The Distinctiveness of Trial Narrative

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Abstract

Scholars have drawn on the rich literature on narrative in their research into the American trial, a perspective at least implicitly endorsed by the United States Supreme Court in the Old Chief case. This is all to the good. However, the real power of the “narrative approach” emerges when one thinks concretely about what is distinctive to the different kinds of narrative employed at trial. This article explores the rhetorical and epistemological significance of trial narrative in the full context of the “consciously structured hybrid” of language practices that make up the American trial. Such a perspective enables us to admire a well-tried case as realizing practical truths beyond story-telling.
The Distinctiveness of Trial Narrative

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Introduction: Description, Interpretation, and Evaluation

Wittgenstein’s injunction to “Don’t think, look!” gives us the first step to an adequate understanding of the trial, but only the first. As I have recently argued at length, much more is afoot in the trial than our received philosophies of law would suggest. Indeed, an adequate understanding of the trial, “the central institution of law as we know it,” cannot but enrich our understanding of “what law is.” I believe that the common law trial is one of our great cultural achievements, but that we need first to describe, then interpret, and finally “think what we do,” as Hannah Arendt liked to put it, in order to fully appreciate it. Finally, the most adequate interpretation of the account of the “consciously structured hybrid of languages” that make up the trial will have an idealizing quality. It will be “partly evaluative, since it consists in the identification of the principles which both best ‘fit’ or cohere with the settled law and practices of a legal system and also provide the best moral justification for them, thus showing the law ‘in its best light.’” These principles will turn out to be situated ideals, ideals already implicit in the practices that constitute the trial. And so the best account can be justified only in the same way that the best judgment can be achieved at trial, hermeneutically, “by the mutual support


of many considerations of everything fitting together into one coherent whole.” The method for an adequate interpretation of the trial must involve “a 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.” Such an account is reflexive, an interpretation of an interpretation. The criteria for the adequacy of both interpretations are the same, and both interpretations have an idealizing element. Primarily insofar as actual trials fall away from that ideal, is there call for explanation, rather than interpretation, for efficient causes or correlations, rather than final or formal causes. And, though I will say almost nothing about this here, the best way to understand those deviations from the ideal is by examining the formal and often bureaucratic framework within which practices of the trial go forward, to understand how practices can be distorted by the institutions within which they are encased. But this, too, is a delicate business, because the formal rules of the trial—the rules of discovery, evidence, professional responsibility, and procedure—are enabling as well as distorting. And the discriminations here have to be as careful and context-specific as are the discriminations made at trial.

I have spoken of the common law trial. There is no doubt that my own experience of the common law trial is in its American incarnation. My knowledge of the English and Scottish versions is through reading and conversation. There are significant

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5 C. Geertz, ‘From the Native’s Point of View: On the Nature of Anthropological Understanding,” in P. Rabinow and W. Sullivan (eds.), Interpretive Social Science: A Reader (Berkeley and Los Angeles, University of California Press, 1979), 239.
differences in trial practices within the common law tradition, though they are relatively less significant that the differences between common law trials and “inquisitorial” procedures. Although the trial is an important institution in all common law countries, one may argue about whether the history and subsequent “spirit of the laws” of one or other country makes the trial more or less central. One can also imagine a continuum with the American trial at one extreme, British trial procedure near it, and continental versions farther along. Though the greater availability of the jury, especially in civil cases, in America is a feature of these differences, it is not itself the focus of my argument. I focus on the trial’s linguistic practices and the constitutive rules that surround them. Though I am wary asking what is “essential” to the common law trial, let me mention some important features. Common law trials involve a relatively greater control by the parties over what evidence is presented and perhaps more importantly, how it is presented, and thus, implicitly, greater control over the range of social norms and common sense judgments which the party may invoke. Common law trials create a tension between the parties’ “theories of the case,” narratives designed to embody powerful social norms, including those not explicitly appearing in the law as written, and the almost obsessively detailed presentation of evidence of events in question. In the American version, this “theory of the case” is explicitly presented in opening statement, but it is also present implicitly, as I understand it, even in the Scottish version (which does not employ opening statement) where it appears incrementally in the parties witness examinations, both direct and cross, and then explicitly in summation. Though the “law of rules” is important to the structure of the common law trial in a number of ways, it does not provide the only social norms at play in the trial.
Depending on one’s perspective, one can describe the whole range of common law trials as more individualist, more political, more democratic, more empiricist, more egalitarian, more dramatic or theatrical, and more adversarial than their continental cousins. Likewise they can be described as less authoritarian, less statist, less rationalist, less normatively coherent, and less professional. Which form of trial is better? In a recent exchange with Lindsay Farmer, I argued that one can begin to compare the relative strengths of trials only in relation to the societies in which they have their places. The “right” trial for a more traditional, hierarchical, and organic society will be different from the “right” trial for a more market-based, egalitarian, and individualist society. With the exception of features of the trial that are responsive to fully universal norms, judgments about relative superiority of this or that procedural feature can only be evaluated in the context of all the procedural features of the trial and from within a particular political tradition. It is only because procedure X in tradition A solves a problem in tradition B that its own procedure Y cannot solve that one may say that procedure X is superior to Y for B.

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7 Whether there are such and what they are is, of course, an enormous inquiry that I avoid here for reasons of space.

One final, related, and perhaps controversial point. The most adequate account of the trial will require a “style of ‘attentiveness to reality’ that is more the mark of the political actor than a scholar” because political understanding relates more closely to political action than to political science…”⁹ The most adequate knowledge of the trial is that which an experienced participant—say a trial lawyer or a judge—has in his or her reflective moments. It involves “finding a footing” (Heidegger) or “finding one’s way around” (Wittgenstein). This is what occurs at trial, I will argue. If an account of the trial is successful, it is what begins to occur in the reader of that account.

