

# FACTUM ASSIGNMENT

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Law 405

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# SLIDES ONLINE @



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**Blog link:**  
**Alberta Writes: Conversations About Writing:  
Exploring Shared Responsibility for the  
Teaching of Writing in Alberta**



**Recent presentations to classes**  
This page contains links to slides displayed at presentations I've given to classes.

**Research and faculty presentations**

**Digital rhetoric**



**Research Writing Groups**



**TLEF: Group Writing Tutorials Put to the Test**  
Proposal writing class helps raise \$5000 for non-profit organic farming group

As Director of Writing Across the Curriculum, I work with faculty and students across the university to improve student writing. I consult with instructors and departments, and I teach writing in a wide variety of courses when students in those courses are starting a writing assignment. The link

<http://www.ualberta.ca/~graves1/>

# THE ASSIGNMENT

The purpose of this assignment is

- to help you develop your legal writing skills
- to develop an ethical and persuasive argument on behalf of your client
- to argue for a particular legal outcome
- to demonstrate your abilities to discern legal issues

# ARGUMENT IN THE FACTUM

- **Part V – Points of Law:** This is the argument section, which should be broken down by sub-issue. Both the appellant's and the respondent's arguments must concisely outline the points of law and argument to be addressed, along with properly cited authorities. Both appellants and respondents should disclose and discuss all relevant case law, even that which does not support their case. Counsel may try to distinguish non-supporting law but may not ignore it.

# THE GENRE

- The factum is the written document outlining the legal position of one party in an appeal. It is used to inform opposing counsel so that they may prepare to meet arguments (both in written and oral form). The factum also informs the Court of each party's position on the law.

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# GENRE AS SOCIAL ACTION

- The appellants and respondents must prepare a factum, **file** it with their instructor and the LRW Director, and **serve** it on the opposing party

# GRADING CRITERIA

Format	10
Writing (style and grammar)	15
Overview	10
Citation & book of authorities	10
Statement of facts	10
Grounds of appeal and standard of relief	5
<b>Points of law and argument</b>	<b>35</b>
Request for relief	5

# LEGAL RHETORIC C. 500 BCE

- Corax / Tisias
- Syracuse in Sicily
- Tyrant overthrown; law courts needed to establish ownership
- Developed system of argument to enable common people to argue their claims



# WHAT'S NEW ABOUT THE NEW RHETORIC?

3 kinds of Aristotelian oratory:

- Forensic (judicial)
- Deliberative (legislative)
- Epideictic (praise and blame)

