Communication and Litigation

Case Studies of Famous Trials

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With a Foreword by Peter E. Kane

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Foreword

The study of communication in the field of law is one that has recently received a great deal of attention from both lawyers and communication scholars. One of the newer interest groups in the Speech Communication Association is the Commission on Communication and Law. New organizations have sprung up to provide academic consultants to the legal profession and to promote the interchange of ideas among those consultants. Some law schools have even included courses in communciation in their curricula. Communication in the law is a hot field.

However, for those like Janice Schuetz and Kathryn Holmes Snedaker who are familiar with the classical tradition in rhetorical theory, communication in the law is certainly not a new field. The origin of the study of rhetoric in Western culture is generally credited to Corax, a Sicilian theorist and instructor who flourished during the first half of the fifth century B.C.—over twenty-five hundred years ago. Corax focused his attention on legal disputes and instructed citizens, who at that time served as their own lawyers, in how best to prepare and present their cases. His ideas were based upon his observations and analyses of actual trial practices. Corax was thus observing and analyzing real trials, drawing theoretical conclusions based on that observation and analysis, and then instructing others in the use of these insights.

This volume by Schuetz and Snedaker is in the best tradition of the study of rhetoric as Corax first presented it. Like Corax, they have looked at actual trial practices and have analyzed those practices to arrive at theoretical understandings communicated to us through this volume that uniquely provides the reader with the entire intellectual process. Trial materials from celebrated court cases are presented. These fascinating narratives provide the foundation for the analysis and theoretical observations that follow. Finally, the reader is offered insightful commentary on Schuetz and Snedaker's work by communication scholars, legal practitioners, and in one case a participant in the events that Schuetz and Snedaker describe.

In this study the trial process is broken into five phases from opening statement to appeal of the trial court decision. For each of these five phases Schuetz and Snedaker have selected and developed a narrative from an appropriate historically important criminal case.

The cases—those of the defendants in the Haymarket riot trial, Bruno Richard Hauptmann, Sacco-Vanzetti, the Rosenbergs, Sam Sheppard—are familiar to most of us. These cases are part of our popular culture as well as, in one way or another, landmarks in the history of law in the United States. The nature of the rhetorical (persuasive) discourse in each of these five phases of the trial process is analyzed. Conclusions are then drawn, based on this narrative and analysis, regarding the expectations for the discourse at each of these phases and what the practitioners in each case actually did.

Two additional chapters at the beginning and end of the volume focus on more global issues that transcend particular phases in the trial process. The first of these looks at a compelling case with massive pretrial publicity—the case arising from John Hinckley's attempt to kill the president of the United States. While the topic of pretrial publicity has received much attention, no treatment is more clear and succinct than that provided here. The second, dealing with the Chicago Eight, develops the theme of trial as a form of theater, an important concept that is often overlooked even though trials have been a frequent subject for drama (*Merchant of Venice, The Crucible, The Caine Mutiny,* and many others). Daniel Berrigan even turned the transcript of one of his own trials into a successful play *(The Trial of the Catonsville Nine).*

What Schuetz and Snedaker have produced is that most difficult and most rewarding type of intellectual activity—a synthesis. Drawing on concepts from classical to contemporary, they have synthesized a communication theory that illuminates the actual trial activities presented. This theory is then joined to legal theory regarding appropriate trial practice at the various phases of trial that Schuetz and Snedaker consider. The resulting final synthesis brings together in a unified whole the best insights from the fields of both law and communication.

In traditional rhetorical theory the ends or goals of discourse are often identified as "to inform," "to persuade," and "to entertain." Janice Schuetz and Kathryn Holmes Snedaker have produced an additional level of synthesis by achieving all three of these ends simultaneously in a discourse that offers meaningful levels for response for both novices and experts in communication and law.

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Preface

The relationship between communication and law dates back to the early theories of Aristotle and Isocrates in the fourth century B.C. Students attending Aristotle's school of rhetoric learned how to prepare and deliver forensic (legal), deliberative (political), and epideictic (special occasion) speeches. The Roman teachers Cicero and Quintilian elaborated the Greek ideas about forensic and deliberative speaking in several formal treatises on rhetoric, which then served as the textbooks for the training of young men for careers in law and politics. During the Middle Ages, many of Cicero's principles of courtroom logic and evidence continued to be central ideas of the curriculum.

During the Renaissance, the curriculum for students of law used Ciceronian concepts but focused the content more on philosophy than rhetoric. Despite this shift, when the first law school in the United States opened at Harvard in 1756, the curriculum featured the study of Aristotle's *Rhetoric* and Cicero's *De Oratore*. Many famous legal practitioners, including Daniel Webster, Rufus Choate, and William Ewarts, studied rhetoric as a preparation for their distinguished legal careers (Oliver, 1965). As schools of law became more specialized, however, rhetoric gradually disappeared from the curriculum.

