

ETHOS, PATHOS, AND LOGOS: THE BENEFITS OF ARISTOTELIAN RHETORIC IN THE COURTROOM

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I. INTRODUCTION

Rhetoric, or “the faculty of observing in any given case the available means of persuasion,”¹ is a necessary skill for legal advocates.² While some theorists have argued classical rhetoric in the courtroom has largely died off in favor of what some have called an “inferior” brand of persuasion,³ Aristotle’s *Rhetoric*, as “the earliest authoritative analysis of persuasive discourse and argumentative techniques,”⁴ and the Roman treatises that followed⁵ are still applicable to modern day trial procedure and would assist trial advocates in most effectively arguing their position and, thereby, advocating for their clients.

In order to support the idea that Aristotelian rhetoric not only should be utilized by trial attorneys, but when utilized, would serve both clients and society as a whole, I will be examining the effect on and applicability to the courtroom of the three modes of proof,⁶ or categories of persuasive discourse, that have stemmed from Aristotle’s *Rhetoric: ethos* (perceived persuader credibility), *pathos* (emotional appeal), and *logos* (logical appeal).⁷ After discussing the applicability of the three modes of proof to trial practice, and their implications in terms of trial outcomes,⁸ I will

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1. ARISTOTLE, *RHETORIC*, Book I, Part II, Paragraph I (Trans. W. Rhys Roberts. Mineola, NY: Dover Publications, 2004).

2. Mark DeForrest, *Introducing Persuasive Legal Argument Via the Letter from a Birmingham City Jail*, 15 *LEGAL WRITING* 109, 163 (2009) (“As a constant component of the everyday work of the practicing attorney, the ability to use persuasive rhetorical techniques is an essential part of each lawyer’s tool kit.”).

3. Dan Levitt, *Rhetoric—From Socrates to Court TV*, 26 *LITIGATION* 42 (1999).

4. Michael Frost, *Ethos, Pathos & Legal Audience*, 99 *DICK L. REV.* 85 (Fall 1994).

5. *Id.*

6. “Using the same word to connote ‘proof’ and ‘means of persuasion’ may unnerve strict positivists, but the unifying conception makes perfect sense in legal discourse where argument ‘proves’ truth and the ‘truth’ that matters is that which a judge, jury, or other fact-finder accepts as persuasive.” Colin Starger, *Criminal Law: The DNA of an Argument: A Case Study in Legal Logos*, 99 *J. CRIM. L. & CRIMINOLOGY* 1045, 1056 (Fall 2009).

7. See Levitt, *supra* note 3.

8. I am limiting this analysis to rhetoric’s value at the trial level. I am doing this because

conclude with the argument that, when used in concert, the utilization of the three modes of proof, to the extent the applicable evidentiary and procedural rules allow,⁹ is likely to lead to the best possible outcome for the persuader as an advocate for his client, as well as the best possible outcome for society as a whole in its pursuit of justice.

II. HISTORY OF RHETORIC

As the earliest authority on persuasive discourse, Aristotle's *Rhetoric* laid the foundation for most of the later Roman treatises on the subject.¹⁰ These treatises, which were written for the instruction of audience members of all classes, not just lawyers or politicians, "systemized legal analysis and suggested ways of effectively organizing and presenting commonplace arguments."¹¹ The authors of these treatises, including Quintilian and Cicero, utilized Aristotle's rhetorical analyses in order to "divide persuasive discourse, and legal arguments in particular, into three categories: logical argument (*logos*), emotional arguments (*pathos*), and ethical appeal or credibility (*ethos*)."¹² These three categories have since been commonly referred to as Aristotle's three modes of proof.

The theories surrounding legal discourse have changed over time.¹³ Greek and Roman theorists' analyses were "[b]ased on their close observations of human nature and on their own considerable experience in arguing cases."¹⁴ These historical theorists consistently focused on the audience receiving the message, explored the potential for the

rhetoric at the appellate level, where juries are completely removed from the process and oral arguments, arguably, play a much smaller role as compared to writings, deserves an article of its own. For an example of the greater role of written persuasion in appellate work, see Ben Adlin, *At Supreme Court, Evolution of Oral Arguments Speaks Volumes*, The Loyola Law School, Los Angeles Faculty Blog: Summary Judgments (Jan. 6, 2014), <http://llsblog.lls.edu/faculty/2014/01/as-supreme-court-evolves-oral-arguments-impact-fades.html> ("One can hardly fault Scalia for his focus on the written word. His own legal organ operates almost entirely through briefs and opinions, as do virtually all appellate courts in the land. In that world, writing counts. Most seasoned appellate practitioners will tell you that if an attorney today hasn't persuaded the judges through writing by the time she steps up to the lectern, oral argument is largely window dressing. Amid the turning gears of the appellate engine, oral argument is a 'minor, almost formulaic part,' said Loyola Law School professor Allan Ides, a former Supreme Court clerk. 'I can tell you, at the Supreme Court level, very, very rarely are oral arguments going to make a difference,' he said. 'You don't even in most cases get to make an oral argument. You just get grilled.'").

9. See Teneille R. Brown, *The Affective Blindness of Evidence Law*, 89 DENV. U.L. REV. 47, 93 (2011).

10. Frost, *supra* note 4, at 85.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

manipulation of judges and juries, and analyzed the potential of emotional arguments and lawyer credibility as fully as “logical, definitional, or organizational aspects” of persuasion.¹⁵ On the other hand, one could argue modern theorists have a far more limited depth and breadth of analyses.¹⁶ Where modern theorists¹⁷ often base their notions on the assumption that a persuader’s audience will be largely rational,¹⁸ Aristotle conversely recognized that legal audiences would not always have a high legal acumen, sound analytical abilities, or a tendency toward fairness.¹⁹ Aristotle thus argued that “an audience of untrained thinkers”²⁰ is that which persuaders should prepare to face rather than erring on the side of treating an audience as if it were fully rational.²¹

Likely, the rationality and fairness of audiences will most often fall somewhere between where Aristotle and modern theorists have placed them. However, the acknowledgement that every audience is unique,²² and the idea that focusing on and catering arguments toward specific audiences is important,²³ support the conclusion that Aristotle and his predecessors’ theories on persuasion, despite and perhaps partially because of their age and complexity, are still relevant in a courtroom setting. Furthermore, for the same reasons, these theories would benefit trial attorneys, their clients, and society as a whole, when utilized properly.

III. RHETORIC IN PRACTICE

“Revealing how rhetorical knowledge operates in legal practice is particularly difficult since legal practice is marked by a vehement denial of its rhetorical nature. This denial usually is expressed by an insistent claim that legal practice involves only dialectical reasoning about objectively determined concepts.”²⁴ I will attempt to demonstrate, with full knowledge of this limitation, that the utilization of Aristotle’s three modes of proof,

15. *Id.*

16. *Id.*

17. The modern theorists mentioned here often fall into the category of those that favor strictly logical, rationality-based decisions on the part of juries. See M. Neil Brown, Carrie Williams, and Garrett Coyle, *The Shared Assumptions of the Jury System and the Market System*, 50 ST. LOUIS L.J. 425, 467 (Winter, 2006).

