MOVING BEYOND INSTINCT: PERSUASION IN THE ERA OF PROFESSIONAL LEGAL WRITING

Book review of *Advanced Legal Writing* by Michael R. Smith

by
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Moving Beyond Instinct *is a book review of* Advanced Legal Writing: Theories and Strategies in Persuasive Writing *by Professor Michael Smith. In the Review,* Advanced Legal Writing *is evaluated not only as a teaching text, but also as a practitioner desk reference and a theoretical exploration of advocacy writing. The Review argues that* Advanced Legal Writing *represents a significant forward step in the literature about persuasive writing, because it names and categorizes specific rhetorical devices and, using multiple theories from disciplines outside law, explains why they work. In this way,* Advanced Legal Writing *allows scholars and practitioners to move beyond their reliance on what they instinctively think or know is "persuasive" toward a more analytical, informed knowledge of persuasion. In addition, the Review argues that* Advanced Legal Writing *encourages and helps advocates make persuasive writing more beautiful and interesting, and proves that persuasive legal writing is an art and a discipline worth studying.*

The Review critiques Advanced Legal Writing *for its failure to address some of the moral issues related to the troubling aspects of advocacy, particularly those techniques that are psychologically manipulative or easily misused. Having noted that certain techniques are effective because they play on human psychology in a particular way, the Review argues that the book should have explored a bit more the line between persuasion and manipulation. Specifically, the Review suggests that* Advanced Legal Writing*, in particular because it is a teaching text, should have devoted some space to acknowledging how certain persuasive techniques can reflect and reinforce hierarchies of class, race, and gender.*

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I. INTRODUCTION

Michael Smith's *Advanced Legal Writing* takes a number of significant steps toward the goal of better persuasive legal writing. It is both an excellent teaching tool and a practical guide for novice lawyers. Certainly, it is a must read for every legal writing and advocacy teacher, and the academic audience is, in the end, the book's primary target. But practicing lawyers, particularly litigators who write, will find value in it too. Here's why: *Advanced Legal Writing* goes beyond the superficial platitudes that too often pass for persuasive writing pedagogy and gives detailed information about several rhetorical tools, defining them and articulating the reasons why they persuade, as well as examples of their effective use. Professor Smith's meticulous examination of these rhetorical tools provides a sound pedagogical foundation for an advanced class in persuasive writing and can give both novice and experienced lawyers greater control over their writing and their advocacy.

The text devotes itself to the study of rhetorical devices, an area of study sorely neglected in the legal academy. The book does not cover how to develop substantive legal arguments and different methods of argumentation—it presumes an audience that already knows, to some degree, how to do this. Instead, the book looks at how best to communicate legal arguments once you have them. It is about the presentation of legal arguments: how to give them more impact, more persuasive power, more jazz, more beauty. Any good advocate knows how important it is for arguments to be appealing to the legal audience. But not too many know *how* to make an argument appealing.[1] This book will teach you how, and in doing so, will make you a better, more thoughtful, more effective advocate.

II. REVERSE-ENGINEERING THE DEVICES USED IN PERSUASIVE DOCUMENTS

Advanced Legal Writing approaches the examination of rhetorical tools by examining persuasive documents, mostly judicial opinions, and cataloguing and categorizing the methods of persuasion used in them. The effectiveness of this approach comes from its reverse-engineering of successfully used persuasive devices. Reverse-engineering, a term usually reserved for inventions, is the

[1] Many have criticized the legal academy for failing to teach or devaluing the teaching of essential skills, such as written communication. Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools' Dirty Little Secrets*, 16 BERKELEY WOMEN'S L.J. 3, 3 (2001); Harry T. Edwards, *The Role of Legal Education in Shaping the Profession*, 38 J. LEGAL EDUC. 285 (1988); Lisa Eichhorn, *Writing in the Legal Academy: A Dangerous Supplement?*, 40 ARIZ. L. REV. 105, 105−14 (1998).

process of starting with a known product and working backwards to try to recreate or improve on the product.[2] *Advanced Legal Writing* uses this method to explain rhetorical devices. It starts by looking at the finished product of expertly executed persuasive devices and then analyzes them in depth, dissecting, categorizing and describing them.

For each category of device, the book explains the function served by the device, and evaluates its persuasive power from the perspectives of different disciplines, including classical rhetoric and cognitive psychology. The goal is to help students and lawyers discover "the hidden world of forces" underlying effective advocacy, and to demonstrate that certain tools of advocacy are effective for concrete, demonstrable reasons.[3] *Advanced Legal Writing*'s realization of this goal makes the book stand out among advocacy texts.

A. The Naming Function

The categorization and description of rhetorical devices contained in *Advanced Legal Writing* is one of the more comprehensive and exacting collections of these techniques. Naming these rhetorical devices provides the advocate with a checklist of devices that will greatly expand the reader's array of persuasive tools. An advocate can never have too many tools at her disposal; more tools mean more choices, and more choices mean that the advocate can make more conscious decisions about how to persuade. The only real danger of so many tools is one that Professor Smith repeatedly points out: overuse.[4] But this danger pales in comparison to the usefulness of the book's presentation of the tools, organized and labeled and illustrated by example.

