Introduction

This book grew out of a long attempt to understand an epiphany, one I have experienced and that seems often to occur in American trial courts. In the course of trial there emerges an understanding of the people and events being tried that has a kind of austere clarity and power. This experience surprises and "elevates" the participants, including the jury. The grasp of what has occurred and what should be done seems to have a kind of comprehensiveness, almost self-evidence, of which it is extremely difficult to give an account. It involves factual and normative determinations of very different kinds. The evidence and legal doctrine do not together *determine* the result in any logical sense, there is considerable freedom at play, yet the best course is apparent. The certainty that emerges is often less about the accurate representation of a past event—what I will call a "screenplay"—than it is a kind of knowledge of what to do. Judgment as it occurs at trial is a kind of skillful performance of a particularly complex kind. And those in a position to know seem almost universally to agree that the level of performance, day in and day out, is very skillful indeed.

The key to understanding this high level of achievement is the trial itself, a "consciously structured hybrid of languages" and performances, to which relatively little attention has been paid. This study is that *fides quaerens intellectum*, an account of the felt certainty that emerges in the course of the trial. Along the way, I rely on many different sources, but primary among them is a careful and detailed examination of the linguistic practices and performances that the trial comprises. My aim is to see how they come together to achieve the minor miracle of a convergence on and display of the practical truth of a human situation. Along the way, too, I summarize the evidence that it does indeed happen.

This is something quite different from an empirical study of jury "behavior," important as such studies have been. As I explain in chapter 5, jury studies are of very different sorts. Some involve the search for independent variables extrinsic to the trial itself—race or class, for example—that explain and predict jury determinations, through the mediation of empirical generalizations or "covering laws." Others, usually in the cognitivist tradition, focus on factors intrinsic to the trial, concluding that "the evidence" is the most important determinant of jury behavior, but inevitably describe that "behavior" as the "response" to the trial as the "stimulus event." Both sorts of studies seek to achieve causal explanation, or at least correlations with some predictive power. Though the empirical investiga-

tors themselves almost always conclude that juries are "remarkably competent," their methods cannot allow them to go very far in explaining the basis for this obviously normative judgment.

What is necessary is not causal explanation but what Richard Bernstein has called a "rational reconstruction," an attempt to show how the languages and practices of the trial actually achieve their human purposes. In this effort, we conceive of the trial not as a set of objectively considered stimuli or even bits of information, seen through the appropriately objectivizing eye of the social scientist, but as itself a mode of intelligent inquiry and responsible practice. Its purposes are quite different from those of most social scientific investigation, but they are equally an expression of human intelligence, one that puts the jury in touch with both cognitive and moral sources.

My goal here is close to what Hannah Arendt called "thinking what we do," that is, to raise to a higher level of self-consciousness the normatively based practices in which we are actually engaged. This goal is consistent with that most traditional, and paradoxical, of philosophical goals—to think the concrete. One important approach to this task has been, again to use Arendt's language, a "linguistic phenomenology," a careful, attentive description, ideally without presuppositions, of what we actually do, not in the style of a suspicious unmasking, but in order to identify the distinct principles and "spirit" that inform each important realm of human practice. This is a real task, because, as I show at length below, our inherited concepts almost always distort, and usually impoverish, such practices.

My enterprise is, then, an interpretation of the trial. Because it is an interpretation, I cannot compel the reader to accept my conclusions:

> There are strict dialectics whose starting point is or can reasonably claim to be undeniable. And, then there are interpretive or hermeneutical dialectics, which convince us by the overall plausibility of the interpretation they give.[1]

Thus my view of the trial will be justified only "by the mutual support of many considerations, of everything fitting together into one coherent view."[2] Such an interpretation requires me to consider the trial from a broad range of perspectives, to walk around it and look at it from every side—doctrinal, social scientific, tactical, ethical, epistemological, institutional, and purely descriptive. Though I draw on a wide range of humanistic, social scientific, and strictly legal sources and try to be respectful of the integrity of those approaches, I also try to keep my inquiry disciplined

[1] Charles Taylor, *Hegel* (Cambridge: Cambridge University Press, 1975), 218.
[2] John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), 579.

by a consistent attention to the thing itself: the actual practices of the trial. So description is central, and interpretation closely tied to it. I ask the indulgence of the practitioners of these important disciplines for my employing them as handmaidens to the central inquiry.

