

2012

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## Recommended Citation

Carlo A. Pedrioli, Professor Kingsfield in Conflict: Rhetorical Constructions of the U.S. Law Professor Persona(e), 38 OHIO N.U. L. REV. 701 (2012)

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**PROFESSOR KINGSFIELD IN CONFLICT:  
RHETORICAL CONSTRUCTIONS  
OF THE U.S. LAW PROFESSOR PERSONA(E)**

CARLO A. PEDRIOLI\*

I. INTRODUCTION

At least since the 1960s, a “two cultures’ phenomenon” has become quite apparent within the legal field in the United States.<sup>1</sup> On one hand, some lawyers, usually those within the university, have been more academically oriented, and, on the other hand, other lawyers, usually those in legal practice or sitting on the bench, have been more pragmatically oriented. Problems arise when these two groups begin to talk differently from each other.<sup>2</sup> In a way, the field of law has developed into at least two different legal professions,<sup>3</sup> and, not surprisingly, scholars and practitioners have experienced tension because of this situation.<sup>4</sup> The problem comes to a head when, through rhetoric,<sup>5</sup> lawyers envision their ideal role(s) for the law professor.

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1. Harry H. Wellington, *Challenges to Legal Education: The “Two Cultures” Phenomenon*, 37 J. LEGAL EDUC. 327, 327 (1987).

2. *Id.*

3. Robert Stevens, *American Legal Scholarship: Structural Constraints and Intellectual Conceptualism*, 33 J. LEGAL EDUC. 442, 445 (1983).

4. Francis A. Allen, *The Prospects of University Law Training*, 29 J. LEGAL EDUC. 127, 131 (1978). In recommending that law schools should offer students more practical experience during the students’ study of law, the Carnegie Foundation has suggested that law schools are at least somewhat disconnected from the world of legal practice. WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND, & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (SUMMARY) 8-10 (2007). See also David Segal, *What They Don’t Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 19, 2011, <http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?pagewanted=all>.

5. In general, the term *rhetoric* refers to communication, which itself refers to human symbol use. SONJA K. FOSS & KAREN A. FOSS, INVITING TRANSFORMATION: PRESENTATIONAL SPEAKING FOR A

The law professor is the central figure in the education of prospective lawyers, “the principal actor in the [law school] classroom.”<sup>6</sup> In many cases, the law professor can represent students’ first encounters with the legal field and has the opportunity to make “a positive impact” on students.<sup>7</sup> Naturally, the law professor can make a negative impact on students, too. Either way, the law professor helps to shape the way students view the legal field because, when interacting with students, “the law professor . . . convey[s] a sense of what it means to be a lawyer.”<sup>8</sup>

Within the legal profession, the law professor has “a profound impact on thinking about law, procedure, and institutions.”<sup>9</sup> Today, because “[t]he American law professor is American legal education,”<sup>10</sup> he or she is “both the gatekeeper[ ] and molder[ ] of the profession.”<sup>11</sup> In 1927, Felix Frankfurter, then a law professor at Harvard University and a future justice on the U.S. Supreme Court, observed, “In the last analysis, the law is what the lawyers are. And the law and the lawyers are what the law schools make them.”<sup>12</sup> Given such “a tremendous influence” that the law professor has on the U.S. legal system,<sup>13</sup> one might think of the law professor as a senior high priest among the high priests.

In the mid-1980s, Douglas D. McFarland conducted research that sought to understand the images of U.S. law professors, both those images that law professors had of themselves and those images that practicing lawyers and law students had of law professors. McFarland’s study

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CHANGING WORLD 4 (2003). Various types of rhetoric are available to communicators. For example, traditional rhetoric is based on persuasion. In his fourth century B.C. treatise *On Rhetoric*, Aristotle saw rhetoric as “an ability, in each [particular] case, to see the available means of persuasion.” ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 36 (George A. Kennedy trans., 1991). Additionally, invitational rhetoric is based on dialogue. Some feminist scholarship has suggested that rhetoric can be “an invitation to understanding as a means to create a relationship rooted in equality, immanent value, and self-determination.” Sonja K. Foss & Cindy L. Griffin, *Beyond Persuasion: A Proposal for an Invitational Rhetoric*, 62 COMM. MONOGRAPHS 2, 5 (1995). Moreover, cooperative rhetoric is based on problem-solving. Contemporary scholarship has theorized that rhetoric can be “a process of reasoned interaction intended to help participants and audiences make the best assessments or the best decisions in any given situation.” JOSINA M. MAKAU & DEBIAN L. MARTY, COOPERATIVE ARGUMENTATION: A MODEL FOR DELIBERATIVE COMMUNITY 87 (2001) (emphasis omitted).

6. Robert J. Borthwick & Jordan R. Schau, *Gatekeepers of the Profession: An Empirical Profile of the Nation’s Law Professors*, 25 U. MICH. J.L. REFORM 191, 195 (1991).

7. Jason Ostrom, *The Competing Roles of Law Professors*, 42 S. TEX L. REV. 539, 540 (2001).

8. *Id.*

9. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* xiii (1983).

10. Douglas D. McFarland, *Self-Images of Law Professors: Rethinking the Schism in Legal Education*, 35 J. LEGAL EDUC. 232, 232 (1985) [hereinafter McFarland, *Rethinking the Schism*].

11. Borthwick & Schau, *supra* note 6, at 193.

12. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992).

13. Eugene A. Gilmore, *Some Criticisms of Legal Education*, 7 A.B.A. J. 227, 230 (1921).

concluded that, at least throughout the years studied, lawyers could not agree whether the law professor should be more academic or practical in nature.<sup>14</sup> McFarland observed that legal academics and practitioners had come to “live in different rhetorical worlds.”<sup>15</sup> Specifically, these players in the legal field came to develop “little or no understanding” of each other and even became “hostile to one another.”<sup>16</sup> Although each camp continued to disseminate its rhetoric, the other camp failed to process that rhetoric because the views of the camps were so different.<sup>17</sup> Quite simply, the communication was not working well.<sup>18</sup> Since this communication had not been moving forward, observers reasonably could expect nothing more than minor change, if that at all.<sup>19</sup>

McFarland’s study addressed legal articles from the 1960s, 1970s, and early 1980s, but, as a function of the time in which the study took place, the research did not consider legal articles from the mid-1980s on.<sup>20</sup> Although he expressed doubt about studying the past of the conflict over the law professor, McFarland explicitly suggested studying the law professor over time as a topic for future research.<sup>21</sup> Also, McFarland conceded that essentially “[t]he discussion . . . should be read as descriptive rather than normative.”<sup>22</sup> In other words, McFarland’s study offered no major suggestions for addressing the problem he identified. Given the time that has passed since McFarland conducted his research, as well as the lack of a normative dimension to that research, further study of the role(s) of the law professor is appropriate and may lead to important new insights.

Calling upon rhetorical theory, this Article traces the contours of the conflict over the construction of the role(s), or persona(e), of the U.S. law professor from 1960 to the present. The Article draws an initial line at 1960 because, by the 1960s, law schools in the United States had matured to the point at which they clearly were thinking of themselves as graduate programs within the university system.<sup>23</sup> After a discussion of persona

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14. Douglas Dale McFarland Jr., *Self-Images of Law Professors: Rethinking Legal Education* 230-31 (1983) (unpublished Ph.D. dissertation, University of Minnesota) (on file with Wilson Library, University of Minnesota) [hereinafter McFarland, *Rethinking Legal Education*].

15. Douglas D. McFarland, *Students and Practicing Lawyers Identify The Ideal Law Professor*, 36 J. LEGAL EDUC. 93, 105 (1986) [hereinafter McFarland, *Students and Practicing Lawyers*].

