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Eugene Garver

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Justice, Play, and Politics

by Eugene Garver*

*Justice as Play*¹ is a highly illuminating gloss on Coke's idea of the law as "artificial reason," and one of its merits is that it is equally about the law as artificial and as reason. While he leans on Huizinga to talk about justice as play, Jack Sammons deepens the analogy by another meaning of play, celebrating the venerable connections between the trial and the drama as relatively insulated arenas for developing alternatives to the existing political order. According to Jack, legal argument can be regarded as play because of that relative insulation. So I want to turn from judicial to deliberative and political reasoning and ask whether it too can be regarded as play, in spite of its not having several of the features that Jack singles out to make his analogy.² To be quite unfair to *Justice as Play*, one could say that it argues that justice, and legal argument, is play because political argument is not. I am interested in what we can learn about political argument from thinking about legal argument as play.

I also want to ask a question Jack does not ask: if legal argument is a game, what sort of game is it? Justice, as embodied in trials and other legal proceedings, is a very peculiar sort of game. One set of people plays and another pays. The best analogy I can think of is cock-fighting. In addition, one often has to participate, while in most games, playing is optional. So I want to use *Justice as Play* as a place to look at the nature of representation.³

Justice is play because it has a certain freedom from politics, a freedom that, as Jack notes, is a privilege granted by the political

* Regents Professor of Philosophy Emeritus, Saint John's University (Minnesota). University of Chicago (A.B., 1965); University of Chicago (Ph. D., 1973).

1. Jack L. Sammons, *Justice as Play*, 61 *MERCER L. REV.* 517 (2010).

2. I use deliberative and political as synonymous adjectives for one kind of rhetoric, and judicial and forensic for the other.

3. It is true, as Sammons has written elsewhere, that legal ethics calls for certain participation by clients, but not in presenting legal argument. There the client speaks only through the attorney. See, e.g., JACK L. SAMMONS, *LAWYER PROFESSIONALISM* (1988).

community.⁴ A cynic might argue that relative autonomy opens up a space for a non-threatening venting of ideas that would be dangerous if taken seriously.⁵ This is play as the contrary of the serious, so one challenge for someone treating justice as play is to show how its ludic aspects don't make it frivolous.

The analogy to tragic drama brings out one respect in which legal argument is artificial reason. The participants who meet as adversaries are actors. They separate their dramatic personae from the identities they have outside the courtroom. They speak for other people. They speak in a stylized, artificial language that is designed to make everyone constantly aware of the artificiality and conventional nature of the combat. Aristotle insists that the *ethos* that is the most authoritative source of proof be an *ethos* constituted by argument, not antecedent reputation. The evident artificiality of the courtroom promotes the recognition of this artful *ethos*. Jack expresses the artificial and so self-contained nature of legal argument beautifully:

The judge and jury are to do nothing that would render the "we" whose definition is at issue static and known, nothing that would render the "persons" appearing before the court anything less than the singularities they are, and nothing that would jeopardize the open and ongoing nature of the conversation. We give the most credence, as did the Greeks, to those decisions that are made in public in conscientious avoidance of these prior commitments.⁶

Put in more usual vernacular language, judges don't legislate from the bench. Even when an equitable decision corrects the laws, it only corrects them for that particular case. More generally, legal argument and the judicial decision are temporary islands of definiteness in a sea of prior and posterior indeterminacy. The good legal argument and decision leave the world as indeterminate as they find it.

4. Sammons, *supra* note 1, at 530.

[W]e think we know—we need mention only the frequent censorship of theatre throughout history in the name of security—that the theatre and the legal conversation could be threats to the polity precisely *because* they have the alterity they do. When the political claims that it *is* the polity, as the political almost always does, this alternative polity of rhetoric, however it might be understood, would seem unambiguously to need political control.

Id.

5. Please note that when I contrast Jack with Aristotle, this is not a criticism of Jack for failing to say what Aristotle says. Jack is as little a typical contemporary American as Aristotle was a typical Greek of his time, but their differences do tell us something about the contemporary situation.

6. Sammons, *supra* note 1, at 547.

The artificial character of rhetoric is clearer in judicial than in deliberative argument. The audience knows that lawyers are advocates for their clients. But the audience has to evaluate the arguments as making a case for the justice of their client's cause, not the performance of actors. To anticipate, representation here is transparent—we see through the lawyer to the client. We have to ignore the fact that lawyers' statements are interested by concentrating on the characters the actors play, and refusing to acknowledge that they are players. This is, in Coleridge's term, the suspension of disbelief.

In *Rhetoric* III Aristotle offers the common maxim that the best art conceals the fact that it is art, and the best rhetorician looks natural. Judicial rhetoric is an exception. Judicial rhetoric has to be a game that makes its artificial nature clear through the formalities that insure that we don't conflate the actor with his role, just because the audience has to be made to care about the best result. They themselves have nothing at stake and so might favor one party over another for all sorts of extrinsic reasons. That is, in judicial rhetoric, unlike deliberative rhetoric, they might make a judgment solely on the performance values of the contenders, judging them, as we might say, aesthetically rather than judicially. Jurors shouldn't award style points. The artifices of the trial might invite them to do just that, but Aristotle sees it the other way around. Formality generates solemnity that makes the jurors take their job seriously. One hint of how people can be made to care about the just result, rather than praise the best performance, comes in *Rhetoric* II: people "do not praise the same things openly as they do secretly [*ou phanerōs kai aphanōs*] but to a great extent praise the just and [the noble] while privately they wish rather for what is to their advantage."⁷ The artificiality and formality of judicial rhetoric encourages people to praise the just and the noble.

