PART I

Introduction

1

Rhetoric and Law

A *Mosaic*

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1.1 INTRODUCTION

With this book, we offer the beginnings of an answer to this question: "How can we understand and intervene in contemporary legal practice using texts from the rhetorical tradition?" We envisioned this volume as a mosaic of rhetorical theories and texts from various historical traditions juxtaposed with contemporary legal texts. Our goal was for the contributions to show a picture of the continued vitality and potential utility of rhetorical traditions – construed broadly – for understanding, interrogating, and criticizing contemporary legal texts. As to the latter, we hoped to depict the utility of rhetorical traditions as applied to a greater variety of contemporary legal texts than those that are often the focus of rhetorical criticism: the opinions of American courts, often the US Supreme Court. We are confident that the contributions to this volume succeed in these tasks. We see this effort as contributing tesserae – the small pebbles, tiles, and sometimes pieces of glass that lie in the matrix of mosaics – to a broader picture.

In the Western tradition, rhetoric has always been about particulars. In his translation of Aristotle's *On Rhetoric*, George Kennedy interposed the word into Aristotle's definition of the topic of study: "the ability, in each [particular] case, to see the available means of persuasion" (Aristotle, 2007, p. 27). Nevertheless, the oldest surviving treatises on the topic in the West, including Aristotle's, often treat it as a whole. These treatments create big, theoretical pictures, but if we think of those big pictures as mosaics, we can imagine the application of those theories to particular cases or situations as tesserae.

The ancient Western theoretical treatments also tended to deal with law, as the two disciplines (at least as they were practiced in the West) were born together in the Eastern Mediterranean during a brief experiment in democracy by Greek city states in the fifth and fourth centuries BCE (Larson & Tiscione, 2024). Though they grew together through most of the ensuing two millennia, they have become estranged: Rhetoric has broadened its attention to include many other forms of symbolic action

(such as workplace, medical, and social media communication, and even some non-human objects of study), while law has turned its back on rhetoric. Contemporary legal theory continues to ignore, and even deny, the rhetorical nature of law, but some legal scholars over the last two to four decades have brought rhetorical theory to bear on the law.

Two recent volumes have brought attention to the interplay of rhetorical traditions and contemporary (American) law. Together, they sketch or outline some of the mosaic, representing pictures of the intersection of these disciplines. In *Critical and Comparative Rhetoric: Unmasking Privilege and Power in Law and Legal Advocacy to Achieve Truth, Justice, and Equity*, Elizabeth Berenguer, Lucy Jewel, and Teri A. McMurtry-Chubb (2023) outline a sweeping segment of the picture that attempts to correct the overreliance of the American legal system – and approaches to rhetorical criticism of it – on classical Western thinking. They argue first that Western rhetorical traditions and their contemporary manifestations in law are grounded in hegemonic impulses of white European men. They then argue that some of the responsibility for contemporary socio-legal problems lies with deduction and the syllogism, which they see as inherent to the ancient Western models. Finally, they argue that the introduction of rhetorical traditions from other places and times – that is, texts from the "Indigenous, African Diasporic, Asian Diasporic, and Latine" traditions (Berenguer et al., 2023, p. 18) – can help to remedy the resulting problems. Their volume approaches the mosaic from a bird's-eye view, outlining the contours of the rhetorical tradition they critique and the traditions they offer as alternatives.

Meanwhile, Francis J. Mootz III, Kirsten K. Davis, Brian N. Larson, and Kristen K. Tiscione have edited a collection titled *Classical Rhetoric and Contemporary Law: A Critical Reader* (2024) that takes a close-up look at the mosaic. The central thesis of their volume contradicts a main premise of *Critical and Comparative Rhetoric*, that the ancient Western rhetorical tradition is bound up with deduction and the syllogism. Instead, the volume asserts that this tradition is concerned with judgment "grounded in practical wisdom addressing probabilities rather than in formal, deductive certainties" (Davis & Mootz, 2024, p. 3). In addition, the volume treats the Western rhetorical tradition as heterogeneous, identifying the locales where various tesserae might be found, from the pre-Socratic sophists to Augustine of Hippo. It includes lengthy excerpts from these texts, providing critical questions and inviting readers to apply them to contemporary American legal texts.[1]

Our volume complements these books by offering detailed and careful analyses of both rhetorical traditions and contemporary legal texts.

