

Carlo Pedrioli's *Exploring Conflict over the Professor's Role in U.S. Legal Education: Theory v. Practice* is a thorough, well-written, and meticulously well-documented study of the American law professor from an historical and descriptive perspective. He uses communication theory to bring together both self-views from law professors and views from their consumers: students, practicing lawyers, and judges. All of these groups will find valuable insights on themselves and on legal education. This book provides a valuable extension of theory, research, and practice into legal education in general and the role of law professors specifically.

—**Douglas D. McFarland, J.D., Ph.D.**

PROFESSOR EMERITUS OF LAW
MITCHELL/HAMLIN SCHOOL OF LAW

In this fascinating book, Professor Pedrioli explores a core tension between the law professor as a scholar and the law professor as a practitioner. His intriguing blend of communication studies with scholarship on legal education offers an entirely novel perspective on that perennial tension within the law professoriate, which has become so entrenched that it has attracted negative attention from many in the legal community and beyond. Professor Pedrioli applies persona theory to suggest a creative path beyond that stalemate, bringing a welcome fresh perspective to a stale impasse in legal education.

—**Elizabeth Mertz, Ph.D., J.D.**

RESEARCH PROFESSOR
AMERICAN BAR FOUNDATION
JOHN AND RYLLA BOSSHARD PROFESSOR OF LAW EMERITA
UNIVERSITY OF WISCONSIN—MADISON LAW SCHOOL

This new book by Professor Pedrioli is a fascinating combination of rhetorical theory and law and offers a new approach to the history of American legal education. I recommend it to all those interested in the subject.

—**Michael H. Hoeflich, J.D., Ph.D.**

JOHN H. & JOHN M. KANE DISTINGUISHED PROFESSOR OF LAW
UNIVERSITY OF KANSAS SCHOOL OF LAW

Professor Pedrioli does an excellent job of bringing this pedagogical investigation to the attention of all those who believe our law professors should do a better job of preparing students for the practice of law. He makes a good argument that should be read and discussed widely.

—**Richard D. Rieke, Ph.D.**

EMERITUS PROFESSOR OF COMMUNICATION
UNIVERSITY OF UTAH

Exploring Conflict *over the*
Professor's Role *in*
U.S. Legal Education

Exploring Conflict *over the*
Professor's Role *in*
U.S. Legal Education

THEORY V. PRACTICE

Carlo A. Pedrioli

Professor of Law

Southern University Law Center



CAROLINA ACADEMIC PRESS

Durham, North Carolina

Copyright © 2024
Carlo A. Pedrioli
All Rights Reserved

LIBRARY OF CONGRESS CATALOGING-IN-PUBLICATION DATA

Names: Pedrioli, Carlo A., author.

Title: Exploring conflict over the professor's role in U.S. legal education :
theory v. practice / by Carlo A. Pedrioli.

Description: Durham, North Carolina : Carolina Academic Press, 2024. |
Includes bibliographical references and index.

Identifiers: LCCN 2023058908 | ISBN 9781531027841 (paperback) |
ISBN 9781531027858 (ebook)

Subjects: LCSH: Law—Study and teaching—United States. | Law—Study and
teaching—United States—History. | Law teachers—United States.

Classification: LCC KF272 .P43 2024 | DDC 340.071/173—dc23/eng/20240117

LC record available at <https://lcn.loc.gov/2023058908>

CAROLINA ACADEMIC PRESS

700 Kent Street
Durham, North Carolina 27701
(919) 489-7486
www.cap-press.com

Printed in the United States of America

Contents

Prior Works	ix
Acknowledgments	xi
INTRODUCTION New Light on an Old Problem	xiii
Works Cited in Introduction	xvii
CHAPTER I The Law Professor in the United States	3
Lawyers in the United States	3
The Rise of Law Professors and Law Schools in the United States	6
Communication Research on the Law Professor	15
Organization of This Book	17
Works Cited in Chapter I	20
CHAPTER II Persona Theory	27
The Personae of Persona Theory	27
The Methodology of Persona Theory	33
The Value of Persona Theory	38
Conclusion	40
Works Cited in Chapter II	41
CHAPTER III 1870–1920: The Conflict over the Construction of the Ideal Law Professor Persona in the Early Days of a New Paradigm in U.S. Legal Education	47
The Law Professor as Scholar	49
The Law Professor as Practitioner	54
The Law Professor as Scholar/Practitioner Hybrid	57
Conclusion	59
Works Cited in Chapter III	61

