The Practices of the American Trial

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American trials are ubiquitous, often at the center of domestic and even international news stories, and dramatized in American movies and television shows.[1] If, as Alexis de Tocqueville wrote, Americans tend to transform their political controversies into legal cases, it remains true that the trial is the sun around which all the planets in the American legal order revolve. What is an American trial? Though strictly social scientific attempts to answer that question surely have their place, *ultimately* the question is a practical or normative one. To say what a trial *is* inevitably requires at least implicitly taking a stand on what it ought to be. And that stand will, again at least implicitly, involve commitments concerning the nature of the legal order and its relationship to the moral and political spheres. The inquiry about the nature of this institution has an odd reflexivity, in that the kinds of inquiries that go on *within* the contemporary American trial likewise implicitly require the jury to decide whether a particular human action should be evaluated from moral, political, or narrowly legalistic perspectives. Ultimately, trials decide what is most practically important about a human act and, derivatively, what that act *is*. The American trial has evolved into a forum of self-governance that is precisely adapted to our practical task, "less to create constantly new forms of life than to creatively renew actual forms by taking advantage of their internal multiplicity and tensions and their frictions with one another."[2]

[1]Unfortunately, it is a rare journalistic or dramatic description that is not misleading.

[2]David Kolb, *The Critique of Pure Modernity: Hegel, Heidegger, and After* (Chicago and London: University of Chicago Press, 1986), p. 259. There are extremely interesting comparative insights to be gained in comparing the American trial to its close cousin, the British trial, and to its more distant cousins, trials in civil law countries. On this point, see Mirjan R. Damaska, *The Faces of Justice and State Authority: A*

A full understanding of the trial requires not an empirical study but a "rational reconstruction"[3] of the institution and the linguistic practices it comprises. It is by "continuous dialectical tacking between the most local of local detail and the most global of global structures in such a way as to bring both into view simultaneously,"[4] that real insight becomes possible. In the case of the trial, a variant of what Hannah Arendt called "linguistic phenomenology" yields an understanding of the trial as a "consciously structured hybrid of languages" that actually can achieve their human purposes, and most astoundingly, converge on the practical truth of a human situation. Such an understanding is inevitably interpretive, and can only be justified "by the mutual support of many considerations," of everything fitting together into one coherent whole."[5] In order to achieve a concrete understanding, to "think what we do," it is necessary to walk around the trial, to look at it from every side. Those sides are formed by (1) legal doctrine, (2) the actual linguistic practices and forms of rhetoric employed at trial, (3) social scientific explanations of jury "behavior," and (4) broader philosophical accounts of the trial in the American legal order. Those often incommensurable perspectives must be woven together into a coherent, inevitably normative account so as to form an argument that, to use Peirce's metaphor, is more like a steel cable woven from innumerable fine wires tightly wound, than links in a logical chain.

Comparative Approach to the Legal Process (New Haven: Yale University Press, 1986). Each kind of trial is of a piece with its broader public culture. To overgeneralize: the American trial gives the most opportunity to the litigants to present "their" case on "their day in court." In the British, and especially the continental, tiral, the judge, has considerably more authority than his American counterpart over what will be allowed to emerge during the trial. In the American trial, there is a distrust of this kind of authority.

[3]Richard Bernstein, *Beyond Objectivism and Relativism: Science, Hermeneutics, and Praxis* (Philadelphia: University of Pennsylvania Press, 1983). The argument of this article is presented in much greater detail in Robert P. Burns, *A Theory of the Trial* (Princeton: Princeton University Press, 1999).

[4]Clifford Geertz, "From the Native's Point of View: On the Nature of Anthropological Understanding," in *Interpretive Social Science: A Reader*, ed. Paul Rabinow and William M. Sullivan (Berkeley and Los Angeles: University of California Press, 1979), p. 239.

[5]John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), p. 579.

What happens when there emerges a discontinuity between the dominant legitimizing theory of a public institution and the actual practices of that institution is indeterminate. It may be that the better argument is that those legitimizing theories have lost touch with the actual normatively relevant practices of the institution and that the reigning public philosophy should be revised. At least within the form of pragmatism championed by John Dewey, this kind of discontinuity usually meant the theory is moribund. On the other hand, it is possible that the institutions have become decadent, that they are no longer true to the first principles that more or less necessarily animate and legitimize them. Such a conclusion is a call for reform. It is the attempt to reach "reflective equilibrium"[6] between principles and practices that should structure the debate on issues of public policy.

The effort to reach reflective equilibrium with regard to the trial is important from a number of perspectives. The trial is a central American institution by any number of measures. Understanding it is an important part of understanding the American form of self-governance. The jury trial is embedded in several of the guarantees in the Bill of Rights, the first ten Amendments to the American Constitution. One distinguished commentator wrote recently that it was "at the heart of the Bill of Rights." DeTocqueville noted long ago that the criminal jury trial was "above all, a *political* institution" for "he who punishes the criminal is the real master of society." He argued, too, that the civil jury trial was an important school of social responsibility. Virtually identical procedures are employed to address a vast range of problematic situations: individual criminal cases where only the identity of the perpetrator is at issue; cases where the "underlying facts" are not in dispute but where there is deep controversy on matters of interpretation and evaluation; class action suits where jury awards may effectively restructure an industry, such as the asbestos or tobacco industries. In all these enormously varied contexts, the jury trial reflects Jefferson's conviction that it is more important that the people be involved in the application of the laws than in their making.

