Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life

James Boyd White†

In this paper I shall suggest that law is most usefully seen not, as it usually is by academics and philosophers, as a system of rules, but as a branch of rhetoric; and that the kind of rhetoric of which law is a species is most usefully seen not, as rhetoric usually is, either as a failed science or as the ignoble art of persuasion, but as the central art by which community and culture are established, maintained, and transformed. So regarded, rhetoric is continuous with law, and like it, has justice as its ultimate subject.

I do not mean to say that these are the only ways to understand law or rhetoric. There is a place in the world for institutional and policy studies, for taxonomies of persuasive devices, and for analyses of statistical patterns and distributive effects. But I think that all these activities will themselves be performed and criticized more intelligently if it is recognized that they too are rhetorical. As for law and rhetoric themselves, I think that to see them in the way I suggest is to make sense of them in a more nearly complete way, especially from the point of view of the individual speaker, the individual hearer, and the individual judge.

I

Let us begin with the idea that the law is a branch of rhetoric. Who, you may ask, could ever have thought it was anything else? The ancient rhetorician Gorgias (in Plato's dialogue of that name) defined rhetoric as the art of persuading the people about matters of justice and injustice in the public places of the state,[1] and one could hardly imagine a more compendious statement of the art of

---

† Professor of Law and Professor of English Language and Literature, University of Michigan. I am grateful for helpful comments by Alton Becker, Lee Bollinger, Stanley Fish, Bruce Gronbeck, L.H. LaRue, Richard Lempert, Sallyanne Payton, Terrance Sandalow, Frederick Schauer, Stephen Shiffrin, Philip Soper, Cass Sunstein, Joseph Vining, and Christina Whitman. This article is a version of a chapter in my forthcoming book, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW.

[1] PLATO, GORGIAS 452e, 454b. For further discussion, see my article, *The Ethics of Argument: Plato's* Gorgias *and the Modern Lawyer*, 50 U. CHI. L. REV. 849 (1983).

the lawyer than that. A modern law school is, among other things, a school in those arts of persuasion about justice that are peculiar to, and peculiarly effective in, our legal culture. And the commitment of the rhetorician to the cause of his client presents him, in the ancient and the modern world alike, with serious (and similar) problems of intellectual and personal integrity. How can it be that law was ever regarded as anything but rhetoric?

The answer lies, I think, in two traditions—one old, the other new—which I can summarize this way. The older (primarily Judaic and Christian) tradition saw the law as a set of authoritative commands, entitled to respect partly from their antiquity, partly from their concordance with the law of nature and of God. In this view law is not rhetoric but authority. The newer tradition is that of institutional sociology, the object of which is to describe and analyze the structure and function of various social institutions, so far as possible, from the point of view of "value-free" social science. These institutions may of course have certain kinds of political authority internal to the culture in which they are found, but they are normally not seen as sources of true moral authority, as law once was. With the apparent death of the first tradition in most Western European (but not Islamic!) countries, we are left with the second, and tend to view law as a system of institutionally established and managed rules. Actually, as this conception has worked itself out in practice it has led to a kind of substantive neutrality (or emptiness) that makes it natural once again to see a connection between modern law and ancient rhetoric, and to face—as Plato did in the *Gorgias*—the great question of what talk about justice can mean in a world as relativistic, adversarial, competitive, and uncertain as ours is and Plato's was.

As a result, the law is at present usually spoken of (by academics at least) as if it were a body of more or less determinate rules, or rules and principles, that are more or less perfectly intelligible to the trained reader. Law is in this sense objectified and made a structure. The question "What is law?" is answered by defining what its rules are, or by analyzing the kinds of rules that characterize it. The law is thus abstracted and conceptualized: H.L.A. Hart's major book on jurisprudence was appropriately entitled *The Concept of Law*.[2] Sophisticated analysis of law from this point of view distinguishes among various kinds of legal rules and among different sets or subsets of legal rules: substantive rules are

[2] H.L.A. Hart, The Concept of Law (1961).

distinguished from procedural or remedial rules, or primary rules from secondary rules, or legal rules from more general principles.

This idea of law and legal science fits with, and is perhaps derived from, the contemporary conception of our public political world as a set of bureaucratic entities, which can be defined in Weberian terms as rationalized institutions functioning according to ends-means rationality. These institutions have goals, purposes, or aims, which they achieve more or less perfectly as they are structured and managed more or less well.

