

Two Preachers, a Trial Attorney and Aristotle

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“This is a football.”

Randall O’Brien held out a worn, leather football. Eighty-five law students stared at him, leaning forward in their seats. And, for a moment, that is all that happened. He held the football in his outstretched hand. For that bare moment, there was total, utter silence. Thus began our beautiful mess.

This article describes the first eventful offering of a class in Oral Advocacy taught by myself and two Baptist Ministers, based on the writings of Aristotle and the composition of the sermon— a class we developed in response to the practical need to teach law students how to compose a substantial and passionate courtroom argument.¹

How We Started

I’m new at this— I just began teaching two years ago, after a career as a federal prosecutor. I was hired to teach advanced criminal classes and to assist in teaching Practice Court, Baylor’s intensive third-year litigation training program. I was also invited to start a new class if I wanted.

And I wanted. Something about my own legal education had not sat well with me. In short, I hadn’t learned to do what, up to that point, I thought lawyers did— give moving and eloquent speeches in courtrooms. The week before my first trial I sat before a blank sheet of paper, wondering where a closing argument came from. I had learned the common law of torts, I had learned about the limits of legal searches under the Fourth Amendment, I had learned how to evaluate tragic choices in the field of torts, but I had never learned what to do with that blank sheet of paper on the eve of trial.

Once I became a professor, I tried to see if that issue was addressed in the curriculum at Baylor. In a limited way, it was— as part of the Practice Court class, and in an elective Trial Advocacy class which also covered many other aspects of trial. Most students, however, seemed to rely primarily or almost exclusively on the advice in the popular book by Thomas A. Mauet, *Fundamentals of Trial Techniques*, (which in more recent editions has been titled more simply *Trial Techniques*).

The profound effect of Mauet's well-written classic became clear to me quickly in listening to student arguments in Practice Court. With striking uniformity, the students were adopting almost verbatim the samples provided in the Mauet text. For example, Mauet suggests beginning a closing argument with some variation on "This case is about...." or "This is a case about...."² The students, almost to a person, parroted this phrase in beginning their own closing arguments.

There had to be more. More about how to sit down before that blank sheet of paper and convey what lies at the heart of advocacy. More about how to tell the story of a bank robbery, a lost limb, or the day a merger fell apart— More about injecting the stuff of life into the heart of legal practice.

I now had a goal. I would create a class which taught the practical skill of speaking effectively in court.³ To the best of my limited abilities, having already examined our own program, I examined the curricula of other law schools and could not find a class devoted to oral advocacy. In short, my problem was that there was no apparent model to borrow from.

The answer, of course, was all around me at Baylor, a Baptist law school.⁴ Preaching is the heart of the Baptist service, a rich vein which has provided this country with Baptist Clergy-Orators such as Martin Luther King, Jr. and Billy Graham. The goal of the preacher is, like that of the courtroom attorney, to convince an audience to make an affirmative moral choice. Preachers, like lawyers, find that the expectations of their audiences are now defined by television, and that they must strive to meet those expectations if they are to succeed.

Baylor is in Waco, a city rich in Baptist preachers of all conceivable types. It is also, naturally, a city of strong opinions regarding those same Baptist ministers, as I found in seeking the counsel of others about possible collaborators in my Oral Advocacy class.

Two recommendations were made almost by all, however: Randall O'Brien, revered as a preacher and Professor at Baylor's School of Religion, and Hulitt Gloer, the equally well-regarded Professor of Preaching at Baylor's Truett Seminary. Both were also serving as interim pastors, preaching each Sunday to large congregations. To my surprise, both were intrigued with my idea, and quickly signed on to co-teach a one-credit class at the law school. I told them that because the scheduled time of the class conflicted with most students' schedules, we could expect 10-15 students to enroll in the class.

