

(A) Just Rhetoric?

*J.M. Balkin**

Costas Douzinas and Ronnie Warrington with Shaun McVeigh, Postmodern Jurisprudence: The Law of Text in the Texts of Law, London and New York: Routledge, 1991, xiii + 303 pp hb £40.00.

The collected essays in *Postmodern Jurisprudence* seek to apply postmodernist theories, and in particular deconstruction, to jurisprudence. The book's organising theme is an attack on what the authors describe as law's 'logonomocentrism,' a pun on the deconstructive term 'logocentrism.' 'Logocentrism' refers to the characteristic manoeuvre of philosophical projects that attempt to explain the world, justice or ethical norms in terms of 'concepts claimed to exist in themselves, complete, self-referring and proper' (p 10). These explanatory concepts are presented in opposition to others which, by comparison, are seen as inferior, deviate, peripheral, indirect, distorting or inessential. Thus distinction, the creation of an interior and exterior, or a centre and a periphery, is the characteristic logocentric device. Logocentric projects fail, deconstruction argues, because the concepts used for theoretical explanation always turn out to bear a curious relationship of mutual dependence as well as differentiation from the marginalised, deviate or excluded concepts.

The authors' 'logonomocentrism' applies this analysis to law. The legal equivalent of logocentrism is 'the presentation of law as a unified and coherent body' of thought grounded in reason (p 27). However, 'an entity, work or field can claim unity only if it can be clearly delineated from the outside' and '[p]ower is legitimate [only] if it follows the law, *nomos* and, if *nomos* follows *logos*, reason' (pp 26–27). Hence, logonomocentrism is the attempt to view law as a coherent, self-sufficient, unified, ordered body of principles, subject to and justified by reason. The book's major argument is that this picture of law is misleading. It attacks the organic unity of law, law's self-sufficiency and independence from other disciplines, and law's grounding in reason. It claims that law 'cannot be seen any longer as a coherent, closed ensemble of rules or values' (p 27).

The authors argue that the law nevertheless attempts to create the illusion of rational order, self-sufficiency and coherence. It does so by the use of rhetorical and figural language that legal actors and legal theorists refuse to recognise as rhetorical and figural, because this would undermine law's claim to be grounded in reason. Law tries to 'keep out of its empire those other discourses that it has pronounced alien to its scientific or normative closure' (p xi). Law thus spurns mere rhetoric; yet the authors claim that when jurisprudential arguments are studied carefully, they are revealed to depend heavily on rhetorical and figural language.

The final chapter of the book, which is nothing short of a *tour de force*, is as much a symbol of the book's positions as an articulation of them. The authors mingle literary, legal and philosophical themes through an elaborate commentary on Melville's *Billy Budd*. The commentary is offered in the form of a fictitious law review article whose authors are accused of plagiarism by a former student. This premise allows the authors of *Postmodern Jurisprudence* to juxtapose the 'article' with a pastiche of interviews, letters and other documents concerning copyright law,

*Charles Tilford McCormick Professor of Law, University of Texas at Austin.

the meaning of artistic originality and a host of other philosophical subjects. Below this literary mosaic, the authors place a running commentary which may or may not be directly relevant to the text above it. This last device is itself a rather obvious crib from Jacques Derrida's controversial book *Glas*; hence it becomes still another way of evoking questions about originality and copying. By forcing us to wade through a melange of intertextuality of their own devising, the authors hope to demonstrate, more by lived experience than linear argument, their doubts that law, literature, reason and rhetoric can be fully and finally separated.

As the above description suggests, the book's arguments are deliberately designed to be provocative in content and wide-ranging in scope. The book raises so many interesting issues that one cannot discuss them all fully in a brief review. Therefore, I have chosen to focus on two interrelated questions about the relationship between deconstruction, law and justice. The first is the relation between the reason of law and rhetoric. The second concerns the possible ethical, political and legal implications of the authors' deconstructive techniques.

Rhetoric's Empire?

