The relevance of rhetoric

An introduction

Austin Sarat

Dealing in words is dangerous business . . . Dealing in long, vague, fuzzy-meaning words is even more dangerous business and most of the words The Law deals in are long, vague and fuzzy.

Fred Rodell

INTRODUCTION

Why should legal scholars be interested in rhetoric and argument? Law, some might say, is much too serious an enterprise for legal scholars to be distracted by flights of fancy like the analysis of rhetoric. There are, of course, responses that might be offered to defend the study of rhetoric in law. Some might say that "law," as Gerald Wetlaufer claims, "is the very profession of rhetoric"[1] or that it is "a profession of words."[2] Others might say that it is rhetoric and argument that enable the serious business that law does.

Whatever the explanation, over the last several decades legal scholars have plumbed law's rhetorical life.[3] Scholars have done so under various rubrics, with law and literature being among the most fruitful venues for the exploration of law's rhetoric and the way rhetoric shapes law. Today, new approaches are shaping this exploration. Among the most important of these approaches is the turn toward history and toward what might be called an "embedded" analysis of rhetoric in law. Historical and embedded approaches locate that analysis in particular contexts, seeking to draw our attention to how the rhetorical dimensions of legal life work in those contexts. This book seeks to advance that mode of analysis and also to

[1] See Gerald Wetlaufer, "Rhetoric and Its Denial in Legal Discourse," *Virginia Law Review* 76 (1990): 1555.

[2] David Mellinkoff, *The Language of the Law* (Boston: Little, Brown, 1963): vi.

[3] See, for example, Austin Sarat and Thomas Kearns, eds., *The Rhetoric of Law* (Ann Arbor, MI: University of Michigan Press, 1994). Much of what follows is taken from Austin Sarat and Thomas Kearns, eds., "Editorial Introduction," in *The Rhetoric of Law* (Ann Arbor, MI: University of Michigan Press, 1994).

contribute to the understanding of the rhetorical structure of judicial arguments and opinions.

Mere mention of the rhetorical dimensions of legal life traditionally conjured images of obscure legal jargon and Dickensonian evocations of law's sometimes absurd preoccupation with form over substance. But, it also reminded us that law can never escape the intricacies and imprecisions as well as the promise and power of language itself.[4]

Some scholars have attended to the rhetoric of law as one way of attending, albeit from a perhaps unrecognized angle, to questions of justice and injustice.[5] They believe that analysis of law's rhetoric is more than aesthetic self-indulgence, but rather it is part and parcel of a political and ethical project whose object is the transformation of law in the name of a justice all-too-rarely spoken about in the profession of law. It may also be an important way of understanding the power that law exercises.

Instead of focusing on legal rhetoric as itself the object of inquiry, historical and contextual approaches come to the analysis of rhetoric indirectly, obliquely. Those approaches only care about rhetoric insofar as it contributes to an understanding of a phenomenon that rhetoric helps explain, for example the justice or injustice of a legal decision or the power exercised by law in a particular time and place.

Historical and contextual approaches confirm that law is not only profuse in its verbosity but that it celebrates, and dogmatically insists on, the proper and precise formulation of human desires in words. Those approaches call on us to keep in mind the dramatic consequences that often accompany law's peculiar linguistic formulations. As Robert Cover put it, "Legal interpretation plays on a field of pain and death."[6] Law is, in this sense, both a stage for the display of verbal skill, linguistic virtuosity, and persuasive argument and a place in which words take on a seriousness virtually unparalleled in any other domain of human experience.

Other scholars seek to show how legal language and argument mystify social relations.[7] Linguistic indeterminacy makes it possible, they contend, to generate opposing arguments with equal force and convictions; "Given the play in the logic of justification," Stanley Fish observes, "the facts of a case can, with equal plausibility, be made to generate any number of outcomes, no one of which is deduced from a firm base of principle."[8] Moreover, as Fish continues, "One who has learned the

4 See Stanley Fish, "Fish v. Fiss," *Stanford Law Review* 36 (1984): 1325.

5 Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority,'" *Cardozo Law Review* 11 (1990): 919, 935.

