Evidence law as pragmatic legal rhetoric: reconnecting legal scholarship, teaching and ethics

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This article is about the relationship between scholarship and teaching on procedural issues, particularly in the law of Evidence and ethics. We teach Evidence, Trial Advocacy, and other procedural courses without thinking about our scholarly and pedagogical heritage. Although issues of epistemology, pedagogy, and ethics are also the concern of more modern legal theorists, these three dimensions are central to the notion of pragmatic legal rhetoric.

'Pragmatism' goes by many names, such as 'neopragmatism', 'practical legal studies', 'practical reason', 'practical wisdom' and 'scepticism'. Neopragmatists distinguish themselves in two ways. First, they talk about language instead of experience. Secondly, they take a suspicious approach to scientific method. The dimension of critical self-consciousness, realising the political effect that one's gender, sexual orientation, race, and so forth can have on one's perspective, is a further hallmark of neopgramatists. Perhaps the only common denominator of pragmatism is some degree of rejection of foundationalist theories of truth and knowledge.

The continuing contribution of legal realists to current legal scholarship is the understanding that the law is influenced by factors other than pure doctrinal considerations and a willingness to look to disciplines outside the law, especially to the social sciences, for a greater understanding of such influences. Pragmatism embraces many aspects of the critical schools of thought, especially in the willingness to be self-reflexive and self-conscious of one's own prejudices and biases, as one tries to do careful and critical readings of legal texts. Pragmatic legal rhetoric differs from the perspective of some critical legal academics in that compromise and incremental change do not necessarily demonstrate the inadequacy or failure of a particular critical perspective or theory for resolving such difficult problems.

This heritage holds that the ambiguity and difficulty of the question, 'what is best?' is well answered by recognising that (1) there is no definitive answer for all time and space but (2) that this is what appears to be the 'best' solution for this time. This neglected tradition of classical rhetoric is the best perspective for professors of evidence, advocacy, and procedure.

Those scholars who emphasise the rhetorical dimensions of law, especially the denial of rhetoric in academic, social, and political spheres, tend to be marginalised for their lack of 'rigour' or 'scholarly' quality. There is a strong tone of disapproval for those who dare to consider notions of legal truth outside of the rationalist or empirical tradition.

Pragmatic legal rhetoric is a subtype of the more general category of pragmatic rhetoric. Evidence law can be taught as pragmatic legal rhetoric as an alternative to perspectives labelled as legal realism or critical perspectives. The subject of Evidence is the subject of how truth is created or presented in the courtroom. Teaching and writing about Evidence law as pragmatic legal rhetoric allows us to expose the false dilemma of absolute truth versus radical scepticism, while studying the consequences of perpetuating this dichotomy throughout history.

Understanding Evidence law as pragmatic legal rhetoric also has implications for Evidence pedagogy. Traditional forms of civil litigation are being supplemented by alternative forms of dispute resolution which employ less technical or rule-based approaches to evidentiary issues. It is therefore essential to raise and discuss the underlying principles of Evidence. The subject has a rich content that goes beyond the presentation of a set of narrow technical rules.

Approaching the subject of Evidence as pragmatic legal rhetoric challenges us to think constantly about the ethical consideration of one's relationship with one or more audiences. Understanding Evidence law as pragmatic legal rhetoric means making a critical assessment of strategic choices of arguments and presenting justification for them. This is a pragmatic rhetorical process and, when it is employed in law by law students, law professors, lawyers and judges, it is pragmatic legal rhetoric. This sense of ethical deliberation is an essential part of the pragmatic rhetorical education. While the Evidence course does, and should, cover topics about the presentation of evidence at trial, it can have a much more fundamental and important place in the law school curriculum.

