PREFACE

What is rhetoric? Read this issue and you'll see many of its facets, each of which, like those of a jewel, draws the viewer. In our case, each facet speaks, as well; it persuades. This can be persuasion through blarney, such as the outlaw lore to which the labels on some American whiskeys allude in the expectation of luring the imaginations, and dollars, of whiskey drinkers. Such is the tasty tale of Derek Kiernan-Johnson's "The Potemkin Temptation or, The Intoxicating Effect of Rhetoric and Narrativity on American Craft Whiskey." You'll learn more than the sparkle of rhetoric from this article, including how American whiskeys are made, and aged, and how they differ from the "whisky" made in Scotland. On the whole, this article is more fun to read than read about. You'll find it delectable.

Persuasive tale-telling—narrativity—makes for great marketing, of course, but it's also the strategy of advocates, who know that a story well told can sway the reader's judgment. Such is the lesson of Terri LeClercq's "Rhetorical Evil and the Prison-Litigation-Reform Act." The story resulting in this Act's interceding and interfering with the federal-court system, though, was one about rhetoric without ethical ballast: its supporters sold its bill of goods to Congress by means of logical fallacies—misleading labels and statistics, lopsided narratives, hyperbole, and scaremongering. Such political storytelling is storytelling without ethos—rhetoric's backbone of good morals, good character. LeClercq urges us—the lawyers who wield the tools of the law—to be watchful that our own narratives and those of our representative first reflect the moral and professional standards we have sworn to uphold.

Such deliberate misdirection of the audience from a narrative's honest arc is something we are alas familiar with in the current political climate, and none doubt that it can and often does break ethical bounds. But Melissa Weresh asks in "Wait, What? Harnessing the Power of Distraction or Redirection in Persuasion" whether the rhetorical use of distraction—or, more palatably put, redirection—familiar in fiction as a narrative device, might be adapted, ethically, to advocacy. Weresh reacquaints us with the formal and substantive qualities that make narrative persuasive, then introduces us to psychologists' use of distraction to manipulate the

subject's engagement or compliance, thus enhancing her receptivity to the message. Can such techniques be used in advocacy? Yes, says Weresh—they already are, by defense attorneys, for example, who know how to frame a story to their clients' advantage ("redirecting" jurors' attention from unfriendly facts, from their own feelings to those of the client, from their own sense of security to a sense of threat from whatever wrong injured the client). Even mediators mis- or redirect participants in a game the latter have chosen to play. The tool is useful, and it is used. The part it plays in an advocate's strategy, though, must be appropriate and it must be ethical. Each of the articles thus far says as much.

The ethical use of rhetoric goes without saying for transactional lawyers. In Susan Chesler and Karen Sneddon's "Telling Tales: The Transactional Lawyer as Storyteller," fairness to both sides is a given (though in some contracts, it is a myth, as in an employment contract in which, true to a stock story, one party is Goliath, the other, David). The authors counsel that incorporating the lessons of storytelling can make transactional documents more effective. Such drafting does not mean replacing form agreements, which have been tested by repeated use and even judicial construction; it does mean using the best form (for there are many possibilities, whatever the transaction) as a starting point, a base for the parties' particular narrative. The authors offer a handful of ways the drafter can shape the story told by the agreement, from substituting party names for their roles in a transaction (Buyer, Seller; Insurer, Insured), to remembering that a contract envisions a plot—a series of events, the order or expression of which the drafter can modulate.

