

Forensic Oratory in Antebellum America

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I. INTRODUCTION

Most Americans speak of baseball as the “national sport” and, certainly, there is much truth to this, particularly in the spring and summer. But Americans have a second passion, one that dates back to the early Republic: litigation. And, like baseball, this is a sport for both participants and spectators. Long before television or radio or the Internet, Americans had trials. Had Topps existed in 1850, there can be little doubt that children would have been collecting trading cards with the likenesses of Daniel Webster, Henry Clay, John Quincy Adams, and Rufus Choate.

Of course, trials are not intended simply to provide amusement. As Lawrence Friedman has pointed out in a recent article, trials also serve other important functions.¹ First and foremost, in the context of our system of adversarial justice, trials provide the means by which we resolve disputes and maintain social order.² Trials have also traditionally had a pedagogical function, both in the sense that they help to instill civic values in those who observe them and in that they provide litigants a forum in which they may air their views before an audience of their peers.

Today, scholarly debates about trials tend to focus either upon the procedural rules by which they are conducted or upon the efficiency with which the adversarial process can achieve desired results. To take just one example, every law school in the United States requires its students to take a basic course in procedure, and many require a minimum of two semesters of this subject. These courses tend to focus on the Federal Rules of Civil Procedure but not on presentation, strategy, or other trial-related concerns. All

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1. Lawrence M. Friedman, *Lexitainment: Legal Process as Theater*, 50 DEPAUL L. REV. 539, 541 (2000).

2. See generally ROBERT BARTLETT, TRIAL BY FIRE AND WATER: THE MEDIEVAL JUDICIAL ORDEAL (1986) (discussing the medieval practices of trial by water or fire); DISPUTE AND SETTLEMENTS: LAW AND HUMAN RELATIONS IN THE WEST (John Bossy ed., 1983) (listing a number of articles discussing different types of ancient dispute resolution processes).

law students are also required to take a course in professional responsibility, which invariably includes a section on the ethical aspects of trial practice.³ Many law schools also offer courses, or parts of courses, in which they teach the procedural rules of their own states. Other courses on specialized aspects of civil procedure, such as conflict of laws, are common. But one does not find courses on oratory. Occasionally, oratorical instruction—though rarely so identified—is a small part of courses on trial practice, which are usually taught by adjuncts; but that is the only place one finds the subject considered. Indeed, if one were to ask most law teachers to define even basic oratorical terms, such as “apodictic,” they would be unable to do so.⁴ In spite of this, forensic oratory, known in the nineteenth century as “judicial eloquence,” has been an important part of trial practice from the origins of the American legal tradition; and, although not taught in law schools, it continues to be so today.

Lawyers are men and women of the book and of the podium. The popular heroes of our profession are the great courtroom advocates: Webster, Choate, Clay, and Calhoun. And yet, paradoxically, American legal education devotes almost no curricular attention to the art once known as “forensic eloquence.” It is this paradox we seek to explore in this essay.

Contemporary legal practice is informally divided into various categories, one of which—litigation—is itself subdivided into appellate and trial work. We tend to associate the former, generally the province of the elite bar, with a staid, “scientific” style of discourse. The discourse of trial attorneys—excepting elite-firm defense attorneys—tends to be marked as much by showmanship and emotional appeals as by scientific legal principles. Along with this distinction in rhetorical styles, we perceive two phenomena relevant to our inquiry. First, we sense a general disdain on the part of the academy for the ostensibly “speechifying” tactics of plaintiffs’ trial attorneys. We also note a parallel, and perhaps concomitant, lack of curricular attention not merely to oratory, but to trial strategy in general. Second, we note the persistence of the *public* fascination with trial oratory. The particular genesis of this article was a series of “Johnny Cochran” skits on *Saturday Night Live*, in which the humor depended entirely upon the audience’s recognition of Cochran’s highly stylized phrases and delivery. (Why, we wondered, does the academy scoff at such successful tactics?) More generally, the public obsession with courtroom drama—and in particular courtroom oratory—is impossible to miss. Slightly less obvious, but important

3. THOMAS MORGAN & RONALD ROTUNDA, PROFESSIONAL RESPONSIBILITY 364–475 (7th ed. 2000).

4. RICHARD A. LANHAM, A HANDLIST OF RHETORICAL TERMS 164 (2d ed. 1991) (defining apodictic as “[t]he rhetoric of praise or blame”).

to our inquiry, is the fact that few of the heroes of the countless television shows focusing on lawyers are appellate or elite-firm defense attorneys.

To answer our empirical question about the absence of rhetorical training from law school curricula, we begin by briefly considering the functions of trials in our history. We proceed to trace the history of oratorical training in general, and training in judicial eloquence in particular, from Periclean Athens to the American antebellum period. From the earliest period, we note that the ancestors of two styles of legal oratory we identified *supra* not only existed, but were codified in treatises, taught, and learned as discrete styles—styles every student was expected to master. From the ancient period through the Middle Ages and the Renaissance, the choice between these styles at any given moment was essentially tactical; and the tactical decision itself was part of rhetorical training.

In the United States during the antebellum period, however, the styles became associated with political, as well as tactical, postures; thus the choice between them developed an unavoidable political dimension. At the end of the American antebellum period, other developments exacerbated the effects of these political forces, further dividing and isolating the styles from each other. In the war between the “apprenticeship” and “university-affiliated law school” models of legal education, necessity forced the university-affiliated advocates of “law as a science” to tout a purely “scientific” style, a professional *lingua franca* that eschews any consideration of rhetorical technique and assumes an audience systematically trained in legal principles. Necessity also forced those practicing the apprenticeship model to depend heavily on a “narrative” style that appealed to the audience’s emotions and avoided technical legal rules and legal citations. Given the unqualified—and perhaps unreconstructed—victory of the university-affiliated model, we suggest in conclusion that the forces which split the styles along political and pedagogical lines no longer justify the absence of rhetorical training from the legal curriculum. Thus, we as legal educators need no longer sacrifice the tactical advantages we could provide our students through systematic training in rhetoric—including the “narrative” style, at which the academy, we think, still lifts its nose.

II. THE PLACE OF RHETORIC AND ORATORY IN PRE-NINETEENTH-CENTURY EDUCATION

Rhetoric and oratory were staples of the Western educational system for more than two thousand years. From the heyday of Periclean Athens until

the late nineteenth century, the art and science of how to present one's ideas effectively in speech was a major concern of teachers of law, politics, religion, and the arts.⁵ Aristotle produced the first fundamental treatise on the subject, a text that continues to be of utility in the modern day.⁶ In this treatise Aristotle developed some of the basic concepts and techniques of rhetorical practice, based, in large part, upon the usages of his own day. The treatise exercised an important influence upon Roman rhetoricians and was supplemented by the works of Cicero and Quintilian.⁷ These three ancient authors—Aristotle, Cicero, and Quintilian—provided the basis for all future works on the subject and were studied and interpreted throughout the Middle Ages, the Renaissance, and the early modern period.

