

**THE RHETORICAL IS ETHICAL:  
A DEFENSE OF RHETORIC AND  
LAWYERS**

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## **THE RHETORICAL IS ETHICAL: A DEFENSE OF RHETORIC AND LAWYERS**

### **I. INTRODUCTION: THERE IS NOTHING NEW ABOUT ATTACKS AGAINST LAWYERS (*PLATO VS. THE SOPHISTS*)**

Plato, no friend of lawyers and no friend of rhetoric, tells us that “one who intends to be an able rhetorician has no need to know the truth about the things that are just or good. . . .” (*Phaedrus*, 272D).

Plato’s condemnation of rhetoric and lawyers continues. “No one in a law court, you see, cares at all about the truth of such matters. They only care about what is convincing. This is called ‘the likely’ [*eikos*] and that is what a man who intends to speak according to art should concentrate on. Sometimes, in fact, whether you are prosecuting or defending a case, you must not even say what actually happened – you must say something that is likely instead. Whatever you say, you should pursue what is likely and leave the truth aside: the whole art consists in cleaving to that throughout your speech.” (*Phaedrus* 272E, 273A).

Plato’s usual targets were sophists. These itinerant teachers taught rhetoric for a fee. They taught their students how to argue cases before Athenian juries during the so-called Golden Age of Athenian Democracy. Plato believed the sophists were guilty of the worst kind of deceit. These first rhetoricians had the power to make the weaker argument stronger (i.e. to make the wrong argument win). For Plato, this was a great crime.

This paper is an attempt to rehabilitate the sophists against Plato’s attacks and to do the same for contemporary lawyers (and the rhetoric employed by lawyers) against attacks from our modern-day Platos. I will show that rhetorical skills possessed by lawyers are skills that instill in citizens what the Greeks called *euboulia*, good judgment.

### **II. A DEFINITION AND SOME CRITICISMS OF RHETORIC AND LAWYERS**

#### **A. Rhetoric Defined**

In book 1, Chapter 2 of Aristotle’s *On Rhetoric*, Aristotle says that “[r]hetoric may be defined as the faculty of observing in any given case the available means of persuasion.” Aristotle speaks of three modes of persuasion. “The first kind depends on the personal character of the speaker; the second on putting the audience into a certain frame of mind; the third on the proof, or apparent proof, provided by words of the speech itself.” (1355b, 1356a)

By the personal character of the speaker, Aristotle means that “[w]e believe good men more fully and more readily than others: this is true generally whatever the question is, and absolutely true where exact certainty is impossible and opinions are divided. This kind of persuasion, like the others, should be achieved by what the speaker says, not by what people think of his character before he begins to speak. It is not true, as some writers assume in their treatises on rhetoric, that the personal goodness revealed by the speaker contributes nothing to his power of persuasion; on the contrary, his character may almost be called the most effective means of persuasion he possesses.” (1356a)

By putting the audience into a certain frame of mind, Aristotle means that “persuasion may come through the hearers, when the speech stirs their emotions. Our judgments when we are pleased and friendly are not the same as when we are pained and hostile.” (1356a)

Thirdly, and finally, Aristotle says that “persuasion is effected through the speech itself when we have proved a truth or an apparent truth by means of the persuasive arguments suitable to the case in question.” (1356a)

In this paper we will concern ourselves primarily with the third mode of persuasion: the nature of rhetorical proof itself, the nature and form of arguments commonly employed by lawyers. It is this third mode of persuasion about which Plato is most critical. The most common form this third mode takes is based on *eikos* reasoning (what is “the likely” or what is the “reasonable expectation”). This is the type of reasoning Plato criticizes so harshly in the just quoted passages from his *Phaedrus*. Plato’s criticism is misplaced. I will return to this third mode of persuasion in detail.

