

Chapter Four: The ethics of storytelling?

1

It's interesting to note that *plausible* stories can often be turned upside down. For example, if the Accuser tells a plausible story about how the Defender acted so carefully to carry out the crime, the Defender can tell a story back that since he's not stupid, it's plausible that he wouldn't have done anything so obvious. The more the Accuser belabors the careful preparations that show he was planning a crime, the more the Defender can insist that it's implausible that any clever criminal would have acted like that. The same actions show both an intent to commit a crime, and no intent to commit a crime.

Question: Try it yourself. Make a list of all the theories of the case you've thought of for your own trial. Now try turning them upside down.

This sort of inversion is an extremely old rhetorical device; in fact, it may in fact have been the rhetorical device ever "discovered" or consciously recognized. Legend has it that Tisias, one of the first teachers of rhetoric, proposed the following arguments to be used when a big guy and a little guy get into a fight, no matter who really started it.

Little guy: Of course he did it! It isn't likely that a little guy like me would attack a big guy like him!

Big guy: I did not! Us big guys have to be extra careful, since everyone would think that we started the trouble. He did it, knowing that as a little guy he would likely be able to get away with it!

Question: In general, what theories can the Accuser use to reply when the Defender gets "clever"? In other words, what does the little guy say next? And then what does the big guy say? And then the little guy?

2

Are you suspicious yet? Are you getting the impression that the rhetorical tools you are learning have given you the power to argue well either side of the case? To make up plausible stories, even when you don't know the truth? The "clever " technique is just the icing on the cake: it allows you to show that something is *unlikely* just because it is so likely!

Excess cleverness is nowadays a common complaint against lawyers, but it's origin goes back again to ancient Greece. The philosopher Plato (Aristotle's teacher) raised some serious

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doubts about the role of "probabilities" (plausibilities) in trials. Consider this selection from one of Plato's dialogues:

Plato, Phaedrus

Socrates. [Some teachers of rhetoric] tell us that there is no need to treat [argument and persuasion] with such gravity, or to lay out such a long and circuitous road to the summit. As we said at the beginning of this discussion, a man who is going to be a competent speaker need have nothing at all to do (according to them) with truth about just or good conduct, or indeed about just and good men, whether they are so by nature or by education. In the courts, they maintain, nobody gives a damn about the truth in these matters; all they care about is what is plausible--that is to say, what is probable; and this is what must occupy the attention of a man who is going to make an art of speech. Sometimes one ought to omit even the actual facts if they don't correspond with probability: replace them with the probable, both in prosecution and in defense. By all means and in every way one must pursue probability while speaking and let truth go to hell and stay there. This goal, pursued through one's entire speechmaking, will equip you with all the art you need, complete! [--or so they say.]

Phaedrus. You have certainly, Socrates, stated exactly the very words of those who claim to be experts in the art. I recall that we did indeed touch briefly on this sort of business a while back; and the professionals do think it terribly important.

Socrates. Very well then, since you've made Tisias your field of study and know him well, let's let Tisias himself enlighten us on the following point: when he uses the term "probable," he means only what satisfies the expectations of the many, doesn't he?

Phaedrus. Yes, that's just what he means.

Socrates. In consequence it would seem, of this profound scientific discovery Tisias wrote, that if a man who is courageous, but physically weak, gives a beating to a strong but cowardly one because he has been done out of his cloak or some such thing, and then is brought to court in consequence, neither of them ought to tell the truth. The coward must allege that the courageous fellow did not give him the walloping unaided, while the other must seek to prove that the two of them were quite alone. Then he goes on to make play with the famous argument: "How could a little fellow like me have attacked a huge creature like him?" The latter, on the other hand, will not admit his own cowardice, but will try to produce some other false statement by which he may very likely give his opponent a handle to refute him. And similar "scientific" rules are handed out for other cases of the kind. Isn't it so, Phaedrus?

Phaedrus. It is indeed.

Socrates. Ah, 'twas a wonderfully recondite art that Tisias seems to have brought to light!--or whoever it may have been and by whatever name he wants us to call him. But, friend, shall we or shall we not say to him--

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Phaedrus. What shall we say?

Socrates. [Socrates replies that it is necessary to know the truth about the matter and the truth about what persuades people in order to have a true art of rhetoric.]

Question: Is Plato right? Are there any limitations on the power of rhetoric? Can the advocate make *anything* sound plausible? What do you expect to do at your own trial?

3

Question: Take a look at the attached essay by a famous trial lawyer. What does he think is wrong with storytelling? Does he make you rethink the importance of storytelling at trials? If not stories, then what? Is there a better method for establishing "social truth"?

4

Question: What about a mathematical theory of probabilities? Consider the following case: should it be decided by a computer, or a jury?

A Purse is Snatched: State v. Collins, 438 P.2d 33 (1968)

The scene is Los Angeles. The victim and a bystander testify that a white woman with a blond ponytail pushed an elderly lady to the ground, grabbed her purse and escaped in a yellow car with a white top driven by a black man with a mustache and beard. A police officer investigating the crime discovers a yellow car with a white top parked in front of a house; when he knocks on the door, he finds a white woman with blond hair in a ponytail and a black man with a mustache and beard.

Assume the following probabilities of having these characteristics in LA at that time:

Partly yellow automobile:	1/10
Man with moustache	1/4
Woman with ponytail	1/10
Woman with blond hair	1/3
Black man with beard	1/10
Interracial couple in car	1/1000

Question: What's your view? How do advocates in fact win cases? Do the means of persuasion they use serve or distort justice?