Professor Smith analyzes both familiar and novel advocacy techniques. In Part I, Professor Smith catalogs the myriad ways to use literary references in persuasive writing.[5] He separates them into three different categories: (i) "literary references for nonthematic comparison", (ii) "literary references for borrowed eloquence", and (iii) "literary references for thematic comparison".[6]

Literary references for nonthematic comparison are used to illustrate a minor point or argument within a legal document that has no connection to the theme of the referenced literary work.[7] An example is a reference to a prior judicial decision as an "ugly duckling"—a decision that many thought to be wrong, but that turned out to be right.[8] By contrast, literary references for thematic comparison are those used in a legal document for the specific purpose of evoking the theme or major point of a literary work, as when a

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[2] Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 476 (1974); Jennifer A. Johnson, *The Experimental Use Exception in Japan: A Model for U.S. Patent Law?*, 12 PAC. RIM L. & POL'Y J. 499, 510 n.98 (2003).

[3] MICHAEL R. SMITH, ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING 12−13 (Aspen Law & Business 2002).

[4] *Id.* at 28, 37, 49, 66.

[5] *Id.* at 13−14.

[6] *Id.* at 15, 39, 51.

[7] *Id.* at 15−16.

[8] *Id.* at 16.

reference to Orwell's *1984* is used to evoke themes of dangerous government control or propaganda.[9] Finally, literary references for "borrowed eloquence" directly quote a particularly vivid or beautiful phrase or passage from literature to add passion and memorability to an argument.[10] These categories are further refined to include six separate literary rhetorical devices: (i) "nonthematic metaphoric comparison", (ii) "nonthematic hyperbole", (iii) "direct borrowed eloquence", (iv) "creative variation", (v) "literary references to works involving obvious political or social commentary", and (vi) "literary references for general societal values".[11]

In Part II, Professor Smith explains the classical rhetorical concepts of *pathos*, *logos*, and *ethos*, which roughly translate to the use of emotion, logic and credibility in persuasion.[12] While these concepts are well-known to most advocates, *Advanced Legal Writing* offers some interesting new examples of these concepts as they are used in product marketing.[13] Although the focus in Part II is clearly on *ethos*, *pathos* and *logos* also get some attention.

Pathos, in particular, is usefully separated into two separate concepts: using the substance of a case to appeal to the emotions of the reader ("emotional substance") and using techniques that affect the reader's mood ("medium mood control").[14] This is a welcome change from the traditional world of advocacy writing, in which *pathos* tends to get short-changed: often emotion is given cursory or superficial treatment, dismissed as a last resort for a weak case or undermined by stern warnings about its overuse.[15] Thankfully, *Advanced Legal Writing* does not give in to the common tendency to undervalue *pathos*. Instead, the book recognizes *pathos* as a critical part of the engine that drives persuasion by referencing it throughout the book. Finally, *logos* is explained in Part II, and it gets much more attention in Part IV (Persuasive Writing Strategies Based on Psychology Theory). *Advanced Legal Writing*, however, unlike many other legal writing texts, does not let *logos* dominate or outshine its sisters.

In Part II, however, *ethos* is the star of the show, and is presented via a highly-organized classification system that details the many ways to evince

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[9] *Id.* at 51−52, 55.

[10] *Id.* at 39−40.

[11] *Id.* at 15, 39, 51−52.

[12] *Id.* at 81.

[13] *Id.* at 85−90.

[14] *Id.* at 94−98.

[15] *See, e.g.*, RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT (Rev. 1st ed., NITA 1996) (recommending that appellate lawyers eschew "shamelessly emotional matters" more appropriate to trial work); JAMES A. GARDNER, LEGAL ARGUMENT: THE STRUCTURE AND LANGUAGE OF EFFECTIVE ADVOCACY 136 (The Michie Co. 1993) ("When all else fails, the advocate may have no choice but to turn to general arguments based on justice, morality or policy."); Susan A. Bandes, *Introduction* to THE PASSIONS OF LAW, 1−2, 6−7 (Susan A. Bandes ed., New York Univ. Press 1999); Laura E. Little, *Negotiating the Tangle of Law and Emotion*, 86 CORNELL L. REV. 974, 977 (2001) (noting that in law, the word "emotional" is often derogatory in intent); Tamara R. Piety, *Smoking in Bed*, 57 U. MIAMI L. REV. 827, 843 (2003) ("[I]t is unseemly and unlawyerly to have feeling or commitments. Detachment is lawyerly. Passion is not.").

ethos in persuasive writing. Within Part II, *Advanced Legal Writing* offers no fewer than nineteen separate ways to demonstrate credibility in legal writing, all of which are explained and analyzed, and often accompanied by examples.[16] Who knew lawyers had so many ways to show credibility? The list is downright inspirational, and lawyers can significantly improve their advocacy writing by familiarizing themselves with its contents. For example, Professor Smith suggests lawyers strengthen their credibility by having a command of the facts and law (demonstrating intelligence) and using affirmative and confident language (demonstrating zeal).[17] Also included here are perhaps less well known (and sadly, perhaps less widely used) methods of evincing *ethos*, such as the importance of disclosing damaging facts and adverse authority (truthfulness and candor), being respectful to audience and opponent (professionalism), and being a deliberate, careful writer and analyzer (intelligence).[18] For novice lawyers or students, this comprehensive, well-described list is an easy way to internalize the techniques. For experienced lawyers, the benefit comes from the highly organized, exhaustive list, which creates an excellent desk reference.