[6] *Ibid*, 20-22.

The Received View of the Trial

The received view of the trial understands it as an institutional device to assure the rule of law where there are issues of fact. This understanding draws on very important ideals, rooted in both the natural law and modern positivist traditions. From a natural law perspective, the norms embedded in constitutional provisions and the carefully chiseled out doctrines of the common law are thought to embody a "higher law," in the latter case the unfolding of "right reason" in concrete cases. From positivist perspectives, both constitutional law and statutory law is legitimized by truly representative institutions that express sovereign popular will. Modern forms of positivism also emphasize the control on arbitrary official decisions and the empowering of individual autonomy that come from norms announced before the conduct they are meant to control.

Further, the Received View explains well some of the most distinctive linguistic features of the actual conduct of American trials. Those features are thought to assure both accuracy in fact finding and adherence to the norms embedded in legal doctrine. The enormous superstructure of the law of evidence was thought to assure that the jury would consider only evidence that met basic requirements of reliability, to be further tested, once it met those basic requirements, by the devices of the adversary trial. The generative evidentiary doctrine of materiality requires that every piece of evidence be linked in a logical relationship with a factual issue created solely by the authoritative norms. Witnesses are permitted to testify, with some important exceptions, only "in the language of perception," a form of stylized conversation with sponsoring attorneys that seeks to minimize the witness's "non-representative" forms of language such as opinions, interpretations, suggestions for action, and promises as to future behaviors. This form of testimony is thought to further accuracy: perceptions are thought less likely to be distorted by interest than are opinions. It also is thought to further the Rule of Law: testimony in the language of perception provides a kind of prime matter, normatively plastic to the legitimate rules embedded in the jury instructions.

So conceived, the trial is a sort of machine for upholding "the rule of law as a law of rules." There are, however, even embedded in the legal doctrine, where one ought to find a high level of adherence to the

received view, significant anomalies that hint at another understanding of the trial deeply embedded in its actual practices and arguably reflective of considered judgments of justice. In criminal cases, judges are not permitted to direct a verdict[7] of conviction even where there are no real issues of fact. In criminal cases, the state is not permitted to appeal a jury verdict to a higher court. Even in civil cases, rules of trial court procedure require a large amount of deference by trial judges to the decisions of the jury, and by appellate judges reviewing those findings. Rules prohibiting the "impeachment of verdicts" drastically reduce the circumstances under which a court may inquire into the *actual* discussions and intentions of the jury members. Developments in trial procedure likewise suggest an understanding of the trial as something quite different from that advanced by the received view. Opening statements, the narratives of "what the evidence will show" offered by each lawyer at the beginning of the trial, implicitly invoke an enormous range of common sense moral and political norms that need bear no logical relationship to the rules to be found in the jury instructions. Liberal evidentiary doctrines allow lawyers to present evidence whose normative significance radiates well beyond those instructions. Liberal doctrines of "harmless error" allow for appellate affirmance of trial court decisions even where legal errors have been made in the instructions or evidentiary errors made by the trial judge. The common wisdom of trial judges and trial lawyers points to modes of decision-making that are discontinuous with the received view. And the historical record suggests that the framers of the Bill of Rights expected juries to decide cases in ways quite different than judges might.

An Interpretation of the American Trial

These anomalies led me to a more phenomenological approach to the actual practices and languages that prevail in the American trial, a form of inquiry akin to the "linguistic phenomenology" that Arendt invoked as her method. What emerged from this descriptive and interpretive inquiry into the devices of the trial was in many ways discontinuous

[7]Where a judge directs a verdict, he or she issues a legally binding order requiring the jury to rule one way or another. This order is self-executing — the jury need not actually agree to follow the order for it to be effective.

with, and richer than, the understanding of the trial embedded in the received view. The American trial proceeds by the construction and deconstruction of narratives. The narratives themselves are of different kinds, the sharpest contrast existing between the broad narratives of opening statement and the more constrained narratives of direct examination of witnesses. But both kinds of narratives are *constrained.* They are constrained by both ethical and evidentiary rules that serve both epistemological and political ends. And both kinds of narratives are systematically deconstructed in different ways as the trial progresses. These acts of deconstruction serve the traditional moral function of pointing out the limitations of the empirical and moral generalizations around which narratives are inevitably spun. They further serve the critical modern function of pointing out the limitations of the moral and political ideals underlying those narratives, and so, derivatively, forms of life built around them. This allows the trial to be, on the one hand, a very traditional forum, one that has had a major role in protecting American society from the full "onslaught of modernity."[8] It serves this function by bringing contextual moral judgment to bear on the actions of the large public and private bureaucracies that dominate American life, and which often proceed by peculiarly modern forms of instrumental reason, such as cost-benefit analysis. On the other hand, the consciously structured hybrid of languages within the trial creates the tensions among them that, in the absence of an Archemedian point beyond the practices of the society, allows for a renewal of those practices. And there have been instances where American juries have initiated what can only be called significant structural changes in the basic structure of society.[9] My boldest thesis is, then, that the trial's hybrid of languages and practices serves both to elevate and to criticize common sense morality as it functions in the public forum and to put us in touch with moral sources that go beyond the law, narrowly considered. Even more boldly, these languages and practices can plausibly be defended as precisely those that can achieve justice, or the justice appropriate to American civic culture.

[8]Hannah Arendt, *On Revolution* (New York: Penguin Books, 1977), p. 196.

