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Trial as theater

Mark I. Bernstein and Laurence R. Milstein

Dr. Hunter, an expert witness, sits on the witness stand. Six-year-old Jenny, a severely disabled, neurologically impaired child, is about to enter the courtroom.

"Dr. Hunter, I will ask my associate to bring Jenny into the courtroom now. While he assists Jenny, Dr. Hunter, would you please describe for the jury her neurological impairments?"

All heads turn to the rear of the courtroom as the doctor begins: "It will be readily apparent when Jenny walks in that she doesn't have adequate control over her muscles. She can't stand still. She has difficulty with fine motor coordination and with rapid alternating movements."

As the doctor's "voice-over" continues, the rear courtroom doors open, and Jenny struggles to walk down the aisle, her hands clutching a teddy bear, her arms supported by her mother and associate counsel. The stage has been set for a powerful moment in courtroom drama. Counsel has elevated the art of persuasion to its highest form. He has combined oral testimony with vivid visual imagery to create an understanding that transcends both the intellectual and the visual experiences.

Powerful moments such as this transform ordinary courtroom interactions into dramatic events. These unique moments not only teach on an intellectual level, they evoke passions on an emotional level. The ability to strike at a juror's sense of humanity, to engender identification with a client, sets a masterful attorney apart from a mediocre one. Indeed, the masterful attorney recognizes that every jury trial is a theatrical event.

World history demonstrates that trial as theater is not a novel concept. Trials in classical Greece were political events mandating a jury of hundreds. Political fortunes were made and destroyed at such trials.

Closer to home, the Salem witch trials in colonial America were as much concerned with ritual expurgation as with crime and punishment. No one could deny the theatrical component of the Chicago Seven trial, which was a metaphor for the antiwar riots and internal turmoil permeating America in the 1970s. More recently, the trials of Dr. Jack Kervorkian concerning physician-assisted suicide have been a platform to change the social fabric of America.

In Massachusetts, stage plays were illegal until the 1790s. Consequently, when the circuit court arrived in a county once or twice a year, it provided the primary source of live entertainment.[1] Since that time, Americans have looked regularly to the courts as a source of both drama and education.

America's public fascination with trials is strikingly similar to the popularity of classical Greek theater. Trial drama satisfies the same inherent cathartic needs as does stage drama. The juror's vicarious participation in human tragedy and suffering engenders personal pride in the victor's success or relief in the knowledge that the loser's problems were never really the juror's own.

Both trials and theater afford us the opportunity to scrutinize private details of others' lives and to learn from them. The world's fascination with the O.J. Simpson trial attests to our cathartic and voyeuristic needs. Domestic violence, money, fame, murder, interracial relations, government conspiracy, perjury—could Euripedes have devised a more intriguing plot? Once pulled in, our imaginations captured, we are ready to be educated and perhaps even enlightened.

Not every trial provides the opportunity to reexamine social norms on a grand scale. Nonetheless, each trial contains a challenge to educate and influence an audience of jurors. Like the dramatic actor, the trial attorney has a story to tell. To do so, the courtroom's enormous opportunity for persuasion is available. Similar to a live theater, the physical courtroom provides a conducive setting for audience receptivity and, ultimately, identification with the properly presented story, theme, and characters.

The courtroom, like an elaborate theater, is often adorned with polished oak walls and barriers. Elevated above all, wearing ritual black garb, sits the presiding au-

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thority to whom all eyes look for wisdom, discretion, and control.

The ceremonial proceedings further enhance the uniqueness of the jury experience. The court officer, similar to an usher, seats jurors and quiets other observers before the event begins. He then chants a mystical incantation: "All rise in the name of..."

The ceremonial procedure reminds jurors of the solemnity of the event. Similar to the theater audience, which hopes for a communal transformation, a shared immersion in the drama itself, jurors have been taken from their everyday affairs and placed in this ritualistic setting. The theater lights are dimmed, the court officer recites his incantation—and suddenly the audience and jurors are cast into a heightened mode of receptivity sometimes referred to as "suspended disbelief." The curtain rises, the judge ascends the bench, and each juror dons the cloak of a public official and awaits the start of the trial.

