RHETORIC AND THE LAW

by

JAMES ROBERT ALDRIDGE

B.A., Brock University, 1972-75
L.L.B., York University, 1975-78

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Department of Law

The University of British Columbia
Vancouver, Canada

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Legal philosophy is viewed as irrelevant by virtually everyone except for legal philosophers. In this thesis, I suggest that the main reason for this is legal philosophy's inattention to the question of why the law and legal reasoning are valuable. Rather than addressing this issue, jurisprudence has simply assumed that the law is valuable because it is objective. Legal reasoning is valuable to the extent that it obtains the truth. The belief that law is essentially a system of rules stems from this underlying premise.

The assumption that the only valuable rational activities are those which single-mindedly pursue truth, is not unique to the law. In fact, it reached its highest expression in nineteenth and twentieth century science. But, in recent years, many philosophers have rejected the notion that science is objective, and based upon independently existing facts. This, however, has not resulted in a rejection of science's value. Similarly, an increasing number of legal philosophers are realizing that the belief in rules is a myth. The law is not, and cannot be objective. How then can it be valuable?

To answer this question, I search for the foundation of the belief that truth is the only value of rationality. In fact, philosophy proceeded for hundreds of years without any such notion. The goal of rational activity was the good, or virtue, or excellence. Philosophers strove to generate beautiful or valuable visions of the universe. Rationality had several tools which it could employ to this end. Logic, the technique of proof, was but one of these tools. No less important was rhetoric, the art of persuasion, and the craft of the Sophists.

The concept of truth as the most important value, was introduced in Athens, by Socrates, and especially by Plato and Aristotle.
The legacy of these three individuals was the elevation of truth to a position of ultimate value. This, of course, resulted in a corresponding elevation of logic, and a demeaning of rhetoric. But logic, by its nature, can only elicit truth. Where there are other values, such as beauty, love, or justice, logic is impotent.

The remainder of the thesis is dedicated to proposing a revival of rhetoric. I argue that philosophy in general, and the law in particular, should become openly and avowedly rhetorical. It is only by persuading the public that its decisions are just that the law can ever be just. Legal decisions will inevitably be decisions of value. Rhetoric is the tool that can guide our decision makers to an appreciation of our culture's values, and can give them the skill to reach "good", rather than "true" conclusions.
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RHETORIC AND THE LAW

-- CHAPTER ONE --

The practice of reflecting about the law has fallen into severe disrepute. When people learn that my thesis concerns the philosophy of law, most either ask what is, or else politely change the subject. When I was introduced to a local lawyer as a graduate student of law, he studied me carefully and sneered, "Oh, so you're one of those are you?" Eight months later, at my first articling interview, my prospective employer casually assured me that my philosophical training had no value whatsoever to the business of practicing law. Even in law school, jurisprudence courses tend to be optional with small enrollments, and are viewed by the student body as "bird" courses for philosophy graduates. Its teachers are urged to supplement their "theoretical" pedagogy with "substantive" (i.e., valuable) courses. And the vast majority of law students, professors, practitioners, and lay people that I know, at least profess to believe that legal decisions depend ultimately on the whims of the person making the decision, and that reflecting any deeper than that is nothing more than self-indulgent and impractical fancifying. Yet, at the same time, the other sides of their mouths are paying lip service to rights and duties, to fidelity to the law, and to justice.

This state of affairs does not bode well for the law, the absence of a widely shared commitment to some form of theoretical appreciation of the law presents it with at least two dangers, both of which have already begun to be realized. Without some overall beliefs concerning the law, it is an edifice without a foundation. Not only is it precariously balanced, it has nothing to direct its builders in the exercise of their responsibility over its future growth. The other side of this is without the belief that the law incorporates
society's values, people will see it as amoral, and something to be adhered to or professed only when it is pragmatically beneficial to do so. The law is thus conceived of as something neutral in the world, something that can be used or abused, like electricity or the wheel, but something whose value lies only in its effects and not in itself.

The purpose of this paper is to explore the means by which we can acquire and exercise an appreciation of the law itself. How is the law valuable? Why does it matter to us?

If we are to investigate the law's value, a good place to start is with some of the conclusions that legal philosophers have reached. After all, they must bear some of the responsibility for the ignominy which legal theory has acquired in the minds of all but themselves. For even though few people care to indulge themselves in legal philosophy, the presuppositions of the philosophers have managed to seep through the body of the law, influencing the perceptions and actions of even its most concrete-minded participants.

Law is a set of rules. This, we are told, is the starting place for any coherent theory of law. In fact, if we look at the history of legal philosophy, this belief can be seen to have been axiomatic for many centuries. Natural law has held that the law is the set of rules reflected in the natural order of the universe, or stipulated by the divine will. Positive law has held that the law is the set of rules stipulated by the sovereign, by the cultural will, by the courts, or by the systematic nature of the law itself. Despite their many differences, for both there is the belief that law is a set of rules.

This claim is based upon epistemology and upon values. Philosophers have always believed that, in order for the law to be knowable, it must be totally independent and autonomous from any particular person, and perhaps from man himself. The desire to discover true propositions about the law has motivated every legal philosophy since classical times. The differences between competing
theories have accordingly always reflected changing theoretical fashions con­
cerning the means by which we acquire knowledge. When it was believed that
knowledge could only flow from divine revelation, or rationalistic contemplation
of abstract forms, natural law was the orthodox, if not the only, legal theory.
The rise of empiricism and decline of metaphysics resulted in the development
of legal positivism, and more recent refinements in empiricism has led to the
enthusiastic application of set theory and linguistic analysis to the theory of
law. Even legal realism can be seen to be merely the adaptation of behavioural
social science to the study of legal decision making.

Why should legal theory be so intimately tied to issues of how we know
things? This is the "value base" that I referred to above. The highest value
in almost every Western philosophy is given to truth. Before the truth, all
other values pale into insignificance. In order, then, for the law to be as
valuable as it must be, it must be one of those things which lie within truth's
domain. This ultimate value is acknowledged in the descriptions of such "values"
as certainty, clarity, and predictability which naturalists and positivists alike
assert must exist within the law.

The necessary relationship between law and the truth has thus never
been an issue in legal philosophy. In a sense, though, it is the source of the
question which has been the central concern of all legal philosophy. What is
the relationship between law and morality? How can we reconcile the residence
of law in the palace of truth, with the exile of justice to the slums of opinion?

Philosophers have consistently taken one of two possible avenues of
approach. They have elevated justice along with law to the domain of truth.
Or, they have denied that there is any necessary connection between the two at
all. Any apparent relationship is either the result of good luck, or else of the
unreality of justice.
The former is the tactic not only of the natural thinkers, but also of many modern writers, such as Ronald Dworkin, or J. C. Smith and Sam Coval, who say that a method can be found for discovering the right principles or the "correct hierarchical order of a legal community's values". It is the route taken by economics-minded philosophers such as John Rawls who define justice and law in terms of a materialistic definition of rational behaviour.

The latter horn of the dilemma is preferred by such traditional positivists such as John Austin, Hans Kelsen and H.L.A. Hart, as well as by the legal realists and most Marxists.

Throughout this paper I shall be advocating that the way to confront this dilemma is to choose neither of these horns, but to pursue a third possible choice. I propose that we cease thinking about the law solely in terms of its truth or objectivity, and restore it to the domain of opinion, where most other valuable things in our lives reside. For it is opinion that governs love and art and cooking. It is our subjectivity, our passions that really count in most of our lives, and anything that denounces all of these, renounces its own value.

But wait, here is something curious. For, as I have already pointed out, the law bases its claim of value on its objectivity, on its independence from individual feelings and beliefs.

Claims of objectivity are inevitably framed and argued in terms of rationality. So it is with the law. Law must be rational in order to valuable, the argument begins. Rationality is concerned solely with ascertainable, objective facts. Therefore, to be valuable, law must be concerned with ascertainable, objective facts.

Now, the word "rationality" is in large part a term of approval. To say that something is "rational" is certainly to suggest that it is at least prima facie good, to say that it is valuable. I am happy, therefore, to give my affirmation to the first premise of the above syllogism. So, if, as I have
promised, I am going to reject its conclusion; logic tells me that I must reject the truth of the second premise: that rationality is concerned solely with ascertainable, objective facts.

Before tackling such a formidably entrenched maxim as this, however, it seems prudent to examine its source and extent. From where did legal theory acquire such a belief?

Without a doubt, the most significant development in recent human history has been the triumph of experimental science. From its modern genesis in the minds of Francis Bacon, Isaac Newton, and David Hume, empiricism has empowered man to achieve a technological mastery of his universe that earlier cultures could never have imagined. The dramatically visible successes of science in the fields of physics, astronomy and biology has led thinkers in other areas to try to emulate science's success by emulating its method.

The people who developed the theory of science's success ascribed it to the scientific method. They can be thought of as using David Hume's famous exhortation as a starting point:

If we take in our hand any volume, of divinity or school metaphysics, for instance, let us ask, Does it contain any abstract reasoning concerning quantity or number? No. Does it contain any experimental reasoning concerning matter of fact and existence? No. Commit it then to the flames: for it can contain nothing but sophistry and illusion.1 [emphasis his]

The only valuable thinking concerns propositions capable of being proven to be either true or false. Unless a statement is necessarily true or false because of its logical or mathematical nature, or unless it describes a sensory experience, it is meaningless and without rational value. Accordingly, scientific thinking must deal only with such propositions.

Sometimes, however, we encounter a statement such as "a body continues in its state of rest or motion unless acted upon by some force" or "cats always land on their feet". These are neither logically true or false, but neither are
they subject to empirical confirmation. No one can experience all bodies or all cats. But it is just this kind of general or universal statement that gives science its quality of independence and objectivity, as well as its predictive value. So to explain how general statements describing various classes of things can be found to be true or false, to account for the meaningfulness of theories, the scientific method was invented.

The scientific method is both a justification and a guarantee. Referring to it always establishes that one's activities are rational, and hence valuable. Dutiful reliance on it ensures that its practitioner will never make meaningless statements, nor will he fall into falsities. He is guaranteed to discover the truth, and nothing but the truth.

Simply put, the scientific method requires proceeding in the following fashion. Facts are observed. A theory, or group of universal statements, is formulated. Each general statement can be reduced deductively to a set of simple statements about facts. Some of these "observation statements" will describe the initially observed facts, while the others will constitute predictions about the world. The scientist conducts experiments to test these predictions. Each time the experimental results coincide with a prediction, the theory is said to have been "confirmed", or "verified". The more times a scientist has "confirmed" a theory, the more he is justified in believing it is true. But, if a single one of the predictions deductively generated from the theory fails its experimental test, the entire theory has been "falsified" or "disconfirmed" and must be abandoned. A new theory must be formulated that accounts for all of the data of the old theory, and it must make new predictions that the scientist can set out to confirm.2

The essential points underlying the scientific method's claim to rationality are:

(1) No proposition is said to be true unless it is logically true or empirically confirmed.
(2) Inconsistency with observed fact is the only grounds for, and always results in the abandonment or rejection of a theory.

(3) Emotion, personal interest and aesthetic appeal are never factors in the acceptance or rejection of any theory.

It can be fairly said that virtually every theory developed up to the midpoint of the twentieth century that explains the success of science adhered to some elaborated version of the pattern sketched above. The school of logical positivism was the highest development of this outlook.

The positivist conception that law is a set of rules is the result of a desire to apply this scientific or objective model to legal decision making. Like the scientist, the judge is, in principle, capable of making the right determination, if he vigorously applies the proper method. The judge is confronted with a "theory" concerning the law. It will normally be a general or universal statement similar to the scientific theories described above. It will state that, in every state of affairs of a certain type, a specific legal determination must be made. It could be that, whenever one person physically strikes another person, that person is guilty of assault. Or, it could be that, whenever a person enters into a contract while suffering from mental delusions, that contract is not binding. Clearly, a countless number of these "theories" or general laws can be formulated. It is the responsibility of a judge to determine whether a proposed "theory" is true; whether a purported law really is the law.

How does he do this? First he observes the "legal facts". These "legal facts" are not to be confused with the facts of the case. "Legal facts" are the facts of the legal institution itself. They include all of the statutes, regulations, and previous legal judgements which constitute the judge's legal universe.

He tests the "legal theory" or purported law against all of these "facts". Each time he can find a "fact" (decision, statute) that would be logically prescribed by the "law" in question, he "confirms" his theory — he finds authority
for his law. But, if a single authoritative case or statute is found which is logically inconsistent with a deductively generated instance of the law in question, then that "law" is not the law at all. The theory is refuted.

Like the scientist, the judge must then generate a new theory -- a new expression of the law -- which is consistent with all of the "facts" recognized in the system, and which can then be tested against other facts. An interpretation of the law must be generated for which authority can be found.

Opposing counsel, in this view, are nothing more than sources of information to the judge, and the trappings of the adversary system are merely technical safeguards to ensure a high degree of factual reliability, to ensure that all relevant "facts" are considered.

It is essential to this vision that the judge be objective and impartial. In fact, a person who publicly denies this objectivity can, in certain circumstances, be found guilty of contempt of court, and be either imprisoned or fined or both. Objectivity enables the judge to discover what the law is without his judgement or rationality being clouded by personal interest, feelings or other arbitrary considerations. He must be like the scientist, dispassionately engaged in the search for truth.

So it is that the conventional vision of legal reasoning lays claim to the same earmarks of rationality that are espoused by scientific reasoning.

(1) No law is applied unless it is deductively related to a valid statute or is supported by authoritative case law.

(2) Inconsistency with some authoritative rule is the only grounds for, and always results in, the abandonment or rejection of a "legal theory" or putative law.

(3) Emotion, personal interest and aesthetic appeal are never factors in the acceptance or rejection of any putative law.

Rules are to legal reasoning as facts are to scientific reasoning. Facts give scientific reasoning its value by tying it to physical reality, to truth. Rules give legal reasoning its value by tying it to legal reality, to truth.
Much of the debate about legal reasoning has been whether it can be really scientific in the sense that I have described. In fact the history of legal positivism can be seen as an attempt to gain for the law the scientific and objective rigor that its big brother, logical positivism, claimed for science.

However, while legal philosophy has been trying to catch up to the certainty and objectivity of science, an increasing number of scientific thinkers have been realizing that science itself is not objective. Spurred by the impact of relativistic physics as well as by existentialism, by the rejection of authority in the West and by the failure of technocracies around the world, a new group of thinkers has emerged who have challenged the traditional description of scientific method, and found themselves examining the foundations of rationality itself.³

The common theme of all of these writers is that human knowledge does not, never has, and never will develop in the fashion described by objective rationality.

The basis of scientific reasoning's value is, as I have said, that it grounds all of its claims on facts, on observations and experiences of the world. Facts are the ultimate arbiters of our beliefs -- they are autonomous, independent, objective. The attack on objectivity has focussed on precisely this claim. Scientists everywhere began to realize, and to point out, that facts and theories are simply not inseparable. Every observation is "theory-laden". Experiences require the personal involvement of the experiencer. The nature of the experience, the set of facts which is perceived, is always affected by the person's beliefs and values. There is no such thing as objectivity.

Even at the most fundamental level, human values and interests determine the picture of the universe that we paint for ourselves to contemplate.
Compared to the countless eons that have transpired in the universe, compared to the immense cosmic regions which contain nothing but interstellar dust, the entire history and material significance of the human species is so trivial as to warrant nothing but the scantiest attention. And yet no one, including scientists, looks at the universe this way. It is only our (eminently understandable) interest in ourselves that leads us to value facts in such a way as to place us firmly at the centre of attention.  

Our experiences are determined not only by the world, but also by our values, our culture, and our previously held beliefs. Any attempt to explain the acquisition, development and testing of knowledge that does not account for all of these factors, is necessarily doomed to failure. Exclusive attention on the world as the legitimate source of knowledge, led to the description of a method which, if followed, would render all human development impossible. Violations of these methodological rules are not accidental or merely the results of human failings, but are necessary for progress.

Indeed, one of the most striking features of recent discussions in the history and philosophy of science is the realization that events and developments, such as the invention of atomism in antiquity, the Copernican Revolution, the rise of modern atomism (kinetic theory; dispersion theory; stereo chemistry; quantum theory), the gradual emergence of the wave theory of light, occurred only because some thinkers either decided not to be bound by certain 'obvious' methodological rules, or because they unwittingly broke them.² [emphasis his]

Methods that insist on consistency with the facts are really insisting upon the facts as viewed through the framework of some other, usually older and widely accepted, theory. Because all of our perceptions are so intimately bound up with our own subjective, historical, mythical and psychological makeup, methodological insistence upon consistency with the facts results in continued adherence to the older, rather than the better theory.

The Copernican Revolution is probably the most discussed historical example of the growth of scientific knowledge. This is no doubt partially due
to the dramatic nature of the change in world views that was involved in shifting from a geocentric to a sun-centred universe. It is also explained by the familiarity of the concepts with which it dealt.

When I was in public school, and even later in high school, the story of the Copernican Revolution was often used to illustrate the workings of the scientific method. According to this myth, scholars had always believed that the earth was stationary and lay at the centre of the universe. Their belief was reasonable enough, because it accorded with all of the facts that people could experience. However, Galileo Galilei came along and proved that the Copernican hypothesis was true. That is, using his telescope, he showed that the Ptolmaic theory could not account for all of the facts (some of its predictions failed) that the Copernican hypothesis not only explained or predicted all of the well confirmed facts, but that it also made new predictions, which experiment confirmed to be true. Accordingly, he announced that the sun was the centre of the universe. Unfortunately, the Church was dominated by superstitious and self-interested bigots who ignored Galileo's proofs and who proceeded to persecute him to force him to renounce the truth. Despite his recantation, the myth concludes, the truth had been discovered and there was no possibility of reburying it. In the face of scientific, objective proof, the Church eventually had no choice but to grudgingly accept the heliocentric thesis.