[9]Nancy S. Marder, "The Myth of the Nullifying Jury," *Northwestern University Law Review* No. 93 (1999), p. 877.

The Languages of the American Trial

In the American version of the adversary system, parties and their lawyers enjoy a large measure of control over how to present their cases, something often thought to be a consequence of the political tradition of distrust of government, and of judges as government officials.[10] Concretely, this means that each party is free to choose what trial lawyers call their "theme" and "theory of the case." A theme is the norm around which the narratives and arguments are structured. Indeed, it is common for a lawyer to begin his or her opening statement with the phrase, "This is a case about ..." Typically, this invokes a value important in the life world,[11] that is, the common sense pattern of practices and expectations that are assumed in everyday life. And so a lawyer trying a large commercial contract case may begin the opening statement, "This is a case about broken promises." The theory of the case is the God's eye narrative of events that the lawyer suggests actually occurred in the real world drama leading up to the case. It is a "God's eye" narrative because it explicitly provides as elements or episodes in the story "facts" which we can only infer — notably the beliefs, intentions, and motives of the principal actors in the case. As historians have long known, it is impossible to tell such a story without simplistic empirical and moral judgments. The opening statement announces just what the evidence will *show*, not what the evidence will *be*. Because it implicitly offers a plan of action, much more is omitted than included.

In choosing a theme and theory of the case, an American lawyer weaves a double helix of norms. One set of norms are those that are embedded in the official legal doctrines. In a civil case, a judge may even direct a verdict based on the opening statement of a party if it does not adequately invoke, to use a deliberately vague term, the official norms embedded in the instructions. In a criminal case, the lawyer will be limited by a combination of evidentiary and ethical rules that limit,

[10]Garry Wills, *A Necessary Evil: A History of American Distrust of Government* (New York, Simon & Schuster, 1999). In the last major overhaul of the Federal Rules of Evidence, the Congress rejected a provision that would have explicitly allowed the judge to "sum up" the evidence in the way that British judges do. It was thought that this handed too much power over to the court to shape the case for the jury.

[11]Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge: MIT Press, 1996), pp. 21-25.

though only limit, the extent to which the theme and theory of the case can disregard legal doctrine. Aside from a nod toward the legal doctrine, the lawyer must make a very subtle judgment among the incommensurable values that may structure the theory of the case. The theory should ideally be internally coherent, and "externally" consistent with common sense empirical judgments. What is more, it should invoke the "more powerful norm" (the value of greatest importance in the concrete ethical life of the political community), and, more subtly, the norm that most plausibly coheres with the evidence that will be presented or, if you will, that has an "objective correlative" in the evidence. Failure in this last effort will produce a willful, strident, and unconvincing case.

The actual trial proceeds in a number of steps. Both sides first give their opening statements. The opening statement is an apparently simple story that concretely presents the theory and theme of the case. The party with the burden of proof then presents his or her evidence, in the form of the direct examination of a series of witnesses, who will sometimes authenticate exhibits such as physical objects or documents. As the received view emphasizes, this testimony must be presented in the language of perception as a kind of stylized public interview of the witness in which the lawyer is not generally permitted to ask leading questions, questions that strongly suggest the expected answer. The various rules of witness examination generally conspire to require that the examination proceed as accounts of one or more vignettes, each of which comprises first the description of a scene followed by a narrative of what occurred at that scene. Each witness presented can then be cross-examined. Cross examination proceeds by a series of leading "questions" (statements really) to which, in a well-prepared examination, the witness must agree. The witness is required to answer every proper cross-examination question, often by a simple "Yes" or "No." This allows the cross-examiner to deconstruct the direct examination in a number of different ways. By re-characterizing and reordering the facts to which the witness has testified, and including or excluding a different set of facts, the cross-examiner may tell a "counter-story" to the story told, and thus reinterpret the meaning of the witness's perceptions and memory. Or the cross-examiner may suggest, by means of a dozen or more legally recognized methods of "impeachment," that the witness's account is not credible. Each party has an absolute right to cross-examine the witnesses called against him. When the party with the bur-

den of proof (usually the plaintiff in civil cases and the prosecution in criminal cases) is through calling witnesses and offering exhibits, he then "rests." If enough evidence has been presented to allow a reasonable jury to decide for the party with the burden of proof ("evidence sufficient to support a finding"), the defendant then presents his or her case, again in the form of a series of direct examinations of witnesses, each of whom is subject to cross-examination. Finally, each side may present a closing argument, arguing the superiority of his or her case through a vast array of rhetorical means: culturally accepted stories, anecdotes, aphorisms, informal logic directed at factual questions, moral reasoning concerning the applicability of accepted norms to the particular circumstances of the case, and legal reasoning from the rules in the instructions. These closing arguments dispute the truth of factual claims, the applicability of the competing norms, and the relative importance *in the specific context of the case* of these moral, political, and legal norms. As with all trial performances, closing arguments are constrained by rules that prohibit rhetorical tactics thought to rely on matters not presented in the trial and so not tested by adversary presentation or thought unduly to "inflame" the passions of the jury. Likewise, any form of overtly "political" argument,[12] in which the jury is asked to treat the case instrumentally, as an opportunity to "send a message" that may prospectively affect behavior, is sharply circumscribed. Nonetheless, it can fairly be said that closing argument is the least constrained form of trial discourse.

