Osgoode Hall Law Journal

Volume 23, Number 2 (Summer 1985)

Article 4

Rules and Rhetoric

Bruce McLeod

Rules and Rhetoric

Abstract
Mr. McLeod argues that the role of rules in judicial decision-making is commonly misunderstood by both the formalists and realists. The rehabilitation of rhetoric in fields of study outside law suggests a novel and useful insight for jurisprudence: judges neither mechanically apply legal 'commands' nor exercise arbitrary, subjective preferences. They engage in a process of argumentation structured by the 'wishes' of statute and precedent, and directed towards persuasion of their anticipated audiences. Mr. McLeod offers the reasons of the Supreme Court of Canada in Hunter v. Southam Press as an example of rhetorically structured argument. The Court was required to interpret the new Canadian Charter of Rights and Freedoms section 8 which prohibits "unreasonable search or seizure". He argues that though the Court could not define 'unreasonable' with reference to any prior fixed rules, it was not compelled to exercise arbitrary and subjective preferences. The decision is best understood when analyzed in light of the Court's rhetorical obligations.

RULES AND RHETORIC

BY BRUCE MCLEOD*

Mr. McLeod argues that the role of rules in judicial decision-making is commonly misunderstood by both the formalists and realists. The rehabilitation of rhetoric in fields of study outside law suggests a novel and useful insight for jurisprudence: judges neither mechanically apply legal 'commands' nor exercise arbitrary, subjective preferences. They engage in a process of argumentation structured by the 'wishes' of statute and precedent, and directed towards persuasion of their anticipated audiences. Mr. McLeod offers the reasons of the Supreme Court of Canada in Hunter *v.* Southam Press *as an example of rhetorically structured argument. The Court was required to interpret the new Canadian* Charter of Rights and Freedoms *section 8 which prohibits "unreasonable search or seizure". He argues that though the Court could not define 'unreasonable' with reference to any prior fixed rules, it was not compelled to exercise arbitrary and subjective preferences. The decision is best understood when analyzed in light of the Court's rhetorical obligations.*

The accepted status of rhetoric is due for a change. Often used as a pejorative term, as in 'cutting through the rhetoric' or 'rhetoric *vs.* reality,' rhetoric today is experiencing a minor renaissance in scholarly circles.[1] The rehabilitation of rhetoric is occurring to the detriment of the former monopoly that logic exercised over modes of reasoning.[2] The focus of research is shifting from the substance of formal propositions to the social processes of argumentation itself.[3]

Legal theory can benefit from this renewed interest in rhetoric. By treating law as a process of argumentation, the new rhetoric pilots a middle course between the Scylla and Charybdis of modern jurisprudence: formalism and realism.[4] Both the formalist model of law as a

---

* Bruce McLeod is a member of the class of 1986 at Osgoode Hall Law School, Toronto.

[1] Good general introductions to this literature are C. Perelman, *The Realm of Rhetoric*, trans. W. Kluback (1982), C. Perelman, "The New Rhetoric: A Theory of Practical Reasoning" in Encyclopaedia-Britannica, *The Great Ideas Today* (1970), S. Ijsseling, *Rhetoric and Philosophy in Conflict*, trans. P. Dunphy (1976), and D. Fogarty, *Roots for a New Rhetoric* (1968). For rhetoric and jurisprudence see P. Goodrich, "Rhetoric as Jurisprudence: An Introduction to the Politics of Legal Language" (1984) 4 *Oxford J. Legal Stud.* 88 and M. Gold, "The Rhetoric of Constitutional Argumentation" (1985) 35 *U. Toronto L.J.* 154.

[2] See Part I, *infra.*

[3] See S. Toulmin, *The Uses of Argument* (1958), S. Toulmin, *Human Understanding*, vol. 1 (1972), C. Perelman & L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, trans. J. Wilkinson & P. Weaver (1958), and J. Habermas, *Communication and the Evolution of Society*, trans. T. McCarthy (1979).

[4] As H.L.A. Hart points out, both extremes stem from the same exaggerated notion of the objectivity of legal rules: "The rule-sceptic is sometimes a disappointed absolutist; he has found

system of rules and the realist renunciation of legal rules fail to consider judicial decisions as exercises in persuasion. Rhetorical analysis brings the judicial decision to the forefront by focusing upon the judge's persuasive obligation to the audience. Legal rules are nevertheless accorded an important function since the judge's subjective role in willing a specific decision remains structured by the hortatory influences of statute and precedent.

The work of Kenneth Burke elucidates the operation of law as rhetoric.[5] The common ground of identification between speaker and audience retroactively influences the speaker's treatment of his or her topic. In law, the rhetorical obligation on the judge to persuade through identification with one's audience has real legal consequences. Nowhere is this clearer than in constitutional law. The recent decision in *Hunter* v. *Southam*[6] reflects the truth of this proposition. In that case the Supreme Court of Canada was called upon to determine the meaning of 'unreasonable' in the *Canadian Charter of Rights and Freedoms* protection against unreasonable search or seizure.[7] In a non-arbitrary manner and without the benefit of precedent, the Court reached clear legal conclusions through its use of a particular rhetoric of private right and Lockean liberalism.[8]

In what follows I begin by outlining the philosophical foundations of the rehabilitation of rhetoric. In the second section, I address the implications of philosophically rehabilitated rhetoric for the concept of law. The last section shows how rhetorical analysis might be applied to individual decisions by examining the rhetorical dimension of the Supreme Court of Canada decision in *Hunter*.

I. THE REHABILITATION OF RHETORIC

Rhetoric has not always been considered, at best, an art of empty embellishment, and, at worst, a device of disingenuous manipulation. Historically, rhetoric became downgraded when its ancient integration with logic and dialectic was dissolved. More recently, reconsideration of

---

that rules are not all they would be in a formalist's heaven . . . The sceptic's conception of what it is for a rule to exist, may thus be an unattainable ideal, and when he discovers that it is not attained by what are called rules, he expresses his disappointment by the denial that there are, or can be, any rules." H.L.A. Hart, *The Concept of Law* (1961) at 135. Hart's highly sophisticated positivism nevertheless inflates the explanatory power of the model of rules, and neglects the role of the audience in judicial decisions.

[5] K. Burke, *A Grammar of Motives and A Rhetoric of Motives* (1962).

[6] *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145.

[7] "Everyone has the right to be secure against unreasonable search or seizure." *Constitution Act*, 1982, Pt.I, (hereinafter referred to as the Charter) s.8.

[8] See Part III, *infra*.

the various claims of rationalism has led to reconsideration of the separation of reason and rhetoric. This section will first trace the historical disintegration of rhetoric, logic and dialectic, and then will argue for a greater appreciation of their underlying unity.

Aristotle defined rhetoric as: "the faculty of discovering in the particular case what are the available means of persuasion."[9] His definition does not equate rhetoric with the art of persuasion *per se*: "Its function is not [strictly] to persuade, but to discover the available means of persuasion on a given case."[10] It is inherently bound up with dialectic, which Aristotle defined as the technique of argumentation by which one proposition is countered by another. He described rhetoric as "a kind of offshoot on the one hand, of Dialectic, and, on the other, of that study of Ethics which may properly be called Political."[11]

Logic does not exist independently of dialectic in Aristotle's view. The syllogistic demonstration of definite conclusions from clear premises occurs within dialectic. Indeed, Aristotle took the primary function of dialectic to be discerning the true from the sham syllogism.[12]

Rhetoric and logic thus share a common ground in dialectic. The rhetorical syllogism, which Aristotle called the enthymeme, is less conclusive than the logical or true syllogism, but the distinction is one of degree only.[13] The Aristotelian integration of rhetoric, dialectic and logic maintains the primacy of argumentation over the propositions of formal logic, thus preserving an important role for rhetoric in discourse. The demise of rhetoric begins when this essential unity is broken.

Though in retrospect, the demise of Aristotle's concept of rhetoric is prefigured in the Socratic dialogues of Plato,[14] the process really be-

---

[9] Aristotle, *The Rhetoric*, trans. L. Cooper (1932) at 7.

[10] *Ibid* at 6. (Whether this distinguishes his definition from that of his predecessors, the Sophists, is open to debate. E.M. Cope characterises Sophistic rhetoric as:

> the analysis and exemplification of . . . the probable . . . . It will appear from this that, whether they actually adopted it as a definition or not, persuasion at any price . . . without restriction or qualification, was their motto and their declared object.

