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THE ARTS OF CULTURAL AND COMMUNAL LIFE

JAMES BOYD WHITE

In this paper I wish to make a general suggestion about the relation between law and rhetoric, which I can summarize this way: that law is most usefully seen not, as it normally is by academics and philosophers, as a system of rules, but as a branch of rhetoric; and that rhetoric, of which law is a species, is most usefully seen not, as it normally is, either as a failed science or as the art of persuasion, but as the central art by which community and culture are established, maintained, and transformed. On this view rhetoric is continuous with law and like it has justice as its ultimate subject. I will develop the more general position at some length, for it is in a sense a precondition to what I suggest about the nature and structure of legal rhetoric.

I

When I say that we might regard law as a branch of rhetoric, I may seem to say only the obvious. Who ever could 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, and one could hardly imagine a more compendious statement of the art of 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. What do people think law is if it is not rhetoric, and why do they think so?

The answer lies I think in two traditions, one old, the other new. 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. On 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 can be 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. 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 theirs was.

For these reasons 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*. Sophisticated analysis of law from this point of view distinguishes among various kinds of legal rules and different sets or subsets of legal rules: substantive rules 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 are defined by their 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 policymakers, as a machine acting on the rest of the world; the rest of the world is in turn reduced to the object upon which the machine acts. Actors outside the bureaucratic world are made the objects of manipulation through a series of incentives or disincentives. Actors within the legal-bureaucratic structure are either reduced to "will-servers" (who regard their obligation as being to obey the will of a political superior), or they 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 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 unselfconscious 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.[1]

This is a necessarily crude sketch of certain ways in which law is commonly thought of. Later in this essay I shall propose a different 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

I turn now to what is usually meant by "rhetoric." This term is in greater flux, and what I say must be somewhat less dogmatic. But 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 estabish 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 not themselves true but probable. 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;[2] and it is as contemporary as the standard modern condemnations of propaganda in government and of advertising as 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's case has not attained some requisite degree of probability. In doing so each 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 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 such 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 been recently 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 lan-

guage and conventions of science the ruling model of our age, our popular religion, lives on in the language and expectations of others, 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

In this essay I shall propose 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 will also be suggesting a way to think about rhetoric as well, especially about that "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 specifically as a rhetorical activity.

In particular I want to direct attention to three aspects of the lawyer's work. The first is the fact that, like any rhetorician, the lawyer 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 anyone you must in the first instance speak a language 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 and culture. 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 as 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.[3] 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" which he said it is the art of rhetoric to discover.

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 the identity, the meaning, and the authority of the materials are always arguable, always uncertain. There is a sense in which 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 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; 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 proposes a relationship

among them. The lawyer's speech is thus always implicitly argumentative not only about the result—how should the case be decided?—and the language—in what terms should it be defined and talked about?—but about the rhetorical community of which one is at that moment a part. One is always establishing in performance a response to the question "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 he is given by his culture to speak; his argumentative reconstitution of it; and his implicitly argmentative constitution of a rhetorical community in his text. 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 may 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. 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 said, 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. In this way we might come to see the law less as a bureaucracy or a set of rules than as a community of speakers of a certain kind: as a culture of argument, perpetually remade by its participants.

IV

All this flows 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 an independent system of meaning, but as a way of talking about real events and actual people in the world. At its heart 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. (Think of the way that, in Sophocles' *Philoctetes*, Neoptolemus recasts Philoctetes' story, with a different beginning and a different sense of causation, to give it a different meaning and to make a different ending seem possible, indeed inevitable and right.)[4] This story will in the first instance be told in the language of its actors. That is where the law begins; in a sense this 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, in which our methods of reasoning are elaborated and enacted; and it gives us our terms for constructing a social universe by defining roles and actors and by establishing expectations as to the propriety of speech and conduct. 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 literary and rhetorical system.