The constraints on trial rhetoric stem largely from the rules of evidence and the rules of attorney professional responsibility. Together, they serve to partially tame the excesses of rhetoric that troubled moralists like Plato and Kant. They provide the "grammar" of the trial, the rules subject to which all the performances of the trial take place. The received view captures some of the significance of the rules of evidence: they are designed in essence to assure that evidence is reliable and material, that it promotes accurate fact-finding and decisions in accordance with the norms embedded in the jury instructions. However, the relaxing of the rules of evidence described above has somewhat transformed

[12]In the *Rhetoric,* Aristotle distinguished sharply between forensic rhetoric, aimed at evaluating a past act, and deliberative rhetoric, aimed at the most advantageous future policy.

the function of the law of evidence into a set of devices which serve to focus and so to elevate the questions of interpretation that almost inevitably occur at trial. They have become a broad set of discretionary guidelines that allow a fair-minded trial judge to prevent the worst excesses of adversary presentation. The rules of professional responsibility as they apply at trial serve two values, energy in defense of individual autonomy and rights, and respect for "those things that men cannot change at will." The client sets the goals of the representation and an attorney is obligated to pursue those goals with "warm zeal."[13] This involves attempting to frame a theory of the case which may justify the legally permissible remedy that the client, after counseling, actually wants, as well as attempting to present the most persuasive evidence to support the outcome sought. Though attorney vigor certainly may have a dark side, it serves important interests in the public forum. It is a counterweight to a kind of bureaucratic heaviness in administration, an institutionalized sloth that keeps public officials from seeing the case as new and, to some extent, unique.[14] It institutionalizes a kind of brashness that propels into the public forum facts that powerful interests, especially government interests, may seek to hide.[15] On the other hand, countervailing rules enjoin the presentation of evidence that the attorney knows is false, helping a witness to testify falsely, as well as interference with an opponent's access to important negative evidence.

One can begin to understand the significance of these practices and rules when one places them in the context of aspects of the trial that are so basic that it is easy to miss their importance. The trial elevates the concrete, the factual, and the multiple. As Wallace Stevens put it, "no ideas but in things."[16] Indeed, during the entire evidentiary phase of the trial no lawyer is permitted to make a point except by calling a

[13]Although most academic discussions of adversary ethics tend to focus on examples of the excesses of partisanship exhibited by attorneys, it may well be that in the greater number of instances, attorneys fail by a lack of vigor and care. As is usually the case, virtue is a mean between the extremes of excess and defieciency.

[14]Chesterton has a wonderful essay, written after his own jury service, in which he describes the "fallacy" that one sees a thing more keenly the more times one has been a witness to similar situations. *Tremendous Trifles* (London: Methuen, 1920).

[15]Hannah Arendt, "Truth and Politics," in *Between Past and Future* (New York: Penguin Books, 1977), p. 227.

[16]William Carols Williams, *Patterson* (New York: New Directions, 1951), p. 14.

witness who will testify to that witness's perception. The time compression of the American trial, especially the jury trial, intensifies the struggle over the meaning of the evidence presented. Giving adversaries almost complete discretion over which issues to engage, and which rhetorical feints to avoid, tends to focus attention on precisely the key points: each lawyer wants to emphasize his strongest evidence, but cannot avoid meeting his adversary's best points. The sequence of the trial honors its inevitably hermeneutic reality by creating a tension between each party's continuous presentation and critical interruptions by the opponent. A party gives his entire opening statement uninterrupted; then his opponent does the same. The plaintiff presents his entire case before the defendant is permitted to present any evidence; but each of his witnesses is cross-examined. The defendant likewise may present his entire case, though his witnesses, too, are cross-examined and the plaintiff is usually permitted to present a rebuttal case. Again, closing arguments are usually presented in a continuous fashion without interruption. Continuous development allows for the function of persuasive thematic unities — the whole is understood in light of the parts, and the parts in light of the whole. Interruptions remind the jury that the opponent's narratives are inevitably partial, can be ominously "autopoetic," and emphasize the gaps between the real story and the telling of it.

The trial, obviously, is also spoken and heard and has many of the qualities of a dramatic representation. The spoken and aural medium provides the preconditions for the doing of justice — sympathy and detachment. On the one hand, a hearer "loses himself" in the act of paying attention to and hearing a real human being speaking. On the other hand, the courtroom semiotic places the jury at a physical distance from the speakers whom they can see. Hearing is the medium of identification, while sight is initially distancing.[17] The dramatic medium of the trial forces the players into rule-bound interactions with each other and the jury, such that courtroom drama inevitably becomes a lens and metaphor for the real-world event that brings the case to trial.

[17]Walter J. Ong, *Rhetoric, Romance, and Technology: Studies in the Interaction of Expression and Culture* (Ithaca: Cornell University Press, 1971), p. 284; Marshall McLuhan, *Understanding Media: The Extensions of Man* (New York: McGraw-Hill, 1964), p. 241.

