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Response to Elizabeth L. Rosenblatt Paper, “Fair Use as Resistance”

Joseph S. Jenkins*

The title of our conference today refers to a “discursive turn.” It is fitting that Betsy Rosenblatt’s paper focuses on Mikhail Bakhtin. Bakhtin considers *dialogics* as the crucial form of the modern novel: one entire language or conventional way of speaking—including the world view implicit in it—approached and provoked from the perspective of another.

We may be in the midst of Bakhtinian dialogics, right here in this room. This is a meeting of disciplines, each under the sway of different genre conventions. One relates to law schools, the law review article, which I tend to see, from the distance of the humanities, as responding to a kind of social-science convention—backed also, of course, by a more ancient pedigree: common law. Under this convention, a series of propositions, each backed by citation to collected facts and recognized authority, is arranged in the manner of logical deduction. I know this is not an ironclad rule; however, Betsy’s paper conforms to this convention. It is a fine and well-crafted example.

Humanities “critical theory” responds to different conventions. Certainly from *commercial* lawyering’s point of view—and some of this seeps into law schools as well—critical theory *complicates* and far too much. I remember my first year, right out of Berkeley. I was a new associate in a big law firm. At some point, a third-year, a bit old to be an associate, started dropping by my office. At first, I thought these were kindly social calls, from someone higher up on the totem pole. He’d ask what I was working on, and then stroke his beard and wax philosophically, recalling in too-great detail the treatises that dealt with what he called “somewhat related matters.” *Then* when he was done, half hour or so, he’d ask me the name of the client and *bill* for the time—which of course did not please the partner in charge of

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invoicing that client. Needless to say, this third-year associate soon disappeared. *Complication* is not prized by lawyers, looking for tangible, near-term results.

But that's not the convention in some other places. Ten years after that, I'm the little guy again: first-year grad student, UCLA, Comparative Literature. I'm doing all I can to get some grip on all these impossible theory books they're telling us to read. And whenever I'd finally work up the *nerve* to say something in class, some snooty fourth-year student would stick up his nose and say, "Well, we might want to *complicate* that." It always made me think of that billing partner, back at my old firm.

And now more time rolls by, and you invite me here—pretty much to be the humanities theory guy, the "complicator." And I don't want to sound like an arrogant jerk, which is what I always thought of those fourth-year grad students. Also I admit, without hesitation, that you'll never get near-term, tangible results by speaking the language of critical theory. It's only in the long term, if we ever get there, that thinking discursively *might* help *somewhat*, in understanding plays of potentiality, lurking behind what we say.

In short, *my* Bakhtin—he just happens to be mine, since I come at him now through Walter Benjamin, Hans Blumenberg, Giorgio Agamben, and some others—*my* Bakhtin I can only touch on lightly. Hard to pry him into the logic-based conventions of the law review article. Even *analogy*—the thing you *do* in law with precedents—presses too hard on Bakhtin! Yes. At times he resorts to analogy, but he is most compelling, when he relates historical moments, distant in time and space, *neither by analogy nor contiguity*—neither by metaphor nor metonymy.

Complicated, no? And who the hell's got time for this? So I'll just say a few short things and then sit down.

Bakhtin is influential, in literary circles, for his theory of the novel. He traces what he calls the "prehistory" of the novel, back beyond classical Greece. He also gives special importance to Hellenic culture's spread, including its interactions with Roman conquest: languages and cultures interact; experience is gained in seeing and thinking the world through more than one language. This facilitates perception and expression of particular language styles. And once you have an image of a language as a whole, you perceive, at least implicitly, the *gap* between any *one* language and the things outside language it tries to convey. This is an important intuition, crucial to political resistance. It renders the world view of a particular language *merely conditional*.

However, in the ancient Roman world, according to Bakhtin, these dialogics I've just described are still scattered about: parody and travesty of different ways of speaking appear in *various* genres of the time—and in everyday life. They haven't yet cohered into a *single* genre; this is a *pre*-history of the novel. Still, Bakhtin maintains that this Roman sense of humor is a larger contribution to Western cultures than Roman law.