In developing the reading for the class, Hulitt Gloer suggested two titles: Aristotle's *On Rhetoric*, and *Just Say The Word: Writing for the Ear*, by G. Robert Jacks. Aristotle's work, of course, forms the basis for the study of rhetoric, and in a broad sense fit our project: It was written as a response

to, and improvement on, previous Greek handbooks intended for use by those making an appearance in the ancient law courts.⁵ By using it, we were, in a way, completing a circle—returning these thoughts to the courtroom context they were meant to address, having been sheltered and renewed by the Church and the humanities in the nearly two and a half millennia from Aristotle’s time to ours.⁶

In developing a syllabus, we began with the three elements of persuasion described by Aristotle: Ethos (“the projection of the speaker’s character”),⁷ Logos (“logical argument”),⁸ and Pathos (“awakening the emotions of the audience”).⁹ The plan, generally, was to focus on each in turn after an introductory class, followed by class sessions specifically addressing the writing process, structure, storytelling, and asking an audience to make a moral decision.

In developing these ideas, we also agreed to share class time: During each class period, at least two of us would lecture, and at some points all three of us would trade off. Generally, I was the last to speak, in order to connect what the others had discussed with what lawyers do in the courtroom.

Thirty minutes before the first class began, the three of us met in my office. I had shocking news. Instead of the 10-15 students we anticipated, 85 students had enrolled in the class. This constituted about one of every five students in the Law School. The inclusion of ministers had not scared many off, it appeared—several students of other faiths had signed on, including some who were deeply committed to those other faiths.¹⁰

Theory Meets Practice

For the first class session, we had a simple plan to begin the project. Randall O’Brien would give a sermon using the text from Genesis 4:8-16 (the story of Cain and Abel),¹¹ then I would follow by presenting a closing argument in a death penalty case using the same theme.

That first Wednesday morning, Randall O’Brien walked in front of that large group with the football in his hand. We had not compared notes, but there were striking similarities in our presentations—the use of physical objects, the telling of a story from a defined perspective, the appeal to emotion and morality. What O’Brien did with his football, however, was distinctive. He began with a commonality, the football, that we all knew. While continuing to explain how great coaches started with the most basic information, he threw the ball up to a student, who seemed to know what to do with it (this is Texas). The football showed, from the start, the potential and the limits of our project. O’Brien’s use of the physical object to draw

the audience in was masterful, but throwing things at the jury was something a trial lawyer best avoid if she hopes to continue her practice very long.

Thereafter, we launched into Aristotle, the basis not only for the modern study of rhetoric, but for much of homiletics (the study of preaching).¹² Beyond the basic structure of ethos, logos and pathos, much of Aristotle's ideas presaged concerns of the modern lawyer.¹³ For example, I have often heard trial lawyers say that it is important to leave something unsaid—that is, to allow a jury to do at least some of the work in “connecting the dots” at the end of a trial. This precise advice is given by Aristotle, who in describing what he calls an “enthymeme,” says that such an argument can be based on only a few express premises, because others are already known by the jury:

... if one of these is known, it does not have to be stated, since the hearer supplies it; for example, [to show] that Dorieus has won a contest with a crown it is enough to have said that he has won the Olympic games, and there is no need to add that the Olympic games have a crown as the prize; for everybody knows that.¹⁴

However relevant these ideas might have been to our topic, the students seemed flustered by the archaic language of the text. Determined to plow ahead, however, we began to explore these broad themes.

As a first question to the class, I called on a skilled third-year student, asking him if he could define the idea of the enthymeme and relate it to the trial of O.J. Simpson. He looked down from the top of the room (due to the size of the class, we had been moved to an auditorium) with what I took to be a look of shock and dismay. He stuttered a little, then perfectly defined the concept and played out the idea in describing the role societal racism made in completing the picture presented to the jury by the defendant in that trial. It was only later that I learned that this student had, in fact, written a Master's thesis on that precise topic.

