The Dialogics of Legal Meaning: Spectacular Trials, the Unwritten Law, and Narratives of Criminal Responsibility

Martha Merrill Umphrey

Drawing upon Mikhail Bakhtin's theory of the dialogic, this essay explores the production of legal meanings about criminal responsibility in the 19th and early 20th centuries. In particular, it examines the honor-based defense of the "unwritten law" as it was articulated in relation to the formal law of provocation in the 19th century, and in the 1906 trial of Harry K. Thaw for the murder of Stanford White. Meanings about criminal responsibility emerge, I argue, from a process of discursive conflict and negotiation between the domains of legal consciousness and formal law. At trial, competing narratives of indictment and exoneration literally enact that dynamic process, so that trials may be said to be the materialization of the dialogic production of "law" in its broadest sense.

In his closing argument to the jury in Harry Kendall Thaw's first trial for the 1906 murder of renowned New York architect Stanford White, Thaw's attorney Delphin Delmas argued that his client should be acquitted on the basis of what he called "dementia americana," "that species of insanity which makes every home sacred . . . which makes a man believe that the honor of his wife is sacred . . . which makes him believe that whoever invades the sanctity of that home . . . whoever stains the virtue of that wife has forfeited the protection of human laws and must look to the eternal justice and mercy of God."[1] At first glance Delmas's oxymo-

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[1] *New York Times,* 10 April 1907; see also Langford (1962). A note on sources is in order here. Quite surprisingly, after an extensive search I have been unable to locate the official transcripts of Harry Thaw's two trials for Stanford White's murder in any of the likely legal or historical archives. As a result I have relied instead on the extensive newspaper coverage of the trials and on two later trial summaries, F. A. Mackenzie (1928) and Gerald Langford (1962). This is risky historical business, particularly given the fact that the fever of yellow journalism was stoked by the fires of the Thaw scandal and that New York newspapers staked out competing (and colorful) positions on the ethics of Thaw's act in order to boost their circulation rates. Among these newspapers, though, the *New York Times* stands out as one that attempted to remain relatively straightforward in its coverage of the trials, consistently coupling its reporters' summaries of the day's events

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ronic appeal, one that couples competing medical and moral conceptions of responsibility in an attempt to persuade the jury to acquit Thaw of murder, appears to exemplify what historian Lawrence Friedman (1993:398) has called, in describing Thaw's trials, "a carnival of scandal mixed with psychiatric mumbo jumbo." As the country's first "trial of the century," Thaw's proceedings were most certainly the "super-sensation" Friedman suggests. They manifested in full all the show-trial trappings with which we are now so familiar: the crowds and the cameras; the scandalous revelations of unseemly private behavior, inevitably made into fodder for moralists; the legal maneuvering and posturing and the ensuing public skepticism of law's ability to do justice. And yet to assimilate Delmas's oxymoronic claims to the atmosphere of carnival surrounding such trials, and thus to dismiss those claims as just so much mumbo jumbo, is to detach such trials from both "law" in its graver aspects and the serious cultural anxieties that infect and inform trials. It is, in other words, to deny any significance, legal or cultural, to the spectacular trial except insofar as it "provides the public with a vicarious thrill" (Friedman 1993:398).

What would it mean to take such a show trial seriously as a site of law? How might we begin to theorize such trials as spaces in which, far from being irrelevant or evicted by the irrational dynamics of spectacle, law is enacted in critical, if peculiar, ways? In this essay I begin to answer that question through the lens of Harry Thaw's trials by exploring the conditions of possibility that produced Delphin Delmas's honor-based argument to the jury in the first of Thaw's two trials for Stanford White's murder. The proceedings ended with a hung jury in spite of what might be construed as Delmas's appeal to nullify the law via a defense known as the "unwritten law." The important question for my purposes, however, is not why Delmas failed to gain Thaw's acquittal, but rather how he was able to raise such a defense plausibly in the first instance; that is, how we might understand his argument not as "mumbo jumbo" but as marking a deep instability in the law of criminal responsibility at the turn of the century. In its attempt to map the terrain of that instability, this essay offers a meditation on the role of narrative in law and, in particular, on the dynamics of narrative within the legal domain of the trial.

The trial, I argue, is a distinctive domain for the production of legal meaning. It is a liminal legal space, one situated between—and one that mediates the relation between—formal

with a transcription of testimony, even if that transcription tended to duplicate much of the substance of the reporters' own writing. Thus, in this article I rely largely on the *Times* transcriptions, which I have cross-referenced with other newspapers and with the two subsequent trial summaries. Although specific phrasings may occasionally vary, I have not included any material whose meaning is inconsistent among my sources.

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legal rules and the unofficial world of norms, customs, common sense, and social codes. In a slightly different context David Engel has proposed the spatial heuristic of the "domain" as a useful way to conceptualize the mutually defining relationship between law and everyday life (Engel 1993:126-28). Here I draw on his heuristic as a means of framing my analysis of the trial as a mediating legal space, a third term lying between the classic divide that marks sociolegal work: the domain of the script (statutes, treatises, case law) and the domain of legal consciousness (the meanings attached to law in the everyday world of social relations).[2] When Delphin Delmas raised the unwritten law defense before Thaw's jury, he appealed to its members' sense of justice as particular kinds of citizens, citizens who might value an individual's honor above and against the authority of the state. He drew on powerful cultural codes, meanings developed over time and in relation to formal legal rules prohibiting intentional murder, to argue that the law that ought to govern Thaw's act, though unwritten, had a status higher than positive law insofar as it accorded with the jury's own sense of justice. In reply, prosecutor William Travers Jerome asserted the primacy and justice of positive law. The trial process not only marks the space in which those competing claims were narrated; its procedural rules also helped to constitute them by directing the ways in which stories could be told.

If it can be said that both formal legal rules and norms governing everyday life are "law," however distinctive in their manifestations (see, e.g., Weisberg 1992), then trials might be said to manifest yet a third kind of law—an unstable, distinctive law that draws its substance from the clash between script and consciousness. And yet I wish to make a different argument: not that trials manifest a different kind of law but that they lay bare the processes by which law may be said to be constituted in any domain; they are the materialization of a general process of legal meaning making. In this essay I justify that broad claim by drawing on the work of Mikhail Bakhtin (1895–1975), a philosopher of language and culture whose writings have considerably influenced literary and cultural studies but not, to date, sociolegal studies.[3] I argue that Bakhtin's theories, particularly his concept

[2] Legal consciousness, as defined by Ewick and Silbey (1998:45), is a "cultural practice" or "participation in the construction of legality," a broad domain of legal meanings that extends beyond the boundaries of legal institutions. Legality, they argue, refers not only to law within legal institutions but also to "the meanings, sources of authority, and cultural practices that are commonly recognized as legal, regardless of who employs them or for what ends. In this rendering, people may invoke and enact legality in ways neither approved nor acknowledged by the law" (p. 22). On legal consciousness, see also Sarat & Felstiner 1995; Engel & Munger 1996.

[3] Bakhtin wrote his most significant texts between the two world wars, but has received extensive critical attention only in recent decades, in part because of the vagaries and hazards faced by intellectuals writing and publishing under Stalin's regime. Bakhtin himself experienced exile in Kazakhstan in the 1930s, lost several manuscripts in the

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of the "dialogic," can usefully gloss the claim that law is not only constitutive of social relations (Gordon 1984) but is also constituted by them (Silbey 1992; Engel 1993).

On the most general level, Bakhtin argues that all language is inescapably a social phenomenon, one that can be analyzed effectively not as a formal system but only on the level of particular utterances (Bakhtin 1981). This argument mirrors an approach to law that began in the early 20th century with Legal Realism: the sense that law cannot be understood except as it is enacted in the social world. But Bakhtin's work helps to bridge the divide between "law" and "society" in ways recognizable to sociolegal scholars. Linguistic meaning, he argues, emerges from the relation between the utterance and its context, or in the clash between various discourses, because every utterance is directed toward an anticipated answer. In his terms language is dialogic; that is to say, internally constituted by its orientation to an addressee or in contest with other languages, discourses, and texts.[4] Even language that aspires to the status of a command (that is, to be monologic) can never be fully insulated from its relations with other discourses, with its own history, and with the presumed audience it is to govern.[5] In this sense, the domain of the script and the domain of consciousness are mutually constitutive in that they have and produce meaning via their inter-orientation. As I argue below, the unwritten law cannot be conceived without reference to formal laws governing murder, even as formal law (as it is articulated in cases and treatises) grapples with the unwritten law by reconceptualizing the values embedded in the defense of provocation. Harry Thaw's trial becomes the materialization of that space in between the unwritten law and the law of homicide, the place where the meeting of domains occurs and is enacted through narrative.

