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## ***Towards a Rhetoric of Medical Law: A Law and Humanities Symposium***

This symposium is dedicated to John Harrington's recent monograph *Towards a Rhetoric of Medical Law*.<sup>1</sup> The book examines the development of British health care law since the foundation of the National Health Service in 1948 from a critical cultural and historical perspective. Its ambition is two-fold. First, it seeks to explain changes in key medical law doctrines, for example informed consent and clinical negligence, with reference to shifts in the organization of health care in the UK, and with reference to the broader pattern of crisis and reform in British political economy over the period. It pays particular attention to the decline of welfarist paternalism and the rise of neo-liberal marketization in health. Second, it renews and extends rhetorical analysis of law, developed by modern scholars such as James Boyd White and Peter Goodrich. It draws on theories of legal indeterminacy, especially critical legal studies and systems theory, to justify the rhetorical stance. Combining classical patterns of analysis with tools from materialist cultural studies it shows that rhetorical criticism offers a powerful combination of humanistic and socio-legal approaches to law. The present symposium brings together a diverse group of scholars whose interests enable them to speak to the several ambitions of *Towards a Rhetoric of Medical Law* and to evaluate the extent and limits of its achievement. These interests include rhetoric and British politics (Alan Finlayson), social studies of medicine and law (Emilie Cloatre), legal rhetoric (Gary Watt) and law and literature (Martin Kayman).<sup>2</sup> Their contributions are followed by a reply from Harrington, part justification, part concession, which concludes with a brief defence of rhetoric against both technocratic and populist anti-rhetorics which dominate the contemporary scene in Britain and beyond.

### ***Law and the National Health Service as Metaphor***

#### **Alan Finlayson**

On June 14<sup>th</sup> 2016 – ten days before the UK voted narrowly in favour of leaving the European Union – the leader of the Labour Party, Jeremy Corbyn, gave a speech at the Trade Union Congress in London. His focus was The National Health Service which he described as 'Labour's proudest creation', 'a force for civilization' and 'one of our greatest achievements, not just as a Labour Party, but as a country'. But, he said, it was facing a crisis which Brexit

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<sup>1</sup> John Harrington, *Towards a Rhetoric of Medical Law* (London, Routledge, 2017). The book was runner-up for the Socio-Legal Studies Association Legal History and Legal Theory Book Prize 2017.

<sup>2</sup> The book was launched at the Institute of Advanced Legal Studies, London and at Centre of Law and Society, Cardiff University in February and June 2017 respectively. The contributions published here are based on those proceedings. Thanks are due to Diamond Ashiagbor and Jiri Priban for hosting them, and also to Barbara Hughes-Moore for here expert editorial assistance.

would make worse: 'A vote to Leave is a vote to put our NHS in jeopardy, in the hands of those who want to break it up, to end it as a service free at the point of use'.<sup>3</sup>

The Brexit referendum put into question how the UK imagines itself - its place in the world and how it should treat the peoples who are here. In answering that question Corbyn made the NHS into an exemplar of the nation's historical achievements, and of a way of caring for each other. In so doing he was reaffirming established usage. Fifty-eight years earlier, on February 9th, 1949, Aneurin Bevan spoke in the House of Commons to counter the hostility of some in the medical profession towards the new Service. They should be proud, he argued, that even in straitened circumstances the country was doing 'the most civilized thing in the world' by putting 'the welfare of the sick in front of every other consideration'.<sup>4</sup>

For Bevan, famously: 'no society can legitimately call itself civilized if a sick person is denied medical aid because of lack of means'.<sup>5</sup> And after its founding the Service would become an index of that achievement, a way of measuring continued civilizational advance or decline and of contesting what we think that is. It was perhaps natural that at the opening ceremony of the 2012 London Olympic Games, the NHS, was portrayed as a definitive component of the national culture alongside Shakespeare, industrialization, and James Bond.

In short, the NHS has always stood for more than itself. It is a means of providing healthcare, and as such to be judged by its effectiveness, alacrity or efficiency. But it is also a national service symbolizing and serving that community and demonstrating its ethical development. Its condition is always a cipher for the health of the nation – the politics of bodies and the body politic inextricably linked – and assessments of its capacity to care are also judgements of the moral fitness of the nation, propositions about who is deserving of care, and to what degree. The NHS, John Harrington shows, is one place where core political conflicts have been fought out: rights versus responsibilities, patient autonomy versus professional authority, freedom from want versus freedom of choice.

In this book, what John Harrington gives us is a kind of rhetorical history of this conflict – of the legal and political arguments surrounding it. He thus makes an important and illuminating contribution not only to the study of law and medicine but also to the study of British political culture and rhetoric. There is a growing body of work concerned with the formation, performance and fate of public argumentation in the UK. That work is not only a reflection of the influence of a range of theories and methods emphasizing the importance of varied practices of 'discourse'. It is also a response to profound upheaval in the conditions of public communication. The nation that Bevan spoke of and spoke to could – just about – be imagined as sharing a common fate and as having a relatively stable if not wholly unified national common-sense. That idea of unity is today under pressure from, on the one hand, resurgent nationalisms and a range of collective interest or identity groups and, on the other hand, powerful forces of individualization which reduce political discourse to self-expression or personal branding. Transformations of the means and platforms of public communication

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<sup>3</sup> Jeremy Corbyn, Speech on the risk of Brexit to the NHS at the TUC, (June 14<sup>th</sup>, 2016).

<sup>4</sup> Aneurin Bevan, Speech to the House of Commons on the Appointed Day (February 9<sup>th</sup>, 1948).

<sup>5</sup> Aneurin Bevan, *In Place of Fear*, (London: Heinemann 1952, p. 75).

have changed who has access to, and who has power over, collective debate as well as altering the form of that debate (from op-ed pages and letters to the editor to Facebook threads, viral videos and two-hundred and eighty-character pronouncements). All of this has complicated and weakened traditional means for the communicative coordination of societal action, the creation of common understandings and reference points, giving rise to new kinds of democratic demand and new kinds of authoritarianism.

For a Politics specialist Harrington's book is especially interesting in this context. He shows how the particular codes of formalized discursive practice (legal debate and decision-making) are connected to wider ideological and institutional, cultural and political practice. He is enabled in this by a significant conceptual move made early on in the book. Affirming the rhetorical and intellectual creativity and effectiveness of individual judges Harrington immediately puts it into socio-cultural context. Judges share a conception of the law and resources for argumentation in the form of precedent and interpretation. They also share general sources 'ranging from classical myths, religious stories and philosophical treatises, to novels, dramas and poetry, and political declarations and tracts' which connect them with horizons of national imagining (6). Lord Denning's judgements, Harrington writes, were 'intertextual in just this way, articulating a pastoral vision which resonated with long established literary views of England as a garden' (7).

