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Eileen A. Scallen

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Nobody Likes a Sophist Until They Need One

Eileen A. Scallen*

If I read Professor Eugene Garver's book, *For the Sake of Argument: Practical Reasoning, Character, and the Ethics of Belief*,¹ correctly, this may be the most futile essay I have ever written (and some of them have been pretty futile, believe me). This is because I am a cheerful, unrepentant, out and proud, latter-day Sophist. At one point, Gene says, "Aristotle was wiser than Plato in not trying to refute the sophists. Refuting the sophists is as impossible or as pointless as refuting the skeptic."² At another point, Gene notes that "Aristotle himself does not take the sophists seriously as Plato does. He thinks that they are so philosophically uninteresting that any practical dangers they present are not worth extended thought."³ Ouch.

As one can probably guess, Gene's book does not have nice things to say about Sophists. Nonetheless, I will continue with this essay because Gene's overarching thesis about the ethical dimension of practical reason suggests that he wants to be friends even with us Sophists—I think. That's good, because I think the world of Gene. He is a brilliant, humane, engaging scholar, and the kind of man anyone would be proud to claim as a friend. And I care deeply about the themes he writes about in the book—rhetoric (small r), Aristotle's Rhetoric (capital R), practical reason, character, trust and ethics. We touch on so many common themes in our writing that it startles me—not only legal argumentation and persuasion, but also the role of trust and betrayal and the process of confrontation in law and justice, among other topics. So I was enormously honored to be asked to comment on Gene's book. And I

* Professor of Law, William Mitchell College of Law, St. Paul, Minnesota. This essay is based on a paper presented at the Annual Meeting of the Association for the Study of Law, Culture and Humanities at the University of Connecticut Law School, March 13, 2004.

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

2. *Id.* at 54.

3. *Id.* at 49.

still am, even after reading this book, which has challenged and helped me in so many ways, I cannot possibly discuss them all in this brief essay. Thus, I will focus on the dimension of Gene's book that I found highly disturbing because, if ethical rhetoric aims at friendship, Gene will surely want to know why his arguments bothered me so much. His arguments disturb me because they do not speak to me—the kind of person probably most receptive to the arguments in his book.

Before it was published, Gene sent me an electronic version and page proofs of his book. When I saw the title, I started salivating—I could not wait to dig in to the feast. Because I did not have a bound copy of the book at that point, I could realistically start reading almost anywhere. So, just for fun, I started with the endnotes. Unlike some people, I love footnotes and endnotes; they provide a chance not only to provide “authority” for one's argument and supplement the argument's internal authority, but also to engage in the kind of digressions that can be enlightening and even entertaining, but that would never be tolerated in text. I thought it might be fun and interesting to read the endnotes first—I wanted to see if I could guess Gene's argument from the notes—like playing the TV game show *Jeopardy*, where the show provides contestants with the answers and the game is to formulate the questions. So, I read the endnotes through in their entirety. And I was stunned to discover that although Gene's book discusses practical reason, character, ethics, classical rhetoric and law, Cicero was mentioned only twice—in one endnote,⁴ and Isocrates and Quintilian, who wrote fairly extensively on these topics, were nowhere to be found. I looked closely at endnote 37, and saw that Gene quotes James Baumlin's entry for “ethos” in the *Encyclopedia of Rhetoric* as saying that “Cicero ignores the Aristotelian notion of a ‘rational ethos’ or ‘ethos of trustworthiness’ and, in its place, emphasizes *conciliare*, or an ethos of sympathy. . . . Ciceronian ethos resembles a milder form of pathos.”⁵ My note in the margin reads “huh?” Are we talking about THE Cicero? You know, the Roman lawyer, politician and rhetorical theorist?

But before I could get too bent out of shape about the omissions in Gene's book, the Massachusetts Supreme Court handed down its decision in *Goodridge v. Department of Public Health*.⁶ For those readers who have just returned from a visit to another planet, a 5-4 majority held in *Goodridge* that: (1) marriage licensing statutes as currently written are not susceptible of interpretation permitting qualified

4. *Id.* at 212 n.37.