16. *Id.*

17. McFarland, *Rethinking the Schism*, *supra* note 10, at 260.

18. McFarland, *Students and Practicing Lawyers*, *supra* note 15, at 106.

19. *Id.* at 106-07.

20. McFarland, *Rethinking Legal Education*, *supra* note 14, at 45.

21. *Id.* at 237.

22. *Id.* at 207.

23. Thomas F. Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637, 649 (1968). Today, U.S. legal education offers its graduates an advanced degree, the J.D. Xu Wei, *A*

theory and persona analysis, this Article will address the two major personae that have emerged in the conflict, the law professor as scholar and the law professor as practitioner. As appropriate, each subsection of the Article that considers a persona also will address the type of rhetoric that lawyers have employed in developing their preferred persona. In this study, the term *lawyers* will refer to both practicing lawyers and academic lawyers. A concluding section will synthesize some of the communication problems that have emerged in this ongoing conflict, usually due to a heavy reliance on traditional Aristotelian rhetoric, or persuasion,<sup>24</sup> as a rhetorical strategy. Although descriptive in nature, the current Article will set the stage for a subsequent article, normative in nature, that will open the door to an alternative approach to this ongoing conflict.

## II. PERSONA THEORY AND PERSONA ANALYSIS

This section of the Article addresses the theory and methodology for the study. More specifically, the section calls upon rhetorical theory for a discussion of persona theory and persona analysis.

### A. *Persona Theory*

Persona theory considers the roles, or *personae*, that communicators, or *rhetors*, create in discourse.<sup>25</sup> At least four types of personae can be present in discourse, including the first, second, third, and fourth personae. This subsection of the Article will reference each persona, but, given the focus of the Article on the first persona, this subsection will concentrate on the first persona as opposed to the other personae.

One can describe the first persona as “the constructed speaker/writer or ‘I’ of discourse.”<sup>26</sup> Such a persona is “the created personality put forth in the act of communicating”<sup>27</sup> and allows the rhetor to identify with the audience.<sup>28</sup> In literature, the first persona is the speaker or character a writer

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*Comparative Study of Environmental Law Clinics in the United States and China*, 19 EDUC. & L.J. 75, 78 (2009).

24. See *supra*, note 5.

25. Paaige K. Turner & Patricia Ryden, *How George Bush Silenced Anita Hill: A Derridian View of the Third Persona in Public Argument*, 37 ARGUMENTATION & ADVOC. 86, 88 (2000).

26. *Id.*

27. Paul Newell Campbell, *The Personae of Scientific Discourse*, 61 Q. J. SPEECH 391, 394 (1975) (emphasis omitted) (quoting WALKER GIBSON, *PERSONA: A STYLE STUDY FOR READERS AND WRITERS* xi (1969)).

28. Walter G. Kirkpatrick, *Bolingbroke and the Opposition to Sir Robert Walpole: The Role of a Fictitious Persona in Creating an Audience*, 32 CENT. STATES SPEECH. J. 12, 12 (1981).

creates in the course of crafting writing like poetry or fiction.<sup>29</sup> In a way, a first persona is a rhetorical mask that the rhetor chooses to wear as he or she performs rhetorically, and because the persona at issue is a mask, the persona is not necessarily the rhetor himself or herself.<sup>30</sup>

Several examples of first personae that rhetors have adopted will help illustrate these principles. For instance, in 1916, Marcus Garvey, the then-unknown leader of the new Universal Negro Improvement Association, faced the problem of leading members of an outsider racial group against social injustice.<sup>31</sup> In part, Garvey met the challenge by assuming a Black Moses persona.<sup>32</sup> In his rhetoric, Garvey relied upon subjects like election, captivity, and liberation, calling to mind Moses and the Jewish experiences from the Old Testament.<sup>33</sup> While Garvey was not actually Moses, he did assume the Moses persona. A more recent rhetor who adopted the Moses persona, among other personae, was Louis Farrakhan. In his Million Man March speech, delivered on October 16, 1995, in Washington, D.C., Farrakhan attempted to enhance his credibility, or *ethos*, which had suffered due to Farrakhan's prior inflammatory rhetoric, by assuming a prophetic persona, specifically that of Moses.<sup>34</sup> In a related example, Martin Luther King, Jr., assumed in his rhetoric against civil rights violations the general persona of a prophet, although despite his skillful rhetoric King was not necessarily an actual prophet.<sup>35</sup>

Regardless of which first persona or personae a rhetor assumes, the notion of the first persona comes from Greek and Roman theater and in Latin suggests the idea of a "mask" or a "false face."<sup>36</sup> In this theatrical context, the actor would put on a mask and assume the persona of the mask.<sup>37</sup> Such a historical understanding gives rise to the notion that the persona is pre-existing and that the actor only needs to assume the role.<sup>38</sup> Much of the existing scholarship on persona theory takes for granted that an

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29. Emory B. Elliott, *Persona and Parody in Donne's The Anniversaries*, 58 Q. J. SPEECH 48, 49 (1972); Campbell, *supra* note 27, at 391.

30. Thomas O. Sloan, *The Persona As Rhetor: An Interpretation of Donne's Satyre III*, 51 Q. J. SPEECH 14, 14, 26 (1965).

31. B. L. Ware & Wil A. Linkugel, *The Rhetorical Persona: Marcus Garvey As Black Moses*, 49 COMM. MONOGRAPHS 50, 52-53 (1982).

32. *Id.* at 61.

33. *Id.* at 56-61.

34. John L. Pauley, *Reshaping Public Persona and the Prophetic Ethos: Louis Farrakhan at the Million Man March*, 62 W. J. COMM. 512, 512-14, 522-23 (1998).

35. Campbell, *supra* note 27, at 394.

36. Ware & Linkugel, *supra* note 31, at 50.

37. *Id.*

38. *Id.*

advocate assumes a role from a selection of cultural archetypes, or original models or prototypes.<sup>39</sup>

Despite what much previous scholarship suggests, not all personae need to be pre-existing. For example, one might argue that Franklin Roosevelt and Winston Churchill created their own personae during the dark days of the Great Depression and World War II. Rather than selecting from previously existing personae they might adopt, the two leaders created their own distinct personae.<sup>40</sup> Later leaders could call upon the Roosevelt and Churchill personae for rhetorical effectiveness. Thus, it is important to note that some rhetors are able to create their own personae, which then can become part of a repository of available personae from which other rhetors can select.

While in certain cases the two concepts of construction and performance of first personae can function together, distinguishing between two major types of first personae is necessary, as this Article will for its analysis. On one hand, a rhetor can select and assume a persona in his or her communication. The focus of study here is on the performance, so it is appropriate to think of this type of first persona as *first persona performed* (FPP). On the other hand, as in the case of the construction of the role of the then-new U.S. president, the rhetor involved might create the persona, which the rhetor himself or herself or a different rhetor might employ in subsequent discourse. The idea is the creation of a rhetorical tool for later implementation. This additional type of first persona is a *first persona constructed* (FPC). The theoretical distinction allows critics to focus more on either performance or construction of first personae.

In addition to helping explain the personae advocates can adopt for themselves, persona theory also addresses the roles, as the rhetor constitutes them, that audiences play in the communication process.<sup>41</sup> These roles that audiences play are the second, third, and fourth persona; respectively, the personae are idealized, marginalized, and collusive in nature. They are mentioned here for theoretical context only. The second persona is the “implied auditor” who is supposed to respond to the rhetor’s appeals.<sup>42</sup> If the first persona is the “I” of discourse, the second persona is the “you” of . . . discourse.”<sup>43</sup> While the first persona is the assumed “I” and the second persona is the assumed “you,” the third persona is “the ‘it’ that is not

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39. *Id.*

40. *Id.* at 62.

41. Turner & Ryden, *supra* note 25, at 88-89; Charles E. Morris III, *Pink Herring & The Fourth Persona: J. Edgar Hoover’s Sex Crime Panic*, 88 Q. J. SPEECH 228, 230 (2002).

