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# Right Rhetoric: What Lawyers May Learn from the Study of Rhetoric

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Right Rhetoric:  
What Lawyers May Learn from the Study of Rhetoric

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It is a great honor and privilege to contribute to this Festschrift dedicated to the work of Professor Guy Haarscher. The timing of this celebration could not be better. We live in perilous times for deliberative democracies, and Guy has been one of the most important voices discussing rhetoric in contemporary political and legal spheres. On the other hand, the human race has always lived in perilous times. As we address contemporary perils, we confront the realization, yet again, that there are no fixed truths upon which we might anchor society. As our technical manipulation of nature and our conceptual powers reach heights that were unimaginable just a generation ago, we are fated to recall – with humility – that it is only in the realm of discourse about the probable that we sustain human society. There is no safety net to protect us, and yet we require prudential guidance. Reflecting on the work of Guy Haarscher is responsive to this vital need.

The title of my chapter has multiple meanings, and I unfold my thesis in the interstices of these meanings. I discuss “right rhetoric,” but I use this term in a deliberately confused manner. On one hand, I mean rhetoric that is done correctly – or, righteous rhetoric. This meaning can be opposed to the traditional epithet that one is engaged in “mere rhetoric,” by which the critic usually means sophistry and trickery. But there is another sense of “right rhetoric,” suggesting the rhetoric employed by those on the political right. The phrase “right rhetoric” contains within itself a conundrum: how can we judge the rhetoric of the political right without having a timeless standard of right rhetoric?

The subtitle, “What Lawyers May Learn from the Study of Rhetoric,” is a play on the title of Chaïm Perelman’s essay, “What the Philosopher May Learn from the Study of Law.”<sup>1</sup> Perelman famously argues that philosophers should not posit math or natural science as their model, but instead should look to legal practice and its practical attention to concrete

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<sup>1</sup> Chaïm Perelman, “What the Philosopher May Learn from the Study of Law,” (S. Rubin trans.) in *Justice, Law and Argument: Essays on Moral and Legal Reasoning* (Dordrecht, Holland: D. Reidel Publishing Co., 1980).

problems that cannot be resolved by applying an algorithm. Legal practice is a continuing practical adjustment of guiding norms to meet the need for a decision that must be rendered on imperfect information and in cases where more than one reasonable argument may be made.<sup>2</sup> We must admire the wisdom in Perelman's conclusion that modeling philosophy on law "would permit better understanding of the specificity of philosophy, a discipline which is elaborated under the aegis of reason, but a reason which is essentially practical, turned toward rational decision and action."<sup>3</sup> But is it not equally the case that the pragmatic engagements of the lawyer call for the refinement and perspective that might be offered by the philosopher of rhetoric? I wish to emphasize that this is one of the important roles that Guy Haarscher has played during his fruitful career.

## I. The Dilemma of Right Rhetoric

In the West we face the dilemma of "right rhetoric." Regressive forces who seek to limit dialogue and narrow the participation of those engaged in the dialogue pose a disturbing challenge to our increasingly globalized, multi-cultural societies. If the provincialism and anti-intellectualism of the right were to prevail we would be threatened with the prospect of a society grounded in contention and violence, as those who are silenced and excluded from avenues of peaceful participation respond to the repressive violence with violence of their own. This is a dilemma, and not simply a political problem, because it is difficult to see how we can confront the rhetoricians of the right, unless we are able to offer an account of how one may engage in proper rhetoric. The dilemma is whether we can combat the rhetoric of the right without a theory of righteous rhetoric, given that it is the notion of a righteous rhetoric that appears to be the very problem with the rhetoric of the right. Haarscher provides an important contribution to our civic discourse by tackling this precise question.

Haarscher advances this endeavor in an article that diagnoses the pseudo-arguments used by religious fundamentalists to promote the ideology of creationism.<sup>4</sup> The problem

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<sup>2</sup> Perelman writes:

It is when the subject matter escapes the qualification of true or false, because it does not depend upon a unitary science but upon a philosophical pluralism, that an attitude of tolerance is justified and that a dialogue, permitting the perspectives to be enlarged, is not only useful but even indispensable. Just as the judge, before making a decision, should hear two sides . . . the adoption of a philosophical positions, at the risk of lacking rationality, should take into account the opposed points of view concerning the subject matter.

