

CRITIQUING MODERN-DAY U.S. LEGAL EDUCATION WITH RHETORIC: FRANK'S PLEA AND THE SCHOLAR MODEL OF THE LAW PROFESSOR PERSONA

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INTRODUCTION

During the late nineteenth century, law in the United States began to develop into a field worthy of study at the university.¹ Rather than learning law in the law office, the traditional method for entry into the legal field in the States,² the prospective lawyer could learn law within the institution of higher education. Indeed, the university provided a means of converting law from a trade into a profession.

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¹ ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 36 (1983).

² LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 278 (1973). In England, training for entry into the legal field also had been practical in nature. The Inns of Court in London, which were separate from the universities like Oxford and Cambridge, provided such training. *Id.* at 20.

Earlier scholarship has explained how, between 1870 and 1920, some lawyers used rhetoric³ to construct a scholarly role, or persona, appropriate for the law professor situated within the U.S. university.⁴ This scholar persona had multiple dimensions that included (1) an almost exclusive professional commitment, (2) teaching duties, (3) the production of research, and (4) a public function.⁵ The scholar persona contrasted sharply with the practitioner persona of the law professor that other lawyers advocated. The primary claims in support of the latter persona were (1) that law was a practical subject that called for practical training and (2) that only an individual with practical background was well-suited for assuming the law professor persona.⁶ Rhetorical conflict between these competing views resulted.

By the early 1920s, law schools had established themselves as the main portals of entry into the legal field in the United States. Even a decade earlier, most of the individuals admitted to the bar had gone to law school.⁷ Meanwhile, law office study “was traveling the long dusty road to extinction.”⁸ “The American law professor [was becoming] American legal education,”⁹ and the scholar model of the law professor had been spreading to the nation’s major universities at least since the dawn of the new century.¹⁰ The legal field was undergoing a process of professionalization.

³ The term *rhetoric* refers to communication, which itself refers to human symbol use. SONJA K. FOSS & KAREN A. FOSS, INVITING TRANSFORMATION: PRESENTATIONAL SPEAKING FOR A CHANGING WORLD 4 (2d ed. 2003). This Article focuses on rhetoric that is persuasive in nature. See ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 36 (George A. Kennedy trans., 1991).

⁴ See generally Carlo A. Pedrioli, *Constructing Modern-Day U.S. Legal Education with Rhetoric: Langdell, Ames, and the Scholar Model of the Law Professor Persona*, 66 RUTGERS L.J. 55 (2014). For a discussion of legal education and the role of the law professor in continental Europe, England, and the United States before 1870, see *id.* at 59-62.

⁵ *Id.* at 69-70.

⁶ *Id.* at 75.

⁷ LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY 35 (2002).

⁸ *Id.*

⁹ Douglas D. McFarland, *Self-Images of Law Professors: Rethinking the Schism in Legal Education*, 35 J. LEGAL EDUC. 232, 232 (1985).

¹⁰ BRUCE A. KIMBALL, THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL, 1826-1906 192 (2009).

With the change in the means of entry into the legal field, some observers, including U.S. Attorney General Harlan F. Stone, later a member of the U.S. Supreme Court,¹¹ were concerned that, while law school was more the norm for prospective lawyers, not all schools had high standards. This phenomenon was “the development in the United States of two distinct types of law school.”¹² Stone suggested that one type of law school, the university law school, had “high entrance requirements and exacting educational standards,” while the other type, often the night or part-time school, had “low admission requirements, low educational standards and on the whole low professional ideals.”¹³ In general, the teacher at the university was a scholar of law, while the teacher at the night or part-time school was a practitioner of law.

The American Bar Association (ABA), which itself had expressed concern for “creat[ing] conditions which [would] tend to strengthen the character and improve the efficiency of those admitted to the practice of law,”¹⁴ spoke to concerns like those of Stone by addressing standards for legal education in the United States. In 1921, the ABA’s Section of Legal Education and Admissions to the Bar recommended, and the ABA then accepted, that every candidate for bar admission should have graduated from a law school that had the following standards: two years of college as a prerequisite, three years for full-time law study or longer for part-time law study, an adequate library available for law students, and a large enough number of faculty members who would devote their full attention to the law school.¹⁵ This action by the ABA effectively recognized the scholar’s “claim to primacy in teaching law” because the ABA was endorsing the university law school, and the scholar was a key player within the university law school.¹⁶ Additionally, the ABA recommended that, after graduation from an appropriate law school, a candidate should

¹¹ Harlan F. Stone, *The Future of Legal Education*, 10 A.B.A. J. 233, 233 (1924).

¹² *Id.*

¹³ *Id.*

¹⁴ *Conference on Legal Education*, 7 A.B.A. J. 637, 637 (1921).

¹⁵ *Id.* at 637-38.