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political tumult of the era, and appears to have authored a number of texts under the names of his intellectual associates (though this issue is a contested one among Bakhtin scholars). In what follows I draw primarily on Bakhtin's late-1930s essay "Discourse in the Novel," published in the United States in *The Dialogic Imagination: Four Essays* (1981). Other major translated texts include *Rabelais and His World* (1984a), *Problems of Dostoevsky's Poetics* (1984b), *Speech Genres and Other Late Essays* (1986a), *Marxism and the Philosophy of Language* (1986b; published under the name of V. N. Volosinov), and *The Formal Method in Literary Scholarship: A Critical Introduction to Sociological Poetics* (1978, with P. N. Medvedev).

[4] "Forming itself in the atmosphere of the already-spoken, the work is at the same time determined by that which has not yet been said but which is needed and in fact anticipated by the answering word. All rhetorical forms, monologic in their compositional structure, are oriented toward the listener and his answer" (Bakhtin 1981:280).

[5] This point is similar to one made by Wrong (1979:10): "Power relations are asymmetrical in that the power holder exercises greater control over the behaviour of the power subject than the reverse, but reciprocity of influence—the defining criterion of the social relation itself—is never entirely destroyed except in those forms of physical violence which, although directed against a human being, treat him as no more than a physical object."

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Why narrative? In part because of the nature of trials themselves. Trials turn past events into texts by rendering them in language. As Robert A. Ferguson has argued, trials always function "through a framework of storytelling" because they are shot through with narratives; that is, with information organized and mobilized into a relatively coherent and temporally logical form by witnesses, attorneys, and judges, and directed at and consumed by various audiences, including other attorneys, judges, the jury, the press, and the public (Ferguson 1996:85; see also Gewirtz 1996:7). That multiplicity, compounded by the adversarial structure of the proceedings, makes the trial an unusually vivid and complex venue in which to explore the dynamics of the narrative transaction, which I will examine more specifically below. In that sense, this essay is part of a by-now-familiar turn to narrative in sociolegal scholarship. Scholars interested in questions of voice, of legal rhetoric, and of the interplay between law, culture, and power have used narrative analysis to explore the ways in which law produces, structures, and suppresses particular narratives, and conversely the ways in which narrative gives meaning to law in various settings.[6] But I wish to make the further argument that narrative may be found not just in trial settings, in the self-conscious tales told by legal actors to legal decisionmakers, but also that narratives are dialogically interpolated within formal law itself, providing the ground on which the ostensibly nonnarrative domain of the script pronounces legal rules.

In what follows I elaborate on and illustrate this analysis of the dialogic nature of law. After briefly sketching the events leading up to Harry Thaw's first trial, I map the dialogic relation between the domains of script and consciousness on two levels. First, I trace the history of the unwritten law as it was articulated in relation to formal legal rules governing intentional murder and provocation; that is, I explore the ways in which formal law is itself dialogized, constituted in its conflict with social customs that sanctioned honor-based killing. Second, I explore the terrain on which Harry Thaw's trial may be seen as an enactment of the struggle that constituted formal law itself. Over the course of Thaw's first trial, Delphin Delmas argued that "responsibility" ought to be adjudicated not just as a question of cognition and intent (following the M'Naghten rule as it was articulated in New York law, did Thaw understand the nature and illegality of the act of shooting Stanford White?) but also as a question of honor (was it wrong to rid the world of a libertine who had ruined

[6] Narrative approaches to law are by now abundant, well developed, and too extensive for a detailed enumeration here. My own analysis has been informed by, among others, Brooks & Gewirtz (1996) and Ewick & Silbey (1995). On storytelling in courtroom settings in particular, see Bennet & Feldman 1981; Jackson 1988; Ferguson 1994; Korobkin 1995; Robertson 1996; and Ganz 1997.

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Thaw's wife Evelyn Nesbit before her marriage?). However carnivalesque the juxtaposition of those two competing models of responsibility—one relying on a denial of rationality and agency, the other embracing and valorizing agency—may appear to our eyes, it was a juxtaposition that had been offered and defended in American courtrooms over the course of the second half of the 19th century. Out of this clash between competing conceptions of culpability emerged a "law" of criminal responsibility that was, as articulated and adjudicated in trial settings, both rich with meaning and highly unstable.

Violence/Vengeance

The 25th of June 1906 was a warm summer evening. A new musical, *Mamzelle Champagne,* had just opened in the rooftop theater at New York's Madison Square Garden. Near the stage and amid colored light strings hanging from arches of vines sat Stanford White, the architect and designer of this new and marvelous monument to the city's thriving culture of leisure. Some distance away from him and farther from the stage sat White's former paramour Evelyn Nesbit Thaw, once accustomed to stage life herself, and her husband Harry Kendall Thaw. As Harry Short, a comedian, struck up the tune "I Could Love a Million Girls," one that seemed an eerily apt description of both Thaw and White, the Thaws and their guests rose to leave, apparently bored with the show. Harry Thaw parted from the group, walked toward White's table, and raised a revolver. His three shots, two to the shoulder, one to the head, killed White immediately, burning his face beyond recognition. Captured at the scene by the police, Thaw was escorted to the nearest station in the Tenderloin section of the city. He identified himself as John Smith, a student, of 18 Lafayette Square, Philadelphia; but his card named him otherwise. Thaw was booked on the charge of murder and sent to his cell in the New York's Tombs prison.

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Born in Tarentum, Pennsylvania, on Christmas day, 1884, Florence Evelyn Nesbit, the woman in the case, moved with her mother and brother to New York late in the year 1900. The years preceding that move had been difficult: Nesbit's father, an attorney, died when she was very young, leaving her mother to support the children by taking in roomers and working as a dressmaker. But Nesbit, forced to scrub floors, was a beautiful child; and when her mother's attempts at a dressmaking career in New York proved fruitless, she used letters of introduction from Philadelphia artists to work her way into a modeling career. At age 16 she began to appear in paintings by Carroll Beckwith, drawings by Charles Dana Gibson, photographs by Gertrude Kasebier and

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Rudolph Eickemeyer, sculptures by Augustus Saint-Gaudens. She quickly became the favorite of advertisers, combining as she did innocence and sensuality. But her heart was set on the stage.

The New York Evelyn wished to conquer was a showcase of Stanford White's artistry. Throughout the city, his hand was recognizable not only in a number of fine residences and private clubs (including the Players' Club, the Century Club, and the Metropolitan Club) but also in monumental works: Washington Square Arch, Judson Memorial Church, Madison Square Garden, the Bronx campus of New York University. The streets she wandered were streets he had touched; the company she desired was the company he kept.

She soon found a place in the famous Floradora Sextette, a chorus line whose members were constantly besieged by "Champagne Charlies" (a better class of "Stagedoor Johnnies"). It was a small step from model to stage; but with it she stepped from poverty into the ambit of millionaires and sporting men who, in an era of loosening norms and burgeoning public amusements, flocked beneath their social station to Broadway to entertain such beautiful women with a lavishness and zest that raised the ire of many a custodian of culture and values. The geography of such a life was beguiling: extravagant dinners in opulent lobster palaces—places to watch and be watched; infamous parties in the private dining rooms maintained by those restaurants; secret rendezvous in secluded chambers deep in the hearts of business districts. The era's love of spectacle was such that it could transport a beauty across class lines from cheap boardinghouse to high society in an instant. Fine clothes, elegant jewels, rich food, ample libation, bright company—Nesbit found all of these immediately.

Soon after her debut as a Floradora girl, Nesbit and a friend were invited to Stanford White's lavish 24th Street apartment for lunch. To enter it she passed behind the counter of a toy store—FAO Schwartz—and watched amazed as doors opened automatically to usher her into a lush set of rooms. Red velvet curtains shut out the sun; indirect electric lights cast a soft glow. She had her first glass of champagne, and after lunch she and the others ascended to the next floor and entered a studio. Set in the ceiling at one end of the room was a red velvet swing; she settled in, was pushed from behind, higher and higher until her feet pierced a paper umbrella, suspended above (Nesbit 1934:27). White, then a married man in his early 50s, took her under his wing, acting as both a paternal figure and a financial support for Nesbit and her mother. But ever a lover of beauty, he also "took" her, either by seduction or force, one night in his lavish penthouse suite in the tower of the old Madison Square, afterward making the 16-year-old his not-unwilling mistress for some period of time.

