

## FOREWORD

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This book is a collection of essays on a set of common themes. I have put them together here in the hope that they will have, as a whole, a shape of their own and make a kind of collective sense, establishing as it were by triangulation a position from which they all proceed. This position is in fact the center of this book. It cannot be adequately summarized here in conceptual form for it is not a conceptual position, but what I call a literary one: a set of attitudes and questions, a way of giving attention to experience, a kind of intellectual identity worked out in performance. But I will try to say something useful here by way of introduction to one who is leafing through this book and wondering what it is all about.

### 1

The reader may at the outset be puzzled by the analogies suggested by the titles to many of the essays. Law is like, they seem to say, a language, but it is also like drama and poetry and rhetoric and narrative. Each of these analogies, even if in some way attractive, seems in its own terms arguable, but taken together how can they possibly be true? Can these analogies be seriously meant?

I do indeed mean each of these analogies, but I also mean each to be qualified by the others, and I also mean to say something about analogic thinking more generally. Part of my object is to establish a way of thinking by drawing analogies, by making metaphors—by talking about one thing in terms of another—and these essays can be taken in that spirit: not as proposing comparisons between law and other things, each of which is presented as uniquely true and better than any other such comparison, but as manifesting a bent of mind, a disposition and a method, that works by looking at law as one cultural and social activity among others. My emphasis is for the most part on the similarities rather than the differences, partly because many of the differences are self-evident, but also, and more centrally, because one of my aims is to get behind these activities to what they can be seen to share. The kind of analogy I draw is thus not a point-by-point comparison of features, but an attempt by looking at two

things to make real and vivid the ground that they share, against which each is a somewhat different figure.

I have no certain name for this ground (or activity, or discipline) and my best definition of it naturally enough lies in my performances in these pages. I would like to call it the art of constituting character, community, and culture in language; if I were to give it a name it would be "constitutive rhetoric," as I suggest in "Rhetoric and Law" (Chapter 2), or perhaps "the poetics of community." But these would be only names, and I would not want to be bound by all their implications, nor by what they seem to omit, as a way of defining the arts of communal and cultural life with which I am concerned. In particular, I want to say that in using such terms as "rhetoric" and "poetics" I do not commit myself to the use of the theoretical apparatus that is rapidly developing in academic circles under those headings.<sup>1</sup>

As for "law," I consciously use that word in a somewhat parochial way, at least at the outset, for by it I mean to speak mainly of modern American law. I do hope that much of what I say about the "law" in this sense can also be said of the law of other cultures and other times, but it is not my purpose to claim that this is so.

## 2

To put another way what I have just suggested, my aim in this book is to set forth as vividly as I can my sense of the law as a social and cultural activity, as something we do with our minds, with language, and with each other. This is a way of looking at the law not as a set of rules or institutions or structures (as it is usually envisaged), nor as a part of our bureaucracy or government (to be thought of in terms of political science or sociology or economics), but as a kind of rhetorical and literary activity. One feature of this kind of activity is that it must act through the materials it is given—

1. In fact, I think that many academics in both law and literature have become rather too preoccupied with questions of "theory," and in doing so have committed themselves to a language and a set of practices, modeled perhaps on certain social sciences or on analytic philosophy, which actually cut them off from their greatest resource, the roots of their disciplines in ordinary language and ordinary life. For lawyers or readers of literature to become "theorists" in the modern mode is to give away their common birthright, their access to a natural language of many voices. In this book I am trying to work out a way of reading that is not reducible to a technique or technology, but is rather a way of talking about text and language that always assumes the presence of an individual reader's mind, different from others, that is responding to the text and trying to make sense of it, and of the rest of life, in compositions of its own.

an inherited language, an established culture, an existing community—which in using it transforms.<sup>2</sup>

On this view law is in the first place a language, a set of terms and texts and understandings that give to certain speakers a range of things to say to each other. Two lawyers on opposite sides of a case, for example, look at the same statutes, the same judicial opinions, the same general conventions of discourse in the law, and this set of common terms—this common language—is what enables them to articulate to themselves and to each other (or to a third party, such as a judge) what it is they agree and disagree about. And the very fact that the lawyer speaks a legal language means that he or she inhabits a legal culture and is a member of a legal community, made up of people who speak the same way. For this “language” is not just a set of special-sounding words, but a set of intellectual and social activities, and these constitute both a culture—a set of resources for future speech and action, a set of ways of claiming meaning for experience—and a community, a set of relations among actual human beings. The law can thus be seen at once as a language, as a culture, and as a community. What does it mean—what can it mean—to speak this language, to become a member of this culture and this community? These are central questions for any lawyer, and part of my object here is to work out a way of elaborating and addressing them.