6 Robert Cover, "Violence and the Word," *Yale Law Journal* 95 (1986): 1601.

7 See Pierre Schlag, "Cannibal Moves," *Stanford Law Review* 40 (1988): 929. Also Jamie Boyle, "The Politics of Reason: Critical Legal Theory and Local Social Thought," *University of Pennsylvania Law Review* 133 (1985): 685; Clare Dalton, "An Essay in the Deconstruction of Contract Doctrine," *Yale Law Journal* 94 (1985): 997.

8 Stanley Fish, "Law Wishes to Have a Formal Existence," in *The Fate of Law*, ed. Austin Sarat and Thomas R. Kearns (Ann Arbor: University of Michigan Press, 1991), 194.

lesson of rhetoricity does not thereby escape the condition it names . . . There is . . . no contradiction here, only a lack of relationship between a truth one might know about discourse in general – that it is ungrounded – and the particular truths to which one is temporally committed and concerning which one can have no doubts."[9]

For scholars like Fish, careful analysis reveals law's dependence on a repetitive series of highly stylized, bootstrap arguments each of which claims to be grounded in a reality external to language and rhetoric. Legal argument, so these scholars suggest,

> consists . . . of a series of shifting appeals to . . . various grounds for decision making, with any particular ground on which the decision is said to rely ultimately resting on yet another ground. An argument built on precedent, for example, may be said to turn on the facts of the case, but the facts themselves are often interpretable only in light of the intention of the parties, which is understandable only through a court's reading of the facts of the case; and which facts are relevant . . . is determined by precedent. In legal argument, this kind of shifting of the basis of decision can continue *ad infinitum* without ever finding an adequately stable place on which the decision can be grounded.[10]

In addition, rhetoric is itself also available as a device for disguising the inescapably rhetorical quality of all legal arguments and for lending the appearance of stability to law. While law may be a profession of words and of rhetoric, "the particular rhetoric embraced by law operates through the systematic denial that it is rhetoric."[11] Despite its need to appear to do so, law cannot escape its own rhetoricity.

Law's rhetorical quality is apparent in all of its institutions and processes not just in the elaborately staged legal argument before a jury or in the highly stylized production of an appellate court. It can be observed in the way lawyers speak to clients and the way they speak to each other; it can be observed in the places and on the occasions where law empowers citizens to speak, as in the deliberations of a jury or of a police citizen review board. In each of these places, and on each of these occasions, law regulates and disciplines particular acts of speaking and defines appropriate modes for the making of persuasive argument. In each, conventions and rules enable and, at the same time, constrain the opportunities for voice.[12] This phenomenon is, for example, surely and purposefully the case when social movements try to advance rights claims, though their rhetoric will also be shaped by historical context and political opportunity.

[9] See Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham: Duke University Press, 1989), 522.

[10] Gerald Frug, "Argument as Character," *Stanford Law Review* 40 (1988): 869, 871. In *Allegories of Reading* (New Haven: Yale University Press, 1979), 10, Paul de Man argued that "rhetoric suspends logic and opens up vertiginous possibilities of referential aberration."

[11] See Wetlaufer, "Rhetoric and Its Denial . . .," 1554. Also Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric, and Legal Analysis* (New York: St. Martin's Press, 1987).

[12] Robert Ferguson, "The Judicial Opinion as a Literary Genre," *Yale Journal of Law & the Humanities* 2 (1990): 201.

Contemporary scholarship on rhetoric and law is rooted in a long history, going as far back as Plato and Aristotle. In the Platonic tradition, study of the rhetoric of law is thought to involve the examination of the orator who knowing "nothing about good or evil undertakes to persuade a city in the same state of ignorance . . . by recommending evil as though it were good."[13]

In this tradition, law can only be worthy to the extent that the rhetorical life of law is contained and rendered secondary to a deeper commitment to justice. Where law is unable to discipline rhetoric, it is inevitably corrupted by it; "[T]he orator," Socrates says, "does not teach juries and other bodies about right and wrong – he merely persuades them."[14] The rhetoric of law is, in this understanding, ". . . a magical thing. It transforms things into their opposites. Difficult choices become obvious. Change becomes continuity. Real human suffering vanishes as we conjure up the specter of righteousness. Rhetoric becomes the smooth veneer on the cracked surface of the real and hard choices in law."[15]