In this way, the government (of which the law is a part) and in fact the entire bureaucratic system, private as well as public, tends to be regarded, especially by lawyers, managers, and other policy-makers, as a machine acting on the rest of the world. This naturally reduces the rest of the world to the object upon which the machine acts. Human actors outside the governmental world are made the objects of manipulation through a series of incentives or disincentives. Actors within the legal-bureaucratic structure either are "will-servers" (whose obligation is to obey the will of a political superior) or are "choice-makers" (who are in a position of political superiority charged with the responsibility of making choices, usually thought of as "policy choices," that affect the lives of others). The choices themselves are likewise objectified: the items of choice are broken out of the flux of experience and the context of life so that they can be talked about in the bureaucratic-legal mode. This commits the system to what is thought to be measurable (especially to what is measurable in material ways) to short-term goals, and to a process of thought by calculation. The premises of cost-benefit analysis are thus integral to the bureaucracy as we normally imagine it. Whatever cannot be talked about in these bureaucratic ways is simply not talked about. Of course all systems of discourse have domains and boundaries, principles of exclusion and inclusion, but this kind of bureaucratic talk is largely unself-conscious about what it excludes. The world it sees is its whole world.

Law then becomes reducible to two features: policy choices and techniques of their implementation. Our questions are "What do we want?" and "How do we get it?" In this way the conception of law as a set of rules merges with the conception of law as a set of institutions and processes. The overriding metaphor is that of the machine; the overriding value is that of efficiency, conceived of as the attainment of certain ends with the smallest possible costs.

This is a necessarily crude sketch of certain ways in which law is commonly thought of. Later in this paper, I will propose a differ-

ent way of conceiving of law, which I think can be both more true to its actual nature as practiced and more valuable to us as critics.

II

But I turn first to the meaning of "rhetoric." This term is in great flux, and what I say must be somewhat less dogmatic than my discussion of "law." It is my impression that rhetoric is at present usually talked about in either of two modes. The first of these is by comparison with science. The main claim of science is that it contributes to knowledge by informing us of what is knowable in the sense that it can be demonstrated. This is true both of deductive sciences, which establish propositions by demonstrating their entailment in certain premises, and of inductive sciences, which establish, but with less certainty, propositions that can be regarded as the most complete and economical accounts of the evidence available to us, and hence as presumptively true. From this point of view, rhetoric is thought of as what we do when science doesn't work. Instead of dealing with what is "known," it deals with what is probably the case. Thus in Aristotle the enthymeme is defined as a syllogism based upon propositions that are themselves not necessarily true but probable.[3] So regarded, rhetoric is the art of establishing the probable by arguing from our sense of the probable. It is always open to replacement by science when the truth or falsity of what is now merely probable is finally established.

The other heading under which rhetoric is frequently discussed is explicitly pejorative: rhetoric is defined as the ignoble art of persuasion. As I suggested above, this tradition has a history at least as old as the Platonic dialogues, in which rhetoric is attacked as a false art; it is also as contemporary as the standard modern condemnations of government propaganda and of the kind of advertising practiced by the wizards of Madison Avenue.

To the extent that law is today regarded as a kind of rhetoric, these two traditions establish the terms of analysis. In the courtroom the truth is never known, and each of the lawyers tries to persuade the jury not of the truth, but that his (or her) view is more probable than the other one (or that the other side has not attained some requisite degree of probability). In doing so, each lawyer employs untrustworthy arts of persuasion by which he seeks to make his own case, even if it is the weaker one, appear the stronger. Rhetoric, in short, is thought of either as a second-rate

---

[3] ARISTOTLE, RHETORIC 1357a23-33.

way of dealing with facts that cannot really be properly known or as a way of dealing with people instrumentally or manipulatively, in an attempt to get them to do something you want them to do.

The tendency to think of rhetoric as failed science is especially powerful in the present age, in which determined attempts have been made to elevate, or to reduce, virtually every discipline to the status of true science. The idea of science as perfect knowledge has of course recently been subjected to considerable criticism, both internal and external. It is now a commonplace that scientific creativity is imaginative, almost poetic; that scientific knowledge is only presumptive, not certain; and that science is a culture that transforms itself by principles that are not themselves scientific. Yet the effort to make the language and conventions of science the ruling model of our age, our popular religion, lives on in the language and expectations of many people, especially of those who are in fact not true scientists. Much of economic discourse, for example, is deformed by the false claims of the discipline to the status of perfect science, which leads to the embarrassing situation in which economic speakers representing different political attitudes couch their differences in scientific terms, each claiming that the other is no true economist. This not only confuses the observer but renders the field of economics less intelligible than it should be, even to its participants, and it reduces important political differences, which might be the topic of real conversation, to the status of primary assumptions.