That student's familiarity with the material was unusual. Dealing with the Aristotle's *On Rhetoric* worked best when it was kept focused on the practical art of lawyering. For example, in addressing the idea of ethos, or the credibility of the speaker, Aristotle was a starting point:

We believe fair minded people to a greater extent and more quickly [than we do others] on all subjects in general and completely so in cases where there is not exact knowledge but room for doubt.¹⁵

We began, then, on common ground—to both the preacher and the trial attorney, the principal audience is often going to be those for whom “there is not exact knowledge but room for doubt.” Once that was recognized, all three professors discussed the specific tactics we used to establish *logos*: Making fair concessions where necessary, avoiding excess, representing something beyond narrow self-interest, and establishing a common ground of knowledge between the speaker and the audience (like Randall O’Brien’s toss of the football). We all talked about humility; the demon of self-importance, apparently, is as toxic to the credibility of a minister as it is to the persona of a trial lawyer.

Though we had not anticipated it, at this point the idea of vocation became important. To present oneself as credible, how could one have that credibility? What if we don’t represent someone or something we believe in? To the ministers, this was not an issue; to me, the answer was more complex. Hulitt Gloer beautifully summed up the moment that a preacher becomes a success: “When your deep gladness and the world’s deep hunger meet.” At this moment, I suspect, students began wondering if their planned careers in the law (primarily at larger firms) could meet this high standard of success. From this point on, the moral compromises inherent in the practice of law became an explicit part of the course, brought to the fore in contrast to the relative moral unambiguity of the clergy.

On the subject of *logos*, a strange synchronicity developed. I had planned to start my part of the lecture by talking about the limited role of logic in argument; that there was a “gap” between what someone knew and what was necessary to persuade them to convict a man or award money, a gap which needed to be bridged by the other elements of argument. In my customary role of speaking last, I was surprised to see Randall O’Brien pull out a bag from an auto parts store containing a spark plug and a gap measuring device—his tools to pre-empt my point! Again, Aristotle addressed this same point, suggesting that, for example, a prosecutor attempt to bridge this gap by describing the defendant not only as violating the law but by violating “many norms of justice” including marriage vows or the pledge inherent in a handshake.¹⁶ This technique, of course, is still very popular, despite the attempts of the rules of evidence to constrain it.¹⁷

I suspected that within our discussion of *On Rhetoric*, the biggest disparity between preaching and court argument would come in the use of *pathos*. In court, the use of appeal to the emotions is muted by the demands of the court and ethical restrictions. Prosecutors, for example, are expressly forbidden from “inflaming the emotions” of the jury.¹⁸

However, even on this point there was some agreement between the preachers, the lawyer and Aristotle. One key to managing *pathos*, Aristotle

makes clear, is through description— to describe acts and people in such a way to make the audience feel a certain way towards those involved in a case. He describes key emotions to be created as being in opposition to one another— Calm/anger, confidence/fear, and emulation/envy, for example.¹⁹ The trick, naturally, is to describe people and events in a way which will make the audience view your client in a positive light and the opponent in a negative light. The shading of emotion through description was emphasized with particularity by Hulitt Gloer, who excelled at showing the students methods to more fully make human those involved in an event. For example, Gloer sometimes removed any reference to time from his recital of facts, which emphasized the universal aspects of even the most ancient story.

In discussing pathos, Aristotle advises bringing out our commonalities to manage emotions. For example, he writes that one common cause of fear is being at the mercy of another,²⁰ suggesting that the common trial tactic of describing an opponent as predatory is a wise one. Professors Gloer and O'Brien, by example and explicit teaching, returned to this theme repeatedly— the importance of describing an event in a way that involves an aspect the audience can relate to their own lives, an essential step in opening up the emotional vulnerability of a group of strangers. This was one lesson that was well learned by the students— in their own exercises, they excelled at finding a point of reference all could relate to, whether it was the experience of going on a roller coaster for the first time or the sense of frailty we sometimes see in children.

This last discussion led to a natural progression into storytelling, an art which is an integral part of preaching and trial advocacy. Ministers and Rabbis, in describing the ancient texts, are constantly faced with the challenge of making them relevant to a world much different than that inhabited by Abraham and Moses. As the ministers demonstrated in class, describing emotions and relationships are as important as describing movement and action in storytelling, as it is the feelings of and connections between the people involved in a story that an audience will relate to their own experiences. Lawyers too often fail in this project, getting tied up in legal jargon and argument without clearly describing the people involved in a case. To the lawyer, the skill of such an emotional description is especially important, as a compelling description of facts may be presented without objection not only in closing argument, but through testimony and in the opening statement.