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Yet another millionaire courted Evelyn Nesbit in her early days on the stage. As the Floradora show moved from the Casino to the New York Theatre, flowers began to pour in from a Mr. Munroe; soon one bouquet came wrapped in a $50, accompanied with a card: "Mr. Munroe is waiting for an answer." She returned the money. Later, she met a man at a luncheon who she described as "unattractive, even repellent. . . . His protruding eyes held a wild look. He glared. There was some indefinable quality about his whole personality that frightened and repulsed me" (Nesbit 1934:6). This was Mr. Munroe, who announced himself as "Harry K. Thaw of Pittsburgh." Thaw, the prodigal playboy son of a Pittsburgh railroad magnate, became obsessed with Nesbit. In 1903, Nesbit fell ill and was advised to travel, and Thaw succeeded in persuading Nesbit and her mother to travel with him to Europe. There he proposed to the 17-year-old, who refused him, perhaps on the grounds that she had been involved with White, perhaps because she wished to remain on the stage, perhaps because of his evident eccentricities. After some time in Paris, though, he renewed his proposal and proceeded to escort her around Europe without her mother, holding her out as his wife. Near the end of their trip Thaw took Nesbit to a castle, the Schloss Katzenstein, in what was then the Austrian Tyrol (now northern Italy); there his tenderness turned violent as he whipped and abused her brutally during their two-week sojourn.

Nesbit returned without Thaw to New York, and on White's advice swore an affidavit against Thaw. She took no further action, though, and eventually Thaw and Nesbit reconciled. They married in April 1905. White remained on the scene only insofar as they ran in similar New York social circles, but his presence, along with Nesbit's story of her relationship with him, agitated the obsessed Thaw for two years. Fifteen months later, Thaw pulled the gun from his overcoat pocket and fired. Thaw and his family moved quickly to mobilize public opinion after the shooting. Three days later, and immediately after the coroner's inquest, Thaw telephoned the city's preeminent social purity advocate, Anthony Comstock, who later told reporters that at Thaw's urging, he had gathered a wealth of evidence against Stanford White from nighttime espionage activity in the tower of Madison Square Garden. But he had been frustrated by people of influence, Comstock said, in pursuing charges. Stories began to circulate through the burgeoning yellow press concerning White's scandalous social life: of secret rendezvous in various apartments, of elegant stag dinners enlivened by barely clad women.

The sensation-seeking press published a number of such stories, fueling the character-blackening campaign against White. The Thaw family contributed heavily to this effort, hiring Benja-

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min Atwell as a publicity specialist,[7] and financing a film and three plays based on the case. One, which opened at the Amphion Theatre in Brooklyn on 24 September, extolled Thaw (alias Harold Daw) as a hero, protected by the unwritten law against any punishment in his killing of White (alias Stanford Black). "No jury on earth will send me to the chair, no matter what I have done or what I have been," cries Daw from his cell, "for killing the man who defamed my wife. That is the unwritten law made by men themselves, and upon its virtue I will stake my life" (quoted in Langford 1962:50; from Atwell, *The Unwritten Law* 1907b). Meanwhile, Harry Thaw waited in his cell on the third floor of the Tombs prison—rather comfortably, all things considered. The famed Delmonico's delivered his meals; his doctor prescribed a bottle of champagne per day; he had all the whiskey he wanted.

In spite of his public relations efforts, the press did not leave Harry Thaw unscathed. On 14 July, for example, both the *Tribune* and the *Times* ran a story about a $20,000 suit against Thaw brought by one Ethel Thomas in 1902. As she alleged in her affidavit, after lavishing attention and presents on Miss Thomas, Thaw met her one day for an appointment at his apartment and, along the way, stopped in a store to buy a dog whip. "I asked him what that was for," she reported, "and he replied laughingly, 'That's for you, dear.' I thought he was joking, but no sooner were we in his apartment and the door was locked than his entire demeanor changed. A wild expression came into his eyes, and he seized me and with his whip beat me until my clothes hung in tatters" (*New York Times*, 14 July 1906).

Other stories circulated: of Thaw's summary dismissal from Harvard after having committed moral indiscretions that were apparently unspeakable; of a scene with a young hotel boy, who, accused of taking some money, was thrashed, then made to strip, forced into a bathtub, and rubbed with salt; of Thaw's attempt to ride a horse up the steps of the Union Club after being turned down for membership. Rumor also had it that he had scalded and whipped a number of girls in a brothel. All such stories fed the credibility of Nesbit's own story of Thaw's abuse (*New York Times*, 6, 7, 10 July 1906). But still Nesbit visited Thaw daily in the Tombs, stood bravely before a churning press corps, prepared to testify in her husband's defense.

In his opening argument, New York City's Assistant District Attorney Garvan put the prosecution's version of events before the jury in a direct manner. "The People claim that [Thaw's act] was a cruel, deliberate, malicious, premeditated taking of human life. . . . After proving that fact to you, we will ask you to find the

[7] Atwell published two editions of his book, *The Great Harry Thaw Case: Or, A Woman's Sacrifice*. The first, published in 1907 (Atwell 1907a), covers events leading up to the murder and the first trial; the second (1908) also covers Thaw's second trial.

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defendant guilty of the crime of murder in the first degree" (*New York Times,* 5 Feb. 1907). He called nine witnesses to the stand; after two hours, he rested his case. The prosecution's story was straightforward: Thaw had publicly, deliberately, and without provocation shot White three times, and was thus by definition a murderer. New York at the time followed the 1842 English *M'Naghten* rule, which held that culpability was based on whether a criminal defendant knew the nature and quality of his actions or knew that they were wrong. (On the *M'Naghten* rule, see Moran 1981.) If Thaw understood that he was shooting a gun at Stanford White and knew that such an action was illegal, he could be found guilty; if he did not understand cognitively either one of those conditions, he would be excused from responsibility as insane.

That legal standard set the initial terms of the trial: Thaw's defense opened with a plea of insanity. Quickly, though, lead attorney Delmas, the silver-tongued "little Napoleon from California," began to construct a narrative based less clearly on insanity than on honor, contesting the prosecution's definition of "wrongfulness" with the defense of the unwritten law. If indeed Thaw both knew what he was doing and knew it to be illegal, Delmas argued, he nonetheless did not believe that his actions were morally "wrong"; rather, he believed them to be "right," justifiable, and a judgment in which any man of worth would concur. In other words, Delmas constructed a narrative that articulated a different relationship between agency and malice than that presumed by the formal law of homicide. Indeed he exploited an instability in the 19th-century law of homicide, which, according to the era's leading authority on criminal law, Francis Wharton, required malice; that is, "a generally wicked, depraved, and malignant spirit, a heart regardless of social duty, and deliberately bent upon mischief" (Wharton 1855:33). The terms of the unwritten law implicitly contested that interpretation of deliberate killing, removing the presumption that all acts of killing are contrary to social duty. Thaw may have killed White, Delmas argued, but he did so with the public good in mind: He eliminated a dangerous libertine and removed a very real threat to the young women of the city.[8]

Narrative Transactions, Cultural Codes

At its most basic, narrative is (as literary critic Barbara Herrnstein Smith [1981:232] has so economically formulated it) someone telling someone else that something happened. That is to

[8] Though he does not make the distinction, it is important to note that Delmas relied on an objective, not a subjective, standard here. He did not contend that Thaw *thought* he was doing good, an argument that would implicate Thaw's mental state; he made the stronger claim that Thaw *did* good, as any upstanding juror would recognize.

