

Notes and Opinions

Truth in the Telling: Procedure, Testimony, and the Work of Improvisation in Legal Narrative

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As the privileged space for the public determination of legal truth, trials are one of the most culturally valorised manifestations of law. They function to pronounce the existence of legal rights and obligations, and to ascertain their scope. Courtrooms often metonymise the origins of law itself, an understanding that eclipses other sources of legal authority, such as parliament, in favour of a juridical model that is rhetorically adversarial, vested in cultural concepts of impartiality (Bell 42), and aimed towards the determination of a specific form of truth. Trials are seen to establish a definitive legal answer that is both particular and universal, not only affecting the case at hand but also adding to the normative discourse of common law precedent. These determinations are also often held to provide a corrective to the majoritarian nature of democracies, a means whereby *individuals* are protected from the state (although some critics, like F. L. Morton, argue that constitutional rights claims can create homogenisation by eroding local customs and laws). Such understandings of the trial idealise it as a public forum for discordant narratives, enabling what Elena Loizidou describes as “the possibility of antagonising, resisting and answering back. . . . to give the subject the possibility of telling their story, albeit within the confines of the law, its rules and procedures, to have their story recorded and to counter-attack, and to at least be given the possibility of survival rather than be put to death” (109). Under a constitutional instrument like the Canadian Charter of Rights and Freedoms, the trial can become one of rights’ most powerful scenes of affirmation.

What follows cannot adequately address both these and the many other cultural connotations of the trial. Rather, it is a brief consideration of some of the ways in which the trial, and the legal aesthetics it exemplifies, are central to certain representations of truth. Vitally important to the construction of such representations is legal testimony, the stories told to a court by witnesses through a mixture of statements and formalised answers to questions. Testimonial narratives are both produced and constrained through an apparently improvised, interrogative, discursive performance that legitimises law’s claims to determining truth. The perceived immediacy and responsiveness of testimony is necessary for interpreting its claims to veracity within the trial, and this in turn influences broader understandings of truth and the narratives by which truth is known. Performed in and effected by the valorised space of the courtroom (a physical context inseparable from the nature of legal stories), testimony mirrors a culture steeped in an aesthetics of law, and an understanding of truth that is constituted by, and dependent upon, the forms of its production.

Hayden White states that narrative provides an “integrity, fullness and closure of an image of life” that structures our otherwise chaotic lived experience with “proper beginnings, middles and ends, and a coherence that permits us to see ‘the end’ in every beginning” (22). Narrative, in White’s conception, is a way of creating meaning; an imaginary response to the past, narratives are representations of events, creating order through a rhetorical strategy that artificially imposes causality and coherence. Understood in this light, narrative is as much procedural as it is substantive, the form by which the texts of history, fiction, and innumerable other cultural practices are effected and the concomitant means and methodology for their discursive claims to coherence and truth.

This urge to narrativise, to “show ‘reality’ as meaningful and closed” (107), is, as Costas Douzinas and Ronnie Warrington argue, also a legal urge. Like historiography, and also like much novelistic fiction,¹ law seeks to create a unity from the past, “closing” representations of “the diffusion and dispersal of lived experience,” through a narrative ordering that reinterprets seemingly unconnected events as connected (107). Legal trials understand past occurrences as a series of potentially conflicting narratives—manifest in arguments and testimonies—that culminate in the form of a judgment that determines truth. This rhetorical ordering creates a “privileged description, the one that enables the audience to tell what *really* happened as opposed to what those involved *thought* happened” (Scheppele 2089-90). Legal procedures work in aid of law’s attempt to “organise in its own grammar and lexicon other dialects and idioms, not least ordinary speech” (161) so as to impose legally-sanctioned narrative coherence. Procedures, then, are methodologies for producing a true account of an event, but they are also moments in which normative legal ideals are enacted. Law constructs narrative meaning, such as the veracity of testimony, through a self-referential understanding of legal forms as inextricable from content, with procedures both creating ideal narratives and constituting exemplary instances of legalised values themselves.

