

REMARKS

THE RHETORIC OF DISPUTES IN THE COURTS, THE MEDIA, AND THE LEGISLATURE

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I. INTRODUCTION

The Schiavo case is our immediate subject. The transaction there involved a traumatic injury to Ms. Schiavo, her husband's immediate and subsequent responses to her condition, her prolonged period of apparent mental dormancy, the original and repeated judicial proceedings addressing whether to continue sustaining her in life, and the prolonged and intense disputes over the proper answers to those questions.¹ One of the eventual responses was the extraordinary enactment by Congress of legislation granting the federal courts jurisdiction to address the case.² A further response was that of the federal courts in declining to address the merits of the underlying controversy, in deference to the decisions made by the Florida state courts.³ A still further response was denunciation by congressional critics of the proceedings, complaining in essence that the federal courts had not been activist enough.

The scenario in the Schiavo case can be considered bizarre, particularly the congressional denouement. But it cannot accurately be considered unique. It is a familiar phenomenon that a case of legal significance becomes the focus of attention on the part not only of the courts, but also of the public, the media, and the political agencies of government. Consider, for example, Watergate, Enron, Rodney King, Keating, and now Hurricane Katrina. For the record:

Watergate involved the burglary of an office in Washington, D.C. by operatives who were later revealed to be acting at the direction of close associates of President Nixon and, inferentially, of the President himself.

Enron involved financial and accounting fraud in a major energy company by corporate officials who were later revealed to have acted more or less in concert with outside accountants and bank officers.⁴

¹ See Arian Campo-Flores, *The Legacy of Terri Schiavo*, NEWSWEEK, Apr. 4, 2005, at 22 (detailing history of Terri Schiavo's legal struggle).

² Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, § 1, 119 Stat. 15, 15 (2005).

³ See *Schiavo ex rel. Schindler v. Schiavo*, 357 F. Supp. 2d 1378, 1388 (M.D. Fla. 2005), *aff'd*, 403 F.3d 1223 (11th Cir. 2005), *stay denied*, 125 S. Ct. 1692 (2005) (denying parents' request for injunctive relief).

⁴ See generally MIMI SWARTZ & SHERRON WATKINS, *POWER FAILURE: THE INSIDE STORY OF THE COLLAPSE OF ENRON* (2003) (describing Enron scandal).

Rodney King involved brutalization of a black arrestee by Los Angeles police who denied the charge, but were later shown in the act in an amateur's video tape⁵—the Louima case in New York City was somewhat similar.⁶

Keating involved financial manipulation and fraud in use of funds of federally insured savings banks.⁷

And Hurricane Katrina involved many things, including government officials lacking a clue about events everyone else in the country could see on television.⁸

Fading memories erase some recollection of these cases, but the list goes on: Scottsboro, referring to a racially abusive prosecution that occurred three-quarters of a century ago;⁹ Ponzi scheme, referring to a fraudulent securities scheme in the same era;¹⁰ and watered stock, a term originally referring to the practice of engorging cattle with water before the weigh-in at the market and thereafter applied to accounting inflation of corporate securities.¹¹ Yet another example is the name “bubble,” which today refers to reckless market performance, but which originated three centuries ago in an earlier financial market collapse.¹²

II. IN LEGAL CONTEMPLATION

For members of the legal profession, cases such as Enron, Schiavo, and Rodney King are understood as conspicuous

⁵ See Tracy Wood & Faye Fiore, *Beating Victim Says He Obeyed Police*, L.A. TIMES, Mar. 7, 1991, at A1 (detailing attack of Rodney King).

⁶ See *Charges of Brutality*, N.Y. TIMES, Aug. 15, 1997, at B9 (reporting injuries sustained by Abner Louima).

⁷ See *The S & L Scandal's Cruel Truths*, N.Y. TIMES, Nov. 21, 1989, at A24 (reporting Charles Keating's upcoming congressional testimony).