We take analysis of the primary texts of rhetorical traditions to be an important part of their use in contemporary law. We think we know what contemporary legal

[1] This is a category in which the editors included court opinions – of course – but also lawyers' appellate briefs, amicus curiae briefs, and jury instructions.

texts are supposed to do, because we inhabit their context.[2] But traditional rhetorical texts are often unmoored from their contexts. Careful reading of traditional texts – as done by the contributors to this volume – coupled with careful reading of more contemporary readings of those traditional texts (see, e.g., Hannah & Mootz, Chapter 2 in this volume) is essential to understanding their ideas and adapting them to contemporary practices. As scholars, we have a duty to understand and acknowledge what we owe to those who came before us, but we must also ensure that what we have inherited merits our attention and use. Indeed, the volume by Mootz and colleagues concludes with a set of questions that we should ask about any traditional text, whether ancient Western or not, if we wish it to "tell … us something insightful and informative about contemporary law" (Larson, 2024, p. 246):

- Is [the] text widely known, either among scholars or among some broader human community?
- Is it, or was it, influential in its historical or cultural context?
- Does it relate sufficiently to contemporary legal discourse to say something about that discourse?
- Does it offer insights into how legal language and argument operate?
- Does it help scholars see something about the law that is more difficult to reveal without its help?
- What voices are or were absent from it? Are there characteristics of its author or their milieu that may limit its perspectives?
- Can it offer something emancipatory, helpful, insightful, or revelatory even if the text or its author(s) exhibited biases and limitations … that were inherent in their cultural contexts and norms?

The contributions in this volume address these questions, guiding scholars from both fields – law and rhetoric – to use each other's work. Through analyzing each legal text's rhetorical moves, each chapter shows not only how the text works and to what ends but also how it might have worked otherwise. In other words, the analyses point to the possibility for change. By focusing on contemporary legal texts, the volume demonstrates the usefulness of rhetoric for considering today's most pressing problems.

In the rest of this introduction, we offer our sense of why rhetoric is integral to the law and then provide an overview of the chapters. Given that all but one of the chapters in this volume contribute tesserae to the mosaic from Western rhetorical traditions and contemporary American legal texts, this introduction provides an imperfect and incomplete description of the scholarly matrix in which this volume intervenes.

[2] Of course, careful analysis can sometimes expose misunderstandings of contemporary contexts. Our senses of our lived experiences are not *knowledge* until they are examined thoughtfully.

1.2 RHETORIC IS INTEGRAL TO THE LAW

Although the contributors to this volume draw on different definitions of rhetoric, we broadly define it here as the use of symbols to influence thought, belief, and action. The symbols through which rhetoric does its work permeate law, from the more obvious (think closing arguments, judicial opinions, legislation) to the less so (think rules, client communications, law textbooks).[3] These symbols influence not just the lawyers, judges, and jurors in courtroom settings, but also publics beyond the courtroom's narrow confines. The symbols of law matter profoundly. They tell us who we can marry, whether we are entitled to health care, and how we will choose our leaders.

Like all rhetoric, law's symbols are choices and therefore assert a point of view. These choices are made on a number of fronts. In the opening statement of a trial, for example, an attorney would choose how to tell a compelling story favorable to their client, including choices about narrative structure and character development. But even everyday legal texts like the forms used to obtain a restraining order involve choices that inevitably assert a point of view (for example, whether to call the act at issue "abuse," "violence," or something else). The point of view asserted is not necessarily that of the speaker or writer. Instead, it is one that the audience is invited (successfully or unsuccessfully) to adopt. These invitations are not always intentional or conscious. From a rhetorical perspective, the intent of the speaker or writer is less significant than how their choices potentially influence an audience and how, over time, these choices accumulate to construct the law as a social system.