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say, narrative is a transactional phenomenon; as Ross Chambers (1984) has argued, it mediates exchanges between teller and listener. This understanding of narrative highlights the significance of both the production and reception of stories and suggests that meaning emerges from a *negotiation* between teller and listener over the import of a story. That negotiative process marks a fundamental instability in narrative: though a teller weaves a tale, she cannot control the interpretation her audience places on it; and though a listener in some sense becomes his own author, creating meaning from the story he hears, he cannot be said to produce that meaning out of whole cloth. By definition, then, no story can be guaranteed to produce one unitary, coherent understanding of any event or action because no one can guarantee a uniformity of reception. Moreover, when a story is told in court, conditions of narrativity not only admit but *require* the production of multiple, discontinuous, and discordant stories as witnesses testify and are peppered with hostile questions, as attorneys attempt to form a mass of "facts" into coherent and competing reconstructions of events and motivations, and as both testimony and argument are received by the judge and jury, the press, and the public.[9]

Yet merely noting the multiple registers of trial narratives is in itself insufficient. One must ask further, what makes any particular narrative persuasive? Quite apart from the issue of factual "truth," how is it that narratives are constructed to draw in their intended audiences? This is not precisely to ask why one narrative "wins" while another "loses."[10] Though the outcome of any particular trial is hardly irrelevant to an inquiry into the power of particular narratives, it does not exhaust the potential of narrative to provoke debates over the meanings that can be derived from that trial (here, think of the continuing debates over the meaning of the Simpson criminal trial in spite of, and indeed because of, his legal acquittal). At the same time, though, trial procedures define the boundaries of "proper" legal storytelling (Ferguson 1996:85). Through the operation of various rules, law attempts to regulate what is able to be narrated; that is, it attempts to discipline both the form and substance of narrative in

[9] The peculiar nature of the jury as audience makes difficult anything more than a cursory analysis of the reception of stories within a courtroom, about which one has little, if any, evidence, since deliberations are secret and verdicts flatten complex stories into a "guilty/not-guilty" dichotomy (see Ferguson 1996:85). In the case of Thaw's trials, one, of course, has access to a great deal of evidence about the wider public's reception of the attorneys' arguments. Much of that evidence is contradictory, though to some extent one can detect from the popular reportage itself a hint that middle-class women tended to sympathize with Thaw and Nesbit and to vilify White (on this point see Abramson 1990). But that aspect of Thaw's trials goes beyond the scope of this essay; here I focus in the main on the productive side of the narrative transaction.

[10] I resist this win/lose model because it proposes an understanding of narrative that is reductive insofar as it envisions the courtroom as a locus of dueling stories—of two, and only two, opposed tales vying for the interpretive soul of the jury.

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order to produce particular kinds of stories. Formal legal rules, in other words, produce conditions of possibility for some kinds of narratives while undercutting others.

Within that framework, to tell a story, claims Ross Chambers (1984:50), is to exercise power; but the authority of storytelling is relational, "the result of an act of authorization on the part of those subject to power, and hence something to be earned." To be persuasive, Delphin Delmas had to identify and articulate those recognizable cultural codes that made Thaw's act justifiable to the jury and the public. But simply making the argument would not be enough; to persuade his audiences, Delmas needed to draw them into his tale, to entice them to defy the terms of formal legal rules governing homicide. The terms of the prosecution had to be altered because an appeal to the unwritten law required that the jury invert the object of judgment from attacker to victim—in this case, from Thaw to White.

To gauge the power of particular narratives within the courtroom, however, we must first step back from the trial process in order to tease out the salient cultural codes constituting the defense's unwritten law narrative, because as Bakhtin argues, discourses "cannot fail to be oriented toward the 'already uttered,' the 'already known,' the 'common opinion,' and so forth" (Bakhtin 1981:279). As a question of representation, cultural codes are, according to Roland Barthes (1974:82), constituted by repetition; they are made of the "already-seen, already-read, already-done." A mixture of common opinions and received ideas, "vulgarisms," they convert the contingent into the seemingly natural; that is to say, in Barthes's terms, the ideological. The fact that meaning is naturalized via repetition suggests that one way to understand the power and lure of a particular narrative is to examine it as it has been constituted and elaborated historically—a history not necessarily relying on a dissection of particular events so much as being a history of discourse, one tracing the received opinions and imaginings about symbolic or emotionally compelling conflicts or movements.

If one constructs such a discursive history of the unwritten law, one finds a relation between a strongly articulated (if not universally implemented) customary right to avenge sexual humiliation and formal legal prohibitions against intentional killing—between the domain of consciousness and the domain of the script. In what follows I sketch the history of this dialogic relation by examining the ways formal legal rules governing homicide are marked by their relation to the unwritten law; or, in Bakhtinian terms, the ways in which formal legal rules were constituted at least in part by their orientation to the "other" and were thus internally divided. That internal division accounts for the peculiar ways in which law was articulated in Harry Thaw's trials and illuminates the dynamics of persuasion, a subject to

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which I will return after sketching the relation between script and consciousness in the 19th century.

A Dialogics of Script and Consciousness: The Unwritten Law in the 19th Century

In 1906 (the year Harry Thaw killed Stanford White) the southern jurist Thomas Kernan asked a question that was on the minds of some of the nation's leading legal scholars: "Do not we in America have, in reality, a jurisprudence, as it were, of lawlessness as well as a jurisprudence of law?"[11] Kernan's article, "A Jurisprudence of Lawlessness," laid out a decalogue of nominally illegal practices, from the duel to lynching, that over the course of the previous century had been given such legitimation as to constitute "a jurisprudence which has almost assumed the dignity and symmetry of a system" (Kernan 1906:450).[12] The "unwritten law" that a man could kill his wife's lover was among these self-help practices, emerging as an articulated legal defense in the 1850s (Ireland 1989:30).[13] It played a part in a number of trials

[11] Speaking of jury nullification, the young professor Roscoe Pound wrote in 1907, "it must be admitted that the law of the land has not the real hold upon the American people which law should have . . . . When everyone out of his own private judgment is wiser than the law, there is a condition in which the law is of no effect" (Pound 1907:607–8).

[12] On the social history of the duel, see Dickson 1979; on vigilantism see Brown 1975.

[13] Though the contours of the unwritten law are difficult to sketch because of its very nature as an extralegal defense designed to result in acquittal (leaving no written legal record in the ordinary run of cases), some generalizations about the social landscape of unwritten law may be made. On the whole, men, and particularly husbands, claimed it as a defense after killing rivals who, in seducing their wives, compromised their sexual honor (Ireland 1989; Hartog 1997). Though it seems possible and even likely that resort to the unwritten law was more common in the South and West, given the tendency in those regions toward a greater reliance on private self-help (see Friedman 1993, particularly the chapter on "Lawful Law and Lawless Law: Forms of American Violence"; Brown 1975, 1991; Dickson 1979; Wyatt-Brown 1982), Ireland does not identify such regional distinctions as salient, citing cases equally from the Northeast and the South and, to a lesser extent, the Midwest. Other commentators have also sketched the geographical spread of the unwritten law defense, as well as its continuing manifestation in the 20th century. See, e.g., Yale Law Journal 1934. Indeed, I think that the symbolic weight of the era's major cases is at least as important as the breadth of the unwritten law's use in understanding the meaning it held in the late 19th century. As both Ireland and Hartog suggest, the major unwritten law trials of the 19th century were public spectacles in which defendants were acquitted to great (though not universal) approbation, at least among those who made "public opinion" (Ireland 1989:37). Both Ireland and Hartog link this embrace of the unwritten law to shifts in gender ideologies and configurations. Ireland argues that the unwritten law materialized in a era of declining male authority and an emergent ideology of female passionlessness. The conflict between a theory of the republican family as a space of virtue and purity and the reality of changing gender roles provoked an anxiety, according to Ireland, that in turn justified the assertion of the unwritten law as a defense against domestic destabilization. Hartog elaborates on this point in suggesting that the unwritten law was a conservative response to the profound disquiet men felt about mid-19th-century legal reform on behalf of women. To the extent that these arguments are persuasive, they militate in favor of differentiating between killings by men and by women. For a clear articulation of this distinction in the context of late 19th-century "crimes of passion" in France, see Harris 1991; Berenson 1992.

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in which high-profile defendants accused of murdering their wives' lovers were acquitted outright, and the breadth of the media's coverage in each instance provoked widespread commentary on the relationship between honor and homicide.[14] It was, in other words, a notorious and ideologically freighted defense that placed honor, a value emanating from the domain of gendered social relations and customs of self-help, in direct conflict with formal legal principles of culpability.

"Any man who commits adultery," wrote Kernan (1906:451–52), "may be put to death with impunity by the injured husband, who shall have the right to determine the mode of execution, be it never so cowardly."[15] Though this "legal" pronouncement is tinged with irony, it nevertheless captures the spirit of the unwritten law defense as it emerged mid-century. Yet the unwritten law is perhaps best viewed not as a negation of positive law but as a moral claim running at an oblique angle to and in dynamic tension with the formal law of homicide. As a defense arising from the domain of consciousness, the "unwritten law" dialogic on its very face insofar as it named itself as "unwritten"—as not-script—in relation to the domain of the script; or, as it was articulated in its originary cases, as a kind of supplementary or transcendent law emerging out of a man's "natural right" to protect the chastity of his wife when formal law can or would not do so.[16] In court, according to historian Robert Ireland, proponents of the unwritten law justified self-help in cases of adultery, seduction, and sexual insult on two grounds, both of which signaled the perceived inadequacies of formal laws governing domestic relations. First, in those states that did not criminalize adultery or seduction, they argued that a man's only recourse was to bring a civil suit for criminal conversation or alienation of affection against the marauder who had destroyed his domestic happiness. Yet seeking money damages could never, in an honorific economy, compensate for the degradation of a polluted hearth (Ireland 1989:30; Hartog 1997:89). As Kernan (1906:459) put it, "What consolation does such a remedy bring to outraged husband or innocent girl victim, or her family, for a happy hearthstone desolated and a precious life blasted forever? 'The jingling of the guinea' never did and never will 'help the hurt that honor

[14] In this regard, the three trials cited above stand out: that of New York Congressman Daniel Sickles for the killing of U.S. District Attorney Philip Barton Key (1859); that of General George W. Cole for the killing of L. Harris Hiscock (1868); and that of Daniel McFarland for the killing of the well-known Civil War correspondent Albert Richardson (1872).