For now it is enough to say that the first mode of persuasion involves the credibility of the speaker, the second mode, emotional appeals. Aristotle seems to deplore the use of emotional appeals, but “what he really deplores. . . is the stirring of emotions in inappropriate situations and the concentrating on emotional appeals to the utter exclusion of appeals to the rational faculties of the audience.”<sup>1</sup> But Aristotle did not believe that the stirring of emotions was wrong in itself. Aristotle “recognizes that if speakers do not responsibly arouse emotions, they will frequently not be able to persuade people to change their minds or be able to move them into action, even though the audience has been won over logically.”<sup>2</sup>

## **B. Ancient Criticism of Rhetoric and Lawyers**

Plato and Aristotle frequently used the word rhetoric to refer “to the inept or irresponsible (so it seemed to them) anticipations and alternative versions”<sup>3</sup> to Plato and Aristotle’s own programs. The sophists, these first teachers of rhetoric, were seen by Plato and Aristotle as the creators and facilitators of the inept and irresponsible programs.

Plato and Aristotle made rhetoric seem “not only a discipline separated from philosophy, but one fundamentally at odds with it.”<sup>4</sup> Yet “it is in philosophical texts that we first hear of this discipline; and the word *rhetoric* itself bears every indication of being a Platonic invention.”<sup>5</sup>

It is certainly the privilege of a culture’s winners to write that culture’s history. Plato and Aristotle, having won the historical battle against the sophists, had the power to define the

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<sup>1</sup> Aristotle, *Rhetoric and Poetics*, trans. W. Rhys Roberts, with an Introduction by Edward P.J. Corbett (New York: McGraw-Hill, 1984), xvii

<sup>2</sup> Ibid., xvii, xviii

<sup>3</sup> Thomas Cole, *The Origins of Rhetoric in Ancient Greece* (Baltimore: The Johns Hopkins University Press, 1991), 2

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

sophists as they wished. I will attempt to “reclaim” the sophists by describing their actual program. In doing so, we will see that the sophists’ actual program strongly resembles the legal methods lawyers employ. We will see that the criticisms of the sophistic program bear a strong resemblance to contemporary criticisms of lawyers and the legal profession. Finally, I will show that those criticisms are wrong-headed and come about as a result of a misunderstanding of the type of knowledge that is available to human beings in this world.

As just noted, sophists themselves did not use the term “rhetoric.” Plato coined the term and then defined it in the negative manner illustrated by his use of the term in the *Phaedrus* and elsewhere. Plato has been very effective in creating, defining and providing the negative characterizations and connotations that the art of rhetoric has enjoyed.<sup>6</sup>

### C. Contemporary Criticism of Rhetoric and Lawyers

There is certainly, and understandably, significant criticism of unethical lawyers. Many of our ethics presentations provide numerous examples of such unethical conduct (usually with strong demonstrations as to the consequences that befall us when we so stray). Lawyers act unethically when we take advantage of our clients, abuse the system, file frivolous lawsuits.

There is yet a deeper criticism. This is the criticism that the honest and rigorous application of our talents is, in itself, wrong. This is the criticism that:

- Lawyers, by the very nature of what they do, have no allegiance to truth;
- A lawyer’s job is to persuade by whatever means her rhetorical skills may provide to achieve ends that are not predicated on reaching the truth, but on defeating an opponent;
- Even when lawyers argue or contend that truth emerges from the push and pull of these factual disputes, that kind of truth is not truth as lay persons understand the term in its strong moral or religious sense;
- The truth that lawyers talk about when a jury reaches a verdict is merely about a victor in a particular legal battle;
- A verdict (that “truth” result as a lawyer might call it) is independent of Truth (meant as the one, eternal, unchanging, capital T, Truth);
- When a jury verdict in a particular case happens to correspond with “Truth,” that correspondence is merely that: happenstance, coincidence, a lucky break;
- There is no necessary connection between truth generated through legal methodology (e.g., the adversarial method) and the Truth of science or, better yet, the Truth revealed in religion.

Truth is no constraint to the conduct of the legal profession, say these critics, yet that profession has the gall to claim that truth is what it seeks. Such a profession is both unethical (perhaps, immoral) and hypocritical. The profession engages in a huge deception by trying to persuade

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<sup>6</sup> Edward Schiappa, *Protagoras and Logos* (Columbia: University of South Carolina Press, 2003), 40-49

people that its goal is truth and its methods are designed to pursue and capture truth, when its goals and methods are otherwise.

So, therefore, how can lawyers defend what they do and the method by which they do it (predominantly a rhetorical method, a method of persuasion) against the criticism that it is a profession that by its very nature acts without regard to Truth? This is a deep criticism of lawyers and the legal profession. Although this criticism is not often explicitly made, I believe it is the source of much of the criticism we hear about lawyers, the legal profession, and, indeed, about the judicial branch of government itself.