The analogy to play exposes the ambiguity here. The judge and jury are supposed to decide on the evidence, but can't be counted on not to be attentive to the pleasures of performance detached from any sense of justice to the contending parties. In the same way, the American system of judicial rhetoric engages professional adversaries supposedly in the interests of equality, so that the decision does not depend on the skill of the parties, which is irrelevant to the rights and wrongs of the case, but the inequalities of advocates just replaces that of the clients.

In an excerpt I will return to, Jack says:

Clients with strong and strongly conflicting intentional goals—often understood by themselves as principled differences—represent the

7. ARISTOTLE, ON RHETORIC 198 (George A. Kennedy trans., Oxford Univ. Press 1981).

ancient risk of a return to violence. What the lawyer does, then, is what the Greek rhetorician did: translate this potential for violence into a literary game that is always a conversation about the community itself. The lawyer does this, while keeping the clients together within the community, by speaking to it for them. Just as before, what stands between right and might, between justice and power, between conversation and violence, is a game. This game is only sustainable, however, because of the willingness of others, most especially the political other, to attribute justice to the judgment of an audience of judges and jurors—people intentionally removed from the ways in which we most commonly make our decisions.⁸

Lawyers “translate this potential for violence into a literary game.”⁹ Jack’s picture strikes me as too rosy. Zealous advocates can turn a disagreement into something much more polarized, something that turns out to have more potential for violence than the original dispute. Rights are heavier weapons than desires. Even when advocates and their clients are fully committed to accept the verdict of a judge—and that is not always the case—the game of justice can as easily raise the temperature and the stakes of a dispute as cool it off. Lawyers represent clients by amplifying their voices. To the extent that law does not involve violence, it is because politics does.

Legal argument is artificial in another way. Justice is reduced to the justiciable. Controversies are only justiciable if two parties can participate. Harms, no matter how serious, lie where they fall unless you can find someone else to blame. An act of God is not justiciable. If a defendant is not competent to assist in his own defense, or if the government cannot defend itself without revealing secrets, there may be justice involved, but not legal justice. “Political questions” are not left to judicial decisions.¹⁰ Therefore, “Lawyers as advocates have often insisted that the justice that is their responsibility is a world apart from

8. Sammons, *supra* note 1, at 544.

9. *Id.* Contrast Schmitt: “The essence of liberalism is negotiation, a cautious half measure, in the hope that the definitive dispute, the decisive bloody battle, can be transformed into a parliamentary debate and permit the decision to be suspended forever in an everlasting discussion.” CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 63 (George Schwab trans., 2005). And consider Kahn’s comment: “Liberalism’s political sin is the belief that it can always be inclusive because talk will lead to understanding, and understanding to agreement. Sometimes more talk just leads to more disagreement.” PAUL W. KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 135 (2011).

10. *Baker v. Carr*, 369 U.S. 186, 217 (1962). “Legal rhetoric, for example, considers only those disputes that must be decided; it also insists, at least in the form that emerges from the Greeks, that the actual disputants meaningfully participate in the presentation of the narrative and in resolution of the dispute.” Sammons, *supra* note 1, at 532 n.95.

the actual and that this justice is approachable only indirectly, perhaps metaphorically, through the procedures and argued alternatives of adversarial rhetoric rather than directly through dogma."¹¹ I will return to the idea of metaphor later. I will also question the idea that the alternative to adversarial rhetoric is "dogma." There are more alternatives available. First, we are told that the alternative to law is violence; here it's dogma. In both cases, politics and legislation is a further alternative.¹²

There is another side to law as artificial reason that the analogy to games could illuminate. The combat in the legal trial is limited, which is why it is seen as an alternative to violence. When the case is over, the lawyers take off their masks and return to their normal lives. Except in the case of capital punishment, even the clients engage, through their surrogates, in limited combat. They might lose all their money or reputation, but they are able to go on to participate in further litigation.¹³ They continue as members of the community.¹⁴ In an age of total war, legal controversy is always limited. For this I turn to Jonathan Shay:

Democratic process embodies the apparent contradiction of *safe struggle*. . . . Democratic process entails debate, persuasion, and compromise. These all presuppose *the trustworthiness of words*. The moral dimension of severe trauma, the betrayal of "what's right," obliterates the capacity for trust. The customary meanings of words are exchanged for new ones; fair offers from opponents are scrutinized for traps; every smile conceals a dagger.

Unhealed combat trauma—and I suspect unhealed severe trauma from any source—destroys the unnoticed substructure of democracy, the

11. Sammons, *supra* note 1, at 522 n.34. Also, quoting Huizinga:

We moderns cannot conceive justice apart from abstract righteousness, however feeble our conception of it may be. For us, the lawsuit is primarily a dispute about right and wrong; winning and losing take only a second place. Now it is precisely this preoccupation with ethical values that we must abandon if we are to understand archaic justice.

Id. at 520 (quoting JOHAN HUIZINGA, *HOMO LUDENS: A STUDY OF THE PLAY-ELEMENT IN CULTURE* 78 (Beason Press 1955)).

12. KAHN, *supra* note 9, at 19. "Politics does not put the security of law in place of the violence of the state of nature; rather, it brings sacrifice in place of murder." *Id.*

13. The exclusion of felons from voting, and so from citizenship, is another exception, an exception that is not a mark against the theory but instead shows that that exclusion is at odds with the rule of law. The Constitution bars corruption of the blood.

