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Rhetoric Theory and Legal Writing: An Annotated Bibliography

Michael R. Smith*

This volume of the Journal of the Association of Legal Writing Directors (J. ALWD) contains articles relating classical and contemporary rhetoric theory to the practice of professional legal writing. This bibliography supplements these articles by setting out a list of other works that have been written in this growing area of legal writing scholarship.

The scope of this bibliography is limited in two ways. First, the works listed here focus primarily on how rhetoric theory applies to the discipline of legal writing. While rhetoric is a discipline unto itself, only a few works on general rhetoric theory have been listed here. Moreover, although rhetoric theory has been explored and applied in a number of other disciplines outside the law such as forensics and debate, advertising, business writing, and communication, no works from these other disciplines have been included. Except for a few seminal background works, the only works listed here are those that specifically apply rhetoric theory to legal writing or to legal advocacy or to both.

The first limitation implies the second. This bibliography lists works that focus on rhetoric theory and legal writing; it does not list more generally works that focus on rhetoric theory and "the law." A number of legal scholars have produced scholarship that explores the implications of rhetoric theory on various facets of the law such as distinct areas of doctrinal law, various legal institutions, and various schools of legal theory and jurisprudence. This bibliography, however, in keeping with the purpose of J. ALWD, focuses only on works that explore the relationship between rhetoric theory and legal writing and advocacy. Works that explore the implications of rhetoric on other aspects of the law are beyond the scope of this listing.

The works listed here are broken into two main groups which correspond with the two main schools of rhetoric: Classical Rhetoric and Contemporary Rhetoric. These two main groups are further broken down into a number of sub-groups which correspond in turn with various foundational principles within these schools of rhetoric.

I. Classical Rhetoric

Classical rhetoric, which dates back to 450 B.C. Greece, is a discipline that systematically studies the art of persuasion. Although classical rhetoric originally focused on only oral persuasion, it has during its history expanded

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to written persuasion. In view of classical rhetoric's comprehensive treatment of the subject of persuasion, it comes as no surprise that many modern scholars on legal advocacy are rediscovering this ancient discipline and its time-tested principles. Below you will find a listing of many modern works that apply classical rhetoric principles to contemporary legal writing and advocacy. These works have been grouped together based on their focus on specific principles within classical rhetoric.

A. Background reading in classical rhetoric

As stated in the introduction of this bibliography, no attempt has been made here to list all or even a significant number of works on general rhetoric theory. However, there are a few important works with which anyone interested in classical rhetoric should be familiar. Three of these works are by the three most famous classical rhetoricians of the Greco-Roman era: Aristotle (384-322 B.C.); Cicero (106-43 B.C.); and Quintilian (35-95 A.D.). (There are numerous translations of the works of Aristotle, Cicero, and Quintilian. Four of the most popular are listed here — two for Aristotle, and one each for Cicero and Quintilian.) The other listed work is a modern retelling of the classical works by Edward P. J. Corbett and Robert J. Connors. Although there are a number of modern books on classical rhetoric, the Corbett and Connors text is a perennial favorite.

1. Aristotle, *On Rhetoric: A Theory of Civic Discourse* (George A. Kennedy trans., Oxford U. Press 1991).
2. Aristotle, *The Rhetoric of Aristotle* (Lane Cooper trans., D. Appleton & Co. 1932).
3. Marcus Tullius Cicero, *Cicero: De Oratore*, Books I-II (Loeb Classical Library) (H. Rackham trans., Harv. U. Press 1969).
4. Edward P. J. Corbett & Robert J. Connors, *Classical Rhetoric for the Modern Student* (4th ed., Oxford U. Press 1999).
5. Marius Fabius Quintilianus, *Quintilian: Institutio Oratoria*, Books I-III (Loeb Classical Library) (H. E. Butler trans., Harv. U. Press 1980).

B. Classical rhetoric and persuasive legal writing generally

The following works explore the relationship between classical rhetoric and legal writing and advocacy generally. These works are a good place to start for anyone new to this area of scholarship.

6. John W. Cooley, *A Classical Approach to Mediation — Part I: Classical Rhetoric and the Art of Persuasion in Mediation*, 19 U. Dayton L. Rev. 83 (1993).
7. Michael H. Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage* (Ashgate Publ. Ltd. 2005) (cross referenced under various sub-topics).

