Legal Communication & Rhetoric: JALWD

Fall 2011 / Volume 8

ARTICLES & ESSAYS

Rule Synthesis and Explanatory Synthesis: A Socratic Dialogue Between IREAC and TREAT

Michael D. Murray

Rule Synthesis and Explanatory Synthesis:

A Socratic Dialogue Between IREAC and TREAT

Michael D. Murray*

PLATO: By way of introduction, this conversation concerns two forms of synthesis of legal authorities—rule synthesis and explanatory synthesis. Socrates inquired, as he is wont to do, What is the difference between these two forms of synthesis in legal discourse? He sought the two persons best able to answer his question: Ireacus, the practitioner of IREAC and rule synthesis, and Treatis, the practitioner of TREAT and of both rule synthesis and explanatory synthesis. Socrates insinuated himself into a dialogue with these two at the corner of the Academy occupied by Michael D. Murray. In accord with our custom, I endeavored to record the dialogue of Socrates,[1] while Michael Murray promised to provide footnotes.

* * * * *

SOCRATES: My dear Ireacus, dear sweet Treatis, how fortunate I am to encounter you here.

IREACUS: The pleasure is ours, Socrates.

* Associate Professor of Law, Valparaiso University School of Law. Professor Murray thanks Kristen K. Robbins-Tiscione (Georgetown), Christy DeSanctis (George Washington), David E. Sorkin (John Marshall-Chicago), and the participants in the Scholars' Forum of the Capital Area Legal Writing Conference at George Washington University Law School, February 25, 2011, for their thoughtful and insightful comments on this article, and Linda Berger (Mercer), Bruce Berner (Valparaiso), Bruce Ching (Valparaiso), Michael DeSanctis (Jenner & Block), Terry Phelps (American), and the participants in the "Rhetoric and Persuasion: The Substance of Our Discipline" session at the 2011 AALS Annual Meeting, Legal Writing, Reasoning, and Research Section for their comments on the presentation of this article. He also thanks Jenna Throw, Valparaiso JD candidate 2011, for her research assistance.

1 *E.g.* Plato, *Phaedrus* (Benjamin Jowett trans.), http://www.classicallibrary.org/plato/dialogues/7_phaedrus.htm (accessed Mar. 26, 2011), Plato, *Gorgias* (Benjamin Jowett trans.), http://www.classicallibrary.org/plato/dialogues/15_gorgias.htm (accessed Mar. 26, 2011), and Plato, *Phaedo* (Benjamin Jowett trans.), http://www.classicallibrary.org/plato/dialogues/14_phaedo.htm (accessed Mar. 26, 2011).

SOCRATES: I wonder if I may prevail upon the two of you to answer some questions about the methods of synthesis of legal authorities used in your systems of structure and analysis, IREAC and TREAT.[2]

TREATIS: We are at your disposal.

SOCRATES: Before I start, I must comment that upon seeing both of you for the first time here today, I cannot help but remark that the two of you bear a strong resemblance to a distinguished and venerable member of the Academy, Iracus Simplicitus. Are you related?

IREACUS: We are. The two of us are siblings, and Iracus Simplicitus is our father.

TREATIS: Iracus Simplicitus was a pupil of Aristotle and formed the core of his organizational paradigm for legal discourse and analysis, IRAC, from the *topos* of invention preferred by Aristotle: the syllogism and the enthymeme. The major premise of the syllogism is the rule section—the R of the analysis—and the minor premise is the facts and situation to which the rule is applied in the analysis or application—the A section of the analysis—to produce the conclusion of the analysis—the C of the IRAC paradigm.[3]

IREACUS: Treatis and I, in turn, refined the paradigm, to incorporate another step in the analysis, explanation of the Rule—the E section of IREAC and TREAT—and to incorporate the legal method of synthesis of authorities.[4] Of course, this is the point at which our systems differ.

SOCRATES: Wait! You're getting way ahead of me. I haven't had the chance to show off my stupendous insight and keen penetration into the problem. Let me interject a question, by which I mean, let me go on and tell you what I already know about this topic and throw in a query at the end to allow you to say something.

TREATIS: By all means.

IREACUS: Fire away.

SOCRATES: Thank you. Now, at the point of legal analysis when synthesis occurs, the author has already determined an issue, a legal

2 *See* Michael D. Murray & Christy H. DeSanctis, *Legal Writing and Analysis* chs. 2, 6, 7 (2d ed., Found. Press 2009) (discussing IRAC and TREAT); Linda H. Edwards, *Legal Writing: Process, Analysis, and Organization* chs. 10, 11, 19, 20 (5th ed., Aspen Pub. 2010) (discussing IREAC and variations for objective and persuasive discourse); Kristen K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 Vt. L. Rev. 483, 484–87, 492 (2003) (discussing IRAC and IREAC).

3 *See generally* sources cited *id*.

4 *See id.*

question that must be answered in order to render advice or advocacy for a client.[5] She has researched and compiled a number of applicable authorities—primary controlling authorities and primary persuasive authorities and secondary authorities.[6] Then the author considers a synthesis of these authorities.

IREACUS: You are entirely correct.

SOCRATES: In my conversations, I have learned that synthesis of authorities is universally recognized in the legal academy as being a fundamental component of legal analysis[7] and legal rhetoric,[8] including the exposition of legal reasoning, and the communication of legal argument and advocacy. I am told that the consensus of the scholarship on this topic is that a synthesis of authorities found to be on point and controlling is a necessary part of legal analysis and legal argument in order to accurately determine and state the prevailing law—the *rules*—that govern a legal issue.[9] Am I correct so far?

TREATIS: Quite so.

SOCRATES: Authorities that control the disposition of a legal issue must be reconciled for their explicit statements and pronouncements of the governing legal standards as well as examined for implicit requirements that are induced from the controlling authorities. This is established doctrine that enjoys the nearly unbroken support of the scholarly commentary,[10] is that not right?

IREACUS: You perfectly conceive the meaning, Socrates.

5 Murray & DeSanctis, *supra* n. 2, at ch. 2.

6 *Id.* at chs. 2–5.