As we moved away from the Aristotle text and into the more mundane ideas of structure and wording described in the Jacks book, the themes of ethos, logos and pathos continued to define our approach. For example, in

describing the need to request a verdict in a way consistent with the rest of the presentation, the idea of ethos was inescapable. And a flexible idea it is— in approaching this topic, I relied on a scene from a recent episode of the television show *The Osbournes*.²¹ In that episode, Ozzy Osbourne’s children are complaining about the conditions at their high school in Beverly Hills. After hearing their complaints, and in his usual meandering style, Ozzy suggests homeschooling, a suggestion which immediately ends the conversation and strengthens the children’s commitment to their school. While this is within the well-developed ethos of Ozzy Osbourne, it is unlikely to work for the rest of us.

The need to direct a moral decision, just before concluding an argument or sermon, was fertile territory for us. Much as the lawyer too often becomes timid when asking for a verdict, ministers sometimes shy away from asking for a moral commitment from their congregation. We taught this, in part, by example— offering variations on the themes with which we had found success our own professional lives. In doing so, we returned to the professional challenge shared by ministers and trial lawyers: Asking those in an audience to make a moral decision based on facts and argument had put before them. Whether done behind a pulpit or a podium, at that moment the preacher, the lawyer, and the citizen in the ancient courts of Athens face a common task: To move at once both the heart and mind of a passive listener. For over two millennia the same questions have presented themselves, and the techniques of success remain surprisingly unchanged.

What We Learned

After the class was finished (and grades were determined), I asked students for feedback via email. These responses were overwhelmingly positive, but did point to some areas to re-examine. In retrospect, some of the best effects of the class on students, such as the special challenge of the reading and the re-examination of career paths, were unforeseen when we set out to teach the class.

The Benefits of Collaboration

There is value in being shocked once in a while. Bringing ministers into the law school was a bit of a shock to them, and to the law school. As it turned out, however, the best part of the class was a result of this collaboration. As we hoped, the strengths Professors Gloer and O’Brien brought, both in personal talents and in areas of knowledge, fit the hole in our student’s school experience that I hoped to fill. This impression was reaffirmed by the student’s comments. Typical was this reflection of a third-year student:

One of the best things about the class was listening to you, Prof. Gloer and Prof. O'Brien give examples of each technique we were taught. This was much more effective than simply telling us what to do. The different approaches of the three professors complemented each other well, and I think made us realize that we all don't have to be carbon copies of each other and can connect with our listeners in a variety of ways.²²

Expanding the collaboration, or trying different forms of collaboration, could provide further benefits. One obvious tack would be to include elements of theater. As trial attorneys quickly become aware when speaking with juries, the expectations of the average jury member is forged by television and movies. Much as we are tempted to respond to this development by decrying the shallowness of these expectations, that will not do us much good in court. It is more effective, as an advocate, to draw what is best and most fitting from the field of acting. For example, I have found that most students are almost unaware of the effect of the simplest physical movement during argument—moving towards the jury, for example, at a point of crucial importance. At most of our institutions, the resources to teach simple dramatic physical movement are only a stone's throw from the law school.

There is no limitation, either, on the faiths that can contribute to this dialogue. While preaching is a central part of the Baptist service, it is no less central to a number of other faiths, including reform Judaism and some branches of Islam.

When the Oral Argument class is next offered, in Spring, 2003, we may include seminarians as well as law students, so that they may share in the cross-training that has been a success for law students. Allowing the law students and seminarians to work together on class projects would further the collaborative ideal we have found amongst the teachers.

Collateral to this course, it is tempting to begin a competition across the lines of disciplines involving public oratory. For example, to orchestrate a contest between drama students, law students and seminarians, in which the field of battle would alternate between sermons, plays and closing arguments, each group bringing different strengths to new forums.