8. Michael H. Frost, *Greco-Roman Rhetoric: The Canon and Its History*, in *Introduction to Classical Legal Rhetoric: A Lost Heritage* 1 (Ashgate Publg. Ltd. 2005).
9. Michael Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage*, 8 S. Cal. Interdisc. L.J. 613 (1999).
10. Robert F. Hanley, *Brush Up Your Aristotle*, 12 Litig. 39 (No. 2, 1986).
11. Jennifer Kruse Hanrahan, *Truth in Action: Revitalizing Classical Rhetoric as a Tool for Teaching Oral Advocacy in American Law Schools*, 2003 BYU Educ. & L.J. 299 (2003).
12. Linda Levine & Kurt M. Saunders, *Thinking Like a Rhetor*, 43 J. Leg. Educ. 108 (1993) (cross referenced under Contemporary Rhetoric).
13. Dan Levitt, *Rhetoric — From Socrates to Court TV*, 26 Litig. 42 (No. 1, 1999).
14. Ron Moss, *Rhetorical Stratagems in Judicial Opinions*, 2 Scribes J. Leg. Writing 103 (1991).
15. Michael R. Smith, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* (Aspen L. & Bus. 2002) (cross referenced under various sub-topics).

C. Modes of persuasion — *logos*, *pathos*, and *ethos* in persuasive legal writing

One of the foundational principles of classical rhetoric is that there are three primary means of persuasion in oral or written discourse: *logos*, *pathos*, and *ethos*. *Logos* refers to persuading through logic and appeals to reason. *Pathos* refers to persuading through emotional appeals. *Ethos* refers to the credibility of an advocate and how this credibility affects the advocate's effectiveness. This triad of persuasive processes has attracted much interest from modern legal writing and advocacy scholars. The works on this topic have been sub-divided below based on their specific area of focus.

1. *Logos, pathos, and ethos in persuasive legal writing generally*

The work listed below offers an introductory explanation of *logos*, *pathos*, and *ethos* and how these concepts differ from and complement one another.

16. Michael R. Smith, *Logos, Pathos, and Ethos in Television Commercials: Understanding Fundamental Persuasive Processes*, in *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* 81 (Aspen L. & Bus. 2002).

2. *Logos (persuasion through logic) in persuasive legal writing*

The following works explore in detail the role of *logos* — persuading through appeals to logic and reason — in contemporary legal writing. In the context of persuasive legal writing, these works discuss topics of formal

analysis such as induction, deduction, syllogism, enthymeme, analogical reasoning, and logical fallacies.

17. Ruggero J. Aldisert, *Logic for Lawyers: A Guide to Clear Legal Thinking* (3d ed., Contemp. Med. Educ. 2001).
18. Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 Harv. L. Rev. 925 (1996).
19. Steven J. Burton, *An Introduction to Law and Legal Reasoning* (Little, Brown & Co. 1985).
20. Julian L. Bush, *Argument and Logic*, 67 Mo. L. Rev. 463 (2002).
21. Michael H. Frost, *Greco-Roman Legal Analysis: The Topics of Invention*, in *Introduction to Classical Legal Rhetoric: A Lost Heritage* 23 (Ashgate Publg. Ltd. 2005).
22. Michael Frost, *Greco-Roman Legal Analysis: The Topics of Invention*, 66 St. John's L. Rev. 107 (1992).
23. James A. Gardner, *Legal Argument: The Structure and Language of Effective Advocacy* (Michie 1993).
24. Wilson Huhn, *The Uses and Limits of Syllogistic Reasoning in Briefing Cases*, 42 Santa Clara L. Rev. 813 (2002).
25. Dan Hunter, *No Wilderness of Single Instances: Inductive Inference in Law*, 48 J. Leg. Educ. 365 (1998).
26. Steven D. Jamar, *Aristotle Teaches Persuasion: The Psychic Connection*, 8 Scribes J. Leg. Writing 61 (2002).
27. Kristen K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 Vt. L. Rev. 483 (2003).
28. Mary Massaron Ross, *A Basis for Legal Reasoning: Logic on Appeal*, 46 No. 4 DRI For Def. 46 (2004).
29. Anita Schnee, *Logical Reasoning "Obviously,"* 3 Leg. Writing 105 (1997).

3. Pathos (*persuasion through emotion*) in persuasive legal writing

The works listed below apply the classical rhetoric concept of *pathos* — persuading through emotion — to contemporary legal advocacy.

30. Michael H. Frost, *Ethos, Pathos, and Legal Audience*, in *Introduction to Classical Legal Rhetoric: A Lost Heritage* 57 (Ashgate Publg. Ltd. 2005) (cross referenced under Ethos).
31. Michael Frost, *Ethos, Pathos, and Legal Audience*, 99 Dick. L. Rev. 85 (1994) (cross referenced under *Ethos*).
32. John C. Shepherd & Jordan B. Cherrick, *Advocacy and Emotion*, 138 F.R.D. 619 (1991).