[15] Though he does not discuss the unwritten law, in "Lawful Law and Lawless Law: Forms of American Violence," Lawrence Friedman (1993) chronicles many of the same practices detailed by Kernan.

[16] This kind of language figured prominently in the 1859 trial of Daniel Sickles for the murder of Philip Barton Key and became a paradigmatic rhetorical device in unwritten law cases.

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feels.'" Moreover, defense attorneys argued, a man who turned to the law in response to deeply humiliating situations such as a wife's sexual infidelity was perceived by his peers as unmanly and effeminate (Ireland 1989:30). In such situations, men's actions were governed by a "higher law" that allowed, even required, vengeance in spite of its formal legal prohibition as intentional murder.

Thus characterized by its proponents, the unwritten law emerged as a defense gendered in its very nature, its social legitimacy dependent on a powerful and ideologically charged cluster of values defining proper masculine and feminine behavior (see Ireland 1989; Hartog 1997). To the extent that those values provided the basis for legal acquittal, they demanded notice of the formal law, and placed it under pressure to justify itself, instigating a dialogue between legal domains that in turn inscribed self-help in the heart of positive law. We can trace the path of that process of inscription by examining successive editions of Francis Wharton's definitive treatise on the law of homicide. Wharton, one of the 19th century's leading legal commentators, published the first edition of *A Treatise on the Law of Homicide* in 1855 and later amended it (the 1875 and 1907 editions being most relevant to Thaw's case).[17] In all three, he defines "murder" as "where a reasonable person of sound memory and discretion unlawfully kills any reasonable creature in being, in the peace of the commonwealth, with malice prepense or aforethought, either express or implied." Each of these carefully crafted phrases has significance, but the most relevant here is his emphasis on "malice." To be convicted of murder, one must kill, having the capacity to reason about one's actions, and one must act with, as Wharton puts it in 1855, "a generally wicked, depraved, and malignant spirit, a heart regardless of social duty, and deliberately bent upon mischief" (p. 33). Put more succinctly, to act with malice is to act with "evil intent" (ibid., p. 2).

According to Wharton, killing without evil intent constituted the common law crime of manslaughter, "the unlawful killing of another, without malice, on sudden quarrel or in a heat of passion." To mitigate murder to manslaughter, the defendant must prove that he was provoked by his victim in a way that was both sufficient and legally cognizable. The "classic" example of such provocation is that of one man's hot-blooded, lethal response to the nonlethal assault and battery of another in a fight. Yet the defense was not limited to those confronted with physical assault, and it is here that one begins to find the era's extralegal activities putting pressure on the formal law of homicide. "[I]f a man be greatly provoked by any gross indignity," wrote Wharton (p. 35), "and immediately kills his aggressor . . . the law kindly appreciat-

[17] On Wharton himself, see Tighe 1983; Wharton 1891.

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ing the infirmities of human nature, extenuates the offense committed, and mercifully hesitates to put on the same footing of guilt, the cool deliberate act, and the result of hasty passion."

This statement is striking in its characterization of the relation between the law and the defendant. As both a convention of writing and a paradigm, the defendant is figured as male, a significant gesture that presages one of the law's primary fields of regulation in this area: responses to sexual betrayal and dishonor. Ironically, even as law imagines its object of regulation to be male, it portrays itself as the omnipotent and merciful sovereign, who by his grace alone recognizes the disruptive nature of emotion in an otherwise rational man. To be a murderer is to act with deliberation and intent, however maligned one's spirit; to be convicted of manslaughter is to have lost stoic self-control, to be overcome by emotion. It is, in other words, to be the impetuous son, appealing to the father for pity after an adolescent outrage.

What will the law recognize as "gross indignity"? The classic street battle case of provocation is relatively clear-cut and does not detain Wharton long. More interestingly, even in the 1855 edition of his treatise Wharton spends a significant amount of time wrestling with a more difficult question: To what extent does an affront to a man's honor constitute provocation? Rather weakly he says that words alone are never enough to satisfy the legal test; that is, that verbal insult is not recognized as provocation sufficient to mitigate a charge of murder to manslaughter (p. 169). Immediately, though, he recites in great detail a narrative of provocation from an 1805 Massachusetts opinion—a text within his text—in which a court of appeals allowed to stand a jury acquittal of one Selfridge for shooting and killing a young man who may or may not have threatened him with a cane.[18] The jury appears to have acquitted Selfridge not because he was in some physical danger but because the young man's threat constituted a public insult to his reputation. Wharton adamantly condemns the judgment but uses the case to explore the role of honor in a provocation defense. "Whether a homicide committed by a man smarting under a sense of dishonour is murder or manslaughter," Wharton concludes (p. 177), "depends upon the question whether the killing was in the first transport of passion or not." Evidently, then, in spite of the axiom that mere words can never amount to legally adequate provocation, Wharton declares reluctantly that the law will mitigate punishment when injury is done to one's sense of self, as well as to one's body, if the lethal response occurs immediately.

[18] Interestingly, Wharton appends the opinion to the end of his treatise without providing further citation, in effect enveloping it into the text of the treatise itself.

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What specific kind of injury is imagined here? Curiously, in a postacquittal apologia for his actions, Selfridge characterized his injury as if it were bodily, in particularly gendered terms. "The honor of a gentleman should be as sacred as the virtue of a woman," he wrote, "but the female is authorized to take his life, who would violate her honour. Why is not a man bound to maintain his honour at the same hazard?" (quoted in Wharton, p. 174). Selfridge uses the language of physical violation, of violence done to a quality of self that is holy, sanctified. As he moves across gender lines, his language slips significantly from violation to maintenance, and from authorization to duty, suggesting that for a man some outside force impels a response to an attempt at dishonor. Those who have written on cultures of honor locate that force in public opinion and, more specifically, in a community's imposition of shame for behavior that is perceived as dishonorable, unmanly, or below one's social station.[19] The injury felt after insult, then, is an injury causing humiliation, which without response converts to disgrace in the mind of the public. Just as a virtuous woman would no doubt rebuff a sexual affront, an honorable man must rebuff an attack on his honor.

Selfridge's perhaps inexact analogy between rape and insult nonetheless points to the direction the jurisprudence of provocation will take over the course of the century. By the time of his 1875 edition, Wharton has focused his discussion of honor and provocation specifically on the problem of sexual insult and outrage. He (unlike Selfridge) still imagines his defendant to be male, specifically stating that a husband, following a hot-blooded killing of one committing adultery with his wife, is guilty of manslaughter only. This understanding of provocation seems plausible: the shock and injury one would feel at the unexpected sight of one's wife in bed with another man would certainly seem to rise above the level of "mere words." Yet as Wharton continues, it becomes clear that the injury to be redressed is not necessarily confined to that which causes personal sexual humiliation; rather it expands to encompass a more diffuse sense of public honor. "[W]here there is a legal right and a natural duty to protect," writes Wharton, "an assault on the chastity of the ward (using the term in its largest sense) will be a sufficient provocation to make hot blood thus caused an element which will reduce the grade to manslaughter." To clarify this vague rule Wharton provides two examples: a father who kills after becoming incensed at an "unnatural outrage" upon his son (Wharton elaborates no further); and a father's or brother's indignation at a sexual outrage attempted upon a daughter or sister. Presumably hot blood is

[19] "Honor," writes William Ian Miller, "is above all the keen sensitivity to the experience of humiliation and shame . . . that disposition which makes one act to shame others who have shamed oneself, to humiliate others who have humiliated oneself" (1993:84–85; see generally Wyatt-Brown 1982).

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still a requirement; but in such situations the defendant experienced no direct insult. Rather, the injury seems to be a violation of the defendant's sovereignty by harm done to a dependent. Wharton justifies this extended conception of injury on pragmatic grounds: "To impose a severer rule would be a departure from the analogies of the law, and would bring the court in conflict not only with the jury, who under such circumstances would never convict of murder, but with the common sense of the community" (Wharton 1875:412).