Cope, *An Introduction to Aristotle's Rhetoric* (1867) at 28. But Cope is still under the spell of Plato. The 'analysis and exemplification of the probable' is equivalent to 'persuasion at any price' only if we assume the existence of a transcendent reality beyond that of "the probable." As G.B. Kerferd remarks: "In the modern world, where the majority of scholars are not Platonists and, for the most part, do not even wish to look for reality in the direction where Plato believed it lay, it is something of a paradox that the Platonic condemnation of the Sophists has remained largely unquestioned." Kerferd, "Sophists" in P. Edwards, ed., *Encyclopedia of Philosophy* (1972) at 495.

[11] *Supra* note 9 at 9.

[12] *Ibid.* at 7.

[13] *Ibid.* at 5.

[14] In Perelman's words: "To Plato, philosophical rhetoric is the one that would convince the gods themselves, a rhetoric based on truth." C. Perelman (1982) *supra* note 1 at 151.

gins with the rise of modern rationalism. Throughout antiquity and the Middle Ages, rhetoric remained an integral part of all learning.[15] Peter Ramus, writing in the sixteenth century, severed the connection between dialectic and rhetoric. He defined rhetoric as the art of the eloquent and ornate use of language.[16]

> [Ramist rhetoric] is a rhetoric which has renounced any possibility of invention within the speaker-auditor framework . . . and [which] ultimately seems to deny that the processes of person-to-person communication play any necessary role in intellectual life . . . In Ramist rhetoric, dialogue and conversation themselves become by implication mere nuisances.[17]

Dialectic becomes a technique for discovering the logically true. The validity of statements is thus immunized from the now frivolous art of rhetoric.

Descartes took the process one step further and severed logic from both rhetoric and dialectic. The standard of truth which he imposed is that of certain evident knowledge. Where doubt exists as to the validity of any proposition, that proposition must be false. Where two conflicting propositions exist, at least one of them must be false.[18]

Claims about the truth content of propositions, according to Descartes, attach to the ideas attained by the individual thinking sub-

---

Plato disparaged ordinary rhetoric as lacking in truth. For Plato, Perelman says, "[Rhetoric] no longer aims to convince but to please; at best, rhetoric makes it easier to accept, through the magic of words and presentation, truths that are known independently of the art of persuasion." *Ibid.* at 152. Socrates employs dialectic to eliminate falsehood, and to bend his listeners to the fundamental truth of the Ideal Forms. Socrates' listeners do not participate in fashioning a consensus. Rather, dialectic is merely a more pleasing presentation of the logical syllogism. Out of the provisional truths of discourse, Socrates fabricates a 'real world' of his own devising which he sets against the merely apparent world known to others. Already in this superfetation of the logical, argumentation is being compromised by one philosopher's particular notion of what is objectively true. See F. Nietzche, *Twilight of the Idols*, trans. R.J. Hollingdale (1968) at 29-41.

[15] With Cicero, Quintilian, and Augustine, rhetoric was increasingly bound up with matters of style. It became imbued with the connotations of the Latin *suadere*, from which the English 'persuade,' 'assuage,' 'suavity,' and even 'sweet' derive, rather than the connotations of 'faith' and 'obedience' conveyed in the original Greek. Nevertheless, rhetoric remained very much a practical and not merely ornamental art. Respecting the Middle Ages, Richard McKeon documents the universality of rhetoric among medieval intellectual disciplines:

> In theory of application, the art of rhetoric was now identified with, now distinguished from, the whole or part not only of grammar, logic, and dialectic (which were in turn distinguished from or identified with each other), but also of sophistic and science, of 'civil philosophy,' psychology, law, and literature, and finally of philosophy as such.

McKeon, "Rhetoric in the Middle Ages" (January 1942) *Speculum* at 32.

[16] C. Perelman (1982), *supra* note 1 at 284.

[17] W. Ong, *Ramus, Method, and the Decay of Dialogue* (1958) at 288-89.

[18] "Whenever two men come to opposite decisions about the same matter one of them at least must certainly be in the wrong, and apparently there is not even one of them who knows; for if the reasoning of the second was sound and clear he would be able so to lay it before the other as finally to succeed in convincing *his* understanding also." cited in C. Perelman (1970), *supra* note 1 at 284.

ject, or 'cogito'. The audience or addressee has disappeared. Logical certainty is the only standard, and is identified with the rules applied in the conduct of one's own thought.[19] Rhetoric and dialectical argumentation have been eliminated.

Practically speaking, the separation of logic from discourse condemns the realms of political, social, moral and religious discussion to irrationality. While formal logic increasingly resembles pure mathematics, the other realms of discourse are dismissed for dealing in "mere pseudo-concepts."[20] Perelman and Olbrechts-Tyteca argue that the rejection of non-legal techniques in these realms of discourse "would leave the field wide open, in all the essential spheres of life, to suggestion and violence."[21]

There is a great divergence between the formal standards of philosophy and the practices of everyday life which extends into the private lives of philosophers themselves. Thus, for example, Descartes did not allow the standard of 'certain and evident knowledge' to affect his moral intentions, which were:

> to obey the laws and customs of my country, constantly retaining the religion in which, by God's grace, I had been brought up since childhood, and in all other matters to follow the most moderate and least excessive opinions to be found in the practices of the more judicious part of the community in which I would live.[22]

As David Hume frankly acknowledged: "Philosophers neglect not this advantage; but immediately upon leaving their closets, mingle with the rest of mankind in [their vulgar and natural notions]."[23]

While this practical inconsistency can be passed off as an inconse-

---

[19] Perelman and Olbrechts-Tyteca also attributes this view to both Schopenhauer and J.S. Mill. C. Perelman & L. Olbrechts-Tyteca (1958), *supra* note 3 at 41.

[20] These are the words of A.J. Ayer in *Language, Truth and Logic* (1971) at 142. Ayer dismisses ethical discourse as fundamentally incompatible with reason:

> The presence of an ethical symbol in a proposition adds nothing to its factual content . . . [If I] say, 'Stealing money is wrong,' I produce a sentence which has no factual meaning . . . Another man may disagree with me about the wrongness of stealing, in the sense that he may not have the same feelings as I have, and he may quarrel with me on account of my moral sentiments. But he cannot, strictly speaking, contradict me.

Ibid.

[21] C. Perelman & L. Olbrechts-Tyteca (1958), *supra* note 3 at 512.

[22] R. Descartes, *Discourse on Method*, trans. L. Lafleur (1956) at 22-23.

[23] D. Hume, *A Treatise of Human Nature* (1969) at 266. Elsewhere, Hume describes the depression to which his philosophy led him, and then states its antidote:

> I dine, I play a game of backgammon, I converse, and am merry with my friends; and when after three or four hours' amusement, I wou'd return to these speculations, they appear so cold, and strain'd, and ridiculous, that I cannot find it in my heart to enter into them any farther. Here then I find myself absolutely and necessarily determin'd to live, and talk, and act like other people in the common affairs of life.

Ibid. at 316.

quential novelty which accompanies philosophical acuity, Toulmin argues otherwise: "It may be, in fact, a consequence of nothing more than a straightforward fallacy — a failure to draw in one's logical theorising all the distinctions which the demands of logical practice require."[24]

The rationalistic view of rhetoric is logically objectionable because formal logic cannot itself generate its premises. Formal logic operates from fixed premises to certain conclusions. If discussants cannot agree as to their premises, however, logic is silent. At this point, they must engage in argumentation in order to establish an initial set of premises. This incapacity of logic to generate premises, Grassi argues, indicates the priority of rhetorical speech. Since original ideas must derive from 'figurative' or 'imaginative' (and not demonstrative) processes, rhetoric must be given primacy to logic.[25]

A final objection to the rigid separation of logic from argumentation stems from the renewed interest of philosophers in language and linguistics. The meaning of ideas is increasingly being sought in the use of words in language.[26] As a result, the traditional questions of logic are being re-integrated with the traditional concerns of rhetoric and dialectic.

For example, Toulmin's search for the basis of meaning in actual linguistic practices has led him back to the neglected realm of argumentation.[27] He argues that the validity of particular concepts requires a prior empirical assessment of their relevant theatre of discourse. Such

---

[24] S. Toulmin (1958), *supra* note 3 at 10.