⁸ See Nancy Gibbs, *The Aftermath*, TIME, Sept. 12, 2005, at 44 (reporting devastation in New Orleans from Hurricane Katrina and unpreparedness of officials).

⁹ Douglas O. Linder, *The Trials of "The Scottsboro Boys,"* http://www.law.umkc.edu/faculty/projects/FTrials/scottsboro/SB_acct.htm (last visited Feb. 2, 2006).

¹⁰ See generally “Ponzi” Schemes, <http://www.sec.gov/answers/ponzi.htm> (last visited Feb. 3, 2006) (defining term as “type of illegal pyramid scheme”).

¹¹ See BLACK'S LAW DICTIONARY 1458 (8th ed. 2004) (defining term as “stock issued for less than per value”).

¹² The Mississippi Bubble and the South Sea Bubble, which occurred in the early eighteenth century, are generally considered to be among the first delusive financial schemes. Peter M. Garber, *Famous First Bubbles*, 4 J. ECON. PERSP. 35, 35-42 (1990).

illustrations of traditional legal problems: Protecting integrity in commercial and financial transactions, regulating use of force (the Schiavo case involved the minimal force of removing a tube), controlling impulses to invidious discrimination, and assuring fair procedure and competence in government administration.

The legal mind wants to consider these and other legal disputes isolated from their community roots and insulated from their political implications. Thus, we wish to consider the Schiavo case as presenting a general problem of the relationship between a disabled person, the person's family, and the state. Only by abstracting the situation in this way is it possible to disregard or discount the idiosyncratic "local" elements of such a case—for example, that Mr. Schiavo had established a new intimate and family relationship while his wife remained hospitalized in intensive care. Framing a problem in formal legal terms also makes it possible to repress the political implications of the Schiavo case, such as right to life issues in other contexts like the controversy over abortion.

Professor Thomas Reed Powell of Harvard defined the legal mind accordingly: "If you think that you can think about a thing inextricably attached to something else without thinking of the thing which it is attached to, then you have a legal mind."¹³

In more prosaic terms, Professor Karl Llewellyn tried to teach that in a tort case it was of no special relevance that the vehicle involved was a magenta-colored Buick,¹⁴ even though every trial lawyer and highway policeman knows that the kind of car involved can make a difference in a subsequent legal proceeding.

Considering a situation such as the Schiavo case as a "strictly legal" matter puts it in a zone of specially bounded and insulated reality. That zone is above or alongside the broader reality captured in a news report or the recollection of an ordinary observer. A nonlegal account of the Schiavo case would include references to the apparently unhappy Schiavo marriage and Mr. Schiavo's subsequent domestic situation, the conflicted relationship between

¹³ THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 101 (1935), *quoted in* FRED SHAPIRO, *THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS* 270 (1993).

¹⁴ K.N. LLEWELLYN, *THE BRAMBLE BUSH* 48 (*Oceana* 1951) (1930).

Mr. Schiavo and his wife's parents, the medical examinations and reports in the years of Ms. Schiavo's hospitalization, the cost of hospitalization and Mr. Schiavo's malpractice suit and the proceeds of its settlement, and the moral concerns of religious and activist groups on all sides of the issues. All that information is an ingredient of ordinary talk and gossip, and, accordingly, is relevant to ordinary consciousness.

There are similar stories or "narratives" for all "high profile" cases, and indeed for the low profile cases of everyday life. The "background" information, however, is excluded as irrelevant in the insulated zone of legal contemplation. In legal contemplation, by the time the Schiavo case came before the federal courts, the issue, as Judge Whittemore properly concluded, was whether the determinations by the Florida courts were subject to invalidation through collateral attack.¹⁵ Also excluded from the zone would be the various views and stances of actors in the political agencies of government, notably those in Congress.

