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Legal Writing

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*Human Perspective and Conflict in Feminist Legal Rhetoric Theory*

This graduate project summarizes two papers by a feminist rhetorical theorist, and it attempts to look at two different sides of the coin through two of her papers, to see the consistent theoretical approach in her approach. Professor Elizabeth Britt is a feminist rhetoric theory scholar, who teaches the only rhetoric classes at Northeastern University. Her work primarily concerns establishing new or expanding on classical rhetorical theory in the context of legal education. As a result, both of the papers analyzed in this essay relate to the intersection of legal education and rhetorical theory.

The first, "Dangerous Deliberation: Subjective Probability and Rhetorical Democracy in the Jury Room," outlines the dangers of opting for statistical and mathematical ways of determining guilt over deliberative, communal decisions on guilt. The second, "Listening Rhetorically to *Defending Our Lives*: Identification and Advocacy in Intimate Partner Abuse," explains the impact she observed on first-year law students who viewed a specific documentary on intimate partner abuse, going on to analyze what made the documentary so effective in making an impact. These two papers connect in that each has an opposite conclusion: each takes rhetoric surrounding the court, but the first looks at legal rhetoric that was *deconstructive* and the second describes rhetoric that was *constructive*. Professor Britt's work is concerned with the intersection of the rhetorical education of law students and the arguments actually being used in cases; thus, her first paper shows rhetoric that *disrupts* proper advocacy, while the second describes rhetoric that can *help* advocacy, with the note that these analyses primarily surround

the advocates of the disenfranchised (i.e. interracial couples in the former, and abused women in the latter). By summarizing and then briefly comparing the conclusions of each paper, the gleaned meaning is twofold: legal professionals can rethink advocacy from a rhetorical theory standpoint (especially in "Listening Rhetorically," which outlines successful novel rhetorical moves for generating the defendant's perspective for a broad audience), and rhetoricians can theorize where and how the law disenfranchises marginalized groups.

"Dangerous Deliberation" specifically outlines a 1968 case (*People v. Collins*), where a white woman with a ponytail and bearded black man left a robbery in a yellow vehicle. Britt attests that this case "vividly illustrates the potential for technoscientific knowledge to reinforce (and exacerbate) existing prejudices" ("Dangerous Deliberation" 104). Collins was convicted despite no physical evidence of guilt; the ultimate argument of the prosecution was "to illustrate the statistical unlikelihood that any couple matching all of these characteristics could be innocent of the crime" (Britt 107), via use of the product rule (where multiple independent characteristics are multiplied to come up with the likelihood of a single entity with all characteristics). The table below shows the table that the prosecution gave to the jury:

**Table 1** Probabilities Presented by the Prosecutor in *People v. Collins*

| Characteristic | Individual probability |
|---|---|
| A. Partly yellow automobile | 1/10 |
| B. Man with moustache | 1/4 |
| C. Girl with ponytail | 1/10 |
| D. Girl with blond hair | 1/3 |
| E. Negro man with beard | 1/10 |
| F. Interracial couple in car | 1/1,000 |

By this metric, the prosecution calculated that it would be a 1 in 12 million chance that the robbers *were not* the defendants. On appeal, the decision was overturned, primarily for the reason that these statistics were ball-park estimates made by the prosecution's clerical staff; and most of the legal criticism, at least at the time, revolved around this fact. However, Britt interprets this table and line of mathematical reasoning differently. First, this reasoning is part of "attempts to mathematize juror decision making both hide and reify disagreement…in the service of reaching a 'rational' consensus" (105), known as "New Evidence Scholarship." That is, "the jurors, who normally assess potential errors in testimony about guilt, were so mesmerized by the statistics that they assumed their accuracy" (108). Secondly,

> The prosecutor's use of the product rule in *Collins* relies on culturally available topoi about race and marriage. Had the couple been of the same race, it is hard to imagine the prosecutor using statistics in general or the product rule in particular to identify them. (109)

As Britt puts it, "The line of reasoning created by the prosecutor…begins rather than ends with the Collinses as an interracial couple. This fact is the catalyst that sets the rest of the argument in motion" (110). More to the point, this couple had already "been known to the police as an 'interracial couple in the area who drove a yellow car' and 'were on the police's list of suspicious characters'" (106). In short, Britt highlights that this interracial couple was targeted because they were a cultural anomaly at the time—the prosecution thought it evident that no other evidence would be needed to convict, and they were correct, in that the jury ended up convicting, even when witnesses could not identify the couple individually.

With this highlighted fact, Britt then breaks down the flaws in the math of this argument and in attempting to reduce trials to mathematical problems, in general; her main takeaway is that reducing cases to statistical or mathematical logic means the loss of nuance in decisions. For example, she points out how the different characteristics in the above table also had overlap

(such as “Negro man with beard” and “man with moustache”). She also does this by evaluating the critique of two statisticians, Finkelstein and Fairley, who spoke out against the *Collins* decision but counter-proposed a different formula for calculating guilt that would use Bayes’s theorem. She summarizes this theorem, which essentially is a theorem that takes known probabilities (based on past events or characteristics in a population) and attempts to add in new, subjective information. In this new application by Finkelstein and Fairley, the table below represents how it would be used, where the jury would simply have to choose what subjective prior probability they determined (e.g. ‘I believe with 75% accuracy that they are guilty’) and input the frequency of characteristics:

**Table 2** Probabilities that Finkelstein and Fairley Proposed for Jury Use

| Frequency of characteristics P (H \| NG) | Prior probability P(G) | | | | |
|---|---|---|---|---|---|
| | .01 | .1 | .25 | .50 | .75 |
| .50 | .019 | .181 | .400 | .666 | .857 |
| .25 | .038 | .307 | .571 | .800 | .923 |
| .1 | .091 | .526 | .769 | .909 | .967 |
| .01 | .502 | .917 | .970 | .990 | .996 |
| .001 | .909 | .991 | .997 | .9990 | .9996 |

This kind of probability use was especially being considered at the time, because technology that depended on some kind of probability was increasingly being used (e.g. DNA identification). However, Britt takes issue at how reducing a case to simple math could *hide* from a jury possible nuances, using an example where a partial fingerprint has been discovered that is an 80% match. In this analogy, a murder weapon with a partial fingerprint is discovered, and the jury is asked to

determine their "output probability" of guilt based on the 'soft' evidence that the victim had an argument with the person sharing the partial fingerprint. Britt objects:

> "'soft' evidence…is considered, but the 'hard,' quantifiable evidence takes center stage. This hard evidence is then further reified by the quantification. For example, Finkelstein and Fairley assume that if the handprint found on the knife matches that of the boyfriend, then he is guilty of the murder…Their calculus cannot account for subtleties of motive and circumstance: Was the boyfriend framed? Did the knife belong to the dead woman, and was it therefore part of her household and likely to have been used by the boyfriend for innocuous purposes (such as cooking dinner) prior to the murder?" (118)

Moreover, Britt points to the fact that, "expert witness testimony is part of the entire story of a trial that jurors must assess along with other evidence. Often the testimony from expert witnesses…on one side directly contradicts the testimony from an expert witness hired by the other side…" (119). Under Finkelstein and Fairley's proposal, however, expert witness testimony on probabilities is presented not as evidence to be considered but as a procedure to be adopted. In other words, such mathematical 'rationality' only seems logical because it reaffirms certain realities (or, in the case of *Collins*, cultural "anomalies") while ignoring others. Britt concludes by saying,

> In *Collins*, an overzealous prosecutor used the discourse of mathematical probability to make racist assumptions seem natural and logical to a jury apparently all too willing to listen… However, the reluctance of scores of commentators on *Collins* to situate the case in its cultural context—to recognize not just the constructed nature of the categories but also their roots in a particular historical moment—is troubling. (120)

"Listening Rhetorically" similarly looks at those the law disenfranchises, the subject matter of the documentary *Defending Our Lives*: domestic abused victims who killed their husbands and were given lengthy sentences for it. Britt, through interviews with first-year law students who viewed it as part of their coursework, attempts to describe what makes the film so impactful. She notes this audience, saying,

> With at least some faith in the ability of the law to render justice, law students are more likely to identify with the law than with those who have broken it. *Defending Our Lives*

> challenges this faith by reversing these identifications, disrupting the commonplace that the imprisoned person should be associated with moral wrongdoing and creating a different moral order that places these women on the honorable side and their abusers, the criminal justice system, and the legal system on the other. (157)

This film has great impact for a law student audience, because it brazenly asserts the injustice these women have experienced, even if it "does not portray the abusers as deserving death, and it does not portray each woman as vigilante—as judge, jury, and executioner" (165). Rather, "the abusers' deaths appear inevitable, as a product of inexorable social and cultural forces" (Britt 165). In this sense, Britt sees the film as a way to teach rhetorical education—"what Isocrates imagined as instruction in the wisdom of choosing what to say or do under conditions of uncertainty" (156)—and more specifically "promoting rhetorical listening, which rhetorical theorist Krista Ratcliffe defines as 'a stance of openness that a person may choose to assume in relation to any person, text, or culture'" (157).

Britt also identifies two specific rhetorical moves the film makes, to get such an audience to listen closely. The first is "the creation of identifications not only across commonalities but also actress differences, allowing for communication across cultural divides" (157), and the second is "the analysis of not only claims (what a person says) but also cultural logics (the epistemological frameworks within which claims are made)" (158). Britt notes, "This identification is necessary because the legal system can be hostile to the claims of women who have killed their abusers, contrary to its purported neutrality" (161). She emphasizes this in many ways, such as citing the history of how "men who killed after witnessing their wives in an adulterous act were committing justifiable homicide…, while wives who killed their husbands in the same circumstances were guilty of murder" (163) or pointing out the victim's stories in the film of how police repeatedly ignored calls for help.

Throughout these two papers, Britt emphasizes the human aspect that should be brought forth in legal rhetoric, and should likewise be considered in legal theory. That is, the law is not simply *about* human conflicts but it is also a place that *decides by* human conflict. In "Dangerous Deliberation," her ultimate conclusion is that the jury *must* discover each juror's individual perspective and engage in "rowdy" deliberation such as that in *12 Angry Men*; the jury must be able to see each individual's prejudices and come to conclusion by holistic argument, not cold, calculated math. Similarly, in "Listening Rhetorically" Britt emphasizes the *necessary* emotion evoked by the film, as, without such emotion, the film would not have the impact to galvanize change; to be effective rhetoric, the film had to strategically identify with the audience, and then tear that identification away by emphasizing the horror of the abuse and its neglect by police that lead to somewhat-necessary violence. In short, Britt's theory and the rhetoric she champions focuses on *perspective*. Thus, these papers show how the *human* elements are what should be emphasized in such defenses by the marginalized.

**Works Cited**

Britt, Elizabeth. “Dangerous Deliberation: Subjective Probability and Rhetorical Democracy in the Jury Room.” Rhetoric Society Quarterly, vol. 39, no. 2, 2009, pp. 103-123.

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