5. James S. Baumlin, *Ethos*, in *ENCYCLOPEDIA OF RHETORIC* 269 (Thomas O. Sloane, ed., 2001) (citation omitted).

6. 798 N.E.2d 941 (Mass. 2003).

same-sex couples to obtain marriage licenses⁷; and (2) as a matter of first impression, limitation of protections, benefits and obligations of civil marriage to individuals of opposite sexes lacks a rational basis and violates the Massachusetts constitutional equal protection principles.⁸ Since that decision was handed down in late November, 2003, I have been engaged in the most important rhetorical battle of my life—as a lawyer, law professor, activist, lesbian and, yep, Sophist: preventing amendments to the United States Constitution and the state constitution of Minnesota (where Gene and I currently live) to outlaw same-sex marriages and other types of legal recognition of same-sex relationships.

After finishing Gene's book, I realized that these experiences—discovering the exclusion of my favorite classical rhetoricians (Isocrates, Cicero and Quintilian) from Gene's book and the legal and cultural battle over same-sex marriage—presented a good way to explain my difficulty with Gene's book. First, let's deal with Gene's decision to ignore my classical pals. Who were they and why does it matter that they were omitted?⁹ Isocrates (436 to 338 B.C.E.) was a contemporary and rival of Plato. Isocrates founded his own school to help Greek citizens learn to argue and represent their interests in the courts and the legislature. Plato dismissed Isocrates, as he did writers on similar themes, as an author of cookbooks—a mere “trainer” who offered to enhance one's technical skills but who did not teach knowledge and truth. It was easy for Plato to link Isocrates to the rest of the Sophists because, like them, he expressly taught legal and political rhetoric. However, Isocrates considered himself a philosopher; indeed he had his own objections to some of the Sophists. Isocrates differed from many of these other teachers of rhetoric

7. *Id.* at 953.

8. *Id.* at 961.

9. For a longer description of this school of practical reasoning and its relevance to law, especially legal advocacy and evidence, see Eileen A. Scallen, *Evidence Law as Pragmatic Legal Rhetoric: Reconnecting Legal Scholarship, Teaching and Ethics*, 21 QUINNIPIAC L. REV. 813 (2003); Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 AM. U. L. REV. 1717 (1995). After many years of neglect, there is renewed interest in Isocrates. See Eugene Garver, *Philosophy, Rhetoric and Civic Education in Aristotle and Isocrates*, in ISOCRATES AND CIVIC EDUCATION (Takis Poulakos and David Dephew, eds., 2004) (essay in which Professor Garver argues that Aristotle, rather than Isocrates, ought to continue to be our model for developing a concept of civic education); EKATERINA V. HASKINS, LOGOS AND POWER IN ISOCRATES AND ARISTOTLE (2004). See also EDWARD SCHIAPPA, THE BEGINNINGS OF RHETORICAL THEORY IN CLASSICAL GREECE (1999) (containing an extensive discussion of Isocrates' contributions to classical rhetoric, portraying him as Exhibit A of the attempts of philosophers to exclude those, unlike Aristotle and Plato, sought to treat rhetoric as an integral and worthy element of democracy). On more general interest in classical rhetoric, there is MICHAEL H. FROST, INTRODUCTION TO CLASSICAL LEGAL RHETORIC: A LOST HERITAGE (2005). Frost also omits Isocrates, although he does discuss the Romans Cicero and Quintilian, who credited Isocrates as their inspiration.

in several respects. For example, many of the Sophists were itinerant teachers, moving from town to town, taking their shows on the road, so to speak. In this sense, some of these Sophists were more akin to today's motivational speakers and Continuing Legal Education presenters who promise to teach their students, in ten steps or less, to dazzle a jury in any case. Isocrates, in contrast, founded a school of higher education in Athens, about 5 years before Plato established his Academy. The school of Isocrates lasted for over fifty years, where he trained as many as one hundred students at a time, many of whom became leaders of Athens and other parts of the ancient Greek world. Plato stigmatized and helped marginalize his rival Isocrates for a good part of history to date, although lately there has been renewed interest in Isocrates' teachings. Later, in ancient Rome, Cicero and Quintilian built on the teaching of Isocrates. These Romans were practicing lawyers, as well as teachers of the art of speaking well in court and in the legislature. Quintilian would have made a good illustration for the cover of Gene's book—since Quintilian is remembered for defining the ideal orator as “a good man, skilled in speaking.”¹⁰