The majesty of the environment leads jurors to transcend personal biases and assume the consciousness of the "community." As Milner Ball noted, "The theatricality of judicial proceedings may foster just decisions through encouraging impartiality and aiding the mental judgment process."[2]

The similarities between trials and live dramatic theater are real. Both educate as they persuade by linking a series of events with appeals to human emotion, and both portray the "director's" clear vision of reality—a reality juxtaposed to historical "truth," which can be muddled and obtuse.

Great lawyers and great playwrights educate and persuade their audiences on a human level by capitalizing on the theatrical trappings of the event. They create scenes in which ordinarily passive viewers become active participants, consciously identifying with the mother, father, son, daughter, or spouse. The director-litigator who achieves a visceral response to his production has perfected his craft as a storyteller and advocate.

The perfection of the craft requires an awareness of the stage. The dramatic actor is in complete control of movements as they relate to the other actors, the lights, the props, and the actual set. The actor knows that to reach the audience in a visceral way, the message and its delivery must be flawless.

The masterful trial attorney recognizes that every jury trial is a theatrical event.

No exit

The courtroom is the stage where the trial attorney simultaneously serves as producer, director, and actor, while the jury observes. As producer, the attorney must ensure that all witnesses, exhibits, and presentation technology are present, prepared, and ready when needed. As director, she coordinates the sequence of witnesses and visual displays to educate the jury as she builds the story to its climax. As actor, she is constantly on stage, whether on stage center or not. In this way, the trial attorney differs from the stage actor, who periodically exits and reenters.

An awareness of the attorney's omnipresent role within the courtroom drama is critical, since the attorney's appearance and actions will play a key role in establishing credibility with jurors—even when the attorney is not directly addressing them. Credibility is assessed by an audience 55 percent visually, 38 percent audibly, and only 7 percent verbally.[3]

The attorney's "presence" is a significant unspoken quality; it incorporates attitude and technique. How does the attorney walk back to the chair? How does she sit? How does she listen to others who have assumed center stage? How does she interact with cocounsel and opposing counsel off the record? All of this is happening while the unsophisticated attorney believes she is offstage.

Awareness has greater implications at trial since, unlike theater, trial drama presents two producers, two directors, and two actors—each in direct and acknowledged conflict with one another. There are two productions and two stories being presented simultaneously—yours and your adversary's. If you are unable to help the audience transcend the words and achieve an emotional understanding of your theme, opposing counsel may do so, and thereby prevail.

Beyond the production of two stories, there are other differences between stage and courtroom drama. In courtroom drama, the jurors (no longer a passive audience), not the playwright, write the ending. Despite all the preparation, there is only limited control over the actual witness testimony, especially during cross-examination, always an unpredictable adventure. Regardless of how good the attorney is at telling the story, there is always the judge who may deny the answer to a certain question, or worse, call for a recess when the attorney's tale is about to reach its crescendo.

Some will emphasize these differences to resist the description of trial as theater: "I went to law school, not Juilliard. I don't have time to play games trying to reach the jury. I must focus on objections, statutes, impeachment, making a record, getting evidence in." However, as Roy Black noted at a recent conference, "Law school may have sharpened the mind, but it may have done so by narrowing its focus."[4]

The courtroom is not ultimately about issues and legal theories—it is about people and life. It is not about history—it is about rights, wrongs, and resolution of actual disputes.

Forceful ending

The skillful playwright ends each "act" with a powerful scene so that the audience has time to digest it. He coordinates the timing of the dramatic recess to achieve maximum impact.

The attorney-director must do the same. He must contemplate the sequence and manner of witness presentation, not merely to build and clarify the story but to ensure maximum comprehension of direct and cross-examinations. Just before the curtain or gavel falls, the audience and jurors are ripe for the internalization of new impressions. Jenny's counsel, Thomas Kline, understood this well.

"Dr. Hunter, would you please conduct a neurological examination of Jenny for the jury?" asks plaintiff counsel.

Dr. Hunter steps off the witness stand and moves toward Jenny. The attorney steps to the side. The judge, the jury, and even opposing counsel perceive the dimming of the houselights as a spotlight illuminates doctor and patient. They are no longer hearing testimony. They are participating in a medical examination:

Witness: Jenny is here, and she has promised that she will try real hard. We are going to stand very still, putting our hands at our sides.