If we were asked to provide a definition of “truth” we might be inclined to paraphrase Justice Potter Stewart who, when attempting to define what is obscene, said “. . . I know it when I see it. . .”<sup>7</sup> What do we mean when we say that certain things “ring true” or that something “sounds right?” What is truth’s imprimatur? How do you know truth when you see it?

When it comes to truth, there is an often unstated premise which lawyers assume: that truth is something which is pursued, not possessed. Truth doesn’t arrive neatly packaged. Facts *do not* speak for themselves. Facts much be marshaled. A point of view, a perspective, must be imposed on facts. We recognize that points of view and perspectives are imposed on facts when we tell a story, provide a narrative, indeed such imposition occurs in the asking of a simple question. Facts cannot speak, and certainly cannot persuade, in the absence of the imposition of a point of view, a perspective. This recognition that truth is understood only from a point of view, from a perspective, marks the important difference between lawyers and their deepest critics and illuminates and directs my defense of rhetoric and lawyers.

### **III. THE VALUE OF RHETORIC AND LAWYERS**

#### **A. Plato and the Sophists, a Critical Distinction**

To say that truth is understood only through a point of view or perspective, is not to claim that truth is relative. Truth is objective. The problem is that each human being is limited in his or her ability to know objective truth because we each see through our own perspective or point of view. Yet it is still necessary to make judgments about what objective truth is in any given situation. Thus it makes sense to have a jury of 6 or 12 evaluate the facts, rather than a jury of 1. Out of those 6 or 12 perspectival evaluations, it is assumed that there is a better chance that objective truth will be discerned than from a single perspective. Indeed, it is thought that the search for objective truth is substantially enhanced by bringing to bear multiple perspectives, multiple evaluators of the facts.

Plato is a monist. Simply put, this means belief not only in objective truth but in a single and unique path to that truth. It is important for Plato that his system not only discover truth, but also convince us that his particular path to truth is the only way to get there. Plato hopes to bring rhetoric into line: to subjugate it to his program.

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<sup>7</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964)

The sophists have a pluralist view of reality. The projects of the sophists assume, and thrive within, a pluralistic society. For the sophists, there is more than one path to the truth. Indeed, to know the truth, the whole truth and nothing but the truth, requires a recognition and appreciation of *all* the paths to truth.

## B. Teaching and Practicing Good Judgment (*Euboulia* and *Eikos*)

Paul Woodruff describes the sophist, Protagoras, as a teacher whose subject is the art of words – an art that Plato later came to call rhetoric. Woodruff describes this art as a “kind of defeasible reasoning known in Greek as *eikos*.”<sup>8</sup> Defeasible reasoning provides generalizations that can be defeated in some circumstances. For instance, the principle ‘one should not lie’ is defeasible because the principle is defeated when there is some overriding moral consideration (e.g. to prevent murder). One can think of a defeasible principle as similar to what in law we refer to as a rebuttable presumption.

Good judgment, says Woodruff, “relies not on luck, but on. . . *eikos* – reasonable expectation.”<sup>9</sup> By reasonable expectation Woodruff means a conclusion drawn after a careful review of all the evidence but notwithstanding such careful review, the evidence is still less than certain. “No one knows what the future will bring; no one knows whether a war we might wage will make us safer or put us more in danger. No one *knows*, but, luckily, knowledge is not everything. Even without knowledge we can use methods of decision making that are likely to lead to a good result. The ability to make good decisions without knowledge was called *euboulia* by the ancient Greeks – good judgment.”<sup>10</sup>

*Eikos* reasoning is understood as proceeding “from generalizations that hold broadly but not uniformly over a large sample, but may be defeated in specific cases. [Through good judgment] we arrive at the most reasonable expectation relative to the knowledge available.”<sup>11</sup> Woodruff says *eikos* only leads to a defeasible conclusion because if you knew enough to draw an infallible conclusion, you would be exercising knowledge, rather than good judgment.

In developing good judgment, we acquire the capacity to ferret the sub-textual from the pre-textual in an argument or speech. We acquire the capacity to expose and avoid bad faith judgments.