To be clear, here, rhetoric is not simply manipulative or vapid argument, nor is it reducible to a list of literary tropes. Rhetoric is argument as action. It is not the only thing that argument is and it is not the only kind of action. But there are places and moments where action takes place primarily as and through discourse and where arguments can have a decisive effect on the outcomes of a situation. Parliament and the court room are paradigmatic examples of such spaces. In both, discourse plays a key role because the matters they decide upon are formally deemed uncertain – they constitute a controversy to be resolved. That decision cannot be made simply by the declaration of an authority or the application of a formula but must be made by an audience (jury members, judges, MPs) judging the rival arguments put before it. The situation demands that people act rhetorically - working out what to say about a particular case to a particular audience at a particular time in order to persuade them to think something. But such work is not conducted in an entirely open and free space. It is a material space in the most straightforward way: a building or a room with a layout that shapes the situation and which is linked with rules about who can go where, who can and can't speak, where and when, and which induce certain kinds of discourse while determining in advance that other kinds will be 'out of order'. Behind those formal rules are the informal ones of convention, custom and practice which condition what audiences will hear as legitimate speech or argument, the voices they will recognize as speaking in the correct way and as worth listening to. All of that is located within a larger social order of roles and powers, and articulated with other domains of public communication.

All of this means that, to get a hearing, to stand a chance of being persuasive, our arguments need to conform to what audiences already think, know and understand. But as we have seen with healthcare that is neither fixed nor uniform. There is controversy because what we already think is not sufficient for grasping new circumstances, or because different interests or groups think differently and there must be some brokering, or translation, between them.

Common sense, as Gramsci famously observed is ‘a chaotic aggregate of disparate conceptions’<sup>6</sup>.

Rhetoric, then, ‘panders’, as Socrates complained, to what is already accepted within a communicative community. But because that is never uniform there is always a chance for rhetoric to redefine our concepts, to join ideas and images in new ways, rearticulating the relationship of our general values to particular cases, altering the common sense of that community. As Harrington writes “common sense is both a means of rhetorical struggle and a stake”.

Of particular value, then, is Harrington’s identification of the *topoi*, the “commonplaces” that shape our arguments about the medicine and about the National Health Service. In classical rhetoric there are all sorts of common topics: the definitions of things, their belonging to a species or genus, relations of cause and effect, precedent and probability and so on. Harrington, however, identifies topics particular to healthcare and medical law: paradox, national space, time, utopia, progress, art and ethics. These give shape to controversies, structuring rival conceptions of what is at stake and connect the domain of medical law to more general ideology and culture.

For example, in the chapter on utopias Harrington explores how people like Bevan (98) and Richard Titmuss (99) conceived of the NHS as a place of decommodification, governed by the gift relationship rather than the cash nexus, and enhancing the human capacity for human collaboration, creativity and care. This utopian form of argument gave shape to a controversy, calling forth opposing arguments within the same *topos*: critiques of the NHS as unrealistic, ‘merely’ utopian, and more powerfully, the charge that it is a dystopia, in need of reform. Healthcare could then be conceived of as a site for testing and developing a very different utopia. Through a reading of Ian Kennedy’s Reith Lectures, Harrington shows how the medical lawyer redefined medical commitment to professional care as a kind of unchecked authority over patients (104). In Renaissance rhetoric this is the technique of *paradiastole*, re-describing something so as to alter its location in a moral schema. For Kennedy, the necessary conclusion is that the Law must step in to regulate fairly the doctor-patient relationship. This became part of a wider rhetorical reconfiguration in which the gift economy is displaced and substituted by a market imagined as a utopian space of free and rational contractual bargaining (111).

Harrington’s analysis helps us to see not only how political rhetorics enter into legal processes but also how legal rhetorics are picked up and employed in other domains. The political and legal history of the NHS is part of a history of the societal organization of imagination and knowledge: their interaction, and the ways some ways of thinking are constituted as legitimate or necessary and how that is contested through rhetorical communication. There is little that could be more timely. At the core of current political conflict is the collapse of the authority of all sorts of professional and expert discourses and the breakdown of their connection to the executive power, to means of public communication and to publics. Specialist or technical discourses have been re-described as ‘elite’, and thus as intrinsically illegitimate and illiberal.

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<sup>6</sup> A Gramsci, *Selections from the Prison Notebooks* (Lawrence & Wishart, 2005).

We might say - with only a little license - that political dispute over the NHS has always been a Bolam Test for the state: of its professional duty, of the standards a people can expect of a state, and therefor of whose judgement of these things will count. But the Bolam Test becomes unintelligible if appeal to a body of specialist opinion is always seen as an appeal to one's elite colleagues over and above the head of 'the people'. It is tempting, in this context, simply to assert more forcefully the power of expert insight. But what Harrington shows is that this situation is part of a larger political project in which the power of judgement has been removed from rhetorical spaces and handed over to markets governed by the logic of commodities and the evaluation of the price mechanism. What Harrington helps us to see is the role that medical law, politics and rhetoric have played in getting us here - the better to see how politics, law and rhetoric may create ways for us to go somewhere else.

## ***Critique and the politics of medical law***

**Emilie Cloatre**

*Towards a Rhetoric of Law* is an ambitious and highly original project in the field of medical law. Its distinct contributions are both to open-up medical law to a new form of scrutiny, and to re-imagine the relationship between legal doctrine, medical ethics and politics. In doing so, the book contributes to a much needed and arguably too rare endeavor: to revisit medical law not only as a technical field, but as a socially inscribed and political phenomenon. As the opening line of the book ambitiously states: ‘This is a critical study which seeks to “resurface the politics and history presently submerged in the enterprise” of medical law’<sup>7</sup> (1). The book rests on the assumption that the positioning of medical ethics as the central source of normative power in medical law has resulted in the field losing sight of other constitutive elements. For example, ‘it suggests that the standard model of scholarship rests on an oversimplified understanding of the nature of legal argumentation which neglects the pervasive phenomenon of indeterminacy in lawyers’ reasoning’ (2).

The proposal, carefully delivered in the book, is to use rhetorics as a lens to draw out this indeterminacy and the ultimate constitution of possibilities and plausibilities through medical law. This enables the analysis ‘to study speech from the perspective of politics and power’ (4), thereby reallocating to medical law its historical and political context. While informed by an impressive range of theoretical concepts, Harrington’s argument throughout is heavily influenced most visibly by two sets of thoughts. First, it is shaped by a materialist Marxist approach, and an attention to how shifts in economic structures have co-constituted medical law from the post-war period. The effects of capitalism (understood through an ecological model, as socially-embedded) on legal understandings of the NHS and on the practice of medicine are important focal points of the analysis (9). This also shapes Harrington’s understanding of both law and medicine, including ‘a particular concern with medicine and law as forms of work’ (9). Second, Systems Theory is influential in shaping Harrington’s understanding of law’s indeterminacy, and of its relationships with other fields, notably medical ethics.

Harrington’s analysis is compelling, and his case for the broader significance of medical law is significant: too often, medical law has failed to engage broader readership, or to be mobilized in conceptual critiques. Reasserting its political and historical dimensions is a crucial reminder of why thinking critically about medicine and law is a fruitful exercise to enrich critical understandings of law as social phenomenon. The emphasis on reading the law as discourse enables him to demonstrate how shifts, tensions and disagreements in law also reflect the stakes and framings of particular times. For example, as the NHS of the Beveridge report has progressively been attacked and transformed, and shifted away from its utopian origins, medical law has come to redefine what citizens could expect from the state and what constitutes acceptable welfare.