This statement is indeed remarkable, coming from a careful taxonomist of formal law. Wharton does not clarify why this extension of the earlier principle is in fact justified by analogy—to what?—but his acquiescence to jury sentiment and public "common sense" may be read as a response to a perceived rash of unnamed instances when defendants have been convicted of some charge less than murder, if indeed they have been convicted at all. The injury of sexual outrage is the moral space in which script and consciousness must negotiate their competing visions of responsibility and justification; that is, in this particular area of provocation, formal law directs itself toward its anticipated nullification and is redefined by that dialogic orientation. One can view Wharton's characterization of provocation as a way to uphold the law in the face of a direct challenge; in expanding circumstances of mitigation, positive law meets halfway juries that would outright acquit. This stance, in its humble tone, departs from Wharton's earlier rendering of law's "merciful hesitation" at convicting a defendant of murder who acted in the heat of passion; it is almost as if the law is asking for mercy from the jury and the community who apply it. A crack has emerged in the veneer of the formal law; this gesture of humility is Wharton's attempt to shore up the law's legitimacy. And yet it simultaneously points to law's fragility, its dependence on community consent, and the direction of force exerted on the law by the self-help practices threatening to undermine it.

That threat is literally written into positive law by the time of Wharton's third edition (edited by Frank H. Bowlby). By 1907, particularly in southern states, courts and legislatures had expanded the notion of provocation to cover a broad range of sexual effrontery. Texas went furthest in this process, passing a statute that expanded the notion of provocation to cover opprobrious words or conduct directed at a female relative.[20] Moreover, the Texas statute not only mitigated punishment but out-

[20] See Texas Penal Code Ann., sec. 1220 (1861). The rule states that "insulting words or conduct of the person killed toward a female relative of the slayer is made, by statute, adequate cause to reduce the offense if it takes place at the first meeting after information concerning the insult" (Wharton 1907:279). The treatise is vague about the geographical spread of this rule in the 19th century; in fact both New Mexico and Utah passed versions of it, and Georgia partially adopted it by court decision. See New Mexico Comp. Laws, sec. 1076 (1897); Utah Comp. Laws, sec. 1925 (1876); *Biggs v. State* (1860).

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right excused the killing of an adulterer if the wronged husband found his wife and her paramour *in flagrante delicto*, a rule that went well beyond the classic common law approach to provocation.[21] Though unusual in its official status, the Texas statute crystallized in a relatively untempered form assumptions about white masculinity and honor that were widespread in, but by no means limited to, the South.[22] As historian Bertram Wyatt-Brown (1982:364-65) has argued, honor was "a filter or medium through which specific cases were often decided," and at least in small communities, law tended to mold itself to local opinion, "adjusting the penalties of shame to meet community demands." One can see in the general expansion of the contours of provocation over time the ways in which formal legal rules contain within them values, implicit and explicit, from other legal domains (both social custom and trials, to the extent that Wharton's rules are derived from court opinions) which in turn reconstitute the substance of written law. Formal law enters the domain of the trial in an already-dialogized state, constituted internally in relation to the domain it nominally governs, that of everyday life and consciousness. But this relation is not simply one in which law "mirrors" society; rather it is a relation of conflict, of struggle for the power and authority to define criminal culpability and its consequences.

The Dialogics of Legal Narrative: Harry Thaw's Trial

The substance of the unwritten law as it was articulated at trial emerged from the defense's paradoxical origins: even as the defense was raised in order to convince a jury to acquit, it had, in and of itself, no formal legitimacy precisely because it did not have the status of positive law. The very presence of unwritten law claims in the courtroom, then, depended on the articulation of two substantively different dialogic relationships: not only the relationship between written and unwritten norms of provocation and excuse (the terms of contest with the prosecution), but the relationship, with regard to the law of criminal responsibility, be-

[21] Wharton 1907:307: "So, an act of adultery with the wife of a man who kills the adulterer therefor, provided the killing takes place before the parties to the act of adultery have separated, is made by statute in Texas not only a sufficient provocation to reduce the crime of killing to manslaughter, but a complete justification therefor." In the usual course of events, the only killings for which a civilian (i.e., someone not working in an official capacity for the state) may be fully justified or excused are those done in self-defense, those done to prevent a heinous felony (murder, rape, arson, and so forth), and those done while insane.

[22] These assumptions informed not only justifications for the duel—the paradigmatic example of honor-based violence—but other areas of formal law as well. Some states, for example, eliminated the English common law rule that one has a duty to "retreat to the wall" before defending oneself against deadly force, substituting in its stead what became known as the American "true man" doctrine that one need not fly in the face of such a threat. See Brown 1991.

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tween honor and insanity. Defense attorneys, in need of presenting some kind of "legitimate" defense that would allow a jury to acquit their clients outright (rather than mitigation through a provocation defense), offered insanity as a formal legal defense. But the insanity plea was not purely an instrumental means of sneaking the unwritten law into the proceedings. Theoretically, the two defenses devolved in contradictory directions: the insanity plea emphasized a lack of rationality and agency, while the unwritten law privileged a manly response to sexual humiliation. Yet they were also mutually dependent insofar as each partially supplemented the other accounting for acts arising from sexual humiliation. Indeed, the problem of interpreting rage and obsession lies at the heart of the dialogic relation between the unwritten law and insanity pleas.

In narrative, if not in theory, righteous indignation can coexist with irrational excess to create a powerful story of exoneration that answers positive law's accusation of malice. Trials provide the space within which such dialogic relations are, through narrative, made material and put on display. Because of their adversarial and polyvocal structure, trials literally stage clashes of meaning as attorneys attempt to construct persuasive narratives to sway decisionmakers. Adopting Bakhtinian terms, one might say that the task of each opposing advocate is to mount an argument that takes on the air of an "authoritative discourse" (embodying "authority as such, or the authoritativeness of tradition, of generally acknowledged truths," and so on), and then to transform that discourse into one that is "internally-persuasive," "tightly interwoven with 'one's own word'" (Bakhtin 1981:344-45). What, then, makes a story persuasive? More specifically, what narrative strategies did Delphin Delmas marshal in Harry Thaw's first trial in the attempt to gain his acquittal?

Narrative theorists argue that particular narratives gain credibility and persuasiveness through an act of seduction. "Seduction as a narrative tactic," argues Ross Chambers (1984:215), "takes the form of recruiting the desires of the other in the interests of maintaining narrative authority"; that is, the narrator maintains his or her authority to narrate by exchanging something that the listener wants for the listener's attention. This kind of seduction is associated with authority because granting one's attention is at least a contingent acknowledgment of a story's power; moreover, because stories can partially construct their listeners' responses, they in effect subjugate through seduction, implicating what Brooks (1984:61) calls the "shaping power of desire." Thus "authority and seduction are in a sense interchangeable" (Chambers 1984:218).

In Harry Thaw's trial, Delphin Delmas tried to gain authorization for the unwritten law narrative in two distinct but related ways: by drawing on the generic conventions of melodrama, and

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by rhetorically interpolating jury members (and by extension the general public) into the heroic roles of the melodrama he had narrated. Both of these tactics had been used with success in earlier major unwritten law trials.[23] Melodrama, a mode of conception and expression characterized by emotional excess, heightened dramatization, and the symbolic confrontation between starkly polarized, even hyperbolic characters signifying a manichaean opposition between good and evil (Brooks 1976:ix-xiii, 11), was one of the 19th century's predominant representational forms, particularly in the theater (Mason 1993:15). Melodrama articulates moral conflict as a confrontation between good and evil, hero and villain. To be narratively satisfying, the audience must witness and endorse the expulsion of evil and the admiration of virtue: the girl must be rescued from the railroad tracks and the shady man in black banished. This structure sutures neatly into the courtroom, a place in which opposing attorneys tend to emphasize moral clarity over nuance as they argue their cases, casting their side as heroic, the other as villainous.[24] The dramatic tension in melodrama lies in the possibility that virtue will be masked or misrecognized through misunderstanding, disguise, or manipulation. Describing melodrama as a "drama of recognition," Brooks argues that virtue's recovery depends upon its public acknowledgment, often figured in a full-fledged trial "where virtue's advocates deploy all arms to win the victory of truth over appearance and to explain the deep meaning of enigmatic and misleading signs" (Brooks 1976:27, 31). Delmas does precisely this in raising the unwritten law defense, as he works to characterize Stanford White in such a way that jurors would recognize Thaw's act as a triumph over evil, not an evil act itself.