7 "It would be impossible to do legal research without analyzing, synthesizing, and applying the information found, both to the original issue and to the research plan developed to address the issue." Sarah Valentine, *Legal Research as a Fundamental Skill: A Lifeboat for Students and Law Schools*, 39 U. Balt. L. Rev. 173, 210 (2010) (citing ABA Sec. Leg. Educ. & Admis. to B., *Legal Education and Professional Development—An Educational Continuum: Narrowing the Gap* 152 (ABA 1992)); Jane Kent Gionfriddo, *Thinking like a Lawyer: The Heuristics of Case Synthesis*, 40 Tex. Tech L. Rev. 1, 4 (2007).

8 *See* George A. Kennedy, *Classical Rhetoric and Its Christian and Secular Tradition from Ancient to Modern Times* 61 (U. N.C. Press 1980) (discussing Plato's concepts of the dialectic and synthesis, and Aristotle's connection of the dialectic with rhetoric); *see also* Eileen A. Scallen, *Evidence Law as Pragmatic Legal Rhetoric: Reconnecting Legal Scholarship, Teaching and Ethics*, 21 QLR 813, 834 (2003); Steven D. Jamar, *Aristotle Teaches Persuasion: The Psychic Connection*, 8 Scribes J. Leg. Writing 61, 66–67 (2002); Kurt M. Saunders & Linda Levine, *Learning to Think like a Lawyer*, 29 U.S.F. L. Rev. 121, 125–26 (1994).

9 Synthesis, when used in scholarship or legal analysis, refers to rule formation through a process of synthesis of authorities. *E.g.* Helene S. Shapo, Marilyn R. Walter & Elizabeth Fajans, *Writing and Analysis in the Law* ch. 2(IV), ch. 5(III) (4th ed., Found. Press 1999); Deborah A. Schmedemann & Christina L. Kunz, *Synthesis: Legal Reading, Reasoning, and Writing* chs. 4, 6, 9 (3d ed., Aspen Pub. 2007); Richard K. Neumann, Jr., *Legal Reasoning and Legal Writing* chs. 10–13 (5th ed., Aspen Pub. 2005); Terrill Pollman, *Building a Tower of Babel or Building a Discipline? Talking About Legal Writing*, 85 Marq. L. Rev. 887, 909–10 (2002); Jamar, *supra* n. 8, at 67.

10 *See* sources cited *supra* nn. 2, 7–9.

SOCRATES: But here is where I must prevail upon you for understanding, for the doctrine of which I speak is undoubtedly referred to as synthesis of authorities, but is it rule synthesis or explanatory synthesis?

TREATIS: What you are describing is referred to as *rule synthesis*.

SOCRATES: I suspected this to be the case.

IREACUS: Rule synthesis or rule proof, as Treatis and I conceive of it,[11] uses an inductive process to inform or construct the major premise of the syllogistic structure, IREAC or TREAT.

TREATIS: Rule synthesis follows Aristotle's teaching on the induction and the example as *topoi* of invention.[12] The invention is construction of knowledge through an inductive process that draws from multiple applicable authorities to construct the most accurate and beneficial statement of the rules that apply to answer the legal issue at hand.

SOCRATES: This teaching of Aristotle is a little bit after my time, but I surmise that your conception of rule synthesis follows the overall doctrine of precedent and stare decisis that is part and parcel of the Anglo-American common-law tradition?[13]

IREACUS: Yes, and not only that: it allows for advocacy of the progression of law, either calling for a recognition of the present state of the law or advocating further progression based on the direction of the existing authorities. Rule synthesis recognizes that the rules governing a legal issue rarely are defined by a single authority but rather by a progression of authorities, one to another, and that the statement of the rules—the governing legal standards—must be drawn or, in our terminology, induced from a number of authorities.

SOCRATES: You're going to cite Karl Llewellyn or Edward Levi here,[14] aren't you?

11 *See* Murray & DeSanctis, *supra* n. 2, at chs. 4–5.

12 In rhetoric, the *topoi* [Greek] or *loci* [Latin] (singular, *topos* or *locus* = "place") are the "topics" or "subjects" of argument that can be made in various situations. *Topoi* are developed in the process of *inventio* [Latin] or *heuresis* [Greek], which may be translated as "invention" or "discovery" of the type of argument that will be most persuasive in the situation, and in the *dispositio* [Latin] or *taxis* [Greek] of the argument, which translates as the "arrangement" or "organization" or "disposition" of the contents of the argument. *See* Edward P.J. Corbett & Robert J. Connors, *Classical Rhetoric for the Modern Student* 17, 20, 89–91 (4th ed., Oxford U. Press 1999).

13 David S. Romantz & Kathleen Elliott Vinson, *Legal Analysis—The Fundamental Skill* 7–9, 34–35, 38 (Carolina Acad. Press 1998); Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process* 166–67, 1148–79 1211–18, 1379 (William N. Eskridge, Jr. & Philip P. Frickey eds., Found. Press 1994); Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 Emory L.J. 437, 448–50 (1996).

14 Karl N. Llewellyn, *The Bramble Bush* 12, 14, 23, 39, 48–49, 70, 72, 77 (Oceana Publications 1960) (orig. ed. 1930); Edward H. Levi, *An Introduction to Legal Reasoning* 2–3, 5, 8, 26, 29–30 (U. Chi. Press 1949).

TREATIS: Yes, and Cardozo, too.[15] Ireacus and I do seek to be realistic about the role of authorities, particularly cases, in building the construct of the legal standards governing the issue.

IREACUS: A constitutional provision, statute, or administrative rule or regulation is a starting point of the process of defining the legal standards that govern an issue. But in the American legal system, courts interpret and at times redefine the standards, so a proper analysis of the rules requires an examination of what has happened to the legal standards over time. And the demonstration of the process of development of the law calls for rule synthesis.

SOCRATES: This seems entirely positive, but earlier you suggested that rule synthesis can be a mode of invention of advocacy of a new direction in the law.

TREATIS: Rules develop to cover new situations. Patterns develop in the body of authorities that have been written to cover new and specific situations brought under the control of an existing general rule by extension and interpretation, encouraged by the public policies of the area of law in which the issue is placed. When a new situation is presented for extension by one interpretation of the rules or another, the analyst can advocate for a favorable interpretation drawing or inducing support from previous extensions and interpretations of the same law.[16]

SOCRATES: Rule synthesis, therefore, examines the authorities and traces the changes in the law and the patterns revealed in the development of the legal standards governing the issue; it then compiles a complete, up-to-the-minute definition of these legal standards, the R section.