In many subtle ways, the truthfulness of witnesses and lawyers in court becomes the device by which to assess the evaluation of the underlying events. In many subtle ways, a factually and normatively strong case *allows* the witnesses and the lawyers to be more truthful and so more plausible in court. These dramatic interactions allow the jury to rely on a large range of tacit capacities for evaluations, and to bring a richer perception to the case:

> 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.[18]

The empirical studies that have been conducted of aspects of the American trial constitute a vast literature. Many of the results are controversial and intertwined with significant methodological questions. Nonetheless, certain conclusions consistently emerge from investigators employing different methods and are sufficiently reliable to include in a concrete understanding of the American trial. Jurors bring an elevated and refined intelligence to their work, and are themselves often surprised at the quality of their own perceptions and deliberations. Trial results cannot, thankfully, be predicted by demographic variables, such as race and class, nor even by any small number of evidentiary variables. The results at trial are really determined "by the discipline of the evidence." Legal rules are important, but secondary, at trial. Jury deliberation is also important, but secondary, since it seems that the majority vote in the first ballot usually prevails.[19] The jury is aware of a political dimension in their work and understands that it may use its verdict to

[18]Martha C. Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (Cambridge: Cambridge University Press, 1986), p. 390.

[19]This conclusion is currently being reexamined by social science investigators.

affect broader government or corporate behavior, "to send a message." The most important element of the trial is, then, the practically oriented encounter of the individual jury with the trial's consciously structured hybrid of languages, the construction and deconstruction of narratives with the trial. The trial's the thing!

Thinking What We Do

The American trial creates a justice that is strife. "It is by being at variance with itself that it coheres with itself, a backward stretching harmony, as of a bow or a lyre." In a practical situation, action is normally a largely unthematized response to the meaningfulness of the situation in which one is engrossed. The situation created at trial is one of an almost unbearable tension of opposites. There are tensions among the roles of judge, lawyers, witnesses, and jury. There are tensions among the forms of narrative employed at trial. Most significantly, there is a tension between the broad comprehensive narratives employed by lawyers during opening statements and the more specific, detailed, perceptual narratives into which the rules of direct examination force witness testimony. There is obviously a tension between the narratives of direct examination and the harsh "argumentative" rhetoric of cross examination. And the argumentative structure of closing argument is in sharp contrast to the broad story-telling of opening statement. It will turn out that these different roles and rhetorics embody important social values, themselves in tension, and sometimes contrasting modes of social ordering, for example, ordering through the bureaucratic imposition of rules and through a more contextual moral judgment. It will turn out that the kind of "truth" that can emerge at trial is an appropriate practical resolution of the tensions among those values and modes of social ordering, *specifically adapted to the features of the particular case.*

The broadly narrative structure of the trial allows the comprehension of vast amounts of significant information in a "natural" mode of human understanding. The construction of those narratives already involves judgments of relative importance, already presenting for the jury's judgment a choice among definite social values. The narrative structure of the trial assures that its internal morality is not an abstract morality of principle, but is highly contextual. Since the jury is asked to "finish the story," the narrative structure of the trial exactly reflects

the structure of commutative or corrective justice.[20] Of course, there is not one broad narrative, but two. This duality reflects an aspect of ordinary moral experience, where a subject attempts to understand his situation by telling competing stories to himself: within one account a proposed course of action is appropriate, within the other it is wrong.[21] These competing narratives will tend to include just those sorts of elements that openings at trial do, notably, interpretations of the subject's own character, motives, and intent, and of how the proposed course of action would determine, in the strong sense, what those subjective features are. This close analogy to moral experience invites the jury to rely on common morality and experience in deciding the case. This duality also relativizes each side's position and serves as an important antidote to facile moralizing in the public sphere. The mere fact that there are *two* initially plausible interpretations of what has occurred cannot but alert the jury to the "gaps between what is told and the telling of it." One or other of these initial stories may be more plausible than the other because of epistemological, moral, or political reasons. Because of the hermeneutical reality of the trial, because the part will interpreted, given meaning, in light of the whole, opening statements are important. But since the choice of the story is constrained by an ethical canon forbidding mention of any matter of which there will be no admissible evidence, the lawyer cannot simply appeal to the most powerful general norm. Even in the opening statements, truth constrains meaning.

Of course, the trial has just begun after opening statements. The evidentiary phase of the trial strongly emphasizes, is almost obsessed with, the detailed analysis of the concrete, perceptual truth of this particular case. This is possible only because this attention to the details of the case connects up with deep values, ultimately with the respect due to the parties and the consequent aversion to treating the case merely as an opportunity to make a broad symbolic statement or to change prospectively some aspect of the political structure of the society. The evidentiary stage of the trial, the way in which the rules of direct and

[20]Aristotle, *Nicomachean Ethics*, Book v.

[21]Stuart Hampshire, "Public and Private Morality" in *Public and Private Morality* (Cambridge: Cambridge University Press, 1978). A common "general" jury instruction suggests that the jury rely on its "common sense and experiences in life" to decide the case.

cross examination focus attention on the details of a past event, serves as an implicit critique of the broad common sense "scripts" or prejudgments[22] with which we inevitably begin any attempt to understand a human situation. The trial as a whole is then a battle between the general and the specific, between meaning and truth. The balance in an individual situation can *only* be fought out.

The trial is an event that can be thought to have objective and subjective sides. The objective side consists in the various rule-bound linguistic practices that I have just described. A full theory of the trial, however, requires some attempt to describe as well the cognitive operations that the trial's practices occasion. These operations turn out to be much richer and more complex than the scheme that the received view offers. The received view understands the operations that go on at trial as a three-stage linear sequence. First, the jury constructs a value-free narrative of past events from the direct and circumstantial evidence presented; second, it compares that account with the legal categories contained in the instructions to determine whether it falls fairly within those categories; finally, it simply inspects these judgments of subsumption to reach a verdict. After the initial factual account is constructed, the next step basically involves a judgment about the meaning of the legal categories designed to determine whether or not the party with the burden of proof has produced evidence that, when weighed against the contrary evidence, brings the factual situation squarely within those categories.