An Interpretation of the Common Law Trial

Let me state rather baldly a set of conclusions that seem to me to constitute the core of the best interpretation of the common law trial. I will devote most of my efforts here to describing the place of the narrative structure of the trial within this interpretation. Though the received view expresses only a partial truth, the languages and performances of the trial are highly structured. This structure, about which more shortly, is what imposes the discipline on the largely tacit response to an engrossing situation that determines the jury verdict. The more engrossing that structure—and a well-tried case can be enormously engrossing—the better will be the judgment the jury renders. The judgment is better because the jury has “dwelled” within the tensions created by that structure. The effect of the trial’s hybrid of languages is to create an almost unbearable tension of opposites. Some of those tensions are among roles (judge, lawyer, witness, jury), but many are among forms of language. Those tensions reflect the tensions among the conflicting forms of life, norms, and mode of social ordering that exist within the

society as a whole. It is within those tensions, created in part by the constitutive rules of the trial, that the jury can get it right, can decide what is the most important aspect of the case in front of them, not in general, but in the context of a level of knowledge about a concrete situation that they will almost never have in ordinary experience. This experience allows the trial to function as a kind of critique of both common sense and of the law. The jury’s final form of understanding is a literally indescribable\(^\text{10}\) grasp of facts, norms, and possibilities for action. Its implicit mode of social ordering is not formalistic and is anti-bureaucratic and so the trial is an important bulwark for us against the often bureaucratic “onslaught of modernity.”\(^\text{11}\)

What the common law trial allows is

\(^{10}\) This phrase occasioned quite a bit of consternation and discussion at the Sterling Conference. This was understandable in that I have gone on for hundreds of pages about trial decision-making. What is “indescribable,” I think, is the subjective “grasp” (note the physicalist metaphor) in the individual case of the right way to go forward. One can identify all the elements of the rules and practices of the trial, what I call the objective side of the trial event, to which the jury responds. One can identify the cognitive operations of which the jury would have to be capable in order to get it right. One can give increasingly adequate philosophical accounts of those operations. In an individual case, one can provide reasons defending the chosen resolution of the factual and normative issues. But this subjective grasp seems to require an integration of incommensurable factual, legal, moral, and political considerations unique to the case, “too fine to avail separately, too circuitous to be convertible into syllogisms.” If the trier of fact can “get it right,” it will not be because the result necessarily or deductively flows from any inevitably general descriptions of features of the case. The philosophical tradition contains many attempts to explain the “practical holism” that this account suggests. Those attempts are themselves inevitably hermeneutical in that they rely on “the mutual support of many considerations, of everything filling together into one coherent view” that does not compel assent. See R. Burns, A Theory of the Trial, 4-5, 201-219. See also P. Steinberger, The Concept of Political Judgment (Chicago: University of Chicago Press, 1993).

a practical judgment of the relative importance of the moral, political, and formal legal aspects of the case, again, not generally, but in the very specific context of the facts of the individual case. One of the tensions within which the mind of the jury dwells is the tension between formal legality—“closeness of fit” with the legal rules—and the other dimensions of the case. The importance of that tension is, more narrowly, that it keeps the law from ossifying into a rigid ballet of bloodless categories. More broadly, it allows us moderns to renew our society after the passing away of any Archimedian point from which the entire society may be criticized at once--whether Absolute Knowledge, a politically dispositive Categorical Imperative or Divine Revelation, or a “scientific” understanding of the interests of the Universal Class. Instead, the common law trial is one of the places we moderns can do what we 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.”\textsuperscript{12}

These are enormous claims, and I will not be able to provide all the evidence for all of them here. What I will do, however, is to show how the narrative structure of the trial is of a piece with the interpretation of the trial I have offered. The general structure of the trial is familiar. The common law trial begins not with the evidence, but with opening statement. Here the lawyers are permitted to tell the jury what the evidence will show, not merely provide a preview of what the actual evidence will be. Significantly, he may narrate, but he may not argue. The party with the burden of proof then will present

\textsuperscript{12} D. Kolb, The Critique of Pure Modernity: Hegel, Heidegger and After (Chicago, University of Chicago Press, 1986.)
his evidence, mainly in the form of a series of direct examinations of his witnesses. The
direct examinations will require the witness to answer nonleading questions and testify
“in the language of perception,” that is, in the main, recount what he did and what he
saw. They will typically be structured in the form of description followed by
chronological narration and will force the mind of the jury down to the details of the
events recounted. Witnesses will be limited to the “representative” function of language:
they will typically not be permitted to make promises (not to do it again), give advice
(how to rule in the case), or provide overt interpretations of the behavior they recount
(what was on the perpetrator’s mind when he acted.) Each witness will be subject to
cross examination, which will interrupt the flow of direct examinations and force the jury
to see the evidence from a contrary point of view. When the party with the burden of
proof rests, then the opposing party will present its evidence, itself interrupted by cross
examination. The party with the burden of proof may offer rebuttal testimony. The
parties will offer closing argument, the jury instructions will be read, and the case will be
submitted to the jury.

The Orthodox Interpretation: The Received View of the Trial

Let me present first the outlines of what I take to be an orthodox understanding of the
trial, what I call the “received view of the trial.” Within this view, which I take not so
much to be wrong as to be woefully partial, the trial is the institutional device for
realizing the rule of law where there are disputes of fact. The goal of trial procedure,
including the law of evidence, is to allow the jury\textsuperscript{13} to engage in a three-step process: (1) to construct an accurate, value-free account of what occurred, (2) to engage in an act of what might be called “fair categorization,” by which it determines whether the value free account previously constructed fairly fits within the categories defined by the substantive law and found concretely in the jury instructions, and finally (3) to announce a verdict that emerges solely from the inspection of the conclusions reached at stage (2) to determine whether the party with the burden of proof has established by the legally defined standard (“preponderance of the evidence” or “clear and convincing evidence” or “beyond a reasonable doubt”) each of the elements of the crime, claim, or affirmative defense. In this view, the construction of a value-free and accurate account of what happened is the result of common-sense reasoning, common sense being conceived as a “web of belief” containing value-free empirical generalizations about probabilities connecting bits of circumstantial evidence to “material” factual conclusions. It is important that this account be value-free so that the only source of norms to enter the trial flow from the law embedded in the jury instructions, itself legitimized somewhat differently in natural law and positivist traditions. The rule of law should be the law of rules.\textsuperscript{14} Put less charitably, it is a form of “mechanical jurisprudence” at the trial level.