14. The ancient practice of ostracism is a fascinating exception.

cognitive and social capacities that enable a group of people to freely construct a cohesive narrative of their own future.¹⁵

There is one way in which law differs from games. Law has enough distance from justice as the subject of political, as opposed to legal, dispute that parties can either identify legal justice with justice or distinguish the two. Imagine how oppressive the world would be if justice was simply the outcome of legal process and if the law was the only language of justice. A Miami Heat fan cannot credibly maintain, after the 2014 NBA Finals, that the Heat is really the better team. But a losing party in a legal controversy can always maintain that.¹⁶ Maine claims that Greek law and rhetoric was not able to make that separation:

One of the rarest qualities of national character is the capacity for applying and working out the law, as such, at the cost of constant miscarriages of abstract justice, without at the same time losing the hope or the wish that the law may be conformed to a higher ideal. The Greek intellect, with all its nobility and elasticity, was quite unable to confine itself within the strait waistcoat of legal formula; and, if we may judge them by the popular courts of Athens of whose working we possess accurate knowledge, the Greek tribunals exhibited the strongest tendency to confound law and fact. The remains of the Orators and the forensic commonplaces preserved by Aristotle in his *Treatise on Rhetoric*, show that questions of pure law were constantly argued on every consideration which could possibly influence the mind

15. JONATHAN SHAY, *ACHILLES IN VIETNAM: COMBAT TRAUMA AND THE UNDOING OF CHARACTER* 180-81 (1994) (second emphasis added). Shay's comment that "the customary meanings of words are exchanged for new ones" is reminiscent of Thucydides's observation that in the madness of war "words lose their meaning." See JAMES B. WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTRUCTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* (1984); LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 117 (1986) ("[A] willingness to compromise and . . . even to accept total defeat are essential components of the democratic personality. Democracy, like literature, . . . requires a kind of suspension of disbelief. At the norm-setting level, as well as at the enforcement level, a capacity to contain one's beliefs in the interest of maintaining a continuing community is critical. The problem of deciding on the nature of the commitment to one's belief is one of exquisite complexity.").

16.

By the end of the twentieth century, not only had we depersonalized the sovereign, but the West had taken a decisive turn toward the rule of law as the single source of political order. A modern constitution imagines no political situation or action to which the law does not apply; it can imagine nothing that cannot be evaluated as a matter of law.

KAHN, *supra* note 9, at 54. My examples of incompetent defendants and the government mooting a case on the grounds of national security are exceptions to Kahn's claim.

of the judges. No durable system of jurisprudence could be produced in this way.¹⁷

Let me turn to political argument. Judicial rhetoric has a determinate subject-matter, justice, because of its subordination to political rhetoric. Political rhetoric has nothing to be subordinate to, except the way of life that defines a particular community.¹⁸ Therefore Aristotle says that deliberative rhetoric is nobler and more worthy of a statesman.¹⁹ The subject of deliberation is the human good, and that is a subject too important to be subjected to rules. The challenge is to make political rhetoric limited in the sense that Shay uses, while not limited in subject. It is a contained and limited struggle about the human good. The lack of determinate subject-matter changes the relation between speaker and audience. Because of the indefinite subject of political rhetoric, instead of seeing deliberation as corrupt because the judges are interested—which would disqualify them as arbiters, and therefore disqualify deliberation as a game—Aristotle sees deliberation as superior and less corruptive just because its judges are interested. What would be a bribe for a judge in a judicial setting becomes an incentive in deliberative rhetoric. While he thinks that good laws will exclude irrelevant emotional appeals from judicial argument, Aristotle argues that deliberative reasoning needs no such procedural rules: *ethos* is the most persuasive of appeals, and it is right that it be so. When contemporary theories of public reason seek to bar discussions of the characters of the speakers, they reduce political to judicial reasoning.²⁰ Law may be, as Aristotle says, thought without

17. HENRY MAINE, *ANCIENT LAW: ITS CONNECTION TO THE HISTORY OF EARLY SOCIETY* 44 (Cosimo 2005) (1861).

18. The way of life is what Aristotle means by constitution. ARISTOTLE, *THE POLITICS* 180 (Ernest Baker ed., Oxford Univ. Press 1948). A modern written constitution limits the scope of deliberative rhetoric by announcing what politics may not do, while Aristotle's constitution limits the scope by orienting deliberation towards an end, such as freedom or wealth, embodied in the constitution.

In a courtroom or in private relations, one might demand justice, the consequences be damned. But *fiat justitia, pereat mundi* is almost impossible to sell in political deliberation—unless one is speaking to a group that shares a set of religious convictions that makes the end of the world seem like a means to a transcendently good end.

Bernard Yack, *Rhetoric and Public Reasoning: An Aristotelian Understanding of Political Deliberation*, 34 *POL. THEORY* 417, 422 (2006). I remember people, and I may have been one of them, who thought that immediate and unconditional withdrawal from Vietnam was the right policy, consequences be damned. So, while I think Yack's point remains sound, it is less categorical than he makes it.

19. See ARISTOTLE, *supra* note 7, at 31.

20. Thus, according to Rawls, attacks on character or self-interest amount to "an intellectual declaration of war" that makes it impossible to regard speakers as arguing in

desire (*nous aneu orexis*),²¹ but political deliberation is desiring reason or rational desire.

Political argument, unlike legal argument, has nothing to be subordinate to. Consequently, we can't separate the good as the product of political argument from the good as such, as we can separate legal justice from justice as such. Consider, for example, these lines from Justice Jackson's opinion in *Williamson v. United States*:²² "[T]he very essence of constitutional freedom of press and of speech is to allow more liberty than the good citizen will take. The test of its vitality is whether we will suffer and protect much that we think false, mischievous and bad, both in taste and intent."²³ Jackson shows that legal justice itself erects a distinction between itself and justice more broadly considered. There is no parallel distinction between political utility and utility in general. Law may have an internal morality, but politics can't. It just has morality, not a morality external to it, because political morality is the only morality there is.²⁴

Take again the example of a lawsuit that is quashed because the government claims that for it to defend itself would force it to reveal secrets that endanger national security. There is then no controversy, and so no legal justice is possible. But that leaves the question of justice—real justice, actual justice—untouched. Deliberation aims at deciding on the most useful course of action. There is no form of advantage that is cabined by deliberative rhetoric but which falls short of true good. The procedural rules necessary for political argument do not produce their own form of fairness or their own good. They are purely instrumental means for doing one's best to get the best decision in the circumstances. Contemporary formulations of public reason conflate deliberative with judicial reasoning by making procedural rules substantive. Good laws limit the subject of judicial reasoning by taking as much as possible off the table; proposals to limit deliberative reasoning to things on which all can reasonably agree try to do the same for political rhetoric.²⁵

good faith. John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y. U. L. REV. 233 (1989).

