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Francis J. Mootz III

University of Nevada, Las Vegas – William S. Boyd School of Law

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The Irrelevance of Contemporary Academic Philosophy for Law: Recovering the Rhetorical Tradition

Francis J. Mootz III¹

Can we hope for justice in this world? Plato thought not. In the *Republic* he suggests that justice can be achieved only if the philosophers rule, but also that philosophers cannot simultaneously rule the many and remain in the sunlight of true knowledge. They must return to the cave. Leo Strauss famously interprets Plato as arguing that the philosopher in the cave must speak esoterically because if he speaks plainly his wisdom will be misunderstood, leading the prisoners to attack the one who opens this dangerous line of thinking. After all, the philosopher

returning from divine contemplations to the petty miseries of men cuts a sorry figure and appears most ridiculous, if, while still blinking through the gloom, and before he has become sufficiently accustomed to the enviroing darkness, he is compelled in courtrooms or elsewhere to contend about the shadows of justice . . . (Plato 1930: 517d-e)

What, then, can be said about striving to create a just world? Plato leaves us with the *Laws*, in which three tradition-bound men discuss politics in light of real-world practical constraints. Law is our resignation in the face of the impossible demands of justice; it is not just unphilosophical, it is antiphilosophical.

Against this backdrop, is it realistic to believe that today's philosophers will provide our divided world with the roadmap to just social relations? Can philosophy reveal that we are living in the shadows and shed light on our imprisoned predicament? Dare we hope for salvation to emerge from the cadre of Ph.D. philosophers who teach in our universities and colleges, or have they descended back into the cave so far that they only vaguely recall the blinding light that captivated them in their youth? These questions, of course, suggest their own answers.

Philosophy

Philosophy no longer is a way of life for members of a community seeking to determine what the good life entails. Today, "philosophy" designates a department of the modern research university, a technical discipline whose members vie for prestige and glory in the shadowy world of academe. This is not to say that philosophers are disqualified by their profession from active participation in the communal effort to define justice, but it is to suggest that being a professional philosopher is no better preparation for this task than being a literature professor, artist, or medical doctor.

Academic philosophers are quick to point out that the ugly machinery of law ignores the

¹ I dedicate this essay to the memory of William Hardman Poteat, formerly Chair of the Department of Religion at Duke University, who served as a wonderful role model for me by living the life of a philosopher in the real world. Poteat exemplified what he termed our "mindbodily" presence; his presence will be missed by many.

painstaking philosophical clarification of pertinent concepts such as responsibility, culpability, and intent. This is a hollow indictment, however, because they inevitably fail to establish that conceptual confusions in law have important negative consequences that can be identified and corrected only through philosophical analysis. A woefully tangled mess of cases has attempted to define an “intentional act” for purposes of insurance coverage, and there can be no doubt that this area of law always benefits from careful analysis. Can a philosophical exegesis of the concepts of intention and causation assist lawyers and judges in a manner that is uniquely philosophical?

Philosophers tend not to think so. “Applied philosophy” is a ghetto that the philosophical Brahmins are loath to enter. It is enough simply to establish that judges and lawyers do not deal with concepts like intentionality with the precision of philosophers, and better not to struggle to bring philosophical precision to bear on specific legal problems, which are inherently normative and contextual rather than analytical and conceptual. An intentional act for purposes of insurance coverage is different from an intentional act for purposes of criminal law, tort law, or the expression of moral opprobrium by the community toward the actor. Clarifying the polysemic concept of “intentional act” is a philosophical challenge that is important and difficult, but any potential payoff with regard to specific legal dilemmas is both unlikely and rather beside the point. Once you’ve basked in the sunlight it is difficult to go grubbing around in the earth again.

Perhaps the most dramatic illustration that law is a speluncean adventure occurred when Ronald Dworkin, John Rawls, Robert Nozick and other moral philosophers submitted an amicus brief to the United States Supreme Court regarding the asserted constitutional right to assisted suicide. The “philosopher’s brief” began by admitting that the Court was not being asked to make a moral or ethical judgment, but rather to determine the scope of the constitutional principle of liberty that guarantees individual self-determination. The elegant and persuasive argument elided various philosophical debates in which the authors might otherwise have engaged, and instead made an argument for what justice demands under our constitutional system in a manner not altogether different in kind from an ordinary legal argument (although, thankfully, they did not cloak their arguments with endless case citations and overblown claims of inevitability and univocity).

