FAMOUS COURT SPEACHES

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Abstract: Appreciating the art of persuasion truly begins with Aristotle's Rhetoric. Although it is not light reading, Rhetoric is deeply rewarding. Aristotle observed what so many lawyers learn the hard way—that audiences differ in attitudes, beliefs, and preconceived notions about the matter at hand: An argument or presentation before one judge may fail before another. Just as each receiver is different, each argument should be unique, Aristotle insisted. The capacity to match your rhetoric to your audience is well-served by a sophisticated understanding of human nature, habits, desires, and emotions. For him government of the polis was most appropriately subject to incontestable principles, not localized argument and contingent decision making.

Using methods developed in anthropology, linguistics, psychology and other social sciences for the study of just such issues as those involved in testimonial style, it is possible to generate empirical answers to these questions of longstanding interest to the legal profession. This Article presents the findings of an empirical study developed by the authors to determine the influence of presentational style on juries functioning as decision makers and analyzes the significance of these findings. The Article concludes with proposals for dealing with the effects of presentational style on the process of communication in the courtroom.

The average trial lawyer lacks time to read Aristotle, Demosthenes, Cicero, or Quintilian. But most trial lawyers will not settle for being average. There is gold to be mined in Rhetoric, that dusty work of Aristotle's, along with the speeches of Demosthenes, and the works of their Roman heirs. Although these classical rhetoricians lived centuries ago in cultures very different from yours, their understanding of what makes a winning argument is timeless. Their techniques and steadfast belief in the rule of law are continually instructive and inspiring for modern trial lawyers. Spending time with the works of these sages will not only improve your performance in court, but also give you a deeper appreciation for the rich history of this profession.

Keywords: rhetoric, Aristotle, lawyer, Plato audience, judge, etc.

1. INTRODUCTION

Legal writers have long speculated about various aspects of human behavior. In the area of trial tactics, such speculation has focused on the probable effects of various trial events upon the thoughts and actions of judges, juries, witnesses and attorneys. Traditionally, writers concerned with tactical issues have offered suggestions based on their own experiences in trials and on their intuitions about human nature[130]. This Article, however, takes a new approach by bringing the observational, analytical and experimental methods of social science to bear on a question affecting trial tactics: the effect of variations in the presentational style of courtroom witnesses upon legal decision makers[131]. The rules of evidence control the content of testimony that may be introduced at trial. Those same rules, however, place relatively few constraints on how testimony is presented once it is deemed admissible. This freedom in testimonial style, together with the impact that a witness' demeanor has upon the reception of his testimony, makes the prediction and control of the witness' presentational style issues of importance to the practicing attorney[132].

To aid attorneys in this aspect of their trial responsibility, works on trial tactics enumerate the major stylistic variations that may arise in testimony and speculate on the possible effects of various styles on the reception of evidence by a judge or jury[133]. Although discussions of this sort are no doubt helpful in conveying the wisdom of accumulated advocacy experience, the development of techniques in the social sciences and the increasing

[130] F. Bailey & H. Rothblatr, "Successful techniques for criminal trials" (1971); J. Jeans, "Trial advocacy", (1975); R. Keeton, "Trial tactics and methods", (2d ed. 1973); J. Mcelhaney, "Effective trials, problems and materials", (1974); A. Morrill, "Trial diplomacy", (1971).

[131] "Presentational style" is a comprehensive term including both verbal and nonverbal behavior. The latter includes what is commonly termed "demeanor" or "presence." See note 3 infra. That presentational styles can and do have an impact on jurors is often the underlying assumption in other studies dealing with trial tactics and courtroom presentation. See, e.g., G. MILLER & N. FONTES, REAL VERSUS REEL: WHAT'S THE VERDICT 73 (1979).

[132] See, e.g., Mitsugi Nishikawa v. Dulles, 235 F.2d 135, 140 (9th Cir. 1956), rev'don other grounds, 356 U.S. 129 (1958); Broadcast Music, Inc. v. Havana Madrid Restaurant Corp., 175 F.2d 77 (2d Cir. 1949); Gilliams v. Waltsons Corp., 105 N.H. 373, 201 A.2d 107 (1964); People v. Carter, 37 N.Y.2d 234, 333 N.E.2d 177, 371 N.Y.S.2d 905 (1975).