The received view has power. It explains a good deal of what actually goes on in common law trials, their most distinctive features. In particular, it explains the central

\textsuperscript{13} For ease of reference, I will refer to “the trier of fact” as the “jury.” The social scientific literature suggests that judges and juries reach the same conclusions in the significant majority of cases. Not much turns on the distinction for purposes of the account I provide.

evidentiary doctrine of “materiality,” a doctrine that requires that each bit of evidence have a pedigree, or “warrant,” that connects it up though an empirical generalization found usually in common sense, though sometimes in science, with a fact that is “of consequence,” that is, which the substantive law declares to be of significance. It also in part explains the pervasive preference of the common law of evidence for testimony in the language of perception by witnesses who themselves have had perceptual experience of the matter to which they would testify. The received view is also connected with important political ideals, specifically with justice as regularity, the notion that legal decisions should be based on rules announced ahead of time and that similar cases be similarly decided. The former fosters autonomy of the citizen in that it allows him to avoid the state’s intrusion into his freely planned affairs by his staying clear of the lines drawn by the pre-announced rules. The latter assumes that there are constant and legally salient aspects of inevitably different situations whose presence or absence can be made the criterion for decision in different cases.

It is also connected up with notions supporting the normative superiority of the substantive law to the contextual moral intuition that would likely prevail in the absence of legal doctrine. In natural law traditions, such as that represented by Blackstone, the slow development of common law rules provides a deeper appreciation of the demands of right reason in particular contexts than could ever be expected from the immediate intuitions of a particular judge or jury. In positivist traditions, this normative superiority usually is derived from the source of law in the statutes passed by democratically elected
bodies and so expresses the will of the people. (Of course, there are many varieties of each tradition and the lines between them can be blurred.)

I have argued that this model of trial decision making fails to take account of a large range of the practices in which we are actually engaged, and that those practices, and even the legal rules that structure them, reflect a different ideal of trial decision-making. This is largely a descriptive matter and I have argued at length that the received view does not fairly capture central aspects of what our actual practices are. Description, however, cannot here be wholly separated from evaluation. It is always open to a defender of the received view to argue that all the aspects of trial practices that are inconsistent with the received view are simply appropriate targets for reform. But this is simply to emphasize the point made earlier about the inevitably hermeneutical or circular nature of justification in this context. Each theorist must argue that the descriptive details he emphasizes are, as Rawls puts it, “considered judgments” of justice, and so deserving of normative weight in the process of achieving reflective equilibrium on these matters, and also that they are consistent with broader political ideals which we accept and which we can defend. In other words, justification comes “by the mutual support of many considerations of everything fitting together into one coherent whole” that requires “a 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.”

During and after the Sterling Conference, philosopher Sandra Marshall raised a series of questions concerning the status of the received view and my view that it
expresses a “partial” view of the trial. The orthodox view is partial in a number of ways. It captures some trials more than others. I argued in *A Theory of the Trial* that common law trials are ultimately about what dimension of the situation is most important. Thus in some cases, cases which relatively little moral or political importance, the jury may well decide that “fairness of fit” with the legal categories is the most important question that the case presents and will decide the case must like the received view would expect. The received view is also an important aspect of all contemporary common law trials, even in American jury trials, because, I argue, the political values implicit in the “rule of law as the law of rules” are important for our mode of self-governance, though not the only values of importance. And so, for us, the received view does not present a unitary or dominant ideal to which we ought to aspire; it does not offer an appropriate form of adjudication for us. Are the features identified by the received view necessary, if not sufficient, conditions of a proceeding to be a “trial.” For me, this is not a conceptual question, but a normative one. We meaningfully use phrases like, “trial by combat” and “trial by ordeal.” At the other extreme, there exist in some places what are, by common law standards, extremely unstructured forms of dispute resolution. I am not sure what we are asking when we ask whether such procedures are “really trials.” For us, the fluid tension among formal-legal, moral, and political modes of decision making that the common law trial expresses, I have argued, is a “considered judgment” of justice, to use Rawlsian language, a structure that reflects judgments made over a long period of time under favorable conditions by those in a position to know what they are doing.

Justification of this mode of decision making has both descriptive and normative elements. The task of understanding the trial is an interpretive task and it “is partly
evaluative, since it consists in the identification of the principles which both best ‘fit’ or cohere with the settled law and legal practices of a legal system and also provide the best moral justification for them, thus showing the law ‘in its best light.’”  

So yes, for us, the best form of trial is one where the values that the received view of the trial celebrates are represented, but are in a harsh and demanding tension with other important values.

**The Rhetorical Dimension of the Trial**

My focus here will be on the narrative structure of the trial, how it proceeds by the construction and deconstruction of narrative, of different sorts of narratives. That is itself a partial perspective. To appreciate the trial fully, it is also necessary to appreciate a range of other characteristics that are so basic that their significance can easily be missed. The trial is spoken; it proceeds through time; it is a sort of drama; it is a rhetorical situation. Each of these features has significance. “The aspects of things that are most important for us are hidden because of their simplicity and familiarity….We fail to be struck by what, once seen, is most striking and most powerful.”  