All three classical authors took the position that rhetoric was a subject that could be studied and learned. They taught that specific techniques and approaches could be mastered by anyone wishing to use them. Thus, rhetoric—the ability to present ideas cogently and persuasively—could be studied as a branch of knowledge; it was not relegated solely to the realm of natural talent. Rhetoric became a standard part of the school curriculum and was studied by everyone who moved past the most elementary educational levels. In England and the United States, rhetoric, along with classical languages, became one of the most important subjects studied both at school and university.⁸ No would-be lawyer, cleric, or M.P. could fail to

5. See S.F. BONNER, EDUCATION IN ANCIENT ROME: FROM THE ELDER CATO TO THE YOUNGER PLINY (1977) (discussing the history of rhetorical theory); GEORGE A. KENNEDY, A NEW HISTORY OF CLASSICAL RHETORIC (1994) (same); GEORGE KENNEDY, THE ARTS OF PERSUASION IN GREECE (1963) (same); JAMES J. MURPHY, RHETORIC IN THE MIDDLE AGES: A HISTORY OF RHETORICAL THEORY FROM ST. AUGUSTINE TO THE RENAISSANCE (1974) (same).

6. The most accessible Greek text is the ARS RHETORICA (Clarendon Press, 1959). See also ARISTOTLE, ON RHETORIC (George Kennedy trans., 1991); ARISTOTLE, THE "ART" OF RHETORIC (John Henry Freese trans., 1926).

7. Cicero wrote several works concerned with rhetoric including his *De Oratore*. The most accessible text (with translation) of the *De Oratore* is in the Loeb Classical Library. CICERO, DE ORATORE, reprinted in III & IV CICERO IN TWENTY-EIGHT VOLUMES (E.W. Sutton & H. Rackham trans., 1979) [hereinafter CICERO]. For a brief summary of his rhetorical texts, see KENNEDY, RHETORIC, *supra* note 5, at 111–15, 128–58. Quintilian's most important surviving rhetorical work is his *Institutio Oratoria*, on which, see, KENNEDY, RHETORIC, *supra* note 5, at 177–86. The most accessible text of his work (with English translation) is QUINTILIAN, THE ORATOR'S EDUCATION (Donald A. Russell ed. and trans., 2001). Of course, Cicero not only wrote about the theory of rhetoric, he also practiced it. His surviving speeches have had immense importance as models. On Cicero's style, see HAROLD C. GOTOFF, CICERO'S ELEGANT STYLE: AN ANALYSIS OF THE PRO ARCHIA (1979).

8. See, e.g., ALPHEUS CROSBY, A MEMORIAL OF THE COLLEGE LIFE OF THE CLASS OF 1827, DARTMOUTH COLLEGE 13 (1869–70) (listing courses of study at Dartmouth College as including: "Blair's Lectures on Rhetoric and Belles Lettres" and reporting that "the Rhetorical Exercises in the class were usually, for each member, a Declamation every four weeks, and a composition as often."). At Yale, too, rhetoric was an important component of undergraduate study, of which the students studied Cicero's *De Oratore*, *supra* note 7, and HUGH BLAIR'S LECTURES ON RHETORIC AND BELLES LETTRES (1783). See CATALOGUE OF THE OFFICERS AND STUDENTS IN YALE COLLEGE, 1846–47 (1846); see also

learn at least some basic rhetorical skills. The study of rhetoric was sufficiently important that it could not be left solely to ancient authors; throughout the centuries scholars and teachers devoted their lifetimes to elaborating on the seminal texts of Aristotle, Cicero, and Quintilian.⁹

One of the most important modern treatises on rhetoric and oratory was *Lectures on Rhetoric and Belles Lettres*, written by Hugh Blair and first published in 1783.¹⁰ Blair, born in 1718,¹¹ held the Chair in Rhetoric and Belles Lettres at Edinburgh from 1762 until 1800,¹² and was known as “the British Quintilian.” His *Lectures* were widely read and reprinted throughout the English-speaking world. Certainly, Blair’s lectures were taught in many American colleges and were widely recommended as a basic text to students, including those studying the law.¹³ John Adams told his son, John Quincy, when John Quincy was a law student in the offices of Theophilus Parsons, Sr. (later Chief Justice of the Massachusetts Supreme Court) that he ought to study Blair along with Cicero and Quintilian.¹⁴

Indeed, when one looks at the reading of early American lawyers one discovers that works on rhetoric—especially those of Blair, Cicero, and Quintilian, and including several of Cicero’s most famous orations, such as the *Pro Cluentio*—were staples.¹⁵ The reason for this was quite simple. During the colonial and early national periods the profession of law was

LAWRENCE A. CREMIN, *AMERICAN EDUCATION: THE NATIONAL EXPERIENCE 1783–1876*, at 604 (index s.v. “rhetoric”) (1950).

9. See BONNER, *supra* note 5; KENNEDY, *RHETORIC*, *supra* note 5; KENNEDY, *PERSUASION*, *supra* note 5; MURPHY, *supra* note 5.

10. BLAIR, *supra* note 8.

11. ROBERT M. SCHMITZ, *HUGH BLAIR* 7 (1948).

12. Paul G. Bator, *The Formation of the Regius Chair of Rhetoric and Belles Lettres at the University of Edinburgh*, 75 Q. J. SPEECH 40, 58 (1989). Hugh Blair actively held the chair from 1762 until 1784. From 1784 until 1799 Blair shared the chair with Rev. William Greenfield, and then was the sole professor of the chair until his death on December 27, 1800. *Id.* For more on Blair’s career, see FRANKLIN E. COURT, *THE SCOTTISH CONNECTION* 14–16 (2001); Rajit S. Dossanjh, *The Elegance of the Bar: Hugh Blair’s Lectures, Professionalism and Scottish Legal Education*, in *THE SCOTTISH INVENTION OF ENGLISH LITERATURE* 55–67 (1998). For a modern biography of Hugh Blair see SCHMITZ, *supra* note 11.

13. The educational importance of Blair’s lectures in the United States is discussed in COURT, *supra* note 12. An example of a school edition of the *Lectures* is BLAIR, *supra* note 8, to which are added copious questions and an analysis of each lecture by Abraham Mills.

14. See the letter dated January 23, 1788 of John Adams to his son, John Quincy Adams pretrial in JOHN QUINCY ADAMS, *LIFE IN A NEW ENGLAND TOWN: 1787, 1788*, at 125–26, n.3 (1903).

15. See Stephen Botein, *Cicero as a Role Model for Early American Lawyers: A Case Study in Classical Influence*, CLASSICAL J., 313–31 n.73 (1978); see generally M.H. HOEFELICH, *ROMAN AND CIVIL LAW AND THE DEVELOPMENT OF ANGLO-AMERICAN JURISPRUDENCE* (1997) (discussing the development of Roman and Civil law before and after 1850).

primarily *advocacy*.¹⁶ Virtually every lawyer, with the possible exception of conveyancers, was expected to handle trial-level litigation. Even a small sampling of lawyers' diaries of the period demonstrates that trial work was overwhelmingly the bread and butter of practice, even for the most elite lawyers.¹⁷ Teachers and lawyers alike saw the study of "judicial eloquence" as a necessary prerequisite to success in this endeavor.