In Part III, Professor Smith outlines the use of metaphor and simile in persuasive writing, and exhaustively lists other useful figures of speech, like the rarely used anastrophe and hyperbole.[19] Most advocates are likely unfamiliar with most of the figures of speech listed, but will be interested to learn about them. In Chapter 9, the advocate can discover the many ways metaphor functions in our language, and how to energize dry legal topics with some creative rhetorical flair.[20] While most lawyers are probably familiar with the concepts of metaphor and simile, *Advanced Legal Writing* offers a uniquely in-depth look at these common devices as tools of persuasion in law. Especially helpful is the last section on how to draft a metaphor and when it might be useful to insert one into a persuasive document.[21] The chapter also includes an interesting chart containing three effective metaphors from judicial opinions that are deconstructed to demonstrate the progression of steps from concrete point to metaphor.[22]

In Chapter 10, *Advanced Legal Writing* moves beyond the more familiar territory of metaphor and more deeply into classical rhetoric. In this chapter, legal writers are introduced to a number of rhetorical figures of speech that will probably be new to them. These include: *antonomasia*, use of a proper name in place of a common word (he's a real Einstein); *polysyndeton*, excessive use of conjunctions (he ate an appetizer and dinner and dessert); and *metonymy*,

[16] SMITH, *supra* note 3, at 101−37.

[17] *Id.* at 128−31 (discussing intelligence), 114−15 (discussing zeal).

[18] *Id.* at 104−14 (discussing truthfulness and candor), 117−22 (discussing professionalism), 143−55 (discussing the analytical and deliberate writer).

[19] *Id.* at 179−221 (discussing metaphor and simile), 223−49 (discussing other figures of speech).

[20] *Id.* at 192−203.

[21] *Id.* at 217−20.

[22] *Id.* at 221.

reference to something by a word associated with it (the pen is mightier than the sword).[23] Many readers will recognize the examples, but most will not know the names or definitions of the techniques. Here again, the list and examples function as a well-organized desk reference. *Advanced Legal Writing* lists twenty figures of speech, some of which, like the listing for repetition, have a number of categories within them. There is a wealth of rhetoric here for advocates who wish to invigorate or add some sparkle to their writing.

The naming of all these devices is a great service to legal writers. For too long, many lawyers either have not known about persuasive techniques or knew only vaguely about them and used them, not always well, by instinct or by imitation. This is at least partially a result of the historical neglect of practical skills teaching in American law schools.[24] The mythology within law is that the ability to persuade, like writing prowess, is something inherent; you either have it or you don't.[25] This mythology has led to a significant gap in law school teaching. Most law schools do not focus on strategic persuasive writing. Advanced persuasive writing is not a required course in most law schools. Some law students are introduced to the basics of persuasive writing in the second semester of their legal writing course. But for a host of reasons, the first year legal writing courses often cannot move beyond the elementary concepts of brief-writing tone and convention.[26]

This situation leaves aspiring advocates with a limited number of imperfect options for learning the art of persuasion. Too often, the foundation for an advocate's "knowledge" about persuasion is a chaotic, inconsistent oral history that trickles down haphazardly from judges and other lawyers. Lawyer access to this oral history has traditionally been erratic. Those lucky (or privileged) enough to have mentors in the profession are passed the conventional wisdom, but even those with dedicated and learned mentors often received information in disorganized dribs and drabs, as the context or situation called for it. Those many lawyers without a mentor undoubtedly groped their way through advocacy writing by trial and error. And, the oral history itself is problematic: disorganized and quite frequently contradictory, or even

[23] *Id.* at 234, 237, 241−42.

[24] Jan M. Levine, *Leveling the Hill of Sisyphus: Becoming a Professor of Legal Writing*, 26 FLA. ST. U. L. REV. 1067, 1073−74 (1999).

[25] J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 41−43 (1994); Pamela Edwards, *Teaching Legal Writing As Women's Work: Life on the Fringes of the Academy*, 4 CARDOZO WOMEN'S L.J. 75, 80 (1997).

[26] SMITH, *supra* note 3, at 2; Most legal writing programs are understaffed and over-burdened, making it difficult, if not impossible, to cram more material into the course. *See* ASSOCIATION OF LEGAL WRITING DIRECTORS LEGAL WRITING INSTITUTE 2003 SURVEY RESULTS (ms. at 51, copy on file with author; also *available at* http://www.alwd.org/alwd Resources/surveys/2003survey/PDFfiles/2003surveyresults_alwd_.pdf) (Question 82); Levine, *supra* note 24, at 1071−73; Susan P. Liemer, *The Quest for Scholarship: The Legal Writing Professor's Paradox*, 80 OR. L. REV. 1007, 1015−17 (2001). Although the number of advanced persuasive writing courses is increasing, most of these courses can serve only so many students.

(sometimes) wrong.[27] The results of this haphazard process of legal education speak for themselves: by and large, judges are very critical of the writing of lawyers.[28]

Advanced Legal Writing takes a big step in moving us beyond this oral history and toward better persuasive writing. First, exhaustively organizing, naming, and cataloguing rhetorical tools equalizes access to knowledge about persuasive techniques. It makes available to everyone a detailed sampling of advanced rhetorical tools. Additionally, the cataloguing function organizes and corrals the large and amorphous oral history of persuasion into a clear, usable desk reference. In doing so, *Advanced Legal Writing* moves the legal profession forward, toward greater skill and control in drafting persuasive documents.