But why does it matter that Gene left out my favorite classical rhetoricians? It matters because these old dead white men, Isocrates, Cicero and Quintilian, were just as concerned with the problem of reconciling ethics with rhetoric as Aristotle and Gene Garver. These ancients: (1) refused to be trapped by the dichotomy drawn by others between objective truth and radical skepticism; they argued for a middle ground—a contingent but practical kind of truth, one good enough to deal with even the most important and difficult issues of society, especially those decided by the courts of law; (2) understood and advocated a liberal arts approach to education as the best preparation for resolving these practical problems in the courts or legislature; and (3) eschewed an amoral approach to advocacy, but understood that while good character cannot be instilled through indoctrination, it can be nurtured and can flourish through inspiration and education.

Isocrates is traditionally treated as a Sophist and certainly was portrayed as a Sophist by Plato, on whom Gene relies for his description of the Sophists. I have not seen Cicero and Quintilian described as Sophists, but I think it is fair to say that Plato and Gene would put them in that category too, given my description of them above. I regret to say that the portrait Gene draws of these ancient Sophists is downright unfriendly. First, it is not friendly to exclude people who rightly should

10. MARCUS FABIVS QUINTILIAN, INSTITUTIONS ORATORIAE [THE INSTITUTES OF ORATORY] Book XII, para. 1 (H.E. Butler trans., G.P. Putnam's Sons 1920). Quintilian actually attributes this phrase to Marcus Cato. *Id.*

be part of the debate. Second, it is not friendly to portray a class of people who had diverse perspectives, ranging from radical relativism to quite mild pragmatism, as a uniform gang of thugs. Finally, it is not friendly to allow one side of the debate to speak (entirely) for the other side.

This is what Gene does when he describes the Sophists exclusively through his use of Plato's dialogue, the *Gorgias*.¹¹ In this dialogue, Callicles the Sophist is interrogated by the noble Socrates. But Plato is the playwright of this drama, putting arguments in the mouths of Callicles and the others, and Plato is none too fond of his characters, except for his former teacher Socrates. Indeed, if I were to use Gene's thesis, Plato is the most unethical and unscrupulous of rhetoricians by making his main opponent a straw man. As Gene states:

[A]rguing against a straw man violates no logical rules. The validity of an argument is the same whether it is directed against views actually held by an opponent or against a caricature. But ethically it is not the same argument and does not have the same value. When an argument is not well motivated, it fails to treat an opponent with adequate respect and charity. These are intellectual virtues related to friendship that can be imputed to an argument. They are part of the ethos of an argument. Good controversial arguments have worthy targets and treat their targets as worthy opponents.¹²

Plato fails this standard of ethical rhetoric. By relying on Plato's portrait and not letting the Sophists of various types speak for themselves, Gene fails too. He ignores worthy opponents who could really give his theory a run for the money, such as Isocrates, Cicero and Quintilian. These ancient writers cared deeply about character and ethical rhetoric, but they depart from Gene's thesis, which suggests that ethics and character are intrinsic to rhetoric. They would agree with Gene that there is such a thing as "ethical rhetoric," and that this ethical quality stems, in large part, from the character of the speaker. But they would hold that such character is developed through education and critical reflection on one's models, and that such civic education is essential for any hope of leadership in a democracy, which puts a premium on rhetoric and deliberation. They would disagree with Gene on a fundamental point: that the standards for such ethical rhetoric or practical reason are somehow intrinsic to rhetoric itself.

So what does any of this have to do with the same-sex marriage debate? I suggest that these debates will provide scholars, such as Gene and me, with a perfect contemporary example to use in exploring the

11. PLATO, *GORGIAS* (E.R. Dodds, ed., Oxford Univ. Press 1959).

12. GARVER, *supra* note 1, at 101.

dimensions of rhetoric, character and ethics. This essay is not the right forum to fully develop my alternative to Gene's view here, but I want to use an example from this debate to suggest why Gene's approach, based on an Aristotelian concept of political "friendship," will not work as the ethical standard of practical reason. Gene dismisses the epistemological and ontological underpinning in Plato's (and later, Aristotle's) treatment of the Sophists, stating:

It is question-begging to argue for the superiority of rational rhetoric on the grounds of some ontological or epistemological high theory about the nature of reality or whether the truth should be spelled with a capital letter or not. . . . These claims about reality and knowledge follow from rhetorical practices, and do not ground them. Arguing about whether reality exists is simply a way of raising one's voice, not elevating the things talked about.¹³

With all due respect, I think Gene goes astray here, and the current debate about same sex civil marriage (and other legal protection for committed partners of the same sex) provides support for my conclusion.