Bad faith is “the phenomenon involving self-deception that occurs when a person blinds himself to considerations that would block a conclusion he wants to be able to hold.”<sup>12</sup> Bad faith judgments are related to what we call wishful thinking. By making opposing arguments explicit, we are forced to deal with conclusions other than those we want to hold. The opposed speeches

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<sup>8</sup> Paul Woodruff, *Paideia and Good Judgment*, Philosophy of Education, Vol. III of the Paideia Project: Proceedings of the 20<sup>th</sup> World Congress of Philosophy (1999), David Steiner, ed., 8

<sup>9</sup> Woodruff, *Paideia and Good Judgment*, 5

<sup>10</sup> Paul Woodruff, *First Democracy: The Challenge of an Ancient Idea* (New York: Oxford University Press, 2005), 153 (emphasis supplied)

<sup>11</sup> Woodruff, *Paideia and Good Judgment*, 6

<sup>12</sup> Paul Woodruff, “Eikos and Bad Faith in the Paired Speeches of Thucydides,” *Proceedings of the Boston Area Colloquium in Ancient Philosophy* 10:115-45 (1994), 116

of rhetoricians promote democracy by disrupting wishful thinking and directing a decision on the merits rather than on mere self-interest.

Good judgment, when it functioned in 5<sup>th</sup> century Athens, was obtained through *eikos*-type reasoning “in deliberative bodies, in the law courts, among generals discussing tactics, and among private citizens managing their households.”<sup>13</sup> Unfortunately for Athens, its citizens were not always sufficiently attentive to the lessons of the sophists.

Pericles’ last speech to the Athenians is rife with the type of deception and bad faith that only a citizenry skilled in the understanding and use of rhetoric could discern. “And do not think that the only thing we are fighting for is our freedom from being subjugated: you are in danger of losing the empire, and if you do, the anger of the people you have ruled will raise other dangers. You are in no position to walk away from your empire, though some people might propose to do so from fear of the current situation, and act the part of virtue because they do not want to be involved in public affairs. *You see, your empire is really like a tyranny – though it may have been thought unjust to seize, it is now unsafe to surrender.*”<sup>14</sup>

One might counter Pericles by noting that if empire precludes choice, rather than provides it, then their empire has already cost the Athenians the very freedom for which they claim to be fighting. Although Pericles’ speech occurs in a democracy where countervailing voices presumably could be heard, Pericles was successful in presenting his defeasible conclusions as necessary ones. It is not likely [not *eikos*] that the path Pericles proposed was the only viable one. The inability of the Athenians to appreciate and apply the rhetorical techniques of the sophists (i.e. *eikos*-type reasoning) played a part in their ultimate defeat.

Like the adversarial method, good judgment, when institutionalized in a society, works “as a kind of procedural rationality, producing a series of checks on defeasible conclusions.”<sup>15</sup> This method attempts to bring “every possible factor into an adversarial discussion before that matter is put to judgment.”<sup>16</sup> Good judgment is the power to take necessity [*ananke*] out of an argument or speech. Good judgment has the power to free us from the seductive bad faith of necessity and determinism.

True, *eikos* only provides defeasible conclusions, but for judgments made about the facts in this world (rather than about a Platonic, transcendent one), what other types of conclusions are there? That is to say, we reach decisions based on reasonable inferences drawn from the available evidence. In this world, all the votes are never in, so to speak. There are always new facts, more evidence and thus more inferences to draw.

Rather than being relativistic, as Plato claims, *eikos* reasoning, “the likely,” assumes, to the contrary, that there is an unqualified truth underlying a factual situation. There is objective truth, but the direct evidence is insufficient to resolve the facts which are lacking. *Eikos* is a

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<sup>13</sup> Woodruff, *Paideia and Good Judgment*, preface

<sup>14</sup> Paul Woodruff, *Thucydides on Justice, Power and Human Nature, Selections from the History of the Peloponnesian War* (Indianapolis: Hackett Publishing Company, 1993) 54-55 (emphasis supplied)

<sup>15</sup> Woodruff, *Paideia and Good Judgment*, 11

<sup>16</sup> Woodruff, *Paideia and Good Judgment*, preface



generalization that is only possible if there is in fact a truth about which we all agree. Truth is objective, but sufficient knowledge is lacking. That is the state of human affairs in this world.