Careful study of what really happened in the scientific revolution shows that this is all fanciful nonsense. In fact, the Church, especially the Jesuit Order, had been very interested in the use of a sun-centred model of the universe, such as that of Copernicus, as a means of predicting stellar phenomena, of "saving the appearances". However, as an actual description of reality, Galileo's claims not only contradicted Scripture, they were not very plausible. But it was exactly this claim that Galileo made, and which got him into trouble. He proceeded and argued as though his theory had been rigorously
demonstrated and the burden of proof was on his opponents, the defenders of Scripture, to disprove it.

Throughout the document The Letter to the Grand Duchess Christina, which was the initial source of the Church's ire, Galileo completely evaded any astronomical or physical discussion of the Copernican systems. He simply gave the impression that it was proven beyond doubt. If he had talked to the point, instead of around it, he would have had to admit that Copernicus' forty-odd epicycles and eccentrics were not only not proven but a physical impossibility, a geometrical device and nothing else; that the absence of an annual parallax, i.e. of any apparent shift in the position of the fixed stars, in spite of the new telescopic precision, weighed heavily against Copernicus; that the phases of Venus disproved Ptolemy, but not Herakleides or Tycho [other geocentric theories]; and that all he could claim for the Copernican hypothesis was that it described certain phenomena (the retrogression) more economically than Ptolemy; as against this the above-mentioned physical objections would have carried the day. For it must be remembered that the system which Galileo advocated was the orthodox Copernican 'system, designed by the Canon himself, nearly a century before Kepler threw out the epicycles and transformed the abstruse paper-construction into a workable mechanical model. Incapable of acknowledging that any of his contemporaries had a share in the progress of astronomy, Galileo blindly, and indeed suicidally, ignored Kepler's work to the end, persisting in the futile attempt to bludgeon the world into accepting a Ferris wheel with forty-eight epicycles as 'rigorously demonstrated' physical reality. 

But, while Galileo failed in obtaining consent to the details of his system, it was certainly his work and popularity that resulted in the change in world view from geocentricity to heliocentricity. If it wasn't scientific, objective proof that made this advancement possible, what was it? To sum it up in one word, it was rhetoric.

Galileo used psychological tricks, eloquent language, appeals to emotions and just plain dishonesty in his campaign to advance his beliefs against the believers in geocentricity. He did this in order to get people to reject their old experience and thus see the world in a totally new way. The experiences upon which he based the Copernican view was "nothing but the result of his own fertile imagination, it has been invented."
Whenever an observed fact was proposed as a refutation to Copernicanism, Galileo delved into the fact to find the theoretical or "natural interpretation" that underlies this offensive observation. He then used appeals to common sense, to analogy and to aesthetic appeal to dethrone this natural interpretation and replace it with another, one that resulted in the observation losing its contradictory effect. This new theoretical claim constituted an auxiliary, but unproven hypothesis, which supported and was itself supported by the main theory -- in this case Copernicanism. So it was that Galileo suggested such things as the law of inertia and a theory of optics that defused troublesome facts. In fact by combining all of these precarious and "irrational" beliefs, Galileo made possible a new kind of experience.

... while the pre-Copernican astronomy was in trouble (was confronted by a series of refuting instances and implausibilities), the Copernican theory was in even greater trouble (was confronted by even more drastic refuting instances and implausibilities) -- but that being in harmony with still further inadequate theories [inertia, optics] it gained strength, and was retained, the refutations being made ineffective by ad hoc hypotheses and clever techniques of persuasion. 

Paul K. Feyerabend and others have argued that every scientific advance has been preceded by this kind of irrational, non-methodological activity. Reliance on the facts can only verify a theory to which the scientist has already made a commitment -- which he already believes is true. Facts cannot, therefore, provide value to science by guaranteeing its connection to objective reality -- to truth.

As I suggested above, legal thinking has based its claim to value on objectively existing rules in the same way that science was said to be based on objectively existing facts. In fact, this claim about the law would seem to have a far lower initial plausibility than the belief in facts. Physical facts are certainly a much better contender to objectivity than are rules or
principles. The "reality" of the latter tends to be somehow inferred by their effects, rather in the same way as we experience gravity or inertia as opposed to apples or tables. But habits run deep and the belief in the reality of rules is so deeply imbedded in our legal culture that most people would no more think to challenge the existence of rules than they would that of concrete facts.

The first sustained attack on law's claim to value based upon the objectivity of rules came from the school of legal realism. This group of thinkers, many of whom were eminent judges, was twice blessed with legal experience and an inquisitive attitude untrammelled by overwhelming deference to the positivist doctrine.

Traditional jurisprudence has consistently maintained that the law was objective, and that, if different judges applied the rules correctly, they would always reach the same conclusion. Philosophers had such a strong attachment to this belief, that they dismissed apparent counter-examples as mere aberrations, caused by the judge allowing his personal makeup to contaminate his judgement. This meant that the theory that law is a set of objective rules was not capable of being disproved. The legal realists recognized this to be a violation of the very scientific method to which the positivists purported to adhere. They knew from their own observation and experience that the influence of judges' personalities on legal decision making was far too prevalent to be simply shrugged off. They knew that this influence constituted a falsification of the theory that legal decisions are made by discovering and applying rules. Accordingly, another theory was needed which could not only explain the existing body of legal decisions, but would also enable the theorist to make predictions about future legal decisions. The theory could thus be confirmed or falsified by the success of the predictions. It was this empirical feature of the realist jurisprudence that gave it value in the eyes of its exponents.
Intellectual fashion once again intervened and determined the course adopted by the realists. Empirical behaviourism and its influence on the fledgling social sciences was enjoying the height of its popularity. It was seized upon and eagerly applied to the study of legal decision making. After all, if the determining factor in decision making is the personal intervention of the judge, then it is his psychological and sociological makeup that should constitute the main subject matter for an empirical (i.e., rational) theory of law.

The realists, with the hubris typical of the social scientist, embarked upon the massive task of developing a theory based upon the sociological and psychological structure of the judicial and legal professions. Eager young graduates applied themselves to assembling and disassembling data. They drew charts and graphs and graphs and charts. They conducted interviews and drew up personality profiles. They compiled data and argued about theories of data compilation. But all their efforts were to no avail.

Legal realism had appeared suddenly amid much enthusiasm, but the enthusiasm waned and the research done by its adherents did nothing to rekindle its flames. It has reached such a low level of credibility today that many a defender of the reality of rules will dismiss any challenge to their hegemony as "only" legal realism. And we all know about legal realism. It has been passé for year.

The sneering dismissal of the realists by modern jurisprudence is surely an injustice. Many of their initial criticisms of the belief in rules are powerful and convincing. The thoroughgoing scepticism of the realists is an invaluable aid in unearthing many of the serious problems and anomalies involved in the belief in law's objectivity. It is no doubt at least partially because of the embarrassing nature of many of these criticisms that positivists are so eager to relegate everything said by the realists to the shelf where we store quaint, but essentially useless antiques.
The problem with legal realism was not with its diagnosis, but rather with its prescription. The realists' major error lay in their wholesale subscription to behaviourism. This paper is not the place to embark upon an examination of the many philosophical difficulties with that school of thought -- it has been done thoroughly and beautifully by many others. These criticisms are easily applicable to the behaviourist foundations of legal realism. Suffice it to say that, in applying the empirical method of science, the legal realists maintained the tradition of treating the law as something that can be described factually. The independently existing rules were no longer legal rules, but rather behavioural rules. But, by giving the behavioural rules the exclusive position of truth, of reality, they shackled themselves to their graphs and charts. The people involved in the law vanished to be replaced by units of behaviour. Because of their obsession with verifiable facts, they ignored the fact that people do believe in rules. Judges rely on rules to justify their decisions. People rely on rules to govern their behaviour. Lawyers rely on rules to structure their arguments. By refusing to acknowledge this belief, the legal realists entrapped themselves in a fantasy that bore no relationship to the law as it is actually experienced by most people.

The reason that legal realism so alienated itself is because it misunderstood the nature of the belief in rules. It treated this belief as simply an empirical hypothesis. In fact the belief in the objective existing of rules is not just an explanation or prediction of legal decisions, it is a justification of the law. When a judge refers to a rule, he is not merely explaining his decision, he is giving it a value. He is saying that this rule makes my decision right, it is correct. Because it is correct, it is just. Truth always is valuable. It is absurd to think of a judge explaining his decision on the basis of an emotional trauma suffered when he was twelve, or because eighty percent of
judges with similar cultural backgrounds would make that decision. Unless a
decision is the right decision, then it is not capable of being a good decision
and we have no reason to respect it.

The realists had painted themselves into a corner. If their theories
were correct, the law had no value and was simply an instrument of arbitrary
coercion. Yet, if the legal spokesmen persisted in describing the law's activity
as the discovery and application of pre-existing rules, they would be indulging
in myth making and obfuscation of truth. They would, that is, be acting against
their own highest ideal. In the face of such a quandary, American legal realism
simply withered away, without ever being actually refuted.

The realization that the belief in law's objectivity as a set of rules
is an evaluative as well as a descriptive claim, led Judith Shklar to character­
ize it as an ideology which she calls "legalism". By ideology she means merely
an attitude, or set of preferences, that is shared by people in a community.
Because it is shared, and normally very deeply imbedded, this attitude and the
beliefs that it entails are normally considered self-evident and are simply taken
for granted. Thus "legalism", the belief that law, as a discrete entity of
ascertainable rules, is in fact a preference, a belief that law should be a set
of pre-existing rules. However, as the realists knew, and as Feyerabend points
out regarding scientific theories, adoption of an ideology or a theory means
that its fundamental beliefs are not subject to critical examination. The belief
that law is valuable because it is objective is unchallengeable as long as there
is no competing ideology, no alternative preference on which to ground an under­
standing of the law.

I should make it clear that it is no part of my argument to urge that
we adopt an ideologically "pure" position from which to study the law. I do not
believe that this is either possible or desirable. Shklar makes this point in her
typically concise and articulate manner:
... it may well be doubted whether political theory, of which legal theory is a part, can be written without some sort of ideological impetus. Nor is there any reason to feel that the expression of personal preferences is an undesirable flaw. It must seem so only to those who equate objectivity with remoteness from their own experiences, and especially from those they share with their contemporaries. However, if one thinks of ideology as merely a matter of emotional reactions, both negative and positive, to direct social experiences and to the views of others, it is clear that ideology is as inevitable as it is necessary in giving any thinking person a sense of direction. To be sure, ideological responses are often difficult to recognize in oneself, as they insensibly come to condition one's interests, one's methods of study, one's conceptual devices, and even one's vocabulary. However, if we did not think of ideology as a gross form of irrationality, we would be less anxious to repress it and our self-awareness would be correspondingly greater.12

She states her own ideology, her own order of preferences, to be one of "barebones liberalism," to include a primary commitment to social tolerance and diversity, to cherish the freedom of the individual and the subordination of the State's power to these virtues. Throughout the remainder of her book, Shklar shows how the adoption of a legalistic view of law inevitably leads to the compromise of these important goals. It is in the nature of rules to homogenize their objects, to ignore and thus devalue differences, while exalting similarities.

Not only are differences between individuals frowned upon, but so are the differences between situations. By constantly striving to treat the present and structure the future in the same was as we coped with the past, legalistic law inhibits rather than enhances the growth and development of the law. Those who insist on the conservative view that the law is a complete evolutionary entity inevitably ignore "the complex and heterogeneous historical process that combines reasonable thought with personal idiosyncracies; sophisticated political programmes with ancient and petrified means of expression and thought".13

What is the source of this insistence on a view that has so many unsatisfactory consequences, that turns a blind eye to so much common sense and historical experience? Shklar identifies it as the fear of arbitrariness that
underlies the entire growth of the western political tradition. We have enthusiastically endorsed the notion of the rule of law, because the rule of men is assumed to be necessarily arbitrary and whimsical. In order to stave off the tyranny that inevitably accompanies arbitrariness, we have developed laws that are immune from the will of kings and judges. If people are to be capable of freely ordering their lives in such a way as to avoid conflict with the law, it must be certain and predictable. The likelihood of tyranny and oppression increases inversely with the certainty of the law's application, and directly with the amount of discretion its officials are able to exercise. Lack of objectivity leads to arbitrariness. Arbitrariness leads to tyranny. Tyranny is bad, so objectivity must be good. In order to be good, law must be objective. Q.E.D.

The problem is, the belief in law's objectivity does not eliminate its uncertainty, it merely ignores it. This is the theme of Steve Wexler's article "Discretion: The Unacknowledged Side of Law". He shows that the vast majority of legal decisions made today are not the result of clear and unambiguous rules, but are rather the result of some official applying his personal feelings, beliefs and preferences to a case which he has the discretion to decide either way.

That discretion, and the absence of clear and binding rules, is ubiquitous in the functioning of bureaucracies is well known to anyone who has had any contact with what we euphemistically call administrative law. But legal theorists continue to deny to this fact any relevance to their general view of the law.

But even in the courts, according to Wexler as to the legal realists, the judge is only rarely bound by a rule which compels one particular decision. The judge's job is to "discover" the applicable rule for the case before him.
But this always involves choosing the relevant features of the situation before him, as well as the interpretation of both statutes and previous judicial decisions. The judge is no more capable of performing this choosing and interpreting unaffected by his own values, beliefs and prejudices than is the scientist who is "testing" a theory. Values, beliefs, and prejudices, essential to all human decisions, are not objective, not certain, and are not capable of being captured or eliminated by a rule, or by a methodology.

But by talking and acting as though the law is objective, we end up paying an enormous price. It is not merely that we alienate the law from its historical and cultural context, which is indeed serious, but somehow theoretical and amorphous. The real tragedy is that we allow our decision makers to proceed without being honest and responsible to the people affected by their choices. A judge or a bureaucrat inevitably makes his decision on the basis of his personal values and desires. But he is not required, indeed he is forbidden, to be above board about this. He must not state his real reasons nor frankly outline the values upon which he relies. Instead he must hide behind the cloak of objectivity and rules. Discussion and evaluation of the values involved are normally precluded by the mass of what is too often tangled and impenetrable "reasoning".

Furthermore, the myth that judges simply discover and apply pre-existing rules leads us to value too highly the wrong qualities in the people that we appoint to bench and bar.

Impersonal judgement and the striving for objectivity are intellectual virtues of the highest order. But they are the virtues of observers, of technicians, and of strategists, not of those how must make social choices for themselves and for others in situations where it is far from clear what ends can and should be pursued, however much the participants may long for clear rulebooks to guide them.15

... we allow hack officials to decide cases which even the most sensitive among us would find very difficult to decide. We pretend or believe that rules are at work when it is men who are, and we do not demand that the men be our best or that they answer for their decisions.
Perhaps most tragic is the plain, simple fact that, increasingly, no one is fooled anymore. Lawyers, law students, policemen, and even some judges show their worldliness and sophistication by scoffing at the idea that law is objective. They all know that "it all depends on which judge you get". The pronouncements of the professors and the assurances of the judges that the law is just because it is objective, that one can learn "legal reasoning" and see that, despite its appearances, the law really is rational, all of these fall on deaf ears.

Arguments can be made, and no doubt will be, that those who deny that the law is objective simply don't understand, that their view of the law is shallow. But it is too late for that. The choice is not between rules and discretion, but "between the pretense of rules, and the reality of discretion".¹⁷

And while our philosophers and our judges and our teachers postpone this decision and maintain their facade, the gap between law and justice yawns wider and wider. The "fidelity to law" appears increasingly naive. And the value of law, the basis of our commitment to it, has evaporated.

How can the law cope with this crisis? Neither Shklar nor Wexler offer us any more definite prescription than to recognize that the law is not merely a set of objective rules. They do not tell us what to do with this recognition. I have argued that the law seeks to be objective in order that it be rational; rational in order to be valuable. Perhaps the problem is with this equation. Is it really necessary that the law be objective in order to be valuable?

As I pointed out, science once thought that, in order for it to be valuable, it had to be based upon objective facts. Now it has been realized that science is not objective: there are no facts. This realization has not led anyone to deny the value of science; people have merely sought a new basis for
its value. This has been the motivation for the historical work of such individuals as Paul K. Feyerabend and Arthur Koestler.

They have identified a pattern that seems to accompany all evolutionary growth, whether it be of species or of ideas.

... a new period in the history of science commences with a backward movement that returns us to an earlier stage where theories were more vague and had smaller empirical content. This backward movement is not just an accident. It has a definite function; it is essential if we want to overtake the status quo ... 18 [emphasis added]

Koestler identifies this backward movement as a reculer pour mieux sauter: a drawing back to leap. It may be useful at this point to draw back in our intellectual history to make a new start. We should attempt to return to the embryonic stage of Western philosophy — to the thinkers of ancient Greece.
There is no doubt that ancient Greece has had a powerful influence on subsequent Western world views. The full nature of this impact is not properly appreciated. Many scholars describe the accomplishment of the Greek thinkers in terms of abstraction. For the first time, according to these accounts, man acquired the ability to conduct his rationality in an abstract universe, separate from the world of mere sensation. This permitted the development of abstract mathematics, Euclidian geometry, and formal logic. It resulted in the development of a precise and elaborate astronomy and physics.