Harrington’s analysis is deployed throughout the book through a careful and expansive exploration of medical law cases and documents that illustrate key historical shifts and

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<sup>7</sup> A Hutchinson, *It’s All in the Game: A Non-Foundationalist Account of Law and Adjudication* (Duke University Press, 2000) 173.

moments. The book's structure is organized around what he refers to as 'topics', i.e. 'positions or common-sense assumptions shared between speaker and audience, from which an argument can begin' (12). Those reflect crucial moments and tendencies in the national history and politics of medicine that the book explores: 'national space; time and the organization of treatment; the NHS as a utopian project; the idea of medicine as an art and as a progressive science' (13). But they also echo, and are ultimately framed as, important themes in contemporary critical legal scholarship (Space; Time; Utopia; Progress; Art; Ethics). This illustrates Harrington's effort to address broad conceptual questions through a discussion deeply grounded in the particularities of medicine. This is successfully delivered throughout: the book is an exceptional crafting of post-war medical law as a field of inquiry, and while also making a compelling argument for understanding medical law as a political field.

The book's argument is made through a highly thorough and meticulous engagement with key cases and moments in medical law (in England and Wales). This is important in illustrating the approach itself – the close attention to legal documents and case-law is warranted by the discursive emphasis. But this means that material covered in the book also constitutes in and of itself a crucial resource in medical law readings. The breadth of the thematics covered cuts across the field of medical law, and enables the reader to grasp its vast socio-political ramifications on issues such as gender, immigration, welfare, or individual rights. This is a particularly worthy aspect of the book because, in medical law, as elsewhere, there has been a tendency for such topic specialization that cross-cutting conversations have not always been enabled. In this the book constitutes a useful reminder of why such engagement across issues are important to provide new conceptualizations. Furthermore, by paying attention to shifts and dissents on essential topics of medical law since the post-war, Harrington is also able to demonstrate the continued significance of long-rooted debates, and indeed the ways in which law has embedded political shifts and transformations. As healthcare continues to be at the core of political tensions, and as the NHS is both approaching its 70<sup>th</sup> anniversary, and facing one of its most significant crisis, the historical perspective the book provides on the transformation of the 'taken-for-granted' over time is particularly striking: historical framings echo contemporary struggles over the role of the state in healthcare provision, over what may be considered as acceptable levels and forms of care, over competing rights or the influence of borders in shaping access to health. As well as its impressive analysis of legal documents and cases, the book provides a similarly remarkable overview of scholarly debates in the field, and a careful reflection on how its particular methodological approach can productively engage other currents of thoughts and concepts. In those respects, while it provides a challenging and erudite read, the book is also a thorough and dynamic overview of the field for non-specialist readers, and for those looking to explore how medical law can feed into broader critiques. The structuring of this thorough analysis around conceptual themes, or 'topics', is an effective way to draw out the lived politics of medical law. It also enables Harrington to carefully ground each of these topics of medical law into broader scholarship on core concepts such as time or space, while enabling the discursive analysis to draw out the social construction of these elements through medical law. Again, this contribution is particularly important for medical law as a field that still needs critical opening, but is also rarely engaged by more general critical reflections on law. The political dimension of medicine, historically and in contemporary settings, should however enable such mobilization and engagement, as Harrington illustrates here. In that, the book is also a gesture



for other scholars to continue to build and expand on the core ideas that the analysis is suggesting.

Harrington's book is a fantastic effort to critically mobilize a field that has rarely received cross-cutting and conceptual attention. As such stimulating books tend to do, it also opens up a number of new questions and avenues for future explorations. Here I will sketch out two such sets of questions. First, in its challenge to a rational and apolitical vision of medical law, Harrington's book echoes efforts deployed in recent years by interdisciplinary scholars to rethink the relationship between law and medicine, and to reimagine how law and medicine participate in shaping the social, as process and practice. Some of these conversations have emerged from Science and Technology Studies (STS), and broader reflections on the relations between law and science (or the 'social studies of law'<sup>8</sup>). Often conceptually influenced by STS, and to some extent anthropology, this scholarship has shared Harrington's interest in disrupting the taken-for-granted of medical law, and the self-construction of law and medicine as value-free and rational systems of thought. *Towards a Rhetoric of Medical Law* adds to this critical engagement. However, where others have focused on deconstructing scientific discourses and knowledges in their interactions with law, or on socio-legal practices or objects as sites of entanglement, his focus on the rhetoric of law takes the critique in a different direction. A distinctive outcome of STS-inflected approaches to law and medicine has been to pay renewed attention to the role of materials in legal processes, and to the displacement of law through embedded practices. In turn, this has suggested a closer scrutiny of law as lived practice, outside of the courts and of strictly legal spaces. Such focus has enabled an expansion of what is considered as the boundaries of law (and of medicine) as social spheres, and to reimagining the ways in which the boundaries of, for example, medical knowledge that contributes to legal making get constituted. This emphasis on materiality (in the STS sense of the term) provides a contrasting standpoint from the discursive analysis Harrington provides, that nonetheless could be brought into fruitful conversation. This is particularly so because materiality-inflected theories have been influential in drawing out the fluidity of the social, and of some of its key elements that the book also explores. Themes such as time<sup>9</sup> or space<sup>10</sup> have been progressively revisited through this emphasis on the fluidity of the social, resulting, for example, on understandings of progress and modernity that echo the disruptive readings suggested by Harrington. At the same time, the emphasis on the fluidity of the social on which such approaches rest do not sit easily with what at times appears as a more causal reading of historical events that the book suggests, or indeed with the more structural approach it suggests to understandings of trends and events. Second, some of the critical questions that explorations of medicine as a set of social practice have raised are not fully explored in the book itself. Again, this is not a limitation of the book, nor

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<sup>8</sup> E Cloatre and M Pickersgill (eds), *Knowledge, Technology and Law: At the Intersection of Socio-Legal and Science & Technology Studies* (Routledge, 2014); S Cole 'Establishing Culpability: Forensic Technologies and Justice' in MR McGuire and TJ Holt (eds), *The Routledge Handbook of Technology, Crime and Justice* (Routledge, 2017), 505-517.

<sup>9</sup> E Grabham, 'Time and technique: the legal lives of the 26-week qualifying period' (2017) 45 *Economy and Society* 379.

<sup>10</sup> A Philipopoulos-Mihalopoulos, 'The movement of spatial justice/Il movimento della giustizia spaziale' (2014) 8 *Mondi Migranti* 1.

is it necessary for its argument to most convincingly unfold, but it leaves some scope to productively engage its key themes into new directions, and bring medical law in further conversations with medical humanities. Medicine as both profession and knowledge-system is itself relatively discreet – though never simplified nor taken for granted – in the analysis of medical law provided. Medical law as a discourse, and the discourses of medical law, however are inevitably entangled in the different shifts and existences that medicine as institution and practice has occupied over the years. Critical explorations of medical law can in turn provide some significant if underexplored elements to understand the political resonance of medicine as an apparatus of governance and power. Similarly, bringing together critical understandings of medicine with a careful excavation of medical law knowledge are essential to a better understanding of how legal moments are built into medicine itself. Engaging with the ‘medical’ of medical law in such a way would inevitably require a shift towards sites that are not legal per se. This would enable a different form of engagement with the politics of medical law, the type of power it hides and often renders more discreet, and in turn the possibilities for resistance and challenges.