Because it is a partial antidote to the received view, I want now to give a very compressed account of the ways in which the trial is a rhetorical event.

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16 Burns, supra n.1, 124-54.


In a rhetorical situation, someone says something to somebody. Persuasiveness to an audience is the primary criterion for judging the performance. Rhetoric rules where a practical resolution of a concrete situation is necessary. In such a practical context, the jury’s common sense is inevitably a source of norms, not simply a depository of empirical generalizations. Rhetoric is in play where action is necessary under uncertainty, and persuasion must occur through the “cumulative force of minute considerations,” rather than by any direct comparison between what is said and the thing itself. Such a comparison is impossible. As Gadamer put it with regard to artistic works, “works of art are not reproductions of a reality that can be identified independently of the work of art and used to judge the adequacy of its representation; rather the features of the objects works of art represent…are illuminated only by means of the representation itself; …Hence the representation does not provide a mirror of reality that exactly reflects it…”

The whole and the parts are mutually determining and the entire position is likely accepted or rejected at once. This only suggests what we will see later—that understanding the trial’s linguistic practices is the key to understanding the kind of truth that is allowed to emerge within them. Rhetoricians’ “commonplaces”—multiple sources for arguments—have always understood the multiplicity of the sources of “persuasives.”

We don’t only “use” rhetoric to achieve goals instrumentally, our norms and so our identity are constituted rhetorically, in disputing the relative importance of multiple norms for a highly specific situation—that is how we decide “who we are.” Negatively, this suggests the limitations of the received view, especially when one considers, for example, an engrossing two-week trial, followed by the reading for twenty minutes of

(often unintelligible) jury instructions. Decision in rhetorical situations stems from a tacit response to a situation in which one is engrossed. This engrossing rhetorical situation is the trial itself, a “consciously structured hybrid of languages” which determines the kind of truth that can emerge under uncertainty for a practical purpose.

Now, to the ears of a certain sort of analytic philosopher, the “rhetorical” nature of the trial may suggest the conclusion that the mode of thought at work at trial is irrational, or worse. After all, doesn’t rhetoric have “savage roots,” doesn’t it inhabit the “world of the lie,” isn’t it “a weapon called upon to gain victory in battles where the decision hung on the spoken word,” isn’t it always “possible for the art of ‘saying it well’ to lay aside all concern for ‘speaking the truth’”? At the very least, doesn’t the rhetorical dimension of the trial suggest that decisions made there are “emotional” or based on “sentiment.” Though I cannot make the argument here at length, the constitutive rules of the trial, the rules of court procedure, evidence, and professional responsibility, seek to maintain the energy that comes from rhetoric’s primitive roots (and so protect us from the dead weight of bureaucratic lethargy) while structuring that energy to a productive tension of opposites. I will say more about that it a moment. For now, the rhetorical nature of the trial should make us suspect that the received view of the trial cannot quite be true, that there is more in play than accurate fact-finding followed by fair categorization. In fact, rhetoric does call forth a larger range of human responses than the

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received view’s notion of judgment suggests. My view is that this broader range of responses allows the juror to capture more of the human truth of the situation before him:

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.

The perception that is created by the trial’s “consciously structured hybrid of languages” relies not only on feeling, but on what one theorist has called political wisdom:

Taken as a whole, this composite type of knowledge represents a contrast with the scientific type. Its mode of activity is not so much the style of the search as of reflection. It is mindful of logic, but more so of the incoherence and contradictoriness of experience. And for the same reason, it is distrustful of rigor. Political life does not yield its significance to terse hypotheses but is elusive, and hence meaningful statements about it often have to be allusive and imitative. Context becomes supremely important, for actions and events occur in no other setting. Knowledge of this type tends, therefore, to be suggestive and illuminative rather than explicit and determine.

21 The received view operates on what Peter Steinberger has called the “tripartite model of judgment, a process of categorization of particulars within universals. *The Concept of Political Judgment* (Chicago: University of Chicago Press, 1993). Steinberger argues that this is an impoverished account of the range of performances embedded in quite ordinary human judgment.


23 More precisely, the trial’s languages not only rely on these capacities, but, in a strong sense, realize them.

The Centrality of Narrative at Trial: A Preliminary Summary

We will see shortly that the kind of narrative that is available in opening statement is quite different from the kinds of narrative that pervade the evidentiary phase of the trial. But first, I want to consider briefly the significance of narrative in general as it operates at trial. As my title suggests, this is the least interesting aspect of the narrative quality of the trial, and so easy deductions from the conclusions of the burgeoning field of “narratology” to the nature of the trial are thus far misplaced. The full sequence of considerations goes about like this. First we should consider the narrative quality of the trial in general. Then we should consider the significance of the fact that the jury faces almost immediately two competing narratives in a context where an “either-or” choice will have to be made. We should consider the criteria that are likely to control what may be called an “initial” theory choice between the two “factual theories of the case” embedded in the opening statements. (This will prove important, though not always decisive, because of the inevitably circular or interpretive nature of trial decisions making: the meaning and truth of the whole (the theory of the case) is determined by parts (the circumstantial evidence), but the meaning and truth of the parts (the circumstantial evidence) is determined by the whole (the theory in which they are embedded and give them both significance and relative plausibility).) Then we should consider the meaning of the tensions between the form of narrative that prevails in opening and that which occurs during the presentation of evidence. Ultimately one would ask how the entire consciously structured hybrid of languages creates the situation in which the jury is immersed and to which it responds. Though this is beyond the scope of this essay, one should then show how that determination among the incommensurable
values made by the jury was within its capacities, and identify the forms of understanding that is consistent with the trial’s consciously structured hybrid of languages and performances. Finally, one ought to provide an understanding of the place of this mode of social ordering within the range of orderings available to us.