Now, just as the groundwork for these disciplines can be traced to the newly found Greek ability to abstract from everyday experience, so too can Western legal systems find their common root in the Hellenic genius.

... Professor F.S.C. Northrop ... has shown that the creation of the Western contractual legal science was the result of the Roman Stoic lawyers' introduction of the epistomology, logic, and imageless theoretical forms of Greek physics into their legal system, producing the revolutionary change in Roman law described by Sir Henry Maine as the shift from Status to Contract.1

An understanding of the change in world view that occurred twenty-five centuries ago on the shores of the Mediterranean cannot help but enlighten us about the beliefs and dogmas that underlie our own world view, and particularly our legal structure.

The change that evolved in the thinking of the Greeks was more fundamental than the "acquisition" of the power to think in an abstract or universal way. In fact, it seems more plausible to suppose that the actual capacity to think abstractly did not develop in the span of a few hundred years, but had existed for as long as homo sapiens had walked the surface of the earth.
Instead, the Greeks invented a particular style of abstract thought that had never before been performed. But before this change in style could occur, a radical change of world view was necessary, a change that went to the very core of rationality itself. And it was this change that is the real legacy of the philosophy of ancient Greece. More precisely, it is this change that is the legacy of the later Greek philosophers, especially Plato and Aristotle.

For the first time in philosophy, these two men made the true rather than the good, the ultimate criterion of rationality. It is this change which has haunted our rationality ever since. It was this change that led to the type of abstract thinking that we call "objective". It was this change that made science and her sister technology possible, that led to the discovery of the cure for smallpox and to the invention of napalm. It was this change that both determined the form of Christian doctrine, and provided the basis for national socialism.

Because of the notion that the true really is the Holy Grail after which all of our rational quests are directed, it is difficult for us to imagine that this is not inherent in the very concept of rationality. This difficulty is not surprising, for the belief lies behind, or under, all of our other beliefs. It is the foundation of our rational lives. A threat to it is a threat to our rationality, perhaps to our sanity. But surely any true confrontation with a world view will entail this sort of threat. If it doesn't, then we are not really attempting to understand the world view in question, but merely to embrace it and assimilate it within the folds of our own.

What is needed then, is a sense of imagination, an openness to suspend disbelief, and a feeling of adventure. Crossing frontiers is never easy, but is almost always exciting. Every frontier requires a vehicle to facilitate the crossing. The vehicle that I have discovered for the exploration of the foundations of rationality is the conflict between logic and rhetoric. This is
especially useful when we consider the philosophy of ancient Greece, for it was here that this battle was first fought. In this chapter, I will examine the role that rhetorical thinking played in pre-Socratic philosophy, and the nature of the attack that was levelled against it by Socrates and Plato. I will show how this determined the treatment which was given to rhetoric by Aristotle, and suggest how this has influenced Western rationality ever since. I will start where histories of philosophy inevitably start -- with Thales of Miletus, who walked into a well while looking at the stars.

** i i **

The sixth century before the birth of Jesus Christ was one of the most remarkable epochs in the short history of our species. It produced the Buddha in India, Confucius and Lao-Tzu in China, Zarathustra in Persia, and the Ionians and Pythagoras in the Mediterranean. Perhaps even more remarkable is the fact that the spirit of discovery in all of these far distant lands was so similar.

The city of Miletus was in Ionia, which we now call Turkey. It was here that the first Greek philosophers lived and died. And it was here that Thales proposed the fundamental substance of the universe to be water. This preposterous claim cannot be considered in the same way that we entertain our own assertions. For Thales, as for all of the philosophers that we shall consider in the next few pages, truth was not the goal. Neither was there the separation between the worlds of religion and of knowledge that we are so familiar with today. Thales was a philosopher and not merely another religious prophet or oracle, because he described the fruits of his own reflections and his own experience, and not a belief about the universe based upon communication with the gods. But his description of the universe was certainly tied to what we would
call religious belief. The water that formed the basis of all existence was not a simple object in the world. It was divine water, it was ensouled and communicated its life to all matter. The universe was alive for Thales and this life was the source of all motion. Man was but a part of this divine motion. Behind all of the apparent distinctions, was the unity of the living water.

The belief in a primary substance that characterized the unity of all things was held in common by all of the pre-Socratic thinkers. But, as in the East, where the same belief was firmly entrenched, philosophers came up with different ways of trying to communicate the ineffable. No description of the universe can be complete, for language is based on distinctions, and the basis of the universe is the One -- the absence of distinctions. But that does not dictate silence. It is human nature to communicate. Therefore different people came up with different descriptions of the One, descriptions that enabled others to experience their world in new and richer ways. But these descriptions all shared something. They always included the observer as an indispensible part of the observed. Humanity participated in the experiences that it had, and so human qualities played a determining part in the structure of the world.

This is especially evident in the thinking of Anaximander, another Milesian and a younger contemporary of Thales. For Anaximander the fundamental principle is the unbounded or indefinite. The unbounded is internally undifferentiated, but is the source of all appearances. Opposites separate themselves out from the One and then war upon each other. There is a continuous cycle of becoming and ceasing to be as the opposites intrude upon each other, and then are forced to pay retribution in accordance with the principle of cosmic justice (dike). This concept of justice as the regulating principle of the universe is a vital part of the pre-Socratic thought. In the way that it binds gods as well as men, it is strongly suggestive of the Eastern concepts of Karma or Tao. It
invokes a dramatic portrayal of the universe -- a qualitative and moral understanding of empirical phenomena that is quite foreign to our scientific manner of thinking. But once we adopt the view that the nature of the perceived world is the result of the participating subject, it becomes inevitable that moral concepts will play an essential role in the description of that world.

The human participation in the universe was also stressed by Anaximenes, who described the fundamental substance as air or, more accurately, as breath or spirit (pneuma). All objects are thickenings or thinnings of this primordial, homogeneous breath. This substance is alive or ensouled and its life causes all change and motion.

I must repeat my contention that these explanations of the universe were not attempts at constructing scientific theories in the sense of a set of true propositions. It is probably better to think of them as activities that resemble painting or writing poetry. They were attempts to share an experience, or way of experiencing the world that was pleasing or fulfilling, rather than true or factual. This may help us to understand the following observation of Arthur Koestler:

None of the cosmologies ... gained a considerable following. Every philosopher of the period seems to have had his own theory regarding the nature of the Universe around him. To quote Professor Burnet, "no sooner did an Ionian philosopher learn half a dozen geometrical propositions and hear that the phenomena of the heavens recur in cycles than he set to work to look for law everywhere in nature, and with an audacity amounting to hybris to construct a system of the universe."3

Surely this image is more evocative of a group of fledgling artists all trying to paint the best picture, than a group of draughtsmen trying to replicate the true state of affairs.

The most complete example of how cosmic wonder, aesthetic delight and the exercise of reason are inextricably tied together at this time was the doctrine of the Pythagorean brotherhood. Pythagoras of Samos is universally
recognized as the father of Western mathematics. It is his influence that persists in attempts to explain the universe in terms of mathematics. There are, however, essential differences between the relation of numbers to reality for Pythagoras, and for more recent thinkers.

Pythagoras, it seems, believed in the same cosmic unity that was described in various ways by the Milesians. He also believed that the universe was in a continuous state of flux. But the unifying vision that he proclaimed was not water, or breath, or the combination of opposites. Pythagoras believed that the study of numbers was the way to understanding of the universe. Once again, we must be careful not to think that the goal of Pythagoras' thinking was knowledge. Mathematics was not a method for constructing true descriptions of the universe. Rather it was a discipline that enabled an adept to have a mystical insight into the cosmos.

It may be easier to appreciate the nature of the Pythagorean vision if we consider its religious roots. It displayed a powerful Orphic influence. The Orphic religion had sought ecstatic release from the world through intense rituals of dance, drinking and other sensual pleasures. Now, Pythagoras taught that intellectual ecstasy (ekstasis) could be attained by contemplation of the "divine dance of numbers". In fact, the modern word, "theory" is derived from this Pythagorean idea. But rather than the coldly objective connotations that it bears today, to the Greeks of that time it meant something quite different: "passionate, sympathetic contemplation". It was the kind of beholding characterized by a spectator at a religious festival.

For Pythagoras, the "passionate sympathetic contemplation" was intellectual, and issued in mathematical knowledge. In this way, through Pythagoreanism, "theory" gradually acquired its modern meaning; but for all who were inspired by Pythagoras it retained an element of ecstatic revelation. To those who have reluctantly learnt a little mathematics in school this may seem strange; but
to those who have experienced the intoxicating delight of sudden understanding that mathematics gives, from time to time, to those who love it, the Pythagorean view will seem, completely natural even if untrue. It might seem that the empirical philosopher is the slave of his material, but that the pure mathematician, like the musician, is a free creator of his world of ordered beauty.\(^5\) [emphasis added]

Through the passionate contemplation of the relation of numbers to the appearances of the world, through the pursuit of the balance and order (armonia) of the universe as displayed by the relations between numbers, purification (katharsis) was obtained and the individual could then escape from the wheel of rebirth. The study of numbers, then, was for Pythagoras what the practice of yoga, or the activity of meditation, or the solving of Koans were for his Eastern contemporaries. It was the method to realize the illusory nature of the world of things, and a method for loosing oneself from its bonds. The claims about numbers were not statements of fact, but methods of personal involvement with reality, of control over experience.

the Pythagoreans ... were aware that the symbols of mythology and the symbols of mathematical science were different aspects of the same, indivisible Reality. They did not live in a 'divided house of faith and Reason'; the two were interlocking like the ground plan and elevation on an architect's drawing. It is a state of mind very difficult for twentieth century man to imagine -- or even to believe that it could have existed. It may help to remember though, that some of the greatest pre-Socratic sages formulated their philosophies in verse; the unitary source of inspiration of prophet, poet, and philosopher was still taken for granted.\(^6\)

The major impact of the Pythagorean philosophy, along with the introduction of mathematics to the description of the universe, was the method of deductive reasoning that it introduced to all aspects of philosophical speculation. It must be kept in mind, however, that the Pythagoreans saw deduction as a means of gaining ecstasy, as a mystical discipline that brought them into contact with the ultimate reality and thereby liberated them from day-to-day appearances. Its appeal was aesthetic and spiritual rather than scientific. Those scholars who suggest that the Pythagoreans founded the
deductive method as an avenue to the truth, à la René Descartes, distort the relation that the Pythagoreans themselves saw between their thoughts and their world.

One of the most influential of the later followers of the Pythagorean doctrines was Heraclitus. Like Pythagoras, he taught that everything is in a state of flux. For him the fundamental substance is fire. But as with the Milesians who preceded him, this identification should be thought of as metaphorical or poetic. He states that the unity in the world is a unity of opposites. The dynamic principle of the universe is strife.

His belief in strife is connected with this theory of opposites, for in strife opposites combine to produce a motion which is a harmony. There is a unity in the world, but it is a unity resulting from diversity: "Couples are things whole and things not whole, what is drawn together and what is drawn asunder, the harmonious and the discordant. The One is made up of all things and all things issue from the One." 7

The remarkable similarity between the teachings of Heraclitus and those of the Chinese philosophy of Taoism has been pointed out by Fritjof Capra:

It is amazing that, at the same time when Lao Tzu and his followers developed their world view, the essential features of this Taoist view were taught also in Greece, by a man whose teachings are known to us only in fragments and who was, and still is, very often misunderstood. This Greek "Taoist" was Heraclitus of Ephesus. He shared with Lao Tzu not only the emphasis on continuous change, which he expressed in his famous saying "Everything flows", but also the notion that all changes are cyclic. He compared the world order to "an ever-living fire, kindling in measures and going out in measures," an image which is indeed very similar to the Chinese idea of the Tao manifesting itself in the cyclic interplay of Yin and Yang.8

The teachings of Parmenides of Elea are often supposed to be in conflict with those of Heraclitus. This is because Parmenides and his disciple Zeno taught that the only true being is the One, which is infinite and indivisible. Any change, motion, or opposites, then, are illusory. But, as I pointed out, Heraclitus also believed in the One. His concern was the
relation between the world of events, of illusions if you will, and the One. Parmenides devotes his energy to the One itself. I suspect that the differences between the two was more one of emphasis and attention than anything else. I might also note that Parmenides' second major work has been lost to us. Its title was The Way of Opinion and it can be reasonably supposed to have dealt more with the perceived world than did his surviving piece The Way of Truth, in which he taught the doctrine of the unchanging whole.

Parmenides is also credited with being the first to invent a metaphysics based on logic. This is true, but its truth must be tempered with another fact about his writings — they were all done in poetry. The aesthetic element of philosophy is still prominent today, and I suggest, it is still the aesthetic, rather than the factual, appeal of logic that explains its use.

A younger contemporary of Parmenides was Empedocles. He taught that everything is composed of the four elements of earth, air, fire and water. Different objects result from different proportions of mixtures. He has been termed a "pluralist" rather than a "monist" such as Parmenides. As is usual with such labels, this appellation is not entirely accurate. Empedocles believed that the eternal, and unchanging reality is the cyclic motion and interaction of these elements. This eternal motion is governed by a unifying principle and a separating principle. The former is love and the latter, strife. Like Parmenides, Empedocles wrote in verse.

The first person to introduce philosophy to Athens was Anaxagoras. He said that mind is the source of all motion and added it to the other four distinct types of elements.

The pre-Socratic cosmologists developed a rich and varied set of philosophies. I have maintained that to speak of them as contradictory or to criticize them for not being true is like describing Rembrandt and Goya as
being "contradictory" or criticizing Van Gogh because the sky doesn't really have all of those funny circles in it.

All of the philosophers of pre-Socratic Greece believed in an ultimate reality that transcended the world of appearances. They sought different ways to describe and enrich experience and managed to excite many minds with the power and beauty of their visions. But in all cases there was an expression of the human participation in the fabric of reality. Their goal was virtue, excellence, the good (arete). No one had thought of discovering a truth that was independent of man. That would come later, in the city to which Anaxagoras had introduced philosophy. It would come in Athens.

** iii **

One of the characteristics of all of the philosophers considered thus far is the scant attention which they pay to questions of ethics. This may be explained partially by the fact that poetic visions of the universe lend themselves to moral issues only in an exhortatory manner. Where codes of conduct do appear (as for example, with Pythagoras) they tend to be expressions of tabus rather than rationally considered or reflected upon standards of behaviour.

As the fifth century progressed, philosophical attention began to swing from the heavens to everyday life. The fashion of philosophical speculation spread to broader walks of life, and became concerned with reflecting upon concepts that had previously been the sole preserve of myth and drama. This level of consideration was facilitated by the arrival of philosophy in Athens.

The Athenians were certainly interested in exercising their mental skills. But there were more pressing demands than merely painting pictures of the primordial unity. Athens was governed by the assembly of its citizens.
Decisions were made by large groups of citizens after hearing contenders for different sides of an issue argue their points of view. Similarly, legal cases were decided by the assembly and each party was required to present his own case. Questions of justice, of right-wrong, of virtue were therefore continually under public debate. There was a great demand for teachers of the art of persuasion -- people who could instruct the Athenians of the most effective way of swaying people's opinions. These teachers were the Sophists.

The term "Sophist" has become highly perjorative. This is due mostly to the influence of Plato.

His pictures of the rhetoricians are so broadly satirical that at times they become caricatures; but his literary power and philosophical originality have so impressed themselves upon succeeding ages that the sophists and rhetoricians of Athens have become symbolical of false pretense of knowledge, overwhelming conceit, fallacious argument, cultivation of style for its own sake, demagoguery, corruption of youth through a scepticism which professed complete indifference to truth, and in general, a ready substitution of appearance for reality.  

Recently, scholars have begun to take a more sympathetic view of some of the Sophists and to examine their philosophical positions with a new respect. In many ways they are realizing that the Sophists can be seen to be the ones carrying the mantle of the earlier philosophers, and Plato and Aristotle to be an aberration that knocked Western philosophy for a two-thousand-year loop.

Space and time prevent me from giving full justice to the Sophists. There are many whose names I shall not even mention. Furthermore, while I describe only the philosophy of Protagoras, it is dangerous to think that this is a philosophy which is representative of all Sophists.

... it has been established that such terms as a sophistic mind, a sophistic morality, a sophistic scepticism, and others implying a common basis of doctrine are quite without justification. Their common characteristics were that they were professional teachers, that they accepted fees, and that rhetoric was a large element in the teaching of virtually all of them. The general emphasis upon rhetoric does not mean that as scholars all the sophists found
their intellectual interests centred in rhetoric. But rhetoric was the one subject with which they could be sure to make a living. The conditions which made rhetorical training a universal necessity in Athens have been frequently set forth. The sophist who was a master of rhetoric had a number of possibilities before him. He could win power and repute from the delivery of eulogistic orations at public funerals, or deliberative addresses at times of political crises. He could appear at games, or upon occasions of his own making, with what we sometimes call occasional, or literary, addresses, expounding Homer or other works of Greek literature. He could write speeches for clients who were to appear in court. He was not allowed to appear in person as an advocate unless he could show that he had a direct connection with the case, but the profession of logographer was profitable.\(^{10}\)

Rhetoric formed a vital part of the Sophists' intellectual activities, though few of them actually studied it as a subject. The distinction I am suggesting is analogous to the difference between the study of logic and use of logic. Because of the intimate connection between sophistry and rhetoric, the ignominy cast upon the former also brought the latter into disrepute. Even today the word "rhetoric" suggests something underhanded and somewhat deceitful. It is mere gift wrapping for the really important things -- logic and facts. Since rhetoric's demise was occasioned first of all by the downfall of the Sophists, it is appropriate that the rehabilitation of rhetoric should commence with a new look at the teachers of ancient Athens.