In the Aristotelian tradition rhetoric is defined as a faculty or art whose practice helps us to observe "in any given case the available means of persuasion."[16] Aristotle suggested that we use persuasion in order to assign meaning to events and to convince others that the meaning so assigned is reasonable, if not right. Thus, as opposed to the Platonic view, in the Aristotelian tradition rhetoric is not in itself morally iniquitous. It can be used well or badly by good as well as evil men; "What makes man a 'sophist' is not his faculty, but his moral purpose."[17]

Since the 1970s, perhaps the most powerful and eloquent statement of the Aristotelian view of rhetoric in legal scholarship has been advanced by James Boyd White. In a series of books and articles dating back to 1973,[18] White argued consistently and repeatedly that

> law is most usefully seen not, as it usually seen by academics and philosophers, as a system of rules, but as a branch of rhetoric, and . . . the kind of rhetoric of which law is a species is most usefully seen not, as rhetoric usually is either as failed science or as the ignoble art of persuasion, but as the central art by which community and culture are established, maintained, and transformed.

[13] Plato, *Phaedrus*, ed. and trans. W.C. Helmbold and W.G. Rabinowitz (New York: Macmillan, 1952), 260.
[14] Ibid.
[15] Thomas Ross, "The Rhetorical Tapestry of Race: White Innocence and Black Abstraction," *William and Mary Law Review* 32 (1990): 1.
[16] *Rhetoric* (New York: Modern Library, 1984), Book I, 1355, 27.
[17] Ibid., Book I, 1355, 17.
[18] See James Boyd White, *The Legal Imagination* (Chicago: University of Chicago Press, 1973); James Boyd White, *When Words Lose Their Meaning: The Constitution and Reconstitution of Language, Character and Community* (Chicago: University of Chicago Press, 1984); James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of Law* (Madison: University of Wisconsin Press, 1985); James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990).

> So regarded, rhetoric is continuous with law, and like it, has justice as its ultimate aim.[19]

At the center of White's conception of law is the view that law, as Marianne Constable argues, depends on words and, in so doing, avows, or professes, faith in the capacity of language to work in the world.[20] But, as a "profession of words," law does more than avow its faith in language; it creates occupations in which rhetorical facility is claimed and cultivated.[21] In this sense, law provides a "set of resources for thought and argument . . ."[22]

White juxtaposes a conception of law as rhetoric with a conception of law "as a machine acting on the rest of the world."[23] When a court renders an opinion or an agency makes a ruling, it not only resolves a particular dispute but it also validates, in White's view, one way of looking at the world, one way of speaking and thinking. "In rhetorical terms, the court gives itself an ethos, or character, and does the same both for the parties to a case and for the larger audience it addresses . . . It creates by performance its own character and role and establishes a community with others."[24] Courts speak, and *how* they speak matters independently of what they say.

But, as I noted above, the rhetoric of law is seen everywhere, not just in the highly stylized pronouncements of courts. And the study of rhetoric and argument is now less distinctive as an object of study than it was when White was charting a path for rhetorical analysis. Indeed the maturity and success of White's enterprise can be measured by its growing appropriation by scholars who would not identify themselves first and foremost as rhetoric scholars. They have other concerns, concerns about justice and power in particular settings. They are moved to study those settings and only take up rhetoric as one aspect of that work.

Chapters 1–3 explore the uses of rhetoric in struggles to advance rights from the nineteenth century to the present. Chapters 4 and 5 focus in particular on the rhetoric of judicial opinions and various possibilities for rethinking that rhetoric. Each chapter takes up the challenge of understanding the way law is spoken to, and spoken about, as well as the way law speaks in the context of specific historical moments. They seize on rhetorical analysis to open up the question of politics and of law's connection to the world of contingency. In so doing, they offer us a vision of the contested life of legal rhetoric.

[19] James Boyd White, "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life," *The University of Chicago Law Review* 52 (1985): 684.
[20] See "Discussion Outline: Justice and Power in Language and Discourse," unpublished manuscript, 1992.
[21] Ibid.
[22] White, "Law as Rhetoric . . .," 689.
[23] Ibid., 686.
[24] *Justice as Translation: An Essay in Cultural and Legal Criticism*, 102. Also Ferguson, "The Judicial Opinion as a Literary Genre," 201.

Chapter 1, by Eric Slauter, examines the historical origins of the phrase "Equality before the Law."[25] Slauter's primary focus is the case *Roberts* v. *Boston*, which Slauter suggests is noteworthy for introducing a novel phrase ("equality before the law") and for inaugurating a doctrine ("separate but equal"). He examines the use of *Roberts* throughout history, both by historians and as precedent in cases like *Plessy* v. *Ferguson*.