(Jenny tries to stand still.)

Witness: Can you touch your nose for me, Jenny?

(Jenny tries to touch her nose.)

Counsel: Does Jenny just keep moving? Is she constantly in motion?

Witness: She is in perpetual motion except when she's asleep or watching the television.

Counsel: Do the motor impairments we just witnessed affect speech as well?

Witness: Yes. Rather than the speech being fluid with normal rhythm, it has a very skewed, abrupt, poorly coordinated flow.

(Jenny comes forward.)

Witness: So what should we say? Do you know where you live? Tell them where you live.

(No response.)

Witness: Can you say "Mary Had a Little Lamb"?

Jenny: Mary had a little lamb.

Witness: Its fleece was white as snow.

(Pause.)

(Jenny becomes hysterical.)

Witness: That's OK. Let's go back to Mommy. That's OK.

"That's all right," says plaintiff counsel as his assistant quickly escorts Jenny from the courtroom—exit, stage right.

Counsel resumes center stage by requesting a 15-minute recess to allow jurors to compose themselves. The jurors are no longer dispassionate passive observers. They have been pulled into Jenny's life.

The jurors have heard with their eyes and seen with their hearts. They were educated through direct participation in a neurological exam. Malpractice and breach of the "reasonable person" standard now have real and felt consequences. The jurors feel this pain along with their burden of decision as public officials.

The courtroom is not ultimately about issues and legal theories—it is about people and life.

Trials are heavily oral. Sworn oral testimony of fact and expert witnesses provides the foundation for the trial story. Unfortunately, law schools have inundated future advocates with the notion that law is primarily a profession of words. Law students have studied how subtle distinctions, innuendoes, and variations in syntax are the difference between a winning and losing argument, between innocence and guilt.

The stage director does not dispute this, however. Since theater is heavily visual, he recognizes that verbal and written subtleties tend to confuse his vision rather than clarify it. He understands that to convey the complete expression, it is better for others to see, not merely read or listen. A visual component to oral testimony provides the range of tools necessary to create juror empathy.

Visual tradition

Although the trial story is still primarily told orally, people have moved from a pre-Homeric oral tradition, through the Gutenberg print tradition, to today's visual tradition. TV has conditioned modern jurors to expect to receive information in a visually satisfying way.

A good playwright must also be a good teacher. The good teacher does not tell her students what to think—she shows them what to think.

A wonderful lesson in courtroom drama emerged, according to James McElhaney, from attorney Weymouth Kirkland's defense of a Chicago insurance company during the Depression.[5] Peck, a commercial sailor on Lake Michigan, was lost overboard and never found. His friends came forward with a life insurance policy, claiming to be the beneficiaries. To prove that Peck was dead, the plaintiffs miraculously located a star witness, a cook from another boat, who said he saw Peck's body floating in the water. Kirkland cross-examined the cook:

Kirkland: You were an old friend of Peck's?

Witness: Yes.

Kirkland: So there was no doubt in your mind when you saw that body floating by in Lake Michigan. It was Peck?

Witness: That's right.

Kirkland: What were you doing when you just happened to look out the porthole and saw Peck?

Witness: Why, I was in the galley, fixing dinner.

Kirkland: What part of dinner were you fixing?

Witness: Well, I was . . . let me see . . . I was peeling potatoes . . .

Kirkland: I see. You were down in the galley, peeling potatoes, when you just happened to look out the porthole and there was Peck?

Witness: That's right.

Kirkland: Did you tell your captain about seeing Peck?

Witness: I certainly did.

Kirkland: Would you tell the ladies and gentlemen of the jury when you told the captain you saw Peck?

Witness: Ah . . . well . . . it was the next day.[6]

Kirkland's questioning gave jurors reason to doubt the cook's veracity.