4. Ethos (*establishing credibility*) in persuasive legal writing

As explained earlier, *ethos* refers to the means by which an advocate establishes credibility in the eyes of his or her audience. The following works explore in detail the role of *ethos* in contemporary legal advocacy.

33. Michael H. Frost, *Ethos, Pathos, and Legal Audience*, in *Introduction to Classical Legal Rhetoric: A Lost Heritage* 57 (Ashgate Publ. Ltd. 2005) (cross referenced under *Pathos*).
34. Michael Frost, *Ethos, Pathos, and Legal Audience*, 99 *Dick. L. Rev.* 85 (1994) (cross referenced under *Pathos*).
35. Jerry Frug, *Argument as Character*, 40 *Stan. L. Rev.* 869 (1988).
36. Michael R. Smith, *Ethos in Legal Writing: Character and Good Will*, in *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* 101 (Aspen L. & Bus. 2002).
37. Michael R. Smith, *Evincing Intelligence in Legal Writing*, in *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* 127 (Aspen L. & Bus. 2002).
38. Ronald J. Waicukauski, JoAnne Epps & Paul Mark Sandler, *Ethos and the Art of Argument*, 26 *Litig.* 31 (No. 1, 1999).

D. Classical rhetoric and large-scale organization in persuasive legal writing

Another basic tenet of classical rhetoric is the concept of *dispositio*, or the effective arrangement or organization of the material to be presented by an advocate to an audience.¹ The following works explore the relationship (and the compelling overlap) between the ancient concept of *dispositio* and the organization of modern court briefs.

39. Michael H. Frost, *Brief Rhetoric: The Organization of Argument*, in *Introduction to Classical Legal Rhetoric: A Lost Heritage* 44 (Ashgate Publ. Ltd. 2005).
40. Michael Frost, *Brief Rhetoric — A Note on Classical and Modern Theories of Forensic Discourse*, 38 *U. Kan. L. Rev.* 411 (1990).

E. Rhetorical figures of speech in persuasive legal writing

In addition to analyzing substantive modes of persuasion and how best to organize that substance, classical rhetoricians also explored in detail how writing or speaking *style* can impact the persuasiveness of an argument. Although classical rhetoricians did study many basic topics of style such as grammar, diction, and sentence structure, they also spent a great deal of time and energy dissecting the most mysterious and elusive component of style, *eloquence*. In studying what makes eloquent language eloquent, classical rhetoricians have identified and analyzed over 200 "figures of speech."² A

¹Edward P. J. Corbett & Robert J. Connors, *Classical Rhetoric for the Modern Student* 20 (4th ed., Oxford U. Press 1999).

²*Id.* at 378.

figure of speech is a linguistic device that achieves eloquence by intentionally deviating from the normal or literal use of language. Many of these figures of speech — such as metaphor, personification, and alliteration — are fairly well known by most people. Others, however — such as polysyndeton and antimetabole — are more obscure. Nonetheless, classical rhetoricians' materials on figures of speech offer a treasure trove of information for those who wish to systematically study the art of eloquent style. Not surprisingly, many modern legal writing scholars have been drawn to the classical rhetoricians' materials on figures of speech and have adapted and applied them to modern legal advocacy.

1. *Rhetorical figures of speech in persuasive legal writing generally*

The works listed below offer introductory information about rhetorical figures of speech and their use in contemporary persuasive legal writing.

41. Anne Enquist & Laurel Currie Oates, *Eloquence*, in *Just Writing: Grammar, Punctuation, and Style for the Legal Writer* 159 (2d ed., Aspen Publishers 2005).
42. Bryan A. Garner, *Rhetorical Figures in Law*, in *The Elements of Legal Style* 149 (2d ed., Oxford U. Press 2002).
43. Thomas R. Haggard, *Rhetoric in Legal Writing — Part I*, 8–June S.C. Law. 13 (1997).
44. Thomas R. Haggard, *Rhetoric in Legal Writing — Part II*, 9–Aug. S.C. Law. 13 (1997).
45. Thomas R. Haggard, *Rhetoric in Legal Writing — Part III*, 9–Oct. S.C. Law. 13 (1997).
46. Susan McCloskey, *Rhetoric is Part of the Lawyer's Craft*, 74–Dec. N.Y. St. B.J. 8 (2002).
47. Richard A. Posner, *Judicial Opinions as Literature*, in *Law and Literature* 255 (Harv. U. Press 1998).
48. Jane N. Richmond, *Writing with Flair*, in *Legal Writing: Form & Function* 117 (NITA 2002).
49. Michael R. Smith, *Beyond Metaphor and Simile: The Use of Other Figures of Speech in Persuasive Writing*, in *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* 223 (Aspen L. & Bus. 2002).
50. Craig D. Tindall, *Rhetorical Style*, 50 Jun. Fed. Law. 24 (2003).
51. Henry Weihofen, *A Touch of Eloquence*, in *Legal Writing Style* 310 (2d ed., West Publ. Co. 1980).