V

What I have said means something, I think, about what we can mean by "rhetoric" as well. 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 rhetoric so understood that I think we can see the law as 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 human beings from other animals. Imagine a bear, fishing for salmon in a river of the great Northwest. What is he 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 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 person following the other, or are they in some 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, from our point of view much more importantly, 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 it means from the point of view of the woman herself, as in the cases of Andromache, Helen, and at one moment Briseis herself.

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; community between them is never reestablished, even when Achilles returns to the battle, because that is done 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 itself / Can make a Heav'n of Hell, a Hell of

Heav'n.") 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 be. 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, a new life 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 be said and what need not—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.

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 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.

VI

Like law, rhetoric invents, and like law it invents not out of nothing but out of something. It always starts in a particular place among particular people. There is always one speaker addressing others in a particular situation about concerns that are real and important to somebody, and always 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 not an 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 between cultures and that one is in substantial part the product of one's own culture. The rhetorician, like the lawyer, is thus 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 even as to our own motivations. The knowledge out of which the rhetorician ultimately functions will thus be not 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 political philosophers who think in terms of a social contract do, and not with the self isolated from all of its experience except that of cogitation, as metaphysicians in the Cartesian tradition do, but where Wittgenstein tells us to begin, with our abilities of language, gesture, and meaning. This knowledge is itself not reducible to rules, nor subject to expression in rules, though many analysts wish 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—notwithstanding our radical uncertainties, for all of us 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.

VII

What would be the effects of thinking of law in this rhetorical way? If, as I think, it is more true to the experience of those engaged in the activity of law than the standard conceptual accounts, it should in the first place lead to richer and more accurate teaching and practice of law and to a greater sense of control over what we do. Law might come to be seen as something that lawyers themselves make all the time, whenever they act as lawyers, not as something that is made by a political sovereign. From this point of view the law can be seen 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 it perhaps normally does not rest: to the way in which we create new meanings, new possibilities for meaning, in what we say; to the way 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 or 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 and writing it. As I suggest above, the United States Constitution can be regarded as a rhetorical text: as establishing a set of speakers, roles, topics, and occasions for speech.[5] So understood, many of its ambiguities and uncertainties become more comprehensible; we can see it 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. Similarly, a statute can be read not merely as a set of orders or directions or commands, but also 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. To see the statute as a way of starting a conversation of a certain kind on a certain set of subjects might well assist both one's reading and one's writing of the form. 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 culture. All this is necessarily to 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, in a proper language. The basic premise of the hearing is that two stories will be told in opposition or competition and a choice made between them. It is the role of the jury to insist upon the ultimate translatability of law into the common language of the culture. You are entitled to have your story told in your language (or translated into it), or the law is failing. 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 which rhetorical criticism would begin.

As I suggested above we can also 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 on 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 shall 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 uncertainty of life 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; 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 community of a certain sort, a set of shared relations, attitudes, and meanings. To view law as rhetoric might enable us to attend to the spiritual or meaningful side of our collective life.[6]

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.

But these activities would not merely be learned as crafts to be performed as efficiently as possible; they would be contrasted with other ways of doing similar things, both from ordinary life and from other disciplines. Learning how to argue in the law about the meaning of rules, or of fairness, or of blaming, 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. Another 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 become to ourselves and to one another when we converse.[7] And our central question would become how to understand and to judge those things.

VIII

By this kind of conjunction with the law, rhetoric itself can perhaps be seen in a somewhat different light. No longer a substitute for science when science does not work, it can 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, in the ways we speak to each other. Rhetorical knowledge is allied with artistic knowledge in that it is tacitly creative and 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 may also provide a set of questions and attitudes that will 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 rhetoric calls for can be made about the work of experts—in history say or psychology—without one's having to be an expert in the professional sense oneself. 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 lot about the kind of history written by Gibbon, for example—about the sort of community he establishes with us, about his language of value and judgment—without being able to make professional 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 even 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 it is their language you must speak to reach and to persuade them. This is the sense in which, as I suggested above, rhetoric is always culture-specific. You must take the language you are given and work with that.

