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Francis J. Mootz III
University of Nevada, Las Vegas – William S. Boyd School of Law, Jay.Mootz@unlv.edu

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Argument, Political Friendship and Rhetorical Knowledge: A Review of Garver’s *For the Sake of Argument*

Francis J. Mootz III*

Gene Garver’s book, *For the Sake of Argument*, responds to the dilemma at the core of contemporary legal theory. “Reason,” Garver charges, too “often seems either impotent or dangerous, or both.” Reason appears impotent to the extent that we maintain its rigor by limiting its scope to dialectical demonstration, as epitomized by mathematics. Circumscribed in this manner, reason quickly loses any efficacy in resolving social conflicts through legal practice, because these disputes simply are not subject to the rational demonstration of an eternally and universally correct answer. But if we extend the scope of reason it suddenly appears dangerous; unhinged from having to provide definitive answers, reason threatens to become nothing more than sophistic manipulation of pre-given and conflicting interests. Finding the mean between these unsatisfactory poles is the holy grail of social and political philosophy, and Garver promises no less than an account of how we can reason about legal disputes in a polysemic, multi-cultural world.

Garver’s return to Aristotle might appear highly suspect. Given that we no longer inhabit the polis, Aristotle’s analysis of public deliberation appears to be rubbing salt in our modern wound. But Garver does not return only to the Aristotle of the *Nicomachean Ethics* that garners so much attention in the literature on practical reasoning. Garver’s insight

* Professor of Law, Penn State Dickinson School of Law. The first part of this essay originally was presented as part of a panel at the Annual Meeting of the Association for the Study of Law, Culture & the Humanities, convened at the University of Connecticut School of Law in March, 2004 to review a pre-publication draft of Gene Garver’s book, *For the Sake of Argument*. An earlier version of the second part of this essay originally was presented as part of the conference, “Rhetoric and Democracy: About an African Athens,” at the University of Cape Town in June, 2004. I thank my fellow panelists at both events, and the audiences, for their comments and questions. In particular, I thank Gene for his illuminating and challenging work, and even more for his conversations with me over the years on these topics.

is that practical reasoning emerges from persuasion, and persuasion is the product of rhetorical engagement within a community. His thesis is that Aristotle’s Rhetoric “shows how reason can be contingent, emotional, and interested without ceasing to be rational.” He concludes that we can rediscover the character of legal reasoning by connecting Aristotle’s account of rhetoric with Aristotle’s insistence on the distinct integrity of practical reasoning.

Garver locates the critical link between rhetoric and practical reasoning in the paired notions of character and community. Aristotle reveals that rhetoric is an “art of character,” and carrying character forward into the public deliberations of practical reasoning engenders community, or what might be termed social character. This tack is not particularly comforting, since character and community appear to be in short supply in the modern world. But this is precisely Garver’s point: it is only through reasoning together that character and community develop. There is a constitutive and reciprocal relationship between character/community and the social practices of reason.

Garver’s book consists of four paired chapters, with each pair providing first a practical examination and then a theoretical elaboration. Chapters One and Two argue that persuasion is at the root of practical reasoning, drawing upon the experience of the South African Truth and Reconciliation Commission to defend the idea that persuasion can be more than mere sophistic manipulation. Chapters Three and Four extend this argument by showing that persuasion rests on character and community rather than solely on logical imperatives, working from the constitutional landmark, Brown v. Board of Education. Chapters Five and Six explore the genesis of character and community in the practical engagement of persuasive reasoning. Finally, Chapters Seven and Eight explore the potential for practical reasoning through rhetorical engagement despite society’s heterogeneous character and our polity’s pluralistic and democratic features.

In Part One of this review essay I briefly recount Garver’s elaboration of these four themes. Law is an organized effort to subsume its rhetorical construction under hypothesized rationalistic structures, and so Garver’s incisive descriptions of the constitutive role of rhetoric in our democratic society is a significant addition to the literature. In Part Two, I undertake a (friendly) critical analysis of Garver’s themes and suggest

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2. Id. at 6.
3. Id. at 3.
4. Id. at 6-8.
7. 41 U.S. 539 (1842).
that my account of "rhetorical knowledge" supplements and expands his insights. I consider this to be the highest form of praise: it is not easy to write a challenging and engaging book that provides the basis for readers to develop one's important insights in so many fruitful ways.

I. Garver's For The Sake Of Argument: The Rhetorical Construction of Law and Legal Practice

Garver's four paired chapters work through a carefully selected set of legal issues to illuminate the principles of rhetorical reasoning at work and to point the way toward improving these rhetorical practices. His first theme is that persuasion is a form of reasoning together with another person, rather than overwhelming the other through the force of one's demonstration. Garver begins by noting that the South African Truth and Reconciliation Commission (TRC) stands as an affront to the modern liberal dogma that politics is an elaborate agreement among strangers who are pursuing competing life plans and wish only to structure a neutral playing field. The TRC gave voice to truths—multiple, fractured, and competing, though they might be—in the service of a constitutive reconciliation. This political exercise built a community from the ground up through rhetorical exchange, generating a staying power that could not follow from a political compromise in the war of all against all. The TRC illustrates the animating thesis of Garver's book: "Through political friendship, practical reason can aim at truth while staying committed to public argument because ethical arguments can be more powerful and more rational than arguments from reason alone. . . "

South African constitutionalism required more than a logical elucidation of the principles of good government, and the TRC provided a forum for some modicum of political friendship to permit the new country to begin to take shape. This is not pie-in-the-sky communitarianism, in which politically desirable results naturally follow from talking together. Efforts to build community might serve to isolate and ostracize "outsiders," just as rhetoric can be used to bring an audience to engage in violence. But linking persuasion and reasoning makes it possible to understand the halting and fragile possibilities of social reason.

Although there is no definitive methodology to distinguish persuasion from sophistic, Garver emphasizes that persuasion is fundamental and sophistic is parasitic. First, manipulation works best when the victim believes that she has been persuaded, and perhaps the very nature of sophistic is to induce a feeling that one has been persuaded through reasonable argument. Second, the sophist has no

8. GARVER, FOR THE SAKE OF ARGUMENT, supra note 1, at 27.
basis for claiming that a particular audience is inept, or that the result of deliberations has resulted in the "wrong" decision. Sophistic is wholly defined by its result, rather than by elements of rationality internal to the practice. Garver concludes that sophistic simply cannot stand alone and that persuasion as a reasonable activity is primary.

Garver's second theme is the inevitable role of character in persuading another person. He analyzes Brown v. Board of Education as an example of how practical reasoning is properly considered reason, and not just a second-best activity after genuine reason runs out. The opinion in Brown embodies ethos because the persuasive force of the opinion extends beyond the narrow logos of the role of education in modern society and embraces an evolving commitment to the anti-discrimination principle. "The meaning of Brown—its ethos—survives in the ethical surplus of the argument," by which Garver means that its ethos outstrips the logical force of the opinion. This does not mean that character exists independently of logic, but rather that they both are important elements in deliberation about matters which can be otherwise. "Ethical argument is never illogical. It depends on logic, and then goes beyond what it is logically authorized to conclude."10

The role of character in legal argumentation is not a gloss, then, but is constitutive. Despite the overt rhetorical conventions of judges and lawyers, there can be no strictly logical arguments that are persuasive. "Aristotle attributes to both practical wisdom and to the art of rhetoric the ability to apprehend and treat rationally particulars that seem beyond the reach of reason,"11 and it is precisely this expansive understanding of the role of reasoning and social deliberation illustrated by Brown.

The third theme of Garver's book is the source of ethical authority. Garver turns to an argumentative failure to explore his thesis that the most authoritative ethos is generated in persuasive argumentation. By citing Dred Scott12 in the course of arguing that the principles of Brown should not extend to the District of Columbia, the government's lawyer committed an egregious error. How could the lawyer "have done anything so obtuse? I think the most reasonable hypothesis is that he mistakenly supposed that the Court's decision was a logical one, rather than an ethical one..."13 Garver's point is that arguing for a logical extension of legal authority fails if it is not ethical, and that the ethos of the speaker is therefore a product of her willingness to engage in dialogue oriented toward persuasion.

9. Id. at 74.
10. Id. at 86.
11. Id. at 106.
13. GARVER, FOR THE Sake OF ARGUMENT, supra note 1, at 118.
Although Aristotle’s *Rhetoric* provides a wealth of detail on how to persuade others, Garver notes that Aristotle is silent on how to be persuaded. Looking to Aristotle’s notion of political friendship, Garver contends that the friendly relations engendered in public discourse provide a space in which citizens can both persuade and be persuaded. This activity generates an *ethos* of argument that permits persons to trust their own claims, as well as trust those with whom they deliberate. The attorney arguing *Bolling v. Sharpe*¹⁴ breached the trust embodied in social reason by failing to be reasonable; he did so by being rigidly logical and ignoring the ethical dimension of legal persuasion.

Garver rounds out his first three themes in the final two chapters. He asserts that we can avoid the age-old debate between rhetoric and philosophy by recognizing the ethical dimension of practical reason, which is shown not only in the rhetor’s character but also in the public’s communal *ethos*.

This vision of constitutional hermeneutics, rhetoric, and practical wisdom, in which pluralism, the internal ends of argument, and the ethical dimensions of argument develop together, is ethically superior to the more popular sophistical and philosophical constructions of constitutional interpretation. The latter two pretend that the superiority of their position is metaphysical, not ethical.¹⁵

Pluralism means that argumentation will never cease. But when ethical rhetoric is viewed in terms of the forms of argument rather than the goal—in terms of legitimacy rather than abstract justice—we achieve sufficient room for the development of character and the maintenance of community. *Ethos* permits practical rationality to be “self-sustaining and fully rational.”¹⁶

Garver argues that public reason cannot be fully institutionalized in democratic bodies or judicial tribunals. “To try to make the rationality of reasoning about ends into a method, or to offer it an institutional home, is like trying to devise a method for creativity or for friendship.”¹⁷ Although he endorses Dewey’s celebration of the scientific *ethos* in which argumentation rises above unavoidable personal interests and agendas, he acknowledges that risk and uncertainty are inevitable. “Like the autonomy of science, the autonomy of practical reason is always in danger of becoming self-isolation. The identity I have relied on, between *pistis* as referring to a trustworthy speaker, a cogent argument, and a

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¹⁵. GARVER, FOR THE SAKE OF ARGUMENT, supra note 1, at 174.
¹⁶. *Id.* at 185.
¹⁷. *Id.* at 189.
convinced audience, depends on the autonomy of practical reason.”

Practical reasoning is not a scientific enterprise, because it is not oriented toward compelling, universal truths. It is an exercise of character within a community that cannot be scripted in advance, and therefore requires the participants to place more at risk.

The contemporary fact of pluralism creates new opportunities and dangers for the autonomy of practical reason. The existence of competing arguments and incommensurable values reminds us that rhetorical arguments lack the kind of necessity that purely logical arguments sometimes have. The lack of conclusiveness seems to open up the possibilities of arbitrariness, of determination by something other than argument, and so leads us back to my earlier questions about whether there was really any difference between reasoning and rationalizing. We can only make such a distinction to the extent that we engage in practical reasoning for its own sake and not solely for the results it may bring. If we model practical reasoning on science and theoretical reasoning, conflict is a sign of failure. If practical reasoning is autonomous, then rationality can lead to conflict as easily and as rationally as to consensus.

Garver optimistically charts the potential of practical reason, even as he honestly acknowledges the challenges we face in making rhetorical argument a centerpiece of our social lives when it is all too easily misconstrued as being dangerous, impotent, or both.

II. The Role of Rhetorical Knowledge

I wish to build on Garver’s insights by arguing that we can gain “rhetorical knowledge” in addition to merely employing “rhetorical technique,” and that “rhetorical knowledge” is more robust than Garver’s Aristotelian account of rhetoric. Rhetorical theorists celebrate the role of rhetoric in building community, but pay less attention to describing the kind of community that must exist in order for rhetoric to get off the ground as an epistemic activity. Garver’s focus on ethos and community provides important guidance in this project. Rhetoric is epistemic only by virtue of its character as a social practice; in order to describe how rhetorical engagement produces knowledge we must explain the social prerequisites for successful rhetoric and also recognize its socially constitutive results. Exposing these connections illustrates the critical

18. Id. at 200.
19. Id. at 201.
role of rhetorical knowledge in democratic governance.

I approach this subject with two biases. First, it will come as no surprise that as a lawyer and a law professor my primary interest is the role of legal actors and institutions in generating rhetorical knowledge, and also that I regard legal practice as exemplary for other rhetorical venues. Although he is a philosopher, Garver’s book displays a nuanced understanding of the significance of legal argumentation, and I wish to reaffirm his account, from the inside as it were. Second, I approach legal theory from the hermeneutical tradition, primarily the “philosophical hermeneutics” of Hans-Georg Gadamer. I am most concerned with investigating how legal texts embody meaning over time and with justifying our faith that law can be text-based without degenerating into an historicist-archival practice. My hermeneutical orientation naturally has brought me to consider the intertwined role of persuasion and understanding, to investigate the mutually implicating practices of rhetorical engagement and hermeneutical discernment. By coming to rhetoric from hermeneutics, though, I believe that it is possible to develop the issues raised in Garver’s book and to augment contemporary debates in rhetorical theory more generally.

My thesis is that legal argumentation yields rhetorical knowledge only to the extent that it is both hermeneutical and rhetorical in nature, and that Garver’s book provides an important touchstone from which to elaborate this claim. We can fully understand and promote the role of rhetoric in practical reasoning, and the civic friendship that both subtends and follows from reasoning together, only by acknowledging the hermeneutical dimension of this rhetorical activity. After describing my conception of rhetorical knowledge, I discuss how this concept might be used productively to extend aspects of Garver’s argument.

A. Rhetorical Knowledge as Epistemic and Ethical

I could join Garver in using the more familiar term, “practical reason,” but instead I use the more provocative term “rhetorical knowledge” precisely because it is unsettling. It is all too easy to construe “practical reasoning” as an individual activity, as something one might do when thinking through one of life’s dilemmas in the solitary dark of the night. But even when a person employs practical reason in this solitary setting, she remains enmeshed in a social activity. “Practical reason” is not an individual faculty for engaging in self-reflection about how to proceed as much as the accumulated effects of having reasoned together with others over one’s lifetime.\(^{21}\) I use the term “rhetorical

\(^{21}\) Chris Smith has made this hermeneutical point forcefully, emphasizing that “we
knowledge” to foreground the social and argumentative root of practical reason.

The bias of the modern age is to equate knowledge with the logical foundations of modern science and to characterize nonscientific discourses as “mere” aesthetics, self-expression, or hortatory moralizing. Rhetorical knowledge refers to the knowledge that emerges from historical and social situations that remain dynamic and contingent. Although rhetorical knowledge is a social achievement rather than purely an intellectual accomplishment, it is knowledge. We can know the requirements of justice and we can know the solutions to mathematical problems; it is just the case that our knowledge of justice is rhetorical rather than logical.

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 these prejudices. 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. A reconfiguration of communal images can dramatically challenge received wisdom and impel 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 would be a mistake to regard these relatively rare limit cases as paradigms of rhetorical knowledge because doing so can obscure the everyday role of rhetorical knowledge. Garver points to the work of the TRC in building a new democratic society in South Africa, but we cannot permit the intense drama of the TRC’s work to limit the range of

never think in wordless ideas, but only in the words we have first heard from others and then hear again in our thinking.” P. Christopher Smith, The Uses of Aristotle in Gadamer’s Recovery of Consultative Reasoning: Sunesis, Sungleōme, Epieikeia, and Sumboulwesēthei, 76 CHI.-KENT L. REV. 731, 741 (2000). He explains:

In other words, language, audible speech, is not invented by private individuals to signify thoughts they already have but is the gift of the community that allows the individual to think in the first place. Not cogito ergo sum ["I think, therefore I am"] is the truth of the matter, rather loquimur ergo cogito ["We speak, therefore I think"].

Id. at 736.