2. *Metaphor in persuasive legal writing*

The works listed in the prior section address rhetorical figures of speech as a group generally. Some individual figures of speech, however, have attracted significant attention unto themselves. One such figure of speech is the metaphor. Without a doubt, metaphor has been the most popular figure to be singled out for detailed examination. This was true for ancient

rhetoricians, and this is true for their modern counterparts. Below is a list of works that explore the many wonders of metaphor in the context of modern legal writing and advocacy.

52. Jim Accardi, *Winning Closing Arguments With Narrative Metaphor*, 33–Dec. Prosecutor 38 (1999).
53. Maureen Archer & Ronnie Cohen, *Sidelined on the (Judicial) Bench: Sports Metaphors in Judicial Opinions*, 35 Am. Bus. L.J. 225 (1998).
54. Linda L. Berger, *What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ALWD 169 (2004).
55. Haig Bosmajian, *Metaphor and Reason in Judicial Opinions* (S. Ill. U. Press 1992).
56. Michael H. Frost, *Greco-Roman Analysis of Metaphoric Reasoning*, in *Introduction to Classical Legal Rhetoric: A Lost Heritage* 85 (Ashgate Publ. Ltd. 2005).
57. Michael Frost, *Greco-Roman Analysis of Metaphoric Reasoning*, 2 Leg. Writing 113 (1996).
58. Bryan A. Garner, *A Dictionary of Modern Legal Usage* 558 (Metaphors) (2d ed., Oxford U. Press 1995).
59. Bernard J. Hibbitts, *Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse*, 16 Cardozo L. Rev. 229 (1994).
60. Chad M. Oldfather, *The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions*, 27 Conn. L. Rev. 17 (1994).
61. Thomas Ross, *Metaphor and Paradox*, 23 Ga. L. Rev. 1053 (1989).
62. Michael R. Smith, *The Power of Metaphor and Simile in Persuasive Writing*, in *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* 179 (Aspen L. & Bus. 2002).
63. Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 Wis. Women's L.J. 225 (1995).
64. Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. Pa. L. Rev. 1105 (1989).
65. Michael J. Yelnosky, *If You Write It, (S)he Will Come: Judicial Opinions, Metaphors, Baseball, and "The Sex Stuff,"* 28 Conn. L. Rev. 813 (1996).

3. *Literary and historical allusion in persuasive legal writing*

Another specific figure of speech that has attracted some individual attention by legal writing scholars is literary (and historical) allusion. The following is a list of recent works on this topic.

66. William Domnarski, *Shakespeare in the Law*, 67 Conn. B.J. 317 (1993).

67. Bryan A. Garner, *A Dictionary of Modern Legal Usage* 531 (Literary Allusion) (2d ed., Oxford U. Press 1995).
68. Jane N. Richmond, *Literary and Historical References*, in *Legal Writing: Form & Function* 130 (NITA 2002).
69. Michael R. Smith, *The Functions of Literary References in Persuasive Writing: A Multi-Disciplinary Analysis*, in *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* 9 (Aspen L. & Bus. 2002).
70. Lis Wiehl, *Judges and Lawyers Are Not Singing From the Same Hymnal When It Comes to Allowing the Bible in the Courtroom*, 24 Am. J. Tr. Advoc. 273 (2000).
71. Charles Alan Wright, *Literary Allusion in Legal Writing: The Haynsworth-Wright Letters*, 1 Scribes J. Leg. Writing 1 (1990).

4. Other specific figures of speech in persuasive legal writing

Below is a list of other works that explore individual figures of speech and their relevance to contemporary legal writing. The citation to each work identifies the specific figure of speech the work addresses.

72. Michael H. Frost, *Greco-Roman Elements of Forensic Style*, in *Introduction to Classical Legal Rhetoric: A Lost Heritage* 109 (Ashgate Publg. Ltd. 2005) (discussing the rhetorical stylistic devices of antithesis and parallelism).
73. Bryan A. Garner, *A Dictionary of Modern Legal Usage* 44 (Alliteration) (2d ed., Oxford U. Press 1995).
74. Bryan A. Garner, *A Dictionary of Modern Legal Usage* 468 (Irony) (2d ed., Oxford U. Press 1995).
75. Bryan A. Garner, *A Dictionary of Modern Legal Usage* 718 (Puns) (2d ed., Oxford U. Press 1995).
76. Bryan A. Garner, *A Dictionary of Modern Legal Usage* 808 (Similes) (2d ed., Oxford U. Press 1995).
77. Judith A. Harris, *Recognizing Legal Tropes: Metonymy as Manipulative Mode*, 34 Am. U. L. Rev. 1215 (1985) (analyzing the use of the rhetorical device — metonymy — in legal discourse).
78. Karen Larsen, *Say It Again*, 60-Apr. Or. St. B. Bull. 39 (2000) (discussing rhetorical forms of repetition).
79. David M. Zlotnick, *The Buddha's Parable and Legal Rhetoric*, 58 Wash. & Lee L. Rev. 957 (2001) (analyzing the use of parables in legal scholarship).