A key theme in *Postmodern Jurisprudence* is that behind the reason of law one will find rhetoric. For example, in the book's third chapter, the authors attack Ronald Dworkin's arguments in *Law's Empire*¹ for employing unacknowledged rhetorical methods to persuade us of law's unity and coherence. In fact, the authors claim, Dworkin's entire argument for the coherence and order of law ultimately turns on a rhetorical device — personification, through which law is imagined to represent the wishes of a single person (pp 66–67). Dworkin's famous judge Hercules is yet another rhetorical trope — an anthropomorphism of the law, or a legal *prosopopoiea* (creation and bestowal of a face) (p 66).

Interestingly, the authors do not question Dworkin's assumption that comparing the law to a single person's beliefs would tend to establish its order and coherence. They merely attack the rhetoric that permits the comparison. However, one might instead study Dworkin's rhetoric carefully to uncover deeper insights and unintended difficulties concerning his jurisprudential project. According to the authors, Dworkin imagines the law as a person. Yet in real life, most people are full of conflicts in their beliefs and attitudes. They manifest all sorts of contradictions and hypocrisies, and they usually engage in all sorts of strategies, conscious or otherwise, to reduce the resulting cognitive dissonance. Rather than attacking Dworkin for using rhetoric to place a human face on the law, one might rather take Dworkin's metaphor very seriously indeed and ask if Hercules (who after all, Greek mythology tells us, went mad and slaughtered his children) is not the perfect rhetorical symbol of a legal system that, like most persons, hides and suppresses its many conflicts of value and keeps as best it can its many skeletons safely in the closet. In this way, Dworkin's rhetorical flourish should be seen not as a disguise to be castigated, but rather as an uncannily accurate appraisal of how lawyers and judges consciously and unconsciously reduce cognitive dissonance through a combination of rationalisation, suppression and professional myopia. Dworkin's *prosopopoiea* thus unwittingly symbolises the difficulties of his jurisprudential project — a jurisprudence which, despite all odds, must 'put the best face' on a legal system that often condones unjust and oppressive results in practice.

¹ Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986).

The authors' approach to Dworkin is in many ways symbolic of their own ambivalent attitude towards rhetoric. The authors clearly adore rhetoric. Much of their book is devoted to demonstrating how what is called rhetoric and what is called reason are close cousins, and how the urge to deny rhetoric, to encapsulate and domesticate it, invariably fails. Yet the authors also distrust what they love. Instead of accepting Dworkin's rhetoric, following it tenaciously to see where it leads, they hope to isolate and expose it in the hopes of delegitimizing Dworkin's enterprise.

This schizophrenia can be seen by comparing the treatment of rhetoric in their own arguments with the treatment of rhetoric in the arguments of their opponents. In their own arguments, rhetoric is celebrated joyously. The authors cannot resist a good turn of phrase, or a clever play on words and, indeed, who can blame them? Rhetoric is a never ending source of unseen connections, of new ways of thinking. Yet in their readings of other legal scholars, rhetoric is more often the villain doing illicit work under the disguise of reason. Rhetoric is the subterranean brotherhood, the secret society, the *eminence grise* who must be unmasked and, through exposure, disempowered. Their approach in these contexts is well summed up in their description of Paul de Man's deconstructive technique: to read texts rigorously for their individual rhetorical characteristics, 'supremely alert to the aesthetic attributes of the text, in order to keep the aesthetic within its proper domain of art and deprive it of its fraudulent assertion of epistemological rigour or ethical or political propriety' (p 60). Although they themselves hope to overturn rigid distinctions between the legal and the literary, the authors nevertheless worry that rhetoric unrecognised grants reason illegitimate powers, and thus seek to keep the aesthetic in its proper place. These authors who so love rhetoric also turn out to be distrusters of rhetoric, interdisciplinary disciplinarians devoted to keeping the aesthetic from leaking into the legal. For them, rhetoric is the delightful trickster who at any moment may be transformed into the perpetrator of great frauds. This love-hate attitude is clearly articulated in the introduction to Chapter Four: before beginning their attacks on John Finnis' natural law theories, they soberly note that 'we use the same rhetoric that we claim is also the source of delusion. Figural language is both the source of meaning and all we have for dismantling the ruses of texts' (p 75).