21. ARISTOTLE, *supra* note 18, at 146.

22. 184 F.2d 280 (2d Cir. 1950).

23. *Id.* at 283. Compare Aristotle's statement that the just man will take less than what he's entitled to.

24. LON FULLER, *THE MORALITY OF LAW* (rev. ed. 1969).

25. Yack, *supra* note 18, at 418.

Public reason in these models is a constrained reason, a form of deliberation that sharply limits both the form and substance of political argument to facilitate cooperation among free and equal individuals. Aristotelian public reasoning, in

Judicial rhetoric, even if it fails to uncover the truth about what happened, is still defensible as it protects the rights and dignity of the parties and makes conflict manageable and finite. Political rhetoric can't take those justifications as sufficient, and in that sense it is not a game. Even if voting is a substitute for violent conflict and makes us treat citizens as fellows and not enemies, we all have a stake in getting the answers right. In judicial rhetoric only the parties have something at stake, and the rest of us can be complacent as we watch justice be done, even at the cost of being indifferent to whether it is true justice or not. In both cases, there can be a tension between the ideals of equal participation and of getting the best answer, but that tension is resolved differently in the two cases, with equality taking priority in judicial rhetoric and the best answer in political discourse.²⁶

The *Rhetoric* makes judicial rhetoric subordinate to political argument, not to set it free within a limited sphere, but because the laws should decide as much as possible, leaving to judges (and juries) only that judgment of particulars about which the law cannot speak. Instead of praising judicial rhetoric for its civilizing effects, Aristotle wants to limit its operation as far as possible.²⁷ Similarly, where Jack sees the

contrast, lacks such constraints. It draws its premises from the whole range of "reputable opinions," rather than from the limited number of premises that could, at least in principle, command reasonable assent of all members of the community.

Id. at 417-18 (footnote omitted); see also ARISTOTLE, *supra* note 7, at 32-37. ARISTOTLE, TOPICS 5-6 (W.A. Pickard-Cambridge trans., Digibooks.com 2006).

26. Therefore Aristotle warns against the dangers of emotional appeals in judicial rhetoric. The jury has no personal stake in the outcome and so can be moved by extraneous appeals. In political argument, he thinks that self-interest makes judges less vulnerable to emotional distraction.

27. Sammons, *supra* note 1, at 531.

In [Aristotle's *Rhetoric*] legal rhetoric is to be considered as subsumed by the deliberative and is good only when and because it is in the service to those judgments that arose from the deliberative (which, given his assumption of an audience acting as good citizens, it should always be). He did not see the alterity of legal rhetoric as a potential threat to the polity because he did not think of it as separate from the political, but as fully subordinated to it.

Id. "If we see our game as seeking an external justice, it is a matter of Huizingan 'righteousness,' and as he rightly observes, being no longer a true game it will fail to civilize us as true games can." *Id.* at 542.

Law reflects but in no sense determines the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.

GRANT GILMORE, THE AGES OF AMERICAN LAW 110-11 (1977).

relative autonomy of legal argument, and of drama, as providing a space for criticism, Aristotle sees no such thing. Equity is not critical of justice; it corrects it in a particular case.²⁸

The judicial decision does not criticize politics and the laws partly because Aristotle is such an unhistorical thinker. So let me make the relation of political and judicial reasoning more historical. While Tocqueville is constantly quoted with approval when he says that “[t]here is hardly a political question in the United States which does not sooner or later turn into a judicial one,”²⁹ the reverse is also the case. If the verdict in a trial does not correspond with democratic conceptions of justice, the people can turn to legislation to overturn the verdict. *Roe v. Wade*³⁰ may be settled law, but it isn’t settled justice. *City of Boerne v. Flores*³¹ is no longer good law because Congress has overridden it in the Religious Freedom Restoration Act of 1993 (RFRA).³² Thus crimes come into and go out of existence as law and political argument decide what can be adjudicated. Spousal abuse, sexual harassment, insider trading, and price fixing were not crimes in the past. Abortion was criminalized and then decriminalized. Politics decides too what will not be a judicial issue, giving immunity to gun manufacturers.³³

Maine captures this phenomenon perfectly: “That ‘all men are equal’ is one of a large number of legal propositions which, in progress of time, have become political.”³⁴ Therefore, in the passage I quoted earlier, Jack says that “clients with strong and strongly conflicting intentional goals—often understood by themselves as principled differences—represent the ancient risk of a return to violence.”³⁵ But violence is not the only alternative. Politics is another. At this point, the ludic nature of legal argument is overcome; justice according to law is not good enough.

28. “[F]or Aristotle the equitable judgment is still interpretation of the positive law itself, not of some independent and superior norm that would have to be called moral, for instance.” Richard Bodéüs, *The Natural Foundations of Right and Aristotelian Philosophy, in ACTION AND CONTEMPLATION: STUDIES IN THE MORAL AND POLITICAL THOUGHT OF ARISTOTLE* 73 (Robert C. Bartlett & Susan D. Collins eds., 1999).

29. ALEX DE TOCQUEVILLE, *Democracy in America, in DEMOCRACY IN AMERICAN AND TWO ESSAYS ON AMERICA* 1, 315 (Gerald E. Bevan trans., Penguin Books 2003).