F. Rhetorical analysis of existing legal texts

All of the works listed so far in this bibliography have as their focus a specific topic or group of topics from classical rhetoric and the relevance of that topic or group of topics to modern-day legal writing and advocacy. The central theme of these works is to educate their readers on a specific rhetorical principle or set of principles, and any reference in these works to a specific

legal text — like a specific judicial opinion — is merely there to illustrate the rhetorical principle under discussion.

The works listed below are different because they focus on "applied classical rhetoric." That is, rather than focusing on a specific rhetorical principle, these works focus on a specific legal text or set of legal texts and analyze whatever rhetorical devices are used in the text. Rather than being driven by a specific rhetorical principle or set of principles, these works are driven by the *target* of the rhetorical analysis. For some of these works, the target is a single legal text, like a specific judicial opinion by a specific judge. For others, the target is a group of related texts, like the writings of a single author, the writings of an identifiable group of authors, or the writings on a specific doctrinal topic. Whatever the target may be, works of this nature apply the entire body of classical rhetoric doctrine (or a significant part thereof) to the specifically targeted material and identify the various rhetorical strategies that may exist in that material. This type of scholarship is called "rhetorical analysis scholarship." The citation to each work below includes a brief explanation of the target of that work's rhetorical analysis.

80. Marie A. Failing, *Not Mere Rhetoric: On Wasting or Claiming Your Legacy*, *Justice Scalia*, 34 U. Toledo L. Rev. 425 (2003) (engaging in a rhetorical analysis of the judicial opinions of Supreme Court Justice Antonin Scalia).

81. Elizabeth Fajans & Mary R. Falk, *Shooting from the Lip: United States v. Dickerson, Role [Im]morality, and the Ethics of Legal Rhetoric*, 23 U. Haw. L. Rev. 1 (2000) (cross referenced under Ethics and Classical Rhetoric) (setting out a rhetorical analysis of the judicial opinions, parties' briefs, and scholarly comment generated from the case of *United States v. Dickerson*, in which the Fourth Circuit Court of Appeal denied the applicability of the *Miranda* rule to a criminal defendant (the decision was later overruled by the Supreme Court)).

82. Michael H. Frost, *The Rhetoric of Dissent: A Greco-Roman Analysis*, in *Introduction to Classical Legal Rhetoric: A Lost Heritage* 119 (Ashgate Publ. Ltd. 2005) (engaging in a rhetorical analysis of Justice Scalia's dissenting opinion in the Supreme Court case of *United States v. Virginia*, in which a majority of the Court required the previously all-male Virginia Military Institute to admit females).

83. Michael Frost, *Justice Scalia's Rhetoric of Dissent: A Greco-Roman Analysis of Scalia's Advocacy in the VMI Case*, 91 Ky. L.J. 167 (2002) (same as the previous item).

84. Yury Kapgan, *Of Golf and Ghouls: The Prose Style of Justice Scalia*, 9 Leg. Writing 71 (2003) (presenting a rhetorical analysis of the judicial writings of Justice Scalia).

85. Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. Rev. 75 (1998) (engaging in a

rhetorical analysis of United States Supreme Court opinions in the doctrinal area of federal jurisdiction).

86. Andrew Jay McClurg, *Logical Fallacies and The Supreme Court: A Critical Examination of Justice Rehnquist's Decisions in Criminal Procedure Cases*, 59 U. Colo. L. Rev. 741 (1988) (setting out a rhetorical analysis of Justice Rehnquist's judicial opinions in the area of criminal procedure).

87. Kathryn M. Stanchi, *Feminist Legal Writing*, 39 S.D. L. Rev. 387 (2002) (setting out a rhetorical analysis of the published works of several feminist legal scholars).

G. Ethics and classical rhetoric in persuasive legal writing

The final grouping under classical rhetoric includes works that explore the moral and ethical implications of rhetorical strategies in the legal context.