Philosopher-lawyer H.L.A. Hart brought rigor to legal theory, but this is not the same as connecting the disciplines of philosophy and law. Analytic legal philosophy strives to rise above the everyday struggles within a legal system to focus on the conceptual structure implied by existing legal practices. Just as a philosopher of aesthetics wouldn’t attempt to tell a painter how to paint, philosophers of law in this vein don’t attempt to tell parties how to engage in legal practice. The Hart-Fuller debate and the Hart-Dworkin debate, as interesting as they may be, do not connect with legal practice in a unique and directive manner.

Some philosophers embrace an even more hermetic posture. Nietzsche famously acknowledged that he would be a posthumous philosopher because his contemporaries were incapable of seeing the light. There appears to be no reason for the philosopher to return to the cave where, still blinded by the light of true knowledge, she is unable to relate to prisoners who live among the shadows. Heidegger suggests that the murder of the philosopher returning from the light is a metaphor of the poisoning of philosophy that occurs if the philosopher abandons the quest for truth as the unconcealedness of beings in favor of the search for truth as the correct framing of propositions about the shadows. (Heidegger 2002: 61) Heidegger’s elitist reading of Plato’s elitism

leads him to conclude that the philosopher is destined to rescue only a few prisoners by force, but only if he ignores the “obligatory cave-chatter” of the sophist-philosophers of the cave.

He does not liberate by conversing with the cave-dwellers in the language, and with the aims and intentions, of the cave, but by laying hold of them violently and dragging them away. He does not try to persuade the cave-dwellers by reference to norms, grounds and proofs. In that way, as Plato says, he would only make himself laughable. (Ibid: 62)

Heidegger, like Nietzsche before him, considered academic philosophers to be cave-dwellers who could not be saved, and he almost certainly would characterize philosophers of law who work even indirectly with the shadows in the same manner. For Heidegger, academic philosophy is the enemy of thinking.

Law

If philosophers generally do not seek to engage law on the ground, it is equally true that lawyers generally do not seek such engagement. Llewellyn’s sentiments on this score are particularly revealing. Although he taught Jurisprudence and was engaged in the preeminent theoretical disputes of his day, academic philosophy offended Llewellyn’s realist sensibilities. (Twining 1985: 93, 173) He embraced a notion of philosophy that was pragmatic and instrumental: relevant legal philosophy just is the set of concepts and heuristics that facilitate the everyday work of the legal system, whereas elitist academic posturing is of no consequence. Llewellyn attempted to understand the play of shadows on the wall, and saw no point in musing about the light of philosophy that was outside the scope of the concerns of people making their way through life in the cave. Moreover, he regarded philosophy as a follower rather than a leader; philosophy gains traction by answering a felt need within society by permitting us to render dynamic social trends coherent. He argued that legal realism was a helpful way of thinking about law whose time had come rather than a dictate to change the legal system in a particular manner. The very name, “legal realism,” denoted an effort to develop concepts that match what already exists so as to serve present needs.

It is easy to indict the vast majority of lawyers and judges, and not a few law professors, for an anti-intellectual approach to their profession. If a jurisprudential giant like Llewellyn took such a dim view of academic philosophy, it is safe to assume that most contemporary legal actors would be even more skeptical. It is not that they necessarily are uninterested in philosophy, but only that philosophy is irrelevant to their day-to-day activities as lawyers. This in no way suggests that philosophy is a frivolous enterprise. Philosophy is hard work, and professional philosophers earn their pay. The question is whether contemporary academic philosophy is able to, wishes to, or should speak directly to the troubling issues that pervade our legal system. Llewellyn, like Plato, thought not.

Theory – Practice

We might explain the lack of a relationship between philosophy and law by characterizing it as a feature of the unavoidable chasm between theory and practice, grudgingly conceding that philosophers philosophize and lawyers lawyer. But this facile “answer” ignores the inevitable slippage between the two activities. Philosophers must talk about something. However ill-informed or removed from reality their knowledge of law and legal practice, it forms part of the basis for philosophizing about social and political experience. The merit of contemporary legal positivism is its attempt to engage with legal practice to the greatest degree possible before ascending back toward the light of conceptual clarity. Similarly, lawyers inevitably utilize philosophy in their work, however poorly. Great legal arguments and decisions have crisp analysis, conceptual clarity and normative force. We would never confuse legal practice with philosophy, but neither is it possible to make a difficult legal argument without confronting the great issues of legal philosophy. To repeat the old saw, there is nothing so practical as a good theory, and nothing that calls for theoretical reflection so much as a difficult practical problem.