Writing as a psychoanalyst, clinical psychologist and psychotherapist, Peter Hobson argues that thinking is rooted in our social existence. He concludes that “the tools of thought are constructed on the basis of an infant’s emotional engagement with other people. To put it bluntly, if an infant were not involved with other people, then she would not come to think. . . . Without the right kind of social engagement, intellectual development can proceed only so far.” PETER HOBSON, THE CRADLE OF THOUGHT: EXPLORING THE ORIGINS OF THINKING xiv, 274 (2004).
constitutive rhetorical practices. Philippe Salazar's assessment of the role of rhetoric in the shaping of democracy in South Africa is instructive in this regard: he not only analyzes highly publicized and dramatic speeches by Archbishop Tutu and Nelson Mandela, he also explores the creation of democratic culture through the rhetorical significance of sports, popular publications, and physical spaces.22

My use of "invention" and "refashioning" to describe rhetorical activity is potentially misleading because it brings to mind an image of a skilled technician adjusting the rhetorical bonds of society as one might adjust a fuel injection system 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 in the course of creating knowledge. Rhetorical reasoning is a reciprocal activity that depends on the existence of an ethical relationship between the speaker and audience, in which neither wholly surrenders to, nor subordinates, the interests of the other. This ethical relationship is not grounded in a shared criterion of judgment, but rather is a shared space in which multiple criteria may be jointly proposed, tested, and employed.

A concrete example may help to explain the concept. Rhetorical knowledge figures prominently in the contentious "debate" in America over affirmative action. This intemperate political, social and legal battle over the legitimacy of seeking to achieve the full participation of previously excluded minorities in communal life would appear to be the last feature of civic life that exhibits rhetorical knowledge. Unlike the remaking of South African life in the transition to democracy, the American battle over affirmative action appears to shroud self-serving political gamesmanship with the use of a coded vocabulary. But this is a good example precisely because it uncovers the provisional, halting, and dynamic nature of rhetorical knowledge.

The competing slogans of equality ("color-blind" treatment of all citizens in all respects) and fairness ("leveling the playing field" for historically disadvantaged groups) are deployed in rhetorical exchanges that can produce rhetorical knowledge. It is obvious in some instances that these slogans are wielded strategically, but the worst abuses of rhetorical practices prove 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 sub-optimally, by
traversing the many discourses within society in order to align points of
shared agreement into new constellations of meaning. 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 the formulation of political-ethical
theories, for instance) in a manner of communication that is derivative of
conversational exchange. The reality of rhetorical knowledge is proved
not because the participants unanimously agree on the uniquely correct
answer to the question posed, but because they continue to develop the
public discussion along new and more productive lines of argumentation
in response to a changing social reality.

Two recent U.S. Supreme Court cases—one upholding the
University of Michigan Law School’s affirmative action policies and the
other declaring the University of Michigan’s undergraduate affirmative
action policies illegal—provide competing opinions that reveal how
legal practice is grounded in rhetorical knowledge and is not simply a
matter of providing a dialectical elaboration of fixed principles, nor a
wholly unreasoning exercise of power. The multiple opinions in the two
cases elaborate the contemporary implications of the famous “diversity”
rationale for affirmative action articulated in Justice Powell’s concurring
opinion in the Bakke case, reinvigorating the topos of that opinion in the
context of the role of higher education in American life some twenty-five
years later. The cases present a tangled mess when viewed through the
lens of logical analysis, but when viewed rhetorically they represent a
contingent and ongoing process of social reasoning that open avenues of
thinking even as they create cul-de-sacs that might calcify the debate.
The opinions are not rhetorical failures for embodying the underlying
conflict between equality and fairness, because the conflict is
unavoidable. The measure of the opinions is whether their engagement
with the intractable oppositions raised by affirmative action is persuasive

23. In Grutter v. Bollinger, 539 U.S. 306 (2003), the Supreme Court held that the
Michigan Law School’s consideration of race as part of a holistic review of each
applicant’s file was constitutional because the consideration was for the purpose of
admitting a diverse student body for the educational benefit of all students. In Gratz v.
Bollinger, 539 U.S. 244 (2003), the Supreme Court distinguished Grutter and held that
the University of Michigan’s practice of granting twenty points out of a maximum of one
hundred fifty points to under-represented minority undergraduate applicants was
unconstitutional because the minority applicant’s race became, in effect, a decisive factor
in the admissions decision.

concurring).
and leads to future elaboration. Legal commentators agree that the legal landscape changed after these cases; my point is that the change is not only political, it is epistemic.

The space constraints of this short review essay preclude a detailed rhetorical analysis of these opinions, but this example should be suggestive enough of what I mean by the term "rhetorical knowledge" to support my emendation of Garver's thesis. I bring the theory of rhetorical knowledge to bear on Garver's analysis by developing two related topics: an account of audience that captures the socially constitutive features of rhetorical knowledge founded on political friendship, and a hermeneutical account of this political friendship that explores the social prerequisite of rhetorical knowledge.

B. Rhetorical Knowledge, Audience and Legal Argumentation.

Garver argues that rhetorical reasoning charts a path between dialectical demonstration and sophistic manipulation because it involves a deliberative exchange founded on the participants' characters and friendly relationships. Noting that Aristotle's Rhetoric pays insufficient attention to the circumstances of friendship, Garver insists that it is necessary to supplement rhetorical advice about speaking effectively with advice on how the audience can listen well. He concludes:

The ability to express ethical arguments and the ability to hear persuasive appeals as ethical arguments are among the chief circumstances of friendship. . . . Of course there are practical and material background conditions that have to be in place for persuasion to be received as the giving of reasons rather than manipulation.

I want to illuminate the "background conditions" of rhetorical rationality by reconsidering the role of audience. Too often, we assume that sophistic manipulation reveals the true power of rhetoric to shape the

25. For a more detailed analysis, see MOOTZ, RHETORICAL KNOWLEDGE, supra note 20.
26. GARVER, FOR THE SAKE OF ARGUMENT, supra note 1, at 6. Garver explains that the Rhetoric has little to say about the institutional conditions in which rational friendship can flourish, as opposed to circumstances that invite a hermeneutics of suspicion or a rationality fit for bargaining with strangers. . . . An account of practical reason has to have room for the intellectual virtue of listening to people who know more than I do, intelligently binding oneself to authority. Aristotle's own Ethics and Rhetoric are incomplete because he shows the virtue of giving good advice, but not of listening to it.
Id. at 129.
27. Id. at 27-28.
beliefs of an inert (and slightly dull-witted) audience, with rhetorical rationality being a kinder and gentler exercise of this power. I have noted that Garver reverses this account by arguing that sophistic manipulation is parasitical on rhetorical reasoning. Garver suggests that an audience actively permits itself to be persuaded, and that even in the case of sophistic "the audience’s rational faculty is an active, even if unknowing, partner in being persuaded."28 Rhetorical reasoning—exchanges that I would characterize as giving rise to rhetorical knowledge—involves an active relationship between speaker and audience. Sophistic replaces the ethical relationship of argumentation with the functional relationship of manipulation, which deadens, even if it does not entirely eliminate, the active audience.

I concur with Garver’s suggestion that this account, perhaps surprisingly, squares with the practice of legal argumentation. Lawyers who treat judges or opposing counsel as objects to be manipulated rather than persons to be persuaded are unlikely to be successful. There is more than a bit of sophistry in lawyering, but it works only to the extent that it piggybacks on argumentation. Many first year law students—disappointed when their positivist fantasies are debunked—quickly conclude that judges have unbridled discretion to decide cases on a personal whim and then later to supply a plausible legal justification for their decision. It is not surprising that these same students have incredible difficulty formulating a coherent argumentative essay for the final exam. It is easy to indulge the cynical view that law is “mere rhetoric” when reading a well-crafted opinion, but the tremendous challenge of addressing a specific legal controversy by arguing persuasively on behalf of a client quickly demonstrates to students that rhetorical exchanges are centering and destabilizing, and therefore do not easily suffer subject-driven assertions of sophistic power. In short, one’s audience is not an inert object, but rather a partner in the persuasion.

It is commonplace to acknowledge that rhetoric builds community, but it is perhaps more accurate to say that a community of political friendship makes possible the rhetorical engagement that can produce rhetorical knowledge, which in turn nourishes our communal life. Over hundreds of years America has developed legal institutions and practices that structure the community of legal argumentation and also play an important role in the maintenance of civic life. For example, Robert Burns suggests that the American jury trial is carefully orchestrated to promote practical knowledge about what to do in response to a social disruption; critics who charge that trials are ineffective at getting at the

28. Id. at 64.
empirical "truth" of the matter in dispute simply miss the point of the rhetorical exercise of trying a case. 29

Legal argumentation vividly demonstrates that rhetorical knowledge emerges only through active engagements with multilayered communities. Lawyers arguing a case or negotiating a contract are rhetorically bound to their adversaries as an active audience, engaged in a deliberative give-and-take that seeks a solution to some form of disruption. Lawyers zealously represent their clients' interests, but only an incompetent lawyer would select a desired result at the beginning of the representation and then doggedly pursue that goal at all costs. Rhetorical knowledge emerges through the efforts to persuade various audiences of the legitimacy of the client's best interests, and good lawyers use this knowledge to continually reassess their client's best interests in consultative deliberation with the client, determining how the legal system might plausibly be used to maximize these interests.

Lawyers also engage the wider community dialogically, as it is expressed through norms, worldviews and socializing imperatives. Celebrated cases, reported widely in the mass media and even televised live, exemplify the role of law in shaping communal norms and the role of communal norms in shaping legal practice, but this relationship is ubiquitous in law. Garver is mistaken when he asserts that contract disputes are more easily resolved than constitutional litigation because the court needs only to resolve the meaning of the contract for the parties before the court. 30 The common law of consensual obligation says much about our view of individual autonomy and social responsibility, and the resolution of every contract dispute reaffirms or challenges foundational communal norms no less important than those embodied in the Constitution. As a result, the advocate's rhetorical construction of the case will not be persuasive unless she is hermeneutically sensitive to the underlying social framework. This competency is part of the sensus communis of practicing lawyers.

C. Rhetorical Knowledge and the Hermeneutic Ethic

Rhetorical knowledge is distinguished from sophistic by the ethical relationship between speaker and audience, a relationship marked by activity by both parties rather than the passive reception of information flowing in one direction. But this seems curious, if not incoherent: what does it mean to attempt to persuade someone while exhibiting character and treating the other ethically? Garver solves the problem by restating

30. GARVER, FOR THE SAKE OF ARGUMENT, supra note 1, at 157.
it, inasmuch as he concludes that persuasion is the product of an ethical relationship when it is rooted in argument rather than logical compulsion or sophistic manipulation. But this does not help us to characterize the nature of persuasive argumentation that exhibits the ethos required for rhetorical knowledge.

We gain clarity by acknowledging the hermeneutical dimension of rhetorical practices, a dimension that is implicit in Garver’s attention to the active role of audience. Hans-Georg Gadamer’s investigations into the varied practices of human understanding led him to a conclusion that is deceptively simple:

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 conversation. But this means: Always recognize in advance the possible correctness, even the superiority, of the conversation partner’s position.

This so-called “hermeneutic ethic” explains how one might seek to convince another person within the context of an ethical relationship founded on argument rather than manipulation. A relationship founded on argumentation just means a relationship that is negotiated on the basis of the probable, and therefore is open to reconsideration. A rhetor engenders an ethical relationship with her audience when she seeks to persuade despite the lack of a logically compelling proof, thus holding herself open to counter-arguments. If the rhetor seeks to gain adherence without placing her beliefs at risk, she is engaged in a sophistic effort to secure a desired response rather than a rhetorical effort to persuade. There can be no rhetorical knowledge in such circumstances; there can only be rhetorical technique that is measured by its effectiveness in motivating the audience to act in a desired manner. Gadamer concludes that the hermeneutical ethic is an ethic of openness to dialogic experience that permits non-logical truths to emerge. “The hermeneutical consciousness culminates not in methodological sureness of itself, but in the readiness for experience that distinguishes the experienced man from the man captivated by dogma.”

31. Arguing that when “the connection between reason and character is severed, the definitive resolutions of the mathematicians and the mere battle of interest and power are the only alternatives,” Garver extols “a civic and rhetorical ethos of putting reason first.” Id. at 1, 12. “Only by limiting myself to argument can I have ethical relations with my audience, since the only rational form of ethos is one created through argument.” Id. at 54.


Garver’s “active audience” is a hermeneutically-attuned audience prepared to be persuaded by argument. But the rhetor must be no less hermeneutically-attuned if there is to be an ethical relationship that can result in rhetorical knowledge. Drawing a line between rhetoric as the art of speaking and hermeneutics as the art of listening risks reducing rhetoric to mere technique. Understanding that speaker and audience both are engaged in a rhetorical-hermeneutical relationship avoids the pitfall of this dichotomy by recognizing the ethical contours of a dialogic relationship that gives rise to rhetorical knowledge. The political friendship that makes rhetorical knowledge possible arises when the rhetor seeks to persuade the audience through argument and stands ready to listen to counter-arguments.

The unique role of the TRC in building a democratic South Africa can be explained in part along these lines. Although many details of the apartheid regime were exposed by the TRC’s work, the participants told multiple stories that did not fit into a seamless accounting of past events that merely needed to be voiced. The important contribution of the TRC was its contribution to rhetorical knowledge, knowledge that is civic, social and political in character. The negotiated settlement between the warring parties rejected both a general amnesty and state-sanctioned vengeance, and the parties created the TRC to move the country forward as a diverse, even divided, democratic community. Professor Salazar’s characterization of the TRC’s rhetorical significance in pursuing this goal suggests that the TRC’s success may derive in part from institutionalizing political friendship through hermeneutical attentiveness.

By affirming differences on issues and accepting that to listen to each other’s arguments is part of this process of affirmation, citizens of a rhetorical democracy celebrate both the power of dissent and the power of acceptance; in sum, they celebrate their community as a rhetorical community.34

The TRC provided a proto-model of the kind of political friendship that subtends a democratic community by promoting hermeneutical-rhetorical argumentation and deliberation.

Admittedly, there is much dissatisfaction in South Africa with the TRC. A standard historical account suggests that it was a failure because the races were even more divided by the TRC’s conclusions and actions, due to excessive amnesties for those who engaged in gross violations of human rights.35 But this same account notes the importance of the

34. Salazar, An African Athens, supra note 22, at 81.
symbolic acts by President Mandela and others to assure the Afrikaner minority of their place in the emerging democracy. Thus, the TRC is significant for its civic role, accomplished rhetorically, rather than the judicial role of identifying and punishing crimes. Only time will tell if this rhetorical role has succeeded. It may be that the rhetorical role of the TRC will prove to be insufficient in the long run to foster a democratic society that respects human rights, and that the racial divisiveness of the apartheid years will overwhelm the democratic project. But one recent empirical study of the attitudes of South Africans toward human rights and the rule of law that has pessimistic overtones also notes the contributions of the TRC to fostering a democratic culture. The TRC is not significant because it exemplified the application of neutral principles necessary to cultivate a culture of human rights; in fact, the TRC’s relaxed procedures and generous amnesty may have undermined the development of rule of law consciousness. However, the rhetorical legacy of the TRC, in which deeply contested realities were heard and mediated, might have profound and lasting significance.

The South African legal system will have to carry forward the rhetorical work of the TRC. Democracy is sustained by rhetorical engagement in an institutional context that prevents raw majoritarianism, rather than by sophistic manipulation by those who hold power. In America, there is reason to believe that a rhetorical-hermeneutical engagement might work through what Chaim Perelman would call our

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36. Id. at 274.
37. James L. Gibson, Truth, Reconciliation, and the Creation of a Human Rights Culture in South Africa, 38 LAW & SOCIETY REVIEW 1 (2004). James Gibson’s research leads him to conclude the following:

Those who have not learned the complex lessons of democracy have also failed to learn about the importance of the rule of law. . . . I suspect that some South Africans view law as a means by which whites maintain their hegemony in South Africa. If so, this is an important, and ominous, finding. . . .

. . . . It may well be that since South Africans have had little experience with legal universalism, they have yet to learn of its value. The TRC seems to have had some influence on attitudes toward law, although I admit that the evidence of causality is not as strong as it might be. By exposing people to the consequences of arbitrary government not constrained by law and by judging all sides in the struggle according to the same criteria, the truth and reconciliation process may have deepened and widened respect for law.

Id. at 33.
38. Id. at 21, 24-25.
“confused notions” of equality and fairness in resolving the problem of affirmative action. The South African experiment is more dramatic, far-reaching and perilous, but the TRC also points the way toward the institutionalization of a rhetoric that recognizes the hermeneutical value of listening, and it provides a signpost for an emerging democratic legal culture that must carry the heavy baggage of racial balkanization.