We are all familiar with the wide range of topics on which expert witnesses are called to testify, from "hard science" expertise in blood-spatter analysis to "soft science" expertise in art provenance or gang tattoos. Writing experts, including those in legal writing, occupy the witness box, too, testifying on written expression customary in one trade or another, or comparing the written documents' content or style, or construing many kinds of documents with legal effect. In "Applying *Daubert* to Flaubert: Standards for Admissibility of Testimony of Writing Experts," Heidi Brown examines the criteria for admissibility of expert testimony, explores the range of writings in which such experts in legal writing have in fact testified, and offers guidance as to how a scholar or practitioner of legal writing might establish her qualifications as an expert and develop her testimony. What does all of this have to do with Flaubert? Well, as to this last criterion, his inspiration, for one thing—to exercise assiduous care in the task, as he did in his writing: "Whatever the thing you wish to say, there is but one word to express it, but one verb to give it

movement, but one adjective to qualify it; you must seek until you find this noun, this verb, this adjective."[1]

The next article addresses the potential disjuncture of cultures in their varied responses to notions whose meaning we take for granted. Lindsay Head takes the right of privacy as an example of a notion in flux by reason of "social, political, and technological change."[2] Yet the legal community craves law that is "finite, stable, unmoving,"[3] not to mention morally "right." There's a disjuncture here, between reality and ideal, between rhetoric and formalism, between a horizontal identification with the rhetorical culture in which it thrives—and changes—and vertical identification with history and precedent. Because we lawyers inhabit both axes, Head notes, it falls upon us to make the two work together, to find a "rhetorical place to stand, between reason and power."[4]

In the last article in this issue, Ian Gallacher offers practical advice: In "Four-Finger Exercises: Practicing the Violin for Legal Writers," Gallacher suggests that legal writers, like musicians, would benefit by exercises, including writing daily, for short periods, in different formats, with different instruments, at different times of day—shaking ourselves out of numbing, normal conditions and so nudging our creativity. And he advises sharing the products of such labors with others. Gallacher offers many more suggestions, all of which promise to strengthen the skill and the ultimate performance.

The essays in this volume begin with more practical advice for improving the most important skill in our trade, our own writing. Julie Oseid ("What We Can Learn from Edgar Allen Poe") offers lessons that might apply to brief writing, drawn from qualities noted by Poe, a storyteller of indisputable renown, who lauded unity, brevity, focus, and "novelty in tone."[5]

How do you get to Carnegie Hall? Practice, practice, practice. Patrick Barry explores the rhetorical device known as a tricolon (often given a boost by alliteration) in "The Rule of Three," a pattern ubiquitous in our verbal culture. Its appeal is its rhythm, perhaps because, as one of Barry's sources suggests, we can remember three; any more, and we start to

1 Attributed to Gustav Flaubert. *See* https://www.goodreads.com/quotes/129938-one-day-i-shall-explode-like-an-artillery-shell-and.

2 Head, *infra* at 207.

3 *Id.*

4 Linda L. Berger, *Studying and Teaching "Law as Rhetoric": A Place to Stand*, 16 LEGAL WRITING 1, 4 (2010), *quoted in id.* at 207.

5 GREAT AMERICAN SHORT STORIES: FROM HAWTHORNE TO HEMINGWAY 527 (Corrine Demas ed., 2004).

6 *See* CARMINE GALLO, TALK LIKE TED: THE 9 PUBLIC-SPEAKING SECRETS OF THE WORLD'S TOP MINDS 191 (2014), quoted in Barry, infra p. 248, n. 4.

forget.[6] The parallelism snags us all, whether it's a thrice-repeated word or phrase ("Oyez, oyez, oyez!") or three parts of an appealing notion ("Wings. Beer. Sports."[7]). Barry observes that the broken promise of three beats can be even more effective if the third is shaken up at the third step, "same, same, kind of different,"[8] either notionally ("Fresh. Fast. Tasty."[9]) or rhythmically ("Nobody bothered me. Nobody vibed me. It was the opposite of my life at school.")[10] It's rhetoric. It exerts a pull; it persuades.

Suzanne Rowe approaches rhetoric of a different sort: situational rhetoric—in this case rhetoric that repels. She advises what one might do when the office or classroom is electrified by a racially charged comment or joke. Confronting the offense directly is without question awkward, but Rowe offers a couple of strategies to do so, which will enlighten, alleviate, and ameliorate what's left behind by the elephant.