CHAPTER IV	1920–1960: The Conflict over the Construction of the Ideal Law Professor Persona in the Days of a More Established Paradigm in U.S. Legal Education	65
	The Law Professor as Scholar	66
	The Law Professor as Practitioner	70
	The Law Professor as Scholar/Practitioner Hybrid	75
	Conclusion	75
	Works Cited in Chapter IV	77
CHAPTER V	1960–Present: The Conflict over the Construction of the Ideal Law Professor Persona in an Era of Graduate Law Study	79
	Conflict over the Doctorate	80
	The Law Professor as Scholar	86
	The Law Professor as Practitioner	97
	The Law Professor as Scholar/Practitioner Hybrid	104
	Conclusion	105
	Works Cited in Chapter V	109
CHAPTER VI	In Support of Invitational Rhetoric as a Propitious Discursive Form	117
	The Aristotelian Notion of Rhetoric and Its Limitations	120
	Invitational Rhetoric as a Potential Alternative to Aristotelian Rhetoric	122
	Critiques of Invitational Rhetoric and Some Responses to Such Critiques	126
	Conclusion	134
	Works Cited in Chapter VI	135
CHAPTER VII	Invitational Rhetoric and the Conflict over the Construction of the Ideal Law Professor Persona	141
	How Invitational Rhetoric Might Unfold in the Conflict over the Ideal Law Professor Persona	142
	The Benefits of Invitational Rhetoric as a Means of Addressing the Conflict over the Ideal Law Professor Persona	150
	Potential Concerns with Applying Invitational Rhetoric to the Conflict over the Ideal Law Professor Persona	152
	Conclusion	153
	Works Cited in Chapter VII	154

CHAPTER VIII Cooperative Rhetoric: A Possible Future for the Conflict over the Construction of the Ideal Law Professor Persona	157
Cooperative Rhetoric as Invitational Rhetoric Informs It	158
Collaborative Law as Legal Precedent for the Implementation of Cooperative Rhetoric	164
How Cooperative Rhetoric Can Be of Value to Lawyers Involved in the Conflict over the Ideal Law Professor Persona	169
Conclusion	173
Works Cited in Chapter VIII	173
CONCLUSION New Doors to Imperfect, but Positive, Communication	179
Works Cited in Conclusion	184
Works Cited in This Book	185
Index	213

Prior Works

Prior versions of portions of this book appeared in the following papers on communication and legal education: Pedrioli, Carlo A. “Professor Kingsfield in Conflict: Rhetorical Constructions of the U.S. Law Professor Persona(e).” *Ohio Northern University Law Review*, vol. 38, 2012, pp. 701–27; Pedrioli, Carlo A. “Beyond Aristotle: Alternative Rhetorics and the Conflict over the U.S. Law Professor Persona(e).” *Ohio Northern University Law Review*, vol. 38, 2012, pp. 919–55; Pedrioli, Carlo A. “Constructing Modern-Day U.S. Legal Education with Rhetoric: Langdell, Ames, and the Scholar Model of the Law Professor Persona.” *Rutgers Law Review*, vol. 66, 2013, pp. 55–80; and Pedrioli, Carlo A. “Critiquing Modern-Day U.S. Legal Education with Rhetoric: Frank’s Plea and the Scholar Model of the Law Professor Persona.” *Mississippi Law Journal*, vol. 83, 2014, pp. 1049–69. The author has retained copyright to the foregoing publications.

Acknowledgments

Thanks are due to various individuals who, over the years, have contributed to my understanding of legal education, my understanding of communication, my work on this book, my own related studies, or some combination of the foregoing.

I begin with professional connections. In the early 2000s, I was a law student at the University of the Pacific, McGeorge School of Law in Sacramento, California. For numerous conversations about legal education when I was trying to make sense of it, I thank Thomas Main.

During the mid-2000s, I was a graduate student in communication at the University of Utah in Salt Lake City, Utah. For introductions to new ideas about communication related, or that could be related, to law and its institutions, as well as for feedback on my own ideas, I thank David Vergobbi, Richard Rieke, Tarla Rai Peterson, Lisa Flores, Marouf Hasian, and Geoffrey Klinger. I also thank Wayne McCormack for bringing a legal perspective to discussing ideas about communication and for offering feedback on my ideas.

From 2015 to 2017, I was a visiting scholar at the American Bar Foundation at Northwestern Pritzker School of Law in Chicago, Illinois. For facilitating my visit, during which I worked on this book and other projects, I thank Jothie Rajah and Ajay Mehrotra. For various discussions about legal education, both past and present, which drew upon perspectives from anthropology and political science, I thank Elizabeth Mertz and Stephen Daniels.