[25] " 'Rhetoric' is not, nor can it be the art, the technique of an exterior persuasion; it is rather the speech which is the basis of the rational thought." E. Grassi, *Rhetoric as Philosophy* (1980) at 20. Grassi traces this insight to Plato. Citing a passage from the *Gorgias*, Grassi shows that Plato's concept of order is identified with the original harmony of the Muses. The ultimate original principles from which reason derives, or *archai*, are thus simultaneously the original source of *pathos*, i.e., rhetoric. "Thus the true philosophy is rhetoric, and the true rhetoric is philosophy, a philosophy which does not need an 'external' rhetoric to convince, and a rhetoric that does not need an 'external' content of verity." *Ibid.* at 32.

[26] Wittgenstein's later work, in which he defined meaning as use, shifts the focus of knowledge from the Cartesian individual *cogito*, to the publicly accepted rules of language use. See L. Wittgenstein, *Philosophical Investigations*, trans. G.E.M. Anscombe (1976). For a useful secondary source see C. Brown, *Wittgensteinian Linguistics* (1974). J.L. Austin elaborates a basis for the study of language 'acts' (or 'linguistic phenomenology,' as he would name it, "only that is rather a mouthful" (J. Austin, *Philosophical Papers* (1961) at 130), with reference to the 'performative' nature of utterances. Many uses of language do not 'describe' or 'report' anything at all, and cannot be termed either true or false. Words instead 'do' things, in that they achieve certain effects. As examples of performatives, he gives: "I do, etc," as uttered during a wedding ceremony; or "I give and bequeath, etc," as occurring in a will. J.L. Austin, *How to do things with Words*, 2nd Ed. (1975) at 5. Austin's linguistic phenomenology drives us away from fixed representational meanings and back to the actual use of language in discourse.

[27] *Supra*, note 3.

an assessment would involve:

> Locating precisely, within the socio-historical matrix of human understanding, the point at which rational appraisal and criticism find their operative niches . . . The intellectual authority of our concepts finds an ultimate source within the empirical matrices of understanding itself.[28]

Perelman also returned to the empirical study of communicative practices. He describes the origin of his rhetorical method as the insight that concepts of norms are best studied in the processes of normative discourse.[29] Like Toulmin, he replaces Cartesian certainty of knowledge with a standard of 'explanatory adequacy.' Conceptual validity, on this model, partakes more of argumentative efficacy than of abstract, objective correctness.

The unduly rigid separation of logic, dialectic and rhetoric has thus started to fade. Beyond the trenches that Ramus and Descartes dug between logic and rhetoric, one can already discern the first indications of reconciliation. Renewed interest in the social bases of communication betokens renewed concern with the processes of argumentation. The disdained traditional foci of rhetorical analysis, such as 'means of persuasion' and 'audience' should no longer be viewed with suspicion.

II. RHETORIC AND THE ROLE OF RULES

Discussions about the nature of law tend to rest on two competing interpretations of the role of rules in law: formalism and realism. A new perspective on the debate between these two schools, deriving from rhetorical analysis, construes the judge as an agent of argumentation whose many means of persuasion include, but are not limited to, legal rules. From a rhetorical standpoint, law can be described as an exercise of argumentation, structured by the hortatory motives of statute and precedent and retroactively conditioned by the onus of audience persuasion.

The two schools of formalism and realism go by many different

---

[28] S. Toulmin (1972), *supra* note 3 at 28. Jürgen Habermas is developing a social theory based upon 'communicative competence.' He describes his research programme as the study of 'universal pragmatics.' He relies heavily upon Austin's theory of performative utterances. See: J. Habermas *supra*, note 3 at 1-5, 7, 34-68, and J. Habermas, *Knowledge and Human Interests*, trans. J. Shapiro (1968).

[29] Instead of working out *a priori* possible structures for a logic of value judgements, might we not do better to follow the method adopted by the German logician Gottlob Frege, who, to cast new light on logic, decided to analyze the reasoning used by mathematicians? Could we not undertake, in the same way, an extensive inquiry into the manner in which the most diverse authors in all fields do in fact reason about values? C. Perelman (1970), *supra* note 1 at 281.

names.[30] While few modern authors subscribe to either of these theories in any absolute sense, most are influenced by these subtly persistent modes of thinking about law.

Formalists regard the law as a system of rules. The task of the judge in any particular case, as formalists conceive it, is to ascertain the appropriate single rule that applies to the given fact situation, and then to apply it. Judicial discretion which extends beyond this process of rule selection amounts to judicial legislation. The standard to which the judge aspires is correctness.

The realist believes that rules do not exist ready-at-hand. The law rarely speaks with one voice. Conflicting rules can inevitably be found.[31] This inherent ambivalence of legal authority forces the judge to rely upon his or her own resources. Judicial discretion becomes the whole of the law,[32] which some realists equate with judicial exercise of personal, social and political values.

Each of these positions provides an important insight. The realist rightly recognizes the deep-rooted indeterminacy of the law. The formalist rightly recognizes that judges do not exercise merely subjective preferences. "Rules for mechanical application are fictitious" says the realist; while the formalist responds, "But judges are bound by the rules." Neither model is capable of accommodating the essential insight of the other. Formalism is premised upon the existence of determinate rules, rules denied by realism. Realism is premised upon the full legal status of judicial discretion, which formalism abhors.

The differences between these two schools of jurisprudence are reconcilable from the standpoint of modern rhetoric. Rhetoric reasserts the primacy of communicative interaction over the formal truth content of isolated expressions. Thus, judicial reasons provide the starting point of analysis, rather than some idealized system of rules. A judgment is analysed as an exercise in argumentative persuasion. The test of validity is not correctness, but persuasiveness. Rules play a central role as instruments of persuasion, indeed, as the quintessentially legal instruments of persuasion.

The philosopher Martin Heidegger provides a metaphor for thinking in general which is useful to the present argument since it illuminates the process of judicial decision-making.[33] He compares thinking

---

[30] Their most recent respective incarnations are called 'strict constructivism' and 'critical legal theory'.

[31] Indeed, most members of the legal profession stake their existence on the truth of this proposition.

[32] As in "the law is what the judges say it is."

[33] M. Heidegger, *What is Called Thinking?* (1968) at 16.

to manufacturing and proposes two different models of this process. In the first or "craft" model, thinking is likened to the act of making something, like the handicraft of a cabinet-maker. Skill of the hand is required, as are design and purpose. The second or "industrial" model likens thinking to factory production. Buttons are pushed, levers are pulled. The hand moves, but design is lacking. The purpose of the production process is built into the machine itself.[34]

The formalist approach to judicial decision-making follows the industrial model of thinking. The judge's wishes are eliminated. The purposes of the law are embedded in the rules of law. The judge has only to apply them.

A rhetorical model is more inclined to conceive of judges as cabinet-makers. Unlike the realist model, however, legal rules are not repudiated. Legal rules form part of the tools and materials of the judicial craft. Since the situation rarely arises where the law speaks univocally, judges must choose among contradictory rules. Judges must entertain other considerations as well, such as principle, public policy or justice. Like a skilled craftsman, the judge must design and compose the decision according to his or her own best judgment.

A leading proponent of the new rhetoric, Chaim Perelman, articulates a critique of the 'industrial model' of judicial reasoning. He does so in counterpoint to Kelsen's well-known "pure theory of law."[35] In Perelman's view, Kelsen's formalist theory neglects two essential contributions of argumentation: it neglects argumentation firstly in the application of particular rules to fact situations in all their worldly complexity, and, second, in establishing the basic premise of a legal system.

Kelsen's attempted elimination of all non-positive elements of law fails, according to Perelman, because a judge must make voluntary and normative choices in order to reach his decision.

> Dans les systèmes juridiques modernes, le juge est obligé . . . de juger et de motiver ses décisions . . . Il est obligé de juger et d'argumenter comme si le système du droit qu'il applique n'avait pas de lacunes et ne comportait pas d'antinomies. Pour éviter le déni de justice, le juge doit obligatoirement considérer les lacunes et les antinomies comme apparentes, sans qu'il résulte du système, d'une facon non-ambigüe, comment il doit procéder pour arriver au résultat, c'est-à-dire à la décision motivée qu'on attend de lui.[36]

The lacunae and antinomies that would result from a purely mechani-

---

[34] *Ibid.* at 23.