For this reason, although *Advanced Legal Writing* is perhaps most helpful for novice writers and students, seasoned advocates would be well advised to browse through it, too. Most advanced writers, when we are honest with ourselves, know that much of our persuasive writing is done by feel or by instinct.[29] Some of what we call "instinct" is a byproduct of internalizing much of the oral history of persuasion, through mentors or by reading the persuasive writing of others. But some of it is not. There is a lot to be said for this method. I am not anti-instinct; I believe the best advocates often are those who have that indefinable "something" that helps them get under the skin of their readers. But instinct is also risky, and far too many lawyers rely on it too heavily.[30] And, by definition, instinct is reflexive. We cannot articulate why we follow instinct; we just do. So, it contradicts one of the basic tenets of good, persuasive writing (and one of the basic tenets of the practice of law generally) that every move a lawyer makes should be based on a conscious, deliberate, articulable strategy.[31]

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[27] Michael J. Saks, *Turning Practice into Progress: Better Lawyering through Experimentation,* 66 NOTRE DAME L. REV. 801, 803−04 (1991); Peter Friedman, *Book Review: Bryan A. Garner, The Winning Brief (Oxford University Press 1999)*, 2 J. APP. PRAC. & PROCESS 219, 221 (2000) (lauding an advocate's "defiance of empty convention").

[28] *See* Judge William Eich, *Writing the Persuasive Brief*, 76 WIS. LAW. 20, 21 (2003) ("[M]ost appellate court judges will tell you that poorly-written, unpersuasive briefs are commonplace—almost as commonplace as articles and comments attacking lawyers' (and judges') writing efforts as archaic and incomprehensible."); Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 LEGAL WRITING 257 (2002).

[29] *See* Kristen K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 VT. L. REV. 483, 498 (2003) (lawyers "rely heavily on instinct in gauging the effectiveness of arguments").

[30] *See* Robbins, *supra* note 29, at 498 ("instinct is not at all foolproof").

[31] RICHARD K. NEUMANN, LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE 271−72 (4th ed., Aspen Law & Business 2001); *see also* ASSOCIATION OF TRIAL LAWYERS OF AMERICA ANNUAL CONVENTION REFERENCE MATERIALS VOL. 2, *Ten Commandments for a Plaintiff's Attorney* 2153 (2003) ("[E]very lawyer should be conscious of what he or she is aiming for when acting as an advocate. . . . [T]he essential foundation of good advocacy is a command of the basic skills incorporated in a prepared and well thought out presentation.").

Unfortunately, there is no quantifiable gauge for the persuasiveness of a piece of writing. Thus, no amount of strategic analysis will give you an answer about what is persuasive; you will have to go with your gut. But many (most) other times, strategic analysis will get you a lot closer to the answer, and in a way that eliminates much of the risk of pure instinct. *Advanced Legal Writing* is one of the first legal writing texts to give experienced advocates enough detail and knowledge about rhetorical devices to help sharpen our legal instincts, and also helps us move beyond instinct toward a more conscious process of decision-making in our own persuasive writing.

For many of the same reasons, *Advanced Legal Writing*'s checklist of devices is also invaluable for professors of persuasive writing courses. Most professors of advocacy writing are experts who, quite often, were "naturals" at persuasive writing. How does a person for whom good legal writing came instinctively teach a student who is struggling, who is not a "natural"? It is very difficult to teach from instinct, partly because it is difficult to dissect instinct.[32] *Advanced Legal Writing* performs the dissection of instinct for its readers, which will help professors be better advocates and better teachers.

Teaching from instinct has an authoritarian quality, a "do it this way because I said so" superficiality. Most students do not respond well to this method. This is especially true of law students, who tend to want to understand in depth the culture and mores of law practice. In addition, much like learning persuasion from a mentor, teaching from instinct tends to be disorganized and haphazard. Professors operating on instinct can tell students whether something sounds persuasive or not, but not the pedagogically essential what, why or how. This leaves students ill-equipped to transfer their learning to new situations. Platitudes or generalizations about persuasion do not advance the ball much—and many persuasive writing texts rely on this method. Not *Advanced Legal Writing*: it is detailed almost to a fault. But the detail and organization is invaluable to professors, helping them see the inner workings of their persuasive instincts and helping them pass this knowledge on to their students.

It is a compliment to *Advanced Legal Writing* that, in places, I wanted more information. As I was reading about *ethos*, I found myself wanting more detail in some of the examples. I also found myself wondering about the wisdom of focusing so heavily on what judges *say* they want, as opposed to something deeper.[33] For example, I would have liked more depth about the "hard" lines advocates have to draw. Sure, it is important not to dash credibility by failing to disclose an adverse fact or case that is obviously relevant and bound to rear its ugly head anyway, but what about the conflict between the candor of disclosing a damaging relevant fact or case, and the lack of

[32] For an example of the difficulty of teaching even something that one does well, see Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer For Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 RUTGERS L. J. 459, 463 (2001) ("We could write something that seemed to work . . . and we often won our motions—but we could not have explained how we wrote them.").

[33] SMITH, *supra* note 3, at 106 (chastising a lawyer for misstating fact), 111 (chastising a lawyer for failure to disclose bad facts), 111−12 (commending a losing lawyer for disclosing bad law).

intelligence evinced by doing so unnecessarily (or clumsily)? What if the advocate is in a position to know the fact or case won't rear its head?[34] Or, what about a damaging fact that is of questionable relevance, but nevertheless is "out there" in the record? Should you include it in the brief just to show your credibility? An occasional foray into the murkier questions would have been welcome, at least to this reader.