[133] Techniques/or Conducting Cross Examination in F. BAILEY & H. ROTHBLAIT, stpra note 1, §§ 180-198; R. KEETON, supra note I, at 30-42 (preparing witnesses for direct examination).

application of these techniques to the study of courtroom behavior provide a more efficient and accurate means for gathering information about styles of testifying, for drawing conclusions about the effects of style on the reception of testimony by the jury and, ultimately, for developing recommendations about appropriate judicial responses to presentational phenomena. Using methods developed in anthropology, linguistics, psychology and other social sciences for the study of just such issues as those involved in testimonial style[134], it is possible to generate empirical answers to these questions of longstanding interest to the legal profession. This Article presents the findings of an empirical study developed by the authors to determine the influence of presentational style on juries functioning as decision makers and analyzes the significance of these findings. The Article concludes with proposals for dealing with the effects of presentational style on the process of communication in the courtroom.

This focus on the particular makes rhetoric suitable as a means of taking seriously the interdependent cultural and political nature of law. We can follow Luhmann, for these purposes, in understanding law as a series of discrete textual and verbal episodes recursively linked to other such moments by the requirement to show legal validity in distinguishing lawful from unlawful[135]. Thus, for example, pleadings for a case and the decision of a court itself, are all connected by chains of normative reference to previous such instances, including precedents, statutory enactments, and binding executive decrees. Each moment can be studied as an attempt to persuade a range of audiences of the legal soundness and factual appropriateness of the outcome and, more broadly, that the normative materials require this conclusion to be reached[136]. Rhetorical criticism draws us into the particular time and place of these moments of persuasion. It encourages us to take seriously the contingency of the outcome, the crafting of arguments, and the pressure of cultural and social forces upon them. As well as the scholar, the law teacher and her students can only benefit from opening-up inquiry in this way[137]. Rhetoric outflanks orthodox doctrinal analysis which, as we know, cultivates a certain blindness as to the identity of the speaker and as to the constitution and location of her audience, and which aims to condense the actual words of the judge or parliamentarian into a kernel of rules and principles, with much of what was actually said cast off as mere interpretive chaff[138]. Agency, creativity, and chance are given their due as they are not by legal formalism and structuralist social theory. Law is performance[139]. It is something we do, not something which we have as a result of what we do[140].

This understanding of law as argument and performance in the first instance also points to the manner in which rhetoric indexes law's politics. Let's go back to Plato. For him government of the polis was most appropriately subject to incontestable principles, not localized argument and contingent decision making[141]. As Jacques Rancie Áre put it, Plato proposed an `archipolitics', whereby the noisy to-and-fro of debate and disagreement would be stilled in favour of metaphysical contemplation[142]. This longing for order has ever since animated the schemes of rationalists seeking to subsume politics to some philosophy or other. An opposed formation, associated with Aristotle, favours republican forms of government, to which argument and, thus, rhetoric are central. Accordingly, not every dispute can or should be solved by rigorous philosophical logic[143]. Innovation and improvisation in responding to unforeseen situations are important values which are realized through context-bound deliberation. More than this, if life in community is the ultimate end of the person, then public debate about the welfare of the community is the highest calling upon its citizens and the capacity to speak and be listened to is the key token of their membership of the political community[144].

[134] Aronson & Carlsmith, Experimentation in Social Psychology, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 1-79 (G. Lindzey & E. Aronson eds. 1968). But see Bermant, McGuire, McKinley & Salo, The Logic of Simulation in Jury Research, 1 CRIM. JUSTICE AND BEHAVIOR 224 (1974).
[135] N. Luhmann, Das Recht der Gesellschaft (1993) 165 ff.
[136] J. Harrington, Towards a Rhetoric of Medical Law (2017) ch. 2; see, further, M. King and C. Thornhill, Niklas Luhmann's Theory of Politics and Law (2003) 48.
[137] G. Watt, `The Art of Advocacy: Renaissance of Rhetoric in the Law School' (2018) 12 Law and Humanities 116.
[138] A.W.B. Simpson, `The Common Law and Legal Theory' in Oxford Essays in Jurisprudence (Second Series), ed. A.W.B. Simpson (1973) 99.
[139] S. Levinson and J.M. Balkin, `Law, Music, and Other Performing Arts' (1991) 139 University of Pennsylvania Law Rev. 1597; S. Ramshaw, `The Paradox of Performative Immediacy: Law, Music, Improvisation' (2013) 12 Law, Culture and the Humanities 6.
[140] A. Hutchinson, It's All in the Game. A Non-Foundationalist Account of Law and Adjudication (2000) 193.
[141] Plato, Protagoras (1996) 356dm - e.
[142] J. RancieÁre, Disagreement. Politics and Philosophy (1999) 70.
[143] Kronman, op. cit., n. 5, p. 692.
[144] H. Arendt, The Human Condition (1959) 53.