Thus the inquiry is not driven by the scientific ideals of "reductionism, causal explanation, and prediction."[3] I follow the advice here of a distinguished social psychologist, Jerome Bruner, that these ideals "need not be treated like the Trinity" and that "plausible interpretations [are] preferable to causal explanations, particularly when the achievement of a causal explanation forces us to artificialize what we are studying to a point almost beyond recognition as representative of human life."[4] I argue instead that a well-tried case produces a form of concrete universal where an event and its meaning are transparent to each other. It is precisely in giving an account of the forms of human meaning that the scientific paradigm is at its weakest.[5] What Arendt said of political understanding generally is also true of the trial. To understand the trial is to deploy "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. . . ."[6] My goal is to have the reader come away from this study with something akin to the kind of knowledge that an experienced trial lawyer or judge has in his or her reflective moments: not scientific knowledge, but "finding a footing" or "finding one's way around."[7]

My sources for what follows are varied. The first is over twenty years' experience in the trial and appellate courts, state and federal, litigating civil, criminal, and administrative cases, both individual and class actions. In particular, after deciding to pursue this study, I focused in a more intense way on four fairly complex cases in which I served as trial counsel: one civil and three criminal, two bench trials and two jury, three state and one federal. Most of the examples and much of the interpretation of the meaning of the trial's structure throughout this book come originally from those cases. Here I relied on my own judgments of the meaning of

[3] Jerome Bruner, *Acts of Meaning* (Cambridge: Harvard University Press, 1990), xiii.

[4] Ibid., xiii. On the inevitable limitations of the experimental method in the study of the trial, see Norman Finkel, *Commonsense Justice: Jurors' Notions of the Law* (Cambridge: Harvard University Press, 1995), 58–62. On the relative failure of the standard forms of causal explanation of jury verdicts, see Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* (New York: Basic Books, 1994), 143–76.

[5] Bruner, *Acts of Meaning*, 2–11.

[6] David Luban, *Legal Modernism* (Ann Arbor: University of Michigan Press, 1994), 206.

[7] Herbert Dreyfus, "Holism and Hermeneutics," *Review of Metaphysics* 34 (1980): 12. The first phrase is Heidegger's, the second Wittgenstein's.

events as they occurred, followed by a careful study of the transcripts to test those interpretations. I have reviewed much of the vast social science literature on the trial; however, for reasons I explain below, I limit my review to those conclusions that seem the most reliable and important. The procedural, evidentiary, and ethical rules, and the judicial interpretation of those rules, are obviously important sources, and I have drawn on many years' study of those subjects in different ways throughout the book. Another important source has been my long involvement as a teacher with the National Institute for Trial Advocacy, the premier organization for the continuing legal education of trial lawyers. Here I have had the inestimable advantage of watching some of the most decent and skilled trial lawyers in the country demonstrate and explain their craft and of sharing conversations in which they answered questions and offered their perceptions. Those demonstrations and conversations have sharpened my understanding of what excellent trial lawyers do and why. They are important sources for my frequent references to "a well-tried case" and for my statements that "A lawyer will. . . ." For I am convinced, again for reasons I will describe at greater length, that to understand an institutionalized practice like the trial requires that we understand a set of contextualized ideals.

To an unusual degree, this study employs both what Clifford Geertz has called "experience near" and "experience distant" concepts. As Geertz maintained, it is by cycling between the most detailed descriptions of institutionalized practices and the broadest generalizations that we are likely to achieve real insight into both those details and our theoretical self-understandings. A particular reader may be far more interested in one end of this spectrum than the other. For example, given both the frequency and the superficiality of press coverage of major trials, a simple, careful description of the practices in which lawyers engage and the rules under which they perform can enrich the understanding of anyone interested in public affairs. If that is the motive for which a reader picks up this book, the earlier chapters are likely to be of more interest than the later. On the other hand, if the reader's interests are primarily theoretical, the earlier chapters will serve primarily to situate the issues that emerge later.

I anticipate multiple audiences and so have written to address the somewhat different concerns of those audiences. The trial is an extremely important American institution by any number of measures. Trials often figure near the center of stories that have very broad significance of various sorts. Think of the O. J. Simpson trial, the trial of Rodney King's attackers, or the trials in the tobacco litigation. Even the best media reports of those cases fail to provide the educated reader with sufficient context to understand the dynamics of the proceedings. Ubiquitous trial

scenes on television dramas are more likely to mislead than to enlighten. Undergraduate and graduate education in American institutions, whether in history or political science departments, has not given students anything approaching the understanding of the trial necessary for critical judgment concerning many important issues of the day. I hope this sort of book may make a contribution to that understanding.

