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RHETORICAL KNOWLEDGE IN LEGAL PRACTICE AND THEORY©

FRANCIS J. MOOTZ III*

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This paper was presented at the Joint International Meeting of the Law and Society Association and the Research Committee on Sociology of Law, convened in Glasgow, Scotland on July 10-13, 1996, to address the topic: "Globalization and the Quest for Justice." I wish to thank former Dean Joan Mahoney for her personal encouragement to pursue this project and also for arranging institutional financial support and Interim Dean Donald Dunn for his continued support. I owe a great deal to Jim Gardner and Don Korobkin for patiently reading early drafts of this paper and providing clear examples of the conversational structure of knowledge in their discussions with me and to Bruce Miller for being a committed conversation partner throughout the project. My fellow panelists, Jack Balkin, Costas Douzinas and Allan Hutchinson, challenged me to think more carefully about these issues, as did the members of the audience. Stephen Feldman, Peter Goodrich, Gary Wickham, and Willem Witteveen offered very helpful written comments. Finally, Brad Hirshon and Michelle Dill LeRose secured research materials for me with their customary efficiency and cheerfulness.

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INTRODUCTION: RHETORICAL KNOWLEDGE IN TODAY'S FRAGMENTED LEGAL CULTURE	

It seems that since our globe, as is said, has shrunk, we have acquired more problems regarding justice than we had in previous generations when nations, countries, and continents were isolated. . . . Today more than ever, the questions of justice are global.

....

If the golden rule or Kant's Imperatives are the most generally accepted precepts concerning individual justice, then [Chaim] Perelman's question re-emerges: how can the general be translated into the concrete and individual?

....

We must realize that we will be required repeatedly to return to the starting point of every discussion and re-argue what had been previously determined.

Mieczyslaw Maneli¹

Gadamerian hermeneutics is not just a parochial ingredient of Continental thought, but an important building stone in the emerging global city and in a dialogically construed cultural ecumenicism.

....

For [Hans-Georg] Gadamer it is chiefly the multiplicity (or multiculturalism) of Europe which harbors the continent's legacy and promise for the world.

....

In a world rent by the competing pulls of Western-style universalism and bellicose modes of ethnocentrism, his accent on cross-cultural engagement opens a vista pointing beyond the dystopias of "melting pot" synthesis and radical fragmentation.

....

Hermeneutics from this angle is not a synonym for subjectivism and willful appropriation, but for a sustained, dialogical learning process.

Fred Dallmayr²

The longstanding goal of linking a rigorous, philosophical conception of justice to concrete political action appears infinitely more problematic in a world comprised of competing, incommensurable visions of justice rooted in distinct and rich social traditions of political

1. MIECZYSLAW MANELI, PERELMAN'S NEW RHETORIC AS PHILOSOPHY AND METHODOLOGY FOR THE NEXT CENTURY 126 (1993). For a similar assessment that the challenges of globalization require a rhetorical analysis of the tensions between the emergence of a "global culture" and the "intense local resurgences of ethnic, religious, and national identities," see Richard H. Roberts & James M. M. Good, *Introduction: Persuasive Discourse in and Between Disciplines in the Human Sciences*, in *THE RECOVERY OF RHETORIC: PERSUASIVE DISCOURSE AND DISCIPLINARITY IN THE HUMAN SCIENCES* 11-12 (Richard H. Roberts & James M. M. Good eds., 1993).

2. Fred Dallmayr, *Self and Other: Gadamer and the Hermeneutics of Difference*, 5 YALE J.L. & HUMAN. 507, 508, 520, 524, 514 (1993).

understanding. Globalization, construed broadly as a social, economic, and political development, raises the specter of relativism not as a conceptual critique but as a lived reality. In the age of globalization it appears that one of two equally unsatisfactory trajectories will ensue: either the concept of justice will be a convenient tool for justifying the triumph of a particular worldview through the exercise of social, economic, and political power or the vacuity of the concept will be invoked to absolve us of responsibility for the nihilistic chaos inevitably resulting from the refusal to permit any one parochial vision to hold sway. More succinctly stated, the belief that "justice" can serve as a productive point of discussion in a multicultural world rent with deep divisions appears extremely problematic.

There is little need to rehearse the disintegration of the ideal of justice in contemporary philosophical discourse. The current state of affairs is best revealed by recalling the most ambitious efforts to overcome the current aporia. Within the past thirty years, John Rawls has captivated philosophers and political theorists by reviving the question of justice within the rationalist tradition, Jürgen Habermas has held open the possibility of rationally critiquing the justice of social relations within the framework of contemporary Continental philosophy, and Alasdair MacIntyre has revived Aristotelian virtues ethics as an antidote to the excessive rationalism of the prior two thinkers. These impressive projects are part of a vigorous and broad-based effort to rescue justice from the disabling quiescence of modern skepticism. Nevertheless, justice remains a bitterly disputed concept, and these philosophical projects appear impotent to end the disputations. Reminiscent of the collapse of Greek virtue ethics when exposed to different cultures, the Western quest to articulate the principles of justice appears to have exhausted itself.

What appears most troubling is that there no longer seems to be solid ground even within the parochial confines of American legal theory from which to elaborate the requirements of justice. Disarray in the political philosophy of justice is magnified in contemporary American legal philosophy, where the mythical halcyon days of objectivism and formalism have receded into vague and wistful memories. The "linguistic turn" in legal theory—comprised of a wide variety of approaches that include ordinary language philosophy, deconstruction, and philosophical hermeneutics—has indelibly shaped jurisprudential inquiry by establishing incontrovertibly the indeterminate and political character of legal practice. In its most recent manifestations,

however, the linguistic turn threatens to bring legal theory beyond the bounds of reasoned inquiry altogether. Radically deconstructive, postmodern theorists accept the proposition that legal relations are linguistically mediated, but they argue further that language is inveterately heterogeneous and unstable, thus precluding the possibility that reason might serve as a limitation on the exercise of power. This account of legal practice parallels the pessimistic assessment that “discourse” in contemporary global politics is always conducted in the shadow of gunboats (economic as well as military). In short, the “linguistic turn” in legal theory suggests that the well-recognized problems of defining justice in the age of globalization have always been present, although vigorously suppressed, within the local confines of American legal thought. It may not be too far-fetched to conclude that the message of contemporary legal theory is: “We have seen the Balkans, and they is us.”

The intemperate “debate” over affirmative action would appear to symbolize this breakdown in reasoned discourse about the requirements of justice. After all, it is difficult to hold much hope for resolving the pressing questions of social and political justice posed by globalization—problems that include allocating scarce resources and plentiful waste, identifying and defining human rights on a global scale, and preserving the cultural integrity of different peoples—when a rich country with relatively stable political, economic, and social institutions is unable to come to grips with the presence and legacy of racial oppression. For several decades there appeared to be a political consensus that members of disadvantaged groups are entitled to the benefits of “affirmative action” on the part of employers and educational institutions to provide them with opportunities that would enable them to overcome the pervasive effects of discrimination. However, affirmative action is now the subject of intense and heated debate, figuring largely in political elections at all levels of government.

Most importantly, the debate over affirmative action appears to be unresolvable as a question of legal rights, thus relegating the issue solely to strategic political action. This issue has become part of the aptly named culture wars, since the debate appears to be as intractable as a political dispute arising between two countries with dissimilar cultures. What is the just resolution of this important issue? The answer to this question appears to be no less elusive than defining justice on an international scale in the age of globalization. In short,

there appears to be no rational resolution of the issues raised by the debate over affirmative action. Radical deconstructionists argue that law is politics, politics is power, and power is ideologically structured. In the controversy over affirmative action, this philosophical scepticism is married to political cynicism, undermining the belief that the justice of affirmative action can be assessed rationally as a question of law or as a matter of political action. If the culture wars in America between the proponents and detractors of multicultural diversity foreshadow political discourse in the emerging global village, there is cause for serious alarm.

In this article, I reject the radically deconstructive approach and argue that we can reason about justice, notwithstanding the multicultural challenges that are particularly highlighted by globalization. Drawing from the complementary philosophical projects undertaken by Hans-Georg Gadamer and Chaim Perelman, I contend that justice is a product of rhetorical knowledge. Rhetorical knowledge is a social activity—a ground-without-foundation upon which justice may be constructed—rather than the result of a purely contemplative undertaking. Under this view, justice is not a pristine concept requiring philosophical clarification, but rather is a practical engagement in politics that is historically conditioned and subject to the restrictions of human finitude. Rhetorical knowledge is not necessarily disabled by multicultural diversity; in fact, it is stimulated by the cross-cultural engagements attendant to globalization. This is not to say, however, that rhetorical knowledge emerges only from the clash of incommensurable traditions. Even within a relatively homogeneous and unified society, members of the society draw upon rhetorical knowledge to regenerate their shared lifeworld. As the challenges of globalization lead us to acknowledge the central role played by rhetorical knowledge in pursuing justice, we will be in a position to reconfigure the role of justice within the parochial confines of American political and legal practices. The challenge of globalization, then, points the way to a better understanding of issues internal to our culture-bound horizon.

The claim that rhetorical knowledge plays a constitutive role in society is a theoretical argument, but the thesis should not be a concern solely of philosophers and sociologists. The American legal system plays an increasingly important role in structuring social relationships and defining shared meanings. This role may be (and often is) secured by a variety of undesirable strategies—including physical force, ideological manipulation, or bureaucratization—but I

claim that rhetorical knowledge plays an important role in the legal system and consequently that it is a mistake to view the operation of the legal system as a function of purely strategic or bureaucratic imperatives. Thus, legal scholars not only are particularly well-suited for exploring the theory of rhetorical knowledge, their inquiries will suffer if they do not take account of this constitutive feature of legal practice. The central themes of this article, then, are that rhetorical knowledge—however imperfectly pursued and attained—is a very real feature of social life; that rhetorical knowledge plays an important role in legal practice; and that legal critique is appropriately grounded by the normative injunction to maximize the generation of and reliance on rhetorical knowledge in the administration of justice by legal actors.

This article is organized in three parts. In Part One, I provide an overview of Gadamer's philosophical hermeneutics and Perelman's new rhetoric, describing how these philosophies illuminate the activity of understanding by invoking the ancient conception of rhetoric. In Part Two, I address the most common criticism directed at both philosophers—that they provide an overly conservative account that precludes an effective theoretical critique of existing practices—by engaging several contemporary theorists as challenging interlocutors. Acknowledging the inadequacy of either Gadamer's or Perelman's approach standing alone, I draw from both thinkers to develop an account of rhetorical knowledge. In Part Three, I demonstrate that rhetorical knowledge subtends legal practice and that the concept of rhetorical knowledge is indispensable for understanding the concrete implications of achieving "justice" in the legal system. Rhetorical knowledge also shapes the critique of legal practice, so I consider the implications that rhetorical knowledge holds for jurisprudential inquiry and suggest a reconceptualization of how best to relate a theory of justice to the practice of law. The article concludes with a call for increased attention to rhetoric. Rhetoric is defined not as a grudging resignation from the false hopes of a rigorous philosophy of truth, nor as a celebration of boundless and playful irrationalism, but instead as a disciplined encounter with the activity of rhetorical knowledge.

By defending the idea that justice is achieved by the cultivation of rhetorical knowledge, I intend to pursue the truly radical implications of a deconstructive attack on legal rationality rather than simply retrenching in the face of perceived postmodern excesses. At the outset, then, it is important to emphasize that I do not sanction a relapse

to comforting and familiar platitudes. Indeed, the activity of rhetorical knowledge is so demanding that it may very well prove to be beyond the reach of contemporary society. The magnitude of this challenge, though, only emphasizes the need to explore the activity of rhetorical knowledge critically (which is to say, rhetorically) in order to facilitate its realization in our troubled times.

I. GADAMER AND PERELMAN ON CONVERSATION AND PERSUASION

We need to concentrate on what we are conflicted about and how we become conflicted about such things. In our view this orientation to "how" is cultivated chiefly by rhetorical and hermeneutic training in interpretation and persuasion; it is stabilized (for the moment) in our varied understandings of our own and other's dynamic traditions. In our time, accordingly, rhetoric and hermeneutics should be understood to range from specific arts whose handbooks articulate rules and strategies of invention, address and application to the broadest possible conceptions of rhetoricality (in Bender and Wellbery's phrase) and rhetoricity (in Charles Altieri's) as dimensions of human existence. . . . Indeed, we believe that only rhetoric and hermeneutics, properly redefined, can show how the principled subject-matter disciplines presuppose the nonexpert realm of *praxis* and practical reasoning and how they must, in the beginning and in the end, be responsible to them.

Walter Jost & Michael J. Hyde³

Hans-Georg Gadamer and Chaim Perelman are important contributors to this century's philosophical effort to identify the deficiencies of the Cartesian tradition and to fashion a new account of understanding and knowledge. It is somewhat surprising to find that neither philosopher engages the other's work in a sustained and detailed manner, although this is explained largely by the fact that Gadamer and Perelman work within different intellectual traditions. Gadamer consciously places his efforts within the German romantic and humanistic tradition, but he is strongly influenced by the path-breaking phenomenological approach of his teacher, Martin Heidegger. Perelman—a Belgian—was a logician by training, although his

3. Walter Jost & Michael J. Hyde, *Prologue*, in *RHETORIC AND HERMENEUTICS IN OUR TIME: A READER* xx (Walter Jost & Michael J. Hyde eds., 1997).

approach was strongly influenced by the return to the Sophists undertaken by his teacher, Eugène Dupréel. Despite these different orientations and starting points, it is plain that Gadamer and Perelman share important themes: the dialogic character of understanding, the inadequacy of neo-Kantianism as an account of knowledge, and the overriding ethical imperative of holding oneself open to questioning and challenges rather than proceeding as if one is possessed of apodictic truth. In this Part, I will describe these complementary approaches by emphasizing their similarities without papering over the very real, and in some cases important, differences between them.

A. PHILOSOPHICAL HERMENEUTICS: JUSTICE AS CONVERSATION

Hans-Georg Gadamer develops his hermeneutical philosophy in the manner initiated by Kant, analyzing how we *in fact* know rather than presuming that philosophy has the power to dictate how we *should* acquire knowledge.⁴ Philosophers traditionally regarded hermeneutics as a technical inquiry into methods for understanding different kinds of texts; consequently, theological, legal, and literary hermeneutics developed as separate disciplines that shared, at most, general characteristics. Under the weight of Enlightenment ideology, however, hermeneutics was slowly transformed into a unified scientific methodology of meaning that was grounded in theory and divorced from the practical aims of various disciplines. Textual meaning was equated with the subjective intentions of the author, an historical fact that in principle was subject to philological reconstruction. Gadamer follows this expansion of the scope of hermeneutics by analyzing the unitary hermeneutical situation, that subtends all knowledge, but he rejects the narrow methodological focus of Enlightenment thinking in favor of a philosophical description of hermeneutical experience. According to his account, hermeneutical understanding has been devalued because it stands outside the empiricist and rationalist accounts of knowledge, when in fact hermeneutical understanding is the primordial experience of knowledge that makes possible the derivative experience of scientific thought.

Gadamer gives a phenomenological account of the activity of understanding in all of its manifestations—including deciphering, translation, reflection, and critique—without limiting his inquiries to any particular venue of understanding, and without heeding artificial

4. See HANS-GEORG GADAMER, *TRUTH AND METHOD* xxviii-xxix (Joel Weinsheimer & Donald Marshall rev. trans., 1989) (2d rev. ed. 1960).

disciplinary borders.⁵ Gadamer's principal philosophical claim is that our truthful relation to the world subtends but is not exhausted by modern technical-empirical science and that the Enlightenment picture of a monadic, prejudice-free subject decoding the world of objects must therefore be viewed as a mirage. The belief that we cast interpretations (whether scientific, aesthetic, or political) over the objects comprising the world is a core component of the metaphysical foundations of the Enlightenment that Gadamer places in issue. Breaking from the ontological commitment to the individual subject as a self-directing center of knowledge by following Heidegger's analysis of being-in-the-world, Gadamer uncovers the intersubjective relations that make possible any later assertions of the epistemological integrity of the subject. His focus is the seamless web of truth and meaning that we constantly renew simply in the course of living, an intersubjective belonging defined by our historical and finite nature that lies behind the later methodological attempts to repair localized disruptions of understanding by applying rules of exegesis. From this perspective, interpretation is not just an activity designed to bring the being of certain objects into sharper focus; it is our fundamental mode of existing.⁶

5. Gadamer writes:

Philosophical hermeneutics takes as its task the opening up of the hermeneutical dimension in its full scope, showing its fundamental significance for our entire understanding of the world and thus for all the various forms in which this understanding manifests itself: from interhuman communication to manipulation of society; from personal experience by the individual in society to the way in which he encounters society; and from the tradition as it is built of religion and law, art and philosophy, to the revolutionary consciousness that unhinges tradition through emancipatory reflection.

HANS-GEORG GADAMER, *On the Scope and Function of Hermeneutical Reflection*, in PHILOSOPHICAL HERMENEUTICS 18 (David E. Linge ed., 1976) (G.B. Hess & R.E. Palmer trans., 1967) [hereinafter GADAMER, *On the Scope*] [the translation of this essay under its original title is: Hans-Georg Gadamer, *Rhetoric, Hermeneutics and the Critique of Ideology: Metacritical Comments on Truth and Method*, 8 CONTINUUM 77 (Jerry Dibble trans., 1970)]. See also G.B. MADISON, THE HERMENEUTICS OF POSTMODERNITY: FIGURES AND THEMES 25 (1988) ("Hermeneutical theory is a veritable crossroads."). In a recent autobiographical essay, Gadamer admits to a "special sort of satisfaction" arising from the work of his students to extend his hermeneutical philosophy to various fields of inquiry. Hans-Georg Gadamer, *Reflections on My Philosophical Journey*, in THE PHILOSOPHY OF HANS-GEORG GADAMER 17 (Richard E. Palmer trans. & Lewis Edwin Hahn ed., 1997) [hereinafter Gadamer, *Reflections*].

6. I have chosen not to burden the text describing Gadamer's general philosophical project with footnotes, since my earlier work discusses the relevance of Gadamer to legal theory in some detail. See Francis J. Mootz III, *Is the Rule of Law Possible in a Postmodern World?*, 68 WASH. L. REV. 249 (1993) [hereinafter Mootz, *Postmodern World*]; Francis J. Mootz III, *Law and Philosophy, Philosophy and Law*, 26 U. TOL. L. REV. 127 (1994) [hereinafter Mootz, *Law and Philosophy*]; Francis J. Mootz III, *Legal Classics: After Deconstructing the Legal Canon*, 72 N.C. L. REV. 977 (1994) [hereinafter Mootz, *Legal Classics*]; Francis J. Mootz III, *The New Legal*

1. *Conversation and Hermeneutical Understanding*

Gadamer captures the ego-decentering thrust of his philosophy with a number of detailed phenomenological investigations of life experiences, including playing a game, appreciating art, and making sense of history. Perhaps Gadamer's most vivid and succinct model of hermeneutical understanding, though, is his analysis of the give-and-take of everyday conversation. Beginning with the observation that "the more genuine a conversation is, the less its conduct lies within the will of either partner," he argues that the understanding emerging from a conversation is "like an event that happens to us."⁷ This analysis introduces a central argument of *Truth and Method*: language is the intersubjective medium of all hermeneutical experience, and understanding is always an interpretive accomplishment within this medium.

Conversation is a process of coming to an understanding. Thus it belongs to every true conversation that each person opens himself to the other, truly accepts his point of view as valid and transposes himself into the other to such an extent that he understands not the particular individual but what he says.

....

Everything we have said characterizing the situation of two people coming to an understanding in conversation has a genuine application to hermeneutics, which is concerned with *understanding texts*.

....

This is not to say, of course, that the hermeneutic situation in regard to texts is exactly the same as that between two people in conversation [since] one partner in the hermeneutical conversation, the text, speaks only through the other partner, the interpreter.

....

[When interpreting a text] the interpreter's own horizon is decisive, yet not as a personal standpoint that he maintains or enforces, but more as an opinion and a possibility that one brings into play and puts at risk, and that helps one truly to make one's own what the text says. . . . We can now see that this is what takes place in

Hermeneutics, 47 VAND. L. REV. 115 (1994) [hereinafter Mootz, *New Legal Hermeneutics*]; Francis J. Mootz III, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas and Ricoeur*, 68 B.U. L. REV. 523 (1988) [hereinafter Mootz, *Ontological Basis*]; Francis J. Mootz III, *Rethinking the Rule of Law: A Demonstration that the Obvious Is Plausible*, 61 TENN. L. REV. 69 (1993) [hereinafter Mootz, *Rethinking*].

7. GADAMER, *supra* note 4, at 383.

conversation, in which something is expressed that is not only mine or my author's, but common.⁸

In these passages Gadamer is not providing a provocative analogy; rather, he is making an ontological claim about the nature of hermeneutical understanding. He argues that all understanding is founded on a decentering "fusion of horizons," an experience that is placed in sharp relief when two conversationalists find the path of their dialogue taking on a life of its own.⁹

The central concepts of Gadamer's philosophy can be explicated by working from the claim that conversation is a model of the dialogic encounter of hermeneutical understanding. Gadamer summarizes his attack on Enlightenment epistemology by rehabilitating "prejudices," defined as the pre-understanding that motivates and shapes all later interpretive encounters.¹⁰ Each participant in the conversation comes to the encounter with a history that shapes what later evolves in the discussion. To be a discussant without prejudices would be to exist outside of history, in which case there could be no shared basis from which to engage another person in conversation. Prejudices are not rigid limitations, but rather they form a horizon that continually is in flux as the person moves through life. Understanding involves the fusion of horizons in which a common subject is taken up by two participants in a manner which allows the subject matter to unfold. Thus, a conversation yields understanding when two people, working from their own prejudiced starting points, find common ground sufficient to

8. *Id.* at 385, 387-88.

9. See GEORGIA WARNKE, *GADAMER: HERMENEUTICS, TRADITION AND REASON* 100-03, 168-71 (1987) (linking Gadamer's analysis of conversation to his ontological claims about the dialogic structure of understanding and critically analyzing the remaining ambiguities in Gadamer's account). Thus, Gadamer argues that it is a profound mistake to read the Platonic dialogues as embodying principled arguments that compel adherence, since they obviously fail on this level.

It is unavoidable that philosophy, which never finds its object already at hand but must itself provide it, does not move within systems of propositions whose logical formalization and critical testing for conclusiveness and univocity might somehow deepen its insights . . . To illustrate this point with an example, if one analyzes with logical methods the arguments in a Platonic dialogue, shows inconsistencies, fills in gaps, unmasks false deductions and so on, one can achieve a certain gain in clarity. But does one learn to read Plato by proceeding in this way? Does one make his questions one's own? Does one succeed in learning from Plato instead of just confirming one's own superiority? . . . Simple logical rigor is not everything.

Gadamer, *Reflections*, *supra* note 5, at 38-39.

10. GADAMER, *supra* note 4, at 270-71. Ironically, Gadamer invokes the idea of prejudice to challenge the overriding prejudice of Enlightenment thought, namely "the prejudice against prejudice itself, which denies tradition its power." *Id.* at 270.

develop a topic that informs both participants.¹¹ This description accords with the common understanding of conversation, inasmuch as it would be regarded as a mistake to refer to the bare transmission of data by one person to another as conversing.

In the case of textual interpretation, the horizon of the text is comprised of the history of its reception and recirculation within the culture, which Gadamer terms the history of its effects (or historical effectiveness).¹² We can never read a text for the first time, so to speak, because the way in which the text will speak to us is already shaped by the tradition from which it emerges, although a contemporary reading will transform as well as carry forward this tradition. Gadamer seriously intends the claim that interpreting a text involves entering a conversation with it and seeking a fusion of horizons.¹³ The inevitability of the prejudices of the interpreter and the effective-history of the text leads Gadamer to conclude that understanding and application are never fundamentally distinct activities. Understanding occurs only by virtue of application; there is no ahistorical text-in-itself that can be applied, but rather only a horizontal text that meets an interpreter in a dialogical encounter within a particular context.¹⁴

2. *Conversation as Rhetorical Exchange*

By using the experience of everyday conversation to explain his philosophy, Gadamer signals the tremendous importance of the rhetorical tradition to his approach, even though his explicit discussions

11. See Hans-Georg Gadamer, *Text and Interpretation*, in *DIALOGUE AND DECONSTRUCTION: THE GADAMER-DERRIDA ENCOUNTER* 26 (Dennis J. Schmidt & Richard E. Palmer trans., Diane P. Michelfelder & Richard E. Palmer eds., 1989).

The dialogic character of language . . . leaves behind it any starting point in the subjectivity of the subject, and especially in the meaning-directed intentions of the speaker. What we find happening in speaking is not a mere reification of intended meaning, but an endeavor that continually modifies itself, or better: a continually recurring temptation to engage oneself in something or to become involved with someone. But that means to expose oneself and to risk oneself. Genuinely speaking one's mind has little to do with a mere explication and assertion of our prejudices . . . it exposes oneself to one's own doubt as well as to the rejoinder of the other.

Id.

12. See GADAMER, *supra* note 4, at 300, 307.

13. See *id.* at 388. It is important not to misunderstand Gadamer's analogy by concluding that the reader and the author each constitute a horizon and that the "fusion" is just the reader's recovery of the author's intended meaning. A reader cannot even begin to hypothesize about the historical intentions of an author until she has engaged the text and allowed it to pose a question to her, which is the principal experience that Gadamer captures with his term "fusion of horizons." See Jan Edward Garrett, *Hans-Georg Gadamer on "Fusion of Horizons,"* 11 *MAN AND WORLD* 399 (1978).

14. See GADAMER, *supra* note 4, at 312-24.

of rhetoric might appear at first glance to be peripheral. Gadamer begins *Truth and Method* by recalling Vico's development of the humanistic concept of *sensus communis* as a means of preserving the independent validity of moral-practical wisdom, as distinguished from the logical-empirical truths of science.¹⁵ Gadamer aligns Vico with the substantive rhetorical goal of saying the right thing well, and applauds his development of the "positive ambiguity of the rhetorical ideal."¹⁶ Vico's importance lies in his prescient challenge to the unitary Cartesian paradigm of knowledge by re-asserting "the independent rights of rhetoric . . . the art of finding arguments [which] serves to develop the sense of what is convincing, which works instinctively and ex tempore, and for that very reason cannot be replaced by science."¹⁷

15. *Id.* at 19-24. John Schaeffer argues that Gadamer appropriated only part of Vico's holistic concept of *sensus communis* in order to subjugate it to his hermeneutical model. See JOHN D. SCHAEFFER, *SENSUS COMMUNIS: VICO, RHETORIC, AND THE LIMITS OF RELATIVISM* 101 (1990). However, it is clear that Gadamer is perfectly aligned with Vico's full-bodied conception of "*sensus communis* as an epistemological principle which unites imagination, language, and social institutions in a dynamic, holistic relationship analogous to the simultaneity of invention, figurality, and organization that occurs in extemporaneous oral performances," *id.* at 150-51, even if he does not credit Vico sufficiently in Schaeffer's estimation. Schaeffer's critique is on point when he suggests that a more explicitly rhetorical account could have aided Gadamer in responding to Jürgen Habermas's challenges without surrendering critical theory. See *id.* at 117-22.

For Gadamer, tradition, and the prejudices of which it is composed, is revised by a dialectical interaction with texts, especially classical texts. For Vico, on the other hand, the *sensus communis* is revised by social action under the influence of eloquence. It is not dialectic that challenges, but imagination that reconstellates, *sensus communis*.

....
The hurly-burly of oral debate not only applies the *sensus communis* to concrete problems, but also tests and reshapes the *sensus communis* itself. The *sensus communis* cannot be merely a static set of value embodied in a literary canon. . . . The *sensus communis* is constantly reinterpreted and reshaped by the decisions of the community. Vico conceives of these decisions as constituting a kind of jurisprudence, a kind of developing interpretive context with which the values contained in classical texts meet the problems of daily life. In short, rhetoric transmits the *sensus communis*; eloquence transmutes it; the community tests it.

This matches my revised reading of Gadamer, *infra* at II.B.

16. GADAMER, *supra* note 4, at 19-20. Gadamer principally is concerned with overcoming the effects of nineteenth-century historicism and romanticism in German philosophy, but he begins his book by recalling that Vico was the last thinker to hold to the ancient truths of the rhetorical tradition.

Vico's return to the Roman concept of the *sensus communis*, and his defense of humanist rhetoric against modern science, is of special interest to us, for here we are introduced to an element of truth in the human sciences that was no longer recognizable when they conceptualized themselves in the nineteenth century. Vico lived in an unbroken tradition of rhetorical and humanist culture, and had only to reassert anew its ageless claim. Ultimately, it has always been known that the possibilities of rational proof and instruction do not fully exhaust the sphere of knowledge. Hence Vico's appeal to the *sensus communis* belongs, as we have seen, in a wider context that goes right back to antiquity and whose continued effect into the present day is our theme.

Id. at 23-24.

17. *Id.* at 21.

The rhetorical tradition preserved and advanced by Vico concerns a way of understanding no less legitimate or important than the methodological model of the natural sciences. Indeed, Gadamer asserts that rhetoric "is the universal form of human communication, which even today determines our social life in an incomparably more profound fashion than does science."¹⁸

Gadamer relates ancient rhetoric to his inquiry into our pre-methodological complex of meanings, but he is careful to distinguish substantive rhetoric, as exemplified in Plato's *Phaedrus*, from the "idle speculations of the sophists."¹⁹ Gadamer argues that genuine rhetoric concerns the "discovery and transmission of insight and knowledge," an event that he asserts is exemplified in the "art of leading a conversation."²⁰ The ancient rhetoricians well understood that the cultural "common sense" serving as a background for all understanding is nourished not on methodologically-secured truths, but rather on the "probable" as articulated in contingent and historically-defined knowledge. At a key juncture in the conclusion to *Truth and Method*, Gadamer reminds us that his book principally has been concerned with recovering and rehabilitating this rhetorical model of knowledge.²¹ As one commentator recently summarized, Gadamer is not

18. Hans-Georg Gadamer, *The Relevance of the Beautiful*, in *THE RELEVANCE OF THE BEAUTIFUL AND OTHER ESSAYS* 17 (Nicholas Walker trans. & Robert Bernasconi ed., 1986) (1977).

19. GADAMER, *supra* note 4, at 19. Gadamer links ancient rhetoric with the lived experience of the lifeworld in Hans-Georg Gadamer, *Hermeneutics as a Theoretical and Practical Task*, in *REASON IN THE AGE OF SCIENCE* 119-22 (Frederick G. Lawrence trans., 1981) (1978) [hereinafter Gadamer, *Practical Task*] and Hans-Georg Gadamer, *The Expressive Power of Language*, 107 *PUBLICATIONS MOD. LANGUAGE ASS'N AM.* 348, 350 (1992) [hereinafter Gadamer, *Expressive Power*].

It is important not to misunderstand Gadamer's invocation of Plato as an attempt to invest rhetoric with the qualities of certain and unchanging truth. Gadamer places much greater emphasis on Plato's activity—writing the Socratic dialogues—than on Plato's philosophical self-understanding. HANS-GEORG GADAMER ON EDUCATION, POETRY AND HISTORY: APPLIED HERMENEUTICS 71 (Dieter Misgeld & Graeme Nicholson eds., Lawrence Schmidt & Monica Reuss trans., 1992) ("It is more important to find the words which convince the other than those which can be demonstrated in their truth, once and for all. We can learn this from the Platonic dialogues.") [hereinafter GADAMER, APPLIED HERMENEUTICS]. See generally HANS-GEORG GADAMER, *DIALOGUE AND DIALECTIC: EIGHT HERMENEUTICAL STUDIES ON PLATO* (P. Christopher Smith trans., 1980) [hereinafter GADAMER, *DIALOGUE*].

20. Gadamer, *Expressive Power*, *supra* note 19, at 348.

21. Acknowledging that his guiding focus on the "event" of understanding is drawn from "an ancient truth that has been able to assert itself against modern scientific methodology," Gadamer concludes that the "eikos, the versimilar, the 'probable' . . . the 'evident,' belong in a series of things that defend their rightness against the truth and certainty of what is proved and known. Let us recall that we assigned a special importance to the *sensus communis*." GADAMER, *supra* note 4, at 485. In his review of *Truth and Method*, Klaus Dockhorn suggests

advocating that we elevate rhetorical study over philosophy as much as he is insisting on the rhetorical nature of all humanistic inquiry, including philosophy.²²

Gadamer employs Aristotle's practical philosophy to flesh out the role that rhetoric plays in hermeneutical understanding. Gadamer borrows from Aristotle's discussion of *phronesis* not to describe one of the virtues possessed by the good citizen, but rather to describe a type of knowledge that is distinct from that gained by methodological science.²³ *Phronesis* is the capacity to converse with another and to make practical-moral judgments on the basis of a common, historically transmitted tradition, despite the lack of any firm rules guiding these judgments. This reliance on Aristotle clearly signals Gadamer's commitment to a rhetorical model of human understanding, according to which reasons are given and judgment is informed despite the absence of methodological prescriptions.²⁴ Practical inquiry is rhetorical and conversational in structure because it works from shared, accepted norms in a creative effort to arrive at acceptable concrete decisions about ethics or politics.²⁵

Although Gadamer relies heavily, even if often indirectly, on the classical rhetorical tradition to develop his hermeneutical account of

that Gadamer underestimates the extent to which the rhetorical tradition underwrites his project, yet nevertheless he declares that the "widespread depreciation or dismissal of rhetoric . . . should be effectively brought to an end by this book." Klaus Dockhorn, *Hans-Georg Gadamer's Truth and Method*, 13 PHIL. & RHETORIC 160, 160 (1980). Jean Grondin places particular emphasis on Gadamer's use of the rhetorical tradition to elucidate "a concept of truth that remains aware of its attachment to human finitude." Jean Grondin, *Hermeneutics and Relativism*, in FESTIVALS OF INTERPRETATION: ESSAYS ON HANS-GEORG GADAMER'S WORK 42, 49 (Mildred Mortimer trans. & Kathleen Wright ed., 1990). By and large, however, this early invocation of the rhetorical tradition in *Truth and Method* has been overlooked by commentators. An exception is found in Donald Phillip Verene, *Gadamer and Vico on Sensus Communis and the Tradition of Humane Knowledge*, in THE PHILOSOPHY OF HANS-GEORG GADAMER, *supra* note 5, at 142.

22. See MADISON, *supra* note 5, at 164.

23. See HANS-GEORG GADAMER, *Phenomenology*, in PHILOSOPHICAL HERMENEUTICS, *supra* note 5, at 114-18.

24. See Jeffrey L. Bineham, *Displacing Descartes: Philosophical Hermeneutics and Rhetorical Studies*, 27 PHIL. & RHETORIC 300, 309 (1994).