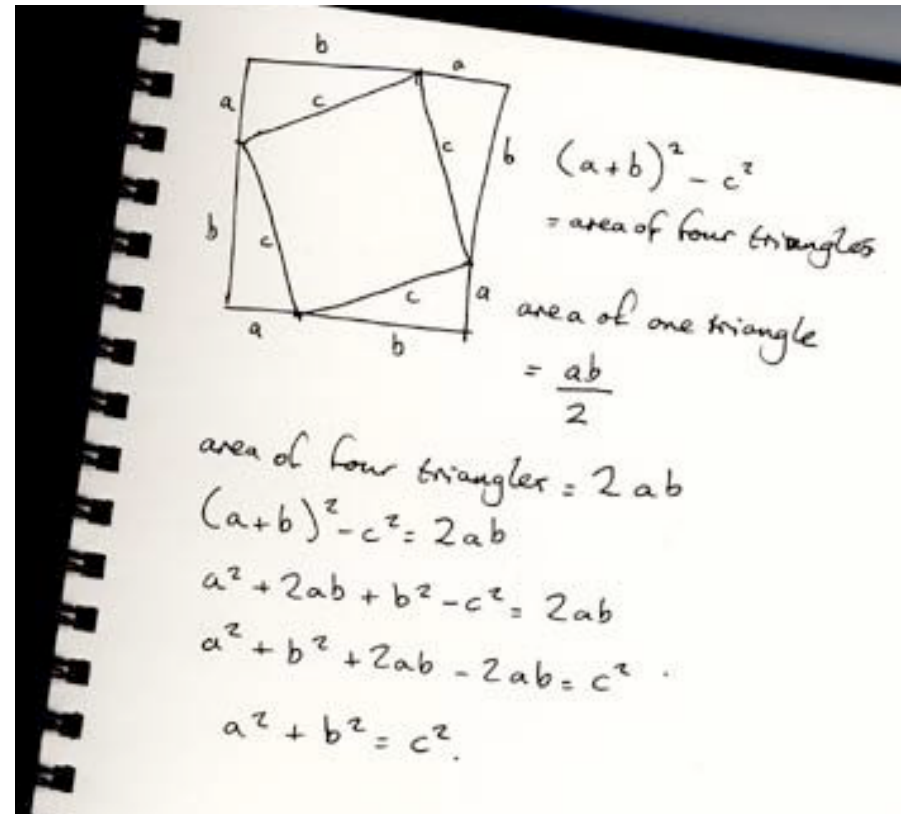
# THE NEW RHETORIC

Not like the old philosophic logical reasoning

- Focused on *values*
- Dependent on *audience*
- Based on *informal* reasoning

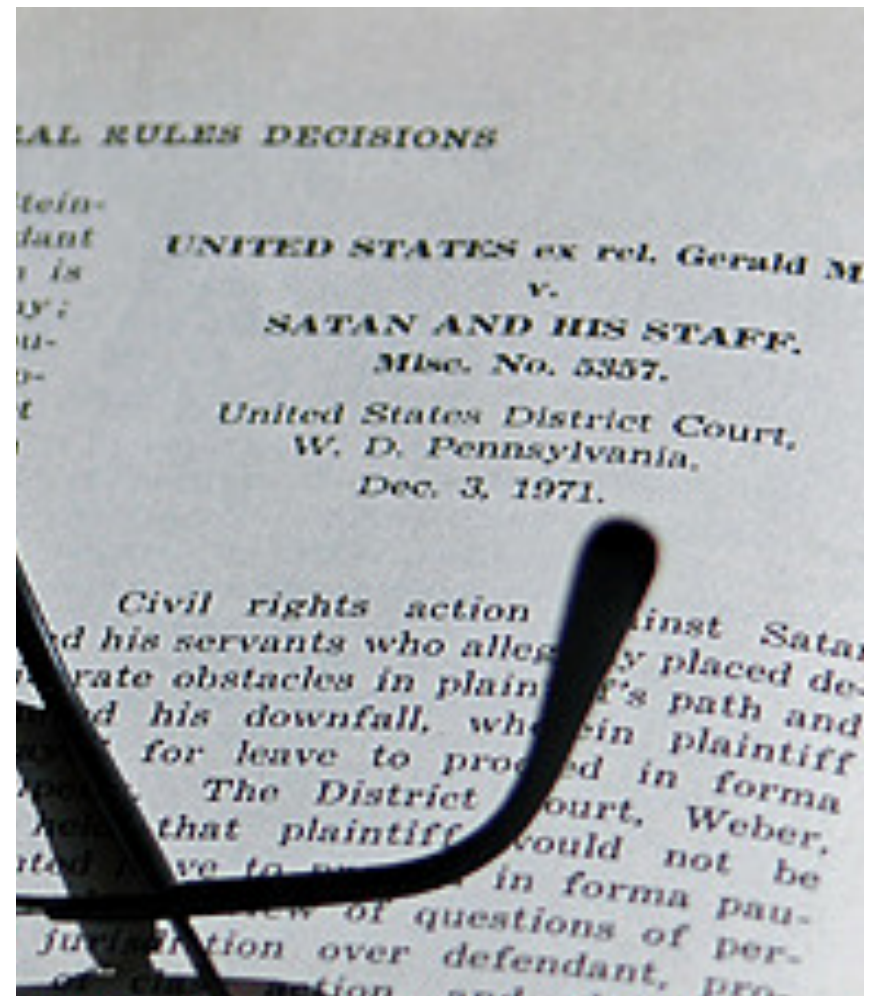
# Demonstration

- Demonstration: mathematical, logical, rational instead of the reasonable



# Argumentation

- Argumentation: contains ambiguity of language, more reasonable



# AUDIENCE

- Universal audience = a mental construct
- No direct role; think of it as a common frame of reference; all possible listeners with these characteristics
- Particular audience = actually addressed audience; the group you want to influence
- **Who are your audiences for the factum?**
- “The **appellants** and **respondents** must electronically file and serve their factums by emailing them to **the instructor**, their **opponents**, the **intervener** (if applicable) and the **LRW Director** before the beginning of class on the assigned due date.”