I hope as well that this book will provide a broader context for empirical investigators of the trial and for consumers of their work, including intelligent laymen, for lawyers litigating cases where that social scientific work about trials is at issue, and for judges. All rigorous scientific inquiry requires abstraction and simplification. When that work is done, there always remains the further question of its significance for trials as they are conducted in their full concreteness. In order to answer that question, we must understand what the scientific enterprise has abstracted *from*—what has been systematically ignored for legitimate methodological reasons. Otherwise we commit Whitehead's fallacy of misplaced concreteness, mistaking our simplifying abstractions for the real.

This book should also be of interest to serious students of the law in law schools and elsewhere. Theoretically, the trial in general, the jury trial in particular, is a central institution in our legal order.[8] An appreciation of its distinctive languages and performances cannot but enrich, and often quite radically changes, standard understandings of "what law is." An adequate philosophy of law must take account of those languages and practices. The trial makes law in the overwhelming majority of tried cases; law is what emerges from those languages and practices as a matter of constitutional right. The legal realists understood that the trial did not fit easily into inherited formalist conceptions of law, but were too much the creatures of the philosophical positivism of their age to give any constructive normative account of the institution. I attempt to remedy that shortcoming, at least in part.

Chapter 1 provides an account of a powerful normative understanding of the trial, one that explains many of its most striking internal features, which I call the "Received View." I then argue that the Received View grasps only a partial truth, something of which there is evidence even in the trial's own legal structure. In chapter 2, I offer a primarily descriptive account of the distinctive linguistic practices internal to the trial, that is, what trial lawyers *do* to prepare for and conduct trials. Chapter 3 provides what is also a primarily descriptive account of the most important rules—procedural, evidentiary, and ethical—under which trial lawyers practice, rules which often decisively structure the kind of truth that is

[8] Its importance suggests the poverty of our more usual expression, the "legal system."

allowed to appear in the courtroom. Chapter 4 is an example of an opening statement in a murder case, heavily glossed with my interpretation of the usually implicit significance of the narratives presented by the prosecution and defense; it illustrates important aspects of the theory of the trial emerging from the descriptive materials in the earlier chapters. Chapter 5 contains (1) a phenomenology and interpretation of aspects of the trial so basic that their institutional and philosophical significance can easily be missed, and (2) my account of the most important and reliable conclusions about the trial that have emerged from the social science literature. Chapter 6 marks the transition to a much more theoretical idiom: here I present an interpretation of the *significance* or *meaning* of the doctrinal, descriptive, and social scientific material that has gone before. Chapter 7 provides accounts of what I term the "objective" and the "subjective" sides of the trial event. The former consists of an explanation of a model, much more complex and interesting than that of the Received View, of the issues that the trial's "consciously structured hybrid of languages" presents for the jury's decisions. The second portion of chapter 7 offers an account of the kinds of intellectual operations that the jury has to perform in order to resolve those issues, and discusses some evidence that we actually can and do perform those operations. Chapter 8 is the most theoretical of the book; it attempts to identify the conditions of the possibility that the operations which take place at trial converge on the truth of a human situation. It then provides a compressed account of the historical and institutional significance of the modes of decision making that occur at trial within the structure of American institutions.

Two final notes. I refer to the decision-maker at trial as "the jury." This is for ease of reference. Almost all of what I have to say applies with equal force to bench and to jury trials. As I explain below, the social science literature suggests strongly that in the great majority of cases it does not matter whether the case is tried to a judge or a jury. The trial's the thing. It is far more significant that a case is or is not allowed to go to trial, rather than being decided on a motion to dismiss or summary judgment, than whether a judge or a jury decides the case.

Finally, it is clear that the trial, the jury trial in particular, is under attack at this point in our history. This attack expresses itself in "tort reform" schemes, limitations on the jury's ability to assess compensatory or punitive damages, mandatory arbitration, systems of administrative adjudication where judges are subject to bureaucratic controls, and journalistic discussions in the wake of recent highly publicized trials. The reasons for this are complex. Most basically, the trial provides for a kind of highly contextual moral and political decision making which is in deep tension with the instrumental rationality of tightly organized bureaucratic organizations, public and private, that otherwise dominate American public life.

This is an enduring tension. By contrast, it is no accident that the level of hostility to the trial has risen during a period (roughly the last thirty years) when Congress and the Supreme Court have quietly democratized the jury, bringing perspectives to this important institution that had long been unrepresented. In the longer run, this is a promising development, likely to enrich further what I believe to be one of the greatest achievements of our public culture.