25. See MADISON, *supra* note 5, at 32-35. See generally Shaun Gallagher, *The Place of Phronesis in Postmodern Hermeneutics*, PHIL. TODAY, Fall 1993, at 298, 304 (arguing that Gadamer follows Aristotle by distinguishing *phronesis* from the clever application of preexisting rules by defining it as the ability to "work out the rules for the situation" within a particular "sub-discourse" or "conversation"). See also Marcelo Dascal, *Hermeneutic Interpretation and Pragmatic Interpretation*, 22 PHIL. & RHETORIC 239 (1989) (urging a cross-disciplinary encounter between the quasi-empirical focus of pragmatics in linguistic studies and the ontological focus of Gadamer's philosophical hermeneutics).

understanding, he resists the temptation to counsel a return to a bygone era. Even as he writes of the necessary interdependence of rhetoric and hermeneutics due to their linkage to the idea of shared understandings and the need to overcome disruptions in this understanding,²⁶ Gadamer emphasizes that the hermeneutical task is markedly different from the rhetorical task in ancient Greece. Today, social meanings are reproduced and disseminated through texts (all manner of media) rather than with persuasive speeches made in the public square. Ancient rhetoric was transformed irreversibly by the movement from an oral culture to one founded on writing and reading; rhetorical performances now require a hermeneutical recovery by later readers who might be removed from the original event by hundreds of years and wide cultural differences.²⁷ Nevertheless, because rhetoric and hermeneutics are united by a shared ontological status, Gadamer contends that the rhetorical tradition can serve as a resource for textual interpreters in our literate culture.²⁸ By understanding that some forms of knowledge are predicated on persuasion founded on

26. See GADAMER, *On the Scope*, *supra* note 5, at 20-25. Gadamer goes so far as to emphasize that "the rhetorical and hermeneutical aspects of human linguisticity completely interpenetrate each other." *Id.* at 25.

Clearly the ability to speak has the same breadth and universality as the ability to understand and interpret . . . Hermeneutics may be precisely defined as the art of bringing what is said or written to speech again. What kind of art this is, then, we can learn from rhetoric.

...
[Because] the being of the interpreter pertains intrinsically to the being of what is to be interpreted . . . the orator always has to link up with something like [a prior, sustaining agreement] if his persuading and convincing in disputed questions is to succeed. So, too, any understanding of another's meaning, or that of a text, is encompassed by a context of mutual agreement, despite all possible miscomprehensions; and so too does any understanding strive for mutual agreement in and through all dissent.

GADAMER, *Practical Task*, *supra* note 19, at 119, 136. Gadamer cites Perelman's work in this passage, acknowledging that rhetorical studies are illuminating because the hermeneutical recovery of meaning is always predicated on the interpreter finding common ground with the text, much as an orator must find common ground with her audience in order to speak effectively.

27. See Gadamer, *Expressive Power*, *supra* note 19, at 348; Gadamer, *Practical Task*, *supra* note 19, at 123-24.

28. A similar account is given by H.P. Rickman, who contends that an effective lecture originally delivered to a specific, known audience—such as Aristotle's *Nichomachean Ethics*—presents entirely different challenges to understanding when read by later audiences removed from the rhetorical immediacy of its original presentation. See H.P. Rickman, *Rhetoric and Hermeneutics*, 14 PHIL. & RHETORIC 100 (1981). Rickman similarly looks to Vico as an important bridge: "Vico's principle that the mind can understand what the human mind can create is the link which connects hermeneutics and rhetoric." *Id.* at 111. It is important not to misunderstand this insight, as Rickman perhaps does, by permitting it to devolve into Schleiermacher's narrow conception that hermeneutical recovery of meaning is the inverse of rhetorical production, i.e. that hermeneutics amounts to reconstructing the rhetorical intentions of the author. See GADAMER, *supra* note 4, at 188-89. Rather, Gadamer argues that the contemporary interpreter has more in common with the rhetor than with the audience, since the interpreter must render

shared assumptions, the interpreter is better able to reanimate the text by cultivating a broader, shared agreement with it.

Gadamer argues that the role of nourishing political society that rhetoric played in ancient Greece is paralleled today by the sustaining power of hermeneutical appropriation. Acknowledging the important contribution made by Perelman in rehabilitating the full-bodied ancient rhetoric,²⁹ Gadamer sets as his task the goal of applying the rhetorical idea of political truth grounded on the probable to the hermeneutical experience.³⁰ A prominent venue for this hermeneutical experience today is the legal system, which is premised on the production and interpretation of authoritative texts as sources of governing authority rather than the performance and reception of speeches before all competent citizens of the polis. Rejecting the scientific impulse to reduce law to a disciplined methodology of application, which would create an unbridgeable chasm between the presumed universal and timeless meaning of the text and the demands of the individual case, Gadamer counsels us to regard every attempt to understand a legal text as a function of applying the text to the case at hand and to regard legal reasoning as a particularly vivid model of all hermeneutical understanding.³¹

It accords with the age-old Aristotelian wisdom that the finding of the law always required the enlarging consideration of equity and that the perspective of equity does not stand in contradiction with the law but precisely by relinquishing the letter of the law brings the legal meaning to complete fulfillment for the first time.³²

Here the model of conversation fits well: an interpreter can understand a text best by falling into it and allowing it to speak to the question posed by the case at hand, rather than by charting in advance the line of inquiry. The interpreter does not adopt a subjective attitude of dominance over the text, but rather suppresses her subjective aims

the text meaningful by establishing a shared basis of understanding from which to proceed. *See supra* note 26. This point is emphasized in Dockhorn, *supra* note 21, at 168-69.

29. *See* Gadamer, *Practical Task*, *supra* note 19, at 93; Hans-Georg Gadamer, *Culture and Media*, in *CULTURAL-POLITICAL INTERVENTIONS IN THE UNFINISHED PROJECT OF ENLIGHTENMENT* 171, 179-80 (Barbara Fultner trans. & Alex Honneth et al. eds., 1992) (criticizing the dismissal of rhetoric as "ornate prattle" by scientific consciousness and recalling its central role in Greek democracy and Roman republicanism).

30. *See* GADAMER, *On the Scope*, *supra* note 5, at 23-24 ("Convincing and persuading, without being able to prove—these are obviously as much the aim and measure of understanding and interpretation as they are the aim and measure of the art of oration and persuasion.").

31. *See* GADAMER, *supra* note 4, at 324-41 ("The Exemplary Significance of Legal Hermeneutics").

32. *See* Gadamer, *Practical Task*, *supra* note 19, at 127.

and attends to "the saying" of the historically-effective text as it is revealed in a given context. This parallels the need for a rhetor to conceive a speech only in connection with the particular audience that will be addressed on a particular occasion, since persuasive speeches do not exist in the abstract, ready to be used indiscriminately at some point in the future.

Given his claim that all meaning is a product of historicity and context, as exemplified by the event of a conversation, it is not surprising to find that Gadamer does not hypostatize the current experience of textuality as an essential feature of understanding. Just as the decentering character of interpretation became much more apparent after the move from oral culture to written culture, Gadamer hypothesizes that the rapidly developing computer age might engender an equally significant transformation that will undermine once and for all the parochial scientism of the West.³³ Similar to the alphabet, which "demanded an immense achievement of abstraction and introduced an almost nonhuman distance from everything representational into our forms of communication," the computer appears to be truly trans-cultural, "comprehen[ding] all of humanity and its forms of life."³⁴ In this environment, Gadamer contends, we may be able to rise above contingent forms of life in response to radically different cultures made available to us instantly by means of global information technologies, thereby enabling us to embrace a shared rhetorical exploration of what it means to cultivate one's humanity.³⁵

3. *The Critical Dimension of Rhetorical Conversation*

To this point, Gadamer's account has reverberated with conservative overtones: positing the wisdom of the "other," especially in the case of a text embedded in tradition; sublimating individual designs to a fusion of horizons; and proposing that everyday hermeneutical experience reveals important lessons for philosophy rather than vice-versa. Gadamer accepts this criticism, if by conservative one means only a refusal to chase after the Enlightenment myth of prejudice-free

33. See Gadamer, *supra* note 29, at 188.

34. *Id.* at 177, 179.

35. See *id.* at 174 ("It is not only our tiny Europe or its appendages that are at issue. At stake now is a global human task and the question of what the living conditions and life expectations for humanity look like in the breathtaking technological development and transformation of the natural as well as of the social world.").

knowledge.³⁶ Gadamer rejects the pejorative intent behind this characterization by confronting head-on the implicit understanding of critical practice that informs his detractors. Particularly in his response to Habermas's insistence on the need to develop a critical theory to serve the emancipatory interest in human progress, Gadamer reemphasizes his alignment with the rhetorical model of truth as pointing the way to a better understanding of social critique.

All coming to understanding in language presupposes agreement not just about the meanings of words and the rules of spoken language; much remains undisputed with regard to the "subject matter" as well—i.e., to everything that can be meaningfully discussed. My insistence on this point is taken to demonstrate a conservative tendency and to deter hermeneutical reflection from its proper—critical and emancipatory—task.

. . . .

I would like to see more recognition of the fact that this is the realm hermeneutics shares with rhetoric: the realm of arguments that are convincing (which is not the same as logically compelling). It is the realm of practice and humanity in general, and its province is not where the power of "iron-clad conclusions" must be accepted without discussion, nor where emancipatory reflection is certain of its "contrafactual agreements," but rather where controversial issues are decided by reasonable consideration. . . . Vico rightly assigns [rhetoric] a special value: copia, the abundance of viewpoints. I find it frighteningly unreal when people like Habermas ascribe to rhetoric a compulsory quality that one must reject in favor of unconstrained, rational dialogue. This is to underestimate not only the danger of the glib manipulation and incapacitation of reason but also the possibility of coming to an understanding through persuasion, on which social life depends. . . .

Only a narrow view of rhetoric sees it as mere technique or even a mere instrument for social manipulation. It is in truth an essential aspect of all reasonable behavior. Aristotle had already called rhetoric not a *techne* but a *dunamis* because it belongs so essentially to the general definition of humans as reasonable beings. However extensive their effects and however broad their manipulation, the institutionalized means of forming public opinion which our industrialized society has developed in no way exhaust the

36. See GADAMER, *supra* note 4, at xxxvii-xxxviii.

realm of reasonable argumentation and critical reflection that social practice occupies.³⁷

In this passage from the "Afterword" of *Truth and Method*, Gadamer once again references Perelman's principal works with the acknowledgment that they form "a valuable contribution to philosophical hermeneutics."³⁸ Gadamer's answer to those who challenge the lack of critical bite in his philosophy is a restatement of his principal thesis: an emancipatory critique of society is always derivative of our meaningful participation in society, and so critique is always a particular comportment of belonging. Gadamer stresses that the rhetorical dimension of knowledge provides the motivation and resources for social critique, and so he rejects the urge to develop philosophical constructs that purport to exert critical leverage from outside the rhetorical arena.

In particular, the transition from the oral traditions of the ancients to contemporary written traditions proves to be decisive for Gadamer's account. He argues that critical distance is opened by the existence of written texts, since they introduce a temporal gulf between author and interpreter that can be bridged only with a fusion of the two horizons into a shared point of departure. Because the participatory givenness of a rhetorical exchange is never completely available to a textual interpreter, the room for critical appraisal always exists.

Rhetoric as such, however, is tied to the immediacy of its effect.
 . . . While under the persuasive spell of speech, the listener for the moment cannot and ought not to indulge in critical examination.

37. GADAMER, *supra* note 4, at 567-69. Gadamer's other extended discussion of rhetoric similarly occurs in the context of defending his approach from the challenges issued by Habermas. See GADAMER, *On the Scope*, *supra* note 5 (demonstrating that the scientific claims of critical sociology fail for the same reason that scientific approaches to rhetoric and hermeneutics fail to capture the full scope of the experiences of persuasion and understanding). It is not happenstance that Gadamer invokes rhetoric extensively in the latter essay, since he is not only rebutting Habermas's critical theory but also absorbing and responding to Klaus Dockhorn's review of *Truth and Method*. Dockhorn argues that, despite scant references to rhetoric, the entire argument of *Truth and Method* is suffused with the concepts of the rhetorical tradition, see Dockhorn, *supra* note 21, at 161, and Gadamer readily accepts this characterization as a helpful clarification of his thesis, see GADAMER, *On the Scope*, *supra* note 5, at 43 nn.3, 6 & 7. In his most recent commentary on his philosophy, Gadamer has chosen to highlight the rhetorical themes that guided his thinking and therefore bring to the forefront what earlier was only suggested. See Gadamer, *Reflections*, *supra* note 5, at 30 (referencing Perelman's philosophy); Hans-Georg Gadamer, *Reply to Donald Phillip Verene*, in *THE PHILOSOPHY OF HANS-GEORG GADAMER*, *supra* note 5, at 154 (commending Verene's "more precise elaboration" of the elements of Vico's philosophy that are relevant to Gadamer's project); *supra* note 26.

38. GADAMER, *supra* note 4, at 569 n.27.

On the other hand, the reading and interpreting of what is written is so distanced and detached from its author—from his mood, intentions, and unexpressed tendencies—that the grasping of the meaning of the text takes on something of the character of an independent productive act, one that resembles more the art of the orator than the process of mere listening. Thus it is easy to understand why the theoretical tools of the art of interpretation (hermeneutics) have been to a large extent borrowed from rhetoric.³⁹

This analysis holds great significance. By equating the textual interpreter with the rhetorical actor rather than with the receptive audience, Gadamer emphasizes the dynamic character of interpretation and the space for critical reappraisal of the tradition that is opened by, not despite, the de-centering dialogic structure of understanding.

4. *Justice as Conversation*

How does Gadamer's philosophical hermeneutics shed light on the problem of justice? Gadamer's descriptions of legal practice are descriptive rather than normative; while illuminating, they remain ambiguous with regard to the requirements of justice. In her recent book, *Justice and Interpretation*, Georgia Warnke carefully elaborates a Gadamerian-inspired conception of justice that accords with the foregoing description of Gadamer's work.⁴⁰ Warnke contends that the failure of modern political theory stems from its inability to ward off the threats of conventionalism and subjectivism that arise from the acknowledgment that principles of justice always are grounded in particular contexts arising within a social tradition. Theorists are nearly uniform in their response by proposing that unanimous consent, either actual or hypothetical, can validate principles of justice that rise above mere preference. In contrast, Warnke places great emphasis on Gadamer's philosophy to argue that an ongoing "fair and equal hermeneutic discussion" ought to be the central political goal of society rather than unanimous consent.⁴¹ This conclusion follows from the recognition that many political discussions involve "disagreements between equally well-justified interpretations" of the requirements of justice, and so consensus rarely will be attainable.⁴² Relying on Gadamer's description of everyday conversation as a model of the

39. GADAMER, *On the Scope*, *supra* note 5, at 23-24. See *supra* notes 26 and 28 (discussing Gadamer's argument that interpreters share an ontological status with rhetors).

40. GEORGIA WARNKE, *JUSTICE AND INTERPRETATION* (1992).

41. *Id.* at 12.

42. *Id.* at viii.

rationality of hermeneutical events, Warnke does not abandon the ideal of consensus with regret as much as she champions the vitality of a dynamic dialogue that never is pressured into a univocal agreement binding on all members of society.⁴³ It is only within this context that Gadamer's recent writings on the challenges and opportunities posed by multiculturalism make sense.

Warnke explains her hermeneutic conception of justice with reference to the abortion controversy. The bitter debates over abortion are not only unlikely to lead to consensus on principles of justice, they are positive impediments to justice. Warnke insists that it is a tolerant and respectful dialogue between persons who never will reach consensus that embodies justice, rather than a conclusive victory through strategic argumentation. This position accords with Gadamer's critique of the Enlightenment model of knowledge by drawing from the idea of rhetorical truth, and thus Gadamer's philosophy might best be characterized as equating the requirements of justice with the hermeneutical experience of conversation.

The important question, then, is no longer which interpretation of our history and experience is correct because none is exhaustively correct. The important question is, rather, how or why our interpretations differ and what new insights into the meaning of our traditions we might glean from the attempt to understand the cogency of interpretations different from our own.

....

Both diversity and dialogue, then, are necessary, not because we could be wrong, but because we can never be wholly correct or rather because the issue is no longer as much one of rightness or wrongness as one of continuing revision and reform.⁴⁴

Warnke does modify Gadamer's approach by supplementing it with a subdued version of Habermas's proceduralist critical theory, arguing that Gadamer is insufficiently attentive to the social forces that warp practical dialogue and hinder the educative function of conversation.⁴⁵

43. "Once we make the interpretive turn [with Gadamer], the justification of our principles becomes dialogic and the scope of the dialogue becomes unlimited." *Id.* at 133.

44. *Id.* at 132, 137.

45. Warnke emphasizes:

Does the rationality of hermeneutic conversation require more [than remaining open to other discourses]? I have suggested that it does, for if we allow for systematically distorted interpretations of meaning, such as those offered of American history by the Ku Klux Klan, we cannot assume that all interpretive conversations will be equally educational.

Nevertheless, it is fair to say that Warnke credits Gadamer with providing the basis for concluding that justice is a hermeneutic conversation rather than the cessation of conversation upon achieving the (always unattainable) rationally compelled consensus.

B. THE NEW RHETORIC: JUSTICE AS PERSUASION

In contrast to Gadamer, Chaim Perelman was motivated from the beginning of his philosophical career to elucidate principles of justice, and the ancient conception of rhetoric plays an explicit role in his philosophy. In his first major work, Perelman demonstrated that arguments about the dictates of justice cannot be rational, since the arguments cannot accord with formal logic; this bizarre conclusion led him to seek an informal logic of justice.⁴⁶ Describing the progenitive force of Descartes' philosophical thinking, Perelman characterizes the Western philosophical tradition as one committed to a univocal vision of truth, according to which at least one party to every real disagreement must be wrong if the disagreement involves a proposition having a truth value.⁴⁷ Kant's majestic effort to salvage practical reasoning having failed, the idea of rational inquiry into matters of justice slowly was abandoned in favor of the skeptical conclusion that no truth about such matters can be known.⁴⁸ Unsatisfied with this bleak situation, Perelman set for himself the task of rethinking the roots of the tradition that led inexorably to these conclusions. His resulting approach is most succinctly described as a break with the Cartesian tradition and a return to studying the means by which it is possible to secure

Id. at 160. See also *id.* at 155 (arguing that the purpose of political theory is to critique those features of society that render the political conversations of its inhabitants unfair and to bring to voice those perspectives that have been silenced).

46. See CHAIM PERELMAN, *THE NEW RHETORIC AND THE HUMANITIES: ESSAYS ON RHETORIC AND ITS APPLICATIONS* 56 (William Kluback et al. trans., 1979); Ray D. Dearin, *Justice and Justification in the New Rhetoric*, in *PRACTICAL REASONING IN HUMAN AFFAIRS: STUDIES IN HONOR OF CHAIM PERELMAN* 155, 156 (J.L. Golden & J.J. Pilotta eds., 1986); THOMAS M. CONLEY, *RHETORIC IN THE EUROPEAN TRADITION* 296-97 (1990).

47. See *id.* at 112 ("Descartes claims that disagreement is both a sign of error and a lack of rationality."). See also Edgar Bodenheimer, *Perelman's Contribution to Legal Methodology*, 12 N. KY. L. REV. 392, 392-403 (1985) (tracing the intellectual legacy of Cartesian philosophy and Perelman's rejoinder).

48. See PERELMAN, *supra* note 46, at 125. Perelman describes the skeptical view as the inevitable result of a truncated conception of knowledge and truth.

The imperialism of rationalistic dogmatism finds its counterpart in the nihilism of positivistic scepticism. Either each question is resolved by finding the objectively best solution and this is the task of reason, or truth does not exist and every solution depends upon subjective factors: reason can be no guide to action.

Id. at 112.

adherence to reasonable claims regarding the requirements of justice.⁴⁹

1. *Persuasion and Reasonable Adherence*

To rehabilitate philosophical inquiry into the means of reasonable persuasion, Perelman rejects Plato's model of philosophy as the search for timeless truths in favor of the model provided by Aristotle's rhetorical philosophy.⁵⁰ Whereas Aristotle distinguished dialectical demonstration (rational deduction from agreed, though not necessary, premises) and rhetorical persuasion (the art of convincing a public that is not trained in the dialectical method), Perelman radicalizes Aristotle's approach by arguing against a fundamental distinction and asserting that rhetorical persuasion can be reasonable.⁵¹ By combining the truth value of dialectic with the performance of rhetorical persuasion, Perelman contends that the practice of reasoning about matters of justice has an epistemological status between rational deduction and fanatical, irrational adherence.

49. This is the characterization of his work that Perelman offers at the commencement of his magnum opus. See CHAIM PERELMAN & L. OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* 1 (John Wilkinson & Purcell Weaver trans., 1969) (1958).

50. See CHAIM PERELMAN, *JUSTICE, LAW, AND ARGUMENT: ESSAYS ON MORAL AND LEGAL REASONING* 88-89 (John Petrie et al. trans., 1980) ("In the debate between Plato and Aristotle, I have no hesitation in placing myself on the side of Aristotle."). Ever the iconoclast, I.F. Stone argued that Socrates was executed by Athens for the simple reason that he was an enemy of democracy and an open society, as particularly revealed in his denigration of rhetorical engagement as compared to Aristotle's more temperate and commonsensical approach. See I.F. STONE, *THE TRIAL OF SOCRATES* 90-97 (1988). Stone notes that Socrates could easily have won acquittal by appealing to principles of free speech, but that "he would have found it repugnant to plead a principle in which he did not believe; free speech for him was the privilege of the enlightened few, not of the benighted many. He would not have wanted the democracy he rejected to win a moral victory by setting him free." *Id.* at 230. Whether the divergence between Socrates/Plato and Aristotle in their conceptions of a democratic, rhetorical public life was this stark, Stone does make a persuasive case that an important divergence existed.

51. See PERELMAN, *supra* note 46, at 12 ("For the new rhetoric . . . argumentation . . . is manifest in discussion as well as in debate, and it matters not whether the aim be the search for truth or the triumph of a cause, and the audience may have any degree of competence."). It is clear that Perelman does not simply follow Aristotle, but rather transforms Aristotle's approach by rejecting any sharp distinction between dialectical reasoning and rhetorical persuasion. See Bernard E. Jacob, *Ancient Rhetoric, Modern Legal Thought, and Politics: A Review Essay on the Translation of Viehweg's "Topics and Law,"* 89 NW. U. L. REV. 1622, 1641 (1995); Morny Joy, *Rhetoric and Hermeneutics*, 32 PHIL. TODAY 273, 276-77 (1988); W. Jack Grosse, *Chaim Perelman and the New Rhetoric*, 12 N. KY. L. REV. vii (1985). This feature of Perelman's philosophy is debated in Timothy W. Crusius, *A Case for Kenneth Burke's Dialectic and Rhetoric*, 19 PHIL. & RHETORIC 23 (1986) (criticizing Perelman for rejecting the distinction) and Paul G. Bator, *The "Good Reasons Movement": A "Confounding" of Dialectic and Rhetoric?*, 21 PHIL. & RHETORIC 38, 43 (1988) (defending Perelman's reaction against the "historical attempt to create a clear, albeit artificial distinction between dialectic and rhetoric").

Since rhetorical proof is never a completely necessary proof, the thinking man who gives his adherence to the conclusions of an argumentation does so by an act that commits him and for which he is responsible. The fanatic accepts the commitment, but as one bowing to an absolute and irrefragable truth; the skeptic refuses the commitment under the pretext that he does not find it sufficiently definitive. He refuses adherence because his idea of adherence is similar to that of the fanatic: both fail to appreciate that argumentation aims at a choice among possible theses; by proposing and justifying the hierarchy of these theses, argumentation seeks to make the decision a rational one. This role of argumentation in decision-making is denied by the skeptic and the fanatic. In the absence of compelling reason, they both are inclined to give violence a free hand, rejecting personal commitment.⁵²

The core claim made by Perelman is that it is necessary to distinguish the narrow conception of rationality issuing from Cartesian presuppositions from the broader conception of reasonable action that he fashions from Aristotle's discussion of the rhetorical arts.⁵³

52. See PERELMAN & OLBRECHTS-TYTECA, *supra* note 49, at 62. See Dearin, *supra* note 46, at 175 ("From Perelman's point of view, it is possible to *justify* both one's criteria and their application. Justification involves, simply, the securing of the adherence of the appropriate audience. The means by which this is achieved are the techniques of argument identified and exemplified in the new rhetoric."); Marijan Pavcnik, *Legal Decisionmaking as a Responsible Intellectual Activity: A Continental Point of View*, 72 WASH. L. REV. 481, 482 (1997) ("It is between these two poles—absolute constraint and absolute freedom—that the field of argumentation lies."). For a complementary definition of rhetoric as a form of reason, see FRANS H. VAN EEMEREN ET AL., *FUNDAMENTALS OF ARGUMENTATION THEORY: A HANDBOOK OF HISTORICAL BACKGROUNDS AND CONTEMPORARY DEVELOPMENTS* 5 (1996) ("Argumentation is a verbal and social activity of reason aimed at increasing (or decreasing) the acceptability of a controversial standpoint for the listener or reader, by putting forward a constellation of propositions intended to justify (or refute) the standpoint before a rational judge.").

53. See *id.* at 509-11; PERELMAN, *supra* note 46, at 118-22; PERELMAN, *supra* note 50, at 92. See DOUGLAS N. WALTON, *ARGUMENTATION SCHEMES FOR PRESUMPTIVE REASONING* 11, 1 (1996):

The analysis of argumentation schemes is very much affected by the recognition of practical reasoning as a distinctive type of reasoning, as distinguished from what might be called theoretical or discursive reasoning.

....

Practical reasoning is a goal-directed sequence of linked practical inferences that seeks out a prudent line of conduct for an agent in a set of particular circumstances known by the agent.

....

In this pragmatic framework, two participants are reasoning together in a goal-directed, interactive, conventionalized framework called a *dialogue*. An argument is considered good (correct, reasonable) to the extent that it contributes to the goal of the dialogue. An argument is evaluated as bad (incorrect, fallacious) to the extent that it blocks the goals of the dialogue.

See also Dilip Parameshwar Gaonkar, *The Revival of Rhetoric, the New Rhetoric, and the Rhetorical Turn: Some Distinctions*, 15 INFORMAL LOGIC 53, 58 (1993) ("In Perelman & Olbrechts-Tyteca's work, rhetoric is offered as an alternative theory of argumentation that can provide

Perelman argues that by distinguishing the rational from the reasonable we can preserve the proper scope and role of each mode of thinking. The concept of the rational "is associated with self-evident truths and compelling reasoning" and therefore "is valid only in a theoretical domain,"⁵⁴ whereas to reason with another person "is not merely to verify and to demonstrate, but also to deliberate, to criticize, and to justify, to give reasons for and against—in a word, to argue."⁵⁵ Perelman rejects, however, a strict bifurcation of the rational and the reasonable, since each inevitably plays off the other.

It is the dialectic of the rational and the reasonable, the confrontation of logical coherence with the unreasonable character of conclusions, which is the basis of the progress of thought. . . . The *rational* in law corresponds to adherence to an immutable divine standard, or to the spirit of the system, to logic and coherence, to conformity with precedents, to purposefulness; whereas the *reasonable*, on the other hand, characterizes the decision itself, the fact that it is acceptable or not by public opinion, that its consequences are socially useful or harmful, that it is felt to be equitable or biased. . . . Thus, the idea of the reasonable in law corresponds to an equitable solution, in the absence of all precise rules of adjudication. But it can be that recourse to the reasonable only give a provisional solution, waiting for the elaboration of new legal construction which would be more satisfying. The reasonable guides this endeavor toward systematization, toward the rational systematic solution.⁵⁶

Reason acts as a check on rationality, just as rationality provides the aspirational model for reasoning.

2. *Persuasion and "Confused Notions"*

To emphasize the philosophical nature of his project, Perelman asserts that justice is a "confused notion," by which he means that it cannot be clarified according to the test of absolute truth but can only be developed in the course of responding to the practical demands of

grounding for philosophy, jurisprudence, and the human sciences in the wake of that colossal failure of the logicist tradition in philosophy from Descartes to logical positivism."). Gaonkar contends that Perelman's new rhetoric wrongly was received as an effort to "update" rhetorical techniques for modern times, rather than as one of the first steps in the "rhetorical turn" in contemporary thought. *Id.* at 63 n.13.

54. PERELMAN, *supra* note 46, at 117-18.

55. PERELMAN, *supra* note 50, at 59.

56. PERELMAN, *supra* note 46, at 120, 121, 123.

political action in a manner informed by reasonable belief.⁵⁷ The Cartesian tradition viewed philosophy as the means of erasing confusion, but philosophy conceived in this way proves itself to be impotent as a guide for civic action and the development of reasonable compromises in social life, since circumstances often demand a choice between actions which can be defended equally on logical grounds. What holds true for the topic of justice holds true for philosophical inquiry generally: philosophy often is concerned with confused notions and therefore never reaches definitive conclusions except in the most narrowly defined circumstances. Thus, Perelman regards his "new rhetoric" as a philosophical claim about how we reason rather than simply as a handbook of certain technical, forensic skills used in public speaking.⁵⁸ This claim is intimately linked to a philosophy of language that emphasizes pragmatics over semantics and rejects the fantasy of developing an ideal, perspicacious language that can resolve all philosophical problems once they are shorn of the ambiguity and illogic of everyday communication.⁵⁹

The new rhetoric is concerned with reasonable action rather than rational *contemplation*, and thus rejoins the ancient battle between philosophy and rhetoric.⁶⁰ Perelman crystallizes this opposition by distinguishing rational thought, in which the truth of the matter can be known through careful reflection, from acting reasonably even though the "truth" of the matter is uncertain and multi-dimensional. In the face of limited time and information, profound disagreements about the relevant guiding principles, and the inability to reach complete consensus without the use of force, the challenge for modern man is to

57. PERELMAN, *supra* note 50, at vii, 96-105. See generally PERELMAN & OLBRECHTS-TYTECA, *supra* note 49, at 133-41.

58. See generally PERELMAN, *supra* note 46. "If rhetoric is regarded as complementary to formal logic and argumentation as complementary to demonstrative proof, it becomes of paramount importance in philosophy, since no philosophic discourse can develop without resorting to it." *Id.* at 31.

59. See *id.* at 82-89; PERELMAN, *supra* note 50, at 96. Perelman's friend and collaborator, Mieczyslaw Maneli, reports that Perelman was beginning to develop the ontological features of his approach just prior to his untimely death. See MANELI, *supra* note 1, at 4. This confirms what seems evident on the face of Perelman's writings: he was concerned with the lived experience of reasonable social interaction rather than just outlining a methodology for advancing that interaction with rhetorical tools.

60. See PERELMAN, *supra* note 46, at 43-45; PERELMAN & OLBRECHTS-TYTECA, *supra* note 49, at 26 ("Here is resumed the age-old debate between those who stand for truth and those who stand for opinion, between philosophers seeking the absolute and rhetors involved in action."). The most prominent contemporary critic of the rhetorical tradition, Jürgen Habermas, characterizes postmodern theory as an heir to the rhetorical assault upon reason. See JÜRGEN HABERMAS, *THE PHILOSOPHICAL DISCOURSE OF MODERNITY* (1987).

act reasonably rather than coercively. To overcome the philosophical tradition—epitomized by formal logic—which has disabled the ideal of reasonable action, Perelman outlines an informal logic of social action rooted in practical demands and concerns.⁶¹

Perelman asserts that the existence of competing arguments should not be regarded as a sign that at least one of the participants has engaged in defective thinking or that the matter in question is one that admits only of irrational adherence. Instead, he demonstrates that argumentation has its own logic or reasonableness that can foster reasonable action even in the face of undecidability under Cartesian strictures of rationality. As a prime example, Perelman points to the operation of the legal system in which arguments are made and action is taken despite the inevitable lack of indubitable knowledge about the questions raised by the case at hand.⁶² In this venue and others, it is the process of argumentation that gives meaning to human freedom by underscoring judgment as a reasonable choice among several viable alternatives.⁶³ Perelman's theme is that norms for action can never be justified purely through empirical observation (empiricism/naturalism) nor purely through conceptual analysis (rationalism), but that this situation does not consign normative inquiry to irrationality (intuitionism). Argumentation exists as a shared experience of a lived, practical reasoning.

3. *Transforming Aristotelian Rhetoric*

Perelman's philosophical reconceptualization of rhetoric is evident in the ways that he transforms familiar rhetorical principles. The concept of the audience played an important role in Aristotle's *Rhetoric*, but Perelman makes clear that he utilizes the notion of audience in order to describe a mode of knowing rather than to identify the group

61. See PERELMAN & OLBRECHTS-TYTECA, *supra* note 49, at 512; PERELMAN, *supra* note 50, at 108; MANELI, *supra* note 1, at 28.

62. See PERELMAN, *supra* note 50, at 129; MANELI, *supra* note 1, at 85-95; Donald H.J. Hermann, *Legal Reasoning as Argumentation*, 12 N. KY. L. REV. 467, 509 (1985) ("While legal reasoning cannot be assimilated to formal logic nor utilize scientific demonstration, neither can it be dismissed as mere subjectivism and exercise of unrestrained power. The argumentation which is the ultimate method of legal reasoning necessarily employs reasons which are ultimately tested by their effect in persuading.").

63. See PERELMAN & OLBRECHTS-TYTECA, *supra* note 49, at 514 ("Only the existence of an argumentation that is neither compelling nor arbitrary can give meaning to human freedom, a state in which a reasonable choice can be exercised."); Pavcnik, *supra* note 52, at 502-04 (arguing that Dworkin's "right-answer thesis" cannot be sustained except as an aspirational recognition that legal decisionmaking is "a responsible intellectual activity" and that legal decisions "are always responsible human acts, ones that create law in the fullest sense of the word").

of listeners who require artful convincing due to their inability or unwillingness to follow the philosopher's dialectical demonstrations.⁶⁴ Attention to one's audience signals an ethics of humility in light of the

64. See PERELMAN & OLBRECHTS-TYTECA, *supra* note 49, at 6-7. In one sense, Perelman's thrust is to avoid having rhetoric degenerate to a form of obeisance to Aristotle, since "Aristotelian rhetoric—in spite of heroic twentieth-century efforts by a host of scholars to defend it as whole, good, noble, and necessary . . .—is a degraded, low-class thing." Jasper Neel, *The Degradation of Rhetoric; or, Dressing Like a Gentleman, Speaking Like a Scholar*, in RHETORIC, SOPHISTRY, PRAGMATISM 61, 70 (Stephen Mailloux ed., 1995). See PERELMAN, *supra* note 46, at 57-58 (explaining that the "universal audience" was formulated to dispel the perception that he follows Aristotle's effort to develop techniques for persuading the ignoramuses in the public square). Perelman's reading of Aristotle is widely accepted, but some scholars argue that Aristotle accepted the epistemic significance of civic discourse. See, e.g., Richard J. Burke, *A Rhetorical Conception of Rationality*, 6 INFORMAL LOGIC 17, 19 (1984). Burke argues that Aristotle's "*Rhetoric* along with his *Politics*, should be read as a justification of this assumption against both Plato's elitism and the cynicism of most prior teachers of rhetoric, who apparently taught it (as some advertising manuals do today) as an art of manipulating the emotions of the audience." *Id.* Burke's interpretation finds support in the following passage from *On Rhetoric*:

[O]ne should be able to argue persuasively on either side of a question, just as in the use of syllogisms, not that we may actually do both (for one should not persuade what is debased) but in order that it may not escape our notice what the real state of the case is and that we ourselves may be able to refute if another person uses speech unjustly. None of the other arts reasons in opposite directions; dialectic and rhetoric alone do this, for both are equally concerned with opposites. Of course the underlying facts are not equally good in each case; but true and better ones are by nature always more productive of good syllogisms and, in a word, more persuasive.

....
In addition [it is clear] that it is a function of one and the same art to see the persuasive and [to see] the apparently persuasive.

ARISTOTLE, *ON RHETORIC: A THEORY OF CIVIC DISCOURSE*, 34-35 [1354b-1355a] (George A. Kennedy trans., 1991).