To characterize this activity as “rhetorical,” as I do, is to claim a somewhat richer meaning for that term than is common. By it I mean not merely the art of persuasion—of making the weaker case the stronger, as the Sophists were said to do—but that art by which culture and community and character are constituted and transformed. It is to be understood in connection with the other key term of my title—“poetics”—by which I mean to suggest that for me the activity of law is at heart a literary one. The law can best be understood and practiced when one comes to see that its language is not conceptual

2. I do not mean to suggest that the law is not a set of rules and institutions or that it cannot sensibly be talked about as an instrument of policy. But to talk in those ways is to leave out a lot that is also true about law, and those vocabularies have their own force that can capture the minds that use them and carry them into thinking that they are complete and adequate accounts of what they describe. Talk about law as “rhetoric” has similar dangers, of course, but also certain advantages: its open texture leaves room for uncertainty and variation; and it is naturally concerned with the resources and limits of different modes of speech—with contrast and comparison—and hence with what it itself leaves out. Perhaps rhetorical analysis can even see itself, as it sees other modes of thought, as a discourse that is to some degree artificial, chosen or made, and hence in need of perpetual justification.

or theoretical—not reducible to a string of definitions—but what I call literary or poetic, by which I mean, as I will say more fully below, that it is complex, many-voiced, associative, and deeply metaphorical in nature.

For me it follows that the law is best regarded not as a kind of social science but as one of the humanities. Its practice requires a constant sense of the resources and limits of one's language and culture; a conscious attention to the silence against which all language action takes place, to what *cannot* be said; an awareness of one's own need for an education, particularly for an education from the past that has created our linguistic and intellectual inheritance; a recognition that it is our responsibility to preserve and to improve this inheritance, leaving it fit for use by others; an acknowledgment that the authority of this inheritance is at once real and tentative; and an awareness that others, who are all also users of language, composers of texts, and members of communities, are entitled to basic respect as autonomous and equal persons. All these things mark it as an essentially practical and literary, rather than scientific or theoretical activity.

As I conceive it, the life of the law is thus a life of art, the art of making meaning in language with others. Its goal, like that of other arts always imperfectly attained, is the integration into meaningful wholes of the largest and most contradictory truths—the incorporation into the case of what can be said on both sides of it, the recognition in our discourse of other ways of talking—all under the ruling requirement that what we say make sense. The lawyer must know what the literary person knows, that he or she is always one person speaking to others in a language that is contingent and imperfect. And the excellence of mind required of the lawyer, like the excellence of the composition the lawyer makes, is integrative: a putting to work in the same text of as many of one's resources and capacities as possible, organized in a meaningful way.

The case or controversy to which the lawyer speaks, on which the judge acts, is always a real disturbance in real lives, and our understanding of it and our response to it must both be incomplete. Yet every time we act as lawyers we create and claim a set of meanings: about the events, about the institutions of which we are part, about the very language in which we speak; and for the meanings that we make we are deeply responsible.

A part of the "rhetoric" of the law is rhetoric in a more standard sense, the art of persuading others. Whatever else he or she may be, the lawyer is of necessity a persuader: one who constantly tries to persuade judges, juries, other lawyers, governmental agencies, and

sometimes the public at large to take action, or to adopt views, that will advance a client's interests. What does it mean—what can it mean—to devote so much of one's talent and energy to trying to persuade others? (What does it mean for the lawyer, for his or her client, for the world?) Whenever he (or she) organizes his material into persuasive form and addresses the audience he wishes to move, the lawyer gives himself a character and establishes, for the moment at least, a relation with his audience, as well as with his client. What kind of character, what kind of community, does he—can he—establish in these ways? What sort of truth, or justice, or beauty, can he be said to serve?

These are the central questions of this book. They can be summed up by saying that my attention is focused on the expressive and constitutive life that is the center of law—in this sense on the ethics of rhetoric, examined from the inside.

I begin with a reading of Sophocles' *Philoctetes*, a play that considers these questions not in the context of modern law but more generally, and makes a devastating case against a sort of persuasion that looks rather like what modern lawyers do. I end with an explicit defense of the lawyer as rhetorician, framed as a response to Plato's unremitting attack on rhetoric in the *Gorgias*. (As my title suggests, part of my answer lies in the fact that the lawyer can be seen not only as a "rhetorician" but also as a poet.) I hope the intervening essays will be seen as complicating the reader's initial sense of the questions stated above and setting forth the ground upon which the last essay can be said to rest. Even if my defense of the modern lawyer is ultimately thought inadequate, as it may be, I hope that the larger conception of the law as a literary activity by which meaning and community are established can be seen to have a value of its own, especially as a ground upon which criticism of particular laws, of the legal culture, indeed of this book itself, can rest.