The greatest of the Sophists in terms of philosophical sophistication, was Protagoras. Professor F.C.S. Schiller, the founder of pragmatism, wrote the following statement:

> Our only hope of understanding knowledge, our only chance of keeping philosophy alive by nourishing it with the realities of life, lies in going back from Plato to Protagoras, and ceasing to misunderstand the great teacher who discovered the measure of man's universe.\(^{11}\)

One of the problems in gaining an adequate understanding of Protagoras, or any of the Sophists, is the small number of their written works which have survived to the present. Also, the Sophists, for the most part, directed their attention towards the edification of their immediate listeners rather than to
future readers. They accordingly, spent more of their time speaking than writing. The works that Protagoras did write were largely destroyed after his exile, when the Athenians collected his books and publicly burned them. Fortunately there are sufficient references to him and the things he said in the works of his contemporaries that we can ascertain his chief philosophical doctrines.

Protagoras' thought has two distinct movements — one negative and the other positive. The first is the theme of his initial book, the Antilogiae. He maintained that in every experience, there are two *logoi* in opposition to each other (*dissoi logoi*).

The concept of *logos* was a vital part of Greek thought. In fact, it has become something of an academic commonplace to say that the development of ancient Greece was that from *mythos* to *logos*. The difficulty in fully understanding the concept of *logos* has led many scholars to a shallow understanding of this phrase. They construe it to mean simply that Greek thought moved from mythical explanations of the world to scientific explanations of the world. The identification of *logos* with scientific rationality is our own ethnocentric projection on to the ancient use of "*logos*" to mean "reason". We think of "reason" as scientific or logical thought; therefore *logos* must mean scientific or logical thought. In fact, *logos* is also used to mean the word, and sometimes the idea. It could mean a series of words, a text, or a speech. It could be used to signify the capacity for language, or even the divine will of God. Heraclitus referred to the principle by which the opposites reveal themselves to us as *logos*. This power of *logos* over our experience was recognized in one form or another by most of the earlier philosophers, and it was often eulogized by the Sophists.
One of the best known of these eulogies was composed by Isocrates, a contemporary and academic competitor of Plato. Isocrates says that it is \textit{logos} which distinguishes humanity from other living things.

... because we have the innate capacity to convince each other and express our opinions, desires, and decisions, we not only surpass all wild life but have succeeded in forming a society, building towns, formulating laws and discovering all sorts of techniques.

... the Word enables us to put the wicked to shame and commend the good, to educate the ignorant and to learn from the wise ... the Word directs all our thoughts and activities, our use of it being proportionate to the degree of our intelligence.\footnote{The magic or creative power of \textit{logos} was its most important feature. It not only constructs, it "directs" our experiences and actions. \textit{Logos} is the \textit{hegemon} of thought and experience. \textit{Hegemon} meant something like a prince, leader, or guide. \textit{Logos} then has a kind of authority -- not the coercive kind, but rather the sort that an older brother or more experienced friend might give. The direction that it suggests is freely chosen, not imposed.}

For Protagoras, \textit{logos} denoted the principle by which things are experienced. His statement that there are two \textit{logoi} in everything means that every experience contains its own opposite or negation. It is an idea that closely resembles Heraclitus' doctrine of opposites. But Heraclitus taught that, when men perceive in common, it is due to the universal \textit{logos}; when they disagree, \textit{logos} does not exist, or is not present. Protagoras on the other hand, taught that all things contain or consist of two opposing \textit{logoi}, and are thereby all subject to disagreement and uncertainty.

The description of the conflict of opposites had been present in the Greek psyche for a long time. It first showed up in the early and Homeric mythologies in the guise of moral dilemmas that the world posed for both gods
and men. The dramatic expression of the problem formed the core of the tragedian's work. The idea of the conflicting sides of justice or morality (dike) is a fundamental element in, for example, the Aeschylean drama.

... a characteristic, therefore, of the Aeschylean drama is the spasmodic harshness in which this double nature of reality finds expression. This thought is dominant in all the tragedies of Aeschylus; in the Supplices, where the Logos of the Danaides contends with that of the responsible power of the State; in the Persae the divine authority imposes on Xerxes a contradictory action such that it was possible to speak of a division in the mind of God; in the Prometheus there arises the greatest conflict of God with himself; in the Seven Against Thebes the problem begins to be concentrated on abstract dike from the moment when Agamemnon has taken his tragic decision at Aulis, till the end of the trilogy. In the Choephoroi the conflict which arises for dike in the heart is carried to a tragic pitch of anguished suffering throughout the course of the whole drama, in such a way that all are gradually involved. Orestes, who must by divine edict commit matricide, thus violating another divine edict, when after much thought he realizes his true situation, exclaims: 'Ares will come into conflict with Ares, Dike with Dike.'

God will war with God, and justice with justice.

The tragedy involved in relativity was well known to the Greek mind, but it was not until Protagoras that anyone attempted to reflect philosophically upon this element of human existence.

Only in the light of his theory of logoi in opposition can Protagoras' agnostic opening of the Antilogae be properly appreciated:

Concerning the gods, I am not in a position to experience their phenomenal existence or otherwise, nor their nature with regard to their external manifestation; for the difficulties are many, which prevent this experience; not only the impossibility of having a sense-experience of the gods, but also the brevity of human life.

He showed that it would be impossible to ascertain either the existence or the non-existence of the gods, by means of perception or by means of logic. This is because in every perception or proof of the gods, there is also the opposing logoi -- the opposite and inconsistent conclusion can always be reached. This is the same sort of thing that Eastern philosophy claimed
about the divine. Because it is the fundamental reality, it is impossible to speak of it, except in paradox. Protagoras' statement about the gods is the ultimate case of his claim about everything. If there cannot be a certain statement regarding even the gods, how can we expect that any truth at all is attainable?

Opinion (doxa) rather than knowledge holds rule over even the most important concepts. Protagoras engaged Pericles in argument for an entire day once, attempting to decide who was to blame for the accidental killing of a spectator at a javelin-throwing match — the man who threw it, or the supervisor of the competition. This incident has been interpreted as teaching:

... the impossibility of deciding which was the cause — the absolutely capricious and arbitrary character of the choice.16

It taught the complete dependence of right (dike) on opinion (doxa).

What was true for justice also applied to morality. The Greek word dike comprises not only our whole concept of right and justice, but also that of moral or ethical goodness. Protagoras extended his claim of relativity to all spheres of human experience and activity, to judgements of usefulness, of artistic worth, and even to mathematics and geometry.

The old notion of opposites, of the paradox inherent in existence, led Protagoras to the assertion that there is no such thing as certain knowledge. He is accordingly often described as a sceptic.17 This is a wrong conclusion. He denied not merely the possibility of learning or discovering the truth, he denied that there even is such a thing. This involves a tragedy for the intellect for it is the mind itself which authors the logoi in opposition. The mind therefore must go through the tragedy involved in the realization of the paradox. Had he been merely a sceptic, Protagoras would have stopped at this point. Remember, however, that he did not suddenly have
an insight that dissuaded him of truth. He had never believed in it. The belief in truth as an independently existent "fact" had not yet entered the philosophical mind. The statement of dissoi logoi is a starting point, not a conclusion.

In order to transcend the tragedy of uncertainty that necessarily inheres in existence, Protagoras turned to the question of the value in the experience that man does have. How is any experience possible if everything contains the logos of its opposite? To answer this question, Protagoras formulated his most famous proposition: μέτρον ανθρώπος This phrase is most often translated as "Man is the measure of all things." However, Professor Untersteiner translates it, and the sentence in which it is found, in the following fashion:

Man is the master of all experiences, in regard to the "phenomenality" of what is real, and the "nonphenomenality" of what is not real.

He interprets this to mean:

... One succeeds in having in one's own power all those "experiences" of which one can say that they are real, whether sense percepts or intellectual concepts, in so far as they have the possibility of becoming apparent (this is the meaning I give to the word "phenomenality"). The aim envisaged by Protagoras consisted in the mastery of a rich domain of "experiences" since this was not real until the moment when the "experiences" were freed from those contradictions which could nullify all their value.\textsuperscript{18} [emphasis added]

The universe for Protagoras is in a state of flux. It is continually becoming and ceasing to be. It is the indefinable absolute that is determined for the first time by man experiencing it, and therefore the nature of the experience will be vitally linked to the man who brought it into actuality. Man thus is the master of experience in two different ways. As the root or cause of all experience, it is he who brings forth reality. As an individual member of a community, he determines the manner in which specific "objects" are perceived, the logos which determines the actual experiences.
The paradox that necessarily accompanies descriptions of the One is eloquently stated by Protagoras: "it is not possible to think that which does not exist, nor anything except what one experiences, but the latter is always true." As mentioned above, this is often wrongly regarded as a sceptical position. But, whereas scepticism normally entails the disbelief that knowledge of the external can be gained from internal or subjective states, Protagoras states that the subjective state is the only reality, and thus determines the external as well as itself. None of this denies that the universe is real, that it does exist as a (somewhat Kantian) pre-condition to experience.

There still appears to be a contradictory attitude between the negative "logoi in opposition," and the constructive "man is the master of all things." There is still no explanation of how uniform experiences are possible, nor how one experience can be said to be superior or more valuable than any other. For the crucial third leg of his system, for the main inspiration that Protagoras has left to us, we must look at the third of his chief propositions.

This is the claim that it is possible to change the lesser possibility of knowledge into a greater possibility of knowledge. He explains this idea in a long passage contained in Plato's dialogue, the Theaetetus. He says that the fact that man is the master of all things does mean that different men can and do experience different realities and that neither can claim to be right and the other wrong. But this does not mean that wisdom does not exist, or that one opinion is not better than another. The mind that controls the logos and thus is master of the experience can be improved and thereby improve the experience that it creates.
Strange as this sounds, it is not dissimilar to things that we are all familiar with. Protagoras mentions doctors and farmers as examples of people who are wise about certain things. Their experiences of the body, or of crops and husbandry, is superior to the experience a lay person would have. More dramatic examples can easily be thought of. A computer expert looks at a paper covered with various geometrical patterns, and sees a new design of logic circuit. He looks at a hockey game and sees a chaotic movement of players and puck. Right beside him, I see a brilliant strategy of attack foiled by defensive skill. One person sees an impenetrable mass of verbiage. A lawyer glances at it and sees a perfectly drafted will. A novice sees chess pieces scattered at random about the board. A master sees a checkmate in five moves. The capacity for superior experience with regard to certain classes of things has been acquired by each group of persons.

It would be wrong to think of the improvement consisting merely of the acquisition of facts, or of knowledge. None of the "experts" mentioned above perform deductions based on a series of true propositions that they know. Rather, they immediately recognize features of the experience that are inaccessible to the lay person. It is thus better to think of the improvement as the acquisition of a skill, a way of dynamically interacting with the universe, of structuring it so as to receive a rich and valuable set of experiences. The skill is attained through practice and correction by a master. The group of wise people in a given area determine the value structure of that area. The values are those developed adhered to and passed along to learners in each area. These novices thereby acquire the superior logos, the superior ability to apprehend experience. The judgement of who has the superior logos will vary from community to community and from time to time. But at each time and in each place there will be persons who are wise in various areas, and who, in
their wisdom, determine the judgement of others' experiences. Thus are values determined, and yet are not the subject of factual knowledge. For no one's judgement is right or wrong. It is better or worse.

Between the wise men ... there is a kind of ideal relationship which all of them, farmer, doctor, and teacher, exercise in some way with regard to physical nature and with regard to its spirit. This activity according to a like principle is determined by the fact that each individual farmer or doctor or teacher becomes an exponent of the advantage of the community, an aggregate of individuals of a specified category, which is united, epistemologically speaking, by a correspondence of ability to apprehend a given experience. The aspects of the ability of apprehension on which all are agreed are contained in the category "superior logos", those on the other hand in which this agreement is lacking constitute the "inferior logos", the elementary fact of experience which resists the demands of the community, and therefore of universality.20

Just as there is a greater possibility of knowledge of farming or medicine, there is also a wisdom to be attained concerning moral questions. In order to tie his metaphysics to ethics, Protagoras constructs a myth.21 He relates the story of Epimetheus and Prometheus who, shortly after the creation of the mortal species, were charged with the task of distributing the powers of preservation and attack to the various species. But after Epimetheus had finished assigning powers to all of the other animals, they found themselves with none left for man. Prometheus crept into heaven and stole, along with fire, the "knowledge of the crafts" which gave to man the ability to survive by means of obtaining or making food, shelter, and clothing. But Prometheus had not been able to obtain the "political art", for this was with Zeus. And so, when men gathered together for protection, they were unable to live together and injured each other through lack of this "political art". In order to keep mankind from annihilation, Zeus sent Hermes to convey to mankind aidos, which is the respectful acknowledgement of any superiority in others, and dike, or justice, in order that there be principles of order. Each person received a share of this "political knowledge" and thus community life was made possible.
The myth represents the relation of the two constructive propositions. The "knowledge of the crafts" is the symbolization of man's mastery over all experiences. It is the individual control that belongs to each human being. The "political art" represents the superior logos which succeeds in mastering the inferior logos that belonged to the stage of "knowledge of the crafts". The ability to have a better experience with regard to morals then, belongs to every one in the community by virtue of the fact that they are a part of the community.

It is in this light that we must approach Protagoras' claim pointed out earlier, that justice or morality (dike) is dependent on opinion (doxa). Because of its connotations of dubiousness and inferiority, "opinion" is an infelicitous translation of doxa. A better interpretation is "common sense". So, to say that justice is dependent upon doxa is to say that it is in the realm of common sense. Even today, common sense is something to which we attach value. We often appeal to and trust common sense, both our own and that of others, especially in making moral decisions. We also recognize that certain members of our community have a greater measure of common sense than others, and so we appeal to the wisdom of older and highly respected people when we make hard choices.

Every community has some set of moral beliefs. These vary between communities and none are true or false. But within each community there are people who are wise concerning moral questions. These people determine and reflect the values of the community in the way that experts in other fields, other possessors of superior logos, determine and reflect the values of their areas of wisdom. A farmer acquires common sense about crops. So, too, one can acquire common sense about morals.

While Socrates, as we shall see, thought that the ethical phenomenon is discovered, is already existent, Protagoras held that it is constructed,
that it is the work of the will. The business of rationality for Protagoras is therefore the acquisition and exercise of the superior logos -- the ability to appreciate and communicate the excellence (arete) in the world which we participate in creating. The fundamental test of our thinking is not the true, but rather the good. Wisdom is not a set of propositions, but an ability to place value in the best things.

Just as the superior logos concerning other matters is acquired through instruction, practice and experience, so too can the superior logos regarding virtue (arete) also be acquired. This is the meaning of the Sophistic claim that virtue can be taught. The teaching of rhetoric was a means, not of ascertaining truths about morality, but of acquiring wisdom, the ability to experience in a better, or more valuable way. A student of rhetoric learned how to persuade people. He therefore had to be familiar with the values that his audience already held. He had to be familiar with the rough order of these values. He had to be able, by means of the skilful use of language, to lead an audience to see a situation in a specific manner so that the course of action advocated would appear, and hence be, the right thing to do. This meant that, more than anyone else, the rhetorician had to be familiar with the morals of his community. This familiarity led him to the same kind of common sense with regard to virtue of actions as that which enables the farmer to judge the excellence of crops or farming methods.

The difficulty that this description seems to encounter is the question concerning rhetoricians who are wrong. How can rhetoricians be experts in virtue when they urge their audiences to do unvirtuous things?

What the asker of this question does not appreciate is that there is no external standard for judging whether the action espoused is really virtuous
or not. He must either be in the rhetorician's audience, or not. If he is, and he claims that the cause of the speaker is unvirtuous, then what he is saying is nothing more than that he has not been persuaded. The rhetorician has failed. His rhetoric has been ineffective. He needs to acquire more wisdom, a better appreciation of the values which the audience holds. But, suppose that the rest of the audience is convinced? Then the rhetorician has been effective, but wrong nonetheless. The response to this is easy. According to whom is he wrong? The rest of the audience apparently thinks that he is right. If only you and few other malcontents disagree, then would not this suggest that you are wrong? No, says Protagoras, there is no such thing as wrong. There is only better and worse. Fine, you say, and commence to attempt to persuade the audience that they should not have been convinced by the rhetorician. To do this you attempt to get them to restructure their experience in the way that you do. You try to find and appeal to commonly held beliefs. You engage, that is, in rhetoric.

An analogy might be made to the change in thinking that was occasioned by the development of modern physics. From the time of Aristotle until that of Albert Einstein, it was thought that it made sense to speak of absolute time or space. An event could be located with certainty by using space-time coordinates. The theory of relativity denied that such a locating was possible. Einstein showed that any determination of a thing's position in both space and time is contingent upon the inertial frame of reference of the observer. There is simply no such thing as a right answer to the question of an event's relation to other things and events. Different observers will have different answers. It similarly misses the point to ask which moral answer is right. The answer depends upon the observer's own moral frame of reference.
(To push this analogy one step further, we can think of Einstein's general theory of relativity as the resolution of the "tragedy" of uncertainty posed by the special theory, in the same way as Protagoras' third proposition resolves the tragedy posed by his first two statements.)