Aristotle's translator, George Kennedy, acknowledges the apparent incongruity of these passages with Aristotle's later emphasis on style and arousing the emotions. See *id.* at 28. Eugene Garver persuasively demonstrates that the conflict arises only because contemporary readers are inattentive to Aristotle's claim that rhetoric is an ethical activity subordinate to politics and thus inevitably requires a judicious use of civic emotions in determining the proper course of action. See EUGENE GARVER, *ARISTOTLE'S RHETORIC: AN ART OF CHARACTER* 104-38 (1994). As Garver reports:

The emotions are the form in which we perceive practical particulars. In any but the easiest cases, it is not simple to determine whether the emotional coloring of an issue is enabling or corrupting. It is characteristic of the realm of praxis that there be no theoretical standpoint, outside the practical situation itself, for making such decisions.

....
[T]he need for rhetoric comes not from the weakness of audiences but from the complexity and indeterminacy of the world. The emotions can be constitutive of particular judgments because they are constitutive of the enterprise of judging and deliberating.

Id. at 106, 109 (citation omitted). Given the subject matter of deliberative rhetoric, not all appeals to emotions are illegitimate, but there are illegitimate uses of emotion.

As two commentators aptly summarize: "rhetoric is, in terms of a minimal but classic definition, the art or science of persuasion. . . . Rhetoric, however, has always been more than merely the art of persuasion. . . . it also represents certain philosophical assumptions about the nature of humanity." Roberts & Good, *supra* note 1, at 2.

speaker's commitment to persuade rather than coerce her adherence.⁶⁵ A speaker who truly addresses her audience remains open to the possibility that she may fail in her task if the audience is not persuaded or that she may even be converted to a new view in light of the rhetorical exchange.⁶⁶ Thus, the audience is not an empirical fact that the rhetor must take into account in pursuing her goals; it is a community that the rhetor seeks to persuade as an engaged and committed participant.

The extent to which Perelman transforms the conception of the audience is underscored by his notion of the "universal audience," seemingly an oxymoron under the Aristotelian reference to the audience as a means of emphasizing attention to context. Perelman regards the universal audience as the touchstone for philosophical argumentation, since philosophy is concerned with persuasion rather than logical demonstration even while it is directed to an anonymous audience of all inquiring minds.

To reconcile philosophical claims to rationality with the plurality of philosophical systems, we must recognize that the appeal to reason must be identified not as an appeal to a single truth but instead as an appeal for the adherence of an audience, which can be thought of, after the manner of Kant's categorical imperative, as encompassing all reasonable and competent men.⁶⁷

The "universal audience" is meant to capture the gesture of philosophical thinking, in which a thinker proposes arguments that she deems acceptable to all reasonable persons rather than invoking a privileged human faculty with access to demonstrable truth.⁶⁸ This

65. See PERELMAN & OLBRECHTS-TYTECA, *supra* note 49, at 16 ("wanting to convince someone always implies a certain modesty on the part of the initiator of the argument . . . He acknowledges that he must use persuasion, think of arguments capable of acting on his interlocutor, show some concern for him, and be interested in his state of mind."), 55 ("Recourse to argumentation assumes the establishment of a community of minds, which, while it lasts, excludes the use of violence.").

66. See *id.* at 17 ("We must not forget that by listening to someone we display a willingness to eventually accept his point of view.").

67. PERELMAN, *supra* note 46, at 13-14, 48-50.

68. Although Perelman in several instances appears to equate the hypothetical universal audience with an actual agreement of all reasonable persons, it is more accurate to avoid eschatological characterizations of the concept. See PERELMAN & OLBRECHTS-TYTECA, *supra* note 49, at 19 ("The audience, as visualized by one undertaking to argue, is always a more or less systematized construction.") (emphasis added). On this reading, the universal audience serves a function similar to Vico's *sensus communis*: it represents an historical, finite, and communal resource from which thought proceeds and which tempers its development. See Harold J. Berman, *Introduction*, in PERELMAN, *supra* note 50, at xi ("Professor Perelman's 'universal audience' . . . is 'common sense' in the seventeenth-century English meaning of that phrase."); James

gesture is essential, though, since it makes clear that the philosopher has no access to a disembodied logic of truth. The philosopher engages in actual discussions with fellow citizens who serve as representatives of the hypothetical community of all reasonable persons who remain to be convinced and whose challenges or obtuseness might always, in principle, lead her to revise her thinking.⁶⁹

Similarly, Perelman places great emphasis on another central Aristotelian insight, arguing that persuasion can be successful only when it works within a community of interests by proceeding from

Crosswhite, *Universality in Rhetoric: Perelman's Universal Audience*, 22 PHIL. & RHETORIC 157, 166 (1989) (arguing that the universal audience "represents a '*sensus communis*' rather than being an abstraction that stands above the agreements reached by actually existing groups"); Evelyn M. Barker, *A Neo-Aristotelian Approach to Dialectical Reasoning*, 34 REVUE INTERNATIONALE DE PHILOSOPHIE 482, 484-85 (contrasting Perelman's use of audience with the abstract conceptual analysis dominant in philosophy generally and exemplified in Rawls's theory of justice).

Although the universal audience is therefore grounded and contextual in its construction and representation by the rhetor, Professor Crosswhite emphasizes that there nevertheless is a *gesture* that looks beyond any existing audience. See Crosswhite, *supra*, at 170 (discussing the comportment toward an "undefined universal audience" as enabling the rhetorical construction of a "universal audience" in the course of argumentation). This accords with one of Perelman's last characterizations of the universal audience, in which he argued that "every philosopher addresses himself to the universal audience *as he conceives it*, even in the absence of an objectivity which imposes itself upon everyone." Chaim Perelman, *The New Rhetoric and the Rhetoricians: Remembrances and Comments*, 70 Q. J. SPEECH 191, 191 (1984). See William Kluback, *The Implications of Rhetorical Philosophy*, 5 LAW & PHIL. 315, 317, 326 (1986) (interpreting Perelman's statement not as a reference to the power of the rhetor's subjective will, but to the rhetor's participation in a tradition which pulls all participants toward idealizations while simultaneously preserving "the freedom and truth of the plurality of audiences in their limitations").

69. Robert Alexy suggests that Perelman's universal audience serves the same role in his philosophy that Habermas's ideal speech situation serves in Habermas's critical theory, namely the idealized form of dialogic interaction anticipated in every genuine communicative exchange. ROBERT ALEXY, *A THEORY OF LEGAL ARGUMENTATION: THE THEORY OF RATIONAL DISCOURSE AS THEORY OF LEGAL JUSTIFICATION* 160-63 (Ruth Adler & Neil MacCormick trans., 1989). James Crosswhite agrees, but persuasively argues that Perelman succeeds in ways that Habermas cannot, since Perelman avoids entanglements in transcendental claims. See Crosswhite, *supra* note 68, at 172. See also CONLEY, *supra* note 46, at 301-03 (noting that Habermas's distrust of language leads him from rhetorical exchanges to an attempt to define a universal principle of rationality). For example, in comments about his recent book on legal theory, Habermas emphasizes that the *validity and legitimacy* of legal norms depends upon the participation of all persons possibly affected in rational discourse, a situation that he contrasts with the *application* of norms in judicial decision-making. See Jürgen Habermas, *Postscript to Between Facts and Norms*, in HABERMAS, *MODERNITY AND LAW* 135, 144 n.11 (Mathieu Deflam ed. & William Rehg trans., 1996). This, of course, stands in sharp contrast to Perelman's reference to judicial decision-making as a model for moral philosophy. See *infra* text accompanying note 83. See generally Guy Haarscher, *Perelman and Habermas*, 5 LAW & PHIL. 331 (1986) (drawing connections between the two philosophers without undertaking a critical analysis).

prior, shared agreements between the speaker and her audience.⁷⁰ Presupposed agreement among the parties is a necessary feature of every act of persuasion because there is no recourse to justifications that exist outside the unfolding historical situation in which both speaker and listener are enmeshed, an historical context which alone can provide grounds for deciding between two alternatives.

It is true that the search for universally valid principles which would provide a common context for all criticisms and all justifications has been a millennial aspiration of all philosophy, and especially of all rationalist philosophy. But, in fact, criticism and justification are always found in a historically determined context. For all societies and for all intellects, there exist certain acts, certain agents, certain values and beliefs that at a given moment are approved without reservation and accepted without argument; hence there is no need to justify them. These acts, these persons, these values, and these beliefs furnish precedents, models, convictions, and norms which in turn permit the elaboration of criteria by which to criticize and to justify attitudes, dispositions, and propositions.

....

Every effort to convince presupposes the existence of an agreement on certain notions and principles.⁷¹

Perelman spends the better part of his treatise cataloguing the techniques for employing "commonplaces" as points of departure when seeking adherence through argumentation.⁷²

Once again, however, Perelman transforms this notion from an observation on mere technique to a philosophical insight. Prior agreement on matters that cannot be deduced by means of formal logic is an unavoidable starting point for any inquiry, even within the natural sciences, for it is precisely this prior agreement that is recuperated and

70. See PERELMAN & OLBRECHTS-TYTECA, *supra* note 49, at 65-95; PERELMAN, *supra* note 50, at 100 ("Aristotle emphasized that, when it is a question of dialectical reasoning, it is necessary to begin with what is accepted by the listeners, with what constitutes an accepted opinion, a recognized value. In rhetorical and philosophical tradition, this point of departure has been defined as commonplace.").

71. PERELMAN, *supra* note 50, at 61, 132.

72. Perelman describes commonplaces as storehouses for arguments that most generally pertain to the quality or *quantity* of the matter under discussion, see PERELMAN & OLBRECHTS-TYTECA, *supra* note 49, at 83-95, and the great majority of his treatise describes various techniques of argumentation, such as using examples and analogies, *id.* at 185-508. Douglas Walton attempts to provide a tighter, systematic account of the proper use of argument forms than Perelman provides, although Walton shares Perelman's point of departure. See WALTON, *supra* note 53, at 46-110.

expanded in the course of seeking to persuade another.⁷³ The web of preexisting beliefs subtending all discussion is always subject to testing and revision, although it is impossible for discussants to rise above such beliefs in their totality and to ground their discussion on a rationalist Archimedean point.⁷⁴ In Perelman's view, this epistemological reality translates to the normative principle of inertia: adherence to presupposed agreement embodied in precedents should have presumptive force, although challenges should be recognized if the proposed change is defended by reasons, which of course will be derived from the aspects of presupposed agreement that are not brought into question at that time.⁷⁵

In short, the shared assumptions from which we reason have presumptive authority because they are unavoidable, but they remain

73. Perelman distinguishes between seeking agreement about the "real" (including facts, truths, and presumptions) and seeking agreement as to the "preferable" (including values, hierarchies of values, and lines of argumentation). In the former case, one is committed to persuading the universal audience, whereas in the latter instance, one seeks only to assert a validity claim with respect to a particular audience. However, Perelman makes clear that there can be no sharp demarcation between the two, since "[v]alues enter, at some stage or other, into every argument," PERELMAN, *supra* note 49, at 75, such that "all audiences, of all kinds, have to take *loci* [commonplaces of argument] into account," *id.* at 85.

74. Perelman believes that the wisdom of the legal system flows from the fact that it institutionalizes this philosophical insight.

The exigencies of the juridical order, which continues through all kinds of upheavals as long as it has not been entirely or partially replaced by a new order, clearly show us what is unfeasible in the advice of Descartes, asking us to make a *tabula rosa* of all our opinions . . . Nobody has ever seriously put in doubt the totality of his opinions, for they test each other reciprocally: One keeps those which, up to the present moment, have best resisted the testing. This, however, does not guarantee them absolutely against all subsequent tests.

Thus rationality, as it presents itself in law, is always a form of continuity—conformity to previous rules or justification of the new by means of old values . . . Law teaches us, on the contrary, to abandon existing rules only if good reasons [drawn from other existing rules] justify their replacement.

PERELMAN, *supra* note 50, at 169-70.

75. See PERELMAN, *supra* note 46, at 131; PERELMAN, *supra* note 50, at 27-28 (construing the principle of inertia in legal practice as a central aspect of justice). Richard Burke emphasizes this same point by defending the rhetorical device of "appeal to authority" as a perfectly reasonable argument capable of persuading an audience. Burke, *supra* note 64, at 18. The informal logic at work in argumentation means, though, that the application of this argument to particular disputes cannot be charted in advance.

Instead of saying that an appeal to authority or majority opinion is fallacious unless certain other conditions are present, the textbooks should say that these are plausible arguments, and therefore should persuade a rational person, unless a stronger argument to the contrary is available with a reasonable expenditure of time and effort.

Id. at 24. See PERELMAN & OLBRECHTS-TYTECA, *supra* note 49, at 305-10 (discussing the argument from authority). As Perelman notes, most attacks on arguing from authority in fact amount to attacks on the authority in question rather than on the nature of the argumentative strategy. See *id.* at 307.

subject to revision on a relatively localized basis in accord with reasonable elaboration of the undisturbed features of prior agreement. As does Gadamer, Perelman faces strong criticism that his approach results in a quiescent acceptance of the powerful force of ideology in shaping the prior agreements in a given society,⁷⁶ but like Gadamer he resists succumbing to the unattainable desire to rise above situatedness in prior agreement by emphasizing the unavoidable critical dimension of this very situatedness.⁷⁷

4. *Justice, Legal Practice, and Philosophy as Persuasion*

Having established his philosophical orientation, Perelman argues that justice can be the subject of reasoned inquiry despite its "confused" nature. The traditional idea that justice is achieved when the natural law is embodied within positive legal institutions must be rejected to the extent that the natural law is presumed to be a universal and timeless set of directives. However, Perelman argues that both Aquinas and Aristotle invoked a more subtle conception of natural law that accepts the ontological pluralism of legal practice without devolving into a relativistic positivism.

The idea of natural law is also misconceived when it is posed in ontological terms . . . Natural law is better considered as a body of general principles or *loci*, consisting of ideas such as "the nature of things," "the rule of law," and of rules such as "No one is expected to perform impossibilities," "Both sides should be heard"—all of which are capable of being applied in different ways. It is the task of the legislator or judge to decide which of the not unreasonable solutions should become a rule of positive law. Such a view, according to Michel Villey, corresponds to the idea of natural law found in

76. See William L. McBride, *Professor Perelman and Authority*, 12 N. KY. L. REV. 511, 516-17 (1985); Bodenheimer, *supra* note 47, at 414-17 (arguing that Perelman should not have been so quick to collapse rhetoric (persuasive speech) with dialectic (reasoning toward truth) since attention to presumed agreement with one's audience may lead to grave injustices).

77. See PERELMAN & OLBRECHTS-TYTECA, *supra* note 49, at 85 ("[A]ll audiences, of all kinds, have to take *loci* into account."). Perelman emphasizes that rhetorical practices are critical because they are inventive and responsive, thus "the opportunity for reconsideration, innovation, rejection, and amendment appears as a moment in the basic structure of every legal problem." Jacob, *supra* note 51, at 1643. Cf. PERELMAN, *supra* note 46, at 155-57 (contending that the commonplaces utilized by professional historians—the conception of historical periods and analytical perspective brought to bear on the data—can never be "entirely put aside [since the] only way to do without them is to replace them with others," but emphasizing that the contingent quality of such periodization makes "dialogue among historians both possible and indispensable").

Aristotle and St. Thomas Aquinas—what he calls the classical natural law.⁷⁸

Although legal practice can never be reduced to a formal logic, there is a nature of law in the sense that all legal argumentation works from presumed agreement embodied in commonplaces.⁷⁹ The advocate and judge must act; they do not have the option to withhold their activity until certainty is established. Consequently, legal judgments represent further articulation of general principles in the course of resolving the case at hand, rather than a mere deductive application of a previously known legal rule.⁸⁰ This is the true import of Aristotle's analysis of equity: legal decisions always require a defense of the preferable outcome in the present case to some degree, no matter how clear-cut the abstract general principle appears to be in addressing the case.⁸¹

Although the demand for action has always prevented lawyers and judges from engaging in an academic pursuit of certainty, legal theorists only now are beginning to emerge from under the oppressive mantle of scientism to rediscover that rhetoric is a central feature of legal practice.⁸² Consequently, Perelman stresses that legal argumentation provides a model for philosophical inquiry, particularly moral philosophy, and that an analysis of legal practice provides a helpful guide to establishing the appropriate role of philosophical thought.

After having sought, for centuries, to model philosophy on the sciences, and having considered each of its particularities as a sign of inferiority, perhaps the moment has come to consider that philosophy has many traits in common with law. A confrontation with the latter would permit better understanding of the specificity of philosophy, a discipline which is elaborated under the aegis of reason, but a reason which is essentially practical, turned toward rational decision and action.

78. PERELMAN, *supra* note 46, at 33.

79. See PERELMAN, *supra* note 50, at 125-29. Perelman suggests that an analysis of the elements of legal reasoning might provide a map of argumentative strategies by which the demands of justice are articulated, challenged, and defended. See *id.* at 81.

80. See *id.* at 98, 123, 125-46; Hermann, *supra* note 62, at 469 (arguing that Perelman rejects both formalism and the cynical, demystifying hubris of CLS by concentrating on the reasonableness embedded in legal argumentation).

81. See PERELMAN, *supra* note 50, at 38-39, 94, 127. As John Valauri emphasizes, Perelman does not oppose rules and equity as two distinct approaches, but rather he views them as two necessary features of a unified legal practice that may be deemed just. See John T. Valauri, *Confused Notions and Constitutional Theory*, 12 N. KY. L. REV. 567, 577-78 (1985).

82. See PERELMAN, *supra* note 50, at 145.

....

[T]he diverse principles which the philosophers have presented as supreme norms in ethics are in reality only commonplaces, in the meaning of classical rhetoric, that they give reasons which are to be considered in each concrete situation rather than as axioms like those of geometry whose consequences can be drawn by simple deduction. Practical reasoning, applicable in morality, must not be inspired by the mathematical model, which is not applicable in changing circumstances, but by a knowledge characterized by reasonableness and by the taking into consideration diverse aspirations and multiple interests, defined by Aristotle as *phronesis* or prudence, and which is so brilliantly manifested in law, in Roman *jurisprudencia*.

....

If law has suffered much from being too influenced by the sciences, I believe the same reproach can be addressed to philosophy . . . If the new concept of law spreads, which is basically a very old one, and which has been forgotten for centuries, philosophers will have much to learn from it. They will look to the techniques of the jurist to learn how to reason about values, how to realize an equilibrium, how to bring about a synthesis of values.⁸³

Of course, this is not to equate the task of the lawyers and the judge in a particular lawsuit to the task of a philosopher writing about the conditions of justice. However, Perelman insists that it is precisely the principles of the new rhetoric which permit a distinction to be drawn between these two different rhetorical exchanges with regard to the different audiences they engage.⁸⁴

II. RHETORIC, HERMENEUTICS AND THE POSSIBILITY OF CRITIQUE

Who has not had the experience—especially before the other whom we want to persuade—of how the reasons that one had for one's own view, and even the reasons that speak against one's own view rush into words. The mere presence of the other before whom

83. *Id.* at 174, 119, 146. The collection of essays repeats this theme throughout, *but see id.* at vii, 78, 114, 117, 128-29, 159.

84. Perelman contends that the philosopher makes arguments of a different type to the extent that she addresses the universal audience rather than the litigants in a lawsuit within a particular legal system, and yet the philosopher is employing rhetorical rationality to no less a degree than the judge. *See PERELMAN, supra* note 50, at 72. Perelman notes that the demand for stability within the legal system requires that *res judicata* play an important role, whereas in philosophy there can be no *res judicata*. *Compare id.* at 53, *with id.* at 75.

we stand helps us to break up our own bias and narrowness, even before he opens his mouth to make a reply. That which becomes a dialogical experience for us here is not limited to the sphere of arguments and counterarguments the exchange and unification of which may be the end of meaning of every confrontation. Rather, as the experiences that have been described indicate, there is something else in this experience, namely, a potentiality for being other [*Andersseins*] that lies beyond every coming to agreement about what is common.

Hans-Georg Gadamer⁸⁵

Reading Gadamer and Perelman as challenging supplements to each other provides the key to developing the concept of "rhetorical knowledge," which I argue is the appropriate point of departure for contemporary legal theory. Rhetorical knowledge is a practical accomplishment that neither achieves apodictic certitude nor collapses into a relativistic irrationalism; therefore, rhetorical knowledge can sustain legal practice as a reasonable—even if not thoroughly rationalized—social activity. Before outlining how the theory of rhetorical knowledge plays an important role in understanding and critiquing modern legal practice, though, it is necessary to move beyond the descriptions of the individual projects undertaken by Gadamer and Perelman by sketching the connections and divergences between rhetoric and hermeneutics generally. I conclude that Gadamer and Perelman both offer important insights and nuances in developing an account of rhetorical knowledge appropriate for legal theory, but that their respective contributions to this approach must be carefully integrated into a new theory.

A. CONVERGENCES AND DEPARTURES

The new rhetoric and philosophical hermeneutics have a number of natural affinities that flow from their participation in the same broad movement in contemporary philosophy away from the Cartesian paradigm of knowledge. In the words of one commentator, contemporary "rhetoric and hermeneutics are both symptomatic of, and at the same time constitutive of, the changed philosophical situation."⁸⁶ Gadamer and Perelman undoubtedly strike a similar chord by

85. See Gadamer, *supra* note 11, at 26.

86. Joy, *supra* note 51, at 273, 284. See RHETORIC AND HERMENEUTICS IN OUR TIME: A READER, *supra* note 3; BRUCE KRAJEWSKI, TRAVELING WITH HERMES: HERMENEUTICS AND RHETORIC (1992). I do not mean to suggest that hermeneutics and rhetoric have maintained separate traditions which only now are being read together productively. It is more accurate to

emphasizing that a return to Aristotelian practical philosophy can expose and overcome the deficiencies of modern philosophical thought.⁸⁷ Several theorists have related this neo-Aristotelian conjunction of hermeneutics and rhetoric to Martin Heidegger's path-breaking attack earlier this century on the Cartesian tradition.⁸⁸ Perelman, unlike Gadamer, does not explicitly work within the Heideggerian tradition. Nevertheless, philosophical hermeneutics and the new rhetoric are unavoidably and inextricably complicit in the contemporary challenges to Cartesian metaphysics epitomized by Heidegger's critique and therefore share substantial common ground.⁸⁹

say that the problems and goals of hermeneutics and rhetoric have always been mutually implicated, and it is our contemporary appreciation and elaboration of this situation that proves instructive. See KATHY EDEN, *HERMENEUTICS AND THE RHETORICAL TRADITION: CHAPTERS IN THE ANCIENT LEGACY AND ITS HUMANIST RECEPTION* 102 (1997) (chronicling the "profound interaction between rhetoric and hermeneutics" in the tradition stretching from ancient Greece to medieval humanism).

87. See Bineham, *supra* note 24, at 309 ("Gadamer's appropriation of [key Aristotelian] concepts locates hermeneutics within a rhetorical tradition."); Enrico Berti, *Aristotle's Renaissance as an Example of the Essential Tension Between Tradition and Innovation*, 16 *PHIL. INQUIRY* 26, 30-31 (1994) (tracing the "rehabilitation of practical philosophy" exemplified in the work of Gadamer and Perelman to the resurgence of interest in the Aristotelian tradition). Robert Scott correctly argues that Gadamer and Perelman's shared emphasis on the idea that understanding and knowledge always involve contextual application—an idea that they both derive from Aristotle—provides the essential linkage of rhetoric and hermeneutics in contemporary thought. Robert L. Scott, *On Viewing Rhetoric as Epistemic: Ten Years Later*, 27 *CENT. STATES SPEECH J.* 258, 266 (1977).

88. See, e.g., Ramsey Eric Ramsey, *Listening to Heidegger on Rhetoric*, 26 *PHIL. & RHETORIC* 266 (1993) (arguing that Heidegger's philosophy—and particularly his consideration of Aristotle's *Rhetoric*—provides an antidote to the methodologism of modern communication studies); Michael R. Heim, *Philosophy as Ultimate Rhetoric*, 19 *So. J. PHIL.* 181 (1981) (adopting Heidegger's recovery of Aristotle's analysis of deliberative-practical rhetoric).

89. Two leading commentators have argued that Heidegger's synthesis of rhetoric and hermeneutics provides the intellectual backdrop for the contemporary advances in both disciplines.

[T]o observe and disclose the relationship between hermeneutics and rhetoric, one must describe it ontologically [in the manner initiated by Heidegger].

....
Rhetoric's ontological relationship with hermeneutics occurs when understanding becomes meaningful, when interpretation shows it "as something" If the hermeneutical situation is the "reservoir" of meaning, then rhetoric is the selecting tool for making-known this meaning. . . . Without the hermeneutical situation there would be a meaningless void; without rhetoric the latent meaning housed in the hermeneutical situation could never be actualized.

....
[Consequently,] [a]ll knowledge, when it is acquired, is contextual, a product of the hermeneutical situation, and therefore founded in rhetoric—the making-known of primordial interpretive understanding.

Michael J. Hyde & Craig R. Smith, *Hermeneutics and Rhetoric: A Seen but Unobserved Relationship*, 65 *Q. J. SPEECH* 347, 354-56 (1979). For an extended discussion of the connections between Heidegger's phenomenological hermeneutics and Gadamer's philosophical hermeneutics, see Mootz, *Rethinking*, *supra* note 6.

Gadamer and Perelman both rely explicitly on Aristotle to develop their shared effort to displace the Cartesian tradition, but they underemphasize the extent to which philosophical hermeneutics and the new rhetoric reinforce each other in this task. From a rhetorical perspective, philosophical hermeneutics provides guidance in the face of the "Cartesian anxiety": by moving from epistemology to hermeneutics, scholars can develop an ontological account of the social nature of understanding and thereby avoid the relativistic implications of simply abandoning the Cartesian model of knowledge without offering a radically new account.⁹⁰ From a hermeneutical perspective, the new rhetoric provides guidance in the face of hermeneutical idealism: by moving from ontology to politics, scholars can foster a critical inquiry oriented toward improving our various rhetorical practices and thereby avoid the conservative implications of replacing the Cartesian model with a model premised on abstract notions of historicity and finitude. According to this reconfigured approach, the breakdown of the Cartesian paradigm results from the discovery of a better ontological account of communication and understanding rather than an irrational abandonment of objective methodological inquiry.

The new orientation that emerges from the confrontation of hermeneutics with rhetoric is grounded in the *activity* of social interaction rather than in conceptualizing the hermeneutical situation in which each individual finds herself. The ability of theorists to describe reasonable dialogic interaction is not just facilitated by this new account; it is impossible without such a change in philosophical perspective. Philosophical hermeneutics and contemporary rhetorical theory converge in the claim that there is a lived truth beyond the boundaries of Cartesian metaphysics and that such truth is actualized only in rhetorical exchanges. This move to displace Cartesian objectivity retains a critical component by resolutely refusing to abandon the criteria of reasonableness, and the elaboration of this component requires the insights of both philosophical hermeneutics and the new rhetoric.⁹¹

90. See Bineham, *supra* note 24, at 300-05; Jeffrey L. Bineham, *The Hermeneutic Medium*, 28 PHIL. & RHETORIC 1 (1995).

91. Jeffrey Bineham emphasizes that Gadamer's ontological claim that human finitude is the defining feature of the hermeneutical situation does not undermine rhetorical elaboration of a better course of action according to the standard of reasonableness.

Neither subjectivity nor universal agreement on the criteria for rationality obtains Rationality itself is a product of the [hermeneutical] medium, of the language and tradition that have established, for the time being, what is considered reasonable and unreasonable. . . . People live within a medium that *does* exhibit preferred understandings and interpretations, but other often unnoticed possibilities do exist within the

Capturing this critical bite is difficult, though, inasmuch as it is lodged precisely within the fundamental tension between the approaches adopted by Gadamer and Perelman. It is a relatively easy matter to align Gadamer and Perelman by charting their parallel use of concepts,⁹² but a divergence with overriding importance also emerges when comparing their work. Gadamer is intent on developing an ontological account of understanding that will fill the philosophical void in a post-Cartesian world, whereas Perelman outlines a descriptive methodology of informal argumentation with the goal of preserving sound rhetorical practices against the theoretical challenges of Cartesianism and the practical challenges of violent suppression. Because Gadamer's ontology principally is issued as a challenge to the methodologism of the scientific mindset, the many parallels between the two thinkers might at second glance appear to be only superficial. To develop an account of rhetorical knowledge by drawing from these philosophies, it is necessary to describe how it is possible to introduce a critical methodology that is consistent with Gadamer's ontological insights.⁹³

medium and can be embraced and cultivated. For Gadamer this condition rescues hermeneutics from a morally and intellectually chaotic relativism. Any medium contains a variety of criteria for the comparison of rival interpretations and understandings. But such comparisons do not require belief in a fixed rule by which to measure progress or worth.

The rejection of [Cartesian] objectivity, therefore, does not deny that arguments and interpretations are subject to critique and correction. Any criticisms will appeal to judgmental standards that may be *assumed*, for the sake of the criticism, to be fixed.

Bineham, *supra* note 90, at 13-14. See also Anthony J. Cascardi, *The Places of Language in Philosophy; or, The Uses of Rhetoric*, 16 PHIL. & RHETORIC 217, 225 (1983) ("Modern hermeneutics asks for itself how a living verbal system works, *how* we understand. In order to respond, we must take language both as an instrument which produces understanding in us and as a form of life in which we make ourselves understood. In the understanding of a dialectical process we are literally submitted to—placed under—the capacity of words.").

92. Mindful of the inevitable oversimplifications attendant to "charting" similarities between two philosophers, I believe that the following table provides an accurate representation of some of the related concepts employed by Gadamer and Perelman.

Comparing Gadamer's Terminology with Perelman's Terminology	
GADAMER [Conversation]	PERELMAN [Persuasion]
Truth	Universal Audience
Common Sense (prejudice)	Commonplace (<i>loci</i>)
Authority	Persuasion
Authoritarian	Violence
Application as Understanding	Practical Philosophy as Politics

93. My project is inspired by Gary Madison's impressive effort to radicalize the postmodern implications of Gadamer's project while also developing a methodology for assessing competing interpretations. See MADISON, *supra* note 5, at 26-35. Madison argues that Gadamer's hermeneutics, despite its uncompromising attack on methodologism, "can provide

The challenge of reading Gadamer and Perelman together can now be cast in sharp relief. Gadamer's ontological account of understanding as an intersubjective event that precedes methodologically-guided inquiry appears to reject the possibility of criticizing current practices according to specific criteria of reasonableness. Perelman's methodological account of the rhetorical devices used to persuade others appears either to slip into a descriptive conventionalism or to purport to provide a guide for rhetorical practices from outside the exchange. However, as intimated in the course of describing their respective philosophies, each thinker provides important conceptual resources for developing an account that avoids these failings. Gadamer and Perelman do not provide the missing pieces to the other's philosophy as much as they develop the same argument with different but complementary emphases. Taken together, then, their philosophies provide the basis for understanding rhetorical knowledge and responding to the serious challenges addressed to them by critical theorists.

Gadamer's reliance on the rhetorical tradition reaffirms the critical elements of his work and provides an opening to the development of an appropriate methodology.⁹⁴ By reassessing Gadamer's model of understanding as conversation—which was revealed to be a rhetorical model—in conjunction with Perelman's emphasis on persuasion, it is possible to provide an account of interpretive understanding that includes an explicitly critical element. Similarly, Perelman's consistent attack on Cartesian metaphysics in the course of describing the activity of persuasion reaffirms both the critical element of his new rhetoric and its non-rationalist basis.⁹⁵ By reading his new rhetoric as

for norms or criteria for assessing interpretations," and "can allow for a *logic of interpretation* in the light of which *rational* decisions can be made," about competing interpretations. *Id.* at 26, 35. This logic is not derived from the model of scientific knowledge, but rather from rhetoric, which "throughout its long history, as long as that of science itself, . . . has always opposed an alternative conception of rationality [and] has taught . . . that while in the realm of human affairs and action we can never be absolutely certain of anything, we can nevertheless have legitimate grounds for believing that some things are clearly better than others." *Id.* at 35. See also Paul Fairfield, *Truth Without Methodologism: Gadamer and James*, 67 AM. CATH. PHIL. Q. 285, 286 (1993) (connecting Gadamer's ontology with James's pragmatic conception of truth as workable coherence in beliefs). As Fairfield succinctly argues:

. . . indicating the limits of methodology does not relieve us of the responsibility of engaging in it, and directing our attention to the historicity of the criteria by which we adjudicate between rival interpretations (as is Gadamer's habit) should not deter us from trying to uncover such standards and norms.

Id. at 286.

94. See *supra* notes 37-39 and accompanying text.

95. See *supra* notes 76-79 and accompanying text.

a reflection on social activity within the hermeneutical situation described by Gadamer, it is possible to provide a model of critical rhetoric congenial to the postmodern philosophical situation. I underscore the need to make these accommodations and to effect these shifts in emphasis by confronting each thinker with his staunch critics and revising my reading of each philosopher's effort accordingly.

B. PHILOSOPHICAL HERMENEUTICS AND CRITICAL INSIGHT

Charles Altieri has chided Gadamer for glibly incorporating rhetorical themes into his philosophy as a means of fending off Habermas's insistent demand that the emancipatory interest manifested in social critique be accorded a role in hermeneutical understanding.⁹⁶ Altieri rejects a hermeneutical abdication to abstract "otherness" and argues in favor of a rhetorical view of the "other" as an active agent with whom the interpreter must negotiate the bonds of social life.

I am . . . interested in the ways rhetorical thinking helps us flesh out what is dark about hermeneutics. For by focusing on wills and orientations towards actions, rhetoric reminds us that the limitations in our understanding extend far beyond our inability to penetrate or contain what is excessive and singular.⁹⁷

In short, Altieri faults Gadamer for ignoring the wariness attendant to any social experience, and he emphasizes that maintaining this wariness is essential to the task of diagnosing the power lodged within discursive practices and mitigating the effects of such power on social life.

In similar fashion, Thomas Farrell argues that Gadamer has too quickly conflated the model of everyday conversation with the model of rhetorical interaction.⁹⁸ Farrell contends that Gadamer's invocation of conversation as a model of understanding hypostatizes the unguarded encounter with another that occurs in casual conversation and thereby obscures the more judicious attitude that occurs in a deliberative exchange.⁹⁹ While agreeing that "the reflective capacity of rhetoric is embedded in the reflective capacities of conversation in general," Farrell emphasizes that rhetoric is partisan (monologic

96. See Charles Altieri, *Towards a Hermeneutics Responsive to Rhetorical Theory*, in *RHETORIC AND HERMENEUTICS IN OUR TIME: A READER*, *supra* note 3, at 90, 91.

97. *Id.* at 23.

98. See THOMAS B. FARRELL, *NORMS OF RHETORICAL CULTURE* 232-49 (1993).

99. See *id.* at 248-49.

speech aimed at effect), whereas conversation is bipartisan (dialogic speech oriented toward understanding).¹⁰⁰ Gadamer's comforting vision of conversational give and take obscures the more challenging rhetorical moments of deliberative struggle to define a public ethos, and so Farrell concludes that it is necessary to move beyond Gadamer's insights by developing an explicitly critical rhetorics.

Farrell argues that contemporary rhetorical theory should translate Aristotle's insights to present concerns via Habermas's critical theory, with the aim being to develop normative criteria of successful dialogue.¹⁰¹ Rhetoric is more than a *techne*, which would admit only of an inquiry into the "actual rules and techniques of discourse practice;" it also has a "prescriptive mission of invention, discovery, and judgment" within the context of "occasions of urgent practical choice" and therefore includes a critical component.¹⁰² Farrell cautiously embraces Habermas's discourse ethics as a means of introducing this critical element, although only after emphasizing Habermas's grudging concession that critical ideality emerges only from the messy practical engagements of rhetorical exchanges.¹⁰³ Farrell argues that this practical experience of rhetorical critique necessarily extends beyond Gadamer's idealization of conversation.