IREACUS: You have delivered a splendid restatement of the concept.

SOCRATES: I am not a lawyer, and I do not devote myself to the painstaking task of writing down legal discourse. (As you can see, I even rely on my student, Plato, here for the recording of my thoughts in these dialogues). How do lawyers perform this task of rule synthesis in writing?

IREACUS: Within the taxonomy of the rules governing the issue, it is logical and customary to proceed from the most general applicable legal rule from the highest source of the law[17] to the most specific rules addressing the particular legal issue at hand in the discussion. A starting

15 Benjamin N. Cardozo, *The Nature of the Judicial Process* 19–25, 51–63 (Yale U. Press 1949) (orig. ed. 1921) (evaluation of precedents in a process of induction); Benjamin N. Cardozo, *The Paradoxes of Legal Science* 8, 9, 11–12 (Greenwood 1970) (orig. ed., Colum. U. Press 1928) (induction and "relativity" concerning precedents).

16 *See* sources cited *supra* nn. 13–14.

17 In terms of a hierarchy of judicial authority. Murray & DeSanctis, *supra* n. 2, at ch. 3.

point of analysis might be a constitutional provision or statutory section, followed by more particular administrative rules or regulations, followed by specific rules—both definitional rules[18] and interpretive rules[19] from case law—that address the particular legal issue at hand. [20]

In rule synthesis, if you have a single authority (e.g., a constitutional, statutory, or regulatory provision) that provides the exact wording of the legal standards that govern the issue, this should be stated first in the rule section. That articulation should be followed by any further legal standards (definitional rules or interpretive rules) that explain, modify, or supplement the elements of the rule found in cases and other authorities that construe and apply the statute or rule. The same principle applies when there is a standard wording of the rule, often the version laid down by a watershed case, which is used consistently by most if not all of the authorities in the applicable jurisdiction. The author should present the traditional wording of the rule first, followed by any further explanation and modification of the rule found in later authorities.

If, however, several applicable authorities that define the legal standards governing the issue at hand *do not agree* on the wording of the applicable rule, then the author must synthesize the precedents into a coherent statement of the rule and its required elements. Supporting discussion and commentary about the rule can be presented separately, but the actual statement of the required elements of the rule should be presented as cohesively as possible.

TREATIS: Ireacus has explained the theory of legal reasoning and analysis that supports the practice of rule synthesis. But there are many rhetorical advantages to rule synthesis, too.

SOCRATES: Rhetoric? You mean cookery?[21] Flattery?[22]

18 *Id.* at chs. 4, 5. A definitional rule defines a legal rule or legal standard providing the terms, elements, or requirements of the rule or standard. E.g., the rule defining parody as a form of comment and criticism in copyright law under 18 U.S.C. § 107 (2011), *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994), and the definition of "parody" as the use of some elements of a prior author's work to create a new one that, at least in part, comments on or criticizes the original author's work, *Campbell*, 510 U.S. at 580.

19 Murray & DeSanctis, *supra* n. 2, at chs. 4, 5. An interpretive rule is a rule issued by a court or provided in another primary legal authority (constitution, statute, or administrative rule or regulation) that instructs attorneys and judges on the proper interpretation and application of a definitional rule. One example is the Supreme Court's issuance of interpretive rules concerning the copyright fair-use factors of 17 U.S.C. § 107: the factors are to be weighed together in a case-by-case analysis in light of the purposes of copyright law, no one factor predominates, and commercial use is simply one factor to be weighed with the others and is not dispositive. *See Campbell*, 510 U.S. at 577–78, 584–85.

20 This paragraph reflects standard legal method within the legal writing discourse community. *See e.g.* Ruth Ann McKinney, *Reading Like a Lawyer* 14 (Carolina Acad. Press 2005); Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. Leg. Educ. 155, 158, 159 (1999) [hereinafter Berger, *New Rhetoric*]; Denise Riebe, *Readers' Expectations, Discourse Communities, and Effective Bar Exam Answers*, 41 Gonz. L. Rev. 481, 488–91 (2006).

21 Plato, *Gorgias* 56–58 (Benjamin Jowett trans., Echo Lib. 2006).

22 *Id.* at 57–59.

IREACUS: Please restrain yourself, my dear friend. I'm afraid your critique of rhetoric is a few thousand years off the mark. Treatis and I do not speak of *mere* rhetoric as in the artful embellishment of language for flattery or deception.[23] We speak of the discipline that studies the construction of knowledge, effective communication, and persuasion, which has enormous implications for legal discourse.[24]

SOCRATES: I'm listening, but I am not promising that I'll like it.

TREATIS: Fair enough. In classical rhetoric, rule synthesis is used primarily as a topic of invention and secondarily as a topic of arrangement. The invention fits the analysis of multiple authorities into a syllogistic structure—meeting *logos* objectives of the communication. It also is a topic of arrangement involving open demonstration of the analysis—showing your work, so to speak—which furthers the *ethos* objectives of the analysis and communication.[25]

SOCRATES: My usual piercing insight is limited by my unfamiliarity with legal writing, and I am having trouble grasping why open demonstration of the analysis is both logically persuasive (*logos*) and further supports persuasion through the credibility, competence, and benevolence (*ethos*) of the author?

IREACUS: In classical rhetorical terms, the structure of a proof—syllogistic structure—is persuasive both substantively and rhetorically. Substantively, it reveals the components of the analysis—the major and the minor premises—to examination and refutation. This is the concept of falsifiability. If the openly demonstrated analysis is not refuted, it is held to be conclusive when the premises are capable of conclusive determination; in other words, the proof is absolute when both premises are absolutely and necessarily true, as in a true syllogism. When the premises are not susceptible to conclusive determination, as in most instances of legal analysis where the facts and the law are not susceptible to absolute certainty of determination, the syllogistic structure is still held to be highly persuasive because the premises are openly demonstrated and exposed to

23 Against the confusion of rhetoric with *mere* rhetoric, see Scallen, *supra* note 8, at 817, 829; Wayne C. Booth, *The Rhetorical Stance*, 14 J. College Composition & Comm. 139, 139 (1963) (in *Toward a New Rhetoric*); Wayne C. Booth, *The Rhetoric of Rhetoric: the Quest for Effective Communication* ix–x, 6–7 (Blackwell Publg. 2004).

