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Narrative and Drama in the American Trial

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The Trial as a Law Enforcement Device

One influential view of the American trial understands it precisely as an instrument of law *enforcement.* I have called this conception "the received view of the trial." (Burns, 1999: 10-33) Here the trial is the institutional device to incarnate the rule of law where there are disputes of fact. The "rule of law" is here conceived, as Justice Scalia is fond of calling it, "a law of rules," rules which have the higher level of legitimacy that derives from their democratic pedigree in the constitution or legislature or, in a traditional notion of the common law, as the slow working out of the requirements of the natural law over time to produce norms superior to the likely intuitions of a given judge or jury. Additionally, liberal legality finds it important that these rules be announced before the action they are to control *and* that the same rules that were announced ahead of time be the very same rules that are applied in evaluating those actions. (Hart 1968) This both enhances the freedom of the citizen and controls the potentially arbitrary behavior of the "magistrate." Within the received view of the trial, "the law" exists before the trial begins and, in a strong sense, can be *enforced* through the trial's devices. I have written that one of the remarkable things about the Anglo-American trial is the extent to which these very utopian ideals of the rule of law were given very practical shape by the very practical utopians who were common law lawyers. For example, the doctrine of *materiality* in Evidence law provides that no unit of evidence can be received at trial unless it has, as a matter of a common sense empirical generalization embedded in our "web of belief," a link to one of the authoritative legal rules that control the case. Thus, if the applicable landlord-

tenant law provides (as Anglo-American property law traditionally did) that a tenant who fails to pay her rent may be evicted regardless of whether the apartment fails miserably to conform to the local building code, then the tenant will be barred from offering evidence of the condition of her apartment in an eviction trial. To admit such evidence would be to tempt the jury to reach beyond the authoritative norm and decide the case based on its own sense of justice, an affront to the rule of law as a law of rules. (Evidence *law* is more important in Anglo-American legal regimes than in Continental because of both the centrality of the jury and because of the adversary parties' control over the presentation of evidence.)

So the trial's rules and structure were designed to protect the rule of law as the law of rules. But the institutions and practices of the trial are also designed to assure that facts are accurately determined. After all, so the argument goes, the kind of justice germane to the trial is Aristotle's compensatory or commutative justice, in different ways restoring parties to an assumed legitimate *status quo ante* that has been disrupted by illegal action. (*Nicomachean Ethics* 1131a-1132b) (Aristotle also notes in the *Rhetoric,* that narrative is the form particularly germane to forensic rhetoric, as is argument to political rhetoric. [*Rhetoric* 1414b]) There can be no vindication of the rights embedded in that *status quo* unless the judge or jury can apply the preexistent rules to the facts as they occurred. If a judge or jury is either indifferent to accurate fact-finding, or *unable* to find facts accurately, there can be no legal vindication of rights and so no rule of law. (Extreme fact-skepticism undermines the possibility of the rule of law.) And so many of the devices of the trial are thought to enhance accurate fact finding by assuring that the evidence presented is

sufficiently *reliable* to depend on in an important matter. This is the justification for the rules (as it turns out, shot through with exceptions) requiring the originals of documents, proof of the authenticity of physical evidence, and forbidding hearsay testimony.

This view of the trial is powerful, but partial. It is powerful for a number of reasons. First, as I mentioned, it connects up with important norms of liberal legality. Second, it is actually consistent with much of what we do at trial. It is, as we have seen, the dominant philosophy embedded in the "rationalist tradition" in the law of evidence. It explains the strange and artificial rules that control the direct examination of witnesses, where testimony is elicited through nonleading questions "in the language of perception," that is, in a language artificially stripped (to the extent feasible) of opinions, conclusions, interpretations, and evaluations. (It took a while for evidence writers who were educated to empiricism to concede that perceptions were inevitably "theory-laden.") Testimony in the language of perception, in the view of the architects of the common law trial, serves *both* the normative and factual ideals animating the trial. It assures that the witnesses may not surreptitiously inject their own norms into the evidence, compromising the rule of law *and* it offers the jury the witness's perceptions, not those opinions and conclusions that were *more* likely to be the "anxious, usually self-preoccupied, falsifying veil," in Iris Murdock's famous phrase, that we have ourselves fabricated. (Murdoch 1991: 83). If the received view of the trial reflects our "considered judgments of justice," then it has a claim on our allegiance and, when brought into "reflective equilibrium" with more abstract principles, additionally should play a role in even more theoretical accounts of what justice is. (Rawls 1971: 579)