88. Sherman J. Clark, *The Character of Persuasion*, 1 Ave Maria L. Rev. 61 (2003).

89. Elizabeth Fajans & Mary R Falk, *Shooting from the Lip: United States v. Dickerson, Role [Im]morality, and the Ethics of Legal Rhetoric*, 23 U. Haw. L. Rev. 1 (2000) (cross referenced under Rhetorical Analysis of Existing Legal Texts).

90. Jack L. Sammons, *The Radical Ethics of Legal Rhetoricians*, 32 Val. U. L. Rev. 93 (1997).

91. Michael R. Smith, *The Ethics and Morality of Persuasion: Justifying the Life of a Professional Advocate*, in *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* 313 (Aspen L. & Bus. 2002).

92. James B. White, *Plato's Gorgias and the Modern Lawyer: A Dialogue on the Ethics of Argument*, in *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* 215 (U. Wis. Press 1985).

II. Contemporary Rhetoric

Contemporary rhetoric is an outgrowth of the concept from modern philosophy that reality is not "fixed," but rather is "constructed." Elizabeth Fajans and Mary R. Falk explain:

The New Rhetoric does not regard experience as a "given," that is, as simply there to be retrieved by the subject. Following Kant, it conceptualizes experience and reality as "constructed," i.e., as a synthesis of the data of experience and the activity of the subject in perceiving, structuring, relating, and interpreting that data. Experience or reality is therefore not a result of the encounter between subject and object, but is the presupposition of it. And because language is analogous in this regard to experience, the New Rhetoric does not conceive it as a static by-product of the interaction between the person and the world. Rather, language creates the

meaning of the person and the world. As such, language neither mirrors nor reveals truth; it defines or makes truth possible.³

As Fajans and Falk indicate, contemporary rhetoric views discourse as "creating meaning" rather than merely describing it. This general philosophy has led to numerous new theories in the fields of contemporary rhetoric and composition. Some of these theories have, in recent years, been applied to legal discourse. The three most significant are Modern Argument Theory, "Writing as a Process" Theory, and "Discourse Community Acculturation" Theory. Each of these theories is briefly described below, together with lists of recent works that explore the implications of these theories on contemporary legal writing and advocacy.

A. Modern argument theory

Modern argument theory recognizes the indeterminacy of language and asserts that, outside the realms of mathematics and formal logic, arguments are not provable in the absolute. According to this theory, in most real-world arenas (such as various social situations or societal institutions), an advocate offers in support of his or her position not an incontrovertible argument, but merely a reasonable argument that the advocate hopes the decisionmaker will find more reasonable than competing arguments. Because arguments are based on language, and because language is susceptible to alternative interpretations, universal proofs are not possible. The goal of argument and persuasion in most contexts is not to establish a conclusion that is universally and objectively valid; rather the goal is to persuade the decisionmaker that the advocated position is more probable and reasonable than the competing position.⁴ This view of argumentation has had a major impact on how persuasion theorists view their subject. Acknowledging the informal nature of persuasion, modern theorists stress such things as the "process" of persuasion, the importance of an advocate understanding his or her particular audience, and the role of extralogical variables such as values and motives in decisionmaking.

1. *Background reading in modern argument theory*

³ Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 *Cornell L. Rev.* 163, 174 (1993) (citing James A. Berlin, *Contemporary Composition: The Major Pedagogical Theories*, in *The Writing Teacher's Sourcebook* 47, 55-58 (Gary Tate & Edward P.J. Corbett eds., 2d ed. 1988)).

⁴ Kurt M. Saunders, *Law as Rhetoric, Rhetoric as Argument*, 44 *J. Leg. Educ.* 566, 567 (1994).

It is beyond the scope of this bibliography to provide a comprehensive list of background works on modern argument theory. Nevertheless, a few of the ground-breaking works in this area are listed below.

93. Lloyd F. Bitzer, *The Rhetorical Situation*, 1 *Phil. & Rhetoric* 1 (1968).
94. Kenneth Burke, *A Rhetoric of Motives* (U. Cal. Press 1969).
95. Chaim Perelman & L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* (John Wilkinson & Purcell Weaver trans., U. Notre Dame Press 1969).
96. Stephen E. Toulmin, *The Uses of Argument* (Cambridge U. Press 1958).

2. Modern argument theory in legal writing and advocacy

Because argumentation in the law is based on language (as opposed to mathematical proofs), it is exactly the type of rhetorical situation to which modern argument theory speaks. Consequently, the theories of modern argument scholars are particularly relevant to legal advocacy. The following works explore some of the implications of modern argument theory for persuasive legal writing and argumentation.