One result of this 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. It establishes a kind of structural openness. Another result 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 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. These facts are all too often obscured or denied by the ways 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. These questions focus on the three aspects of the lawyer's rhetorical situation I identified above.

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 systems of discourse?
2. *The art of the text.* How, by what art and with what effect, is this language remade by this speaker in this written or oral text? Is the 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 or she speak? What kind of response does this text invite, or permit? 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 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, 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 judgment.

IX

Consider, for example, the criticism of judicial opinions. It is common, and in a sense perfectly natural, for judicial critics to

direct their attention primarily to the legal results reached by a particular court or judge. This kind of criticism argues the merits of the questions presented and resolved. You might thus criticize a judge, or a court, for being in your view insufficiently sensitive to the importance of free speech or to the rights of states to govern their own affairs; or you might argue that his (or her) method of statutory or constitutional interpretation, or his treatment of precedent, is unsatisfactory. In either case you can expect your argument to be met by others. The resulting conversations—let us call them political and professional—are important branches of judicial criticism. But there is I think another even more fundamental branch of judicial criticism, in which attention is focused less on results or methods than on a special kind of judicial ethics that is in large measure a matter of voice.

Of course one may properly argue against the results of particular cases and, more deeply, against a judge's institutional or political premises, and one may properly criticize technique as well. But any judge brings a set of basic values and orientations to his or her work and it is hard to fault someone for having a different set from one's own. The law is meant to be a way in which people can live together in spite of their differences. Our most important concern is accordingly less with the original preferences and attitudes a judge brings to the bench than with what he or she does with them; here we can imagine ourselves greatly admiring the work of a justice with whose substantive predispositions we disagreed, and having contempt for one who largely shared our own social and political attitudes. This is partly a matter of meeting what can be called professional standards—treating precedent in an appropriate way and knowing how, and how not, to use legislative history, for example. But what we admire cannot be reduced to such skills. The deepest judicial excellence is an excellence of attitude and character.

The ideal would be a judge who put his (or her) fundamental attitudes and methods to the test of sincere engagement with arguments the other way. We could ask, does this judge see the case before him as the occasion for printing out an ideology, for displaying technical skill, or as presenting a real difficulty, calling for real thought? The ideal judge would show that he had listened to the side he voted against and that he had felt the pull of the arguments both ways. The law that was made that way would comprise two opposing voices, those of the parties, in a work made by another, by the judge who had listened to both and had faced the conflict between them in an honest way. In this sense the judge's most important work is the definition of his own voice, the character he makes for himself as he works through a case.

Or take an example from substantive law: in evaluating the law that regulates the relations between police officials and citizens (which in our system is largely the law of the Fourth and Fifth Amendments to the Constitution), I think the important question to be asked is not whether it is "pro-police" or "pro-suspect" in result, nor even how it will work as a system of incentives and deterrents, but what room it makes for the officer and the citizen each to say what reasonably can be said, from his or her point of view, about the transaction—the street frisk, the airport search, the barroom arrest—that they share. Here too the central concern is with voices: whether the voice of the judge leaves room for the voices of the parties.[8]

X

The practice and teaching of rhetoric is by its nature self-reflective, for the questions that one learns to ask of others can be asked of oneself as well. We have asked, for example, what kind of community and culture a speaker or writer makes when he or she engages in a particular kind of intellectual analysis, say cost-benefit analysis. Those communities and cultures, performed and tentatively offered to the world, can be analyzed and judged. But the same question can be asked of what we ourselves say and what we think. What kind of community do we make in our own writing and our own speech, what language of meaning do we create? What is the voice with which we speak? These are the first and hardest questions, and they can be asked of this essay and of all of our expressions to each other. Whenever we speak or write, we should be prepared to ask ourselves what kind of community and culture we make, what kind of meaning they shall have.[9]

NOTES

Portions of this chapter have previously appeared in the University of Chicago Law Review (Summer 1985) and in James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (Madison: University of Wisconsin Press, 1985).