In the Western world, law and rhetoric were born together nearly 2,500 years ago in the Mediterranean. In the newly emerging democracies of Athens and other city-states, citizens spoke for themselves in the law courts, defending themselves or bringing charges against others. Because knowing how to persuade others took on such importance (and could be a matter of life and death), learning rhetoric for legal purposes became a fundamental part of citizenship. As a result, teachers and scholars of rhetoric in ancient Greece and Rome, including the sophists, Isocrates, Plato, Aristotle, Cicero, and Quintilian, developed theories and pedagogies that would become the foundation of the Western rhetorical and legal traditions.

Larson and Tiscione (2024, p. 12) recount rhetoric and law's intertwined history from that time until the end of the nineteenth century, at which time they describe a "rupture between training in rhetoric and law . . . that has only gradually begun to heal." Law's rhetorical roots have largely been forgotten. In the late nineteenth-century American context, legal practice and education moved away from the apprenticeship model by which most attorneys had been trained. At the forefront of this movement was Harvard University, which instituted broad reforms aiming to intellectualize the professions, including law. Reformers there saw law as a science,

[3] Many, but not all, of these genres are represented in this volume.

with rules that could be derived from legal opinions and then neutrally applied to other scenarios. As explained by James Boyd White, the legal scholar widely credited with founding the law and literature movement, this conception treats law as a bureaucratic "machine acting on the rest of the world," with legal decisions abstracted from their lived contexts and evaluated through a cost–benefit logic (Boyd White, 1985, p. 686). This view of law now predominates in the American context, manifesting primarily as legal formalism, or the application of quasi-formal logic to determine the outcome of cases.[4]

Ironically, one of the central features of the rhetoric of legal formalism is, as put by legal scholar Gerald Wetlaufer (1990, p. 1555), "the systematic *denial* that it is rhetoric." To admit the rhetorical nature of law would be to admit its partiality, or the point of view inevitably inscribed with every textual choice. Denying law's rhetorical nature is a way of constructing an impartial façade, thereby shoring up law's legitimacy and authority.

Because law denies its rhetorical nature, calling attention to legal rhetoric is sometimes seen as trivial or, worse, as distracting from justice, law's ultimate aim. Such criticisms are as old as the connection between rhetoric and law: Plato himself condemned the popular teachers of legal rhetoric of his time, saying that they taught speakers to say what audiences wanted to hear without regard for truth or justice. We instead see attention to law's rhetoric as essential to justice. Legal scholar Patricia J. Williams embraces this view, focusing on the tendency of law to favor abstractions rather than the complexities of lived experience. As she writes: "That life is complicated is a fact of great analytic importance. Law too often seeks to avoid this truth by making up its own breed of narrower, simpler, but hypnotically powerful rhetorical truths. Acknowledging, challenging, playing with these *as* rhetorical gestures is . . . necessary for any conception of justice" (Williams, 1991, p. 10).

Heeding Williams' call, this volume challenges law's truths by engaging in rhetorical criticism. If rhetoric is about subjectivity, contingency, and specificity, law purports instead to be about objectivity, certainty, and universality. By denying its rhetorical nature, law maintains its authority and therefore its power. Calling attention to law's rhetoric – through rhetorical criticism – is therefore an important check on its power.

The contributions in this volume are by no means alone in this work, as many others have added tesserae to this mosaic. For example, many scholars of rhetoric, cultural studies, and law and society have added facets to the picture, including authors in this volume, along with Alden (2020), Amsden (2016), Campbell (2012), Camper (2018), Chávez (2016), Coulson (2012, 2023), Craig and Rahko (2016), Gibson (2018), Hasian (1997), Hasian et al. (1996), Johnson and Smith (2024), Langford (2018), Pham (2015), Rountree (2007), Schuster and Propen (2011),

[4] Many chapters in this volume discuss this view (e.g., Hannah & Mootz, Chapter 2; Larson, Chapter 4; Tanner, Chapter 5).