18. *See id.*

19. *Id.*

20. ARISTOTLE, *supra* note 1, at Book I, Part II, Paragraph VII.

21. *Id.*

22. Frost, *supra* note 4, at 85.

23. *Id.* This concept has been supported by the trial bar. *Id.*

24. Francis J. Mootz III, *Rhetorical Knowledge in Legal Practice and Theory*, 6 S. CAL. INTERDIS. L.J. 491, 568 (Spring 1998).

the logical along with the two considered less rational, while catering them to a persuader's audience,²⁵ is possible, still occurs in the courtroom setting, and can be a beneficial tool for trial advocates. Furthermore, I will argue that the use of these modes is the most effective way to demonstrate the validity of one's claims and come "as near such success [persuasion] as the circumstances of each particular case allow."²⁶

In order to be in command of Aristotle's three modes of proof, an advocate "must be able (1) to reason logically, (2) to understand human character and goodness in their various forms, and (3) to understand the emotions—that is, to name them and describe them, to know their causes and the way in which they are excited."²⁷ While the value of these skills to an orator, politician, or lobbyist may seem obvious, their value, as well as their applicability, has been the topic of much debate among theorists when applied to persuasion in the courtroom. In the following sections, I will detail the different arguments that have been made regarding the applicability, viability, and ethics of trial advocates' use of Aristotle's three modes of proof in a courtroom setting.

A. *Logos—Appeals to Logic*

Logos seems to be the most widely promoted,²⁸ accepted, and sought after²⁹ mode of proof in legal argument. Stemming from the emphasis on logical appeals that has saturated the profession, some legal theorists have argued that legal rhetoric has transcended classical rhetoric in favor of a

25. "Classical rhetoricians, beginning with Aristotle, constantly remind their readers of the importance of remembering their audience." Frost, *supra* note 4, at 85.

26. ARISTOTLE, *supra* note 1, at Book I, Part I, Paragraph VII. It is notable that Aristotle made ultimate persuasion conditional on the circumstance of each case. This lends itself to the argument against that of unjust outcomes based on emotional appeals or unfounded persuader credibility. This limitation is also in the interest of justice, and therefore society as a whole, as undeserving litigants will not be as likely to succeed in unmerited claims or in defending against deserving litigants. See Christopher J. Anderson, *The Functions of Emotion in Decisionmaking and Decision Avoidance*, DO EMOTIONS HELP OR HURT DECISIONS? (Roy Baumeister, George Loewenstein & Kathleen Vohs eds., forthcoming 2008) (manuscript at 23), available at <http://ssrn.com/abstract=895781>.

27. ARISTOTLE, *supra* note 1, at Book I, Part II, Paragraph IV.

28. See Laurie C. Kadoch, *Seduced by Narrative: Persuasion in the Courtroom*, 49 DRAKE L. REV. 71, 74–75 (2000) ("[O]ur trial system, as it has developed, aspires to promote a rational mode of processing information or decision-making. The system is peculiarly interested in the fair imparting of facts and is concurrently cognizant of the effect of the mode of telling on rational decision-making.") (citations omitted).

29. See Starger, *supra* note 6, at 1057 ("[A]s doctrine evolves on a specific issue, the individual litigants arguing the issue and judges deciding it necessarily change. In this more abstracted discourse [that is cases on appeal], over time, particularized appeals to *ethos* and *pathos* become less significant. As various district and appellate courts moot a particular legal issue, one *hopes* that *logos* becomes more prominent.") (emphasis added).

more logical, rationality-based form of discourse.³⁰ This form of discourse relies on the notion that a litigator's audience, largely consisting of the judge and jury, is one that is "curious, circumspect, overwhelmingly attentive to relevant evidentiary factors, and possessed of judgmental standards that we would ordinarily associate with good reasoning."³¹ In response to those who have argued in favor of the existence of this profession-based form of discourse, other theorists have argued that the debatable fluidity of individuals' proclivity to act rationally³² and base decisions upon rational criteria³³ depreciates the value of the utilization of strictly logical appeals in the courtroom in favor of a more comprehensive form of argument in which the emotions and tendency of the judge and jury to trust what an advocate is saying are considered.³⁴

Furthermore, the persuasiveness of Oliver Wendell Holmes's assertion, that "[t]he life of the law has not been logic: it has been experience," experience in all of its plasticity and subjective bases, necessitates a hard look at the capability of the human race as a whole, as well as jurors, judges, and litigators themselves, to utilize logic consistently and similarly over time.³⁵ While this seems possible to a certain extent based on the influence that the reliance on logic and rational decision-making has had on trial procedure,³⁶ it does not eliminate the need for, or the benefits that may be derived from, the use of an attorney's appeals catered toward the other two modes of proof, *ethos* and *pathos*.

30. See Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1555–59 (Nov. 1990) ("But if law is, at its core, the practice of rhetoric, the *particular* rhetoric that law embraces is the rhetoric of foundations and logical deductions. And that particular rhetoric is one that relies, above all else, upon the denial that it is rhetoric that is being done. Thus, the rhetoric of foundationalism is the essence of philosophy and the antithesis of rhetoric.").

31. See Coyle, *supra* note 17, at 467.

32. See Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67, 83–84 (Nov. 2002) ("[A]ffective and developmental changes within individuals can lead to changes in judgment and decisionmaking behavior regardless of apparent changes in the situation. Thus, the propensity to act rationally varies not only across individuals but also within individuals over time."); see also CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 4, 7 (1997) ("People's choices are a function of the distinctive social role in which they find themselves, and we may act irrationally or quasi-rationally.").

33. See Coyle, *supra* note 17, at 467 ("[Social science data] give[s] us a portrayal of human decision-makers who are, as Nietzsche famously said, 'human, all too human.' Sometimes they are attentive to rational criteria; sometimes they are not.").

34. *Id.*

35. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881) (Holmes continued: "The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.").

36. See Kadoch, *supra* note 28.

Though the use of logic by a judge or jury in response to a logical appeal by a litigator could be inconsistent and unpredictable,³⁷ it does not eliminate the persuasive effect logical appeals have on an audience, the audience being the judge and jury in a trial context.³⁸ This assertion is based on the theory that individuals are persuaded by the use of such appeals alone.³⁹ In other words, regardless of whether a juror ultimately utilizes the specific rationality of the litigator's logical appeal to come to his final decision,⁴⁰ the logical appeal will at least positively influence the juror, if for no other reason than that the litigator used logic in his attempt to persuade.⁴¹

B. Ethos—Appeals of Persuader Credibility

Aristotle recognized the inherent truth that “[w]e believe good men more fully and more readily than others: this is true generally whatever the question is, and absolutely true where exact certainty is impossible and opinions are divided.”⁴² Thus, in a case where there is no definite logical outcome, or even in the case where there may or may not be such an outcome, the audience's perception of the credibility of the persuader plays a key role in whether persuasion is achieved.

While legal theorists have emphasized the importance and superiority of logic and rationality in a courtroom setting,⁴³ Aristotle recognized that “[i]t is not true, as some writers assume in their treatises on rhetoric, that the personal goodness revealed by the speaker contributes nothing to his power of persuasion; on the contrary, his character may almost be called the *most effective means of persuasion he possesses*.”⁴⁴ It may not be true that in a courtroom setting personal goodness trumps all other means of persuasion as Aristotle suggests, but his statement at the very least

37. See Mitchell, *supra* note 32; see also SUNSTEIN, *supra* note 32.

38. Steven D. Jamar, *Aristotle Teaches Persuasion: The Psychic Connection*, 8 SCRIBES J. LEGAL WRITING 61, 62 (2001–2002) (“To Aristotle, logical arguments are persuasive not because of something inherently true about logic, but rather because the audience values and responds to logical arguments. That is, logic is not outside human experience, but of it.”).

39. *Id.*

40. In fact, Aristotle recognized the potential for an audience member's failure, or refusal, to utilize logic or the exact knowledge imparted onto them by a persuader in his assertion that “before some audiences not even the possession of the exactest knowledge will make it easy for what we say to produce conviction. For argument based on knowledge implies instruction, and there are people whom one cannot instruct.” ARISTOTLE, *supra* note 1, at Book I, Part I, Paragraph VII.