30. 410 U.S. 113 (1973).

31. 521 U.S. 507 (1997).

32. 42 U.S.C. §§ 2000bb to 2000bb-4 (2012).

33. KAHN, *supra* note 9, at 34. “The quality of the exception is always one of self-limitation: the exception cannot become normal. Nevertheless, the nature of norms is such that the exception is always subject to normalization: law will seek to extent to the exceptional decision.” *Id.* (footnotes omitted).

34. MAINE, *supra* note 17, at 54.

35. Sammons, *supra* note 1, at 544.

The idea of the law as artificial reason, or justice as play, is a half-truth. Legal argument does not fit the model of games because legal argument always occurs in a context of precedents.³⁶ Each game of chess, and each Ice Dancing competition, begins with an empty scoreboard. This is true even if my son gives me a pawn or two before we start playing. (Chess, not ice dancing.) In this regard, Jack, like Aristotle, is not historical enough. For that reason, I would question the image I used before that legal argument and the legal decision leave the rest of the world untouched. Each decision partly structures the problems and solutions that can be encountered later.

I want to look at two further features of political argument that emerge through a contrast to the aspects of judicial rhetoric that Jack highlights. The first is the nature of representation; the second will be the nature of expertise or proficiency. I mentioned at the beginning that if judicial argument is a game, it is a strange one because one set of people plays and another pays, wins, and loses. In fact, one great difference between political and legal argument today and in Aristotle's time is that today both political and legal argument are carried on by representatives. We live in a representative democracy, and retain attorneys to carry on the game of legal combat in our names.³⁷ Unlike poetic representations, both political and legal representation is always transparent. Watching Shakespeare's history plays, our judgment is

36. *Id.* at 542. "Arguments appealing to statute and precedent were, at rock bottom, arguments about integrity, faithfulness, fairness, and so forth. They were, in other words, also narrative claims about the character of the community offered in opposition to other narrative claims about the character of the community." *Id.*

37. J.E. GREEN, *THE EYES OF THE PEOPLE: DEMOCRACY IN AN AGE OF SPECTATORSHIP* 68 (2010).

The history of democratic practice prior to the birth of representative democracy was so dominated by the institutionalization of the People as an actual legislative assembly that it was difficult for philosophers of the new representative system to imagine the People playing any other role, even if the very structure of representative government ought to have inaugurated precisely such a rethinking.

Id.

I disagree with Green first because until democracy became representative democracy, with the single exception of Athens, democracy was more a term of opprobrium than of reference, and second because Hobbes did engage in such rethinking. The better point is [i]f early theorists of representative government—especially French thinkers like Sieyès, Constant, and Guizot—always treated representation as much as a check upon popular power as a device for extending it, in the following generations of the nineteenth century and beyond, when formal aristocracy had altogether receded from social life and voting rights became gradually universalized, representative government was widely interpreted as a fully democratic institution that served, rather than restricted, the power of the People.

Id. at 70-71.

about Shakespeare's characters, not the actual kings they represent.³⁸ "[A] symbol is not a source of information about what it represents, does not depict or make allegations."³⁹ Legal argument is supposed to lead to a judgment not of the lawyers but of the claimants and the merits of their cases, and political argument too leads to a decision about what to do, not about which speaker is preferred.

Representation then makes the situation of argument more complicated. Three sets of people are involved: the parties who go to court for justice, the lawyers who represent them, and the judges to whom representations are made. If justice is play, it is the sort of game that has judges who decide who the winners are, not just referees who insure fair play. Political argument, by contrast, maintains the fiction that the first and third sets of people are identical: the people affected by a decision are those who make the decision, even if a different group of people make the arguments. There are no neutral judges.

Representation means something different in political and in legal argument, and I suggest that the differences are best understood by thinking about representation as a trope.⁴⁰ These figures of speech give political and legal argument a degree of freedom from claims to a literal truth, the freedom that Jack highlights; the fidelity to reality of rhetorical argument remains but becomes more indirect.⁴¹ The lawyer represents her client by metaphor, which is why the game of legal argument advertises its own artificiality.⁴² In the long passage I quoted

38. Pitkin argues that representation begins in judicial argument, and then since early Parliaments were courts, was transferred to political argument.

The communal consent to taxation became linked with a Roman-law doctrine that all parties having something at stake in a civil case had a right to participate in, or at least to attend, its trial. With Parliament being considered a court, the idea came easily that the communities had a right to participate in the levying of taxes, since they had something at stake in the decision.

HANNA FENICHEL PITKIN, *The Concept of Representation*, in REPRESENTATION 1, 3 (Hannah Fenichel Pitkin ed., 1969) (footnotes omitted).

39. *Id.* at 12.

40. "Basically, as the word's etymology suggests, 'representation' means 're-presentation,' a making present of something absent—but not making it literally present. It must be made present indirectly, through an intermediary; it must be made present in some sense, while nevertheless remaining literally absent." *Id.* at 16. "Thus, too, rhetoric dresses itself up in the form of politics, as do those who pretend to a knowledge of it. . . ." ARISTOTLE, *supra* note 7, at 39.

41. For this indirect relation to reality, see my "Aristotle" in OXFORD HANDBOOK OF RHETORICAL STUDIES (Michael MacDonald ed., forthcoming 2015).