¹⁶ John Henry Schlegel, *Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor*, 35 J. LEGAL EDUC. 311, 317 (1985).

have to take “an examination by public authority” before joining the bar.¹⁷

In light of this ongoing evolution of U.S. legal education from law office study toward university law school study, this Article explains how, from 1920 to 1960, the role, or persona, of the law professor in the United States remained a situs of considerable rhetorical controversy. On one hand, lawyers used rhetoric to continue to promote a persona, that of a scholar, appropriate for the law professor situated within the university, a context suitable for the professionalization of law. On the other hand, different lawyers like Judge Jerome Frank used rhetoric to critique, often in a scathing manner, the scholar persona and put forth their own persona, that of a practitioner, as a more appropriate model for legal education. Beginning at 1920, where prior scholarship concluded an examination of the development of the scholar persona of the law professor as a new phenomenon in U.S. legal education,¹⁸ the current Article takes 1960 as an ending point because, during the 1960s, law schools finally entered a new era by discursively thinking of themselves as graduate programs of study.¹⁹

To develop the argument, the Article will draw upon rhetorical theory and present persona theory and persona analysis as a means of conducting this study. Next, the Article will consider the then-established persona of the law professor as scholar and in turn the alternative persona of the law professor as practitioner. For this study, the term *lawyers* will refer to practicing lawyers and judges as well as academic lawyers. Given that, to this day, law paradoxically remains a program of academic study within the university that purports to prepare students for practical careers, the insights from the rhetorics between 1920 and 1960 remain important to understanding present-day legal education.

¹⁷ *Conference on Legal Education*, *supra* note 14, at 638.

¹⁸ *See generally* Pedrioli, *supra* note 4.

¹⁹ Thomas F. Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637, 649 (1968).

I. PERSONA THEORY AND PERSONA ANALYSIS²⁰

This section of the Article addresses the theory and methodology for the present study. More particularly, the section looks to rhetorical theory for a discussion of persona theory and persona analysis.

Persona theory helps to inform the discussion of a law professor persona suitable for law as an academic field. This theory addresses the roles, or *personae*, that communicators create in discourse.²¹ At least four types of personae can be present in discourse, including the first, second, third, and fourth personae.²² However, given the focus of this Article on the first persona of the law professor, this section will concentrate on the first persona. The second, third, and fourth personae, which deal with audiences, will not receive attention here.

The first persona is “the constructed speaker/writer or ‘I’ of discourse.”²³ Such a persona is “the created personality put forth in the act of communicating”²⁴ and allows the communicator to identify with the audience.²⁵ In literature, the first persona is the speaker or character a writer creates in the course of crafting writing like poetry or fiction.²⁶ In a way, a first persona is a rhetorical mask that the communicator chooses to wear as he or

²⁰ An expanded version of this discussion of persona theory and persona analysis appeared in Pedrioli, *supra* note 4, at 65-69. The author of that article has retained copyright to the article.

²¹ Paaige K. Turner & Patricia Ryden, *How George Bush Silenced Anita Hill: A Derridian View of the Third Persona in Public Argument*, 37 ARGUMENTATION & ADVOC. 86, 88 (2000).

²² *Id.*; Edwin Black, *The Second Persona*, 56 Q. J. SPEECH 109, 112 (1970); Philip Wander, *The Third Persona: An Ideological Turn in Rhetorical Theory*, 35 CENT. STATES SPEECH J. 197, 209 (1984); and Charles E. Morris, *Pink Herring & the Fourth Persona: J. Edgar Hoover's Sex Crime Panic*, 88 Q. J. SPEECH 228, 230 (2002).

²³ Turner & Ryden, *supra* note 21, at 88.

²⁴ Paul Newell Campbell, *The Personae of Scientific Discourse*, 61 Q. J. SPEECH 391, 394 (1975) (emphasis omitted) (quoting WALKER GIBSON, PERSONA: A STYLE STUDY FOR READERS AND WRITERS xi (1969)).

²⁵ Walter G. Kirkpatrick, *Bolingbroke and the Opposition to Sir Robert Walpole: The Role of a Fictitious Persona in Creating an Audience*, 32 CENT. STATES SPEECH J. 12, 12 (1981).

²⁶ Emory B. Elliott, Jr., *Persona and Parody in Donne's The Anniversaries*, 58 Q. J. SPEECH 48, 49 (1972); Campbell, *supra* note 24, at 391 (observing that “[t]he term is used to mean the imaginary, the fictive being implied by and embedded in a literary or dramatic work”).

she performs rhetorically, and because the persona at issue is a mask, the persona is not necessarily the communicator himself or herself.²⁷ For example, Martin Luther King, Jr., assumed in his discourse against civil rights violations the persona of a prophet, although despite his skillful performance King was not necessarily an actual prophet.²⁸

The existing corpus of research on first personae has focused predominantly on the performance of personae communicators select.²⁹ Although some communicators might create their own first personae,³⁰ many communicators employ first personae already in existence. In the case of King, the chosen persona was that of a prophet.³¹ Because the scholarly interest has tended to be what communicators do with the assumed personae, scholars often have ignored much or all of the process of the creation of rhetorical personae.