The criticisms of Gadamer voiced by Altieri and Farrell offer, in essential respects, appropriate emendations of Gadamer's hermeneutics. Altieri proposes a more traditional critical project of demystifying surface meanings to expose the exercise of power, whereas Farrell more narrowly defines critique as a reflective capacity that both emerges from, and gains perspective on, practice. Both emphasize, however, that hermeneutics can ill afford to remain passively quiescent in the face of the skewed rhetorical arena of modern culture. They both reject the conclusion that an ontology of situatedness disables the theorist from proposing means of identifying and encouraging sound rhetorical practices. Confronting Gadamer with these challenges reveals that he in fact does emphasize the critical dimension of hermeneutical understanding, but that he regrettably underdevelops this aspect of his philosophy.

Gadamer's notion of "unproductive prejudices" that are revealed and overcome in a hermeneutical encounter signals his interest in the

100. *Id.* at 232, 236.

101. *See id.* at 140.

102. *Id.* at 135.

103. *See id.* at 213.

critical moment of hermeneutical appropriation, although he provides little in the way of suggestions for facilitating this critical event.¹⁰⁴ Altieri's emphasis on "wariness" is meant as a warning that the hermeneutical "fusion of horizons" championed by Gadamer can often serve to concretize the shared ideological limitations in the text and interpreter, but Gadamer never naively sanctions the comforting practice of reading only reaffirming texts. In his discussion of the authority of classic texts, Gadamer emphasizes that historical distance can transform a text into an unsettling and persistently provocative dialogic partner that challenges interpreters to translate its meaning to contemporary concerns.¹⁰⁵ This interpretive experience generates critical insight when the interpreter is (literally) questioned by the text and finds herself adjusting her preconceived notions; simultaneously, the text acquires a new facet in the history of its appropriation to present concerns and inevitably emerges as a different focus of critical engagement for future readers.¹⁰⁶ Similarly, Gadamer's fascination with the demands of translating texts from a foreign language reaffirms his belief that a challenging and discomfiting hermeneutical exchange reveals the epistemic potential embedded within interpretation.¹⁰⁷ Regrettably, these themes not only are underdeveloped, they are consciously suppressed in the course of Gadamer's challenge to Habermas's critical hubris.¹⁰⁸

104. The following argument that Gadamer's philosophy explicitly and necessarily includes a strong critical gesture has been a theme in my prior work. See Mootz, *Ontological Basis*, *supra* note 6, at 602-05 and Mootz, *Rethinking*, *supra* note 6, at 159-64.

105. See GADAMER, *supra* note 4, at 277-307.

106. See Hans-Georg Gadamer, *Aesthetics and Hermeneutics*, in PHILOSOPHICAL HERME-NEUTICS, *supra* note 5, at 95, 104 (describing the experience of the work of art as the "shattering and demolition of the familiar"). Gadamer defines classic literary texts by their power of overcoming the subjectivism of the reader. "The interpreter, who gives his reasons, disappears—and the text speaks." Gadamer, *supra* note 11, at 51. Gadamer's thesis helps explain the controversies surrounding the teaching of books like *Huckleberry Finn* in public schools. Although the banalities of political correctness predominate the discussion, one might ask *why* the issue is deemed to be so important. It seems plain that critics regard the book as dangerous precisely because its real life (ambiguous) portrayal of race in language and settings now removed from contemporary discourse would prove threatening to students. On the one hand, the book might be presented to students too young and unsophisticated to meet the critical challenge posed by the text; on the other, the book might be too challenging for any reader within the context of contemporary American social and political reality. In either case, the critical force of a classic text is reaffirmed and feared as a decentering tool perhaps too powerful to be contained, which is precisely Gadamer's point as to why such encounters are necessary and beneficial.

107. See GADAMER, *supra* note 4, at 383-89.

108. Gadamer admits as much. In the closing to the Preface of the second edition of *Truth and Method*, Gadamer admits the one-sided nature of his hermeneutical universalism, but he

The model of conversation provides a focus for drawing these critical impulses out of Gadamer's work. Gadamer's use of "conversation" should not be confused with superficial banter or social pleasantries. Gadamer specifically calls to mind "true" conversations, in which two or more people join in discussion with the aim of coming to an understanding collaboratively about a subject that evolves from their discussion, even though the conversation lacks formal or institutionally-guided criteria. A conversation is a dialogic activity that engages the participants, rather than mere idle chatter, and for this reason he equates it with rhetorical exchange.¹⁰⁹ By choosing as his guiding metaphor an image of the interpreter enmeshed in an inventional discourse with another person in real time, Gadamer reaffirms his opposition to the exegetical model of a reader prostrate before a classical text that must be honored with reverent deference.¹¹⁰ Gadamer insists that textual interpretation provides a more expansive hermeneutical encounter than conversation because the text, removed from the immediacy of a given moment, persistently demands that the reader engage in a dialogic exchange rather than falling back on banalities.¹¹¹ By suspending the ordinary contextual aids used by conversationalists to come to an understanding, reading is derivative of and highlights the reality of conversation, and so Gadamer means quite literally to found his hermeneutics on the experience of conversation.

Perelman's valuable contribution to Gadamer's hermeneutical insight is that he traces the *means* by which conversationalists inventively shape their dialogue so as to permit them to move beyond the subjective designs of each individual. By offering conversation as a model of hermeneutical understanding, Gadamer indicates that his references to rhetoric are not simply afterthoughts; rather, he embraces the inescapable *action* involved in every communicative event of understanding. This recognition is driven home by Gadamer's radical claim that all textual interpreters exhibit something of the reflective inventiveness required of successful rhetors. This

defends his approach as a necessary "corrective" to the "will of man" that aspires to "eschatological consciousness" of all that is contained within tradition. GADAMER, *supra* note 4, at xxxviii-ix.

109. See Cascardi, *supra* note 91, at 226.

110. See Mootz, *Legal Classics*, *supra* note 6, at 1016-23 (describing Gadamer's conception of a classical text as one that refuses to submit to reverent, repetitive readings and instead invites a dialogic encounter in the form of a series of questions and answers posed and proposed by both reader and text).

111. Gadamer, *supra* note 11, at 33-35.

understanding of the hermeneutical event as an active, critical appropriation is the core of his philosophy even though he fails to develop the rhetorical dimension of this experience in great depth.

Gadamer's essay in response to Habermas's extended critique of *Truth and Method* provides one of his most explicit discussions of rhetoric, but Altieri is wrong to construe this as mere defensiveness on Gadamer's part. Gadamer reasserts the primacy of linguisticity as a mode of being, not only for hermeneutics but also for rhetoric and sociology. Just as a rhetor never has language at his disposal merely as a tool to motivate action, Gadamer insists, neither can a sociologist wield sociological theory as a tool able to demystify lived experience entirely. Hermeneutical finitude means that "language is not only an object in our hands, it is the reservoir of tradition and the medium in and through which we exist and perceive our world," and so a theorist never gains complete perspective on linguistically-mediated practices.¹¹² Gadamer does not intend to subdue rhetoric by absorbing it into a passive hermeneutics. To the contrary, he seeks to establish that persuasion can occur within a rhetorical exchange and truth may emerge despite the lack of recourse to theoretical assurances of the rational criteria to be employed.¹¹³ Gadamer would agree with Altieri that "wariness" is always a feature of the give and take of interpretive practice, but he would reject a theory-driven methodological attitude of "wariness" intended to get behind rhetorical practices.

Farrell provides a convincing correction to Gadamer's one-sidedness, and it is no mistake that he invokes Perelman's philosophy as a moderating influence on Habermas's quasi-transcendental, Enlightenment philosophy.¹¹⁴ He reformats Habermas's celebrated validity claims from ahistorical universal criteria to expressions that are captured in Perelman's argument that "the practical exercise of judgment [cultivates] our recognition of a sense of the universal within the particular."¹¹⁵ Farrell persuasively challenges Gadamer to the extent that he uses Perelman's new rhetoric to develop the critical element suppressed in Gadamer's philosophy. Perelman's new rhetoric thus provides the methodological key to unlock the hidden critical dimension of Gadamer's ontological account, a necessary clarification in order to understand the nature and potential of rhetorical knowledge.

112. GADAMER, *On the Scope*, *supra* note 5, at 29.

113. See *supra* notes 26-30 and accompanying text.

114. See FARRELL, *supra* note 98, at 202-08.

115. *Id.* at 210-11.

C. THE NEW RHETORIC AND CRITICAL THEORY

Perelman likewise is challenged by critical theorists on account of his apparent conservative conventionalism. Peter Goodrich applauds Perelman's critique of rationalist accounts of knowledge, but as a prominent critical legal theorist, he challenges Perelman's seemingly narrow methodological inquiry into rhetorical practices. Rather than accepting the apparent givenness of meanings in legal texts, Goodrich insists that theorists must relate these meanings "to institutional and ideological practices" that constitute exercises of social power.¹¹⁶ This theoretical program requires a transition in legal theory from the model of biblical hermeneutics (exegesis of received truth embodied in a text) to a rhetorical model (uncovering the political exertions of authority through historical and social inquiry), a transition that Perelman anticipates but does not complete.¹¹⁷

Goodrich acknowledges that Perelman's work marks the reemergence of rhetoric after an extended period of suppression by structural linguistics and formalist jurisprudence, but he finds Perelman's rehabilitative efforts wanting.¹¹⁸ In Goodrich's account, Perelman fails primarily because he wrongly supposes that the inability to apply formal logic to legal problems forecloses a critique of the internal logic operative in legal discourse.¹¹⁹ Perelman's too easy identification with Aristotelian rhetoric and the resulting bias favoring existing authority are "manifestly absurd" in Goodrich's view, particularly since Aristotelian rhetoric was developed for use in the small, homogeneous city-states of ancient Greece.¹²⁰ In opposition to this conventionalism, Goodrich advocates a "materialist rhetoric of law"

116. See Peter Goodrich, *The Role of Linguistics in Legal Analysis*, 47 MOD. L. REV. 523, 531 (1984); PETER GOODRICH, *LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC AND LEGAL ANALYSIS* 205 (1987) [hereinafter GOODRICH, *LEGAL DISCOURSE*] (describing his project as placing "the communicative or rhetorical functions of law within their institutional and socio-linguistic contexts").

117. See Peter Goodrich, *Historical Aspects of Legal Interpretation*, 61 IND. L.J. 331, 334 (1986); GOODRICH, *LEGAL DISCOURSE*, *supra* note 116, at 3, 210. Goodrich places Gadamer's hermeneutics within the glossator-philological tradition of biblical hermeneutics rather than recognizing it as part of the rhetorical tradition that emphasizes the inventiveness of language, Goodrich, *supra* at 348-49, a surprising position in light of Goodrich's emphasis that critical inquiry reveals the hermeneutical openness of texts rather than "seeing through them" from a privileged perspective. See GOODRICH, *LEGAL DISCOURSE*, *supra* note 116, at 208-09.

118. See GOODRICH, *LEGAL DISCOURSE*, *supra* note 116, at 111.

119. See *id.* at 113.

120. *Id.* at 120-23.

that can serve as a "political instrument for the analysis of legal relations."¹²¹ Goodrich challenges Perelman with a provocative question:

[I]s the study of law primarily to accept legal relations as "given" and consensual, or is it to treat the rhetoric of law as a primary datum to be evaluated and appraised against the background of the institutional power and social relations of inequality, of superordination and subordination, that underpin that rhetoric and determine its semantic content?¹²²

In the face of this challenge, Perelman's careful catalogue of the commonplaces of argument would appear to be almost beside the point.

Supporting this critical challenge, Goodrich also criticizes Perelman for correctly displacing rationalist ideology but then failing to provide a theoretical basis for his approach.¹²³ Goodrich carefully constructs a multi-faceted analysis of legal discourse premised on the critique of law as a specialized and determinant discourse. He identifies three features of a robust critical inquiry: using the psychoanalytic model of critique to expose how the internal logic and syntax of legal practice represses the inventive possibilities of working with unstable textual meanings (critique of "intradiscourse"),¹²⁴ drawing the connections between the use of concepts like "economic" in legal discourse and other arenas of social discourse (critique of

121. *Id.* at 125. Goodrich is careful to emphasize that he is not arguing in favor of a crude Marxist analysis of law. *Id.* at 158-67.

122. *Id.* at 123-24.

123. *See id.* at 113.

124. *Id.* at 175-82. Goodrich's psychoanalytic account of legal language seeks to "move from the analysis of textual figures to that of the emotions, conflicts or repressed histories that underpin them." Peter Goodrich, *Jani anglorum: Signs, Symptoms, Slips and Interpretation in Law*, in *POLITICS, POSTMODERNITY AND CRITICAL LEGAL STUDIES* 105-44, 113 (Costas Douzinas et al. eds., 1994). In a recent book Goodrich links rhetoric and psychoanalytic theory as strategies for exploring the intradiscourse of legal practice:

[A] theme of the present study is to pursue the deflections or screenings instituted by the mask, facade, or image of law. . . . The specific strategy of this study is that of thinking historically of psychoanalytic jurisprudence. Using the earliest theoretical discipline associated with law, namely rhetoric, the study professes to a genealogy of the image in law . . .

. . . .
[Another] theme, although I am uncertain of its success, is that of the return of the repressed within the discourse of law. . . . The recollection of institutional repression offers a positive politics, a wealth of resources, of fragments and contaminations of the science of doctrine, the purity of reason or the ideality of law. It offers the possibility of a criticism or critical legal studies that rereads and rewrites doctrinal scholarship and, by implication, the future of professional practice through the epistemological other of legal knowledge.

. . . .
Rhetoric, which studies the tropes and figures of language simultaneously and necessarily, studies also the unconscious of the institution as the long-term significance of its figures and as the symptoms of the culture, work, and affect of law.

"intradiscourse"),¹²⁵ and describing the organizationally-defined limitations on the acceptable uses of authoritative texts within legal practice (critique of "institutionalism").¹²⁶ Goodrich characterizes this complex inquiry as "rhetorical" because it involves a civil and political practice rather than the exposition of pre-given truths.

The rhetorical analysis has its basis in forms of political criticism which endeavored to evaluate the relation and appropriateness of language use to its specific context as well as to evaluate the content of the speech in terms of its value for the immediate historical community. These two criteria of analysis combine in the simple claim that all speech is dialogic in character and consequently is best understood not solely in the normative linguistic terms of the various forms of exegesis but rather in the material terms of its specific context and uses.¹²⁷

PETER GOODRICH, OEDIPUS LEX: PSYCHOANALYSIS, HISTORY, LAW 10-13, 183 (1995) [hereinafter GOODRICH, OEDIPUS LEX].

In his most recent book, Goodrich attempts to make good on the goal of recollecting "institutional repression" in the effort to develop a "positive politics." PETER GOODRICH, LAW IN THE COURTS OF LOVE: LITERATURE AND OTHER MINOR JURISPRUDENCES (1996) [hereinafter GOODRICH, COURTS OF LOVE]. For example, Goodrich recovers the intimate linkage of legal judgment and divine authority in centuries past in order to bring to consciousness the severe repression that accompanied the formalization of secularized legal procedures.

[T]he history of spiritual law and of its incorporation within the secular jurisdiction gives evidence of an aspect of legal genre which is forgotten at the exorbitant cost of instituting a discourse which no longer recollects either its purpose or its transformative power as a law that writes itself upon the soul. While, in a relatively banal sense, the language of legal justification and of precedent is self-evidently replete with narratives of the good community and of the myriad proprieties of behavior, such features of ethical governance and justice, such rhetorics of penitence and improvement, are deemed jurisprudentially to be incidental or simply rhetorical.

Id. at 126.

125. GOODRICH, *LEGAL DISCOURSE*, *supra* note 116, at 183-204. Goodrich explains that the

purpose of this interdisciplinary study would not be that of juxtaposing legal knowledge with that of other, essentially separate, knowledges (pluridisciplinary), nor would it be that of absorbing other disciplines or sciences into legal expertise (transdisciplinary) for the purposes of providing a further technical dimension of legitimation to legal discourse. The interdisciplinary study of law is aimed rather at breaking down the closure of legal discourse and at critically articulating the internal relationships it constructs with other discourses.

Id. at 212.

126. *Id.* at 127-28, 171-74. Goodrich argues that a properly understood rhetorical tradition poses radical questions about how ideology is maintained through institutional practices by asking: "what politics does this discourse enshrine and what are the political effects of this text—not simply what does it say, but what does it do, by what means and to whom?" Goodrich, *supra* note 117, at 354.

127. Goodrich, *supra* note 117, at 353.

Perelman's rhetorical inquiry is just too simplistic and conventional under Goodrich's account to provide disruptive and therefore enlightening insights into rhetorical practices generally and the workings of the legal system in particular.

The criticism of Perelman voiced by Goodrich suggests the need for appropriate emendations of Perelman's new rhetoric to better articulate the critical elements of rhetorical practice. The primary force of Goodrich's criticism derives from his insistence that it is not enough for the theorist to leave the practice as she finds it, since the purpose of philosophy is to gain perspective in a manner that can guide participants in a practice. By working through this challenge to the new rhetoric, I wish to demonstrate that Perelman does take account of the need for criticism defined in these broad terms, but that regrettably he underdevelops this aspect of his philosophy.

Perelman's catalogue of the commonplaces of argument is not just a description of certain moves in a closed language game, but rather is an integral aspect of a radical critique of rhetorical practices. By characterizing commonplaces as resources that serve both as starting points for, and strategies within, attempts to persuade, Perelman makes clear that he does not abandon rhetorical practices to an assumed pre-existing logic. The central importance of "confused notions" in Perelman's philosophy reflects his emphasis on the realm of responsibility in the working out of concrete problems.¹²⁸ His goal is to facilitate argumentation by providing a better understanding of the dynamics of gaining the adherence of others. If the fabric of civic and social life is argumentation about reasonable courses of action, reflection on the activity of argumentation is the most important critical intervention available to a theorist.

Perelman's analysis of the precepts of the natural law provides an illuminating example of his conception of how rhetorical exchanges working from commonplaces contain a critical bite. Perelman rejects the authoritarianism at the core of modern conceptions of natural law as an expression of overreaching rationalism, but he does not discount

128. Michael Billig notes that

[T]he rhetorical perspective suggests that common sense or ideology is not, as is supposed in some sociological accounts, a unitary block, rather like a giant schema, which is imposed on the stimulus world and which acts to prevent thought. Instead, common sense will be dilemmatic, in that it contains contrary themes and common places, and these will ensure that members of the community have the resources to think and argue about their social worlds.

Michael Billig, *Psychology, Rhetoric and Cognition*, in *RECOVERY OF RHETORIC*, *supra* note 1, at 127.

the tradition as a "mistake" that should be exorcized from our vocabulary. Arguing that natural law principles are commonplaces of argument, Perelman not only effectively strips these principles of their inauthentic claim to eternal and universal validity, he also empowers legal theorists and practitioners by emphasizing how the principles serve as vital (indeed, unavoidable) resources for innovation and critique of existing legal relations.¹²⁹ Gadamer's ontological argument that prejudices enable understanding girds Perelman's description of argumentation in this regard. Both philosophers stress that there simply is no place to begin a critical effort except with commonplaces such as "equality before the law," "the rule of law," and so forth, even if the effort is designed to uncover the many abuses cloaked by these signifiers.¹³⁰

Goodrich's challenge is not met by simply acknowledging the critical element of rhetorical exchange, though, because his attack rests on the broader claim that Perelman lacks a theoretical validation of his project. In this regard, Goodrich certainly is correct, although this lack might be attributed to Perelman's career being cut short.¹³¹ Regardless of the explanation, the new rhetoric remains incomplete without an account of the ontological status of rhetorical practices and critical inquiry. Gadamer's philosophical hermeneutics can perform this vital role by providing the theoretical backdrop for Perelman's methodological inquiry into the practice of argumentation.

Goodrich's reliance on a psychoanalytic model for critiquing the internal logic of legal rhetoric can be met by importing Gadamer's response to Habermas' similar theoretical move. Acknowledging the reality and importance of psychoanalytic dialogue in the analyst-patient relationship, Gadamer nevertheless questions Habermas'

129. See *supra* notes 78-81 and accompanying text. Perelman equates the dogmatic view of natural law with the overblown claims of rationality generally, see PERELMAN, *supra* note 50, at 32, inviting the intriguing question: can there be a "natural law" of the reasonable? I think that Perelman answers this in the affirmative.

130. See *id.*; Mootz, *Rethinking*, *supra* note 6, at 131-32 (discussing Gadamer's philosophy). The literary theorist, Steven Mailloux, makes a strong argument against equating the absence of foundational norms guiding critique with political quietism, echoing Gadamer and Perelman.

No universal, objective idea of Justice and no ahistorical foundationalist theory of how such Justice should be implemented is necessary for specific interpretations, arguments, and resistances to take place. All such practices are historically grounded in specific rhetorical and political situations that provide the contemporary (and only) available arguments and justifications for defending, reforming, or revolutionizing the status quo.

STEVEN MAILLOUX, *RHETORICAL POWER* 169 (1989).

131. See *supra* note 59.

effort to build a critical theory on this model. Psychoanalytic discourse is strategic since one of the parties to the "conversation" is not accepting the truth of the other's assertions at face value, but instead is seeking to get behind the surface discourse and bring suppressed meanings to speech. Gadamer emphasizes that therapy is a highly specialized and derivative mode of communication, just as science is a highly specialized and derivative style of rational analysis; therefore, it cannot be universalized as the theoretical foundation of all critical understanding.¹³² Gadamer's ontological claim that understanding is an historical event resulting from the fusion of the horizons of a prejudiced interpreter and the cumulative significance of a text, when melded with Perelman's philosophy, provides just the theoretical grounding of the practical accomplishment of critique that Goodrich demands. Although Goodrich ultimately would be unsatisfied with this grounding, Gadamer lends a clearly articulated philosophical position otherwise lacking in Perelman's project.

Goodrich's nuanced model of critique is not limited to demystifying a given field of discourse; he also stresses the need to explore the interdiscursive connections between differentiated rhetorical practices such as law and political economy. Perelman shares this approach, as exemplified by his extended discussion of the use of moral terms in legal practice, a convergence that has engendered the age-old debate over the relationship of positive law and ethical norms. Perelman argues that moral terms interpenetrate and shape legal discourse, but that the two discourses cannot be conflated because they are addressed to different audiences.¹³³ Buttressed by Gadamer's ontological claim about the universality of the hermeneutical situation, Perelman should be read as arguing that rhetorical inquiry, in some important sense, inevitably is interdiscursive. Tracing the connections between the concept of responsibility as it is analyzed by moral philosophers, as it is used as an ethical criterion by citizens, and as it is

132. "The emancipatory power of reflection claimed by the psychoanalyst is a special rather than general function of reflection and must be given its boundaries through the societal context and consciousness, within which the analyst and also his patient are on even terms with everybody else," GADAMER, *On the Scope*, *supra* note 5, at 41-42, and so psychoanalysis constitutes only a "limit situation for hermeneutics," rather than a scientific model able to assert precedence over the hermeneutical situation. Hans-Georg Gadamer, *Hermeneutics as Practical Philosophy*, in REASON IN THE AGE OF SCIENCE, *supra* note 19, at 108. See also Hans-Georg Gadamer, *What is Practice? The Conditions of Social Reason*, in REASON IN THE AGE OF SCIENCE, *supra* note 19, at 78-79; HANS-HERBERT KÖGLER, THE POWER OF DIALOGUE: CRITICAL HERMENEUTICS AFTER GADAMER AND FOUCAULT 228-29 (Paul Hendrickson trans., The MIT Press 1996) (1992).

133. See PERELMAN, *supra* note 50, at 114-19.

employed by lawyers may prove to be illuminating, but there is need for caution. It is foolhardy to seek to gain purchase on these different practices by developing an understanding of "responsibility" in itself, despite the shared rhetorical nature of these practices, since each rhetorical arena has its own important defining features.

Finally, Goodrich devotes attention to the institutional constraints on rhetorical practices, debunking the mythical view of the legal "system" as a neutral vehicle for an unfolding rationality in legal doctrine. Rendering rhetorical theory "material" in this respect is necessary and acknowledged by Perelman, although certainly with less intensity than Goodrich displays. Perelman agrees that the structural features of the legal system have a tremendous effect on legal discourse, leading him to stress the rhetorical significance of institutional features such as the adherence to precedent and the hierarchical structure of the court system.¹³⁴ One might wish with Goodrich for deeper critical impulses on Perelman's part, just as one might wish with Warnke for Gadamer to pay greater attention to bureaucratic and hierarchical impediments to hermeneutical understanding.¹³⁵ In this respect, Gadamer and Perelman mutually reinforce weak aspects of the other's philosophy. Developing an account of rhetorical knowledge thus requires not only conjoining Gadamer and Perelman's projects, but also pressing beyond a mere synthesis to provide a new account receptive to these structural inquiries.

D. RHETORICAL KNOWLEDGE

An account of rhetorical knowledge emerges from the foregoing challenges to Gadamer's hermeneutic ontology and Perelman's rhetorical methodology. Rhetorical knowledge is co-equal with logical and empirical knowledge, but it is a different way of knowing. Although rhetorical knowledge is a social achievement rather than an intellectual elaboration, it is properly characterized as *knowledge*. We can *know* the requirements of justice and we can *know* solutions to mathematical problems; it is just the case that our knowledge of justice is rhetorical rather than logical. Gadamer and Perelman provide the conceptual resources necessary for providing a positive account of rhetorical knowledge, as opposed to defining it as a watered down

134. For example, Perelman emphasizes that it is the institutional constraints of the legal system designed to ensure stability that differentiate legal and moral reasoning, and he contends that these constraints bring the nature of all practical reasoning into sharper relief. See PERELMAN, *supra* note 50, at 53, 78-81, 117.

135. See *supra* note 45.

version of "true" knowledge. This positive account provides the basis for claiming that legal practice has an epistemic dimension that goes beyond strategic means-ends analysis.

1. *Rhetorical Knowledge as a Way of Knowing*

The bias of the modern age is to equate knowledge with the logical foundations of modern science and to characterize non-scientific discourses as "mere" aesthetics, self-expression, or hortatory moralizing. Because rhetorical knowledge arises out of a historical and social situation that remains dynamic and contingent, it cannot be subsumed under the model of rational thinking according to logical dictates. It is counterproductive, though, simply to reverse the Enlightenment prejudice by falsely aggrandizing rhetorical knowledge and suppressing other ways of knowing.¹³⁶ The tragic error of the age of science has not been the championing of a certain mode of knowledge as much as the failure to recognize the multiplicity of ways of knowing. It is worth remembering that nobody today proposes to revive Aristotelian biology and that the growth of scientific knowledge has been beneficial to social life in numerous ways.

Giving into the strong temptation to regard all knowledge as rhetorical knowledge ultimately would undermine the status of rhetorical knowledge. Seeking the adherence of others in reasonable argumentation is ubiquitous across disciplines and modes of thought; therefore, all knowledge is rhetorically defended and propagated in an important sense.¹³⁷ Thomas Kuhn's account of the history of science as a sequence of incommensurable paradigms of thought has been the fountainhead for an expansive body of work describing the social dimension of science.¹³⁸ A shift from one scientific paradigm to another does not reflect the orderly advance of thought according to some wider, methodologically-secured rationality, Kuhn teaches, but instead represents the success of proponents of the new paradigm in securing the adherence of the relevant scientific community.¹³⁹ Kuhn's insight is too easily accommodated to the prevailing scientific

136. See Scott, *supra* note 87, at 259 ("[I]t is important to seek to understand rhetoric as a way of knowing not *the way*.").

137. See GEORGE L. DILLON, *CONTENDING RHETORICS: WRITING IN ACADEMIC DISCIPLINES* 52-62 (1991) (describing the many challenges to the notion that scientific discourse is "pure" or less structured rhetorically than other academic discourse).

138. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970) (1963).

139. See *id.* at 98-110, 118-30, 163-68.

ideology, however, by dismissing the rhetorical strategies of those engaged in battles to redefine paradigms as unfortunate deviations from the rational elaboration that comprises "normal science," deviations made necessary by our limited ability to perceive the structure of the natural world. Grudgingly conceding the social and historical roots of the prevailing scientific paradigm, defenders nevertheless can champion the rational thought enabled by such irrationally-secured orientations. This move maintains the traditional bifurcation of rhetorical commitment and rational knowledge, even if the dividing line is drawn a little tighter around the citadel of reason. Lost in this account is a description of the activity of rhetorical knowledge.

It makes sense to follow Gadamer's somewhat conservative tendency to accord natural science its own (limited) epistemic space so as to avoid developing an account of rhetorical knowledge that is so capacious and abstract as to be unhelpful. Although scientists are able to generate very reliable knowledge that has far-reaching ramifications for social life, their work can never render superfluous the rhetorical knowledge embedded in traditional belief systems that sustain their research agendas. Using "rhetorical knowledge" to refer to this shared, dynamic belief system founded on the probable—as distinguished from the specific field of scientific rationality—permits greater clarity in the discussion. It thus seems appropriate to speak of two intertwined rationalities and to acknowledge the profound importance of rhetorical knowledge as a dimension of human reason.

[T]he intrinsic rationality of scientific methods does not imply that scientists themselves, let alone the rest of modern society, use anything resembling these methods to arrive at the beliefs on which they base their everyday behavior. The *content* of "common sense" gradually changes to reflect the findings of science—often with a "lag" of a century or more—but the *process* of thinking remains the same. If we identify rationality with scientific method, this would mean that people are still as irrational as ever. But it is much less misleading to conclude that most people have been rational all along in the more relevant sense: namely, they reason from assumptions believed to be true in their community, and which they have no reason to doubt.¹⁴⁰

140. Burke, *supra* note 64, at 22. Donald McCloskey successfully uses a colloquial expression to argue that the alliance of economics with the delimited world of scientific knowledge has been for the worse.

The modernist attempt to get along with fewer than all of the resources of human reasoning puts one in mind of the Midwestern expression, "few bricks short of a load."

In Perelman's terms, science involves claims about the "real" directed to a "universal audience," rather than claims about the "preferable" directed to a "particular audience" and seeking their commitment.¹⁴¹ Thus, rhetorical principles clarify the different status of scientific rationality and suggest that a measure of caution against the tendency to overgeneralize is appropriate. As Aristotle observed with succinct clarity long ago,

It is the mark of an educated man to look for precision in each class of things just so far as the nature of the subject admits; it is clearly equally irrational to accept plausible reasoning from a mathematician and to demand scientific proofs from a rhetorician.¹⁴²

Respecting this distinction implies respecting (for present purposes) the disciplinary boundaries of science and humanistic inquiry as demarcating two rhetorical practices that can be usefully distinguished in terms of their goals: scientific knowledge and rhetorical knowledge.

Notwithstanding this acceptance of different ways of knowing, it would be a profound mistake to believe that they are equally suited for all purposes. Scientific knowledge and reasoning plays only a small, subsidiary role in the establishment and enforcement of legal norms, despite its appealing rigor and consistency. Very few legal questions can be resolved by means of a scientific demonstration. Adjudicating a paternity dispute generally is thought to be a straightforward question of biology, but even in this situation, the scientific determination of biological relationships is bounded by legal norms that are not established nor applied with scientific reasoning. For example, a putative father who years ago legally acknowledged paternity of a child born to his mistress in order to hide the (groundless) allegations of paternity from his wife can find that his current effort to prove that he in fact is not the biological father of the child is utterly beside the point.¹⁴³ On the other hand, the biological father of a child

It means cracked, irrational. The modernist program of narrowing down our arguments in the name of rationality was a few bricks short of a load. To admit now that metaphor and story figure also in human reasoning is to become more, not less, rational, because of putting more of what persuades serious people under scrutiny. Modernism was rigorous about part of reasoning and angrily irrational about the rest.

Donald N. McCloskey, *The Rhetoric of Economic Expertise*, in *THE RECOVERY OF RHETORIC*, *supra* note 1, at 137, 146.

141. See *supra* note 73.

142. ARISTOTLE, *NICHOMACHEAN ETHICS* I.3, 1094b, 24-28 (W.D. Ross trans., 1942).

143. See, e.g., CONN. GEN. STAT. § 46b-172(b) (Supp. 1998) (providing that the filing of a written acknowledgment of paternity and a written waiver of the right to a hearing, to counsel, and to the results of a blood test shall result in a final judgment that is *res judicata* after three years); *Bleidner v. Searles*, 19 Conn. App. 76, 83-84 (1989) (holding that there is no absolute

born to a woman who was then married to another man may find that he has no legal standing as the father even if he offers nearly conclusive scientific proof of his paternity.¹⁴⁴ With respect to most legal questions, of course, claims of scientific knowledge provide only support for one line of argumentation among many pursued by a lawyer, as when a prosecutor argues that DNA testing demonstrates that the defendant's blood was found at the scene of a murder in the course of presenting additional arguments concerning the defendant's motive, opportunity, and capability to commit the crime. Consequently, although it makes sense to distinguish scientific claims supported by expert testimony from rhetorical claims about the demands of justice in a given case, it also seems clear that rhetorical knowledge figures far more prominently in legal practice.¹⁴⁵

2. *A Positive Account of Rhetorical Knowledge*

Defending the reality of rhetorical knowledge means more than just conceding the limitations of the rationalist account of knowledge. Gadamer and Perelman complement each other because they provide different insights into the activity of rhetorical knowledge as a positive and distinct accomplishment, relegating to a subsidiary theme the argument that scientific rationality inevitably is grounded in rhetorically secured points of departure for investigation.¹⁴⁶ Each thinker stresses that rhetorical knowledge is *knowledge*, and not just a skill subordinate to rational inquiry. I shall delineate a positive account of rhetorical knowledge that is not beholden to either philosopher's particular project, but which holds true to the central argument propelling both thinkers by seeking to uncover the activity of rhetorical

right to contest the acknowledgment within the three year period when the putative father was represented by counsel at all times and therefore is presumed to have filed the acknowledgment voluntarily and with an understanding of the legal ramifications of doing so).

144. See, e.g., CAL. FAM. CODE §§ 7540, 7541 (West 1994) (upheld as constitutional in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989)).

145. I make a similar point in my recent contribution to a Symposium addressing the potential benefits of applying "linguistic science" to legal problems involving the interpretation of contracts and statutes. Francis J. Mootz III, *Desperately Seeking Science*, 73 WASH. U. L.Q. 1009, 1012-18 (1995). Distinguishing "rhetorical" and "scientific" knowledge for present purposes should not be misinterpreted as a rejection of the "rhetoric of inquiry" movement which seeks to clarify the rhetorical structure of all knowing, since I adopt this approach later in the article. See *infra* notes 213-227 and accompanying text.

146. Gadamer's earlier writings suggested that he embraced the romantic notion of two cultures of knowing and that he viewed his role as reasserting the legitimacy of humanistic knowing in the face of scientific hegemony. More recently, he has acknowledged Kuhn's legacy and the hermeneutical grounding of scientific rationality while still avoiding the temptation of collapsing science into hermeneutics. See GADAMER, *supra* note 4, at 283.

exchange as a vital element of human reasonableness. For present purposes, rhetorical knowledge can be defined as the product of two or more persons working together creatively to refashion the linguistically structured symbols of social cohesion which serve as the resources for intersubjective experience. I explore this paradoxical, self-reflexive definition as a prelude to charting the role of rhetorical knowledge in the practice and theory of law.