In this century, the study of communication in the courtroom is found in two broad categories of periodicals: social science journals and legal journals. The literature found in the social science journals consists almost entirely of experimental research examining, for example, the impact of defendant variables and witness characteristics on juror perceptions. In contrast, the material published in the legal journals typically includes hypotheses by advocates explaining their personal uses of trial techniques, rather than developing strategies based upon a systematic analysis. In recent years, however, there has been an increased interest in identifying strategies of successful courtroom communication.

This resurgence of interest in the relationship between rhetorical theory and the study of law is evident in the research of scholars in both disciplines (Mauet, 1980; Bennett & Feldman, 1981; Dicks, 1981; Rieke, 1982, 1986; Tanford, 1983). Trial lawyers also have shown new interest in communication. As former Supreme Court Justice Tom Clark noted: "Most trial attorneys are knowledgeable

of the law. Many, however, don't communicate well in the courtroom. They don't know how to construct persuasive oral arguments and don't know what kinds of techniques influence a judge or jury" (Frontes & Bunden, 1980, p. 251). Moreover, the late Irving Younger, well-known criminal lawyer and trial consultant, recommended that lawyers could learn a great deal about the strategies of successful courtroom communication by reading about historical trials. The responses by legal scholars and practitioners, following each of the chapters in this volume, point to the importance of communication to successful litigation. This volume contributes to this academic debate by directly applying communication theories in a legal context. Our goal is to illuminate how the critical analyses of celebrated trials can enhance understanding of both the traditional and contemporary connections between communication and law.

Goals and Content

The present volume explicates the relationship of communication to litigation through the analysis of trial discourse. The trial process functions as a sequence of persuasive arguments. This sequence begins with the media coverage of the trial; enters into the courtroom persuasion by way of opening statement, direct examination, cross-examination, and closing argument; and often culminates in appellate arguments. The entire trial operates as a persuasive unit, and yet each segment functions as a distinctive and identifiable part of the case.

We analyze one process of litigation in each of the seven historical cases—Hinckley, Chicago Anarchists (Haymarket), Hauptmann, Sacco-Vanzetti, Rosenberg, Sheppard, and the Chicago Eight. Each chapter uses a critical approach that integrates theories of communication with principles of advocacy.

The case study of the press coverage in the Hinckley trial (chapter 1) demonstrates how media coverage of trials may result in overt persuasive content in the form of slanted depictions, agenda setting, and social scapegoating. Understanding how the "opening statement" of the press persuades the public about the accused, attorneys, judges, witnesses, and evidence will aid litigators in jury selection, selection of theme, and presentation of the case.

Our rhetorical analysis of opening statement (chapter 2) demonstrates how effective opening speeches should preview the un-

derlying story structure of the case, which in turn establishes the perceptual framework for all subsequent persuasion in the trial. Specifically, the chapter on opening statement systematically reveals the preferred form, content, and style of effective opening statements.

The chapter on direct examination (chapter 3) distinguishes between narratives that are likely to persuade during this segment of the trial and those that are not. The chapter further contributes by delineating how the prosecution and defense should construct the stories, how direct questioning should be conducted, and why some stories are more persuasive for jurors than the competing narrative.

In contrast to the direct examiner who seeks to create a narrative, the strategies available to the cross-examiner are investigated in chapter 4. The chapter details the recommended approaches to cross-examination, and demonstrates how cross-examinations can be more persuasive by adoption of specific communication strategies and tactics.

Our analysis reveals participatory persuasion as the basis for effective closing argument (chapter 5). This analysis demonstrates how advocates can enhance the persuasive content of their closing speeches, communicating in ways that stimulate thought, mental activity, and sensory involvement.

The chapter on appellate brief writing (chapter 6) identifies the persuasive strategies underlying effective brief writing. Our approach reveals the components of effective arguments and demonstrates how these components can be manipulated in the effective advocate's brief.

The Chicago Eight chapter (chapter 7) considers the communicative universe of the courtroom, the complete courtroom drama—characters, plot, denouement, action, setting, as well as narrative. Understanding the trial drama makes sense of the trial interaction as a whole and demonstrates the importance of the assumptions that underlie the justice system.

This analysis results in a trade-off between depth and breadth. On the one hand, by analyzing only one part of each trial, we risk overlooking the whole process of that trial. On the other hand, by examining seven trials, using a unique theoretical perspective for each, we gain the advantage of a broader and more comprehensive investigation of the role of communication in the litigation process than otherwise possible.