Along this line, scholars who have conducted *persona analyses*³² of performance of first personae have not explored in depth situations in which communicators create, or continue to create, in their discourse first personae for future use.³³ While in certain cases the two concepts of construction and performance of first personae can function together, distinguishing between two major types of first personae is necessary. On one hand, a

²⁷ Thomas O. Sloan, *The Persona As Rhetor: An Interpretation of Donne's Satyre III*, 51 Q. J. SPEECH 14, 14, 26 (1965) (noting that, for example, one should "not confuse the *persona* with [the poet]").

²⁸ Campbell, *supra* note 24, at 394.

²⁹ See, e.g., B. L. Ware & Wil A. Linkugel, *The Rhetorical Persona: Marcus Garvey As Black Moses*, 49 COMM. MONOGRAPHS 50, 56-61 (1982); Campbell, *supra* note 24, at 394; John L. Pauley, *Reshaping Public Persona and the Prophetic Ethos: Louis Farrakhan at the Million Man March*, 62 W. J. COMM. 512, 522-23 (1998); Phyllis M. Japp, *Esther or Isaiah?: The Abolitionist-Feminist Rhetoric of Angelina Grimké*, 71 Q. J. SPEECH 335, 337, 339-43 (1985); Craig R. Smith, *The Persona of Jesus in the Gospel According to St. Matthew*, 14 J. COMM. & RELIGION 57, 59-63 (1991); Laura Severin, *Becoming and Unbecoming: Stevie Smith As Performer*, 18 TEXT & PERFORMANCE Q. 22, 32 (1998); Karrin Vasby Anderson, *Hillary Rodham Clinton As 'Madonna': The Role of Metaphor and Oxymoron in Image Restoration*, 25 WOMEN'S STUD. COMM. 1, 19 (2002); and Nneka Ifeoma Ofulue, *President Clinton and the White House Prayer Breakfast*, 25 J. COMM. & RELIGION 49, 55-61 (2002). *But see* Pedrioli, *supra* note 4, at 79-80.

³⁰ Kirkpatrick, *supra* note 25, at 22.

³¹ Ware & Linkugel, *supra* note 29, at 61; Campbell, *supra* note 24, at 394.

³² Smith, *supra* note 29, at 64; Turner & Ryden, *supra* note 21, at 90.

³³ *But see* Pedrioli, *supra* note 4, at 79-80.

communicator can select and assume a persona in his or her communication. The focus of study in this situation is on the performance, so it is appropriate to think of this type of first persona as a *first persona performed* (FPP). On the other hand, the communicator might create the persona, which the communicator or a different communicator might employ in subsequent discourse. The idea is the creation of a discursive tool for later implementation. This additional type of first persona is a *first persona constructed* (FPC). The theoretical distinction allows critics to focus more on either the performance or the construction of first personae.

The present FPC study involves identification of the various traits of the law professor for which, between 1920 and 1960, lawyers argued in their writings and organization of such traits into categories of personae. For instance, such traits include participating in full-time teaching and research, as well as having extensive practical experience in lawyering. These traits may be more scholarly or more pragmatic in nature. When considered together, the particular characteristics within artifacts offer an outline of the law professor persona that communicators put forth.

The texts for this current research come from a search of HeinOnline. This electronic database contains law review articles that date back to the nineteenth century. For example, the database contains the first issue of the *American Law Register*, which debuted in 1852 and later became the *University of Pennsylvania Law Review*.³⁴ Although HeinOnline does not necessarily contain all law reviews, the database does contain hundreds of law reviews, including law reviews at some of the most influential law schools. A critical advantage of the database is that, unlike databases such as Westlaw and LexisNexis, HeinOnline contains numerous articles that date back to the early and mid twentieth century, which is essential for a study focused on the era from 1920 to 1960. Hence, because it dates back so far, HeinOnline proved to be an appropriate database for this particular study.

The search in HeinOnline identified any law review article that contained the terms *law* and *professor* in the title. Many such

³⁴ 1 AM. L. REG. (1852); STEVENS, *supra* note 1, at 128 n.34.

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

II. THE LAW PROFESSOR PERSONA – SCHOLAR V. PRACTITIONER

Applying persona theory to the texts identified for the study, this section of the Article examines the two main personae that lawyers put forth in their rhetoric between 1920 and 1960. The discussion focuses on the persona of the law professor as scholar and the persona of the law professor as practitioner.³⁵

A. *The Law Professor As Scholar*

The law professor as scholar model, which Christopher Columbus Langdell and James Barr Ames of Harvard Law School, along with other like-minded lawyers, had promoted to the legal field between 1870 and 1920,³⁶ retained crucial importance between 1920 and 1960. During this latter period, various lawyers argued in favor of the merits of this scholar persona, including how the persona was quite different from that of the judge or practicing attorney, but controversy still remained. In general, the scholar persona had major dimensions that included (1) an almost exclusive professional commitment, (2) teaching duties, (3) the production of research, and (4) a public function. As in the period from 1870 to 1920, this scholar version of the law professor

³⁵ Other than a few items like Jerome Frank's brief comment that the law professor might continue to practice law while teaching, this particular study did not locate rhetoric that suggested scholar/practitioner hybrid models of the law professor. See Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 921 (1933) [hereinafter Frank, *Why Not*].