To return from this brief digression, all of the Sophists taught rhetoric. But it must not be thought that this was a factual or analytic study. There is no set of "valid" rhetorical forms that are the analogue of logical rules of inference. The study of rhetoric was the acquisition of a skill, not of knowledge. This skill enabled them to pursue and create excellence -- in this way the Sophists taught virtue.

The growth in the pre-Socratic philosophy can be seen to be consistent. For all, the universe is an imperceptible unity. The principle that causes its manifestations, or its distinct objects, is originally life itself, and is governed by justice (dike). The cause becomes numbers, and is mastered by mystic transcedence, or ecstasy. The interplay of opposites is offered as the cause of appearances, and emotions, strife and then love are the means of control. The introduction of mind as the source of all appearance sets the stage for Protagoras' ideas. The universe exists only as it is experienced. But every experience contains its opposite. There are therefore no certainties in the universe. The "logoi in opposition" is a tragedy of the intellect, and the intellect can master it. Experiences can be "enriched" and their value preserved. This is skill which is acquired through the learning and practice of rhetoric -- through the mastery of language and persuasion and the development of common sense.

Early Western philosophy had reached a zenith, but its most formidable opponents were already brandishing their weapons. The exile of rhetoric from the activity of serious thinkers was set under way by a younger contemporary of Protagoras. The first and most telling blows were struck by Socrates, and his student Plato.
Everyone who has encountered Plato's dialogues is familiar with the contempt which he held for the Sophists. He caricatures them so cruelly that it is difficult to understand the high esteem that this group of teachers enjoyed. Why did they arouse such venom in Plato? What stirred him to the demolition of their credibility that haunts us to the present day?

The reasons behind Plato's ferocious attack are both speculative and complex. An important thing to bear in mind is that Plato despised nearly every facet of his society. We tend to think of the establishment of dualistic metaphysics as an expression of an enlightened Athenian democracy. We automatically consider "objectivity" to be positive and valuable — akin to Greek concepts of "equality" or "liberty". In fact, at the time that Plato was laying the foundation for Western rationality, Athens was well into decline. It had been conquered by Sparta and had only recently regained its assembly. Barbarians threatened from the North. Bitterness and feuding filled the courts and assembly as Athenians vainly attempted to stem the ebbing tide. In this situation, Plato appears to be more of a reactionary than a reformer.

... his utopia owes at least as much to his dislikes as to his desires. Had the sophists and rhetoricians been the only objects of his scorn he might not have been driven to writing the Republic. But the politics, poetry, art, education, and religion of Athens were all wrong — so wrong that it was easier to paint a utopia than seriously to attempt the reformation of Athens. We may say in the beginning, then, that Plato's condemnation of rhetoric and rhetoricians is merely a small part of his condemnation of all contemporary civilization.22

So when we consider Plato's rejection of rhetoric, we should recall that he also banished litigation, poetry, most music, other fine arts, freedom of speech, and most foreign travel from his utopian state. There is no place
for any of these things in a nation governed by the authoritarian hand of
the philosopher-king.

The ruling class of the Athens which Plato so despised was the group
of citizens who employed the Sophists. (The Sophistic practice of charging
fees for their teaching was another source of disdain to the aristocratic Plato.)
Sophists taught Athenians the means of maintaining power — they taught them
the art of rhetoric. Sophistry and rhetoric must therefore, to Plato's mind,
be responsible for the evil that was being perpetrated by the city.

The crowning blow must have been the execution of his beloved teacher
Socrates. Anyone who had caused such a good man to be killed must be evil.
And, if the teachers of these people claimed to teach virtue and justice, well
then they must be liars and cheats.

Plato's great fear about rhetoric was that it enabled its practitioners
to convince others of things that were simply "untrue", for example, that
Socrates ought to be executed. Of course, to say that such a thing is untrue,
is to say that you don't believe it, that you have not been persuaded. So
what bothered Plato is that rhetoric could persuade an audience, and induce it
to an action that he believed was wrong.

He wanted to irrefutably establish that his opponents were wrong and
that he was right. He wanted to live in a society where his beliefs, and only
his beliefs, would be translated into action. He imagined a society where it
would be impossible for anyone's will other than a philosopher's (i.e., one
that agreed with him) to govern decisions. His contempt for the general citizenry
precluded attaching any value to common sense. But he could not be content with
merely painting his political utopia. He had to develop a philosophical justifi-
cation for his suggested republic. He had to establish a natural order that
would vindicate his desired socio-political order.
Now, essential to the public acceptance of rule by philosopher-kings, is the perception that it is the only good rule. As I earlier pointed out, the standard which the Greeks applied to philosophical speculation was quality or aesthetic appeal. Unlike today, when we conceive of philosophy as aspiring to truth, in Greece it aspired to the good. Plato's task was accordingly to show how his philosophers were the sole persons capable of attaining the good, how his theories and beliefs were the only "virtuous" theories.

Recall that, until this moment, every philosophy testified in one way or another to man's creative or participatory role in the structure of the world. The ideal of a single universally held vision of the universe was incompatible with personal participation. Plato's gigantic leap was to deny this participation. In order to give his beliefs universal acceptability, he removed them from the realm of opinion or common sense, and enshrined them as truth. Truth had hitherto applied only to the fundamental, ineffable One. Plato expanded it into the world of appearances by means of his theory of forms. His universal forms were related hierarchically both to the good and to appearances. The only means of gaining access to the good was to transcend the changing world of appearances and conduct your speculation solely at the level of abstract and universal forms. By restricting the domain of thought to the level of abstract universals, Plato sought to eliminate the value of individual participation. His bifurcation of reality enabled him to establish the quest for truth as the sole virtuous goal of thought.

Now, such a claim would be far less plausible to Plato's contemporaries than it is to modern objectivism. He therefore had to embark upon one of the greatest public relations efforts of all time. He set out to market the truth, to an age that believed only in the good.
Ironically, it was Socrates' execution that gave Plato his best "argument" for truth's elevation. Throughout the dialogues, Socrates is presented as the most noble of men. Unlike the picture that is painted by Aristophanes and Xenophone, the Platonic Socrates is idealized to the limit of credibility. He epitomizes the selfless pursuit of the highest ideal -- truth. Socrates' death in the name of truth eulogized its value more effectively than any logical analysis could ever hope to. In the same way that the description of Christ's death was to enshrine humility and love of God, Plato's presentation of Socrates' death elevated the love of truth to a position where it became the exclusive avenue to the good.

Plato had taken the first step in his break with the rationality of his times. But his mission was not yet complete. He needed a means by which one could discover the truth. Rhetoric obviously could not serve, for it was the servant of the Sophists, the defilers of truth, the sceptics. They had used rhetoric as a tool to cloak their real motives for persecuting Socrates. If rhetoric could be used to accomplish evil, then it could not be trusted to obtain truth, to attain virtue.

Plato turned to an older tradition to supply the basis of his method. Pythagoreanism had developed a means of describing the universe based upon the deductive rigor of mathematics. Plato stripped away the ecstatic or passionate aspect of mathematics that lay behind the Pythagorean use of numbers; and claimed that this method of reasoning gave exclusive insight into the pre-existent truth. He also contended the application of definition and deduction was better suited to conversation between two "seekers of truth," where rigor could be maintained by brief questions and answers, than to lengthy monologues and orations where questionable statements were slipped by in order to contribute to the total effect. Dialectic was the only worthy method of describing the universe, the only trustworthy kind of philosophy.
In his attacks on rhetoric, Plato causes various Sophists to submit to the dialectical probings of Socrates. Answers are put into the mouths of the interlocutors that make arguing with the Sophists like shooting fish in a barrel for the wise and noble Socrates.

In the *Gorgias*, Socrates is talking to the Sophist Gorgias in an attempt, he says, to discover whether a youth should employ Gorgias' services. Socrates starts by insisting that rhetoric be defined, and its uses enumerated. He gets Gorgias to agree that rhetoric is the art of persuasion, and that it gives no real knowledge (episteme) but only opinion (doxa). Simply by giving this definition, Plato has laid the groundwork for his destruction of rhetoric. Sophists do not limit their study to opinion because of an inability to discover truth. They rather studied the workings of opinion because it constitutes reality -- all beliefs are the result of man's mastery over the logos in opposition.

Gorgias does not point this out to Socrates, although we know that his philosophy was similar to that of Protagoras. Instead, he defends rhetoric by referring to its usefulness. He argues that rhetoric can be used to make people think in the right way or in the way that is most desirable. But, once the belief has been introduced that there is a body of knowledge that is inaccessible to rhetoric, then any defense on the grounds of usefulness is bound to appear tenuous and dishonourable. To refer again to Protagoras, rhetoric increases the quality of the logos used to construct and adjudge experience. The acquisition of the superior logos enables one to create, not merely discover or teach the best values.

Socrates attacks Gorgias with the assertion that rhetoric can never really result in right and just behaviour unless the speaker already has clear and true knowledge of rightness and justice -- which, by definition, cannot come from rhetoric.
As proof that the Sophists really don't know what they are professing to teach, Socrates refers to the fact that so many of the Sophists and their students perform evil acts. This reflects Socrates' problematic belief that all evil actions are the result of ignorance about right and wrong. If the Sophists really imparted virtue, their students would be far more virtuous people than they in fact were. Now, the real Gorgias would certainly have not acceded to the statement that virtue flows from knowledge. Indeed, he would have denied the existence of knowledge and said that whether an action is right or wrong depends upon opinion. Rhetoric improves a person's capacity for opinions as well as his appreciation of the opinion of his particular community. That a person chooses to do what his community deems wrong is very possible, and in no way inconsistent with his teaching.

Socrates insists that, without a grounding on knowledge of the truth, the rhetorician is merely pandering. His activity is to real philosophy as cookery is to the art of medicine, or as cosmetics are to the art of physical fitness. He gives to the audience what it wants rather than what is beneficial to it.

This suggests the one way the rhetoric can be noble. Plato proposes at the end of the Gorgias that the true rhetorician would seek to improve the people, rather than just please them. But in order to improve the people, it is not sufficient to deal with their opinions, one must communicate the truth. Thus the only worthwhile rhetoric is one which conveys the truth.

This is the main idea pursued in another dialogue, the Phaedrus. Socrates outlines the requirements of a worthwhile rhetoric, and enunciates as the first rule of good speaking.

The mind of the speaker should know the truth of what he is going to say ... There never is nor will there ever be a real art of speaking which is unconnected with the truth.
So any person who aspires to rhetoric must, if his calling is to be noble, first acquire the ability to discern truth — he must be a philosopher. It is important to recall that a fundamental part of Plato's epistemology is his theory of dialectic. Only the method of two persons seeking the truth through conversation enables one to recall the truth about the eternal forms. While Plato first stipulated truth as the ultimate criterion of rationality, he certainly differs from the modern idea of how we attain truth. This was invented a short time later by Aristotle.

Before leaving Plato, it is necessary to summarize the change that he made from the philosophers that had preceded him. All of them, from Thales to Protagoras believed that the universe was fundamentally unknowable. Rationality was devoted towards constructing theories or performing actions so that they had arete, virtue, excellence, quality. The good was the ultimate goal of their thought and action. Man played a creative role in the world by virtue of being in the world. Plato said, no, the only way to aspire to the good is to determine the truth.

The price that is paid when one acquires the true as an ultimate goal is the existence of a lived-in and freely chosen world. If there is truth, there is objectivity. Things are as they are, no matter what we think about it. Man is no longer master of all things. He has lost his freedom and is now the slave of facts.

Plato's belief in truth and his theory of forms had another effect that warrants mentioning. If truth was the sole avenue to virtue or excellence, and if truth could not be known in the world of appearances, of particular situations, then the only valuable thinking concerned the general world of forms. But often the aspects of our experiences which make them valuable or meaningful to us are the "non-essential features," and our personal responses to these features. By stressing that only the most general features of the
world are valuable, Plato stymied much of the wonder, the joy that results from participation in a lived-in universe. It is as though our group of fledgling painters were told that the only valuable paintings were ones which displayed no personal techniques, but only a uniform commitment to the unadorned shapes of things around them. It is little wonder that Plato's political Utopia appears so austere and oppressive. But the same austerity now applied to philosophical thinking, as only the most abstract qualities of things became valuable and uniformity rather than quality became the ideal. It was this stipulation that only this style, this fashion of universalization was valuable that led to the near-elimination of the passion that had motivated the practice of mathematics. Clearly, the pre-Socratics had had the capacity to make abstractions and universal statements. The very use of speech necessitates the ability to manipulate signs that are not wholly tied to their referents. But, whereas the pre-Socrates had perceived this ability to be the source of human mastery over the cosmos, Plato used universals to subjugate the human will. Whereas they had been used aesthetically to aspire to the good, Plato used them logically, to "discover" the truth.

Once one has the truth, then he is justified in using any means to force other people to "know" the same facts. Illogic, rhetoric, and even poetic device may be used, and indeed are used by Plato in his attacks on rhetoric. It is his masterful ability with the techniques of the Sophists that makes his attacks so convincing to us (or, should I say, persuasive).

... the triumph of the Platonic Socrates is not a triumph of logic over oratory. John Stuart Mill has put this clearly: 'This great dialogue the Gorgias full of just thoughts and fine observations on human nature, is, in mere arguments, one of the weakest of Plato's works. It is not by its logic but by its that it produces its effects; not by instructing the understanding, but by working on the feelings and imagination.'
It is ironic that it was Plato's rhetoric which brought about rhetoric's long rejection by all "serious" thinkers. But while Socrates and Plato combined to elevate truth to the level of virtue, it was left to Aristotle to demote the good below the true, and to put the final stake in rhetoric's heart.

Aristotle did not share Plato's hostility to rhetoric. In fact, he taught it himself, while he was still enrolled in the academy. He devoted a long and systematic treatise to it and thereby had the same major influence on the subsequent study of rhetoric that he had on so many other subjects. But in the very act of studying it, however, Aristotle killed rhetoric. He did this by making it the object of his scientific analysis.

Aristotle begins the *Treatise on Rhetoric* with the statement that rhetoric is the counterpart of dialectic. Now Aristotle believed that rhetoric was a part of practical wisdom while dialectic was a part of theoretical wisdom. Practical wisdom was concerned with action, whereas only theoretical wisdom deals with truth. Dialectic and rhetoric are alike in that they both deal with speech interactions, but dialectic is to rhetoric as theoretical is to practical, as truth is to action.

In order to understand the devastating impact that this had, one must recall that Plato had elevated the true to the level of the good. The good still maintained its station at the top of the hierarchy of being. But now it could only be reached through true knowledge of the forms. One obtained true knowledge through the use of dialectic. Aristotle had acquired Plato's belief in the truth. But he rejected dialectic as the method through which it was realized. In its place he substituted scientific demonstration. All
knowledge was gained through the logical and systematic study of nature -- of appearance. Dialectic was merely a method for communicating the truths that had been discovered and for testing one's reasoning.

Jeager writes that "when the theory of Forms was abandoned (by Aristotle) being and value fell apart, and dialectic thereby lost its direct significance for human life, which to Plato was an essential feature of it".29

When Aristotle turned his scientific attention to rhetoric, then, his study became a study of the facts of rhetoric. His study was alienated from rhetoric's value, because he was not concerned with value, he was concerned with truth. The Sophists' study of rhetoric had been completely different. For them the only truth was what was created. The acquisition of rhetoric was the acquisition of a skill by which one structured the world in a valuable way. It was not a method by which one discovered or merely communicated a separate and pre-existent truth.

Thinking of rhetoric as an acquired skill rather than as a body of facts enables us to understand why Aristotle's study was so misguided. Think, for example, of learning to ride a bicycle. A number of futile attempts are made, a person who already knows how to ride gives "tips", and gradually you acquire a feel for the activity. In order to do this you must "learn" hundreds of subtle muscle movements and "rules" which tell you what to do in case of various contingencies. And yet it would be stretching credibility beyond all acceptable limits to suggest that learning to ride a bicycle is learning that for example:

The rule observed by the cyclist is this. When he starts falling to the right he turns the handlebars to the right, so that the course of the bicycle is deflected along a curve towards the right. This results in a centrifugal force pushing the cyclist to the left and offsets the gravitational force dragging him down to the right. This manoeuvre presently throws the cyclist out of balance to the left, which he counteracts by turning the handlebars to the left; and so he continues to keep himself in balance by winding along a series of
appropriate curvatures. A simple analysis shows that for a given angle of unbalance the curvature of each winding is inversely proportional to the square of the speed at which the cyclist is proceeding.30

This is exactly what Aristotle attempts to do in his Treatise on Rhetoric. He identifies, categorizes, and names hundreds of persuasive techniques. And yet, if someone could not persuade before he read it, it is quite certain that the most he would have gotten from Aristotle is an extensive set of tips. By separating fact and value, and then treating rhetoric as a fact, Aristotle robbed it of all value. From being the author of reality, it became merely a small and relatively unimportant part of the world. It was separated from what really counted -- the pursuit of truth. It is as though someone wrote an exhaustive scientific analysis of how to ride a bicycle, but then argued that the only places really worth going to are accessible by foot. If you can get there by foot, it's unnecessary and dishonourable to use your bicycle. And, if you can only get there by bicycle, then it isn't worth going there at all. But, because there are those who will insist on riding bicycles, it is acceptable to study how it is done. It would be surprising if interest in the work of bicycle analysis persisted for very long.