III. Conclusion

My theory of rhetorical knowledge works from Garver’s insights and provides a more complete account of legal rhetoric by illuminating the hermeneutical character of the active audience. Rhetorical knowledge is epistemic, which means that it is not just an internally-coherent rational practice that can be pressed into service in furtherance of politics or ethics, but rather is a practical activity in which political and ethical knowledge is acquired. Garver’s Aristotelian approach to rhetoric preserves the integrity of the practice against the age-old challenge of the sophists, but he does not go far enough. Rhetorical-hermeneutical practices generate rhetorical knowledge, particularly in the legal sphere, and it is imperative to investigate the social and institutional conditions for fostering such practices.

By way of conclusion, it might pay to recall that Gadamer begins his magnum opus with an excerpt from Rilke that captures the power of hermeneutical understanding through a fusion of horizons. This excerpt might also be read as a parable of the source of the power of rhetorical-hermeneutical engagement when speaker and audience extend political friendship to each other, as well as a caution against the sophistic efforts of an insular speaker.

Catch only what you’ve thrown yourself, all is mere skill and little gain;
but when you’re suddenly the catcher of a ball
thrown by an eternal partner
with accurate and measured swing
towards you, to your center, in an arch
from the great bridgebuilding of God:
why catching then becomes a power-
not yours, a world’s.

-Rainer Maria Rilke

40. Quoted as the epigraph in GADAMER, TRUTH AND METHOD, supra note 33.
Nobody Likes a Sophist Until They Need One

Eileen A. Scallen*

If I read Professor Eugene Garver’s book, *For the Sake of Argument: Practical Reasoning, Character, and the Ethics of Belief*, correctly, this may be the most futile essay I have ever written (and some of them have been pretty futile, believe me). This is because I am a cheerful, unrepentant, out and proud, latter-day Sophist. At one point, Gene says, “Aristotle was wiser than Plato in not trying to refute the sophists. Refuting the sophists is as impossible or as pointless as refuting the skeptic.” At another point, Gene notes that “Aristotle himself does not take the sophists seriously as Plato does. He thinks that they are so philosophically uninteresting that any practical dangers they present are not worth extended thought.” Ouch.

As one can probably guess, Gene’s book does not have nice things to say about Sophists. Nonetheless, I will continue with this essay because Gene’s overarching thesis about the ethical dimension of practical reason suggests that he wants to be friends even with us Sophists—I think. That’s good, because I think the world of Gene. He is a brilliant, humane, engaging scholar, and the kind of man anyone would be proud to claim as a friend. And I care deeply about the themes he writes about in the book—rhetoric (small r), Aristotle’s Rhetoric (capital R), practical reason, character, trust and ethics. We touch on so many common themes in our writing that it startles me—not only legal argumentation and persuasion, but also the role of trust and betrayal and the process of confrontation in law and justice, among other topics. So I was enormously honored to be asked to comment on Gene’s book. And I

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* Professor of Law, William Mitchell College of Law, St. Paul, Minnesota. This essay is based on a paper presented at the Annual Meeting of the Association for the Study of Law, Culture and Humanities at the University of Connecticut Law School, March 13, 2004.

2. *Id.* at 54.
3. *Id.* at 49.
still am, even after reading this book, which has challenged and helped me in so many ways, I cannot possibly discuss them all in this brief essay. Thus, I will focus on the dimension of Gene’s book that I found highly disturbing because, if ethical rhetoric aims at friendship, Gene will surely want to know why his arguments bothered me so much. His arguments disturb me because they do not speak to me—the kind of person probably most receptive to the arguments in his book.

Before it was published, Gene sent me an electronic version and page proofs of his book. When I saw the title, I started salivating—I could not wait to dig in to the feast. Because I did not have a bound copy of the book at that point, I could realistically start reading almost anywhere. So, just for fun, I started with the endnotes. Unlike some people, I love footnotes and endnotes; they provide a chance not only to provide “authority” for one’s argument and supplement the argument’s internal authority, but also to engage in the kind of digressions that can be enlightening and even entertaining, but that would never be tolerated in text. I thought it might be fun and interesting to read the endnotes first—I wanted to see if I could guess Gene’s argument from the notes—like playing the TV game show Jeopardy, where the show provides contestants with the answers and the game is to formulate the questions. So, I read the endnotes through in their entirety. And I was stunned to discover that although Gene’s book discusses practical reason, character, ethics, classical rhetoric and law, Cicero was mentioned only twice—in one endnote, and Isocrates and Quintilian, who wrote fairly extensively on these topics, were nowhere to be found. I looked closely at endnote 37, and saw that Gene quotes James Baumlin’s entry for “ethos” in the Encyclopedia of Rhetoric as saying that “Cicero ignores the Aristotelian notion of a ‘rational ethos’ or ‘ethos of trustworthiness’ and, in its place, emphasizes conciliare, or an ethos of sympathy. . . . Ciceronian ethos resembles a milder form of pathos.” My note in the margin reads “huh?” Are we talking about THE Cicero? You know, the Roman lawyer, politician and rhetorical theorist?

But before I could get too bent out of shape about the omissions in Gene’s book, the Massachusetts Supreme Court handed down its decision in Goodridge v. Department of Public Health. For those readers who have just returned from a visit to another planet, a 5-4 majority held in Goodridge that: (1) marriage licensing statutes as currently written are not susceptible of interpretation permitting qualified

4. Id. at 212 n.37.
same-sex couples to obtain marriage licenses; and (2) as a matter of first impression, limitation of protections, benefits and obligations of civil marriage to individuals of opposite sexes lacks a rational basis and violates the Massachusetts constitutional equal protection principles.

Since that decision was handed down in late November, 2003, I have been engaged in the most important rhetorical battle of my life—as a lawyer, law professor, activist, lesbian and, yep, Sophist: preventing amendments to the United States Constitution and the state constitution of Minnesota (where Gene and I currently live) to outlaw same-sex marriages and other types of legal recognition of same-sex relationships.

After finishing Gene’s book, I realized that these experiences—discovering the exclusion of my favorite classical rhetoricians (Isocrates, Cicero and Quintilian) from Gene’s book and the legal and cultural battle over same-sex marriage—presented a good way to explain my difficulty with Gene’s book. First, let’s deal with Gene’s decision to ignore my classical pals. Who were they and why does it matter that they were omitted? Isocrates (436 to 338 B.C.E.) was a contemporary and rival of Plato. Isocrates founded his own school to help Greek citizens learn to argue and represent their interests in the courts and the legislature. Plato dismissed Isocrates, as he did writers on similar themes, as an author of cookbooks—a mere “trainer” who offered to enhance one’s technical skills but who did not teach knowledge and truth. It was easy for Plato to link Isocrates to the rest of the Sophists because, like them, he expressly taught legal and political rhetoric. However, Isocrates considered himself a philosopher; indeed he had his own objections to some of the Sophists. Isocrates differed from many of these other teachers of rhetoric

7. Id. at 953.
8. Id. at 961.
9. For a longer description of this school of practical reasoning and its relevance to law, especially legal advocacy and evidence, see Eileen A. Scallen, Evidence Law as Pragmatic Legal Rhetoric: Reconnecting Legal Scholarship, Teaching and Ethics, 21 QUINNINPAC L. REV. 813 (2003); Eileen A. Scallen, Classical Rhetoric, Practical Reasoning, and the Law of Evidence, 44 AM. U. L. REV. 1717 (1995). After many years of neglect, there is renewed interest in Isocrates. See Eugene Garver, Philosophy, Rhetoric and Civic Education in Aristotle and Isocrates, in ISOCRATES AND CIVIC EDUCATION (Takis Poulakos and David Depew, eds., 2004) (essay in which Professor Garver argues that Aristotle, rather than Isocrates, ought to continue to be our model for developing a concept of civic education); EKATERINA V. HASKINS, LOGOS AND POWER IN ISOCRATES AND ARISTOTLE (2004). See also EDWARD SCHIAPPA, THE BEGINNINGS OF RHETORICAL THEORY IN CLASSICAL GREECE (1999) (containing an extensive discussion of Isocrates’ contributions to classical rhetoric, portraying him as Exhibit A of the attempts of philosophers to exclude those, unlike Aristotle and Plato, sought to treat rhetoric as an integral and worthy element of democracy). On more general interest in classical rhetoric, there is MICHAEL H. FROST, INTRODUCTION TO CLASSICAL LEGAL RHETORIC: A LOST HERITAGE (2005). Frost also omits Isocrates, although he does discuss the Romans Cicero and Quintilian, who credited Isocrates as their inspiration.
in several respects. For example, many of the Sophists were itinerant teachers, moving from town to town, taking their shows on the road, so to speak. In this sense, some of these Sophists were more akin to today’s motivational speakers and Continuing Legal Education presenters who promise to teach their students, in ten steps or less, to dazzle a jury in any case. Isocrates, in contrast, founded a school of higher education in Athens, about 5 years before Plato established his Academy. The school of Isocrates lasted for over fifty years, where he trained as many as one hundred students at a time, many of whom became leaders of Athens and other parts of the ancient Greek world. Plato stigmatized and helped marginalize his rival Isocrates for a good part of history to date, although lately there has been renewed interest in Isocrates’ teachings. Later, in ancient Rome, Cicero and Quintilian built on the teaching of Isocrates. These Romans were practicing lawyers, as well as teachers of the art of speaking well in court and in the legislature. Quintilian would have made a good illustration for the cover of Gene’s book—since Quintilian is remembered for defining the ideal orator as “a good man, skilled in speaking.”

But why does it matter that Gene left out my favorite classical rhetoricians? It matters because these old dead white men, Isocrates, Cicero and Quintilian, were just as concerned with the problem of reconciling ethics with rhetoric as Aristotle and Gene Garver. These ancients: (1) refused to be trapped by the dichotomy drawn by others between objective truth and radical skepticism; they argued for a middle ground—a contingent but practical kind of truth, one good enough to deal with even the most important and difficult issues of society, especially those decided by the courts of law; (2) understood and advocated a liberal arts approach to education as the best preparation for resolving these practical problems in the courts or legislature; and (3) eschewed an amoral approach to advocacy, but understood that while good character cannot be instilled through indoctrination, it can be nurtured and can flourish through inspiration and education.

Isocrates is traditionally treated as a Sophist and certainly was portrayed as a Sophist by Plato, on whom Gene relies for his description of the Sophists. I have not seen Cicero and Quintilian described as Sophists, but I think it is fair to say that Plato and Gene would put them in that category too, given my description of them above. I regret to say that the portrait Gene draws of these ancient Sophists is downright unfriendly. First, it is not friendly to exclude people who rightly should

10. MARCUS FABIUS QUINTILIAN, INSTITUTIONS ORATORIAE [THE INSTITUTES OF ORATORY] Book XII, para. 1 (H.E. Butler trans., G.P. Putnam’s Sons 1920). Quintilian actually attributes this phrase to Marcus Cato. Id.
be part of the debate. Second, it is not friendly to portray a class of people who had diverse perspectives, ranging from radical relativism to quite mild pragmatism, as a uniform gang of thugs. Finally, it is not friendly to allow one side of the debate to speak (entirely) for the other side.

This is what Gene does when he describes the Sophists exclusively through his use of Plato’s dialogue, the Gorgias. In this dialogue, Callicles the Sophist is interrogated by the noble Socrates. But Plato is the playwright of this drama, putting arguments in the mouths of Callicles and the others, and Plato is none too fond of his characters, except for his former teacher Socrates. Indeed, if I were to use Gene’s thesis, Plato is the most unethical and unscrupulous of rhetoricians by making his main opponent a straw man. As Gene states:

[A]rguing against a straw man violates no logical rules. The validity of an argument is the same whether it is directed against views actually held by an opponent or against a caricature. But ethically it is not the same argument and does not have the same value. When an argument is not well motivated, it fails to treat an opponent with adequate respect and charity. These are intellectual virtues related to friendship that can be imputed to an argument. They are part of the ethos of an argument. Good controversial arguments have worthy targets and treat their targets as worthy opponents.

Plato fails this standard of ethical rhetoric. By relying on Plato’s portrait and not letting the Sophists of various types speak for themselves, Gene fails too. He ignores worthy opponents who could really give his theory a run for the money, such as Isocrates, Cicero and Quintilian. These ancient writers cared deeply about character and ethical rhetoric, but they depart from Gene’s thesis, which suggests that ethics and character are intrinsic to rhetoric. They would agree with Gene that there is such a thing as “ethical rhetoric,” and that this ethical quality stems, in large part, from the character of the speaker. But they would hold that such character is developed through education and critical reflection on one’s models, and that such civic education is essential for any hope of leadership in a democracy, which puts a premium on rhetoric and deliberation. They would disagree with Gene on a fundamental point: that the standards for such ethical rhetoric or practical reason are somehow intrinsic to rhetoric itself.

So what does any of this have to with the same-sex marriage debate? I suggest that these debates will provide scholars, such as Gene and me, with a perfect contemporary example to use in exploring the

dimensions of rhetoric, character and ethics. This essay is not the right forum to fully develop my alternative to Gene’s view here, but I want to use an example from this debate to suggest why Gene’s approach, based on an Aristotelian concept of political “friendship,” will not work as the ethical standard of practical reason. Gene dismisses the epistemological and ontological underpinning in Plato’s (and later, Aristotle’s) treatment of the Sophists, stating:

It is question-begging to argue for the superiority of rational rhetoric on the grounds of some ontological or epistemological high theory about the nature of reality or whether the truth should be spelled with a capital letter or not. . . . These claims about reality and knowledge follow from rhetorical practices, and do not ground them. Arguing about whether reality exists is simply a way of raising one’s voice, not elevating the things talked about.\(^{13}\)

With all due respect, I think Gene goes astray here, and the current debate about same sex civil marriage (and other legal protection for committed partners of the same sex) provides support for my conclusion.

In spring of 2003, about the same time I was thinking deeply about Gene’s thesis, I participated in a “debate” sponsored by our school’s chapters of the Federalist Society, a politically conservative national group, and the American Constitution Society, a more recent, politically liberal national organization. The participants included Tom Pritchard, Executive Director of the Minnesota Family Council, Professor Doug Kmiec, from Pepperdine Law School, Professor Dale Carpenter, from the University of Minnesota, and yours truly. All speakers, I am told, were impressive to members of the audience. But what became clear to me was the maddening quality of the debate. Sure, I had to sit there and listen to Mr. Pritchard and Professor Kmiec tell me and the rest of the audience that marriage is a natural and God-given status, open to no tinkering by man-made institutions like courts or legislatures. I had to listen to them tell me that if I am permitted to marry my partner, then I could also be permitted to marry my entire Civil Procedure class, my brother, my dog and even my couch (I had never heard THAT version of the argument before).\(^{14}\)

\(^{13}\) *Id.* at 51.

\(^{14}\) This argument is a classic example of the logical fallacy called “slippery slope.” The speaker essentially argues that once the listeners take the first step toward a particular policy option, they will fall down the “slippery slope” to all sorts of bad ends. Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 Hofstra L. Rev. 1155 (2005) (analyzing the mechanics of the “slippery slope” argument in the context of same-sex marriage); Dale Carpenter, *Gay Marriage and Polygamy*, Independent Gay Forum, available at [http://www.indegayforum.org/authors/carpenter/carpenter46.html](http://www.indegayforum.org/authors/carpenter/carpenter46.html) (first published on April 29, 2004, in the Bay Area Reporter) (arguing that same-sex marriage
But what was truly maddening is that the arguments of my opponents came not from their “rhetorical practices,” as Gene suggests. No—what was maddening is that those arguments came from the very foundations of those speakers’ cores. They firmly believe that there is Truth (capital T), and their Truth comes from one particular God as they interpret that God’s message. This foundation, based on external and unquestioned authority, grounds their rhetorical practices. These rhetoricians, like Plato, do not engage in rhetoric (from their perspective). They do not engage in practical reasoning with their friends; they simply deliver messages from authority. They are conduits of Truth, not participants in any sort of real dialogue. We know that this is also the case with Plato. The Gorgias15 and the Phaedrus16 are not genuine dialogues of the kind that the historical Socrates is supposed to have had; they are simply extended speeches by the elite aristocrat Plato, who serves as our guide to Truth.