III. ORDINARY LIFE, PRIVATE DISPUTES

Most events and transactions in the community—at least in the American community as most of us experience it—do not involve disputes about how people should behave. People drive their cars more or less carefully, and at any rate without collision; people buy things without reading the disclaimers and warnings, and usually are satisfied with their purchases thanks to the wonders of market competition; most pay their bills, even if sometimes slowly; and most treat their spouses and children with at least minimal decency. Indeed, most people appear to live without much conscious regard of legal regulations, but rather are guided by ethical understandings and simplified "rules of thumb" shared within their various subcommunities.

¹⁵ See *Schiavo ex rel. Schindler v. Schiavo*, 357 F. Supp. 2d 1378, 1382 (M.D. Fla. 2005), *aff'd*, 403 F.3d 1223 (11th Cir. 2005), *stay denied*, 125 S. Ct. 1692 (2005) ("Whether the Plaintiffs may bring claims in federal court is not the issue confronting the court today, however. The issue confronting the court is whether temporary injunctive relief is warranted.").

Even when disputes arise in ordinary life, most people do not respond by thinking in legal terms,¹⁶ a pattern of conduct that might be called Legal Abstinence. This pattern continues to be characteristic in contemporary society notwithstanding the “legal explosion”—the prevalence of legal advertising, television programs like *Judge Judy*¹⁷ that romanticize the legal process, and controversies over tort lawyers and tort reform. Most people regard legal disputes as uncivil, lawyers as expensive, and litigation as intensely unpleasant.¹⁸ Hence, when confronted with a legal dispute, most people simply “lump it,” “chalk it up to experience,” become sadder but wiser in the ways of the world, and get on with their lives.

Thus, the pattern in the community at large is as follows: First, general conformity to shared norms of conduct so that conflicts over right and wrong do not arise; second, recession from overt disputation when conflicts do arise; and, third, resort to litigation only under exceptional circumstances. Even when resort is made to legal process, most legal disputes do not proceed to litigation, and most litigation does not proceed to trial. Despite folklore to the contrary, most lawyers turn away the majority of cases—especially litigation specialists, who turn away even more prospective claimants.¹⁹ And most litigation is essentially encapsulated matter among the parties and their counsel, a court clerical staff and sometimes a trial judge, and perhaps some witnesses and interested bystanders. Public information about the case is immured in the judicial archives.

The result of these patterns is that the very largest number of legal disputes—unlike Schiavo, Enron, and the other cases discussed earlier—are of no interest to the general public, except

¹⁶ See William L.F. Felsteiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 651-52 (1980) (noting Americans' reluctance to raise legal claims due to their celebrated individualism).

¹⁷ See generally Judge Judith Sheindlin, Presiding Judge, <http://www.judgejudy.com/Bios/allaboutjudy.asp> (last visited Jan. 10, 2006) (detailing biography of Judge Judy).

¹⁸ Many lawyers hold the same view. See Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, in 3 LECTURES ON LEGAL TOPICS 89, 105 (1926) (“[A]s a litigant, I should dread a lawsuit beyond almost anything else short of sickness and death.”).

¹⁹ See Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L.Q. 739, 754-57 (2002) (dispelling myth that lawyers take most cases brought to them).

perhaps for transitory local gossip. Neither are they of interest to the media or the political branches of government. They are private, essentially by default.

IV. HIGH PROFILE LITIGATION

Some disputes, however, burgeon into litigation, and some litigation (a very small proportion) is amplified by public curiosity and media attention. We should accept that public curiosity is the primary driving force that transforms a legal dispute into “high profile” litigation.²⁰ A case acquires a high profile through media reaction, which in turn reflects the media’s estimate of potential public curiosity. The media—newspapers, television, radio, and other mediums—are selective in their attention because they cannot cover everything. In turn, their estimates of public curiosity are derived from the concepts of relevance shared by the ordinary citizens who make up “the public.”

Put differently, the media are especially interested in what is of interest to their audiences, which consist primarily of ordinary citizens. And the ordinary citizen’s sense of relevance is also of special interest to members of the political branches of government, particularly those who hold elective office.