2. DISCUSSIONS

Rhetoric is the art of selecting the most effective means of persuasion, which ultimately translates to the refinement of your own style of expressing yourself in the courtroom. Words are important, yes, but it's how you use them that matters most[145]. The three most important ingredients of a well-crafted argument, as suggested by Aristotle, are ethos (the listener's perception of the speaker's character), logos (logic), and pathos (emotion). Allow these three principles to guide you as you polish your individual style—perhaps the most important rhetorical element of persuasion. Words can be symphonic, and elevate your emotions. Words can also be clumsy tools that cut your very own fingers. Carefully selecting your choice of words—and arranging them to achieve eloquence—is the essence of style.

Now take, for example, two personal injury cases. Both trial lawyers seek damages in their closing arguments. Imagine one lawyer exhorting, "Let's turn to the measure of damages." Now imagine the other quietly stating, "Let's turn to the grim, grueling audit of pain." Which style is most effective? It is impossible to evaluate without first knowing to whom these lawyers are speaking. Tailoring the argument to the listener is, therefore, a significant principle of rhetoric. So, in choosing your style, you might select the first version if arguing before a judge, but—if arguing before a jury—the second version may serve you well, if you believe members would be receptive. Remember: Choosing the appropriate style is important. But it is perhaps even more important to know when to alter that style[146].

In a now famous 1982 article, "The Winds of Change: Thomas Kuhn and the Revolution in the Teaching of Writing,[147]" Maxine Hairston outlines the new paradigm for the teaching of writing. Drawing from Thomas Kuhn's notion of a "paradigm shift," the change that occurs in a discipline "when old methods won't solve new problems,"[148] Hairston compares the old method of teaching writing, known as the current-traditional paradigm, to the emerging method, the new rhetoric. The crucial difference between the current-traditional paradigm, which most of us experienced as students, and the new rhetoric is that the current-tradition paradigm focuses on the composed product rather than on the composing process.

Influenced, knowingly or not, by the current-traditional paradigm, teachers assign paper topics, students write the papers outside of class and turn them in, teachers grade and comment on the papers and return them to the students. This procedure is repeated for the duration of the course. Kinds of writing are frequently divided into four modes: exposition, description, narration, and argument. Students are expected to write a given assignment in one or another of these modes. The stress on the modes of discourse results in a stress on the form of the writing. It neglects the role of the reader and the writer, seeing writing as form rather than as conversation.

The writer's role in producing the text remains mysterious, and a tacit assumption of the current-traditional paradigm is vitalism, which stresses the natural powers of the mind and "leads to a repudiation of the possibility of teaching the composing process."[149] The composing process is a creative act not susceptible to conscious control by formal procedures. "The writer is, in a sense, at the mercy of his thoughts. He does not direct them at this or that point; instead, he follows them with more thoughts, spontaneously, naturally. It is hard to say whether he has the thoughts or they have him."[150] The composing process is thus not teachable, and writing teachers have relied on the "frequent writing followed by careful criticism"[151] method. "The teaching of composition proceeds for both students and teachers as a metaphysical or, at best, a wholly intuitive endeavor."[152]

Hairston points out three other misconceptions of the current-traditional paradigm: "writers know what they are going to say before they begin to write"[153]; the writing process is linear, proceeding systematically from prewriting to writing to revising; and teaching editing is really all a writing teacher can do[154]. These same misconceptions flaw the way legal writing is taught. Specific problems are detailed in a later section. Despite the lengthy hegemony of the current-traditional paradigm, it has fallen on hard times. The current-traditional paradigm has been criticized for failing to provide adequate instruction at "the 'prewriting stage' of the composing process and in the analytical and

[145] See chapter 9, Ronald J. Waicukauski, Paul Mark Sandler, and JoAnne A. Epps, The 12 Secrets of Persuasive Argument (ABA Publishing 2009).
[146] Jeffrey Collin's book review of Phillippe Desan's Montaigne: A Life, Wall Street Journal, January 28, 2017.
[147] Hairston, The Winds of Change: Thomas Kuhn and the Revolution in the Teaching of Writing, 33 C. COMPOSITION & CoMM. 76 (1982).
[148] Id. at 76.
[149] Young, Paradigms and Problems: Needed Research in Rhetorical Invention, in RESEARCH IN COMPOSING 29, 31 (1978).
[150] Id. at 32.
[151] Young, supra note 16, at 33.
[152] J. EMIG, THE COMPOSING PROCESS OF TWELFTH GRADERS 1 (1971).
[153] Hairston, supra note 14, at 78.
[154] Ibidem.

synthetic skills necessary for good thinking."[155] The failure of the current-traditional method to teach students to write well is evidenced by the ubiquity of complaints about the lack of writing skills in nearly all students. As a result, a new field has arisen called the new rhetoric, which rejects the assumptions and methods of the current-traditional paradigm.

