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RUNNING AWAY WITH THE CIRCUS: UNTAPPING THE SUBVERSIVE POTENTIAL OF CIVIL LITIGATION'S NARRATIVES

*Susan Bandes**

It is difficult to imagine a more pleasurable academic task than commenting on papers by Professors Susan Silbey, Patricia Ewick, and Lawrence Friedman. Their thought-provoking and delightful papers, Ewick and Silbey's *No Laughing Matter: Humor and Contradictions in Stories of Law*,¹ and Friedman's *Lexitainment: Legal Process as Theater*,² provide the type of opportunity commentators always hope to encounter. The authors explore a common set of issues in diverse contexts, each article enhances the other in surprising ways, and the issues they raise are endlessly fascinating.

Ewick and Silbey continue their inspiring work on legal storytelling. In their wonderful book, *The Common Place of Law*,³ they provided a tremendously helpful typology for studying the stories people tell about the role of law in everyday life.⁴ The authors identified three categories of law stories (before the law, with the law, and against the law) which, they explained, may act in concert to reinforce the status quo.⁵ However, the authors posited, where significant imbalances among these three categories exist in a structure, that structure becomes vulnerable and more open to structural transformation.⁶ Thus, a grand narrative of law as just, impartial, and majestic would be far more vulnerable to attack if it did not exist side by side with more pragmatic and cynical counter-narratives about playing games with and against the law.⁷ As I understand Ewick and Silbey's theory,

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1. Patricia Ewick & Susan Silbey, *No Laughing Matter: Humor and Contradictions in Stories of Law*, 50 DEPAUL L. REV. 559 (2000).

2. Lawrence Friedman, *Lexitainment: Legal Process as Theater*, 50 DEPAUL L. REV. 539 (2000).

3. PATRICIA EWICK AND SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (1998).

4. *Id.* at 1-17.

5. *Id.* at 47-49.

6. *Id.* at 45-46.

7. *Id.* at 230-31.

these counter-narratives (which I would refer to as anecdotes)⁸ act as a foil, or even a safety valve, that enables us to accept the law as a majestic and impartial ideal from which we stray fairly often, but which is still attainable (and indeed still exists, somehow above the fray).⁹

Thus, for the three general narratives Ewick and Silbey identify to remain hegemonic, they must be seen as in some way operating on separate tracks.¹⁰ The narratives are reconcilable only because the more profane or subversive stories are separated from each other, and from the idealized story, in time, space, and meaning.¹¹ This insight has been tremendously helpful to me in understanding the workings of narratives of police brutality, for example. The argument might be that a grand narrative of a well run and law abiding police department can be maintained as long as it assimilates the anecdotal data of “a few bad apples.” However, a grand narrative which rejects and fails to assimilate any anecdotal data, or a continual series of “bad apple” anecdotes with no narrative unity, would be vulnerable to change. In other words, the grand narrative of the well run police department would be far less stable if it did not exist side by side with more pragmatic and cynical counter-narratives about the few bad cops playing games with and against the law. The function of the aberrational story as a safety valve can be viewed in some of the reactions to the King, Louima, and Diallo incidents to the extent the incidents are dismissed as, essentially, the exceptions that prove the rule.¹² Nevertheless, at times it seems we are moving, albeit intermittently, toward a more sustained critique of systemic police brutality.¹³ There is a slowly dawning consciousness that these anecdotes are not an aberration, but are in many respects connected and representative.¹⁴ If it is true that this subversive story is becoming more widely understood, what conditions have permitted this to occur?

The crucial issue that Ewick and Silbey continually engage is: why do stories sometimes preserve and sometimes subvert the status quo?¹⁵ The question can be broken down more precisely. First, why

8. Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 *BUFF. L. REV.* 1275, 1309-17 (2000) (discussing the use of anecdotes in storytelling).

9. EWICK AND SILBEY, *supra* note 3, at 226-28.

10. *Id.* at 232-33.

11. *Id.* at 233-34.

12. See Bandes, *supra* note 8, at 1283-88.

13. *Id.* at 1284.