24 Michael D. Murray, *Law and Economics as a Rhetorical Perspective in Law* nn. 14–17 (forthcoming 2011) (copy on file with author).

25 The structural form of pure logic and scientific or mathematical proof is the syllogism, while the structural form of rhetorical demonstration and legal argument is the enthymeme. *See* Aristotle, *The Rhetoric* bk. I, ch. 1, at 1355a (W. Rhys Roberts & Ingram Bywater trans., Random House 1954). In an enthymeme, a highly probable construction of the applicable legal principles is applied to a highly probable construction of the specific circumstances of the case at hand so as to describe a highly probable conclusion or prediction about the application. *Id*.

examination and refutation both as to the probability and accuracy of the statement of the premises and the probability and reliability of the conclusion drawn from the premises.

Rule synthesis is a form of open demonstration of the analysis of examples (authorities) that inform the major premise (the rules, legal standards) of the syllogistic structure of the enthymeme in legal reasoning. It is falsifiable because the synthesis reveals the authorities that are synthesized. If the components or the analysis of the combinations of authorities and the principles induced from these combinations are not challenged or rebutted, the demonstration promotes persuasion from the logical arrangement and credibility and benevolence from the frankness and candor of this form of demonstration. [26]

SOCRATES: One could simply pronounce that the rules are thus and such, without making any demonstration of the process of analysis used to define the terms of the rules or the authorities from which the definitions are derived and induced. But this would be persuasive only if the audience enjoyed some special relationship of trust or deference to the person pronouncing the rules or if the audience was in a position where adherence to the pronounced rules was compelled, making persuasion irrelevant.

TREATIS: Exactly. And when we examine rule synthesis under the perspectives of modern and contemporary rhetoric, we see that it has rhetorical advantages, particularly under modern argument theory, writing-as-a-process theory, and discourse-community theory.

In modern argument theory,[27] rule synthesis involves coding the discourse through analysis of relevant authorities and places the analysis within the enthymatic structure of an argument of probabilities. The syllogistic structure of the enthymeme in modern argument (or practical

26 In classical rhetoric, the example was the rhetorical companion of the induction, much in the same way that the enthymeme was the companion of the syllogism. Both forms, the example and the induction, seek to induce information—construct truth, if you will—from subjects or examples, the difference being that an induction uses absolute, conclusive truths about the genus and species principles that are demonstrated in the induction, and an example uses probability about the genus and species principles that are demonstrated in the example. *See id.* at bk. I, ch. 2 at 1356b, bk. II, ch. 19 at 1392a–1392b.

27 On modern argument theory, see e.g. Kathryn Stanchi, *Persuasion: An Annotated Bibliography*, 6 J. ALWD 75, 80–81 (2009); Michael R. Smith, *Rhetoric Theory and Legal Writing: An Annotated Bibliography*, 3 J. ALWD 129, 139 (2006); Linda L. Berger, *Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation*, 58 Mercer L. Rev. 949 (2007) (the corporate metaphor in modern argument theory); Linda L. Berger, *What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ALWD 169 (2004) (use of metaphor in modern argument theory and cognitive studies); Jerome Bruner & Anthony Amsterdam, *Minding the Law* chs. 2–3, 6–7 (Harvard U. Press 2002); Frans H. Van Eemeren et al., *Fundamentals of Argumentation Theory: A Handbook of Historical Backgrounds and Contemporary Developments* (Lawrence Erlbaum Assoc. 1996); Stephen Toulmin et al., *An Introduction to Reasoning* (2d ed., Collier Macmillan Pub. 1984); Chaim Perelman & Lucie Olbrechts–Tyteca, *The New Rhetoric: A Treatise on Argumentation* (U. Notre Dame Press 1969).

reasoning) constructs the most probable definition of the major premise of the argument, followed by the most probable statement of the facts and circumstances at hand in the problem and its rhetorical situation. Rule synthesis, with its open and falsifiable rendering of the components of the analysis and the principles induced from the examination and combinations of the components, creates a highly probable and thus highly persuasive major premise of the argument.

In writing-as-a-process theory,[28] rule synthesis involves the open demonstration of analysis through a systematic process of comparing and combining authorities to build meaning and comprehension of the author and her audience. The process constructs the rule section—it defines the legal standards that govern the issue of the discourse for the benefit of the author and the audience. The careful, open, and demonstrative process of rule synthesis allows the author to better understand the rules and their requirements, exceptions, and limitations, and in turn allows the audience to understand the same requirements, exceptions, and limitations of the rules defining the analysis and the discourse. The process of rule-synthesis analysis is reflective and recursive, causing the author to revisit the same authorities multiple times to compare them and to induce from them different nuances of the meaning of the rules to best address the problem and its audience and rhetorical situation. This produces work that is both inventive and persuasive in bringing the audience to an understanding and conviction concerning the discourse.

Under discourse-community theory,[29] the process of reasoning through synthesis to inform the major premise—the R section—of the analysis has become the accepted and expected structure and process of analysis within the legal writing discourse community. Rule synthesis devotes attention to the proper authorities based on their rank in the hierarchy of judicial authority accepted by the legal writing discourse community. Rule synthesis also follows the discourse community's expectations that a combination of authorities must be used to make a single

28 On writing-as-a-process theory, see Smith, *supra* note 27, at 141; Linda L. Berger, *A Reflective Rhetorical Model: The Legal Writing Teacher as Reader and Writer*, 6 Leg. Writing 57 (2000); Berger, *New Rhetoric*, *supra* note 20; Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 Neb. L. Rev. 561 (1997); Leigh Hunt Greenhaw, *"To Say What the Law Is": Learning the Practice of Legal Rhetoric*, 29 Val. U. L. Rev. 861 (1995); Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 Cornell L. Rev. 163 (1993); Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 Sw. L.J. 1089 (1986).