III

I shall sketch out a somewhat different way of conceiving of law, and indeed of governmental processes generally: not as a bureaucratic but as a rhetorical process. In doing this, I shall also be suggesting a way to think about rhetoric, especially that kind of rhetoric—I call it "constitutive rhetoric"—of which law can I think be seen as a species.

I want to start by thinking of law not as an objective reality in an imagined social world, not as a part of a constructed cosmology, but from the point of view of those who actually engage in its processes, as something we do and something we teach. This is a way of looking at law as an activity, and in particular as a rhetorical activity.

I want to direct attention to three related aspects of the lawyer's work. The first is the fact that the lawyer, like any rhetorician, must always start by speaking the language of his or her audience, whatever it may be. This is just a version of the general truth

that to persuade anybody you must in the first instance speak a language that he or she regards as valid and intelligible. If you are a lawyer, this means that you must speak either the technical language of the law—the rules, cases, statutes, maxims, and so forth, that constitute the domain of your professional talk—or, if you are speaking to jurors or clients or the public at large, some version of the ordinary English of your time and place. Law is in this sense always culture-specific. It always starts with an external, empirically discoverable set of cultural resources into which it is an intervention.

This suggests that one (somewhat circular) definition of the law might be the particular set of resources made available by a culture for speech and argument on those occasions, and by those speakers, we think of as legal. These resources include rules, statutes, and judicial opinions, of course, but much more as well: maxims, general understandings, conventional wisdom, and all the other resources, technical and nontechnical, that a lawyer might use in defining his or her position and urging another to accept it.[4] To define "the law" in this way, as a set of resources for thought and argument, is an application of Aristotle's traditional definition of rhetoric, for the law in this sense is one set of those "means of persuasion" that he said it is the art of rhetoric to discover.[5]

In the law (and I believe elsewhere as well), these means of persuasion can be described with some degree of accuracy and completeness, so that most lawyers would agree that such-and-such a case or statute or principle is relevant, and another is not. But the agreement is always imperfect: one lawyer will see an analogy that another will deny, for example. And when attention shifts to the value or weight that different parts of the material should have, disagreement becomes widespread and deep. Ultimately, then, the identity, the meaning, and the authority of the materials are always arguable, always uncertain. There is a sense in which

---

[4] In light of the current view of law as a set of rules, it is worth stressing that while much legal argument naturally takes the form of interpreting rules, or redefining them, and while some rules are obviously of greater authority than others, the material as a whole is not structured as a set of rules with a hierarchical or other order, nor is it reducible to a set of rules. The rule is often the subject as well as the source of argument, with respect to its form, its content, and its relation to other rules. Perhaps the best way to understand what a rule is, as it works in the legal world, is to think of it not as a command that is obeyed or disobeyed but as the topic of thought and argument—as one of many resources brought to bear by the lawyer and others both to define a question and to establish a way to approach it.

[5] ARISTOTLE, RHETORIC 1355b26-27.

the materials can be regarded in the first instance as objective, external to the self; but they are always remade in argument. Their discovery is, in a sense, an empirical process, their reformulation and use an inventive or creative one.

This suggests that the lawyer's work has a second essential element, the creative process to which I have just alluded. For in speaking the language of the law, the lawyer must always be ready to try to change it: to add or to drop a distinction, to admit a new voice, to claim a new source of authority, and so on. One's performance is in this sense always argumentative, not only about the result one seeks to obtain but also about the version of the legal discourse that one uses—that one creates—in one's speech and writing. That is, the lawyer is always saying not only, "Here is how this case should be decided," but also, "Here—in this language—is the way this case and similar cases should be talked about. The language I am speaking is the proper language of justice in our culture." The legal speaker always acts upon the language that he or she uses, to modify or rearrange it; in this sense legal rhetoric is always argumentatively constitutive of the language it employs.

The third aspect of legal rhetoric is what might be called its ethical or communal character, or its socially constitutive nature. Every time one speaks as a lawyer, one establishes for the moment a character—an ethical identity, or what the Greeks called an *ethos*—for oneself, for one's audience, and for those one talks about, and in addition one proposes a relation among the characters one defines. One creates, or proposes to create, a community of people, talking to and about each other. The lawyer's speech is thus always implicitly argumentative not only about the result—how should the case be decided?—and about the language—in what terms should it be defined and talked about?—but also about the rhetorical community of which one is at that moment a part. The lawyer is always establishing in performance a response to the questions, "What kind of community should we, who are talking the language of the law, establish with each other, with our clients, and with the rest of the world? What kind of conversation should the law constitute, should constitute the law?"