Most of us ordinary folk have a strong appetite for morality tales. Listening and talking about other people’s troubles—gossip—enlivens the tedium of ordinary life and transmits practical wisdom and moral counsel. Court proceedings have always been source material for such gossip. In bygone eras, those proceedings in small towns were heralded by the arrival of circuit judges and lawyers for trials and hearings. In larger centers, the townfolk were and are supplied with similar material by the local newspapers providing court coverage. From time immemorial there has been interaction among local court proceedings, local media, and politics.

In the modern era of mass media, the speed and range of dissemination has increased exponentially. For example, the mass

²⁰ WILLIAM C. COSTOPOULOS & CHARLES R. GEROW, WORKING WITH THE MEDIA IN HIGH PROFILE CASES 1 (2005), available at <http://www.abanet.org/litigation/abaannual/papers/02a.pdf> (“Sometimes the media make non-profile cases into high profile cases.”).

media within the last year transformed the murder trial of Scott Peterson in a small California city into an international event,²¹ as well as the trial of Michael Jackson.²² Hurricane Katrina came to the general public “live and direct” worldwide. Litigation now competes with sitcoms as material for television. Crime, corruption, and sexual deviance get prime coverage in the newspapers and magazines, sometimes even in the *New York Times*²³ and the *Wall Street Journal*.²⁴

Thus, the interaction in Schiavo, Enron, and similar cases—to say nothing of the fatally delayed evacuation in Katrina—between the event and the media, the public and the political response, is essentially this: The event animates the immediate parties to engage in responses that can have legal implications. These implications involve background facts that go beyond the narrow conception of legal relevance, which along with the legally relevant facts implicate issues of curiosity and concern to ordinary citizens; which stimulate media attention; which results in publicity that may stimulate political attention. In this interaction, an event that originally was more or less private becomes public and perhaps political.

V. VIEWPOINT AND PRESENTATION

The accounts of the underlying transactions in local gossip, the media, and the political and legal arenas are not the same. From an external viewpoint, there is a major difference between large, publicly visible events like Hurricane Katrina and an initially local and private event like the Schiavo case. It should be remembered, however, that even in Katrina there were private and local events of wind and water in the individual dwellings of what turned out to

²¹ E.g., Chris Taylor, *Peterson's Martha Defense*, TIME, June 14, 2004, at 16.

²² E.g., Paul Forhi, *Firm in It's Conviction There Was Too Much Doubt*, WASH. POST, June 14, 2005, at A1.

²³ See, e.g., Brenda Goodman, *Corrupt or Victim of Lies? Trial of Former Mayor Begins in Atlanta*, N.Y. TIMES, Jan. 24, 2006, at A15 (describing first day of trial of former city official charged with bribery, racketeering, and fraud).

²⁴ See, e.g., Mark Maremont, *Be Very Careful What You Put in Writing—It May Add to Jail Time*, WALL ST. J., June 23, 2005, at B1 (recounting developments in case of former Tyco International executive convicted of larceny).

be mass victimization. Television displayed hundreds of individual victimizations.

The differences in the accounts about Schiavo, Enron, and even Katrina resemble those in classic literary works, such as Shakespeare, *Rashomon*,²⁵ and a Pirandello play.²⁶ Every observer understands reality somewhat differently from everyone else. In Shakespeare's *Othello*, for example, the portrayal of Desdemona's conduct perceived by the audience is very different from that reported by Iago and understood by Othello.²⁷ In *Hamlet*, the protagonist has difficulty in his interpretation of reality, partly because that interpretation conflicts with the version held by others.²⁸ *Rashomon* presents different versions of the same sequence of events, each according to a different observer,²⁹ and so also Pirandello.³⁰ Schiavo was understood one way by the immediate family members and another way by political figures concerned with the activities of the federal courts. Katrina has already become notorious for the differences in perception. In our legal venue, many of us remember the radical difference in public reaction to the "not guilty" verdict in the O.J. Simpson case, where most of the white audience was stunned and much of the black audience was jubilant. Similarly, reactions to Enron and Katrina ran from sadness to righteous indignation.