29 On modern discourse-community theory, see Smith, *supra* n. 27, at 143; Susan L. DeJarnatt, *Law Talk: Speaking, Writing, and Entering the Discourse of Law*, 40 Duq. L. Rev. 489 (2002); Pollman, *supra* n. 9; Brook K. Baker, *Language Acculturation Process and the Resistance to In"doctrine"ation in the Legal Skills Curriculum and Beyond: A Commentary on Mertz's Critical Anthropology of the Socratic, Doctrinal Classroom*, 34 John Marshall L. Rev. 131 (2000); Kathryn M. Stanchi, *Resistance is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices*, 103 Dick. L. Rev. 7 (1998); J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 Wash. L. Rev. 35 (1994); Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 Leg. Writing 1 (1991).

coherent statement of the applicable legal principles that govern the legal issue at hand.

SOCRATES: You have said that rule synthesis creates the "R" section of the discourse, or the first half of the major premise of the syllogism. Why is it only the first half of the major premise? What is the second half?

TREATIS: The second half is the E or explanation section of the analysis: an explanation of how the rules work. The E section is an analysis of the authorities that instruct us about how the rules are meant to be interpreted and applied in specific, relevant situations.

IREACUS: Treatis is indicating a point of difference in our systems. Are you ready to go there, Socrates?

SOCRATES: I think so, therefore I am.

IREACUS: In legal discourse, an explanation of how the rules work—how the rules are to be interpreted and applied—aids the reader in accepting the argument that the definitions and requirements of the rules (major premise part I) applied to the facts of the case at hand (minor premise) to produce the outcome described in the discourse (conclusion). This explanation section is separate from the rule section both structurally and conceptually: the rule section tells what the rules are—what the definitions, elements, and requirements of the rules are—and the explanation section tells how the rules work—how the rules are to be interpreted and applied to specific situations to produce specific outcomes.

TREATIS: On that much we agree. The purpose of the explanation section is to demonstrate how the rules work in specific situations. The specific situations referred to typically are cases—the examples of specific situations where the rules have been applied in the past to produce a concrete outcome. This demonstration, in turn, is used to argue how the rules will work in a specific future situation, namely, the situation of the client.

SOCRATES: Fair enough. But what is the difference that the two of you have alluded to?

IREACUS: In IREAC and in most of the prevailing paradigms of legal discourse, the demonstration is made using a select number of individual cases. The primary and in most instances exclusive method is direct analogical reasoning of one historical precedent at a time compared to the present client situation. The author is advised to be very limited in the number of historical precedents that are selected because these authorities must be explained at some length and in detail; often a page or two of text

is required for the explanation of the facts, the story, the issues, and how the rules worked throughout a single historical precedent.

SOCRATES: Why is that much detail required?

IREACUS: In part, because analogical reasoning fits into an analytical model of direct comparison based on the common-law theory of precedent and stare decisis and simultaneously relies on a rhetorical model that is aligned with storytelling and narrative reasoning, in particular the style trope of parables, myths, or fables that shape reality so as to place the client's story into the narrative of the precedent. Simple surface-level comparisons are metaphorical and thus are tropes to inspire creative thinking and comprehension, but they lack the persuasiveness of a deeper, detailed comparison of the fundamental policies at work in the precedent case as compared to the facts and narrative of the client's case.

SOCRATES: My head is swimming. Perhaps it is because I am getting hungry. Plato, when we are finished here, let's see if Crito can get a nice rooster from Asclepius. Tell him to pay for it, and don't forget.[30]

IREACUS: In rhetorical terms, the details of the fable or parable form recounted through the explanation of the precedent tell the audience the narrative in which the client's story should be placed. The fable or parable has a known outcome; this is to be the outcome in the client's case. Naturally, to be persuasive, the storylines do have to match up—you cannot simply pick a favorable storyline that has no parallels or connections to the client's situation.

In similar fashion, the method of direct analogical reasoning fits the common-law theory of precedent if a precedent is closely aligned with the client's situation—"on all fours" with the case at hand, it is sometimes said. In those circumstances, the comparison of the working of the rules in the precedent case to produce its outcome will be an accurate predictor of the outcome of the client case. If the audience is a court or tribunal, the court should feel compelled to decide the case the same way as the precedent.

SOCRATES: Of course, to be highly persuasive or even determinative as an analogy, the precedent would have to be controlling and recent enough in time to be considered relevant and not possess details that might distract the audience away from the similarities or suggest to the audience distinguishing features of the two cases—the precedent and the case at hand.

30 *See* EyeWitness to History, *The Suicide of Socrates, 399 BC*, http://www.eyewitnesstohistory.com/socrates.htm (accessed Mar. 26, 2011).

TREATIS: You have keenly grasped the point, as usual, Socrates. What you have stated is the point of division for Ireacus and me. Analogical reasoning has built in limitations that make it unattractive for many client issues and in many rhetorical situations. It works best in terms of analysis and rhetoric if there is one single case that closely matches to the client's situation and goes in favor of the client. This is the case that will control the determination. This is a case with a single, consistent narrative whose ending is beneficial to the client. When the precedents are not closely similar to the client's situation, the author must make a more indirect analogy—"this case is like the client's case in certain ways, although not exactly similar." In analytical terms, the precedent is not compelling, and the author's appeal is merely to extend the principles of the case to the client's case. In rhetorical terms, the author has shifted from a style trope of parable, myth, or fable to a simple trope of metaphor—this thing is somewhat like another thing—which is not as exact and certainly not as compelling as a good parable, myth, or fable to insert the client's story into.

SOCRATES: If one single case is not appropriate, why wouldn't you just expound on more cases?

TREATIS: You are limited because you are forced to spend so much time and page space on each single authority. If the best of the applicable controlling cases all agree *and* have the same consistent narrative, then you can write persuasive discourse using only two or three cases and make the system work for the audience and the situation. But when the author has to stretch to reach the first case and must stretch even farther to reach the second case, the power of the authorities to compel a certain outcome is reduced. In rhetorical terms, the story will shift from one case to the next, and this may send a confusing message to the audience. Here is one story in which you might identify the client; but if not that one, then here is another story. If that fails, would you believe this third one?

IREACUS: The author will do the best she can picking the most analogous cases.

TREATIS: But many times none of the cases are particularly close in terms of facts and policies and the storyline of the precedents. If analogical reasoning is your only tool, you will be forced to write a weak explanation section making weak, unpersuasive analogies, and chalk it up to bad luck for the client not to have one great precedent to ride on.