Each of the three aspects of the lawyer's rhetorical life can be analyzed and criticized: the discourse one is given by one's culture to speak; the argumentative reconstitution of it; and the argumentative constitution of a rhetorical community in one's speech or writing. The study of this process—of constitutive rhetoric—is the study of the ways we constitute ourselves as individuals, as communities, and as cultures, whenever we speak. To put this another

way, the fact that the law can be understood as a comprehensibly organized method of argument, or what I call a rhetoric, means that it is at once a social activity—a way of acting with others—and a cultural activity—a way of acting with a certain set of materials found in the culture. It is always communal, both in the sense that it always takes place in a social context and in the sense that it is always constitutive of the community by which it works. Both the lawyer and the lawyer's audience live in a world in which their language and community are not fixed and certain but fluid, constantly remade, as their possibilities and limits are tested. The law is an art of persuasion that creates the objects of its persuasion, for it constitutes both the community and the culture it commends.

This means that the process of law is at once creative and educative. Those who use this language are perpetually learning what can and cannot be done with it as they try—and fail or succeed—to reach new formulations of their positions. It also means that both the identity of the speakers and their wants are in perpetual transformation. If this is right, the law cannot be a technique, as the bureaucratic model assumes, by which "we" get what we "want," for both "we" and our "wants" are constantly remade in the rhetorical process. The idea of the legal actor as one who is either making policy choices himself (or herself) or obeying the choices made by others is inadequate, for he is a participant in the perpetual remaking of the language and culture that determines who he is and who we are. The law is not merely a bureaucracy or a set of rules, but a community of speakers of a certain kind: a culture of argument, perpetually remade by its participants.

All three of these aspects of the lawyer's work flow from the fact that the law is what I have called culture-specific, that is, that it always takes place in a cultural context into which it is always an intervention. But it is in a similar way socially specific: it always takes place in a particular social context, into which it is also an intervention. By this I mean nothing grand but simply that the lawyer responds to the felt needs of others, who come to him or her for assistance with an actual difficulty or problem. (These felt needs may of course be partly the product of the law itself, and the very "intervention" of the law can create new possibilities for meaning, for motive, and for aspiration.) From this point of view, the law can be seen, as it is experienced, not as a wholly independent system of meaning, but as a way of talking about real events and actual people in the world. It is a way of telling a story about what has happened in the world and claiming a meaning for it by

writing an ending to it. The lawyer is repeatedly saying, or imagining himself or herself saying: "Here is 'what happened,' here is 'what it means,' and here is 'why it means what I claim.'" The process is at heart a narrative one because there cannot be a legal case without a real story about real people actually located in time and space and culture. Some actual person must go to a lawyer with an account of the experience upon which he or she wants the law to act, and that account will always be a narrative. The client's narrative is not simply accepted by the lawyer but subjected to questioning and elaboration, as the lawyer sees first one set of legal relevances, then another. In the formal legal process, that story is then retold, over and over, by the lawyer and by the client and by others, in developing and competing versions, until by judgment or agreement an authoritative version is achieved. This story will in the first instance be told in the language of its actors. That is where the law begins; in a sense that is also where it ends, for its object is to provide an ending to that story that will work in the world. And since the story both begins and ends in ordinary language and experience, the heart of the law is the process of translation by which it must work, from ordinary language to legal language and back again.

The language that the lawyer uses and remakes is a language of meaning in the fullest sense. It is a language in which our perceptions of the natural universe are constructed and related, in which our values and motives are defined, and in which our methods of reasoning are elaborated and enacted. By defining roles and actors, and by establishing expectations as to the propriety of speech and conduct, it gives us the terms for constructing a social universe. Law always operates through speakers located in particular times and places speaking to actual audiences about real people; its language is continuous with ordinary language; it always operates by narrative; it is not conceptual in its structure; it is perpetually reaffirmed or rejected in a social process; and it contains a system of internal translation by which it can reach a range of hearers. All these things mark it as a rhetorical system.

IV

What I have said means something, I think, about what we can mean by "rhetoric" as well as what we mean by "law." What I have been describing is not merely an art of estimating probabilities or an art of persuasion, but an art of constituting culture and community. It is of this kind of rhetoric that I think the law is a branch.

Let me approach what I mean about rhetoric with a primitive example, meant to suggest that what I call "constitutive rhetoric" is actually the set of practices that most fully distinguish humans from other animals. Imagine a bear fishing for salmon in a river of the great Northwest. What is it doing? "Fishing," we say. Now imagine a man fishing in the same river for the same fish. What is he doing? "Fishing," we say; but this time the answer has a different meaning and a new dimension, for it is now a question, as it was not before, what the fishing means to the actor himself. If a person does it, it has a meaning of a kind it cannot otherwise have. Today the meaning may well be that of sentimental escape to the wilderness by one sportily clad in his L.L. Bean outfit, demonstrating his place in a certain social class; but once—for a Native American say—it might have been a religious meaning.