Slauter notes that scholars like Leonard W. Levy and Harlan B. Phillips argued that the decision to segregate schools was not first made in *Plessy*, but instead in *Roberts*. What made the case interesting to Levy and Phillips was competing ideas of equality. The plaintiff's lawyer, Charles Sumner, used the phrase "equality before the law" to argue against school segregation. On the other side, the court, although not using the explicit phrase "separate but equal," created a vital source of the argument which later became the separate but equal doctrine.

Slauter follows Sumner as the latter traced the notion of equality across history, from Seneca to the French Revolution. Sumner reads heavily from the French Constitution of 1791, comparing "equality before the law" to the American "all men are created equal." On the other side of the coin, Chief Justice Shaw compliments Sumner on his concept of equality before the law, calling it a "great principle." However, that does not necessarily mean, according to Shaw, that all people be "legally clothed with the same civil and political powers," thereby differentiating between principle and application. After *Roberts*, Sumner continued to lobby for the inclusion of "equality before the law" in the Massachusetts Constitution but was not successful.

Slauter notes that Sumner was not the first to use the phrase "equality before the law." It appeared in translations of French newspapers in the 1790s, in the constitutions of Latin American countries in the 1820s, in the reports of political events in France in 1848, and in a pamphlet by Reverend William Batchelder Greene, distributed in Massachusetts the year *Roberts* was decided. Most significantly, however, it appeared in African-American publications, like Frederick Douglass' *North Star*, published a month before Sumner began his argument. While Sumner did not coin the phrase "equality before the law," his arguments in *Roberts* made it part of mainstream equality rhetoric.

Slauter reviews invocations of *Roberts* throughout history. The Committee of Law Teachers against Segregation in Legal Education's 1950 brief in *Sweatt* v. *Painter* traced the origins of the Fourteenth Amendment and highlighted the role Sumner played in adapting the concept of "equality before the law" from French revolutionaries. Slauter contends that Sumner transformed the concept of "equality" from a saying to a legal instrument and observes that *Roberts* began to appear more and more in segregation cases in the 1950s. Thurgood Marshall invoked it while arguing in *Briggs* v. *Elliot* in 1952, and it surfaced again in 1953 during *Brown*. During the

[25] What follows is taken from work prepared by Keshav Pant for inclusion in this book.

re-argument of *Brown* v. *Board*, Marshall put together a team of historians to trace the history of the Fourteenth Amendment, based on the questions raised by *Roberts*.

In the end, Chapter 1 highlights the rhetorical stakes of the *Roberts* case, drawing our attention to the way legal rhetoric responds to or shapes contemporary understandings and how it is taken up and refigured over time.

Chapter 2 continues Slauter's interest in examining legal rhetoric in the context of civil rights struggles. Schmidt focuses on the civil rights struggles of the 1950s and 1960s, a period in which state and federal courts confronted powerful challenges to the rule of law from both segregationists who defied federal antidiscrimination law and civil rights activists who defied discriminatory state policy. He seeks to understand a particular subset of judicial rhetoric: how the Supreme Court responded to challenges to its own authority and to the "rule of law." He notes that in these cases the Court aimed to shift the debate from the substance of law to the rule of law itself. However, because it is difficult to make these arguments, it sometimes did the opposite: defending the substance of the law rather than the neutral judicial process. Also, Schmidt notes, the Court moved from legal reasoning to declaration as a mode of conveying its arguments.

Schmidt shows how the Supreme Court came under attack during the civil rights era. He first examines the "Southern Manifesto," signed by most southern members of Congress, attacking *Brown*. Schmidt argues that this attack was directed against the authority of the Court. The Manifesto praised and exalted the Constitution while attacking the Court. Next he discusses the rhetoric of civil rights leaders as they tried to justify civil disobedience. Here again those attacking the legal status quo did so while expressing respect for the rule of law.