### **C. The Power of Opposed Speeches**

The sophists were accused of making the weaker argument stronger. But the effect of such methodology is not to confound or confuse the search for truth as Plato would have us believe. The ability to give opposed speeches – the effort to make the weaker case stronger – is how you test the strength of the so-called stronger argument.

“The value of adversary debate is that it encourages speakers on both sides to bring up all the arguments they can think of that bear on the decision. . . [A]dversary debate promotes good judgment. Even if you must decide all by yourself, you need to know how best to frame arguments on both sides. Only then will you be equipped to consider a wide enough range of points to catch the ones that might defeat your initial expectation. Without knowledge, you must have good judgment, but without arguments on both sides, you have small hope of good judgment.”<sup>17</sup>

Michael Gagarin contends that the use of opposed speeches produces more than good rhetoricians. The use of opposed speeches forces us “to go more deeply”<sup>18</sup> into the issues under discussion than would be the case if the subject matter was presented otherwise (e.g., in single speeches or in a treatise). “[A] sophist’s reputation depended not on his success in presenting a traditional argument, but on his skill at finding a novel and clever way to argue an untraditional view that might at first seem implausible or even absurd.”<sup>19</sup> Sophistic rhetoric went deeper than mere persuasion. Sophistic arguments opened “up new ways in which to think about language, emotion, causation and responsibility.”<sup>20</sup>

The criticism of the sophists that they made the weaker argument stronger was not only an accusation that the sophists were attempting to persuade others that what is false should prevail over what is true. Plato understood that the real danger was that rhetoric (e.g., making the weaker argument look stronger) demonstrated that there was more than one point of view towards any set of facts. Such multiple points of view include the set of facts that constitute a culture’s grounding mythologies, customs and religious beliefs. In other words, if truth is only understood from a point of view, then the truth that constitutes the structure of society’s institutions and customs is up for grabs. In that situation, the validity of every institution must be justified; no one’s authority can be presumed. This is also the premise of democracy.

### **D. Opposed Speeches Make Enemies of Those Who Don’t “Get It.”**

Here is an example of how rhetoric was seen as undermining a society’s values. “Carneades was one of a group of philosophers sent as ambassadors from Athens to Rome in 155 BC.... While

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<sup>17</sup> Woodruff, *First Democracy*, 179, 181

<sup>18</sup> Michael Gagarin, *Antiphon the Athenian: Oratory, Law and Justice in The Age of the Sophists* (Texas, 2002), 157

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

there he took the opportunity of giving two public lectures on justice. In the first, he undertook a detailed if unexciting defense of conventional notions on the subject; the following day he delivered a point-by-point refutation of the previous day's discourse. This caused something of a stir in the staid circles of Republican Rome – so much so that Cato the Censor, not amused by his systematic destruction of traditional Roman virtue, had Carneades (and the other philosophers) expelled from the City.”<sup>21</sup>

Cato lacked more than a sense of humor. Cato lacked an understanding of how truth is perceived and, thus, he lacked an understanding of the nature of the values that informed Rome's institutions. Traditional Roman virtue, like Rome's other values, did not arrive signed, sealed and delivered. Roman values developed and evolved over time. Republican Rome was not prepared to debate and justify its values. It is probably no coincidence that within 100 years of Cato's tenure, Republican Rome gave way to the Imperial Rome of the Caesars.

### **E. The Limits of Knowledge**

As we have seen, without knowledge you can be fooled when failing to exercise good judgment. You can also be fooled by believing you have knowledge when you don't have it.

Years after the youthful exuberance of *Self-Reliance*, Emerson came to better appreciate the limits of knowledge and the wisdom that comes with the recognition that we merely skate on surfaces. “It is very unhappy, but too late to be helped, the discovery we have made, that we exist. That discovery is called the Fall of Man. Ever afterwards, we suspect our instruments. We have learned that we do not see directly, but mediately, and that we have no means of correcting these colored and distorted lenses that we are, or of computing the amount of their errors. Perhaps these subject-lenses have a creative power; perhaps there are no objects.”<sup>22</sup>

Emerson came to recognize that we do not see things as they really are (as they are “directly”). We see things through our own distinctive point of view (through the “colored and distorted lenses which we are”).