42. THOMAS HOBBS, THE LEVIATHAN 17-18 (Prometheus Books 1988) (1651) ("The names of such things as affect us, that is, which please, and displease us, because all men be not alike affected with the same thing, nor the same man at all times, are in the common discourses of men, of *inconstant* signification. . . . And therefore such names can

earlier, Jack talks about legal argument “translat[ing] this potential for violence.”⁴³ Legal representation is metaphorical; someone represents a principal by translating—the Latin for metaphor—the combat from one arena to another.⁴⁴ Advocates translate desires into rights, a language that allows for adjudication rather than combat. At the same time, this translation deletes the intensity of desire, which is not taken up into the validity of the claim to a right or wrong. As I said before, the American system of judicial rhetoric engages professional adversaries supposedly in the interests of equality, so that the decision does not depend on the skill of the parties, which is irrelevant to the rights and wrongs of the case, but the inequalities of advocates can replace that of the clients. Rhetoric has from the beginning been both an alternative to force and its own form of coercion; here it both renders parties equal and unequal.⁴⁵

By contrast, the member of Congress, or the President for that matter, represents the people by synecdoche, by a part standing for the whole, a replica of the realm. Each speaker in deliberative rhetoric claims to

never be the true grounds of any ratiocination. No more can Metaphors, and Tropes of speech: but these are less dangerous, because they profess their inconstancy. . . .”). For the relations of lawyers to their personae, see JOHN NOONAN, *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS* (1976).

43. Sammons, *supra* note 1, at 544.

44. In Aristotle’s third genre of rhetoric, epideictic, representation becomes imitation. Its master trope is not metaphor or synecdoche but metonymy: “I pledge allegiance to the flag and to the republic for which it stands.” I develop ideas of epideictic rhetoric in *The Way We Live Now: Rhetorical Persuasion and Democratic Conversation*, 63 *MERCER L. REV.* 807 (2012).

45. David Luban, *Lawyers as Upholders of Human Dignity (When They Aren’t Busy Assaulting It)*, 2005 *U. ILL. L. REV.* 815, 819.

Once we accept that human dignity requires litigants to be heard, the justification of the advocate becomes clear. People may be poor public speakers. They may be inarticulate, unlettered, mentally disorganized, or just plain stupid. They may know nothing of the law, and so be unable to argue its interpretation. . . . None of this should matter. . . . Just as a non-English speaker must be provided an interpreter, the legally mute should have—in the very finest sense of the term—a mouthpiece.

Thus, [the] argument connects the right to counsel with human dignity in two steps: first, that human dignity requires litigants to be heard, and second, that without a lawyer they cannot be heard.

Id. Contrast James Bohman, *Deliberative Democracy and Effective Social Freedom: Capabilities, Resources, and Opportunities*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* 331, 332 (James Bohman & William Rehg eds., 1997) (“Deliberative democracy should not reward those groups who simply are better situated to get what they want by public and discursive means; its standard of political equality cannot endorse any kind of cognitive elitism.”).

speaking for the whole, to represent the community.⁴⁶ Each, therefore, accuses the other of representing a faction. In judicial rhetoric, it is assumed that there is such a difference of interest as well as perspective—and parties can argue not for a common good but for what they themselves deserve. A deliberative appeal assumes—and in the best argument the argument itself makes the assumption come true—that the deliberative body and the community have a single interest that is to be represented. Judicial rhetoric has to translate a client's desires and hopes into the technical language of rights; no such translation is needed for political rhetoric. Instead, we argue about whether some object of desire is a common good. In judicial rhetoric, each speaker represents a client. No one represents justice or the community. No one "speaks for England," as Arthur Greenwood was urged to do in the House of Commons in 1940.

Deliberative rhetoric consists in a clash of competing synecdoches, competing arguments that purport to stand for the whole community and the common good. Judicial rhetoric features a clash of competing metaphors, and the judges choose which metaphor stands for a contested reality. Synecdoche depends on each member of the assembly assuming an identity between his own good and that of the whole.⁴⁷ Lawyers and judges can be professionals, but not politicians. I've insisted on rhetoric as a civic art, a craft necessarily practiced by citizens; here one can say

46. There are other ways of representing the whole than through argument. Writing of Weber's charismatic leader, Green says:

[T]he People does not *choose* the charismatic leader so much as acknowledge him or her. . . . Thus Weber can write of the pure bearer of charisma that "he does not derive his right from [the charismatic community's] will, in the manner of an election. Rather, the reverse holds: it is the *duty* of those to whom he addresses his mission to recognize him as their charismatically qualified leader."

GREEN, *supra* note 37, at 147 (quoting MAX WEBER, *Sociology of Charismatic Authority*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 245, 246-47 (H.H. Gerth & C. Wright Mills eds., reprt. 1972) (second alteration in original)).

47. Since Aristotle's time, and really since the modern invention of the state with Hobbes, factions have gone from a disease which a good constitution will purge, to what Hume called parties of principle, modeled on theological disputes, to parties as institutionalized organs of the state, with various interest groups having their own government department. Rousseau followed ancient Athenian practice by asserting that deliberation required that citizens not talk to one another before voting, since persuasion causes factions and occludes the general will. For Rousseau, the sovereign general will, like God, cannot be represented; all representation is faction. This has been a history of changes in the meaning of the synecdoche of representation. KAHN, *supra* note 9, at 15. "[I]f the sovereign is he who decides, a system in which no political actor can make an uncontested claim to be sovereign is one that cannot localize the power to decide." *Id.* Under the rule of law, "[t]he sovereign is displaced from view, lingering at best as a mere abstraction—popular sovereignty—but not capable of any concrete intervention." *Id.* at 32.

that political representation is also civic in a way legal representation need not be.⁴⁸

Unlike the politician, because the legal representative must insist on a difference between his persona and his person,⁴⁹ the legal advocate may do things that otherwise would be illegal and immoral. Legal representatives have privileges of immunity from liability because of the representative relation between agent and representative.⁵⁰ Acts that would otherwise be assaults are part of the game, if the game is ice hockey. Making the weaker case appear stronger is a duty in judicial rhetoric, but in deliberative situations it is a reason to put Socrates to death.