My purpose in making these observations is not simply to demonstrate that the authors are guilty of some inconsistency about rhetoric, or that they want to have it both ways. Rather, I am interested in explicating the picture of rhetoric and its relation to reason that might lead the authors, or any of us for that matter, to want to have it both ways. We might begin by asking ourselves what the point of deconstructing the distinction between reason and rhetoric could be. Perhaps surprisingly for those who know of deconstruction only through popular accounts of it, the goal of this deconstruction cannot be to destroy the distinction between reason and rhetoric; nor can it be to show that all reasoning ultimately depends upon rhetoric. If we were to say that all reasoning is rhetorical, we would have already acquiesced in the division of the world of discourse into rhetorical and non-rhetorical discourse, the very division which the deconstruction is designed to question. In other words, arguing that 'all reasoning is rhetorical' implicitly accepts that there are two sets of things, rhetorical arguments and non-rhetorical arguments, and merely asserts that the latter category has no members.

The point of the deconstruction, however, is not to deny the existence of non-rhetorical language, but to study and understand the important conceptual work being done when we construct separate categories of rhetoric and reason. This is the work of supporting a conception of what could be non-rhetorical. Rhetoric is viewed as a detour, a substitute for reason which is focused on persuasion, and seeing it as

a detour allows us to believe in a straight and narrow path to knowledge or truth. Rhetoric is described as a supplement to reason, which eases the path of understanding but is ultimately unnecessary to reason, and viewing it as a supplement permits us to believe in the possibility of a direct, unmediated language of reason. We exile a certain class of discourse to the periphery in order to create the effect of a discourse — non-rhetorical, literal discourse — that can be defined against it and thus secretly supported by its exclusion. The periphery is like a frame that squares and straightens the canvas it surrounds.

In order to understand the conceptual work that the distinction between reason and rhetoric performs, we must try to imagine the possibility of a more general category that includes what our thought has assigned to the rhetorical and the non-rhetorical, the figurative and the literal. It would encompass the processes of description and argument that both rhetorical and non-rhetorical language have in common. It is perhaps tempting to label this category 'rhetoric' but, if we do so, we will surely have expanded the meaning of that word. Therefore, deconstruction does not demonstrate that rational argument is nothing other than rhetoric. Rather, the goal of deconstructive analysis is to unearth and identify a set of cognitive tools of which what we call 'reason' is merely a special case.

This general category of 'metarhetoric' would include all of the ways that human beings use language to effect purposes, to discover and refine their values, to create, decide, understand and generally get about in the world. It would also follow that this metarhetoric can be used well or ill for these purposes, that it can help us or can mislead us. There is no guarantee that our cognitive and linguistic practices will serve ethical goals or will even be efficacious, however this efficacy is defined. The logocentric temptation has been, nevertheless, to try to isolate the efficacious, good uses of this metarhetoric from the bad and unreliable ones; hence the development of a category called 'reason' on which the privileged and favoured features of discourse are projected, and a category called 'rhetoric' to which the others are assigned.

It now becomes clear why the authors simultaneously adore and distrust rhetoric. Although they accept the common definition and categorisation of rhetoric, they nevertheless sense that the ideological projection of good and bad qualities onto reason and rhetoric is precisely that, ideological. They perceive a good, efficacious rhetoric as well as a bad, dangerous, misleading one. But it follows that they should also recognise a good, efficacious reason as well as a bad, dangerous and misleading one. Thus, the goal of the deconstruction of reason and rhetoric should be to undo the ideological privileging which has assumed that the ideological distribution of good and bad qualities has been successful, that through the smaller categories of reason and rhetoric the larger category of discourse we have called 'metarhetoric' has been successfully divided into efficacious and dangerous, central and peripheral, essential and supplementary.