Over the years, library staff members at various institutions have assisted me in locating sources. For this support, I thank librarians Patricia Brown, Louis Rosen, and Diana Botluk, as well as library assistant Caroline Devine.

I also thank anonymous library staff members who were working quietly in the backgrounds of large institutions to locate sources.

In terms of the review process, Michael Hoeflich, despite facing health challenges, offered sustained feedback on the manuscript, including recommendations for sometimes obscure, but nonetheless useful, additional sources. Stephen Sheppard added constructive criticism. I thank them for helping to strengthen the manuscript.

For interest in the manuscript and handling the technical and promotional sides of the publication process, I thank the staff at Carolina Academic Press. I hope that the partnership with Carolina Academic will be fruitful.

Moving beyond professional connections, I continue with personal connections. Although not legally trained, my parents Charles and Christine Pedrioli supported my law studies, as did my aunts Adriana and Carmen Pedrioli. Relatives often provide students with quiet background support that enables study, which is what happened in my case. For this support, as well as for that of my other educational endeavors, I am grateful.

More recently, my brother Chad Pedrioli provided copyediting of the manuscript for this book, as well as a review of the proofs. With some persistence, my friend Alina Oknianska successfully located graphic designer Rhea Mathew, whose work the cover reflects, along with that of Steve Oliva of Carolina Academic. I offer my appreciation for the support.

When I was a law student, Bobby Gabell was the husband of my classmate Paula Gabell. During my time in law school and graduate school, as well as when I was beginning my career as a professor, Bobby and I had countless conversations about numerous subjects, including higher education—and particularly law school—often while breaking bread together. Having had law school as a third party in his marriage for several years, Bobby, himself a non-traditional undergraduate student in government who managed to fit four years of higher education into twelve years of life, offered the following observation about the traditional pedagogy of U.S. legal education: “If they taught people to swim the way they teach law school, half the people would drown.” For the conversations about law school, as well as the friendship, I thank Bobby.

INTRODUCTION

New Light on an Old Problem

In the wake of the collapse of the housing market and the resulting financial meltdown of 2008, the legal profession in the United States faced serious problems. Many law graduates had difficulty finding suitable employment (Palazzolo). For instance, nine months after graduation, only 55% of the class of 2011 had found full-time, long-term employment that required a law degree (Palazzolo). Numerous recent law graduates were only able to find part-time or temporary work (Bourne 658). Larger private firms were unable to hire new graduates, and some such firms even had to rescind employment offers or delay starting dates for new attorneys for up to a year (Bourne 657). Many experienced attorneys simply lost their jobs (Organ 897). Also, with the continued development of the Internet, fewer lawyers were needed for research, and some research went overseas (Bronner, “Law Schools’ Applications Fall”).

Although the job market for lawyers was declining, the approximately two hundred law schools accredited by the American Bar Association (ABA) continued to graduate large numbers of students (“ABA-Approved Law Schools,” Henderson & Zahorsky). Over 40,000 graduates were entering the job market annually (Palazzolo). For example, in 2010, 44,258 individuals graduated from law school, an increase of over 11% from a decade earlier (Henderson & Zahorsky, Persky). In 2013, 46,766 individuals graduated from law school, while, in 2014, 43,832 individuals did so (“2014 Law Graduate Employment Data” 1).

For years, law school tuition had been on the rise. In 2001, annual public tuition had averaged \$8,500, while annual private tuition had averaged \$23,000 (Bronner, “Law Schools’ Applications Fall”). In 2012, annual public tuition

averaged \$23,600, while annual private tuition averaged \$40,500 (Bronner, “Law Schools’ Applications Fall”).

With the continued rise in law school tuition, much of which went to support law faculty salaries and research (Tamanaha 52), large amounts of debt became more and more a reality for law students (Bourne 671–72). After the financial meltdown of 2008, the average student graduated owing around \$100,000 for having attended law school (Persky). In academic year 2012–13, in 2014 dollars, the average debt for public law school students was over \$88,000, while the average debt for private law school students was over \$127,000 (Archer et al. 31–32). These figures were calculated from the average student debt reported in the annual survey of ABA-accredited schools, not from individual student debt (Archer et al. 6, 31). From academic year 2005–06 to academic year 2012–13, student debt by school from public law school study increased by 34% in adjusted dollars, while student debt by school from private law school study increased by 25% in adjusted dollars (Archer et al. 31–32). Between 2001 and 2011, the average private law school debt jumped from \$70,000 to \$125,000 (Bronner, “Law Schools’ Applications Fall”). In 2010, students borrowed at least \$3.7 billion for law school (Henderson & Zahorsky). In one way or another, borrowing impacted most law students, as 90% of them assumed debt to pay for legal education (Bronner, “Law Schools’ Applications Fall”).