41. See Jamar, *supra* note 38, at 62.

42. ARISTOTLE, *supra* note 1, at Book I, Part II, Paragraph III.

43. See Kadoch, *supra* note 28.

44. ARISTOTLE, *supra* note 1, at Book I, Part II, Paragraph III (emphasis added).

indicates the potential persuasive value in presenting oneself as a credible person, be it via the less clearly definable quality of “goodness,” by credibility based on preparedness, or by any other means.

While Aristotle recognized and memorialized the importance of ethos in persuasion, “that importance has been further investigated—and supported—by modern scholars of rhetoric” and by many legal scholars.⁴⁵ Possibly for this reason, persuader credibility, while not touted as being as important as logic and rationality in the courtroom,⁴⁶ has not come under as much scrutiny as appeals to emotion in trial procedure.⁴⁷ Likely, this is also because the inevitability of the influence of attorney credibility is widely recognized, even in a trial setting,⁴⁸ whereas the community of legal theorists has not yet come to a consensus as to whether the total elimination, or support in specific instances, of emotional appeals is plausible or even desirable.⁴⁹ Furthermore, credibility assessments on the part of the jury within a courtroom setting have been recognized as helpful in certain situations to the point that rules have been put into effect to help juries determine the credibility of certain types of individuals (e.g., witnesses).⁵⁰ Where logic normally reigns, then, credibility assessments based on “[e]motion, intuition, and common sense perspectives” are not only allowed but encouraged.⁵¹

Countless factors can influence how an audience perceives a persuader’s credibility.⁵² A few examples of the types of factors that a juror could use to determine the credibility, or weight to be given an

45. See Melissa H. Weresh, *Morality, Trust, and Illusion: Ethos as Relationship*, 9 J. ALWD 229, 231 (Fall 2012).

46. See Kadoch, *supra* note 28.

47. See, e.g., Peter B. Bayer, *Not Interaction but Melding—The “Russian Dressing” Theory of Emotions: An Explanation of the Phenomenology of Emotions and Rationality with Suggested Related Maxims for Judges and Other Legal Decision Makers*, 52 MERCER L. REV. 1033, 1038 (2001).

48. THOMAS MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* 46, 48 (3d ed. 1992) (supporting idea that lawyer credibility plays important role in courtroom persuasion, with those affected being both judges and juries, and memorably noting that “[c]redibility is the only thing a lawyer has to sell.”).

49. See, e.g., Bayer, *supra* note 47, at 1038. But see, e.g., Kathryn AbramsHila Keren, *Who’s Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997 (June 2010).

50. See FED. R. EVID. 608 (allowing a witness’s credibility to be attacked so the jury may determine the credibility of the witness in order to accord his testimony greater or less weight).

51. Brown, *supra* note 9, at 47 (noting that “only in this function [credibility assessments] do we openly accommodate juror frailty, illogical and inaccurate statements, and heated emotional processes.”).

52. See, e.g., Peter Reilly, *Resistance is Not Futile: Harnessing the Power of Counter-Offensive Tactics in Legal Persuasion*, 64 HASTINGS L.J. 1171, 1187 (May 2013).

attorney's position, include the rate of his speech;⁵³ his professional status, social status, or job title;⁵⁴ the persuader's "confidence in presentation as exhibited through eye contact, body posture and gestures, facial expressions, and speaking style (such as tone, volume, speed, and accent);"⁵⁵ the persuader's intelligence and trustworthiness;⁵⁶ and the persuader's similarities to the juror in the areas of race, gender, religious belief, and socioeconomic status.⁵⁷

While the attributes listed above consist of "source-characteristic attributes," attorneys also have the avenue of "source-relational attributes"⁵⁸ such as "familiarity, similarity, and attractiveness"⁵⁹ through which to establish credibility with their audience.⁶⁰ These source-relational attributes create a bond, termed identification by rhetorical theorist Kenneth Burke,⁶¹ between the persuader and audience. Then, "[w]hen source-relational attributes enhance the audience's acceptance of or identification with the source, or with the material presented by the source, those attributes similarly enhance persuasion."⁶² When applying this theory to the courtroom setting, this type of identification would lead to a greater probability of the audience, a judge and jury, heeding, and potentially being persuaded by, an attorney's arguments. This persuasion would most likely be achieved in the event that the attorney managed to

53. See Jansen Voss, *The Science of Persuasion: An Exploration of Advocacy and the Science Behind the Art of Persuasion in the Courtroom*, 29 LAW & PSYCHOL. REV. 301, 309 (2005) ("Varying the speed of one's speech affects credibility and helps create a temporal framework for events or actions. Studies show that 'rapid speaking (to a point) tends to increase believability,' while 'unnaturally slow speech is [perceived] as an indicator of uncertainty . . .'" (alterations in original) (footnote omitted)).

54. Reilly, *supra* note 52, at 1187.

55. *Id.*; see also Craig Lambert, *The Psyche on Automatic: Amy Cuddy Probes Snap Judgments, Warm Feelings, and How to Become an "Alpha Dog"*, HARV. MAGAZINE, Nov.-Dec. 2010, at 48, 52 (discussing research by Lakshmi Balachandra that indicates venture-capital pitches are largely based on non-verbal cues such as "calmness," "passion," "eye contact," and "lack of awkwardness").

56. See Weresh, *supra* note 45, at 231 (discussing building of relationships through source-relational attributes to establish credibility, alongside more typically discussed source-characteristics).

57. VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 133 (1986). *But see* ARISTOTLE, *supra* note 1, at Book I, Part II, Paragraph III (claiming "this kind of persuasion [*ethos*], like the others, should be achieved by what the speaker says, not by what people think of his character before he begins to speak.") This clearly goes against the idea that factors such as race and gender, that can be perceived before and have nothing to do with a persuader's presentation, play a role in perceived persuader credibility.

58. Weresh, *supra* note 45, at 231.

59. *Id.*; see also HARRY C. TRIANDIS, ATTITUDE AND ATTITUDE CHANGE 168 (1971).

60. Weresh, *supra* note 45, at 231.

61. See KENNETH BURKE, A RHETORIC OF MOTIVES 172 (1950).

62. Weresh, *supra* note 45, at 234.

form some sort of connection with his audience, be it emotionally or otherwise.

Some of the aforementioned avenues through which a persuader may achieve credibility with his audience are not easily accessible to attorneys in a courtroom without some deliberate effort. Specifically, an attorney's establishment of familiarity or similarity with his audience, without having met the jury members he is attempting to persuade, may be difficult to establish, particularly with the preconceived negative perception of attorney credibility held by some members of the public.⁶³ However, perceived familiarity or similarity with jury members could conceivably "be achieved by what the speaker says,"⁶⁴ through his use of familiar, colloquial language as opposed to formal, legalistic language, as well as with relaxed body language, open and honest facial expressions, and a friendly as opposed to lecturing or impersonal tone of voice. If the attorney succeeds in creating trust, or a greater perceived similarity, familiarity, or liking between him and his audience through any of these or other strategies, including displays or appeals to emotion discussed in detail below, he will have enhanced his persuasiveness.⁶⁵

C. *Pathos—Appeals to Emotion*

"Our everyday experiences leave little doubt that our emotions can influence the decisions we make, much as the outcome of our decisions can influence the emotions we experience."⁶⁶ Aristotle recognized this fact, noting, while introducing the *pathos* mode of proof, that "persuasion may come through the hearers, when the speech stirs their emotions. Our judgments when we are pleased and friendly are not the same as when we are pained and hostile."⁶⁷ While some would argue there is no room for emotion in legal decision-making,⁶⁸ it appears evident that, to some extent,

63. Julie A. Oseid, *When Big Brother Is Watching [Out for] You: Mentoring Lawyers, Choosing a Mentor, and Sharing Ten Virtues from My Mentor*, 59 S.C. L. REV. 393, 423 ("Lawyers are constantly criticized for their dishonesty, lack of civility, and greed.").