# FUNCTIONS OF THE UNIVERSAL AUDIENCE (P. 89)

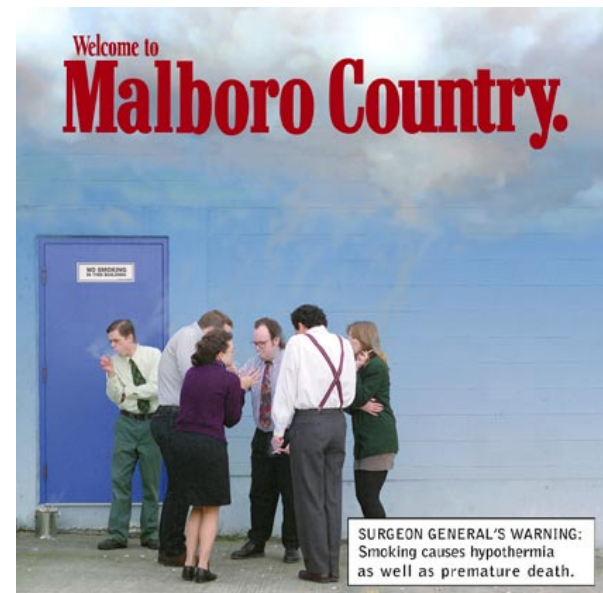
- 1. helps you identify good and bad arguments
- 2. establishes the norms/values for the audience
- “In deciding that such consent is legally valid, the Ontario Court of Appeal provided a sound basis to conclude that not only is the recognition of such consent consistent with the language used in the Criminal Code and Supreme Court decisions, it also respects personal autonomy and as such accords with our society’s **values**.”
- “The Court accepted arguments”
- “It is well accepted that one can consent to be touched by a surgeon while unconscious”
- “the Court noted that its decision was consistent with values respecting autonomy and control over one’s body”

# Adherence

Adherence comes from the audience:

- The audience buys into or agrees with the speaker's argument

“Obviously, no person could continue to entertain these myths where the statute explicitly deems no consent to be obtained if the person has expressed a lack of agreement to continue with the activity, or if the person could not consent due to incapacity (which can result from the ingestion of drugs or alcohol).”



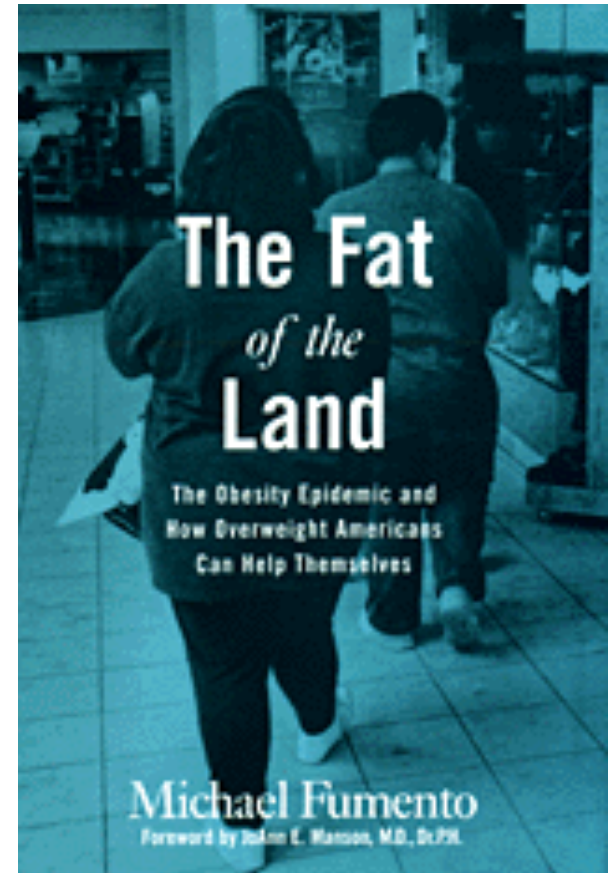
# WHAT IS PRESENCE?

## How do you create “presence”?

- Elements that you choose to focus on in your factum become “present” through your words

## Why is presence important?

- It helps persuade the audience by making the subject concrete and real





# What is presence?

- How do you create “presence” in texts?
- “Although the reasoning in the JA decision could be contrasted with that of Ashlee, **it is important to emphasize** that only in JA does this issue of advance consent to unconscious sex actually arise on the facts.”
- “**The critical point here is that** section 273.1 was enacted to remedy a specific mischief that has absolutely no connection with the consent given by Ms. Child.”

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# JUST THE FACTS: THINGS AS THEY ARE

- What is a **fact**?
- “Canadian growth considerably exceeded that of all other remaining countries in the G8. While United Kingdom and France respectively recorded rates of 0.34% and 0.40%, Japan, Germany and Italy all had rates between 0.1% and 0.2%. The Russian Federation was the only G8 country to see its population decline over the period.” (Statistics Canada)
- What is a **truth**?
- Whereas US growth was primarily due to a high rate of natural increase, the growth of the Canadian population was largely and increasingly due to its net international migration.
- What is a **presumption**?
- This will continue.