42. Edwin Black, *The Second Persona*, 56 Q. J. SPEECH 109, 112 (1970).

43. Turner & Ryden, *supra* note 25, at 89.

present, that is objectified in a way ‘you’ and ‘I’ are not.”<sup>44</sup> This persona captures the experience of negation.<sup>45</sup> Like the second persona, the fourth persona functions as an implied auditor of a given ideological position, but a key distinction between these two personae is that the discourse that creates the fourth persona operates at two levels, the level of those in the know and the level of those who do not understand the double entendre.<sup>46</sup>

As this subsection of the Article has noted, a rhetor can constitute various personae in his or her discourse. A rhetor can select or create a first persona, which the rhetor then assumes. A rhetor even may construct a persona for later use, as has been the case when lawyers have constructed the persona(e) of the law professor in the United States. Also, through discourse the rhetor can constitute at least three distinct audience-based personae, including the second, third, and fourth personae.

### B. *Persona Analysis*

Although not all communication scholars have employed persona theory from a rhetorical perspective,<sup>47</sup> this Article calls upon persona theory from such a perspective, specifically to analyze lawyers’ writings on the ideal role(s) of the law professor. Rhetorical scholars have offered some discussion of the methodology of persona theory, which several such scholars have labeled *persona analysis*.<sup>48</sup>

At least two types of persona analysis are possible. One type of analysis is *first persona performed* (FPP), which considers roles that rhetors perform in discourse, while the other type of analysis is *first persona constructed* (FPC), which considers the rhetorical creation of roles that rhetors might perform in the future. Although FPP has been the traditional approach taken in rhetorical studies, FPC, which this Article seeks to develop, is more appropriate for this study because the present study focuses on creation, not performance, of roles. Here, the interest is in the expectations that lawyers have had for the ideal role(s) of the law professor. Nonetheless, contrasting FPP analysis with FPC analysis will afford a better understanding of FPC analysis, so this subsection of the Article initially will

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44. Philip Wander, *The Third Persona: An Ideological Turn in Rhetorical Theory*, 35 CENT. STATES SPEECH J. 197, 209 (1984).

45. *Id.* at 210.

46. Morris, *supra* note 41, at 230.

47. See Kenneth L. Hacker, Walter R. Zakahi, Maury J. Giles, & Shaun McQuitty, *Components of Candidate Images: Statistical Analysis of the Issue-Persona Dichotomy in the Presidential Campaign of 1996*, 67 COMM. MONOGRAPHS 227, 232-35 (2000).

48. Craig R. Smith, *The Persona of Jesus in the Gospel According to St. Matthew*, 14 J. COMM. & RELIGION 57, 64 (1991); Turner & Ryden, *supra* note 25, at 90.



review how one might conduct an FPP analysis before the subsection reviews how one might conduct an FPC analysis.

With regard to FPP analysis, B. L. Ware and Wil Linkugel argued that the critic who performs the persona analysis should identify a rhetor who “represents or symbolizes an historic period, a movement, or world-view.”<sup>49</sup> In other words, the rhetor studied should be significant in one way or another. Examples would be politicians, social activists, and lawyers. After identifying the rhetor, the critic consults relevant artifacts that become the objects for study.<sup>50</sup> Relevant artifacts are the rhetorical texts, such as speeches, diary entries, and performances, that a rhetor has constructed.

After selecting the artifacts, the critic can consult a variety of sources, including “the aesthetic realm of literature or myth, or . . . an analogous historical episode,” for authority on the persona the rhetor in question arguably adopts.<sup>51</sup> Often, the adopted persona is a cultural archetype, which is an original model or prototype upon which later models are based.<sup>52</sup> These sources offer the critic a selection of possibilities for potential personae, which the critic uses as evidence that the rhetor employed a particular persona in the text. For instance, in their study of Black activist Marcus Garvey, Ware and Linkugel consulted the biblical authority *Exodus* for an understanding of the Moses prophet persona, which they then argued Garvey had assumed.<sup>53</sup> If the critic is concerned with the response of the specific audience in question, the critic may need to determine whether the audience would ascribe to the rhetor the qualities of the given persona.<sup>54</sup> This inquiry could be whether a Black audience of the early twentieth century would be likely to link a social activist with a prophet persona like Moses.

Regardless of whether the critic is concerned with the audience’s ascribing to the rhetor the particulars of a persona, the critic still needs to explain how the rhetor calls upon the persona, which gets at the rhetorical strategy at hand.<sup>55</sup> In their study of Garvey, Ware and Linkugel made numerous comparisons between Garvey’s circumstances and rhetoric and the circumstances and rhetoric of Moses in *Exodus*, including calls to leadership, signs of leadership like drawing large audiences, characterizations of people as divinely chosen, and experiences of liberation

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49. Ware & Linkugel, *supra* note 31, at 62.

50. Turner & Ryden, *supra* note 25, at 90.

51. Ware & Linkugel, *supra* note 31, at 62.

52. *Id.* at 50.

53. *Id.* at 54.

54. *Id.* at 62.

55. *Id.*

from captivity.<sup>56</sup> Ideally, the critic will complete the analysis with an explanation of how the assumed persona could impact the rhetorical situation.<sup>57</sup> For example, Ware and Linkugel noted that Garvey's rhetoric was a factor that helped him assume a position of leadership in the movement for Black equality in the United States during the early twentieth century.<sup>58</sup> This was historically important because the death of Booker T. Washington in 1915 had left a void in leadership in the Black community.<sup>59</sup>

With regard to FPC analysis, which is the tool in the present study, a slightly different approach is appropriate. In this study, conducting such an analysis involves consideration of law review articles and other legal writings about lawyers' expectations of the ideal law professor role(s) produced since 1960. More details on the sample follow shortly.

Such consideration involves identification of the various traits for which lawyers have argued in their writings on the ideal law professor persona(e) and organization of such traits into various categories of personae. For instance, such traits include participating in full-time teaching and research or having extensive practical experience in lawyering. These may be more scholarly or more pragmatic in nature. When considered together, the particular characteristics within artifacts offer an outline of a law professor persona that certain rhetors have put forth. Unlike an FPP analysis, an FPC analysis may not give the critic the opportunity to rely upon various precedents for the persona because the persona is often new. The methodology employed here is similar to content analysis, except that the process is based on rhetorical studies rather than social science.

Unfortunately, research for this Article did not locate any examples of FPC studies. As noted above, critics have focused their energies on studying the FPP. Nonetheless, rhetorical personae have to come from somewhere, so at some point in time their construction must have taken place. Accordingly, FPC studies are appropriate, and this Article offers such a study.

The sample for this study comes from a search of the electronic database HeinOnline. HeinOnline contains law review articles that date back to the nineteenth century. For example, the database contains the first issue of the *American Law Register*, which debuted in 1852 and later became the *University of Pennsylvania Law Review*. Although HeinOnline

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56. Ware & Linkugel, *supra* note 31, at 55, 58, & 59-61.

57. For more on the rhetorical situation, see Lloyd F. Bitzer, *The Rhetorical Situation*, 1 PHIL. & RHETORIC 1 (1968). For a critique of Bitzer's argument, see Richard E. Vatz, *The Myth of the Rhetorical Situation*, 6 PHIL. & RHETORIC 154 (1973).

58. Ware & Linkugel, *supra* note 31, at 52-53.

59. *Id.* at 53.

does not necessarily contain all law reviews, the database does contain hundreds of law reviews, including law reviews at some of the most influential law schools. A key advantage of the database is that, unlike databases such as Westlaw and LexisNexis, HeinOnline contains articles that date back to the 1960s, the early part of the period covered in the current study. Hence, because it goes back so far, HeinOnline proved to be an appropriate database for this particular study.