Trial Selection

Each of the trials analyzed in this volume was selected according to several criteria. First, each of the trials qualifies as a sensational case because of the nature of the crime, the social and political affiliations of the defendants, or the questionable legal practices of the litigants, judge, jury, or media. Second, the cases represent different decades and hence different historical, social, and legal influences on the trial. Third, each of the trials marks an historical milestone in the legal process, showing the potential of the courts and the media for abridging the rights of the defendants to an impartial and public trial, due process, and freedom from prejudicial press coverage. Fourth, each of the cases demonstrates the important role that communication plays in the enactment of legal drama. Finally, our analysis shows that public opinion often influences the persuasion inside of the courtroom. Among the many trials in the last century that qualify as "sensational," the seven cases selected stand out as a representative sample in that they show diverse contexts, feature different decades, reveal unique persuasive strategies, and point to the impact of political climate upon the process of litigation.

Although the focus of our study is not on legal change per se, we recognize that the last century has witnessed a number of legal changes. Some of these changes are noteworthy. For example, at the time of the Haymarket and Sacco-Vanzetti trials, women were not allowed to serve on juries. In the trials prior to 1960, opening and closing arguments often consumed as much time as the advocates wanted, whereas contemporary judges often impose strict time limits upon advocates' speeches. Before current laws required that jurors be summoned from voter registration rolls, judges could constitute juries from meetings at a local lodge, as was done in the Sacco-Vanzetti case. Prior to the Miranda laws, Sacco and Vanzetti and the Rosenbergs could be interrogated and forced to disclose self-incriminating evidence without their attorneys present. The police's ransacking of the Hauptmanns' home and the prosecution's withholding of evidence from the defense in the Lindbergh case would not have occurred under present laws. Prior to the restraints on media, mandated by the Supreme Court in the Sheppard decision in 1966, the press covered trials with very little concern for the defendants. In contemporary cases, defendants would not be brought into the courtroom in cages as Sacco and Vanzetti were in 1921. Under current Codes of the American Bar Association, litigants and

judges would not talk to the press prior to and during the trial, as they did in Haymarket, Sacco-Vanzetti, Hauptmann, Rosenberg, and the Chicago Eight cases. From the time of the Haymarket case until the Hinckley trial, the law has evolved to give greater protection to the rights of the accused.

Because statutes and legal practices evolve over time, the actions or procedures in historical cases might seem to contemporary readers to be obvious infractions of the rights of defendants. In fact, however, these actions were routine practices at the time of the trial. Our analysis necessarily incorporates contemporary legal assumptions and communication practices. However, when pertinent, we have noted the legal norms and practices that existed at the time the trial took place.

Rhetorical Criticism of Narrative

Rhetorical criticism is our method of analysis. This method seeks to understand how the symbols used within the trial or in discourse about the case persuade audiences. The focus of this method of criticism is on rhetoric, persuasive discourse. In its broadest sense, Wallace (1971) defines rhetoric as the "art of discourse" (p. 3). Nichols (1963) clarifies the definition, noting that "rhetoric is the practice of the verbal mode of presenting judgment and choice, knowledge and feeling" (p. 7). The "Report of the Committee on the Scope of Rhetoric" (1971) broadens the definition further claiming: "Rhetorical studies are properly concerned with the processes by which symbols have influence on beliefs, values, attitudes, and actions" (p. 208).

We use the word "rhetoric" as synonymous with persuasive communication. Rhetoric includes verbal and nonverbal symbols that influence beliefs and attitudes, judgment and choice, and knowledge and feeling. More specifically, this analysis of litigation processes looks at rhetoric as it occurs in the narrative arguments found in the press' reconstruction of the arrest, indictment, and trial; the prepared speeches of advocates; the questions and answers between advocates and witnesses; the appellate briefs of advocates and legal opinions of appellate judges; and the complex dramatic interaction within the trial as a whole. It is not surprising that legal philosopher Chaim Perelman (1963, 1967, 1980) recommends the law be interpreted in terms of rhetorical choices that incorporate the values and understandings of the audiences addressed by litigators.

Each chapter investigates in three phases the elements of persuasion with the litigation process. First, the chapter describes the trial and the circumstances in which it occurred. The background information is followed by an explanation of a theoretical framework accounting for the choices made by advocates in that particular unit of the trial. Second, each chapter analyzes one segment of each trial by comparing the theoretical framework to the communication prior to or during the trial. Finally, each chapter evaluates one part of the case, judging its merits and suggesting how the conclusions might assist contemporary legal or communication practitioners in understanding the trial persuasion.