In spring of 2003, about the same time I was thinking deeply about Gene's thesis, I participated in a "debate" sponsored by our school's chapters of the Federalist Society, a politically conservative national group, and the American Constitution Society, a more recent, politically liberal national organization. The participants included Tom Pritchard, Executive Director of the Minnesota Family Council, Professor Doug Kmiec, from Pepperdine Law School, Professor Dale Carpenter, from the University of Minnesota, and yours truly. All speakers, I am told, were impressive to members of the audience. But what became clear to me was the maddening quality of the debate. Sure, I had to sit there and listen to Mr. Pritchard and Professor Kmiec tell me and the rest of the audience that marriage is a natural and God-given status, open to no tinkering by man-made institutions like courts or legislatures. I had to listen to them tell me that if I am permitted to marry my partner, then I could also be permitted to marry my entire Civil Procedure class, my brother, my dog and even my couch (I had never heard THAT version of the argument before).¹⁴

13. *Id.* at 51.

14. This argument is a classic example of the logical fallacy called "slippery slope." The speaker essentially argues that once the listeners take the first step toward a particular policy option, they will fall down the "slippery slope" to all sorts of bad ends. Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 HOFSTRA L. REV. 1155 (2005) (analyzing the mechanics of the "slippery slope" argument in the context of same-sex marriage); Dale Carpenter, *Gay Marriage and Polygamy*, Independent Gay Forum, available at <http://www.indegayforum.org/authors/carpenter/carpenter46.html> (first published on April 29, 2004, in the Bay Area Reporter) (arguing that same-sex marriage

But what was truly maddening is that the arguments of my opponents came not from their “rhetorical practices,” as Gene suggests. No—what was maddening is that those arguments came from the very foundations of those speakers’ cores. They firmly believe that there is Truth (capital T), and their Truth comes from one particular God as they interpret that God’s message. This foundation, based on external and unquestioned authority, grounds their rhetorical practices. These rhetoricians, like Plato, do not engage in rhetoric (from their perspective). They do not engage in practical reasoning with their friends; they simply deliver messages from authority. They are conduits of Truth, not participants in any sort of real dialogue. We know that this is also the case with Plato. The *Gorgias*¹⁵ and the *Phaedrus*¹⁶ are not genuine dialogues of the kind that the historical Socrates is supposed to have had; they are simply extended speeches by the elite aristocrat Plato, who serves as our guide to Truth.

When speakers such as Tom Pritchard, Doug Kmiec and Plato base their speech in unquestionable authority, universal Truth, how can we possibly debate them? Gene might say this is futile. Don’t bother. It would only be an exercise in who can speak the loudest; their “claims about reality and knowledge follow from rhetorical practices, and do not ground them.”¹⁷ But their claims do ground them. And it is their grounding in this solid, unimpeachable authority that attracts listeners longing for conviction, predictability and clarity. Does this certainty provide a false sense of security? From my perspective, and I think from Gene’s too, it does. But that does not diminish the power of the siren’s call of certainty.

Professor Francis J. Mootz III has noted the futility of debates between those who base their claims on foundationalist notions of Truth and those who do not. In his review of Daniel A. Farber and Suzanna Sherry’s book, *Beyond All Reason: The Radical Assault on Truth in American Law*, Professor Mootz argues that Professors Farber and Sherry re-enact the Plato vs. Sophist battle in their book condemning “radical multiculturalism” in the legal academy.¹⁸ Professor Mootz argues that rehashing this ancient debate “is unproductive and even

meets an essential need for the individuals involved and benefits society while polygamy, by contrast, does neither).