Yet to introduce the melodramatic narrative that would justify an acquittal, Delmas had to overcome a significant procedural hurdle: rules of relevance that prohibited any testimony about either Stanford White's character or the relations he had

[23] Take, as an example, the first of the 19th-century's well-known unwritten law trials, the 1859 trial of New York Congressman Daniel Sickles for the killing of U.S. District Attorney Philip Barton Key. Sickles, the day after receiving credible information that Key was having an affair with Sickles's wife Teresa, confronted and shot Key three times. Defense attorney John Graham painted a picture of a villain justly eliminated by an honorable defendant, and explicitly interpolated the jury into that narrative. Having entered a plea of not guilty by reason of insanity, he instead argued to the jury that it alone could "fix the price of the marriage bed" (*Sickles-Key* 1859:25); that the greatest provocation one man can give another is to "pollute his wife" (ibid., p. 70); that in killing Key, Sickles had done nothing more or less than "become a man" (ibid., p. 98). "That life, taken away as it was," Graham argued, "may prove your and my gain. You know not how soon the wife or daughter of some one of you would have been—in fact you know not but she had been—marked by the same eyes that destroyed the marriage relations of the defendant" (ibid., p. 25). Sickles was acquitted, to great acclaim, as were a number of other defendants in the era's spectacular unwritten law trials, on similar terms.

[24] Ferguson (1996:87) makes the general point that genre is a crucial aspect of courtroom narrative: "[A]dvocates . . . know that jurors must first recognize the developing contours of a story to accept it, and the perception makes them practical students of preexisting narrative forms."

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with Evelyn Nesbit. Without that evidence Delmas could not establish the social and sexual landscape necessary to narrate the melodrama of the unwritten law. And yet here lay the strategic value of the defense's dialogic constitution. Delmas drew on the prerequisites of the insanity defense, carefully crafting Evelyn Nesbit's testimony in the classic literary form of the framed tale: she described her relations with White by describing the effect her own, earlier telling of that story (a story of drugging and rape) had on Thaw's mind. The truth of the story was not at issue and could not be contested by the prosecution; only the truth of the telling mattered, and there were no witnesses to that particular narrative transaction. The story's effects on Thaw, it appeared from Nesbit's testimony, were powerful, almost overwhelming; and in detailing those effects on the stand she told a parable about the power of narrative.

Nesbit began her testimony by describing the night of the murder; then Delmas took her back to a scene in Paris, in June 1903—the night Thaw first proposed to her. She testified that she refused him because of a particular event in her life connected with Stanford White, then described her conversation with Thaw about that event. District Attorney William Travers Jerome objected to the admission of that evidence; but Nesbit swore that she would recount only what she told Thaw of White's behavior, which appears to have been a very long and detailed story indeed. "He told me to tell him everything," she said, and what she swore she confessed to Thaw, she also confessed to the jury and the public.[25] She recounted her first meeting with White in 1901, when she was 16, of first riding in his red velvet swing and piercing his paper umbrella with her foot, and detailed his later gifts and his parties. Finally, she described "occurrences" that took place in one of White's many studios during a time when her mother was out of town. They had eaten dinner alone, she said, reconstructing what she told Thaw; then White took her through several rooms she had not yet seen.

> Mr. White asked me to come to see the back room, and he went through some curtains, and the back room was a bedroom, and I sat down at the table, a tiny little table. There was a bottle of champagne, a small bottle, and one glass. Mr. White picked up the bottle and poured the glass full of champagne. . . . I don't know whether it was a minute after or two minutes after, but a pounding began in my ears, a something and pounding, then the whole room seemed to go around. Everything got very flat.
>
> Then when I woke up, all my clothes were pulled off of me, and I was in bed. I sat up in the bed, and started to scream. Mr.

[25] Nesbit's testimony was considered so scandalous that it provoked nationwide calls for censorship of the press, and President Theodore Roosevelt investigated the possibility of prohibiting the circulation of the "full disgusting particulars" of the Thaw case through the mails as obscene. *New York Times,* 12 Feb. 1907.

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> White was there and got up and put on one of the kimonos. The kimono was lying on a chair, and then I moved up and pulled some covers over me and sat up, and there were mirrors all around the bed. There were mirrors on the side of the wall and on top. Then I screamed, and he came over and asked me to please keep quiet, that I must not make so much noise. He said, "It is all over, it is all over." Then I screamed, "Oh no!" (*New York Times,* 7 Feb. 1907)

Thaw became very excited, Nesbit testified, after she told him this story. "He would get up and walk up and down the room a minute and then come and sit down and say, 'Oh God! Oh God!' and bit his nails like that, and keep sobbing." Here the seductive operations of narrative are clearly visible. Nesbit is testifying to a situation in which the audience of a particular story—Thaw—is overcome with emotion to the point of hysteria. Her story has carried him with her through her own seduction, drugging, and rape—her victimization at the hands of a libertine—emplotted as a classic melodrama. One can see in his exclamations and sobs a deeply impassioned, even identificatory response to Nesbit's story; her tragedy has become his own.

Moreover, the testimonial stance the law required her to take (i.e., recounting facts in the form of a tale she told to Thaw) enabled Nesbit and Delmas to displace the first audience—Thaw—with the second—the jury and the public. Their narrative tactic was metathetic: provoke the same emotional response in the second audience as was provoked in the first; transpose one listener for another. This gesture toward an implied audience, interpolating juror for defendant, is Delmas's second tactic of seduction. Here, the plot of Nesbit's framed tale is designed to entice the listener into its generic logic: innocence betrayed, injury redressed, honor and order restored. This structure and language bolster the tactic by provoking the intense emotionalism associated with melodrama. Its rendering of womanhood fits neatly with its conventional typological tendencies: in the version Nesbit narrated at trial she is made into the guileless innocent, seduced and despoiled by a manipulative villain. Yet melodrama, far from offering only cardboard cutout of a morality tale, presents "a drama of morality: it strives to find, to articulate, to demonstrate, to 'prove' the existence of a moral universe" (Brooks 1976:20); and to the extent that it makes those greater claims on its audience, it does so by drawing them emotionally into the conflict, by creating a narrative paradigm whose outcome is already a predetermined "celebrat[ion of] the sign of the right" (ibid., p. 43). It is precisely this kind of positioning of the self in sympathy with moral good that Delmas claims as the basis authorizing this, rather than the prosecution's, narrative of responsibility.

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> Men, judge your fellow man as you would be judged, and in order to judge him, place yourself, as far as in your power lies, in the spot where he stood, surround yourself with the circumstances that surrounded him, then, and then only, will you be able to do him justice, which you under oath have promised to do. (*New York Times,* 10 April 1907)

If Delmas were to have privileged an insanity-based interpretation of Nesbit's story, his appeal to the jury would have appealed to its members' sympathies by emphasizing Thaw's alienation from reason and cultural common sense. But with this interpolative tactic one can see that Delmas wished to privilege an honor-oriented interpretation of Nesbit's narrative and Thaw's shooting. Far from emphasizing Thaw's difference from the jurors, Delmas tries to provoke identificatory responses in order to draw them into the logic of his story.

And yet Thaw's response to Nesbit's story can be assimilated to the discursive fields of both domains of honor and insanity. Nesbit's story provides evidence for either framework, an ambiguity Delmas exploited by supplementing her testimony with that of a number of medical experts. Those experts offered testimony on the question of Thaw's state of mind to support the argument, made in other unwritten law cases as well, that Thaw suffered from some sort of temporary insanity at the time of the shooting (though, much to the chagrin of the public and the medico-legal community more generally, the experts were unable to agree on a plausible diagnosis that would also satisfy the M'Naghten standard).[26] This claim was not presented precisely as an argument "in the alternative" to the honor defense; rather it was meant to complement and color the substance of the defense in suggesting that any man of honor would respond with righteous rage to insult and humiliation at the hands of a sexual rival.[27] That melding of theoretically contradictory claims—that Nesbit's story provoked both moral outrage, resolved through intentional and honorable violence, and a kind of mental instability that could dissipate only when its symbolic provocateur disappeared—became the cornerstone of Delmas's most powerfully stated closing argument:

[26] Medical experts from both sides offered conflicting testimony on the nature and extent of Thaw's insanity. Indeed, though initially arguing against the insanity defense, the prosecution at one point in the first trial's proceedings demanded and received a hearing in front of a "lunacy commission" to determine whether Thaw was competent to advise counsel (he was declared competent). This move placed the defense in the awkward, though not impossible, position of having to argue that Thaw suffered from a mental disorder serious enough that it should excuse him from murder but that it had ceased or receded by the time of his trial. Members of the medico-legal community felt that their struggle for professional respectability had been marred by the Thaw trials' "battle of the experts" (see Bell 1907; Hamilton 1907; McIntyre 1907; Osborne 1907; Somerville 1907; Halsey 1908; Keedy 1911–12, 1915) in spite of Thaw's ultimate acquittal and confinement in Matteawan Asylum.