When speakers such as Tom Pritchard, Doug Kmiec and Plato base their speech in unquestionable authority, universal Truth, how can we possibly debate them? Gene might say this is futile. Don’t bother. It would only be an exercise in who can speak the loudest; their “claims about reality and knowledge follow from rhetorical practices, and do not ground them.”17 But their claims do ground them. And it is their grounding in this solid, unimpeachable authority that attracts listeners longing for conviction, predictability and clarity. Does this certainty provide a false sense of security? From my perspective, and I think from Gene’s too, it does. But that does not diminish the power of the siren’s call of certainty.

Professor Francis J. Mootz III has noted the futility of debates between those who base their claims on foundationalist notions of Truth and those who do not. In his review of Daniel A. Farber and Suzanna Sherry’s book, Beyond All Reason: The Radical Assault on Truth in American Law, Professor Mootz argues that Professors Farber and Sherry re-enact the Plato vs. Sophist battle in their book condemning “radical multiculturalism” in the legal academy.18 Professor Mootz argues that rehashing this ancient debate “is unproductive and even

meet an essential need for the individuals involved and benefits society while polygamy, by contrast, does neither).

15. PLATO, supra note 11.
17. GARVER, supra note 1 at 51.
harmful to scholarly discourse."\textsuperscript{19} Instead, he proposes that we embark on "an effort to reclaim reason in American legal scholarship by steering a course between the dogmatic pursuit of truth and the self-indulgent pursuit of provocation."\textsuperscript{20}

I take a slightly different direction than Professors Garver and Mootz. I agree that these debates have no definitive winner and are frustrating, even maddening, experiences. This is because individuals who are even willing to consider "the rhetorical turn" or Gene Garver's concept of "political friendship" express an openness to genuine dialogue that will never be found among the pure rationalists, strict empiricists, and pseudo-Platonists. Those who respect only foundationalist notions of objective truth stemming from their preferred authority are not open to persuasion, only "enlightenment." They will not argue with us. They will not listen to us because the only speaker that matters is their source, their authority. They will only "inform" or "instruct" us on the issues at hand. As a result, they are the most likely candidates to deny that they are employing "mere" rhetoric because, for them, the meaning (of a contract, a statute, the Constitution) is "plain." In short, the epistemology and ontology matter deeply here because they ground my debating opponent's rhetoric, as well as mine. And this is what produces the frustration: two earnest and well-intentioned debating opponents who cannot communicate with each other.

So what is a good Sophist to do? Keep talking. And I did debate those opponents of same sex marriage and other legal protection for same-sex families. I used my best effort to invite my audience to keep an open mind, to recognize that our legal, social and cultural reality does evolve over time. In good neo-Aristotelian fashion, I used logos: several examples of the history of "traditional" aspect of marriage that made women an appendage of their husband, with no independent legal status, a "tradition" that was forced to change with recognition of equality for women. I used pathos to describe how heart-broken I was to have to leave a job and a city I loved because I could not adequately protect my partner's financial security by marrying her. And I used my ethos: I told my students my story, and came out to them in a more direct and honest fashion than I ever have. Time will tell the outcome of the same-sex marriage controversy. But by engaging in the debate, I gave my larger audience a chance to use their ability to reason and criticize, to make critical judgments based on a difference of opinion, evidence and argument—something my opponents (grounded in the foundation of authority) do not. I can offer a competing model of rhetoric to my

\textsuperscript{19} Id. at 608.
\textsuperscript{20} Id. at 609.
audience (which contains many of my law students) that does not command my audience to obey, but instead respects their intelligence and offers them a chance to grow through the use of their own critical judgment. Exercising critical judgment is essential to the success of our democratic system.

I am not the first to suggest that good rhetoric can only flourish in a well-educated democracy. History shows that this is the case. Whenever a society is ruled by autocrats or dictators, one of the first freedoms to be curtailed is the freedom of speech, and theorizing about rhetoric and the practice of rhetoric disappears therewith. It is not an accident that with the fall of democracy in ancient Greece and Rome, and the rise of dictators, kings, and Popes, the concept of “rhetoric” was utterly transformed from a philosophical and educational activity to a constricted set of precepts of style.21 And, as new democracies have risen, so too has interest in rhetoric. Democracy has not just been spread by the superior weapons of the army behind it; democracy is inspired by the eloquence of “good men” (and women) “speaking well.” Democracy is won and supported by citizens who have been liberally educated and encouraged to engage in critical thinking and speaking. Democracy is protected not only by those who speak well, but also by those who listen well and to diverse sources of information, values and needs. Democracy is strengthened not by those who act with certainty and raw power, but by those who make the best possible judgments in an uncertain world with limited knowledge.

Gene Garver’s notion of a political “friendship” as the foundation of an ethical rhetoric works only in a utopian society. It does not sufficiently confront the serious reality that there are those for whom “friendship” is just another tool to use as one pursues ends dictated by authority. It is good to dream. It may be the philosopher’s prerogative to dream. But, as a lawyer and law professor engaged in practical reasoning right this moment, I can only let go a dreamy sigh as I ponder Gene’s book before I head off to another debate.

21. For two of the many books tracing the correlation between the rise and fall of democracy and the role of rhetorical theory, see GEORGE A. KENNEDY, CLASSICAL RHETORIC AND ITS CHRISTIAN AND SECULAR TRADITION FROM ANCIENT TO MODERN TIMES 31-32 (1980); THE RHETORICAL TRADITION: READINGS FROM CLASSICAL TIMES TO THE PRESENT (Patricia Bizzell & Bruce Herzberg, eds., 1990).
Judicial Ethos and the Autonomy of Law

Paul W. Kahn*

Eugene Garver’s *For the Sake of Argument* is a tremendously interesting book on one of the most important topics in jurisprudence today.¹ This topic used to be called the “autonomy of law.” Today, the issue is better put as understanding the rational character of law. If we can no longer speak of law as a science, what is it that distinguishes the reasoning of law from other forms of political reasoning? Especially interesting is the way in which Garver analyzes a situation familiar to those of us who practice law: the experience, on the presentation of equally plausible arguments from opposing sides, of equipoise that gives way to decision, followed by a sense of necessity. The problem is to understand this movement from legitimacy to justice in a way that does not undermine the autonomy of law by appealing to interests, subjectivity, or politics. Garver argues that, during this mysterious middle moment of decision, logic may give out but reasonable argument is not exhausted.

Modern jurisprudence began with the simple claim that the autonomy of law derived from the unity of the source of law: the will of the sovereign.² That law was the will of the sovereign seemed clear to those who focused on the character of its enforcement: the coercive power of the sovereign will be applied to punish and correct violations.³ But this view was soon supplemented by another: the autonomy of the law lies not in its origin, but in its content.⁴ Legal autonomy points to the

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* Robert W. Winner Professor of Law and the Humanities and Director of the Orville H. Schell, Jr. Center for International Human Rights, Yale Law School. Thanks to Adam Romero for excellent research assistance.


closed character of a system of legal reasoning. For every legal question, legal science could produce a single, correct answer. Experts in the field would agree on the answer because they would reason in an identical manner from common sources.

These two competing ideas on the sources of the autonomy of the legal order—sovereign will or rational science—were both subject to devastating attack by the legal realists who argued that claims for a deductive science of law are "transcendental nonsense," and that the unitary sovereign is really nothing more than a competition among interest groups.

If there is no unity to law, however, what distinguishes law from politics? For much of the twentieth century, the answer was "nothing." Law was understood as "politics continued by other means." If politics is an art of compromise, then law was an art of "balancing." Of course, that does not mean that nothing useful, normative, or true could be said about politics or about that particular form of politics that is law. A just politics has as its end the material well-being of its members; it supports their individual participation in a project of community self-determination and protects their personal liberties. Different theories were elaborated as to the correct measure of politics—utility or justice, for example—and different views were offered as to how courts could contribute to these ends. Nevertheless, a theory of law had to find itself in this political world. Some theories made law an adjunct to the political process ("policing the process of representation"), some an adjunct to administrative rationality ("legal process"), and some to utility maximization ("law and economics"). Still others tied law to

8. This idea of justice provides the foundation of human rights law.
12. E.g., Guido Calabresi, The Cost of Accidents: A Legal and Economic
ideas of Rawlsian justice or Pocockian republicanism.

By the last quarter of the century, however, many were wondering what happened to the autonomy of law. Something had gone wrong with theory, for it did not seem to capture very well the character of our practice and belief in the rule of law. Those who live a life immersed in the law believe that they are working within an autonomous domain of reasoning. They feel that they are constrained by law and working to establish the truth of the law. They define themselves by distinguishing their practice from that of politics, believing that their decisions are not simply an expression of their personal preferences. They understand law as deeply normative, but it is not the same as morality. They also believe that law’s rule embodies and reflects the character of our polity, but it is not merely a product of political factions or of a balancing of interests among those factions.

As a consequence of this reexamination, there were shifts in the character of legal scholarship. A new focus on doctrinal work appeared. Scholars were concerned with canons of interpretation, with textualism and intratextualism, with precedents rather than with high theory. Without a good theory of law’s autonomy, there is a natural inclination to act out that autonomy by turning to doctrine narrowly conceived.

Simultaneously with the turn to doctrinal analysis appeared a new interest in narrative. Understanding the autonomy of law required theorizing an experience that lies between the domain of formal rationality, on the one hand, and individual or group preferences, on the other—that is, between logic and politics. Narrative seems to occupy just this middle range. Narrative does not reject the demands of formal reason, but it recognizes that logic alone will not get us very far. Neither is narrative simply an expression of personal interest. Community and


narrative are always mutually constitutive. A community’s narrative offers the common ground that supports the possibility of disagreement within a single, on-going project. If law is constitutive of community, then it must be embedded in narrative. As Robert Cover said, there is no nomos without narrative.\textsuperscript{18} That narrative is built out of and supports what Garver calls “common knowledge”: a common history, a common set of commitments and paradigms from which and by which we reason.\textsuperscript{19}

The idea of narrative generated three different approaches. First, there were those who took literally the idea of story-telling, trying to add their stories to the corpus of American legal rhetoric.\textsuperscript{20} Second, there were those who tried to elaborate, from within the law, the public values sustained in this communal narrative.\textsuperscript{21} Third, there were those who tried to theorize law’s need for narrative.\textsuperscript{22} This form of legal theory had to look less like philosophy and more like cultural anthropology. At issue was the interpretation of a practice. Theory had to stick close to facts, shunning too much abstraction toward justice or efficiency.

The most important figure in this third category was Ronald Dworkin.\textsuperscript{23} Despite its Aristotelian frame, Garver’s jurisprudential project sits very close to that of Dworkin. Much of what Garver has to say about authority, for example, reminded me of Dworkin’s metaphor of the “chain novel”: it is a matter of reasoning with, rather than complying.\textsuperscript{24} For both, integrity is central to decision-making. Dworkin too uses the idea of integrity to describe this middle domain as one in which character is as important as logic.\textsuperscript{25} He agrees with Garver that the character that matters to law is principled, not interested; it is built within the legal arguments offered, rather than brought to the controversy. Both understand that integrity is demonstrated by the

\begin{itemize}
    \item[18.]
    Cover, supra note 17, at 5.
    \item[19.]
    See Garver, supra note 1, at 37-43.
    \item[20.]
    \item[21.]
    \item[22.]
    E.g., Ronald Dworkin, Law’s Empire (1986).
    \item[23.]
    See, e.g., id.; Dworkin, Freedom’s Law, supra note 9.
    \item[24.]
    Compare Dworkin, Law’s Empire, supra note 22, at 225-38 (comparing the task of the judge to that of an author attempting to contribute a chapter to a chain novel) and Dworkin, Freedom’s Law, supra note 9, at 10 (arguing that authority is drawn from the interpretation of past acts of popular will as expressions of consent to rule under moral principles) with Garver, supra note 1, at 109-131 (arguing the Court creates authority through argument premised on and constituted by symbols, ethics, and authorities shared among the community).
    \item[25.]
    Dworkin, Law’s Empire, supra note 22, at 164-67.
\end{itemize}
construction of an ethos and that legal argument is central to this project.

If we ask what makes ethos so important to legal argument, I think the answer has much to do with what we might call the circumstances of adjudication or of legality more broadly. Legal argument takes place in a situation that simultaneously offers too little and too much. To fully pursue the normative issues at stake in any constitutional case of moderate complexity would be the effort of a lifetime. Consider, for example, the moral philosophy surrounding the issues of abortion or gay rights, or the issues generated by the tension between equality and liberty, or of free speech and silencing. The Court confronts these issues under the relentless pressure of the docket. Justices cannot argue to a conclusion: they vote, they compromise, they do their best to articulate a position that can hold together diverse views, and then they move on to the next case. Bickel famously praised the Justices for exercising the virtues of the academic, but the actual Justices are far too busy to meaningfully exercise these virtues. Their work is not moral philosophy—not by a long shot. If we are to trust them, it must be because we trust the character they bring to bear on these issues. We understand that character, however, not because we have access to them personally, but because we see the reasons they offer to justify what they have done.

Just as circumstances constrain, resources overwhelm. There are always an indefinite number of ways to reach a conclusion or to reach a contrary conclusion. There are no “givens” in the law, no necessary starting points. Who would have thought that we could reach a conclusion about racial equality by starting from the Commerce Clause? Reasoning is analogical, which means that the movement from one point to another is unpredictable in advance. It only becomes clear once the analogy or distinction is drawn. Logic is not going to tell us how to build a convincing argument when neither the premises nor the forms of reasoning are determined in advance. The judicial opinion is necessarily a performance and an improv performance at that. Again, we learn whether the Justice has integrity by asking whether he has managed to take us in by this act of legal bricolage. We want, however, not just to be enthralled, but also to be enthralled for the right reasons. In the end, we ask of the Court whether it has made us better; has it treated us as the

28. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1-4 (1949); see also KAHN, THE CULTURAL STUDY OF LAW, supra note 15, at 71-72.
kind of people we believe we should be? A successful judicial opinion, for this reason, cannot be other than principled.

Both Garver and Dworkin see that what is at stake in such an argumentative context is character, and the virtue that we seek is "integrity." Thus, Dworkin gives us the memorable figure of Hercules, who reflects the whole of the legal order in the integrated character of his own commitment to principles. For both Garver and Dworkin, legal autonomy is a matter of ethos. Ethos is not adequately captured in either the idea of reason or that of will. It lies in character, which is always a matter of principles embedded in the will.

If Dworkin's work set us on the trail of integrity twenty years ago, then Garver reminds us that if our object is to understand the role of character in argument, we might do well to return to our first and best source on this topic: Aristotle's *Rhetoric*. I fear that this is a strategy that might fall on deaf ears in much of the legal community. Regardless, because the virtue of integrity—its simultaneous relationship to character and to argument—was never adequately worked out by Dworkin, we can use all the help we can get.

Still, there is a common criticism of Dworkin that I fear may apply with equal force to Garver's work. That criticism of Dworkin is that he knows only four cases. With Garver's book, I sometimes worried that he seemed to know only one. Of course, if you are going to pick one case, an excellent choice is certainly *Brown v. Board of Education*. Nonetheless, I fear Garver asks this case to bear more weight than it can. *Brown* is a great case, but a terrible opinion. If this opinion is a display of judicial integrity, something seems to have gone wrong.

*Brown* works through a kind of bait and switch strategy. It purports to decide only a single issue: the constitutionality of the application of the separate but equal doctrine to the nation's public schools. It relies upon a claim about the conditions of democratic self-government—citizens cannot fully participate in the political or civic life of the modern nation without an adequate education—and the findings of contemporary social science—segregation is detrimental to the education of minority students. *Brown* concludes that it is both irrational as a matter of public policy and damaging to individuals to continue to segregate the public schools.

That something more may have been afoot was suggested in *Brown*’s companion case, *Bolling v. Sharpe*. In *Bolling*, the Court

29. See DWORKIN, LAW’S EMPIRE, supra note 22, at 380.
31. Id. at 493-95.
confronted the problem of an absence of constitutional text putting a similar obligation of equality upon the federal government. The critical line of that opinion—a line that Garver does not emphasize, although it seems to support his reading—is that in which the Court pronounces it "unthinkable" that the federal government could continue to discriminate when and where the states could not. Of course, from a historical, structural, and textual point of view it is not unthinkable at all. Two generations later, the Court briefly allowed the federal government to discriminate in the context of affirmative action while prohibiting the states from doing so. However, if the basis of Brown is a moral principle of equality, rather than education policy or social science, then indeed it is "unthinkable." That principle, not policy, is at issue became clearer in the years following the Bolling decision as the Court struck down every application of the "separate but equal doctrine."