Relatedly, I have often wondered whether there is a difference, in terms of persuasion, between what judges *report* impresses them, and what *actually* sways them. This concern raises questions about *Advanced Legal Writing*'s reliance on judicial reports of what persuades, or even, to some extent, on what judges include in their own writing. Especially in the area of *ethos*, the conventional wisdom of persuasive writing has always seemed to favor credibility over zeal: judges like lawyers who are professional and reasonable more than lawyers who are pushy and stubborn. But, it begs the question of what (or who), in the end, carries the day. And, while it is true that judicial opinions are persuasive, judges simply do not have the same obligations to their audience that lawyers have to their clients. To be sure, probing beyond what people say and have written would be a large task, perhaps too large for this book, but it would have been worth noting the limitations of the evidence.

In other places, however, I would have preferred less information, or at least less nuanced categorization. To a legal writing academic, for example, the difference between metaphoric words, clauses, and sentences may be useful, but for most practicing lawyers, this level of categorization gets beyond the realm of practicality. Similarly, although *Advanced Legal Writing* convinced me that there is a difference between literary references involving "obvious political and social commentary" and those invoking "general societal values," I question whether advocates truly need to master this kind of subtle distinction.

But this criticism is minor, and does not detract from the overall usefulness and originality of the book. It would be the flaw of any book that, like this one, is the first step in the long overdue process of critical examination of persuasion and legal writing.

B. Why Things Work

Another significant way in which *Advanced Legal Writing* takes advocates and writing professors to new ground is in its exploration of *why* the techniques it highlights persuade. It is rare for an appellate advocacy text to take the extra step of illustrating the aspects of human nature that make rhetorical techniques effective. To do this, *Advanced Legal Writing* relies heavily on classical rhetorical principles, but also delves into cognitive psychology and literary theory. In the Introduction to the book, Professor Smith is somewhat cautious

[34] *See* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 135−36 (Harvard Univ. Press 1982) (telling the story of a lawyer named Hilary who struggled with whether to point out to her opposing counsel that he had missed a key document that would help his client's case).

about his foray into theory, assuring his readers that the book is nevertheless "concrete and practical."[35] I suppose this cautionary note is necessary, given the practicing bar's distrust for what it sees as the impractical, fanciful quality of most law review pieces.[36]

Pragmatists, including the practicing bar, however, would be mistaken to write off the "why" part of *Advanced Legal Writing* as mere "theory." Better persuasive writing requires not only knowledge of the available persuasive techniques, but also a solid understanding of why and when they work. Only with this understanding can the advocate make informed, effective choices about when to employ a particular persuasive technique (and when to forego it). Without the "why," all the advocate has is a list of strategies, with little idea of when and how to use them. I can think of few more terrible fates than to be the audience for the persuasive writing of a newly-informed, enthusiastic advocate who has numerous literary and rhetorical strategies at her disposal, but not the first idea of why they work. Luckily, *Advanced Legal Writing* does not leave the judiciary (or other counsel) in such a position.

For each category of literary persuasive device, including literary references and use of metaphor and simile, *Advanced Legal Writing* analyzes the rhetorical function served, as well as some explicit cautions about when a particular device might be inappropriate or how it might be ineffectively used.[37] For example, Professor Smith offers substantial evidence for the persuasive value of literary references, using the concept of "shared knowledge" from discursive psychology, "intertextuality" from literary theory, and *logos*, *pathos* and *ethos* from classical rhetoric theory.[38] He explains the different ways that certain rhetorical devices can play directly to a reader's emotion or affect a reader's mood.[39]

Similarly, the text breaks new ground (in the law world) with its explanation of the psychology of persuasive devices. No longer are lawyers dependent on their personal knowledge or conventional wisdom of dubious validity to evaluate how or why a particular argument or turn of phrase will affect a reader's mental state. For too long, lawyers seeking to persuade have relied on a kind of "armchair psychology" which was part of the oral history and purported to "know" how readers would react to certain persuasive tactics. All practicing lawyers have heard platitudes like these: Don't make jury arguments to an appellate court. Judges get irritated when the Statement of the Case is emotional or sarcastic (but they may get bored if the writing is dry and lacks color). Don't slant the formulation of the issue too obviously in your

[35] SMITH, *supra* note 3, at 3 ("[T]his book is not exclusively theoretical. The strategies themselves are concrete and practical and are directly applicable to the day-to-day writing of practicing lawyers.").

[36] *E.g.*, Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 36 (1992).

[37] SMITH, *supra* note 3, at 204−17.

[38] *Id.* at 20−24.

[39] *Id.*

favor (but frame issues in a way that suggests a favorable answer).[40] Armchair psychology may contain a few grains of truth, but it has serious limitations. Often, its generality makes it of limited use or it can appear contradictory. And, some of it is, to say the least, of debatable accuracy.

The point is that none of it even purported to be based in the science of human psychology even though that science has developed significantly since the oral history was established. Why not? There is a whole science out there devoted to the study of how human beings react to things, and it is high time lawyers paid attention to it. Professor Smith's interdisciplinary approach doesn't give us too much psychological data, but at least it starts us on the road.