The contemporary divide between academic philosophy and legal practice is neither absolute nor unavoidable. At the height of natural law philosophy there was an organic connection between the work of ecclesiastical courts and the theologians. The question is whether such a bond can be (re-)forged between the academic philosophy of the modern research University and the vast bureaucratic machinery of the legal system. If the goal is a robust relationship between philosophy and law, then both disciplines will have to adjust their orientation and find common ground. Llewellyn suggested, in an unnoticed and almost unnoticeable manner, that this common ground is the ancient art of rhetoric.

Llewellyn is well known for his series of lectures to entering law students beginning in 1929 and eventually published in 1951 as *The Bramble Bush*. In the Acknowledgments and Afterword he bemoaned his failure to deal with the role of the rhetorical arts in the lawyer’s craft, arguing that this would have done much to blunt his critics’ accusation that he was a nihilist. His castigation of the elite law schools for their slavish adherence to the theoretical dogmatism of the case method suggested an uncompromising anti-philosophical stance, but Llewellyn’s point was to argue that we must develop a broader theoretical appreciation of law that remains connected to practice. He emphasized that the craft of law “cries out for the development and teaching of its theory, as it does also for study by *doing* in light of that theory.” (Llewellyn 1951: 185) He named the needed theory “Spokesmanship,” and he derived it from the theories first developed in Greece as “Rhetoric—in essence: the effective techniques of persuasion.” (Ibid) Spokesmanship calls for a theoretical-practical inquiry intended to equip lawyers for the rhetorical challenges of their profession. Counseling clients is an important feature of Spokesmanship no less than arguing a case, and this art cannot be reduced to simple rules for communicating doctrine because it involves theoretical development and argumentation over contested principles. (Ibid)

Llewellyn’s suggestive reflections in 1951 were presaged in “On Philosophy in American Law.” In his star note, before proceeding to take the reader on a dizzying ride through the tides of American jurisprudence, Llewellyn delivered the following tease in his customary florid prose:

“One system of precedent” we may have, but it works in forty different ways. Some

day, someone will help the second year student orient himself. Nor does anyone bother to present to him the difference between logic and persuasion, nor what a man facing old courts is to do with a new vocabulary; in a word, the game, in framing an argument, of diagnosing the peculiar presuppositions of the hearers. I think the second year student is entitled to feel himself aggrieved. Meanwhile, while we wait upon the treading of the Angel, there is rushing in that calls for doing. Here is a start. (Llewellyn 1934: 205 n.*)

This was Llewellyn's call for a theory of the practice of Spokesmanship, but the essay that follows answers this call only obliquely and in an unsatisfying manner. In the Afterword to *The Bramble Bush* he rediscovered this focus and attempted to recast his life's work in this way, but he did so only suggestively. Forging a productive relationship between philosophy and law today requires embracing Llewellyn's intuition and developing it with vigor. Doing so challenges the self-understanding of large segments of both philosophy and law, but it is precisely these self-understandings that have promoted the current state of relative nonengagement.

Law, Hermeneutics and Rhetoric

The sharp distinction between philosophy and law occurred when both disciplines built insular guilds that employed distinctive vocabularies to distinguish themselves from rhetoric. Rhetoric was part of the Trivium at the core of classical education, and it is the point at which philosophical thinking and legal practice naturally, and inevitably, join. By fleeing rhetoric, the connection between philosophy and law was severed.

Modern Western philosophy emerged in ancient Greece, in part, by painting the rhetoricians with a broad brush as opportunistic Sophists concerned only with achieving success with jurors rather than devoting themselves to the pursuit of knowledge. Rhetoric was tied inextricably to the law courts and politics of the day, and so the philosophers regarded the teachers of rhetoric with great suspicion. Plato cast the die and, Aristotle's moderate approach to rhetoric notwithstanding, philosophy successfully marginalized rhetoric and sent it packing to Departments of Communication Studies. Two thousand years later Vico lamented that the emerging critical philosophy of Descartes sought to erase the rhetorical tradition altogether, destroying an essential feature of liberal education that was particularly important for statesmen and lawyers. Vico summarizes:

whosoever intends to devote his efforts, not to physics or mechanics, but to a political career, whether as a civil servant or as a member of the legal profession or of the judiciary, a political speaker or a pulpit orator, should not waste too much time, in his adolescence, on those subjects which are taught by abstract geometry. Let him instead, cultivate his mind with an ingenious method; let him study topics and defend both sides of a controversy, be it on nature, man, or politics, in a freer and brighter style of expression. Let him not spurn reasons that wear a semblance of probability and verisimilitude. Let our efforts not be directed towards achieving superiority over the Ancients merely in the field of science, while they surpass us in wisdom; let us not be merely more exact and more true than the Ancients, while allowing them to be more eloquent than we are; let us equal the Ancients in the fields of wisdom and eloquence as we excel them in the domain of science. (Vico 1990:41)

Vico's call fell on deaf ears. Even he must have known that it was too late to avoid philosophy's excision of rhetoric, and therefore its excision of law.

Lawyers pursued their own parochial concerns by sundering the legal system from rhetoric and securing it on some (supposed) bedrock such as natural right or economic rationality. The legal guild had no desire to embrace the endless discussions of the philosophers, and even less to embrace the potentially deconstructive effects of the rhetoricians. As law schools became fixtures of the modern research university and the training of lawyers was severed from practical apprenticeships, legal scholars sought a distinctive and stable method that could secure law from the hurly-burly of civil life and constitute a suitable "object" for their analysis. It was against this unfortunate concerted effort that Llewellyn registered his lament on behalf of the aggrieved second year law student, a lament that remains unanswered.

Recuperating ancient rhetoric should not be confused with an antiquarian interest in oratorical style. I use the term "rhetoric" to refer to both a practical activity and a self-referential theoretical consideration of that activity; philosophical argumentation is a form of rhetoric despite its protests to the contrary. Today, the study of rhetoric is informed by an important, though still marginalized, strand of contemporary philosophical inquiry. Philosophical hermeneutics provides an ontological account of the social nature of understanding that girds rhetorical activity. Rhetorical analysis moves from this ontology to political engagement, revealing the entwinement of theory and practice. The recent effort to link rhetoric and hermeneutics (Hyde 1979; Schrag 1992; Jost 1997; Mootz 2006) follows from the insight that there is a lived truth that is not captured by the circumscribed rationalism of modernity, and that within a social practice such as law one can adopt a theoretical comportment that clarifies and influences the practice of interpretation and persuasion by participating in, rather than sitting in judgment on, hermeneutical discernment and rhetorical elaboration.

Hermeneutics and rhetoric experienced a revival with the publication of two seminal works: Chaim Perelman and Lucie Olbrechts-Tyteca's *The New Rhetoric* (1958) and Hans-Georg Gadamer's *Truth and Method* (1960). Perelman argued that justice is a "confused notion" that can only be developed in the course of responding to the practical demands of political action in a manner informed by reasonable beliefs that arise from rhetorical exchanges. Following Aristotle, he famously distinguished the rational (subject to demonstration) from the reasonable (subject to persuasion), and cited legal practice as a prominent example of the latter. Gadamer explained his ontology of understanding by analogizing to the playful give-and-take of a conversation in which each participant is drawn out of her prejudiced horizon to some degree and they experience a "fusion" of horizons. Also drawing from Aristotle, Gadamer argued that this experience of human understanding is no less legitimate or important than scientific demonstration, and he too placed great weight on the example of law.

The modern age has disastrously equated knowledge with the logical foundations of modern science and characterized nonscientific discourse as merely aesthetics or hortatory moralizing. The development of a rhetorical hermeneutics stresses the independent significance of what we can call "rhetorical knowledge." (Mootz 2006; cf. Scott 1977) Rhetorical knowledge cannot be subsumed under the model of rational thinking according to logical dictates because it arises within a historically-situated social encounter that is irremediably dynamic and contingent. (Of course, this

is true also of methodologically-secured knowledge, but in this context we can indulge the Cartesian fantasy that solitary reflection generated the critical tradition against which Vico struggled). Legal practice is an exemplary site of rhetorical knowledge, and so it is by returning to rhetoric that law and philosophy might reconnect in a vital manner.