64. ARISTOTLE, *supra* note 1, at Book I, Part II, Paragraph III.

65. Weresh, *supra* note 45, at 234.

66. Norbert Schwarz, *Emotion, Cognition, and Decision Making*, 14 COGNITION & EMOTION 433 (2000).

67. ARISTOTLE, *supra* note 1, at Book I, Part II, Paragraph III.

68. See Todd E. Pettys, *The Use of Prejudicial Evidence: The Emotional Juror*, 76 FORDHAM L. REV. 1609 (2007). (Many in the legal profession, particularly in the United States, have come to believe "emotions undercut rational decision making."); see also *id.* at n.6 ("While not without the occasional notable exception, judicial opinions habitually profess a Platonic-Kantian credo that emotions have no legitimate place in legal decision making.") (citing Bayer, *supra* note 47, at 1038).

the successful use of emotional appeals does affect trial outcomes, for good or ill.⁶⁹

On one end, scholars have argued that, in the legal arena, emotion is a tool individuals use in analogical reasoning that operates in conjunction with logic.⁷⁰ Emotion is thus “what releases the legal imagination to see relevant similarities and therefore permits the final leap to judgment.”⁷¹ Completely apart from the connection between emotion and logic is the following notion that expands further upon the benefits that may arise from the presence of emotions in the courtroom.

Legal decision-making is enriched and refined by the operation of emotions because they direct attention to particular dimensions of a case, or shape decisionmakers' ability to understand the perspective of, or the stakes of a decision for, a particular party. Efforts to exile affective response—a damaging outgrowth of historic dichotomizing—can produce legal judgments that are shallow, routinized, devaluative, and even irresponsible.⁷²

To rephrase, completely void of the influence of emotion, those engaging in legal reasoning are rendered incapable of, or severely handicapped in their efforts at placing themselves in the shoes of litigants. Cases in which this ability would be advantageous are easy to conceive of as any argument in which the reasonableness of the actions of the individual in question is implicated would clearly benefit from the individual's advocate being able to convey the emotional state of the individual through the advocate's use of emotional appeal.⁷³

On the other end of the spectrum, there are those that have argued that emotions are not only present in the courtroom, but dispositive in jury

69. Emotions precluding rational decisionmaking altogether is one concern of those in opposition of their existence in the courtroom. *See id.* (certain communications can preclude rational processing when they “generate emotions”) (citing Yoav Hammer, *Expressions Which Preclude Rational Processing: The Case for Regulating Non-informational Advertisements*, 27 WHITTIER L. REV. 435, 459–60 (2005)).

70. *See* Jonathan Uffelman, *Hamlet Was a Law Student: A “Dramatic” Look at Emotion’s Effect on Analogical Reasoning*, 96 GEO. L.J. 1725, 1728 (June 2008).

71. *Id.* at 1728–29.

72. Keren, *supra* note 49.

73. Claiming self-defense in Missouri, or the use of force in defense of persons, requires a jury to determine whether the person asserting it “*reasonably believe[d]* such force to be necessary to defend himself . . . from what he . . . *reasonably believe[d]* to be the use or imminent use of unlawful force by such other person[.]” MO. ANN. STAT. § 563.031 (Lexis) (emphasis added). This is an example in which the ability to identify with the person asserting the defense through emotion, in order to determine what he believed and whether it was reasonable, would be valuable.

trials to the detriment of justice.⁷⁴ In recognizing the potential for such a result, and to guard against the inappropriate use of emotions to manipulate juries,⁷⁵ safeguards have been inserted into the rules surrounding litigation.⁷⁶ For example, Rule 403 of the Federal Rules of Evidence, which authorizes a trial court to exclude relevant evidence if its “probative value is substantially outweighed by the danger of . . . unfair prejudice,”⁷⁷ unfairly prejudicial evidence being that which has “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an *emotional* one,”⁷⁸ is such a safeguard.⁷⁹ Alongside the federal rules, “states have responded differently to the question of how far counsel can go to appeal to the jurors’ emotions. Attorneys are often permitted to display some aspects of emotion during their closing arguments, but they are ‘not permitted to appeal to the emotions and prejudices of the jurors.’”⁸⁰

Attempting to limit the influence attorneys have on the emotional state of jurors with rules is not likely to prevent such an inevitability. Emotions can be influenced by countless stimuli, including the previously mentioned use of emotions by attorneys⁸¹ and the all-but-uncontrollable preexisting mood of the jurors themselves.⁸² Instead of fighting emotions altogether,

74. Emotional reactions from juries have been blamed for unwarranted damage awards as well as inaccurate factual findings. See Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 57 (2001); see also Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537, 593 (2005).

75. Emotional appeals frequently have been equated with manipulation, particularly when used in a legal setting. See *Closing Arguments in Insurance Fraud Cases*, 23 TORT & INS. L.J. 744, n. pag. (1988) (“[P]ersuasion is restricted to influence by appeal to reason, and it is free of coercion or other forms of influence that deprive a person of free choice . . . Emotion-based influences are inherently manipulative, not persuasive . . .”).

76. See Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655 (May 1989) (“The Court has, over a period of years, undertaken an extensive regulatory project aimed at suppressing emotive influence in capital cases by mandating rationalistic rules to guide sentencing.”).

77. FED. R. EVID. 403.

78. FED. R. EVID. 403 advisory committee’s note (emphasis added).

79. “In the evidentiary setting in particular, the legal community needs to move beyond the notion that all emotional influences automatically fall on the “unfair prejudice” side of the balance that Rule 403 prescribes for testing the relative weight of the evidence’s probative value and potential for unfair prejudice.” Pettys, *supra* note 15, at 1613.

80. Brown, *supra* note 9.

81. See, e.g., Reilly, *supra* note 52, at 1171 (discussing perceived persuader mood as having effect on emotions of those being persuaded); see also Pillsbury, *supra* note 76 (discussing influence emotions have on jurors in context of sentencing and prevalence and inevitability of role of emotions during sentencing in which the death penalty is possible).

82. See ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 112 (George A. Kennedy trans., Oxford Univ. Press 2d ed. 2007) (“Things do not seem the same to those who are friendly and those who are hostile, nor . . . to the angry and the calm . . .”).

“[t]he questions we ought to be asking . . . [are] which emotions are helpful or harmful and in which contexts they play that role. . . . [And] in evaluating emotions, we need to consider how they structure the perception of decisions to be made at the outset, and how they can influence both toward action and inhibition.”⁸³ These questions deserve further research, as the ostracization of emotions altogether from the courtroom is not realistic. Thus, it would be ideal to have a more well-defined limitation on attorney appeals to emotion in order to guard against manipulation and other potential injustices.

Pending a determination on those questions, the persuasiveness of the suggested connection between emotion and “reasonable (adaptive and desirable) outcomes” as well as rational decision-making lends itself to a determination that emotion is not *per se* a negative presence in the courtroom.⁸⁴ On the contrary, when appeals to emotion are utilized in conjunction with the expected and more widely appreciated appeals to logic and the inherent and unavoidable persuasion based on perceived persuader credibility, a more complete argument is possible. In this respect, the litigator’s argument will not suffer from the absence of an otherwise beneficial and compelling mode of proof at trial.⁸⁵

D. An Illustration of the Utilization of the Three Modes in a Courtroom

Some may argue that the conscious redirection of a seasoned or a fresh-off-the-Bar attorney’s litigation style would not be worth the effort it would require. An argument against that, however, is that while it is true that the effective utilization of Aristotle’s three modes of proof in a courtroom setting may require conscious effort on the part of the advocate, trial advocacy requires conscious effort even when specific persuasive techniques are not being used or experience is the only “edge” being relied on. As Caldwell, Perrin, Gabriel, and Gross noted:

In the courtroom, the advocate must inform and persuade; he must respect the cumbersome rules of the court but still present the facts

83. Anderson, *supra* note 26.

84. See Gerald L. Clore, *For Love or Money: Some Emotional Foundations of Rationality*, 80 CHI.-KENT L. REV. 1151 (2005) (“Results from psychology and affective neuroscience suggest that, in the final analysis, emotional considerations may be essential for attaining reasonable (adaptive and desirable) outcomes.”).