Schmidt takes up *Walker* v. *Birmingham*, a case in which the Court upheld the contempt conviction of civil rights demonstrators for protesting in defiance of an injunction. Civil rights lawyers argued that the court order was unconstitutional and, as such, need not have been followed. While the dissent in *Walker* agreed with the civil rights framing of the argument, the majority took Alabama's side, arguing that what the demonstrators did was an affront to the judicial process itself. The majority pushed the debate away from the merits of the claims made by both sides, focusing instead on the authority of courts. Similarly in *Cooper* v. *Aaron*, when the Court had to deal with Arkansas' efforts to disobey the *Brown* decision and avoid desegregation, it did not seek to defend *Brown*; instead the Justices framed the case as about the acts of state officials who shirked their duty to the Court and the Constitution.

Nonetheless, in both cases the Justices offered a defense of the underlying substantive law. In *Walker*, Stewart's majority opinion points out that Birmingham's injunction was not "transparently invalid," that state and local governments had the right to regulate the use of public places. The dissent, however, attacked that claim, stating that the injunction was a "gross misuse of the judicial process," and "patently unconstitutional on its face." In *Cooper*, the Court made a significant effort to justify

its reading of the Constitution in *Brown*. Even Justice Frankfurter, who wrote a concurring opinion that went into even more depth about rule-of-law principles, felt the need to justify the Court's decision to desegregate.

After noting the impurity of rule-of-law rhetoric in these cases, Schmidt suggests that the only way to convey that the judicial process is supreme in its authority is through declaration. He argues that the Court abandons the conventions of legal reasoning in favor of sweeping claims of judicial supremacy. Justice Stewart's opinion in *Walker* states that despite the aims and intentions of the protesters, "respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom." Frankfurter writes in *Cooper* that delaying desegregation would mean that "law should bow to force." Schmidt concludes that in its vehement defenses of the judicial process the Court defends its institutional prerogatives and that the apparent confidence with which judges condemn challenges to their authority reveals the fragility of the authority which they claim.

Chapter 3 continues our exploration of legal rhetoric in the context of struggles for civil rights, only here the rights of gays and lesbians. Teresa Godwin Phelps examines the evolving rhetoric of same-sex relationships, their advocacy and repression. She aims to track the movement of gay rights rhetoric, focusing on the period after 1969, and argues that in the past fifty years, the main movement of gay rights has been from the rhetoric of "otherness" to one of "inclusion."

"Creeps, pedophiles, queers." It is difficult, Godwin Phelps notes, to believe that only a few decades ago, these were the rhetorical tropes employed by those who opposed any kind of recognition of gay rights and supported statutes criminalizing certain sexual behavior. The very term "gay rights" is inappropriately used in this context because it was not until after the 1969 Stonewall riots that the word "gay" was commonly used at all. Prior to 1969, gays were "homosexuals," a clinical term bestowed on the group by heterosexuals that emphasized "otherness," sexuality, and even malady. Law sanctioned the persecution of gays and lesbians, while the American Psychological Association labeled homosexuality as a disease. Gays and lesbians were also cast as being dangerous to children. When "homosexuals" renamed themselves "gays," they made an enormous rhetorical and political move.

Godwin Phelps highlights four main rhetorical shifts: silence to activism, otherness to inclusion, legal to personal, and from homosexuality endangering children to homosexual repression endangering children and families. She argues that gays and lesbians were victims of rhetoric until they took control of language, becoming active participants in the rhetoric that described them and thereby changing the laws that repressed them.

Hints of a new rhetoric were seen in amicus briefs in *Bowers* v. *Hardwick*. Supporting Hardwick, those briefs were filled with rhetoric of intimacy. Bowers' brief used what Godwin Phelps calls "scourge language" – religious rhetoric which positions gay sex as an unholy, immoral act. Some years later, *Romer* v. *Evans*,

highlighted a new trend in gay rights rhetoric, namely the use of personal stories. Personal narratives were used to show the suffering caused by antigay legislation and to attack stereotypes.

In *Lawrence* v. *Texas*, a case that laid the foundation for gay marriage arguments, gay rights lawyers emphasized general problems caused by discrimination and focused on families with children and committed relationships. While the state used the traditional scourge language in its attack on gay rights, the Supreme Court's majority described gay sex in a new rhetoric, calling it "intimate sexual conduct." Godwin Phelps argues that this rhetorical switch heralded a change in the position of the Supreme Court and helped transform the situation of gays and lesbians from being a danger to children to being themselves in families which were threatened by antigay legislation.