³⁶ See Pedrioli, *supra* note 4, at 69-75.

persona was multidimensional, which is one possibility for a first persona.³⁷

First, pro-scholar lawyers argued that the law professor should devote almost all professional time to the university. For instance, Learned Hand of the U.S. Court of Appeals for the Second Circuit made such an argument,³⁸ as did Chief Justice William Howard Taft of the U.S. Supreme Court³⁹ and Karl N. Llewellyn of Columbia University Law School.⁴⁰ Taft justified the position that he, Hand, Llewellyn, and others took by claiming that full-time work in the practice of law while one held employment in a law school would prove to be a large distraction from one's scholarly duties.⁴¹ Carl C. Wheaton of the St. Louis University Law School argued from the position of having been an associate dean at a practitioner-taught law school that active practitioners had "almost no time to prepare lectures" for class.⁴² Because time was so short for the legal practitioner, the law professor had to be available full-time for teaching law students and assuming other duties. Accordingly, the law professor persona should be that of a full-time individual.

Second, advocates of the scholar persona argued that the law professor persona should have a teaching dimension. Roscoe Pound of the University of California, Los Angeles, Law School stated, "If one's main interest is in anything but his teaching he will be no teacher."⁴³ According to Pound, some of the ideal qualities in teachers were "a sense of their high calling as lawyers and as teachers of law, devotion to duty, and putting forth of their powers to the utmost in the work of the law school and the service of the students."⁴⁴ By comparison, Hand suggested that members of the bench and bar were "not competent as teachers," so the

³⁷ Smith, *supra* note 29, at 63.

³⁸ Learned Hand, *Have the Bench and Bar Anything to Contribute to the Teaching of Law?*, 24 MICH. L. REV. 466, 466 (1926).

³⁹ William Howard Taft, *Legal Education and the University Law School*, 10 MINN. L. REV. 554, 555 (1926).

⁴⁰ K. N. Llewellyn, *On What is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651, 658 (1935).

⁴¹ Taft, *supra* note 39, at 556.

⁴² Carl C. Wheaton, *Law Teaching and Pragmatism*, 25 GEO. L. J. 338, 344 (1937).

⁴³ Roscoe Pound, *Some Comments on Law Teachers and Law Teaching*, 3 J. LEGAL EDUC. 519, 532 (1951).

⁴⁴ *Id.* at 530.

teaching function of the law professor was special.⁴⁵ This approach clearly assigned teaching to the persona of the law professor rather than to the personae of other members of the legal field, and, in doing so, the approach omitted many of the practical aspects of law that experienced judges and practicing lawyers might bring to the classroom.

Third, pro-scholar advocates claimed that, because teaching was not enough, the law professor persona should have a research dimension. Noting, in 1926, that “reports during the last quarter century are proof enough of . . . an increasing tendency to accept as authoritative the conclusions of the great writers” on the law, Hand described the research dimension of the law professor persona as having “preeminence.”⁴⁶ William Prosser, dean at the University of California, Berkeley, School of Law, recalled many applicants for law professorships who had never written much, if anything, scholarly in nature.⁴⁷ Prosser noted that individuals who were interested in teaching law but not interested in writing about law had “the wrong approach” to entering the legal academy, and Prosser, as well as probably most law school deans, would not have been likely to hire such candidates.⁴⁸

Several other points about this research-oriented dimension of the law professor persona are of note. For example, Harold Gill Reuschlein of Georgetown University Law School added that a legal researcher should be well “grounded in the law and other disciplines.”⁴⁹ Also, good research involved a professor’s ability to make important contributions to the academic legal literature; such contributions would not necessarily involve quantity but instead quality.⁵⁰ Observing a relationship between the research and teaching dimensions of the law professor persona, Pound maintained that research would be a source of inspiration for teaching.⁵¹ Research, then, would aid a professor’s work in the classroom.

⁴⁵ Hand, *supra* note 38, at 466.

⁴⁶ *Id.* at 468.

⁴⁷ William L. Prosser, *Advice to the Lovelorn*, 3 J. LEGAL EDUC. 505, 511 (1951).

⁴⁸ *Id.* at 511-12.

⁴⁹ Harold Gill Reuschlein, *Law Professor—Post-War*, 30 MINN. L. REV. 68, 69 (1946).

⁵⁰ *Id.* at 71-72; Pound, *supra* note 43, at 532.

⁵¹ Pound, *supra* note 43, at 532.

James Willard Hurst of the University of Wisconsin Law School offered an important justification for the need for research to be a key dimension of the law professor persona. Writing in the late 1950s, Hurst conceded that law schools were supposed to develop law graduates who would be able to practice law, but he also pointed out that the law school, by then well established within the university system, had a duty to contribute to one of the main functions of the university,⁵² which one might describe as “the production of knowledge.”⁵³ In light of this point, Hurst called for renewed vigor in university law school research that would contribute to the university’s aim of enhancing humankind’s knowledge of the world, including the legal world.⁵⁴

Fourth, pro-scholar advocates maintained that the law professor persona should have a public function dimension. Hand argued that the law professor would provide guidance to the bench and bar for a clear statement of “a doctrine, with a complete knowledge of its origin, its authority and its meaning.”⁵⁵ Hand even went so far as to state that because the law professor assumed a persona that was “less prone” to align itself with “the side of wealth,” the law professor might be better suited “to solve new questions” of doctrine.⁵⁶ Also in terms of the public function dimension, a law professor had to help bring “about better requirements for admission to the bar.”⁵⁷ One might assume that such improvements would aid both the legal field and the public.