The Role of Aristotle

The reading material was semi-incomprehensible and I quit reading it after about the 4th week. It simply was not worth the effort for a one-hour class to spend several hours deci-

phering Aristotle. (Please do not read this until after I am graded). I'm still trying to get a grip on "enthymeme."²³

As this email from a student makes clear, not everyone got the full benefit of Aristotle's writings.²⁴ However, most of the students appeared to have done the reading and digested the essence of what we tried to teach based on Aristotle. Despite the difficulty it presented to some students, *On Rhetoric* was an effective teaching tool. Beyond providing insights into human nature and effective speaking that have been honored over the centuries, *On Rhetoric* served two purposes beyond any standard text. First, the Aristotle readings provided a neutral "center" which helped dilute the tension between the thoroughly secular world of law and the thoroughly spiritual world of ministry. By beginning on this neutral turf, we each proceeded off into our own fields of knowledge, comparing notes as we went. This did not mean that the ministers had to secularize their messages; rather it simply allowed the methods of conveying those messages to be seen in a historical context which begins with the ancient Greeks and then branches out into the modern worlds of the church and the courtroom.

A second benefit provided by the Aristotle readings was to prod the students into attention with something other than case law, fiction or academic articles. Law books offer a numbing sameness, and many attempts to deviate from the standard casebooks risk being irrelevant to the larger project of learning the law. "On Rhetoric" was both a wholly different type of writing, and directly relevant to what a lawyer needs to do with that blank sheet of paper on the eve of trial.

Letting Them Talk

The students and professors were unanimous in concluding that more opportunities for the students to use the techniques we taught would have been useful. This would enable us to have the students work on each technique individually, such as storytelling, in the wake of the lecture on the topic. To move towards this goal, it will probably be necessary to limit enrollment and increase the course credits from one to two.

Demonstration and Explanation

One aspect of the class will probably stay the same— that the professors both lecture and provide dynamic examples of the techniques we promoted. The demonstration we began with, for example, and Randall O'Brien's football, provided a template that was referred to throughout the

remainder of the course. The only tweak to this system will be to allow more demonstrations by students, which was limited this year due to the lack of available class time.

Reprise

We will offer Oral Advocacy again. In the end, it met not only my own personal goal (of offering concrete instruction on how to construct an argument), but several institutional goals as well. Most obviously, it offered a wonderful opportunity for collaboration with parts of the University which usually have no interaction with the Law School. At the same time, the class was eminently practical, and addressed the general need to focus at least some of the law school curriculum on practical lawyering skills without giving up academic ideals.²⁵ Hopefully, over time, our experiment will achieve that rare trick: Being at once practical and broadening, with a football thrown in for good measure.

Notes

1. I am not the first to suggest that passion and practicality can be combined in legal education. See D. Maranville, "Infusing Passion and Context into the Traditional Law Curriculum Through Experiential Learning," *J. Legal Educ.* 51 (2001): 51.
2. Mauet, T. A., *Fundamentals of Trial Techniques*, 3rd ed., (New York, 1992), 287-288; Mauet, T. A., *Trial Techniques*, 6th ed., (New York, 2002), 432.
3. From the beginning, the course was intended to be the kind of practical skills course urged by the MacCrate Task Force Report. Section of Legal Education and Admissions to the Bar, American Bar Association, *Report of the Task Force on Law Schools and the Professions: Narrowing the Gap, Legal Education and Professional Development—An Educational Continuum*, (Chicago, 1992).
4. Specifically, Baylor is affiliated with the Baptist General Convention of Texas. It is not affiliated with the Southern Baptist Convention.
5. Kennedy, G. A. ed. & trans., "Introduction," *Aristotle, On Rhetoric*. (Oxford, England, 1991), 8-9.
6. Gerber, D. J., *Prometheus Born: The High Middle Ages and the Relationship Between Law and Economic Conduct*, (St. Louis U.L.J., 2001), 673, 689-690
7. Kennedy, G. A. ed. & trans., "Prooemion," *Aristotle, On Rhetoric*. (Oxford, England, 1991), ix.