The Aristotelian method combined with the Platonic belief in truth had the effect of making all rational study somewhat pedestrian. The places that could be walked to, the objects of scientific demonstration were explored, re-explored, and re-explored again. This left whole universes that had been rendered inaccessible. Many have attempted to walk to the universe of value. But legs just won't make it. Many others have denied that values "really" exist at all. They are more difficult to forgive. But surely our imagination and feelings yearn for the skill that was taught by the Sophists, to acquire the ability to structure the world in a virtuous way. The creative role of the intellect, the participatory role of rationality can only be fully engaged once the good regains its place above the true in our day-to-day thinking.
In the introduction to this chapter, I spoke of embarking on an adventure. This adventure still lies ahead. For many years Western thinking has assumed that rationality necessarily involves the search for truth. Accordingly, all of our rational endeavours have sought to reflect the truth. All of our philosophical controversies have revolved around questions of how we can discover truth. Even in areas such as ethics and aesthetics, philosophers have concerned themselves mainly with the truth, through asking such questions as whether moral propositions are true or false, or whether a certain method ensures true moral or aesthetic opinions.

Many scholars have begun to question the dictum that rationality is primarily concerned with objectivity and truth. This is reflected in the works of the existentialists and phenomenologists. It has been advanced in various forms for several years by such philosophers of science as Michael Polanyi, Thomas Kuhn and Paul K. Feyerabend. The social sciences are at long last beginning to appreciate a similar point and are rejecting the various lingering forms of behaviourism.

But, in jurisprudence, most scholars still see legal decision making as a process of determining what the law is. Judges are still expected to discover a pre-existing right answer, and apply it. The entire controversy between natural and positive law can be seen as merely an argument about the truth. This belief in truth is made most manifest in formalizations, for the very act of formalizing proceeds on the assumption that reasoning is a "truth preserving" activity. It furthermore wrests the rational mind out of its existential situation by stating that the specific or particular content of any situation can be ignored without precluding a full understanding of the law as it applies to that situation.
This belief, that the general truth is more important than the values which inhere in the particular facts, has been traced to the belief in "universalizability". In fact, the crisis in modern law, the inability to establish a connection between law and justice, between obedience and authority, has been traced to an "archetypal clash between two opposing paradigms that reside in our psyches". One of these two archetypes is described as relating to the "positivistic, will-oriented, patriarchal legal system". The second is based upon a supposed psychological need to believe in universality. Clearly, both of these "archetypes" are based on the assumption of truth. True statements about what the law is are found by referring either to the will of the patriarch-sovereign, or by referring to universal truths of nature.

My position is that characterizing the situation in this way ignores the possibility of another vision of rationality, precludes our attending to what may well be another "archetypal" belief. Rationality is the quest for the good, for quality, for excellence. Truth is illusory and of less importance than virtue.

I shall make a couple of quick points before concluding this chapter. The first is that to understand the ancient or primitive "status or kinship" legal systems in a truth-oriented fashion, as Smith and Weisstaub seem to, is to miss the point that, in such societies, things such as laws, status, tabus and so on are direct features of the experienced world. To think of the members of these societies as using their sovereigns as methods for ascertaining what the law really is, is to ignore the creative participation that these "primitives" employed in the structure of their world.

The second point concerns "universalizability". It is claimed that Eudoxus' proposition concerning ratios in Euclid's fifth book is the first example of the notion of the universally quantified variable, and that this
notion underlies the idea of justice. Eudoxus was a student of Plato -- a contemporary of Aristotle. His principle of universality was constructed on his master's authoritarian metaphysics. The shift from the good to the true preceded and made possible Eudoxus' universally quantified variable.

But: prior to Eudoxus, prior to Plato, philosophers were engaged in systematic and profound reflection that certainly dealt with universal concepts, including that of justice. But, because they did not claim the ability to construct universally true statements about justice, they are today dismissed as primitive and unimportant.

Besides his destruction of rhetoric, his utopian state and theory of forms, Plato also stipulated some truths about astronomy. He insisted that the cosmos consisted of perfect spheres moving in perfect circles at uniform speeds. Coupled with Aristotelian geocentricity and physics, this paradigm exerted a stranglehold on cosmological thought that was only broken by the "irrational" arguments of Johannes Kepler, and Galileo Galilei,32 two thousand years later. Could it be that Plato's stipulation that rationality be based on truth, coupled with Aristotelian scientism, has exerted a similar stranglehold on our rational thought? Can we expect that our desperate clinging to truth will be viewed by our descendents with the same scorn that we smugly level against Galileo's clerical opponents?
--- CHAPTER THREE ---

** i **

Seeing things in a different way does not occur in stages. We don't move from one perception to another in a series of small, safe steps. Rather, once the new seed has been planted, and taken hold, it springs into full bloom with a will seemingly of its own. It requires a plunge, a leap.

Artists and psychologists have long been aware of the active role played by the observer in the experiencing of many kinds of perceptions. They know that order is often projected onto random or ambiguous patterns. Most people are aware of many of these so called optical illusions. They know that we can see forms in ink blots, and in clouds. But no one argues about whether the patterns are really there. Children spend many happy hours trying to get their friends or parents to see the clouds in their way, and in turn to see them themselves in new and pleasing ways.

"Look, it's a cow! See, there is its head, that over there that's one horn, and there's the other, and over there there's its tail. See it? See it?"

"Yeah, I see that, but look instead of those being horns, look at them as towers, and then that thing down there is a drawbridge — see? It's a castle!"

Which is it? Is the cloud really a cow, or a castle? No one would take such a question seriously. Still less would we tolerate someone explaining to the children that it is neither. That the cloud's shape is a more or less random aggregation of condensed water vapour that assumes the shape dictated by various meteorological and physical forces. A person who did would be seen as dry, pedantic and irrelevant—a boor who ruined innocent fun, who took the magic out of a child's afternoon.
Most of us have seen "degraded" images of high contrast photographs. Look at Figure I. At first glance, it is a meaningless jumble of nondescript shapes. But, if you stare at it for a short while, a picture begins to emerge. The process is hastened greatly if someone tells you that it is a dalmation dog on a bed of leaves. Look, here is the head, it's facing away from us, and here is the line of its back ...

Suddenly the entire picture clears before your eyes. Of course, that's what it is! You have just acquired a skill -- the ability to "make sense" out of this picture. Your experience has been enriched, deepened. But I certainly have not "proved" anything to you.

Now look away from the picture for a minute, a day, a week, a year. When you look at it again, you will still be able to make out the dog. Not only has your immediate experience, but your capacity for future experience has been improved. In fact, you will probably have a certain amount of difficulty seeing the picture the way you did before you were taught to see the dog. It is as though, faced with the choice of seeing chaos or order, your eye of its own accord sees order. With some effort you can force the vision of chaos to reappear. Relax and the dog snaps back.

It is this which might lead us to say that it is really a picture of a dog. But what justification, or point is there to such a claim? It can be seen as a dog, but when you first saw it, it was chaos. What does the claim that it was really a dog, even then, amount to? Surely nothing at all.

This point is clearer if we think about the next three figures. Is Figure II really a goblet or two facing profiles? Is Figure III really an old woman or a young woman? Which way does the cube in Figure IV really face? These are all pointless questions. Neither is real. Both, are real. First one is real, and then the other. It doesn't matter anymore than the "real" shape of the cloud matters.
And yet, despite the absence of "reality" that these images have, they retain their fascination. There is a joy, an exhilaration almost, that comes with the realization that you control the pattern. It is akin to the exhilaration that comes from solving a problem or a puzzle.

What are the next two letters in the following sequence:

0, T, T, F, F, S, S?

At first glance there simply is no sequence. Any answer, or no answer seems right. "X, Y." "A, B." Why not? Well, because there is no pattern evinced by X, Y or by A, B. You must be able to see the existing pattern, in order to continue it.

Most people try to solve this puzzle by assigning numerical values to each letter based on their alphabetical order. "Let's see. '0' is the fifteenth letter, and 'T' is the, umm twentieth, and 'F' is the sixth and 'S' is the nineteenth, -- 15, 20, 20, 6, 6, 19, 19 -- AARRGH! Still no pattern."

In fact, even the information that the "right" answer is 'E, N' does not immediately help. First the person must look at the problem in a new way. "The '0' stands for 'one'; 'T' for 'two', 'T' for three ... Oh, I get it: 'eight, nine' -- 'E, N'."

Now, try to see the pattern in the old way. It is very difficult. Having learned a way of ordering the perception, it is tough to disorder it. But one can re-order it, if a new way of developing a pattern can be shown.

I have little doubt that someone with mathematical aplomb could devise a function which would generate the numbers 15, 20, 20, 6, 6, 19, 19. This function could then give the next two values as numbers which would result in two different letters than E, N. Which answer would be right?

If I have overly laboured this point, it is because I feel it is both important, and difficult. In fact, I think that it is this request, "look at it this way" that characterizes most human development innovation.
Perhaps it is clear that this kind of a process goes on when a painter paints a picture. "Look at the world this way," says Van Gogh. "Or this way," says Rembrandt. Which is the right way? What a foolish question!

Art is an exhortation, an invitation, a plea to structure your perceptions in a certain way. It is an invitation to deepen your own experience, and, by sharing in the experience of the artist, to enter into a communion with a fellow human being.

To decline to do this; to say, "I refuse to see things in any way but my own unless you prove that yours is the right way" is to miss the entire point of the art. It is to lock oneself in one's own room, and to refuse to explore the view from the rest of the castle.

When a poet invites us to see "the garden in a young girl's eyes", it is nonsense to refuse because gardens aren't really in young girl's eyes. When a novel asks us to suspend our disbelief, we do so in the expectation of an enjoyable or worthwhile experience. "I don't read Sherlock Holmes books because he never existed" is not an appropriate response to the genius of Arthur Conan Doyle. See things as though there could be a Holmes, and you will (perhaps) enrich your life by some small measure.

Look at things this way instead of that way. This is the plea not only of the child looking at clouds, nor of the painter, poet and playwright. It is also the invitation of the great scientific innovators. "Look at things as though the sun instead of the earth lies at the centre of the universe," Galileo urged. He did not, he could not prove that it did. But he pleaded, he cajoled, he urged and he stated, "the sun is in the centre. Look at things that way and see what you see." Because of his persuasive power, people did try to see things in his way. They did not let facts, or rationality, stand in their way. They chose to see things in a certain way, and the facts
associated with that way appeared to support their decision. Once you try to see the cow in the sky, her tail and horns appear of their own accord.

"Look at things this way. Suppose that the velocity of light is constant regardless of the observer's inertial frame of reference," said Einstein. "How would the universe look then?" He did not, he could not prove that light behaved in such a strange, counter-intuitive way. But those who were persuaded by his genius to try and see things that way experienced the deep emotional appeal of relativistic physics. They learned to structure their concepts in such a way as to constantly support their initial decision. Once you pick out the dalmation, you can see the leaves and trees without any help from me. The full implications of a given vision of the world are not necessarily known to the person who first proposes or "popularizes" it. A maxim of art criticism is to "trust the art, not the artist." Are Ingmar Bergman or Woody Allen aware of all of the symbolic meanings in their films? It doesn't matter. They give us a vision. What we see with that vision is up to us, not to them.

This paper, both what has gone before and what will follow, is not a safe, sure, step-by-step argument. It is an invitation, an exhortation to look at things in a different way. It is a plea, not a proof. What if rationality is not the quest for truth? What if virtue, excellence, quality, is the goal of rational thought? How would things look to us then?

** II **

I believe that it was Alfred North Whitehead who said that all of Western philosophy is a gloss on Plato and Aristotle. This is because nearly every subsequent thinker has spent the vast majority of his or her time and
energy exploring, examining and expostulating the foundations and ramifications of different ways of acquiring knowledge. The underlying theme in all has been truth -- how we find it, what it is, and what we do with it.

I have proposed that philosophy, and particularly legal philosophy, would do well to attempt to progress by means of a *reculer pour mieux sauter*, that it draw back to leap. Imagine a philosophy that had developed and matured without the Platonic encyclical to truth. Imagine a philosophy that is grounded on the intellectual foundations laid by the Milesians, the Pythagoreans and the Sophists.

The first step, and the one which must be constantly borne in mind, is that the rejection of the ultimate value with which truth was imbued, means the end of our slavery to facts, to reality. But this newfound freedom is not an unmixed blessing.

In fact, it is precisely the realization that there is no truth, no "objectivity" and no order in the world that is at the root of the existentialist's despair. When suddenly confronted with the realization that the universe has no inherent meaning, man's immediate reaction is one of fear, of despair, of angst. The comforting visions provided by religion and science evaporate, leaving us to face the chill wind of chaos. The numbing pessimism of much of the work of Jean Paul Sartre, Albert Camus, Ingmar Bergman and others captures and confronts us with this despair. Too many of the people who have felt this despair have become its victims.

Like the born slave who is suddenly emancipated without the means or training to live in a world where one must fend for himself, people have escaped the shackles of truth only to sink into spiritual and emotional destitution, without values, without joy and without fulfillment.
The task of existentialism since its inception has been to find a source of comfort and a vision of happiness in the face of tragedy and despair. This task has especially been undertaken by such religious existentialists as Gabriel Marcel and Martin Buber.

The despair of existentialism has been felt by most people who come into contact with its voice. It appeals to some intuition that seems to be universal. I suggest that it was exactly this despair that Protagoras was considering in his presentation of the "logoi in opposition". There is a tragedy of the intellect involved in the apprehension that everything contains its own negation, that all is chaos. Recall, though, that Protagoras' resolution of this uncertainty was not doubt, despair and cynicism. He prescribed two more maxims: "Man is the master of all things. Man has the ability for acquiring the superior capacity for understanding."

In fact, one of the first of the "existentialist" writers can be seen to have these same three themes running through most of his work. It was early in his career that Freidrich Nietzsche issued his rejection of the world of facts:

Life no argument: We have arranged for ourselves a world in which we are able to live — with the postulation of bodies, lines, surfaces, causes and effects, motion and rest, form and content: without these articles of faith nobody could now endure to live! But that does not yet mean they are something proved and demonstrated.

Ultimate scepticism: What then in the last resort are the truths of mankind? They are the irrefutable errors of mankind.¹

These words have not only a similar message as that propounded by Protagoras so many years before, they are written in a virtually identical style. But the similarity between Protagoras and Nietzsche does not end here.

Protagoras used his statement of uncertainty concerning the gods' existence or non-existence in order to emphasize his "scepticism". Nietzsche used a similar image: God is dead. Reading this statement makes us shudder.
It is one thing to believe that God does not exist. It is quite another to suggest that he no longer exists because we have killed him. With the death of God comes the death of order, the death of reason, the rise of nihilism.

His attitude towards truth led Nietzsche to emphasize the paradoxes which he saw all around him in the world.

All Nietzsche's statements seem to be abrogated by others. To be self-contradictory is thoroughly characteristic of him. For every judgement one can nearly always find an opposite judgement. It seems as if he has two opinions about everything.² [emphasis added]

Dissoi logoi. Nietzsche devoted many of his pages not merely asserting, but painstakingly forcing the reader to perceive each of the opposing realities in the world.

But he was just as vivid in his vision of how to escape from nihilism. Everyone, everything, has the will to power. Man can order, can control the nature of his universe because of his place in the universe. He is not a slave to facts. Failing to realize his "mastery over all things," man stagnates as mere man. The triumphant cry is that he can transcend man, he can become Superman. He can conduct his mastery of the universe in a superior, a better way. It is to this he should strive, should aspire. Protagoras' man of superior logos has become Nietzsche's Superman.

That Nietzsche so resembles the pre-Socratic tradition is made yet more interesting when we realize that, in his study of classical philology in Greek and Roman literature, he was confronted with the study of rhetoric. It acquired a central position in his study and conducted lectures on the history of Greek rhetoric as well as on rhetoric itself. This fascination would certainly have brought him face to face with the work of the Sophists, but from a rhetorical perspective rather than from a logical, analytic point of view. He would not so casually dismiss their work in the way that philosophy had long since learned to do, and so could gain unique inspiration from his study.
Other circumstances intervened to dampen the influence that Nietzsche might have had. For Nietzsche was not of his time. The mid to late nineteenth century was a time of adherence to the old religions or of wholesale conversion to the new ones of science and industry. Virtually no one else was saying the sorts of things that Nietzsche went on about. Unable to shake the dogma of truth, Nietzsche's writings and paradoxes appeared to be the shrill babblings of a madman confronted by the terrors of his own insanity. His concept of the will to power and his idea of supermen were clear signs of megalomania. His subsequent lingering in an asylum due to the ravages of syphilis, madness caused by sin, vindicated his rejection. It is little wonder that his work was useable by those other madmen of Germany -- the Nazis. In their aftermath, the European thinkers reverted to the stance of despair and nihilism that characterizes so much existential thought.

The madness that appears in Nietzsche's writings needs more reflection than can be given to it here. For he wrestled with truth at a time when he was its sole assailant. This, of necessity, caused a strain, a bruise that persisted in his spirit until the end.

Still, much of his "madness" is apparent only to our truth-obsessed eyes. Once we have repudiated the Platonic vision, Nietzsche's begins to lose some of its appearance of insanity and acquires an aura of deep insight. It is the other view that begins to falter and stammer, to appear, frankly, quite mad.