But something has to happen, before all this parody and travesty can congeal into the form of the modern novel. What happens is the rise of philology—study

of ancient texts, etc.—developing in the renaissance. This part is well known, and easy to understand, because we live still in cultures well-indebted to Greek and Roman classical texts, even if many people today do not know their names. What Bakhtin adds is that certain great renaissance texts—Rabelais, Cervantes, and Shakespeare, for example—were written *subject* to still-*direct* exposure to the grotesque realism of medieval carnival, which is itself indebted to that Roman sense of humor. This is an exposure that later writers—including those concerned with fair-use exceptions and their masters, I might add—cannot have lived directly. Later cultures have no direct experience with the carnivalesque, because it has been weakened and degraded in modernity, notably by the individualism that arises in the renaissance.

The carnivalesque, for Bakhtin, is a language, a way of speaking, with a world view attached; it interacts with other languages. It also responds to differing historical circumstances. Certainly the renaissance brought great changes. But Bakhtin describes as well a more ancient moment, related to what he calls the “grotesque realism” of the carnivalesque. He traces it back to prehistoric moments, where a tribe enacts not only *solemn* religious rites, beseeching respectfully what it needs to survive, but also *humiliates* its god. The comic and the solemn are equally sacred. Later, in the early Christian era, clerics accommodated pagans, by lining up Christian holidays with traditional feast days. And they also had to tolerate the earthy humor of their rustic flocks—progeny of those god-humiliating tribes.

A thousand years goes by and clergy still, not only tolerate, but engage themselves in witty Latin verses, vulgar dialogics,—like describing their needs to fill their bellies and empty their bowels in the Latin of the Church. The clergy enjoyed this, even those decidedly *not* rustic. Also there occurred a kind of *unconcealment*, inaccessible to those who see the world through a single language lens. Dialogical parody, including the carnivalesque, intuits the *conditionality* of supposedly unconditional “truths,” implied by particular language conventions.

Bakhtin uses the word “indestructible” to describe this medieval “grotesque realism.” It includes not only town-market speech, but also the Latin parodies I’ve just mentioned. Rabelais, Cervantes, and Shakespeare are exposed directly to grotesque realism; at that time, its degradation, in modernity, is just beginning. Yet even in modernity, the carnivalesque impulse does not disappear; rather it is *repressed* by other discourses, under changing circumstances.

Bakhtin uses the term “potentialities” in describing these movements of appearance and repression. This is a term much-used today by critical theory, in the tradition of Walter Benjamin and Giorgio Agamben (you could also mention Freud and Jacques Lacan here). It’s not that the powerful grant permission for the carnivalesque to appear. It is rather that the potentiality of the dominant language (along with the value hierarchy presupposed by it) is *itself constituted* by *other* potentialities, even those repressed, with which it interacts. For example, the bloody dictator decides his next move, based on worried reads of street-crowd noise. Or a

duly elected president consults opinion polls, while deciding on the words for an upcoming speech.

In modernity, according to Bakhtin, meanings that once attached to the carnivalesque become inaccessible. We today can't read Rabelais as his early readers did, because the *redemptive* impulse, of Rabelais' grotesque realism, is almost lost. It is *nearly* made incomprehensible, by individualistic presuppositions, with us in various forms since the renaissance.

But we can take a stab at comprehending it. Bakhtin underlines that the carnivalesque is "*nearly* incomprehensible"; what is repressed or cancelled insists on return. So here's the stab: we can understand, intellectually, that the medieval carnivalesque redeems each mortal death, seeing each person as part of a greater human mass. Each death fertilizes some new birth—and takes it laughingly. *Change* is the essence, metamorphosis. Here is where Bakhtin comes close to accepting an unconditional truth. Ancient laughing hags w pregnant bellies, which *we* may have trouble relating to; as opposed to Michelangelo's statue of David, represented as complete unto himself, serenely independent of his surroundings, individualized.

I've got to stop here, since time is moving on. Before you know it, David's rump is wrinkled, and he's starting to get a paunch. If I had some more time, I'd try to relate Bakhtin to copyright's kowtow to "originality," which Betsy's paper ably critiques—through a different convention. One of the most important points Betsy makes is that fair use is shadowed by low moral status, because of its treatment, as a mere exception, neighbored by pirates, under current law.

I would add something—but it would be of course annoyingly complicated. I'd juxtapose what copyright calls "original" with what Walter Benjamin calls "*originary*." This marks a play of potentialities that is readable as well in Bakhtin's writings—the one writing under Hitler, the other under Stalin (where maybe complication was a try for self-protection).

What I might say would have something to do with authority granted to *tradition*, as opposed to *innovation*; what is old versus what is new; redemptive grace controlled by the forebear, versus control by the follower. This involves a puzzle that's been with us all, ever since Jacob wrestled with the angel.

Thank you.