Ibid. at 172-73.

<sup>3</sup> Ibid. at 174.

<sup>4</sup> Guy Haarscher, "Perelman's Pseudo-Argument as Applied to the Creationist Controversy," *Argumentation* 23:3 (2009), pp. 361-73. Haarscher carefully notes the technical meaning of "pseudo-argument" in Perelman's terminology. It does not refer only to hypocritical arguments, but to any argument in which the rhetor does not embrace the values that serve as the starting point. For example, one might believe that a course of action is proper but choose to invoke religious grounds for motivating a believer to agree to the course of action, even if one is

identified by Haarscher is the rhetorical “wolf in sheep’s clothing” that occurs when fundamentalist Christians use the liberal language of tolerance in an effort to introduce religious beliefs into the public school curriculum. He analyzes the situation from the perspective of a philosopher of rhetoric, noting the evolving patterns that the fundamentalists employed in their efforts to require religious education in public schools. His account provides an overview that brings together various points in time and situations to paint a picture of the abuse of rhetoric.

He begins his story with the famous Scopes trial, in which the progressive lawyer William Jennings Bryan directly and unapologetically argued that fundamentalist Christianity has a place in public education in order to ennoble society. Bryan was proved to be ignorant of scientific doctrine in a cartoonish stunt posed by defense attorney Clarence Darrow, but the trial court found Scopes guilty because he had blatantly and purposefully violated the law. The Supreme Court had not yet developed the doctrine under the First Amendment that religious dogma has no place in the science classrooms of public schools. In this environment, the advocates of a religious worldview competed directly with the secularists in the legislatures and courts, contending for the right to shape the contours of the society. On one side were religious believers, who rejected the chutzpah of modernity and sought a traditionalist society; on the other side were scientific secularists, who sought to relegate religious belief to the private sphere and to ground the organization of society on liberal democratic principles.

Haarscher contends that the obvious need for rigorous scientific education after the threat posed by the launch of Sputnik by the Soviet Union forced the fundamentalist Christian movement to use alternative strategies of persuasion in their effort to shape social mores according to religious doctrine. After the United States Supreme Court declared that an Arkansas statute prohibiting the teaching of evolution violated the Establishment Clause,<sup>5</sup> the fundamentalists no longer could promote their religious agenda directly. The debate became less open and honest, and as a result the debate became more dangerous. The fundamentalists altered their strategy to include rhetorical invocations of the desirability of open debate, the need for freedom in research and thinking, the acceptance of plural worldviews, and other disingenuous claims to advance their religious agenda. In the face of challenge, they changed their strategy to an indirect claim that the rights of believers must be given equal credence in the public sphere.

I will not recount Haarscher’s detailed and complex analysis, and will just affirm my agreement with his conclusion that we should “not concentrate all our energies on the frontal attack” by enemies of liberalism, but instead that it is important for us to acknowledge that

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agnostic as to those beliefs.

<sup>5</sup> Epperson v. Arkansas, 393 U.S. 97 (1968).

“indirect attacks, that is, the “wolf in the sheepfold” strategy, can perhaps be still more damaging to the very fabric of liberal-democratic values.”<sup>6</sup> I wish to strengthen this claim by emphasizing that Haarscher seeks to expose “right rhetoric” by offering a model of “right rhetoric.” It is sophistry to argue that every form of argument is equally valid at every point for every cause. Rhetoric cannot be scripted in advance to ensure a specific result – such a view is antithetical to the heart of discourse – but nevertheless there is an integrity to argumentation that makes some arguments appropriate and others inappropriate. Haarscher provides an example of how we can reveal a lack of integrity in a specific instance of democratic argumentation without having to resort to the claim that there is only one correct answer to the social problem that can therefore be implemented and enforced without debate.