So then, the received view conceives the trial an institutional device for deciding cases by stamping legal rules on an accurate account of past events presented in a form utterly plastic to those rules, a kind of normative "prime matter." This has sometimes been described as a "bureaucratic" notion of the trial. The rules, which in the positivist version have a legitimacy based on their source in popular *will*, fully pre-exist the trial and fully determine the outcome. (It recalls Thrasymachus' view of rhetoric as the fully instrumental means for achieving the will of the stronger man's fully pre-existing desires, where rhetorical power is itself an instance of strength.) In its *relatively* benign contemporary manifestation, it is an instrument for effecting popular will.

The Trial and the Narratives of the Life-World

The received view is a very partial view of the trial, a kind of "misplaced concreteness" read off the law of evidence. What more the trial is emerges from a thick description of what we actually do at trial, in particular, an account of the distinctive forms of trial narratives and the severe dramatic tensions that the trial's "consciously structured hybrid of languages" creates. (I have argued that the tasks of an adequate philosophy of law will suggest that the line between philosophy and both anthropology and rhetorical studies will tend to blur. [Burns 2009a: 232]) And so my argument is largely carried by my description of the trial's elements, and I can only provide that in barest outline here. Let me start with the conclusions of this descriptive effort.

It turns out that the trial is not really a device for law *enforcement* in a bureaucratic sense at all. It is rather a forum within which "true law," is discovered or revealed or realized in and through the tensions created by the trial's "consciously structured hybrid of languages and practices." It proceeds through the construction and deconstruction of different sorts of highly constrained narratives in a dramatic medium. What notion of law is in play here? It's the one which James White has characterized as "an old fashioned notion of law," one where law is realized only through the dialogic tensions through which it is constituted. (White 2011)

American trials begin with the opening statements of the parties. (In criminal cases, the state is generally treated simply as one of the parties at trial.) Opening statements are *narratives.* They tell a full "God's eye" story of the events, a "vivid continuous dream," woven of a double helix of norms. The two strands are (1) the norms embedded in the law of rules and (2) the norms embedded in the life-world of the judge or jury. (For ease of reference, I will call the trier of fact "the jury.") In American trials *the parties* initially define "what this case is about," the "as-structure," to use hermeneutical language, through which the jury is invited to interpret the inevitably underdetermining evidence to follow. (This is in contrast to most European countries, where the judge's questions tend to "frame" the case. [Damaska 1986]) Empirical investigators have found that it is through these narratives that the jurors organize the vast amounts of information that come to the jury in the course of the trial. We have a natural "predisposition to organize experience into a narrative form into plot structures and the rest." (Bruner 1990: 47). Mercifully, these stories are not simply artifices imposed on a wholly resistant substrate; rather

narratives are "found …in the midst of experience and action, not in some higher level linguistic construction or reconstruction" and "are told in being lived, and lived in being told." (Carr 1986). As Alastair MacIntyre has argued, any attempt to understand a human action (and all trials are about human actions) "in themselves" and before, so to speak, the employment of narrative categories will yield only "the disjointed parts of some possible narrative." (MacIntyre 1984: 212-3). It will turn out that the ability of the trial to converge on a just decisions has a great deal to do about the way in which narratives, refined and disciplined by the devices of the trial, cut at the joints of a human action.