Two of the more interesting discussions of why persuasive techniques work occur in the chapters addressing use of literary references. The first of these discussions occurs in the explanation about why to use literary references for thematic comparison.[41] The second occurs when *Advanced Legal Writing* turns to discursive psychology to offer an explanation about why literary metaphors work on the reader.[42]

1. Pushing Judicial Buttons

According to *Advanced Legal Writing*, literary references can be separated into a number of different categories. One category is a kind of reference that explicitly calls to the reader's mind the theme of a literary work.[43] A good example of this rhetorical device is a judge's quotation of Shakespeare's *King Lear* ("How sharper than a serpent's tooth . . .") to show his disgust for a litigation involving adult children who had attempted to defraud their mother out of property.[44] Another example is a judicial opinion that quotes from Hans Christian Andersen's *The Emperor's New Clothes* to compare the Federal Sentencing Guidelines to "a sovereign who can be neither clothed nor dethroned."[45]

Advanced Legal Writing points out a primary function of literary references for thematic comparison: to influence a decision-maker's value system.[46] Legal decision-making often involves choosing between competing values. Therefore, a rhetorical tool that influences the hierarchy of a decision-maker's value system has the potential to change the outcome of a case.[47]

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[40] The advice noted in these examples was taken from a variety of sources, including the author's recollection of what lawyers have told her. *See generally* Andrew L. Frey & Roy T. Englehart, Jr., *How to Write a Good Appellate Brief*, LITIG., Winter 1994 at 6.; William Pannill, *Appeals: The Classic Guide*, LITIG., Winter 1999, at 6 (reviewing the 1950 text *Effective Appellate Advocacy* by Colonel Frederick Bernays Wiener).

[41] SMITH, *supra* note 3, at 59−64.

[42] *Id.* at 64.

[43] *Id.* at 55.

[44] *Id.* at 56−57 (quoting Mileski v. Locker, 178 N.Y.S.2d 911 (N.Y. Sup. Ct. 1958). The entire Shakespeare quotation that appears in *Mileski* is "How sharper than a serpent's tooth it is to have a thankless child. Filial ingratitude! Is it not as this mouth should tear this hand for lifting food to it."

[45] *Id.* at 58 (quoting United States v. Harrington, 947 F.2d 956 (D.C. Cir. 1991)).

[46] *Id.* at 59−63.

[47] *Id.*

Moreover, because literature is both a reflection, and sometimes a source, of social and cultural values, literary references can serve a number of rhetorical functions. Literary references can often "cause the reader to relive the original experience of reading the book and . . . revive the value [the book] represents in the mind of the reader."[48] In this way, incorporation of literary references into persuasive writing can "activate and enhance" the importance the reader assigns to a particular value, convincing the reader to choose that value over an equally compelling, competing value in the case.[49]

Tapping into a reader's feelings about a particular piece of literature falls squarely within the *pathos* side of rhetoric. In terms of what *Advanced Legal Writing* calls "emotional substance," thematic literary references evoke the emotions associated with the theme of the literature.[50] They can make the reader feel the emotions that she felt when she read the book and discovered the book's central message—in pop psychological terms, they "push the reader's emotional buttons." The interesting part of button-pushing is that it can be subtle and overpowering at the same time. Good writers have immense control over their readers' perceptions. Perhaps even more interesting, the control can often be hidden: the reader may not even notice she is being led by the author to one conclusion or another. Authors make us love or hate characters, feel happy or sad while reading, and cry or get up to lock the door, all by design.

When applied to persuasive legal writing, the subtle but powerful quality of literary references as a way of eliciting emotion is quite valuable because legal convention requires that appeals to emotion be indirect. Lawyers want to appeal to the emotions of their audience, but convention usually requires that they not do so explicitly.[51] Literary references may evoke a particular reader reaction, but they look like they do not come directly from the advocate, whom the reader knows is an obviously biased party (regardless of how often the writer has demonstrated her *ethos*). Rather, the emotional pull seems ultimately to come from another source (the author of the literature). This is a little sneaky. That isn't to say that persuasive writers should avoid emotional strategies—part of being a persuasive writer is using the tools you have to get the reader to do what you want her to do. But, where does emotional appeal cross over into the fuzzier ethical area of manipulation? That thematic literary references can subtly tap into a reader's stored feelings or emotional framework without a direct appeal is their great power—and like all power must be used

[48] *Id.* at 63.

[49] *Id.* at 62.

[50] *See* Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 1003 (1991) (Professor Abrams writes about her reaction to reading a narrative in which Professor Patricia Williams describes being in a clothing store while the salesclerks made derogatory comments about Jews. The story made Professor Abrams recall "uncomfortably" the many times she has been silently complicit while others were mistreated. Abrams describes this quality of Professor Williams' writing as like a good piece of literature in its ability to subtly invoke themes that are "common and recurring.").

[51] *See* Kathryn M. Stanchi, *Feminist Legal Writing*, 39 San Diego L. Rev. 387, 396−98 (2002); *see also* Abrams, *supra* note 50, at 1003.

wisely. *Advanced Legal Writing* might have done a bit more to show the reader the line.