85. Emotional appeals to jurors are not necessarily unethical in all circumstances. Such appeals are even viewed as necessary by some in the right context and to the right extent. See Peter W. Murphy, “*There’s No Business Like . . . ?*” *Some Thoughts on Acting in the Courtroom*, 44 S. TEX. L. REV. 111, 123 (2002).

in a memorable and compelling way. That is, the advocate's message must be accurate, factual, and legally adequate, but also absorbing, captivating, and emotionally forceful. Similarly, the advocate, as messenger, must not only be lawyerly, making sure that all the "i's" are dotted and "t's" are crossed, but also credible and likeable. Both message and messenger play critical roles in the communication process.⁸⁶

Thus, instead of refusing a change because formerly used strategies served well enough or had become accepted as the "'right' way to try a case" at a particular firm⁸⁷ out of a desire to adhere to the "old dog new tricks" mentality, even a seasoned trial advocate could be more persuasive through the use of Aristotelian rhetoric, while still taking advantage of his experience by using it to reign in these new persuasive techniques so as to comply with the applicable rules.⁸⁸

Within the following passages, I will place into narrative various common scenes in a courtroom setting. Within these scenes, I will illustrate what the effective use of Aristotle's three modes of proof may look like. I will also provide comparisons of this to a courtroom setting in which Aristotle's theories are ignored in favor of the aforementioned "lesser" form of persuasion in which one or all of the modes are not used to their fullest potential.

1. Opening Statements

Dressed in a dark blue suit, topped off with a conservative blue and gold tie, the persuader steps up to the podium. The judge sees a professional, dressed appropriately for the courtroom. The jury sees an attorney, a diploma, of a socioeconomic status they assume to be higher than theirs. At the same time, they see someone whose outfit reminds them of the suit they wore for their cousins wedding, their job interview, or their high school graduation. The attorney greets the court, introduces himself

86. H. Mitchell Caldwell, L. Timothy Perrin, Richard Gabriel & Sharon R. Gross, *Primacy, Recency, Ethos, and Pathos: Integrating Principles of Communication Into the Direct Examination*, 76 NOTRE DAME L. REV. 423, 435.

87. *Id.* at 426 ("The last two decades or so, however, have witnessed movement away from the "learning by war story" method to the "learning by doing" method. In this way, trial advocacy training has matured to some extent. Yet, there remains a vast legion of lawyers in the trenches of litigation trying cases as they always have without regard to the advances of recent years.") (citing PETER L. MURRAY, *BASIC TRIAL ADVOCACY* 1-5 (1995)).

88. *See id.* at 431 ("That does not mean, of course, that the anecdotal material from the past should be dismissed out of hand. Indeed, many of the old stories are grounded, albeit some by happenstance, in sound theory and technique.").

with his first and last name, no job title, no law firm, no higher education mentioned. The persuader then introduces his client, addresses the type of work done by his client's company or the lifestyle his client lives that led up to whatever the situation may be that is being litigated.

The persuader mentions the good his client brings to society, through the jobs it provides, the community service she does, or the family for whom he provides. The judge and jury both know something they may have not known before about the attorney's client, have begun to identify with the client through an emotional connection with them or their work, and have potentially begun to perceive the attorney as slightly less of a diploma in a suit and a little more of a person who is defending the rights of someone they identify with.

The persuader proceeds to the situation in question. He outlines what he *will* prove about the situation with the specific evidence he has gathered to provide. The judge and jury both note that the attorney is prepared, has apparently covered all of his bases, and seems passionate about his cause. They begin to see him as more credible, and appreciate that he has support for his claims and has prepared to provide such support to them.

Aristotle himself noted that "advocates can use the introduction to make the audience receptive."⁸⁹ This, as illustrated above, can be achieved through body language, appearance, preparedness, demonstrated passion, and reasoning to name only a few. Notably, Cicero considered emotion a particularly effective tool in an advocate's introduction of a case, positing "it is essential that [the *exordium*] should have the power of stirring the minds of the audience . . . [because it has] a very great effect in persuading and arousing emotion."⁹⁰ This supports the idea that setting an emotional tone in the case to aid in the audience's identification with the advocate and his client can only serve to benefit the client throughout the remainder of the trial. On the contrary, for an attorney who fails to establish some connection from the outset, emotional or otherwise, between himself or his client and the judge and jury, making the jury and judge see a situation from his client's perspective, or believe his client's testimony or his own arguments, will likely prove far more difficult than it otherwise would have been, than if the attorney had initiated the connection in his opening statements.

The "every-man's" suit worn by the attorney and his demonstrated preparedness, as well as his avoidance of legalese in the above illustration

89. Frost, *supra* note 4, at 94.

90. MARCUS TULLIUS CICERO, DE ORATORE 327, 435 (E.W. Sutton trans., 1942).

would serve to lessen the oft-preconceived distance between an attorney and a lay person of any other profession.⁹¹ This would thus promote identification between the attorney's audience and himself and therefore increase his credibility in the eyes of the judge and jury. The attorney's demonstrated passion for his client and his client's cause, as well as his depiction of his client's situation from the client's perspective, based on his or her station in life and responsibilities, would hopefully also serve to stir the emotions of the audience. This would ideally increase the likelihood of not only identification via an emotional connection with the client but also reasoned deliberation between jury members that takes into account all facets of the client's case including his or her particular situation.

2. *Direct Examination of a Witness*

The advocate calls his primary witness to the stand. He begins by asking very basic, foundational questions of the witness. The importance of these preliminary questions was effectively explained by Caldwell, Perrin, Gabriel & Gross, in that:

From the jury's perspective, it is just as important to know who is testifying as it is to understand what they say. Thus, every direct examination should begin with an attempt to personalize the witness and to reveal some of the witness's background. This getting-to-know-the-witness block should . . . develop a personal overview, including areas such as marital status, children, significant nonprofessional activities, and even the part of the country from which the witness comes. These personal facts give jurors a way to identify with the witness. Personalization creates rapport between the witness and the jury that leads to credibility and trust.⁹²

91. See Caldwell, Perrin, Gabriel & Gross, *supra* note 86, at 449 (“[T]here are basic principles of trial advocacy that can help trial lawyers improve the quality of their advocacy and help them avoid the pitfalls of a negative impression. Although there is no magic formula to enhance the likeability or charisma of the witness (or advocate), there are a few fundamental techniques available to anyone. For example, lawyers should avoid (1) the use of legalese or jargon associated with the case, (2) speaking down to the jury in a condescending manner, (3) inadequate preparation, (4) excessive partisanship, and (5) an unnecessarily combative demeanor. All of these behaviors serve to distance and alienate the jurors.”) (citing HARRY M. CALDWELL ET AL., WEST'S CALIFORNIA CRIMINAL TRIALBOOK 7-2 (3d ed. 1996); Jeffrey H. Kinrich, *Dull Witnesses*, LITIG. (Spring 1993), at 38; JEFFREY T. FREDERICK, THE PSYCHOLOGY OF THE AMERICAN JURY 155 (1987)).