For purposes of comparison, while the law professor persona was that of “the scholar,” the persona of someone on the bench or at the bar was that of “the man of affairs.”⁵⁸ Members of the bench and bar heard cases and practiced law, respectively, but they did not assume the personae of scholars. Rather, members of the bench and bar would handle the cases that might “stimulate an

⁵² James Willard Hurst, *Research Responsibilities of University Law Schools*, 10 J. LEGAL EDUC. 147 (1957).

⁵³ JAMES ANDERSON, COMMUNICATION THEORY: EPISTEMOLOGICAL FOUNDATIONS 146 (1996).

⁵⁴ Hurst, *supra* note 52, at 161.

⁵⁵ Hand, *supra* note 38, at 468.

⁵⁶ *Id.* at 471.

⁵⁷ Pound, *supra* note 43, at 519.

⁵⁸ Hand, *supra* note 38, at 482.

excessive fertility of invention” in the minds of legal scholars.⁵⁹ Again, although different members of the legal field might work toward a “common enterprise of keeping and advancing the law,”⁶⁰ each individual had a different persona to assume.

During the 1920s, 1930s, 1940s, and 1950s, this rhetoric of a law professor persona with the dimensions of an almost exclusive professional commitment, teaching duties, the production of research, and a public function echoed the rhetoric of Langdell, Ames, and their colleagues from the fifty-year period before 1920, but one minor modification began to appear in the law professor as scholar model after 1920. Some limited practical experience became more acceptable in the background of the law professor persona. For instance, Taft admitted that some practical experience might be of value to the law professor persona.⁶¹ Prosser observed that for various courses law schools were looking “for some practice before teaching, some experience of some kind in the field.”⁶² As an estimate, Prosser indicated that three years of practical experience would be “about right” for the future law professor.⁶³ Wheaton felt that in some cases fewer than five years might be appropriate.⁶⁴ Suggesting that only a poor law faculty would have absolutely no professors with practical experience, Reuschlein noted that some legal experience was beneficial.⁶⁵ Indeed, the professor ought to “become familiar with at least the ordinary problems that arise in practice.”⁶⁶

If one were to think that the emerging acceptance of some limited practical experience in the background of the law professor persona was a major addition to the scholar model, consideration of a response from Prosser would be appropriate. Prosser quite sharply pointed out the following: “One thing on which all law schools are in agreement is that too many years of practice hardens the arteries, stunts the intellect, and ossifies the ideas, so that few lawyers over the age of fifty are ever much of a success

⁵⁹ *Id.* at 472.

⁶⁰ *Id.* at 480.

⁶¹ Taft, *supra* note 39, at 555.

⁶² Prosser, *supra* note 47, at 513.

⁶³ *Id.*

⁶⁴ Wheaton, *supra* note 42, at 345.

⁶⁵ Reuschlein, *supra* note 49, at 72-73.

⁶⁶ Wheaton, *supra* note 42, at 346.

when they retire and enter teaching.”⁶⁷ It seems that the acceptance of a few years of practical legal experience proved to be a small concession to the lawyers who had been advocating the practitioner model of the law professor persona. Indeed, the essence of the scholar model of the law professor persona remained. Langdell, Ames, and their allies would have been pleased with this continuing promotion of their model.

B. The Law Professor As Practitioner

Regardless of the above-noted general affirmation of the law professor persona as essentially that of a scholar, sharp resistance to that position remained. One of the strongest voices, although not the only voice, against the law professor as scholar model came from Jerome Frank, a federal appellate judge who took more than one opportunity to speak his mind on this matter. Indeed, in 1947, Frank observed that he had been calling for a different type of legal education, which included an alternative law professor persona, for the past fifteen years.⁶⁸

In attempting to advance this alternative persona, Frank and his colleagues maintained (1) that the scholar model generally did not address the needs of legal education adequately and (2) that the practitioner model was much better suited for legal education. The ensuing discussion examines the arguments for such a practitioner persona.

To make his argument that the scholar persona was inadequate for legal education, Frank placed legal education within its historical context as he saw it. Going back to the days of Langdell, whom Frank called “a brilliant neurotic,”⁶⁹ Frank claimed that “[d]ue to Langdell’s idiosyncracies, *law school law came to mean library-law.*”⁷⁰ Langdell’s teaching method “was the expression of the strange character of a cloistered, retiring bookish man.”⁷¹ Under the Langdellian paradigm of legal education, the law professor would become one who “had little or no contacts

⁶⁷ Prosser, *supra* note 47, at 513.

⁶⁸ Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303, 1303 (1947) [hereinafter Frank, *A Plea*].