One of the hallmarks of a pragmatic legal rhetoric approach to teaching Evidence is flexibility and versatility. Another hallmark of pragmatism is its willingness to embrace interdisciplinary studies, noting that the problems of proof are not unique to the courtroom setting. A genuine need for teaching students about the canons of statutory construction, which provides vocabulary and a set of argumentative conventions unique to legal culture that can be of vital importance to persuading a judge about the construction of an evidentiary rule, also exists. The best teaching materials are those that reveal the tensions within disciplines, those that show that within social science or literature or

art history, there are those who challenge the traditional models of creating, finding, and testing claims about knowledge and truth within a particular field. Pragmatic legal rhetoric perspectives expose students to the diverse, and sometimes conflicting, values behind those rules. It presents a perfect opportunity not only to learn to make arguments on all sides, but also to learn how to critique those arguments persuasively.

The link of pedagogical choices to pragmatic legal rhetoric is that, when student voices dominate in class, students not only learn to argue and persuade through actual experience, but also learn the importance of listening and evaluating the arguments of others. Helping our students to become aware of their audiences also has implications for the ethical dimension of a pragmatic rhetoric approach.

The Evidence course devotes a fair amount of time addressing what makes for effective legal argumentation and persuasion. The importance of narrative and the relevance of context, the power of language and an examination of how evidence is unfairly prejudicial are considered. It is possible to have a notion of truth that is not so objective, universal, absolute and concrete, that a bright-line standard of reliability applies to all disciplines, but that is sufficiently reliable within the constraints of a particular field to allow an expert in that field to render relevant opinions. In other words, truth, in various disciplines, depends on the context. Students should be persuaded that the text of Evidence rules, legislative history, canons of statutory construction, case law, social science, and Bayesian analysis are all 'tools' of persuasion and that they are responsible for making the language of Evidence come alive in the minds of their audience.

Two unique qualities of pragmatic legal rhetoric are self-consciousness and sensitivity to audience. We should try to help students recognise their responsibility for the language they use and increase their awareness of their relationship with an audience. This is an ethical question, for it is inherently a question about the nature of the relationship between the speaker and the listener. A pragmatic legal rhetoric perspective invites one to consider a range of answers to the question, 'what should I say?', which can change depending on time and context. What helps our students become better at the use of Evidence is to teach them to think carefully not only about what they can say, but also what they should say and how they should say it.

One of the latest fashions in academia is mentoring. A law professor is almost always on display, at least for his or her students, but a 'mentor' is someone who agrees, if only tacitly, to show the way to a novice. The author has found this pragmatic legal rhetoric perspective to be highly satisfying, both professionally and personally. Scholars and teachers of Evidence should try to become better citizen-lawyers and should try to help their audiences, whether students or readers, become better citizen-lawyers too.

JUDICIAL EDUCATION

Globalisation of judicial education

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Up to this point, judicial education has largely been considered to be local and insular. The assumption has been that each country's judicial system is unique and therefore requires a unique type of judicial education. Much of the individuality among various countries' judicial education results from not being sufficiently exposed to other methods. With little or no cross-fertilisation of ideas, individuality may well occur, but may be based upon a lack of knowledge, rather than a perception of specific needs and an understanding of judicial training options.

Judicial education includes instruction in judicial process, procedure, skills, and attitudes and also includes teaching judges substantive law, such as new trends in international law. Globalisation of judicial education does not mean that all judges should be trained exactly the same way in each country and should not mean uniformity. It also does not mean an undue focus on the process of quickly closing cases at the cost of not achieving a just result. Globalisation means attracting worldwide participation and establishing synergistic relationships as countries explore and experiment together with education curricula and methodologies. The goal would be to enhance judicial education worldwide, resulting in improvement in court systems and eventually global establishment of the rule of law.

In some parts of the globe, judicial education programs are said to differ depending on whether the legal system is based on civil or common law. In civil law countries, judicial education follows the traditional law school model where students enroll in a program of lectures to prepare them for judicial service. In contrast, common law counties train judges through the peer group educational model in a continuing legal education context, focusing on 'learning by doing' in lieu of the lecture-style of the civil law countries.