92. Caldwell, Perrin, Gabriel & Gross, *supra* note 86, at 473.

After these basic questions, the advocate moves on to establishing the witness' connection with the incident in question and begins to get into the details of the witness' knowledge by asking very pointed questions. He never disparages, or even nears disparaging his client's opponent within his questions, as his goal is not to turn the jury against the other side but instead to bring the jury to the side of his client. The judge recognizes points which the advocate is hitting as the fulfillment of various elements of the case. While the jury may not make such a connection while the questioning is underway, the jury members are able to see the story of the incident in question from the witness's perspective begin to unfold within the courtroom, illuminating what they likely understand to be important facts for consideration in their later deliberation.⁹³

The answers the witness provides to the advocate's questions seem natural. If, at any point, the witness draws a blank, the advocate utilizes his ability to refresh the witness's recollection with prepared writings or other objects, at hand and easily accessible, complete with copies for opposing counsel when necessary pursuant to Rule 612 of the Federal Rules of Evidence.⁹⁴ The advocate's line of questioning remains relevant, receives clear answers from the witness, and ultimately concludes with the jury and judge feeling more informed about the case and, if the advocate is fortunate, more inclined to believe and trust the advocate for remaining factual as opposed to displaying his biases and gracefully leading a helpful witness through a necessary step in the litigation.⁹⁵

As Caldwell, Perrin, Gabriel, and Gross succinctly stated in their discussion of a legal advocate's role in the direct examination of a witness:

[Direct witness examination] is an attempt by the examiner and the witness to communicate a story or position to the fact-finder. And,

93. *See id.* at 474 ("One reason that personalization enhances the weight of the testimony is that it makes the witness more accessible to the jurors. Accessibility provides a sense of connection between jurors and the witness and more readily allows the jurors to view the testimony from the witness's perspective. This maxim is so obvious that it is often overlooked.").

94. FED. R. EVID. 612.

95. For further discussion of persuasion during direct witness examination, *see* Caldwell, Perrin, Gabriel & Gross, *supra* note 86, at 445 ("Conventional wisdom holds that direct examinations are the one point in the trial when advocates should shift the spotlight from themselves to their witnesses. The lawyer must relinquish control of the courtroom, allowing the jury to hear the testimony of the witness with as little interference from the lawyer as possible. All too often, however, lawyers have taken that advice to mean that they do not have an active role in the direct, and they therefore believe that their role is largely passive. It is the lawyer/examiner, of course, who must construct the direct in such a way that the jury's attention is drawn to the witness; it is the lawyer who must prepare the witness to tell his or her story despite the intimidating glare of the spotlight; and it is the lawyer who must ensure that all of the testimony needed from each witness is elicited in a clear and memorable way.") (citations omitted).

as is true of all communication, the success of the direct examination ultimately turns on whether the jury believes and likes the messenger. In the context of the direct examination, however, the messenger is not merely the witness who is testifying from the witness stand, but it is also the examiner who calls the witness and elicits the testimony, for he implicitly vouches for the witness to the jury.⁹⁶

As the examiner's credibility as well as the witness's is on the line in direct examination, it is crucial for the questioning attorney to have adequately prepared the witness for his line of questions. Louis Nizer, an esteemed trial attorney who published his recollections and observations from his time in the profession, observed:

[A] lawyer who will put a witness on the stand without thorough preparation disserves his client, his profession, and the truth. He defeats justice, because such a witness will wander about unknowledgeably without the benefit of having had his memory refreshed by documents, the recollection of others corroborated by objective facts, and the truthful history painfully reconstructed by interviews, deposition, and written evidence gathered over a period of years, sometimes all over the world.⁹⁷

Thus, if an advocate deviates from the form of the attorney in the illustration, by not being prepared for instances such as recollection problems or not having prepared the witness to answer the questions in their own words but still accurately, he is likely to lose credibility in the eyes of the judge and jury. He is therefore less likely to persuade his audience to see the case from his client's perspective, ultimately making him and his client less likely to succeed in the litigation in question. On the other hand, with preparedness, candidness, and professionalism, both the witness and the attorney can depart from a witness examination having promoted their credibility, potentially provided the attorney with facts needed for his final logical appeal in his closing argument, and, with any luck (or skill), stirred the emotions of the audience to enable them to empathize with the situation of the advocate's client.

96. Caldwell, Perrin, Gabriel & Gross, *supra* note 86, at 446.

97. *Id.* at 431.

3. *Closing Arguments*

Instead of developing my own narrative in this situation, assume the same advocate detailed in the previous illustrations was Clarence Darrow in the case of *The State of Illinois v. Nathan Leopold & Richard Loeb*, in which he closed with the following, among other, remarks:

I could say something about the death penalty that, for some mysterious reason, the state wants in this case. Why do they want it? To vindicate the law? Oh, no. The law can be vindicated without killing anyone else. It might shock the fine sensibilities of the state's counsel that this boy was put into a culvert and left after he was dead, but, your Honor, I can think of a scene that makes this pale into insignificance. I can think, and only think, your Honor, of taking two boys, one eighteen and the other nineteen, irresponsible, weak, diseased, penning them in a cell, checking off the days and the hours and the minutes, until they will be taken out and hanged. Wouldn't it be a glorious day for Chicago? Wouldn't it be a glorious triumph for the State's Attorney? Wouldn't it be a glorious triumph for justice in this land? Wouldn't it be a glorious illustration of Christianity and kindness and charity? I can picture them, wakened in the gray light of morning, furnished [with] a suit of clothes by the state, led to the scaffold, their feet tied, black caps drawn over their heads, stood on a trap door, the hangman pressing a spring, so that it gives way under them; I can see them fall through space—and—stopped by the rope around their necks.⁹⁸

As this passage demonstrates, the effective closing arguments of an advocate, arguably more than his arguments at any other stage of a trial, can be deemed “both an art and a science.”⁹⁹ By this point in the trial, the advocate has hopefully established a positive reputation with the jury.¹⁰⁰ His closing arguments should thus not deviate from the efforts he has made throughout the previous steps of the trial in terms of maintaining his credibility through his preparedness, confidence,¹⁰¹ conservative and

98. H. Mitchell Caldwell, L. Timothy Perrin, Christopher L. Frost, *The Art and Architecture of Closing Argument*, 76 TUL. L. REV. 961, Highlight (Mar. 2002) (citing MAUREEN MCKERNAN, *THE AMAZING CRIME AND TRIAL OF LEOPOLD AND LOEB* 239–40 (1989)).

99. *Id.* at 967.

100. *Id.* at 974.

101. While confidence in arguments helps an attorney establish and maintain credibility, showing some vulnerability to the jury by exposing fears has also been argued to be a way to build credibility in

respectable appearance, passion, and logical thinking.¹⁰² On the other hand, where the attorney may have previously shied away from outright appeals to emotion, “striking the proper emotional tone” is one of the several absolute goals an advocate should have in his closing arguments.¹⁰³

Emotional appeals in closing arguments, as an expected and permitted strategy at trial,¹⁰⁴ should not replace or override but instead accompany necessary logical and legal arguments and the persuasiveness of the advocate’s credibility to form a complete picture of the case from the perspective of the advocate’s client.¹⁰⁵ “Using logic to your best advantage is especially crucial to the closing argument, in which you must concisely present the intellectual frame of your case. Logic is the concrete and steel that holds up your position and shelters your client.”¹⁰⁶

Logical organization of the closing argument, in which the advocate explains the law, how the facts apply to the law, how contrary evidence does not detract from his client’s case, and what, precisely, the jury should do with this information, also likely enhances persuasion as a form of logical appeal.¹⁰⁷ In this regard, the above excerpt from Darrow’s closing argument would be insufficient when standing alone, or at the very least, less persuasive than it would be if combined with a logic-based argument as to why the two young men should not be sentenced to death. Without any form of logical appeal in this case, or logical organization, the fate of the two lives in question might largely have been left up to whether a majority of the jurors believed the death penalty is appropriate in any case,

that it breaks down barriers between the jury and the advocate, therefore promoting identification. *See id.* at 979–80.