Kirkland's closing argument, as told by McElhaney, transformed the courtroom into a live dramatic event:

> Kirkland put a trash can in front of the jury. Then he got a chair and put it next to the can. Then he took a potato out of one coat pocket and a peeler out of the other. He put one foot up on the chair, and in the middle of final argument, Weymouth Kirkland started peeling a potato and whistling a tune.
>
> Then he looked out of an imaginary porthole and said, "What ho! What do we have here? Why, if it isn't my old friend, Peck. I must tell the captain about that tomorrow. Meantime, I will keep on peeling my potatoes."[7]

Kirkland, like most experienced trial lawyers, paid careful attention to stage management. He helped jurors to see the absurdity of the cook's testimony. He understood that a visceral experience would happen for the jury if he integrated his presence and visual imagery into the actual storytelling.

Every case can incorporate visual presentations to properly focus and refine the oral presentation. Visual demonstrations and displays will refine the message and will help jurors retain the information.[8] Professor Steven Goldberg suggests the following fundamental assumptions should be considered in preparing any courtroom drama:

- The manner of presentation is as important as the substance presented.
- The courtroom is a stage jurors can see even when no one is speaking.
- Evidence that can be seen has more impact—good or bad—than evidence that can be heard.
- If you capture jurors' eyes, you capture their minds.[9]

In short, people process information visually, are educated visually, and use visualization as a mechanism for retention.

Use of visuals at trial or in theater creates a uniform mental image, a "shared visual experience" for the audience. Any oral description of Jenny's condition and appearance produces differing mental images among jurors. However, her actual appearance and jurors' participation in her neurological examination forced all to share a communal experience.

In preparation for trial, the attorney-director must visualize the totality of the courtroom presentation—beyond the oral or intellectual perspectives. Standard blowups of photographs, documents, drawings, or charts have traditionally been used to great effect. Does the story lend itself to more sophisticated approaches such as computer animations or the use of a document camera to highlight critical details? Does the case warrant the cost involved with computer animation?

Three-dimensional objects and models cannot be overlooked. The "prop" can become an integral component of the scene. Kirkland's chair and trash can transported jurors to a boat on Lake Michigan.

Even traditional documentary evidence, if presented dramatically, perhaps with a document camera, can have a theatrical component. A document camera revolutionizes trial presentation by creating a communal event out of standard oral testimony—adding "visual" to "voice-over."

These cameras are composed of a built-in video camera aimed at the unit's base. Evidence placed on the base is instantaneously displayed on television monitors positioned throughout the courtroom or on a single large screen. The camera's "zoom" feature permits counsel to present critical details.

Counsel places a document on the base so the entire page is visible. The jury rec-

ognizes the document as a page from the medical chart referred to throughout the trial. Counsel zooms in to a signature scrawl at the bottom.

Counsel: Dr. Tidwell, would you tell the jurors whose signature is displayed on the screen?

Dr. Tidwell: That appears to be my own signature.

Counsel uses the zoom feature again, this time to focus on the culpable "600 mg" prescribed in the record. As the "600 mg" zooms into focus, it is 6 inches high and occupies a large part of the screen.

Counsel: Dr. Tidwell, would you please tell the jury what dosage you ordered?

All 12 jurors instantly recognize the significance of the event. The reading of the note becomes completely unnecessary—except to reinforce, through the defendant's own mouth, a fact jurors have already seen and understood..

Despite the similarities between courtroom drama and live theater, there are crucial distinctions. Jenny's counsel, Thomas Kline, and Weymouth Kirkland understood the crucial important differences between theater and courtroom drama. Real lives have been affected, and real people suffer the consequences of their actions.

Although courtroom drama is entertaining, it is not entertainment. It is and must always remain the living embodiment of community decision making in a democratic society. □

Notes

1. Hiller B. Zobel, *In Love with Lawsuits: Why Litigiousness Is a National Character Trait*, AM. HERITAGE, Nov. 1994, at 60.
2. Milner S. Ball, *The Play Is the Thing: An Unscientific Reflection on Courts Under the Rubrick of Theater*, 28 STAN. L. REV. 81, 107 (1975).
3. Albert Mehrabian & M. Weiner, *Decoding of Inconsistent Communication*, 6 J. PERSONALITY & SOC. PSYCHOL. 108 (1967).
4. Roy Black, Address at the Annual National Conference of the American Society of Trial Consultants, St. Petersburg Beach, Fla. (May 17, 1997).
5. James W. McElhaney, *Peck*, A.B.A. J., Nov. 1990, at 88.
6. *Id.* at 90.