One of the strands in the double helix around such a narrative is built is the common-sense morality of the life-world. The internal morality of narrative is thus highly contextual, not an "abstract computational morality," in Hampshire's terms. It is, as Ricoeur argued, an "ethics already realized" in the life world. It can draw on all the subtlety for the understanding of human action that the culture's common sense can provide. These stories can manifest or "show" what cannot otherwise be said. "We narrate stories in order to make manifest whatever unsayable meaning resides in them." (Luban 1994: 201). Most stories are internally related to questions of justice and an important story schema—legitimate status quo, disruption of the status quo, and often difficult restoration—places jurors *within* the structure of commutative justice and reminds them of their practical task. The story is over only when the jury's verdict finishes it. And, as trial lawyers like to say, part of the goal of an effective opening state is to persuade the jury to *want* to rule for your client by an appeal to feelings as well as logic. And this is to the good:

> Emotions can sometimes mislead and distort judgment; Aristotle is aware of this. But they can also…give us access to a truer and deeper level of ourselves, to values and commitments that have been concealed by defensive ambition or rationalization.
>
> But even this is, so far, too Platonic a line to take: for it suggests that emotion is valuable only as an instrumental means to a purely intellectual state. We know, however, that for Aristotle appropriate responses…can, like good intellectual responses, help to constitute the refined "perception" which is the best sort of human judgment. (Nussbaum 1986: 390)

In the United States this "legitimacy" of the jury's life-world norms has deep historical roots in Federalist concepts of the popular sovereignty and Antifederalist notions, embedded in the Bill of Rights, that the jury retains some of a primordial sovereignty to continuously reevaluate the work of the "magistrates" in all three branches who always threaten "true law." (Wood 1969; Amar 1998: 94-103)

At trial, the first opening statement is followed by a second. The second portrays the case *as* about something else and begins the battle for the imagination of the jury. Trial lawyers are inclined to say with a only a bit of exaggeration, "Every fact has two faces." Because the whole is understood in light of the part and the part in light of the whole, the relative meaning and plausibility of each of the pieces of evidence offered depends on the overall plausibility of each of the opening statements. This plausibility is determined by internal narrative norms, such as coherence, by consistency with empirical common sense generalizations, and, more pragmatically, with the relative importance of the norms it evokes and the attractiveness of the course of action in which it invites the jury to engage. (Thus the trial's holism is not merely theoretical, but also practical.) The jury is thus engaged in an act of theory choice where the evidence is largely theory-laden and the process of decision making is both circular and practical.

The opening statements relativize each other and dramatize the gap between the performing of a human action and the telling of it. The two-story schema of the trial also mirrors an aspect of ordinary moral experience, again to cite Hampshire, where we oscillate back and forth between two ways of describing a possible action, where one way approve of what we are considering and the other condemns it. The competing stories begin the process of resistance to the "aestheticizing of the moral" that students of narrative have warned us against. After all, the teller of the better story should not necessarily be the winner of the trial. And each of the trial lawyers must be aware that the story he or she tells will be evaluated, though deferentially, by the judge to determine whether the truth of the story would entitle the story-teller, *as a matter of the law of rules*, to prevail. Except as against the defendant in a criminal case (where self-consciously political judgments take this authority away from the judge), the judge may rule that "as a matter of law" the narrative does not warrant success, ruling in effect, "if that is what *you* say occurred, you are not entitled to prevail." The background of the law of rules is one of the constraining agencies on trial narrative. The law of rules remains the second of the strands in the advocate's double helix.

The opening statements are not only stories. They have a performative dimension: they are *promises.* They are promises made to the human beings on the jury to produce evidence to support each of the more highly characterized and value-laden assertions made. This creates another of the most important defining tensions that occurs at trial. To invoke one of the rhetorical commonplaces frequently heard in closing argument, a trial

lawyer who fails to produce credible evidence to support the story he tells in opening statement has "broken his promise" and deliberately frustrated the jury in its sworn task.