In addition, this section of the book raised a question about the elusive quality of rhetorical devices that make some effective and others irritating, laughable or even offensive. For example, I wondered whether an advocate, as opposed to a judge, could get away with directly analogizing the Federal Sentencing Guidelines to the Emperor's new clothes. Where is the line between positive emotional reaction and eye-rolling or downright impatience? Many of us have seen judges react well and not so well to quotations from literature. But with this question, *Advanced Legal Writing* doesn't help us much, except for a few generic cautions about overuse, clichés, or "overly grand" references.[52] There is little in the book that helps lawyers gauge whether we are being artful and persuasive, or bombastic or trite, and often the writer is the poorest judge of this.[53]

2. Contrived Camaraderie

The second interesting discussion involves why literary metaphors work, and it derives from discursive psychology. Discursive psychology focuses on the way that human beings communicate with one another.[54] A common way that human beings talk to each other is through a type of shorthand called "shared knowledge."[55] That is, when human beings communicate, they often reference ideas and concepts that all the communicators know (or are expected to know) from previously learned knowledge or experience.[56] Sometimes, we are able to use this shorthand because we know the other person well—we have shared experiences or have read the same book or know the person's favorite movie.

At least theoretically, however, there are some things we can presume about our audience even though we don't know the audience personally. There are some things that we may be able to assume simply by knowing that the audience we are addressing lives in America and is a lawyer or judge. *Advanced Legal Writing* posits that literary references can (at least sometimes) be a kind of shorthand of shared knowledge, even among people who do not know each other personally. This makes them an incredibly useful rhetorical device for a number of reasons. First, it gives the writer a way to communicate an idea by way of something that is familiar and understood by the reader—which allows for a clearer and deeper understanding of the substance of an idea (*logos*). Second, literary references can positively affect the mood of the reader

[52] SMITH, *supra* note 3, at 66.

[53] A famous quote from Samuel Johnson urges authors to edit this way: "Read over your compositions, and wherever you meet with a passage which you think is particularly fine, strike it out." *See* Wikipedia Biography of Samuel Johnson, *available at* http://en.wikiquote.org/wiki/Samuel _Johnson.

[54] SMITH, *supra* note 3, at 20.

[55] *Id.* at 20−21.

[56] *Id.*

by entertaining the reader or evoking happy memories of the literature referenced (what Professor Smith calls "mood control").[57]

Third, and perhaps most craftily, however, literary references convey a sense of sharing and camaraderie between relative strangers that usually only exists among people who know each other better. Professor Smith describes this facet of shared knowledge as a function of *ethos*, as a way of making a kind of inside joke between writer and reader.[58] Especially with literary references, this can have a kind of clubby, elitist, "we are the same kind of people" quality to it. Somehow, we seem often to be (or wish to project that we are) the kind of people who read, for example, *King Lear* and Homer's *Iliad*, not the kind who read pulpy romance novels or watch Fear Factor with a beer or two.[59]

The *ethos* and mood control functions raise some other troubling questions, because they explicitly seem to presume a universal culture and set of priorities within law. To his credit, Professor Smith warns about the danger of assuming a shared knowledge that may not exist.[60] He warns legal writers to be "conservative" and omit references about which they are uncertain.[61] He also specifically cautions writers to be sensitive to cultural differences when making literary references, but says only that the writer should consider any potential cultural differences before deciding in favor of a particular literary reference.[62]

But, there is more here than a problem of a multicultural audience. The problem is that mostly, the audience *isn't* multicultural.[63] Within the decision about what literary references are acceptable is embedded the hierarchy that exists within the law—of culture, of race, of class, and of gender. Let's face it: being cautious about literary references means that Shakespeare will almost

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[57] *Id.* at 23.

[58] *Id.* at 24.

[59] *See, e.g.*, Charles Alan Wright, *Literary Allusion in Legal Writing: The Haynesworth-Wright Letters*, 1 SCRIBES J. OF LEGAL WRITING 1, 5 (1990) (literary allusion "pays the judge the unstated compliment of assuming that he is one of those 'genuinely well-read' persons who will recognize and enjoy being reminded of . . . the 'common body of literature with which all *cultured persons* are familiar'") (emphasis added) (quoting Bryan Garner).

[60] SMITH, *supra* note 3, at 25−27.

[61] *Id.* at 26.

[62] *Id.* at 27.

[63] *See* Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 CAL. L. REV. 1109, 1113, 1115 (2003) (stating that there is a "lack of diversity within the judiciary"); Theresa M. Beiner, *The Elusive (But Worthwhile) Quest for a Diverse Bench in the New Millenium*, 36 U. CAL. DAVIS L. REV. 597, 601 (2003) (noting that "the majority of sitting judges remain white males"); Lauren Makar, Remarks, *The 2002 Sandra Day O'Connor Medal of Honor Recipient—Mary Jo White*, 26 SETON HALL LEGIS. J. 263, 272 n.38 (2002) ("[O]ne in ten judges is a minority and one in five is a woman."); *cf.* DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM. A CRITICAL EDITION 62−63 (New York Univ. Press 2004) (stating that law faculties are "overwhelmingly" white men and noting that in the law school classroom "[y]ou'll find Fred Astaire and Howard Cosell, over and over again, but never Richard Pryor or Betty Friedan").

always be an acceptable reference (even if judges don't know the reference they will think, as educated people, they ought); Collette and Gloria Naylor are probably pushing it; and Ntozake Shange, Adrienne Rich and Eldridge Cleaver are, by and large, out of the question.[64] This should trouble us. However effective it can be, playing the "we're the same kind of people" game smacks of an elitism (and worse) that is not a very attractive part of the legal profession. I don't mean to suggest that this is something a practical text like *Advanced Legal Writing* should have tackled in depth. The issue for discussion in the text was how to present authority, not how to question it. Nevertheless, we should think about embedded hierarchy anytime we write or read a pedagogical text, because it is important to be aware of hidden (and obvious) bias when we are teaching.