At the outset, it is important to recall that the positive account of rhetorical knowledge has ancient lineage and is not just a fancy reworking of Aristotelian philosophy by contemporary thinkers. Treating rhetoric as *logos* is a forgotten part of the legacy of the Greek Sophists, a shrouded inheritance that has been transmitted to us largely through Plato's vitriolic attacks against it and Aristotle's begrudging acceptance of some of its elements. Recovering a conception of rhetoric as the study of *logos* from the discredited Sophist tradition is a helpful first step toward developing a positive conception of rhetorical knowledge.

Perelman's new rhetoric does not revise Aristotle so much as expand upon Aristotle's concessions to the rhetorical conception of *logos* promoted by Isocrates in opposition to Plato's philosophy of truth.¹⁴⁷ A strong argument can be made that the rhetorical tradition stretching from the Sophist Protagoras to Isocrates and then to their Roman successors Cicero and Quintilian provides the most suitable intellectual resources for Perelman's efforts to define a positive

147. See ARISTOTLE, *supra* note 64, at 39 [1356a] (acknowledging that "rhetoric is a certain kind of offshoot of dialectic and of ethical studies," but immediately chastising the sophists as boastful pretenders to knowledge). The translator, George Kennedy, notes that Aristotle was likely attempting to avoid conceding too much to his philosophical adversary, Isocrates. *Id.* at 39 n.46. Nevertheless, Aristotle—and even Plato—owe much to the Sophist tradition that emerged out of Protagoras and blossomed with Isocrates. See EDWARD SCHIAPPA, *PROTAGORAS AND LOGOS: A STUDY IN GREEK PHILOSOPHY AND RHETORIC* 185 (1991) ("Protagoras' implicit theory of *logos* becomes explicit in Aristotle's *Rhetoric* (1391b7): 'The use of persuasive speech . . . is to lead to . . . judgment or decision.'"). Despite this lasting influence, important differences between the older Sophists, as itinerant *provocateurs*, and the rhetorical philosophy of Plato, Aristotle, and even Isocrates remain. "While the rhetoric of the sophists has no end-point, those of Plato, Isocrates, and Aristotle do. . . . [T]he philosophers articulated positions while the sophists provided only *op*-positions." JOHN POULAKOS, *SOPHISTICAL RHETORIC IN CLASSICAL GREECE* 189 (1995).

account of rhetorical knowledge as opposed to Aristotle's more limited account, which never displaces the centrality of formal reason.¹⁴⁸ The Sophists emerged as itinerant teachers when Greece made the transition from a non-reflective "mythical-poetic" culture to a literate, critical, and reflective culture of *logos*. In the face of proliferating opinions about the social and political order, the Sophists set for themselves the task of discerning what constituted *good* opinions through argumentative assessments of prevailing wisdom.¹⁴⁹ Sophistic irreverence served a growing middle class in an emerging democracy.

Contrary to what some of their critics have said, the sophists' motto was not the survival of the fittest but fitting as many as possible for survival [in the post-aristocratic world]. . . . Insofar as the sophists enabled more people to enter the contests and spectacles of public life, the rhetoric they taught created at least two new possibilities: first, the possibility of the weaker challenging the stronger; and second, the possibility of revitalizing calcified discursive practices.¹⁵⁰

As unreflective custom was replaced by energetic and unceasing disputation, a plurality of reasonable social arrangements and political activities emerged.

In a judicious and meticulous book, Edward Schiappa pieces together the teaching of Protagoras to uncover the rhetorical conception of *logos* that emerged in Periclean Athens.¹⁵¹ Protagoras was "the most famous and influential" of the Older Sophists because he was able "to provide a theoretical justification for the practice of Periclean democracy," which was premised on his democratic conception of knowledge as a product of communal efforts.¹⁵²

148. See generally CONLEY, *supra* note 46, at 5-46. Perelman's argument that rhetoric and dialectic are both implicated in the same activity of reasonableness, and therefore that Aristotle's sharp distinction between the two is unhelpful, is one important manifestation of Perelman's allegiance with the rhetoricians against the Platonic tradition. See *supra* notes 50-53 and accompanying text.

149. See VAN EEMEREN, *supra* note 52, at 29-30.

150. POULAKOS, *supra* note 147, at 14-15.

151. SCHIAPPA, *supra* note 147. Schiappa contends that a "different picture of their teachings emerges" once "it is accepted that the Sophists' theorizing concerned *logos* rather than *rhêtorikê* per se."

The Sophists were representatives of an intellectualist movement that favored abstract thinking over . . . the poetic mind. The Sophists were continuing and expanding a "movement" started by the presocratic philosophers, teaching and speaking in a culture still dominated by preliterate practices and modes of thinking.

Id. at 56.

152. *Id.* at 13, 169-70.

The purpose of Protagoras' theory and practice of *logos* was to change people for the better. The objective was understood as literally analogous to the art of medicine. The thesis that people can be made more excellent marked a departure from the traditional belief that *aretê* [excellence in civic virtues] was a function of wealth or noble birth.¹⁵³

....

Protagoras' rhetorical theory, therefore, can be described as an early formulation or anticipation of just such a relationship between *logos* and collective judgment.

Far from entailing solipsism or absolute subjectivism, Protagoras' *logos* is an instrument aimed at *intersubjectivity*. . . . For Protagoras, a consensus induced through *logos* was the means of reaching good judgment.¹⁵⁴

This educative function of discourse was a guiding principle for Protagoras, who reasoned that if civic virtue was developed in discourse and could be taught, then studying and the art of discourse is of utmost importance.

Schiappa stresses that this mission is often misunderstood, as in the case of traditional interpretations of Protagoras's famous "two *logoi*" fragment. Reading the fragment to mean that the Sophists prided themselves on being able to make the weaker argument appear stronger by force of their rhetorical skills—a common pejorative reading by those who dismiss the Sophists—misses the positive account of knowledge that Protagoras advocates. Schiappa demonstrates that the best reading "understands 'making the weaker account [*logos*] the stronger' as advocating the substitution of a preferred (but weaker) *logos* for a less preferable (but temporarily dominant) *logos* of the same experience."¹⁵⁵ In short, Protagoras is championing the process of persuasion by which what was once deemed the better argument is rejected in favor of the (truly, for present purposes) better argument. Returning to my tentative definition of rhetorical knowledge, it is plain that Protagoras and other Sophists argued strenuously that knowledge of the correct course of action emerges in the creative

153. *Id.* at 199. *See also id.* at 162-68.

154. *Id.* at 185.

155. *Id.* at 113; *see generally id.* at 103-16. The charge of relativism is levied because the Sophists refused to accept that any argument could prove itself to be "the stronger" for all time. This idea of "*dissoi logoi*—human linguistic creations in unceasing contest with one another," POULAKOS, *supra* note 147, at 188, does not preclude the belief that at a given time and within a given context, one argument may emerge from the contest as the better argument.

refashioning of the linguistically structured symbols of social cohesion by members of the public.

Following the Protagorean tradition, I shall term the results of public rhetorical engagement “knowledge.” Although the starting points for rhetorical knowledge are the flux of lived existence and the preunderstandings embedded in patterns of social discourse and interaction, rhetorical knowledge is distinguished from habit or convention by its inventive representation and reinscription of the “prejudices” of situatedness. Surveying accepted topics, norms, and opinions as resources for confronting the demands of the present, rhetorical actors continually conjoin these constitutive features of themselves and their society in unique ways. Over the last two hundred years, the public claims made on behalf of American “democracy” have varied widely and evolved dramatically as part of the effort of nation-building; yet, amidst this variation there has always been a deep and strong connection between these various claims and established American political traditions. The robust debate about what democracy means can thus be characterized as an evolving adaptation of a heterogeneous political tradition to the contested issues of the day. Although the inventive dimension of such elaboration can be almost imperceptible at times, such that a rhetorical exchange appears to be invoking only received wisdom, these incremental changes nevertheless prove to be educative in the long run, leading persons to new understandings not only of their society but also of themselves. Momentous rhetorical events do occur, as when a reconfiguration of communal images dramatically challenges received wisdom and impels an audience to see a matter in new light—consider the appeal to American democratic traditions in Martin Luther King, Jr.’s “I Have a Dream” speech—but it is a mistake to regard these exciting experiences as paradigms of rhetorical knowledge. These moments of rhetorical drama represent relatively rare limit cases, and so focusing attention on them can obscure the everyday “ordinary science” of rhetorical knowledge upon which they build.

Using terms such as “invention” and “refashioning” to describe rhetorical activity is potentially deceptive to the extent that it brings to mind an image of a skilled technician adjusting the rhetorical bonds of society as one might adjust a carburetor to maximize engine performance. The distinctiveness of rhetorical knowledge is that it does not service pre-given ends. As *praxis* exhibiting *phronesis* rather than *poiesis* exhibiting *techne*, rhetorical exchanges redefine the criteria for

assessing their accomplishments simultaneously with accomplishing rhetorical knowledge. Thus, one must insist that rhetorical knowledge be characterized as an ongoing accomplishment rather than an elaboration of what is given and remains unquestioned. Syllogistic reasoning from accepted major premises is dialectical in nature and can be a matter of individual effort, even if the proof later is publicized with the intent to persuade others of the correctness of one's reasoning. Rhetorical reasoning, on the other hand, is always a reciprocal activity that depends upon the existence of an ethical relationship between the speaker and audience, although neither the speaker or audience wholly surrenders to the other due to the dynamic and sometimes abrasive confrontation between them. This ethical relationship does not require a shared criterion of judgment, but rather is a shared space in which multiple criteria may be jointly proposed, tested, and employed.¹⁵⁶

Gadamer and Perelman share a fascination with the multi-cultural challenges presented by globalization because they agree that these challenges differ in intensity but not in kind from those arising within a particular culture. Rhetorical knowledge is gained in the

156. Thus, we can agree with Andrew King that "a political rhetoric makes no sense apart from the idea of a community," without believing that such a community must be as cohesive and insulated as the Greek polis. Andrew King, *The Rhetorical Critic and the Invisible Polis*, in *RHETORICAL HERMENEUTICS: INVENTION AND INTERPRETATION IN THE AGE OF SCIENCE* 299, 311 (Alan G. Gross & William M. Keith eds., 1997). Eugene Garver disagrees with epistemic readings of the *Rhetoric*, arguing that Aristotle's argument is intelligible only within a natural form of social life embodied in the polis, see GARVER, *supra* note 64, at 237, and he regards the technical features of Aristotle's treatise as the most relevant teachings for today's fragmented culture. See *id.* at 232-48. However, Garver's detailed argument that Aristotle's rhetoric is an ethical practice in the service of politics is easily assimilated to the "epistemic" response to current dilemmas in political theory. Garver's characterization rings familiar with the argument in favor of rhetorical knowledge developed in this Article.

Excessive rationality is unpersuasive because it makes us suspicious rather than trustful of the speaker. . . . When argument fails by being too logical, it fails by being *too strong*. Such an idea is impossible in logic—validity is the top of the scale, not a mean. Rhetorical arguments can be so strong, though, that they stop being persuasive. They are so strong that they eliminate the speaker and hearer from the decision process. Demonstrations, [Aristotle] says [sic] are insufficient for rhetoric, [sic] because the object of rhetoric is judgment, and therefore *ethos* and *pathos* have to be involved.

....
Deliberating well takes character. Arguing persuasively means showing that one is deliberating well and therefore showing character.

....
Without character the speaker will not be able to *see* different weightings, and so he will be consigned to practicing the sophistic art in which all the things that can be otherwise, the things that form the subject of practical reason, are especially probable. . . . Without character, there is no ethical knowledge. Without ethical knowledge, one is left with empty technique.

Id. at 178, 180, 184 (citation omitted).

reworking of criteria as part of the rhetorical motivation of judgment. The capacity for identifying and drawing upon shared commonplaces in order to bridge wide cultural differences is the same capacity that enables members of a society collectively to make sense of their traditional practices in the (not always slightly) different world of the present. The interaction of audience and speaker in an inventive project is what defines rhetorical knowledge and distinguishes it from ideological insularity on the one hand and manipulation through propaganda on the other. George Dillon sketches a similar account of this sense of rhetorical knowledge by drawing explicitly from Gadamer and Perelman:

Gadamer argues that actual argumentation articulates values and beliefs for hearers that they may not have known they hold. As [David] Ingram phrases it, "reason-giving appeals intentionally or otherwise to the inchoate values, interests, and needs of the receiver while at the same time molding them. Far from being a dispassionate affair, the argumentative search for the truth invariably engages passions and prejudices at many different levels, and it is precisely the engagement of these prejudices that elicits recognition and agreement." What Gadamer and Ingram are talking about here is very close to what Chaim Perelman and Lucie Olbrechts-Tyteca call *presence*, the evoking of which they speak of as "magical" and as involving the imagination as much or more than the reason.¹⁵⁷

The ground of this distinction is the rhetorical remaking of the terms of argumentation in the course of and by means of argumentation.

157. DILLON, *supra* note 137, at 38 (footnotes omitted) (quoting David Ingram, *The Possibility of a Communication Ethic Reconsidered: Habermas, Gadamer, and Bourdieu on Discourse*, 15 MAN & WORLD 156, 156 (1982); PERELMAN, *supra* note 49, at 117). Despite his misgivings about Gadamer's approach, I find that Thomas Farrell articulates this position in precisely the terms that I use to describe rhetorical knowledge by drawing from Gadamer and Perelman's philosophies.

The argument for rhetoric's ethical propensity thus turns on the mutual regard that speakers and audience must have for one another, given the simultaneous condition of being a witness to the construction of proof and an agent vulnerable to the partisanship of others.

....

What remains is to show how the formal technai of rhetoric may be able to generate new dimensions of practical consciousness while working within the received opinions, appearances, and conventions of everyday life. This inventional process, which may be glimpsed within our earlier conversational setting, typically involves an intersection between the rhetorical speaker's suggested interpretive horizon and the audience's received opinions, cultural norms, or encounter conventions and rules. Given the capacity of rhetoric to range over previous utterance episodes for its topics, themes, and proofs, it is possible for a kind of practical wisdom, or *phrōnesis*, to emerge in this sudden joining of otherwise distinct perspective and horizons.

FARRELL, *supra* note 98, at 62, 257.

Additional elaboration of the concept of rhetorical knowledge is provided by the philosopher, Calvin Schrag. Schrag is engaged in the broader project of rescuing the post-Cartesian subject from falling victim to the captious challenges of postmodernism, arguing that the "communicative praxis" of everyday life engenders meaning and rationality.¹⁵⁸ Although not exhaustive of communicative praxis under Schrag's account, he conjoins hermeneutics and rhetoric in a description of persuasive reasoning that parallels the present analysis of rhetorical knowledge, arguing that it is "an integral and inaugural moment in the life of communicative praxis."¹⁵⁹ Schrag relies on readings of Gadamer's philosophy and on an understanding of rhetoric consistent with the new rhetoric to reconfigure ethics on the basis of the "incarnation of the logos within discourse and action in a hermeneutic of everyday life. Communicative praxis announces and displays reason as discourse. . . . In entering discourse the logos is decentered and situated within the play of speaker and hearer as they seek consensus on that which is talked out."¹⁶⁰ Judgments about the appropriate course of action (the "fitting response" to a particular social situation) are rational according to Schrag's account because they arise from the "responsibility of an engaged and decentered moral self as it responds to the prior thought and action already inscribed within a historicized polis," rather than being issued from an "interior construct of a centered and sovereign subject" that today we acknowledge is a subjectivist fantasy.¹⁶¹

Postmodern scepticism is avoided by describing decentered agents engaged in ongoing communicative exchanges and meaning-laden actions that traverse various discourses and repertoires of behavior in a constant inventive renewal of the shared meanings that underwrite subjectivity. The fears occasioned by the ancient sophist, Protagoras, who insisted that "man is the measure of all things," can be put to rest by emphasizing that "man" need not be read as the insular subject that rises above all claims to objective truth. Instead, a

158. CALVIN O. SCHRAG, COMMUNICATIVE PRAXIS AND THE SPACE OF SUBJECTIVITY (1986) [hereinafter SCHRAG, COMMUNICATIVE PRAXIS]; CALVIN O. SCHRAG, THE RESOURCES OF RATIONALITY: A RESPONSE TO THE POSTMODERN CHALLENGE (1992) [hereinafter SCHRAG, POSTMODERN CHALLENGE]. Schrag defines communicative praxis as "an amalgam of discursive and nondiscursive practices, in which the meaning-engendering patterns of the spoken and the written word mix and mingle with meaning-laden actions." SCHRAG, COMMUNICATIVE PRAXIS, *supra*, at vii.

159. SCHRAG, COMMUNICATIVE PRAXIS, *supra* note 158, at 179.

160. *Id.* at 193.

161. SCHRAG, POSTMODERN CHALLENGE, *supra* note 158, at 175-76.

provocative reading emerges by construing “man” to be a plural noun encompassing all of humanity.¹⁶² Man collectively is the measure of all things, then, because in our rhetorical exchanges with others we gain insight and knowledge by suffering challenges to our horizontal prejudices. Postmodernity is not a collapse into relativistic chaos, but rather a confrontation with the social construction of the world in which we continually participate.

Rhetorical knowledge is at once hermeneutical and rhetorical, for it involves both discernment and expression, both understanding and proposing. Hermeneutic idealism and rhetorical methodologism, then, are different exaggerations of the same mode of knowing. After quoting Gadamer on this point, Schrag emphasizes the fundamental linkage of hermeneutics and rhetoric.

Rhetoric and hermeneutics are thus seen to be incommiscibly yoked, complementary and mutually reinforcing—distinct perhaps, but yet indissoluble. They travel with each other, and they travel together all the way down and all the way back. They are both oriented toward an articulation of meaning and an achievement of self-understanding against the backdrop of public concerns.

. . . .

The hermeneutical task of articulating and making manifest the configurations of meaning in our social interaction is seen as an intrinsic component of the task of rhetoric. Rhetorical discourse arises because understanding and consent have been placed into question. Mutual understanding has been disrupted by the insinuation of misunderstanding, and the task of hermeneutical rhetoric is to strive for a rectification of this misunderstanding through a collaborative project of making sense together.¹⁶³

The complex means by which social bonds are proposed, negotiated, and maintained draw upon rhetorical knowledge, which is to say that they involve interactions grounded in both understanding and persuasion.

In a similar vein, Robert Scott’s seminal claim that rhetoric is epistemic provides important clarification of the concept of “rhetorical knowledge.”

162. See Tom Cohen, *The “Genealogies” of Pragmatism*, in RHETORIC, SOPHISTRY, PRAGMATISM, *supra* note 64, at 94, 107.

163. SCHRAG, POSTMODERN CHALLENGE, *supra* note 158, at 121, 140 (quoting and discussing GADAMER, *On the Scope*, *supra* note 5, at 25).

Seeing in a situation possibilities that are possibilities for us and deciding to act upon some of these possibilities but not others must be an important constituent of what we mean by human knowledge. The plural pronoun in the foregoing sentence is vital. As social beings, our possibilities and choices must often, perhaps almost always, be joint. . . . The opacity of living is what bids forth rhetoric. A remark in passing by Hans-Georg Gadamer seems to me to be an important insight: the "concept of clarity belongs to the tradition of rhetoric." But few terms are more relative than that one nor call forth more strongly a human element. Nothing is clear in and of itself but in some context for some persons.

Rhetoric may be clarifying in these senses: understanding that one's traditions are one's own, that is, are co-substantial with one's own being and that these traditions are formative in one's own living; understanding that these traditions are malleable and that one with one's fellows may act decisively in ways that continue, extend, or truncate the values inherent in one's culture; and understanding that in acting decisively that one participates in fixing forces that will continue after the purposes for which they have been immediately instrumental and will, to some extent, bind others who will inherit the modified traditions. Such understanding is genuinely knowing and is knowing that becomes filled out in some particulars by participating rhetorically.¹⁶⁴

Rhetorical knowledge thus encompasses Gadamer's conception of a "truth" that is not methodologically-secured and also Perelman's conception of reasonable argumentation that is not rigorously rational.

Professors Schrag and Scott emphasize the public rhetorical engagements that produce knowledge, but it is important to recall that Gadamer is writing about the ontology of understanding. Thus, rhetorical knowledge arises not only from public debate, but from all dialogical engagements concerning the contingent and probable. Gadamer contends that our mode of existence is dialogic all the way down: the conversational structure of rhetorical knowledge in fact is the structure of thinking and reasoning even when we silently reflect, seemingly as a solitary ego exercising ahistorical rational power.¹⁶⁵

164. Scott, *supra* note 87, at 261.

165. Gadamer emphasizes that thinking follows the logical structure of question and answer that he explores with the metaphor of a conversation.

Knowledge always means, precisely, considering opposites. Its superiority over preconceived opinion consists in the fact that it is able to conceive of possibilities as possibilities. Knowledge is dialectical from the ground up. . . . A person who thinks must ask himself questions This is the reason why understanding is always more than merely re-creating someone else's meaning.

GADAMER, *supra* note 4, at 365, 375.

Gadamer explains that thinking is the conversation that always follows and anticipates conversations with others.

To think is to think something with oneself; and to think something with oneself is to say something to oneself. Plato was, I believe, quite correct to call the essence of thought the interior dialogue of the soul with itself. This dialogue, in doubt and objection, is a constant going beyond oneself and a return to oneself, one's own opinions and one's own points of view. If anything does characterize human thought, it is this infinite dialogue with ourselves which never leads anywhere definitively and which differentiates us from that ideal of an infinite spirit for which all that exists and all truth lies open in a single moment's vision. It is in this experience of language—in our growing up in the midst of this interior conversation with ourselves, which is always simultaneously the anticipation of conversation with others and the introduction of others into the conversation with ourselves—that the world begins to open up and achieve order in all the domains of experience.

. . . .

There are no limits to the interior dialogue of the soul with itself.¹⁶⁶

Rhetorical knowledge developed in the public square is made possible by the hermeneutical openness that constitutes the very power of human reason.

This important theme forms the core argument of Michael Billig's recent analysis of the cognitive significance of rhetoric.¹⁶⁷ Referencing Plato as well, Billig asserts that "thinking is inherently dialogic . . . not merely the silent argument of the soul with itself, but, even more frequently, it is the noisier argument of one individual with another."¹⁶⁸ In other words, if thinking is rhetorically constituted, then rhetorical engagements are embodiments of cognition.

The theoretical point is that cognitive processes are not simply anterior to argumentation, but, as anticipations of arguments, they are themselves constituted by socially observable arguments. In this sense, as the social constructivists emphasize, human thinking is

166. Hans-Georg Gadamer, *To What Extent Does Language Preform Thought?*, in GADAMER, *supra* note 4, app. at 542, 542-44. See also Gadamer, *Reflections*, *supra* note 5, at 33 (arguing that the lesson of the Platonic dialogues is that "dialectic is the art of having a conversation with oneself and fervently seeking an understanding of oneself. It is the art of thinking.").

167. See Billig, *supra* note 128.

168. *Id.* at 121.

socially constituted. . . . The rhetoricians, in teaching their pupils the skills of debate, were also teaching the skills of thinking.

. . . .

[D]ialogue, with its immediate interruptions and contradictions, can be seen as the process of thinking . . . Therefore, thinking can be seen as a social, argumentative process, rather than a monological, individual one.

. . . .

For the most part, the Platonic dialogues end in a state of *aporia*, as the participants realize there is always more to speak about . . . It is not that they have failed to think, but that as they argue rhetorically so they continue to think noisily.¹⁶⁹

The experience of rhetorical knowledge as a feature of legal practice, then, reveals something about the experience of human existence as an ongoing effort of understanding and reasoning, although the full ramifications of this broader theme are far beyond the scope of this paper.

3. *An Example of Rhetorical Knowledge*

Rhetorical knowledge is best explained by returning to an example from the contemporary public square. The "debate over affirmative action" has figured prominently in public life for some time, but the issue recently has acquired an air of serious urgency and holds substantial social, economic, and political repercussions. Initially, one might regard this debate as the last feature of civic life that could shed light on rhetorical knowledge, since it is shrouded by self-serving political gamesmanship and clouded by a coded vocabulary as perhaps no other public issue in our day.¹⁷⁰ But it is for this very reason that the example serves an important role: it not only demonstrates the

169. *Id.* at 124, 133. Calvin Schrag carefully recounts the communal essence of thinking that is revealed by characterizing thought as a dialogue:

Yet, being alone is itself a peculiar modality of being with others; soliloquy is carried on by a language that belongs to the public; and individual acts have meaning only within the wider context of social practices. One can be alone only because one has already been in communal interaction with others; one can speak "by" and "to" oneself only with a grammar that has a social history; and one can act as an individual only as differentiated from others within the body politic. Surrounding all individual manifestations of discourse and action is the space of communicative praxis.

SCHRAG, *COMMUNICATIVE PRAXIS*, *supra* note 158, at 172. See also VAN EEMEREN ET AL., *supra* note 52, at 2.

170. Abortion also has played a peculiar role in American politics and social life for the last quarter-century, but although there is an abundance of political gamesmanship, there seems to be far less double talk, resulting in the particularly vitriolic quality of the debate. Elsewhere I

features of rhetorical knowledge described above, it also signals the provisional, halting, and dynamic nature of rhetorical knowledge. Only Pollyanna would regard the contemporary discourse surrounding affirmative action as a source of rationally defensible norms, but it is possible to trace the (often unwitting) structuring of the public sphere that occurs even in such a tangled discourse and to describe how knowledge emerges even from such a fractious and disjointed social space.

The starting point for analyzing the debate over affirmative action is to acknowledge that the "answer" to this conundrum cannot be derived by a logical explication of the relevant concepts by means of a dialectical demonstration. The obligation of those with economic power to take affirmative action with respect to making educational and professional opportunities available to members of disadvantaged groups in society is not subject to definitive rational explication, but it is subject to reasoned debate as part of ongoing socio-political practices. Rhetorical knowledge lays no claim to ahistorical certitude, but rather involves the discovery of more fitting conceptions to serve present social needs and to facilitate the ongoing revision of these conceptions. Rhetorical knowledge is historically conditioned not because it fails to gain perspective on its subject matter, but because its subject matter is thoroughly historicized.¹⁷¹ It is almost inconceivable that the terms of the current debate over affirmative action would have had significance in the American colonies or that they will have the same significance in America three centuries from now. As Perelman emphasizes, although natural science successfully restricts the influence of values to the setting of its initial problematics by addressing the persistent reality of the natural world, humanistic inquiries such as politics and law are infused with value determinations at all stages of deliberation and assertion because they pertain to an active social project of value formation.¹⁷² Gaining the adherence of others in political matters is not just a means of implementing pre-determined political

have discussed the abortion controversy with respect to philosophical hermeneutics. Mootz, *Rethinking*, *supra* note 6, at 183-93.

171. For example, affirmative action in academia in the nineteen-seventies, amidst a steadily growing economy and the continued expansion of higher education, presented different questions than it does in the academy of the nineteen-nineties, which is buffeted by a radically restructured economy and various demographic and financial pressures. One cannot help but be struck by the shifting use of images during this time period and the changing combinations of these unstable images produced by the participants in the debate.

172. See PERELMAN & OLBRECHTS-TYTECA, *supra* note 49, at 75.

tenets, but rather is part of the political practice about which claims are advanced.

The competing slogans of equality (“color-blind” treatment of all citizens in all respects) and fairness (“leveling the playing field” for historically disadvantage groups) are deployed in rhetorical exchanges that can produce rhetorical knowledge. It is obvious that these slogans are wielded for a variety of strategic, even bad faith, reasons in some instances, but even the worst abuse of rhetorical practices proves the case for rhetorical knowledge. Those seeking to segregate and denigrate disadvantaged minorities could use the physical coercion of an apartheid regime to secure their goal, just as those seeking to mitigate the economic power of the majority could incite a violent revolution in furtherance of their aims. However, the debate about affirmative action continues, even if suboptimally, by traversing the many discourses within society in order to align points of shared agreement into new constellations of meaning. These shifts in meaning represent modifications of arguments designed to secure the adherence of the body politic which prove to be enlightening (or not) only in the continued discourse about affirmative action. The reality of rhetorical knowledge is proved not because the participants have found the “answer” to the question posed, but because they continue to develop the public discussion of affirmative action along new lines of argumentation. The ongoing struggle to come to terms with affirmative action does not disprove the ability to have knowledge of such matters, but rather it reaffirms that such knowledge holds only for discrete historical situations and is tested constantly and revised as these situations evolve.

Conservative insistence on color-blind policies invites the rejoinder that many of the “neutral” features of decision-making are intimately tied to racially exclusive policies—special admissions criteria for children of alumni, or business contacts nurtured at suburban country clubs, for example—and that such decisions are always set within wider cultural practices that have a disparate impact on a variety of groups. Similarly, liberal insistence on leveling the playing field invites the rejoinder that “feel good” de facto quotas have a corrosive effect by leaving the field undisturbed but inviting additional players to try their luck anyway. Equality and fairness are opposed in debate

not as abstract conceptions, but as topics with relevance in and a connection with the real world.¹⁷³ Thus, neither concept is static; both are shaped by their application to the ongoing confrontation. The question of affirmative action has called forth a base version of rhetorical exchange in many quarters, but it remains rhetorical in nature. Advocates seek the adherence of specific audiences (in the faculty meeting, for instance), of hypothetical constructions of specific yet dispersed audiences (in presidential politics, for instance), and of the hypothetical universal audience of all reasonable persons (in political-ethical theories, for instance) in a manner of communication that is derivative of conversational exchange.

Few persons venture into public spaces to engage in dialogue about affirmative action, and contemporary etiquette limits the range of conversational experiences when the topic can be taken up with sustained rigor. Consequently, much of the rhetorical deliberation about affirmative action occurs in "individual" thinking—the soul's dialogue with itself. For those who think, which means to accept the challenge to their prejudices that is posed by questioning, the relatively rare public occasions at which they deliberate about affirmative action serve only to carry forward the deliberative conversation that constitutes them, which in turn is a development of earlier conversational exchanges with others. The ontological claim that human existence is rhetorical does not relate only to the conscious engagement of others in dialogue, but more broadly to a manner of existence as reasoning beings. The concept of rhetorical knowledge invests this conversational process with epistemic significance.

The fact that this rhetorical experience—a feedback loop of public discussion and thinking—is capable of producing knowledge

173. Warren Sandmann uses Michael McGee's notion of an "ideograph" to demonstrate that terms such as "liberty" are not purely conceptual tools, but rather emerge from and refer back to the material, lived reality of the community. Warren Sandmann, *The Argumentative Creation of Individual Liberty*, 23 HASTINGS CONST. L.Q. 637, 638 (1996) (quoting from Michael McGee, *The "Ideograph": A Link Between Rhetoric and Ideology*, 66 Q. J. SPEECH 1 (1980)). Sandmann thus rejects both a crude realism and a crude formalism.

When we analyze the law as rhetoric, we need to look beyond the personalities of the Justices, and beyond the quasi-logic that appears to support the decisions. We need to look a little deeper and attempt to see the public arguments that created the material for that original and now disputed law, and created the conditions for the judicial decision.

Id. at 657. Sandmann's approach to analyzing judicial opinions can be expanded to a broader conception of how successful public debate proceeds. Advocates of affirmative action, then, are best counseled to appeal to "fairness" not in abstract ethical terms but in terms of the lived experience of members of the polity that inform the conception of "fairness" as it is deployed in public debate.

appears to be beside the point, though, since the actual public debate seems far removed from a conversation and more like competing lectures or insistent demands that warp rather than facilitate thinking. As anticipated in the Introduction to this article, critics likely will point to my example of rhetorical knowledge as strong evidence that the term is empty of significance. The "knowledge" gained in the public discourse over affirmative action appears to be nothing more than a knack for clever manipulation of slogans in an ongoing effort to achieve a desired (and fixed) end. From this perspective, rhetorical inventiveness is regarded as a morally neutral skill that can be used in harmful ways as easily as beneficial ways. This line of attack, of course, repeats the indictment issued against the teachers of rhetoric in ancient Greece: by confusing rhetorical technique with true knowledge, the critics alleged, advocates of rhetoric paved the way for social manipulation.¹⁷⁴

Contemporary expressions of caution toward the potential bad uses to which rhetoric can be put are linked with the ideology of political correctness in contemporary academic thought.¹⁷⁵ Many theorists will reject the risk implicit in a rhetorical exchange, arguing that the "wrong" answer may (and perhaps often does) hold sway in these exchanges. Because the public debate over affirmative action is so skewed, because the inventiveness employed by the discussants appears to be oriented toward obfuscation and exciting the passions of a defined segment of the population, and because the shifts in the debate seem unmatched by progress in social relations, critics will conclude that rhetorical "knowledge" (and they likely will concede only "technique" or "style") must be carefully guarded and circumscribed, owing to its dangerous implications.

It is instructive to redirect this critique of rhetoric to a wider application than just "rhetorical knowledge" in order to appreciate the blind alley that it creates. Characterizing rhetoric as a dangerous facility that may be put to bad uses and therefore must be cautiously

174. Thomas Conley relates several accounts of rhetorical exchanges in ancient Greece to underscore the ambivalence over rhetoric that existed then and persists today, arguing that these episodes reveal that rhetorical power reverberates with the "tensions between privilege and correctness, right and might, power and persuasion, and persuasion and ignorance." CONLEY, *supra* note 46, at 3.

175. Willem Witteveen made this point in the discussion period after this paper was presented at the Law and Society conference, *see supra* note *, bringing into sharp focus for me the nature of the contemporary wariness of rhetoric. Paralleling this mindset on the academic left is the equally anti-rhetorical, elitist traditionalism on the right, which fears the disintegration of received wisdom if it is subjected to democratic assessment.

supervised is no more insightful than advocating wariness of intelligence because of the threat of devious cleverness, or of altruism because of the threat of naivete. Certainly all citizens should be concerned and vigilant with regard to the unproductive aspects of the debate over affirmative action, but such concern and vigilance can only be played out in the rhetorical activity of these citizens rather than as a theoretical move to put limits on rhetorical exchanges. Rhetoric is unavoidable as a means of regenerating and creating social and political bonds, and so the question is not so much the limits that should be placed on rhetoric as it is the character of our rhetorical practices. Put differently, we should not take too lightly the concerns about rhetorical practices precisely because these unavoidable practices have such tremendous significance for social life.

Responding adequately to the fear of rhetoric requires a review of the degree to which the Aristotelian rhetorical legacy has been reworked by contemporary theorists. Although Aristotle rejected Plato's univocal vision of knowledge by conceding that rhetoric holds some (ambiguous) significance as an epistemic, social activity, Aristotle nevertheless appears to champion the proper role of reason in politics. In contrast, Aristotle's sophistic competitor, Isocrates, fully embraced the politics of the public square, eschewing both the imperial tradition of the Socratics and the amoral attitudes of some of the Sophists in his defense of vibrant public dialogue in which political questions are rhetorically tested.¹⁷⁶ The example of affirmative action is designed to emphasize the extent to which the rhetorical turn undertaken by Gadamer and Perelman evidences a rejection of Aristotle's caution in favor of an elaboration of his implicit concessions to the radical message propounded by Isocrates and his predecessor,

176. See CONLEY, *supra* note 46, at 21. Isocrates rejected the exuberant playfulness of the itinerant Sophists, but he took seriously their attention to argumentation as an appropriate compartment in an increasingly cosmopolitan Hellas. See POULAKOS, *supra* note 147, at 113-49 (1995) ("Chapter 4: Isocrates' Reception of the Sophists"). Isocrates is most accurately characterized as a philosopher of rhetoric or one whose teaching and thinking existed at the intersection of philosophy (i.e., Plato) and rhetoric (i.e., the Sophists).