The importance of the study of rhetoric to American students was underlined by the creation of the Boylston Professorship of Rhetoric at Harvard in 1805 and the appointment of John Quincy Adams as the first incumbent of the Chair.¹⁸ Although Adams held the chair for only a short period during a respite from his political and diplomatic activities, his Harvard lectures were published in two volumes in 1810 and quickly joined Blair and the ancients as a standard and widely read text on the subject.¹⁹ All of these works, but especially Cicero's *On Oratory*, Quintilian's *Institutes on Oratory*, and Blair's and John Quincy Adams's *Lectures* devote substantial space to courtroom eloquence. By studying these works it is possible to acquire some notion of what fledgling lawyers were taught.

III. THE SPLIT AND SUBSEQUENT DUALISM OF ORATORICAL STYLE

Although the many ancient and modern treatises on rhetoric all differ to some degree as to the rules and principles set out for the legal orator, they were unanimous in stating that the fundamental purpose of legal oratory was to persuade judges and juries of the "rightness" of a client's case. Where they differed, often strongly, was on how such persuasion was to be

16. See EDWARD HAZEN, *THE PANORAMA OF PROFESSIONS AND TRADES* 124–26 (1836). Another integral illustration of the importance of advocacy and rhetoric to American lawyers in the nineteenth century is to be found in the American edition of SAMUEL WARREN'S, *A POPULAR AND PRACTICAL INTRODUCTION TO LAW STUDIES* edited for the American audience by Isaac Thompson and published in San Francisco in 1870 by Bancroft-Whitney. Chapter X of this work is titled *On the Study of Forensic Eloquence*. This chapter, as the editor explains, is absent from the English edition of the work but added to the American by Thompson because "this subject [is] so important to the American Student." *Id.* at 142. See generally ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* (1984) (discussing law and literature in early America).

17. See, for example, the diaries of William Bartlett Sewall, a graduate of Harvard College in 1803 who practiced law in Portland at Kennebunk, Maine. His diaries, giving details of his daily professional life, are now in the library of the American Antiquarian Society in Worcester, Massachusetts. In 1813, for instance, Sewall worked twenty-six days, of which he spent seven in court.

18. M.H. Hoeflich, *Roman Law & Forensic Oratory in Antebellum America*, *ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE ROM. ABT.* (forthcoming 2003). For more information on the life of John Quincy Adams, see PAUL C. NAGEL, *JOHN QUINCY ADAMS: A PUBLIC LIFE, A PRIVATE LIFE* (1997).

19. JOHN QUINCY ADAMS, *LECTURES ON RHETORIC AND ORATORY DELIVERED TO THE CLASSES OF SENIOR AND JUNIOR SOPHISTERS IN HARVARD UNIVERSITY (1810)*, reprinted in *LECTURES ON RHETORIC AND ORATORY* (with an introduction by J. Jeffery Auer & Jerold L. Banning) (1962).

accomplished. Most teachers and writers on rhetoric from Aristotle onwards recognized discrete *styles* of presentation and held that which was most appropriate depended upon the purpose of the speech and the audience for which it was intended. In the case of forensic oratory, most rhetoricians divided the styles into two broad, although not mutually exclusive, categories. The first is often known as the “Asiatic” style, a term which refers to preference of orators of the ancient East for such a style.²⁰ The Asiatic style depended on elaborate constructions, florid language, and appeals to the audience’s passions. The second style, often referred to as the “plain” style, was designed to appeal to the audience’s reason; it tended to eschew literary and rhetorical flourishes in favor of plain, unornamented speech.²¹ One can easily see, for instance, that an orator, such as Cicero, addressing a large jury and the general populace in a great criminal case, might well resort to the Asiatic style to appeal to the crowd’s emotions; in another context, however, perhaps in a civil trial before a magistrate, he might employ a plainer mode of speech. Most rhetoricians used both styles.

By the end of the eighteenth and the beginning of the nineteenth century, though the ancient authors were still taught, these two approaches to oratory had changed. In antebellum America, certainly, the Asiatic style continued to be taught and employed, though it tended to depend as much upon the use of narrative and pathos as it did upon rhetorical tricks. There can be no question, however, that the general theory of this style, whether we call it “narrative” or “Asiatic,” was to apply the orator’s skills to engaging the decision-maker’s emotions in a way favorable to his client’s cause.²² Such a style fit well with the fiery oratory that roused the American Colonies to revolution against the British Monarchy, and many of the lawyers of the early Republic had been professionally baptized in these revolutionary fires.²³ At the same time, the plain style was most appealing to the advocates of law as a *science*, who were coming of age in the 1820s and 1830s.²⁴ It was particularly attractive to the elite, who feared the excesses of populism and Jacksonian demagoguery, and who were also closely allied to the

20. LANHAM, *supra* note 4, at 24, 174–76.

21. *Id.* at 174–76.

22. Cicero, in his oration *Brutus*, describes the “Asian” style in these terms. See CICERO, *BRUTUS*, reprinted in V CICERO, *supra* note 7, at 89 (G.L. Hendrickson trans., 1971).

23. On Revolutionary oratory and the antebellum legal profession, see THOMAS W. HIGGINSON, *AMERICAN ORATORS AND ORATORY* 33–59 (1901).

24. This notion became persuasive in antebellum America. See HAZEN, *supra* note 16, at 126. In this account of lawyers, Hazen describes how lawyers, when arguing “principles,” will do so before a court without a jury. *Id.*

newly emerging university-based law schools at Harvard and Transylvania, among others.²⁵

The popular, narrative style that appealed to the emotions required neither a genteel upbringing nor an extensive formal education. “Stump” speaking translated easily to the courtroom and transformed into effective trial-level oratory.²⁶ For those who knew little or no law such a style was an absolute necessity. For those who feared a learned and elitist Bar such oratory was considered a tool of self-defense. During the Jacksonian period, in particular, with the movement to open up the legal profession to all and to eliminate all requirements for admission to the Bar, such a style was heaven-sent. It particularly appealed to those who distrusted law and judges and favored instead a “people’s justice,” enforced by juries grounding their decisions upon their own innate and unlearned wisdom rather than technical rules of law.²⁷

The “scientific” style of oratory, dependent as it was upon a knowledge of the law and of legal rules, and with its appeal to rational decision-making based upon such rules, was clearly the style of choice for those who feared the Jacksonian rabble and who supported an exclusive Bar and elite, university-based legal education. This “learned” style was favored by the products of Harvard and Litchfield and by those who apprenticed themselves to the elite members of the state Bars.²⁸ It was a style appropriate for judges learned in the law and for juries composed of college graduates and wealthy merchants to whom the rule of law was a prerequisite to security.²⁹

Of course, any rhetorical style, if carried to the extreme, may become counter-productive. The narrative style, if carried too far or if presented to the wrong audience, could backfire with its failure to focus on the relevant law and to provide legal citations. One can imagine that the style of oratory appropriate to a court in frontier Illinois would not have carried the day in Theophilus Parsons’s court in Massachusetts. Similarly, the plain style when carried to its extreme could easily become pedantic, allowing the whiff of the lecture hall to overcome a case in a courtroom. Without doubt,

25. See Michael H. Hoeflich, *Introduction* to *THE GLADSOME LIGHT OF JURISPRUDENCE: LEARNING THE LAW IN ENGLAND AND THE UNITED STATES IN THE 18TH AND 19TH CENTURIES* 1, 2–7 (Michael H. Hoeflich ed., 1988) [hereinafter *THE GLADSOME LIGHT*].