Participants in the legal process have long observed that this scheme does not fairly capture what goes on at trial. As Chief Justice Vaughn put it in Bushell's Case,[23] "A man cannot see by another's eye, nor hear by another's ear; no more can a man conclude or infer the thing to be resolved by another's understanding or reasoning... [Juries] resolve both law and fact complicately, and not the fact by itself." At trial, as in jazz music, "Everything is always going on, all of the time." Or Justice Holmes: "[M]any honest and sensible judgments ... express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions — impressions which may be beneath

[22]Hans Georg Gadamer, *Truth and Method* (New York: Crossroad Publishing Company, 1975).

[23]6 How. St., 999, 1011, 1015.

consciousness without losing their worth."[24] Or Jack Weinstein, perhaps the foremost trial judge and evidence scholar in the United States: "The jury's evaluation of the evidence relevant to a material proposition requires a gestalt or synthesis of evidence which seldom needs to be analyzed precisely. Any item of evidence must be interpreted in the context of all the evidence introduced ... In giving appropriate, if sometimes unreflective weight to a specific piece of evidence, the trier will fit it into a shifting mosaic."[25] Or Louis Nizer, a celebrated trial lawyer who practiced in New York City for many years:

> Although jurors are extraordinarily right in their conclusions, it is usually based on common sense "instincts" about right and wrong, and not on sophisticated evaluations of complicated testimony. On the other hand, a Judge, trying the case without a jury, may believe that his decision is based on refined weighing of the evidence; but ... he, too, has an overall, almost compulsive "feeling" about who is right and who is wrong and then supports this conclusion with legal technology.[26]

Recall the structure of the trial. It does not begin with the evidence, the elements out of which a value free account is built up. It begins, in opening statement, with competing and highly evaluative God's-eye narratives of the case. Only then is the evidence presented. It respects the hermeneutical truth that the whole is known in light of the parts and the parts in light of the whole. Opening statements are important because the simplest details of what occurred are often fiercely contested at trial. We usually have access to these details only through circumstantial evidence and the fallible memories of often interested witnesses. Juries often decide the specifics of what occurred by placing the smallest details that are contested into the whole narrative context provided by the lawyers in opening statement. But not only is the existence of this or that perceivable fact often in dispute, the meaning or significance of those facts also need interpretation. Trial lawyers like to say, "All evidence has two faces." They mean at least two things here. One, the proper

[24] *Chicago, B.& O. Ry. V. Babsock,* 204 U.S. 585, 598 (1907).

[25] *United States v. Chipani,* 289 F.Supp. 43 (E.D.N.Y.) *aff'd* 414 F.2d 1296 (2nd Cir. 1969).

[26] Louis Nizer, *My Life in Court* (New York: Pyramid Books, 1961), p. 359.

characterization of a reported perception is often fairly disputable. (Were spoken words a threat or merely a question? Was a perceived movement offensive or defensive?) Second, the inferences that may fairly be drawn from each piece of circumstantial evidence are multiple. Thus, the existence, the proper characterization, and the inferences to be drawn from each piece of evidence, all depend on their place in the story and require as such holistic forms of comprehension. But this is not a search for coherence in a purely homogenous medium. The trial's evidence is, as Henry James put it in a different context, a "lumpy pudding." Some facts are more likely than others, some characterizations better, some interpretations stronger. And so the lines of integration run from the elements to the whole as well as from the whole to the elements. But it is the relative indeterminacy of the evidence in triable cases[27] that makes the acceptability of the theory of the case and them especially important.

The kind of holism I have been describing has been called "theoretical holism." The part is understood in light of the whole, and the whole in light of the parts. But there is another form of holism at work in the languages of the trial. The trial calls for a practical judgment. Ultimately, something must be *done.* And so the kind of integration it relies on is a form of practical holism. What the case is understood to be is determined in the same act of intelligence by which what is to be done is decided. What the jury grasps is not simply a kind of screenplay of past events. It is an integration of facts, interpretations, and possibilities for action. What occurred and what is to be done "fall into place" together. This requires an implicit judgment of relative importance among the values at play in the trial. The jury must decide what is most important, not in general, but in the specific context of the case: its moral dimension, its political dimension, or its strictly legal dimension. In a society where there are relatively sharp divides between these modes of social ordering, a comprehensive, a *just,* resolution in a given case requires just this determination of relative importance. The trial is the crucible of democracy.

[27]"Triable" cases are cases where there is somewhere a potentially dispositive true question of fact or interpretation.

But are we actually capable of these integrative intellectual performances? There is much reason to believe that we are. Noninferential comprehension of background conditions is crucial in ordinary language use and comprehension.[28] In ordinary human interaction, in sports and music, and in all area of skillful coping we rely on recognition of and response to perceptual patterns that cannot be fully formalized.[29] Even scientific theory choice requires integrative modes of thought that are not exclusively inferential.[30] Most significantly, we regularly rely on these integrative, tacit powers in the course of our moral experience.[31] The philosophical literature provides three notions that cast important light on the "subjective" side of trial decision making.