The search in HeinOnline identified any law review article since 1960 that contained the terms *law* and *professor* in the title. Many such articles, although not all, would be likely to address the subject of this Article, but these articles would not necessarily provide a comprehensive listing of relevant articles since the conflict may have appeared in articles that did not focus exclusively on the law professor. To increase the number of appropriate articles identified, the search included locating relevant articles cited in the footnotes of the articles that resulted from the HeinOnline search. Accordingly, while the texts located for this study are by no means all those relevant to the topic, they are both broad in their historical origins and not necessarily limited to articles that focused exclusively on the law professor.

Another point relevant to the sample of the articles considered for this study is that a review of the articles suggested that the search successfully located various key positions in the conflict over the rhetorical construction of the law professor persona(e). When an attorney is attempting to determine where the law stands on a particular matter, the attorney conducts research until the same main points of law continue to recur within the body of research. Then the attorney can be reasonably confident that he or she has located the appropriate law on a given matter. In the same way, this search turned up several recurring perspectives in the discourse on the law professor persona(e), including the law professor as scholar and the law professor as practitioner. These perspectives have played out in the conflict, but at this point it is important to note that the recurrence of such perspectives suggests that the search successfully focused in on a common nucleus of operative views in the conflict, even if different advocates may have presented the views in slightly different ways.

### III. ANALYSIS OF THE TEXTS

Applying persona theory to the texts located for the study, this section of the Article examines the various personae that lawyers have created in their rhetorics. Such a discussion focuses on the law professor as scholar persona and the law professor as practitioner persona.

*A. The Law Professor As Scholar*

The law professor as scholar model has been an important model of the law professor persona since 1960, if not well before. The rhetoric of lawyers who have supported this model has offered dimensions of the scholar persona that include a full-time dedication to the job, teaching duties, production of research, and a public function.

In constructing this persona, lawyers generally have called upon traditional rhetoric, or persuasion,<sup>60</sup> because the lawyers have been making and supporting claims to advance their position. In adopting traditional rhetoric, the lawyers have advanced four main claims: (1) the law professor persona should involve devoting almost all professional time to the university, (2) the law professor persona should include a teaching dimension, (3) the law professor persona should have a research dimension, and (4) the law professor persona should include a public function dimension. To develop these major claims that have outlined the scholar persona, lawyers have offered various types of evidence. The following discussion examines the arguments that have fleshed out this persona.

Advocates of the law professor as scholar model have maintained that full-time dedication to the job should be an important dimension of the law professor persona. Various aspects of this dimension come from the fact that the law professor is a member of the university after perhaps only a short tenure in legal practice, if that at all. As Robert A. Leflar noted, following two to five years of private practice or government experience, the law professor devotes himself or herself to full-time work in the academy, although some outside work may take place on the side, provided that work does not “interfere with [the law professor’s] day-to-day performance” of working in the university.<sup>61</sup> Robert L. Bard of the University of Connecticut suggested that the law professor has the status that comes with ready access to various individuals such as secretaries and research assistants.<sup>62</sup> Often, access to these people is an indication of full-time employment within an organization. Meanwhile, Robert M. Jarvis of Nova University noted that the law professor has a good amount of available time, and much of that time is open for conducting research.<sup>63</sup> This available time is designed to keep the law professor away from “the

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60. *See supra*, note 5.

61. Robert A. Leflar, *The Law Teacher’s Place in the American Legal Profession*, 8 J. SOC’Y PUB. TCHRS. L. 21, 23 (1964).

62. Robert L. Bard, *Legal Scholarship and the Professional Responsibility of Law Professors*, 16 CONN. L. REV. 731, 736 (1984).

63. Robert M. Jarvis, *Why Law Professors Should Not Be Hessian-Trainers*, 13 NOVA L. REV. 69, 76 (1988).

greater financial rewards offered by private practice.”<sup>64</sup> Bard concurred with that point.<sup>65</sup> By making the point, Jarvis was suggesting largely separate spheres for lawyers in the academy and for those in the world of practice. In short, because the law school is situated in the university,<sup>66</sup> the law professor tends to be a regular member of the university faculty and does not hold other major positions.

In addition to full-time devotion to the job, advocates of the law professor as scholar model have argued that teaching duties should remain an important aspect of the law professor’s persona. Various examples help to demonstrate this point. For instance, lawyers have discussed the purposes and methods of law teaching. Anthony D’Amato of Northwestern University argued that teaching law should be about teaching law students to cope with legal problems.<sup>67</sup> Unlike traditional undergraduate lectures that tend to do nothing to change a student’s “mental pathways,” the process of “[t]eaching [law] is an attempt to change the student’s mind.”<sup>68</sup> In this sense, the law professor has a duty to try to do more than teach the memorization of legal rules; instead he or she needs to enhance the student’s thinking skills because not endeavoring to do so would indirectly harm “the poor future client who discovers too late that her lawyer is part of her problem and not part of her solution.”<sup>69</sup> As such, law professors often employ the Socratic method of questioning students regarding the materials for classes.<sup>70</sup> D’Amato argued that the questions a professor asks while employing the Socratic method should not suggest specific answers; instead, the questions should encourage students to develop new ways of thinking.<sup>71</sup>

Lawyers have made other points about law teaching. Jarvis maintained that the law professor should instruct students in the area of legal policy,<sup>72</sup> while Roger C. Cramton of Cornell University noted that, because the law professor spends most of his or her time teaching large classes of students, teaching is a key part of the law professor persona.<sup>73</sup> Due to law school

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64. *Id.* at 70-71.

65. Bard, *supra* note 62, at 736.

66. John H. Crabb, *On Integrating Law with the Academic World*, 14 J. LEGAL EDUC. 329, 329 (1962).

67. Anthony D’Amato, *The Decline and Fall of Law Teaching in the Age of Student Consumerism*, 37 J. LEGAL EDUC. 461, 493 (1987).

68. *Id.* at 462.

69. *Id.* at 494.

70. *Id.* at 466.

71. *Id.*

72. Jarvis, *supra* note 63, at 77.

73. Roger C. Cramton, *Demystifying Legal Scholarship*, 75 GEO. L.J. 1, 8 (1986).

economics, such large courses may include 100 to 150 students each.<sup>74</sup> Regardless, law professors are still supposed to make the classroom experience valuable for students.

More specifically, lawyers have staked out ground on issues relevant to the new law professor. One such lawyer was Susan J. Becker of Cleveland State University, who noted that two of these issues include deciding which law courses to teach and learning how to teach.<sup>75</sup> Becker explained that the specifics of law teaching consist of items such as self-presentation in front of students, choosing course materials, preparation of a syllabus, handling the first day of class, and interacting with students.<sup>76</sup> In terms of interacting with students, Becker reflected in the following manner:

In my brief career, I have faced students who repeatedly arrived ten minutes late for class (usually with steaming cup of coffee in hand); talked audibly while I or a fellow student had the floor; raised their hands in a Pavlovian response every time a question or comment danced into their heads; continued to wave the raised hand like a first-grader in need of a bathroom pass until I called on them; yawned as if they had never been so bored in their entire lives; asked questions that had been asked and answered at least twice in the previous five minutes; coughed so loudly during class that I could not speak over the noise; fell asleep (sitting straight up, no less); exhibited the dreaded “So what are you going to do about it?” sneer while informing me that they weren’t prepared to discuss the assigned material; and even passed a case brief to a student I had called on who obviously hadn’t read the assignment.<sup>77</sup>

In response to such behaviors, Becker advocated responses like commenting on the offending behavior.<sup>78</sup> Thus, in reply to the yawning student, the professor might comment, “I’m sorry if we’re boring you; I’ll try to move on to something more exciting as soon as possible.”<sup>79</sup> In part because lawyers like Becker have reflected on their teaching in this manner, teaching has remained an important dimension of the law professor as scholar persona.