To sum up, *Towards a Rhetoric of Medical Law* is an outstanding book and a much-needed contribution to the field. It is thorough, innovative, and ambitious; it is also a generous book that provides a basis for much future engagement, exchanges and conversation. As the crisis of care continues to impact lives and bodies across spaces and jurisdictions, rendering the politics of law in medicine visible seems to acquire new urgency. *Towards a Rhetoric of Medical Law* is an important publication that makes a strong argument for a such new political enterprise, and a compelling case for the relevance of rhetoric to understanding the practice of law, and of how lived-politics become constructed in and through law.

## ***Touching the Matter of Medical Law***

**Gary Watt**

Since the Enlightenment and the rise of the empirical scientific paradigm, legal practice and the legal academy in the United Kingdom, as in other common law jurisdictions, has tended to downplay and denigrate the role of rhetoric in constituting legal ideas and producing practical outcomes in legal cases. There has, however, been a more recent and increasing appreciation of rhetoric's positive potential and with it a reassertion of our need to approach legal materials with a critical awareness of rhetorical methods. The modern move to regard rhetoric as the principal constitutive art of legal speech and legal acts can be traced back to James Boyd White's *The Legal Imagination* first published in 1973. The re-publication in 2018 of that large and lively handbook in legal rhetorical method follows a number of recent publications that have sought to impress the value and importance of rhetoric upon a largely cynical legal community. We have, for example, the Australian publication *Rediscovering Rhetoric: Law, Language, and the Practice of Persuasion*;<sup>11</sup> the US publications, *Our Word is Our Bond: How Legal Speech Acts*<sup>12</sup> and *Living in a Law Transformed: Encounters with the works of James Boyd White*<sup>13</sup> and in the UK, *The Art of Persuasion: Tradition and Technique* by Adrian Whitfield QC, a retired judge of the High Court.<sup>14</sup> John Harrington's *Towards a Rhetoric of Medical Law* joins this movement and steers it in some significant new directions, not least of which is to apply rhetorical methods to a specific legal and political context – is there any context more important? – that of medical law, and in particular the UK's National Health Service.

A distinctive achievement of Harrington's approach, and it is a book full of achievements, is that he has given shape to the idea of the NHS as something tangible; something of material substance that is formed by a shared creative vision and by the creative practical work of many hands. This insight into the NHS, and NHS discourse, as a social and cultural artefact produced through rhetorical arts is an insight that will transfer well to other contexts, not least of which is legal practice. At almost the centre point of his book, in the chapter that charts and surveys the NHS as 'Utopia', we find one of the most intriguing and surprising sub-headings of the entire work: 'Labour as art: William Morris'. As it lies at the heart of the book, so it seems to me to lie at the heart of Harrington's rhetorical appreciation. The essence of the beautiful argument of that section is that the founding ethos of the NHS was something akin to that of the Arts and Crafts movement. Harrington writes that for William Morris, best known now for his commitment to craftwork over mass production, 'labour freed from "the brutalities of competitive commerce" is equated with art' (102).<sup>15</sup> He follows this quote with the fascinating and perceptive suggestion that within the early NHS 'the medical profession's

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<sup>11</sup> JT Gleeson and RCA Higgins (eds) (Federation Press, Annandale 2008).

<sup>12</sup> M Constable (Stanford University Press, Palo Alto 2014).

<sup>13</sup> J Etxabe and G Watt (eds) (Michigan University Press, Ann Arbor 2014).

<sup>14</sup> (Middle Temple, 2015).

<sup>15</sup> Quoting W Morris "Art and Socialism", in AL Morton (ed), *Political Writings of William Morris* (Lawrence and Wishart, London 1973) 109 at 118.

view of itself partook of this wider ideal of free labour. As such it chimed with Bevan's [it's founder's] aspiration for workers more generally'. In this ideal view, experts work together with pride and dignity to craft something of artistic beauty because they are personally and deeply committed to the project. The Utopian vision is as simple as it is sweet – labours of love will make something of more lasting and humane worth than could ever be achieved by fully-costed arms-length, free-market exchange. Disjunction between the Utopia and the practical reality has played out as a long-running political drama ever since the founding of the NHS, but the rhetorical point is that the ideal vision has substantial appeal that in practice persuades participants in the system to give it the best chance of ongoing life.

Harrington's material turn is signalled early on, where he writes that 'a rhetorical approach returns us to the concrete context of any given judicial, parliamentary or academic speech...as such it counters the tendency in law and ethics towards abstraction' (2). It continues throughout the book and is especially emphasised in the penultimate chapter "Art" where Harrington associates the concrete, material concern of legal rhetoric with the common law's prioritisation of 'the case' (150). He describes 'precedent cases establishing various rules' as 'the very material of the common law' (151-2). How frequently we overlook the materiality of legal language by which tangible ideas are held in our minds and given sympathetically, that is rhetorically, 'touching' form. Yet it is present in such commonplace cant as the suggestion that a common law judge 'finds' X as a matter of fact and 'holds' Y as a matter of law and then 'hands down' judgment. The metaphor of judicial craft as a material moulding and making could hardly be clearer.<sup>16</sup> The Latin prefix to so many cases in medical law 'In re' ('in the matter of') ought to give the game away.

All jurists should chorus Harrington's lament that 'Rhetoric is no longer the substance of law...but is rather viewed as the other of scientific legal studies...an embarrassing hangover' (3). He is quite correct in this complaint. I recently surveyed academic articles on Westlaw UK and found that almost one third of those with the word 'rhetoric' in their title also contained the word 'reality' in their title.<sup>17</sup> This was not to stress the deep and important connection between the two ideas, but rather to stress their disjunction. The unreality of rhetoric was always implied – and usually expressed – as in the phrases 'rhetoric or reality?' and 'from rhetoric to reality'. Legal commentators' collective failure to imagine a more diverse range of titles for their articles betrays a deeper and more serious failure to imagine that rhetoric might actually constitute the reality of what law does and how law is perceived socially. Harrington approves Gerald B Wetlaufer, who observed in his article 'Rhetoric and Its Denial in Legal Discourse' that 'any bid to claim, the mantle of "reason" by condemning an opposite view as "mere rhetoric" is itself a thoroughly strategic, or rhetorical move'.<sup>18</sup> I wonder, though, if Harrington slips into a similar move (a sort of 'mere rhetoric' dismissal), where he writes that 'Rhetorical analysis promises considerably *more than* the identification of apt techniques for moving audiences...it also allows us to study speech from the perspectives of politics and power' (4) (my emphasis added). This is a false contrast, surely. A deep appreciation of 'techniques for moving audiences' can hardly fail to have implications for politics and power,

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<sup>16</sup> See, generally, G Watt "Reading Materials: The Stuff that Legal Dreams are Made On" in *Living in a Law Transformed* (n 3) 155-172.

<sup>17</sup> 31 of the 100 most recent articles as at 26/4/15.