Are you in mind to do some professional reading? This issue's seven book reviews offer a wide range of pleasureable options: Jennifer Babcock's "This Book Is Just My Type," a review of Matthew Butterick's second edition of *Typography for Lawyers* (2015); Mary Bowman's "Making and Breaking Connections: Valuable Perspectives," reviewing *Legal Persuasion: A Rhetorical Approach to the Science* (2018), by Linda Berger and Kathryn Stanchi; Megan Boyd's review, "Legal Writing Lessons from American Presidents," of Julie Oseid's *Communicators-in-Chief: Lessons in Persuasion from Five Eloquent American Presidents* (2017); Leslie Culver's "My Enemy's Enemy and the Case for Rhetoric," reviewing *Race, Nation, and Refuge: The Rhetoric of Race in Asian American Citizenship Cases* (2017), by Doug Coulson; Andrea McArdle's "Judicial Opinions Reimagined: Engendering a Language of Justice," a review of *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (2016), edited by Kathryn Stanchi, Linda Berger, and Bridget J. Crawford; "A Wound, a Chasm, or Both?," David Thompson's review of Linda Edwards' *The Doctrine–Skills Divide: Legal Education's Self-Inflicted Wound* (2017); and Genevieve Tung's "Legislative History is Dead; Long Live Legislative History," a review of Victoria Nourse's *Misreading Law, Misreading Democracy* (2016). Each one is discerning, insightful, and delightfully readable.

This volume sees the end of terms for two of our excellent associate editors. We are saying farewell to Andrew Carter and Anne Ralph. Both of

7 Buffalo Wings ad, *quoted in* Barry at, *infra* p. 251, n. 22.

8 *See* Barry, *infra* pp. 252–53.

9 Jimmy Johns slogan, *quoted in* Barry, *infra* at p. 253.

10 WILLIAM FINNEGAN, BARBARIAN DAYS: A SURFING LIFE 8 (2015), *quoted in* Barry *infra* at p. 254.

these editors have published important scholarship in their own right. In Volume 11 of this journal, Andrew wrote *The Reader's Limited Capacity: A Working-Memory Theory for Legal Writers* applying cognitive psychology to written advocacy. Anne published her first article in Volume 26 of the *Yale Journal of Law & Humanities*, writing about narrative theory as it pertains to the plausibility standard in federal pleadings. Combined, these two professors offered the journal impressive insights about the selection and editing of articles. Authors have praised each of them for their work on articles. We say goodbye with great respect and fondness, wishing them much success in their teaching and scholarly work.

One of our original editors, Ian Gallacher, also leaves our editorial board, having served terms as a coeditor in chief as well as a lead editor. Ian is one of the Journal's most stalwart and enthusiastic supporters. When authors submit pieces for consideration, Ian has always been the first to read the submissions—and he has always read them deeply. His powers of concentration astound and delight. When Ian offers suggestions, they are always on point. His editing touch is a gentle but thorough magic. Ian has also been a friend to each and all of the editors. When we have needed an extra pair of hands, he has always volunteered—during times of health issues, loss, and other crisis, he was there as a port in the storm. It is almost impossible to think of the Journal's operating without him.

And finally, it is with heavy hearts that we also mark the conclusion of an era with Joan Magat at the helm. Since Volume 8, the team has been Joan and Ruth Anne, a dynamic and complementary duo. Joan has taught us all how to be better editors. Her lyrical, sometimes whimsical, voice in bubble comments offered teaching as well as razor-precise suggestions on word choices, idea-sharpening, and small-but-significant technical edits. Thanks to her, a legion of lawyers are better people for knowing how to use hyphens and en-dashes, how to analyze a book review, and how to think about scholarship based in rhetoric. Joan's mind is keen, and her manner is enchanting. All of the editors who have worked with her adore her character and her style. Luckily, we will continue to have her carry on as a lead article editor. We give thanks and remain thankful she will be here to teach our new generation of editors and Journal leadership, even as she steps back from a top role.

—Joan Magat and Ruth Anne Robbins, Summer, 2018