Select carefully and tailor your language to your listeners so that your style choices do not backfire. During closing argument for a jury trial in Los Angeles, defense counsel from Baltimore once used the term "waterman" in an effort to come across as down to earth. However, the jury had no idea what that word meant. While those from Baltimore know that a "waterman" is one who fishes the Chesapeake Bay, this West Coast jury was confused[156]. Word choice clearly matters. The right choice can make you relatable; the wrong one can just as easily alienate the listener. With diligence, you can improve your style. While some have natural born talent as advocates, many of the best have perfected their skills through hard work and practice. Remember Demosthenes? He practiced speaking with pebbles under his tongue to eradicate his stutter, and is now often regarded as the supreme example of the perfect advocate. His Philippics against Philip II of Macedon are legendary. Woodrow Wilson practiced his speeches alone in the woods, carefully crafting his language over time. Winston Churchill spent hours working on and practicing his speeches. Often, listeners thought Churchill was speaking extemporaneously. He was not. His speeches were the result of a deliberate choice of style.

Ultimately, style is personal so you should develop one that is your own. Regardless of which words you choose, always strive for clarity with logic and emotion when appropriate. So how can you polish your style? One effective means is to study the classical rhetorical figures of speech known as schemes and tropes. An example of a scheme is when you change the traditional—or expected— order of words in a sentence for effect or drama, such as: "A great lawyer was Hank." Tropes are figures of speech that occur when you change the significance of the words in a sentence. The most familiar examples of tropes are metaphors and similes. Metaphors are implied comparisons between two things that are unalike, but that have something in common: "The defendant's case went down in flames." A metaphor transforms a word or phrase from its literal meaning into something else. A simile, however, uses "like" or "as" to explicitly compare two things that are not alike: "These facts are clear as a fire bell in the night." The proper use of schemes and tropes will add zest to your courtroom arguments, and will enhance your arguments and the testimony of your witnesses, should counsel help them in expressing their answers with "style."[157]

Once anthropological and linguistic procedures had been used to identify the powerful and powerless styles as forms of in-court testimony, the methods of experimental social psychology were used to investigate the consequence of each style on the reception of the testimony by the jury. That is, having found that these two styles exist in actual courtroom testimony, the next step was to determine whether witnesses using one style were in fact perceived differently than witnesses using the other style. This determination involved exposing a substantial number of people to versions of testimony that differed only in testimonial style. Because it was possible to assure with a high degree of certainty that there were no apriori differences between those individuals who heard one version of the testimony and those who heard another version[158], any differences in perception that were observed after the testimony had been presented could be attributed unequivocally to stylistic differences in the testimony.

3. CONCLUSION

Introduction (or re-introduction) to rhetoric for socio-legal scholars and a brief demonstration of is a potential in the specific context of mental capacity law. Our aim has been to show that rhetorical categories provide a useful framework for analysing legal communications in detail, and for clarifying difficult questions regarding inequality, respect, and participation. We have showcased both classical and critical approaches in doing so. Classical rhetoric draws our attention to specific interventions and the terms in which they are cast. It is an instrument of what Michael Calvin McGee called `cultural surgery', revealing the common sense, the collectively produced emotions, and the discursive forms of authority which are dominant in a given era, or in a given discipline (like law) and its subdisciplines[159].

[155] Lauer, The Teacher of Writing, 27 C. COMPOSITION & COMM. 341, 341 (1976).
[156] A.W.B. Simpson, `The Common Law and Legal Theory' in Oxford Essays in Jurisprudence (Second Series), ed. A.W.B. Simpson (1973) 99.
[157] Stephen Saltzburg, Trial Tactics, 54 (3rd ed. 2012).
[158] D. CAMPBELL & J. STANLEY, EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH (1963).
[159] M.C. McGee, `Text, Context, and the Fragmentation of Contemporary Culture' (1990) 54 Western J. of Speech Communication 274.