<sup>18</sup> (1990) 76 *Virginia Law Review* 1545-97, 1552.

it is for this reason that appreciation of the dramatic rhetoric of William Shakespeare continues to urge us so forcefully in the critical appreciation of political events. Harrington could occasionally be bolder in his commitment to material metaphors for law's rhetorical substance. Rhetorical appreciation of the constitutive role of metaphor in legal language tends to prioritise what Harrington calls 'metaphorics of visibility' (31), but his list of examples – 'submerge', 'sublimate', 'suppress', 'mask', 'eclipse' – includes several that can be equally, and perhaps more fully, appreciated within a 'metaphoric of materiality'. These points of nuance should not detract from the potential importance of Harrington's material turn in medical law. As Harrington indicates in his approval of Gear (31-32), attention to the affective, touching reality of medical rhetoric offers an improvement upon the excessive simplicity of 'rights-talk' and its tendency to reduce issues, for example in the abortion debate, 'to a binary contest of abstract principles'. Harrington's rhetorical critique of reductive language, especially the traditional binary and rights-based language of legal conflict, lands a palpable hit precisely because it prefers a language of palpability. It is a critique with implications for rhetorical practices across a wide range of medical law contexts. For example, a judge who reads this book might hopefully avoid reductive errors of the sort committed by Ward LJ in *Re A (Separation of Conjoined Twins)*, where he described conjoined baby twins as individuals competing against each other to impose mutually inconsistent rights: 'In this unique case it is, in my judgment, impossible not to put in the scales of each child the manner in which they are individually able to exercise their right to life'.<sup>19</sup>

In the chapter entitled 'Space', Harrington quotes Ward LJ in *Re A* who had stated in his judgment that the visiting Maltese family were not 'Kosovan refugees unjustifiably draining our resources' (54). Harrington alerts us to the territorial and possessive 'our' in such statements. Harrington's engagement with the spatial dimension of the constitutive rhetoric of medical law might be extended to the 'hospital'. In *Re A*, the hospital that invited the Maltese family to receive the benefit of their expertise turned hospitality to hostage-taking when the conjoined twins were locked into the medico-legal machine and surgically separated against the expressed wishes of the parents. The hospital is a space that is intensely imbued with rhetorical meaning. It is shorthand for help, expertise and resources, but along the way we have largely forgotten the original sense of 'hospitality'. The ancient Greeks who were the first to cultivate a sense of rhetorical space or *topos* prized hospitality as the preeminent ethical value associated with space. Indeed, for a host to treat a guest inhospitably was the sort of offence against divine and natural law that called for the revenge of the Furies.

In Chapter 4, Harrington makes the elegant move from space to 'Time'. He doesn't suggest, any more than an ancient Greek dramatist (or indeed a modern physicist) would suggest, that space and time are completely distinct categories. Indeed, early in the book (31) he gave the example of 'legislative intention', as a notion that blends rhetorical space (*topos*) with a sense of time in so far as it 'functions as a topic of legal discourse absorbing the contingency of the law-making process by representing it as a single moment when Parliament speaks unambiguously and with one voice'.<sup>20</sup> In 'Time', Harrington identifies the risk that hasty decision-making might endanger justice. He opines that 'where law comes under pressure to

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<sup>19</sup> [2001] Fam 147, per Ward LJ at 197.

<sup>20</sup> Citing P Goodrich, *Reading the Law* (Blackwell, Oxford 1986) 122.

accelerate its procedures, there is a risk that *pathos* will eclipse *logos* in legal deliberation and that emotions such as anger or pity will prevail over reasoned deliberation' (73). He's right about anger (*ira furor brevis est*, and all that), except perhaps when it comes to anger of the righteous sort that overturns tables in temples, but I'm not sure he's right about pity. Pity might not conform to the cold calculus of strict logic, but isn't pity a good reason? For early modern judge and rhetorician Thomas Wilson, author of *The Arte of Rhetorique*, the art of rhetoric is by definition the art of 'movyng pitie, and stirring men to mercie'.<sup>21</sup>

Harrington's greatest achievement in this book is a rhetorical one. He has translated his own intellectual grasp of medical law into a humane feel for medical law. To express it in terms of the classic qualities of rhetorical art as Aristotle described them, he impresses us with an *ethos* (ethic) and a *pathos* (sympathy) that makes his *logos* (logic) humanly persuasive. To persuade means to influence 'through sweetness'. Harrington's impressive book gives us a spoonful of sugar to help some strong medicine go down.

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<sup>21</sup> [1560] G H Mair (ed.) (Clarendon Press, Oxford 1909) 133.

## ***Around the Rhetoric of Rhetoric***

**Martin Kayman**

A book that proposes ('Towards') a rhetoric for a body of law cannot but appeal to someone in law-and-literature who comes from the hind legs of that pantomime horse, the literary. And when the book begins with a chapter entitled 'Rhetoric' and concludes with a critical account of 'Ethics', it feels like the revenge of the linguistic or textual turn of the 1970s against the ethical turn of the 1990s and 2000s. The humanities-led understanding that culture should be regarded as a text was a warrant for literary critics and theorists to treat the law 'as literature'. For many that meant regarding law in much the same way as they were in fact treating their own subject: not as the expression of universal moral values but as historically and politically embedded and compromised with power.<sup>22</sup> Contrarily, the subsequent turn to ethics warned against what it represented as the dangers of an over-theorised, excessively text-focused and, as a result, anti-humanist view of experience, and of its tendency merely to celebrate the indeterminacy of meaning while condemning the injustices of historic, state, and late capitalism. As many critical lawyers likewise observed, a simple focus on the textual was of questionable value in addressing the actual suffering undergone by individuals at the hands of the law.<sup>23</sup> Literary critics and theorists were thus called upon to reencounter the ethical dimension that they had, it appears, repressed in their zeal to liberate literary studies from the sort of high moral purpose that had informed its traditional ideological functions, and to re-form a positive alliance with moral philosophy.<sup>24</sup>

Nothing as simplistic in John Harrington's book, of course, as a return to the sort of hermeneutical wrangling that had characterised the early stages of American law-and-literature criticism.<sup>25</sup> Starting from the constitutive indeterminacy of legal decision-making as a given, Harrington adopts an approach to rhetoric in the service of a 'cultural sociology'.<sup>26</sup> Its purpose is to surface the political history that explains how medical law developed in the UK in the context of the shift from the Keynesian post-war welfare settlement to the global, neo-liberal regime. At the same time, Harrington's rhetorically forceful and tightly-crafted text serves as a sort of methodological manifesto not only for the analysis of the political and economic forces at work in the law but also for an explanation of the ways in which the resulting doctrine has been *effectively* constructed in language: treating a body of law as a rhetoric explains how it generates plausible forms of common sense and hence triumphs in concrete historical circumstances.

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<sup>22</sup> In works like T Eagleton, *The Ideology of the Aesthetic* (Blackwell, 1990) and P Widdowson (ed), *Re-Reading English* (Methuen, 1982).

<sup>23</sup> Notably, for example, in C Douzinas and R Warrington, *Justice Miscarried: Ethics and Aesthetics in Law* (Harvester Wheatsheaf, 1994).