Sciullo (2019), Somerville (2005), West (2008, 2019), and some of the contributors to Brooks and Gewirtz (1996), Mootz and Frank (2023), Sarat and Kearns (1996), and Slocum and Mootz (2019). Similarly, many from the legal academy have worked on problems there using rhetorical lenses, including Berger (2010, 2013), Inniss (2009), Provenzano (2022), Venter (2021), White (1985, 1990), Williams and Spedding (2024), and other contributors to the edited volumes mentioned previously. Other scholars, harder to classify, work regularly at the intersection of rhetoric and law, including Constable (2004, 2014b, 2014a) and Vats (2016, 2019, 2021).

Some other recent scholarly interventions deserve special attention. A symposium issue of the *Nevada Law Journal* brought together scholars from law and rhetoric to bridge "classical" or ancient Western rhetoric and contemporary legal practice (Cedrone, 2020; Dauphinais, 2020; Davis, 2020; Hannah & Salmon, 2020; Johnson & Koenig, 2020; Mootz, 2020; Provenzano & Larson, 2020; Rountree, 2020; Webb, 2020; Weresh, 2020). The *Feminist Judgments* series, beginning in America with Stanchi and colleagues (2016), but owing its genesis to earlier developments in the United Kingdom and Canada, is not rhetorical criticism, but rather a set of rhetorical performances and analyses of them using feminist theory, designed to highlight differences between the actual opinions and those they could have been. Finally, some scholars from the field of legal writing make use of rhetorical theory when offering their own contemporary rhetorical handbooks (e.g., Tiscione, 2016), not uncommonly looking for a synthesis of rhetorical theory with cognitive science (e.g., Berger & Stanchi, 2018).

1.3 THIS VOLUME'S CONTRIBUTIONS

This volume brings together an interdisciplinary group of scholars with the goal of showing how contemporary legal texts are constructed rhetorically. Each chapter connects a significant text or concept from or constituting a rhetorical tradition and a contemporary legal text or body of scholarship.

We have organized the volume in a way that we hope will most effectively demonstrate what rhetorical criticism can explain about how law works. Part II lays the foundation for the rest of the volume by focusing on the rhetorical construction and function of three key concepts central to US law: originalism, traditionalism, and determinism. The chapters in Part III then examine the legal syllogism and enthymeme and Enlightenment ideology about language, two means by which law presents itself as rational and neutral. Part IV demonstrates that law is not a system separate from culture and ideology but integrated with them. Finally, the chapters in Part V provide examples of the mechanisms by which law operates in exclusionary ways. Other groupings would have highlighted different connections across the chapters, connections we encourage readers to make on their own.

In the first chapter in Part II, "The Ethos of Originalism," Mark Hannah and Jay Mootz explore today's dominant judicial interpretive tenet of "originalism," that the

meaning of a legal text is the ordinary meaning that the text had at the time of its enactment for the average competent speaker of the language, which purportedly provides an objective basis for judging with integrity. They embrace Martin Heidegger's ontological reinterpretation of Aristotle's concept of ethos to show that the proponents of originalism do not prevail by persuading others through logic or dialectical reasoning (logos) nor by promoting their audience's disposition to hear their argument (pathos). Instead, originalists bring force to their claims by establishing and projecting an ethos, but not solely the ethos of originalism's proponents.