Critical rhetoric invites us to consider what SeÂamus Heaney called `government of the tongue': the ethics of speech situations in pluralistic and antagonistic societies, quite different from the bounded and stable scene denoted by the Athenian agora and the Roman forum[160]. More than simply pointing out the fact that certain groups are marginalized or silenced, however, critics concern themselves with how this is realized tactically in discourse, and with how it is challenged. Law provides the infrastructure for these moves and countermoves. Statutory provisions and court procedure, as well as the practice of individual judges, shape the ability of people, such as those with disabilities, to speak effectively of their condition and of their wishes. They are included (or excluded) as addressees along with others such as the media and members of various professions. Changing these rules is a key stake in the politics of mental capacity and in many other fields.

Advocacy is an art, not a science. Understanding the fundamental elements of logic and emotion, and how to apply them in the art of persuasion, is a lifelong quest well worth pursuing. Like many aspects of trial practice, you learn not only by reading and studying, but also through experience by applying concepts—in this instance, logic and emotion—during actual presentations both at trial and on appeal.

REFERENCES

Aronson & Carlsmith, Experimentation in Social Psychology, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 1-79 (G. Lindzey & E. Aronson eds. 1968). But see Bermant, McGuire, McKinley & Salo, The Logic of Simulation in Jury Research, 1 CRIM. JUSTICE AND BEHAVIOR 224 (1974).

Arendt, H. (1959). The Human Condition 53.

Bailey, F. & Rothblatr, H. (1971). "Successful techniques for criminal trials"

Campbell, D. & Stanley, J. (1963).EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH

Dontcheva-Navratilova, O. (2015). 'Cross-cultural variation in citation practices: A comparative analysis of citations in Czech English-medium and international English-medium linguistics journals.' In: Plo Alastrué, R. and Pérez-Llantada, C. (eds) English as a Scientifi c and Research Language: Debates and Discourses. English in Europe, Vol. 2. Berlin and Boston: Mouton de Gruyter. 185-205.

Dontcheva-Navratilova, O. (2016). 'Cross-cultural variation in the use of hedges and boosters in academic discourse.' Prague Journal of English Studies 5 (1), 163-184.

Emig, J. (1971).THE COMPOSING PROCESS OF TWELFTH GRADERS 1

Harrington, J. (2003). Towards a Rhetoric of Medical Law (2017) ch. 2; see, further, M. King and C. Thornhill, Niklas Luhmann's Theory of Politics and Law (2003) 48.

Hairston, (1982).The Winds of Change: Thomas Kuhn and the Revolution in the Teaching of Writing, 33 C. COMPOSITION & CoMM. 76

Heaney, S. (1989).Government of the Tongue. The 1986 T.S. Eliot Memorial Lectures and Other Critical Writings

Hutchinson, A. (2000). It's All in the Game. A Non-Foundationalist Account of Law and Adjudication 193.

Jeans, J. (1975). "Trial advocacy",

Keeton, R. (1973). "Trial tactics and methods", (2d ed.);

Levinson, S., & Balkin, J.M. (1991). `Law, Music, and Other Performing Arts' 139 University of Pennsylvania Law Rev;

Luhmann, N. (n.d.). Das Recht der Gesellschaft (1993) 165 ff.

Lauer, (1976).The Teacher of Writing, 27 C. COMPOSITION & COMM. 341, 341

Mcelhaney, J.(1974). "Effective trials, problems and materials";

Miller, G., & Fontes, N. (1979). "REAL versus reel: WHAT'S THE VERDICT", pg. 73,

McGee, M.C. (1990). `Text, Context, and the Fragmentation of Contemporary Culture' 54 Western J. of Speech Communication 274.

Morrill, A. (1971). "Trial diplomacy",

Plato, Protagoras (1996) 356dm - e.

Povolná, R. (2016). 'A cross-cultural analysis of conjuncts as indicators of the interaction and negotiation of meaning in research articles.' Topics in Linguistics 17 (1), 45-63.

RancieÁre, J. (1999). Disagreement. Politics and Philosophy 70.

Ramshaw, S. (2013). `The Paradox of Performative Immediacy: Law, Music, Improvisation' 12 Law, Culture and the Humanities 6.

Saltzburg, S. (2015). "Trial Tactics", 54 (3rd ed.).

[160] S. Heaney, Government of the Tongue. The 1986 T.S. Eliot Memorial Lectures and Other Critical Writings (1989).

Simpson, A.W.B. (1973). `The Common Law and Legal Theory' in Oxford Essays in Jurisprudence (Second Series), ed. A.W.B. Simpson 99.
Watt, G. (2018). `The Art of Advocacy: Renaissance of Rhetoric in the Law School' 12 Law and Humanities 116.
Waicukauski, R.J., Sandler, P.M., & Epps, J.A. (2009). The 12 Secrets of Persuasive Argument (ABA Publishing).