This all has a bearing on legal education, for a conception of the law as an art of language and community may help explain why the object of law school is to teach law students "to think as lawyers" rather than merely to teach them "the rules." In their practical lives after graduation, what they will be asked to do by their clients, what they will be paid to do, is to act in the poetic and rhetorical way I describe: to bring to bear the materials of the past upon a present question, remaking those materials as they do so, with the idea of creating a new set of relations in the present and the future—relations between the lawyers themselves and their clients, relations between the

clients, and so on. It is the moment of silence, when the lawyer must speak, and in speaking make something new out of his or her language and the world, to which our deepest attention should be directed, in law school and after. And in giving attention to this side of life, we can hope to acquire knowledge of an important kind: not conceptually restatable information—not in that sense theoretical knowledge—but what Wittgenstein would call learning how to investigate our experience and our world and, on that basis, how to go on.

## 3

A word may be helpful about the origin of these essays and their relation to my other work. As the notes at the beginning of each essay make plain, they are addressed to a rather wide variety of audiences and themselves take a variety of forms. This is from my point of view all to the good, for it functions as a claim that the questions and attitudes at the heart of this book can carry us into rather widely differing terrains.

Five of the essays—"Persuasion and Community in Sophocles' *Philoctetes*" (Chapter 1), "Rhetoric and Law" (Chapter 2), "The Judicial Opinion and the Poem" (Chapter 6), "Facts, Fictions, and Values in Historical Narrative" (Chapter 7), and "Telling Stories in the Law and in Ordinary Life" (Chapter 8)—were composed with this book in mind, and have been published, if at all, only in connection with its preparation. As for the others, with the exception of "The Criminal Law as a System of Meaning" (Chapter 9), they have not been substantially rewritten but stand, with small revisions, as originally published, except that for the most part I have eliminated footnotes. References are collected, where important, in bibliographic notes at the end of each essay.

In the context of my own work, this book is the third in a series. *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (Boston: Little, Brown, 1973) is a sustained attempt to define the life of the law as a literary one—a life of speaking and writing—through a set of readings and questions and writing assignments. It works by creating a set of difficulties to which (in my view) the only solution is for the student to make himself at once a writer and a lawyer. *When Words Lose Their Meaning* (Chicago: University of Chicago Press, 1984) is an analysis of a wide range of great texts, drawn

from different genres and historical periods, in which I attempt to establish a sense of the more general activity—in my subtitle I call it “the constitution and reconstitution of language, character, and community”—of which law is in my view a species, or what I referred to above as the ground against which different arts are figures. This is an attempt to define the law by defining what it is part of, what it is like. In the present book I continue to explore my interest in this general activity but with the aim of directing the reader’s attention more explicitly to the nature of modern American law as a field of practice and of life.

I do not mean to suggest that my account of the law is an exhaustive one. Much can be said, for example, about the differences among the various activities that I am interested in seeing in a deep sense as one: law, poetry, drama, narrative, rhetoric, and so on. Law, for example, is explicitly about the use of official power, and it takes place in its own institutional contexts. Much flows from these facts, not only for the purposes of an outside observer like a sociologist or political scientist, but also for the purposes of the legal actors themselves, who are conscious, or should be, that what they do has consequences of special kinds. But these differences are in gross form obvious enough—everyone sees them—and do not need much remark at the outset. In the Afterword I do say something briefly about them, but for me another step comes first, which it is the object of these essays to take: to establish a position from which we are able to see more fully that there is a fundamental identity among the forms of social and verbal action in which we engage and to begin to reflect on the consequences of that fact.

I should perhaps also make explicit, although it should be obvious enough, that my account of law is not meant to be a description of the way it is actually practiced by most judges and lawyers but a representation of the possibilities I see in this form of life both for its practitioners and for the community at large. My apology for the possibilities of the life of the law should thus not be misread as a defense of existing arrangements; rather, it should be taken as an elaboration of the hopes I think we can and should have for the law and for ourselves as lawyers, which may in fact serve as a ground upon which a criticism of law at once idealistic and realistic can rest.

Finally, a word about pronouns and gender. The reader will see that I repeatedly and all too inelegantly struggle with the fact that traditional English speaks as if the male were the norm, the female the exception. I know of no way to resist this insistence that is not

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itself awkward, but I hope that the reader's understandable irritation with my attempted resolutions will be seen to reveal not merely my own deficiencies of art but also this fact of our common language and culture.