Writing Tips ...

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Teaching Law Students Practical Advocacy

"This strategy begins by recognizing that the readers you are trying to persuade have two essential characteristics: they are skeptical and risk-adverse."

By Stephen V. Armstrong and Timothy P. Terrell

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Practitioners regularly criticize law schools for failing to prepare their graduates to practice law. We will step into that crossfire hesitantly, and only to a limited extent. Among the ways in which new lawyers could be better prepared to practice, one in particular continues to bother us: they do not know how to construct arguments that persuade in the real world. In this nonacademic place, a simple syllogism seldom carries the day. Facts, law, principles, and values interact in complex ways; the other side is likely to have an argument that is almost as strong as yours; and a judge or arbiter may be just as concerned with the consequences of a decision as with its technical correctness. As a result, IRAC and the other classic methods of legal analysis are, by themselves, seldom enough to persuade a knowledgeable legal reader.

Novice lawyers usually sense a chasm between a technically correct analysis and a persuasive argument, but lack tools to build a bridge across it. Once they have exhausted the standard law school methods of analysis, all that seems left is hyperbole, repetition, and attacks against their opponents' motives, all of which do nothing except damage their credibility.

Many law school writing instructors tackle this problem by teaching rhetoric as well as legal analysis, introducing their students to a repertoire of persuasive strategies (the "ethos-logos-pathos" framework, for example, which we employ as well[1]). Among these strategies, one is especially useful for showing students how to argue rationally, even when no argument is a clear winner and when their readers worry not only about what the law says, but also about fuzzier and more pragmatic questions: Is this the "right" thing to do? Is a definitive decision really necessary? Can a compromise be reached? Could there be consequences you're not telling them about?

This strategy begins by recognizing that the readers you are trying to persuade have two essential characteristics: they are skeptical and risk-averse. Rather than obligingly falling into line with your reasoning, nodding along with you, they are more likely probing energetically: "What's the problem here? Why should I accept that? Prove it. But what if ... ?" This means that your argument should be more jujitsu than brute force. You will persuade not by wielding your logic like a club, but by anticipating readers' doubts and turning them to your advantage. Hence, good advocates are adept at organizing arguments so that they dispose of the reader's reasonably suspicious questions even before they are fully articulated in the reader's mind.

To implement this strategy, a useful guide is the model of persuasion proposed by the logician and rhetorician Stephen Toulmin,[2] which we will adapt here for our purposes rather than copy faithfully. It arises from an exploration of the kinds of support for a proposition that a reader will accept as rational, not from traditional logic's obsession with the proposition's certainty.

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1 *Thinking Like a Writer*, Chapter 12

2 *The Uses of Argument* (Cambridge University Press, 1958). We have also drawn on *An Introduction to Reasoning* (Macmillan, 1979), in which Toulmin substitutes "grounds" for "data." Several relatively recent articles have discussed the use of Toulmin's model in legal writing programs. *See*, for example, Kritsen K. Robbins-Tiscione, *A Call to Combine Rhetorical Theory and Practice in the Legal Writing Classroom,* 50 Washburn L.J. 319 (2011), and Kurt M. Saunders, *Law as Rhetoric, Rhetoric as Argument,* 44. J. Leg. Educ. 566 (1994).

Toulmin's approach, corresponding to readers' underlying worries, involves two steps. The first step addresses readers' skepticism, the second addresses their aversion to risk. But these two categories should not be taken as rigidly separate from each other. Instead, they overlap and interact: readers are skeptical, in part, because they are risk-averse, and they are risk-averse, in part, because they are skeptical. Hence, what follows is simply a practical structure for organizing the elements of a thorough argument to address both concerns, without worrying too much about the difference between them.