26. Abe Lincoln was an example of this phenomenon. See the descriptions of Lincoln’s trials in HENRY C. WHITNEY, *LIFE ON THE CIRCUIT WITH LINCOLN* 38–71 (1892).

27. See ELLEN E. SWARD, *THE DECLINE OF THE CIVIL JURY* 90–93 (2001).

28. See, e.g., SIMON GREENLEAF, *A DISCOURSE PRONOUNCED AT THE INAUGURATION OF THE AUTHOR AS ROYALL PROFESSOR OF LAW IN HARVARD UNIVERSITY* (1834), reprinted in *THE GLADSOME LIGHT*, *supra* note 25, at 134–44 (speaking on the necessity for university-based legal education).

29. On the alliance of the elite and merchant classes with elite lawyers in the antebellum period, see generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860* (1977).

the greatest advocates were those who mastered both styles and all the stylistic shadings in between. Think of a cabinet-maker who has the task of building a bookcase. Presumably any attempt to do his work with only one tool, say a screwdriver, would result in only the crudest workmanship. To do the best job, the workman needs multiple tools and the acumen to know which tool is appropriate for each particular situation. The same is true of the forensic orator: if the moment calls for an appeal to the audience's emotions, the orator must turn storyteller; if it is the audience's reason and respect for precedent he must engage, then he must with equal skill apply the razor's edge of analytical forensics.

In spite of the fact that most lawyers in practice would combine the two approaches to oratory, one finds strongly marked delineations drawn by those who wrote about rhetoric and oratory, especially among proponents of the plain-speaking or scientific method. There were several important reasons for this. First, as already mentioned, was the political importance of oratory and the concomitant symbolic value of a speaker's choice of method. The antebellum American elite, centered, particularly, in the major eastern cities,³⁰ were terrified by the prospect of mob rule under the Jacksonian Democrats. The greatest source of the Jacksonians' power was the unruly mob, which could be roused to incendiary acts by a demagogue. Boston Brahmins and New York merchants must have recoiled in horror at the sight of thousands of people storming the White House to celebrate Jackson's inauguration, an event that surely must have produced, for them, echoes of the French Revolution. They saw demagoguery as a political evil; and in the courtroom such "speechifying" raised the specter of lawless juries willing to ignore the law, and the interests protected thereby, in favor of the populist lawyer and his colorful arguments.³¹

A second factor in the battle over the proper approach to forensic oratory was the increasing conflict between the traditional apprenticeship method of legal education and the new school-based method championed by university-affiliated law schools, such as Harvard and Transylvania, and elite judges' schools such as Litchfield.³² These schools were far more expensive than apprenticeship and often required that their students leave their

30. See, e.g., Alfred S. Konefsky, *Law and Culture in Antebellum Boston*, 40 STAN. L. REV. 1119, 1119-59 n.40 (1988) (reviewing ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* (1984)).

31. SWARD, *supra* note 27, at 90-93.

32. Michael H. Hoeflich, *Preface* to *THE GLADSOME LIGHT*, *supra* note 25.

local communities and the social and business networks therein.³³ They had to find some basis upon which not only to distinguish themselves but also to justify the added expense and inconvenience involved in a law school education. The approach they chose was to argue that law schools could provide a *systematic* education in the “science” of law—that they could teach legal principles, as Daniel Mayes of Transylvania College put it, equally useful in Lexington, Kentucky or Westminster Hall.³⁴ In pursuit of this new notion of scientific legal education early law-school professors like Joseph Story and Simon Greenleaf became prodigious producers of legal treatises.³⁵ The adoption of this scientific approach to the law allowed the law schools to offer something very few lawyers could offer to their apprentices.

At the same time, what these apprentices gained, which law students could not, was the opportunity to learn by doing and to observe on a regular basis senior lawyers in action in the courtroom—i.e., to learn *advocacy* through example. Although the law schools did initiate moot courts—Harvard students in the antebellum period attended weekly moots—this was not an adequate substitute for daily exposure to experienced lawyers in court, arguing real cases in which the lives and fortunes of real clients were at stake.³⁶ Thus, the proponents of scientific legal education found themselves at a disadvantage in terms of instruction in actual courtroom technique. They dealt with this by insisting that proper forensic oratory was *scientific* and based upon a thorough knowledge of legal principles, some-

33. Harvard, for much of the antebellum period, charged tuition on \$100 per year [with an additional \$10 charge for instruction in French, if desired]. See, e.g., A CATALOGUE OF THE OFFICERS AND STUDENTS OF HARVARD UNIVERSITY FOR THE ACADEMIC YEAR 1845–46, at 51 (1845) [hereinafter HARVARD CATALOGUE].

34. DANIEL MAYES, AN ADDRESS TO THE STUDENTS OF LAW IN TRANSYLVANIA UNIVERSITY (1834), reprinted in THE GLADSOME LIGHT, *supra* note 26, at 145, 154. The law schools also made it a point to emphasize that they had substantial law libraries, not accessible to an ordinary lawyer’s apprentice.

35. See 1 CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 480–506 (1908) (discussing the life of Simon Greenleaf); 2 *id.* 1–47 (same). See also A.W.B. SIMPSON, *The Rise and Fall of the Legal Treatise*, in LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW 311–15 (1987) (discussing the rise in quality of American treatises resulting from the number of qualified law professors who were now writing them); HOWARD SCHWEBER, BEFORE LANGDELL: THE ROOTS OF AMERICAN LEGAL SCIENCE, in THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES 606 (Steve Sheppard ed., 1999); M.H. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95 (1986) (discussing Christopher Columbus Langdell and his impact on legal education through implementation of casebooks and the Socratic method).

36. See M.H. Hoeflich, *Plus Ça Change, Plus C’est La Même Chose: The Integration of Theory & Practice in Legal Education*, 66 TEMP. L. REV. 123 (1993) (discussing the debate between the benefits of practical legal courses). On Harvard, see HARVARD CATALOGUE, *supra* note 33, at 29 (listing Junior Sophisters).

thing that could best be acquired in their classrooms. This approach, of course, fit in perfectly with the conservative political context in which these law schools operated. And when the university-based, law-school model of legal education triumphed over its rival and its graduates assumed control of the legal world, the scientific approach to oratory became virtually monolithic—as long as one lawyer is speaking to another, it is the *lingua franca* of the profession. Whether it is an effective way to communicate with juries or the public, however, is a question we address below.