Whenever two people come together to fish (or hunt, or anything else), they necessarily share the question of the meaning of what they do. Their views may differ, and their differences may reach the meaning of their relationship as well as that of their common activity. There is, for example, the question of dominance or equality. Is one following the other, or are they in some real sense together? Do their views of the meaning of what they do coincide, and, if so, how do they know? Or is there tension or disharmony between them, and, if so, what is to be done about that? How long will the terms upon which they are proceeding remain stable? The establishment of comprehensible relations and shared meanings, the making of the kind of community that enables people to say "we" about what they do and to claim consistent meanings for it—all this at the deepest level involves persuasion as well as education, and is the province of what I call constitutive rhetoric.

Let me expand my example a bit. Think of the kind of opposition that begins the *Iliad,* the opposition between two male human beings quarreling over a female. From one point of view, this is just like two other male mammals doing the same thing, say two male bears or dogs. But from another point of view there is a completely new dimension added to the dispute: the question of what it means from each point of view, including that of the woman. It is from such a dispute, and from the claims of competing meanings for the events involved, that arose both the Trojan War (at least in Greek myth) and—much more importantly—from our point of view the *Iliad* itself. Agamemnon and Achilles are engaged in a struggle. At some level, the struggle is an animal one, with will opposed to will. It is also a human struggle, a struggle over what ought to be done,

and why, and this is a struggle over meaning: what it means for Agamemnon to be deprived of a prize, or of this woman, or for Achilles to be deprived of a prize, or of this woman. (At moments in this poem, attention is directed to what such struggles mean from the point of view of the women themselves, for example in the cases of Helen and Andromache.[6])

Once the quarrel has begun and Achilles has separated himself from the other Achaeans, the question shifts to what *that* means, and, as time goes on, to how the quarrel might be made up. "Making up" a quarrel is a process in which the parties gradually, and often with great difficulty, come to share a common language for the description of their common past, present, and future, including an agreement as to what will be passed over in silence. In this process, they reestablish themselves as a community with a culture of their own. In the *Iliad,* Agamemnon's attempts to make up the quarrel fail; the community between the two antagonists is never reestablished, even when Achilles returns to the battle (because this happens for a different reason, the death of Patroclus).

Or think of another great literary moment, the beginning of *Paradise Lost,* when Satan and the other rebellious angels try to establish a community of their own in Hell, based upon a new language of value and meaning. Their incredible attempts at self-creation and self-assertion have won them the admiration of many readers from Shelley onwards; some even see Satan as the unacknowledged hero of the poem. ("The mind is its own place, and in it self / Can make a Heav'n of Hell, a Hell of Heav'n."[7]) But the poem shows that no community can be built upon the language that they use, a language of selfishness and hatred—a language that in fact made a "Hell of Heav'n"—even by figures with such enormous capacities of imagination and will as Milton represents the angels to have. Compare with this the efforts of the participants at our own Constitutional Convention in the summer of 1787, who were also trying to find or make a language, and a set of relations, upon which a new community could be made and upon which a new life could proceed. Their arguments can be read as the gradual attempt to make a language of shared factual assumptions, shared values, shared senses of what need and what need not be said—of what could be said ambiguously, of what they could not resolve at all—resulting in a text that they could offer to others as the terms on which a new community might begin its tentative life.

---

[6] HOMER, ILIAD bk. III, ll. 121-244; bk. VI, ll. 342-58, 404-39.

[7] JOHN MILTON, PARADISE LOST bk. I, ll. 255-56 (1st ed. London 1667).

What kind of community shall it be? How will it work? In what language shall it be formed? These are the great questions of rhetorical analysis. It thus always has justice and ethics—and politics, in the best sense of that term—as its ultimate subjects.

The domain of constitutive rhetoric, as I think of it, thus includes *all* language activity that goes into the constitution of actual human cultures and communities. Even the kind of persuasion Plato called dialectic, in which the speaker is himself willing, even eager, to be refuted, is in this sense a form of rhetoric, for it is the establishment of community and culture in language.