<sup>24</sup> See, for example, J Adamson, R Freadman and D Parker (eds), *Renegotiating Ethics in Literature, Philosophy, and Theory* (Cambridge University Press, 1998).

<sup>25</sup> See S Levinson and S Mailloux (eds), *Interpreting Law and Literature: A Hermeneutic Reader* (Northwestern University Press, 1988).

<sup>26</sup> J Harrington, *Towards a Rhetoric of Medical Law* (Routledge, 2017), 5.

Rhetoric has in fact been a favoured 'literary' resource for American reformist, literature-inspired legal scholars such as James Boyd White and for British critical legal scholars like Peter Goodrich precisely as a pathway to re-encounter an *ethos* of justice 'before the law'.<sup>27</sup> Indeed, Boyd White's theorisation of law as a rhetoric that creates forms of community, and his optimistic programme to ameliorate the ethos of the law through training in rhetoric, the methods of literary criticism, and the sensitive reading of selected works of literature, can be regarded as foundational to the liberal version of law-and-literature.<sup>28</sup> On the other hand, Peter Goodrich has recovered the classical traditions of Renaissance rhetoric that were contemporary with the early development of a self-conscious national Common Law tradition as a critical means of analysing the latter's unconscious.<sup>29</sup> In both instances, as here, rhetorical analysis gives the legal scholar a privileged position in a pre-modern literary tradition from which to critique modern, or postmodern, law.

In Harrington's case, rhetorical analysis is linked to cultural sociology through systems theory. Drawing on Niklas Luhmann and Gunther Teubner, Harrington argues that the 'paradoxes and perplexities', confronting decisions in modern law are "'managed" (or "deparadoxified") by being displaced onto "black boxes" outside the legal system' – in the exemplary case of medical law, to medical practice or academic bioethics.<sup>30</sup> These acts of displacement construct silent hierarchies, such that ethics has now become 'the master discipline for medical law', 'the truth of the law in this area'.<sup>31</sup> Is, in effect, something of a similar order possibly happening here in methodological terms – as reflected in the glee expressed in my first paragraph? Arguably, methodological disputes within legal scholarship are as unresolvable within their own terms as any legal decision and require their own 'black boxes' to be managed; likewise, in that most plural of subjects, literary study. Various disciplines can serve the law: theology, economics, empirical social science ... or, as we have seen, within the assortment of literary approaches, rhetoric. Finally, the fact that this is a *classical* rhetoric provides it with a similar pedigree to the ancient sources of ethical thought. Rhetoric hence appears as a master method not for resolving the indeterminacies of legal decision-making, but precisely for making them visible, via its mastery over the master discourse of bioethics.

That, in all likelihood, can be viewed as a rhetorical move on my part. Nevertheless, it does draw attention to the book's own rhetorics, starting with its form of address and the complicity it establishes with its intended audiences. One of the most plausible of the book's arguments is the way in which it articulates the consonance and complementarities that have

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<sup>27</sup> Harrington, 3-4. Rhetoric has likewise been used by applied linguists working on empirical court interactions – for a recent proposal in forensic linguistics, see C Heffer, 'Revelation and Rhetoric: A Critical Model of Forensic Discourse' (2013) 26 *International Journal for the Semiotics of Law* 2, 459-85.

<sup>28</sup> J Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (University of Wisconsin Press, 1985).

<sup>29</sup> P Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (Weidenfeld and Nicolson, 1990).

<sup>30</sup> Harrington, 18.

<sup>31</sup> Harrington, 13 and 162.



existed between the self-perceptions of medical professionals and common law judges as practitioners in their respective fields.<sup>32</sup> Further, Harrington intensifies the resonance of the argument by embedding this shared sense of authority and method in a persuasive narrative of representations of 'professional work' as 'a form of labour' from the nineteenth century to the present.<sup>33</sup> This is where academic readers are bound to recognise themselves.

In this narrative, crudely put (by me, never by Harrington), the post-war creation of the National Health Service relied on a trust in the judgement of professionals predicated on their protection from the market in a utopian 'enclave' of non-commodified human relations in which the courts, like the patient, deferred to their benevolent authority.<sup>34</sup> According to Harrington's account, the enclave functioned as a metonymy for an idealised national space. But, as he notes, citing Krishan Kumar, 'Anti-utopia has "stalked" utopia since its beginnings'.<sup>35</sup> From the 1980s, the autonomy of the medical profession has been challenged in the name of 'sovereign patient-consumers'.<sup>36</sup> This figure has become the gateway for the recommodification of medicine and the recasting of the relationship between professionals and others on a contractual basis. The enclave has become vulnerable to commercial considerations and governed by external reporting and regulatory frameworks that promote government policy in the name of 'transparency' and 'value for money'. By the same token, the personal skill and judgement of the experienced professional have been downgraded in favour of 'evidence-based' choices made by funders and/or informed and autonomous patients. The new ethos is enforced by courts that, in the case of medical law, now defer to bioethicists rather than to the medical profession.

Where, then, does one, as an academic working in the British system, stand in relation to this narrative? Certainly, the pleasure I expressed at the opening goes beyond the particular disciplinary interests of the literary scholar; the book's address invites my ready complicity with its account of features that are easily transposed into what we have been experiencing in our form of professional labour. From a rhetorical point of view, as a professional in the Humanities, one recognises the ideal of a self-governing learned and experimental community protected from the demands of the market, exercising nuanced individual judgements on specific complex cases that respect intellectual traditions (precedent) but value plurality and dissent. This is far from exploded by the book's critical tone – which one shares, of course – in relation to that model's elitism, conservatism, and paternalism. At the same time, academic readers are likely to identify and more acutely condemn the aggressions of the market-oriented, state-regulated contractual regime of an increasingly commodified present.

Before one feels too comfortable with this, it is worth exercising a degree of reflective awareness of the rhetoric involved. As Harrington points out, from the 1980s, '[t]he legitimacy of professional self-regulation was in part undermined by a series of scandals involving

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<sup>32</sup> Harrington, *passim*, but particularly 128-31 and 149-55.

<sup>33</sup> Harrington, 117.

<sup>34</sup> Harrington, 96-102.

<sup>35</sup> Harrington, 103.