[35] C. Perelman, "La Theorie Pure Du Droit et L'Augmentation" in *Law, State, and International Legal Order: Essays in Honor of Hans Kelson* (1964). See also H. Kelson, *Pure Theory of Law*, (1967).

[36] C. Perelman, *ibid* at 229.

cal application of the rules force the judge to engage in argumentation. Every step of the process depends upon decisions and acts of will *"qui ne sont pas fondés en droit mais justifiés par des considérations d'ordre politique ou moral."*[37]

Kelsen's theory also fails to justify the origin of the basic premise of a legal system: *la norme fondementale*, or *Grundnorm*.[38] In the same way that formal logic is inoperative if discussants cannot agree as to their premises, legal positivism is silent as to its basic premise. By excluding the necessity of argumentation on this point, Kelsen's theory cannot explain the ultimate authority of a judicial decision because it precludes argumentation on this essential point. Such argumentation entails the use of *"considérations d'ordre politique ou moral."*

The cabinet-maker metaphor suggests that judges impart design and purpose to judicial results. This motivational component is central to the rhetorical approach.[39] Kenneth Burke defines rhetoric as speech designed *"to move people."*[40] The judge however, brings only part of the motivational content to a specific decision. Another major portion of this component is provided by legal rules. The rules act as horatory guides, or sources of motivation, which the judge must balance with other conflicting motivations. They are better understood as 'wishes' than as 'commands'.[41]

Burke's distinction between "grammatical" and "rhetorical" levels of discourse helps to clarify this point. 'Grammar' reflects deep structures or principles that underlie the realm of rhetoric.[42] They provide a motivational ground, or 'scene' of subsequent 'actions'.[43] The United States Constitution provides an example of motivational grammar, with a constitutional decision being the corresponding 'act'. In reaching its decision, a court would choose between 'essentializing' and 'proportioning' grammatical strategies:

> The essentializing strategy would be that of selecting some one clause or other in the Constitution, and judging a measure by reference to it. The proportional

---

[37] *Ibid.* at 228.

[38] This criticism also applies to the notions of ultimate and supreme rules of recognition in H.L.A. Hart, *The Concept of Law* (1967) at 102.

[39] "Motivation . . . is the beginning, the continuity, and the end of Burke's theory of rhetoric." D. Fogarty, *Roots for a New Rhetoric* (1968) at 72.

[40] K. Burke, *A Grammar of Motives and a Rhetoric of Motives* (1962) at 565.

[41] *Ibid.* at 373. The concept of law as a body of commands addressed to judges exaggerates the concreteness of legal rules. The motives of a rule's sponsor (whether the legislator of a statute or the author of a binding precedent) cannot encompass the facts of any specific case which might come before a judge.

[42] *Ibid.* at 52-53.

[43] *Ibid.* at 341, 362.

> strategy would require a more complex procedure, as the Court would test the measure by reference to all the wishes in the Constitution. That is, the Court would note that the legislation in question would be wholly irrelevant to certain of the wishes, would wholly gratify one or some, would partially gratify others, and would antagonize the rest. And its judgment would be rationalized with reference to this total recipe. The aim would be to state explicitly a doctrine of proportions.[44]

If we add to these grammatical strategies the rhetorical onus of audience persuasion, then the essentializing strategy would work like this: the problem presented by a specific case would be manipulated until one rule and one rule only could be said to govern, which would then be treated as dispositive. The result would be presented as the inexorable justice of axiomatic rules of law applied by an impartial arbiter. This is the industrial model of judicial reasoning viewed from the standpoint of rhetorical analysis. It suppresses the distinction between grammar and rhetoric, and equates the scene-setting framework of law with the law itself. It occludes the complexity of judicial discretion by exaggerating the determinative capacity of the rules.

The proportioning strategy in itself is only a rule for the interpretation of the terms of a constitutional document. This document, however, cannot constitute the entire motivational scene, "since it itself is an enactment made in a given scene and perpetuated through subsequent variously altered scenes."[45] In every scene, the motivational framework will be different. Hence, judges must have recourse to a set of considerations that inform the otherwise vague or conflicting terms

---

[44] While Burke develops this terminology with reference to constitutional law, I see no reason to limit its application to this field. Burke's specifically constitutional grammar can be applied to positive law *per se* without altering its status as a grammar. The vindication of proportioning strategies in judicial interpretation can be seen in the judicial recognition of 'innominate terms' in commercial contracts, and the emergence of functionalist analysis in the judicial review of administrative decisions.

Until the relatively recent decision in *Hong Kong Fir Shipping Co.* v. *Kawasaki Kisen Kaisha Ltd.*, [1962] 2 Q.B. 26 (C.A) the courts took an essentialist approach to the classification of terms of commercial contracts in the event of breach. Terms were construed as *either* conditions, the breach of which would enable the injured party to repudiate the contract, *or* warranties, the breach of which would give rise only to an action for damages. In *Hong Kong Fir*, the Court of Appeal shifted judicial analysis from the classification of terms, to the event which is alleged to constitute the breach. The earlier axiomatic approach was partly displaced by a 'proportioning' of effects and intentions.

A similar transformation has been taking place in administrative law. The changes can be partly summarized as a shift from a more purely conceptual, 'essentializing' approach to a 'balancing' approach. The Supreme Court of Canada has abandoned the "unwieldy conceptual framework" yielded by classifying statutory functions as judicial, *quasi*-judicial, or administrative, and now performs a more complex assessment of such factors as institutional design and competence, the relationship between different organs of government, administrative agencies' procedures, powers, and duties, the impact of the administrative decision on the individual, and so forth. See J. Evans, "Remedies in Administrative Law," in Law Society of Upper Canada, *New Developments in the Law of Remedies* (1981) at 429-30.

[45] K. Burke, *supra* note 40 at 362.

of the Constitution.[46] Burke calls such a framework of beliefs the 'Constitution-Behind-the-Constitution'.[47]

Judges must consult some such value scheme generalized throughout society, according to Burke, because the courts are obligated to persuade their audiences. This conclusion stems directly from the central core of his theory of rhetoric, that is, from the concept of identification.[48]

In Burke's view, rhetoric is persuasive in so far as a speaker establishes a substantial 'identification' with his or her audience. In rhetorical speech, the speaker's interests must be rendered 'consubstantial' with those of the audience.

> A doctrine of *consubstantiality*, either explicit or implicit, may be necessary to any way of life. For substance, in the old philosophies, was an *act*; and a way of life is an *acting-together*; and in acting together, men have common sensations, concepts, images, ideas, attitudes that make them *consubstantial*.[49]

This process of consubstantial identification, in which speaker and audience exist as one, is the essence of persuasion.[50]

Burke's concept of rhetoric is not static but dynamic. The interests of speaker and audience are never completely identical. Rather, the speaker identifies them for a purpose: "Among the marks of rhetoric is its use to *gain advantage* of one sort or another."[51] This function of gaining advantage does not reduce rhetoric to its formerly forsaken status as merely instrumental speech, because identification must incorporate to some degree the interests of *both* speaker and audience.

In society, rhetoric functions as a kind of 'courtship' device for different social classes.[52] Rhetoric serves to identify their different interests, thus overcoming the awkwardness of social inequality, while nevertheless effecting matters of advantage. In this process, rhetoric

---

[46] "The total motivation of any act (including a Court's act of judgment) must be derived from substance in its total scope, not merely in the restricted range laid down by the document." *Ibid.* at 376-7.

[47] *Ibid.* at 362. This concept operates like Perelman's "*considerations d'ordre politique ou moral*", see C. Perelman, (1964) *supra* note 35 at 228. Judges must in these circumstances seek to fulfill what Sumner calls the generic social function of law, that is, "to express, regulate and maintain the general nature of the dominant social relations of a social formation." C. Sumner, *Reading Ideologies* (1979) at 272.

[48] "Traditionally, the key term for rhetoric is not 'identification,' but 'persuasion' . . . Our treatment, in terms of identification, is decidedly not meant as a substitute for the sound traditional approach. Rather . . . it is but an accessory to the standard lore." K. Burke, *ibid.* at 522.

[49] *Ibid* at 545.

[50] The "simplest case of persuasion" is "identifying your ways" with your listener's. *Ibid.* at 581.

[51] *Ibid.* at 584.