V

Like law, rhetoric invents; and, like law, it invents out of something rather than out of nothing. It always starts in a particular culture and among particular people. There is always one speaker addressing others in a particular situation, about concerns that are real and important to somebody, and speaking a particular language. Rhetoric always takes place with given materials. One cannot idealize rhetoric and say, "Here is how it should go on in general." As Aristotle saw—for his *Rhetoric* is, for the most part, a map of claims that are persuasive in his Greek world—rhetoric is always specific to its material. There is no Archimedean point from which rhetoric can be viewed or practiced.

This means that the rhetorician—that is, each of us when we speak to persuade or to establish community in other ways—must accept the double fact that there are real and important differences among cultures and that each person is to a substantial degree the product of his or her own culture. The rhetorician, like the lawyer, is engaged in a process of meaning-making and community-building of which he or she is in part the subject. To do this requires him or her to face and to accept the condition of radical uncertainty in which we live: uncertainty as to the meaning of words, uncertainty as to their effect on others, uncertainty as to our own character and motivations. The knowledge out of which the rhetorician ultimately functions will not be scientific or theoretical but practical, experiential—the sense that one knows how to do things with language and with others. This is, in fact, our earliest social and intellectual knowledge, the knowledge we acquire as we first begin to move and act in our social universe and learn to speak and understand. It is the knowledge by which language and social relations are made.

The rhetorician thus begins not with the imagined individual

in imagined isolation (as Hobbes[8] or Locke[9] does), and not with the self, isolated from all of its experience except that of cogitation (as Descartes does[10]), but where Wittgenstein tells us to begin, with our abilities of language, gesture, and meaning.[11] This knowledge is itself not reducible to rules or subject to expression in rules, though many analysts wish that it were; rather it is the knowledge by which we learn to manage, evade, disappoint, surprise, and please each other, as we understand the expectations that others bring to what we say. This knowledge is not provable in the scientific sense, nor is it logically rigorous. For these reasons, it is unsettling to the modern scientific and academic mind. But we cannot go beyond it, and it is a mistake to try. In this fluid world without turf or ground, we cannot walk but we can swim. And we need not be afraid to do this—to engage in the rhetorical process of life—for all of us, despite our radical uncertainties, already know how to do it. By attending to our own experience, and that of others, we can learn to do it better if we try.

VI

What would be the effects of thinking of law in this literary and rhetorical way? If, as I think, it is more true to the experiences of those engaged in the activity of law than the standard conceptual accounts, it should in the first place lead to a richer and more accurate understanding of and control over what we do. The law is something that lawyers themselves make all the time, whenever they act as lawyers, not something that is made by a political sovereign. From this point of view, the law can be defined as the culture that we remake whenever we speak as lawyers. To look at law this way is to direct one's attention to places that are normally passed over: to the way in which we create new meanings, new possibilities for meaning, in what we say; to the way in which our literature can be regarded as a literature of value and motive and sentiment; to the way in which our enterprise is a radically ethical one, by which self and community are perpetually reconstituted; and to the limits that our nature and our culture, our circumstances and our imagination, place on our powers to remake our languages and communities in new forms.

To see law this way may also lead to a different way of reading

---

[8] THOMAS HOBBES, LEVIATHAN ch. 13 (London 1651).

[9] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT bk. II, chs. 1-3 (London 1690).

[10] RENÉ DESCARTES, DISCOURS DE LA MÉTHODE pt. 4 (Leiden 1637).

[11] LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS *passim* (1953).

and writing it. As I suggested above, the United States Constitution can be regarded as a rhetorical text: one that establishes a set of speakers, roles, topics, and occasions for speech. So understood, many of its ambiguities and uncertainties become more comprehensible, for we can see the text as attempting to establish a conversation of a certain kind and its ambiguities as ways of at once defining and leaving open the topics of the conversation.[12] A statute can be read similarly, not as a set of orders or directions or commands, but as establishing a set of topics, a set of terms in which those topics can be discussed, and some general directions as to the process of thought and argument by which the statute is to be applied. Similarly, the judicial opinion, often thought to be the paradigmatic form of legal expression, might be far more accurately and richly understood if it were seen not as a bureaucratic expression of ends-means rationality but as a statement by an individual mind or a group of individual minds exercising their responsibility to decide a case as well as they can and to determine what it shall mean in the language of the culture. And the view of law as constitutive rhetoric should define the lawyer's own work as far less manipulative, selfish, or goal-oriented than the usual models, and as far more creative, communal, and intellectually challenging.

