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NEW PERSPECTIVES

In his seminal book, *The Making of Knowledge in Composition*, Stephen North defines the task of providing a comprehensive overview of the field of composition and rhetoric as one that requires a determination of how knowledge in the field is made. North's purpose reflects the recent intellectual history of the field, a history of the movement from the empirical studies of pedagogy that had largely characterized it to the current theoretical inquiry into the reasons why we teach writing the way we do, or better still, why we should teach it in a particular way. Thus, recently we have begun asking ourselves the sort of questions that have shaped poststructural critical theory: not how do we teach writing but what theories explain writing and, as North pointedly asks, how do we know what we know about them.

Similarly, in the preface to *The Rhetorical Tradition*, Patricia Bizzell and Bruce Herzberg acknowledge that,

> Our conception . . . has changed, following, we believe, the trajectory of the discipline of composition studies itself, with its renewed interest in historical antecedents and its deepening concern for the political and epistemological powers of discourse. The field of composition studies has turned for these purposes to rhetorical theory and its history, joining the fields of speech communication, philosophy, and literary theory, all of which are contributing to the resurgence of rhetoric. (v)

At the same time that rhetoric's traditions are being rediscovered and (in some quarters) joyfully reunited with

composition studies in a more theoretically based discipline, *language studies*—a comprehensive term that does or ought to include communication, and philosophy of language—is renewing its familial relationship to legal studies, the black-sheep cousin. This rapprochement is mutual. The recent *oeuvres* include works by lawyers exploring the imbrication of legal studies with language and literature studies, such as Richard A. Posner's *Law and Literature* and Robert A. Ferguson's *Law and Letters in American Culture.* On the other side, works by literary critics like Stanley Fish[1] and conferences like the recent "Deconstruction and the Possibility of Justice" held under the auspices of the Benjamin N. Cardozo School of Law explore how critical theorists and rhetoricians may apply their knowledge to the different but related discourse of the law.

Of course, the relationship between rhetoric and law is an old one, as I will document below, but deserving of a re-examination now in the light of the newly redefined and redefining rhetoric. We in rhetoric and composition are beginning to look at the literature of legal interpretation not as the befuddling product of a few mystics initiated into the law's mysteries but as another discourse that we can read and criticize and deconstruct just as we would any other texts. And what we are begining to find when we subject the discourse of legal interpretation to critical scrutiny is that, despite its claims to a scientific detachment in the name of disinterested justice, it is a rhetoric with all the limitations and conditions that all rhetorics share; it is not a higher order of abstraction, but simply another text.

Conceptions of Literacy

Each discourse has its literacy, and the legal interpretive discourse is no exception. It follows that readers of the

legal texts devoted to jurisprudence must gain a scholarly legal literacy that purports to be a level of abstraction above the literacy of mere practitioners. Of course, many scholars disagree that any metatext explaining the reasoning behind the decisions and attempting to regularize them is even possible, and this position is explored in some depth in chapter 3. Theoretical discussions about literacy are relatively new to rhetoric and composition, hence the discourse is still developing; perhaps it should all be categorized as what Richard Rorty would call "abnormal."

Implicit in the conversation on the subject of literacy is the notion that the political process by which literacy is gained ought to be fair, an idea that is undoubtedly founded in the broadly American ideological view of ourselves as a nation with an unusual devotion to fairness, particularly in dealings between the state or the society and the individual. But this perspective is logically necessary only when we view literacy as some kind of technical skill that is the badge of entry to the mainstream of economic life. But literacy is not a mere skill, a knack, a techne; literacy is, as David Bleich explains in *The Double Perspective*, "an inquiry into how to say what matters to other people that matter" (330). Note Bleich's use of "inquiry," which is a process not a cognitive state, and the frankly political assumption in his use of "matter." Bleich is saying that the process of literacy is empowering only if we view literacy as enabling people to have real agency, to be able to effect changes in their lives, not merely order a cheeseburger in the latest argot.