Most of the trial is consumed with witness testimony. Testimony comes to the jury through the direct examination of witnesses. We have already seen the received view's understanding of the highly artificial structure of direct examination, an understanding that has some force. But those canons serve other functions at trial as well, normative and "factual." The life-world norms around which the narratives of opening statement are woven are inevitably over-generalized. They are prejudgments ("prejudices") about likely occurrences and their likely evaluations. The obsessive perceptual detail of direct examination serves not only to provide reliable bases for factual inference, but also serves to *refine* the norms for common-sense judgment. They force the jury to determine the reach of those norms in ways that "pre-existent" common sense never has. For example, in ways that outrun doctrinal elaboration, the trial of a contract case may force the jury to decide whether the norms surrounding promise-keeping *really* extend to the detailed factual pattern that emerges at trial. Opening statements have presented to the jury "diplomatic" accounts by trial diplomats which attempt to account for, to be fair to, all of the norms what inhabit the life-world and the law of rules. Witnesses, even well-prepared witnesses are, mercifully, unlikely to be so diplomatic and the personal accounts that they give relatively indifferent to the more coherent accounts given in opening statements. (By the end of trial, both lawyers will understand that *any* opening statement is likely to have been at least a bit *too* coherent for the "booming, buzzing confusion" that William James found in the world.) The trial thus serves as a critique of common sense morality.

But the Spartan narratives of direct examination have, in contrast to opening statements, more epistemological significances as well. This is because of the structure of common sense inference. Recall that every bit of evidence offered will be linked to a material fact by an empirical generalization that forms part of our web of belief. For example, in evaluating a romantically disappointed defendant's motive to engage in a violent act against his former lover, the jury may begin with a common sense generalization such as, "Generally and for the most part, rejected lovers experience powerful negative emotions toward the person who rejected them." The defense will counter with a qualifying generalization, such as "….but not where the person rejected has another romantic interest who is requiting his love…" You can see that this process of qualification that tests the extension of every common sense generalization in the web of belief could go on almost to infinity:

> The jury will necessarily ask implicitly, "How universal is the commonsense generalization that links the circumstantial evidence to the episode in the bare narrative for which it is offered as proof?" Since the structure of the commonsense generalizations that provide those links is always, "Generally and for the most part…" the next question is always "Are all the particular additional facts in this case (F2…..Fn) such as to make the generalization more or less powerful than it would be, all other things being equal?" But the existence of these latter facts (F2…..Fn) and their proper characterizations will themselves be in dispute just as is F1. And the strength of the commonsense generalizations that link those facts to what the proponent seeks to show is also caught in another web of mutually determining probabilities. (Burns 1999: 190, *edited*)

This account tends to suggest a "coherence" theory of the kind of truth that is available at trial. (However, although it is a pudding, to borrow from Henry James description of the novel, it is a lumpy pudding: some of the bits of evidence may resist recharacterization in one of the two theories offered and so support the alternative.) The extent to which trial

narratives can reveal the "truth of what is," in Gadamer's words, the meaning of what occurred, depends on the ability of hermeneutical modes of thought to converge on something that may fairly be called a "practical truth." (Burns 1999: 233-35) The quoted paragraph speaks of a "bare narrative," an account in the language of perception of "what happened." That kind of narrative, is, as we have seen, only *one* kind of narrative at play in the trial and answers only *one* kind of question: "What would you have seen had you been there?" But there are other forms of narrative and they seek to answer other questions: How shall we best characterize those events? How shall we interpret their meaning? How shall we evaluate the actions underlying them? (How shall we allocate Aristotle's "praise and blame?") What will judging this action this way or that say about our moral identity, who we are? (Taylor 1990: 3-53) Which legal category best comprises these actions and events (to give the received view its due)? And then there are more specifically political questions: "What does deciding this case one way or another say about our political identity and what kind of a political society ought we to be?" In ways I cannot describe here, the narratives of the trial can address each of these questions. In any given trial, one or other may be the most important question, though it is up to the jury to make this determination of relative importance which literally decides the case.