For Garver, this is a demonstration of argumentative ethos; of the Court taking responsibility for a decision by showing itself to be of a certain character, building trust in that character through the arguments it offers (and fails to offer), and moving beyond what the more formal tools of reason alone could have offered. I cannot quite see it this way. Indeed, if Garver's general view of the need for ethos is correct, the inadequacy of Brown may tell us something important about the ultimate collapse of the Second Reconstruction Movement.

Garver suggests that Chief Justice Warren was right in turning to the tools of politics in place of the traditional tools of law. The Court made a tough decision and then spent ten years exercising tactical judgments about how far to push—putting off miscegenation laws until the end—and how much to demand—allowing resistance and delays at the remedy stage. While it may have been exercising tactical political judgments over this period, it was not saying very much. For the most part, the Court offered no reason beyond a mute citation to Brown itself. As Justice Scalia has warned, however, those that live by the ipse dixit,
die by it. We can disagree with the principle, but disagreement does not necessarily detract from institutional respect—as Roosevelt later learned. *Roe v. Wade* is immensely controversial and has plenty of its own problems, but at least there is the clear articulation of a principle: constitutional liberty includes the right to choose whether or not to have an abortion. Having spoken a constitutional truth into existence, the principle proves to be remarkably enduring, even in the face of political opposition.

This failure to set forth the principle at the heart of *Brown* has plagued the Court and the nation for more than a generation. Is it the anti-discrimination principle or the anti-subordination principle that stands behind the cases? Is the end color blindness or the elimination of caste? Knowing which principle was at issue would have made a huge difference to the definition of the moral core of the nation and thus to understanding which policies were constitutionally suspect. Without this clarity, it became possible for the Court to engage in substantial dissembling when it began the long process of retreat from a commitment to equality in the 1970's.

When the Court finally made clear a principle, in *Washington v. Davis*, it did so without much attention, as if this were just a side issue to an evidentiary debate. But institutions have integrity when they convince us they are focused on the right issues, when they demand that we look where they look and provide us a moral compass we feel we can trust. The silence of the Court both in *Brown* and afterward was no act of political friendship. It did not create a community; it set the conditions for fracture. It invited a legal process of tactical advance and feint and obscured a clear vision of the problem of race in America. The Court has managed to take us full circle. Today, we have schools that give every appearance of segregation by race, and that produce students who are substantially unequal in their abilities to realize those virtues of citizenship so praised in *Brown*. Yet, these “unequal” schools present no

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38. See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 867 (1992) (reaffirming Roe’s essential holding that the Constitution protects a woman’s right to choose to abort) (“[T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court’s legitimacy beyond any serious question.”).


40. 426 U.S. 229 (1976) (requiring discriminatory purpose in addition to discriminatory impact for an equal protection violation).
problem of constitutional inequality. Indeed, under our “color-blind” Constitution, these inequalities are legally noncognizable: they have become invisible.

Garver offers the right principle to judge this situation, although he does not apply it to the Court itself: we cannot trust an institution that does not trust itself. The Court’s failure to pursue the Second Reconstruction began with a failure of trust in itself. That failure is already evident in Brown II, to which I think Garver gives too little attention. For here, just one year after the victory of Brown, the Court takes most of it back: remedial difficulties displaced the principle.

Garver is correct to see that we cannot speak about law in the abstract. The rule of law is like the domain of the aesthetic: it exists only insofar as it is embodied in particular artifacts. This is why his appeal to rhetoric is so attractive: to understand rhetoric, we must stick close to actual rhetorical performances. This same need to see law as an embedded practice and not just ideas—i.e., not just talk—requires that we look at remedies as well as rights. Brown II showed the Court to be acting as a tactically astute politician. This, however, is a confusion of roles that works against a judicial ethos of integrity. After three years of processing Brown, the Court actually ordered nothing; it took no responsibility for any ameliorative action. It sent the cases back to the lower courts, knowing full well that this would probably result in the denial of any relief to the particular plaintiffs. It made up a story of equitable difficulties, as if the public interest and the private interests of the plaintiffs ran in opposite directions in these cases. It set no timetables or deadlines, invoking instead “all deliberate speed.” If this did not invite resistance, it at least made resistance cognizable at the remedial phase.

There were examples of judicial heroism in the school desegregation cases—the ethos of commitment to principle—but not in the Supreme Court. Again, compare Roe, where the Court laid out a detailed remedial scheme that gave material reality to the right to choose. Of course, the Court was attacked viciously for drawing up a “regulatory plan”—a legislative responsibility—but if ethos involves responsibility, then the Court must not only articulate rights but also ensure their realization. When Casey is criticized today for undermining Roe, it is because the Court’s decision

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44. Roe, 410 U.S. at 162-64.
threatens the realization of the right it purports to uphold.\footnote{45}

In both of these ways—articulating the principle and taking responsibility for the practice—there is much to be criticized in the Court’s performance in \textit{Brown}. The ethos of \textit{Brown} is too political and insufficiently legal. Politics is not necessarily less principled than law. I am hardly accusing the Court of bad faith or of a failure of moral vision. Rather, there was a failure in its legal ethos. This may have been because the Court thought that the problem of race in America was beyond the capacities of law to remedy. That may even have been a correct judgment. One can’t really know about such things. As Garver reminds us in his book, the measure of the excellence of a rhetorical performance is not whether in fact it does persuade.

If we address directly this contrast between a political and a legal ethos, I think we have reason to question another point in Garver’s elaboration of the litigation surrounding \textit{Brown}. He finds it an illustrative, rhetorical failure for the District of Columbia’s counsel to have relied upon Justice Taney’s eloquent language in \textit{Dred Scott v. Sanford}\footnote{46} to support its argument that the Court is bound to the Founders’ intent and is not free to amend the Constitution to accord with contemporary values.\footnote{47} I think this incident more complex than a rhetorical gaffe. What it suggests to me is that the judicial ethos does not map out in any simple way on to moral principle—even as compelling a moral principle as that of racial equality.

I suspect that the attorney was not appealing to the racial prejudice of the Justices or of the Founders. Rather, he was appealing to an ideal of judicial courage, i.e., to an ethos of judicial integrity. An important part of the judicial ethos involves the disappearance—the literal suppression—of the individual Justice as a subject.\footnote{48} The rule of law is not the rule of men, including the Justices on the Supreme Court. Integrity is a function of the opinion, which is the possession of the Court, not the individuals. One aspect of the judicial ethos is to rule against one’s own interests, values, and beliefs. Holmes famously recognized this in his \textit{Lochner} dissent,\footnote{49} as did the plurality in \textit{Casey}.\footnote{50}

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\item E.g., Robin L. West, \textit{The Nature of a Right to an Abortion: A Response to Professor Brownstein’s Analysis of Casey}, 45 \textit{Hastings L.J.} 961 (1994).
\item 60 U.S. 393 (1856).
\item \textit{Garver, supra} note 1, at 112-18.
\item \textit{Lochner v. New York}, 198 U.S. 45, 75 (1905) (Holmes, J. dissenting) (“I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.”).
\item \textit{Casey}, 505 U.S. at 867-68 (“An extra price will be paid by those who themselves disapprove of the decision’s results when viewed outside of constitutional terms, but who nevertheless struggle to accept it, because they respect the rule of law.”).
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The appeal to *Dred Scott* offers a reminder of the demand for judicial integrity. Counsel tells the Court that other Justices have found themselves in very difficult situations with respect to the moral claims of black people in America. They stuck to the Constitution, leaving to the political process—ultimately the Civil War—the process of constitutional amendment. To bear the burden of the sin of *Dred Scott* is a powerful image of the judicial ethos of integrity. This is just what the conservative members of the Court say they are doing with respect to the sin of *Roe*.

The point of returning to this example of lawyering—of sticking close to legal artifacts in offering an interpretation—is to emphasize that the ethos of law is not the ethos of morality. The ethical authority of the judge does not necessarily arise from doing the right thing. Or more accurately, because we live simultaneously in different normative orders—including, the legal, the political, and the moral—there is never just one right thing to be done. Whether advancing the integrity of the judge will give us a morally better society is not a question that can be answered in the abstract. It depends what the courts do with their integrity.

We should not fetishize law, legal process, or judges. The virtues of law will not do our moral or political work for us. *Brown* got this part right. Its problem was not that it failed morally. Rather, the Court failed to utilize the possibilities of law to support its moral vision. The Court thought that its intervention was political and, in the end, paid a political price.

Often the complaint is made of Dworkin that he does not adequately distinguish law from morality. With Garver’s book I had a similar worry from the other side: has he adequately distinguished legal from political ethos? I suspect there is a larger lesson here. The insistence on the role of integrity in law does link law to both morality and politics. Approaching the autonomy of law through the conceptions of integrity and ethos is necessary to understanding the character of reason in law. The difficulty is to keep sight of the autonomy of law even while law’s reason seems always to be drawing on both morality and politics.
On Being Among Friends: A Response to Eugene Garver’s *For the Sake of Argument*

Richard K. Sherwin*

Being among friends, I allow myself to begin with a confession.

I have struggled with my response to Gene’s book. I’ve asked myself: how do I do justice to this gesture of friendship? How can I reciprocate his gift to us, this book, *For the Sake of Argument*? How can I be a good friend?

What is a friend?

Without an answer to this question, how can I know I’ve done well?

Let me begin with something about which I am more certain.

Eugene Garver has done us all a great service. He has written a lucid book about what needs to be integrated into our current understanding of practical reason. He invites us to set *pathos* and *ethos*, affect and character, alongside conventional notions of rationality.

The good person is someone who deliberates and persuades within a broad rhetorical base. Reason does not have to be disinterested to retain its identity as reason. Practical wisdom doesn’t have to be anchored in rules, or avoid appealing to emotions, interests, or prejudices, to remain prudent. In short, practical reasoning is rhetorical, as well as ethical.

As a “living faculty,” rather than a mechanical calculator of

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2. *Id.* at 4 (“Understanding practical reasoning as ‘the exercise of a living faculty in the individual intellect’ is the purpose of this book. Reasoning as the exercise of a living faculty is ethical reasoning. We shouldn’t infer that when method fails us, reason fails us too. Like *eros, praxis* is a great leveler.”).
interests, practical reason flourishes in the spirit of friendship.

Friendship, it would seem, is on many people’s minds these days. As the nation-state falters, and we search for new models for political community, it is not surprising that we turn to character and friendship as sources of normative replenishment. It is as if we were seeking anew the pre- contractual elements of civil society. We are drawn to revisit the mythical stories of political origin: Hobbes’s cowering citizen; Rousseau’s noble savage; Aristotle’s political friend.

And today, as the Internet links us all up in instant global communication, we wonder: what model of self will do justice to the circumstances of our lives? Is it enough to construct and project virtual identities, to create digital avatars at will? Is it enough to mingle affinities with others in a network of momentary amity?

Jacques Derrida has recently written about political friendship, as has Peter Goodrich. There is perhaps more boldness in Gene Garver’s work.

After all, it was only a couple of decades ago that Alasdair MacIntyre hit the philosophical scene with his grim indictment of contemporary culture in After Virtue. According to MacIntyre, not only have we lost our comprehension, both theoretical and practical, of morality, but, he adds, “the dominant philosophies of the present, analytical or phenomenological, [are . . .] powerless to detect the disorders of moral thought and practice.” In sum, MacIntyre concludes, “philosophical analysis will not help us.”

In the face of such a devastating cultural critique, Gene’s book is most welcome. His message is that things are not as bad as MacIntyre says they are. We can still reason together as political friends. In a word, we still have character.

But what sort of character is it?
Paul Kahn suggests it is the character of Hercules, Dworkin’s fabled

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5. See Thomas Hobbes, Leviathan (1882 [1651]).
9. See Derrida, supra note 3.
10. See Goodrich, supra note 3.
12. Id. at 2-3.
13. Id. at 2.
In this view, character is a matter of commitment to principles. But I wonder.

I had thought that what was distinctive about the narrative turn in contemporary philosophy and jurisprudence was precisely its recognition of the inadequacy of abstract principles as a basis for judgment.

In addition to our effort to anchor character in principles, I would have thought the challenge that we face is to construct character and community through our choice of root metaphors or narratives, through our joint efforts to realize a self-reflexive, constitutive ethos.

The question then becomes: what sorts of images cue up what sorts of emotional responses, or collective memories, or shared cultural resources? What kind of community do we create in conversation together? Consider, for example, Johnnie Cochran beseeching jurors to "do the right thing" in the O.J. Simpson case. This was not a matter of principle, but rather of discursive practice and the dialogical community to which it gave rise. Cochran was emplotting his listeners in a subjunctivized, "heroic" struggle against "endemic police racism," a state of affairs, according to Cochran, that only the jurors, by their verdict, could end.

Or consider the initial state criminal trial against the officers responsible for beating motorist Rodney King. In that case the defense team sought to re-constitute reality by digitizing George Holiday's amateur videotape, which had fortuitously captured the event. But visual reality, no less than the verbal kind, needs narrative emplotment for meaning's sake. In the defense version of Holiday's videotape, jurors saw the officers' batons coming down only when King's body rose up off the ground. When he lay prone, as ordered, the batons harmlessly lifted into the air. In this way, when they watched, the jurors saw causation at work. It was King himself who, in defiance of police orders, caused the batons to rain down upon him. Or so several jurors, when called upon to explain their verdict of acquittal, would later assert.

It wasn't abstract principle that guided their judgment. It was a

20. Id. at 212-213.
story about the justified use of force.

It’s the same with Justice Scalia’s opinion in *Michael H. v. Gerald D.* As Anthony Amsterdam and Jerome Bruner observe, Scalia’s narrative invokes a mythic tale of “Adultery as Combat.” Or consider Justice Kennedy’s narrative in *Freeman v. Pitts.* There, Kennedy offers another familiar narrative type: the tale of the “Conquering Hero Turned Tyrant.”

Rather than obsessing, in the company of Dworkin’s Hercules, about the right (principled) outcome, these decision makers seem more in tune with Richard Bernstein’s concern with the contingencies of human meaning making.

Rather than calling Ronald Dworkin to mind, in reading Gene’s work I was reminded of Richard Rorty. Character is embodied in the give and take of human conversation and storytelling. Rather than embedded principles, this is a matter of radical contingency.

It’s not about right answers, but rather a process of unfolding decisions out of local practices. As Rorty puts it, “It is a matter of playing off scenarios against contrasting scenarios, projects against alternative projects, descriptions against redescriptions.”

In his book, Gene gives us examples of this sort of thing. But I must admit, I wasn’t always sure what to make of them, or how to generalize from them.

For example, it is indisputable that South Africa’s Truth and Reconciliation Commission started a national conversation with noble goals. But as South Africans know, the public performance was not always echoed in private. And the sad fact is that to a significant extent a good number of South Africans today have not reconciled with their past.

Not without reason.

For the most part, many black South Africans have remained poor and isolated, while many white South Africans remain rich and powerful. Victims got to speak, yes; but later they were left alone: with their grief, without reparations or therapeutic intervention to ease their suffering and loss.

In Gene’s discussion of practical reason as exemplified in *Brown v.*

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Board of Education, we encounter a compelling vision of equality between the races. But what are we to make of the fact that the ethos exhibited in Brown could not keep the Court from subsequently losing interest in historical reconciliation between the races? It could not keep the post-Brown Court from talking about the goal of “reducing the historic deficit of traditionally disfavored minorities” as an “unlawful interest in racial balancing.”

And today, affirmative action strikes many as an affront, a social injustice.

Is this a sign of bad character?

Gene says that value pluralism and pragmatism are successors to Aristotle’s project. But how does this help us avoid the dangers of treating law as simply a form of politics? Friendship is nice, but politics, as everyone knows, is a game of power.

Why should I turn to Gene and Aristotle’s Ethics rather than to Karl Rove and Machiavelli’s The Prince?

I need to make choices. How should I proceed?

Should I become the instrumental character, the one who weighs means and ends?

Or should I prefer instead to become the Kantian rational character, who posits universal human rights and principles?