Richard Ohmann's understanding of literacy is similar to Bleich's. Ohmann sees various literacies as modes of social behavior rather than as skills or invariant bodies of knowledge, and these modes of behavior always bring the groups practicing them into conflict with other modes. In *The Politics of Letters* he writes that:

> Literacy is an activity of social groups, and a necessary feature of some kinds of social organizations. Like every

> other human activity . . . it embeds social relations within it. And these relations always include conflict as well as cooperation. Like language itself, literacy is an exchange between classes, races, the sexes, and so on. (226)

Ohmann sees, as I do, the necessity of conflict within a literacy as well as between literacies, that is, within as well as between the symbolic activities of communities and cultures. This conflict is the consequence of competing ideologies seeking the most advantageous political expression, the greatest benefits from the political system seen as means of distribution of benefits. Therefore, no social group can be said to be literate that merely tolerates or even encourages conflict; the group must insist upon conflict.

This notion of literacy as process and as engendering social conflict is as much at odds with the traditional view of literacy as the acquisition of a body of basic knowledge as it is with the traditional view of the law and the workings of justice within the American democratic society. The overwhelmingly dominant view among the lay public of the workings of the law is of a process impartial and fair to all, regardless of race, creed, or color, although our national idea of what is fair has changed radically over the last two hundred years. Most of us never think about the question of fairness; we appear to believe that it is being taken care of by the people we have elected to look after our interests and the people our elected representatives have appointed to positions of judicial and administrative responsibility. Moreover, we appear to believe that our rights are guaranteed by the Constitution, even though most of us are aware that the way the Constitution is interpreted has changed radically. Accordingly, most citizens of our free democracy follow the hearings on the confirmation of a Justice of the Supreme Court at a considerable distance, preferring to keep up with the proceedings, if at all, through television's technologically and visually biased representations on the evening news. Some read the more detailed presentation in the newspapers and the "news" magazines,

secure in the belief—if they consider the question at all—that they are getting an ideologically pure report of the "facts."

This disconcertingly popular disinterest in a process that is both demonstrably political and a matter of critical interest to all who place any value on their rights as citizens is an instance of a general disinterest in matters concerning the law and the rights and obligations that flow from them. This disinterest is accompanied by a sullen distrust of lawyers and their incomprehensible texts. Lawyers are the butt of frequent jokes in which they are unfavorably compared to, for example, laboratory rats (or they are occasionally depicted in television dramas as sleekly opportunistic moral counterparts of the Wall Street sharks and the drug kingpins who employ them to evade justice), evidence of the nearly universal view that lawyers and their legalistic jargon are to blame for the fact that no one understands the law but lawyers.

But is it really the case that it is the fault of lawyers that no one understands the law but lawyers? Are lawyers responsible, for example, for the deplorable fact that only a small minority of citizens grasps their legal rights and would therefore be capable of defending those rights in the event of their expropriation by a totalitarian government? Is legal rhetoric in the appellate courts designed to have the same persuasive effect as courtroom rhetoric, or are lawyers themselves the servants of the ideologies implicit in their rhetoric? And what has all of that to do with our growing concern about literacy? These are questions I will explore in the course of this work. To that end I will examine both the nature of the legal discourse concerned with interpretation of laws and the meanings of justice, and I will explore how the rhetoric of legal interpretive theories may disguise the political and ideological purpose of the discourse. Finally, I will consider the relationship of literacy to political empowerment and to social justice. I will proceed by examining the historical connections between law and rhetoric and the history of jurisprudence, at least

insofar as it provides a necessary background to my exploration of current traditional rhetorics of jurisprudence. This necessarily leads to an examination of recent poststructural theories that have begun to influence the way lawyers and jurists think and write about legal intepretation and how legal intepretation interacts structurally with literacy to undermine the ability of the law as presently conceived and administered to render justice to American citizens.

Justice in a Quasi-Democratic Bureaucracy

Thus, this work intervenes in the conversation at the decisive intersection of the discourses about literacy, ethics, justice, liberal politics, and the modern bureaucratic society. Americans today seem more worried about the quality of their lives and the future of their country than at any time since the Civil War. Even during two world wars, the malaise and self-doubt that now afflict Americans was relatively absent, and we are as a nation signifying our dismay and disaffection in the most dramatic way possible: by failing in historically record numbers to enter our votes in elections and referenda at local state and nation levels. Why?