Hannah Arendt argued that the Kantian mental faculty appropriate for political judgments was "reflective judgment," a capacity that Kant thought active in judgments of what we may call artistic coherence.[32] Kant distinguished reflective judgment from determinate judgment. When we judge reflectively, we do so without a predetermined concept that we simply apply to determine the particular. Rather, we reach a judgment by multiplying the perspectives from which we view a situation: "a particular issue is forced into the open that it may show itself from all sides, in every possible perspective, until it is flooded and made transparent by the full light of human comprehension."[33] The particulars that the judging individual comprehends in reaching judgment are the diverse perspectives that exist in his community, and reflective judgment operates within the sphere of common sense, the faculty that reveals to use the nature of the world insofar as it is a common world:

> The greater the reach — the larger the realm in which the enlightened individual is able to move from standpoint to standpoint

[28]Peter Steinberger, *The Concept of Political Judgment* (Chicago: University of Chicago Press, 1993).

[29]Hubert L. Dreyfus, *Being-in-the-World: A Commentary on Heidegger's "Being and Time"* (Cambridge: MIT Press, 1991), pp. 93-94.

[30]*Beyond Objectivism and Relativism*, pp. 52-61.

[31]Stuart Hampshire, "Public and Private Morality," p. 39.

[32]Hannah Arendt, *Lectures on Kant's Political Philosophy* (Chicago: University of Chicago Press, 1989).

[33]Arendt, "Truth and Politics," p. 242.

> — the more 'general' will be his thinking. This generality, however, is not the generality of the concept ... It is, on the contrary, closely connected with particulars, with the particular conditions of the standpoints one has to go through in order to arrive at one's own general standpoint.[34]

The consciously structured hybrid of languages employed at trial functions precisely to multiply the perspective from which the judging mind is forced to view the case. Similarly, Aristotle's notion of *phronesis* describes a kind of capacity for perceptual identification, which Nussbaum describes in the following way:

> We reflect on an incident not by subsuming it under a general rule, not by assimilating its features to the terms of an elegant scientific procedure, but by burrowing down into the depths of the particular, finding images and connections that will permit us to see it more truly, describe it more richly; by combining this burrowing with a horizontal drawing of connections, so that every horizontal link contributes to the depth of our view of the particular, and every new depth creates new horizontal links ... The image of learning expressed in this style ... stresses responsiveness and attention to the complexity; it discourages the search for the simple, and above all, for the reductive ... [C]orrect choice (or: good interpretation) is, first and foremost, a matter of keenness and flexibility of perception, rather than of conformity to a set of simplifying principles.[35]

The obsessive concern for the particular in the trial's evidentiary phase followed by the explicit drawing of at least some of the most important of these "horizontal connections" in closing argument attempts to generate institutionally or "artificially" the practical wisdom of Aristotle's prudent man. Finally, the vast literature of hermeneutics, or interpretive understanding, explains our capacity to reveal the essence of a human situation by circular movement between the part and the whole and between the particular and the human purposes of the interpreter. What the interpreter understands the situation to be "occurs only as an element within a system of practically oriented activity."[36]

[34] *Lectures on Kant's Political Philosophy*, p. 44.

[35] *The Fragility of Goodness*, p. 69.

[36] Mark Okrent, *Heidegger's Pragmatism: Understanding, Being, and the Critique of Metaphysics* (Ithaca: Cornell University Press, 1988), p. 165.

Reflective judgment, practical wisdom, and interpretive understanding are all notions that contribute significantly to our understanding of what occurs at trial, and can serve to show that the jury's response to the structured context of the trial can be understood as an expression of real human intelligence in a mixed theoretical-practical mode.

But can the trial's consciously structured hybrid of languages, designed to promote the construction and deconstruction of different sorts of narrative arrive at the practical truth of a human situation? And can they achieve justice? As Alasdyre MacIntyre put it, "man is in his actions and practice, as well as in his fictions, essentially a story telling animal. He is not essentially, but becomes through his history, a teller of stories that aspire to truth." Thus far, I have attempted to provide an interpretation of the American trial. In asking whether that institution can achieve truth and justice, I am edging dangerously from providing a theory of the trial to providing a theory of everything. And so I will take a somewhat longer way around, one that respects contemporary reticence in the use of that term. I will, in closing, identify five conditions of the possibility of the trial converging on the truth of a human action. To the extent that those conditions are themselves true, to that extent can the trial be successful with the hybrid of languages it actually employs. It turns out that each of them is a defensible philosophical position that strengthens and is itself supported by the accounts already given. Of course, any global defense of such basic philosophical commitments is well beyond my scope.

The first condition is that narrative forms, if constrained and criticized, are in some way congruent with the intelligibility of a human action, always the subject of the trial. Narrative structure is not simply imposed on an alien human reality, distorting the latter instrumentally to meet psychological or political needs. To the contrary, narrative provides the deep structure of human action: stories are lived before they are told. "We dream in narrative, remember, anticipate, hope, despair, believe, doubt, plan, revises, criticize, construct, gossip, learn, hate and love by narrative."[37] As David Carr put it with regard to history, narrative lies in the *objects* of inquiry, not merely in the mode of its

[37]Barbara Hardy, "Toward a Poetics of Fiction: An Approach through Narrative," *Novel* 2 (1968).

presentation.[38] To the extent that narrative can distort, can be the tool of complacency or the will to power, the deconstructive devices of the trial can undermine those uses. A well-tried case can produce a truth beyond story-telling.