⁶⁹ *Id.*

⁷⁰ Frank, *Why Not*, *supra* note 35, at 908 (emphasis in original).

⁷¹ *Id.*

with or a positive distaste for the rough-and-tumble activities of the average lawyer's life."⁷² Indeed, this approach to teaching law was akin to teaching future horticulturists through the use of cut flowers or future physicians without the expertise of individuals "who had seldom seen a patient or diagnosed the ailments of flesh-and-blood human beings."⁷³ One also might compare the Langdellian approach to teaching law with teaching "toe-dancing, swimming, automobile-driving, hair-cutting, or cooking wild ducks" by merely talking about them and having students read about them.⁷⁴ Thus, to Frank's chagrin, practical experience was not a major dimension of the law professor persona that legal education favored.⁷⁵

Frank and other lawyers who agreed with his position further critiqued the scholar model. For instance, Frank suggested that a law school that adopted the scholar model forced law professors who had substantial practical experience to capitulate "to an atmosphere in which the memories of practice became shadowy and unreal."⁷⁶ In class, the professor with legal experience had "to belittle his experience at the bar."⁷⁷ Irving M. Mehler of the Colorado Bar and the New York Bar asked, "How can a teacher deem himself competent to project in a live and compelling way, if he himself has never been confronted with not one or a few, but with many live legal problems?"⁷⁸ To this, Arch M. Cantrall of the West Virginia Bar added that often the idealized scholarly professor of the day was "just fresh from the doors of some law school,"⁷⁹ and Albert K. Orschel of the Illinois Bar suggested that producing scholarship did not necessarily help

⁷² *Id.* Ironically, even Langdell himself, despite a great interest in the academic side of the legal field, had practiced law for some sixteen years, mostly by writing briefs and pleadings. Frank, *A Plea*, *supra* note 68, at 1303. Still, while in practice, Langdell had "led a secluded life, seeing little of clients." *Id.*

⁷³ Frank, *Why Not*, *supra* note 35, at 912, 915.

⁷⁴ Frank, *A Plea*, *supra* note 68, at 1311.

⁷⁵ Frank, *Why Not*, *supra* note 35, at 909.

⁷⁶ Frank, *A Plea*, *supra* note 68, at 1304.

⁷⁷ *Id.*

⁷⁸ Irving M. Mehler, *In Defense of Practitioners As Teachers*, 9 J. LEGAL EDUC. 231, 234 (1956).

⁷⁹ Arch M. Cantrall, *Law Schools and the Layman: Is Legal Education Doing Its Job?*, 38 A.B.A. J. 907, 910 (1952).

students learn the practice of law.⁸⁰ Naturally, critics of the scholar persona saw this situation as problematic because the students would not benefit from the practical experience of a professor.

Taking a different angle on legal education, Frank and his colleagues offered a position in sharp contrast to the one that the pro-scholar lawyers took. Rather than favoring “experience in learning law,”⁸¹ Frank favored looking beyond “rules and principles” of cases and toward two main tasks of the lawyer, which included predicting future court decisions in particular lawsuits and trying to persuade courts in given cases to render decisions favorable to one’s clients.⁸² Mehler reminded the legal field that “the primary purpose of a law school [was] to train lawyers.”⁸³ Upon leaving law school, lawyers had to be ready for the experiences of the “first year or two of practice,” as Cantrall noted.⁸⁴ Indeed, if new lawyers learned law while beginning to practice, clients would have to pay the price.⁸⁵ This understanding of law school and legal practice helped explain why, at some point, the law student needed to observe what transpired in law offices and in court.⁸⁶

Accordingly, Frank and other lawyers promoted a different version of the law professor persona, that of a practitioner. One might call such a persona that of “a ‘live’ lawyer.”⁸⁷ First and foremost, Frank maintained, the law professor should assume a persona endowed with practical experience, and by that he meant “*not less than five to ten years of varied experience in the actual practice of law.*”⁸⁸ Mehler suggested that at least seven years of practical experience might suffice.⁸⁹ This practical experience would come from litigating in the trial and appellate courts,

⁸⁰ Albert K. Orschel, *Is Legal Education Doing Its Job?: Brief of Amicus Curiae*, 40 A.B.A. J. 121, 123-24 (1954).

⁸¹ C. C. Langdell, *Teaching Law As a Science*, 21 AM. L. REV. 123, 124 (1887).

⁸² Frank, *Why Not*, *supra* note 35, at 910-11.

⁸³ Mehler, *supra* note 78, at 231.

⁸⁴ Arch M. Cantrall, *Practical Skills Can and Must Be Taught in Law Schools*, 6 J. LEGAL EDUC. 316, 319 (1954).

⁸⁵ *Id.* at 321.

⁸⁶ Frank, *Why Not*, *supra* note 35, at 911.

⁸⁷ Mehler, *supra* note 78, at 232.

⁸⁸ Frank, *Why Not*, *supra* note 35, at 914 (emphasis in original).