Isocrates articulates a rhetoric whose announced purpose is neither to win contests nor to perform discursive spectacles but to offer insightful advice on social and political issues.

....

... While Plato's new rulers would be driven by uncompromised intelligence, Isocrates' would possess sound judgment. . . . In short, where Plato saw the cure for rhetoric in dialectic, Isocrates saw it in rhetoric itself.

Id. at 131-32.

Protagoras.¹⁷⁷ To fear sophistic manipulation in the course of a rhetorical exchange is not only reasonable, but necessary. To fear rhetorical exchange as an invitation to sophistic manipulation, however, is to eschew the reasonable in a fruitless quest for the rational.

The tragedy of the affirmative action debate is not that it admits of no right answer for all time or that the participants often are moved by arguments that they later regard as having manipulated their fears and base prejudices. The real tragedy is that the debate takes place in a socially constructed field that seems to limit unnecessarily the ability to acquire rhetorical knowledge. Rhetorical activity only rarely and temporarily is precluded in public exchanges in this country (images of Bull Connor's fire hoses and Richard Daley's combat-equipped police officers come to mind), but it appears equally true that rhetorical activity often is an anemic and ineffectual exercise within the institutionally managed arena of public discussion. The example of the debate over affirmative action reveals the epistemic significance of rhetoric, but also reveals its fragile and risky nature. The central question, then, is not whether rhetoric is a good or bad basis for public life, but rather how to invigorate ongoing rhetorical practices. In Part III, I demonstrate that the legal system is a site of rhetorical knowledge that permits consideration of these more challenging questions about the nature and efficacy of critical assessment of rhetorical practices.

III. RHETORICAL KNOWLEDGE IN LAW: PRACTICE AND THEORY

I still feel my wattles grow red as I recall the shock with which, as a dyed-in-the-wool commercial lawyer, I met property phases of mortgage law which left me gasping. "One system of precedent" we may have, but it works in forty different ways. Some day, some one will help the second year student orient himself. Nor does any one bother to present to him the difference between logic and persuasion, nor what a man facing old courts is to do with a new vocabulary; in a word, the game, in framing an argument, of diagnosing the peculiar presuppositions of the hearers. I think the second year student is entitled to feel himself aggrieved. Meanwhile, while we wait upon the treading of the Angel, there is rushing in that calls for doing. Here is a start.

Karl Llewellyn¹⁷⁸

177. See *supra* notes 147-54 and accompanying text.

178. K. N. Llewellyn, *On Philosophy in American Law*, 82 U. PA. L. REV. 205, 205 n.* (1934).

Rhetorical knowledge is a constitutive feature of legal practice that grounds any theoretical reconstruction and critique of that practice. Working from the philosophical insights of Gadamer and Perelman, I have defined rhetorical knowledge as the outcome of efforts to persuade another by engaging in argumentation. This new rhetorical orientation for inquiry remains incomplete in the absence of a fully developed account of critical practice, but the extensive labors to develop a sophisticated understanding of rhetorical knowledge have not been pointless. Critical insight is a feature of the rhetorical practices yielding rhetorical knowledge, and so critical theory arises only from within the discursive field shaped by rhetorical knowledge. My theme is that it is a mistake to regard critical insight as a product only of theoretical efforts. As I hope to make clear, the concept of rhetorical knowledge is indispensable in explaining how legal practice is critical, how critical legal theory is a rhetorical practice, and how these two practices relate to each other.

A. LEGAL PRACTICE AS THE CULTIVATION OF RHETORICAL KNOWLEDGE

Due to its ubiquity and pragmatic qualities, legal practice is not just one setting among many that exhibit rhetorical knowledge; it is a paradigmatic venue for investigating rhetorical knowledge in action. Given the heavily legalistic nature of our public realm, legal practice touches upon, and often shapes, many issues that reach beyond the basic structuring of political relations. Additionally, legal practice fundamentally is a series of judgments and resulting actions rather than a discipline or mode of inquiry. Consequently, rhetorical knowledge in legal practice is put to the test of real (practical) judgment on a daily basis. It is no coincidence that both Gadamer and Perelman emphatically argue against any effort to insulate legal practice from their work by contending that an analysis of the activities of understanding, persuasion, and judgment suffusing legal practice provides the best elaboration of their philosophies.¹⁷⁹ Legal practice is much more than a useful illustration of the previously determined concept

179. See *supra* notes 31-32, 62-63, 82-84, and the accompanying text. Although it is fashionable to deride references to contemporary Continental philosophy in legal scholarship, usually from the perch of a self-satisfied, parochial vision of philosophical inquiry, it is plain that Gadamer and Perelman would regard anyone taking such a position with respect to their works as having missed their point entirely. Mootz, *Law and Philosophy*, *supra* note 6 (discussing the relevance of philosophical hermeneutics to legal theory).

of rhetorical knowledge; it is a practice that exhibits and discloses rhetorical knowledge in particularly vivid ways.

1. *A Rhetorical Account of Legal Practice*

Explaining the role of rhetorical knowledge in legal practice meets a particularly pressing need. Legal commentators have backed themselves into a corner by using unhelpful oppositions to characterize the nature of legal practice, mirroring one of the prominent splits in the philosophical tradition. On one hand are the Platonists, not much in evidence today, who are convinced of the conceptual integrity of legal categories and the rigorous nature of legal reasoning. On the other hand are the descendants of Gorgias, who skeptically view legal practice as the arena of conflict for "hired guns" acting under conditions of undecidability, which means that lawyering can be strategic but never fully rational. Although few scholars adopt one of these caricatures wholesale, most accounts represent a vacillation between, and uncertain reaction to, these two poles. The philosophical movement to revive the sometimes challenging and subtle views propounded by the pre-Socratics and sophists provides a model for the effort to recover the pragmatic, epistemic, and ethical dimensions of legal practice. The resurgence of pragmatism in legal theory represents a step in this direction, although contemporary pragmatist theories of law threaten to degenerate into a kind of subjectivist idealism by presenting judges as artful craftsmen, thereby indulging an egocentric conception of legal knowledge that seems rather naive today.¹⁸⁰

Revealing how rhetorical knowledge operates in legal practice is particularly difficult since legal practice is marked by a vehement denial of its rhetorical nature. This denial usually is expressed by an insistent claim that legal practice involves only dialectical reasoning about objectively determined concepts. To modify Gadamer's artful analysis that the Enlightenment embodies the prejudice against prejudice, one might say that legal practice involves the rhetorical suppression of its rhetoricity.¹⁸¹ Breaking through this protective barrier does

180. Consider the fact that Richard Posner now styles himself a legal pragmatist. See Nancy Levit, *Practically Unreasonable: A Critique of Practical Reason*, 85 Nw. U. L. REV. 494 (1991) (criticizing Posner's invocation of pragmatism within a subjectivist metaphysics designed to buttress his ideological program). A recent collection of essays connects ancient sophistry and rhetoric to the modern resurgence of philosophical pragmatism in more challenging and interesting ways. See RHETORIC, SOPHISTRY, PRAGMATISM, *supra* note 162.

181. See GOODRICH, *COURTS OF LOVE*, *supra* note 124, at 112 (1996) ("Law is a literature which denies its literary qualities. It is a play of words which asserts an absolute seriousness; it is

not reveal that the core of legal practice is irrational, although this fear undoubtedly motivates much of the strident anti-rhetorical rhetoric. Rather, by focusing on the exercise of judgment informed by more or less persuasive arguments, the possibility and limits of rhetorical knowledge can be brought to light. A number of commentators recently have discussed the rhetorical dimension of legal argumentation as a means of gaining purchase on the reasonableness of legal practice, thereby confronting directly the chasm between deductive formalism and postmodern irrationalism.¹⁸² Ironically, viewing law as intrinsically and irredeemably rhetorical reaffirms its integrity and legitimacy as a practice of securing reasonable adherence, even as it rejects, once and for all, conceptualist and formalist approaches to law.

a genre of rhetoric which represses its moments of invention or fiction"); Willem J. Witteveen, *After Rhetoric and Before the Law*, 23 NEDERLANDS TIJDSCHRIFT VOOR RECHTSFILOSOFIE & RECHTSTHEORIE 208, 212 (1994) ("Rhetoric is an important surface phenomenon of legal activity, easily visible to the untrained eye. But once one become knowledgeable in law, rhetoric disappears from view. . . . Specialized research is then needed to draw attention to legal rhetoric."); Gerald B. Wetlaufer, *Rhetoric and its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1555 (1990) ("[T]he particular rhetoric that law embraces is the rhetoric of foundations and logical deductions . . . [and] is one that relies, above all else, upon the denial that it is rhetoric that is being done."). Thus, the familiar bifurcation of rhetoric and reason becomes a staple in judicial rhetoric. See, e.g., *McAllister Bros., Inc. v. United States*, 890 F.2d 582, 585 (2d Cir. 1989) ("The rhetoric of the appellants' brief . . . betrays the weakness of [its] arguments."). This view recently was articulated as a jurisprudential principle by Judge Richard Posner, who argued that rhetorical flair is to be sharply distinguished from moral correctness and scientific validity. See RICHARD A. POSNER, *OVERCOMING LAW* 498-530 (1995). James Aune provides a concise rejoinder to Posner's simplistic delimitation and then dismissal of rhetoric:

Posner's impoverished view of rhetoric seems to go hand in hand with his reification of the role of the market in law and politics.

....

Posner's is a history of rhetoric from which Isocrates, Cicero, and Quintilian, among others, are absent. He constructs a history of rhetoric in which the "extremes" of Plato and Aristotle are seen as unrealistic, leaving the sophistic rhetoric of Protagoras as winner by default.

James Arnt Aune, *On the Rhetorical Criticism of Judge Posner*, 23 HASTINGS CONST. L.Q. 658, 659, 662 (1996).

182. See, e.g., J.M. Balkin, *A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason*, in *LAW'S STORIES* 211 (P. Brooks & P. Gewirtz eds., 1996); Jacob, *supra* note 51; Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 AM. U. L. REV. 1717 (1995) (rhetorical insights permit us to clarify the choices made available by positive law and to justify choices persuasively); Costas M. Stamatis, *Justice Without Law: A Postmodernist Paradox*, 5 LAW & CRITIQUE 265 (1994) (reasoning by persuasion can achieve justice despite the absence of a deductive legal order); Guenter Zoeller, *Is the Life in the Law Worth Living? Some Critical Remarks on Plato's Gorgias*, 74 IOWA L. REV. 815 (1989) (arguing for the dignity of legal practice despite its variance from the "standards of philosophical truth-pursuit"); David E. Klemm, *Gorgias, Law, and Rhetoric*, 74 IOWA L. REV. 819 (1989) (championing the life of Socrates as a dialogic encounter as a model for law rather than the metaphysical message espoused by him).

A rhetorical view of legal practice begins by emphasizing that legal practice involves much more than judges and lawyers deciphering prior appellate court opinions. Counseling and negotiation comprise the bulk of the lawyering, although these activities often are neglected in theoretical accounts of the law. Lawyers meet with clients, elicit their stories, and deliberate with them about appropriate courses of action, sometimes in conjunction with other professionals and advisors. These meetings involve rhetorical exchanges, inasmuch as the lawyer and client seek to understand the client's situation, define the client's goals, and develop the most prudent means of securing these goals.¹⁸³ Similarly, negotiations on behalf of clients proceed rhetorically, which is to say that they involve a process of

183. A branch of the narrative movement in law has looked closely at the narrative story-building aspect of the lawyer-client relationship, particularly in the area of poverty law. Critics describe the constitutive function of story-building but argue that poverty lawyers all too often don't hear their client's stories because they immediately translate them into pre-established legal categories. See, e.g., Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990); Anthony Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991). In response, one commentator argues that this is precisely the lawyer's job—to rework lay narratives in order to achieve the client's goals—and notes that lawyers are not journalists or biographers. See Cathy Lesser Mansfield, *Deconstructive Reconstructive Poverty Law: Practice-Based Critique of the Storytelling Aspects of the Theoretics of Practice Movement*, 61 BROOK. L. REV. 889 (1995). This fascinating dialogue would benefit from a new view informed by the concept of rhetorical knowledge, since lawyers (and not just poverty lawyers) can refashion their client's stories in tired ways rather than inventively and clients (and not just poor clients) can remain trapped within ineffectual narratives of their experience. Rhetorical knowledge arising from a deliberative process and leading to a jointly constructed story is the goal of representation and should be fostered. White, Alfieri, and Mansfield appear to emphasize only certain features of this complex relationship. For example, Mansfield is too quick to conclude that clients obtain only victory or defeat from their lawyer rather than a slightly modified self-understanding, see *id.* at 928, since the rhetorical knowledge that is gained (or not) in effective legal representation will have some bearing on the self-understanding of both the client and the lawyer.

A similar criticism of civil rights litigation strategies and the representation of clients by committed civil rights lawyers was voiced by Derrick Bell in his attack on the integration focus that fueled the litigation culminating in *Brown v. Board of Education*. See Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (questioning whether civil rights lawyers advanced their own litigation interests at the expense of their clients' educational goals). Bell insists that civil rights lawyers pursued the legal goal of establishing abstract equality by court decree rather than attending more closely to their clients' practical desire to have their children educated in good schools. The dilemma of how best to attack segregated and unequal schooling underscores the rhetorical principal that there is not a single "reasonable" solution to social problems and that persuasive appeals will shift focus over time. In this regard, it is important to note that Bell never argues that *Brown* and its principles are "wrong." See Derrick Bell, *Law, Litigation, and the Search for the Promised Land*, 76 GEO. L.J. 229, 233-35 (1987) (reviewing MARK V. TUSHNET, *THE NAACP: LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-50* (1987)).

creating shared conceptions from which the parties can develop the optimal structuring of a deal or resolution of a problem.¹⁸⁴

The obvious challenge to these characterizations—that negotiating a settlement is far removed from a democratic assembly in ancient Athens—in fact underscores the necessity of adopting a rhetorical understanding of lawyering, since the differences between these venues are best explained by taking account of the rhetorical significance of the audience being addressed. Lawyers almost constantly are engaged in rhetorical exchanges that produce knowledge, but the lawyer and client begin by seeking a kind of self-knowledge rather than a shared understanding with a wider audience. In most instances, lawyers work to acquire knowledge of their client's best interests in the given situation. This knowledge is highly contextual and therefore historical: the best interests of their client change with the progress of the lawsuit or negotiation, developments in the client's life, changes in the community, and so forth. Such knowledge, gained by both the lawyer and the client in the course of their deliberative consultation, is properly characterized as rhetorical knowledge.¹⁸⁵

The activities of lawyers engaged in litigation are more obviously rhetorical in nature. Writing a memorandum of law involves a skill that is difficult to describe and even harder to teach. Lawyers begin crafting a written argument by surveying the published precedents, analogous cases decided in other jurisdictions, and influential secondary works to determine the legal commonplaces at their disposal. Simultaneously, the lawyer constructs a factual narrative of the events or procedures giving rise to the dispute. Searching for a means of persuasion is often quite straightforward—e.g., “when a car proceeds through an intersection in such a manner the driver will be held liable in tort under the established case law”—but in interesting cases the means of successful persuasion are much more elusive. The presentation of the client's story and the presentation of the legal precedents continue to evolve in the process of brief writing until the argument congeals into an appropriate characterization of the matter in question for the intended audience: the judge.

184. This is the guiding insight of the idea of “principled negotiation” developed by the Harvard Negotiation Project to facilitate more effective negotiation practices. ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 1991).

185. I have made this same point in hermeneutical terms. See Mootz, *Rethinking*, *supra* note 6, at 162 n.345 (quoting Amy Gutmann, *Can Virtue Be Taught to Lawyers*, 45 STAN. L. REV. 1759 (1993)).

Ultimately, judicial consideration of the case and issuance of a written opinion mark a distinct rhetorical practice shaped by the judge's effort first to persuade herself and then to persuade the parties in the litigation and the hypothetical collection of all reasonable lawyers. In some high profile cases, the judge might even view the audience of her opinion as the citizenry at large.¹⁸⁶ The moment of judgment crystallizes the rhetorical engagements pervading legal practice, which both explains and justifies the fascination that theorists display towards the practice of judicial review. Leigh Greenshaw argues that Chief Justice Marshall's emphatic declaration that it is the province of the courts to "say what the law is" pertains not just to the division of responsibility among coordinate branches of government but also to the very nature of legal practice.¹⁸⁷ This insight sustains Greenshaw's claim that legal writing ought to be recognized as a vital and integrated part of the first year law school curriculum, since "thinking like a lawyer is inseparable from speaking, acting, and writing like a lawyer."¹⁸⁸ Judges and lawyers alike face the rhetorical challenge of "saying what the law is," which is a rhetorical activity rather than a contemplative exercise, a question of argumentation rather than dialectical demonstration.¹⁸⁹

2. *Philosophical Groundings for the Rhetorical Account of Legal Practice*

The philosophical projects undertaken by Gadamer and Perelman provide the appropriate vocabulary for describing the rhetorical knowledge generated by legal practice. Gadamer argues that all understanding involves a fusion of horizons in which the legal text acquires meaning only in its application to the case at hand.¹⁹⁰ The

186. See George C. Christie, *The Universal Audience and Predictive Theories of Law*, 5 *LAW & PHIL.* 343, 347-48 (1986) ("How a judge conceives of his profession and of his role within that profession will figure very prominently in the vision he has of the audience he is addressing.").

187. Leigh Hunt Greenshaw, *To Say What the Law Is: Learning the Practice of Legal Rhetoric*, 29 *VAL. U. L. REV.* 861, 867-72 (1995).

188. *Id.* at 896.

189. Thus, Greenshaw's description of legal practice mirrors the description of a rhetorical engagement offered in this article: "Written authorities are not law, but cultural resources for lawyers engaged in the practice of law. Law is the ongoing process of giving written authorities meaning in the context of disputes over what they mean in and for particular situations." *Id.* at 866.

190. Gadamer characterizes the view that "the meaning of a law [is] both juridically and historically the same" as a "legally untenable fiction," since the judge always determines the law's "normative content in regard to the given case to which it is to be applied." GADAMER, *supra* note 4, at 326. He concludes that the "idea of a perfect legal dogmatics, which would make every judgment a mere act of subsumption, is untenable," since human finitude precludes "first

intersubjective process of understanding the law that occurs in strategizing, negotiating, arguing, and writing an opinion is conversational, since no legal actor discovers or pronounces the law *ex nihilo* through an act of subjective will. Perelman's work adds methodological detail to this ontological account of legal interpretation and understanding. Lawyers do not work from undifferentiated "prejudices"; they begin their work with a storehouse of arguments and strategies that generally are deemed acceptable and persuasive by the audiences to whom they speak. In his more ambitious moments, Perelman proposes to catalogue the argumentative commonplaces of legal practice, although certainly with the understanding that the object of such a study is a fluid practice rather than a fixed lexicon.¹⁹¹

Legal practice is rhetoric all the way down, with rhetorical engagements layered upon rhetorical engagements in a dynamic and challenging confluence that cannot be constrained by pretenses of analytical certainty. To deny the existence of rhetorical knowledge would be to deny the existence of legal knowledge. Many first year law students are troubled by what they perceive to be the wide freedom of judges to decide cases on personal whim and then later to supply adequate legal justification for their decision, but it is no surprise to find that these same students have difficulty formulating a coherent argumentative essay for the final exam. It is easy enough to believe that the law is "just rhetoric" when reading a case, but the tremendous challenge of confronting a specific legal dispute and arguing persuasively on behalf of a client quickly demonstrates to students that a rhetorical exchange can be extremely demanding because it is so decentering. Gadamer's "fusion of horizons" and Perelman's "audience" are indispensable concepts for describing these challenges

understanding a given universal in itself and then afterward applying it to a concrete case." *Id.* at 330, 341.

191. In an essay on achieving justice through legal reasoning, Perelman grounds judicial decisionmaking in the rhetorical practice of law. Perelman argues that the reasoning employed by judges when confronted with conflicting legal commonplaces

can be described as dialectic reasoning, because resort must be had to arguments of all kinds that cannot be reduced either to deductive schemes or to simple induction. They frequently combine analogical reasoning and pragmatic arguments with appeals to the rule of justice requiring the like treatment of like situations.

A systematic analysis of the relations between the rules of positive law, the general principles of law, the rules of morality, and the techniques resorted to by legislators and judges to back their statements and their decisions, makes it possible to enumerate, classify, and systematize the models of argument to which lawyers resort when it is necessary to reason in terms of justice.

PERELMAN, *supra* note 50, at 81.

because they reinforce the radically intersubjective, epistemic dimension of this practice.¹⁹²

A critic might charge that the philosophical gloss provided by Gadamer and Perelman is unnecessary to explain or support the claim that legal practice involves persuasion about matters that cannot be determined with certainty. In fact, after the Legal Realist movement such a position appears quite unexceptional. However, a philosophical understanding of rhetorical knowledge helps to ensure that the description of legal practice does not slip into pragmatist banalities that obscure more than they reveal. Several recent rhetorical explanations of legal practice provide examples of how the rhetorical model can be narrowly conceived and then applied in an overly conventional manner. Reviewing these efforts as contrasting touchstones permits a demonstration of the advantages of using the concept of rhetorical knowledge to describe legal practice.

The principal danger of pursuing a rhetorical approach is that a theorist might mistakenly reconstruct the rhetorical exchange as a confrontation between insular subjects. Such an approach is predicated on a diminished sense of rhetoric as a set of techniques or strategies that are taken up after the problem is understood and a judgment has been reached. Ultimately, this approach collapses into relativistic conclusions about the status of legal knowledge. Certainly, it is true that good lawyers size up their opponents and the judge before whom they will appear, but this strategic positioning hardly exhausts the nature of the rhetorical exchanges between a lawyer and her adversaries or the judge. Consciously pandering to one's audience by fashioning arguments thought to be persuasive to the audience is parasitic on a deeper responsiveness to the audience that is constitutive of being able to understand and represent the situation in which such strategic action is deployed. Gadamer's ontological argument is a necessary

192. Rhetoric is not merely stylistics that mask the exercise of power; its efficacy derives from participating in the generation and definition of authority. Rhetoric places the issue of power in play precisely because it is involved in the exercise of political power (as opposed to mere physical force) in a fundamental way. Once in play, the question of the exercise of power is subject to challenge and the force of the better argument.

Rhetoric is not obviously suspect because it is always ideological if there is no ahistorical, neutral space outside of all ideologies. Charisma and emotional appeal do at times influence an argument's success, but in most rhetorical contexts they are so intimately interwoven with logical rigor, evidentiary support, appeal to precedent, shared paradigms, and so forth that it makes only foundationalist sense to try and separate them out and condemn them as illegitimate.

Steven Mailloux, *Introduction: Sophistry and Rhetorical Pragmatism*, in *RHETORIC, SOPHISTRY, PRAGMATISM*, *supra* note 64, at 20.

addition to Perelman's account of the means of argumentation precisely to emphasize this point.

Jerry Frug's essay, *Argument as Character*, provides an example of how a rhetorical analysis can fail to take account of the ontological dimension of rhetorical exchanges.¹⁹³ Frug properly notes that the audience responds to the character of the rhetor as it is displayed in her argument, but he seems to assume that the speaker and audience have pre-existing characters, with persuasion occurring only if the speaker's character is compatible with her audience's character.¹⁹⁴ Absent from his account is the reciprocal character-building effect of a rhetorical exchange, captured by Gadamer's notion of a conversational fusion of horizons. Frug's approach easily slips into a Nietzschean perspectivism, with persuasion becoming impossible ("I'm a deconstructionist and you're not, so what more can we say") or with rhetoric degenerating into a methodology for projecting an appealing "character."

The same narrow conception of the rhetorical dimension of legal practice is evident when theorists reduce judging to formulating an acceptable rhetorical justification for a decision. For example, Gerald Wetlauffer proposes to discuss the rhetorical conventions of legal argumentation and opinion writing while leaving aside for the moment "the process by which judges decide the cases with which they are presented."¹⁹⁵ While it is true that judges may seek to spell out their justificatory reasoning in a relatively self-conscious manner, the decision is itself a product of rhetorical exchange to the extent that it can be characterized as a *reasoned* decision. Later construction of a syllogistic justification is only the tip of the rhetorical iceberg that has resulted in the decision, and undue attention to this latter phase of judging clouds the nature of the rhetorical process in adjudication. Wetlauffer's provocative thesis is that the rhetorical conventions that require lawyers to invoke clarity, univocity, objectivity, and finality when making arguments have "ontological consequences" by limiting the capacities of lawyers and judges to reason about the uncertain issues they confront daily. This thesis assumes even greater significance, though, when the rhetorical field is expanded beyond mere justification to legal reasoning.¹⁹⁶

193. Jerry Frug, *Argument as Character*, 40 STAN. L. REV. 869 (1988).

194. *See id.* at 926.

195. Wetlauffer, *supra* note 181, at 1561 n.44.

196. *See id.* at 1590-97. Wetlauffer substantially undermines his own thesis when he concedes that the delimited rhetorics practiced by litigators probably do not persuade many judges to

Duncan Kennedy's famous critical phenomenology of the act of judging provides a more sophisticated account of rhetorical engagement, but he too begins with the assumption that a judge having a strong political and moral orientation approaches a case with a desired result that must be rhetorically justified with malleable precedent.¹⁹⁷ Kennedy acknowledges that the normative power of the indeterminate textual field is sometimes strong enough to convince the judge to abandon her first inclinations, but one senses from Kennedy's hypothetical first-person account that he has substantial misgivings about the potential ideological effects of institutionally-defined authority.¹⁹⁸ Again, legal reasoning is presented as a rhetorical practice only to the extent that it is a strategy pursued by a judge or a force embedded in the social significance of a text. While each of the forces are fluid and indeterminate in Kennedy's account, they do not deliberate together so much as collide.

In each of these accounts, rhetorical exchanges are presented as more or less successful confrontations between a legal actor and other legal actors. In contrast, the concept of rhetorical knowledge derived from Gadamer and Perelman's philosophies emphasizes that legal practice is a collective practice of lawmaking. The client's story is almost always pre-formed by the legal tradition when she enters the lawyer's office for the first time, regardless of the level of her sophistication, but the story nevertheless represents a challenge to the lawyer who seeks to develop its present legal significance. The stories told by adverse parties and their lawyers, whether in negotiation or litigation, represent the pragmatically-constructed space in which the abstract ideal of the law once again is pressed into service. The clients, lawyers, and judges that are brought together by a particular story construct new accounts of the law by means of the myriad argumentative

reach the desired decision, even though the judges later repeat the formal "proof" in their opinion. *See id.* at 1593. Wetlauffer's admission suggests that the rhetorical activity of law exists sub rosa and may be shielded from the counterfactual forms of presentation. Wetlauffer's critique would then be read not as a denial of the dynamism and effectiveness of legal rhetoric, but rather as an indictment of its lack of honesty and accessibility to those not initiated into the *real* means of persuasion.

197. *See* Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986).

198. *See id.* at 548-52. Kennedy concludes that rules sometimes bend to the will of the interpreter but that sometimes they do not and that the interpreter sometimes bends to the rule but that sometimes she does not. The confrontation between interpreter and rule is presented in a subtle and sophisticated manner at many points in the article, but he appears (in the voice of the hypothetical judge) to regard the interpreter's acceptance of the law as a "counter-ideal" situation in which the law "manipulates" the interpreter. *Id.* at 551.

moves made by all concerned over the life of the case. By engaging in legal practice, lawyers constantly learn and grow, not just in their ability to recite the black letter law, but in their ability to create the law of each case. In my experience, the derogatory characterization that someone is a "bad lawyer" can usually be explained in terms of the lawyer's inability to invent the law of his or her case successfully.

3. *Rhetorical Invention as Critique: Redefining Justice*

Limiting rhetorical inquiry to an analysis of the linguistic tools used by lawyers and judges is mistaken because it runs afoul of contemporary critiques of subjectivity, but the rhetorical-hermeneutical alternative outlined in this paper seems equally flawed because it appears to invest existing intersubjective practices with an unimpeachable quality. Wetlaufer's critique of legal practice, although based on a narrow conception of rhetoric, therefore poses a persistent challenge: do the rhetorical devices used by practicing lawyers serve as powerful constraints that preclude a robust legal dialogue? The theory of rhetorical knowledge cautiously answers this question with a modified "no." The critical component inherent in rhetorical exchanges as an unavoidable feature of legal practice that is operative to some degree despite the cramped syntax of formal legal argumentation, even admitting the significance of institutional and social barriers that inhibit realization of this critical element in its full rigor.

The mistaken character of formalist accounts of law is now obvious to most lawyers, and so it seems plausible to conclude that the truncated legal rhetorics employed by lawyers and judges in their formal presentations cannot completely suppress the rhetorical nature of law and the operation of rhetorical knowledge. With the advent of Legal Realism, theorists re-learned what practicing lawyers have always known: effective lawyers are not obsessed with manipulating the formal rhetorical devices of legal argumentation since these devices are insufficient to resolve the indeterminate legal question that they face. Instead, good lawyers concentrate on motivating the judge or opposing party by educating them about the reality of the situation and pointing the way toward a reasonable legal solution, even if they must do so under cover of highly rationalistic legal dogmatics. After all, when both advocates in every case argue that the precedents are clear and univocal, that the singular rule articulated in the precedents definitively resolves the case at hand, and that all arguments offered by the opponent are entirely specious and without

merit, one must conclude that persuasion is being accomplished by some means other than these bare stylistic conventions. Wetlaufer concedes as much,¹⁹⁹ but this recognition makes it all the more frustrating that a syllogistic veneer is later draped over the full rhetorical encounter, since this exercise undoubtedly affects legal practice for the worse. Nevertheless, legal stylistics at most obscure rather than preclude the inventive use of commonplaces that defines the rhetorical exchange.

Legal argumentation always invites a critical use of commonplaces, even when the argument is styled in terms of "obedience to the law." Gadamer and Perelman both stress that a law is never understood abstractly but only in reference to its application to a specific case regardless of our pretensions to the contrary. Without a deductive formula or a rationalist algorithm to bridge the hypothetical meaning of the law in itself and the demands of the case at hand, persuasion always involves some measure of invention in the form of re-presenting the relevant law and the facts at issue. Without foundational guarantees of certainty, reasonable means of persuasion and meaningful deliberation emerge as part of the inventive task of developing plausible arguments within the openness of rhetorical exchanges. The activity of invention is the critical element of legal practice, since it represents the disruption of stubborn, habitual manners of thinking.²⁰⁰

199. See *supra* note 196.

200. Gadamer makes a parallel argument in his response to Habermas' theory of "systematically distorted communication," in which Habermas postulates that hermeneutic understanding must be supplemented by a distinct critical inquiry, since everyday interpretation can be warped through ideological effects. See Gadamer, *supra* note 165, at 546. Gadamer regards this extreme suspiciousness of language as an abstraction from the linguistically structured hermeneutical situation that opens the world to us *by virtue* of its prejudiced character.

The fact that we move in a linguistic world and grow up into the world through an experience pre-formed by language does not at all remove the possibilities of critique. On the contrary, the possibility of going beyond our conventions and beyond all those experiences that are schematized in advance opens up before us once we find ourselves, in our conversation with others, faced with opposed thinkers, with new critical texts, with new experiences.

....

To sum up, I would say that the misunderstanding in the question of the linguisticality of our understanding is really one about language—i.e., seeing language as a stock of words and phrases, of concepts, viewpoints and opinions. In fact, language is the single word, whose virtuality opens for us the infinity of discourse, of speaking with one another, of the freedom of "expressing oneself" and "letting oneself be expressed." Language is not its elaborated conventionalism, nor the burden of pre-schematization with which it loads us, but the generative and creative power to unceasingly make this whole once again fluent.

Id. at 546, 549. This passage is one of many points in Gadamer's philosophy where an explicit recourse to the rhetorical would add force to his argument, just as Gadamer's broad analysis of

Bernard Jacob defends Perelman's account of legal rhetoric against charges that it is uncritical by pointing out how Perelman in fact celebrates the critical element of legal practice. Legal commonplaces serve as the springboard for invention, meaning that "the opportunity for reconsideration, innovation, rejection, and amendment appears as a moment in the basic structure of every legal problem."²⁰¹ Commonplaces do not form a closed ideological mindset but rather provide the "prejudices" from which understanding may proceed.²⁰² Despite the attempts of many talented systematizers through the years, legal commonplaces have proved to be recalcitrant to the effort to develop an axiological calculus. Rather than congealing as a formal system, commonplaces remain starting points for dynamic rhetorical engagements that cannot be charted in advance.²⁰³ Invention is not only a possibility opened by argumentation; it is a precondition of understanding and persuasion. Even when an advocate claims that the present case is identical to a previously decided case, the lawyers and judge must take up the case at hand and the legal tradition inventively, since no two cases are ever *exactly* alike in every *conceivable* sense. Because judgment is never a matter of subsumption—meaning that legal practice always requires an interpretive understanding of the situation and a persuasive presentation of this interpretation—it is inevitable that commonplaces are employed inventively to some

language sheds light on the function of commonplaces. See also GADAMER, *supra* note 4, at 456-74, 472 ("The hermeneutical situation is not a regrettable distortion that affects the purity of understanding, but the condition of its possibility.").

201. Jacob, *supra* note 51, at 1643 (discussing Perelman's new rhetoric in the course of a review of complementary work by Theodor Viehweg).

202. In response to critics who bemoan the rhetorically-configured ideologies of contemporary society, it seems only natural to emphasize that the rhetorical field—once opened—includes a self-reflexive capacity. This is the key insight of the "rhetorical turn." Gaonkar, *supra* note 53, at 60.

203. See Jacob, *supra* note 51, at 1656-57 (describing Viehweg's argument that rhetorical studies can only shed light on topicality as a procedure of argumentation and cannot develop a science of legal argumentation by systematizing the topics into a hierarchy of logical relationships). As Jacob elaborates

it is the orientation of topics to problems that is important to Viehweg. And it follows from this orientation that he is not invoking passive lists of topics; nor is he focusing on the logical arrangement of the topics. Instead, he is particularly interested in the use of topics in finding the solution of problems, that is, he is interested in the role of topics in rhetorical invention. . . . It is in finding arguments, rhetorical invention or the practice of struggling with varieties of models for the treatment of a problem, that the topics find a use.

Id. at 1660. Cf. MICHAEL BILLIG, ARGUING AND THINKING: A RHETORICAL APPROACH TO SOCIAL PSYCHOLOGY (1987) (arguing that social psychologists will never be able to "map" the use of maxims in social discourse due to the inventiveness employed).

degree. Critique is a feature of practice because practice is never a rote repetition of what has preceded.²⁰⁴

The rhetorical nature of the critical element of legal practice provides the key to a new understanding of justice. The description of legal practice as a series of interconnected rhetorical exchanges that are oriented to rhetorical knowledge stands in sharp contrast to the traditional accounts of the relationship between legal practice and principles of justice. Legal positivism characterizes law as a distinct socially-defined practice that stands independent of moral inquiry. Under this view, the substantive justice of a law is properly considered only when the law is enacted—or in the event that a judge must fill a “gap” in the law—since legal reasoning is considered distinct from speculations about the requirements of justice. Legal positivism represents a reaction to the older natural law tradition which equates justice with the realization of the fixed principles of natural law in the positive legal realm. Adopting the model of rhetorical knowledge entails a rejection of both legal positivism and natural law theory and, therefore, signals a new conception of the relationship of law and legal practice.