SOCRATES: Sometimes the client's facts are bad under the terms of the law, and the precedents can't help the client out of the jam.

TREATIS: But in many situations, analogical reasoning produces suboptimal results because there are many precedents, but none particularly close to the client's own facts and situation.

SOCRATES: Do you then abandon analogical reasoning altogether?

TREATIS: No. In the TREAT method,[31] I endorse the use of direct analogical reasoning in the explanation section when you have a directly relevant, controlling precedent that is extremely similar to the client's situation. Alternatively, you should use it if there is a small number of substantially similar precedents that must be carefully distinguished from the client's situation in the process of arguing that these two or three precedents do not control the outcome. These tasks warrant the use of a large amount of text, up to a full page or more in appropriate cases, to fully describe the precedent so as to analogize to it or distinguish it.

Nonetheless, I believe this situation I am describing when there is a small number of manifestly similar precedents to compare to the client's case is an unusual situation, certainly not the majority of situations in which case law must be evaluated for its impact on the rules that govern a legal issue. In the majority of situations, there are a sizeable number of authorities—ten, twelve, fifteen, sometimes twenty or more authorities—all of which are on point and all of which might be controlling or highly persuasive. All of the authorities are examples of situations in which the rules applied to produce a concrete outcome, but none of them are on all fours with the client's situation. This more typical legal situation calls for *explanatory synthesis*.

Explanatory synthesis, as distinguished from rule synthesis, is a separate process of inducing principles of interpretation and application concerning the prevailing rules governing a legal issue.[32] The induction is from samples—namely case law—representing specific situations with concrete facts in which the legal rules have been applied to produce a concrete outcome.[33] Whereas rule synthesis is the component of legal analysis that combines and reconciles authorities to determine what legal standards apply to and control a legal issue, explanatory synthesis combines and contrasts authorities to demonstrate and communicate how the applicable legal standards work in various situations relevant to the legal issue at hand.

Explanatory synthesis is not limited to certain areas of law, or even to legal analysis of situations requiring complicated syntheses of authorities to determine the applicable rule governing the legal issue. Explanatory

31 *See* Murray & DeSanctis, *supra* n. 2, at ch. 6.

32 *Id.*

33 *Id.*

synthesis requires cases—the sample set—in order to perform its processes of induction. But explanatory synthesis can be employed to explain or advocate the outcome of any situation calling for legal analysis that has cases applying the rules on the issue.

SOCRATES: If rule synthesis and explanatory synthesis both use the inductive form as a topic of invention and arrangement of the demonstration, how is the audience to differentiate one from the other?

TREATIS: Substantively, by the purpose of explanatory synthesis, and structurally, by the form of explanatory synthesis. The purpose of the explanation section is to explain how the rules work, not what the rules are. The explanation section must follow and be separate from the rule section—it would be very confusing and counterproductive to mix explanation into the middle of the rule section, defining a rule and explaining a bit about it, and jumping back to another rule, and explaining a bit about that, and jumping yet again to another rule. Instead, the rule section should use rule synthesis to present the legal standards that govern the issue together, in one complete statement of the rules, followed by the explanation section using explanatory synthesis that proceeds to demonstrate how these legal standards actually work when applied to concrete factual situations.

The structure of explanatory syntheses is designed for demonstrative inductive reasoning that presents the principles concerning how the rules are to be interpreted and applied first, followed by the authorities from which the principles are induced. Each principle is to be induced from multiple authorities, so the citation will appear different from a statement of the rule in the rule section where only one statute or at most a very small number of controlling authorities is the source of a definitional rule. The citation to each authority that is used as an example of a situation where the rule was applied to produce a concrete outcome shall be followed by a parenthetical that explains in as few words as possible the facts and circumstances and outcome of the case relevant to the application of the rule. Thus the structure is the following: Interpretive Principle—Citation 1 (details concerning the application of the rule in citation 1), Citation 2 (details concerning the application of the rule in citation 2), Citation 3 (details concerning the application of the rule in citation 3), and so on.[34]

IREACUS: Is it necessary to follow the same structure each time? Isn't that repetitive?

34 For the sack of brevity, I have avoided copying full-blown textual examples of the process, but numerous examples are provided in Murray & DeSanctis, *supra* note 2, at chapter 6.

TREATIS: Each part is necessary: the principle stated is the product of the induction. It reveals the interpretive principle concerning how the rules are to be interpreted and applied based on the case examples cited in the synthesis. The citations are necessary to show that the principle is supported by multiple authorities. And the parentheticals explain the details of facts, policy, holding, and outcome of the rule application that are necessary to explain how each case example supports the interpretive principle stated in the synthesis. All of the parts must be stated openly because this is demonstrative reasoning, open to examination and refutation, and thus highly persuasive if it is not rebutted. The structure stated here is the structure of a single explanatory synthesis. It will be repeated several times with new interpretive principles, new authorities, and new parentheticals as the author crafts the explanation section so as to demonstrate how the rules from the rule section are properly applied to circumstances such as the client's to produce the outcome predicted or advocated by the author.

IREACUS: Why parentheticals? Don't readers hate parentheticals? Won't they skip over them?

TREATIS: The use of parentheticals is necessary,[35] and for those who truly dislike parentheticals, I emphasize that they are a necessary evil because the two alternatives are worse. One alternative would be to not provide any details from the case examples showing how the rule application worked in the individual case. This would defeat the purpose and structure of demonstrative reasoning. The interpretive principle would be stated and supported by citations, but the synthesis would rely on the audience to trust that the case examples cited truly support the principle in some manner relevant to the client's case. It becomes opaque, not subject to examination or refutation, nonfalsifiable, and thus dependent on trust of the author and her *ethos* to be persuasive. The task of maintaining this delicate balance of trust and *ethos* can be avoided by showing your work—revealing the details of the application of the rule and the policies of the case to the facts and circumstances of the case.