One of the answers seems to me to be the result of a sea change in the attitude of Americans toward the institutions of the law and the process of obtaining justice. I have been doing some small-scale research into this matter in my own classrooms, and, although the numbers of students I have reached is not large, the results are impressive. What impresses me is the pervasive attitude that junior and senior students in two universities at which I have taught display unconcern about *causes célebrès* like the Clarence Thomas hearings in the U.S. Senate. Overwhelmingly, students profess astonishment that I care to make Thomas's confirmation a topic of discussion—as opposed to, say, the reorganization of IBM—and they display a nearly uniformly cynical view both about the hearings

and Anita Hill's allegations. "It's just politics," they all say. "Boring, man."

This demonstrates a remarkable shift in American sentiment within a group that ought to and presumably does represent an intellectual elite. It shows (admittedly without statistical validity) that within two generations young intellectuals (or perhaps quasi-intellectuals) have gone from an almost religious faith in the operations of the law to a widespread view of the legal system as corrupt and political without hope of redemption. But it is not only the university students' interest that has been laid to rest; in a recent article in the *St. Petersburg Times* (which, despite its quaint name, is one of two daily newspapers in the Tampa Bay–metropolitan area of more than 2 million people), Karl Vick quotes Lane Venardos of CBS News on the subject of CBS's reduced coverage of the Democratic National Convention. Says Venardos, "The people who cluck cluck over [our] being on for fewer hours are the people who don't watch anyway. Fewer than a third of the people with television sets watched any of the convention coverage when it was on all the time" (3A).

Now we see that it is no longer a matter of interest whether human rights may be eroded by cynical appointments to our highest court or who is nominated for the highest office. Worse still, it is no longer even a matter of interest that no one is interested in this phenomenon. The reasons for this massive disinterest may be many, but one that seems particularly plausible is suggested to anyone interested by some of the data available from the Federal Reserve Board. America's 934,000 richest households have a net worth higher than that of its 84 million poorest households, and just 1 percent of our households own 37 percent of our national net worth. This is, by the way, the largest concentration of wealth in the fewest hands of any industrialized nation in the world!

These facts suggest that the people are feeling helpless before the bureaucratic operations of government, incapable of expressing their resentment at the increasing

concentration of wealth in fewer and fewer hands, their rhetoric blunted by a universal education system that serves to maintain the status quo. One wonders, or ought to wonder, how many of our citizens can interrogate the bureaucracy in a meaningful way and intervene in the political process by, as Bleich suggests, saying what matters to people that matter. Marilyn Cooper points out that even after two quarters or semesters of writing instruction, many first-year students still cannot analyze ideas completely or argue positions logically ("Ways" 141). If less than one-quarter of American adults complete college and receive a bachelor's degree and if, as many academics believe, a substantial fraction of these never learn to read and write critically, perhaps only a small fraction—less than 5 percent—have the education and interest to intervene in the administration of justice in a meaningful way. This is probably not a large enough fraction to make a difference because many of these educated, qualified critical thinkers are themselves embedded in the system as lawyers, judges, government officials, and so forth. As Duncan Kennedy has argued in "Legal Education as Training for Hierarchy," the legal education system that produces all the lawyers (and consequently all the higher court judges) and most of the legislators is deeply embedded in the dominant ideology.

The Direction of Legal Theory

Meanwhile, tucked out of sight and out of mind as well, the industry that produces the rhetoric of legal interpretation is operated by legal scholars and through the formal opinions of higher court justices. Its theories have changed slowly over the years, but the rate of change is increasing, influenced as are so many things in contemporary culture by technology and the cult of immediacy. As I will show, the intellectual evolution in law has been (1) away from acceptance of divine law as the only law in medieval canon law courts, (2) through the Anglo-Ameri-

can tradition of relying upon legal precedent as the means of revealing transcendent rules of law, and (3) to an examination of how precedents are interpreted. The focus has changed from a hermeneutic study of the literature to analysis of the way the history of legal thought is narrated. What I mean by this is that at least some legal scholars are less concerned now to rationalize synchronically and diachronically the decisions on what is optimistically referred to as a "point of law" and more concerned with the history of law as a cultural narrative. The modern intellectual struggle, away from the more candidly adversarial arena of the courtroom, is over the issue of what rules must guide judges in applying precedent so that decisions are consistent and, above all, predictable. In the courtroom, advocates are still after 2,500 years lawfully manipulating the opinions of judge and jury in their favor; but in the legal academy, scholars are now trying to find a set of rules that will, as Roberto Unger puts it, "regularize" the application of law to facts. In both discourses, forensic and academic, lawyers are knowingly using rhetoric, although few practicing lawyers, on the one hand, and fewer legal scholars and judges, on the other hand, accept the rhetoric of the other side as producing anything approaching a practical truth.