It is no surprise then that the authors like their rhetoric and not the rhetoric of their opponents, for they also seem to like their own reasons but not the reasons of those they criticise. Yet from the authors' attack on reason and their defence of rhetoric, we surely cannot derive the conclusion that reason should now be seen as evil and misleading, any more than we can derive the conclusion that rhetoric can now be revealed as efficacious and good. Rather, if we insist on retaining the categories of rhetoric and reason, as the authors appear to, we must acknowledge instead that one cannot decide in advance the value, necessity or efficacy of what has been historically instantiated in our culture as 'reason' as opposed to 'rhetoric.' It is not surprising then that the authors describe '[t]he result of the encounter [between

law and deconstruction as] neither a victory for one side or the other, nor a dialectical third term that transcends the original positions. The outcome remains suspended between law and literature, jurisprudence and aesthetics, philosophy and rhetoric' (p x).

Nevertheless, the above analysis also suggests two potential problems for the authors. First, the discovery of the rhetorical underpinnings of philosophical texts can hardly be seen as delegitimizing *per se*. Otherwise, this position would equally delegitimize the rhetorically based arguments of the authors themselves. We must read the authors instead as saying that the simultaneous denial and employment of rhetoric undermines existing jurisprudence. However, this answer raises a second difficulty: if philosophers of law like Dworkin and Finnis were suddenly to admit their debt to rhetoric and start writing jurisprudence in an overtly figural style, making conscious and elaborate use of puns and plays on words, would this then legitimate their particular jurisprudential projects in the eyes of our authors? Or would they not be equally incensed at the now deliberate use of rhetorical methods to justify what they would probably still consider non-progressive or apologetic conclusions about the legal system?

Students of deconstructive theory might well respond that once scholars like Dworkin and Finnis admitted to the rhetorical basis of their work, they could no longer continue to write legal philosophy in the same way, and the substantive conclusions they reached would therefore also be undermined and transformed. Nevertheless, the likely direction of such a transformation is altogether obscure. We are no more justified in believing that a change in rhetorical method will force philosophers of the law to a progressive change in political or ideological outlook than we are justified in holding the belief, rightly criticised by the authors, that an assiduous fidelity to what is called 'reason' will lead everyone in an identical (and proper) direction. The acknowledgement of reason's debt to rhetoric is more likely simply to create new ways for individuals to disagree with each other. It is likely to create ever new occasions for both critique and apology. In particular, the turn to a self-conscious implementation of the rhetorical underpinnings of jurisprudential argument does not necessarily undermine the Dworkinian advocate of the coherence and unity of the law. One can use rhetoric and narrative to construct a unified, coherent picture of the world just as easily as a fragmented and incoherent one.

Rhetoric in the Legal Academy

If the method of post-structuralist jurisprudential theory is to discover the rhetorical features of legal texts, what are the political and legal consequences of this method? Should we expect that the authors' methods of rhetorical analysis will produce important insights into how the legal system should be organised? For the most part, the book does not offer practical suggestions and the book is largely devoted to rhetorical readings of jurisprudential thinkers. In Chapter Eleven, however, the authors attack the inequities of access to legal services in Britain by deconstructing a text which justifies the present system. Nevertheless, it is quite unclear what deconstruction has added to the force of the critique. The authors would probably be the first to admit that any reasonably intelligent person who shared their politics could generate the same basic criticisms of the system of access to legal services; moreover, the argument they have produced, which is full of multilingual puns and plays on words, could hardly have been designed to convince members of the legal

establishment to mend their ways.

In fact, the authors do not claim that post-structuralist jurisprudence is designed to have particular consequences for law reform. Their own analysis of the political consequences of deconstruction is aimed much more narrowly. They argue that 'jurisprudence addresses primarily, if not exclusively, an academic audience'; hence the 'success [of postmodern jurisprudence] must be judged in this setting, rather than in its reception by some other audience, for example, legal professionals' (p 143). The economy of the academy, they argue, is an economy of ideas: 'In a theoretical field, only theory succeeds, and in a fiercely guarded theoretical-ideological one, counter-ideology may change the dominant paradigm. But we must keep reminding ourselves that success or failure must be judged within the correct language game and audience, that of academics rather than of judges or practitioners' (p 143). To critics 'who question the relevance of deconstruction to the "real world",' the authors respond that '[t]he world of academics is as real as any other, and it is in effecting changes within it, in our case by challenging dominant theories and ideologies, that Marxism or hermeneutics, or deconstruction can be judged. No rhetorical references to some reality out there can change that' (p 144). The authors argue that, judged by these standards, Marxist jurisprudence has not had an effect, not so much because a Marxist political revolution has failed to materialise, but because Marxist jurisprudence 'has failed to make any serious inroads on the jurisprudential orthodoxy.' Although '[p]ostmodern jurisprudence may fail too[,] [t]he site of intervention and the audience . . . are exactly the same for both' (p 144).