102. *Id.*

103. *Id.* at 969–70 (“The trial lawyer’s success during the closing argument requires the mastery of a wide range of skills, from explaining the relevant law and integrating it with trial testimony, to incorporating selectively recalled testimony into a comprehensive theme, to mitigating or integrating damaging evidence and arguments, to striking the proper emotional tone.”) (citing Stuart M. Speiser, *Closing Argument*, in *MASTER ADVOCATES’ HANDBOOK* 279, 280 (D. Lake Rumsey ed., 2d ed. 1988); MICHAEL R. FONTHAM, *TRIAL TECHNIQUES AND EVIDENCE* 9–1, at 463 (1995); MARGARET C. ROBERTS, *TRIAL PSYCHOLOGY* 47–48 (1987)).

104. *Id.* at 973 (citing ROBERTS, *supra* note 103, at 9).

105. *Id.* at 1065.

106. Paul Mark Sandler, *Raising the Bar Opening Statement and Closing Argument II*, in *RAISING THE BAR: PRACTICE TIPS AND TRIAL TECHNIQUE FOR THE YOUNG MD LAWYER*, no pag. (2006), available at Lexis Advance <https://advance.lexis.com/fullDocument/fulldoc/link?requestid=6b927146-7384-8099-492e-a0490f1051c1&ContentId=%2fshared%2fdocument%2fanalyticalmaterials%2furn%3acontentItem%3a4XN7-2RP0-01RF-501Y-00000-00&contextFeatureId=1000516&crd=cc6ca879-9dd8-e5d1-3733-4f67b66be1ae>.

107. *See* Caldwell, Perrin, Gabriel & Gross, *supra* note 86, at 996–97. Furthermore, such logical organization does not detract, but instead enhances the advocate’s ability to portray and channel the audience’s emotions effectively.

a decision the individual jurors had likely made before ever walking into the courtroom.

IV. ACHIEVING SOCIETY'S GOALS WITH ARISTOTELIAN PERSUASION

Assuming the goal of the legal system is the achievement of justice to the benefit of society,¹⁰⁸ as well as the individuals involved in particular cases who are in the right,¹⁰⁹ a question arises as to what role rhetoric plays in justice's pursuit. Some have argued that justice is relational in that it "cannot be properly understood without taking account of individuals in a context that brings each into relationship with others."¹¹⁰ This idea seems to comport with that of the necessity of emotional appeals and appeals to persuader credibility within an argument for the argument to be effective. The creation of positive emotions and the development of trust, liking, and some form, if only the foundation, of a relationship were all contemplated by Aristotle's *Rhetoric* within his *ethos* and *pathos*.

As Aristotle and his predecessors emphasized from the beginning, while the logic of an outcome also clearly plays a role in the determination of whether or not it is the most just of a series of options, the context in which the decision is made, as well as the means used to persuade a fact finder to make it, are all contingent upon the audience.¹¹¹ The relationship formed between the audience and the persuader, based on emotional feelings the persuader manages to evoke (*pathos*) as well as liking of, trust, and confidence in him on the part of the audience (*ethos*), is an important avenue through which the persuasion is achieved.

This is so because the next logical step to the analysis is the one in which the persuader, who understands and can relate to his audience,

108. The American legal system seems particularly interested in the concept of justice. A few notable examples of this phenomena include the term's inclusion in the pledge of allegiance: "and justice for all," at the main portal of the United States Supreme Court: "Equal justice under law," and in the Preamble of the Constitution of the United States: "We the People of the United States, in Order to form a more perfect Union, *establish Justice*, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." U.S. CONST. pmbl. (emphasis added).

109. See Robert John Araujo, *Justice As Right Relationship: A Philosophical and Theological Reflection on Affirmative Action*, 27 PEPP. L. REV. 377, 378 (2000) ("Throughout life, most of us participate in the search for justice. It is something to which we believe we are entitled because we are individuals who exist in community with other human beings. Each of us relies on others to do some things, and to refrain from doing others. In order to regulate these relationships, we establish publicly recognized rules identified as laws. It is through these laws that many seek what they believe is just.").

110. *Id.* at 378–79.

111. See Frost, *supra* note 4, at 85.

ultimately persuades them utilizing his understanding of them and the way in which he can fashion his logical and rational arguments to appeal to them. In this sense, “[j]ustice can be understood only when those who claim something because it is ‘just’ are considered in relation to the others who may have concern or involvement with the issue that raises the question of whether something is just.”¹¹²

While I am arguing that the three modes of proof are a positive force in the pursuit of justice when utilized together, it is important to note that other theorists have posited that, without the utilization of practical wisdom and craft alongside rhetoric, rhetoric, “when taken individually, provide[s] an incomplete and even dangerous account of legal reasoning.”¹¹³ This theory does not necessarily apply if the rhetoric referred to is limited to Aristotle’s rhetorical theories because, when taken to its logical end, Aristotle’s *Rhetoric* accounts for both practical wisdom, in that it “imbues craft with a moral dimension that it otherwise lacks”¹¹⁴ by mandating the use of logic and rational arguments through *logos*, as well as the existence of a goodness in the persuader through *ethos*.¹¹⁵

Furthermore, the dangers of non-specifically Aristotelian rhetoric, which has been defined by those concerned with its dangers as “a discipline for mobilizing the social passions for the sake of belief in a contestable truth whose validity can never be demonstrated with mathematical finality,”¹¹⁶ are minimized through the use of Aristotle’s rhetorical theory. Purely sophistic tendencies¹¹⁷ are limited in Aristotle’s *Rhetoric* in favor of a more philosophic art in which the audience is emphasized and logical, rational appeals are valued through the well-rounded form of persuasion that stems from the utilization of all three modes of proof.¹¹⁸

112. *Id.* at 378–79.

113. Brett G. Scharffs, *The Character of Legal Reasoning*, 61 WASH & LEE L. REV. 733, 785 (Spring 2004).

114. *Id.* at 785–86.

115. See ARISTOTLE, *supra* note 1, at Book I, Part II, Paragraph III.

116. See Anthony T. Kronman, *Rhetoric*, 67 U. CIN. L. REV. 677, 687 (1999).

117. Plato developed a rather negative opinion of rhetoric as utilized by sophists of his time who specialized in persuasion. After observing Gorgias, a famous Sophist, Plato posited that rhetoric was naught but a “knack for persuasion and form of flattery.” See Scharffs, *supra* note 113, at 773 (citing Kronman, *supra* note 116, at 680–81).

118. “Plato also addresses the topic of rhetoric in the *Phaedrus*, and concedes the possibility of a true art of rhetoric. However, Plato asserts that rhetoric can only be a true art if the speaker makes an effort to gain knowledge and learn the truth about his subject, makes the speech follow a logical structure by properly defining the subject and dividing it in a systematic way, and tries to fashion his speech to suit the nature of his audience. Plato did not trust the rhetoricians of his day to adapt their methods of persuasion to pursue rhetoric as philosophic art.” *Id.* (endnotes omitted).

This intersection of Aristotle's three modes of proof is what creates true, beneficial, and just persuasion in the courtroom. A trial attorney's appeals to logic after carefully considering his position and thoroughly researching his topic can be considered by his audience, the judge and jury, in their deliberation of the case. Such appeals also lend themselves to the judge and jury members' perception of the attorney's credibility as a well-researched, well-prepared attorney, particularly one that can communicate his position with confidence, is in all cases more trustworthy than one who cannot and does not have full command of the relevant law.