Hollingsworth v. *Perry*, *U.S.* v. *Windsor*, and *Obergefell* v. *Hodges* show how the gay rights movement completely appropriated the family rights argument into their rhetoric. In *Windsor* and *Obergefell* people in long-term committed relationships were sympathetic plaintiffs and their advocates took control of rhetoric to forge new forms of legal recognition. No other area of social opinion and law, Godwin Phelps concludes, has evolved as quickly and dramatically as that surrounding same-sex marriage. The area, thus, offers an excellent example of the way that rhetoric functions, and evolves, in the law and in legal arguments and judgments.

Chapters 4 and 5 shift to a particular institutional domain, the Supreme Court, and deploy analysis of rhetoric to understand aspects of that institution's functioning. Chapter 4 focuses on one of the most important arenas of judicial deployment of rhetoric, namely arguments about precedent. In a number of hotly contested and closely divided Supreme Court cases, the precedents that majority and dissenting justices cite diverge widely. Putting together the narrative from these disparate sets of precedents might almost lead one to conclude that two different Supreme Courts had rendered the earlier related decisions.

Bernadette Meyler begins by analyzing the work of James Boyd White and, in particular, his comparison of the judicial opinion and the poem. Meyler highlights his "personal" approach to both poems and opinions. White argues that a judge should take personal responsibility for his/her writing, that the judge is a person before anything else. Meyler extends this point by arguing that if indeed the judge is to be seen as a person, then his/her writing will have a personal voice, affected by culture and tradition. White suggests readers should attend to two things when considering opinions. The first one is that a judicial opinion is affected by its precedents in the same way a poem is affected by literary history. Second, White argues that opinions must be seen in their rhetorical context, with the situation and audience all taken into account. Meyler ties this together to argue that judicial opinions are personal statements made in both a context of precedent and a context of rhetoric/situation.

Drawing on Paul de Man, Meyler argues that the citation of precedents generates a story about the history of a particular legal doctrine. Reading the precedents of majority and dissenting, or even concurring, opinions may lead to radically different stories about the genealogy of law. And, as de Man argued with respect to the texts he considered, history may leave its mark on each of these stories through "their inability to close themselves off. . . which always produces. . . a residue or remainder of trope and figure irreducible to them."

Meyler argues that legal literature has focused on individual cases, and it might prove useful to look at larger explanatory models by doing so-called distant reading. Meyler applies this approach in analyzing Supreme Court cases treating the roots and scope of executive power under the U.S. Constitution and focuses on two Supreme Court cases: *NLRB* v. *Canning* and *Adkins* v. *Children's Hospital of DC*.

She compares the majority and concurring opinions with the dissents, highlighting references made to previous cases. The major conclusion she draws is that there is very little overlap in the precedents used by the different sides of the argument. Cases that are cited extensively by the majority opinion in *Adkins* are not even mentioned once by the dissent. The same is true for *NLRB*. Meyler concludes that there is actually very limited dialogue present here. Because the precedents used are vastly different, there is no common ground over which to dialogue.

Chapter 5 explores alternative ways to understand and construct legal rhetoric. Writing in opposition to those who argue that the purpose of legal rhetoric is to construct belief and that rhetoricians attempt to convince listeners that they are "right" and the other side is "wrong," Linda Berger examines two alternative conceptions: invitational rhetoric and dialogic rhetoric.

Berger begins with the concept of invitational rhetoric as developed by Foss and Griffin. Foss and Griffin draw on feminist theory to think about the way rhetoric conveys feeling and emotion as well as logical reasoning. Foss and Griffin argue that invitational rhetoric emerged from these feminist principles and is centered in notions of equality. The goal of invitational rhetoric is not to change the minds of listeners, but instead to move the conversation closer to holistic understanding. "Invitational rhetoric is an invitation to understanding as a means to create a relationship rooted in equality, immanent value, and self-determination. Invitational rhetoric constitutes an invitation to the audience to enter the rhetor's world and to see it as the rhetor does." Berger writes that the aim is to "move the other person to grasp your perspective rather than to move the other person to accept your position."

Turning to dialogic rhetoric, Berger suggests that in "arguing as thinking" "[t]hinking is a form of internal argument, modeled on outward dialogue; attitudes are rhetorical stances in matters of controversy; justification and criticism are key rhetorical activities." Basic dialogue involves a constant back-and-forth movement between category and particulars – general and specific. Rhetoric then takes the form of a back-and-forth movement between criticism and justification.