Much of the commentary in legal periodicals within the last five or six years now takes notice of the poststructural view that no general theory of how the law is interpreted is possible. Legal scholars are far from agreement on this, however. Regardless, the commentary of legal scholars fails in the main to note that, as Jonathan Culler points out:

> the defining feature of post-structuralism is the breakdown of the distinction between language and metalanguage—a theory of narrative is itself a narrative, a theory of writing is itself writing. (*Framing the Sign* 139)

Extending Culler's point, I want to make the similar point that a theory of legal interpretation is itself interpretation,

or to put it another way, all of the theories about legal interpretation—being language—are themselves rhetorical and have the same consequence as forensic rhetoric; all rhetoric, as James Berlin, Greg Myers, and others have shown, is always already ideological.[2]

It follows, then, that as ideology is unself-critical, the rhetoric of theories about legal interpretation may work to undermine justice in the interest of maintaining the dominant ideology, just as the rhetoric of the courtroom may lawfully undermine justice in the interest of winning the case.

There are other connections between the legal equivalents of "town" and "gown"—the courtroom/boardroom practitioners and the legal scholars and commentators—despite the distaste with which these factions frequently view one another. The dialectical-adversarial method is not used only in the courtroom. It is often the method by which the legal rules are interpreted and defined and a universal principle accepted. The pages of the law journals are full of the same kind of rhetorical battles that are the stuff of professional courtroom drama generated by good trial lawyers. My point is that the legal theoreticians do not and cannot stand outside the legal discourse to analyze it. Therefore, I am calling attention to the fact that the rhetoric of interpretation appeals to, makes connections with, reinforces the largely unconscious ideology of listeners/readers of legal opinions and legal scholarship similarly to the way in which forensic rhetoric appeals to the emotions as well as the reason of juries.

Argument

Where all of the foregoing leads is to the argument in this work that (1) the discourse of legal interpretive theory must be considered as much a part of the current rhetoric and composition discourse as any other written discourse and as such shares the interests, concerns, and much of the philosophical substrate of the field of language theory;

and, therefore, (2) legal rhetoric in the scholarly commentaries and the rationales for higher court opinions—that is, the metatext of legal interpretation—may work to undermine justice as it attempts to deliver justice, just as we see that any other rhetoric may reinforce social injustice and repression.

I intend to support these claims first by demonstrating the existence of a comprehensive history of legal interpretive theory purporting to be a metatext. I note that the discourse of interpretive theory—jurisprudence—purports to be a metatext because it represents itself as standing outside the text of interpretations of the law constituted by judicial opinions and commentaries on judicial opinions. The voluminous discourse of Anglo-American interpretive theory, mainly contained in the several legal journals published by law schools in North America and Britain, does not merely attempt to restate the law, that is, codify it, or predigest it for lawyers. It also attempts to articulate theories of how and why the judicial decisions are made that constitute the text on which the metatext operates. It purports to be a metatext but is nevertheless only another text, another rhetoric because, as I will show in chapter 3, a text purporting to stand outside the interpretive discourse and to explain or rationalize it is not possible. As a metatext, jurisprudence is socially and culturally identical to, for example, the rhetoric of composition theory or of literary criticism, and it is therefore subject to all of the same critiques.

I will argue the second part of this thesis principally in chapters 4 and 5, where I intend to show that the idea of a transparent rhetoric serving only as a medium for ideas, while remaining value neutral, is itself part of a discredited ideology. As a preliminary to the discussion of the relationships among rhetoric, ideology, literacy, and the delivery of justice, I will review and summarize the current literature regarding the ideological nature of rhetoric and how an ideological perspective affects our reading of the interpretive rhetoric in the legal discourse.