The Oracle of Delphi revealed that Socrates was the wisest man in Athens. Socrates tried to prove the Oracle wrong by questioning everyone he could find about what was truly worthwhile in life. Ultimately, Socrates realized that perhaps the Oracle was right. Socrates was the wisest man in Athens because he alone was prepared to admit his own ignorance rather than to pretend to know something he did not.

“‘Everybody knows’ is the invocation of the cliché and the beginning of the banalization of experience, and it's the solemnity and the sense of authority that people have in voicing the cliché that's so insufferable. What we know is that, in an unclichéd way, nobody knows anything. You *can't* know anything. The things you *know* you don't know. Intention? Motive?

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<sup>21</sup> R. J. Hankinson, *The Sceptics* (New York: Routledge, 1995), 95

<sup>22</sup> Ralph Waldo Emerson, *Experience, The Essays of Ralph Waldo Emerson* (Belknap Press 1987), 261

Consequence? Meaning? All that we don't know is astonishing. Even more astonishing is what passes for knowing."<sup>23</sup>

Good judgment, then, requires we maintain a reasonable sense of humility about our ability to know. Our adversary system is an excellent method for revealing what is true. Our adversary system is also an excellent method for revealing the limits of what we can know about what is true. The most honest answer a witness can give at trial or in a deposition is often: "I don't know."

## F. The Price of Denigrating Rhetoric

What goes wrong when you don't pay enough attention to rhetoric, or when we denigrate it, or we do not take it seriously? Thucydides, perhaps the greatest sophist of 5<sup>th</sup> century Athens and the author of *The History of The Peloponnesian War*, describes what happens when we lose faith in rhetoric; when we lose faith in the meaning of words.

Thucydides describes the Civil War that erupted in 427 BC on the island of Corcyra between the democrats (supported by Athens) and the oligarchs (supported by Sparta). The Corcyrean democrats, having briefly gained the upper hand upon the arrival of an Athenian fleet, took that opportunity to massacre those who supported oligarchy. Thucydides tells us that "[e]very form of death was seen at this time; and (as tends to happen in such cases) there was nothing people would not do, and more: fathers killed their sons; men were dragged out of the temples and then killed hard by; and some who were walled-up in the Temple of Dionysus died inside it."<sup>24</sup> Thucydides reminds us that "war is a violent teacher: it gives most people impulses that are as bad as their situation when it takes away the easy supply of what they need for daily life."<sup>25</sup>

This contest between Athens and Sparta sparked similar civil wars in other Greek cities. Everywhere Greeks were forced to choose between Athens and Sparta. Ultimately, Thucydides tells us, virtually all Greece was in upheaval. "Civil war ran through the cities; those it struck later heard what the first cities had done and far exceeded them in inventing artful means for attack and bizarre forms of revenge. **And they reversed the usual way of using words to evaluate activities.** Ill-considered boldness was counted as loyal manliness; prudent hesitation was held to be cowardice in disguise, and moderation merely the cloak of an unmanly nature."<sup>26</sup>

Honoring rhetoric, remaining faithful to the meaning of words, obviously would not have prevented the Greek civil wars. But denigrating rhetoric, reversing the meaning of words, worked as a catalyst to further inflame and justify the passions of the participants. The Greeks lacked the courage to insist that their extreme conduct be described for what it was.

Our citizens, if knowledgeable about rhetoric, skilled in its applications and alert to its abuses, will hopefully stand up to the abusers of rhetoric when passions run high and the blood starts

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<sup>23</sup> Philip Roth, *The Human Stain* (New York: Houghton Mifflin Company, 2000), 209 (emphasis in original)

<sup>24</sup> Woodruff, *Thucydides on Justice, Power and Human Nature*, 89-90

<sup>25</sup> Woodruff, *Thucydides on Justice, Power and Human Nature*, 90

<sup>26</sup> Woodruff, *Thucydides on Justice, Power and Human Nature*, 90-91 (emphasis supplied)

flowing. Cooler heads have no chance to prevail when we allow words to lose their ordinary, everyday meanings. Lawyers and judges must be in the vanguard in their fidelity to the meaning of words.