Throughout the antebellum period these two approaches to forensic style coexisted and were often discussed. John Quincy Adams in his Boylston Lectures at Harvard made a point of telling his students about both styles, and he warned them that they could not slavishly adhere to either and expect to be successful at the Bar.³⁷ But during this period, instruction in the principles of oratory, including forensic oratory, was not a part of the regular course of instruction in law schools; rather, it was considered a suitable subject for undergraduate instruction.³⁸ The reason for this, we may presume, was that rhetoric was essential not only for would-be lawyers, but also for those who would become clergymen or politicians. Indeed, as the university-affiliated model of legal education gained ground during this period, and as Harvard extended its influence and method across the nation, the exclusion of oratorical instruction (except incidentally, in moots) and the promotion of teaching law as a *science of principles* assured that the scientific or plain-speaking style would continue to gain strength among the graduates of these law schools.³⁹ The fact that these graduates had no systematic training or experience in the narrative style equally assured that it would lose strength.

IV. ILLUSTRATIVE EXAMPLES

So far, this discussion has been rather abstract; to examine these principles in action, we now consider two closing arguments as illustrative examples. Each comes from a notable case of the antebellum period, and each was spoken by a prominent attorney. The first is the *Dartmouth College Case* in which the great orator, Daniel Webster, argued successfully for his

37. See generally JOHN QUINCY ADAMS, LECTURES, *supra* note 19.

38. Rhetoric is not listed, for example, in the antebellum Harvard Law School catalogues. See HARVARD CATALOGUE, *supra* note 33, at 53–56 (listing courses of study).

39. On the triumph of the “Harvard Method” over the course of the nineteenth century, see ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S (1983).

alma mater. The second is the *Webster Murder Case*, in which a prominent Boston lawyer, Judge Pliny Merrick, argued unsuccessfully for the defense. As we shall see, these two cases provide superb examples of the use and misuse of both styles.

A. *Daniel Webster and the Narrative Style*

The facts of the *Dartmouth College Case* are commonly known, so we summarize them only briefly.⁴⁰ Dartmouth College, Webster's alma mater, was established by Eleazar Wheelock as a private institution under a charter granted by the King of England. Under the terms of the charter, the president (Wheelock) and a board of trustees were to oversee the college. After Wheelock's death, his son John became president. John Wheelock and the trustees, however, found themselves in a bitter dispute as to whether Congregationalism or Presbyterianism would dominate the campus. As the dispute burned hotter, the trustees sought outside help from politicians; but they reached too far. The dispute became a political issue in the bitterly divided 1815 New Hampshire election, by which time it was beyond the control of the original parties. After a Republican victory, the new Governor and the new legislature agreed on legislation that essentially took the college away from both the president and the trustees, revoking its charter and converting it from a private to a public institution.

Webster argued part of the original case before a three-judge panel of the newly reorganized superior court. All three judges were new appointees of the Governor, and despite a brilliant performance by Webster, the trustees lost. In what is recognized as one of the greatest displays of oratorical prowess in American history, Webster argued the appeal before the Supreme Court of the United States on March 9, 1818. We, inured as we are in this age to the power of public oratory, cannot, except by a tremendous effort of the imagination, put ourselves into the shoes of his audience. The emotional appeal of the speech, especially the peroration, affected his audience so powerfully that, according to numerous contemporary reports, when Webster finished, "[t]here was a deathlike silence. Virtually the entire audience dissolved into tears Many wept uncontrollably."⁴¹ Even Chief Justice Marshall, hardly known for his sentimental tendencies, wept.⁴² Can we imagine this being reported of Chief Justice Rehnquist? The speech was published, translated, read, and discussed all over the world.

40. Numerous sources recount the factual and procedural history of the case. See, e.g., ROBERT V. REMINI, DANIEL WEBSTER, THE MAN AND HIS TIME 133-62 (1997).

41. *Id.* at 156.

42. *Id.*

Especially in its early stages, the speech is remarkable for its tight construction and its logical cohesion.⁴³ It is extremely user-friendly; Webster alleviates long, complex passages of fact, precedent, or reasoning with concise summaries, full of binary comparisons exemplifying the complex principles just discussed. The entire middle section is a cornucopia of learned references: Blackstone, Kent, the Magna Carta, Papinian and other Roman law, swaths of Latin, and, of course, case after case after case. It is this attention to clarity, logical pattern, precedent, and simplicity that led Robert Ferguson to describe Webster as a practitioner of the new “plain style.”⁴⁴ But, interspersed throughout the speech, one finds momentary lightning-strikes of rhetorical flourish; supporting all the careful logic is the sensibility of a storyteller; and the peroration is an awesome display of pure emotional manipulation that left some of the hardest, most pragmatic and powerful men in the land sobbing uncontrollably.

Unfortunately, it is impossible, without going on at great length and parsing numerous passages, to offer a proper exegetical treatment of any piece of prose, especially a brilliant one. Thus we must limit our discussion to a few crucial points and examples that demonstrate Webster’s mastery of the narrative and the scientific styles and his ability to *fuse* them, for it is this fusion that makes him such a remarkable figure in the history of American oratory. In the introduction to his collection of Webster’s great speeches, Edwin Whipple notes the seamless integration of emotional appeals within Webster’s tightly organized and logical speeches:

[T]hese thrilling passages . . . are not mere purple patches of rhetoric, loosely stitched on the homespun gray of the reasoning, but they seem to be interwoven with it and to be a vital part of it. Indeed we can hardly decide, in reading these magnificent bursts of eloquence in connection with what precedes and follows them, whether the effect is due to the *logic* of the orator becoming suddenly impassioned, or to his moral passion becoming suddenly *logical*.⁴⁵

Webster accomplishes this integration first and foremost through meticulous attention to the sensibilities of his audience. “Appeal to the emo-

43. No definitive text of the early sections of the spoken version of Webster’s speech exists. For a discussion of the authority and textual history of the peroration, which is the primary focus of this paper’s analysis, see *id.* at 155–56 n.81. The published version of the speech is available in numerous sources, including EDWIN P. WHIPPLE, *THE GREAT SPEECHES AND ORATIONS OF DANIEL WEBSTER, WITH AN ESSAY ON DANIEL WEBSTER AS A MASTER OF ENGLISH STYLE* (The Legal Classics Library 1989) (1894).