In "The Role of Tradition in Classical and Contemporary Argument," Vasileios Adamidis and Laura Webb analyze the use of tradition in the legal arguments of the Attic orators, including Demosthenes, Lycurgus, and Aeschines, and in contemporary US Supreme Court cases, including the controversial gun rights case, *District of Columbia v. Heller*. They give particular attention to the Commonwealth of Virginia's amicus curiae brief in *Obergefell v. Hodges*, where the Supreme Court upheld same-sex marriage as a fundamental right. There, the Commonwealth of Virginia sought to abandon its prior approach of framing fundamental rights with a narrow focus on tradition, which had put it on the "wrong" side of cases such as *Loving v. Virginia* (interracial marriage) and *Brown v. Board of Education* (school desegregation) and instead endorsed a broader framing consistent with the "full measure of freedom" protected by the Fourteenth Amendment.

In "Practical Reason in Peril: From Cicero to *Texas Health Presbyterian*," Brian Larson contrasts the interpretive methods that Cicero put forward in his early work, *De Inventione*, dating to the early first century BCE, with those presented by a greatly influential 2012 book coauthored by Justice Antonin Scalia, *Reading Law*. Larson contends that *Reading Law* departs from a millennia-old tradition of practical reason and instead embraces a *determinist imaginary* about contemporary judging. Larson illustrates the contrast in the two approaches by discussing a Texas Court of Appeals opinion – which exhibits Ciceronian practical reason – and the Texas Supreme Court's opinion in the same case – which exhibits Scalian determinism.

Part III illuminates two rhetorical means by which law maintains its façade of neutrality: the legal syllogism and Enlightenment ideology about language. In "Deciphering *Dobbs*: Syllogism and Enthymeme in Contemporary Legal Discourse," Susan Tanner shows that the conception of the "legal syllogism" popular among lawyers, judges, and law scholars is not the iron-clad deductive case that they make it out to be. Rather, she shows that the enthymematic structure of legal reasoning has profound effects on the logic and rhetoric of US court decisions that cannot be fully understood through the traditional paradigm of the legal syllogism. She applies her resulting model to *Dobbs v. Jackson Women's Health Org*, the 2022 US Supreme Court opinion that overturned the 1973 case *Roe v. Wade* and unsettled American reproductive rights law in ways whose ramifications are only slowly becoming understood.

In "Eradicating Ethos: Language, Circumstances, and Locke's Empirical Language Ideology in the Anglo-American Hearsay Principle," Jennifer Andrus explores Locke's theory of language in the *Essay Concerning Human Understanding* and its history of influence on judicial thinking about hearsay evidence. Hearsay is distrusted, she suggests, because it is language all the way down – testimony based on second-hand narrative – rather than language grounded in the empirical world. She analyzes three contemporary US Supreme Court opinions using her framework: *Ohio v. Roberts* (1980), *Crawford v. Washington* (2004), and *Davis v. Washington/Hammon v. Indiana* (2006).

Part IV examines the permeable boundary between law's rhetoric and public discourses. In "Searching for Legal *Topoi* in the Shadow Docket," Kelly Carr explores the US Supreme Court's "shadow docket," the growing number of emergency orders and summary decisions that lack the transparency and consistency of cases granted and decided on their merits. Carr examines the Court's practices in the shadow docket through the lens of the modern classic, Perelman and Olbrechts-Tyteca's *The New Rhetoric*, which itself adapted and adopted many concepts from the ancient Western rhetorical tradition. She applies this lens particularly to *Roman Catholic Diocese of Brooklyn v. Cuomo*, a 2020 shadow-docket case relating to state restrictions on religious gatherings during COVID.

In "*Sensus Communis*, Voter-Inflicted Harms, and *Schuette v. BAMN*," Laura Collins argues that Giambattista Vico's *sensus communis* helps explain why a court's earlier decisions can fail to anticipate decisions in new cases and how courts end up discerning stark breaks between their precedents and cases at bar. Vico defines *sensus communis* as "judgment without reflection," shared by an entire community, which evolves but endures. Importantly, *sensus communis* is "sedimented in language itself" such that a community's values and judgments are confined and animated by its language. She applies this lens to the US Supreme Court's decision in *Schuette v. BAMN*, a 2014 case adjudicating the application of Michigan's statutory ban on affirmative action.