14. See, e.g., Bob Herbert, *A Brewing Storm*, *N.Y. TIMES*, February 11, 1999, at A33 (discussing widespread protests against Diallo shooting and police brutality in New York City).

15. Ewick & Silbey, *supra* note 1. See generally EWICK AND SILBEY, *supra* note 4 (discussing legal stories and their effect on society).

is the dissonance they describe, between the traditional story about the way the world works and the little counter stories that challenge it, sometimes a force for change and sometimes a force for preservation of the status quo? Second, are there certain genres that are inherently suited to subversion or to helping perpetuate the status quo? If not, what conditions need to exist, or what forces need to be brought to bear, in order to tap the subversive potential of particular genres?

These are among the important questions Ewick and Silbey seek to address as they turn their sights to the question of jokes and humorous stories as hegemonic or subversive narratives.¹⁶ Jokes and humorous stories, as they point out, raise these questions in an interesting context.¹⁷ One of the things Ewick and Silbey's paper does so carefully and well is to be very nuanced about context.¹⁸ As they explained in their seminal article on subversive and hegemonic legal narratives, there is something inherently hegemonic about the very process of storytelling: "[N]arratives may actually be complicit in constructing and sustaining . . . patterns of silencing and oppression"¹⁹ To a large extent, as we learn from literary critics such as Seymour Chatman and Martin Price, this is because each genre generates a set of expectations that must be met.²⁰ In order for a story to sound coherent and well-formed, in other words for it to be considered a "good story," it must conform to the culturally imbedded narrative expectations of its genre.²¹

Jokes are a wonderful focus for considering the tension between the subversive and the hegemonic because they announce themselves as subversive, as "upending power relations;"²² and yet are tightly patterned and formulaic. The joke, at least the classic joke, has a highly traditional pattern. In order to appear coherent, to appear pleasing, and to create that satisfaction for both teller and listener that we all want from a joke, it must confine its little subversions and twists within that structure. Thus, a paradoxical question arises as to

16. Ewick & Silbey, *supra* note 1.

17. *Id.*

18. *Id.*

19. Patricia Ewick and Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 *LAW & SOC'Y REV.* 197, 205 (1995).

20. SEYMOUR CHATMAN, *STORY AND DISCOURSE* 18 (1978). See also Martin Price, *The Irrelevant Detail and the Emergence of Form*, in *ASPECTS OF NARRATIVE* 70 (J. Hillis Miller ed., 1971).

21. See CHATMAN *supra* note 20, at 21-22 (discussing narrative coherence as a concept that usually requires a story to follow conventionalized norms or risk appearing "ill formed"). See also Price, *supra* note 20, at 70-71; Hayden White, *The Value of Narrativity in the Representation of Reality*, in *ON NARRATIVE* 1, 15 (W.J.T. Mitchell ed., 1981).

22. Ewick & Silbey, *supra* note 1.

whether jokes are tiny revolutions, as in the Orwell quote,²³ because of their little subversions, or are instead little safety valves, bread and circuses, that allow us to let off steam about existing injustices and hierarchies, and then continue to accept those injustices.

Helpfully, Ewick and Silbey distinguish these highly patterned jokes from more spontaneously structured humorous stories. Such stories cannot call upon the same shared sense of coherence, but because spontaneous stories are more particularized, they can provide flashes of insight that a joke cannot, at least if the story “works” for its audience.²⁴ What is interesting to contemplate is the following: Ewick and Silbey claim that jokes level hierarchy, challenge the inevitability of the world as it is, and allow the weaker combatant to win, imparting the quality of justice.²⁵ Yet, the genre is highly patterned, and in that sense—the sense that the genre gets its kick from drawing on familiar cultural and narrative expectations—it is inherently conservative. So can the genre be used to tell jokes which are not only little subversive flashes, but also somehow part of a sustained critique, a subversive narrative stream? Conversely, humorous stories are not confined to such strict notions of narrative coherence, and thus, the genre can be used subversively. However, the risk of losing the audience is higher due to the very lack of a shared expectation. So, is the medium more or less conducive to subversion? And under what conditions?