There are also deconstructive devices at play in the trial. Cross-examination serves to deconstruct or disrupt the meaningful narrative of direct examination. Cross may construct a competing narrative to the one the witness has told, may reveal facts omitted from an artful direct examination that are broadly "incoherent" with the meaning the direct examiner sought to convey (that change its meaning or challenge its plausibility). Cross

may manifest aspects of the witness's character important to the underlying events on trial, and which, in many different ways, undermining the credibility of the witness herself. Finally, *closing* argument contains any number of rhetorical devices, on the one hand to support the original interpretation of the events embedded in the opening statement and, on the other, to argue that the evidence presented simply cannot be assimilated to the opposing theory (the pudding is *too* lumpy for that proposed interpretation). All of this serves, in a well-tried case, to converge on a truth *beyond* story-telling. Just as art can achieve a truth *beyond* the ineffable.

These narrative engagements occur under circumstances so obvious that their significance is easy to miss. ("What is closest to us is hardest to see….") The semiotic of the trial elevates the importance of the concrete and specific aspects of the case and discourages easy generalizations; it allows the witnesses only the representational function of language (usually no performatives such as promising or urging); the lawyers are given license to be astoundingly intrusive so long as topics are relevant; it progressives *through time* (something intrinsic to drama) so that for a moment, every piece of evidence may be the privileged lens through which to see all the rest of the evidence; the trial is temporally compressed (in sharp contrast with many European proceedings) so as to emphasize interpretive unities of theory and theme; it consists of a rhythm between continuous speech and interruption with conflicting perspectives; as American judges do not comment substantively on the case and never tell an "official" story, it presents a true polyphony of perspectives which is not resolved save by the verdict itself.

The Trial as Drama

This process of narrative construction and deconstruction occurs in a medium that can only be called dramatic. It is an oral medium where real persons speak sometimes to the jury and sometimes to each other. Thomas Green, in his magisterial account of the history of the English jury trial, *Verdict According to Conscience,* argued that the face-to-face nature of the trial has always served to remind the participants that the proceeding was *somehow* about justice. Because the trial is a performance, the jury may judge in a direct, "prepredicative" way, whether a particular story or a particular argument "rings true." The jury may dwell in the confrontations that occur between judge and lawyer, lawyer and lawyer, lawyer and witness. Listening involves a "turning to the Other. An epistemology of listening compels us toward dialogue rather than detachment." (O'Fallon & Ryan 1990: 896-97) In listening "[i]n a certain sense we have to become the other person; or rather, we let him become part of us for a brief second. We suspend our own identities, after which we come back to ourselves and accept or reject what he has said" (Hibbitts 1994: 344). But the listening at trial occurs from a rather formal special distance, dramatizing both requirements for the doing of justice, "sympathy and detachment." (Beiner 1984: 102) Drama qualifies the hegemony of generalities, giving "a more urgent reality to the particular acts that establish distance between a given case and general rule or that expose a given case to competing rules…" (Ball 1981: 61) As Bentley said about the theater, "the little ritual of performance, given just a modicum of competence, can lend to the events represented another dimension, a more urgent reality." (Bentley 1997: 207) Dramatizations serve to "extricate the their subject matter from that which is considered to

be inessential to it and simultaneously reveal that which is most significant," which Gadamer calls "the truth of what is." (Warnke 1987: 58). In short:

> The dramatic form of the trial deepens the general tension between involvement and distance distinctive to the trial as oral communication… It allows for some sympathetic identification by those aspects of common sense invoked in different ways by each lawyer, while distancing the audience from each vision, in order to allow some limited transcendence of commonsense judgment. (Burns 1999: 138, notes omitted).

There is much more that could be said, but I will stop. The American trial is one of the great achievements of our public culture. By dramatizing some of the most demanding conflicts which constitute our common lives, it allows us to do what we American (post)moderns need to do, "less to create constantly new forms of life than to creatively renew actual forms by taking advantage of their internal multiplicity and tensions with one another." (Kolb 1986: 259)

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