For Desmond Manderson, this interdependence of form and content can be best understood as a legal aesthetics. As he argues in *Songs Without Music*, aesthetics is not *like* law, “it is part of what law means and how it develops” (33).

Legal aesthetics, like Weisberg's "poethics," posits that law's efficacy comes when it is most fully able to integrate form and content. As Douzinas and Warrington also note, this aesthetics is intimately tied to the narrative forms that privilege coherence as a means of formulating past events (107). In defining legal aesthetics, Manderson argues that it "is a method of interpretation and categorisation. . . . But at the same time it is epistemological and normative. It stakes a claim not only about the meaning of law but about why the law has developed in certain areas as it has and what the law ought to be" (Manderson 40). Legal aesthetics thus have broad cultural connotations through law's capacity, as an institution and in individual legal instruments, to act as a normative discourse "outside" courtrooms and parliaments:

Aesthetics affect the values of our communities, values which are in their turn given form and symbolism within the legal system. In the law, then, we find not only evidence of our beliefs but traces of the aesthetic concerns that have propelled them. But the converse also holds. The legal system is not merely the passive mirror of a worldview. The law is a kind of discourse whose outlook on the world takes its place as one (frequently privileged) way of perceiving events around us. If we look at a street march as an "exercise of first amendment rights" we may approve of it, while if we focused on the substantive issues behind the demonstration we might not. But either way we think of the question in terms of "freedom of expression" in part because that is how the law approaches the problem. The gaze of the law influences all of us: it defines a situation in a certain way and encourages us all to look at it likewise. (27)

Legal discourse can thus be understood as an aesthetic category, "a way of seeing and constructing the world," that is culturally significant as it "will tell us what a particular law or judgment actually means to a community and how it influences them" (28). In the space of the courtroom the formal aspects of these aesthetics are emphasised, with rules of evidence and procedure explicitly acting in culturally condoned ways to produce a narrative that is given the credence of truth in the form of a judgment. The procedural aspects of the trial aim to produce a specific form of narrative and so, reiteratively, produce a truth that is a consequence of those aesthetics. As Gregory Comnes notes, "in the common law, what separates good jurisprudence from bad is not truth but craft: the immersion in a large and demanding body of work with a commitment to scrupulousness and to the discovery of the right word, recognising that decisions rely as much on rhetoric as logic or dialectic in proving their claims" (359). This is not to say that such judicial decisions are necessarily illegal, or legally incorrect. Rather, because form, content, and the truth that they produce are so inextricable, legal narrative and rhetoric are determinative of good testimony, good judgment, and so good law.

The aesthetic forms that shape the trial both reflect and are constitutive of this idea of good law. Through an understanding of truth and the value of narrative that gives precedence to coherence and relies on the exclusion of certain stories, the trial utilises procedures that generate meaning through legal aesthetics. Law's procedures are the means of its aesthetics; they define the forms of legal narrative and, in so doing, shape the cultural ideas of justice, truth, and responsibility that law has been integral to constructing.