Moreover, this point isn't entirely irrelevant to the practical question of how to present authority. When a text leaves the question of how to choose literary metaphors to the writer's cultural common sense, it presumes a set of shared priorities that may not exist. Instead, it may be requiring certain legal writers to accept or absorb the hierarchy and its attendant biases.[65] What about the writer who feels like a cultural outsider in the legal profession?[66] How does she go about drawing the line on literary references? Maybe the most influential book she ever read was James Baldwin's *Giovanni's Room* or Audre Lorde's *Sister Outsider*.[67] What of the writers who cannot possibly relate to the judge's formative personal experience reading *Lord of the Flies* at prep school?

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[64] The authors listed here are a tiny smattering of literary figures commonly claimed by outsider readers. I realize, however, that in my zeal to provide examples of prominent literary figures who, in part because of their "outsider" status, might be "risky" literary references, I may have chosen authors with whom readers of this Review may be unfamiliar or only distantly familiar. So, as brief background: Collette was a French female writer of the 20th Century, revered by many feminists as a free-spirit and sexual libertine. Gloria Naylor is an African-American female author whose work frequently tackles themes of racism and sexism. Naylor wrote *The Women of Brewster Place* (made into a film starring Oprah Winfrey) and *Mama Day*. Eldridge Cleaver was an African-American revolutionary and Black Panther leader perhaps best known for writing the powerful and disturbing book, *Soul on Ice*. Adrienne Rich is a poet and author who explores themes of sexuality and feminism; she wrote the ground-breaking *Blood, Bread and Poetry*. Ntozake Shange is an African-American novelist, poet and playwright perhaps best known for her choreopoem, "*for colored girls who have considered suicide/when the rainbow is enuf,"* which was produced on Broadway. *See generally* Wikipedia Biographies of Collette, Gloria Naylor, Eldridge Cleaver, Adrienne Rich, and Ntozake Shange, *available at* http://en.wikipedia.org/wiki.

[65] *See* 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); *see also* Kennedy, *supra* note 63, at 35, 38−39 (stating that lawyers "submit to" and are "complicit in" hierarchy).

[66] *See* Stanchi, *Resistance*, *supra* note 65.

[67] James Baldwin was an African-American author and novelist; *Giovanni's Room* is a novel about a man struggling with issues of alienation and sexuality. Audre Lorde was an African-American author and poet. In *Sister Outsider*, she discusses themes of sexuality, feminism, racism and classism. *See generally* Wikipedia Biography of James Baldwin, *available at* http://en.wikipedia.org/wiki/James_Baldwin and Wikipedia Biography of Audre Lorde *available at* http://en.wikipedia.org/wiki/Audre_Lorde.

Advanced Legal Writing doesn't offer the outsider writer much help in line drawing. While I concede that such guidance may be a great deal (even too much) to ask of a law text, an acknowledgment of the problem would have been welcome.

III. CONCLUSION

There is something mysterious and unknowable about what, ultimately, persuades people. This is one of the most engaging aspects of being a lawyer, and a large part of what makes advocacy an art and not a science. Even lawyers—who love control and hate risk—love the mysterious, "fuzzy" part of advocacy. But acknowledging that there is a part of persuasion that can never be truly "known" does not mean ignoring that there are some aspects of persuasion that can be studied and analyzed. It is true: *Advanced Legal Writing* takes some of the mystery out of persuasion. But what it offers lawyers in exchange is more than a fair trade.

In addition to giving advocates a deeper understanding of where the theory of persuasion comes from, how the tools work, and how the tools can be used most effectively, which is all very obviously practical, *Advanced Legal Writing* also gives lawyers something else. It tells us how to make legal writing more beautiful and more interesting, two qualities sadly lacking in most legal writing. It quite literally helps advocates put the art back into lawyering. And, in doing so, it proves legal writing is not drudgery; it can be fun. This is not a frivolous thing in a climate where so many lawyers report dismal levels of job satisfaction.[68]

Finally, although this was not an articulated goal of the text, *Advanced Legal Writing* also takes the important step of proving that persuasive legal writing is a complex, interesting field of academic study worth pursuing. The book demonstrates that lawyering is truly an art; that, at its best, the practice of law requires more than "case-crunching." Empathy, core values, great literature, classical rhetoric, history and psychology are more than mere window dressing: they are the components of persuasion, the lawyer's art. *Advanced Legal Writing* shows us what we have been missing by virtue of law schools' neglect of the art of lawyering, and gives us a glimpse of what riches await us as the academic pursuit of legal writing evolves.

And if it is true that *Advanced Legal Writing* sometimes over-categorizes or shies away from the murkier issues, that criticism may be wishful thinking on the part of a lawyer and teacher who sees such immense potential in the subject matter, and having been given a taste, wants it all. Because, after all, writing is deliberate and knowable, and it can be taught and explained, but sometimes, you have to go with your gut.

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[68] Lawrence R. Richard, *Psychological Type and Job Satisfaction Among Practicing Lawyers in the United States*, 29 CAP. U. L. REV. 979 (2002) (noting the "well documented increases" in low job satisfaction among lawyers).