44. FERGUSON, *supra* note 16, at 210.

45. WHIPPLE, *supra* note 43, at xiii–xiv (emphasis added).

tions” is a simplistic way of describing the narrative style; but to make such an appeal, one must first understand the persons to whom one makes it. Webster’s audience for the speech itself was the Supreme Court—a learned group of Justices, whose immediate concerns included the continued independence of the judiciary from the legislature, along with a still-smoldering flame of revolutionary pride—now severely tempered by a new consciousness of national identity and a sense of duty and loyalty towards the Republic and its Constitution. It is crucial to note that when his audience is *posterity*, as it clearly was for the published version of the speech, Webster removes the spectacular peroration, as if embarrassed by it, because once the case is done, his version is *law*; thus the appeal to emotion becomes a liability. He also excised most of the Latin, which in the days of Jacksonian democracy would have made him appear effete and elitist.⁴⁶

Can we doubt, for example, that Webster understood who his audience was that day, when he argued—in favor of the trustees’ due process rights and against a construction of the legislature’s action as lawful—that

[s]uch a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. *There would be no general, permanent law for courts to administer or men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees; not to declare the law or to administer the justice of the country.*⁴⁷

This is a rather naked appeal to the sources of the Justices’ own political power. In a similar, but subtler, appeal Webster identifies his opponents with historical figures anathema to the Justices’ sensibilities, constructing parallels that were sure to resonate with their lingering revolutionary sentiments. For example, he compares the New Hampshire legislature unfavorably to the theoretically omnipotent English Parliament, which, even in the throes of its worst excesses, virtually never abrogated corporate charters like the one the King of England granted Dartmouth College.⁴⁸ Such power, Webster argued, was sovereign, not legislative, and the Court had a duty to prevent the New Hampshire legislature from wielding it.⁴⁹ Continuing the motif, Webster compares the legislature’s actions to the worst

46. Webster refused a request by Isaac Hill to publish the speech. When he did release it for publication, he told Jeremiah Mason that “All that nonsense [the peroration] is left out.” REMINI, *supra* note 40, at 159 (quoting a letter from Webster to Mason).

47. Daniel Webster, *quoted in* WHIPPLE, *supra* note 43, at 16 (emphasis added).

48. *Id.* at 5.

49. *Id.* at 5–6.

abuses of Charles the Second and James the Second.⁵⁰ For example: “Of all the attempts of James the Second to overturn the law, none was esteemed more arbitrary or tyrannical than his attack on Magdalen College, Oxford; and yet that attempt was nothing but to put out one president and put in another.”⁵¹ The legislature is not merely in *error*, then; its actions embody everything the Revolution intended to strike down and threaten the fundamental principles of the Republic. These principles, enshrined as they are in the Constitution, are now sacrosanct. That a speech could, without contradiction, simultaneously evoke both a grave respect for established authority and revolutionary ardor is, of course, a testament to Webster’s mastery of the form, as well as to the changing nature of the Republic.

Another essential element of the appeal to narrative sensibilities is an organizational principle that connects specific facts to larger principles—good and evil, for example, or right and wrong. That is, the style appeals to the emotional sensibilities of the audience by connecting the specific facts, as if they were *plot elements*, to the most fundamental of those sensibilities. This appeal is distinct from a direct appeal to the *interests* of the audience, something we have already noted that Webster was careful to do as well. The most remarkable instance of this approach is the beginning of the peroration, in which the college’s plight becomes not merely broadly appealing but a universal peril that the Court must deflect, or woe betide us all.

This, sir, is my case. It is the case, not merely of that humble institution, it is the case of every college in our Land! It is more. It is the case of every eleemosynary institution throughout our country—of all those great charities founded by the piety of our ancestors, to alleviate human misery, and scatter blessings along the pathway of life! It is more! It is, in some sense, the case of every man among us who has property of which he may be stripped, for the question is simply this: Shall our State Legislatures be allowed to take that which is not their own, to turn it from its original use, and apply it to such ends or purposes as they in their discretion shall see fit?⁵²

In the story Webster is telling, the Court at this juncture is not merely an arbiter of the law, a sifter of precedent, a parser of statutory language; in the story Webster is telling the Court, it is a champion, a protector of the vulnerable, and it has a choice between *good* and *evil*. Webster calls on it to demonstrate not merely its power but its nobility and goodness by rescuing

50. *Id.* at 17.

51. *Id.*

52. Daniel Webster, *quoted in* REMINI, *supra* note 40, at 155–56.

the college, and with it every property owner in the nation, from the arbitrary tyranny of the legislature.

Webster was not above direct, personal appeals to the men on the bench—of casting them in his play, so to speak—as he did with the following lines, delivered directly to Chief Justice Marshall:

Sir, you may destroy this little institution; it is weak, it is in your hands! I know it is one of the lesser lights in the literary horizon of our country. You may put it out! But, if you do so, you must carry through your work! You must extinguish, one after another, all those greater lights of science which, for more than a century, have thrown their radiance over our land!

It is, sir, as I have said, a small college. And yet *there are those who love it!*⁵³

Thus, a speech in the narrative style will cumulate; its components are not anecdotal, but part of an organic structure in which each part serves the whole, connects outward and makes sense in a narrative way. The proper resolution of the case resonates in successively larger conceptual spaces until finally, it reaches the ultimate space—the common moral ground on which Webster believed all loyal Americans stood, together and firm.

Webster most overtly employs narrative techniques in the crescendo of the peroration, where he personifies the college as both Caesar betrayed and as a helpless mother being stabbed by her own child:

Sir, I know not how others may feel . . . but, for myself, when I see my Alma Mater surrounded, like Caesar in the senate-house, by those who are reiterating stab after stab, I would not, for this right hand, have her turn to me, and say, *Et tu quoque, mi fili!* And thou too, my son!⁵⁴

We are, of course, in purely literary territory here, miles from any species of legal precedent or rational process. The convolution of roles and personae in the passage is, if not irrational, at least arational. But the remarkable thing about the speech is that it began and developed firmly in territory of reason and logic, and that these narrative tactics do not disqualify it as a

53. *Id.* at 156.

54. *Id.* At least three narrative techniques are at work in this passage; that they do not muddle into an incomprehensible mess is, perhaps, the most remarkable thing about it. First, *personification*—as of the college in this passage—is a literary technique by which an author ascribes to inanimate objects elements of human behavior and sensibility, inviting the emotional response due a person, rather than an object. Next, *literary allusion*—in this passage Webster simultaneously personifies the college and alludes to the famous death scene, retold by Shakespeare and many others, in which Caesar meets his fate at the hands of his closest advisors. The final technique is *dramatization*—Webster casts himself as a betrayed mother (the Alma Mater), stabbed as Caesar was by those she trusted most, and speaks her lines to the Court.

speech—at least to some degree—in the “plain” or scientific style. Its structure is incredibly tight and easy to follow; its rational appeal equals its emotional appeal. Thus, a speech may be “scientific” in its careful, rational exposition and organization, yet exploit the impact and cohesive force of narrative techniques.