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74. George C. Christie, *The Recruitment of Law Faculty*, 1987 DUKE L.J. 306, 315 (1987).

75. Susan J. Becker, *Advice for the New Law Professor: A View from the Trenches*, 42 J. LEGAL EDUC. 432, 433-34 (1992).

76. *Id.* at 434-42.

77. *Id.* at 440.

78. *Id.* at 440-41.

79. *Id.* at 441.

Not only have lawyers embraced the importance of the law professor's relatively traditional teaching duties, but some lawyers have advanced alternative ways to teach, including those ways which outsider philosophies have informed. For instance, in critiquing the domineering Kingsfield model from the 1970s film *The Paper Chase*,<sup>80</sup> Catharine W. Hantzis of the University of Southern California offered a feminist perspective on law teaching, suggesting that such teaching would benefit from the professor's spending time with students, showing students that the professor cares, and finding new experiences for the professor's students.<sup>81</sup> Respectively, these suggestions might manifest themselves in a law professor's having lunch with a colleague in the student cafeteria so that the professor is available for informal student interaction, breaking large classes into small groups on certain days, and perhaps even requiring students in a class on disability law to maneuver around the campus in wheelchairs for a few hours.<sup>82</sup> One goal of such an approach to teaching is for the professor to be "both practical and student centered."<sup>83</sup>

While full-time dedication to the job and teaching have continued to function as notable dimensions of the law professor as scholar model, advocates of this persona have argued that research should be a major focus of the persona. Attention given to multiple aspects of scholarship, including its justifications, illustrates this point. For example, Anthony Chase of Nova University argued that law professors have had to produce legal scholarship because at one time the legal profession chose "to utilize universities to control the supply of lawyers in the United States."<sup>84</sup> In essence, scholarship produces the dues that law professors owe the universities in exchange for the universities' granting "the socially and economically useful premises and auspices of the American university" to the legal field.<sup>85</sup> As members and beneficiaries of the university system, law professors have had to play by the rules of publishing or perishing. Chase added that, at least during the late 1980s, law professors made more money than professors in other academic fields, so law professors had another reason for having to pay the publishing dues.<sup>86</sup>

Jarvis extended the idea that Chase and others have advocated, specifically maintaining that scholarship should be "the single most

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80. *THE PAPER CHASE* (Twentieth Century-Fox 1973).

81. Catharine W. Hantzis, *Kingsfield and Kennedy: Reappraising the Male Models of Law School Teaching*, 38 J. LEGAL EDUC. 155, 156-57, 162-63 (1988).

82. *Id.* at 162-63.

83. *Id.* at 162.

84. Anthony Chase, *The Legal Scholar As Producer*, 13 NOVA L. REV. 57, 65 (1988).

85. *Id.* at 67.

86. *Id.* at 66.

important item on [law professors'] professional agendas."<sup>87</sup> "[O]nly law professors have the possibility of becoming and remaining authentic academics," Jarvis asserted.<sup>88</sup> For instance, unlike practicing lawyers, law professors have flexible professional time, resources for academic research, and research assistants.<sup>89</sup> Jarvis made the point that research should be law professors' top priority not only "the year before they come up for tenure" but rather throughout their scholarly careers.<sup>90</sup> If a lawyer in practice seeks to make the transition to the academy, that individual most likely will need to publish at least one article to make the case for his or her suitability for functioning within the academy.<sup>91</sup>

In part because many lawyers have designated research as a major dimension of the law professor persona, these lawyers have argued over the particulars of legal scholarship. For instance, Cramton considered some of the assumptions behind the production of traditional legal scholarship. Cramton argued for a "modernist view of tentative and evolving truth" in scholarship,<sup>92</sup> as well as for backing away from advocacy writing.<sup>93</sup> Additionally, Cramton bemoaned the point that the prolific scholar would gain prestige and move up the ladder of law school hierarchy, regardless of the quality of the scholarship he or she produced.<sup>94</sup> Here, Cramton was arguing against a quantity-over-quality approach to advancement in the legal academy.

Meanwhile, during the 1980s, Richard Posner of the University of Chicago addressed the various types of scholarship, including doctrinal scholarship and interdisciplinary scholarship.<sup>95</sup> According to Posner, doctrinal scholarship is the traditional mode of legal scholarship, supposedly free of other disciplines, by which law professors consider legal authorities and refine an understanding of what legal doctrine is now and should be in the future.<sup>96</sup> On the other hand, interdisciplinary scholarship considers law in light of other scholarly fields such as those in the

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87. Jarvis, *supra* note 63, at 72.

88. *Id.* at 74.

89. *Id.* at 75-76.

90. *Id.* at 76.

91. Tanya K. Hernández, *Placing the Cart Before the Horse: Publishing Scholarship Before Entering the Legal Academy*, 7 MICH. J. RACE & L. 517, 517 (2002); Rebecca E. Zietlow, *Writing Scholarship While You Practice Law*, 7 MICH. J. RACE & L. 511, 511 (2002).

92. Cramton, *supra* note 73, at 5.

93. *Id.* at 7-8.

94. *Id.* at 14.

95. Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1113, 1119 (1981).

96. *Id.* at 1113-14.



humanities and social sciences.<sup>97</sup> Posner concluded that, although doctrinal scholarship “should remain the core of legal scholarship,” both types of scholarship could have a home within the research dimension of the law professor persona and that law schools should attempt to further that end.<sup>98</sup>

During the subsequent decade, Edward L. Rubin of the University of California, Berkeley, concurred with much of Posner’s earlier critique of interdisciplinary legal scholarship. Indeed, Rubin noted the overlap of law and other areas of knowledge such as natural science, literary criticism, moral philosophy, and social science.<sup>99</sup> Although he accepted the potential value of interdisciplinary scholarship in some cases, Rubin still drew lines between legal scholarship and scholarship in other fields. For instance, he argued that while legal scholarship was prescriptive, natural and social science scholarship was descriptive, literary criticism was interpretive, and moral philosophy was categorically prescriptive.<sup>100</sup> According to Rubin, differing assumptions about methodology proved too much for legal scholarship to rely upon the approaches of other fields in most cases.<sup>101</sup> Regardless of whether one accepts Rubin’s distinctions among the approaches of the non-legal fields that he considered, Rubin’s focus on scholarship, much like Posner’s focus, did help advance the notion of the importance of the scholarly dimension of the law professor persona because, one way or another, the law professor would create scholarship.

Beyond the considerations of Cramton, Posner, and Rubin, other lawyers have argued the specifics of how new law professors should engage in legal scholarship, thus again maintaining the belief that the law professor persona has a key research dimension. Robert Abrams of Wayne State University offered a few tips, including the need for writing regularly and avoiding “[b]usy work” like “[b]ar journal articles, survey pieces, glorified op-ed pieces appearing in non-law reviews, law alumni magazine articles, previews of U.S. Supreme Court cases, nonsubstantive book reviews, segments of commission reports or studies, etc.”<sup>102</sup> Abrams urged the new law professor to focus on “[h]igher orders” like “[a]ffirmative thesis articles, law reform articles, book chapters . . . , frontal attacks on the citadel of major legal doctrine, reconciliation of theory with practice articles, [and]

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97. *Id.* at 1119.

98. *Id.* at 1113, 1129-30.

99. Edward L. Rubin, *Law And and the Methodology of Law*, 1997 WIS. L. REV. 521, 524-41 (1997).

100. *Id.* at 565.