**Epistemological Interlude: Why the Characteristics of Trial Narratives Matter**

I don’t think that the trial has come to have the structure it does for exclusively epistemological reasons. The trial is a practical enterprise, not a theoretical inquiry. Political and moral considerations outweigh strictly epistemological considerations. Nonetheless, accuracy has political and moral significance. (And epistemological concerns have been in the recent past of particular interest to British and American philosophers.) From a political point of view, the values implicit in the rule of law, including democratic governance and the control of political officials, could not be realized if officials simply could not find facts with some degree of reliability or could easily manipulate evidence to justify their own preferences. From a moral point of view, we should remember the words of Iris Murdoch, “What looks like mere accuracy at one end looks more like justice or courage or even love at the other.”

An attempt to think of the trial in much the way that the received view understands it will show why the reasoning that occurs there is inevitably circular or interpretive, and so why the received view cannot be quite right. It also shows why, insofar as an understanding of the evidence is possible at all, one pole of this circular movement will inevitably be a narrative. This is true because “the characterization of

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actions allegedly prior to any narrative form being imposed upon them will always turn out to be the presentation of ... the disjointed parts of some possible narrative.”

This means, of course, that characteristics of narrative are necessary characteristics of trial understanding.

One may distinguish provisionally (1) circumcumstantial evidence from (2) a “bare” or “purely perceptual” account of events constructed from such evidence from (3) a fully characterized, or interpreted narrative of events, such as the kind of story told in opening statements. In the common law trial, the jury starts with the third and then moves to the first and second in order to decide between the two narratives presented. The notion of a “bare narrative” is derived from one sort of question the jury will naturally ask in deciding which of the opening statements proves to be the more adequate. That question is basically, “What would you have seen had you been there?” But even in the best prepared cases even the bare narrative will be underdetermined by the circumstantial evidence presented. Often common sense will not be able to reliably


27 The law of evidence distinguishes circumstantial evidence from direct evidence. Circumstantial evidence requires a number of intermediate inferences to establish a “material” fact. Direct evidence, such as eyewitness testimony, requires only a determination with regard to the credibility of the witness. But since the credibility of witnesses is always determined circumstantially, it is fair to say that the probative value of all evidence is circumstantial.

28 I do not suggest that this “bare narrative” is in any way more concrete or basic or foundational than the interpreted narratives. See H. Pitkin, Wittgenstein and Justice (Berkeley and Los Angeles, University of California Press, 1972).
assign relative probabilities to the episodes contained in the proposed and conflicting bare narratives. Often there will be no circumstantial evidence at all to adjudicate the potentially significant details of the bare narrative. The existence of this or that bit of circumstantial evidence is likely to be hotly contested, a contest often made fiercer by the relative lack of evidence one way or the other. (Could a police officer accused of manslaughter for the shooting death of a motorcyclist bearing down on him have stepped out of the way? Where exactly was his car parked? What exactly did he say before shooting? How far exactly was the cycle when he first saw it and when he fired?) These bits of circumstantial evidence come to the jury “under a description.” The description or characterization of the circumstantial evidence may be hotly contested. (Were the defendant’s words an “accusation” or a “threat?”) Since, as we will see, the plausibility of the overall narrative is determined in part by its overall likelihood or probability as a factual matter, its consistency with the empirical generalizations are contained by common sense, these underdetermined factual issues of disputed characterization may be decided in part by their consistency or coherence with the more likely “bare narrative.” The lines of implication between the part and the whole run both ways, and those lines are lines both of meaning and of factual plausibility.

That is, however, only the first of the inevitably circular cognitive movements even at the most basic factual level. Even when the nature of the circumstantial evidence is both complete and uncontested (almost never), that evidence is always linked to the
episodes in the bare narrative by a common sense generalization that provides its “logical relevance.”

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 (F1.....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 (F1.....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.

This suggests a kind of coherence theory of truth for the trial and even suggests that the general criteria for the acceptability of one narrative over the other (“the best story”) can overwhelm the evidence in a particular case. Trial lawyers like to say, “Every fact has two faces.” Almost every fact can be interpreted to support either theory. In a murder case, does the fact that the defendant drank a number of pints before the shooting make it more likely that he was the perpetrator, because of lowered inhibitions, or less likely, because his drinking would have deprived him of the physical coordination that this particular shot seems to have required. The senses in which I am a “realist” about what the trial achieves are complex. Evidence is not infinitely plastic to reinterpretation and some forms of evidence, such as admissions of party opponents, much prized by trial lawyers, are likely to provide relatively more secure anchors in these generally holistic

29 I am considering common sense here as a treasury of purely empirical generalizations. In fact, it is in large part practical, in that it provides modes of coping with situations rather than descriptions or explanations of them.

30 Burns, supra n. 1, 190.
processes. To borrow from Henry James, trial evidence is a kind of pudding, but it is a lumpy pudding.

More importantly, the stories that lawyers may tell in opening statement are highly constrained narratives, as we will see at greater length below. But this is not my main point here. The only point I want to make here is that the existence, proper description, and meaning of even the most basic of circumstantial evidence at trial is partly determined by its place in different levels of narrative. They will thus be partially determined, “colored” if you wish, by whatever renders those narratives more acceptable to the jury. In the end, I argue that the jury is not simply making a theoretical or historical judgment about what more likely happened. Its final cognitive state is not a mental screening of the events that it determined to have occurred. It is, again, a literally indescribable grasp of facts, norms, and possibilities for action. The devices of the trial take it beyond story telling. The story, or rather the tensions among stories, are merely the scaffolding that allows for the integrative and practical grasp that occasions the verdict.

The General Significance of the Narrative Structure of the Trial

Narrative provides the “systematic means of storing, bringing up to date, rearranging, comparing, testing, and interpreting available information about social

31 I am begging the important question of whether historical judgments are themselves theoretical or are themselves inevitably normative.
behavior.” Cognitive psychologists tell us that “what does not get structured narratively suffers loss in memory.” Empirical investigators tell us that narrative is “how jurors actually organize and analyze the vast amounts of information involved in making a legal judgment.”