Difference in viewpoint is a condition not only of immediate observers but also of the "professional observers." The professional observers in legal matters include the lawyers, judges, and other

²⁵ See generally RYUNOSUKE AKUTAGAAWA, *RASHOMON AND OTHER STORIES* (Takashi Kojima trans., Liveright Publishing Corp. 1999) (1952) (recounting fictional death of samurai through many conflicting witnesses).

²⁶ LUIGI PIRANDELLO, *Six Characters in Search of an Author*, reprinted in PIRANDELLO'S MAJOR PLAYS 65, 65-120 (1991).

²⁷ See WILLIAM SHAKESPEARE, *THE TRAGEDY OF OTHELLO, THE MOOR OF VENICE*, act III, sc. iii, lines 410-62, reprinted in *THE RIVERSIDE SHAKESPEARE* 1246, 1272 (G. Blakemore Evans ed., 2d ed. 1997) (presenting Iago's report to Othello that Desdemona has given her handkerchief to Cassio).

²⁸ See William Shakespeare, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK*, act II, sc. ii, lines 601-04, reprinted in *THE RIVERSIDE SHAKESPEARE*, supra note 27, at 1183, 1207 (resorting to play-within-a-play to confirm Hamlet's belief that his uncle the king has murdered his father).

²⁹ See generally AKUTAGAAWA, supra note 25.

³⁰ See generally PIRANDELLO, supra note 26.

officers of the court in legal proceedings. In the media the professional observers include the reportorial staff, and various officials have that role in the political arena. The vocational framework of each professional observer shapes their various perceptions and interpretations. Some of us may recall the question put by President Kennedy to observers sent to see the situation in Vietnam whose accounts of the situation were so radically different: "Did you two gentlemen visit the same country?"³¹

Similar differences of interpretation pervade the subsequent accounts that we call "news" and then those accounts called "history." Interpretation involves transmission of information as well as its reception. Hence, differences in viewpoint have a counterpart in differences in presentation. Some events can be seen with our own eyes, but most of what we know or think we know comes in some proportion from outside information—information supplied by someone else. As every lawyer knows, the motivations and responsibilities of an information-source affect how the elements of an event are chosen and presented. Indeed, as advocates, lawyers are continually engaged in that very selection process. Recognition of this relationship is captured in the folk wisdom "consider the source."

Matters of presentation are also involved in the ordinary citizen's life. In our ordinary lives, we are transmitters as well as receivers. One of the most perceptive sociological propositions is concisely contained in the title of Erving Goffman's classic, *The Presentation of Self in Everyday Life*.³² There is no legal structure defining what an ordinary citizen pays attention to or how people react, as there is for a jury. Nor is there any such structure for the news media in a regime having a free press. But there are patterns that experts in presentations endeavor to exploit, just as lawyers as advocates try to do within the rules of forensic technique. In politics these techniques are now referred to in such terms as "spin control" and "staying on message."

³¹ Jonathan Alter, *Looking for a Way Out*, NEWSWEEK, Nov. 28, 2005, at 33.

³² ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959).

VI. THE LOGIC OF RHETORIC

Legal proceedings, public opinion, and politics all involve relationships between reality (what originally happened or is imminent), presentations about what happened or is expected to happen, and receptions accorded by an audience for the presentations. In classic analysis, these relationships were addressed under the rubric of "Rhetoric," notably in the work of Aristotle and Cicero. Cicero, the Roman senator of the late first century BCE, was concerned primarily with technique, particularly technique in addresses to a political or juridical forum.³³ Conversely, Aristotle was concerned with the logic of rhetoric.³⁴

The remarkable fact is that Aristotle's analysis of rhetoric remains essentially correct, so that we can still learn from it. If we comprehend and accept his analysis, the differences among the legal, the public, and the political versions of events such as Schiavo and Enron become clearer. And perhaps less disturbing.