Given the dwindling employment prospects and the mounting cost of law school, fewer individuals took the Law School Admission Test (LSAT) and applied to law school. Between the 2009–10 school year and the 2014–15 school year, the number of LSATs administered fell from 171,896 to 102,823 (“Historical Data”). For fall 2010, 87,900 people applied to law school, but, for fall 2015, only 54,500 applied (“Archive”). For fall 2005, 95,800 people had applied (“Archive”). Indeed, the word that law school was not the safe investment that it had been in the past was getting around.

As the glow of law school began to fade, law school as an institution received criticism, often publicly in forums like *The New York Times*, for not preparing its graduates well enough to practice law. Law students continued to receive from their schools only limited hands-on training that would prepare them for the practical aspects of their future work (Segal). Instruction in legal skills was not the center of legal education and instead took a back seat to instruction in legal doctrine (Organ 890). Indeed, the lower faculty status afforded to those who provided skills instruction indicated that skills instruction was often marginalized in the law school curriculum (Organ 890).

These observations were very similar to those that the Carnegie Foundation for the Advancement of Teaching had made in a major report only a year before the 2008 financial meltdown. That particular Carnegie Foundation report had noted that law schools failed to make teaching legal skills a priority and, among other recommendations, urged law schools to make more of an effort to teach such skills in a meaningful way (Sullivan et al. 188, 191–93).

Along with the institution of law school, the law professor, “both the gatekeeper[] and molder[] of the [legal] profession” (Borthwick & Schau 193), also came under scrutiny. Critics claimed that the law professor was only remotely connected to the practice of law (Bronner, “A Call”). Indeed, a key criticism was that the law professor, increasingly the holder of a Ph.D. as well as a law degree, was spending a voluminous amount of time writing esoteric scholarship that was irrelevant to law students, the practicing bar, and the judiciary (Newton, “Preaching” 130–32, 113–25). This scholarship would appear in some of the hundreds of law journals in the United States (Segal). The critique was that such a law professor, preoccupied with scholarly interests, hardly could prepare students for the practice of law. A call went out for law faculties comprised of significant numbers of professors who possessed extensive experience in the practice of law (Newton, “Preaching” 149–50). The assumption was that members of such faculties would be less likely to produce esoteric scholarship and more likely to help future lawyers learn the actual practice of law.

While economic issues such as dwindling employment prospects, the large numbers of recent law graduates, and the increasing amount of educational debt may have been new, at least in magnitude, the issues regarding the ability of law school to teach practical skills and the role of the professor in legal education were not new. Indeed, although issues about teaching law students practical skills and the role of the law professor may have appeared new to individuals outside the legal profession, in the United States, such issues dated back at least to the nineteenth century and had lingered without productive resolution. The economic circumstances that followed the 2008 financial meltdown simply drew attention to law school and put underlying issues in the spotlight.

This book presents a study of lawyers’ views of the ideal role that the law professor should perform in U.S. legal education, a matter intimately connected to the issue of teaching or not teaching practical skills. Here, the term *lawyers* refers broadly to practicing lawyers, judges, and academic lawyers. Beyond the economic circumstances of a given period in history, this study

goes to the enduring heart of U.S. legal education. To pursue its goal, the study provides two research questions. First, what expectations have U.S. lawyers had regarding the ideal role for the law professor to perform as an educator? Second, if lawyers have had differing expectations regarding the ideal role of the law professor as educator, how, if at all, have lawyers reconciled such competing visions through communication?

As this study will explain, ongoing controversy has surrounded the role, or *persona*, of the U.S. law professor. Examination of legal writings since the nineteenth century will show that lawyers have been sharply divided over the persona. Indeed, lawyers have advocated two major personas for the law professor to perform. One major persona is that of the scholar, who is a full-time teacher, researcher, and sometimes public servant, but who often has limited practical experience. Another major persona is that of the practitioner, who has a substantial number of years of practice at the bar and is prepared for hands-on lawyering instruction. Some lawyers also have advocated several versions of a minor persona, the scholar/practitioner hybrid, which blends academic and practical aspects.