**G. A Fact the Critics Can't Ignore: Liberty and Democracy, by their Nature, Breed Lawyers and Rhetoric**

In a democracy, citizens are not ruled by, nor do they serve, an elite. "Democracy first grew along with two explosive ideas -- that we all know enough to decide how to govern our public life together, and that no one knows enough to take decisions away from us and do a better job of deciding, reliably and over the long haul.... The enemies of democracy --and they include the founders of philosophy -- fought bitterly for the principle that only the best people should rule. But we have always known that the people who think themselves best -- even the people we all think best --can go spectacularly wrong."<sup>27</sup>

In a democracy, citizens are rule by what the Greeks called *doxa*, opinion. Opinions must be formed. Citizens must be persuaded. Since rhetoric is therefore inherent to democracy, it makes sense to try and get rhetoric right.

The core belief of democracy is that every human being has moral and political worth. Human beings must be treated as ends in themselves and never as means to an end (no matter how universally desired that end might be). Plato believed in the noble lie, in the right of the elite to lie to the other citizens for the sake of a greater good (as defined by Plato, of course). Marxists, monarchs, dictators, any form of government other than democracy, can justify such noble lies because all other forms of government make moral and political distinctions among their citizens. These other forms of government, by definition, are permitted, if not encouraged, to treat some citizens as means towards ends.

"Democracy has this advantage over other forms of government: It is designed to work as well as possible on the basis of fallible reasoning. Its debates, its frequent lawsuits, its way of bringing a shifting array of speakers to assist with decisions -- all these help prevent any given leader from persistently claiming authority on the basis of knowledge. In democracy, there is always a critic around, always a competing leader with arguments for an alternative policy. More than that, democratic ways actually promote the kind of reasoning that we need to use when knowledge fails."<sup>28</sup> It is no accident that the first lawyers, the first rhetoricians, should arise in the first democracy.

As lawyers, we must, in the public affairs of our democracy, continue to encourage the kind of debate that is the foundation of our adversary system. Public debate remains the most potent weapon in preserving and enhancing an honest and open democracy.

"Lies are not a consequence of debate; they usually come from fear of debate. Before a debate has developed, the authorities weigh in with false stories -- for which they declare they have secret sources -- and so foreclose the possibility of open discussion. Authorities are in a position

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<sup>27</sup> Woodruff, *First Democracy*, 24, 25

<sup>28</sup> Woodruff, *First Democracy*, 175-76

to know, and we have little choice but to trust them, if they curtail debate by keeping the truth from the people. Lies in politics are an old story, but do not blame them on rhetoric. Blame them on human credulity, on our tendency to believe authority. But counter them whenever possible by campaigning for open discussion.”<sup>29</sup>

## **H. In a Good Play, Everyone is Right**

In attempting to make the weaker argument the stronger, we are following the dictum of German playwright Friedrich Hebble: in a good play, everyone is right.

In Michael Frayn’s play, *Copenhagen*, the core mystery is what actually occurred in a conversation between Niels Bohr and Werner Heisenberg regarding the Nazis’ plans or hopes of developing and building an atomic bomb. There is no direct evidence of the contents of the conversation. The participants themselves later gave contradictory recollections of what occurred. So the facts are in doubt.

Michael Frayn attempts to write a good play and thus a play in which everyone is right. By trying to make Heisenberg right, many have accused him of, in effect, making the weaker argument stronger. Frayn has been attacked by those who feel that he inappropriately brings sympathy, if not empathy, to Werner Heisenberg. Reflecting on Hebble’s dictum, Frayn says that he assumes Hebble “means by this not that the audience is invited to approve of everyone’s actions, but that everyone should be allowed the freedom and eloquence to make the most convincing case that he can for himself. Whether or not this is a universal rule of playwriting, it must surely apply to this particular play, where a central argument is about our inability, in our observation of both the physical world and the mental, ever to escape from particular viewpoints.”<sup>30</sup>

A good play then represents an umbrella under which opposing stories, opposing truths if you will, are seen, heard and evaluated by an audience. After the play, the audience, like a jury after a well-conducted trial, is in a position to make a judgment. The truth we find through the adversary process, the truth we find through opposed speeches, is, in some sense, finding truth by following that playwright’s dictum of doing our best to make everyone right. It is an exercise, the effect of which is to liberate us from single subjectivity. It allows us to see as many different perspectives as possible. The goal, when realized, comes as close to a transcendent view of truth that human beings can have on the subjects of their conduct and affairs.