From the point of view of the nonlawyer, this way of regarding law as rhetoric invites a certain kind of reading and of criticism, for it invites you to test the law in part by asking whether your own story, or the story of another in whom you have an interest, is properly told by these speakers and in this language. The basic idea of the legal hearing is that two stories will be told in opposition or competition and a choice made between them. On the rhetorical view of law suggested here, you are entitled to have your story told in your own language (or translated into it), or the law is failing. It is the role of the jury to insist upon the ultimate translatability of law into the common language of the culture. To ask, "What place is there for me in this language, this text, this story?," and to feel that you have a right to an answer, is a very different way of evaluating law from thinking of it as a mechanism for distributing social goods. The central idea is not that of goods, but of voices and relations: what voices does the law allow to be heard, what relations does it establish among them? With what voice, or voices, does the law itself speak? These are the questions with

[12] For further discussion, see my WHEN WORDS LOSE THEIR MEANING ch. 9 (1984) and THE LEGAL IMAGINATION 215-40 (1983).

which rhetorical criticism would begin.

At a more global level, we can see that the current habit of regarding law as the instrument by which "we" effectuate "our policies" and get what "we want" is wholly inadequate. It is the true nature of law to constitute a "we" and to establish a conversation by which that "we" can determine what our "wants" are and should be. Our motives and values are not, in this view, to be taken as exogenous to the system (as they are taken to be exogenous to an economic system) but are in fact its subject. The law should take as its most central question what kind of community we should be, with what values, motives, and aims. It is a process by which we make ourselves by making our language.

This means that one question constantly before us as lawyers is what kind of culture we shall have, as well as what kind of community we shall be. What will be our language of approval and disapproval, praise and blame, admiration and contempt? What shall be the terms by which we identify and refine—by which we create—our motives and combine them into coherent wholes? This way of conceiving of law invites us to include in our zone of attention and field of discourse what others, operating under present suppositions, cut out, including both the radical uncertainty of most forms of knowledge and the fact that we, and our resources, are constantly remade by our own collective activities. The pressure of bureaucratic discourse is always to think in terms of ends and means; but in practice ends-means rationality is likely to undergo a reversal by which only those things can count as ends for which means of a certain kind exist. This often results in a reduction of the human to the material and the measurable, as though a good or just society were a function of the rate of individual consumption, not a set of shared relations, attitudes, and meanings. To view law as rhetoric might help us to attend to the spiritual or meaningful side of our collective life.

As one example of what I mean by the difference between the material and the meaningful, consider the question of the invasion of privacy by officials. One way to try to compare different regimes would be to inquire how frequently police officers stopped individuals on the street, asked for their identification, and subjected them to pat-downs or searches. That would be a material mode of determining "how much" privacy existed in a particular culture. But far more important than that is the meaning of the described activities of the officers both to them and to the citizens. There are circumstances, war perhaps being the most obvious, in which almost everyone would agree that this kind of policing was impor-

tant and valuable, and citizens would by and large not feel that their privacy was invaded, because they would feel that the officer was acting as their fellow worker in a common enterprise.

Such a conception of law as I describe would lead to a rather different method of teaching it as well. It would at first require a rather old-fashioned training in the intellectual practices that are the things that lawyers do, from reading cases to drafting statutes and contracts. The rhetorician must always start with the materials of his or her language and culture, and we should continue to train our students to understand these materials, their resources and limits, and to learn to put them to work in the activities of narrative and analysis and argument that make up their professional lives. The rhetorician must first of all master the starting points from which he or she is to proceed, then the methods by which he or she can move, in one direction or another, from the point so established.

But the lawyer's activities of speech and argument should not merely be learned as crafts to be performed as efficiently as possible; they should be contrasted with other ways of doing similar things, drawn both from ordinary life and from other disciplines. For example, learning how to argue in the law about the meaning of rules, or about fairness, or about blame, can be informed by attending to the ways in which we already know how to do these things in ordinary life, and by learning how they are done elsewhere. One focus would accordingly be upon the connection between legal language and ordinary language, legal life and ordinary life, as rhetoric connects them. A related focus would be upon other formal intellectual practices, in an interdisciplinary curriculum rather different from current models: not law *and* sociology or history or economics or literature, but law *as* each of these things. What kind of sociology or history or anthropology are we implicitly practicing in this legal rule, in that legal action or argument, in this judicial opinion? What can be said for and against our implied choices?

But the largest difference would be a shift in the conception of the triadic relation between the student, the teacher, and the subject. The law we teach would not be regarded as a set of institutions that "we" manipulate either to achieve "our policies," as governors, nor "our interests," as lawyers, but rather as a language and a community—a world, made partly by others and partly by ourselves, in which we and others shall live, and which will be tested less by its distributive effects than by the resources of meaning it creates and the community it constitutes: who we be-

come to ourselves and to one another when we converse.[13] And our central question could become how to understand and to judge those things.