⁸⁹ Mehler, *supra* note 78, at 231.

working in the office, dealing with clients, and negotiating.⁹⁰ Such experience would be that of individuals “who ha[d] drafted contracts, . . . tried and defended tort actions, . . . drafted wills and trusts, . . . handled corporate matters, . . . foreclosed mortgages, . . . quieted titles, . . . defended those accused of crime, . . . had experience in trial and appellate practice, and . . . counseled clients regarding ordinary and difficult legal problems.”⁹¹ Indeed, the law professor might even continue to practice law while teaching.⁹² Regardless, the law schools should make “[e]xtensive use of practitioners in every law school course.”⁹³

Such practical experience as a part of the law professor persona would help the law professor enhance personal credibility, or *ethos*, with law students and thus enhance the learning experience of the students.⁹⁴ Mehler argued that when a teacher is lacking in “the practical touch,” students have less regard for the professor and in turn lose interest in the professor’s subject.⁹⁵ However, when “the practical touch” is present in the learning environment, “the subject glows, the respect and admiration for the instructor is heightened, and even a supposedly ‘dead’ subject becomes very much alive.”⁹⁶ Indeed, *ethos* can have a relationship with persona.⁹⁷ In this case, the practitioner persona of the law professor would enhance the *ethos* of the individual who assumed that persona, and the benefit would be a better learning environment for the students.

Lawyers who accepted this position maintained that the law professor who assumed the practitioner persona ought to teach students the practical aspects of law. One such venue for this teaching was the legal clinic.⁹⁸ To illustrate the benefits of the practitioner persona, Frank listed several insights that law students would gain from clinical instruction. These insights

⁹⁰ Frank, *Why Not*, *supra* note 35, at 914.

⁹¹ Mehler, *supra* note 78, at 232.

⁹² Frank, *Why Not*, *supra* note 35, at 921.

⁹³ Cantrall, *supra* note 84, at 322.

⁹⁴ Mehler, *supra* note 78, at 232.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Roger D. Cherry, *Ethos Versus Persona: Self-Representation in Written Discourse*, 15 WRITTEN COMM. 384, 402 (1998).

⁹⁸ Frank, *Why Not*, *supra* note 35, at 917.

included learning about how juries decide cases, the uncertain nature of facts, the nature of how witnesses impact parties' legal rights, influences on judicial decision-making, negotiations and settlements, and drafting client documents.⁹⁹ While learning appellate law was an aspect of learning law, it was not the most important aspect because "upper courts . . . are relatively unimportant for most clients."¹⁰⁰ Frank pointed out that "the overwhelming majority of lawsuits are never appealed, and, in most of the small minority which are appealed, the appellate courts accept the facts as 'found' by the trial court."¹⁰¹ He added, "In most suits, no disagreement arises about the rules, and the disputes relate solely to the facts."¹⁰² Besides, Frank argued, "Intelligent men can learn [criticism of appellate cases] in about six months."¹⁰³

Mehler extended Frank's argument by explaining how law students would learn from more realistic experiences in the classroom as well as in the clinic. For instance, a professor who had assumed a practitioner persona might bring to class a set of articles of incorporation that the professor had drafted and with which the professor was familiar.¹⁰⁴ Other examples would be documents for matters that related to "wills, contracts, partnership, property, and many other courses."¹⁰⁵ Under this approach, the student would be able to engage actual legal drafting and benefit from a "touch of realism."¹⁰⁶ In the end, "the student [would] have had a taste of real law."¹⁰⁷

In addition, Frank added that the law professor could draw from other fields in order to enhance the education of future legal practitioners. As a good legal realist, he proposed that the law professor call upon the social sciences and other allied fields so as to instruct law students in "the inter-actions of the conduct of

⁹⁹ *Id.* at 918-19.

¹⁰⁰ Frank, *A Plea*, *supra* note 68, at 1306.

¹⁰¹ *Id.*

¹⁰² *Id.* at 1310.

¹⁰³ *Id.* at 1318.

¹⁰⁴ Mehler, *supra* note 78, at 233.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

society and the work of the courts and lawyers.”¹⁰⁸ Frank explained that “the vaguest recollections of [one’s] pre-legal work” provided for “an insufficient feeling of the inter-relation between law and the phenomena of daily living, and an artificial attitude towards ‘Law’ as something totally distinct and apart from the facts.”¹⁰⁹

Critics of the scholar persona of the law professor did concede that their approach would allow some law professors to assume an exclusively scholarly persona.¹¹⁰ Nonetheless, law schools should not primarily focus on developing future law professors; the schools ought to focus on developing future lawyers.¹¹¹ As such, “the ‘library-law’ teacher should cease to dominate the schools,”¹¹² and the law schools should back away from “Langdell’s morbid repudiation of actual legal practice.”¹¹³

While very much invested in the hands-on aspects of the practitioner persona of the law professor, various lawyers who supported this position were careful to clarify that their vision of the law professor was not necessarily one that called for a purely trade school approach to legal education. Rather, the law professor would assume the practitioner persona in a context that would blend “[k]nowledge of what courts and lawyers do” and “visual demonstration of the possible values of a rich and well-rounded culture in the practice of law.”¹¹⁴ Indeed, some scholarship was appropriate in the law school, too.¹¹⁵ This was a view of “a realistic lawyer-school.”¹¹⁶ However, although Frank and his colleagues were willing to allow for a minor academic touch to their version of the law professor persona, their focus was on the practical aspects of the law professor persona. Based on the above rhetoric, one can conclude that these lawyers wanted law students to emerge from law school as practice-ready graduates.