[27] This claim elaborated most fully in *Sickles* and *McFarland,* in the defense's recitation of a biblical passage: "jealousy is the rage of man."

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> The learned alienists have left the matter in an uncertain condition, because they have not classified the insanity under which the defendant was labouring at the time. Gentlemen, I care not whether you give that insanity a name or not. It is a species of insanity which, though it may be unknown to those learned alienists, is perfectly familiar to every man who has a family, and to the history of jurisprudence in these United States. It is a species of insanity which has been recognized in every Court, in every State in this Union, from the Canadian border to the Gulf of Texas. It is that species of insanity which, if you desire to give it a name, I will ask you to label it *dementia Americana*. It is that species of insanity which makes every home sacred. It is that species of insanity which makes a man believe that the honour of his wife is sacred; it is that species of insanity which makes him believe that whoever invades the sanctity of that home, whoever brings pollution upon that daughter, whoever stains the virtue of that wife, has forfeited the protection of human laws and must look to the eternal justice and mercy of God. (*New York Times*, 10 April 1907)

And indeed, despite the internal contradictions of the unwritten law defense, at least part of the broader public succumbed to it. Journalists covering the trial replicated Delmas's melodramatic language in their own coverage. "The worst has been told," wrote journalist Ada Patterson.

> Nothing else could ever approach the horror of that story of a poor, beautiful, foolish, ignorant girl of sixteen pursued with the wealth and ferocity of a panther, by a man old enough to be her grandfather. How he marked her for his prey when he first saw her . . . how he stalked her down . . . how he wooed her to him with gifts; how he lulled her suspicions to rest, and how, when she utterly trusted him and revered him like a god for what she thought was his goodness to her, he turned upon her and slayed all that was pure and innocent in her, made up a recital that seemed to those who heard it to drip blood at every word. (*New York American,* 8 Feb. 1907)

Patterson's narrative voice suggests that she herself witnessed Nesbit's downfall, the indignant tone indicating that she understood Nesbit's feelings and responses almost as if she herself had felt them. Nesbit's narrative had moved her just as it had moved Thaw.

The Dialogics of Legal Meaning: The Domain of the Trial

However successful Delmas was at using Nesbit's testimony to win over certain parts of the press (see Abramson 1990), the audience obviously most in need of wooing was Thaw's 12-man jury; and with that problem we return to a more general consideration of the trial as the domain in which processes of legal meaning making are materialized. That is, we move from an analysis of the dialogic nature of particular narratives to an analysis of the dia-

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logic structure of the trial itself. On the most obvious level, trials are dialogic because they provide a forum for contestation between highly stylized narratives of culpability and exculpation. Jury verdicts in effect ratify (though perhaps only partially and imperfectly) the authority of one particular version of events over another or (as was the case in Thaw's first jury's hung verdict) the authority of neither. Jury verdicts, because of their secrecy and terseness, almost never precisely demarcate the bases upon which one story was rejected in favor of another. On a general level, though, narrative theory can help in the articulation of some grounds for assessing a jury's resistance to the seductive power of any given story.[28]

Chambers (1984:8) claims that narrative authority in the end depends on the production of shared meanings, an initial contract or understanding between teller and listener as to the terms and logic of the narrative. In legal terms, a contract can be described as a "meeting of the minds." If, as Bakhtin argues, meaning emerges in the relation between discourses, and between discourse and context (see also Chambers 1984:3), then Delmas's ultimate inability to locate and consolidate a shared narrative terrain stemmed from a perceived gap between his claims and the social meanings the jury would ascribe to them.[29] The prosecutor's narrative attempted to exploit that gap with a narrative of debasement, one that disputed the unwritten law's high tone of moral righteousness. Again and again in cross-examination, District Attorney Jerome undercut Nesbit's claim to innocence, forcing her to admit that she had taken money from White after he raped her, that she had traveled as Thaw's wife before they were married, that she had lived a fast life both in New York and on the Continent. "*Dementia Americana* doesn't for two years flaunt an unfortunate girl as his mistress," Jerome argued in his closing statement. "Gentlemen, this is no case of a Saint George rescuing his maiden. This is a mere, common, sordid, vulgar, everyday Tenderloin homicide, and you know it! . . . The angel child that Mr. Delmas would paint her to be, reared chastely and purely, as she herself tells you, drugged and despoiled! Why, what non-

[28] While any exploration of the complex and varied popular responses to Delmas's melodrama lies beyond the scope of this essay, one can sense from letters to the editors of major newspaper a tendency to condemn not just Stanford White for his libertinous behavior but also Evelyn Nesbit, Harry Thaw, and more generally New York's "sporting" nightlife culture. Both Thaw and Nesbit clearly had their defenders, but one can speculate that they were more vulnerable to public critique in part because Nesbit was put on the stand and subjected to cross-examination. In earlier unwritten law trials of some notoriety, the woman at the center of the case was generally denied the opportunity to testify based on a claim of spousal privilege—a tactic that generally protected the reputation of the defendant who might otherwise have been show to be less than morally pure. In this regard, see the trials of Sickles (1859) and McFarland (1870).

[29] As Ferguson (1996:86) has argued, the most believable stories have some "contemporary understanding"; that is, some credible correlation with contemporaneous cultural codes.

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sense to come here and tell twelve men! She of the Florodora chorus! She dragged into this den of vice and drugged!" (*New York Times*, 10 April 1907). Here Jerome's language is, as Bakhtin would describe it, double-voiced (Bakhtin 1981:324). In its ironic repetition of Delmas's own words ("dementia americana," "angel child"), the prosecutorial discourse serves two speakers at the same time—a rhetorical stance that displays its own dialogic relation to the opposing discourse.[30] Jerome in this rebuttal emphasizes not only immorality (in order to counter Delmas's heroic melodrama) but also agency ("flaunting"; the ironic reference to Nesbit's claims of victimization) in response to the unwritten law's partial reliance on a mental incapacity argument.

While it may seem as though I am belaboring the obvious in indicating the ways in which Jerome's argument depends on and specifically responds to Delmas's argument (how else would we expect courtroom advocates to behave?), my point is precisely that there is a close relationship between legal disputation in the courtroom and the ways in which (seen through a Bakhtinian lens) legal meaning is produced more generally. Taken as a whole, this struggle or clash between advocates becomes not just a metaphor for, but an example of, the process by which legal meanings are made and remade. What, then, can Thaw's first trial's hung jury be said to signify? Within the scope of the narrative transaction, a hung jury is one whose individual members differentially refuse seduction. The jury's nonjudgment is really an ambivalence: it cannot firmly decide guilt or innocence because neither the prosecutor's nor the defense's narrative carries enough authority to sway all its members. More than that, though, Thaw's hung jury marked a moment of crisis in the law of criminal responsibility; and its ambivalence was itself a legal utterance, one that confirmed that—at least in the context of these kinds of killings—"responsibility" was a term of uncertain meaning, fully related neither to honor nor to malice nor to insanity. (Thaw's second jury resolved that uncertainty in favor of acquittal by insanity, but only after the defense purified its narrative of reference to honor and fortified it with evidence of hereditary instability.) Thaw's spectacular trial placed that struggle over the meaning of responsibility on display in the broadest possible way.

Ultimately, verdicts and substantive rulings feed back into formal law via common law reasoning and treatise writing even as spectacular trials become points of reference in a broad set of conversations about social norms and relations, cultural codes and nodes of resistance. Such trials circulate in and through both formal law and everyday life, as potential material for the articu-

[30] Bakhtin (1981:324) argues that double-voiced discourse is always internally dialogized.

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lation and elaboration of legal principle and procedure, and as a cultural texts for public consumption (whether as moral lesson, as object of parody, as site of social self-definition, or as entertainment). In other words, these trials (if not trials in general) not only constitute the legal domain mediating between script and consciousness; they also partially instantiate the domains of script and consciousness themselves. The very spectacularity of these trials marks the space of law's performative identity, its "doing" as and within culture; and emerging from a consideration of such trials—a consideration informed by Bakhtin and other literary theorists—is a vision of law as narrated, negotiated, internally contested, and hence discursively unstable. Far from offering mumbo jumbo to a public thrilled by the display of law's incoherence, Harry Thaw's trial and others like it instead propose a new way of conceiving a history of legal meaning: not the history of formal law corrupted by spectacularity, but one of discursive instability itself.

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