[52] *Ibid.* at 736.

both identifies a ground of consubstantiality in the whole community, and simultaneously realizes the social hierarchy.[53]

These rhetorical constraints on the concept of 'identification' are relevant in difficult constitutional cases, where the terms of the document *per se* are motivationally incomplete, and the judge must give expression to the supra-constitutional values that motivate the document.[54] The precise values will be chosen by judges, but this choice is conditioned by their obligation to persuade their audience.

Judicial use of rhetorical devices, of which identification is but one example,[55] is regulated by the nature of the audience. The means of persuasion available will obviously vary from audience to audience. A political speech on tax policy delivered during an election campaign will share few common features with an academic lecture on tax policy delivered in the classroom. Even if we assume that it is the same

---

[53] It is crucial to distinguish Burke's view of hierarchy from the less sophisticated view that dominant social classes manipulate ideology to serve their own interests:

> Language, typically, is immersed in the ongoing life of a society, as the practical consciousness of that society . . . [It] is an instrument of control as well as of communication. Linguistic forms allow significance to be conveyed and to be distorted. In this way hearers can be both manipulated - and informed, preferably manipulated while they suppose they are being informed. Language is ideological in another, more political, sense of that word: it involves systematic distortion in the service of class interest.

G. Kress & R. Hodge, *Language as Ideology* (1979) at 6. In this passage, Kress and Hodge revert to an instrumentalist view of language. They suggest that speech is programmatically distorted in the interests of class domination. Burke, however, conceives of all people in a community jointly participating in rhetorical identification. Rhetoric for Burke is not easily reducible to sheerly instrumentalist applications.

[54] The judicial resort to supra-constitutional values in *Hunter* is analyzed *infra*.

[55] The vast range of traditional rhetorical figures can be indicated by Burke's selection from Cicero:

> Dwelling on a subject, driving it home (*commemoratio*), bringing it before one's very eyes (*explanatio*), both of them devices valuable for stating a case, illustrating and amplifying it; review (*praecisio*); disparagement (*extenuatio*), accompanied by raillery (*illusio*), with neatly contrived return to the subject; statement of what one proposes to say; distinguishing it from what has already said; return to a point already established; repetition, reduction to sharply syllogistic form (*apta conclusio*); overstatement and understatement; rhetorical question; irony, saying one thing and meaning another (*dissimulatio*), a device which is particularly effective with audiences if it is used in a conversational tone, not rantingly; stopping to ponder (*dubitatio*); dividing a subject into components (*distributio*), so that you can effectively dispose of them in one-two-three order; finding fault with a statement (*correctio*) which has been made by the opponent, or which one himself has said or is about to say; preparing the audience for what one is about to say (*praemunitio*); shifting of responsibility (*traiecto in alium*); taking the audience into partnership, having a kind of consultation with them (*communicatio*); imitation; impersonation (an especially weighty *lumen* of amplification); putting on the wrong scent; raising a laugh; forestalling (*anteoccupatio*); comparison (*similitudio*) and example (*exemplum*), "both of them most moving"; interruption (*interpellatio*); alignment of contrasting positions, antithesis (*contentio*); raising of the voice even to the point of frenzy, for purposes of amplification (*augendi causa*); anger; invective, imprecation, deprecation, ingratiation, entreaty, vowing "O would that . . ." (*optatio*) ——— and, yes, also, lapses into meaningful silence.

Burke, *supra* note 40 at 590-591.

speaker and that identical information is to be conveyed, the means of persuasion employed will be adjusted to best persuade the different audiences.

What audience is relevant to the delivery of legal decisions? The answer cannot be restricted to any single group. Primarily, a judge must address the litigants themselves and their counsel. Every judge must also address the wider legal community. The practicing bar must be given clear statements of the reasons for decision in order to assess the range of possible outcomes in future disputes. Judges in separate jurisdictions, legal academics, and legislators also may form part of the audience. Equally, a judge must address the upper court which might review the decision on appeal. Appellate courts in addressing lower courts must give clear indications as to the likely pattern of future decisions. In exceptional cases, judges of every level may go beyond the legal community to address the public at large, or some personified brooding spirit of posterity.

The nature of legal rules is related to the concept of the audience of law. Legal rules operate within the realm of judicial rhetoric. They cannot be explained in an abstract representation of law as a table of commands independent of the judicial process. In this sphere of argumentation, judges sometimes resort to essentializing strategies, and sometimes to proportioning strategies. They must in any event pay heed to the horatory influences of statute and precedent. The difference does not lie in the efficacy of statute and precedent to shape judicial outcomes. Rather, the difference lies in the rhetoric with which different judges choose to persuade their audiences.

The chief reason for rhetorical formalism may be the desire to appear impartial:

> Formalism has been described as a 'judicial defence mechanism' because it is a rhetorical style that obscures the true basis of a court's decision while enabling the court to appear as if it were acting impartially and without regard to the consequences of its decision.[56]

The judical obligation to appear impartial carries real legal consequences. For example, the rule against administrative bias is concerned with appearances.[57] Even where real impartiality may exist, the appre-

---

[56] M. Gold, "The Mask of Objectivity: Politics and Rhetoric in the Supreme Court of Canada" (1985) 7 *Supreme Court L. Rev.* 455 at 504.

[57] This rule affected the Alberta Court of Appeal decision in *Southam Inc.* v. *Hunter et al.* (1983), 147 D.L.R. (3d) 420 in which the Court rejected the submission that the Combines Investigations Branch's Restrictive Trade Practices Commissioner could impartially approve search warrants:

> [Hunter, et al.] argue that loss of real impartiality here is a far-fetched notion. That may or may not be so, but concern about appearances remains. *That appearance becomes real-*

hension of bias in the eyes of the public can override it. Or, to take another example, the proper role of the judge in the adversary system is restricted by the duty to appear impartial. The adversary system, it is said, provides incentives for the fullest argument and thus the best approximation of the truth. However, even where judicial intervention would ensure better revelation of the facts, judges may not intervene. The appearance of judicial impartiality is preferable to greater truth because it guarantees the strongest moral force and acceptability of a decision.[58] In both these examples, the appearance of impartiality outweighs the more immediate concerns of real impartiality, or greater revelation of relevant facts. The concern of the courts is to secure the *legitimation* of the decision in the eyes of the public. These legal rules are derived from a concern for the audience.

Formalist rhetoric, however, need not efface the judge's role in willing a specific result. The judge of course must remain impartial as to the parties to a dispute, and disinterested in the particular outcome in so far as it favours one party or another. Yet the legitimation function performed by judicial impartiality permits judicial partiality to the decision as a contribution to the law. Indeed, the judge is under an obligation to persuade others that it is a good decision. Judicial disinterest need not be confused with judicial uninterest.

The impetus toward rhetorical formalism stems less from the desire to appear impartial than from the need to be clear. The judiciary uses a language of rules and tests because their audiences are pleased by it. Lower courts seek predictability from higher court decisions. The practicing bar needs the clearest possible statements of what the law requires and permits. Ultimately, this demand for clarity is made by the public at large. The 'spontaneous order' of society, which Hayek argues is the foundation of the common law,[59] could not operate if every difference of opinion had to be litigated. The law is addressed to society at large. Though judicial decisions and legislation need to be translated by lawyers into specific answers to practical questions for non-lawyers, the message is directed to all. To that audience, a rhetorically complex assessment of the many factors in a judicial decision is

---

ity in the eyes of the public and the apprehension of bias alone is sufficient to strike down an otherwise valid exercise of that power.

At 435 [emphasis added].

[58] J. Fleming, *Civil Procedure* (1965) at 5.

[59] See F.A. Hayek, *Law, Legislation and Liberty*, vol. 1 (1973). The gulf which Hayek attempts to create between judicial decisions and legislation is dubious. The degree to which the 'spontaneous order' *requires* these rules to save it from collapsing back into an incommodious state of nature makes it far from spontaneous.

meaningless. The judge's objective must be to state clear reasons that will keep the maximum number of potential disputes out of court. The judge's obligation to persuade these audiences of the correctness of his or her decision encourages the deployment of an essentializing rhetoric of rules.