Rasha Diab's chapter, "(Vernacular) Rhetorics for Women's Rights," broadens our focus beyond US law. Tracing early Arab-Islamic iterations of women's rights, Diab revisits Prophet Muḥammad's "Farewell Speech" (*khuṭbat al-wadā'*), which is often in/directly invoked in vernacular discourses to structure arguments for women's rights. Diab sheds light on early Arab-Islamic discourses on women's rights and uses the concept of vernacular rhetoric of human rights to draw attention to more recent iterations of women's rights. Diab fast-forwards to a speech on women's rights by Malak Ḥifnī Nāsif (1886–1918), Egyptian writer, intellectual, and reformer, who proposed ten articles to promote women's rights, including marital and epistemic rights. Finally, Diab moves to 2019 and the highly publicized Arab Charter on Women's Rights issued by the Federal National Council of the United Arab Emirates in conjunction with the Arab Parliament. She uses these three iterations of women's rights to underline key topoi of (women's) rights discourse.

In "<Police Power> to Stop-and-Frisk: A Pattern for Persuasion," Lindsay Head draws on Michael Calvin McGee's characterization of the ideograph as a link between rhetoric and ideology to explore the development of the ideograph <police power> in the time leading up to, and the court's opinion in, the landmark case *Floyd v. City of New York* (2013). In this case, a bright spot in New York's sullied history of stop-and-frisk, twelve Black and Hispanic individuals succeeded in a class action lawsuit against the city, alleging that the NYPD's use of stop-and-frisk policy violated their Fourth Amendment right to be free from unreasonable searches and seizures and their right to equal protection of the laws under the Fourteenth Amendment. Head shows that ideographic inquiry offers more than a useful tool for education and analysis or a method for predicting societal beliefs and behaviors: It is a force for persuasion.

Part V focuses on law's power to exclude voices. In "Framing the War on Drugs: Judith Butler and Legal Rhetorical Analysis," Erin Leigh Frymire uses Butler's concepts of *frames of war* and *precarious life* to analyze the 1986 Anti-Drug Abuse Act (ADAA), which infamously mandated the same minimum sentence for the possession of 100 times as much powder cocaine as crack cocaine. The two forms of the drug are pharmacologically equivalent and yet the sentences arise from causes not chemical but social and rhetorical, as the two forms are associated with distinct socioeconomic and racial groups. Frymire uses Butler's frames of war and precarious life to highlight not only the rhetorical strategies used in the ADAA and the political discourse surrounding it but also to illuminate how the ADAA is itself a rhetorical strategy for maintaining a racist status quo.

In "Ensnared by Custom: Mary Astell and the American Bar Association on Female Autonomy," Judy Cornett compares two very different authors separated by almost four centuries on the problem of women's social position. Mary Astell, one of the earliest English feminists, examined these questions in 1694 in *A Serious Proposal to the Ladies*. She believed that women were not living up to their intellectual potential and were relegated to the realm of trivia and frivolity by the social norms of the period. In 2019, the American Bar Association published a report entitled *Walking Out the Door: The Facts, Figures, and Future of Experienced Women Lawyers in Private Practice*. Focusing on America's 350 largest law firms, the report found that women with more than fifteen years of experience are leaving law firms in droves. Like Astell, the report attributed this failure to thrive to male-created cultural norms. Although the two authors agree that women should be able to thrive in a man's world but aren't doing so, they rhetorically engage the problem very differently.

In "*Dissoi Logoi*, Rhetorical Listening, and Legal Education," Elizabeth Britt examines the anonymous *Dissoi Logoi*, attributed to a sophistic author in Greece in the late fifth century BCE. She uses the ancient text, and the practices of listening that it implies, to imagine how law students might be taught to listen rhetorically to the materials they encounter in their training. To focus the discussion, she analyzes