It is through narrative that we remember (re-member), and the internal characteristics of narrative, such as presence of extraneous details, can affect its plausibility even before any evidence is offered. We seem to have a natural “predisposition to organize experience into a narrative form into plot structures and the rest.” And, mercifully, this spontaneous tendency seems not to be a mere consoling artifice imposed on a featureless substrate, because narratives are “found … in the midst of experience and action, not in some higher level linguistic construction or reconstructions in the experiences and actions involved.” In short, stories “are told in being lived, and lived in being told.” Narrative structure demands of the story-teller a judgment of relative importance that eliminates the inessential. It is often through a well-crafted story that one can show “things that cannot be put into words. They make themselves manifest.”

The internal morality of stories is highly contextual. Although


37 Ibid., 61.

any retelling of a human action will involve some evaluation of it, that evaluation will not be through what Stuart Hampshire called “an abstract computational morality,” in the imposition of a single-ruled standard on that action. Rather, the narrative form allows the story-teller to invoke all the subtleties for the understanding of human action that the culture’s common sense can provide. Narrative seems internally related to questions of justice, and an important story schema—legitimate status quo, disruption of the status quo, and its often difficult restoration—places the jury within the context of what Aristotle called commutative justice. The jury is thus reminded of its practical task, to take part in the action that will restore justice to the community.

The Distinctiveness of Trial Narratives: Theory, Theme, and Witness Examination

Trial narratives have distinctive features. The received view’s understanding of opening statement is that it is a preview of the evidence that will be presented. It is in fact much more. In A Theory of the Trial, I presented an edited version of an actual opening statement in a criminal case. I offered a running interpretation of what the lawyers were doing and how the openings functioned in the case. Each opening statement provided, indeed “performed” the mode of social ordering that it recommended, in that case, one of bureaucratic processing, the other of a combination of moral judgment and psychiatric explanation. “What is to be done” determined and was determined by “What happened?” Facts were, to a limited extent, purposes. Much in the way that Kuhn argued that

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even in his later philosophy and himself argues that “[w]e narrate stories in order to make manifest whatever unsayable meaning resides in them.” D. Luban, Legal Modernism (Ann Arbor, University of Michigan Press, 1994), 201.

39 Bruner, supra n.30, 39-40.
proponents of rival scientific theories often “talk past each other,” so did the advocates here. (It is also true at trial that it is “difficult, or, more likely, impossible for an individual to hold both theories in mind together and compare them point by point with each other and with nature,” or, in the case of the trial, with the evidence that would be presented.) Each way of telling the story had a bite: the prosecutor presented a sequence of the stages of the legal process and placed the judge within this “processing” of the defendant, while the defendant’s more “omniscient” narrator could order all of the details of the story to suggest a single meaning for the event. Each lawyer was aware of the rhetorical dimension of what he was doing, and each opening was a product of what trial lawyers call a “factual theory of the case,” an inevitably simplifying narrative interpretation of what had occurred: much would be omitted by each party because it did not contribute to his theory. The “political truths,” assumptions that could not realistically be challenged in this forum in front of this judge, were respected by the parties. Both parties knew what the anthropologist Clifford Geertz wryly observed, whatever the law is after, it is not the whole truth. The legal terrain the parties were moving on contained what evidence scholars sometimes call “codified inferences,” apparently factual inferences that had been mandated “as a matter of law.” Thus, appellate courts had sanctioned the notion that prior child abuse was evidence that the abuser acted in the specific instance before the court with the knowledge that great bodily harm was likely to result from his actions (even though no such great bodily harm resulted on the previous occasions). This was actually a moral judgment impersonating a

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factual inference. Both advocates used language that appeared nowhere in the criminal code—words like “child” or “victim” or “madness”—but which had enormous power to define the meaning of the event being tried.\textsuperscript{41} The ability of counsel to tell a fully characterized story in opening inevitably brings to play all of the normative resources embedded in the common sense of the community, its life-world. Aspects of the situation could be shown that could never in this context be said. The legal categories were not ignored, indeed had to be respected, but there was much more at work in these apparently simple stories.

At trial there is not, of course, one opening statement, but two. As Hampshire\textsuperscript{42} has shown, this two-story schema is a feature of ordinary moral experience in which we oscillate between two different ways of describing our actions, one of which approves what we are considering, while the other condemns it. Although there is often no neutral way of describing the alternatives, some us seem to have the ability to engage in a

\textsuperscript{41} “A sentence always means more. Even a single word, within the weave of incommensurable connotation, can, and usually does. The informing matrix or context of even a rudimentary, literal proposition—and just what does literal mean?—moves outward from specific utterance or notation in every-widening concentric and overlapping circles. These comprise the individual, subconsciously quickened language habits and associative field-mappings of the particular speaker or writer….No formalization is of an order adequate to the semantic mass and motion of a culture, to the wealth of denotation, connotation, implicit reference, elision and tonal register which envelop saying what one means, meaning what one says, or neither….“ G. Steiner, Real Presences (Chicago, University of Chicago Press, 1989), 82-83.

“theory choice” that is fairer or wiser. As I noted above the two opening statements often talk by each other, since each is urging and, in a sense, “performing” the adequacy of the understanding that it urges, as well as the eligibility of the mode of social ordering appropriate to the interpretation of events it provides. Unlike standard narrative historiography, where there exists a single account of events that purports to be congruent with the single course of events it recounts, the duality of opening statements is democratic. It leaves it to the jury to provide what coherence there is to the well-represented perspectives presented at trial. The duality of trial openings begin the process of relativizing the easy moralizing that narrative allows and alerts the jury to the always present danger of a gap between events and the retelling of them. They invite the jury to look through the stories. It begins the process by which a well-tried case can achieve some limited transcendence of the norms that are embedded in the common sense scripts of the jury’s life world.