The concerns of rhetoric suggest new questions for legal theory beyond the confines of the realist-formalist debate.[60] Rhetoric reinserts the judge into the realm of argumentation. It asks that the nature of legal rules be explained with reference to their use in judicial decisions, and not *vice versa*. Like the cabinet-maker in the analogy borrowed from Heidegger, the judge is vested with a power of purpose and design. At the centre of the universe of legal 'motives', the judge is obligated to put into effect the 'wishes' of the rules of law, and to forge a rhetorical identification with each of the various audiences. While this entails consideration of ostensibly extra-legal (political, social, or moral) values, it does not require judicial arbitrariness. Judges must *as far as possible* give effect to the overlapping and possibly conflicting 'wishes' of statute and precedent. They must, after all, persuade their legal audiences, and give the clearest possible specifications of the line between permissible and impermissible behaviour to the greater public. Legal rules are but one device among many rhetorical means of persuasion.[61]

III. ADJUDICATING 'UNREASONABLE' IN HUNTER V. SOUTHAM INC.

The advantages of the rhetorical approach in case analysis are demonstrable in a discussion of the recent Supreme Court of Canada decision in *Hunter* v. *Southam*.[62] Here the Court was called upon to determine the meaning of "unreasonable" in section 8 of the Charter.

---

[60] W. Lehmann, "Rules in Law" (1984) 72 *Geo. L.J.* 1571, also attempts to find a middle ground between realism and formalism. Lehmann bases his solution on judges' intuitions of "the good". The approach which I have outlined provides more concrete analytical tools (such as 'means of persuasion,' 'audience,' and 'identification') with which to explain how judicial discretion is circumscribed and how judges' intuitions are shaped.

[61] In prescriptive terms, this analysis suggests that judges should take more candidly rhetorical approaches to law. It is simply not in the nature of law in concrete cases to reduce itself readily to clear-cut tests and rules. Any judge who strains over much to achieve a hard statement of law where none is possible will serve neither law nor justice. (See, F.A. Hayek, *supra* note 59 at 117 and also S. Toulmin, "Equity and Principles" (1982) 20 *Osgoode Hall L.J.* 1 at 17.) Instead, more effort should be expended on effecting both the letter and the spirit of law. This is not to suggest that judges should apply the spirit despite the letter - for the letter of law is the one truly indispensible hortatory motive of judicial decisions. But applying the letter despite the spirit may well be insufficiently persuasive to a relevant audience.

[62] *Supra* note 6.

Section 8 states that: "Everyone has the right to be secure against unreasonable search or seizure."[63] A more open-textured standard than "unreasonable" is hard to imagine. As Dickson J. remarks, the guarantee lacks specificity, and lacks a context from which to derive an "obvious gloss" on its meaning.[64] "It is clear that the meaning of 'unreasonable' cannot be determined by recourse to a dictionary, nor, for that matter, by reference to the rules of statutory construction."[65] Strictly speaking, there are no precedents on which the Court can rely.[66] In this situation, the Court cannot merely apply a fixed rule, since no such fixed rule exists.

How does one reach a legal decision when no clear rule exists? Like logicians, judges find that deductive reason is of no assistance here.[67] Instead, recourse must be had to argumentation in order to generate the premises from which they derive their results.

The Supreme Court decision in *Hunter* is an exercise in the primacy of rhetoric to rules.[68] The Court openly adopted a purposive approach to the interpretation of Charter rights.[69] 'Purposivity' *per se* does not explain the result in the Supreme Court, because it fails to account for the different, conflicting purposes of the Constitution. The Court's *choice* of purpose, namely the protection of the individual's right to privacy, is explained by the rhetorical identification which the Court constructs through its use of the terminology of Lockean liberalism. This rhetoric of private right has real legal consequences in the tests of 'prior authorization' and 'reasonable and probable grounds' that the Court imposes on the issuance of constitutionally valid search warrants. A thorough-going rhetorical formalism could neither reach nor explain these results. The rhetorical method outlined in section II

---

[63] "[T]he crux of this case is the meaning to be given to the term "unreasonable" in the section 8 guarantee of freedom from unreasonable search or seizure." *Ibid.* at 154 *per* Dickson J.

[64] *Ibid.* at 155.

[65] *Ibid. Black's Law Dictionary* indeed offers quite circular definitions of the relevant terms:
Unreasonable. Irrational; foolish; unwise; absurd.
Irrational. Unreasonable, foolish, illogical, absurd.
Reasonable Having the faculty of reason; . . . governed by reason; under the influence of reason; agreeable to reason.

[66] Though American jurisprudence is cited in the *Hunter Case* (in particular *Katz* v. *United States*, 389 U.S. 347 (1967), and *United States* v. *Rabinowitz*, 339 U.S. 56 (1950), see *ibid.* at 158-159, 161), these precedents are strictly of 'persuasive' authority, hence by definition rhetorical in impact.

[67] One requires the rhetorical arts of the Muse. See *supra* note 25.

[68] While the scope of this case is confined to constitutional adjudication, the benefits of rhetorical analysis should obtain when applied to a broader range of case law.

[69] This approach contrasts with that of the British Columbia Court of Appeal in *R.* v. *Hamill* (1984), 41 C.R. (3d) 120.

shows how the reasons for decision in *Hunter* are structured by a 'rhetoric of motives.'

The case first came before the courts when Southam Inc. brought an action against Lawson A. W. Hunter, then Director of Investigation and Research in the Combines Investigation Branch. Southam sought an order to stop and prevent the further search of *Edmonton Journal* offices and the seizure of its property by agents of the Combines Investigation Branch.

In the Alberta Court of Queen's Bench, Southam was refused its application for an interim injunction.[70] Cavanagh J., adopted a purely formalist approach to the constitutional issue. He distinguished some American case law, which later received the warm endorsement of the Supreme Court, on narrow technical grounds.[71] He repeatedly cited the conformity of the impugned search with the statutory provisions of the *Combines Investigation Act*,[72] implying that conformity to statute weakened the force of the charge of unconstitutionality.[73]

The Alberta Court of Appeal however found that the plaintiff's section 8 rights had been infringed.[74] The different result derives from the more openly rhetorical strategy adopted by Prowse J. in his reasons for decision. Prowse J. quotes Viscount Sankey's famous *dictum* that the Constitution is a living tree capable of growth and expansion, which therefore deserves a large and liberal interpretation.[75] Prowse J. also

---

[70] *Southam Inc.* v. *Director of Investigation and Research of the Combines Investigation Branch* (1982), 65 C.P.R. (2d) 80 (Alta. Q.B.).

[71] *Ibid.* at 87-88. The American cases were held to involve *subpoena* powers, whereas the case at bar was solely concerned with a search. Secondly, the Charter makes no specific reference to search warrants, unlike the United States Fourth Amendment. In the United States these rights are dealt with in one clause, the Fourth Amendment, whereas the Canadian equivalents are divided among sections 7, 8 and 9. "In our Charter we have divided up these matters. Those dealing with the liberty of the subject and arrest are ss.7 and 9, and s.8 deals with searches and seizures and there is no specific regulation about the issue of search warrants and the grounds on which they may be issued. I therefore feel that the decisions from the United States based on the Fourth Amendment are not really very helpful." (*Ibid.* at 85.) These statements *as law* are uncompelling. They evoke the rhetorical miasma of "distinctions without a difference" created by an overly formalistic reliance on the terms of legal rules.

[72] *Ibid.* at 87-88.

[73] Perhaps the explanation of Cavanagh J.'s rhetorical formalism can be found in the extreme novelty of the Charter challenge. At the Queen's Bench level, a frankly rhetorical approach would involve the substantial risks of being overruled by the appellate courts for adventuring beyond the law. As Marc Gold has noted:

> Judges will tend to be more comfortable in writing in a non-formalistic way whenever they are engaged with issues traditionally thought to be within their legitimate domain . . . .

Gold, *supra* note 56 at 505-6. Since Southam's section 8 challenge was unprecedented, Cavanagh J. cautiously adhered to a formalist rhetoric.

[74] *Southam Inc.* v. *Hunter* (1983), 147 D.L.R. (3d) 420 (Alta. C.A.).