Or should I perhaps take on the guise of the Kierkegaardian therapist, the character who shows the dangerous deicts of aesthetics?

This is MacIntyre’s cast of modern characters.

How am I to say which, or whether, or when, one is better than another? And what if they are all equally fictitious, or at least equally lacking in all but self-serving, self-evident rationalizations, as MacIntyre asserts?

Or maybe now there’s a fourth character that we should add to MacIntyre’s list. Let’s call him the postmodern rhetorician, the inveterate mapmaker.

The rhetorician categorizes moves and makes maps so that he knows where he stands. “Oh, so now you’re playing the structuralist binary card,” he’ll say. Or the reifying historicist card. Or the genealogy of power card. “I’ve got your number,” cries the self-comforting

30. GARVER, supra note 1, at 69.
33. For more information on Karl Rove, advisor to President George W. Bush, see http://en.wikipedia.org/wiki/Karl_Rove.
34. See MACINTYRE, supra note 11.
cartographer. 35

But none of these characters, not even the postmodern one, really counters Nietzsche's devastating critique.

Again, using MacIntyre as my double here, the critique goes as follows: In the absence of good reasons for particular moral preferences, why not let the will replace reason? "Let us make ourselves into autonomous moral subjects by some gigantic and heroic act of the will." 36

So we start our moral quest from scratch, with an act of will.

But how do we know, beyond the desire that it be so, what the new tables of morality should contain, or how they should be created?

Gene wants to save us from such moral confusion.

Taking a page from Aristotle's Nicomachean Ethics, he finds virtue in friendship. He reminds us that we honor others in virtue of something that they are or have done to merit the honor.

But what is it that we honor today?
What is honor?

What do we value in a friend?

The times play a hand in assigning meanings to these words. For example, it is not unknown for virtue and vice to trade places. Consider the Greek experience during the Peloponnesian War. In his history of that terrible conflict, Thucydides writes: "Reckless audacity came to be considered the courage of a loyal ally; prudent hesitation, specious cowardice; moderation was held to be a cloak for unmanliness. . . . [T]he use of fair phrases to arrive at guilty ends was in high reputation." 37

I will resist the temptation to make comparisons between that period and other, more recent moments, when the fog of war once again clouds the mind and perverts human judgment. Suffice it to say, the meaning of words like "honor," "character," and "friendship" is hardly written in stone.

And we might well ask, what meanings do these words have based on our own cultural practices? What do we honor? What should we honor?

Without a satisfactory answer to these questions, we shall hardly find vindication in Aristotle's ethics.

So I ask, what kind of character should I become?
And how free am I to choose?


36. MACINTYRE, supra note 11, at 114.

Heraclitus famously said: "Character is fate." A two-way street: at once deterministic and open-ended. If I choose my self, I determine my fate. If fate elects me, I am chosen.

If I were naturally gifted with the virtue of prudent judgment in the way of personal excellence, I most likely would be able to answer this question.

I think Gene is suggesting that by engaging in practical reasoning I might find the way out of my ethical dilemma. But if I lack the requisite virtues, how am I to engage in such reasoning in the first place? And won't my ignorance even prevent me from recognizing such reasoning when I come across it?

It's the old Socratic query: can virtue be taught, or is it a gift? Can I learn, and teach others, to be a friend?

When I think of the requirements of friendship, at least as Aristotle understood it, I find myself growing pale in the face of what it demands of me. Like the demand to share all things in common for the sake of the common good.

But what is the common good? In common with whom?

Not many people these days seem to be choosing a common good. Not unless they happen to find pleasure in sharing the goods with the friends that they have. The common wisdom seems to suggest no one is obliged to share anything with anyone. Common access is tragic. Give people access to a common good and they'll just use it up, with no thought of tomorrow. It's the tragedy of the commons, the economists tell us. That's why we're told to acquire our own stuff, and to compete in the open market for the right to use other people's stuff.

Property rights give me power and control. I can protect the value of my things. And I can keep people out. I can even block their unlicensed access to my digital data online.

If the good is understood as internal to those cultural practices in which we currently engage, then it must be good to consume, to own. And while social institutions may be viewed, at least to some extent, as external to individual practices, they certainly help to create the conditions for particular kinds of practices to occur. Our institutions are constructed to encourage private ownership and competition, not to share all in common, as Aristotle requires of friendship.

How can it be doubted? Surely MacIntyre was right when he wrote

38. Philip Wheelwright, Heraclitus 68 (1968 [c. 500 BC]).
41. See id.
that we are a long way from Aristotle.

So on what basis shall I (or should I?) find the will or desire to resist, and become a different sort of character from the one my society tells me to be? How do I learn to be a friend?

It would surely help if there were a living tradition, a living community, in which I might practice the “living faculty” of practical reason that Gene praises in his book.

But where am I to find such a community?
Where do I find such friends?

We cannot even agree on the same set of virtues.

Is it determined by Bentham’s felicific calculus of pleasure and pain? Kantian universal human rights and principles? The Calliclean and Nietzschean will to power? Duncan Kennedy’s and Pierre Schlag’s deconstructive tactics of lucid disillusionment?

Given our ethical disarray, how are we to attain true political friendship? Friendship requires community. There are no virtues in solitude.

Two decades ago, Alastair MacIntyre concluded that we need “new forms of community . . . within which the moral life could be sustained, so that both morality and civility might survive the coming ages of barbarism and darkness.”

To my ears, this dire warning rings truer, and more disquietingly, today than when it was first pronounced.

Gene encourages us to believe that we can still bring life to the classical ethical tradition. I want to be persuaded by him. I want to hope.

But hope risks the pain of disappointment.

I think of the line attributed to Aristotle, the one on which Derrida dwells in his work on political friendship, “O my friends, there is no friend.”

A contradictory statement: caught between aspiration and reality.
But there is authenticity even in contradiction.
Perhaps this is the place from which we must begin.
To begin to act like a friend, even when there is no friend to speak of.

Perhaps to speak as a friend might, to speak about friendship itself, is enough. To begin.

Out of a common yearning, we invoke together the friendship that is to come, the friendship that we would create.

Might it be that daring to speak in this way constitutes the very first

42. MACINTYRE, supra note 11, at 263.
43. See DERRIDA, supra note 3, at 1.
act of political friendship?

In closing, I must convey my gratitude to Gene, for what he has done. For here we are, not exactly sure what to think, or how to choose who we should become. And yet, we remain bound together by the questions that we ask one another.

So I offer my thanks to Gene, for clearing a path to this conversation, now, at this critical moment, about the meaning and place of political friendship.

I hope I have done well, in response to the gift of his book.

I hope I have done justice to the spirit of friendship which allows practical reason to flourish.
The Circumstances of Friendship: A Reply to Francis Mootz, Eileen Scallen, Paul Kahn and Richard Sherwin

Eugene Garver*

I am very grateful to my four comrades for taking my book so seriously. In these responses, I have no interest in showing where they misread me in order to prove that I was right after all. Instead I want to highlight six places that I now take as topics for further inquiry. I take their comments as acts of friendship, and want to respond in kind by using their remarks as the basis for further joint inquiry.

I. At first I was surprised that Kahn— and Mootz—found me addressing the autonomy of law. I didn’t think that’s what the book was about. The word “integrity” appears exactly once in For the Sake of Argument. But, I realized, my subject throughout was the autonomy of practical reason, and legal reasoning was frequently the source of my examples of practical reasoning, so their reading me as concerned with the autonomy of law is, although surprising, fair. This is a case of readers understanding an author’s intention better than the author himself; a nice example of the effects of friendship. Kahn rightly situates questions of the autonomy of law in a larger context of the rational character of law. Not all reasoning is rationalization or the use of reason as an instrument to achieve goals that themselves have nothing to do with reason: but how do you tell the difference between reasoning and rationalizing?

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* Eugene Garver is Regents Professor of Philosophy at Saint John’s University with his A.B. and Ph. D. from the University of Chicago. In addition to For the Sake of Argument: Practical Reasoning, Character, and the Ethics of Belief, Professor Garver is author of MACHIAVELLI AND THE HISTORY OF PRUDENCE (1987), ARISTOTLE’S RHETORIC: AN ART OF CHARACTER (1994), and CONFRONTING ARISTOTLE’S ETHICS (2006).


Since they told me that *For the Sake of Argument* concerns the autonomy of law, I have wondered what is special about legal reasoning as opposed to practical reasoning in general. I’m not concerned with the difference between law and politics, or legal institutions vs. political institutions. Instead, I want to know what is special about the legal *éthos* and the *éthos* of people, not only judges and advocates, engaged in legal reasoning. If there is a difference between reasoning and rationalizing, we won’t find it by a neutral demarcation criterion, but by seeing them as ethically distinct.

Like practical reason in general, as Kahn says, “legal argument takes place in a situation that simultaneously offers too little and too much.”\(^4\) Aristotle says in the *Rhetoric* that rhetorical arguments shouldn’t be too long.\(^5\) That looks like purely tactical advice, but points to something about the autonomy of practical reason. Decisions and judgments are always in danger of being too remote from the evidence because we know both too much and too little to be sure. Practical reason is risky business, and so we have to take responsibility for our decisions. Deliberative and practical situations are not determined and necessary, where we could know enough and so not need to do anything. Deliberative situations are not conditions of chance, where we can’t know enough to make a rational decision. Kahn’s “too little and too much” lies between necessity and chance.

But there are a few features unique to legal reasoning. First of all, legal reasoning—including legal reasoning beyond litigation, about which Mootz and Sherwin\(^6\) remind us—is controversial. There is a conflict of pleas. Most of the legal reasoning we hear, including hear from ourselves and judges, is interested and partisan. We try to figure out the right thing to do in situations that beg for a hermeneutics of suspicion. How to be trustworthy and how to trust others in such a situation calls for virtues of character and intellect specific to law and its conventions. The difference between reasoning and rationalizing is different, I’ve learned, in law and in philosophy.\(^7\)

Second, in legal reasoning and not in practical reasoning in general, there are losers. Legal judgments often force people to do things they wouldn’t do otherwise. Deliberation can at least aspire to ideals like

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7. In Eugene Garver, *Can Virtue be Bought?* 37 PHIL. AND RHET. 353 (2004), I look at Socrates’ performance in the *Protagoras* as confronting exactly this problem. Anything the Sophists say is designed to attract clients, and Socrates says will be heard as part of that same contest.
Pareto optimality, in which everyone is happy with the result. Legal reasoning can’t always have that hope. This also sets unique demands on the legal ethos. I’ll talk about Brown v. Board of Education below, but part of the ethical task the Justices conceived for themselves in Brown was to try to ensure that the losers saw themselves as not fully rejected. (It may be that the failures of Brown that Kahn talks about come from too much attention to this ethical task.)

I find a third difference between legal reasoning and practical reason in general. As I argue in the book, the autonomy of practical reason makes trust central. But central to the autonomy of law is authority. Where Kahn has made the reason/will topos central for talking about justification and obedience, I use the logos/ethos topos for talking about trust and authority. This is rational and ethical authority because a court has “neither sword nor purse.” Plato’s Phaedrus and Lysis offer profound meditations on the relation between friendship, which we assume to be symmetrical, and eros, which all assume to be asymmetrical. My book, on the other hand, examines the relation between trust, a symmetrical relationship requiring a certain degree of equality, and authority, an asymmetrical relationship which requires inequality. Legal ethos is unique in its need to combine trust and authority. My book is about trust, and about the relation between thought and character that develops in what I call the circumstances of friendship. Legal argument has a central place in the operations of trust and authority today.

Fourth, lawyers speak for clients, and judges speak in the name of the people and the law. Rhetoricians began in ancient Greece by ghostwriting speeches because parties had to speak for themselves. There is, however, a long tradition of the rhetorical problems of speaking in the name of someone else, as diplomats do, or speaking in the name of the law and of the people, as judges do. I’ll talk below about the role of emotions in legal reasoning, but in practical reasoning in general I am entitled to my own emotions. They might be unwise, but if my feelings of loyalty, say, dispose me to look at a situation in a specific way, I can see things through the lens of loyalty. Judges are not entitled to their own passions, but must represent the emotions of the community. Kahn talks about the disappearance of the subject in legal discourse, and I am interested in the ethical implications of this suppression.

10. The Federalist No. 78 (Alexander Hamilton).
11. For a nice consideration of these problems, see Thomas L. Shaffer, The Legal
II. Next, I want to focus on what Kahn calls the "mysterious middle moment of decision" that lies between the experience, on reading briefs on both sides of a case, of equipoise and the decision, followed by a sense of necessity.\textsuperscript{12} Often we not only think of it as mysterious, but as scandalous—we shouldn’t move comfortably and instantly from a conflict of persuasive probable arguments to a conviction that one side is necessarily right.

This mysterious moment is such a commonplace experience that we shouldn’t assume that it must be irrational or otherwise wrong. It may be; there are lots of ways in which common human behavior is nothing to be proud of. But I think we should approach the mysterious moment without prejudging whether we should condemn or justify such behavior. For the same reason, I don’t want quickly to condemn the mystery as judicial posturing and bluffing, pretending that things are more settled than they really are. That seems to me an inadequate story because we behave the same in private as in public. When we make an individual decision in the face of incomplete information, we are able to act decisively, and our conclusions become relatively impervious to further evidence. It is hard to change our minds once we have made them up.

Kahn’s mystery violates a principle of the ethics of belief often called evidentialism, derived from Locke’s worries about the rationality of religious belief. This theory declares that the rational person gives assent in proportion to the evidence.

Here is Locke’s formulation:

Faith is nothing but a firm assent of the mind: which if it be regulated, as is our duty, cannot be afforded to anything, but upon good reason; and so cannot be opposite to it. He that believes, without having any reason for believing, may be in love with his own fancies; but neither seeks truth as he ought, nor pays the obedience due his maker, who would have him use those discerning faculties he has given him, to keep him out of mistake and error. He that does not this to the best of his power, however he sometimes lights on truth, is in the right but by chance; and I know not whether the luckiness of the accident will excuse the irregularity of his proceeding. This at least is certain, that he must be accountable for whatever mistakes he runs into: whereas he that makes use of the light and faculties God has given him, and seeks sincerely to discover truth, by those helps and abilities he has, may have this satisfaction in

\textit{Profession’s Rule Against Vouching For Clients: Advocacy and “The Manner that is the Man Himself;” 7 NOTRE DAME J.L. ETHICS & PUB. POL’Y 145 (1993).}

\textsuperscript{12} Kahn, supra note 1, at 935.
doing his duty as a rational creature, that though he should miss truth, he will not miss the reward of it. For he governs his assent right, and places it as he should, who in any case or matter whatsoever, believes or disbelieves, according as reason directs him. He that does otherwise, transgresses against his own light, and misuses those faculties, which were given him.\textsuperscript{13}

The more probable a conclusion, the more firmly I should hold to it. By that standard, the typical judicial performance is inept, and probably dishonest. On the other hand, if there is a difference between legitimacy and justice, and a gap—to be filled by \textit{ethos}—between a legitimate argument and a just decision, then these violations of evidentialism are not irrational. Judicial reasoning, and practical reasoning in general, requires an analysis that goes beyond the tools that logic can offer. We need to distinguish the legitimacy of argument from the justice of a decision. Legitimate arguments produce legitimate objects of belief, things I may believe. Beyond that is not an arbitrary choice of which alternative interpretation I ought to accept, as James argues in “The Will to Believe,”\textsuperscript{14} but a responsible and ethical decision. I choose it because it is right, but it is right—I stand behind it—because I chose it. The challenge is to think of this process as other than willful—I think it good because I desire it. The issue is when that is a vicious circle and when it is legitimate.

The opposition between Lockean evidentialism and Kahn’s mystery is matched by an opposition between two conceptions of reasoning. According to contemporary logic the test of cogency is that there is nothing in the conclusion of an inference that is not already in the premises. If my premises are only probable—and the fact that I have selected from among options shows that they are only probable—the conclusion can be at most as probable as the least among them. If there’s more in the conclusion than in the evidence, whether more content or more firmness of conviction, then something went wrong.