Perelman’s analysis of justice as a confused notion and Warnke’s Gadamerian-inspired account of justice as hermeneutical conversation can now be considered in greater detail. Justice is not a yardstick with which to define or measure legal practice; it is a “confused notion” that operates in legal discourse on several different levels. On one hand, justice is a topic with well established lines of argumentation dating back to the Greeks. This topic is particularly confused, however, because it is bound up with the substantive question of how we take up the topic. We must discuss questions of justice only in a just manner, one might say. Thus, on the other hand, justice refers to the

204. Once again, Calvin Schrag provides important philosophical clarification of the discussion. Schrag rejects a theoretically-secured critique in favor of what he terms “praxial critique,” by which he means the critical development of practices that occurs as part of the practices. He proposes

A resituation of critique within the space of our communicative practices and the dynamics of our lifeworld involvements. Rather than a centripetal activity issuing from the subject-centered rationality of an isolated epistemological, moral, or aesthetic subject, we understand critique as a centrifugal deployment of discursive and nondiscursive social practices. Critique, thusly contextualized, falls out as a communicative project, a praxis that finds its resources in the dialogic transactions and institutional forms that make up the fabric of our socio-historical existence. . . . it rests content to discern and assess the play of forms of thought and action against the background of changing and historically conditioned patterns of signification.

SCHRAG, *POSTMODERN CHALLENGE*, *supra* note 158, at 57.

practical situation in which the opportunity for acquiring rhetorical knowledge about the just manner of proceeding is maximized.

Justice is not a fixed state of affairs toward which practice reaches, then, but rather is a normative characterization of the manner in which the practice should regenerate itself: "justice" challenges where discussants now stand as well as impelling them forward to a new mode of social interaction. As Perelman skillfully demonstrates, principles of justice do not provide determinant guidance to legal practice but, instead, serve as commonplaces for argumentation in legal practice. Justice is a quality of becoming, rather than a *telos*.

Perelman emphasizes that the time-worn question animating the clash between natural law and legal positivism—"Can justice conflict with law?"—no longer makes sense once legal practice is recognized to be a rhetorical engagement.

The question can be put in this way only if no account is taken of the distinction we have established between formal justice [the abstract principle of equal treatment of like cases] and concrete justice [the practical assessment of the criteria of "equality" in a given case]. Indeed, an attempt to judge law in the name of justice is possible only by means of a confusion. Law will be judged by means, not of formal justice, but of concrete justice, that is of a particular conception of justice which assumes a settled scale of values.²⁰⁵

The formal conception of justice as a fixed standard leads natural law advocates to import the logical criteria of judgment to law, equating just laws with those that faithfully reflect the requirements of justice. The emptiness of this abstract, strong conception results in the efforts of legal positivists to differentiate morality and justice from legal practice. Perelman contends that the starting point for this false debate must be abandoned. "Our actions and decisions are never 'true'; they are correct, conform to a moral or legal order, are expedient, just, equitable or reasonable. . . . When we discuss fundamental norms we are concerned much less with their truth than with their interpretation."²⁰⁶ This practical conception of justice converges with Gadamer's conversational ethic of holding oneself open to the rhetorical claims made by others.²⁰⁷ To borrow a legal metaphor, justice is

205. PERELMAN, *supra* note 50, at 20.

206. *Id.* at 109.

207. Gadamer concludes that the "hermeneutical experience . . . has its own rigor: that of uninterrupted listening." GADAMER, *supra* note 4, at 465. The practical and ethical result of this conclusion is clear: "hermeneutic philosophy understands itself not as an absolute position but as a way of experience. It insists that there is no higher principle than holding oneself open in a

not a matter of pre-given substantive rules but rather is lodged in the interstices of the practice of re-creating the law and taking appropriate action within the context of an individual case.

The rhetorical conception of justice is best explored through an example. Dr. Jack Kevorkian has been tried and acquitted several times for violating Michigan criminal law by assisting patients to commit suicide, and his dramatic efforts to publicize his position have succeeded in bringing the matter into the public forum.²⁰⁸ Determining whether the laws against assisted suicide are just laws calls forth familiar responses. A natural lawyer might argue that the criminal laws

conversation." HANS-GEORG GADAMER, *PHILOSOPHICAL APPRENTICESHIPS* 189 (Robert R. Sullivan trans., 1985) (1977). Justice can be realized under conditions in which prejudices are relaxed by means of a confrontation with the other, even if the "other" is a hypothesized dialogue partner in the soul's conversation with itself, for it is under these conditions that we come to know the requirements of concrete justice.

Who has not had the experience—especially before the other whom we want to persuade—of how the reasons that one had for one's own view, and even the reasons that speak against one's own view rush into words. The mere presence of the other before whom we stand helps us to break up our own bias and narrowness, even before he opens his mouth to make a reply. . . . [A]s the experiences that have been described indicate, there is something else in this experience, namely, a potentiality for being other [*Andersseins*] that lies beyond every coming to agreement about what is common.

Gadamer, *supra* note 11, at 26.

208. See, e.g., *Dr. Death Beats Rap, Again*, 18 NAT'L L.J., May 27, 1996, at A8, c.2 (describing the most recent acquittal); David Orentlicher, *Learning Lessons of Life and Death from Kevorkian*, CHI. TRIB., May 21, 1996, at 17 (summarizing the lessons to be learned from the Kevorkian cases and calling for a legalized and regulated practice that takes the issue out of the hands of the "back alley practitioners" and the criminal courts). Kevorkian has largely failed in his efforts to have a recently passed but subsequently elapsed Michigan law against assisted suicide declared unconstitutional or to prevent further criminal prosecutions. See *People v. Kevorkian*, 534 N.W.2d 172 (Mich. Ct. App. 1995) (affirming injunction issued against Kevorkian precluding him from assisting in more suicides). See also *People v. Kevorkian*, 527 N.W.2d 714 (Mich. 1994) (upholding the constitutionality of the 1993 statute criminalizing assisted suicide). Parties in other jurisdictions originally had more success in challenging similar criminal statutes, see *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996) (holding that there is no fundamental right to assisted suicide but that criminal statutes cannot survive the rational basis test under the equal protection clause) and *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (en banc) (holding that criminal laws against assisted suicide violate substantive due process rights), but the United States Supreme Court recently rejected the claim that the Federal Constitution prohibits states from criminalizing assisted suicide. See *Vacco v. Quill*, 117 S. Ct. 2293 (1997) (reversing *Quill*); *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997) (reversing *Compassion in Dying*). The unavoidable rhetorical depth of these judicial considerations is revealed most clearly in Justice Souter's concurring opinion, which openly embraces the challenging character of fundamental rights jurisprudence and eschews the pretense of legal decisionmaking as dispassionate and orderly elaboration. See *id.* at 2274 (Souter, J., concurring). The rhetorical breadth of the resolution of complex issues such as assisted suicide is revealed by the fact that, notwithstanding its newly confirmed constitutional power to criminalize the practice, the state of Michigan apparently has decided not to prosecute Kevorkian for his continuing practice of assisting patients to commit suicide. See *Kevorkian Encountering Fewer Hurdles in Suicides*, N.Y. TIMES, Oct. 17, 1997, at A26.

against this practice are fully just, insofar as they represent an appropriate respect for human life that does not permit active termination of life even when requested by a suffering individual. The moral status of the law would be coincident with its characterization as a just law. A positivist might argue that such laws are duly enacted and clearly apply to the cases at hand, subject only to jury nullification (regarded as an extra-legal, unreasoning kind of safety valve) or a constitutional limitation on the power of the legislature to pass the laws in question. Consequently, the justice of the law becomes a matter of social policy properly assessed by legislators who act outside the more constricted dialogue of legal reasoning. In both instances, the justice of the situation is defined external to legal practice, with the debate hinging on the proper relationship of legal practice to this definition.

In contrast, a rhetorical account of justice would insist that such laws are just if they are applied in an open and deliberative process that leads to rhetorical knowledge of the matter at hand. Legislators, judges, and juries all participate in an ongoing, historically-shaped rhetorical practice of creating the law that cannot be wholly separated from, nor simply conflated with, ethical deliberation about the matter. Although Aristotle's distinction between judicial rhetoric and deliberative rhetoric may have made sense in his day, in contemporary American society many legal cases move well beyond narrow argumentation about the facts of the case and their significance under the law.²⁰⁹ Abortion, school desegregation, civil rights, assisted suicide: the list of important social policy questions taken up by legislatures and in the courtrooms of America seems endless. The Kevorkian prosecutions are discrete moments within contemporary social and legal practices that traverse a number of discourses and carry forward the historical trajectories of past confrontations about these important issues. Passage of the statute banning assisted suicide and its subsequent interpretation by Kevorkian and his lawyer, prosecutors, jurors, and judges represent a series of events in the ongoing effort to determine the justice of permitting assisted suicide in contemporary society. Justice relates to the character of these rhetorical engagements in

209. Aristotle distinguished deliberative rhetoric—when the audience is asked to judge an action to be taken in the future by engaging in political or ethical reasoning—from judicial rhetoric—when the audience is asked to judge an action in the past. ARISTOTLE, *supra* note 64, at 47-50 [1358b]. With the advent of the common law system and its doctrine of *stare decisis* and the tremendous expansion of the system of judicial review in later American legal practice, this distinction is no longer very helpful in characterizing the nature of legal adjudication.

working through the questions at hand, and recourse to arguments about justice will continue to be made by all sides of this issue regardless of the path that the law takes. The law is just when these argumentative positions are taken up freely in an arena that grants them a fair hearing, which is not to suggest that “freely” and “fair” can be resolved other than within the ongoing legal consideration of these cases.²¹⁰

Critics might argue that justice so construed empties the concept of any normative power and collapses into a contextualist relativism, but this reading should hold no sway. The pragmatic deliberation about the requirements of justice in a given case is no more relativistic than the kind of reflection and discussion engaged in by an individual confronted with a moral dilemma about how to act in a given situation. The absence of a definitive answer to moral dilemmas does not mean that this reflection and deliberation is irrational and emotive, and no person in the midst of such a situation regards her reasoning in this way. The condition of undecidability does not mean that decisions are made without any reasonable basis. The “dialogical unendingness” in which rhetorical knowledge is encountered does not signify a “complete relativism” any more than a person’s life is an arbitrary collection of life experiences.²¹¹ In both cases we are not only already committed in certain ways, we also strive—in a manner that can be reasonable rather than just random—for a coherence and closure that we know will never be achieved absolutely. Just as a particular conversation has a history and develops a topic, so too an individual’s life and a social practice like law develop criteria of reasonableness and the rhetorical means to continue the ongoing project. A just legal practice, like a life well lived, does not circle around a determinate ground of truth but instead spirals forward from a shared tradition in the form of reasonable judgments about how to proceed.

210. Professor Warnke’s hermeneutical conception of justice as a well-structured conversation of respect and tolerance captures this point well.

The idea behind the notion of hermeneutic conversation is the idea that an interpretive pluralism can be educational for all the parties involved. If we are to be educated by interpretations other than our own, however, we must both encourage the articulation of those alternative interpretations and help to make them as compelling as they can be. And how can we do this except by assuring the fairness of the conversation and working to give all possible voices equal access?

WARNKE, *supra* note 40, at 157. Warnke is writing about the character of a just democracy, but her analysis applies as well to the limited domain of legal practice.

211. GADAMER, *supra* note 207, at 188-89.

Finally, it would be a mistake to think that pressing questions of justice emerge only in the hot-button issues of the day. Even run of the mill commercial cases can present triers of fact with controversy over the justice of the social and legal relations at issue in the case. Consider a bank foreclosing on a home in a highly rote manner that suddenly is confronted by a defense raised by the elderly owner. The owner contends that a scam artist renting a room in her home tricked her into co-signing a Promissory Note that he executed in connection with a personal loan from the bank, and she also alleges that she was tricked into mortgaging her property to provide the collateral for the loan. She seeks to prove that the bank knew that the borrower had absolutely no ability to repay the loan but approved it anyway, since the owner's real estate equity completely covered the bank's exposure. The owner cannot hope to prevail on the theory that the bank has a duty to protect her from the criminal absolutely, but she argues that the bank has an obligation not to make loans that certainly will result in foreclosure of the primary residence of a non-borrower without some heightened scrutiny of the transaction. The routine foreclosure action—generally handled with form pleadings and stock maneuvers—now requires the court to clarify duties and to assess the justice of the legal relations in order to “apply” the straightforward foreclosure statutes.²¹² “Justice” does not mean successfully implementing the “right” answer to such legal disputes; it is the condition which permits the legal actors and authorities to come to know what justice demands in the situation through a process of argumentation. This rhetorical knowledge is made possible by the critical dimensions of legal practice.

212. This description roughly presents the facts of a case that I worked on before joining the academy. I went to court to argue a discovery motion seeking information from the bank about its loan practices and foreclosure rates, and I was confronted by the judge's predictable response that such information was completely irrelevant to the foreclosure action at hand. This motion argument represents only one of many instances in my experience when the apparently solid rules of commercial law were put under stress in a manner that forced recourse to argumentation about justice, not in poetic terms about abstract ideals, but in concrete terms about the legitimacy of each party's claim. My argument didn't go over very well on this particular day, but on other days during my practice, the system would shake—sometimes for the benefit of my clients and sometimes not. Lawyers are best able to capture the reality of their collective fate with a well-worn witticism: “I'm going to practice law until I get it right.” Of course, we are going to practice law collectively for the foreseeable future because getting it “right” doesn't mean reaching a stasis; it is a quality of dynamism.

B. THE RHETORIC OF RHETORICAL KNOWLEDGE

It would be fatuous to assume that the unavoidable critical element of legal practice is maximally realized in all instances, which is to say that it is obvious that conditions of justice do not always prevail in society despite the pervasiveness of the legal system. The traditional conception of theory as a rational inquiry that first systematizes and then guides practice justifiably is under sustained attack, but more circumscribed theoretical efforts to facilitate the critical elements of legal practice present a different case. Although a theory of interpretation cannot deliver knowledge about a legal text, it might serve to alter the theoretical self-understanding of some participants in legal practice sufficiently to free them from disabling views and to increase their openness to rhetorical knowledge. For example, neither an originalist theory of meaning nor a hermeneutical philosophy of understanding can deliver knowledge about the meaning of the Constitution, but a hermeneutical critique of the bogus philosophical assumptions underlying originalism might lead to a more genuine interpretive practice by removing conceptual roadblocks that inhibit robust rhetorical exchanges.²¹³ Although currently it is fashionable to talk about the end of theory, the concept of rhetorical knowledge invites serious reflection on the rhetorical and hermeneutical dimensions of legal practice. This theoretical project can be pursued only after first developing a new understanding of what a theory about a human practice is and how theories relate to the practice under consideration.

1. *The Rhetoric of Inquiry*

Theory has fallen on hard times in the postmodern era. The “hermeneutic turn” toward characterizing knowledge as situated and interpretive has contributed to growing doubts among scholars about whether their work as critics can effectively bring external insight to bear on the social practices that they study. The “rhetorical turn” toward characterizing knowledge as a social engagement magnifies this doubt about the efficacy of theory to chart appropriate developments in social practices by emphasizing the contingent means of persuading another to adopt one’s own provisional interpretation. If lawyers and judges have no recourse to fixed and universal criteria of judgment and must engage in an ongoing rhetorical practice suspended over an illusory syllogistic safety net, it becomes difficult for

213. See Mootz, *New Legal Hermeneutics*, *supra* note 6, at 130-38; Francis J. Mootz III, *Postmodern Constitutionalism as Materialism*, 91 MICH. L. REV. 515, 524 (1992).

the legal theorist to assert that she has developed a theoretical key for unlocking the logic of this practice. An observer seeking to evaluate or criticize a rhetorical event is no less enmeshed in an interpretive-rhetorical horizon than those whom she is studying.²¹⁴ As two commentators recently noted, the narrative focus of contemporary legal scholarship is challenging and unsettling because narratives not only are the object of inquiry, but they also constitute the methodology and result of the inquiry.²¹⁵

Theory is not precluded by the recognition that the practices under study produce only rhetorical knowledge, so long as "theory" is not construed in its narrow, traditional sense as the construction of a system of laws that has strong predictive value. Viewed as an intervention in the underlying practice from a relatively removed perch (e.g., the standard law review article advocating a particular doctrinal point) or as the participation in a distinct practice that has relatively weak and indirect connections to the everyday practice of law (e.g., this article), legal theory is best understood as a rhetorical practice seeking rhetorical knowledge, no less than the legal practice that is its object.

If the concept of rhetorical knowledge is viewed "only" as a rhetorical claim put forth in an argumentative dialogue about the best means of representing legal practice, it might first appear that the concept strips itself of any authoritative claim. This initial reaction, though, simply repeats the mistake of regarding legal practice either as a rational-deductive exercise or as an irrational (although perhaps ideological) exercise of power under the guise of reason. Just as the better interpretation of a statute can emerge from legal argumentation, the better representation and critique of legal practices can emerge from argumentation in a theoretical dialogue. The recent cross-disciplinary investigation of the "rhetoric of inquiry" represents a sustained effort to describe the rhetorical tools available "not just for deconstructions of objectivist pretensions, but also for much-needed, much sought-after reconstructions of inquiry in the wake of those debunkings."²¹⁶ By emphasizing "the role played by rhetorical

214. See Hyde & Smith, *supra* note 89, at 362 ("[T]he rhetorical critic's task is at least as difficult as that of the most successful rhetor.").

215. See Patricia Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 LAW & SOC. REV. 197, 201-04 (1995).

216. Herbert A. Simons, *Preface*, in *THE RHETORICAL TURN: INVENTION AND PERSUASION IN THE CONDUCT OF INQUIRY* vii (Herbert A. Simons ed., 1990) [hereinafter *RHETORICAL*

invention in the conduct of inquiry," the movement builds on rhetorical insights to foster the exercise of good judgment by scholars as they participate in their own historically defined practices, rejecting anti-theory relativism as having missed the point of the rhetorical turn.²¹⁷ There is a role for legal theory, but it is a thoroughly rhetorical role.

The proper role of theory is obscured by theorists willing to take the linguistic turn as a description of social practices, but who exempt their own theoretical reconstructions from the limitations of everyday speech. For example, the analytic branch of linguistic philosophy acknowledges the primacy of language but eschews the radical implications of philosophical hermeneutics and the new rhetoric by defending a theoretical program of rigorous critique built on the new foundation stone of language. This relapse involves an assumption that language fundamentally is structured by law-like relationships subject to theoretically guided reconstruction, missing the insight that language is a dynamic, pragmatic, and lived-through medium all the way down to everyday practices and all the way back up again to

TURN]. See also *THE RECOVERY OF RHETORIC*, *supra* note 1. Jack Balkin argues along these lines in his discussion of critical legal theory.

Like any other form of ideological analysis, the critical study of topics [legal commonplaces] is potentially self-referential. It involves recognizing limitations and problems in the legal discourse we are studying. Yet the discourse in which we examine legal discourse can also be understood in terms of its own recurring topics, its own distinctive modes of problem recognition and solution. The ways we classify and criticize existing topics may therefore have their own limitations. So when we study the rhetoric of the law critically, we do not abandon topics or escape rhetoric. We do not finally engage in some more authentic or pure form or discourse that cannot itself be studied and criticized rhetorically. Nevertheless, this recognition does not make the task of critical analysis or critical reflection impossible. It merely helps us to see the conditions under which it occurs. This brings me back to my central theme: the use of the rhetorical art of invention is not a hindrance to reason but part of its *modus operandi*.

Balkin, *supra* note 182, at 223-24.

217. *Id.* at viii. Rhetorical practices are not self-deconstructing, since they involve intentional efforts to secure reasoned adherence by refashioning the prior agreements embedded in a shared tradition. The rhetoric of inquiry movement reconstructs these practices in order to explain how they develop and to foster better practices. Herbert Simons describes the positive theoretical object of the movement as follows:

the new rhetoric of inquiry should be able to *prepare the way* for wiser, more judicious judgments by scholars and others engaged in the conduct of inquiry. However open-ended such rhetoric may be, it need not be unreasonable or unempirical. However capable it may be of conceiving plausible arguments for opposing claims, it need not leave us in a state of indecision. If it cannot lay claim to fixed and immutable standards of judgment, or to formal devices by which to compel assent, it can nevertheless provide ways of engaging one's hearers, of clarifying ideas and also of rendering them plausible or probable.

Herbert A. Simons, *Introduction: The Rhetoric of Inquiry as an Intellectual Movement*, in *RHETORICAL TURN*, *supra* note 216, at 17.

sophisticated academic theorizing about these practices.²¹⁸ Taking the concept of rhetorical knowledge seriously means to reject the claim that language is a new fixed point of departure for theoretical reconstruction and instead to confront honestly the challenging implications of regarding reason in all its manifestations in practice and theory as a thoroughly pragmatic activity.²¹⁹

Joseph Margolis challenges scholars to address the radical themes of the new rhetoric by abandoning Aristotle's last-ditch effort to oppose the sophistic claim that rhetorical practices have no recourse to an invariant reality that grounds bivalent thinking.²²⁰ The analytic tradition of linguistic philosophy is a modern analogue to Aristotle's claim that dialectical arguments are distinct from lower forms of persuasion. The move to secure a role for an invariant logic of argumentation constituting the structure of language is precisely the target of the new rhetoric, which regards persuasion as the motivation of *action* within a particular historical *context*.

[T]he entire apparatus of valid argument forms . . . applied in real-world circumstances, must be inextricably intertwined with the conditions of persuasion intrinsic to a particular society's linguistic practices—in virtue of which (alone) intended reference is consensually supported, accepted, agreed upon in the absence of theoretically compelling proofs.

. . . .

All discourse and thought becomes encumbered, at a single stroke, by the "extra"-linguistic, historically contingent, socially constructed, context-ridden, inherently informal habits and practices of a community of humans. But that is the essential nerve of the "new" rhetoric.

218. Gadamer and Perelman conscientiously develop the hermeneutical unfolding and rhetorical activity of philosophy, leading them to claim authority not for their grasp of an invariant logic of thinking but for the tradition that speaks through them and other philosophers in ever-changing ways.

219. This does not mean that rhetorical practices do not share some basic features, and Perelman's new rhetoric is expressly generalist in its account of rhetorical practices. See also Paul Wangerin, *A Multidisciplinary Analysis of the Structure of Persuasive Arguments*, 16 HARV. J.L. & PUB. POL'Y 195, 204 (1993) (arguing that the structure of persuasive argument largely is field invariant but cautioning against narrow readings that fail to capture the multidimensional character of argumentation). The philosophical and empirical work to catalogue the commonplaces and lines of argumentation must always be regarded as provisional and suggestive rather than final and complete, however, due to the living character of language.

220. See Joseph Margolis, *Philosophy in the "New" Rhetoric, Rhetoric in the "New" Philosophy*, in RHETORIC, SOPHISTRY, PRAGMATISM, *supra* note 64, at 109-38.

....

Now, then, very simply put: if reference and predication cannot but be inseparable from the . . . resources of actual societies surviving, at least in large part, as a result of the contingently fortunate effects of their linguistic practices, then given the defeat of the Aristotelian conception of the relationship between the forms of argument and the force of rhetoric, the "new" rhetoric cannot be convincingly resisted.²²¹

Margolis thus links the new rhetoric with the long-suppressed challenge of the sophists, and he breaks the news none too gently to the defenders of philosophical truth: after the linguistic turn, there is no place to stand with confidence in order to elaborate a theory except within the pragmatic and social accomplishments of a living language.

The rhetoric of inquiry leads some theorists to adopt the provocative posture of devaluing the role of theory altogether, providing the opposite reaction to those who strive to maintain the special status of theory. Stanley Fish has attacked the status of theory relentlessly, arguing that the timeless debate between the strong claims to truth by philosophy and the attention to historical practices by rhetoric does not shape practices so much as reflect their ongoing operations.²²² Change occurs not through the projects implemented by a subject possessed of critical self-consciousness, but as a byproduct of the unpredictable and evolving practices about which theorists make their claim.²²³ Fish's approach has parallels in contemporary law-as-literature/law-as-narrative accounts, which present legal practice as a mode of storytelling that is not susceptible to theoretical elaboration. For

221. *Id.* at 138.

222. See STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 471-502, 501 (1989) (characterizing the debate as an unending and unresolvable "tug-of-war between two views of human life and its possibilities").

223. Fish contends that critical self-consciousness sufficient to direct the practices in which we are enmeshed is impossible. He argues that

change cannot be engineered because persuasion is a contingent rather than a formal matter. . . . One can, of course, set out to persuade someone else, but both the career and the success of that effort will be unpredictable; you can never be sure what will work, or if anything will . . .

If change cannot be engineered, neither can it be stopped.

....

The failure of critical self-consciousness is a failure without consequences since everything it would achieve—change, the undoing of the status quo, the redistribution of power and authority, the emergence of new forms of action—is already achieved by the ordinary and everyday efforts by which, in innumerable situations, large and small, each of us attempts to alter the beliefs of another.

Id. at 463-64.

example, L.H. LaRue's recent book traces the rhetorical features of judicial narration in several well-known cases in support of his argument that constitutional law must be regarded as fiction in some important sense.²²⁴ When confronting the question that naturally follows from his thesis—"well then, how do we judge which fictional accounts are good stories?"—LaRue responds with an extended description of the masterful storytelling prowess displayed in Norman Maclean's final book.

I hope that my exposition [of Maclean's book] has not made tedious that which is elegant, for I am convinced that reading Maclean can teach one more about storytelling than all of the theorizing past or future. Lawyers and judges who tell stories, which is to say, lawyers and judges, can learn much by contemplating [the techniques employed by Maclean].

. . . .

To one who might be disappointed [that I end only with a recounting of Maclean's book], I ask, "Why are you disappointed? Do you want a *theory* that distinguishes good stories from bad?"

. . . .

[The] topic of language as a whole is too rich and too open-ended to permit good theories. By analogy, I judge that the topic of storytelling in law is likewise not the sort of practice about which there can be a theory.²²⁵

Fish and LaRue find theory unavailing as against the rich rhetorical practices of law, and they regard the invocation of theory as misguided not because it is pernicious, but because it is simply irrelevant.²²⁶

The anti-theory theories of Fish and LaRue are undermined by their own rhetorical performances, however, since neither is content to leave legal practice to its own devices nor to regard practicing law as the only means of affecting these practices. Fish and LaRue both

224. L.H. LARUE, CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY 8 (1995) (summarizing his thesis "that judicial opinions are filled with 'stories' that purport to be 'factual' but that instead are 'fictional,' and furthermore, that these 'fictions' could not be eliminated without crippling the legal enterprise").

225. *Id.* at 135, 148.

226. To complete the domination of theory by practice, Fish acknowledges that the rhetorical deployment of a theory of meaning—originalist theory, for example—can be influential only if it is acknowledged as a move within the rhetorical practices under study, and never as a supra-practical guide. See Stanley Fish, *Play of Surfaces: Theory and the Law*, in LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE 297 (Gregory Leyh ed., 1992).

use a disarming rhetorical device—humility about the persuasive qualities of one's own project—to seek the adherence of their audience to their reconstructions of legal practice. The consequence of their rejection of theory is an ironic portrait of rhetorically engaged legal actors who somehow remain unaffected by the rhetorical injunctions of theory. They err by not taking seriously the idea that legal theory is a rhetorical practice and by not acknowledging that their own rhetorical efforts are theories about legal practice. The fact that LaRue wrote his book demonstrates that he regards it as more than just one story among many; he plainly regards it as a more convincing story than the received wisdom provides, a story with the potential to have consequences in the world. Although Fish correctly identifies the inevitable critical component of rhetorical practices, his effort to leave critique mysteriously and incorrigibly situated in these practices falls flat. By regarding the rhetorical claims of theoretical discourse either as one of the rhetorical resources of legal practice or as a wholly distinct academic practice, Fish misses the means by which a rhetorical claim can be about a practice without being either wholly within the practice or anchored in an extra-practice ideality. Fish and LaRue both engage legal practice *theoretically* by describing the rhetorical nature of legal practice, even as they disavow theory's overblown claim to direct, justify, or rationalize practice from without. Lacking in their accounts is a description of how a practice-grounded, postmodern theoretical critique operates as an emanation from the critical experience of everyday practices. The concept of rhetorical knowledge demands a positive account of postmodern theory as an emancipatory rhetorical practice.

Gadamer offers an interesting image to emphasize the rhetorical nature of philosophical reflection, delivering a pithy critique of the analytic tradition's effort to secure in language one last stronghold for classical theory while also rejecting the literary abandonment of philosophy. During an interview about his teaching, Gadamer noted that his classes do not appear sufficiently "philosophical" to some, but he reaffirmed the epistemic value of his multivalent approach.

GADAMER: I must add one thing: It seems that not many philosophers are attending these lectures of mine. Those who are now drawn to analytic philosophy speak of my lectures as being vague.

QUESTION: Yes, we know you have heard that before.

GADAMER: Naturally, that is also the reproach that I see in critical reviews of my written work—that I am so vague in my expression. Yet the people who write that do not realize how flattered I feel. It is not so terribly easy to speak in such a way that many ideas are awakened in a person without his being hammered on the head.

QUESTION: Do you mean that to express one's self clearly and distinctly is not necessarily the right way?

GADAMER: It may be a cultivated thing to eat with a knife and fork, but that is not the right approach in philosophy.²²⁷

The rhetoric of philosophical inquiry, like the rhetoric of legal practice, strives mightily to suppress its rhetoricity without success. The concept of rhetorical knowledge leads inevitably to the concept of the rhetoric of inquiry, thereby debunking the theorist's self-conceptions in the same way that it has debunked the lawyer's self-conceptions. This invites the literary-rhetorical-exegetical approach exemplified in Gadamer's hermeneutical philosophy, which properly can be characterized as a postmodern theory of how understanding occurs.²²⁸

2. *Postmodern Legal Theory as an Emancipatory Rhetorical Practice*

The legal critic who chooses to write in academic journals performs a task different from the practicing lawyer who writes legal arguments to be filed in court. Even if the traditional scholarly practice of reporting on doctrinal developments can be characterized as the preparation of a "generic" brief for use by practicing lawyers who encounter the point in question, the role of the legal critic who challenges existing doctrine or otherwise engages in more theoretical endeavors remains unclear. Theoretical reflection on practices seems to be a fundamental part of the human experience, but understanding the epistemic potential of theoretical critique is made more difficult by the postmodern disavowal of strong theory. In this environment of uncertainty, the notion of the "rhetoric of inquiry" provides a starting point for clarifying the role of theory by emphasizing that legal theorists seek rhetorical knowledge about the practice of law. Theory is a productive dimension of legal studies, not because it provides a rationalistic escape from legal practice, but because it operates critically across the fragmented discourse of legal practice to foster rhetorical knowledge.

227. GADAMER, *APPLIED HERMENEUTICS*, *supra* note 19, at 7.

228. See Mootz, *Postmodern World*, *supra* note 6, at 293-98.

Thomas Farrell and Calvin Schrag proved reliable in developing the concept of rhetorical knowledge, and they offer additional valuable insight into the relationship between critical theory and rhetorical knowledge. Farrell acknowledges the paradox arising from the recognition that rhetorical engagement is the only means for reflecting on the sustaining power of public institutions to foster civic (that is, rhetorical) life but also that any such rhetorical engagement always already reflects the institutions that it seeks to assess.²²⁹ Farrell elaborates a rhetorical criticism by reading Habermas' strongest theoretical claims back into Habermas' earlier critique of the transformation of the modern public sphere in which validity claims actually are tested.²³⁰ Rhetorical criticism—the assessment of particular rhetorical events—is enriched by a wider theoretical critique of how public institutions are complicit in both creating and limiting the public space for rhetorical engagement, which in turn is informed only by the actual rhetorical practices of a given society.²³¹ Theory is not just practice dressed up with jargon; it is inter-practice argumentation about the field in which the practice plays itself out.

In similar fashion, Schrag argues that philosophical theorizing can disengage us from the immediacy of our rhetorical involvements sufficiently to foster insight, even though it cannot “put us in touch with

229. See FARRELL, *supra* note 98, at 231 (“The question is, may rhetoric be *liberating*? May it, in other words, put us in touch with a range of issues and experience outside our normalized, received opinion, our *doxa*? And, paradoxically, can it do this *through* received opinion and the traditional resources of rhetoric?”).

230. See *id.* at 197-202.

231. Farrell sets out “to show that there is no contradiction between viewing rhetoric as a normalized, institutional practice and admitting within it the possibility of new orders of realization.” *Id.* at 83. Critique is always in the midst of ongoing practices, leading Farrell to conclude that reason “involves facing up to what we have done, picking up the pieces, and moving on.” *Id.* at 17. These insights guide his persuasive critique of Habermas' universal pragmatics by drawing out the latent ambivalence in Habermas' more recent work.

We find Habermas conceding, whether by accident or design, that a domain of ideality may emerge from practice, in addition to being imposed on it. . . . Rhetoric is the primary—indeed, the *only*—humane manner for an argumentative culture to sustain public institutions that reflect on themselves, that learn, so to speak, from their own history. The more difficult question, of course, is how rhetoric may do this in any normatively reliable way, given the severe difficulties and distortions in many of these institutions.

Id. at 213. Farrell readily concedes that an acontextual theory cannot be pulled off the shelf and pressed into service as a standard against which to test social institutions, but he reaffirms the possibilities opened by a critically motivated rhetorical reconception of practices. Offering Betty Friedan's *The Feminine Mystique* as one example of a successful rhetorical claim that linked theory and practice by means of an incisive criticism, he concludes “that the moment of truth in the best rhetoric comes when a *larger vision is wedded clearly to both the critical judgment and the ordinary convictions of others, all at the same time.*” *Id.* at 267.

the bottom of being or the ground of all meaning.”²³² Under this more modest conception, reflection involves “not a move to another standpoint but ways of moving about in our everyday engagements” in a rational effort to reconfigure them.²³³ The theorist is not freed of rhetorical practices when she criticizes legal practice, but she is freed of the specific contours of legal practice by virtue of the rhetorical resources made available by the confluence of multiple human practices and discourses.²³⁴ Farrell and Schrag both emphasize that theory is a rhetorical engagement *across* a variety of practices rather than an idealization that exists *outside* of practice.

Hans Kögler develops a similar account of political theory on the basis of Gadamer’s hermeneutics, although surprisingly he does not draw from rhetorical theory.²³⁵ Kögler agrees with Gadamer that all

232. SCHRAG, COMMUNICATIVE PRAXIS, *supra* note 158, at 4.

233. *Id.* at 53. Schrag explains that critical efforts emerge from the interplay of our collective practices in which we interpret, act, and express. No practice stands alone, and the multiplicity of practices provides a shifting repertoire of resources for reassessing a particular practice such as law *as if* from the outside.

Transversal communication possesses the resources for transhistorical assessment, evaluation, and critique without the problematic appeals to atemporal essences or transcendental conditions Socio-historical critique may indeed remain *context-dependent*, but this does not preclude an assessment, refiguration, or indeed overturn of different localized contexts as one discerns the play between and among them. Every context-dependency is situated within a wider context interdependency.

SCHRAG, POSTMODERN CHALLENGE, *supra* note 158, at 173.

234. Raymie McKerrow offers a similar account of rhetorical criticism by comparing the decentered rhetorical critic to the decentered rhetor in the public square, arguing that both might evidence reasonable developments of the traditions they take up.