Alternative two is to provide the citation and supporting explanation of the details of the application of the rule and the policies of the case to the facts and circumstances of the case in footnotes, not parentheticals in the text. This may make the text easier to read, but footnotes are hated as much or more than parentheticals, and outside of scholarly legal writing in

35 *E.g.* Soma R. Kedia, *Redirecting the Scope of First-Year Writing Courses: Toward a New Paradigm of Teaching Legal Writing*, 87 U. Det. Mercy L. Rev. 147, 170, 176 (2010); Ira P. Robbins, *Semiotics, Analogical Legal Reasoning, and the Cf. Citation: Getting Our Signals Uncrossed*, 48 Duke L.J. 1043, 1076–79 (1999).

journals and law reviews, footnotes are not accepted as a method for the presentation and analysis of legal authority.[36] Often in litigation contexts, local rules limit the use of footnotes for substantive presentation and analysis of authority.[37] And footnotes are far easier to skip than parentheticals because they are placed at the bottom of the page away from the very principles they illustrate and support.

Parentheticals may be skipped, but that is not a fatal disability of the theory and structure of explanatory synthesis. The interpretive principle induced from the cases is the most import part of the synthesis. The number of authorities used and the quality of the authorities used is the next most important part of the strength and persuasiveness of the synthesis. The parentheticals are used to openly demonstrate to the reader the workings of the analysis—if the reader skips the work but still accepts the interpretive principle, then the author has successfully communicated the point. The appearance of the workings of the analysis gives assurance to the reader that the author has gone to the trouble of breaking down, comparing, and contrasting the authorities so that the reader is presented with a comprehensive analysis of how the rules function and their proper application to the client's facts and circumstances.

A reader can glance at the first or last lines of a complex mathematical proof and happily accept that the proof is sound with the obvious assurance that each step of the proof is open to examination if and when the reader desires to investigate it. The same is true for any particular explanatory synthesis: the reader can stop and read the parentheticals of any synthesis whose interpretive principle is troubling, surprising, or counterintuitive to the reader, while skipping the details in the parentheticals of any synthesis whose interpretive principle already is familiar and acceptable to the reader. This turns out to be a friendly, time-saving device compared to the paragraphs of text that must be read and digested in the direct analogical method in order to establish the narrative and communicate the analogy.

SOCRATES: You have analogized explanatory synthesis to a mathematical proof, but it is not a true induction, not a scientific proof?

TREATIS: It is a rhetorical induction—an example, in Aristotelian terms—not a true induction.[38] The interpretive principles are not necessarily and conclusively induced from the example cases.

36 *See generally* Joan Ames Magat, *Bottomheavy: Legal Footnotes*, 60 J. Leg. Educ. 65 (2010).

37 *E.g.* D.C. Cir. R., I.O.P. IX(A)(8); 3d Cir. R. 32.2(a); 8th Cir. R., I.O.P. III(I)(3).

38 *See supra* n. 34.

SOCRATES: Your assertion that an author must induce the legal standards from the authorities in the rule section and separately induce principles about how these rules work in the explanation section suggests to me that what the courts say the rules are does not necessarily match what they do with those rules when applied to actual cases presented for adjudication.[39]

TREATIS: That observation is one of the principal reasons that I developed the TREAT method and explanatory synthesis. The use of both rule synthesis and explanatory synthesis is significant as a means of proper legal analysis and a rhetorical topic of demonstrative reasoning that advances the persuasiveness of the legal discourse. Rule synthesis and explanatory synthesis do not merely seek to establish the applicable rules; they also seek, through rhetorical exposition, to explain and persuade the audience that the author's prediction or recommendation of the outcome of the situation is correct. Rule synthesis allows the author to construct a rule section that is a favorable environment for the client, and explanatory synthesis allows the author to demonstrate the successful situations under the rules when parties prevail and contrast the unsuccessful situations when parties fail. Both forms of synthesis contribute to constructing a reality in which the client will prevail on the legal issue.

SOCRATES: How can that be? The rules are what they are, is that not so?

TREATIS: An individual statement of a rule is what it is, but a synthesized construct of the rules is created through rule synthesis using the language selected by the author. An individual case tells one narrative in which the rules applied to the client's facts to produce a single outcome, but a synthesis of cases can be created by the author to demonstrate the many narratives and storylines of successful parties, implicating the public policies of the area of the law and the values of the audience and achieving persuasion on many levels of *logos*, *ethos*, and *pathos*.

SOCRATES: Is this not trickery and deceit?

TREATIS: Rule synthesis and explanatory synthesis should never be used to lie about the authorities. These methods are openly demonstrative about the steps of the process of constructing the rule section and the explanation section. All of the stages of the analysis and the data set used in the analysis—the rules and case examples—are openly and transparently presented to the audience for examination. Lying about any rule

39 Llewellyn, *supra* n. 14, at 14.

or authority would cause the entire process to become suspect and defeat the entire purpose of the demonstration.

Legal authorities rarely speak for themselves, and when they do, the author can quote them. But in the usual course of American legal method, a single authority is but one step on the path of creating the complete construct of the legal principles governing the legal issue at hand. Rule synthesis identifies the additional authorities that alter or build on the initial authorities, and it combines the authorities to produce a complete statement of the rules. Similarly, a single controlling authority rarely presents a complete, satisfactory narrative and storyline that matches the public policies of the area of the law with the values of the audience in a manner that aligns with the client's facts and objectives.

When all of the stars align with a single authority that casts a favorable light on the client's case, then direct analogical reasoning is the most efficient, the most persuasive, and the most beneficial method of explanation of the workings of the rules toward the client's objectives. In other circumstances, when a single, perfectly aligned authority favorable to the client is not present, the author must work with a combination of authorities that must be examined, combined, and contrasted in order to explain the workings of the rules. The goal is the same: to demonstrate that the rules, the public policies, and the facts and circumstances of the client's situation still can align in a way that will appeal to the values of the audience, but instead of using one authority, the author must use several.

The method does not contemplate performing one, overwhelming explanatory synthesis, but many. Incremental principles of interpretation may be induced from different sets of precedents. Different, parallel storylines may be drawn out from several cases and depicted in such a way that the storylines converge with the client's narrative. Public policies may be exhibited in a variety of factual settings to reveal that the client's facts further the workings of the policies. Explanatory syntheses should explore the deeper, fundamental connections between cases whose outcome is favorable to the client and those that are not, so as to analogize to a whole group of favorable precedents and distinguish an entire group of unfavorable precedents.