B. *Pliny Merrick and the Scientific Style*

It is truly ironic that the *Webster Murder Case*, a spectacular tale of murder and mutilation among the upper-crusty Brahmins of nineteenth-century Boston, should provide us with the drab, boring text, while an oration about charters for eleemosynary corporations should remain a classic of American letters, known the world over for inducing seizures of passion and patriotism. The facts of the *Webster Murder Case* are simple.⁵⁵ Dr. George Parkman, a physician and prominent businessman, lent money to John White Webster, a young chemist who had just obtained a place on the Harvard faculty. Webster failed to pay the debt, and when Parkman discovered that Webster had used the same collateral to secure other loans, and that Webster was generally profligate and irresponsible in his business affairs, he began to hound Webster for the money. Webster had nothing to give and, during an argument, he killed Parkman and dismembered him with a Bowie knife, a Turkish souvenir blade, and a saw. Some pieces he burned, others he secreted around the building that housed his offices.⁵⁶ Webster was exposed because his janitor, Ephraim Littlefield, was sufficiently convinced that Webster had committed the crime that he tunneled beneath the wall of the dissection vault into a locked room to which only Webster had access. As he broke through the subterranean wall with a sledgehammer and reached his candle inside, he was welcomed by the sight of Dr. Parkman’s raggedly severed pelvis, with viscera still attached.

Sixty thousand people—ushered in and out in ten-minute shifts because of the popular demand—came to hear the trial.⁵⁷ Daniel Webster and Rufus Choate (another master stylist in Daniel Webster’s mold) were Professor

55. Numerous sources recount the bizarre history of the *Webster Murder Case*. Trial transcripts quoted in this paper may be found in GEORGE DILNOT, *THE TRIAL OF PROFESSOR JOHN WHITE WEBSTER* (1928). SIMON SCHAMA, *Death of a Harvard Man*, in *DEAD CERTAINTIES* 71 (1991) presents the trial in a more narrative fashion. The Public Broadcasting Service (PBS) will devote an episode of its documentary series, *The American Experience*, to the case later this year. Details on the production, and Simon Schama’s involvement in it, are available at <http://www.spypondproductions.com/>.

56. In a ghoulish irony, the entire premises were a grant to the university from Parkman himself.

57. SCHAMA, *supra* note 55, at 196.

Webster's first choices as defense attorney, but they declined the case, and Webster chose Pliny Merrick as his lead attorney.⁵⁸ Merrick, a Brahmin like Webster, was a distinguished Harvard lawyer—a judge, in fact, of the Court of Common Pleas, who had recently returned to private practice.

Merrick's style demonstrates why the term "plain" style does not as accurately describe the oratorical tradition of which he was a product. One of the reasons to prefer the term "scientific" is that the style is intimately associated with the "law as a science" philosophy of legal education espoused at Harvard and elsewhere. Merrick exemplifies another reason for preferring the term: by "plain style" we mean a style that appeals to the reason as opposed to the passions, but "plain" also connotes a simplicity of syntax. The term "scientific," on the other hand, suggests both an emphasis on reason and rules and the technical proficiency necessary to apply them. As such, prolixity and complexity do not disqualify an oration from being in the scientific style, just as Lincoln's folksy charm and simple sentence patterns did not mean that his courtroom orations *were* in the plain style. And, indeed, Merrick was prolix. And convoluted in his syntax. According to Simon Schama, Merrick spoke his closing argument "in elaborately turned phrases, in long sentences whose main clauses appeared only gradually like mountains emerging from the mist. It was as though he were addressing the jury in . . . cultivated High German . . ."⁵⁹

Merrick clearly lacked Webster's ability to appeal to the specific audience in front of him. The lofty impenetrability of his style is only the first of his many instances in which he declines to avail himself of the tools of the narrative style. The *Webster* jury was made up of mechanics and tradesmen, "sweat-of-the-brow, shirt-sleeve types with not a trace of the Brahminate in them."⁶⁰ To these men, Merrick appealed for the life of his client in language redolent of treatises and the lectern. His presentation is fussy and meticulous; his concern is always with the legal technicality, with the quibble, and not with the sort of compelling narrative that might have saved Webster from the gallows.

Merrick's organizational choices are the opposite of Webster's. Rather than a cumulating flow—in which rhetoric and narrative technique glue

58. Webster declined because he was concerned with other matters. Choate declined because of the restrictions Webster would have placed upon Choate's freedom to argue the case as he saw fit. *Id.* at 185–88. Franklin Dexter, Webster's relative and his lawyer, chose Merrick as lead counsel and Edward Sohler as second counsel because they were two of the "best known and respected" lawyers available. *Id.* at 185–89.

59. *Id.* at 243–44. A line-by-line comparison of the prose of Merrick's closing argument and law treatises produced at Harvard during the period reveals a remarkable stylistic similarity. Merrick quite literally did speak like a treatise, i.e., in the pure scientific style.

60. *Id.* at 205.

each fact, each particle of precedent, and each image into a narrative that ultimately includes the audience—Merrick’s approach is particulate. Each point, each fact, is a discrete specimen to be analyzed scientifically; and the dissecting table must be cleaned before he moves on to the next specimen. He makes no effort to bring the facts to life, to offer a coherent structure that unites them into a story in which Webster is innocent; in fact, he deliberately breaks them down and severs them from context. Thus were lawyers trained to do in the university-based law schools, and thus are we still trained today. For example, one of the issues at trial was whether the remains were those of Dr. Parkman at all, and an important part of the evidence was a number of charred fragments of bone found in Webster’s furnace. Here is what Merrick offers the jury:

In the first place, gentlemen, there were remains found in the vault, other parts in the tea-chest, and still other parts of a human body in the cinders of the furnace . . . Dr. Wyman, who has exhibited much skill, much science, much knowledge in his profession, has stated to you that the bones—the fragments of bones—which he finds, correspond with, or belong to, parts of a body which were not found in the tea-chest or vault. And he states that these fragments of bones constitute part of the head, neck, arms, hands, feet, and one leg below the knee; and that there was among these fragments nothing duplicated; no fragment which must necessarily have existed in two human bodies; no fragment which could have existed in any part of that found in the tea-chest and vault.

Now, upon this testimony, you are to consider; and I have no doubt of the result to which you will arrive.⁶¹

This drab business goes on for paragraph after paragraph, semi-colon after semi-colon, like a treatise. Note that Merrick is more concerned with the detail (“and one leg below the knee”) than he is with making any sense out of the information for his audience. The point he is making *does* argue in Webster’s favor. Maybe the bones weren’t Parkman’s—maybe they weren’t even from a single body. Maybe they weren’t even human. Had Merrick wanted to tell a story with these facts, one that questioned the government’s case in a way this jury could have understood, felt, and remembered, he might have tried something like this:

And what evidence does the prosecution offer to prove that this is even the body of Dr. Parkman? Bones, gentlemen, if you can recognize them as such; a dismal little pile of bones, burned, fused, blackened beyond the point at which we mere

61. Pliny Merrick, *quoted in* DILNOT, *supra* note 55, at 140.

laymen can recognize them *as* bones, let alone human ones, let *alone* discern their individual identities and functions as here a femur, there a bit of tibia, on this side a melted tooth, on that an incinerated fragment of mandible—gentlemen, beyond our wildest speculations as to whether they are all remains of the *same person*, and beyond the power of all but the Almighty to say, “These are the bones of but *one* man, *and his name is Dr. Parkman!*”

But narrative, and its appeal to emotion and to the memory, is emphatically not Merrick’s concern. As we discussed earlier, Webster’s peroration, in which he personifies the college as both Caesar betrayed and a mother being stabbed by her own son, makes magnificently effective use of imagery. Merrick’s belabored exegesis of the significance of the bone fragments is but one example of his spectacular misuse of—or simple ignorance of—the narrative power of imagery. The most potent images conjured up by the facts of the case are those of the dismembered body. In an effort to emphasize—quite properly—the legal technicality requiring the government to prove the cause of Dr. Parkman’s death, Merrick repeatedly invokes the most gruesome aspects of the murder, summoning into the courtroom again and again the specter of the body and its mutilation.