What are the normative criteria for what we can call a preliminary choice between the stories offered in opening statements? Because the trial is largely a battle for the imagination of the jury, and because of the interpretive nature of reasoning at trial, the initial attraction of opening statements is important. Trial lawyers are taught that the opening statement should make the jury want to rule for you. (Although now largely debunked, there was even an attempt to argue that juries decide most cases after opening statements and before the presentation of evidence.)

First, the jury will be comparing the opening statements to assess their relative factual plausibility. This has two aspects. The internal coherence and completeness of the narrative presented can affect its plausibility. “The inadequate development of setting, character, means, or motive, as any literature student knows, render a story’s actions ambiguous...In a trial it is grounds for reasonable doubt.”\footnote{Bennett and Feldman, \textit{supra} n.27, 10.} Even here one of the constraints on opening statement is apparent. The opening is a story, but it also has another performative feature—it is a promise. It promises that there will actually be evidence to support what are actually conclusions, factual and normative, in the story offered. (One of the standard rhetorical commonplaces of closing argument is to suggest that counsel has “broken his promise” by failing to present evidence to support the assertions made.) Second, unlike the kinds of stories told in most imaginative literature, the story told in opening is about a specific event that occurred in the past, a definite event. Each thing is what it is and no other. This forces the story-teller in general to made relatively more specific factual assertions than he or she might choose for purely “internal” rhetorical purposes. But factual plausibility will also be initially assessed by what we may call “external” factual plausibility, the extent to which the story offered is consistent with the generalizations implicit in the jury’s common sense, what trial lawyer Louis Nizer, called the “rule of probability.” Each advocate relies on the kind of generalizations that in part constitute common sense, that say, “Generally and for the most part....” (for example, generally and for the most part, close relatives have affection for their kin). But the opposing party will be telling a story (and presenting evidence to
suggest) that says implicitly “…but not when…” Ultimately, a “triable case”\textsuperscript{45} will present a level of even purely factual complexity that all previous common sense factual generalizations do not conclusively adjudicate. Each case requires a “new” level of insight even on the factual level, well beyond Kant’s warning that there are no rules for the correct application of rules.

So far I have recounted the ways in which opening statements may be more or less persuasive based on their “factual” plausibility. But trial lawyers, in presenting a case, choose not only a factual theory of the case, but also what they call a “theme.” A theme is the moral claim that the case makes and, in a well-tried case, pervades the choice, characterization, and sequencing of all the details in the opening statement and, later, in the evidence. For, as Paul Ricoeur puts it, narrative is “based on an experience of an ethics already realized” in a context in which “there is no action that does not give rise to approbation or reprobation, to however small a degree, as a function of a hierarchy of values for which goodness and wickedness are the poles.”\textsuperscript{46} For good or ill, “every historical narrative has as its latent or manifest purpose the desire to moralize the events of which it treats.”\textsuperscript{47} This morality is what Hegel called Sittlichkeit, the norms implicit in the practices and institutions of the society. “And this suggests that narrativity, certainly

\textsuperscript{45} Trial lawyers call a case “triable,” when it contains some aspect that is fairly debatable.


in factual storytelling, and probably in fictional storytelling as well, is intimately related
to, if not a function of, the impulse to moralize reality, that is, to identify it with the social
system that is the source of any morality that we can imagine.”48  “In this sense,
narrative already belongs to the ethical field in virtue of its claim—inseparable from its
narration—to ethical justice.”49  In the Rhetoric, Aristotle identified forensic rhetoric as
cconcerned specifically with praise and blame, and argued that narrative was its distinctive
medium.50

Thus each of the opening statements tells a story in which there is an implicit
moral evaluation of persons and actions.  The opening that presents the “more powerful
norm” will offer the theme that is most likely to begin to win the battle for the jury’s
imagination, and to provide the central organizing principle for the interpretation of the
levels of disputable fact that will appear in the evidentiary phase of the trial.51  But the
trial is not only about a judgment of personal morality.  It is a public practice carried out
within public institutions. Not only will the jury be making a moral judgment and
defining its moral identity,52 it will be making a political judgment and defining the

48 Ibid.
49 P. Ricoeur, Time and Narrative (Chicago, University of Chicago Press, 1988) 249.
50 Aristotle, Rhetoric 1414a-b
51 Kalvin and Zeisel called this the “liberation hypothesis,” the way in which unavoidable factual ambiguity
“liberates” the jury from a rigid application of the legal norms.
52 C. Taylor, Sources of the Self: The Making of the Modern Identity (1989).  Taylor argues that identity is
always intertwined with moral evaluation.  What I judge good and bad defines who I am. “By his manner
community’s political identity. “Stories tell us how each one finds or loses his just place in relation to others in the world. And the communication of the story is confirmed when justice has been recognized.”

By exercising the power that they have collectively, the jurors decide what they will do, based on what evidence, at what level of uncertainty. Especially in criminal cases, which always involve the executive or police power of the state, the jury will decide whether the exercise of that power is consistent with their own political self-understanding. The opening statements thus have another performative function, a “signaling” as well as a “labeling” function. Each tries implicitly to offer to the jury a political self-understanding about the exercise of public authority to which he or she can give her public allegiance. As deTocqueville put it in his classic statement:

The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged and with the notion of right. If these two elements be removed the love of independence becomes a mere destructive passion. It teaches men to practice equity; every man learns to judge his neighbor as he would himself be judged….The jury teaches every man not to recoil before the responsibility of his own actions and impresses him with that manly confidence without which no political virtue can exist. It invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society and the party which they take in its government. By obliging men to turn their attention to other affairs than their own, it rubs off that private selfishness which is the rust of society.

of judging the person discloses to an extent also himself, what kind of person he is and this disclosure is involuntary.” R. Beiner, Political Judgment (Chicago, University of Chicago Press, 1983), 18.