We can begin the recuperation of rhetorical knowledge by reading Plato against the grain of the tradition that seeks to find a systematic-propositional “Platonist” philosophy embedded in his work. Gadamer believed that the Platonic dialogues reveal that it “is more important to find the words which convince the other than those which can be demonstrated in their truth, once and for all.” (Gadamer 1992: 71; see generally Gadamer 1980). Recent work carries Gadamer’s insight forward and develops an understanding of Plato’s philosophy that supports the significance of rhetorical knowledge. (See generally, Gonzalez 1998) Although Plato argues for the superiority of philosophy over sophistic, Marina McCoy suggests that Plato recognizes that both are rooted in rhetoric and cannot be distinguished from each other in a definitive manner. (McCoy 2008) Socrates employs practical reasoning and emotion in his conversations, and he understands that an apt argument is determined only in the context. McCoy contends that Plato’s argument for the superiority of philosophy is rooted in the virtue of the philosopher and his willingness to put himself at risk in rhetorical exchange.

If the dramatic and poetic elements of Plato’s dialogues are closely intertwined with the arguments given in the dialogues (and not merely decoratively designed to make them more alluring or easier to understand), then one cannot distinguish between philosophy and rhetoric by claiming that the philosopher offers rational arguments free of rhetoric while the rhetorician merely tries to persuade. . . . The task of separating the sophist from the philosopher becomes all the more interesting since Plato does not reject the use of rhetoric or see it as entirely separable from philosophy but rather views philosophy and good rhetoric as mutually interdependent.

. . . .
. . . Plato’s central means of defending philosophy against these non-philosophers is not to give a definition of philosophy but instead to make a series of claims about *who the philosopher is* (his character) and *what he does* (his practice). (Ibid: 16-18)

The philosopher, then, just is the individual who engages in “good” rhetoric for the right reasons.

Returning to the allegory of the cave, we can construe the puppeteers casting shadows as sophists who understand that the shadows are illusions and yet are willing to deceive the prisoners. (Ibid: 129-31) In contrast, the philosopher strives to learn the truth, and she cares about her dialogue partners as truth-seeking individuals rather than viewing them as objects to be manipulated. (Ibid: 133) Francisco Gonzalez identifies three characteristics of the knowledge that Socrates seeks through dialogue:

(1) it is “knowledge how” in the sense that it is instantiated by the very way in which Socrates conducts the inquiry . . . ; (2) it is “self-knowledge” in the sense that its “object” is not completely external to the knower . . . ; (3) it is “nonpropositional knowledge” in the sense that its theoretical “context” cannot be expressed in propositions/definitions (thus the inevitable *aporia*). (Gonzalez 1998: 61)

Socrates seeks “rhetorical knowledge,” rather than propositional philosophical knowledge. We can seek no more than “rhetorical knowledge” in law; indeed, Gadamer and Perelman both claimed that legal reasoning exemplified the form of knowledge that might be achieved through philosophical dialogue.

Reading Plato in this manner reveals the necessarily rhetorical character of inquiry but also the need to be wary of sophistry. Rhetoric produces ideology and knowledge: it is both a technical art that can be abused and an openness to the world that decenters the pretense of individual self-possession. By understanding how rhetoric produces knowledge within certain social and institutional settings we might foster the “good” rhetoric of the philosopher without having to endorse Plato’s misguided faith in the forms that can be seen in the sunlight of timeless knowledge. Rhetorical knowledge is a practical accomplishment that neither achieves apodictic certitude nor collapses into a relativistic irrationalism, which is enough to sustain legal practice as a reasonable – even if not thoroughly rationalized – activity.

Using rhetorical knowledge as a polestar, philosophers and lawyers can avoid the practice-theory quandary by not severing the two at the outset. At the most practical level, the concept of rhetorical knowledge will guide investigations of how the legal system fosters reasonable resolutions of controversy, examining how understanding and persuasion work in myriad contexts from client interviews to appellate argumentation. At the most theoretical level, the concept of rhetorical knowledge will guide an investigation of the ontology of understanding and persuasion, not by identifying a fixed human nature but rather by illuminating the unfolding hermeneutical-rhetorical character of human understanding in which the investigation itself participates.

The merging of the philosophical traditions of hermeneutics and rhetoric provides the basis for understanding the rhetorical character of knowledge that is achieved in legal practice. Rhetorical knowledge is an incredibly rich starting point for thinking about legal practice and legal theory, stretching back to the pre-Socratics and Roman jurisprudence, and carrying forward today in a variety of work being done in both philosophy and law. Mining this vein of thinking promises to bring together philosophers and lawyers who currently bump into each other in the darkness of the cave, hardly pausing to take real notice of each other.

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