In other words, “right rhetoric” is not an invariable standard that we can derive from looking only to the results of discourse – this would be the sophistic mistake of conflating “right rhetoric” with reaching the “right answer.” Instead, we can regard “right rhetoric” as a standard of how one argues, paying attention to logos, ethos and pathos. In any given situation, there may be many arguments that are logically appropriate, but many of these arguments will fail to have integrity because they do not evidence the ethos of the rhetor as a person seeking an understanding of the subject matter in question. This is the nature of the threat posed by pseudo-arguments: the rhetor does not embrace the starting points of the argument, and so ethos is radically diminished, meaning that the argument is on shaky ground from the beginning. Nevertheless, even a pseudo-argument might make perfect logical sense, but the problem is that it can betray a lack of ethical commitment by the speaker that is manifested by an effort to manipulate, rather than to persuade, the audience.<sup>7</sup>

This is the same problem that Haarscher addresses in an essay that challenges leftist thinkers to abandon their “politically correct” forgiveness for positions taken by some Muslim activists, solely in the interest of expressing solidarity with an oppressed people.<sup>8</sup> He recalls the situation in the last century when left intellectuals apologized for the tyranny in Soviet Russia and China out of a misplaced sense that to criticize these socialist regimes would be to weaken the effort to overcome capitalism. He again identifies a rhetorical basis for this criticism, exploring how the rhetorical device of “poisoning the source” is used to subvert a genuine rhetorical engagement. Whereas the critics of communist tyrants were

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<sup>6</sup> “Perelman’s pseudo-argument” at p. 372.

<sup>7</sup> I agree with Haarscher (and his reading of Perelman) that pseudo-arguments may have integrity in some situations. For example, I would regard it as appropriate to seek to persuade a religious believer that stewardship of God’s creation required us to attend to the threat of global warming, even though I do not share the premises of belief to which I would anchor my argument. This strategy need not be manipulative or deceptive, but could be an open translation of one ethical system to another in an effort to find a basis for shared commitment from a variety of sources.

<sup>8</sup> See Guy Haarscher, “The Decline of Free Thinking” in *Resolving International Conflicts: Liber Amicorum Tibor Várady* 119 (Peter Hay, et. al., eds.) (CEU Press, 2009).

labeled “fascist reactionaries,” the defenders of free dialogue about the Muslim religion are branded “Islamophobe racists.” Such an ad hominem rhetorical framing of the issue serves to cut off genuine discussion of the issues on the merits, reinforcing the sophistic goals of the left in supporting certain persons and causes.

In both of these recent articles Haarscher has spoken clearly to the question of how to provide the standard by which to criticize the rhetoric of the right. In yet another article on the abuses of the forms of liberal discourse by its opponents, Haarscher recognizes the problem in clear terms:

It is here that, it seems to me, a fundamental question must be raised, which concerns both Vico and Perelman. How can we make a meaningful difference between “good” rhetoric and a confused, irrational discourse, full of paralogisms, that is, involuntary errors of reasoning, or – worse – a deliberately manipulated speech (sophistry)?<sup>9</sup>

The answer he offers is that we must attend to the integrity of arguments; we must take arguments seriously and recognize that they have an internal structure that must align with the speaker’s ethos. By attending to this integrity, Haarscher shows that we can identify and critique the sophistry of those on the right who deploy the rhetoric of liberal democracy against its own tenets, as well as the sophistry of the left who shield their favored persons from challenge and critique.

## II. Haarscher and the Lessons of Rhetorical Philosophy

I believe that the foregoing demonstrates that the philosopher of rhetoric has much to teach the practitioners of rhetoric in the political and legal spheres. This is not to suggest that we can provide a philosophical model that will generate the right results in particular cases. Perelman’s incisive point remains equally important today: the practical engagement of the jurist in a particular case reveals how moral reasoning works, and the philosopher is incompetent to provide a roadmap to a person who is confronting an ethical or legal dilemma. Nevertheless, it remains true that philosophical reflection on the activity of rhetorical engagement can generate critical insight that facilitates practical judgment.

It is useful to recall Hans-Georg Gadamer’s “praise of theory,” despite having spent a career emphasizing the irreducibly practical nature of understanding and critique. Gadamer insists that he does not discount the importance of theory, and he emphasizes that his defense of hermeneutical engagement is theoretical, just as Aristotle’s defense of ethical engagement

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<sup>9</sup> “Rhetoric and Its Abuses” at p. 1229.

in the *Nicomachean Ethics* is theoretical.<sup>10</sup> Gadamer builds a theoretical argument that leads him to conclude that practical engagement is necessary, but that also guides his understanding of the manner in which practical engagement should take place in order to be most productive. From Gadamer's pathbreaking work in hermeneutics we can learn something important about the role of theoretical reflection on the art of rhetoric, even if the role is more circumscribed than we academics might hope.