97. Robert Batey, *Parker v. Levy: A Primer in Judicial Persuasion*, 49 *J. Leg. Educ.* 97 (1999).
98. Sherman J. Clark, *Literate Lawyering: An Essay on Imagination and Persuasion*, 30 *Rutgers L.J.* 575 (1999).
99. Delia B. Conti, *Narrative Theory and the Law: A Rhetorician's Invitation to the Legal Academy*, 39 *Duq. L. Rev.* 457 (2001).
100. Jennifer Fowler-Hermes, *Improving Persuasive Effects in the Courtroom: An Application of Rhetorical Theory*, 24 *Am. J. Tr. Advoc.* 313 (2000).
101. David N. Haynes, *The Language and Logic of Law: A Case Study*, 35 *U. Miami L. Rev.* 183 (1981).
102. Donald H. J. Hermann, *Legal Reasoning as Argumentation*, 12 *N. Ky. L. Rev.* 467 (1985).
103. Anthony T. Kronman, *Rhetoric*, 67 *U. Cin. L. Rev.* 677 (1999).
104. Linda Levine & Kurt M. Saunders, *Thinking Like a Rhetor*, 43 *J. Leg. Educ.* 108 (1993) (cross referenced under Classical Rhetoric).
105. Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford U. Press 2005).
106. Thomas Michael McDonnell, *Playing Beyond the Rules: A Realist and Rhetoric-Based Approach to Researching the Law and Solving Legal Problems*, 67 *UMKC L. Rev.* 285 (1998).
107. Francis J. Mootz III, *Rhetorical Knowledge in Legal Practice and Theory*, 6 *S. Cal. Interdisc. L.J.* 491 (1998).

108. Mary Massaron Ross, *Better Advocacy Through Jurisprudential Analysis*, 77 Mich. B.J. 28 (1998).
109. Kurt M. Saunders, *Law as Rhetoric, Rhetoric as Argument*, 44 J. Leg. Educ. 566 (1994).
110. Douglas N. Walton, *A Pragmatic Model of Legal Disputation*, 73 Notre Dame L. Rev. 711 (1998).
111. Paul T. Wangerin, *A Multidisciplinary Analysis of the Structure of Persuasive Arguments*, 16 Harv. J.L. & Pub. Policy 195 (1993).

B. Legal reading and writing as processes for constructing meaning

The second major modern rhetorical theory that has been applied to the discipline of legal writing is the "Writing as a Process" Theory. Traditional approaches to reading and writing viewed these activities as merely the acts of retrieving meaning (reading) and communicating it (writing). Modern "process" theory rejects these notions and asserts that reading and writing are dynamic and recursive processes through which a reader/writer interacts with text and "constructs" meaning.

1. *Legal reading and writing as processes*

The following works explore how "process theory" — viewing reading and writing as processes by which we construct meaning — affects the way legal writing professionals view and teach legal writing.

112. Christopher M. Anzidei, *The Revision Process in Legal Writing: Seeing Better to Write Better*, 8 Leg. Writing 23 (2002).
113. Mary Beth Beazley, *Better Writing, Better Thinking: Using Legal Writing Pedagogy in the "Casebook" Classroom (Without Grading Papers)*, 10 Leg. Writing 23 (2004).
114. Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. Leg. Educ. 155 (1999).
115. Linda L. Berger, *A Reflective Rhetorical Model: The Legal Writing Teacher as Reader and Writer*, 6 Leg. Writing 57 (2000).
116. Jo Anne Durako et al., *From Product to Process: Evolution of a Legal Writing Program*, 58 U. Pitt. L. Rev. 719 (1997).
117. Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 Cornell L. Rev. 163 (1993).
118. Jane Kent Gionfriddo, *The "Reasonable Zone of Right Answers": Analytical Feedback on Student Writing*, 40 Gonz. L. Rev. 427 (2005).
119. Jessie C. Grearson, *Teaching the Transitions*, 4 Leg. Writing 57 (1998).
120. Leigh Hunt Greenhaw, *"To Say What the Law Is": Learning the Practice of Legal Rhetoric*, 29 Val. U. L. Rev. 861 (1995).