** iii **

Science and scientific thought never disproved its critics, it merely ignored them. Thus, until quite recently, the advocates of a non-objective rationality have had very little positive impact on the philosophy of science.
One of the reasons for this is the very common belief that the only way to be rational is to be logical and objective. Critics of objectivity have thus tended to dismiss rationality and to seek other, usually artistic modes of expression. They, in turn, have been dismissed by objectivists for being emotional and irrational.

It is the theme of this paper that one can reject objectivity, and yet retain rationality. This is because rationality is more than the ability to use logic, it includes foremost the ability to use language. Language can be used to prove, to please and to persuade. The first is logic and the second poetry. The third is the one which has been maligned and ignored for more than 2000 years. It is rhetoric — the craft of the Sophists and the root of rationality, until Plato turned its power onto itself.

Rhetoric is presently undergoing its first major revival since the seventeenth century, and the first that has sought to fully restore it to its old position of respect.

It must be clear that by "rhetoric" I mean something more than the ornamentation of speech or the art of the orator. These are certainly parts of rhetoric, but it goes much further than that. Writers on rhetoric have often fallen into the trap laid by Socrates for Gorgias. "Before we begin talking about rhetoric, surely it must be defined. We must have a guide by which we can clearly distinguish that which is rhetoric from that which is not, before we can even consider investigating its value." But some things, as the fictionalized Gorgias found to his chagrin and embarrassment, are simply incapable of precise definition. To Plato this made them worthless, and incapable of being included within the art of the philosopher.

Plato would be right if the only goal of the philosopher were to seek truth. But, if it is to seek quality, then the need for certain definition vanishes. There are so many valuable parts of our lives that defy
definition, that such a state of affairs shouldn't surprise us. What is love, Socrates? What about art, Socrates, or beauty? None of these can be defined. Plato is driven to either eliminating them, or implausibly defining them as the striving for truth. All values are one for Plato, but not for life.

Rhetoric is real, but not capable of clear and precise definition. It can, however, be described in various ways. Things can be said about it. It most certainly is primarily concerned with speech, spoken and written, although there are those who would include non-linguistic communications such as gestures, the clenched fist or the protest march.

The core of rhetoric is its persuasiveness. Its classical definition is "the art of speaking convincingly and well." Rhetoric is the theory of argumentation: "... the study of the discursive techniques allowing us to induce or to increase the mind's adherence to the theses presented for its assent." Rhetoric is a verbal art. It concerns public utterances which are designed to produce some kind of effect on other people. It is the use of language by subjects to relate to each other. Rhetoric is the "rationale of informative and suasory discourse" — the striving for informed opinion rather than scientific demonstration. It seeks to "adjust ideas to people and people to ideas."

It studies how people come to believe that which they believe, not through immediate sense verification, but by inference from the opinions of others. Perhaps my favourite definition is the shortest — "Rhetoric is the study of how people change each other's minds."

The perception of reality is determined by the interaction of the mind and the world. One who can change minds, can by that fact alone influence reality. He escapes from the dilemma of objectivity versus nihilism, by openly and actively imposing and affirming some valuable vision of the universe.
The power of language, the magic of the word has been appreciated since antiquity. In an earlier chapter, I described the Greek belief that the use of language was the source of the world of appearances. Power over language gave power over the world. In most cultures, magic was associated with the use of words. The Judaeo-Christian God performed creation by the use of speech. He spoke the words, and it was done. Man's mastery of the world began with Adam and Eve's task of naming the animals and plants. And when God became flesh, the word became Christ.

But while the use of language by man gives him power over reality, this does not mean that reality is arbitrary or whimsical. Language is not arbitrary although neither is it necessary. It is conventional, historical and valuable. An individual using language is committing himself to something "supra-personal". Language is a covenant between its users. One is not free to use it in just any way he pleases. If he tries to, no one will understand him, and he will no longer be speaking, but merely making noises.

Within the commitment entailed by the use of language, there is still sufficient latitude for an individual to develop his language, to participate in the world he shares with those around him. Reality is seen to be the shared vision of a community, where it can vary between members and yet retain a common core that is apprehended by nearly all of them.

This is all very unclear, and difficult to describe. This is because of our difficulty in understanding ourselves both as complete wholes and as mere parts of a larger whole. I create my own world. My reality exists on its own, a separate entity, with me in the centre. But the nature of my reality is determined to a great extent by my language and my culture, its values and its history. To the extent that many of us share these things, we share the same reality. To the extent that we differ, we occupy different
worlds. By bringing me to change my values and beliefs, you bring me to change reality. But the realities that are available, the range of possible choices if you will, is itself influenced historically and culturally.

Rhetoric is the use of language to affect the nature of reality. It accomplishes this task by affirming and appealing to values. Values determine the nature of the world in all aspects of human experience. Rhetoric is thus ubiquitous. It is not an incidental or accidental addition to rationality, any more than the apprehension of quality in the world is a superfluous addition to objective knowledge.

Rhetoric recognizes the strength of the fictions men live by, as well as those they live under, and it aims to fortify one and explode the other. Rhetoric aims at what is worth doing, what is worth trying. It is concerned with values, and values are established with the aid of imaginative realization, not through rational determination alone; and they gain their force through emotional animation.

It is the ecstatic, emotional release which accompanies the contemplation of nature that motivates intellectual development. The acceptance of any description of the world is grounded upon aesthetic or moral values. This passionate, rhetorical aspect of our knowledge is brilliantly described by Michael Polanyi in his landmark book *Personal Knowledge: Towards a Post Critical Philosophy*. He defines the goal of knowledge as "the apprehension of a rationality which commands our respect and arouses our contemplative admiration."

Like Feyerabend, he argues that it was the aesthetic excellence, the quality of the Copernican and Einsteinian theories that led to their acceptance. The act of knowing always involves an appraisal, a statement of value preferences that leads to some view of the world. It is in the acceptance or rejection of this appraisal that a theory or claim is accepted or rejected. Conversely,
it is by appealing to commonly held values and making arguments based on them that one gets others to see the values involved. A scientist uses rhetoric to get others to share his appraisal.

The task of intellectual activity is the imposition and contemplation of order in the universe. Truth-oriented philosophy says that the universe has an order independent of its perception, and our task is to discover it. But this is never what has been done. We create pleasing orders of the universe because doing so satisfies the passionate nature of our intellect. The creative power of the painter or poet is the joy of the scientist or mathematician:

A scientific theory which calls attention to its own beauty, and partly relies on it for claiming to represent empirical reality, is akin to a work of art which calls attention to its own beauty as a token of artistic reality. It is akin also to the mystical contemplation of nature: a kinship shown historically in the Pythagorean origins of theoretical science. More generally, science, by virtue of its passionate note, finds its place among the great systems of utterances which try to evoke and impose correct modes of feeling. In teaching its own kinds of formal excellence, science functions like art, religion, morality, law and other constituents of culture.11 [emphasis added]

Does this mean that all scientific theories are equal, that there is no reason for designating some as superior and others as simply foolish? Not at all. The suggestion is rather that no theory is superior by virtue of being true, or foolish because false. But some theories are certainly better than others, just as some paintings or some novels are superior to others.

Arguments are sometimes made that, because there is no way of objectively proving that one piece of art is superior to another, therefore all such claims are merely the expression of subjective reaction. "This is a better painting than that" means nothing more than "I like this one better than that." But no one is entitled to say that the things they like are better than others. To do so is snobbish at best and authoritarian at worst.
This argument, much as it appeals to our egalitarian instincts, simply does not accord with the way that we do experience things. In fact, we do say that Bach is better than disco, that Ingmar Berman is a better film director than Russ Meyer, or that French wine is better than British Columbian. Everyone believes these statements or some statements like them. How is it possible to hold such beliefs, and yet not be compelled to define quality objectively?

A key idea in separating apprehension of a thing's quality from one's liking or disliking of it, is that of the connoisseur. 12

Connoisseurs are experts in taste. They are authorities in fields where there are no facts upon which to ground and justify opinions. Not many people uncritically accept all the opinions of all connoisseurs. But it still makes sense to speak of the authority of a connoisseur's opinion.

John Scharr 13 described some useful insights concerning the concept of authority. He distinguishes between two kinds of authority. There is the authority that compels someone to do something by sheer force, the authority of the loaded gun, of coercion and of fear. Quite different is the authority possessed by an older and wiser friend, or a father, or a community elder, or a teacher. This authority flows from respect for that person's superior experience and wisdom. It involves faith and commitment by the person recognizing the authority, who acknowledges the authority freely and without coercion.

The latter is the authority exercised by the connoisseur in his field of expertise. How does a person come to be recognized as a connoisseur? Not surprisingly, there is no objective or certain test by which we can separate the "real" connoisseur from the pretender. Usually, however, a connoisseur will be a person with a large amount of experience with whatever he is a con-
noisseur of. This is instructive, for it indicates that being a connoisseur is an *acquired* skill. Like other skills, it is normally acquired through practice and correction by another person with that skill. Even if rules can be formulated which describe the skill, knowledge of these rules does not entail its possession nor vice versa.

We need the authority of connoisseurs, because we are simply incapable of acquiring firsthand knowledge of all that we believe.

... a society may be said to have a cultural life only to the extent to which it respects cultural excellence. As in science, this appreciation can rarely be the expression of a first-hand judgement. The humanities, the arts, the various religions, are all extensive and highly differentiated aggregates of which no one can fully understand and judge more than a tiny fraction. Yet each of us respects very much larger areas of these cultural domains. I know for example that Dante's *Divine Comedy* is a great poem though I have read very little of it, and I respect Beethoven's genius for music though I am almost deaf to music. These are genuine second-hand appreciations, formed in the same way in which scientists appreciate the whole of science and in which the public follows suit. Indirect appreciations of this kind are, again, the roots through which society as a whole nurtures cultural life. By following their chosen intellectual leaders, the non-experts can even participate up to a point in the works of these leaders and beyond this in the whole range of culture accredited by them.14

Now, to recognize a person as a connoisseur, is not necessarily to agree with him. If a connoisseur advances a judgement, we have a large choice of possible responses. We may agree with him that the object is good, is of high quality, and find that we like it. Or we may agree that it is good, but still dislike it. I recognize that Ingmar Bergman films, symphony music and Bushmills' Irish whiskey are all very good. But I don't *like* them. This is in no way inconsistent.

Or, I could disagree with the judgement that the object is good (and like it or not). But, if I disagree with a connoisseur's judgement, then there is some sort of onus upon me to either give reasons for my opinion, or else show that he is not really a connoisseur. If I choose the latter
course, I am showing that his claims really ought not to have the authority which he claims for them. Keep in mind that there is no such onus if I just dislike the object in question, but do not offer an opinion on its value.

In fact, being a connoisseur is not a state which one suddenly attains. It is a continuum that depends upon the level of authority that one's opinions command. As you assert your opinions, you are claiming this authority. Connoisseurship must be recognized by others. It is of necessity interpersonal. This is how it transcends mere subjectivity.

How does one claim this authority? I already indicated one way -- to refer to one's extensive experience with wine or painting or novels is a prima facie claim to authority. Another way is to give reasons for your opinion. You might say, "I've tasted hundreds of wines and I can tell that this is an excellent one." Or, you might say, "The balance of bouquet and sweetness with colour and clarity makes this a good wine." You couldn't just say, "I am a connoisseur and this is a good wine." That is, you could, but your claim would not have much authority.

A connoisseur is said to appreciate quality. "Liking" is subjective, and perhaps arbitrary. "Appreciation" is not subjective, it is interpersonal and based upon reasons. It is not objective, but neither is it irrational. It is a skill than can be acquired, that can be taught. While "appreciating" and "liking" are quite different, they can be related. I do tend to like things I appreciate (and vice versa) -- I tend to dislike what I don't appreciate (and vice versa). But this relation is not necessary, is rarely stable, and can be affected by my will.

When a connoisseur appreciates the quality of something, what he is appreciating is the craftsmanship that went into the creation of the thing. Another way of seeing the relationship between the craftsman and the connoisseur
is this: A craftsman is capable of doing something with the quality which a
connoisseur can appreciate. Clearly everybody is a craftsman to the extent
they perform a skill well, a connoisseur to the extent they can appreciate a
well performed skill.

Science is incapable of designing a Stradivarius violin, or distingui-
shing the quality of its sound. There is no objective test for quality.
That does not make quality any less real. In fact, it is just the kind of
appreciation that lies at the core of scientific rationality. When a theory
is appreciated and advocated by a scientist, it is his experience and familiar-
ity with his area that gives him the ability to appreciate the aesthetic,
fulfilling virtues of the theory. A scientific innovator is a craftsman. He
designs his theories so that they will be appreciated by the community of
scientific connoisseurs.

Now, because science is a historical institution, there are certain
virtues that are conventionally accepted as very important. These include
elegance, simplicity, consistency, fruitfulness, et cetera. But, rather than
viewing these criteria as aesthetic dimensions, Platonically inspired science
has enthroned them as objective guarantors of truth. Paul K. Feyerabend's
suggestion is that other values be recognized in order that more theories be
generated and our experience deepened and enriched.

Suppose the poetic institution stipulated that all poems must have
certain formal characteristics or be worthless. Or that music dictated that
only symphony was valuable. Or that painting denied any virtue to surrealism --
or realism for that matter.

We view such attempts when they occur as authoritarian stifling of
the creative impulse. We fear that it leads to artistic impoverishment and
sterility. Yet we tolerate this very authoritarianism in science, in much
philosophy and, yes, in law. We should fear intellectual impoverishment and sterility, yet we persist. Why? Well, because of truth.

The connoisseur is the man of superior logos. He has the capacity for a greater or deeper experience. A wine connoisseur can detect flavours that novices cannot. A ballet connoisseur can see movements and elements of beauty that do not exist for a person who has no familiarity with the dance. A hockey fan sees exciting plays and exhibitions of skill that are invisible to the first-time spectator. A scientist sees scientific value and importance in theory that is incomprehensible to someone who has not had his training. And the lawyer — he sees justice in a decision that seems unjust on the surface, he can appreciate legal value ...

Before I approach this point any further, I should summarize my argument thus far, in the hope of establishing some kind of order.

There is no such thing as objectivity. This does not mean that everything is chaotic and valueless. For man has the power to impose order upon the universe.

He does this through the use of language. Language gives man power to create the world which is perceived. Language enables its users to influence the way that others perceive the world. It makes the creation of the universe a communal, cultural activity. Because language is shared by many, it is not purely subjective. Similarly, the ability to influence reality by means of language is not absolute, or without bounds. It is limited to the things that people can be persuaded of. Rhetoric is the use of language to persuade people to see the world in a given way. It concerns values and the effect of values on our perceptions and therefore our decisions. By appealing to commonly held values and beliefs, it transcends mere subjectivity. It is "intersubjective", but certainly not objective.
Because values are normally held in common, communities have "experts" in the values of various areas of endeavour. Expertise can be acquired, it can also be taught. Thus, people's ability to impose order on the world can be improved or enhanced. The criteria for whether this has occurred are determined by the recognized authorities in a given field. These experts can be challenged, but this requires giving reasons, appealing to values, being persuasive. Rhetoric is thus always used to establish a new vision or theory, as well as to defend an old one. It is intimately connected to connoisseurship, to authority, to superior logos.

Something is made more valuable by people choosing to consider it more valuable. This choice is not arbitrary or irrational. It is tied to other values -- cultural and personal, historic, psychological and sociological. The choice is always there. Sometimes it is more conscious, sometimes less. Rhetoric seeks to move its audience to choose certain values and to order the world accordingly. By seeking to order the world valuably, it is inherently ethical. By using language and reasons to bring this about, it is inherently rational.

Scientific thought posited its value on the basis of its refusal to consider values, but only truth. Rhetorical thought posits its value on the basis of its avowal to stem from and appeal to our appreciation of quality, of value.

** iv **

Many pages ago, I asked how the law could be valuable if it was impossible for it to be objective. I went on to show that not only the law, but all other areas of human endeavour, including science, are of necessity non-objective, non-logical. Must we conclude from this that rationality
... is entirely incompetent in those areas which elude calculation and that, where neither experiment nor logical deduction is in a position to furnish the solution of a problem we can but abandon ourselves to irrational forces, instincts, suggestion, or even violence?  

Such a fear is only justified if rationality is limited to seeking the right answer. But I have proposed that we see rationality rather as a quest for quality, the search for the best answer. Logic is reasoning devoted to truth. Rhetoric is reasoning devoted to value. It is the path which skirts both absolute certainty, and absolute doubt.

Law is valuable to the extent that it seeks, and finds, the best answer. The belief in objectivity entailed the belief that the best answer was the right answer. The right answer must be found with certainty, with logic. Values are subject to neither certainty nor logic. Therefore they could not play any role in legal decision making.

Of course this is not strictly true. Values such as certainty, predictability and consistency are constantly cited and given as reasons for decisions. These are the values of science. The error is thinking that these are the most important, or the only values. In claiming that the law was scientific, by appealing to these sorts of values, the law was being rhetorical. It was establishing its own value by appealing to the commonly held values of science.

The trouble is, of course, the scientific values are not the only, nor the most important values that we have. I have said that the scientific values are important because they tend to attain the ultimate value — truth. But there is no such thing as objective truth. I keep repeating this strange claim, in the hope that it becomes more plausible as I proceed. If we turn to our common experience, though, we can easily see that truth is not our ultimate value at all. There are commonly held beliefs that the truth should not be
pursued in every situation. It is moral for a person to lie in order to spare another needless pain, for example not to tell a child about the death of his or her parents. It is often acceptable, and expected, to complement a person's dress or cooking, when you really don't care for either. "Social convention", we call it. It is often acceptable and expected to lie in order to protect a friend or relative. It is certainly acceptable, and expected, for a captured soldier to lie to his enemy captors. Kindness, etiquette, loyalty, love, patriotism. All are virtues which can, in certain situations, outrank the value of truth.