Neither jokes nor humorous stories may be ideally structured for generating sustained critique in the sense that they both tend to be self-contained and focused on individual incidents. Law jokes, for example, tend to be about a series of disconnected, individual depredations, and not about public failures.²⁶ Law jokes do not really seem to question deep structural imbalances.²⁷ Jokes are intermittent, discontinuous, deliberately forgettable, and not connected in any sequence that is designed to threaten the hegemonic narrative of law.²⁸ Such jokes are temporary subversions for the powerless.²⁹ Ewick and Silbey hold out some hope that humorous stories, which are less patterned, more individualized, and less distancing, are more able to “confront and engage, rather than avoid the internal contradictions of law.”³⁰ However, Ewick and Silbey offer an unsettling insight.³¹

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. Ewick & Silbey, *supra* note 1.

29. *Id.*

30. *Id.*

When those who perceive themselves as powerless tell stories about their temporary resistance or triumph over injustice, they tend not to find those stories very funny at all.³² These storytellers correctly perceive their stories as amounting to “momentary and licensed acts of resistance,” which will be righted quickly, “all the more secure for having been mocked.”³³ Thus, Ewick and Silbey leave us with far more insight about the role of storytelling in social change, but, quite appropriately, remind us that there is much more work to be done in identifying the conditions for sustained subversive critique.³⁴

Professor Lawrence Friedman’s paper takes us more directly into law’s most conventional and archetypal setting, the courtroom.³⁵ In contrast to Ewick and Silbey, Friedman’s focus can be said to be on the grand narratives of law, the stories Ewick and Silbey might classify as “before the law.”³⁶ Friedman posits that in more homogenous times, trials told a story that was educational, or didactic, a story that imparted moral lessons and helped mold societal values.³⁷ Although these stories always had a theatrical element, it was subservient to the didactic function. Friedman argues that the balance is decidedly shifting, for the worse, and that the theatrical aspect of trials seems to have subsumed their didactic function.³⁸ Friedman, unlike Ewick and Silbey, is concerned more with the transmission than the subversion of cultural norms. Nevertheless, Friedman evinces a similar concern with the conditions needed for imparting “a good story.”³⁹ As he suggests, there are complex reasons why trials cannot be used as uncomplicated means of transmitting moral values.⁴⁰ In part, the increasing lack of shared cultural understandings has complicated the trial’s didactic function. Transmitting a coherent story requires shared notions of coherence and meaning.

31. *Id.*

32. *Id.*

33. *Id.*

34. Ewick & Silbey, *supra* note 1.

35. Friedman, *supra* note 2.

36. EWICK AND SILBEY, *supra* note 3, at 45. Martha Umphrey, in her wonderful article on the “trial of the century” of Harry Thaw, who was accused of murdering Stanford White, argues that the trial is “a distinctive domain for the production of legal meaning . . . one that mediates the relation between formal legal rules and the unofficial world of norms, customs, common sense, and social codes.” Martha Merrill Umphrey, *The Dialogics of Legal Meaning: Spectacular Trials, the Unwritten Law, and Narratives of Criminal Responsibility*, 33 *LAW & SOC’Y REV.* 393, 394-95 (1999).

37. Friedman, *supra* note 2.

38. *Id.*

39. *Id.*

40. *Id.*

Of course, the line between the didactic and the theatrical, as Friedman recognizes, is by no means fixed.⁴¹ Friedman notes with apparent chagrin that the line is becoming increasingly blurry,⁴² but it would be interesting to explore more fully what exactly is lost when the didactic gives way to the theatrical.⁴³ The term "didactic" has perhaps acquired an unfairly negative connotation, but it does suggest a rather mechanical passing on of unquestioned wisdom, rather than a more active leading to knowledge. For Friedman, the didactic function seems to be exemplified by the Puritan shaming penalties whose moral message was well understood by the members of an insular and homogenous community.⁴⁴ Arguably, these were not educational in the sense that they pushed any in the audience to grasp new connections, or to come to knowledge on their own.⁴⁵ Rather, the penalties were theatrical, in the sense that they traded on shared and culturally imbedded narrative expectations about motivation, good and evil, causality, a fitting ending, and a proper moral.⁴⁶ They did not look very theatrical, because that which achieves verisimilitude never does.⁴⁷ They just looked like the status quo.⁴⁸