Many of the legal rights codified in the Canadian Charter of Rights and Freedoms at Sections 7-14 reiterate this aesthetic preference for certain types of stories and for valorised ways of telling them. Long-standing common law rules such as *habeas corpus*, the presumption of innocence, and the protection from self-incrimination, all attempt to balance state incursion on individual liberty with the regulation of a putatively criminal subject who "is in desperate need of correction to maintain the civil order and to save him from his own vices" (Kramer 392). The general prefacing section, Section 7, for example, enshrines "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Despite its seemingly vague, normative qualities, the meaning attributed to this section is primarily procedural, as determined by Justice Lamer's reasoning for the majority in the 1985 Supreme Court of Canada reference *Re B.C. Motor Vehicle Act*. For Lamer J., the broad guarantees of Section 7 are ascertained internally from law, contextualised by the terms of the Charter, and drawing on and guided by rights concepts derived from the legal system, including law's procedures. The ideologies that determine the nature of "principles of fundamental justice" under the Charter are thus, in Lamer's reasoning, "to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system" (503). So while Lamer asserts that "clearly, some of those sections [the Legal Rights sections of the Charter] embody principles that are beyond what could be characterized as 'procedural'" (503), they are nonetheless shaped by the law as "a system for the administration of justice" (503), and so by its formal, rhetorical, and procedural means of ascertaining legitimacy and truth. Thus, in *R v Seaboyer*, a rape shield law under the Canadian Criminal Code was struck down as overly broad because it unduly restrained the capacity of the accused to conduct his defence. In the court's interpretation, the procedural rule violated the principles of fundamental justice protected by Section 7 by amending the form in which evidence was to be presented at trial. As McLachlin J. held in her reasons for the majority, "Canadian courts, like courts in most common law jurisdictions, have been extremely cautious in restricting the power of the accused to call evidence in his or her defence, a reluctance founded in the fundamental tenet of our judicial system that an innocent

person must not be convicted” (139). In this instance the procedural limitation is held to have significant substantive consequences because it restrains the defendant’s capacity to completely represent events and so to establish an adequate defence. The Court’s judgment is thus a recognition of the importance of form to the creation of a coherent and legally meaningful narrative, and a restatement of juridical principle about the role of form in a just determination based on that narrative.

Section 11(d) of the Charter, which enshrines the right “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal” is therefore crucial to the administration of law. This right not only encodes how subjects before the law are to be understood and the context in which they can be judged, it also takes legal characterisations that are importantly formal and procedural—the accused whose innocence must be reinforced by the court until determined otherwise, the forum in which judgment can properly take place—and prescribes these understandings of fairness and legitimacy as normative for the Canadian nation-state. Necessarily reliant on judicial procedure and interpretation for its content, the Section 11(d) right does little to elaborate on how an “independent and impartial tribunal” might look, or how the presumption of innocence might be enforced in the context of such a tribunal. The Charter right instead leaves these interpretive matters to the courts, who have largely reproduced and validated the trial’s pre-Charter form as ideal, underscoring the values that adhere to the trial and its procedures as a site for the determination of legal truth. Like many of the legal rights in the Charter, the rights to a presumption of innocence and an independent and impartial tribunal cannot be separated from the legal institutions in which they originated. Rather, they reproduce those institutions in the context of rights, establishing them as an exemplary fora for the interaction between state and individual through their constitutionalised capacity to make authoritative determinations of legalised events.

The individual narratives that compose the trial must similarly be understood through the legitimating procedures of the common law. For example, testimony, the privileged form of evidence in the trial, depends upon the production of narrative cohesion for its credibility, what Grace Marks, in Margaret Atwood’s novel *Alias Grace*, describes as “a story that would hang together” (429). Individual testimonies rarely constitute an entire case, representing instead an aspect of a contested event that “is usually selective” (Gewirtz 7). Yet the individual coherence of these statements is essential to a case, speaking not only to a testimony’s veracity but also to that of a defendant’s or plaintiff’s case as a whole. Moreover, because it must be produced and proved, it is not simply, or singly, the telling of a story that constitutes testimony as an evidentiary form in the courtroom. Rather, testimony is a product of both witness and lawyer (as well as, at times, the judicial officer), wherein personal experience is re-produced as a meaningful, and potentially persuasive, legal narrative. Different forms of legal questioning produce different responses, and so different narrative meanings: the examination-in-chief is intended to first produce the witness’s testimony for the court in a compelling manner, while cross-examination seeks to undermine its veracity. But both these forms of questioning speak to the coherence of the testimony that is produced; the latter to interrogate it, the former to create it (or, at least, its appearance). Thus, in her study of narrative fragmentation in trials, Sandra Harris argues that “all courtroom testimony is necessarily fragmented by virtue of being conducted through question/answer sequences. . . . It is the control strategies of lawyers which are crucial in determining both the content and form of witness testimony” (55). Testimony as a form of evidence only comes about in this context, and the fragmentary nature of witness statements is either exacerbated, or made intelligible, by the formal legal rhetorical structures that produce them.