The prohibition against vouching for one's client makes no sense in political rhetoric.⁵¹ There is nothing parallel to contempt of court for political rhetoric. In arguing about legislation, we can either talk about the intent of the legislators—original intent—or the intent of the voters—original meaning. This is a dispute about how to define the people represented in politics. In political rhetoric, there is nothing equivalent to a frivolous claim or argument. Rick Perry can run for President by asserting that Al Queda and ISIS have infiltrated the United States through the border with Mexico, and there is no judge to sanction him. There is nothing equivalent for deliberative rhetoric to the adage that “a man who is his own lawyer has a fool for a client.” A political representative cannot be sanctioned for providing ineffective counsel. Because a member of Congress represents a whole community, none of us can complain that what he does in our name is not what we

48. EUGENE GARVER, *ARISTOTLE'S RHETORIC: AN ART OF CHARACTER* (1994).

49. MODEL RULES OF PROF'L CONDUCT R. 1.2 (2011) (“A lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities.”).

50.

[L]awyers are in most jurisdictions absolutely immune from tort liability for defamatory statements that they make in court. Similarly, although a little more broadly, lawyers are expressly protected against certain forms of legal liability that might otherwise attach to persons who do what lawyers do for their clients: A lawyer who encourages a client to breach a contract is not liable to the client's promisee for tortious interference with contract; a lawyer who gives legal advice to a corrupt business is not guilty of racketeering; and, more broadly still, a lawyer who gives good faith legal advice cannot be held liable as an accessory to tortious actions that her client takes on the basis of this advice.

DANIEL MARKOVITS, *A MODERN LEGAL ETHICS: ADVOCACY IN A DEMOCRATIC AGE* 32 (2008) (footnotes omitted).

51. Thomas L. Shaffer, *The Legal Profession's Rule Against Vouching For Clients: Advocacy and "The Manner That Is the Man Himself,"* 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 145 (1993).

want and declare ourselves not bound by a law he has made. In fact, the first great theorist of representation, Hobbes, wrote in response to just this problem: how can masters authorize a sovereign and thereby become masters no more? Because of the difference between metaphor and synecdoche, a judicial representative can represent anything, a bridge, one of Hobbes's examples, or an endangered species, or a corporation.⁵² On the other side, you have to be represented to be a party to a lawsuit, but you don't have to be represented to be a citizen. Citizens need to be represented to be heard. I am represented by someone in a legislature, whether I voted for her or not, and indeed whether I voted or not. She still does things in my name. Voting a representative out of office is not like firing one's attorney. In court, a party always has the right to represent herself, while no one has that right in a representative democracy. The sovereign people never appear in an unrepresented form, just as Hobbes argues that God is silent and speaks only through being represented.⁵³

[T]hough God Almighty can speak to a man, by Dreams, Visions, Voice, and Inspiration; yet he obliges no man to believe he hath so done to him that pretends it; who (being a man) may erre, and (which is more) may lie.⁵⁴

When we give up on politics and ask experts to decide on the best way to solve economic problems or problems of social welfare, those experts do not represent us. We delegate the decision to them, and so they make

52.

There are few things, that are incapable of being represented by Fiction. Inanimate things, as a Church, an Hospital, a Bridge, may be personated by a Rector, Master, or Overseer. But things Inanimate, cannot be Authors, nor therefore give Authority to their Actors: Yet the Actors may have Authority to procure their maintenance, given them by those that are Owners, or Governours, of those things. And therefore, such things cannot be Personated, before there be some state of Civill Government.

HOBBS, *supra* note 42, at 84-85. Corporations, therefore, can be persons because they can be "personated" for purposes of judicial argument, since they can be represented metaphorically, but not in deliberative argument, since they are not parts of a whole represented by a part through synecdoche.

53. JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 159 (1999) ("Respect has to do with how we treat each other's *beliefs* about justice in circumstances where none of them is self-certifying, not how we treat the truth about justice itself (which, after all, never appears in politics *in propria persona*, but only—if at all—in the form of someone's controversial belief."); GREEN, *supra* note 37, at 79 ("[A] repeated metaphor in *The Federalist Papers* is to liken the decisions of representative institutions to *reason*, and the unmediated forays of the People into direct governance as *passion*.").

54. THOMAS HOBBS, *LEVIATHAN* 271 (A.R. Waller ed., Cambridge Univ. Press 1904).

a decision for us, substituting their judgment for ours.⁵⁵ If this is a game, it is a game without judges, as the best argument is its own criterion and therefore its own judge. We may be bound by the decision. We can think of our relation to experts as contractual. We pay for their expertise in the currency of obedience. But they do not represent us. That is not an argument against expertise. It is simply an observation that Aristotle makes by saying that when one hits on principle, one is no longer engaged in rhetorical argument but in scientific reasoning.

I turn from representation to the other feature that makes me doubt the analogy of legal reasoning to games, and to deny the analogy for political reasoning. Citizens' participating in legal and political argument through representatives invites the subjects of law and politics to become specialized. The law, precisely because of its connection to justice, can never be fully understood as a field for expertise.⁵⁶ Against Coke, we can juxtapose Descartes. Here is Coke:

[T]hen the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it. . . .⁵⁷

And here, in contrast, is the beginning of the *Discourse on Method*:

Good sense is, of all things among men, the most equally distributed; for every one thinks himself so abundantly provided with it, that those even who are the most difficult to satisfy in everything else, do not

55. Yack, *supra* note 18, at 428 ("Unlike the professionals that we often pay to advise us, [public speakers] share with us an interest in the outcome of the issue at hand and therefore seek to persuade us to do something, rather than merely lay out the options before us.")

56. See Aristotle's remarks on music in *Politics* VIII, which I discuss in Aristotle's *Rhetoric: An Art of Character*. GARVER, *supra* note 48, at 49.