I am grateful for helpful comments by Pete Becker, Lee Bollinger, Bruce Gronbeck, Terrance Sandalow, Joseph Vining, and Christina Whitman.

1. This bureaucratic language is very deep in our ordinary culture as well: think of a conversation at a curriculum committee meeting where someone says, "Let us first state our educational goals and then determine how we can arrive at them." That is a dreadful way to talk about teaching, yet it is dominant in our world, and once the conversation has begun on those terms it is almost impossible to deflect it to address any true educational concerns.

2. "The Ethics of Argument: Plato's *Gorgias* and the Modern Lawyer," 50 *University of Chicago Law Review* 849–95 (1983): an analysis of Plato's attack on rhetoric, and a defense, against that attack, of the rhetorical practices of modern law.

3. 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 of course superior in authority to 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; its form and content and relation to other rules are in principle arguable. 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 a 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.

4. See James Boyd White, "Heracles' Bow: Persuasion and Community in Sophocles' *Philoctetes*," in *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (Madison: University of Wisconsin Press, 1985), pp. 3–27.

5. For a fuller statement of the "rhetorical" view of the Constitution outlined here, see my *When Words Lose Their Meaning* (Chicago: University of Chicago Press, 1984), chap. 9.

6. 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, for example, 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. It could in principle be determined statistically. 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 being the most obvious, in which almost everyone would agree that this kind of policing was important 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.

7. 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, which has of itself no meaning at all, as wealth, power, or symbol.

8. For further analysis of what I call the rhetoric of the Fourth Amendment, which regulates and in part constitutes the relation between citizen and official in our culture, see my articles, "The Fourth Amendment as a Way of Talking About People: A Study of the *Robinson* and *Matlock* Cases," 1974 *Supreme Court Review* 165–232, and "Forgotten Arguments in the 'Exclusionary Rule' Debate," 81 *Michigan Law Review* 1273–84 (1983).

9. Another book that sees law as a way of making meaning in an uncertain world by reasoning through progressive analogies is Edward H. Levi's seminal *An Introduction to Legal Reasoning* (Chicago: University of Chicago Press, 1949). For a general view of rhetoric rather similar to my own, see Ernesto Grassi, *Rhetoric as Philosophy: The Humanist Tradition* (University Park: Pennsylvania State University Press, 1980).

18 FEMINIST POLITICAL RHETORIC AND WOMEN'S STUDIES

JEAN BETHKE ELSHTAIN

Women's studies is a highly charged activity, a field of inquiry with explicit connections to a political movement and to the rhetoric of that movement. The nexus between women's studies as an academic enterprise and feminist political rhetoric is clear in a way that most links between academic disciplines and a broader social field are not. At present, women's studies is a rather large magnet drawing scholars from diverse disciplines into an effort characterized, and celebrated, as interdisciplinary. Under the broad umbrella of women's studies one finds a lively, at times contentious, world of competing epistemologies, ideologies, narrative styles, and ethical and political commitments. Women's studies, at this point, crosses the spectrum of academic disciplines and methodologies.[1] Encompassing a diversity of perspectives is the ideal (however imperfectly realized) of the enterprise.

The rhetoric of feminist politics, however, shares with ideologies in general a "will to truth" that quashes ambiguity and squeezes out diversity. The central focus of this paper is the complex and wary relationship between women's studies scholarship and criticism and grand feminist rhetorical strategies. Women's studies seeks to legitimize concern with women within established disciplines and as a field of inquiry in its own right. Feminist political rhetoric aims to provide the ideological glue for sustained political identity and action. This sets the stage for the unfolding of a complex scenario in which feminist political rhetoric and aims, on the one hand, and the scholarly claims and accomplishments of women's studies, on the other, give rise to another politics: politics among writers to determine which rhetorics, forms of discourse, and narratives will take precedence over the long haul.