101. *Id.*

102. Robert H. Abrams, *Sing Muse: Legal Scholarship for New Law Teachers*, 37 J. LEGAL EDUC. 1, 2 (1987).

longer works such as monographs and books.”<sup>103</sup> Sherri L. Burr of the University of New Mexico suggested the importance of a scholarly agenda of interests and choosing to write from that set of interests.<sup>104</sup> She maintained that “what gives you the most satisfaction” should guide selection from the set of interests.<sup>105</sup>

Abrams also advanced several points about self-motivation for writing and the tenure politics that can follow writing. Addressing self-motivation and paraphrasing a colleague, Abrams noted that “the first step in writing is to take off your shoes. Then you crawl under your desk with a hammer and nails and nail the shoes to the floor. Finally, you sit down at the desk, insert your feet into the shoes, and tie your shoes on again.”<sup>106</sup> In terms of tenure politics, Abrams offered “a series of three propositions”:

1. Productive writers receive tenure.
2. Non-writers are denied tenure.
3. In cases not governed by the two primary rules the most important determinant in tenure decisions is the quantity of credible writing produced by the candidate.<sup>107</sup>

The sum total of the analysis was the following: “Write early and often!”<sup>108</sup>

Other lawyers have reviewed critically some of the purposes of legal scholarship. For example, Robert Stevens of Haverford College questioned the audience of legal scholarship. Stevens queried whether the law professor would write academic work that professors in other fields might read or pragmatic work that lawyers in the world of practice might use.<sup>109</sup> Stevens cautioned that law professors could not be all things to all people.<sup>110</sup> Additionally, Marc Rohr of Nova University suggested that some law schools might place too much emphasis on scholarship at the cost of law students’ educational experiences because not all scholarship benefits students.<sup>111</sup> Nonetheless, by placing great emphasis on the research dimension of the law professor persona, lawyers further have emphasized their rhetorical construction of the law professor persona as that of a scholar.

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103. *Id.* at 2.

104. Sherri L. Burr, *Reflections on a Scholarly Agenda for the Beginning Law Professor*, 10 ST. LOUIS U. PUB. L. REV. 155, 155-58 (1991).

105. *Id.* at 159.

106. Abrams, *supra* note 102, at 8 n.13.

107. *Id.* at 11.

108. *Id.* at 13.

109. Stevens, *supra* note 3, at 446.

110. *Id.* at 445.

111. Marc Rohr, *A Law School for the Consumer*, 13 NOVA L. REV. 101, 102-04 (1988).

As vital as research has continued to remain as a dimension of the law professor as scholar model, advocates of this model have argued that the public function dimension is also important, although its importance is not as great as that of the research dimension.<sup>112</sup> This public function dimension has several strands, one of which is the development of scholarship that is helpful to the world of legal practice.<sup>113</sup> While such scholarship may have “a good dose of theory,” this scholarship should give “due weight to doctrine” so as to be of utility to legal practitioners.<sup>114</sup> Roger J. Traynor, an associate justice on the California Supreme Court, noted that judges and members of the practicing bar call upon law review writing in judicial opinions and briefs to the court.<sup>115</sup> Naturally, law professors are frequently the authors behind law review articles. As such, law professors should offer lawyers in the world of practice views on “how the legal regime works” so that lawyers can employ such views while working on cases.<sup>116</sup>

Other strands of the public function dimension of the law professor persona likewise involve “devot[ing] a substantial component of [one’s] work life to selfless public service.”<sup>117</sup> Such additional strands include improving social conditions for individuals who are unable to help themselves<sup>118</sup> and offering consultation to government entities.<sup>119</sup> For example, a law professor who teaches torts might offer services to a legislative committee that is drafting a major new statute in the area of products liability law. This type of service not only would help legislators who would learn from the professor’s expertise and thus be able to produce a more effective statute, but the service also could assist consumers who may be unaware of the current limitations of state products liability law. Besides providing such benefits, participating in this service would set a positive example for law students who are on the verge of entering the profession.<sup>120</sup> In a post-Watergate world where the ethos of the legal profession has been an ongoing matter of concern, providing such an example would be an important benefit.<sup>121</sup> Finally, the law professor might

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112. Bard, *supra* note 62, at 733.

113. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 38 (1992).

114. *Id.* at 45-46.

115. Roger J. Traynor, *To the Right Honorable Law Reviews*, 10 UCLA L. REV. 3, 6 (1962).

116. Edwards, *supra* note 113, at 56.

117. Bard, *supra* note 62, at 749.

118. *Id.*

119. Stevens, *supra* note 3, at 446.

120. Bard, *supra* note 62, at 749.

121. *Id.*

even take on the occasional high-profile case at the appellate level, particularly if the case goes to the U.S. Supreme Court.<sup>122</sup>

While lawyers rhetorically have constructed a generally uniform scholar persona of the law professor, some tension periodically can manifest itself among the various dimensions of this persona. During the 1960s, Thomas F. Bergin of the University of Virginia offered an explanation of the tension between teaching future lawyers and engaging in scholarship. Although the law professor may teach a favorite jurisprudential seminar, the professor is also supposed to teach law students something about the world of practice, a process which Bergin called “Hessian-training.”<sup>123</sup> Unlike jurisprudential teaching, such hands-on teaching often conflicts with the type of research that the law professor does.<sup>124</sup> From this perspective, the tension may be impossible to cure.<sup>125</sup> Clark Byse, formerly of Harvard University and then visiting at Boston University, posited that because a law professor’s research can inform his or her teaching and vice versa, hands-on teaching and research should not be in great tension.<sup>126</sup> Thus, a law professor ought to be able to teach law students something about lawyering and also engage in research on the law. Whether Bergin or Byse made the better point has remained an unresolved issue.

As this Article has illustrated so far, advocates of the law professor as scholar persona have argued that the law professor persona should include the dimensions of a full-time dedication to the job, teaching duties, production of research, and a public function. Indeed, the scholar persona of the law professor has not been oriented heavily in the direction of legal practice.

In presenting their ideal law professor persona as the scholar, lawyers who have embraced this position have done so primarily through traditional rhetoric. This rhetoric has involved the advancing and supporting of claims. The texts studied here did not suggest any serious consideration on the part of the pro-scholar rhetors of competing positions for the purpose of understanding those positions. Indeed, the rhetoric essentially ignored the pro-practitioner rhetoric that will receive attention in the next subsection of this Article.

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122. Jonathan L. Entin, *The Law Professor As Advocate*, 38 CASE W. RES. L. REV. 512, 522-23 (1988).

123. Bergin, *supra* note 23, at 638.

124. *Id.*

125. John L. Costello, Jr., *Another Visit to the Man Divided: A Justification for the Law Teacher’s Schizophrenia*, 27 J. LEGAL EDUC. 390, 391 (1975).

126. Clark Byse, *Legal Scholarship, Legal Realism and the Law Teacher’s Intellectual Schizophrenia*, 13 NOVA L. REV. 9, 29-31 (1988).

*B. The Law Professor As Practitioner*

Although the above rhetoric strongly indicates support for the scholar persona of the law professor, not all lawyers have accepted this type of persona. Instead, some lawyers have argued vigorously for the merits of a practitioner persona, which is experience-based.

In seeking to construct this alternative persona, lawyers have called upon traditional rhetoric because these lawyers have been making and supporting claims to advance their position. Through traditional rhetoric, the lawyers have offered two major claims: (1) legal education, via the scholar model, has failed to educate future lawyers adequately and (2) the practitioner model would be a more effective approach to legal education. To support these major claims, pro-practitioner lawyers have offered various types of evidence. This discussion examines the arguments that have advanced this practitioner persona.