In particular, the focus on persuasion identifies the situational factors that produce the form, style, and content of the discourse. This approach is distinctive in several ways. First, it differs from typical works on celebrated trials in that it is not just a description of the trial nor a systematic history of the trial given in an attempt to justify or debate the verdict. Our purpose is not to discern the guilt or innocence of the parties involved. Instead, we seek to understand how the public opinion of the era enters into the trial and to identify how the communicative practices work. Quite simply, our goal is to understand how each part of the trial functions as persuasion and, in doing so, give a glimpse of the difference between the ideal of what should occur and the reality of what actually takes place.

Second, our analysis attempts to illuminate how theories of persuasion contribute to an understanding of all aspects of the practices associated with litigation. Most legal scholars develop theories of trial advocacy simply from the standpoint of the practitioner. Tanford (1983), an exception to the usual practice, recognizes the contribution of the other disciplines to advocacy, but his work does not apply these theories to legal discourse.

Finally, the method used here is analytical rather than merely descriptive and seeks to answer the question: How does trial discourse work as persuasion? The volume investigates the adequate and deficient aspects of the choices, constructions, and uses of the discourse prior to or during the trial. By noting the factors that make the persuasion strong or weak in each case, we make recommendations in each chapter about what contemporary practitioners can learn from the successes and failures of the litigators.

The communication prior to and during the trial takes the form

of narrative persuasion or storytelling. Fisher (1984) defines narrative in general as "the words and/or deeds—that have sequence and meaning" for others (p. 2). If we apply Fisher's definition to the courtroom, the words and deeds have order and meaning for the press, attorneys, witnesses, accused, jurors, and judge. The litigation stories feature several storytellers, stories, and story listeners. In the pretrial phase, the press tells the story through their medium to the public. Inside the courtroom, the advocates and witnesses tell their story through the opening statement, direct and cross-examination, and closing argument. The judge, jurors, and public listen to the stories given inside the trial. As storytellers, the goal of the press, advocates, and witnesses is to develop narrative accounts that are corroborated, relevant, consistent, and probable. In particular, the story is the message jurors use to decide the guilt or innocence of the accused.

Story has several defining traits. According to Chatman (1978) the first trait is content, that is, the chain of events or actions. The events, actions, and happenings of litigation stories pertain to the facts of the case and point to the charges of the indictment. The second trait, according to Chatman (1978), consists of existents, the characters and setting of the story. In stories relating to the trial, the existents include the people and places associated with the alleged criminal actions and all of the actors holding information relevant to the indictments. In particular, both the press and the advocates seek information about the times, places, people, and relationships that pertain to each case. The final trait is the discourse (Chatman, 1978), the linguistic means by which the content and the existents are presented by those who tell the story to those who listen and evaluate the accounts. The discourse includes descriptions of people, places, and things; claims of fact and the inferences and evidence presented in support of the arguments; refutation and rebuttal of others' stories; instructions about courtroom rules and issues of law; and the enactment of the crime story in the external and internal dramas within the trial.

Our critical analysis focuses on story as rhetoric as it investigates the role of narrative in litigation processes. Although each chapter is independent of the others, the theory we develop for each segment of one trial is generalizable and can be applied to the parallel segment of the other trials in the volume. However, because of the unique circumstances and indictments of each case, the application of the theory will differ slightly with each individual case.

Organization

The following chapters are organized according to the chronology of the trial process: pretrial press coverage in the Hinckley trial (1982), opening statement in the Chicago Anarchists (Haymarket) case (1886), direct examination in the Hauptmann case (1935), cross-examination in the Sacco-Vanzetti case (1921), closing argument in the Rosenberg case (1951), appellate argument in the Sheppard case (1954–66), and trials as drama in the Chicago Eight case (1969). The chronology emphasizes the story and how that story is disjointedly presented in the media, prefaced in opening statement, elaborated in direct examination, refuted and reshaped in cross-examination, reemphasized in closing argument, validated or invalidated by appellate arguments, and carried out in the dramatic theme of the trial as a whole.

Since the book stresses the communicative perspective, we asked well-known scholars and legal practitioners to comment on the chapters from their perspectives. Their responses point to experiences and perceptions that are not likely to emerge from an analysis of the transcripts, such as the historical changes in the law, the adverse conditions under which defense attorneys must present a case, the personalities of the litigants, the importance of preparation that occurs prior to the trial, and the poetic perceptions of a litigator about the case in which he served as one of the defense attorneys. These insights add more depth to our conclusions and provide an additional interpretive point of view for our readers.

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