VII

By this kind of conjunction with the law, rhetoric itself might perhaps be seen in a somewhat different light. No longer a substitute for science when science does not work, it might be seen as a science itself, at least in the eighteenth-century meaning of that term as an organized form of knowledge. It is the knowledge of who we make ourselves, as individuals and as communities, through the ways we speak to each other. Rhetorical knowledge is allied with artistic knowledge in that it is tacitly creative and in that it acknowledges both its limits and the conditions of uncertainty under which it functions. Rhetorical analysis provides a way of addressing the central questions of collective existence in an organized and consistent, but not rule-bound, way. It directs our attention to the most significant questions of shared existence, which are wholly outside the self-determined bounds of science. Justice and ethics are its natural subject, art its natural method.

Rhetoric might also provide a set of questions and attitudes that could enable us to move from one academic and social field to another and, in doing so, to unite them. For at least tentative judgments of the kind that rhetoric calls for can be made about the work of experts—in history or psychology, for example—without one's having to be oneself an expert in the professional sense. Not that one has not always something to learn—of course one has—but one can never know everything and ought not be barred from making important observations and judgments of one kind by a want of competence at making others. We can say a great deal about the kind of history written by Gibbon,[14] for example—about the sort of community he establishes with us, about his language of value and judgment—without being able to make professional

---

[13] I do not mean that distributive effects are irrelevant but that the context in which they are relevant, and from which they derive their meaning, is social and ethical. What does it mean about us that power and wealth are divided this way, or that? Or, more precisely—since power and wealth are at bottom social and cultural—what does it mean about us that we create these powers, these wealths, in this way? Without a social and ethical context, one has after all nothing but brute material that has of itself no meaning at all, as wealth, power, or symbol.

[14] EDWARD GIBBON, THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE (London 1776-1788) (discussed in chapter 7 of my forthcoming book HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW).

judgments about his use of certain inscriptions as evidence on a certain point.

Rhetoric, in the highly expanded sense in which I speak of it, might indeed become the central discipline for which we have been looking for so long—which "science" has proven not to be—by which the others can be defined and organized and judged. One reason rhetoric might be able to perform this role is its continuity with ordinary discourse and hence with real communities, real values, and real politics. It is at least contiguous to a ground that is common to us all. Rhetoric must deal with ordinary language because it is the art of speaking to people who already have a language, and to reach and to persuade them one must speak their language.

One result of the affirmation of ordinary language is that it provides a ground for challenge and change, a place to stand from which to reformulate any more specialized language. Another result of this affirmation is that it confirms our right and capacity to say what we think is really good about what is good in our world and what is really terrible about what is terrible. Rhetorical analysis invites us to talk about our conceptions of ourselves as individuals and as communities, and to define our values in living rather than conceptual ways. For example, consider what is good about America. Our present public rhetoric seems for the most part to assume that what is good about it is its material productivity. But that is often wasteful, self-destructive, and ugly. I think what is really good about this country is its fundamental culture of self-government, independence, and generosity, and these qualities are obscured or denied by the way in which we habitually talk about our government and law.

How does rhetoric enable us to talk about these matters? It does so by giving us a set of very simple but fundamental questions to ask when someone speaks either to us or on our behalf, or when we ourselves speak, such as the following:[15]

> 1. *The inherited language.* What is the language or culture with which this speaker works? How does it represent natural and social facts, constitute human motives and values, and define those persuasive motions of the mind that we call reason? What does it leave out or deny? What does it overspecify? What is its actual or imagined relation to other sys-

[15] These questions focus on the three aspects of the lawyer's rhetorical situation that I identified *supra* p. 688-91.

tems of discourse?

2. *The art of the text.* How, by what art and with what effect, is this language remade by this speaker or writer? Is this text internally coherent, and if so, by what standards of coherence? Is it externally coherent (that is, does it establish intelligible relations with its background), and if so, by what standards of coherence? How, that is, does this text reconstitute its discourse?

3. *The rhetorical community.* What kind of person is speaking here, and to what kind of person does he speak? What is the voice here and what kind of response does it invite, or allow? What place is there for me, and for others, in the universe defined by this discourse, in the community created by this text? What world does it assume? What world does it create?

Such questions are only the beginning of an ethical and cultural criticism but they may enable us to approach a set of texts as they are actually made, in widely varying cultures, languages, and human relations, and to establish connections among them, across their contexts and above or behind their particularities. To ask them is of course not to answer them, but it may direct our attention to the proper place for thought to begin, and suggest, by implication, appropriate modes of inquiry and of judgment.