[75] "The B.N.A. Act planted in Canada a living tree capable of growth and expansion within its natural limits . . . . Their Lordships do not conceive it to be the duty of this Board - it is

notes Lord Wilberforce's remark that a Constitution is "*sui generis*, calling for principles of interpretation of its own . . . [in order to avoid] 'the austerity of tabulated legalism'."[76] With the support of these statements, Prowse J. declares his intention to: "construe s. 8 bearing in mind that it is set out in a constitutional document which enshrines some of the principles which are basic in a free and democratic society."[77] These presumptions shift the Court's concern away from its duty to follow "clear and explicit language passed by Parliament," which weighed so decisively against the plaintiff in Alberta Queen's Bench,[78] and toward its role as "guardian of the citizen's right to privacy."[79] The Court of Appeal's rhetoric of constitutional rights reflects a conclusion opposite to that of the rhetorical formalism of the Queen's Bench.

The Supreme Court of Canada upheld the decision of the Court of Appeal. Writing on behalf of the unanimous court,[80] Dickson J. follows the Court of Appeal in quoting the famous phrases of Lords Sankey and Wilberforce.[81] He adds to their persuasive authority the example set by United States Chief Justice John Marshall in *McCulloch* v. *Maryland*.[82] The Court declares its intention to adopt "a broad, purposive analysis, which interprets specific provisions of a constitutional document in the light of its larger objects."[83]

---

certainly not their desire - to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation." *Edwards* v. *A.G. of Canada*, [1930] A.C. 124 at 136. The rhetorical force of Lord Sankey's metaphor is perhaps greater for an English audience than it is for a Canadian audience. The historical connotations of the constitutional image of the "tree of liberty" are entangled with the early popular struggles for the franchise and other elementary civil rights in England (see E.P. Thompson, *The Making of the English Working Class* (1968) at ch. 5), which convey something more than the merely botanical connotations obvious to Canadians.

[76] *Minister of Home Affairs* v. *Fisher*, [1980] A.C. 319 at 329.

[77] *Supra* note 74 at 425-26. The importance of the phrase "free and democratic society" clearly exceeds its use as as saving device in s.1. It exerts enormous influence as an interpretive device, casting all other charter provisions in a new light. This retrospective effect is felt because it indicates to the judiciary the range of rhetorical 'identification' which underlies the specific terms of Charter rights.

[78] *Supra* note 70 at 87.

[79] The Court of Appeal characterizes this role in words borrowed again from Lord Wilberforce. See *Supra* note 74 at 434.

[80] The then Chief Justice, the late Bora Laskin, took no part in the judgment.

[81] *Supra* note 6 at 155-56.

[82] "We must never forget that it is *a Constitution* we are expounding." *McCulloch* v. *Maryland* 4 Wheat. 316 (1819) (U.S.S.C.) at 407.

[83] *Supra* note 6 at 156. The 'interpretive' message to lower courts is clear, especially when constrasted with the words of the Ontario High Court (*per* Ewaschuk J.), quoting the same cases as Dickson J. but to opposite effect:

> The trap that the learned justice [in *R* v. *Dahlem* (1983), 33 C.R. (3d) 345 (Sask. Q.B.)] as well as the trial judge on this appeal both fell into is the often all-consuming zeal for

The impact of this purposive approach on the outcome of the case is substantial. Analysis of the larger objects of the constitution, when applied to section 8, reveals an intention to protect individual rights by acting as a limitation on governmental power. The Court therefore must determine the meaning of 'unreasonable search or seizure' by focussing upon the: "impact on the subject of the search or seizure, and not simply on its rationality in furthering some valid government objective."[84] This in turn requires the Court to delineate the precise nature of the interests which section 8 is meant to protect. The Court finds that the objects of the Constitution include a right to the reasonable expectation of privacy.[85] This concept of substantive right, which later I will argue is derived rhetorically, generates the legal content of section 8.[86]

The purposive approach adopted by the Court determines its conclusions of law. It impels the Court to demand both prior authorization of searches (where feasible), and reasonable and probable grounds that the discovery of the evidence is likely, before the Court will uphold the validity of a search.[87]

In determining the reasonableness of a search or seizure, the Court has shifted its focus from the 'reasonableness' of the search or seizure in furthering a valid government objective, to "its 'reasonable' or 'un-

---

> some jurists to rewrite the Charter according to their personal perceptions as to what Canadian society requires. Having been incessantly bombarded with quotations . . . to the effect that the construction of a constitution calls for 'a generous interpretation avoiding what has been called the austerity of tabulated legalism', and . . . that a constitution must be liberally construed as a 'living tree, capable of growth and expansion', these jurists have yielded to the temptation to judicially legislate.

R. v. *Boron* (1983), 36 C.R. (3d) 329 at 333-34. The archetypal formalism of this passage, in which 'personal perceptions' are contrasted with the supposedly objective meaning of the terms of the Charter, is repudiated by Dickson J.'s counter-quotation of these classic phrases.

[84] *Supra* note 6 at 157.

[85] "I would be wary of foreclosing the possibility that the right to be secure against unreasonable search and seizure might protect interests beyond the right of privacy, but for the purposes of the present appeal I am satisfied that its protections go at least that far." *Ibid.* at 159.

[86] The right to privacy in the United States is an example of "substantive due process," being one of the 'penumbral' rights that the U.S. courts have read into the terms of the Fourteenth Amendment. Ironically, the drafters of the Canadian Charter seem to have intended to exclude this expansive area of U.S. constitutional law. Peter Hogg quotes one drafter of the Charter, section 7, as follows:

> [In the United States] the term due process has been given the broader concept of meaning both the procedure and substance. Natural justice or fundamental justice in our view does not go beyond the procedural requirement of fairness.

P. Hogg, *Canada Act 1982 Annotated* (1982) at 29.

[87] The third major component of the Court's determination of the test for constitutional validity of search warrants is the requirement that authorization be given by one capable of acting judicially. Since this ruling does not employ rhetorical considerations of the same nature as the other two tests, it is not discussed in this article.

reasonable' impact on the subject of the search or seizure."[88] If 'unreasonable' were to be assessed with regard to the importance and validity of the government objective, then a *post facto* authorization of the search warrant would suffice. But if the ultimate purpose of the Constitution is the protection of privacy, then prior judicial authorization, where feasible, is required.[89]

Before authorizing a search, a minimum standard must be met, which Dickson J. establishes as follows: "reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search."[90] The Court rejects the lower standard of "reasonable belief that relevant evidence *may* be uncovered by the search,"[91] despite the fact that the bald terms of section 8 point to neither the one standard nor the other. The Court rejects the lower standard in the language of individual rights: "It would tip the balance strongly in favour of the state and limit the right of the individual to resist, to only the most egregious intrusions . . . *Anglo-Canadian legal and political traditions* point to a higher standard."[92] The higher legal standard of reasonable and probable grounds thus originates in the purposive approach and the higher objects of section 8.

More specifically, and central to my argument, these legal standards originate in Canada's traditional legal and political rhetoric. The important tests for a constitutionally valid search or seizure established in *Hunter* v. *Southam* cannot be explained purely with reference to the purposive approach. These tests are not the consequence of the uniform application of a single principle, namely, that the specific provisions of a constitutional document must be interpreted in light of its larger objects. The larger objects of a constitution cannot be reduced to protecting citizens from the state. As Dickson J. himself notes about a constitution: "Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights or liberties."[93] There are two functions here. One constitutes the framework of legitimate governmental action. The second protects individual rights. Yet, when the Court assesses the larger objects of section

---

[88] *Supra*, note 6 at 157.

[89] *Ibid.* at 160.

[90] *Ibid.* at 168.

[91] *Ibid.* at 167.

[92] *Ibid* [emphasis added].

[93] *Ibid.* at 155.

8, the primary 'constituting' function of the Constitution has been forgotten. The Court has chosen to concentrate all its attentions on the larger objects of the Charter alone. The purposive approach does not explain the Court's separation of the Charter document from the other terms of the Constitution, nor its preference for the second constitutional function to the exclusion of the first.