121. Mary Kate Kearney & Mary Beth Beazley, *Teaching Students How to "Think Like Lawyers": Integrating Socratic Method with the Writing Process*, 64 Temp. L. Rev. 885 (1991).
122. Philip C. Kissam, *Thinking (By Writing) About Legal Writing*, 40 Vand. L. Rev. 135 (1987).
123. Pamela Lysaght & Cristina D. Lockwood, *Writing-Across-the-Law-School Curriculum: Theoretical Justifications, Curricular Implications*, 2 J. ALWD 73 (2004).
124. Ellie Margolis & Susan L. DeJarnatt, *Moving Beyond Product to Process: Building a Better LRW Program*, 46 Santa Clara L. Rev. 93 (2005).
125. Laurel Currie Oates, *Beyond Communication: Writing as a Means of Learning*, 6 Leg. Writing 1 (2000).
126. Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 Neb. L. Rev. 561 (1997).
127. Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 Sw. L.J. 1089 (1986).
128. J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 Wash. L. Rev. 35 (1994) (cross referenced under Law as a Discourse Community).
129. Nancy Soonpaa, *Using Composition Theory and Scholarship to Teach Legal Writing More Effectively*, 3 Leg. Writing 81 (1997).
130. Christine M. Venter, *Analyze This: Using Taxonomies to "Scaffold" Students' Legal Thinking and Writing Skills*, 57 Mercer L. Rev. 621 (2006).
131. Gerald Wetlaufer, *Rhetoric and its Denial in Legal Discourse*, 76 Va. L. Rev. 1545 (1990).

2. Critical legal reading

One by-product of the process model for reading and writing has been increased attention on critical reading skills. The following works explore the topic of critical reading in the context of law school and legal practice.

132. Brook K. Baker, *Transcending Legacies of Literacy and Transforming the Traditional Repertoire: Critical Discourse Strategies for Practice*, 23 Wm. Mitchell L. Rev. 491 (1997).
133. Scott Burnham, *Critical Reading of Contracts*, 23 Leg. Stud. Forum 391 (1999).
134. Debra Moss Curtis & Judith R. Karp, *"In a Case, In a Book, They Will Not Take a Second Look!" Critical Reading in the Legal Writing Classroom*, 41 Willamette L. Rev. 293 (2005).
135. Peter Dewitz, *Legal Education: A Problem of Learning From Text*, 23 N.Y.U. Rev. L. & Soc. Change 225 (1997).
136. Peter Dewitz, *Reading Law: Three Suggestions for Legal Education*, 27 U. Toledo L. Rev. 657 (1996).

137. Ruth Ann McKinney, *Reading Like a Lawyer: Time-Saving Strategies for Reading Law Like a Lawyer* (Carolina Academic Press 2005).
138. Christina L. Kunz, *Teaching First-Year Contracts Students How to Read and Edit Contract Clauses*, 34 U. Toledo L. Rev. 705 (2003).
139. Laurel Currie Oates, *Beating the Odds: Reading Strategies of Law Students Admitted Through Alternative Admissions Programs*, 83 Iowa L. Rev. 139 (1997).

C. Law as a discourse community

The third major theory of contemporary rhetoric that has been applied to legal writing in recent scholarship is the "Discourse Community Acculturation" Theory. This theory asserts that separate disciplines — or discourse communities — have jargon and language conventions that are unique unto themselves and that learning to write in a new discipline (like law) involves an "acculturation" process. The below works explore the implications of this theory on the teaching of writing to new members of the legal discourse community (i.e., law students).

140. Brook K. Baker, *Language Acculturation Process and the Resistance to In"doctrine"ation in the Legal Skills Curriculum and Beyond: A Commentary on Mertz's Critical Anthropology of the Socratic, Doctrinal Classroom*, 34 John Marshall L. Rev. 131 (2000).
141. Susan L. DeJarnatt, *Law Talk: Speaking, Writing, and Entering the Discourse of Law*, 40 Duq. L. Rev. 489 (2002).
142. Marie A. Monahan, *Towards a Theory of Assimilating Law Students into the Culture of the Legal Profession*, 51 Cath. U. L. Rev. 215 (2001).
143. Terrill Pollman, *Building A Tower of Babel or Building a Discipline? Talking About Legal Writing*, 85 Marq. L. Rev. 887 (2002).
144. Jill J. Ramsfield, *Is "Logic" Culturally Based? A Contrastive, International Approach to the U.S. Law Classroom*, 47 J. Leg. Educ. 157 (1997).
145. J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 Wash. L. Rev. 35 (1994) (cross referenced under Legal Writing as a Process).
146. Lorne Sossin, *Discourse Politics: Legal Research and Writing's Search for a Pedagogy of Its Own*, 29 New Eng. L. Rev. 883 (1995).
147. Kathryn M. Stanchi, *Resistance is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices*, 103 Dick. L. Rev. 7 (1998).
148. Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 Leg. Writing 1 (1991).

D. James Boyd White — lawyering generally as a rhetorical activity

No listing of works on modern rhetoric theory and the law would be complete without a reference to the works of James Boyd White. Professor White has written numerous works that explore the rhetorical nature of law and how lawyering generally is a rhetorical activity. Below is a list of just a few of his works.

149. James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (U. Wis. Press 1989).

150. James Boyd White, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (Little, Brown & Co. 1973).

151. James Boyd White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (U. Chi. Press 1985).