An effective opening suggests that to reject the proponent’s case is to diminish the public identity of the juror and the way of life with which it is intertwined. And so the trial will inevitably involve an act of public self-interpretation.

Of course, the trial does not end after opening statement. The opening’s strength, its ability to offer the full range of considerations and norms relevant to the meaning of the case can also be, from the perspective of justice, its weakness. Some of the internal features of narratives that render them persuasive may be indifferent to the truth of what is said. “That is to say the sense and the reference of a story bear an anomalous relationship to each other.” Now the adversary context of competing narratives and the constraints on opening statements already take this into account. But so do the tensions created by the very different sort of narratives offered by the witnesses on their direct examinations. These chaste narratives require physical description followed by a chronological account in the language of perception. Openings try to be fair to all the values implicit in the community’s common sense. That is why trial advocacy is sometimes called “trial diplomacy.” Mercifully, the witnesses at trial are rarely diplomats. They provide a much more personal account of a specific event. Those accounts are a challenge to the universality of all the norms implicit in commons sense.

Even where court procedures do not include an opening statement, an effective advocate will still have a theme and factual theory of the case in order to organize the evidence he or she presents. In such a system, the theme and theory of the case will likely appear explicitly in closing argument, where both the factual theory and theme are (re)presented and the factual and normative arguments in favor of them are marshaled.

Bruner, supra n.30, 44.
Their accounts are not written by the author of the entire story, as are fiction, drama, and at least some historiography. The witnesses are, to a large extent, really on their own, and their accounts can create a tension between the proposed meaning of the case offered in opening and the truth of what occurred in this case. Although we often see what we want to see, we are able to see what may shock or disappoint us. Accuracy is of high moral value. The accounts provided by witnesses provide a critique of the inevitably overgeneralized principles that inhabit the common sense and the law of the community. Finally, the “brutally elemental data” that the direct examinations offer provides the ideal crucible for the determination of the central questions of the relative important in the specific context of this case of all the competing factual and normative dimensions of the situation. If “justice is conflict” the harsh tension of opposites created by the trial provides the ideal forum within which justice can be done.

To show that these linguistic tensions can actually be the occasion of a genuine form of understanding would require us to provide an account of human understanding that was, in a sense, the subjective side of the trial. I believe that such a account can be given, that there exist philosophical resources that provide the main lines of an account of such understanding. I believe as well that sensitive observers of what actually occurs at trial provide evidence of these sorts of nondeductive cognitive processes. Holmes opined that “many honest and sensible judgments … express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions—impressions

58 Burns, supra n.1, 211-219.
which may be beneath consciousness without losing their worth.”

Judge Jack Weinstein, a very prominent American trial judge and evidence scholar, put it this way, “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…. In sum:

The capacity which leads courts so consistently to get it right is, I suggest, a specialization of a general cognitive ability that functions in somewhat different ways in both factual and normative investigations, and somewhat differently still in the combined normative-factual inquiry that is the trial. It is holistic and interpretive. It can grasp “the cumulations of probabilities…too fine to avail separately, too subtle and circuitous to be convertible into syllogisms.” It is likely to “trust rather in the multitude and variety of its arguments than to the conclusiveness of any one. Its reasoning should not form a chain which is no stronger than its weakest link, but a cable whose fibers may be ever so slender, provided they are sufficiently numerous and intimately connected.” The devices of the trial both supply innumerable such fibers and dramatize their possible connections in ways directly relevant to courts’ tasks.

Conclusion

What is distinctive about the narratives at trial is the way in which they are constrained and counterposed to increase the level of intellectual tension. The story-teller must anticipate his opponent’s case. He must anticipate the evidence that will be presented, both because the opening statement is a promise, but also because of ethical rules that generally forbid assertion of fact for which there will be no evidence. All conspire to prevent the advocate from telling the most persuasive story regardless of its truth. The opening statement is made in the context of what the jury knows to be a determinate past

59 Chicago, B.&O.Ry. v. Babsock, 204 U.S. 585, 598 (1907)

60 Burns, supra n.1, 210-11. The first quote is from John Henry Newman, the second from Charles Sanders Peirce.
event and in a legal context that usually requires an either-or judgment of liability. This demands a lower level of “subjunctivity” or indeterminacy of the key narrative elements—details are blurred in opening only if uncertainty about the evidence forces the advocate into that rhetorically unattractive posture. Each lawyer must respect the political truths and legally codified inferences that operate within the legal order. Each lawyer has the motive to emphasize precisely those facts and norms that the other cannot easily integrate into his factual theory and theme. The advocate must be concerned as well about the moral force of the jury instructions and, in civil cases, the possibility of a directed verdict or a new trial. These constraints pull the accounts toward each other, since they must anticipate the opponent’s most powerful evidence and arguments; toward the evidence, because of the performative aspect of opening statement; and towards the written law. The factual theories of the case are themselves in tension with the narratives offered by the witnesses during their direct examinations, narratives that are, in their particularity, unlikely to be wholly subsumed by the factual theory and theme of even the most accomplished advocate. Cross-examination can be used to tell a “counter-story” to the one offered by the witness, to the factual elements of which the witness must agree, which can by contrasting selection, characterization, and sequencing of facts, offer a starkly different interpretation of events. And both cross and final arguments can be used in purely negative attack on the credibility of a witness and the persuasiveness of the interference that the opponent offers.

This is as it should be. The trial proceeds by the construction and deconstruction of narrative. It is the crucible of democracy. A well-tried case can refine the
community’s common sense to the point where it can achieve a truth beyond story-
telling.