Whereas Perelman challenged moral philosophers to look to the world of action (the world of argumentation, practical reasoning and judgment by judges in law cases), we can conceive of Haarscher as pulling in the opposite direction, asking lawyers and civic officials to consider what they might learn from a philosophical approach to rhetorical discourses. But, if there is no overriding directive theory that we can provide to actors, no methodology to generate the correct results in given cases, what is the lesson to be learned? Haarscher's project is to carefully reveal the rhetorical moves that undermine democratic discourse and sidetrack practical reasoning. He does not attempt a theoretical short-circuit that eliminates the need for practical discourse to take place; rather, he illuminates how the intertwined discourses that are necessary for the building and maintenance of society might be augmented and protected from abusive tactics.

We can return to Haarscher's analysis of the shifting strategies of religious fundamentalists as part of their effort to introduce the teaching of creationism in the public schools. He concludes that these indirect rhetorical ploys can be exposed by careful rhetorical analysis, but he also notes that in each instance the court ruled against the creationists. We might ask whether his example undermines his case. Does this suggest that the philosopher of rhetoric is, in fact, unnecessary; that the law courts are able to reason their way to the correct conclusion without the assistance of contemporary rhetorical theory? I want to suggest just the opposite. The court reaches the correct result in these cases by seeing through the justificatory rhetoric to the motivations of the creationists, but the courts do not analyze (and most likely, do not understand) how these improper motivations are executed. This leaves room for error, because courts may not always appreciate the driving force of the arguments that are proffered. Haarscher notes this problem with regard to a case before the European Court of Human Rights, which accepted the translation of the religious claim against blasphemous speech into a right of believers not to have their beliefs gratuitously offended. Here, the rhetorical claims of the religious right are accepted as a "wolf in sheep's clothing," despite employing the same rhetorical move that has failed in the United States when the motivations are more obvious.<sup>11</sup> In short, by drawing more attention to the ways in which rhetoric is deployed, philosophers can help to keep courts from falling

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<sup>10</sup> Hans-Georg Gadamer, "Praise of Theory" in *Praise of Theory: Speeches and Essays* 16-23 (Chris Dawson trans.) (New Haven: Yale University Press, 1999).

<sup>11</sup> Haarscher, "Rhetoric and Its Abuses," at pp. 1246-1250.

victim to sophistic persuasion in situations where the ethos of the claimants is not patently deficient.

I want to push – and, perhaps, to some extent beyond – Haarscher’s analysis in order to deepen his point that a direct rhetorical confrontation is desirable. Discussing the famous Scopes trial, Haarscher describes it as an honest confrontation between religious ideology and liberal principles of free speech that predated the later rhetorical abuses by creationists. Unfortunately, his analysis suggests that when the arguments are accurately presented the winner is virtually preordained according to our modern conceptions of freedom and democracy. Indeed, it was the perceived futility of making direct arguments after the United States Supreme Court adopted the modern Establishment Clause jurisprudence that presumably motivated the creationists to mount a series of unsuccessful pseudo-arguments.

I want to revisit Haarscher’s example of the direct clash between William Jennings Bryan and Clarence Darrow during the Scopes trial to underscore that a genuine rhetorical exchange can be the source of a rich dialogue that can undermine ideological commitment on both sides of an argument. Bryan was a famous populist politician and ardent defender of the rights of the common person. We might blame his defense of the school district on the grounds of fundamentalist Protestant beliefs, but we find a much more interesting story through a closer examination. Bryan can be criticized for seeking to impose religious worldviews through public education, but the evolutionists of the day cannot be absolved of responsibility for the reprehensible ideology manifested by some of their members. When the rhetorical clash was direct and genuine, the clash between Christianity and evolutionary science produces a far more nuanced picture than we assume.