The research that this book will present will show that lawyers who have promoted differing expectations of the ideal law professor role have done so almost without addressing each other's underlying concerns. For instance, advocates of the scholar persona have not paid sufficient attention to the practical needs of advocates of the practitioner persona, and advocates of the practitioner persona have not given enough attention to the academic needs of advocates of the scholar persona. The various hybrid personas have had limited impact on the communication.

Although the first part of this study is descriptive, addressing the various personas and noting the very limited communication responsive to the needs of lawyers with competing expectations, the second part of this study is normative. The second part will examine how additional types of communication beyond persuasion may be fruitful in improving the communication about the law professor persona.

One final word about the nature of this book is in order. The book is not an economic study. The supply of recent law graduates, the demands of employers for such graduates, and the rising tuition and student debt associated with legal education have been important topics for study. However, the details of such matters primarily relate to economics. This book will provide a communication study of the ongoing conflict outlined above.

Works Cited in Introduction

- “ABA-Approved Law Schools.” *American Bar Association Section of Legal Education and Admissions to the Bar*, www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/. Accessed 28 June 2023.
- Archer, Dennis W., et al. *Report of the Task Force on the Financing of Legal Education*. American Bar Association, June 2015, www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2015_june_report_of_the_aba_task_force_on_the_financing_of_legal_education.pdf. Accessed 28 June 2023.
- “Archive: 2000–2015 ABA End-of-Year Summaries—Applicants, Admitted Applicants & Applications.” *Law School Admission Council*, www.lsac.org/archive-2000-2015-aba-end-year-summaries-applicants-admitted-applicants-applications. Accessed 28 June 2023.
- Borthwick, Robert J., and Jordan R. Schau. “Gatekeepers of the Profession: An Empirical Profile of the Nation’s Law Professors.” *University of Michigan Journal of Law Reform*, vol. 25, 1991, pp. 191–238.
- Bourne, Richard W. “The Coming Crash in Legal Education: How We Got Here, and Where We Go Now.” *Creighton Law Review*, vol. 45, 2012, pp. 651–97.
- Bronner, Ethan. “A Call for Drastic Changes in Educating New Lawyers.” *The New York Times*, 10 Feb. 2013, www.nytimes.com/2013/02/11/us/lawyers-call-for-drastic-change-in-educating-new-lawyers.html. Accessed 28 June 2023.
- . “Law Schools’ Applications Fall as Costs Rise and Jobs Are Cut.” *The New York Times*, 30 Jan. 2013, www.nytimes.com/2013/01/31/education/law-schools-applications-fall-as-costs-rise-and-jobs-are-cut.html. Accessed 28 June 2023.
- Henderson, William D., and Rachel M. Zahorsky. “The Law School Bubble: How Long Will It Last If Law Grads Can’t Pay Bills?” *ABA Journal*, 1 Jan. 2012, www.abajournal.com/magazine/article/the_law_school_bubble_how_long_will_it_last_if_law_grads_cant_pay_bills. Accessed 28 June 2023.
- “Historical Data—LSAT Trends: Total LSATs Administered by Admin & Year.” *Law School Admission Council*, report.lsac.org/TestTakers.aspx. Accessed 28 June 2023.

- Newton, Brent E. "Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy." *South Carolina Law Review*, vol. 62, 2010, pp. 105–56.
- Organ, Jerome M. "Legal Education and the Legal Profession: Convergence or Divergence?" *Ohio Northern University Law Review*, vol. 38, 2012, pp. 885–909.
- Palazzolo, Joe. "Law Grads Face Brutal Job Market." *The Wall Street Journal*, 25 June 2012, www.wsj.com/articles/SB10001424052702304458604577486623469958142. Accessed 28 June 2023.
- Persky, Anna Stolley. "Law School? Bag It, Bloggers Say." *ABA Journal*, 1 Feb. 2011, www.abajournal.com/magazine/article/law_school_bag_it_bloggers_say. Accessed 28 June 2023.
- Segal, David. "What They Don't Teach Law Students: Lawyering." *The New York Times*, 19 Nov. 2011, www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html. Accessed 28 June 2023.
- Sullivan, William M., et al. *Educating Lawyers: Preparation for the Profession of Law*. Carnegie Foundation for the Advancement of Teaching, 2007.
- Tamanaha, Brian Z. *Failing Law Schools*. U of Chicago P, 2012.
- "2014 Law Graduate Employment Data." *American Bar Association Section of Legal Education and Admissions to the Bar*, 28 Apr. 2015, www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2014_law_graduate_employment_data_042915.authcheckdam.pdf. Accessed 28 June 2023.