Through the advocate’s asking of questions and the replies of the witness, which in turn prompt further, different questions, the testimonial story can be understood as developing in a manner that is cumulative and contingent, a narrative formed through the improvised responses of each party to the other.² This apparently improvised form is thus discursively akin to a conversation, an interaction that comes from a process of taking turns and interpreting and responding to another’s statements. As such, a useful analogic analysis for the relationship between improvisation, form, and testimony can perhaps be found in Ingrid Monson’s metaphor of the conversation in *Saying Something*. For Monson, “when [jazz musicians] compare performance in the ensemble to ‘conversation,’ they refer to a specific genre of musical talk that requires listening carefully to the other participants” (85). While I don’t think that jazz improvisation can or should be bluntly extrapolated to legal testimony—Monson continues this sentence by stating that “the interpersonal character of this process is emphasised very clearly by the conversation metaphor, for what could be more social than a musical or verbal conversation” (85), and much testimony, constructed through adversarial means, maps uneasily onto this idea—there does remain a sense in which the analogy productively illuminates the processes by which testimony is constructed. As a conversation, antagonistic or co-operative, testimony is indeed responsive, with both witness and lawyer listening carefully to each other. In examination-in-chief, this conversation can be what produces a coherent statement, wherein the witness’s responses are shaped by the lawyer’s questions, “otherwise the witness might well have difficulty in speaking at all, or in constructing a coherent account” (Lane 241). None of this is to say that lawyers, witnesses, and judicial officers cannot mishear or misrepresent each other, reinterpreting statements in an improvised manner to suit certain rhetorical ends. Certainly, cross-examination is an adversarial practice predicated on a suspicious legal hermeneutics that aims, if not to mishear, then to undermine credulity in response to a witness’s statements. But even a contentious conversation

says something, and the role that testimonial conversations are interpreted as having is an essential part of the narrative of truth and the “principles of fundamental justice” that trials are idealised as upholding.

If improvisation shapes the creation of testimony, then it, or at least the meaning with which it is imbued, also carries through to the forms of knowledge esteemed by the legal structures of the trial. The relative values given to certain types of evidence over others reflect a preference for live, and allegedly unmediated, testimony. As Philip Auslander has noted, there are striking similarities between the hierarchies of value given to testimony by law, and arguments about the authenticity of a live performance and what is lost—or thoroughly differentiated—in any attempt to record or duplicate that performance. Hearsay, for example, when a witness recounts something of which she or he does not have direct experience, is excluded from the trial precisely because it is a mediated version of events, replicated by the witness from the experiences of another. Eyewitness or first-hand testimony, however, constitutes a performance of remembering by the witness (provoked by the lawyer’s questions) that is in turn understood as more authentic because the act of recollection performed is supposedly unmediated. What determines the authenticity of testimony, then, is the directness of the memory being recalled, its value said to lie in its capacity to be recollected. Indeed, as Auslander provocatively notes, “the essence of testimony is not the information recalled but the performance of recalling it in the courtroom, before the accused and the jury” (145). Memory, contingently and conversationally evoked by examination as testimony, thus becomes the exemplary form of evidence through its performance in the trial scene.