8. Ibid.

9. Ibid.

10. The conversion of students to Christianity was not the goal of the course. However, both Christian and non-Christian students welcomed an open discussion of faith and the vocation of law. These discussions, fostered by the class lectures, were most often held at dinner tables and in the hallways of the law school, based on what I saw and was told by students.

11. “And it came about when they were in the field, that Cain rose up against his brother Abel and killed him. Then the Lord said to Cain, “Where is Abel your brother?” And he said “I do not know. Am I my brother’s keeper?” And He said, “What have you done? The voice of your brother’s blood is crying to me from the ground, which has opened its mouth to receive your brother’s blood from your hand. When you cultivate the ground it shall no longer yield its strength to you; you shall be a vagrant and a wanderer on the earth.” And Cain said to the Lord, “My punishment is too great to bear! Behold, Thou hast driven me this day from the face of the ground; and from Thy face I shall be hidden, and I shall be vagrant and a wanderer on the earth, and it will come about that whoever finds me will kill me.” So the Lord said to him, “Therefore, whoever kills Cain, vengeance will be taken on him sevenfold.” And the lord appointed a sign for Cain, lest anyone finding him should slay him. Then Cain went out from the presence of the Lord, and settled in the land of Nod, East of Eden.” Genesis 4:8-16 (New American Standard).

12. As Kennedy notes, Aristotle brought a secular approach to rhetoric: “Though conventionally pious, Aristotle preferred to live in the real world; his theory of ethics is not based on religious belief or reward and punishment in the afterlife (as is Plato’s) but on how to achieve happiness in a secular society by rational control of the emotions.” Kennedy, G. A. ed. & trans., “Introduction,” *Aristotle, On Rhetoric*. (Oxford, England, 1991), 4.

13. At times, the common concerns we share with the ancient Greeks were striking. For example, Aristotle promoted arbitration as an alternative to lawsuits: “And [it is fair] to want to go into arbitration rather than to court; for the arbitrator sees what is fair, but the jury looks to the law; and for this reason arbitrators have been invented, that fairness may prevail.” Kennedy, G. A. ed. & trans., *Aristotle, On Rhetoric*. (Oxford, England, 1991), 106.

14. Ibid., p. 42.

15. Ibid, p. 38.

16. Kennedy, G. A. ed. & trans., *Aristotle, On Rhetoric*. (Oxford, England, 1991), 107.

17. I.e., Federal Rule of Evidence 404(b): “Evidence of other crimes, wrongs

or acts is not admissible to prove the character of a person in order to show conformity therewith.” It may, however, be suitable for other purposes...”

18. United States v. Young, 470 U.S. 1, 6-9 (1985).

19. Kennedy, G. A. ed. & trans., *Aristotle, On Rhetoric*. (Oxford, England, 1991), 124-162.

20. *Ibid.*, p. 140.

21. “The Osbournes” (MTV, 2001-2002) chronicles the real-life adventures within the home of Ozzy Osbourne, the former lead singer of the heavy-metal band Black Sabbath. Osbourne, now well into middle age, is a husband and father to two irascible teens, Jack and Kelly. It would appear that Ozzy Osbourne’s former lifestyle, including drug use, alcohol binges and biting the head off of at least one bat, has only increased interest in his family life.

22. Email, on file with the author.

23. Email from student, on file with the author.

24. Because the class finished reading Aristotle in week six, this student did do most of the reading. The success of the class benefited from the culture at Baylor Law School, where it is generally acknowledged that the third year of the law program is the most difficult. Students were, as it was revealed in class, generally diligent in doing the assignments.

25. At least one academic has observed that “There is no reason why law schools cannot serve the goals of liberal, intellectual values and understandings, on the one hand, and professional competence, on the other.” Elson, J. S. , “The Regulation of Legal Education: The Potential for Implementing the MacCrate Report’s Recommendations for Curricular Reform,” *1 Clinical L. Rev.* (1994): 363. Our Oral Advocacy course demonstrated one attempt to do exactly that. See also, Watson, A. “Legal Education Reform: Modest Suggestions,” *51 J. Legal Educ.* (2001): 91, 92-93.