The outcome of this case and the legal 'meaning' which the Court gives to section 8 therefore must stem from something else, namely the Court's rhetorical delineation of the objects of section 8. The purposive approach, which appears in the form of a rule (a rule of interpretation), acts as a vehicle for rhetorical identification. The specific legal tests of prior authorization and reasonable and probable grounds originate in the Court's rhetoric of private right. "The purpose of section 8," according to Dickson J., is "to protect individuals from unjustified state intrusions upon their privacy."[94] Dickson J. finds this right expressed in the words of Lord Camden in the 'great case' of *Entick* v. *Carrington*: "The great end, for which men entered into society, was to preserve their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away, or abridged by some public law for the good of the whole."[95] Lord Camden's statement originates in the work of the great theorist of constitutional monarchy, John Locke. In Locke's own words: "The great and chief end, therefore, of men's uniting into commonwealths and putting themselves under government is the preservation of their property."[96] The Court's rhetorical invocation of the right to property conjures up the supra-constitutional concepts of Lockean liberalism.[97]

As indicated in the above quotation, Locke's social contract theory conceived of individuals prudently coming together into society and establishing government in order to preserve their property. The Lockean juxtaposition of individual and government, plus the implication that government is at best a necessary evil, recur throughout the opinion of Dickson J.

> [It is] the apparent intention of the *Charter* to prefer, where feasible, the right of the individual to be free from state interference to the interests of the state in

---

[94] *Ibid.* at 160.

[95] (1765), 19 State Tr. 1029 at 1066.

[96] J. Locke, *The Second Treatise of Government* (1952) at 71.

[97] Dickson J. expands the right protected by section 8 beyond the limitations of property law and actions in trespass: "There is, further, nothing in the language of the section to restrict it to the protection of property." *Supra* note 6 at 158. Nevertheless, the substantive right to privacy derives from the rhetoric of private property right.

> advancing its purposes through such interference.[98]
>
> [A]n assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy.[99]

The rhetorical use of terms is important here: 'Public' is not used synonomously for governmental, as in 'public sector'. Rather, the favourable connotations of 'public' are counterposed to "the government's interest in intruding on the individual's privacy." Readers are more likely to identify themselves with 'the public' and 'the individual' than with an "intruding" government. Thus, 'the public' and 'the individual' are rhetorically equated as the beneficiaries of the protections of section 8.[100]

This rhetoric of private right, logically prior to the interests of the state, works for Dickson J. because it reaches back to the supra-constitutional values associated with John Locke. In contemporary Canada, this Constitution-Behind-the-Constitution forms a primary ground of consubstantial identification. By tapping into this common source of identity, the Court motivates its audience to accept its legal conclusions as to the specific meaning of section 8.[101]

The expansive rhetoric of the Supreme Court in *Hunter* v. *Southam* contrasts sharply with the method adopted by the British Columbia Court of Appeal in *R.* v. *Hamill*.[102] Hamill had been acquitted of drug possession for the purposes of trafficking at trial because the evidence had been obtained under a writ of assistance. The trial judge had held that s.8 of the *Charter* invalidated this form of warrantless

---

[98] *Ibid.* at 160.

[99] *Ibid.* at 159 and 160. See also: "The purpose of an objective criterion for granting search or seizure is to provide a consistent standard for identifying the point at which the interests of the state in such intrusions come to prevail over the interests of the individual in resisting them." *Ibid.* at 167.

[100] The rhetorical content of these passages is more striking when one recalls the identity of the plaintiff. Southam Inc. is one of Canada's larger corporations and a leading member of the private sector. It was under prolonged investigation for alleged anti-competitive practices which, among other problems, Parliament found to be of sufficient concern to justify the appointment of a Royal Commission. See Canada, Royal Commission on Newspapers, *Report of the Royal Commission on Newspapers*, (1981). The public has an interest in a fair and free market, especially a market of ideas. The Court's treatment of 'the public' and individual rights as strictly equivalent to the interests of a large corporation demonstrates the powers of identification.

[101] There is, of course, no *identity* of private right, since different individuals enjoy very different quantums of property and effective power. Despite this lack of 'identity', the rhetoric of individual property forges a ground of consubstantiality. In this process, the 'awkwardness of social inequality' is occluded. All citizens are made rhetorical equals in the midst of ordered inequality. Here is proof again of Burke's statement that "the mystery of the hierarchic is forever with us," (*Supra* note 5 at 857), a notion echoed by Foucault's famous phrase about the structures of social power: "Power *is* 'always already' there." Foucault, *Power/Knowledge: Selected Interviews and Other Writings* (1980) at 141.

[102] *Supra*, note 69.

search.[103] The Court of Appeal set aside the acquittal.

The method of argumentation adopted by in the Court of Appeal is revealing. Citing Estey J.'s reasons for decision in *Law Society of Upper Canada* v. *Skapinker*,[104] Esson J.A. writes:

> The issue in that case was entirely different from that in the case at bar, but the Supreme Court's approach to resolving it is instructive. At p.483, Estey J., speaking for the court, said: "At the outset, let it be emphasized in the clearest possible language that the issue before this Court in this appeal is not whether it is or is not in the interest of this community to require Canadian citizenship as a pre-condition to membership at the bar. Rather, the only issue is whether s.28(c) of *The Law Society Act*, is inconsistent with s.6(2)(b) of the *Canadian Charter of Rights and Freedoms*."
>
> In the end, the issue in that case was resolved by analysis of the words used in the Charter, not by reliance on the court's subjective view as to what the law should be.[105]

The lesson which the Court draws from the words of Estey J. commits it to an essentializing, formalist strategy. Any non-textual considerations are stigmatized as merely 'subjective.'

The quotation of Estey J from the *Skapinker* case serves a purely rhetorical function in the *Hamill* decision. It lends a semblance of rule-based authority to a non-rule-determined outcome. As I have argued, the content of section 8 is highly open-textured. No fixed rule exists as to what meets the test of 'unreasonable'. With respect, the *appearance* of conformity with the Charter's authority is unsubstantiated, because the content of the relevant rule has not been defined.

The Court, in effect, never says what 'unreasonable' might mean. While acknowledging that "no law which is inconsistent with the Charter can stand,"[106] the Court defers to Parliament as to what procedures section 8 might require:

> [I]t is for Parliament to decide whether the initial determination of the existence of reasonable grounds is to be made by the judicial or quasi-judicial or administrative personage who has power to issue search warrants or by the police officer. It is for Parliament to decide what exceptions should be made to the general rule requiring search warrants. For courts to lay down a condition that a search warrant must be obtained unless it is not practicable to do so is, in my view, to exercise a jurisdiction which the Charter has not removed from Parliament.[107]

This refusal to contemplate the possible contents of the section 8 provision minimizes the Court's obligations as "guardian of the citizen's

---

[103] The trial judge also held that section 7 invalidated warrantless search. The present discussion concentrates exclusively on the section 8 issue.

[104] *Law Society of Upper Canada* v. *Skapinker*, [1984] 1 S.C.R. 357.

[105] *Supra* note 69 at 135.

[106] *Ibid.*

[107] *Ibid.*

right to privacy."[108] While the decision does not strictly speaking overstep the letter of the law, it falls short of reading the letter of the law in the light of its spirit. The Court in *Hamill* fails to give full effect to the Charter's motives.

The Supreme Court decision in *Hunter* demonstrates the relation of rhetoric to rules in constitutional adjudication. The determination of the meaning of 'unreasonable' in section 8 could not proceed with reference to any foregoing rules. If a rhetoric of formalism had been employed in this situation, the judicial responsibility to generate the specific applicable meaning of legal rules would not have been met. The Supreme Court's purposive approach in *Hunter*, as a rule of interpretation, cannot explain the outcome of the case. As a vehicle for the rhetoric of identification, however, it shows that the Court introduced into this ostensibly purely rational exercise, the commonly persuasive concepts of private right which structure judicial decision-making.

IV. CONCLUSION

The return of rhetoric as a serious subject of study promises to benefit the understanding of law. The practice of law is overwhelmingly an exercise in argumentation *par* excellence, that is, "the discovery of the available means of persuasion in a given case."[109] In legal theory, the characterization of law as a realm of argumentation suggests a middle ground between rule-bound formalism and rule-sceptical realism. Rules can be seen as a set of instruments of persuasion. Judges select from the hortatory recommendations of statute and precedent when willing their decisions. The rules, however, do not exhaust judges' means of persuasion. Society's need for clearly expressed tests and standards does not justify the reduction of hard cases into narrow formalistic law.

The determination of the Charter protection from unreasonable search or seizure exemplifies the judicial obligation to adopt a more frankly rhetorical method. Rhetorical formalism is insufficient to the task of expounding a constitution. The rhetoric of the *Hunter* v. *Southam* decision shows how the Courts employ both rules and rhetoric to discharge their judicial obligations.

---

[108] *Supra* note 79.

[109] *Supra* note 9.