First, to confront skepticism, you must establish your basic credibility. You have to demonstrate that there is an unresolved problem or issue worth addressing. Your argument then requires, in Toulmin's terminology:

- A "claim" (within the context of the problem or issue, of course), which is the conclusion for which you are arguing
- "Grounds" or "data," which are the facts that support your claim
- A "warrant," which is the principle or rule on the basis of which you are asserting that the data support the claim
- "Backing," which anchors the warrant in some form of authority that the reader will accept as valid

Second, to address readers' risk-aversion, you should enhance your credibility by adding reasonableness and pragmatism, as necessary. Again in Toulmin's terminology, sometimes you will have to provide:

- A "qualifier," which modifies the strength of your claim from "certainly" to "usually" or "probably"
- An "exception," a circumstance you have to acknowledge in which the "warrant" you are relying on does not hold
- The pragmatic consequences of acting or failing to act as you request (consequences do not fit neatly into Toulmin's model, but they are too important an element to ignore)
- An acknowledgement, but rejection, of the other side's position (this element is often implicit in the other Toulmin categories, but sometimes needs to be confronted separately and directly)

The best way to appreciate Toulmin's model is to attach his elements to the sequence of questions with which the naturally dubious and anxious reader will confront your argument. Below is a very simple example, adapted from one of Toulmin's.

> Skepticism: Establish that you have a credible argument.
>
> 1. (Context) Is there a problem here about which I should care? Why?
>
>   Although Jane has been incarcerated by immigration officials as if she were an alien, …
>
> 2. (Claim) OK, so what are you arguing?
>
>   … she is a U.S. citizen and should therefore be immediately released.
>
> 3. (Grounds or data) So you say, but why should I believe you?
>
>   Jane was born in the U.S., as proven by her birth certificate, ...
>
> 4. (Warrant) Why does that prove your argument? How is that data relevant?
>
>   … and birth in the U.S. automatically confers U.S. citizenship …
>
> 5. (Backing) On what authority does that proposition rest?
>
>   … under Section 301 of the Immigration and Nationality Act. (8 U.S.C. § 1401).

Sometimes, the warrant and backing will leave a reader still skeptical: "Yeah, but does that law really make sense? Will I be doing the right thing in a principled way?" In those cases, the backing can go on to include the principle that is the reason for the law's existence:

> The United States has a proud history of revitalizing itself through controlled

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immigration, and the grant of citizenship to those born here is a pillar of that tradition. [3]

Risk-aversion: Demonstrate that the action you request is reasonable and safe.

"Hence, your persuasiveness may ultimately rest on how you deal with the proposition's potential weaknesses and the attacks that might be launched against it."

Often, the "warrant" on which you base your argument—that is, the proposition that explains why your data support your claim or conclusion—may not be a slam-dunk certainty. Hence, your persuasiveness may ultimately rest on how you deal with the proposition's potential weaknesses and with the attacks that might be launched against it.

Let's return to Jane. You no doubt noticed a flaw in the argument as it now stands. The core proposition—that is, the warrant that connects the fact the she was born in the U.S. to the claim that she is a U.S. citizen—is that birth in the U.S. automatically confers citizenship. But the question isn't whether Jane was a citizen at birth; it's whether she is a citizen now. If the warrant had been shaped to deal with Jane's current citizenship, we would have had to qualify it: "Those born in the U.S. automatically become U.S. citizens and, almost always, remain citizens for their lifetime." Or "If a person was born in the U.S., she is almost certainly a U.S. citizen."

Instead, the argument will deal with the potential problem in another way. Here, Toulmin's concepts of "qualifiers" and "exceptions" come into play.

6. (Qualifier) Are people born in the United States always U.S. citizens?

   The qualifier is already lurking in the reader's head; instead of making it explicit, the argument both alludes to and disposes of it in the next step.

7. (Exception) How can I be sure there isn't some other reason Jane is no longer a U.S. citizen?

   Although Jane has lived much of her life in the Republic of Desertania, became a Desertanian citizen, and served in its armed forces, she nevertheless remains a U.S. citizen unless she announced her intention to renounce citizenship or Desertania was engaged in hostilities with the U.S. when she served in its military. Neither is the case.

Those sentences would be supported, of course, by a citation to the Immigration and Naturalization Act—that is, by another "warrant."

You may have noticed, however, another weakness in the argument as it now stands. The initial claim had two parts: Jane is a U.S. citizen, and Jane should be released immediately. So far, we have dealt with only the first. Is it safe to assume the second follows inevitably? Circumstances are seldom so simple. Let's assume that the government is arguing, or might argue, that it needs more time to check the facts about Jane's citizenship and that, in the meantime, she should stay in custody to remove the risk that she will flee.

