Chaim Perelman and L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, trans. John Wilkinson and Purcell Weaver (Notre Dame: University of Notre Dame Press, 1969); Theodor Viehweg, *Topics and Law: A Contribution to Basic Research in Law*, trans. W. Cole Durham (Frankfurt am Main: Peter Lang, 1993).

9. See especially Perelman, *New Rhetoric*, p. 190. Perelman and Olbrechts-Tyteca use the Latin equivalent for “topic,” *locus* (also meaning “place”).

10. Viehweg, *Topics and Law*, pp. 69–85. On the influence of Viehweg and the Mainz school, see Katharina Sobota, “System and Flexibility in Law,” *Argumentation* 5:275–82 (1991); W. Cole Durham, Translator’s Foreword to Viehweg, *Topics and Law*, pp. xix–xxii. [*274]

11. Durham, Translator’s Foreword, pp. xix–xxv. As Durham points out, the early history of the common law was heavily influenced by the topical approach, particularly owing to the influence of Aristotle and the felt need to draw legal principles from ancient sources and legal rules. See Stephen Siegel, “The

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Aristotelian Basis of English Law,” 56 N.Y.U. L. Rev. 18, 20–29 (1981). As a result, ancient sources became *topoi* for the discussion of legal problems.

The educational system reinforced rhetoric’s centrality. Law students studied ancient rhetorical texts and practiced their skills in moots and stylized disputations. See Schoeck, “Lawyers and Rhetoric in Sixteenth Century England,” pp. 280–82.

12. As Viehweg notes, this conception of topics goes back at least as far as Aristotle. Viehweg, *Topics and Law*, p. 19.

13. The connection between law and problem solving is Viehweg’s fundamental insight. See especially Viehweg, *Topics and Law*, p. 85.

14. I emphasize that these are not the only tasks of legal analysis, although they have been the primary focus of legal semiotics. In any case, the methods of legal semiotics can and have been extended to other areas, for example, statutory and constitutional interpretation—see, e.g., Philip Bobbitt, *Constitutional Interpretation* (Oxford: Basil Blackwell, 1991)—and factual characterization. On the latter, see, e.g., Mark Kelman, “Interpretive Construction in the Substantive Criminal Law,” 33 Stan. L. Rev. 591 (1981); J. M. Balkin, “The Rhetoric of Responsibility,” 76 Va. L. Rev. 197 (1990).

15. J. M. Balkin, “The Promise of Legal Semiotics,” 69 Tex. L. Rev. 1831 (1991); Duncan Kennedy, “A Semiotics of Legal Argument,” 42 Syracuse L. Rev. 75 (1991); Jeremy Paul, “The Politics of Legal Semiotics,” 69 Tex. L. Rev. 1779 (1991); James Boyle, “The Anatomy of a Torts Class,” 34 Am. U. L. Rev. 1003 (1985).

16. J. M. Balkin, “The Crystalline Structure of Legal Thought,” 39 Rutgers L. Rev. 1 (1986), brings together these and many of the other standard arguments and provides examples drawn from judicial opinions and academic literature.

17. *Vosburg v. Putney*, 80 Wis. 523; 50 N.W. 403 (1891).

18. Balkin, “Crystalline Structure of Legal Thought,” *supra*.

19. Karl N. Llewellyn, “Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed,” 3 Vand. L. Rev. 395 (1951).

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20. For example, Philip Bobbitt's theory of constitutional argument lists six basic "modalities" into which, he claims, all constitutional arguments must fall. See Bobbitt, *Constitutional Interpretation*, supra. Bobbitt's modalities—history, text, structure, consequences, precedent, and national ethos—are topics for the analysis of constitutional law issues. Indeed, Bobbitt argues that one of the advantages of his classification system is that "if citizens and journalists (and politicians) know the basic modes, the fundamental ways of thinking about the Constitution as law, they can work through current problems on their own." Id. at 28. Going through the list of constitutional modalities, even mechanically, "ought to give one an idea of how to proceed to answer a constitutional question, rather than simply shrugging one's shoulders." Id. at 30. Bobbitt's rationales perfectly describe the point of a topical approach.

21. Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little, Brown, 1960), at pp. 77–91.

22. Finally, we should note that even the research tools of American lawyers have been structured in topical form. The West Publishing Company's digest and keynote system is self-consciously organized around topics, as are resources like American Law Reports and treatises like *Corpus juris secundum*. The gradual displacement of these tools by computer-assisted research, I predict, will be unlikely to change the common law's fondness for conceiving, categorizing, and imagining law in terms of topics. Rather, we are likely to see the topical sensibility arise in ever-new forms as new technology develops.

23. A familiar topic introduced by critical legal studies is the interrelation between public and private. Critical race theory and feminism have introduced such topics as unspoken norms of race and gender, analysis of law in terms of its reinforcement of caste, and the intersectionality of identity.

24. For a discussion, see Balkin, "Rhetoric of Responsibility," supra, at pp. 254–63.

25. A good example is Patricia J. Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* [*275] (Cambridge: Harvard University Press, 1991). Although Williams is perhaps best known for her emphasis on personal narrative, I have found her work invaluable for its detailed descriptions of the contrasting rhetorical frames that people use to describe and evaluate racially charged incidents.