The Chicago Seven Trial was overtly theatrical, deliberately subverting our expectations about how a trial should progress, deliberately telling the subversive counter-story underlying the grand narrative of a federal trial in Judge Julius Hoffman's courtroom.⁴⁹ However, as Friedman allows, such an undertaking, successful or not, is an attempt at education and an attempt to wrest the monopoly on the educational function away from the powerful.⁵⁰ The Chicago Seven Trial, in a sense, encapsulates the paradox discussed above. The trial attempted to educate by drawing our attention to the conventions and limitations of the medium, but such an effort can only succeed to the extent that it communicates with its audience. Friedman speculates that much of the audience was "disgusted" by this brand of "guerilla theater."⁵¹ The question is whether it is possible to use a conservative medium to convey a message of change, and to make that message heard.

41. *Id.*

42. *Id.*

43. Friedman, *supra* note 2.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. Friedman, *supra* note 2.

50. *Id.*

51. *Id.*

As Friedman reminds us, our understandings about trials are now irrevocably tied up with television, the medium through which we most often observe or learn about such events.⁵² Thus, he argues, the didactic function has fallen victim to the characteristics of the medium through which the message is so often transmitted.⁵³ We are in a complex feedback loop in which our expectations about trials shape, and are shaped by, what we see not only on “real” televised trials, but on the trials that are offered solely for entertainment.⁵⁴ Identifying this problem brings us back to an aspect of the core question, whether there is something inherent in the television medium that creates or channels a particular set of expectations. Television may be a medium that skews the message from the didactic to the theatrical, or from the subversive to the hegemonic. In the book *The Sound Bite Society*,⁵⁵ Jeffrey Scheuer argues that television, for both intrinsic and extrinsic reasons, is a conservative medium.⁵⁶ Scheuer argues that television is ahistorical, fragments information into isolated, dramatic particles, and resists longer, more complex messages.⁵⁷ Television is inhospitable to abstraction, systemic issues, ambiguity, complex causal links, and non-binary thinking, and thus obfuscates many of the understandings that underlie progressive reform.⁵⁸ Thus, television will tend to privilege a notion of justice that includes clear good guys and bad guys, and quick, definitive closure over a notion that includes ambiguity and the decidedly unfilmic demands of due process.⁵⁹

Nevertheless, these limitations are, as Scheuer is careful to illustrate, extrinsic as well as intrinsic.⁶⁰ The question about the medium of television, the medium of jokes and humorous stories, and the medium of the trial is essentially the same question. We can begin from the assumption that narrative coherence is itself a conservative force, in that it creates verisimilitude and its sense of meaning by drawing on familiar cultural and narrative expectations. The next task is to discern how to reveal hidden linkages without losing a sense of narrative coherence and believability. We as storytellers, judges, and activist

52. *Id.*

53. *Id.*

54. See Susan Bandes & Jack Beermann, *Lawyering Up*, 2 THE GREEN BAG 5, 14 (1998).

55. JEFFREY SCHEUER, *THE SOUND BITE SOCIETY: TELEVISION AND THE AMERICAN MIND* (1999).

56. *Id.* at 10.

57. *Id.* at 121-23.

58. *Id.* at 126-27.

59. Friedman, *supra* note 2; Bandes & Beermann, *supra* note 54, at 13-14.

60. SCHEUER, *supra* note 55, at 8-23.

scholars must find a new language of activism,⁶¹ or at least reconstitute the media in which we work to make them more hospitable to the discourses of reform.⁶²

61. See Francesca Polletta, "It Was Like a Fever . . ." *Narrative and Identity in Social Protest*, 45 *SOC. PROBS.* 137, 154-55 (1998) (discussing features and possibilities of activist narratives).

62. See Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 *YALE J. OF L. & HUMAN.* 201, 219 (1990).