To confront that counter-argument and reassure the reader that releasing Jane immediately isn't too risky, we need data of a different kind, data that go to the consequences of acting or not acting. From here on, Toulmin's terminology becomes less useful. But the basic strategy—to predict and answer your reader's questions—remains just as important:

8. (Consequences) Even if your argument holds water, should I really do what you ask? Is there a safer or less radical solution?

   Jane is employed and may lose her job if not released immediately.

   And finally:

9. (The other side) What about your opponents' argument? Don't they have a point?

   Although immigration officials have not yet received a certified copy of Jane's birth certificate, to incarcerate her while that document is in transit is unreasonable given the risk to her employment. (And here comes an "exception" to be disposed of:) Incarceration would be justified in this case only if Jane were a flight risk. Immigration officials cannot demonstrate that she is. In fact, she is tied to this city by her family and her job.

[3] Some readers will note that the difference between the two forms of backing in this example roughly corresponds to David Hume's familiar distinction between "is" and "ought." *See* David Hume, *A Treatise of Human Nature,* Book III, Part 1, Section 1 (1739).

Toulmin's model works not only for small-scale passages, such as the one we have used here because of space limitations, but also for large-scale arguments such as an entire brief. Whatever the scale, the model has the virtue of flexibility. Depending on the circumstances, some of its elements can be emphasized, de-emphasized, combined, or dropped altogether.

Here is another example:

> Because of the number of parties before the court and the number of potentially dispositive motions now pending *(Data)*, the court should stay discovery pending the entry of a discovery plan *(Claim)*, as it is empowered to do by Rules 16 and 26(f) of the Federal Rules of Civil Procedure *(Backing for the warrant, which will be stated later as a principle of case management)*. The 12 parties to this case have made duplicative discovery demands upon each other, often requesting that different search terms be used to search huge electronic databases, when the same terms would be equally effective for all parties. To compound matters, they have already filed 17 discovery motions, although the case is only three months old *(This is more data to back up the conclusory data in the paragraph's opening clause; it leads directly to the warrant below)*.
>
> As many courts have recognized, "the key to avoiding excessive costs and delay is early and stringent judicial management of the case" *(Warrant)*. In a case of this magnitude involving so many lawyers, and in a district where judicial resources are already strained to the limit, the role of case management is especially important. Without such management, this case is likely to degenerate into chaos, with the parties taking discovery in inconsistent and duplicative ways *(Further backing for the warrant's application to this situation, and a look at the consequences of not acting)*.
>
> At the moment, only discovery on the jurisdictional issues should be allowed to proceed, because these issues involve a limited number of parties and cannot be rendered moot by the court's decisions on the motions before it *(A limitation of the claim, to make it more reasonable)*.

Experienced advocates are so accustomed to dealing with the questions we have described, and to providing the kinds of support for their arguments that Toulmin defines, that they need no prompting. Most students, however, are not that far removed from the high school debate approach to argument (or, for that matter, the school-yard approach). For them, Toulmin's structure can be a useful guide for their first steps towards more effective, practical advocacy.

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Another **Perspective**

"Legal research underpins almost everything that is done in law. Traditionally, legal research includes finding a form, locating a rule, identifying a statute, gaining background information on a regulation, and using law books and legal databases in almost any way. The prevailing paradigms, as contained in "textbooks," are the fodder of legal research. Through research, we clarify and verify the "laws, theories, and application" of a subject-specialty paradigm to understand their effects on our situation. Legal research is our scientific experimentation; law libraries were, after all, Langdell's laboratories of the law. As law changes through the revolutions described by Kuhn, as the paradigms of the various fields of law expand, legal research responds with a revolution of its own. Where once we researched in a set of common textbooks, most notably the digests, we now search the universe of information. Its effect on our context is marked."

Barbara Bintliff, *Context and Legal Research, Symposium on Legal Information and the Development of American Law: Further Thinking About the Thoughts of Robert C. Berring*, 99 Law Libr. J. 249, 257 (2007).