

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

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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."<sup>1</sup> 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

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\* 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.

1. EUGENE GARVER, *FOR THE SAKE OF ARGUMENT: PRACTICAL REASONING, CHARACTER AND THE ETHICS OF BELIEF* 1 (2004).

is that practical reasoning emerges from persuasion, and persuasion is the product of rhetorical engagement within a community.<sup>2</sup> His thesis is that Aristotle's *Rhetoric* "shows how reason can be contingent, emotional, and interested without ceasing to be rational."<sup>3</sup> 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.<sup>4</sup>

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,"<sup>5</sup> 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.<sup>6</sup> 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*.<sup>7</sup> 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.

5. EUGENE GARVER, *ARISTOTLE'S RHETORIC: AN ART OF CHARACTER* (1995).

6. GARVER, *FOR THE SAKE OF ARGUMENT*, *supra* note 1, at 4.

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. . . .”<sup>8</sup> 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

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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,”<sup>9</sup> 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.”<sup>10</sup>

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,”<sup>11</sup> 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 Scott*<sup>12</sup> 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. . . .”<sup>13</sup> 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.

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9. *Id.* at 74.

10. *Id.* at 86.

11. *Id.* at 106.

12. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

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*<sup>14</sup> 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.<sup>15</sup>

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.”<sup>16</sup>

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.”<sup>17</sup> 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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14. 347 U.S. 497 (1954).

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.”<sup>18</sup> 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.

[T]he 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.<sup>19</sup>

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.<sup>20</sup> 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

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18. *Id.* at 200.

19. *Id.* at 201.

20. I develop an account of “rhetorical knowledge” in detail in a forthcoming book, FRANCIS J. MOOTZ III, RHETORICAL KNOWLEDGE IN LEGAL PRACTICE AND CRITICAL LEGAL THEORY (2006).

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.<sup>21</sup> I use the term "rhetorical

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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

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*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, Sungnômê, Epieikeia, and Sumbouleuesthai*, 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.<sup>22</sup>

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

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22. PHILIPPE-JOSEPH SALAZAR, *AN AFRICAN ATHENS: RHETORIC AND THE SHAPING OF DEMOCRACY IN SOUTH AFRICA* (2002).

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<sup>23</sup>—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*<sup>24</sup> case, reinvigorating the topoi 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

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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.

24. *Regents of University of California v. Bakke*, 438 U.S. 265 (1978) (Powell, J., 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,<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup>

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

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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.”<sup>28</sup> 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 decentering 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

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28. *Id.* at 64.

empirical "truth" of the matter in dispute simply miss the point of the rhetorical exercise of trying a case.<sup>29</sup>

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.<sup>30</sup> 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

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29. ROBERT P. BURNS, *A THEORY OF THE TRIAL* (1999).

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.<sup>31</sup> 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.<sup>32</sup>

This so-called "hermeneutic ethic" explains how one might seek to persuade 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."<sup>33</sup>

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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.

32. HANS-GEORG GADAMER, *On the Origins of Philosophical Hermeneutics*, in *PHILOSOPHICAL APPRENTICESHIPS* 189 (Robert R. Sullivan trans., MIT Press 1977).

33. HANS-GEORG GADAMER, *TRUTH AND METHOD* 362 (Joel Weinsheimer and Donald G. Marshall trans., Crossroad 2d rev. ed., 1992).

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.<sup>34</sup>

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.<sup>35</sup> But this same account notes the importance of the

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34. SALAZAR, AN AFRICAN ATHENS, *supra* note 22, at 81.

35. LEONARD THOMPSON, A HISTORY OF SOUTH AFRICA 277-78 (Yale Univ. Press 3d ed. 2000).

symbolic acts by President Mandela and others to assure the Afrikaner minority of their place in the emerging democracy.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup> 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.

39. Samuel Issacharoff, *Constitutional Courts in the Field of Power Politics: Constitutionalizing Democracy in Fractured Societies*, 82 *TEX. L. REV.* 1861, 1871-83 (2004) (arguing that South African constitutionalism appears to be accomplishing this goal).

“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<sup>40</sup>

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40. Quoted as the epigraph in GADAMER, *TRUTH AND METHOD*, *supra* note 33.