Pro-practitioner lawyers have argued passionately that legal education, through the scholar model, has failed to train prospective lawyers adequately to practice law. This critique has come from as high up as the U.S. Supreme Court. In the mid-1970s, Chief Justice Warren E. Burger took U.S. legal education to task for not satisfactorily training law students to function as competent courtroom lawyers.<sup>127</sup> Calling upon “conversations extending over the past twelve to fifteen years at judicial meetings and seminars, with literally hundreds of judges and experienced lawyers,” Burger estimated that perhaps “from one-third to one-half of the lawyers who appear in the serious [legal] cases are not really qualified to render fully adequate representation” to clients.<sup>128</sup> Burger listed witness examination and handling of evidence as examples of skills that many lawyers had not mastered.<sup>129</sup> Analogizing law with other fields, Burger pointed out that “[t]he medical profession does not try to teach surgery simply with books; more than 80 percent of all medical teaching is done by practicing physicians and surgeons.”<sup>130</sup>

Burger was not the only individual upset with preparation for legal practice. For instance, Patricia M. Wald, a judge on the U.S. Court of Appeals for the District of Columbia Circuit, took issue with the research performance of the law professor who adopted the scholar persona and how that performance did little to prepare students for practical legal writing.

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127. Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 *FORDHAM L. REV.* 227, 227, 232 (1973).

128. *Id.* at 234.

129. *Id.* at 234-35.

130. *Id.* at 232.

For instance, Wald noted that “[a]ble advocacy writing has little in common with a long, discursive paper on some abstract facet of the law.”<sup>131</sup> Wald pointed out that this latter type of writing commonly has a home in “law review ‘think’ pieces,”<sup>132</sup> which, as noted above, have become a component of one of the key dimensions of the scholar persona of the law professor. Wald went so far as to explain that her “experience teaches . . . that too few law review articles prove helpful in appellate decision making. They tend to be too talky, too unselective in separating the relevant from the irrelevant, too exhaustive, too exhausting, too hedged, too cautious about reaching a definite conclusion.”<sup>133</sup> From Wald’s perspective, the teaching of law review writing by professors who have adopted the scholar persona has not been in the interest of preparing law students to write as practicing lawyers.

Away from the bench, Scott Turow, a practicing lawyer in Chicago, continued the critique of the efficacy of legal education, claiming, “To put it plainly, law school is not lawyer school.”<sup>134</sup> Turow argued, “The best teachers of legal skills are those who use them, and it would have been pointless for my Harvard Law School professors to attempt to instruct me about the execution of tasks they themselves may barely know how to perform.”<sup>135</sup> Indeed, “law school [did] not teach students to think like lawyers”; it instead taught students “to think like law professors.”<sup>136</sup> According to Turow, something important was clearly missing from law school.

In light of critiques of law school such as those above and others, lawyers have argued that the practitioner model would be a more effective approach to legal education than the scholar model. To address the unsatisfactory status quo, Burger maintained that, at least in the case of trial practice, “trial advocacy must be learned from trial advocates.”<sup>137</sup> U.S. legal education could learn from the hands-on approach that England has employed in the training of its legal advocates,<sup>138</sup> and the practitioner persona would work well with such an approach. Ideally, this type of approach would help address the level of incompetence that Burger and others have described.

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131. Patricia M. Wald, *Teaching the Trade: An Appellate Judge’s View of Practice-Oriented Legal Education*, 36 J. LEGAL EDUC. 35, 42 (1986).

132. *Id.*

133. *Id.*

134. Scott Turow, *Law School v. Reality*, N.Y. TIMES, Sept. 18, 1988, <http://www.nytimes.com/1988/09/18/magazine/law-school-v-reality.html?pagewanted=all&src=pm>.

135. *Id.*

136. *Id.*

137. Burger, *supra* note 127, at 232.

138. *Id.* at 228-30.

From her perspective, Wald offered several benefits that law students would gain from the law professor who effectively had assumed the practitioner persona to teach. For instance, Wald stressed that law school graduates should understand how claims progress through the system so that graduates would know whether to litigate a particular claim; not all claims can be litigated at acceptable costs, financial or otherwise.<sup>139</sup> Also, in noting the importance of trial experience, Wald quoted her former mentor, Judge Jerome Frank, for the point “that focusing on [teaching] appellate opinions, to the detriment of [teaching] what happened in the trial court, was ‘like the difference between kissing a girl and reading a treatise on osculation.’”<sup>140</sup> Further, practical experience can allow law graduates to understand the human dimensions of legal practice.<sup>141</sup> As Wald noted, too much technical training at the expense of learning how to deal “with real clients, witnesses and even judges and court personnel” is detrimental to legal practice because lawyers need to know how to interact with other human actors in the legal world.<sup>142</sup> Wald’s argument suggests that the appropriate professor to help law students down this path would be the professor who could assume the practitioner persona successfully.

Other individuals on the bench have concurred with the rhetoric of Burger and Wald. Judge Sherman G. Finesilver of the U.S. District Court of Colorado argued for the benefits of learning law from professors who have adopted the practitioner persona. Finesilver declared that students become more involved in learning from experienced practitioners because such practitioners can offer realistic experiences that relate directly to “the role of a functioning attorney.”<sup>143</sup> Such practical experience should enhance the relevance of law school for many law students and better help prospective lawyers understand “both the immediate analytic aspects as well as the larger social context of each case.”<sup>144</sup>

Support for the practitioner persona and its accompanying level of expertise has come at the state level as well as at the federal level. Judge Judith Ann Lanzinger, writing while on the Ohio Court of Common Pleas, considered the benefits of the law professor’s adopting the persona of a practitioner with judicial experience. Lanzinger argued that, by adding “depth and breadth to the law school curriculum,” judges could “enrich the

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139. Wald, *supra* note 131, at 36.

140. *Id.* at 43.

141. *Id.* at 38.

142. *Id.*

143. Sherman G. Finesilver, *The Tension Between Practical and Theoretical Legal Education: A Judge’s View of the Gap*, 1977 BYU L. REV. 1061, 1062 (1977).

144. *Id.* at 1062, 1071.

law school itself by balancing faculty who have limited practical experience.”<sup>145</sup> In particular, such judges might teach trial advocacy classes and other litigation-related courses.<sup>146</sup> If law schools without faculty members with judicial experience were to consider employing judges part-time, the law professor persona would take a turn for the practical, which would benefit students.<sup>147</sup>

Although lawyers in the world of practice have been the dominant voices in the call for the practitioner model of the law professor and the purported benefits to law students and the legal field that would come with such a model, lawyers in the academy have not always avoided such rhetoric. One example was Hugh W. Silverman of the University of Windsor, who offered some suggestions that made their way into the U.S. conflict over the rhetorical construction of the law professor. Silverman contended that practical experience would allow a law professor to teach effectively the overlapping nature of branches of law like contracts and torts that frequently come together in practice, much more so than in law school classes usually divided up artificially by areas of the law.<sup>148</sup> Silverman explained that “[t]he practitioner who has whetted his teeth upon the various skills and arts of the law has a storehouse of knowledge and insight into the nature and practice of the law, and can readily assess the needs of the lawyer who is about to enter that arena.”<sup>149</sup>

Silverman suggested several ways in which the practitioner could bring realistic experience to class. For instance, rather than relying upon hypothetical situations to provide instruction, in teaching contracts, the practitioner could instruct students in drafting contracts, in teaching torts, the practitioner could offer examples from torts trials, and, in teaching civil and criminal procedure, the practitioner likewise could present examples from experience.<sup>150</sup> Additionally, because the practitioner with trial experience could offer law students a perspective apart from that via which students merely would consider appellate law, this alternative approach would broaden the education of law students.<sup>151</sup>

One special situation in which lawyers have argued that the practitioner persona of the law professor can be especially helpful in establishing

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145. Judith Ann Lanzinger, *Judges Teaching in Law School: Who, What, Where, and Why Not?* 43 J. LEGAL EDUC. 96, 107, 103 (1993).

146. *Id.* at 99.

147. *Id.* at 105.

148. Hugh W. Silverman, *The Practitioner As a Law Teacher*, 23 J. LEGAL EDUC. 424, 430 (1971).

149. *Id.*

150. *Id.* at 430, 431.