# FACTS AND TRUTH

- **Facts:**

“Robert Love, the appellant, had been living with his common-law partner, Julie Child, for over three years when they discovered that Ms. Child was afflicted with a degenerative neural disease that would eventually render her permanently comatose.”

- **Truth:**

“The trial judge erred in instructing the jury that the consent to sexual activity given by Ms. Child in advance and in anticipation of her unconsciousness could not, as a matter of law, apply to sexual activity that occurred beyond the point of her unconsciousness.”

# ARGUMENTS: DEFINITION

- “Sexual assault is composed of two elements, those being, firstly, “**unwanted sexual touching**” and, secondly, the intention of the accused to touch the other person knowing of, or being reckless of or willfully blind to, the absence of consent. The reasoning in Ewanchuk reaffirmed that the absence of consent is determined by reference to the internal state of the mind of the person who was touched rather than by any external indicators of consent. It is the first element of sexual assault, the non-consensual or “**unwanted**” **sexual touching**, that is relevant to this case.”

# ARGUMENT: LIASON LOGIC

- Liaison or associative: taking two different concepts and establishing a bond between them; connect the starting point with the thesis
- **Example:** connect quality of life with money—the more money you have, the more improved the quality of your life will be because you can afford to buy yourself labor-saving devices or trendy clothing
- “First, the Ontario Court of Appeal has found that advance consent to unconscious sex is consistent with the Criminal Code and Supreme Court jurisprudence.”
- “when the relevant provisions of the Criminal Code are read in light of their context and purpose, it is evident that Parliament . . . intended that women’s autonomy over their own bodies be enhanced”

# ARGUMENT: CO-EXISTENCE

- Coexistence
- No time link between events
- Person can be judged by her/his actions
- Selecting particular traits results in different conclusion
- **Argument from authority:** important person says something is good, people believe it
- “which was eloquently stated by the Honourable Kim Campbell in introducing Bill C-49”

# ARGUMENT

- **Example:** to create a generalization about something or use one example to reach a conclusion about another example
- **Illustration:** illustrates general belief
- Example: smokers suffer ill health therefore smoking is bad; “hard cases make bad law”
- **Model:** convince an audience to imitate qualities of a certain person



# ARGUMENT: DISSOCIATION

- Appearance-reality pair: avoiding incompatibilities by **dissociating** pairs
- Term 1 (appearance, less important) vs. Term 2 (reality, greater importance)
- The Crown also relied on several decisions of the Ontario Court of Appeal that dealt with the issue of consent and unconscious complainants, however, as the Court noted, “these cases are not helpful to the Crown” since none of them involved situations where “complainants consented in advance to sexual activity anticipated to occur while they were unconscious.”



# Techniques of argumentation

- **Quasi-logical:** two subsets: one based on similarity and one based on difference.
- Similarity is more persuasive because people are more likely to accept premises based on logic or what appears to be logic.
- Example: Energy independence is one of the U.S. major priorities. US has plenty of oil reserves in the Arctic. Therefore US should drill in Arctic preserves.

# Techniques of argumentation

- **Metaphor and analogy:**
- A:B :: B:C (they must come from different spheres)
- Example: Coach tells players to act like animals and “kill” opponents
- When these fuse together, the analogy becomes a metaphor
- “The common thread running through the cases”: the “fabric” of the law is made up of “threads” woven together.
- The analogy (legal reasonings : threads :: law : fabric) has become a metaphor.

# Techniques of argumentation

- **Reversal:** dissociates values to eliminate incompatibility
- “the reasons given by the majority of the Alberta Court of Appeal in so deciding constitute a potential source of injustice and an exemplar of the adage ‘hard cases make bad law’.”

# INTERACTION/ORDERING YOUR ARGUMENTS

- Multiple arguments or different kinds create “amplitude”
- Order can affect force of an argument: delay shocking thesis statements until you have already presented your evidence to the audience

# PASSIVE: NO ACTOR

- “It is submitted that . . .”
- “It is acknowledged that . . .”
- “an examination of the context and intention of the statutory provision at issue indicates that . . .”
- “One might ask, then, . . .”
- “It was also observed that . . .”
- “In overturning the Alberta Court of Appeal’s decision, it was noted that . . .”

# POLITENESS

- “However, with respect, . . .”
- “It is respectfully requested that the appeal against conviction be allowed, the conviction quashed and an acquittal entered, or in the alternative, a new trial be ordered.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.”