15. PLATO, *supra* note 11.

16. PLATO, PHAEDRUS (Robin Waterfield, trans., Oxford Univ. Press 2002).

17. GARVER, *supra* note 1 at 51.

18. Francis J. Mootz III, *Between Truth and Provocation: Reclaiming Reason in American Legal Scholarship*, 10 YALE J.L. & HUMAN. 605, 608-09 (1998) (reviewing DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997)).

harmful to scholarly discourse.”¹⁹ Instead, he proposes that we embark on “an effort to reclaim reason in American legal scholarship by steering a course between the dogmatic pursuit of truth and the self-indulgent pursuit of provocation.”²⁰

I take a slightly different direction than Professors Garver and Mootz. I agree that these debates have no definitive winner and are frustrating, even maddening, experiences. This is because individuals who are even willing to consider “the rhetorical turn” or Gene Garver’s concept of “political friendship” express an openness to genuine dialogue that will never be found among the pure rationalists, strict empiricists, and pseudo-Platonists. Those who respect only foundationalist notions of objective truth stemming from their preferred authority are not open to persuasion, only “enlightenment.” They will not argue with us. They will not listen to us because the only speaker that matters is their source, their authority. They will only “inform” or “instruct” us on the issues at hand. As a result, they are the most likely candidates to deny that they are employing “mere” rhetoric because, for them, the meaning (of a contract, a statute, the Constitution) is “plain.” In short, the epistemology and ontology matter deeply here because they ground my debating opponent’s rhetoric, as well as mine. And this is what produces the frustration: two earnest and well-intentioned debating opponents who cannot communicate with each other.

So what is a good Sophist to do? Keep talking. And I did debate those opponents of same sex marriage and other legal protection for same-sex families. I used my best effort to invite my audience to keep an open mind, to recognize that our legal, social and cultural reality does evolve over time. In good neo-Aristotilian fashion, I used *logos*: several examples of the history of “traditional” aspect of marriage that made women an appendage of their husband, with no independent legal status, a “tradition” that was forced to change with recognition of equality for women. I used *pathos* to describe how heart-broken I was to have to leave a job and a city I loved because I could not adequately protect my partner’s financial security by marrying her. And I used my *ethos*: I told my students my story, and came out to them in a more direct and honest fashion than I ever have. Time will tell the outcome of the same-sex marriage controversy. But by engaging in the debate, I gave my larger audience a chance to use their ability to reason and criticize, to make critical judgments based on a difference of opinion, evidence and argument—something my opponents (grounded in the foundation of authority) do not. I can offer a competing model of rhetoric to my

19. *Id.* at 608.

20. *Id.* at 609.

audience (which contains many of my law students) that does not command my audience to obey, but instead respects their intelligence and offers them a chance to grow through the use of their own critical judgment. Exercising critical judgment is essential to the success of our democratic system.

I am not the first to suggest that good rhetoric can only flourish in a well-educated democracy. History shows that this is the case. Whenever a society is ruled by autocrats or dictators, one of the first freedoms to be curtailed is the freedom of speech, and theorizing about rhetoric and the practice of rhetoric disappears therewith. It is not an accident that with the fall of democracy in ancient Greece and Rome, and the rise of dictators, kings, and Popes, the concept of "rhetoric" was utterly transformed from a philosophical and educational activity to a constricted set of precepts of style.²¹ And, as new democracies have risen, so too has interest in rhetoric. Democracy has not just been spread by the superior weapons of the army behind it; democracy is inspired by the eloquence of "good men" (and women) "speaking well." Democracy is won and supported by citizens who have been liberally educated and encouraged to engage in critical thinking and speaking. Democracy is protected not only by those who speak well, but also by those who listen well and to diverse sources of information, values and needs. Democracy is strengthened not by those who act with certainty and raw power, but by those who make the best possible judgments in an uncertain world with limited knowledge.

Gene Garver's notion of a political "friendship" as the foundation of an ethical rhetoric works only in a utopian society. It does not sufficiently confront the serious reality that there are those for whom "friendship" is just another tool to use as one pursues ends dictated by authority. It is good to dream. It may be the philosopher's prerogative to dream. But, as a lawyer and law professor engaged in practical reasoning right this moment, I can only let go a dreamy sigh as I ponder Gene's book before I head off to another debate.

21. For two of the many books tracing the correlation between the rise and fall of democracy and the role of rhetorical theory, see GEORGE A. KENNEDY, *CLASSICAL RHETORIC AND ITS CHRISTIAN AND SECULAR TRADITION FROM ANCIENT TO MODERN TIMES* 31-32 (1980); *THE RHETORICAL TRADITION: READINGS FROM CLASSICAL TIMES TO THE PRESENT* (Patricia Bizzell & Bruce Herzberg, eds., 1990).