151. *Id.* at 431.



professorial ethos and thus more effective legal education is clinical legal education, which goes back at least as far as the 1960s.<sup>152</sup> Clinical legal education involves “integrating the law school with the judicial, legislative and administrative processes of a community.”<sup>153</sup> Often, the law school runs the equivalent of a public interest law firm in which students work on real-life legal problems under the supervision of experienced attorneys.<sup>154</sup>

According to supporters of clinical legal education, the benefits for students are many. For example, Steven H. Leleiko of New York University explained that clinical legal education provides direct legal experience for law students, offers a different perspective on the law from that found in traditional law school classes, opens up students’ minds to social change, enhances students’ capacities, allows students to assume responsibility in their chosen profession sooner, helps with “a broad range of public service activities and the administration of civil and criminal justice,” and challenges law students to employ multiple “intellectual capacities” simultaneously.<sup>155</sup> Naturally, clinical legal education can be only as good as the quality of the supervision and the nature of the opportunities that law students receive during their clinical experiences.<sup>156</sup>

For such experiences to have a chance to take place, the professor has to assume the persona of a practitioner because the persona of a scholar would not fit with the specific means of legal instruction. This is an example of a case in which persona and ethos have a relationship,<sup>157</sup> as the assumed persona of the practitioner would help the professor develop ethos with the audience of law students. If the audience is pragmatically oriented and the performance is skillful, the audience’s perception of ethos most likely will be positive. In turn, windows to learning will be more likely to open. Thus, the likely consequences of the professor’s assumed persona include a strong professorial ethos and an audience more open to instruction.

In an attempt to promote at least something of his favored model, Judge Edward D. Re, formerly of the U.S. Court of International Trade and then of St. John’s University, offered a dose of the practitioner model to contemporary legal education. Reminding law schools that the basic goal of legal education should be “to prepare law students for the legal profession,” Re argued that the law professor without hands-on legal experience should

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152. Steven H. Leleiko, *Legal Education—Some Crucial Frontiers*, 23 J. LEGAL EDUC. 502, 515 (1971).

153. *Id.* at 512.

154. *Id.* at 513.

155. *Id.* at 511-12.

156. *Id.* at 517.

157. Roger D. Cherry, *Ethos Versus Persona: Self-Representation in Written Discourse*, 15 WRITTEN COMM. 384, 402 (1998).

take a sabbatical to “learn about the daily practice of law, and the practical aspects of the trial and appeal of cases.”<sup>158</sup> Such a sabbatical should last at least a semester but preferably a full school year, and the sabbatical should be the professor’s full-time occupation. The inexperienced law professor would acquire hands-on experience and be able to pass on that experience to law students and colleagues.<sup>159</sup> While not fully able to assume the practitioner persona, the law professor who assumed the scholar persona nonetheless would be able to nod more credibly to the practical part of the legal field.

As the arguments of these lawyers, including the lawyers on the bench, show, discontent with the scholar persona of the law professor remains. Giving a hearty nod to the practical qualities that they desire in legal education, lawyers have advanced a spirited case for the practitioner persona to have at least some space within the law school. Unfortunately for these particular lawyers, the rhetoric of individuals like Re concedes that the practitioner persona will not be the dominant model within the legal academy in the near future. Still, lawyers have continued to argue for the importance of the practitioner model, and the rhetoric of this persona has remained defiant.

In seeking to develop their ideal law professor persona, lawyers who have adopted a pro-practitioner position have employed traditional rhetoric. This rhetoric has consisted of advancing and supporting claims. Although Re conceded the prominence of the scholar model in contemporary legal education, the texts studied here did not suggest serious consideration of the pro-scholar position for the purpose of understanding.

#### IV. CONCLUSION

This Article has illustrated how the conflict between lawyers who have supported the scholar model of the first persona of the law professor and lawyers who have supported the practitioner model of the first persona of the law professor has continued since 1960. The fact that many compromise perspectives did not emerge from the rhetorical texts located indicates that the lines of conflict have been sharp.

The traditional rhetoric that lawyers generally have employed in the period since 1960 has not helped the tension in the field. Largely without listening to the competing view in the conflict, lawyers in academia have proceeded to advance their own position. Perhaps to some observers this

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158. Edward D. Re, *Law Office Sabbaticals for Law Professors*, 45 J. LEGAL EDUC. 95, 95, 97 (1995).

159. *Id.* at 97-98.

approach might appear appropriate because, by virtue of their location within the university, these lawyers are currently in the position of power regarding decision-making that surrounds the law professor persona(e) and may be able to afford communicating in this unilateral manner. On the other hand, lawyers in the world of practice have critiqued the view of lawyers in the academy while advancing a very different view of the law professor persona. In this ongoing exercise of either making a case to members of one's own group or making a case to members of one's own group and critiquing the other group's position, even when that other group is not listening, each party has failed to address the other party's underlying concerns.

One minor refinement to this general observation about traditional rhetoric in the conflict is noteworthy because, in the sample of texts studied, not quite every line consisted of purely traditional rhetoric. For example, in her discussion of how to address various teaching issues in law school, Susan J. Becker offered some personal examples from her own classroom,<sup>160</sup> a strategy more common to non-traditional rhetoric.<sup>161</sup> On an optimistic note, this point leaves open the door for other types of communication to enter the conflict, but this rhetorical strategy was not the norm.

In his mid-1980s research, McFarland noted that legal academics and practitioners had come to "live in different rhetorical worlds."<sup>162</sup> These lawyers had developed "little or no understanding" of each other and had become "hostile to one another."<sup>163</sup> While each camp continued to create and send out its rhetoric, the other camp did not process that rhetoric because the perspectives of the camps were so divergent.<sup>164</sup> Consequently, no one could expect anything more than minor change in the communication climate.<sup>165</sup>

Based on the current study, one now can make essentially the same assessment about legal discourse on the U.S. law professor persona(e) from 1960 to the present time. In light of the longer study for which McFarland called, which the current Article has provided, not only is the communication problem as serious as McFarland argued, but the problem has persisted in the decades since McFarland conducted his research. In

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160. Becker, *supra* note 75, at 440.

161. Karen A. Foss & Sonja K. Foss, *Personal Experience as Evidence in Feminist Scholarship*, 58 W. J. COMM. 39, 39 (1994). See also Foss & Griffin, *supra* note 5, at 5-6 & 16.

162. McFarland, *Students and Practicing Lawyers*, *supra* note 15, at 105.

163. *Id.*

164. McFarland, *Rethinking the Schism*, *supra* note 10, at 260.

165. McFarland, *Students and Practicing Lawyers*, *supra* note 15, at 106-07.

short, lawyers have talked past each other and clashed with each other, making few concessions.

While McFarland did not offer any major suggestions for improving this less than constructive communication,<sup>166</sup> Francis A. Allen has acknowledged that “[d]ialogue concerning the methods and emphasis of law training . . . is indispensable to the continuing adaptation of legal education to the world in which it finds itself.”<sup>167</sup> Indeed, this statement hints at part of the underlying problem with the communication in the current conflict. Although the camps are disseminating their rhetoric, they often are not attempting to listen deeply enough to understand each other, and, if they do listen at all, the purpose is to be able to offer a rebuttal. Either way, understanding of underlying concerns like intellectualism and practicality is missing. The traditional approach to the rhetorical process, persuasion, has not proved as helpful as one would have liked, but fortunately other approaches to rhetoric are available to participants involved in the conflict over the rhetorical construction of the law professor persona(e) in the United States. Subsequent research will suggest another approach, grounded in contemporary rhetorical theory, that goes beyond rhetoric based almost exclusively on persuasion. At stake are the law professor persona(e) and the impact of such persona(e) on legal education and the practice of law in, and potentially beyond, the United States.

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166. McFarland, *Rethinking Legal Education*, *supra* note 14, at 207.

167. Allen, *supra* note 4, at 131.