The critic engages in critique not as a centered subject originating thought but as a contributor to the universe of discourse. As inventors of texts, the critic’s role is to represent texts from a collection of fragmentary episodes. . . . The goal in this process is not to produce a master text encompassing all known and possible conditions of its making. Rather, the goal is to pull together those fragments whose intersection in real lives has meaning for social actors—meaning that confirms them as either subjects empowered to become citizens or social actors with a potential to enact new relations of power. As such, the invented text functions to enable historicized subjects to alter the conditions of their lived experience.

. . . .
For social actors embedded in a set of social practices that define as they constrain, a critique of freedom illuminates the possibilities of a new existence. The social actor, in this latter sense, has influence over those considerations. To care for oneself includes the remaking of social practices within which one is inscribed.

Raymie E. McKerrow, *Critical Rhetoric and the Possibility of the Subject*, in THE CRITICAL TURN: RHETORIC AND PHILOSOPHY IN POSTMODERN DISCOURSE 51, 62-65 (Ian Angus & Lenore Langsdorf eds., 1993). For McKerrow, critical assessments of rhetorical practices not only are possible in the postmodern world, but they are an expression of the sense of self that remains after the deconstruction of the insular modernist ego. *Id.* at 64-65.

235. See KÖGLER, *supra* note 132. Kögler corrects what he considers to be Gadamer’s overly idealistic hermeneutic ontology with a critical theory of social power drawn from the work of Michel Foucault, but his emendation of Gadamer is quite close to the result achieved in this Article by supplementing Gadamer’s ontology with rhetorical theory.

understanding, including theoretical reconstructions, are rooted in preunderstanding, but he conceives preunderstanding as the basis from which dialogic encounters proceed rather than a pre-existing linguistic unity that anticipates consensus and assimilation.²³⁶ The political theorist cannot escape her preunderstanding and achieve a god's eye view of the symbolic structures of communication; nevertheless, critical distance emerges in the "break with the immediate self-understanding" that occurs "through the hermeneutic experience of other epochs and foreign cultures"²³⁷ in dialogue. Kögler emphasizes that in "critical interpretation, the reconstruction of the other and of her symbolic background serves as a critical foil from which to become, as it were, one's own other,"²³⁸ and "that the critical-hermeneutic task [of the theorist] is to map the conceptual and methodological space in which such an interpretive practice of critical self-reflection can be most completely and productively achieved."²³⁹ While Kögler's fascination with methodological inquiry into social power structures betrays a Habermasian-inspired rationalism, his project is best conceived as providing the warrant for a theoretical critique and reconstruction of the institutionally and symbolically structured arena within which social actors seek rhetorical knowledge.²⁴⁰ Theorists do not provide answers from "outside" rhetorical engagement, but instead analyze the possibilities for rhetorical engagement by cultivating a critical perspective on the social practices that shape these engagements.

Legal theory, then, is an inquiry seeking rhetorical knowledge about the (rhetorical) practice of law. This inquiry proceeds in a number of different ways, but it can be broken down loosely into

236. See *id.* at 84.

237. *Id.* at 245.

An important alternative to the Gadamerian account here is the hermeneutically and dialogically possible recognition of a plurality of views, forms of life, and cultural projections of meaning. . . . Although this hermeneutic process may not ultimately lead to a single and newly shared view of what is true, the possibilities represented in alterity are nevertheless capable of challenging the structure of our customary assumptions and praxis.

Id. at 148-49.

238. *Id.* at 252. The goal of critical interpretation "is a process of radical self-distanciation, one in which the symbolic assumptions of the other are understood in ways that allow us radically to reconsider our own belief system." *Id.* at 169.

239. *Id.* at 254. He thus proposes a "systematic use of the methodological fact of hermeneutic unfamiliarity." *Id.* at 229.

240. Kögler's thesis that social actors "lose" themselves in the confrontation with the other, thereby gaining a critical perspective on their own situation, fits well with my description of rhetorical engagement as invention.

three different types of theory. *Doctrinal theory* reconfigures some portion of existing legal doctrine in order to provide guidance to decision makers and to render practice more coherent and predictable. This effort involves more than mindlessly cataloguing and pigeonholing case precedents into established frameworks; it amounts to claims about the practice which seek to convince others of the utility of accepting the new characterization. Consequently, it has both descriptive and normative features. Doctrinal theory is distinguished from legal practice because it embraces a set of rhetorical tools beyond those defined by the pragmatics and institutional setting of the practice, but it is closely related to the language of everyday practice.

An example of doctrinal theory is Lon Fuller's justly famous article articulating the underlying interests addressed by courts awarding damages for breach of contract.²⁴¹ Fuller was not playing the role of a lawyer arguing that his client should receive a certain level of damages based on precedent; instead, he wrote as an academic to demonstrate that the self-understanding displayed in case precedents obscured the interests that actually were being taken into account when courts fashioned the measure of damages in particular cases. Fuller's theory about contract damages is not presented as a scientific finding about a certain factual database but rather is argued as a claim about existing practice that seeks to be a persuasive guide for clarifying and improving future practice. The intended audience of doctrinal theory is lawyers and judges: the former to provide them with the understanding to make more persuasive claims in practice and the latter to provide them with a better vocabulary for stating the law. Doctrinal theory is not just spinning a conceptual web of normative laws that purportedly govern the practice of law. Although such exercises can be intellectually challenging, they are far too abstracted from the rhetorical grip on practices that gives good doctrinal theory its power. Doctrinal theory inventively surveys existing representations of legal practice and the activity of lawyering in order to fashion a better representation.²⁴²

A second type of theory is *critical theory*, which encompasses the theorist's effort to move beyond the doctrinal level of legal discourse in order to address the social, economic, and institutional patterns that shape legal discourse through linguistic and non-linguistic means.

241. Lon L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages* (pts. 1 & 2), 46 YALE L.J. 52, 373 (1936).

242. See, e.g., Karl N. Llewellyn, *On Our Case-Law of Contract: Offer and Acceptance*, 40 YALE L.J. 1 (1938).

Critical theory differs from doctrinal theory because it does not seek to clarify or develop doctrine but rather to situate doctrine within broader practices that must be clarified and then challenged from a variety of perspectives. Critical theory generally is historically oriented and interdisciplinary in scope, since it reconstructs and situates the seemingly self-contained dialogue of legal doctrine in a wider historical movement that generates themes and topics beyond those that find expression within legal dogmatics. One example of critical theory is Jay Feinman's reconstruction of the origins of the "at will" default rule regarding the duration of employment contracts.²⁴³ Feinman links historical inquiry into the emergence and proliferation of the doctrine in nineteenth-century America to an understanding of economic, social, and political developments that shaped, directly or indirectly, this feature of legal practice.²⁴⁴ Critical theory thus represents a suspension of the "ordinary science" of legal practice to revive questions that never have been dealt with adequately or have been placed beyond question for some time.

Critical intervention does not issue from a stable normative realm outside legal practice but rather emerges from the cross-practice inventions that result from interdisciplinary inquiry. A critical theory might be closely linked with a doctrinal theory, in which case its interdisciplinarity is suppressed in favor of fostering legal reform,²⁴⁵ or a critical theory might be more closely tied to a philosophical theory, in which case points of legal doctrine primarily will be discussed as

243. Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

244. See *id.* at 129-35. One historian has challenged Feinman's "orthodox" reading that the "at will" rule suddenly was adopted by courts amidst the economic conditions of the nineteenth century, arguing that the "at will" rule consistently was followed due to economic conditions that differentiated America from England as far back as the early colonial period. See Deborah A. Ballam, *Exploding the Original Myth Regarding Employment-at-Will: The True Origins of the Doctrine*, 17 BERKELEY J. EMPLOYMENT & LAB. L. 91 (1996); Deborah A. Ballam, *The Traditional View on the Origins of the Employment-at-Will Doctrine: Myth or Reality?*, 33 AM. BUS. L.J. 1 (1995). Ballam's argument represents a competing critical theory, engaged in a rhetorical confrontation with Feinman's work in an attempt to secure the adherence of her (academic) audience.

245. See, e.g., Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989). Abrams explicitly locates her work within contemporary feminist theory, *id.* at 1185-97, but her focus is on the specific context of the workplace and more specifically the problems arising when courts define sexual harassment without taking into account how a "reasonable woman" would understand and react to certain behavior, *id.* at 1197-1220. Abrams's critical theory is then more readily accommodated to the development of legal doctrine by courts. See, e.g., *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (citing Abrams and adopting the "reasonable woman" standard for sexual harassment litigation).

examples of a wider thesis.²⁴⁶ The intended audience for a critical theory largely determines its placement on this continuum, but the audience generally is composed of a small subset of practicing lawyers and judges for whom it might serve as a persuasive motivation to reargue basic features of the doctrinal landscape along with other academics who might continue, revise, or reject the project as part of an ongoing critical effort. Critical theory affects legal practice when a rough consensus forms among prominent critics and translates to a new orientation or attitude among lawyers and judges. For example, it is a commonplace in employment law cases for courts to historicize classical case law doctrine as a representation of a bygone social and economic structure, in part due to the efforts by Feinman and others to demystify the “at will” rule.²⁴⁷

Finally, *philosophical theory* represents claims about the nature of legal practice in the widest sense of explaining the practice of law *as a whole*. Traditionally, this involves a conceptual analysis that clarifies what we designate by the term “law” and develops the general features of a legal system. The premier example of a traditional philosophical theory in this century is H.L.A. Hart’s exposition of the concept of law.²⁴⁸ More recent works rooted firmly in the hermeneutic turn and the rise of postmodern thinking eschew conceptual analysis in favor of a phenomenological account of the epistemic dimension of law, with the goal being to capture the experience of legal actors (e.g., describing the experience of “legal reasoning” and assertions of “legal authority”) rather than to clarify conceptual terminology. This

246. See, e.g., Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1984). Although more than 100 pages in length, Unger’s article does not discuss a single judicial opinion or statute but rather discusses broad principles and concepts. For example, he utilizes contract doctrine to exemplify his broader critical project of debunking objectivism and formalism, attempting to capture all of contract doctrine within a wider, “single, cohesive set of ideas.” *Id.* at 617.

247. See, e.g., *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 551 (N.H. 1974) (“The law governing the relations between employer and employee has evolved over the years to reflect changing legal, social and economic conditions.”). *Monge* was decided before Feinman’s article was published, but it cited other leading academic criticisms of the at will rule and it in turn was cited by Feinman as an example of the contemporary stresses on the rule that suggested the need for an understanding of its origins. See Feinman, *supra* note 236, at 118 n.2. Several courts have explicitly adopted Feinman’s socio-historical characterization of the at will rule and its development. See, e.g., *Magnan v. Anaconda Indus., Inc.*, 479 A.2d 781, 783-84 (Conn. 1984); *Shearin v. E. F. Hutton Group, Inc.*, 652 A.2d 578, 585 (Del. Ch. 1994); *Darlington v. General Elec.*, 504 A.2d 306, 309 (Pa. Super. Ct. 1986).

248. H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994) (1961).

paper propounds such a philosophical theory, but more notable examples also come to mind.²⁴⁹ Philosophical theory is only tangentially connected to day-to-day legal practice, and many articles (such as this one) make reference to legal doctrine only to supply a clarifying example in the course of a theoretical reconstruction. Philosophical theory often is more closely related to critical theory, since a philosophical orientation might yield critical insight into features of legal practice, but it also can connect with doctrinal theory and legal practice.²⁵⁰ The storytelling/narrative “fad” that swept through the academy has undoubtedly effected a shift in the orientation and vocabulary of professors and casebook writers, and it may well slowly filter into general consciousness and partially shape some doctrinal elaboration.²⁵¹

249. Ronald Dworkin generally adopts an interpretivist posture in his attempt to steer a course between the conceptual analysis dominant in both positivist and natural law theories and the vacuity of an “anti-theory” pragmatist approach. See RONALD DWORKIN, *LAW'S EMPIRE* (1986). Dworkin's work proves frustrating because he glides over the difficult philosophical issues raised by his discussion, but his rhetorical approach has made his writing accessible not just to practicing lawyers but also to the citizenry at large. Consequently, Dworkin's body of work would be an interesting focus for a hermeneutical-rhetorical consideration of the role of audience and the relationship of theory and practice.

250. See, e.g., Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161 (1965), in which Corbin propounded the “context” theory of meaning in the course of arguing against traditional applications of the parol evidence rule. Corbin criticized a court for feeling constrained by the “semantic stone wall” of plain textual meaning and argued that the meaning of words depends on “verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges).” *Id.* at 187. Corbin then made a bold theoretical statement: “This is true whether the words are in a statute, a contract, a novel by Henry James, or a poem by Robert Browning. A word has no meaning apart from these factors; much less does it have an objective meaning, one true meaning.” *Id.* Corbin's assertions, premised on his experience rather than fancy linguistic philosophy, are briefly stated before offering a critique of the traditional parol evidence rule. It is fair to characterize the article as a work of philosophical theory regarding the nature of legal (and non-legal) language that is closely tied to ongoing doctrinal arguments in legal practice and whose intended audience was practicing lawyers and judges as much as legal academics.

251. An interesting, even if highly aberrational, example can be found in a recent Sentencing Memorandum by Senior District Judge Jack Weinstein. Weinstein begins by declaring that his Memorandum “is largely devoted to explaining how a sentencing judge—and a trier of fact generally—reaches a decision. The case presents an opportunity to observe, explain, and discuss forensic decision-making.” *United States v. Shonubi*, 895 F. Supp. 460, 464 (E.D.N.Y. 1995). Judge Weinstein acknowledges that “storytelling” techniques figure into the trier's method of reaching a conclusion on the basis of proffered items of evidence, *id.* at 487-88, and he assesses the record, in part, as a story, *id.* at 490. Judge Weinstein was prompted to draft an extensive and exhaustive explanation of his decisionmaking process when the sentence originally imposed by him was vacated for lack of an evidentiary basis. See *United States v. Shonubi*, 998 F.2d 84 (2d Cir. 1993). The Court of Appeals had held that Judge Weinstein improperly determined that a drug smuggler's sentence could be based on the quantity of drugs discovered when the smuggler was arrested multiplied by the number of smuggling trips taken before he was captured. After

It is helpful to explore the rhetorical dimension of each of these theoretical practices and to reaffirm the usefulness of each mode of theorizing. In no case does the theorist escape from rhetorical practice to the high ground of theoretical laws, but neither is the theorist *just* practicing law nor *only* engaging in a distinct academic practice. Legal theory is the rhetorical practice that opens legal practice to other practices and discourses, and so the linkage of legal theory and legal practice remains indissoluble even though the two never collapse into a unitary practice. It would be a mistake to construct a hierarchy of relationships—e.g., practice is “real,” doctrinal theory less so, all the way “up” to “abstract” philosophical theory—because these modalities of theory are interwoven in a continuous fabric of argumentative deliberation that has intrinsic connections with legal practice. It is not the case that we need only leave practice to its own devices to foster justice because the rhetorical challenges and clarifications that foster critical invention in practice would be anemic without a vigorous theoretical discourse feeding the rhetorical dynamism of practice.

It should be clear that legal theory conceived as an expression of rhetorical knowledge is differentiated from the model of scientific theory. Although legal theorizing often invokes logical and empirical support within the course of argumentation, legal theory never will achieve the status of a scientific theory with strong claims to representational and predictive values. For example, the law and economics movement during the past several decades can best be understood as a theoretical effort to deliver rhetorical knowledge rather than as an attempt to ground legal theory in scientific theory. Law and economics is a conjunction of all three types of legal theory, since it includes descriptive accounts of a purported internal logic of doctrinal development, critical accounts of legal discourse from more broad-based social understandings of political economy, and (less so) philosophical accounts of the nature of human interaction and communication. The empirical economic and sociological claims prominent in this theorizing represent an inter-practice rhetorical engagement rather than

Judge Weinstein reimposed the same sentence and filed his lengthy justification, the Court of Appeals again vacated the sentence, but not before conceding (tongue in cheek?) that “his comprehensive opinion is a valuable addition to the legal literature on the subject of evidence in particular and judicial decisionmaking in general.” *United States v. Shonubi*, 103 F. 3d 1085, 1092 (2d Cir. 1997). The jurisprudential implications of this exchange are none too small, including: how does a higher court review the trial judge’s “story” about the defendant’s “story,” and how can a trial judge be honest about the nature of his decisionmaking process and remain within the framework of legal practice as it is traditionally understood?

the subjugation of legal practice by economic "science."²⁵² The rhetorical claims in favor of efficiency and rational allocation undoubtedly have had a strong influence on legal practice, but this influence is secured rhetorically no less than the influence of conceptions like democracy, even though the economic concepts employed lay claim to scientific-empirical status. Legal theory is not reducible to the more specialized mode of reasoning employed in academic economic theory, but economic theory plainly plays a role in the types of legal theory described above.

By refusing to be co-opted by the grandiose claims of scientific rationality, legal theorists are not consigned to unreasoning speculations divorced from empirical claims and objective knowledge. The rhetorical nature of legal theory does not mean that it is a subjective undertaking, any more than the rhetorical nature of legal practice means that legal reasoning or adjudication are subjective activities. Theorists can lay claim to providing a better description or critique of legal practice even as they acknowledge the rhetorical dimension of their activity. Of course, if one accepts the philosophical theory outlined in this paper, a theorist will be persuasive because, and to the extent, she explicitly embraces the rhetorical character of her theory. The urge to overreach the rhetorical possibilities of theory is strong and often is manifested by a theorist's grandiose effort to merge philosophical, critical, and doctrinal theory into a compelling argument.²⁵³

252. Thus, one would not confuse judicial opinions written by Richard Posner with economic scholarship, nor would one even confuse his books with economic scholarship. Posner is a legal theorist and judge who utilizes doctrinal theory and critical theory that relies on economic claims deployed within broader argumentation. The scare quotes around "science" in the text are intended to signal the obvious: much of economics is rhetorically-secured rather than logical-empirical. See generally DONALD N. McCLOSKEY, *IF YOU'RE SO SMART: THE NARRATIVE OF ECONOMIC EXPERTISE* (1990); DONALD N. McCLOSKEY, *THE RHETORIC OF ECONOMICS* (1985); McCloskey, *supra* note 140. This likely explains why economics has found such a strong connection with legal theory and even legal practice. Economics, thus construed, lends important insights to legal theory. See Paul J. Heald, *Economics as One of the Humanities: An Ecumenical Response to Weisberg, West, and White*, 4 S. CAL. INTERDISC. L.J. 293, 305 (1995) ("Some economists claim that they have put together the whole puzzle. They are wrong, of course. But a condemnation of extremist rhetoric does not demand the condemnation of economic discourse itself any more than listening to Jimmy Swaggert should lead us to condemn religion or listening to the Butthole Surfers should lead us to condemn music.").

253. Peter Goodrich's sophisticated interdisciplinary theory falls victim to this problem. Although his erudite scholarship is extremely thought-provoking on many fronts, in the end it appears too much for him to integrate his postmodern philosophical orientation, critical deconstructions of existing doctrine, and doctrinal analysis into a narrative that purports to unravel ideological formations by seeing through history. Goodrich's historical readings would be more persuasive if couched in the more circumspect and inviting approach taken by Steven Mailloux and described in the text following this note.

The literary theorist Steven Mailloux has elaborated a self-reflexive definition of rhetorical theory that upholds the possibility of having an emancipatory effect without presuming an eschatological dialectic or an indubitable ground of critique.

Mailloux wants to have his anti-foundationalism and his theory too, since he seeks to incorporate the “philosophical insights of neopragmatism without falling into a relativist despair or political quietism.”²⁵⁴ Mailloux argues that “exploring realms of practice, including theory itself, remains not only possible but imperative” in the absence of foundational guarantees and that “there is a role for theory redefined: that, in fact, the theorizing *is* the process of historicizing interpretive practices.”²⁵⁵ Noting the intersection of Gadamer’s philosophical hermeneutics and Perelman’s new rhetoric in the concept of traditionary force,²⁵⁶ Mailloux argues that theory involves a historical project in several senses. Theory is the recovery of the “historical sets of topics, arguments, tropes, ideologies, and so forth which determine how texts are established as meaningful through rhetorical exchanges” by describing “the historical circumstances of various rhetorical exchanges,” but simultaneously it must also locate “itself within, not above, its own history” by reconstructing its “agonistic relationship to other theories.”²⁵⁷ Applied to the legal context, a critical theory would be thoroughly rhetorical only if it situated itself within the realm of critical theories as a means of orienting itself to a persuasive historical reconstruction of a setting within which legal rhetorics play out.²⁵⁸

And so, to Professor LaRue’s rebuke—“Do you want a *theory* that distinguishes good stories from bad”—one might respond, “yes and no.” The hermeneutical and rhetorical dimension of human understanding precludes a master theory that can regulate rhetorical exchanges according to criteria that remain above question. But it is

254. Susan C. Jarratt, *In Excess: Radical Extensions of Neopragmatism*, in RHETORIC, SOPHISTRY, PRAGMATISM, *supra* note 64, at 206, 208.

255. *Id.* at 207. See MAILLOUX, *supra* note 130, at x, 148 (contending that under his conception of “rhetorical hermeneutics the traditional distinction between doing theory and doing history breaks down. . . . Rhetorical histories thus replace foundationalist theory.”).

256. See MAILLOUX, *supra* note 130, at 17 n.24.

257. *Id.* at 167, 148, 166.

258. I regard Kathryn Abrams’s argument for a “reasonable woman” standard of assessing sexual harassment under Title VII to be a good example of a thoroughly rhetorical critical theory. See Abrams, *supra* note 245. This assessment is strengthened by the fact that Abrams subsequently has expressed misgivings about her theoretical conclusions and their implementation by courts. See Kathryn Abrams, *Social Construction, Roving Biologism, and Reasonable Women*, 41 DEPAUL L. REV. 1021 (1992).

equally a mistake to misunderstand the significance that theorizing holds for the practice of law. Theory and practice are distinguishable, but not distinct. Rhetorical knowledge is sought in ongoing practical and theoretical engagements that always place demands on the lawyer, judge, or theorist by posing *questions*.²⁵⁹ One can hardly imagine the law without natural law, legal positivism, legal realism, critical theory (including feminism and critical race theory), law and economics, or pragmatism. To deride these theoretical projects as just stories is to undervalue the power of rhetorical knowledge. To deride these theoretical projects as stories entirely distinct from the practice of law is to undervalue the rhetorical openness of the practice of law.

3. *A Research Agenda to Facilitate Rhetorical Knowledge*

I propose to clarify Mailloux's description by recasting it in terms of the three types of legal theory identified above. A multi-faceted but integrated legal theory in the sense proposed by Mailloux might be comprised of the following projects.²⁶⁰ Philosophical legal theory would take account of the rhetorical, hermeneutical, deconstructive, and linguistic features of the communicative exchanges comprising legal practice, thereby developing an account of the capabilities that enable legal practice to move forward. Critical legal theory would dislodge doctrine from its ethereal conceptual realm and resituate it in the institutional and cultural settings that serve as the forum for the communicative possibilities identified in philosophical theory, thereby exposing how rhetorical capabilities are facilitated and hindered in practice and tracing the effects of institutional influences on the actions of legal actors. Doctrinal legal theory would move within doctrinal ambiguities and contradictions to create opportunities for new deployments of commonplaces in response to changing needs and conceptions. There is no earth-shaking revelation in this account, but if these projects coalesce as part of a wider rhetorical project of theorizing about law, they will maximize their persuasive power and provide impetus for change.

259. Gadamer places particular emphasis on hermeneutical understanding always involving the response to a question and the posing of a question seeking a response. GADAMER, *supra* note 4, at 362-79, 362 ("It is clear that the structure of the question is implicit in all experience.").

260. The following description is intended to be broad and inclusive but obviously is only one of many broader characterizations of an appropriate course for legal theory. Of course, it is rare for a single theorist to provide a historical reconstruction and persuasive argument that encompasses all three types of theory simultaneously, and so what follows should be viewed as an orientation from which scholars might pursue more narrowly tailored inquiries.

Gadamer and Perelman both make “openness to reconsideration” a hallmark of their philosophies, and this maxim serves as the only normative guide that philosophical theory can provide to practitioners and to theorists. Hermeneutical openness is a confused notion that does not lead to logically deduced prescriptions, especially when the ideal of openness is informed by an understanding of rhetorical activity, but it serves as a theoretical commonplace that might prove to be productive for the foreseeable future. Theorists can translate the philosophical norm of hermeneutical openness (which is subject to further elaboration by means of philosophical theory) into a research agenda for continued critical theory and doctrinal theory. This agenda does not require a completely new form of scholarship but rather would provide a new context and guiding force to disparate scholarly endeavors already underway, promising to deliver the elusive and much-sought-after synthesis of theoretical discourse. Ed Rubin most recently has proposed a new paradigm for scholarly discourse, and so I will use his proposal as a point of contrast from which to explore the potential that the concept of rhetorical knowledge holds for defining a new research agenda.

Rubin argues that a commitment to the “microanalysis of institutions” might provide sufficient “common ground” to overcome the current “conceptual disarray of legal scholarship,” much in the same manner that the Legal Process synthesis was able to overcome the unsettling effects of Legal Realism.²⁶¹ Rubin demonstrates that both Law and Economics and contemporary critical theory (especially “outsider” scholarship) have preserved some of the core tenets of Legal Process, even as they speak past each other. “They both are concerned with practical problems of governance, they both focus on the relative effectiveness of institutions in solving these problems, and they both display a particular concern with the judiciary and with the mechanism of legal rights.”²⁶² Admitting that the political motives of the adherents of both perspectives widely diverge, Rubin nevertheless contends that a synthesis on the level of methodology may be possible because the underlying disciplines that inform these schools of legal theory—economics and critical sociology—have begun to converge on institutional analysis as a method of inquiry.²⁶³ Rubin goes on to

261. Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1393-94 (1996).

262. *Id.* at 1411.

263. *Id.* at 1412-13.

paint a fanciful picture of the substantive features of such a new synthesis, however, when he suggests that the debate over the competing norms of efficiency and social justice would be a productive focal point for the assessment of public institutions, since the new synthesis would mandate a broad and inclusive representation of all views in the debate.²⁶⁴ The problem with Rubin's account is that it lacks any justification for, or description of, this broadly inclusive debate that would address specific instances of the question: "how much justice should be purchased at the cost of how much efficiency?"²⁶⁵

The concept of rhetorical knowledge supplies a necessary emendation of Rubin's attempt to fashion a new synthesis. Philosophical elucidation of the rhetorical knowledge at work in legal practice and legal theory provides the backing for the claim that open argumentation over conflicting values is the appropriate methodology for scholarly inquiry. Moreover, this philosophical orientation ensures that no theorist labors under the mistaken impression that there is a fixed optimum balance of these incommensurable values, reinforcing the thesis that a vibrant rhetorical practice is the end rather than simply the methodology of inquiry. In some respects the concept of rhetorical knowledge only renders the assumptions of Rubin's argument explicit, but important clarifications also follow from this explicit grounding.

Gadamer has long been challenged by his critics to attend more to the institutional and cultural setting of interpretative activities, and philosophers such as Georgia Warnke have pursued this inquiry without relapsing into Habermasian grand theory. The new rhetoric often has found its disciplinary home in departments of communication studies, with the result that scholars such as Thomas Farrell have pursued the new rhetoric with a focus on the institutional settings of public rhetorical engagements. In this intellectual environment it should be plain that the concept of rhetorical knowledge invites precisely the focus on the "microanalysis of institutions" that Rubin sees as a unifying theme of contemporary scholarship, but it does so in a manner that provides more concentrated guidance.

Legal institutions can and should be tested against the criterion of facilitating rhetorical knowledge. The resulting inquiry would consist

264. *See id.* at 1429-30.

265. *Id.* at 1432. Curiously, this framing of the question exhibits a thoroughly economic approach to the clash of values. Rubin apparently credits the goal of achieving an efficient trade-off between achieving social justice and maximizing economic efficiency.

of an interplay between participants in the legal system arguing that their claims are receiving insufficient attention and legal theorists arguing about the capacity for legal institutions to address competing claims successfully. Rubin suggests that the debate over mandated access to banking services in poor communities serves as an example of an issue that is better addressed under the rubric of a microanalysis of institutions, arguing that practical analyses of how various proposals would play out in the real world will clarify the inherent trade-off between social justice and economic efficiency.²⁶⁶ But this manner of synthesis begins by accepting relatively stagnant perspectives that must be integrated in a pluralistic solution to the problem of community banking—precisely the type of substantive compromise that increasingly seems implausible, notwithstanding the shared focus on the microanalysis of institutions. By developing the concept of rhetorical knowledge as the starting point of theoretical inquiry, legal theorists can eschew the urge to synthesize their work in favor of orienting it toward a continual self-reflexive mode of challenges and argumentation.

Working from the concept of rhetorical knowledge, critical legal theorists should track the rhetorical constructions embodied in Law and Economics and Critical Race Theory as potentially fruitful inventions that can always be challenged and interrogated, both internally and by other discourses. The purpose of legal theory is not to reach consensus by fashioning a compromise between views but rather to foster interdisciplinary dialogue that unsettles the (sometimes) unproductive commonplaces that have evolved in each school of thought. A doctrinal theorist should elaborate these themes by exploring the complex rhetorical devices at work in legislative debates, regulatory rulemaking, and judicial lawmaking, thereby uncovering the doctrinal tensions that invite inventive responses in light of changing circumstances. A unified research agenda should not be purchased at the cost of settled scale of values; it should be manifested in the effort to uncover previously suppressed assumptions in the process of revisiting the hierarchy of values implicit in legal practice at any given time.

A microanalysis of legal institutions informed by the concept of rhetorical knowledge would not pursue a dubious cost-benefit analysis of incommensurable values but rather would seek to render rhetorical practices relatively more transparent and therefore subject to more

266. *See id.* at 1430-33.

vigorous reassessment. Consider a simple problem within contemporary contract law doctrine: the ubiquitous use of standard form contracts that rarely are read, not to mention understood, by the parties purportedly bound by them. An array of doctrinal topics (including the "duty to read," parol evidence rule, and defense of mistake) connect with more general principles (including the modified-objective theory of interpretation, the need for certain and predictable relational obligations, and the concern for overreaching by more sophisticated parties) in a variety of contexts (the sale of insurance policies, routine transactions with car repair shops, and the sale of supplies by one business to another) to raise this problem as an issue requiring resolution. A theoretical reconstruction that is too specific would lose sight of the degree to which the rhetoric of contract law writ large figures into the specific contextual rules of dealing with form contracts, but a grand theory of the underlying principles of contract law misses the variety of responses taken by legislatures, regulators, and courts in these different contexts. This project necessarily would bring a wide range of rhetorical claims within its scope, from linguistic analyses of how clear the meaning of an insurance policy is for a speaker having average native competence in the language to a philosophical inquiry into the nature of interpretation. The principal question would be how social and legal institutions facilitate the generation of rhetorical knowledge about competing claims as to whether persons should be deemed contractually bound under certain circumstances. The factors to be balanced, and not just the balancing itself, are thrown open to question by this reorientation.

It is not difficult to reconceive much of contemporary legal theory in terms of this broad description of an agenda for research informed by the theory of rhetorical knowledge. Perhaps the most pressing need in legal theory is to develop a sophisticated account of the dynamic conceptual structure of legal argumentation practiced by lawyers and judges and a corresponding account of the conceptual structure of argumentation practiced by legal theorists. Perelman's effort to catalogue the principal argumentation forms is being continually refined and extended by rhetorical scholars.²⁶⁷ These investigations may provide extremely useful guidance that will gird a new description of legal theory that comports with the postmodern account of

267. Recent additions to the literature include VAN EEMEREN ET AL., *supra* note 52, and WALTON, *supra* note 53. In the legal context, see Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923 (1996).

rhetorical knowledge that I have constructed based on Gadamer's philosophical hermeneutics and Perelman's new rhetoric.

CONCLUSION: JOINING GADAMER AND PERELMAN IN DIALOGUE

How do I know what I think till I see what I say, somebody asks, kidding the Philistines. But I can't think the question so stupid. How *do* I know what I think unless I have seen what I say?

Wallace Stegner²⁶⁸

I conclude that we must join Gadamer and Perelman in dialogue, an injunction that can be understood in several different ways. In one sense, the phrase expresses the claim that we can clarify the nature of rhetorical knowledge by joining together the philosophical investigations of Gadamer and Perelman. Combining the insights of philosophical hermeneutics and the new rhetoric leads to a more persuasive account of rhetorical knowledge by emphasizing key features of each approach that otherwise remain submerged. The critical dimension of hermeneutical understanding is underscored by Gadamer's focus on the inventiveness of conversational discourse, and the critical bite of rhetorical inquiry emerges from Perelman's careful refusal to collapse his inquiry into just a methodology of rhetorical techniques. By joining together the complementary projects undertaken by Gadamer and Perelman, a more complete and persuasive picture of rhetorical knowledge emerges.

The phrase can be understood in a different and more challenging way, although this second meaning becomes apparent only after reading this article. Rhetorical knowledge is gained when I (and, hopefully, my reader) join with Gadamer and Perelman in an ongoing dialogue about how we understand legal practice and how we convince others of our understandings. By working creatively with the various arguments, general themes, and evocative styles in numerous texts authored by Gadamer and Perelman (and authored by others who draw inspiration from them), this article represents a rhetorical episode that might help to guide others to new understanding. In this sense, one joins Gadamer and Perelman not as one would join two lengths of pipe to create a new fixture, but as one would join an ongoing conversation with the aim of adding to it in a cooperative manner

268. WALLACE STEGNER, *ALL THE LITTLE LIVE THINGS* 11 (1967).

that does not subordinate the conversation to one's own pre-schematized agenda.

The phrase holds meaning on a final level as well, since the prior two senses of "joining" are both simultaneously implicated in any rhetorical activity. Developing arguments from textual sources always involves an inventive reordering and emendation at the same time that it involves a responsiveness to the rhetorical power of the texts. By joining together the arguments of various thinkers, one necessarily joins them in a conversational give-and-take, which in turn shapes the ongoing project of creatively working from the texts toward a new understanding. This is not an esoteric or invariably profound experience; this is what a good lawyer does every time she writes a brief. It is this sense of my concluding phrase that best captures the project that I have undertaken. I have attempted to provide a model of the hermeneutical openness and the rhetorical inventiveness about which I am writing. I cannot hope to leave my readers with an overpowering demonstration of the answer to the theoretical dilemmas of contemporary legal theory, but I can aspire to provoke them to follow a path of thinking that has yielded knowledge for me.

The thesis of this article is that rhetorical knowledge is a good starting point for thinking about legal practice and legal theory. Proceeding from this orientation, theorists will be better equipped to explore the rich potential for achieving knowledge in the practice and critical appraisal of law. I have described the concept of rhetorical knowledge in some detail, but there are no simple solutions, nor can I invoke any special claim to authority beyond my ability to deliver a persuasive account. It seems fitting, then, to conclude by recalling Gadamer's description of the role played by the philosopher, for it is his circumspect and pragmatic insight that in the end must inform every sophisticated theoretical undertaking that seeks to be relevant to the living community about which it speaks.

[Philosophical hermeneutics] limits the position of the philosopher in the modern world. However much he may be called to draw radical inferences from everything, the role of prophet, of Cassandra, of preacher, or of know-it-all does not suit him.

What man needs is not just the persistent posing of ultimate questions, but the sense of what is feasible, what is possible, what is correct, here and now. The philosopher of all people, must, I think, be aware of the tension between what he claims to achieve and the reality in which he finds himself.

. . . .

It would be a poor hermeneuticist who thought he could have,
or had to have, the last word.²⁶⁹

269. GADAMER, *supra* note 4, at xxxviii, 579.