<sup>36</sup> Harrington, 106.

criminal behaviour and extreme malpractice'.<sup>37</sup> Yet, while the rise of 'rights-based critiques of welfare provision and the social and economic subordination of women' and the role of radical lawyers and sociologists in the critique of the traditional professional model are recognised, these are swiftly absorbed into the exploitation of these arguments by the ascendant ideology of the Hayekian libertarian right.<sup>38</sup> In other words, the text effectively marginalises critiques of what it describes as the characteristically 'English' idiom of the utopic vision other than that spoken in the anti-rhetorical, globalised 'Anglo-American' lingua franca English of neo-liberalism.<sup>39</sup>

This, I suggest, is in part a consequence of the rhetorical focus of the approach. From a rhetorical point of view, alternative justifications for increased protection for the subjects of professional interventions are obliged to yield to the central perspective of the analysis, which relates fundamentally to the plausibility of professionals in medicine and law in their addresses to each other, and the plausibility, in this case to the academic reader, of the neo-liberal versus Keynesian narrative as an overall explanatory frame. Consequently, Harrington's analysis is purposively 'logocentric' in the specific sense that it explicitly privileges *logos* ('the truth, consistency and plausibility of the argument itself') over the other two major Aristotelian categories of persuasion, *pathos* and *ethos* – and, within *logos*, 'the topic or commonplace'.<sup>40</sup> In observing that '*Pathos* is not common in judicial rhetoric' but can be a feature of medical law cases, Harrington refers here to the '*visible* presence of patient litigants', furnishing 'the necessary element of *immediacy* between them and the audience', calling forth 'public *emotions*' which are amplified by 'media representations' and 'publicity'.<sup>41</sup> Judges, Harrington continues, then 'often develop compensatory rhetorical strategies to contain the *pathos* aroused by the facts of the case in hand'. So too, perhaps, the book's rhetorical strategy – i.e. its use of rhetorical analysis as a strategy – also inevitably 'contains' the 'visible', 'immediate' and 'emotional' presence of the patient as a signifier within its analysis.

This, then, is where I need to qualify my enthusiasm for the book's vindication of the textual turn. It was precisely this sort of containment of presence, immediacy and affect that, in my opinion, was the most pertinent criticism to emerge from the 'pictorial turn' in the 1990s: not so much the textual turn's alleged disregard for ethical values, but the creeping imperialism of the linguistic sign over all cultural experience, the tendency to 'read' all phenomena through linguistic models.<sup>42</sup> So, as happened following the panel discussion at the book's

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<sup>37</sup> Harrington, 108.

<sup>38</sup> Harrington, 8-9; 133; 173.

<sup>39</sup> Harrington, 179. See MA Kayman, 'The Lingua Franca of Globalisation: "filius nullius in terra nullius", as we say in English' (2009), 8 *Nordic Journal of English Studies* 3: 87-115. I note that, rather than representatives of an equally characteristic English 'plain style' tradition, Harrington enlists a French critic and a founding figure in the textual turn, Roland Barthes, to define this 'anti-figurative style' as the very antithesis of the rhetorical method.

<sup>40</sup> Harrington, 47.

<sup>41</sup> Harrington, 48; my italics.

<sup>42</sup> WJT. Mitchell, 'The Pictorial Turn' [1992], *Picture Theory: Essays on Verbal and Visual Representation* (University of Chicago Press, 1994). The claims of the visual have obviously had considerable implications for

launch in Cardiff on 6 June 2017, I find myself drawn to the historically significant and visually striking image that occupies the upper half of the front cover. The photograph, we learn from the last words on the back cover, represents 'Aneurin Bevan, on the launch of the National Health Service ... with Sylvia Diggory its "first patient"'.<sup>43</sup> Diggory is a distinctly uncanny presence here, her lower body absorbed into the soft and almost formless expanse of white that extends across the bottom of the image, contrasting in its sensuousness with the parallel upper band of flat and featureless sky neatly framed by the grid of window panes (no pun). Beyond the line of the title and author, her face, already squeezed up against the left-hand margin by the cropping of the original photograph, forms part of the case cover's outer hinge and is distorted as one opens the book.

I draw attention to Ms Diggory in this way not in any sense to invalidate the admirable ambition and estimable achievement of *Towards a Rhetoric of Medical Law*. Besides the eventually gratuitous reminder of the uncanny and uncontainable bodies that underlie the grids formed by our professional talk and verbal and bibliographical frameworks, the turn to the image as it appears on the face of the book is additionally intended to point to the existence of other cultural contexts and discourses in which, to use Harrington's own term, law is 'embedded',<sup>44</sup> and supplementary critical approaches that might further explore, alongside this Rhetoric, how 'common sense' around health care – and other professional – practices and institutions is constructed in the broader socio-cultural realm. A gesture towards further interdisciplinarity, perhaps.

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critical legal studies – see, for example, MA Kayman, 'Iconic Violence: belief, law and the visual' (2016) *Textual Practice* <http://dx.doi.org/10.1080/0950236X.2016.1249710>.

<sup>43</sup> The description omits the matron and the nurse standing next to Bevan. Other sources date the event as 1948, not 1945 as given here.

<sup>44</sup> E.g. Harrington, 5.

## ***The Time and Place of Rhetoric: A Response***

**John Harrington**<sup>45</sup>

Classical rhetoricians talked about *kairos*, the timeliness and time-boundedness of any speech. When was it delivered? What were the conditions of its reception? Did it speak successfully to the moment and place in which it was delivered? Among other things, my book offers a discussion of time and space in medical law scholarship and adjudication in just this way. But what is the *kairos* of the text itself? My concern with this and my thoughts on it are prompted by the generous and insightful responses to the book which you have just read. The book's content, its theoretical ambitions, and its relation to the broader political context are realized, in so far as they are realized at all, across three temporal dimensions.

The first of these is *novelty*: the hope of providing a new perspective on medical law and how it is written, what is suppressed in that process, and how it might be recovered. This required me to set extant medical law reasoning within the larger architecture of the NHS and the post-war welfare state, giving the book a certain structuralist orientation which Cloatre notes. These mundane circumstances had been evoked in preambular fashion by many textbook writers in medical law. But their enduring influence on the development of legal doctrine and scholarship itself had not, I felt, been consistently accounted for. This omission was enabled, at least in the early years of the discipline, by a predominant focus on the relationship between doctor and patient. Old-style professionals in law and medicine constructed this relationship in terms of fatherly care for an essentially infantilized patient, while reformers like Ian Kennedy sought to reshape it in the name of ethics, advancing patient autonomy or control over the course of treatment. In both cases, however, the individual clinical moment was privileged as the site of ethical significance and legal regulation. It is a central ambition of the book to show the cultural and political conditions under which this privileging of the clinical encounter was possible.

That intention was reflected in my choice of image for the book's front cover. Pictured in it are a nurse and matron from Trafford General Hospital (I have not been able to trace their names), along with Sylvia Diggory, claimed to be the 'first patient' of the new NHS, and its founder Aneurin Bevan, health minister and former coal miner. Light streams in through a large window behind them. For me both personae and composition figured the collective, gesturing at the structures neglected in orthodox scholarship, promising a genuine politics of medical law by locating it within a given historical conjuncture and a specific national context. Not only are doctors and judges absent from this scene, but the choice of image deliberately differs from that commonly proposed by publishers for medical law texts. The latter draw consistently on the iconography of Hippocratic or scientific medicine as mediated by professional judgment: stethoscopes, snakes, pills and coils of DNA variously wrapping themselves around the scales of justice. Martin Kayman renders me a service by reading the picture and its physical presentation on the front cover symptomatically and thereby picking out the occlusions which sustain my own rhetorical effort. Sylvia Diggory, her image pushed to edge of the page, stands for the marginalization of palpable suffering and its political expression by the book's structure of address. Scholars, judges and doctors are first among

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<sup>45</sup> I wish to record my debt to the authors of the four comments published here. Further thanks are due to Diamond Ashiagbor and Jiri Priban who organized and chaired launches for the book at the Institute of Advanced Legal Studies, London and the Centre of Law and Society, Cardiff respectively.

the subjects and audiences of my argument. In seeking to return medical law to history (or more precisely to return history to medical law) and wrench the focus away from the clinical encounter, I will admit to what Kayman calls a certain, necessary anti-humanism, a bias which is admittedly not fully articulated in the text itself.