Bryan argued against the teaching of evolution not only to secure the primacy of the biblical story of creation, but also to combat the racist uses to which the “science” of evolution was put in Europe and the United States.<sup>12</sup> Scopes was convicted for using a textbook that described Darwin’s and Mendel’s work to support the practice of eugenics as a natural consequence of taking a “scientific” view.<sup>13</sup> The analysis in the high school text begins with unapologetically racist premises:

The Races of Man. At the present time there exist upon the earth five races or varieties of man, each very different from the other in instincts, social customs, and, to an extent, in structure. [He then describes the Ethiopian (Negro), Malay (brown), American Indian, and Mongolian (yellow) races] . .

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<sup>12</sup> The motivations for Bryan’s crusade against evolution late in his life are described in his biography. See Paolo E. Coletta, *William Jennings Bryan* (Vol. 3, ch. 8: “The Antievolution Crusade”) (University of Nebraska Press, 1964).

<sup>13</sup> The textbook is George William Hunter, *A Civic Biology: Presented in Problems* (New York, NY: American Book Company, 1914). It is available in full text at <http://books.google.com/books>.

. and finally, the highest type of all, the Caucasians, represented by the civilized white inhabitants of Europe and America.<sup>14</sup>

After linking Darwin's theory of evolution to his observation of the successful breeding of animals, the text emphasizes the responsibility of persons to breed well and the relevance of eugenics to the modern social order.<sup>15</sup> Having demonstrated the results of "feeble-minded" persons having similarly impaired descendants, the text proposes the following "remedy" that could lead to a better society:

If such people were lower animals, we would probably kill them off to keep from spreading. Humanity will not allow this, but we do have the remedy of separating the sexes in asylums or other places and in various ways preventing intermarriage and the possibilities of perpetuating such a low and degenerate race. Remedies of this sort have been tried successfully in Europe and are now meeting with success in this country.<sup>16</sup>

Bryan was specifically aware of the "scientific" eugenics movement in Germany, an ideology that helped to fuel the chaos of World War I and that came to fruition a generation later in the horrifically warped expressions of Nazi ideology.

When the wolf is not in sheep's clothing promoting the ideology of free dialogue, we might find that Christianity has a lesson to teach the proponents of evolution. Clothed in the rhetorical mantle of scientific truth, the blatantly political and ideological extensions of basic evolutionary science escape a genuine and challenging dialogue. This is precisely the dialogue that Bryan – champion of the common man, defender of the individual against the power of the elites – wished to initiate in the trial, as he offered the Christian notion of the sanctity of each person against the incipient fascist eugenics of the day.

The point is not to reverse the order of priority and to present Bryan as the virtuous person in the debate. Certainly, the principles of free speech and the arguments against the dogmatic inculcation of public school students with the religion of the majority were nobly advanced by Clarence Darrow, himself a crusader against injustice. Moreover, Bryan was linked to the Ku Klux Klan during his political career – not as an active or even sympathetic supporter, but because he was too ready to tolerate their beliefs as representatives of common men. Ironically, he was flirting with a Christian version of the very racist eugenics that he found deplorable in the scientific evolutionary theory of his day. The point to be taken away

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<sup>14</sup> Ibid. at p. 196.

<sup>15</sup> Ibid. at pp. 253-61.

<sup>16</sup> Ibid. at 263.

from the Scopes trial is that the issues were richly presented, before the creationists went underground and pursued pseudo-arguments, and before the defenders of secularism adopted an ad hominem attack on believers that rejected out of hand any arguments flowing from Christian belief.

The philosopher of rhetoric, exemplified by Haarscher, can remind us of the structural blindness on both sides of a public argument if they both resort to the sophistic pursuit of victory without attending to the integrity of the debate. Haarscher has demonstrated that our modern conceptions of secular democracy are imperilled when creationists adopt pseudo-arguments that do not engage the issues openly on their merits. We should not conclude that those motivated by Christian faith are to be ignored, though, because the rhetoric of scientific truth is also used to shield ideological commitments from genuine debate. The philosopher of rhetoric can show how the debates become derailed, which is not the same as providing the answer to the debates but is far better than a quiescent resignation that the practices of argumentation lie beyond the reach of theoretical critique.