Second, common sense has the capacity to discern the true, not just the generally probable. Aristotle's *Rhetoric* is based on the premise that "what is true and what is just are naturally stronger than their opposites, so that if legal judgments do not turn out correctly, truth and justice are necessarily defeated by their opposites, and this deserves censure."[39] This natural superiority of the true story may certainly be defeated. "Disputes in which truth is worsted suggest themselves: our just cause may be defeated because we are ourselves 'unnaturally' puny in disputation, so that our audience falls prey to malicious rhetoric despite the persuasive edge truth lends us; or our political arrangements may themselves go against nature, in that they lessen the advantage those in the right ought to enjoy, and usually do."[40] Given vigorous disputation and institutional arrangements interested in truth, common sense can prove a deep and flexible instrument in distinguishing fictions from true stories:

> Consider once again how the practices of the trial aid this process. The opening statement is a promise as well as a story: without supporting admissible evidence, it is a broken promise. Lawyers are prohibited from mentioning anything in opening that will not be supported by such evidence. They are constrained in the process of trial preparation both of their own clients and of nonclient witnesses by ethical rules against the creation and presentation of false evidence and by the criminal law against the suborning of perjury. Lawyers are prohibited from suggesting anything in cross-examination that they do not have a good-faith basis to believe is true or (sometimes) admissible evidence to support. Testimony is given under oath. It is subject to cross-examination. Lawyers are permitted to introduce evidence to support their own

[38]David Carr, *Time, Narrative, and History* (Bloomington: Indiana University Press, 1986), p. 177.

[39]*Rhetoric* 1355a24.

[40]Robert Wardy, "Mighty Is the Truth and It Shall Prevail?" in *Essays on Aristotle's Rhetoric*, ed. Amelie Oksenberg Rorty (Berkeley and Los Angeles: University of California Press), p. 60.

> cases and also to undermine their opponents'. The law of evidence, at least in the hands "of a strong and wise trial judge," serves to exclude both utterly unreliable evidence and the sorts of evidence that serve to dissipate the fruitful tensions of the trial with irrelevancy ... In short, the ethics of the bar aim at dissuading "puny" disputation, and the devices of the trial are designed to create the likelihood that the better argument and stronger evidence will prevail.[41]

Third, the trial relies on a human capacity to grasp a truth manifest in the tensions created by its consciously structured hybrid of languages. It is precisely the almost unbearable tension of opposites created linguistically that forces the jury to feel the moral forces of factual plausibility, legal stability, moral decency, social identity, and political purpose in ways that dramatize and sharpen tensions which those perspectives create in individual cases. In a manner explored by modernist writers, this tensed language "makes something appear by juxtaposing images or, even harder to explain, by juxtaposing words. The epiphany comes from between the words or images, as it were, from the force field they set up between them, and not through a central reference they describe..."[42] It is only by holding these mutually limiting perspectives on a concrete situation in tension can we converge on the full reality of a human problem. Trial languages do not simply play off one another. Their tensions *reveal* something by bringing us "into the presence of something that is otherwise inaccessible, and which is of the highest moral or spiritual significance; a manifestation, moreover, which also defines or completes something, even as it reveals."[43]

Fourth, the trial will reveal the truth of a human situation insofar as fundamentally interpretive methods can converge on the essence of a human situation. The truth that emerges at trial is not simply a copy of a reality. Rather its practices and languages lift that reality "into its truth."[44] This notion of truth is close to the concept of "importance" I mentioned earlier: the trial's conflicts of languages allows the jury to

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[41]Burns, *A Theory of the Trial*, pp. 229-30.

[42]Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge, Harvard University Press, 1989), pp. 465-66.

[43]*Ibid*, p. 419.

[44]Georgia Warnke, *Gadamer: Hermeneutics, Tradition and Reason* (Stanford: Stanford University Press, 1987), p. 57.

understand what is most important about the case, given the range of practical alternatives available to it. Without the trial's languages and practices we could not see the significance of the situation; once we have experienced the trial's languages and practices, we cannot see the situation other than in the light the trial has shed.

Finally, the judgments made at trial will be true if there exist no institutions that are better suited to achieve the practical purposes of the trial and those purposes are the most important purposes in the contexts within which trials function. Trial judgments will be capable of achieving those purposes if the moral sources that the trial elicits should be brought to bear on and should "steer" the course of public events in ways that their own momentum would not carry them. In particular, trial judgments can be true if those sources should at least sometimes restructure, even disrupt, the smooth functioning of other more "automatic" forms of social ordering, particularly bureaucratic decision making and the more or less self-regulating market. In the United States, at least, practical truth in this context involves the wise choice among the distinct principles that apply in different spheres of social life and the modes of social ordering available, always after a highly contextual and searching exposure to "the discipline of the evidence." Finally,

> The trial's constitutive rules and practices allow for delicate choices about the inevitable meta-level questions woven into the trial's different linguistic practices. If these incommensurable spheres exhaust our social perspectives, if there is no Platonic perspective from which one might determine which sphere is ultimately dominant, from which (partial) perspective ought the jury to decide which perspective is the right one? The answer seems to be clear. The jury decides the meta-level questions from the perspectives of commonsense morality, rigorously applied, criticized, and sometimes challenged by the devices of the trial. The existence of such a forum is a challenge to any form of social ordering that cannot justify its distinctive principles in the language of ordinary morality. The trial's importance cannot be overemphasized. It is the condition of a decent society. For it is, perhaps ironically, a deeply conservative institution, one of the last bulwarks against the bureaucratized cruelties that have accompanied the "onslaught of modernity."[45]

[45] *A Theory of the Trial*, p. 244, quoting Hannah Arendt, *On Revolution*, p. 196.