Such a privileging is not, of course, necessary or natural: to quote again from Auslander, “it should be clear that this respect for liveness is ideological and that it is rooted in an unexamined belief that live confrontation can somehow give rise to the truth” (144-5). Moreover, memory cannot be separated from its legal manifestations because the cultural meaning of memory has been shaped by law: “it is clear that memories do not summon the law by becoming visible or by being entered into discourse, because there is no moment at which a memory exists prior to its inscription in and by the law. The context of any memory has already been shaped by law as part of the phenomenology of daily life. In that sense, all memory is inhabited by the structures of law, is always already entered into legal discourse” (180). Like the determination of truth through competing narratives, memory is a cultural discourse that cannot be understood as distinct from its legal meaning. But this does not undermine its power or the importance it has to determinations of legal veracity. Rather, it underscores how tropes of improvisation might be read onto testimony in order to understand the valuing of evidence in court. Liveness is not necessarily improvisation. Yet within the trial, evidence is given in a manner that is preferably (although not exclusively) in person, and produced through a discursive form that relies on contingency and responsiveness and that is understood as having no pre-determined outcome. Even expert witnesses, speaking to scientific evidence and often lacking any first-hand knowledge of the specific events being tried, present their evidence by means of a testimony that is first evoked, and then interrogated, in the responsive manner that I have described as owing much to an improvisational ethos.

One fascinating consequence of this is that unlike the derogatory (and often racist and classist) understandings of improvisation as an instinctual practice that operates in the stead of “proper” training and skill (Ramshaw), the trial seems instead to be valorising the improvised, contingent production of testimony as essential to the construction of legal truth. If, according to both common law tradition and the protections of the Charter, responsibility is best determined in “a fair and public hearing by an independent and impartial tribunal,” and the privileged form of evidence in this forum is contingent, conversationally produced testimony, then the space of the trial would seem to be one in which improvised forms of narrative carry with them significant institutional weight. Moreover, even in the face of legal realities that overtly discount improvised practice—witnesses do not always first meet and discuss their stories with the lawyers examining them in the courtroom, and defence lawyers have access to certain prosecution evidence (and often vice versa) in advance of the trial that allows them to prepare for testimony—the *appearance* of improvisation through testimony and the recollection of memory remains and has force. These procedural appearances constitute the substance of the law, shaping it aesthetically, and reproduce a meaning that is deeply connected to a narrative form that glosses the disconnect Scheppelle notes of narratives more generally: “truth isn’t a property of an event itself; truth is a property of an *account* of an event” (2090). In a way, it doesn’t matter if the production of testimony is “really” performing improvisation in the courtroom. What is important is that judicial structures characterise the presentation of persuasive testimonial evidence as contingent and conversational, as collaboratively improvised testimonies that are sufficiently legally persuasive to form the basis of a judicial decision, and so legal truth.

Improvisation is a procedural necessity for the legal production of individual accounts of past events, but that function is not circumscribed by the space of the courtroom. Through their manifestation in formal rules that aim to test the veracity and coherence of witnesses’ memories, improvisatory practices create a valorised form of truth that is both important in the context of the trial and has meaning for how narratives of truth are understood socially. It is, as Manderson posits, part of a cultural aesthetics that cannot be disentangled from legal aesthetics, an understanding of the law as constitutive of other cultural institutions and practices. Reading the formal strictures of the trial is a means of interpreting legal aesthetics, and a recognition of law’s often invisible coercive power. While it may seem to inhabit

a discrete institutional space, then, the legal idea of “a fair and public hearing” is never distant. Instead, it is a perpetual presence, part of a complex of ideas that gives coherence to the narratives by which cultures are represented to themselves and to others. Understanding law’s forms, including the apparently improvised methodologies of testimony, can thus give us a means to know our narratives of truth; but it can also suggest how we might begin to critically engage with those narratives’ production, and to interrogate the presumptions and occlusions on which they are founded.

Notes

¹ This unifying sense of narrative is epitomised in Victorian multi-plot novels by writers such as Eliot and Dickens and maintains a presence in numerous contemporary works, including Rohinton Mistry’s *A Fine Balance*.

² My understanding of improvisational practice here is that while it is constrained by procedural forms—evidentiary rules determining what is relevant and admissible in testimony—there nonetheless exists “an openly responsive dimension” wherein testimony is produced (Ramshaw). This discussion is indebted to Sara Ramshaw’s Derridean reading of law’s improvisatory practices and potentials.

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