It is interesting to compare the authors' views about the political implications of post-structuralist jurisprudence with those recently made by the American post-structuralist legal scholar Pierre Schlag, who has argued in a series of interesting and playful polemics that the entire project of what he terms 'normative legal scholarship' is misguided.² Schlag argues that all legal scholarship which asks the question 'what should we do' about normative issues (which include issues of justice and public policy) is bankrupt for two reasons. First, he argues that judges, legislators and other public officials do not read law reviews. Even if they did, they would be unlikely to believe that post-structuralist philosophy, feminist theory or even law and economics offered the solutions to their problems.³ Second, and more importantly, Schlag argues that normative legal scholarship is a bankrupt enterprise because it rests upon a false picture of the individual. The Enlightenment conception of reason, which presumes free and autonomous subjects who give reasons for their actions and attempt to convince others by giving reasons and appealing to shared values, is wholly mistaken. Decisions about public policy are made by government institutions composed of socially constructed individuals who do not respond to arguments and reasons in the way that Enlightenment ideology imagines. In Schlag's view, it is 'unbelievable' to think that 'we are all self-directing, coherent, integrated, rational, ordinary selves who are engaged in a rational conversation in which we aim to resolve disagreement by resort to normative dialogue.'⁴

Both the authors and Schlag emphasise the non-rational forces and effects which lie behind human decision making and human activity. However, the authors' position differs from Schlag's post-structuralist pessimism in important ways. They do not

2 Pierre Schlag, 'Normative and Nowhere to Go' (1990) 43 *Stanford Law Review* 167; 'Normativity and the Politics of Form' (1991) 139 *University of Pennsylvania Law Review* 801; 'The Problem of the Subject' (1991) 69 *Texas Law Review* 1627.

3 Schlag, 'Normative and Nowhere to Go,' *op cit* at pp 178-179 and n 32.

4 Schlag, *op cit* at p 181.

appear to accept the dissolution of the individual or the explosion of the notion of individual persuasion implicit in Schlag's analysis. Given their emphasis on the power of rhetoric, it is difficult to see how they could do so. Indeed, the book's arguments about rhetoric necessarily assume the persuasive power of language. For them, the key issue is understanding the linkage between the persuasive capacities of language and distinct and limited sites of rhetorical intervention. Where Schlag sees conventional notions of individual persuasion (whether rational or rhetorical) as largely illusory, the authors wish to emphasise that persuasion is necessarily tied to particular social practices and institutions.

The conception of reason and rational argument we have inherited from the Enlightenment has tended to obscure the social embeddedness of reason and knowledge — the fact that both persuasion and the giving of reasons for actions is a distinctly social feature of our lives which is always inscribed in material circumstances, conventional behaviours and ways of living. Although rhetoric and the persuasive arts are conceded to depend importantly on social context, what we call 'reason' is generally viewed as prior to or independent of such influences. Yet if we forget the social embeddedness of reason, we will be tempted to think that a good argument or objection is a good argument or objection no matter who it is delivered to and no matter under what circumstances it is offered. However, we know that this is not always the case. Certain kinds of questions and claims that make perfect sense in one social setting are wildly inappropriate and even bizarre when transferred to another. Consider the epistemologist who engages in a spirited debate with her colleagues in the philosophy department about the reliability of our knowledge of the passage of time. Suppose that as a result of this extended discussion her spouse angrily informs her that she is several hours late for a dinner engagement. If our epistemologist then responds with the same philosophical arguments questioning the validity of her spouse's knowledge claims about time, she will quickly discover that she has entered a very different language game. It may well be true that we cannot ultimately justify our knowledge about time within the language game of philosophy. But in the context of dinner engagements, these speculations are irrelevant and philosophical scepticism is quite out of bounds.