Legal reasoning and rhetoric follow older models of logic in which novelty is a sign of vigor and rationality, a sign that real thinking is going on. When practical reason is ampliative—and a central part of the


\textsuperscript{14} William James, \textit{Essays in Pragmatism}, in \textit{The Will to Believe} 88-109 (1896).
argument of my book, especially chapter 4, is that good practical
reasoning is ampliative—we move from probability to confidence.
Rhetorical and legal reasoning don’t move from probability to
certainty—that’s a fallacy by any standards—but from probability to
certainty. This is the crucial move from a legitimate argument to a just
decision. Practical reason is ampliative because it moves, via ethos but
never irrationally, from probability to confidence. Maybe not faith in
things unseen, but at least commitment and confidence that go beyond
the evidence.15

Practical conclusions often are not only held more firmly than the
evidence they start from, but also they often have greater scope than the
evidence itself licenses, and so practical reason is ampliative and
mysterious in a second respect. Judicial reasoning often must both
resolve a particular issue before a court and speak to more general issues.
Like practical reason in general, legal reasoning wrestles with the
mystery of how to do justice to the parties to a dispute and do justice in a
larger sense. Once we see that legally segregated schools are unjust, we
come to see—it may take time, but it doesn’t take further evidence or
further reasoning—that other forms of inequality are wrong too.

There is a third ampliative dimension. Practical reasoning, and
legal reasoning in particular, moves from is to ought, from facts to a
practical conclusion about what is to be done. Hume, who knew
something about Lockean evidentialism, taught us that this is a fallacy.
But we reason practically from is to ought by finding the implicit moral
structure and value within the facts. This is the discovery of narrative
about which Sherwin and Kahn write. We need character to derive ought
from is. We need ethos to find implicit moral structure and value within
the facts. Logic alone won’t get us from is to ought.

The ampliative nature of practical reasoning, the confidence and

15. ADLER, supra note 13, at 232, 237. Adler usefully distinguishes between the
roles of full and partial belief in our lives. Id. at 232.
Full belief, in contrast to partial belief, facilitates (intentional) action. Partial
belief regularly calls for significantly greater hesitation and calculation. . . .
Partial belief, however, in this respect is more like desire. It points inward to
the believer (his degree of confidence), as desire points inward to how one
wants the world to be. . . . When one holds a partial belief, one may look to the
world for further evidence of its truth. But one cannot look through one’s
attitude . . . to the content as expressing a feature of the world, since one does
not (yet) take the world to be that way. In partially believing that p, however
strongly, we recognize a gap between our attitude and the way the world is.
But with full belief there is no gap—from my first-person point of view there is
no difference between my believing p and this being the case that p. . . . Since
full belief claims truth, there is no reason for one’s actual evidence to be
retained.
Id. at 237.
content and normative direction that go beyond its premises, comes from character, *ethos*. I can’t *know* more than the evidence provides, but I can *claim* more, and be *committed* to more. I don’t add additional evidence concerning my own feelings and desires about the case. That would be cheating. If we think of practical reasoning as theoretical reasoning, this *is* cheating. I stake my character. That performance gives the audience an additional persuasive reason. I hold myself responsible for decisions over and above the extent to which the facts and legitimate arguments suggest the decision.

The mystery of commitment, of moving from doubt to confidence, is an instance of the more general phenomenon of the difference between the contingencies of the future and the necessities of the past. The future looks open; how it turns out depends on us. The past looks inevitable. Once things have happened in a certain way, reality suppresses the alternative, unrealized possibilities. They once were probable, and now are impossible. One probability has become a necessity.

In moving from conflicting and incomplete evidence to a decisive judgment, we do add something, although I don’t think it helpful to call it a premise. We add the thought that it is time to come to a decision. Aristotle supplies a model for deliberation in *Ethics* III: we start with a posited end, and deliberate until we have constructed a causal chain that goes from what we can do up to the end.\textsuperscript{16} We know when deliberation is over. It’s over when it’s complete. Most practical deliberation doesn’t work that way. Sometimes there is an external constraint that tells us when deliberation is finished, although not complete. Time’s up. At other times we may decide that further inquiry is unlikely to be worth the trouble, or will only make things more controversial, or should be avoided for other reasons. Reasonable people can reasonably differ on whether to end inquiry. But when an inquiry or deliberation is finished, that is itself then a reason not to revisit the evidence. That, then, is a reason we become more confident in our judgment. At that point, the alternatives to the decision, such as reexamining the evidence, no longer are attractive, and no longer have the standing they had just before the decision.

These ampliative features of practical reasoning account for the further mystery that once a decision is made, it becomes resistant to change. We are more confident than the evidence alone would justify, and so once we make a decision, new evidence has less weight. Our conclusion is broader than the evidence that leads to it, and so new evidence counts for less because it now has to be evidence against the

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more general conclusion, not the narrower one against which it could have counted before the decision. Finally, because our practical reasoning moves from is to ought, the decision must be more resistant to revision. What we ought to do is less susceptible to refutation than what is the case.

There is another familiar legal mystery, though, that we should juxtapose with Kahn’s. It is a common experience in practical reasoning and in legal reasoning that our decisions are often *better* than the reasons we are able to offer. (We have to be careful not to be romantic about this. We also often make bad decisions on reasons we can’t offer. Sometimes making our reasons public stops us from doing something wrong.) It is possible to explain this by claming that the reasons we present are really just rationalizations. We act on instinct or feeling, and for public consumption mask our desires and emotions in rational covering. Hence attacks on the autonomy of law and of legal reasoning. Hence the common opinion that *Brown*—and *Roe v. Wade*\(^\text{17}\) for some—is a right result but a bad opinion.

A better interpretation of the mystery comes from Aristotle’s discussion of maxims in *Rhetoric* II.21.\(^\text{18}\) Maxims are persuasive because the good speaker is able to put into words what we think but cannot say. When we encounter such a speaker we’ll follow her anywhere. One measure of a great judicial performance is that what seemed unlikely or wrong before the argument looks self-evidently and inevitably right after it. (This is often how dissents become precedents.) The ability to articulate what most of us can’t express is sometimes a matter of cleverness and skill, as in logical reconstruction, but sometimes requires virtues of thought and character. The logician is not an impressive character, and his skill gives me no reason to trust him in persuasive contexts, but the person who can formulate wise maxims has earned my trust.

But I think there’s an even better story to be told about this mystery. We are opaque to ourselves. “On any important decision we deliberate together because we do not trust ourselves.”\(^\text{19}\) I want to juxtapose that line of Aristotle’s with one from Scallen’s\(^\text{20}\) hero, Cicero: an argument is “something probable worked up to create confidence.”\(^\text{21}\) Logic as the

\(^{17}\) 410 U.S. 113 (1975).
\(^{18}\) ARISTOTLE, supra note 5.
\(^{19}\) ARISTOTLE, supra note 16.
\(^{21}\) CICERO, THE GENRES OF RHETORIC (John F. Tinkler, trans., 1995). The Greek word, *pistis*, translated in my Aristotle citation as trust, has the same range of meanings as the Latin *fides* translated here as confidence.
analysis of arguments misses the way in which making something explicit transforms it. Stating a principle is not an innocent act. If character is the true soul of practical reasoning, it is not always best articulated in an explicit principle. Making self-conscious our logos, ethos and pathos are different kinds of acts. The advantages that come from making reasoning explicit are not advantages when ethos and pathos become explicit.\textsuperscript{22}

Awareness of character, of the dependence of how we think on who we are, is different from awareness of hidden premises. That is why analyzing a persuasive argument sometimes looks like explaining a joke—the analysis might explain, but it isn’t funny, and isn’t persuasive. Attempts to persuade directly through an appeal to character are very prone to backfire, as in the notorious, “Trust me; I’m not a crook.” When we make a logical appeal explicit, we come to give it the credit it deserves. Clarification exhibits strengths and weaknesses. But I can defeat your ethical arguments by making them explicit. Fairly characterizing the logical structure of an argument is a purely descriptive act, while there are no neutral characterizations of ethos. If I say, “your argument depends on our trusting you because of your superior experience in these matters,” your argument is weaker. To show that an appeal to character or emotion has a rational structure makes it less effective as an appeal to character or emotion.

When these arguments are propounded in a richer and more flowing style... they more easily escape the captious criticism of the Academics; but when they are expressed more briefly and sparingly as Zeno used to do, they are more exposed to rebuttal. A river in spate suffers little or no pollution, whereas an enclosed pool gets easily sullied; and likewise the critic’s censure is diluted by a stream of eloquence, whereas the narrow confines of circumscribed argument cannot readily defend themselves.\textsuperscript{23}

Expressing a passion transforms the passion. Some of our most persuasive arguments are hard to defend because they are driven by emotion. We see a situation differently because of anger, love, or shame. “The emotions are those things through which, by undergoing change, through which people come to differ in their judgments and which are accompanied by pain and pleasure.”\textsuperscript{24} “Pleasure, genus of emotions.”\textsuperscript{25} “When people are feeling friendly and placable, they think one sort of

\textsuperscript{22} See Sherwin, \textit{supra} note 6, at 949 (“What was distinctive about the narrative turn in contemporary philosophy and jurisprudence was precisely its recognition of the inadequacy of abstract principles as a basis for judgment.”).


\textsuperscript{24} Aristotle, \textit{supra} note 5.

\textsuperscript{25} Id.
thing; when they are feeling angry or hostile, they think either something totally different or the same thing with a different intensity: when they feel friendly to the man who comes before them for judgment, they regard him as having done little wrong, if any; when they feel hostile, they take the opposite view.”²⁶ If I can convince you so that we share the assessment that this situation appropriately dictates an angry response, you will find my reasons compelling. They won’t be reasons for everyone, but they are reasons that bind us together. Kahn’s mystery that I started with, the experience of conflicting plausible argument followed by a sense of necessity, demands that we understand the role of emotion in our practical reasoning. These are emotions that bring people together in friendship.

III. While only two of the eight chapters of the book are about Brown, Kahn is right to insist on it as a test case for my picture of reason and character. I chose to focus only a single case rather than range more broadly because Brown uncovers important facets of practical reasoning. One thing the autonomy of law means is that we have to deliberate and debate about whether Brown is a good opinion. There is no scientific or historical proof of Brown’s excellence or failure that lies beyond practical reason of the kind Gerald Rosenberg, for example, attempts.²⁷ Fifty years on, Brown is unfashionable, although Kahn’s reasons for criticizing it are as unfashionable as my praise for it.

I see at least three legacies of Brown relevant to judging the Court’s ethos and ethical performance. First, Brown was about school desegregation. Schools today are as segregated as they were fifty years ago. The Court was insufficiently courageous, and that’s why schools have stayed segregated. That, I take it, is Kahn’s argument.

Second, Brown made equal protection into anti-discrimination, and elevated equality into a basic legal value of our society. Equality moved from being part of the language of law—equal protection—into part of the language of politics. That is a measure of success for a judicial opinion. Wheel-chair ramps, I tell my students, are the most visible signs of affirmative action today. That is the narrative about Brown that I favor.

Put those two stories together and we discover that the affirmation that equality is an overriding value, and racial discrimination merely an especially egregious denial of equality, turned out to be a failure with respect to racial discrimination in public education, while the meaning of Brown successfully extended all over American life. “The meaning of

²⁶ Id.
Brown—itś ethos—survives in the ethical surplus of the argument. That ethical surplus is the anti-discrimination model which commits the Court to desegregation beyond schools. Brown's meaning is its understanding of equality and discrimination.” Through an irony of history that needs exploring, the per curiam decisions are not controversial while the central holding is. Since I argue that the per curiam decisions and Bolling v. Sharpe represent examples of pure ethical argument, on this verdict of history my account of Brown and my understanding of practical reason seem vindicated against Kahn's. As I say in the book about Bolling:

The ultimate ethical argument is the announcement of a per curiam decision, where everything is tacit. The companion case, Bolling v. Sharpe, which ruled against segregated schools in the District of Columbia, comes close. . . . Nothing could be a more purely ethical argument. Constitutional text does not seem to help; legislative history is on the wrong side. Here is a logically weak rationale for an ethically strong conclusion, and Warren signals the weakness by the double negative, “not mutually exclusive.” Brown has changed the meaning of the Fifth Amendment. “Reverse incorporation,” applying implications from the Fourteen to the Fifth Amendment, makes the Court's [own] reasoning the ultimate ground for the decision. Practical reasoning creates ethos. The authority for Bolling is Brown.

But there is a third legacy of Brown, and a third way of looking at its ethos and its ethical meaning and effect. Brown changed the rule of law into the rule of courts. Kahn criticizes the Court for not sufficiently taking responsibility for its decisions. Starting with Cooper v. Aaron, and leading to cases like City of Boerne v. Flores, the Court has affirmed that it not only has the last word, but the only word, on constitutional meaning. I think this is a legacy of Brown that neither of us would celebrate. But all these are elaborations through history of an aspect of the ethos of Brown.

IV. This third way of talking about the effects of Brown leads to a question, engendered by all three responses. Rhetoric is about the power of words. Marx says that men make their own history, but they don't make it as they please. Rhetoric shows how to do things with words, but human discourse is not omnipotent: when I say, “Let there be light,” nothing might happen. The good rhetorician exercises the virtue of

29. GARVER, supra note 3, at 82.
knowing how much his or her own speech can effect, how much to leave in the hands of audiences of different kinds. The same goes for rhetorical criticism, of which *For the Sake of Argument*, is an example. How do we decide if the Truth and Reconciliation Commission ("TRC") was a success? Lincoln’s *Second Inaugural? Brown?* These evaluations depend on assumptions we make about the power of words. When Kahn and Mootz criticize Warren for being political, and I praise him, we differ over the power of words. When Kahn notes that today’s public schools are as segregated as they were in 1954, or when Sherwin notes that the former victims of apartheid in South Africa remain as poor as before, they are observing the limited power of words. Even the best practical reason is not simply performative: saying doesn’t always make it so.32

Legal rhetoric confronts specific and very interesting problems about the limited power of words. These are problems that I don’t explore in the book, but that my critics show need serious investigation. We can talk about the intention and effects of *To Kill a Mockingbird, Birth of a Nation, Gone with the Wind,* or *The Passion of the Christ.* We can think about the relation between intention and effect. But legal rhetoric often has an additional performative dimension lacking in the powerful discursive performances we think of as aesthetic, or in clearly political yet nonofficial performances, such as flag burning. Legal words do something. Their doing something might be minor compared with the effects of the words—on some understandings of gay marriage the performative that weds a couple is a small effect compared with the sky falling as a consequence. But there are special problems relating the two. Many of Austin’s initial examples in speech act theory are legal: “I now pronounce you man and wife.” “We find the defendant guilty.” “I promise to love, honor and obey.”33 Scallen’s concern with gay marriage is clearly a battle over the power of words. An appropriate official can marry two people, but the issue people fight about isn’t performative rhetoric, but the power of words: can this couple being married debase other people’s marriages? Does gay marriage mean equal citizenship? Does a denial of gay marriage mean caste and subordination?

The important new and legal problem here is the relation between the performative action and the wider effects. It’s one thing, for example, to say that the TRC’s exposure of wrongdoing and the opportunity it gave to victims to tell their stories created community in

South Africa; it's quite another to say that their legal power to confer amnesty created community. The verb "created" points to different things and different causal connections in the two cases. It's one thing to say that Brown introduced and made compelling a new vocabulary of equality and anti-discrimination. The powerful images of Birth of a Nation could in the same way make compelling a shared vision of race and history. There is an additional question specific to law about whether the Brown verdict that separate but equal is impossible led to those effects. What kind of connection is being asserted between the performative of the verdict and the wider cultural changes? Part of the power of words is their power to invite or compel more words—rebuttal, development, redescription, parody, reduction to cliché. Elsewhere I've argued that it is fatuous to believe that posting the Ten Commandments will reduce teen pregnancy, but the real issue people are fighting over is the connection between an official performative act and the wider effects of the posting. The general form of that question needs a lot more reflection.

Scallen's example of gay marriage, like my example of posting the Ten Commandments, shows something about how powerful many people think words and symbols are, and how powerful official pronouncements are frequently taken to be. Is this just magical thinking, or is something more involved? The white southerners who wanted to impeach Earl Warren resisted integration until Congress started attaching its "purse" to the Court's judgments. So, what were they fighting about? Part of it is the strong desire to feel that the state is on our side, which clearly is at work in the gay marriage disputes. But I think there's more.

Isolating official speech acts is similar to isolating law. There are borderline cases between law and politics, texts that don't carry official authority and yet try to do something performative with words. I can only note in passing—because I don't know what more to do with it—the example of the Declaration of Independence. It claims performative power for itself: "these United Colonies are, and of right ought to be free and independent..." If it succeeds, it is self-legitimating. Although it serves as inspiration, as it did for Lincoln, it almost never serves as a legal precedent.