¹⁰⁸ Frank, *Why Not*, *supra* note 35, at 921-22.

¹⁰⁹ *Id.* at 922.

¹¹⁰ *Id.* at 914; Orschel, *supra* note 80, at 122.

¹¹¹ Frank, *Why Not*, *supra* note 35, at 915.

¹¹² *Id.*

¹¹³ Frank, *A Plea*, *supra* note 68, at 1313.

¹¹⁴ Frank, *Why Not*, *supra* note 35, at 923.

¹¹⁵ Mehler, *supra* note 78, at 231.

¹¹⁶ Frank, *Why Not*, *supra* note 35, at 923.

During this period in history, few individuals heeded the call for reform in legal education,¹¹⁷ which included significantly altering the nature of the Harvard version of the law professor persona. The few individuals who may have listened to Frank and his allies refused to allow practicality to be at the center of legal education or at the core of the law professor persona.¹¹⁸ This phenomenon suggested that the understanding of the law professor persona as that of a practitioner was out of touch with the understanding of the law professor persona as that of a scholar, the latter of which held a position of prominence in legal education.¹¹⁹

CONCLUSION

As this Article has illustrated, in the sample of texts from the conflict over the ongoing rhetorical construction of the first persona of the law professor between 1920 and 1960, two competing personae appeared. These were the law professor as scholar persona and the law professor as practitioner persona. Essentially, the scholar model, which was dominant,¹²⁰ remained largely unchanged from the period between 1870 and 1920, except that advocates of this model made the minor concession that some limited practice before a lawyer assumed a professorship may have been acceptable for the law professor persona. Meanwhile, the practitioner model, complete with its focus on helping to foster practice-ready law graduates, remained much the same as it had between 1870 and 1920, but some advocates of this model did make the slight concession that law school could be more than just training for legal practice. Nonetheless, Frank maintained, "Our law schools must learn from our medical schools. Law students should be given the opportunity to see legal operations."¹²¹

¹¹⁷ Frank, *A Plea*, *supra* note 68, at 1303.

¹¹⁸ *Id.* at 1327.

¹¹⁹ Schlegel, *supra* note 16, at 317.

¹²⁰ *Id.*

¹²¹ Frank, *A Plea*, *supra* note 68, at 1315. Frank asked, "What would we think of a medical school in which students studied no more than what was to be found in printed case-histories, and were deprived of all clinical experience until after they received their M.D. degrees?" *Id.*

Any small concessions aside, the dividing line between advocates of the scholar model and advocates of the practitioner model was clearly the background of the persona of the law professor. From one perspective, the law professor should assume a scholarly persona and fit comfortably within the university setting, yet from another perspective, the law professor ought to work to help develop students into legal practitioners. This tension between the values of intellectualism and practicality, present during the period from 1870 to 1920, remained during the period from 1920 to 1960, but the law school was now firmly tied to the university system.¹²²

At a theoretical level, this discussion of how the persona of the law professor in the United States remained a *situs* of considerable rhetorical controversy from 1920 to 1960 has provided an additional example of the benefits of addressing the first persona from a slightly different angle. While most of the prior communication research on the first persona focused on the performance of a pre-existing persona like that of a prophet, the current study has supported the limited amount of research that has illustrated in detail how communicators can fill volumes in the act of rhetorically constructing, or continuing to construct, a persona. This distinction is one between the FPP and the FPC. The theoretical distinction allows critics to focus more on either the performance or the construction of first personae, although performance and construction are not mutually exclusive.

In light of the strong scholarly impulse of the times, lawyers like Frank were voices crying out in the wilderness of legal education.¹²³ For the most part, with law school situated in the university, the pleas of Frank and others were ignored. Frank explicitly lamented, “No one has ever paid much attention to [my] views.”¹²⁴ Indeed, he was aware that, in making his case for the practitioner persona of the law professor, he was “thinking wistfully that perhaps this time some of [his] audience [would] not

¹²² Hurst, *supra* note 52, at 147.

¹²³ *Isaiah* 40:3 (King James Version, 1611 edition) (“The voyce of him that cryeth in the wilderness, Prepare yee the way of the Lord, make straight in the desert a highway for our God.”).

¹²⁴ Frank, *A Plea*, *supra* note 68, at 1303.

dissent.”¹²⁵ Rather than dissent, the audience essentially failed to listen to the message, and today the plea for a practitioner persona of the law professor, grounded in serious legal experience and capable of providing law students with a practical education, continues to ring out.¹²⁶

¹²⁵ *Id.*

¹²⁶ Carlo A. Pedrioli, *Professor Kingsfield in Conflict: Rhetorical Constructions of the U.S. Law Professor Persona(e)*, 38 OHIO N.U. L. REV. 701, 720-25 (2012).