The second temporal mode is that of *retrieval*: a return to neglected methods and their adaption for new purposes. My concern with the politics and contexts of doctrinal debates in medical law, led me back to the Critical Legal Studies (CLS) movement, a theoretical influence identified by Cloatre. Earlier CLS scholars set upon the core areas of legal teaching and scholarship - tort, criminal law, contract and so on - with deconstructive intent. But medical law, as a much newer area, well beyond the heart of the canon, was never confronted in the same way. CLS methods offered potential for reading the play of political and social influences within the back and forth of doctrinal debate. Their emphasis on the indeterminacy of legal reasoning warned against confusing the significance of structure with out-and-out determinism.

The CLS practice of closely reading judicial and other texts, and the explicit promptings of writers in that movement, led me to attempt a further retrieval: of rhetoric, classical and modern. I was encouraged by pioneering law and literature scholars: James Boyd White on law's communities and Peter Goodrich on the critical potential of classical analysis. In that regard, I share Alan Finlayson's understanding that rhetoric is action, capable of changing the world by moving audiences to decide and act. I also share Gary Watt's frustration with the terminological use of rhetoric as a foil for the properly rational or scientific intervention of legal scholars, journalists, politicians and so forth. While I heed his further warning that 'techniques to move audiences' are never to be dismissed as merely superficial, I am also wary of those false friends who would retail rhetoric as a toolkit for winning friends and influencing people. I maintain that we can still go deep with rhetoric, using it as a mode of critique 'all the way down'. It opens up valuable insights into processes of political change, their sedimentation in social structures, and their relationship of reciprocal influence upon legal argumentation. Rhetoric, as Roland Barthes argued, is an eminently modern means of doing critical cultural sociology.<sup>46</sup>

The nature of these critical retrievals led to the tight *spatial* framing of *Towards a Rhetoric of Medical Law* across various scales. At its most general, the book tells a national story, as Finlayson points out. I attend consistently to the British and English idioms and resonances of medical law discourse, all the while noting their constructed and revisable forms and the ambiguity of the relationship between them. At its most particular, the book privileges the court room as the object of study. Readings in the philosophy of science, critical epistemology and the history of medicine furnished critical perspectives on doctors and their work. But that was always in the service of understanding their representation in the texts of official medical law: judicial decisions, parliamentary debates and academic commentary. This twin focus meant that other spaces received less attention, as noted by three of the discussants in their comments and suggestions. Cloatre proposes 'medicine and law', rather than just 'medical law', as the object of a more wide-ranging study examining how both practices and discourses are co-constituted. The latter would proceed by way of an ethnography that takes the

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<sup>46</sup> R Barthes, *The Semiotic Challenge* (University of California Press 1994) 47.

material seriously not only within the courtroom, but also at sites well beyond the formal legal system. Watt picks out the hospital as a distinct site for the production of medical law rhetoric, with classical as well as contemporary resonances. He too urges the claims of the material, reminding us that the tangible and the palpable have considerable rhetorical effectiveness. Kayman, as noted above, suggests a still more concentrated focus on the suffering bodies of patients, one which demands a broadening of critical attention to include image as well as text.

The third moment of the book is *conjunctural*: its relationship to the broader political circumstances within which it was written and in which it is read. These can be grasped by following Finlayson's insight that the NHS has always stood for more than itself. It functions for the British left as the royal family and the military do for the right: a synecdoche of the nation itself in all its ideals and travails. The idiom is one of recurrent crisis, a catastrophist rhetoric that predicts the imminent end of Bevan's vision. The efforts of politicians and their expert economic advisers to 'reform' the Service have been equally punctual and equally productive of the crises which they would themselves resolve. In *Towards a Rhetoric of Medical Law* I fold these episodic crises into a longer-run schema of state-run welfare, beset by fiscal and legitimacy deficits in the 1970s, which were themselves provisionally resolved by neo-liberal restructuring in the decades thereafter.

There was no end of history of course. Neo-liberal orthodoxy is now itself challenged by a shrill populism. Finlayson invites us to consider the ramifications of this eruption for rhetoric and to relate it to the preceding phases. In taking up that invitation I return to the three modes of proof in classical rhetoric, which I discuss more fully in chapter 3 of the book. These help us to understand that the journey to the present conjuncture has also been a rhetorical one, which can be traced through the varied emphasis on ethos, pathos and logos in each phase.

First, welfarist paternalism. In British medicine, as I argue throughout the book, this was secured by the doctrinal figure of the *Bolam* test which privileged professional opinion in determining health care controversies. The rhetorical action here was oriented to ethos. It promoted the authority of medical professionals, embodied in their persons, manifested in the practice of their craft, as Watt observes, and supported by their judicial homologues, all inscribed within a hierarchy articulated and defended in conservative cultural terms.

Second, a technocratic fix for problems thrown up by welfarism. This tendency includes the commodification of health care and the imposition of generalized and objective measures of performance. Ethos here is abstracted away from the person of the practitioner. Authority resides instead in numbers and norms. The respect accorded to independent central banks and credit rating agencies furnishes the central case perhaps, though bodies like the National Institute for Health and Care Excellence, are accorded similar functions, if not quite the same degree of respect. This refusal of dialogue – 'there is no alternative' - represents the triumph of anti-rhetoric, the kind of scientific pretension which Watt diagnoses in law and elsewhere.

Third, ensuing populist challenges to technocratic dominance. These are manifest in the result of Britain's Brexit referendum, the election of Donald Trump as US President and the mainstreaming of xenophobia in much of Europe. Associated phenomena include a lack of concern with fake news and the echo chambers of social media. Pathos is the dominant mode of proof here. Sentiments of suspicion, outrage and apprehension are called forth in order to

dispute the neutrality of experts and raise concerns about the arrival of non-natives. If the challenge to *Bolam* marks the first of these in the field of health care, reference to the NHS as an index of government failure to exclude migrants marks the second.

Where does the rhetorical future lie then? Is there a fourth way? Kayman and Watt suggest that I have privileged logos in my own rhetorical strategy for the book, favouring word and reason over image and emotion. Indeed, I can concede this and would agree that all three modes of proof are always in play. Nonetheless, I think, the present conjuncture calls for a renewed though not, of course an exclusive, emphasis on logos. This is not a plea for reason as univocal rationalism or scientism, but as argument and dialogue. Logos refuses the cold anti-rhetoric of the technocrats. It takes tradition and the particularities of the national seriously. Inherited stories and shared common sense are its indispensable material. Against the swelling rage of the populists, it counsels sobriety and substance in our deliberations. It also challenges 'project fear': the calculated production of anxiety typical of latter-day neo-liberalism, now on the defensive. (As well as Brexit, see the 2014 referendum on Scottish independence.) In every case it suggests that an open, democratic future informed, but not determined by our best traditions, is still possible.