The question of the power of words bears on another comment of Kahn's, again in criticism of the Brown decision and/or my praise for it. Kahn says: "if ethos involves responsibility, then the Court must not

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35. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).
only articulate rights but also ensure their realization."36 But ensuring their realization does not mean that the Court must provide a regulatory plan. One aspect of political wisdom that should be part of legal reasoning is deciding who should realize and enforce rights. The Court can be more powerful by making others do what’s right, and even more powerful by getting others to think that they are voluntarily doing what’s right.

Kahn notes that one of the circumstances of legal reasoning is the pressure of time. I think the Court in Brown worried about a different kind of time constraint. The South African TRC worried about the length of its hearings, sacrificing justice and truth in the name of getting a report out quickly enough for the public still to support the inquiry. Of course we can now see that the Court miscalculated, and that white resistance was more massive and more lawless than they believed it would be. They made a judgment of practical reason about deliberate speed, and the judgment was wrong. They thought, or hoped, that if the opinion were “non-accusatory” there would be less resentment and more cooperation. Here too they were wrong. It is worth noting that these miscalculations were not due to the fact that the Court was politically naïve or that its members were drawn from a narrow academic class without political experience. That charge can be leveled against the contemporary Court, but not the Warren Court. Maybe on the contrary, the Warren Court overrated its political sense.

I read the political calculations of Brown this way. They proposed that the white South be forced to be equal. The best of all possible outcomes was that the white South voluntarily would do the right thing. Clearly they weren’t going to do the right thing unless ordered to. The Court hoped that the order would be enough, and that compliance would be voluntary. If it weren’t, the order would be as ineffective as the First Reconstruction, and for the same reason. After not very long, the rest of the country would grow impatient and say that blacks had received enough special help and that it was time for them to make it on their own, time for the law to be color-blind. They tried to avoid the coercion of the First Reconstruction, but got the same result all the same.

V. Both Kahn and Sherwin note the perversions of history by which we now have a color-blind Constitution that tells us to be ignorant of the continuing problems of race in America. Color-blindness, at least in many current interpretations, is a paradigm for reason without character. The whole point is to be purely formal, neutral, and not sentimental or responsive to special pleading, and to claim that stance as a legal virtue. An étos of the American community develops in that

36. Kahn, supra note 1, at 943.
formal meaning of the color-blind Constitution. It represents an
eagerness to affirm values such as equality without being willing to do
anything to achieve them, a return to something like Harlan's distinction
of social from legal equality in his *Plessy v. Ferguson*37 dissent. The
current rhetoric of self-reliance and freedom permits us to feel good
about ourselves while maintaining a gap between our ideals and our
policies.

We the people discovered, in the years after 1954, what a
commitment to racial equality entailed. We the people rejected the price
as too high. We therefore redefined racial equality as something we
could afford. One of the signs of ethical argument, which Kahn notes in
*Bolling*, is that something is declared unthinkable. If the Court
successfully speaks for the community, it will indeed be unthinkable.
But it is an ethical argument, and so revisable. What used to be
unthinkable becomes thinkable. An older term for the unthinkable was
the shameful, and it is worth looking at Plato's dialogues for ways in
which shame is used as a principle of ethical inference. Not everyone
will respond to such an appeal to shame, and not everyone will agree that
something is unthinkable.

Kahn says: "Under our "color-blind" Constitution, these
inequalities are legally noncognizable: they are invisible."38 In my first
chapter I talk about democratic knowledge, knowledge possessed by a
community, not simply by a set of individuals, something like
Rousseau's distinction between the general will and the will of all. And
corresponding to the idea of democratic knowledge is that of democratic
ignorance.

Each of us might know something that we as a community cannot
know, and so cannot use as the basis for deliberations. We need such
ignorance most clearly in judicial contexts. There are truths that are not
admissible as evidence. . . . But we also exclude some things that each
of us knows from deliberative rhetoric. Each of us might know that
women live longer than men, and that white Americans live longer than
black Americans. However, as a public we are ignorant of these data.
We cannot use them, for example, as the basis for arguing that women
should pay more into retirement accounts than men, or that blacks should
pay more than whites for medical insurance. We are democratically
ignorant of these facts, as of many other facts about race, gender and
class. Maybe we should be. But whether we should be or not, the
reasons we can share depend not only on what the reasons are but on

37. 163 U.S. 537, 552-64 (1896).
38. Kahn, supra note 1, at 943.
who we are."\(^\text{39}\)

The color-blind Constitution is an example of democratic ignorance. Practical knowledge is knowledge about what to do. We can’t know things we can’t do anything about. In this case, we won’t know things we choose not to do anything about. Democratic ignorance includes hiding from ourselves the fact that this is a choice. “If Gene’s general view of the need for ethos is correct, the inadequacy of Brown may tell us something important about the ultimate collapse of the Second Reconstruction Movement.”\(^\text{40}\) Brown revealed something “inadequate” about America: an unwillingness to make a practical commitment to racial equality. Truly equal education would mean facing “unthinkable” realities about property taxes, municipal boundaries and other things we’d like to think of as natural rather than subject to deliberation.

We need to think more about the unprincipled nature of the Brown decision, because I think Kahn’s differences with me point out something else about ethical argument. Just because no principle is explicit and unambiguous in the decision doesn’t make it unprincipled. I think Brown develops an ethical principle, and that it need not be stated in a proposition as a logical or scientific principle might be. Announcing a principle is not necessarily a useful way of doing that, as the Court found in Roe v Wade. The Warren Court’s failure to announce an explicit principle in Brown was not necessarily disingenuous, and not necessarily a failure.

The Court in Brown articulated a principle, not by making it explicit, but by focusing attention on a great wrong. Lochner v. New York\(^\text{41}\) and Roe didn’t do that. Bakers working long hours was not a stain on the nation’s conscience demanding remedy, as school segregation was. Even restrictions on abortion did not as evidently restrict freedom or equality as much as school segregation did; a case that had to be made because the wrongs and rights are private and out of sight, which is why most Americans think they support a right to abortion and at the same time support restrictions that would make that right empty for most people. The obviousness of the wrong of segregation made the kind of articulation of principle Kahn wants unnecessary. When character and emotion are so easily in play, a principle in the form of a proposition could be out of place and can backfire rhetorically.

VI. Sherwin rightly draws a connection between my work and MacIntyre’s. He notes the cast of characters at the beginning of After Virtue, and MacIntyre’s complaint that philosophy cannot solve our

\(^{39}\) Garver, supra note 3, at 40.

\(^{40}\) Kahn, supra note 1, at 941.

\(^{41}\) 198 U.S. 45 (1905).
contemporary problems. MacIntyre’s point is that philosophy has a practical function in some societies and not others, and that it is an indictment of a society that philosophy doesn’t have a function. Sherwin poses the problem as one of character and fate. I would put it slightly differently. MacIntyre raises the problem of when one has a character not suited to the times. Everyone is in favor of friendship and treating each other well, but are the virtues of trust and friendship possible in our dark times? Don’t they presuppose a context in which people already treat each other well, so that I all have to do is join in? And if that context is missing, my friendly arguments will either not be heard or not heard as friendly.

So, to recall Scallen’s title, if I were sued, of course I’d want a shtrarker for a lawyer. Of course I’d opt for, as Sherwin puts it, Karl Rove or Machiavelli over Aristotle. There’s no conflict between good guys and bad buys, friendly philosophers against Sophists or economic reasoners. The conflict lies within each of us, between what I need and what I want to be. I would put the difference between MacIntyre’s project and mine this way: where he thinks that the only way to avoid the dark ages is to invest energy in new local forms of community with a material basis, reenacting Aristotle’s arguments about autarchy, I direct attention—and hope—to exemplary performances. I emphasize especially public and verbal discursive performances because of their visibility and accessibility. This is the Machiavelli in me. I try to reason from the great examples in the past and at the same time learn an art of judgment that lets me identify and criticize those great examples. Sherwin asks what general morals to draw from my examples. I don’t think this puts him with Kahn complaining about Brown’s lack of explicit principle, but I would prefer to draw attention to the work needed to learn from the examples. Disputing over Brown—and I would include Mootz’ remarks about affirmative action here—improves our reflective judgment through concentration on such a rich example. Such powerful judging capacity, rather than a general moral, is my aim.

Philosophy is in one respect in better shape than rhetoric and practical reason today. When philosophy doesn’t have a function, it isn’t philosophy’s fault but society’s. But rhetoric has always been concerned with getting people to listen, so can’t get off that easily. A bad audience is not necessarily an excuse. If practical reason and rational rhetoric aren’t successful, part of the blame must be placed on the rhetoric itself. One dimension of the power of legal rhetoric that Sherwin points to is a distinction between public and private language, such as the language and thought of race in the United States, which tracks my distinction between democratic knowledge and the knowledge of all. I use the TRC to suggest how rational discourse can come into existence and function
even in unlikely and critical situations. The hope that lies behind the book is that greater understanding and self-consciousness about rational persuasion will help us find it in unexpected places. Being able to recognize it for what it is, we can practice it more effectively.

Both Sherwin and Scallen note that a lot of my book is about friendship and trust. Sherwin asks pertinent questions about why friendship and trust seem in the air these days. He also wonders whether writing the book was act of friendship, and so asks how one can reply in kind. Scallen contends that my slighting of the Sophists and the Greco-Roman tradition of humanist rhetoric, the lineage from Isocrates through Cicero and Quintilian, is unfriendly. It isn’t guilt by association, but guilt by following my models, Plato and Aristotle: Aristotle for ignoring the Sophists, and Plato for treating them uncharitably in his dialogues. I contend that Aristotle doesn’t take the Sophists seriously because he seems to assume that their intellectual poverty means that they aren’t worrisome practically either. If that’s the basis for his dismissal, if he thinks that the only serious practical challenges are serious intellectual challenges, we might wonder in what sort of world that basis could make sense. But Scallen mostly shifts the ground from Aristotle to Plato, and wonders how I can talk about friendship when Plato treats the Sophists and their followers without friendship and without an attempt to understand them sympathetically.42

I think this is a very fruitful question. First, we have to distinguish the lack of charity on Plato’s part from the same failure by Socrates. Socrates, the dramatic character, willfully misunderstands the other characters in the dialogues, some of whom are Sophists, some of whom are students of Sophists, and treats just as badly people who have nothing to do with the Sophists. Plato, the author, willfully misrepresents some historical characters, some of whom are Sophists and some their followers. Neither of them has any interest in historical accuracy or fidelity. The idea that we can understand a text or a person without regard for the truth of what is said is completely alien to Socrates and Plato—indeed the separation of meaning from truth had to wait a couple of thousand years. Spinoza seems the first to make such a distinction. We have to be careful not to impose a distinction between meaning and truth that comes from biblical hermeneutics on rhetorical and discursive situations in general. Socrates is not interested in being fair to Gorgias. He wants to know the truth about Gorgias’ art of rhetoric.

In my book, especially in chapter 2, I talk about how one can treat

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42. My own confrontation between Aristotle and Isocrates appears in Eugene Garver, Philosophy, Rhetoric, and Civic Education in Aristotle and Isocrates, in ISOCRATES AND CIVIC EDUCATION 157-185 (David Depew & Takis Poulakis eds., 2004).
rationally and with friendship someone one is trying to defeat in argument, or someone one is trying to persuade. I am interested in how practical rationality can be faithful to its own standards while still trying to win an argument. The Platonic examples create an analogous but different problem. Socrates’ desire to understand Gorgias isn’t trumped or compromised by his desire to win the argument; it is apparently trumped or compromised by his desire to learn the truth. It looks as though anything Gorgias says is simply instrumental towards Socrates’ higher goal. Fairness then becomes beside the point. Is friendship possible in such circumstances? In other words, is Socrates’ desire for the truth incompatible with friendship of any kind, since that commitment dictates an instrumental, and therefore unfriendly, relation to anyone to whom he talks? I’m not asking whether Socrates’ commitment to truth excuses him from duties of charity and friendship the rest of us have. I want to know instead whether his commitment allows him to redefine charity and friendship such that he is in fact treating Gorgias, and maybe even Callicles, with friendship.

There is, as I note in the book, an ambiguity in “charity” that carries over to trust. I quote these words from Donald Davidson: “Charity is forced on us: whether we like it or not, if we want to understand others, we must count them right in most matters.” To understand anyone, we have to assume that most of what they say is true. We have to assume that they are rational beings, responsive to evidence, with senses in working order, and with a common set of background knowledge. I trust everyone. I assume that people I speak with understand my language—recall that Socrates’ only precondition for talking to the slave in the Meno was that the slave speak Greek. I assume that when Scallen and I argue about the Phaedrus we share a commitment to consult a common text if necessary. All such assumptions are obviously defeasible.

But that sense of charity is distinct from a charity and trust that we do parcel out judiciously. Some people are more trustworthy than others. If I find that you’re the sort of person to look for things I say to take out of context in order to ridicule me, then I don’t trust you, and either avoid you or at least speak with you in a much more guarded way. Some people earn and others forfeit our trust. Here I think lie the interesting questions about what friendship can mean in difficult times. Socrates in the Crito argues that his commitment to act justly is unaffected by whether others act unjustly towards him. Should he treat similarly the same someone who shares his commitment to discover truth and someone who is only interested in victory? What would a friendly attitude of Socrates towards Gorgias, or Callicles, look like? How, if at

all, would it be different from how Socrates in fact—in the fiction of the Gorgias—treats Gorgias and Callicles?

VII. To summarize briefly. I have enumerated six places for further inquiry stimulated by the responses to For the Sake of Argument. First, my readers’ surprising interpretation of the book as an account of the autonomy of law generated questions about some unique problems of legal reasoning. Legal reasoning is by nature controversial, so draws the line between reasoning and rationalizing at a different place from, for example, philosophical reasoning. There is always space for losers. Legal reasoning relies on authority and representation, so the legal agent is not autonomous in the easy sense in which moral agents often are. The ethical implications of these features of legal reasoning remain to be explored.

Second, we need to think more about the ampliative nature of practical reason, the way practical reason allows us to commit ourselves to more than the evidence compels. The nature of commitment as an ethical act deserves further development.

Third, competing narratives about the place of the Brown decision in our history brings attention to the rhetorical problem of how to judge among competing versions of history. Judgments about history are inevitably judgments about ourselves and our futures. If we see Brown as a success or a triumph, we will see ourselves as facing certain possibilities for the future. If we see it as a failure, the future as a field for deliberation will look quite different. This leads to the fourth topic.

It is a rhetorical virtue that requires the highest uses of practical wisdom to understand the power of words, to know how much can be accomplished by a speech act, such as a declaration that segregated schools are incompatible with the values of equality expressed in the Fourteenth Amendment. Academics may naturally be prone to overestimate how much words accomplish, how much can be affected with neither sword nor purse. But Scallen’s example of gay marriage shows that academics are not alone in worshipping and fearing the power of words. The power of an argument to compel a conclusion operates in such a different space from the power of that argument to compel belief, obedience, and action that it is extremely difficult to speak coherently about the two together. This seems to me a major challenge for future inquiry.

Fifth, I argue for the need for ethical interpretations of practical reasoning. Ethical principles need not be expressed as logical principles. Kahn and Sherwin have shown the need to say more here. Using logical criteria, I can tell when a decision is principled and when not. But how

44. U.S. Const. amend. XIV.
can one make the corresponding demarcation between an ethically principled decision and ethical opportunism?

Finally, there are issues concerned with friendship itself. We all have to face questions about what friendship could mean in circumstances of radical disagreement and diversity. At the beginning of the book, I quote these lines from Aristotle’s *Ethics*:

Friendship would seem to hold cities together, and legislators would seem to be more concerned about it than about justice. For concord would seem to be similar to friendship and legislators aim at concord above all, while they try above all to expel civil conflict, which is enmity. Further, if people are friends, they have no need of justice, but if they are just they need friendship in addition; and the justice that is most just seems to belong to friendship.\(^{45}\)

These readings of *For the Sake of Argument* raise questions about how to treat each other justly and with friendly spirit when we disagree over the things we hold most important. Nothing could be a more important subject for future inquiry.

\(^{45}\) ARISTOTLE, *supra* note 16.