IREACUS: I don't expect Socrates to ask this, but I gather that you assert that your method of explanation—explanatory synthesis—has rhetorical advantages over direct analogical reasoning?

TREATIS: I do. Explanatory synthesis has all of the same rhetorical advantages of rule synthesis and quite a few other advantages over direct case-to-case analogical reasoning.

You will recall that rule synthesis met modern-argument-theory objectives of practical reasoning through an inductive method to inform the major premise of the syllogistic argument form. Explanatory synthesis follows a similar method of inductive reasoning to construct the most probable explanation of how the rules apply to varying factual situations in multiple authorities. Explanatory synthesis, with its open and falsifiable induction of interpretive principles from a sample set of controlling authorities creates a highly probable and thus highly persuasive argument concerning the application of the rules.

In writing-process theory, explanatory synthesis involves the open demonstration of analysis through a systematic process of comparing and combining authorities to build meaning and comprehension of the author and her audience regarding the various ways the rules interact with the facts of cases and the public policies of the area of law. The process constructs the explanation section—it defines the principles of interpretation and application that will govern the application of the rules to the issue for the benefit of the author and the audience. The careful, open, and demonstrative process of explanatory synthesis allows the author to better understand the application of the rules and how this implicates the public policies of the area and the values of the audience, and in turn demonstrates these lessons for the education and persuasion of the audience. The process of explanatory-synthesis analysis is reflective and recursive, causing the author to revisit the same authorities multiple times to compare them and to induce from them different nuances of the rules and policies, and to draw out the different narratives of success and failure under the applications of the rules. This reflective and recursive process constructs an explanation section that best addresses the problem and its audience and rhetorical situation. This produces work that is both inventive and persuasive in bringing the audience to an understanding and conviction concerning the discourse.

Under discourse-community theory, the process of reasoning through synthesis to inform the second half of the major premise—the E section of the analysis—is the accepted and expected structure and process of analysis within the legal writing discourse community. Explanatory synthesis devotes attention to the proper authorities based on their rank in the hierarchy of judicial authority accepted by that community. Explanatory synthesis can develop many and varied principles of interpretation—many more than direct analogical reasoning—because it can work with a much larger number of authorities, and weave them together so that the client's case can be analogized to whole groups of favorable precedents and distinguished from whole groups of unfavorable precedents.

Explanatory synthesis as used in the TREAT format also is rhetorically advantageous under the newest school of contemporary rhetoric—law and economics.[40]

SOCRATES: The rhetoric of Homo Economicus and Posnero? Do tell.

TREATIS: The rhetorical canons of contemporary law and economics apply four *topoi* of invention and arrangement and four style tropes to legal discourse: the primacy of the forms of analysis of mathematics and science, the concept of law as a system of incentives and costs, the rhetorical theory of efficiency, and the rhetorical lessons of contemporary rational-choice theory.[41]

The syllogistic and inductive structures of TREAT and explanatory synthesis are the same structures used in mathematical and scientific proof. The very concept that the components of a legal argument can be phrased in the form of an induction and a syllogism taking the form of a proof enhances the persuasiveness of the discourse. This is both rhetorically advantageous and substantively advantageous because the power of the mathematical and scientific forms of proof lies in their open demonstration of the steps and components of the analysis in a transparent and falsifiable presentation.[42]

Explanatory synthesis further incorporates the advantages of mathematics and science by increasing the number of authorities that can efficiently be analyzed in the discourse and from which the principles of interpretation can be induced, thus increasing the reliability of the analysis. Explanatory synthesis in effect increases the number—the "*n*"—of the sample set, which increases the reliability and persuasiveness of the principles induced from that sample set. Because the method allows for exposition of many interpretive principles using multiple authorities in a comparatively small amount of space (roughly one-third to one-half page per synthesis, depending on the number of authorities synthesized and the length and complexity of the parentheticals required), explanatory synthesis provides an elegant solution to the rhetorical problem of the client's situation, which is preferred by mathematics and science.[43]

Explanatory synthesis performs an open demonstration of the analysis of multiple authorities as an incentive to the reader. The reader is invited to avoid the cost of delving into such a large number of authorities because the work of the analysis has been performed openly, subject to examination and refutation. Opaque or unsubstantiated reasoning, overworking or stretching an analogy to a precedent that is not closely aligned to the

40 Murray, *supra* n. 24.

41 *Id.*

42 *Id.*

43 *Id.*

client's narrative and rhetorical situation, imposes a cost on the reader who must take the time to unpack the analogy, evaluate whether it is analogous, and still might have to invest the time to compare the analogy to other controlling authorities that also are on point.

Explanatory synthesis is efficient in its method of using a greater number of authorities to substantiate and apply a greater number of interpretive principles to make a more persuasive discourse. It also allows for the demonstration of patterns of narratives and storylines found in more than one authority so as to appeal to the values and preferences of the modern, rational audience. The typical legal audience is prone to the same biases and heuristics as any audience of decisionmakers, and explanatory synthesis creates opportunities to anticipate and target audience biases or shortcuts. Explanatory synthesis, compared to direct analogical reasoning, does not put all of the rhetorical eggs in one or two baskets by relying on the principles of interpretation and application that can be learned from one or two precedents. It can present a series of interpretive principles to address many different audiences and situations, and support the principles with a larger number of authorities.

SOCRATES: You have explained this matter well. I have a much better understanding of the dual role of cases in the common-law system—both as sources of rules and legal standards and as concrete examples of situations where the rules have been applied to produce concrete outcomes. I understand that rule synthesis forms the rule section, which contains both definitional rules and interpretive rules, and that explanatory synthesis is used in a completely different section, the explanation section, the purpose of which is to explain and demonstrate how the rules work as opposed to what the rules are. Treatis has explained his critique of direct analogical reasoning as the sole method of explaining how rules work, and he has given me much to think about concerning the advantages of an inductive synthesis of authorities to create the explanation section.

I am afraid the day is growing long, the sun is getting hot, and Plato and I have to see Crito about that rooster. This way let us go; and in this exhort all men to follow, in the way to which you trust and in which you exhort me to follow you.[44]

IREACUS: Farewell, Socrates.

TREATIS: Best wishes.

44 *See* Plato, *supra* n. 21, at 88.