Aristotle's approach involves two steps. First, a distinction is drawn between rhetoric and logic; second, an analysis is made of the nature of rhetoric. The first step, distinguishing between rhetoric and logic, parallels a distinction that runs through many of Aristotle's works—namely, between the practitioner or active member of a community and the philosopher.³⁵ In this dichotomy, rhetoric obviously is an art of the practitioner. The distinction in analysis of rhetoric is stated in terms of *episteme* as contrasted with *techne*, the former being theoretical knowledge of the world and the latter being practical skill in persuasion.³⁶

Aristotle's second step is analysis of that skill or *techne*. As Aristotle says, "a speech is composed of three factors—the speaker, the subject, and the listener."³⁷ Within this framework, there must

³³ See H.C. Lawson-Tancred, *Introduction to ARISTOTLE, THE ART OF RHETORIC* 50-58 (H.C. Lawson-Tancred trans., Penguin Books 1991) (n.d.) (describing Cicero's approach to rhetoric as primarily concerned with art of oratory and advocacy).

³⁴ See *id.* at 56 ("Aristotle[] . . . saw the task of rhetoric not as the production of persuasion but as the discovery of the latently persuasive in any subject.").

³⁵ *E.g.*, ARISTOTLE, *THE NICOMACHEAN ETHICS* 5 (J.A.K. Thomson trans., Penguin Books 2004) (n.d.).

³⁶ Lawson-Tancred, *supra* note 33, at 15.

³⁷ ARISTOTLE, *supra* note 33, at 80.

be three types of rhetorical speech: *deliberative*, *forensic*, and *display*.³⁸ “Forensic” argument of course refers to argument made in litigation, involving a vantage looking backward at past events to make judgments about “*justice* and *injustice*” concerning those events.³⁹ “Deliberative” argument refers to argument made in an assembly or other lawmaking or policymaking forum, involving a vantage looking forward to the future and giving counsel as to “*advantage* or *harm*” entailed in one or another course of proposed action.⁴⁰ It would include not only rhetoric presented in public, but also argument by “those who privately advise.”⁴¹ “Display” argument refers to the projection of praise or blame on someone.⁴²

This tripartite analysis substantially corresponds to the difference in the contemporary scene between those presentations and contentions in court (“forensic”), those in the legislature and other official agencies such as the White House or a governor’s office, and those in the media and ordinary gossip. These differences can be discerned whether the topic is a domestic relations case such as the Schiavo matter, a business case such as Enron, or a case of government performance such as Hurricane Katrina.

Aristotle goes on with a subtle and illuminating discussion of differences in the appropriate structure of argument in forensic matters, in policy deliberation, and when presented in “display” to an audience that Aristotle calls “spectator.”⁴³ Correlatively, he observes distinctions among the identities and responsibilities of the audiences to whom argument is addressed. Forensic argument addresses a judge or jury, while deliberative argument addresses someone responsible for charting a future course of events. The audience for display argument, being merely spectators, has no responsibility, at least none for the time being. That kind of argument, however, expounds the nature of virtues, such as “justice,

³⁸ *Id.* at 80-81.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 80.

⁴² *Id.*

⁴³ *Id.*

courage, restraint . . . liberality, prudence and wisdom.”⁴⁴ In modern terms we could call such presentations public information or, invidiously, propaganda.

VII. CONCLUSION

The more general point to be drawn is that the purposes of a forensic or judicial inquiry and determination are different from those of policymaking and different also from those of public information and discussion. As Aristotle explained long ago, these events have different participants, who have different responsibilities and hence different interests, and who proceed upon different types of information. We should not be surprised that they are indeed very different, as indeed the courts and the legal profession have usually recognized. Perhaps we should be surprised that the media, the public, and the legislature often do not share that recognition.

⁴⁴ *Id.* at 105.