57. 12 Coke's Rep. 65, available at <http://faculty.history.wisc.edu/sommerville/367/367044.htm>. But see LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 131 (Alexander Fraser ed., Dover Publications 1959) (1689) ("[D]oth it not often happen, that a man of an ordinary capacity very well understands a text, or a law, that he reads, till he consults an expositor, or goes to counsel; who by that time he hath done explaining them, makes the words signify either nothing at all, or what he pleases.")

usually desire a larger measure of this quality than they already possess.⁵⁸

Rhetorical argument, judicial and deliberative, lies between these two poles, between epistemic democracy and expertise. We have to reason about things for which there are no experts, but the presumed equality of all reasoners is not a rationale for sloth. Protagoras, in Plato's eponymous dialogue, gives the canonical response, arguing that to be a citizen everyone has to have an equal ability to discern and dispute about justice, but that he will make the people who pay him more successful in arguing about justice. Augustine, or whoever wrote the *De Rhetorica* attributed to him, puts Protagoras' point more succinctly. Rhetoric concerns things about which people would be ashamed not to have an opinion. "[I]t would be disgraceful not to know, and which we, even if we do not know, nevertheless talk about as if we do. . . ."⁵⁹ Spinoza echoes the point in his social contract when—note the words I've italicized—

[E]ach must have firmly resolved and contracted to direct everything by the dictate of reason alone (which no one dares to oppose openly lest he appear to lack understanding) to bridle his appetite when it suggested anything harmful to another, to do to nobody what he would not wish done to himself, and finally, to defend his neighbor's right as if it were his own.⁶⁰

Here we can see a crucial contrast between judicial and deliberative rhetoric. In contrast to Coke's dictum, Blackstone says that while "a long course of reading and study is required to form a professor of laws, 'but every man of superior fortune thinks himself *born* a legislator.'"⁶¹ One

58. RENE DESCARTES, DISCOURSE ON THE METHOD 11 (John Yates trans., 2008).

59. Otto Alvin Loeb & William Charles Kurth, *The De Rhetorica of Aurelius Augustine*, 35 SPEECH MONOGRAPHS 90.97 (1968). Apparently, the latest scholarly consensus is in favor of Augustine's authorship. See generally *id.* "Verum ut facilius intellegatur, quae sit haec ipsa conditio, quam demonstratam esse volumus, omnia quaecumque huius modi sunt, ut ea nescire pudori sit, et quae vel ignorantes, quasi sciamus tamen, cum simulatione prae nobis ferimus, quotienscumque in dubitationem vocantur, efficiunt civilem quaestiuonem." *Id.* Compare Mill: "No one but a fool . . . feels offended by the acknowledgment that there are others whose opinion, and even whose wish, is entitled to a greater amount of consideration than his." JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 105-06 (Serenity Publishers 2008).

60. Benedict de Spinoza, *A Treatise on Religion and Politics*, in MORAL PHILOSOPHY FROM MONTAIGNE TO KANT 239, 245-46 (J.B. Schneewind ed., Cambridge Univ. Press 2003).

61. WALDRON, *supra* note 53, at 9C (quoting WILLIAM BLACKSTONE, COMMENTARIES 9). Similarly Locke in the *Second Treatise*: The law of nature is "intelligible and plain to a rational Creature . . . as the positive Laws of Common-wealths; nay possibly plainer; as much as Reason is easier to be understood, than the fancies and intricate contrivances of

of the subjects of deliberative rhetoric is legislation, but the *Rhetoric* has little to say about it, and after Aristotle says that little, he takes it all back, saying that “all this is the business of political science, not of rhetoric”:

In legislation . . . it is useful to an investigator not only to know what constitution is advantageous on the basis of past history but also to know the constitutions in effect in other states, observing what constitutions are suitable to what sort of people. Thus, it is clear that in constitutional revision the reports of travelers are useful (for there one can learn the laws of foreign nations) and [that] for debates about going to war the research of those writing about history [is useful]. But all these subjects belong to politics [politikê], not to rhetoric.⁶²

If deliberation is a game, then, it is more like Trivial Pursuit, in which you have to know something to win, than it is like chess, where all you need to know are the rules and possibilities within the game itself, as in judicial rhetoric. Judicial rhetoric is doubly subordinate, first to deliberative rhetoric, which is in turn subordinate to politics. Political argument shades into politics because there is no difference between the goods that politics seeks and those talked about in deliberative rhetoric, as there is between legal justice and justice as the community understands it.

I want to close by returning to Maine’s insight that “That ‘all men are equal’ is one of a large number of legal propositions which, in progress of time, have become political.”⁶³ Equality is now part of the American constitutional *ethos*. Whatever its status before the Civil War, Lincoln and the Fourteenth Amendment made the Declaration of Independence part of the Constitution, the constitution in Aristotle’s sense is the way of life and purpose of the community. As a legal principle, it states that all parties to a conflict are to be treated equally—justice is blind. This is the equality of competing metaphors prior to a judgment that one of them is a faithful representation of reality. As a political principle, it is an equality of all the parts of the whole, an equality of synecdoche. The principle is often today expressed in parody, in which each faction claims to be a victim and therefore deserving of special treatment. “All men are equal” is a passport that allows political issues to become legal and legal

Men, following contrary and hidden interests put into Words.” LOCKE, SECOND TREATISE OF GOVERNMENT 12 (C.B. Macpherson ed., Hackett Publishing Co. 1980) (1690).

62. ARISTOTLE, *supra* note 7, at 55 (all but final alteration in original) (footnotes omitted); *but see* ARISTOTLE, POETICS (Stephen Halliwell ed., trans. Harvard Univ. Press 1999) (“The earliest poets make people speak politically, present day poets make them speak rhetorically.”).

63. MAINE, *supra* note 17, at 54.

issues to become political. Equality is the place where legal argument gains and loses its autonomy.