Because the law claims it makes its decision solely on the basis of truth and logic, two undesirable effects often occur. The court makes a decision in such a way as to undermine values which most people hold more dearly than truth in the given situation. (The Canadian evidentiary rule that accepts evidence no matter how it was obtained, if it is relevant and reliable, results in many such decisions.) Or the court makes a decision on the basis of values other than objective ones, but gives its reasons as though the decision really were objective and value-free. This leads to tangled and foolish reasoning, obfuscation and concealment of the real determining values, and lays the court wide open to charges of hypocrisy. Both of these situations result in the increase of cynicism towards the law, and the decrease of its perceived value.

Law is valuable to the extent that its decisions are just. So much effort and energy has been spent attempting to define justice, that it appears to be one of the most difficult and elusive concepts we have. I do not intend to define justice, But I shall point out that it is the quality that we see in decisions that we agree with. If we have been persuaded by the reasons given for a decision, we say that it is just. If we have not been persuaded (and we don't agree with the decision for other reasons) then we say that it is unjust.
The notion that justice is connected with the reasons for decision is not a new one. It is exactly this which leads us to describe the reasons for a decision as its justification. Now, where the only ideals of the law are those of objectivity, reference to the rules and their logical derivation becomes the sole means of justification. This stems from the belief that just decisions are those made in accordance with clear and objective rules. It has been described as the principle of formal justice. Unfortunately, this belief gives us no grounds for determining whether the rule itself is just. Furthermore, since most cases turn, not merely on the application of a rule, but rather on its interpretation or characterization, logical reasoning and formal justice fail in their attempt to justify the decision.

Yet legal judgements often are persuasive, they do persuade us that the decision is just. Stephen Toulmin has explored this with his analysis of moral reasoning.

Toulmin has pointed out that in the field of law-court argument, lawyers and judges have developed their own patterns and rules of rational activity, for which the field of reference is their own field of practice. The law has found that acceptable and workable standards of rational proof exist without being syllogistically proper and inductively perfect. Justice is believed to be served.¹⁷ [emphasis added]

Toulmin and most other writers on "legal logic", seem to think that legal reasoning is rational to the extent that it measures up to its own standards of logic, which may differ from other "more rigorous" types of logic. What they don't appreciate is that law is not just to the extent to which it measures up to some standard of rationality, rather it is rational to the extent that it persuades people that it is just. Such persuasion rests inherently on appeal to various values. Consideration of values is not logical, but rhetorical. Therefore law is just, law is valuable because it is rhetorical.
Rhetoric seeks to persuade others to make a certain decision. It does this by appealing to values that are held by, or can be induced and amplified in the audience. It would be a mistake though, to think that rhetoric could be reduced to a set of rules, or tricks. "Means to persuade for all occasions." Persuasion is always the interaction between real, unique people in real, unique situations. It is almost never universal; it is not capable of formalization.

The incompleteness of the image of man as a creature who should make use of formal reason only can be demonstrated in another way. It is a truism that logic is a subject without a subject matter. That is to say, logic is a set of rules and devices that are applicable whatever the data. As the science of the forms of reasoning, it is a means of interpreting and utilizing the subject matters of the various fields which do have their proper contents. Facts from science or history or literature for example, may serve in the establishment of an inductive generalization. Similar facts may be fed into a syllogism. Logic is merely the mechanism for organizing the data of other provinces of knowledge. Now it follows from this truth that if a man could convert himself into a pure logic machine or thinking machine, he would have no special relation to any body of knowledge. All would be grist for his mill as the phrase goes. He would have no inclination, no partiality, no particular affection. His mind would work upon one thing as indifferently as upon another. He would be an eviscerated creature, or a depassionated one, standing in the same relationship to the realities of the world as the thinking technique stands to the data on which it is employed. He would be a thinking robot, a concept which horrifies us precisely because the robot has nothing to think about.

A confirmation of this truth lies in the fact that rhetoric can never be reduced to symbology. Logic is increasingly becoming "symbolic logic;" that is its tendency. But rhetoric always comes to us in well-fleshed words, and that is because it must deal with the world, the thickness, stubborness, and power of it.18

Rhetoric is the way in which we insert content into our reasoning. It is ironic that logical thought, in its single-minded devotion to truth, isolated itself from the very world concerning which it sought understanding. This is seen clearly in the definition of formal justice offered by J. C. Smith:

Any judgement made in regard to a particular situation, that a particular person is or is not legally obligated to do a particular act, logically entails that the judgement instances a rule of law such that anyone in a relevantly similar situation is or is not legally obligated to do the same act ... The principle of universalizability entails that: What is right for A must be right for B, granted relevantly similar circumstances.19
Terrific. More than 2000 years of intellectual, objective development have yielded this "truth". Justice means treating "relevantly similar" situations in the same way. But the world does not contain "relevantly similar" situations. It contains only chaos. "Similarity" is the result of the participating intellect. Now, surely we can all agree that there is similarity in the world. After all, a ball is like a ball, and a tree like a tree. But balls are also similar to rocks, and to paperweights, and to tumbleweeds, and to frightened porcupines and to hundreds of other things. I can't treat balls the same way as all of these things! You don't have to, Professor Smith assures us, you only have to treat relevantly similar things in the same way. Oh. Is the ball relevantly similar to a rock, or a paper weight, or ... I suppose if a ball were found in a bottle of gingerbeer, it might be relevantly similar to a snail. Maybe even in a bottle of whiskey. Or a glass of milk. The head spins. Particularly when we remember that the law doesn't only consider easy things like balls, and trees, and weapons, and possession, it also deals with rights, and duties and privileges. How do we even detect the similarities between these constructs upon constructs, let alone tell which ones are relevant? The spinning head boggles for a while, and then, like so many that consider these problems, just shuts itself off.

The world does not contain "relevantly similar" situations. These always involve the choice of some way of structuring the world, the imposition of some order, the pursuit of some values. Detecting "relevant similarity" can never be objective. It must always involve beliefs and passions. Yet it is exactly here that the real decision takes place. No one argues against treating the same situation in the same way. Every challenge to the justice of a decision is rather whether the situations are similar or not.
legal judgement amounts to a justification for treating this case as though it were more relevantly similar to this one, than to that one. Rules cannot identify relevant similarity, they presuppose it. This is why rules work well in easy cases, where everyone agrees about relevant similarity, and not at all in hard cases, where questions of justice are invoked.

Smith's description of formal justice tells us exactly nothing about justice, because it can only be invoked after the decision has been made. He seems to think that we appreciate law for its formal, logical characteristics. That's where he thinks justice lies. I think that this is exactly wrong. We appreciate law for the intimate way in which it affects our lives and our passions. Justice is the quality perceived in the law.

One of the unhappy effects of the belief that the law is not concerned with the real, unique features of situations, but only with the mythical, formal, objective aspects, is that important values are displaced or forgotten. Wexler mentions a case which is merely a good example of a lamentably common situation. An elderly woman boarding a bus fell and hurt herself when the driver started away too suddenly. The case was decided on the basis of whether her senior citizen's pass was a contract, or a license. "What happened to the old lady?" Wexler asks. "The bus driver's nastiness, the bus?" These have all vanished into the limbo reserved for irrelevant similarities.

Such cases appear unjust precisely because we have not been persuaded that the features concentrated on are the relevant ones, or that those ignored should be ignored. The law simply proceeds in its objectivist way, because of its naive faith in pseudo-scientific generalizations:

As someone has recently pointed out, it was not merely the apple which fell with Newton. An apple ready to fall is presumably ripe, shapely, coloured, textured, and potentially tasty. But
these 'secondary' traits are precisely those the legend ignores...
Also lowered was man's capacity for understanding this fruit of
the earth not merely as an example of mass descending, but also
as an item of sustenance and of sensory enjoyment.21

By obsessively pursuing an objective vision of rationality, the
law decreases its capacity for being relevant to real human values and concerns.
If it is to aspire to the value it requires to avoid becoming wholly coercive
and arbitrary, it must commence to openly declare its nature as value laden,
just and rhetorical.

** v **

I have been arguing that we should see that the law is valuable,
not to the extent to which it is objective and logical, but rather to the
extent that it is "intersubjective" and persuasive. It should, therefore,
stop pretending and openly declare itself to be based upon personal value
judgements and rhetorical justification. There will be a tremendous reluctance to take this suggestion seriously. Part of this is because of the
clinging to truth to which I have so often alluded. But much of it is due to
the fear which people have of rhetoric. It is probably inevitable that we
will fear those who have power, because we cannot be sure that they will
exercise this power in a way which is beneficial to us. It was precisely
this fear which led Plato to elevate logic above rhetoric so many years ago
(and thereby appropriate the power for the "good guys").

Gary Cronkhite states the charge, and his answer to it, in the
following excellent example of rhetoric:

Rhetoric creates a verbal elite capable of manipulating the masses,
putting the masses at the mercy of such ethics as that elite may
deed appropriate for its purposes ... "Rhetoric" appears in the
modern public press almost exclusively as a perjorative term ...
Why? One reason is that the rhetorician is in a poor position to defend himself, a position akin to that of a witch on trial in colonial Salem. If he says nothing, it can be assumed he has no defense. If he defends himself with the tools of his trade, his detractor can say, in essence: "Methinks the lady doth protest not only too much but too well; if the sophistic devil were not in her she could not be so eloquent in defense of her honour."

A second and far more disturbing reason, plainly put, is that the circumstantial evidence in favour of the charge is overwhelming... ... while the accusation had been there too often in the past, it is not inherent in the nature of rhetoric: a rhetoric which includes the study of the rational bases for belief in a society which nurtures and reciprocally depends upon individual freedom of choice is necessarily ethical. Put succinctly, the thesis of this article is that the best antidote for a sophistic rhetor is a sophisticated rhetoree, and we had best get at the business of producing such an antidote.22 [emphasis his]

The law will inevitably make its decisions on the basis of values, and thus will inevitably rely on persuasion and rhetoric both in making those decisions and in subsequently justifying them. Claiming otherwise does not change this. It simply conceals the real process, emphasizes the wrong values, and diverts meaningful criticism. The best antidote for the misuse of rhetoric by legal decision makers is the development of rhetorically sophisticated judges, lawyers, professors, students -- and most important, the public.

What, then are the general ways in which a rhetorical sophistication would alter our view of the law? The first realization would concern the authority of our judges. It would flow not from his position of political power, nor from his logical ability (both of which would presumably be present). His authority would be based upon his skill as a connoisseur and craftsman of both legal argument and moral judgement. He would need to be a connoisseur in order to appreciate and choose between opposing arguments, and among apparently relevant cases and statutes. He would need to be a craftsman in order to write reasons for his decisions which persuade us that it was the best, the just course to take. Like a connoisseur, his authority will stem both from
his experience, and from his reasons. He must be able to appeal to values held by his audience. Like a craftsman, his task will be to perform his task in an emotionally or aesthetically pleasing way. His creative responsibility is to quality, which, in law, we call justice.

The legal principles which he applies and appeals to as justification are not objectively existing rules, but are value preferences. The way that he arranges these, depends on his personality, his beliefs, and the audience to whom he is responsible. The belief that the law is objective and rule governed has led to the myth of legal reasoning. This amounts to nothing more than the belief widely held by the public as well as the profession, that only a highly trained, extraordinarily intelligent elite is capable of determining whether or not a legal decision is just.

The inevitable results of this belief is that judicial reasons, the justifications of decisions, are directed almost solely to this elite audience. This audience is the legal profession, the exact group which has been inculcated with the legalistic ideology. First we create an audience with a special set of values, then we justify our decisions to only that audience. But, as St. Thomas pointed out, the law is the business of the whole people. It exists for the benefit of all, hence it should, in order to be seen as just, aspire and respond to the values of the whole people. It must contain a good measure of common sense.

The members of the legal profession must be people of superior logos. They must acquire the ability to structure the legal cosmos in a valuable way. They must be accountable to the whole community, for their decisions affect the whole community. They must be able to refer to, and in turn structure the moral perspective of their culture. Rhetoric is the pathway to all of these skills. But, as I pointed out, learning rhetoric must
be like learning to ride a bicycle. Memorization of rules and categories and their names will not assist anyone who has not learned to persuade real people. Legal education should give up its foolish preoccupation with rules and legal reasoning, and devote itself to argument, and persuasion. Judgments should be examined for their justice, not their systematic nature. Students should persuade and be persuaded and then reflect on how these things happened. Every moment should be devoted to advocacy, rather than just a few hours at moot court time.

Remember, I am not suggesting that there is a "rhetorical method" that a judge can apply to ensure that his decision is the best one. I am suggesting that a judge has the duty to honestly seek what appears to be the best decision as measured by the values that he deems important, and then to openly state what these values are and how they justify his decision. Despite how it appears, this gives judges no more "discretion" than they already exercise. What it does do is insist that they be responsible for their discretion, which they never will be so long as they deny that it exists. To say that they must be responsible for their discretion merely means that they must persuade us that they exercised it properly.

Law is rational because it involves the use of language to seek the best solution, and then to justify this choice. A great irony resulted from the law's attempted emulation of science. By pretending that judges discovered rather than created the law, by stating that it was applying the right answer rather than pursuing the best course of action, it reduced its ability to justify its decisions, it refused to pay much attention to non-objective values, and consequently became less rather than more rational.

The tragedy is that the law could and should provide us with a far better model of rationality than science, before which the law has so eagerly
prostrated itself. For whereas science, or art or even morals are rarely compelled to make decisions, the law must always decide. A judge is never free to decline making a decision on the basis that both sides offer good reasons. Nor can he decide randomly. He must choose, and he must, ideally, give reasons to justify his choice. Failure to do this constitutes a "denial of justice". What better ground for rational persuasion to flourish!

The history and evolution of the law can thus be seen as the evolution of man striving to be rational in the face of uncertainty and necessary choice. Law should assume this mantle, and strive to become a paradigm of rationality, of seeking the best course of action.

There are those who will respond with horror to my idea that a rhetorically skilled judge produces justice. It is certainly possible to imagine a judge writing an eloquent defense of an unjust decision. But would we not say of this judge that he was not persuasive. He did not persuade us that his decision was just, even though his eloquence was superb. And, if he persuaded others, well, they are mistaken. The decision is not a good decision, because it infringes this value or that value. Hitler was persuasive but evil. And I can persuade you that this is so. He had no respect for human life.

The law is one of the most important moral and cultural artifacts of any culture. We should realize that, like paintings, literature, architecture, music, law is a description of ourselves and an eulogy to the values that it expresses. Things always begin to resemble their description. Eulogized values become the real values. If we want to be a good, and just people, we must allow the law to professedly aspire to goodness and justice.
NOTES TO CHAPTER ONE


2. The many followers of Sir Karl Popper will claim that I have ignored his theory of falsification, which states that theories are not confirmed, but rather falsified. Experiments are designed, in this view, not to confirm a theory, but rather to falsify it. As Feyerabend (infra) and others have pointed out, Popper's theory does not save empiricism. It is, furthermore, subject to all of the criticisms levelled at more traditional forms of positivism.

   For these reasons, I have not given it the attention that some might think that it deserves.

3. Of the many writers who have influenced my ideas, two, Paul K. Feyerabend and Michael Polanyi, are referred to specifically below. Another book which has had an immeasurable impact upon all of my thinking is Zen and the Art of Motorcycle Maintenance by Robert Pirsig, (New York, Bantam Books, 1974). As should be obvious to anyone who has read that fine work, Pirsig's influence is present throughout this thesis.


8. ibid, p.143.

9. See, for example, Thomas Kuhn, The Structure of Scientific Revolutions, (Chicago, 1962).


12. ibid, p.4-5.


NOTES TO CHAPTER TWO


2. Through the course of this paper, I often include the Greek word for the concept under discussion. I do not mean to suggest by this that I am versed in the Greek language. Rather, I found it to be a convenient method for keeping track of ideas that the Greek mind was intimately familiar with, but that English can only imperfectly capture by using a series or set of more or less separate concepts. I have also, for the most part, used English letters rather than Greek letters. Where I have used Greek, it is because the book that gave me the word used only Greek, and I have been incapable of transliterating.


4. I mean to include, perhaps inaccurately, the Bacchic religions in my use of the word "Orphism".


7. Bertrand Russell, op. cit., p.44.


10. ibid, pp.21-22.

11. quoted by Hunt, ibid, p.27.


15. ibid, p.27.
16. ibid, p.31.
17. For example, see Russell, op. cit., p.77.
24. See Untersteiner, op. cit., Chapters IV-IX.
27. Hunt, op. cit., p.45.
32. See Koestler, The Sleepwalkers, op. cit.

NOTES TO CHAPTER THREE


10. See Note 4, Chapter One.


12. This is a key idea in Polanyi's book.


BIBLIOGRAPHY


Chatterjee, Satischandra, and Dhirendramohen, Datta, An Introduction to Indian Philosophy, 7th ed., Calcutta, University of Calcutta, 1968.


Wexler, Steve, "Discretion: The Unacknowledged Side of Law", (1975), 25 *University of Toronto Law Journal* 120.