A trial attorney's appeals to his credibility, alongside the inherent credibility that stems from his successful appeals to logic, come from his establishing a relationship, or common bond, with the judge and jury members. His body language, apparent attitude, use of identifiable and easily understandable language, and candidness all play a role in whether his audience likes, identifies with, trusts, and ultimately is more likely to be persuaded by him. Finally, an attorney's appeals to his audience's emotions stem from rousing his audience's passions so that they invest themselves in the best possible outcome of a case, inspiring his audience to think creatively in order to rationally bridge gaps in a situation or analysis, and encouraging his audience's sympathy enabling them to see a situation from all possible sides.

"If the ultimate goal of the legal process is justice, then . . . we should desire the most sensitive understanding of the intersection of emotion and reason in order to maximize the breadth and depth of a [legal audience's] imagination in conceiving justice."¹¹⁹ This understanding and imagination can most effectively be maximized by providing all three modes of proof in concert to assist in an audience's decision-making process. Only through the use of all three modes can one most effectively come to a logical, rational decision, which is fair and just based on the circumstances surrounding a case. This decision may ultimately be against the persuader, but Aristotle acknowledged that every argument was limited by the context in which it is made.¹²⁰

119. Uffelman, *supra* note 70, at 1773.

120. See ARISTOTLE, *supra* note 1, at Book I, Part I, Paragraph VII. This is still a widely accepted idea in communication theory. See Caldwell, Perrin, Gabriel & Gross, *supra* note 86 ("The objective of any effort to communicate depends heavily on context—the particular needs of the speaker, the make-up of the audience, and the specific circumstances present."); see also Caldwell, Perrin & Frost, *supra* note 98, at 969 ("Many if not most cases turn not on the advocacy talents of the lawyers, but on the evidence and the law. This, of course, is as it should be. The party in the right prevails, justice triumphs, and the system works.") (citing HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 104–17 (1966)).

Thus, while the client of a trial attorney may not come out with the victory he sought, “justice for all” will have been served by the ultimately correct disposition of the legal audience, the judge and jury. Furthermore, with the advocates of both sides, or each side in a multi-party case, utilizing Aristotelian Rhetoric, the posited dangers of *ethos* and *pathos* fall away as one side will not be at an emotional or credibility-related advantage. In such a case, where a balanced form of persuasion has been utilized by all sides, a just outcome based on the law will be the most likely to be achieved, provided the attorney of one side did not neglect his responsibilities and successfully collected all of the relevant facts in a case to present at trial.

V. RECOMMENDATIONS

While this Note hopefully has provided inspiration for legal theorists and educators, as well as practicing attorneys, to appreciate the value of Aristotle’s original *Rhetoric* and the Roman treatises that stemmed from it, it has merely scratched the surface of what specific tactics may be used to most effectively appeal to a legal audience using *ethos*, *pathos*, and *logos*. Because “the better we understand why we make the decisions we make, the more transparency the law will have,” I believe the step that follows this Note is one in which quantitative studies are conducted to ensure the three modes can and do intersect peacefully in order to result in just outcomes.¹²¹ Within these studies, the potential for emotional and ethical manipulation should be further explored, and safeguards against unjust manipulation, if in fact it is possible in the courtroom, can be further developed.

Alongside this research-oriented call to action, I hope this Note serves to communicate the value that Aristotle’s rhetorical theories and the treatises they inspired could have if included in the curricula of the institutions charged with training future attorneys.¹²² “Indeed, trial lawyers have much to learn about advocacy in general and direct examination in particular from contemporary communication and psychological research and, rather than ignore those disciplines, lawyers should look to them for instruction and guidance”¹²³ as “despite the proliferation of trial advocacy

121. Uffelman, *supra* note 70, at 1773.

122. Where there is room for improvement other than that involving the addition of Aristotelian persuasive techniques to legal curricula is a topic for another note entirely, as the extent to which these institutions are fulfilling their duty is a matter of much debate. See BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012).

123. Caldwell, Perrin, Gabriel & Gross, *supra* note 86, at 432.

clinics and the offerings in law schools, much of what is actually taught is still unduly colored by the anecdotal experiences of the teachers.”¹²⁴ Instead of relying primarily on the singular perspective of a professor in practical skills law classes, legal education institutions should rely on curricula centered on legitimate communication, political, psychological, and sociological theories, and what better theory to begin the revolution than the one that started them all, and has furthermore retained legitimacy throughout the history of persuasion theory?

VI. CONCLUSION

Classical, Aristotelian rhetoric, based on the above analysis, is still viable and would be useful if utilized by advocates in a courtroom setting. Its dismissal in favor of solely logic-based forms of argument is not ideal as such dismissal removes the human element from the courtroom.¹²⁵ Such a human element is clearly valued in the judicial system. Proof of this lies in the fact that one of the system’s foundations, the use of a jury of one’s peers, exists to insert a human element where it otherwise may have been replaced by logic standing alone.¹²⁶ The value that such an element can bring to the legal environment was expressed with great clarity by Minow and Spelman, in that:

Context . . . represents the acknowledgement of the situatedness of human beings who know, argue, justify, and judge. Rather than a weakness or a departure from the ideal of distance and impersonality, acknowledging the human situation and the location of a problem in the midst of communities of actual people with views about it is a precondition of honesty in human judgements. Ultimately, the attention to the varieties of contexts for judgement helps to focus on human intelligence, the thinking, creating,

124. *Id.* (citing Anthony T. Kronman et al., *The Second Driker Forum for Excellence in the Law*, 42 WAYNE L. REV. 115, 154 (1995) and Lori Tripoli, *Filling Law Firm Needs . . . Second-Drawer Schools Create Top Notch Litigation Training*, INSIDE LITIG., Apr. 1998, at 1 (discussing the trend among lower ranked law schools in providing practical as opposed to theoretical experience in order to compete with higher ranked law schools)).

125. See David Jabbari, *Reason, Cause and Principle in Law: The Normativity of Context*, O.J.L.S. (June 1999) (noting that “[W]e must push on beyond principles to the deeper rationality of law; it is not enough to be content with formal logic and formal rationality, ignoring the richness and subtlety of the human element in adjudication.”) (no citation in original).

126. See 2-18 JAMES FARRAGHER CAMPBELL, P. DAVID FISHER, & DAVID A. MANSFIELD, DEFENSE OF SPEEDING, RECKLESS DRIVING & VEHICULAR HOMICIDE § 18.02 (Matthew Bender) (noting that “a jury provides the defendant with the benefit of a human element. The trial judge, from constant exposure, may approach the same factual situation with a rather blasé attitude.”).

responding parts of human beings, drawn out by the task of making decisions about how to live and treat others.¹²⁷

Logos, ethos, and pathos, a persuader's logical, credibility-related, and emotional appeals, when used in concert, create a whole argument.¹²⁸ This argument is one which takes into account the human element as well as the rational and logical needs of the law in its pursuit of justice. Classical Aristotelian rhetoric, thus, must not be dismissed by the advocate hoping to most effectively represent his client. Nor should it be dismissed by the legal community as form over substance.¹²⁹ As I have demonstrated, the end result of an attorney utilizing Aristotle's three modes together is the fairest result possible in a given situation, so substance is not sacrificed, and effective form is still maintained.

127. Jabbari, *supra* note 125 (no pagination) (quoting Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1649 (1990)).

128. See Steven J. Johansen, *This Is Not the Whole Truth: The Ethics of Telling Stories to Clients*, 38 ARIZ. ST. L.J. 961, 981 (2006).

129. See DeForrest, *supra* note 2 ("Learning the skill of persuasive legal advocacy is an important component in legal education and legal practice.").