How did he come to his death? Remember, it is not for the prisoner at the bar to explain how these were dead remains, but the Government are to show you that a living man was killed. How was he killed? Was he killed at all? Do you find upon the person wounds, blows, and evidences of destruction, sufficient to take human life? To take a man’s head off, kills him. To take his breast-bone out, and separate all the internal parts of the body, kills him; to cut off his arms and his thighs, kills him Was Dr. Parkman killed in any of these ways? Do you think he was burnt to death? Was his limb placed in the fire—that limb of which you found fragments—was that put in the fire till the fire scorched him to death? Was his head placed so as to be burnt alive? Nobody believes it. Do you believe that he was killed by having these two legs cut off? That he was laid upon the floor, or upon an anatomist’s table, and held there until his legs were chopped off? Nobody believes that. Or, was he held there until his arms were chopped off, and all his limbs severed? Nobody believes that. That is to say, that, though you find this body mutilated—distressingly mutilated—yet nobody believes that this mutilation was the cause of death.

What, then, was the cause of death?⁶²

A scientifically trained mind—like that of a contemporary judge, one supposes—could and would disperse the awful images conjured up here and see Merrick’s point from a dispassionate distance: the government must prove the cause of death; the mutilations make this difficult; these difficul-

62. *Id.* at 143.

ties favor the defendant. But it is very unlikely that this jury could do so. An orator attentive to the sensibilities of his audience would either decline to summon these gruesome images of the defendant's supposed crime, or would turn them, somehow, to the service of his client. Merrick seems simply to be unaware that they will have any effect at all. He is a practitioner of the unadulterated scientific style, in which audience is not a factor in the oratorical analysis. He makes a similar decision—or error—when at one point he asks his audience to “assume” that Webster had killed Dr. Parkman. He wants to preserve for Webster, in the event the jury finds against him, the possibility of some sentence other than death. The point he is trying to emphasize is the legal distinction between murder and manslaughter. Simon Schama offers this internal courtroom reaction from George Bemis, one of the attorneys for the government:

“Assume,” such a little, little word, Bemis thought. For gentlemen such as him and me and all the Harvard classmates sitting in this room, it signifies something hypothetical, suppositious, intellectually experimental. But, my learned friend and fool, you have *assumed* too much; you have used it to those good tradesmen and mechanics over there. They are more accustomed to hearing it mean “take for granted” as in “we may assume you owe me twenty dollars for these groceries.”⁶³

Merrick's points were the right ones; his legal argument was the right one. One could argue that his case was as strong as Webster's. Had the jury been made up of fellow Harvard-trained Brahmins, perhaps Merrick would have persuaded them, at least, to find for manslaughter instead of murder. Had Merrick been able to tell the jury a story, he might also have gotten somewhere. He produces instead a meticulous interference with the government's case, with no life of its own; his focus is always the technicality, the fine distinction of law, the particulate exhibit of evidence. This, we would argue, is the problem with the scientific style in its unadulterated form. It ignores the cohesive, cumulative power of the narrative style—just as, of course, the unadulterated narrative style would lack the logic and precision of Merrick's distinctions. Pure “scientific oratory” communicates effectively only to those systematically trained in its principles; and while the day-to-day business of the practice of law requires this form of address, many occasions—*viz.*, a jury trial—emphatically require something else.

63. SCHAMA, *supra* note 55, at 246.

VI. CONCLUSION

It is useful at this point to pause and ask what relevance the above history and analysis might possibly have to the concerns of lawyers today. Part of the answer, of course, is that we are all the children of history and that what has come before has shaped that with which we live today. But a more vital part of the answer is that any lawyer who speaks to an audience of non-lawyers and is ignorant of fundamental rhetorical techniques is crippled. Contrary to the image created by the oft-repeated statistics about how few cases ever make their way before a jury, a visit to the county courthouse on any given weekday demonstrates that litigators do argue cases, every day. They do so to people with no systematic training in the law and who find the unmodulated scientific style dull, alienating, and hopelessly diffuse. While the ability to perform complex legal analyses, and to see and understand incredibly fine distinctions, are essential skills for a modern lawyer, the ability to communicate the results of those difficult labors to those who are *not* highly trained lawyers is, in many cases, equally important. All other things being equal, the lawyer who can employ narrative techniques has the advantage over the lawyer who cannot.

The disappearance of oratorical training from law schools is not unique. Formal study of oratory is generally in decline. A few universities offer programs in rhetoric, but even these are not designed to train public or forensic speakers. Public oratory, as it was practiced in the nineteenth century, is dead. Politicians now speak in sound bites. Appellate advocacy is very much alive, but it has become less a matter of oratory and far more a matter of learned discourse and rapid-fire questions and answers. In this field, the spare, often boring style of Merrick now reigns supreme. But oratory does still exist, albeit it without formal training, in trial courtrooms around the United States. From local prosecutors and defense attorneys to Johnny Cochran and other television lawyers, the thunder, drama, and passion of the narrative style continues to be heard. It is today's trial lawyers who have inherited the tradition of Webster and Lincoln.

And, here, perhaps, lies the importance of knowing the history and development of forensic oratorical study and style in the United States. Today's law schools very much follow the nineteenth-century Harvard model. The elevation of the study of law to a science based upon principles is the dominant legal-educational philosophy today. And with it comes the repudiation of the narrative style of legal discourse and, more importantly, a repudiation of any belief in the importance of the formal study of rhetoric and oratory. In our present philosophy of legal education the underlying goal is to teach students policy and law. We tell our students that they are to win cases based upon the substance of their arguments. She who has the best

legal basis for her side will win, so the theory goes. But Webster and his colleagues in the nineteenth century, and thousands of trial lawyers today, know that to win a case, particularly at the trial level, requires more than having law on one's side. It also requires the ability to present the case in the most effective manner possible. At times this may well require the plain style of presentation. At other times it may require more. But, without question, the more we prepare our students in how to present a case—the more we teach our students that rhetoric and oratory do have a place in the law—the better lawyers our students will be. Thus, in the end, the conclusion we may draw from this brief discussion of forensic oratory in the nineteenth century is that what was good enough for Daniel Webster is good enough for us today. The peculiar political, economic, and pedagogical influences that led to the decline of oratorical training and the triumph of the plain style may no longer be valid today.