In using rhetoric and reason to persuade others and to understand the world, we do not participate in a single community of persons, nor do we participate in a single language game. We travel in many different circles, and we use language for many different reasons. The epistemologist's conversation with her academic colleague was a language game which concerned the philosophical development of ideas; her conversation with her spouse was a language game organised around social and intimate relations. In our lives, we move easily and seamlessly from one language game to another, usually implicitly understanding the different purposes and therefore the conditions of judgment appropriate in each. However, when we misunderstand the shifts involved in moving from one language game to another, confusion and embarrassment can often arise. Then we become like the relative who, when asked how she is feeling, gives us a detailed account of her recent gall bladder surgery.

This analysis allows us to see how the authors' position differs importantly from Schlag's own postmodernist thesis. One reason that academic writing may have little persuasive effect on legal professionals is that legal theorists and legal professionals increasingly inhabit different language games and constitute different interpretive communities.⁵ But this tells us nothing about the persuasive effects of

5 The term 'interpretive community' has been popularised by the literary critic Stanley Fish. It describes a group of persons who more or less agree about what kinds of questions are relevant to their shared

rhetoric within a particular language game or interpretive community — such as the community of legal scholars. The authors' point is precisely that the meaning and effects of a particular act of rhetoric cannot be deduced from its form but only through viewing it in terms of the site of rhetorical intervention. Because persuasion *across* communities — from the legal academy to the legal profession, for example — often appears to be illusory, one cannot conclude, as Schlag appears to do, that persuasion among individuals must be illusory *within* each community and within each language game. Schlag may well be unable to effect change in the doctrines promulgated by the United States Supreme Court. However, the purpose of his critique is to effect change in the way that legal scholars in the United States write about and think about the law. In that professional community, and in that language game, he may well have some influence. Indeed, there is considerable irony in Schlag's position. The more effective he is in convincing others to abandon normative legal scholarship and adopt his methods, the more clearly he will have shown how individuals can persuade others to action within a specific professional community or a specific language game. Thus, Schlag's ultimate success would entail the falsification of his own thesis.

By contrast, the authors of *Postmodern Jurisprudence* begin with the presumption that the effects of jurisprudential scholarship are wholly situated within the community of scholars, where its successes and failures will be judged. The authors hope to avoid difficult questions about the relationship of post-structuralist jurisprudence to justice by limiting their aim in this way. Nevertheless, although this confession and avoidance solves some problems, it creates still others. If the locus of success or failure of postmodern jurisprudence is the academy, we still need to know what it would mean for postmodern jurisprudence to be successful in such an endeavour. Unfortunately, the authors are not very clear on this score. In the book's introduction, the authors identify their project with that of 'feminist and ethnic critiques' that 'give a voice to the echoes of what has been almost silenced down the long corridors of the time of law' and which 'challenge the white male order of the world and its claim to present a timeless universal rationality' (p xii). They tell us that the goal of their scholarship is 'to enable the voice of the other, the "unrepresentable," not so much to speak (protests have been made) as to be acted upon' (p xiii). Their 'readings of the law of our fathers are designed to legitimate the Oedipal overthrowing that these critiques commence' (p xiii). How could these goals be realised in the limited sphere of legal education? One can imagine a number of specific reforms that would improve the lot of hitherto repressed voices in the legal academy — more appointments of women and ethnic minorities to prestigious positions, for example — but it is not clear whether the authors have anything so concrete as this in mind. Still less is it clear how post-structuralism of the kind they offer in this book will help to achieve gender or ethnic justice even within the limited arena of the academy. One leaves this book, then, with the sense of an agenda uncompleted, with explanations not fully given. The authors need to tell us much more about how their project could be vindicated before we can ascertain whether theirs is truly a rhetoric of justice or just rhetoric.

practices and what standards of judgment should be employed in resolving them. See Stanley Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (Cambridge: Harvard University Press, 1980).