## **I. A Wonderful Letter Captures our Theme**

A good friend and colleague of mine, Charles R. “Skip” Watson, Jr., upon completion of his tenure as Chair of the State Bar of Texas Appellate Section, wrote a public letter in *The Appellate Advocate* which he described as “long overdue,” to Chief Justice Jack Pope. It is a wonderful letter and it largely captures the themes I have tried to present in this paper. I appreciate Skip’s willingness to let me include this letter:

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<sup>29</sup> Woodruff, *First Democracy*, 189

<sup>30</sup> Michael Frayn, “Copenhagen Revisited,” *New York Review of Books*, 28 March 2002, 23

Dear Chief Justice Pope:

The opportunity to help people obtain justice drew many of us to this profession. We also affect those we encounter outside the office and courtroom, as you did one Sunday afternoon in September.

The first assignment of my eighth grade speech class was to prepare and present a *speech on how public speaking is important to a businessperson or professional*. My father suggested that I ask permission to interview a justice he knew on the San Antonio Court of Appeals. You graciously agreed. We drank iced tea on your porch as you explained what it takes to be a lawyer.

You said at least one of two qualities is present in most people who become lawyers. *The first is the ability to communicate orally or in writing. The second is the intelligence to understand what needs to be said.*

You said both qualities are necessary to succeed as a lawyer. The best orator accomplishes nothing by repeating the obvious. Great insight is useless if it is not communicated with clarity and precision. You said the best advocates speak and write as if they are having a conversation about the law. They understand what is important and have the ability to make a judge or jury see it as clearly as they do.

I thought we were finished when you added that *some lawyers have an additional quality. You called it "good judgment."* These lawyers know whether an argument will win and why. You told me that other lawyers tend to seek the advice of lawyers possessing all of these qualities. You called them "lawyers' lawyers."

After giving the speech, I called to thank you again and tell you that my speech teacher had praised me, which meant a lot to an eighth grader. *She encouraged me to become a debater, which taught me that there are two sides to any issue, and that either can win.* My application to law school followed as surely as your election to the Texas Supreme Court.

Your opinions helped me understand the tension between precedent and relevance. You understood the law must be predictable, but must adapt to the issues of the day. You anticipated and minimized the problems created by change while explaining why change sometimes was not needed.

You touched my life that Sunday afternoon. Each time I read one of your opinions, I remember the sun on your porch, the taste of the tea, and your words that day.

Over the years, I have concluded that there was another term you did not explain that day: There is such a thing as a “judge’s judge.”

Thank you.

Charles (Skip) Watson

#### IV. CONCLUSION: FREEDOM AND RESPONSIBILITY

Every story, every set of facts, is told and understood from a perspective. The sophists practiced the art of re-reading traditional Greek stories. Such rereading was a threat to an elite who traded in, and got their legitimacy from, a traditional story told in a particular way.

The method of critical thought that leads to *euboulia* may also call into question the legitimacy of (single point of view) authority. Certainly this method encourages, if not requires, authority to continually justify itself. But in democracy, is this a bad thing?

A human being is free. Her actions are the result of choices she makes, not from a necessity she follows. This recognition of freedom is also a recognition of responsibility. If we are free, we have choices. Often these choices will be difficult (e.g., in a given situation all the choices may involve substantial risks). But we are responsible for the choices we make. *The development and exploration of human freedom and responsibility is, in my judgment, the core value the sophists taught then and the core value lawyers practice, and thus teach, today.*

Opinions diverge when dealing with issues such as justice. Good judgment represents a form of procedural due process. We all disagree on the best course to take, on how each of us should live our lives, but good judgment asks us to agree on a process by which we can hope to obtain some type of consensus on these issues.

Plato posited the Good as a transcendent norm that governed all the particularities that we confront in our day-to-day struggles in this decidedly non-transcendent world. As to the practical affairs of *this* world, it is good judgment, not knowledge of the Good, which is valuable. *This is what lawyers do: through the practice of law, through honest and rigorous argument and analysis, lawyers both practice and teach good judgment.*