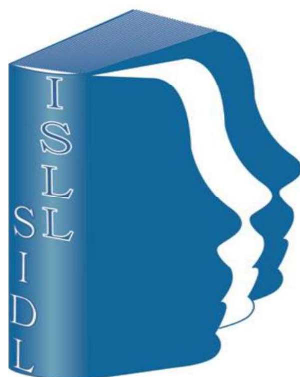

ISLL Papers

The Online Collection of the Italian Society for Law and Literature

Vol. 2 / 2009

Ed. by ISLL Coordinators
Carla Faralli e M. Paola Mittica

ISLL Papers

The Online Collection of the Italian Society for Law and Literature

http://www.lawandliterature.org/index.php?channel=PAPERS

© ISLL - ISSN 2035-553X

Vol. 2 /2009

Ed. by ISLL Coordinators
C. Faralli & M.P. Mittica

ISBN - 9788898010547
DOI - 10.6092/unibo/amsacta/5572

Table of Contents

Giorgio Maria Zamperetti, **Desiderio simbolo diritto (Desire Symbol Law)**

Antonello Ciervo, **La classe operaia non va in paradiso. Le trasformazioni del mercato del lavoro tra Diritto e Letteratura ("La classe operaia non va in paradiso". Labor market transformations between Law and Literature)**

José Calvo González, **Constitutional Law en clave de teoría literaria. Una guía de campo para el estudio (Constitutional Law and Literary Theory. A Field Guide)**

Ilario Belloni, **Il fattore K. Legge, vita, corpo nell'opera di Franz Kafka (The K factor: Law, life and body in Kafka's works)**

José Calvo González, **Quevedo en tela de juicio, o sea el Tribunal de la justa venganza de Luis Pacheco de Narváez (De contiendas literarias y Derecho en la España del siglo XVII) (Quevedo Questioned, or the Court of the Vengeance of Luis Pacheco de Narváez. From Literary Controversies and Law in 17th Century, Spain)**

Jacob Strain, **A Literary Approach to Substantive and Procedural War Law: An Illumination of War Law through T.H. White's The Once and Future King**

Francesca Scamardella, **Ragionando sul diritto: Alice e il gioco degli specchi (Reasoning about Law. Alice Crosses the Mirror)**

Alberto Vespaziani, **Per un'ermeneutica della metafora giuridica (Toward an Hermeneutics of Legal Metaphor)**

Giovanni Tuzet, **Diritto e letteratura: Finzioni a confronto (Law and Literature: Comparing Legal and Literary Fictions)**

Felice Casucci, **Etica Letteratura Diritto (Ethics Literature Law)**

Roger Campione, **Los derechos flexibles. A proposito de "La cuadrilla" de Ken Loach (Flexible Rights. About "The Navigators" by Ken Loach)**

Flora di Donato, **Conversing in the Garden on Psychology, Culture, Law, and Narration: An Interview with Jerome Bruner**

Reviews

Riccardo Cappelletti, **Dentro e oltre la letteratura. Un atelier inedito in un convegno in onore di Jean Carbonnier (In and Beyond Literature: A Special Atelier at a Congress in Honour of Jean Carbonnier)**

Robert Cover, **Nomos e narrazione. Una concezione ebraica del diritto, a cura di M. Goldoni, Giappichelli, Torino 2008, 145 pp.** by M. Paola Mittica.

Mônica Sette Lopes, **Uma metáfora: música & direito, LTr, São Paulo 2006, 183 pp. All. CD audio** by Valerio Nitrato Izzo.

Marcello Strazzeri, **Il teatro della legge. L'enunciabile e il visibile, Palomar, Bari 2007, pp. 254** by M. Paola Mittica.

Antoine Garapon, Denis Salas, dir., **Imaginer la loi. Le droit dans la littérature, Michalon, Paris 2008, pp. 301** by Francesca Scamardella.

R. Voza, a cura di, **Lavoro, diritto e letteratura italiana, Cacucci, Bari 2008, pp. 190** by Martina Di Teodoro.

José Calvo González, **Octroi de sens. Exercices d´interprétation juridique-narratif, Les Presses de l'Université Laval, Québec, Canada 2008, pp. 141** by Concepción I. Núñez Martínez.

Jeanne Gaakeer, François Ost, eds., **Crossing Borders: law, language, and literature, Wolf Legal Publishers, Nijmegen 2008, pp. 179** by Valerio Nitrato Izzo.

ISLL Papers

CONVERSANDO IN GIARDINO CON JEROME BRUNER SU PSICOLOGIA, CULTURA, DIRITTO E…NARRAZIONE*

Flora di Donato

Abstract

Professor Jerome Bruner is known as one of the most important psychologists of the 20th century.

From the first, his psychological research was focused on the relation between *mind* and *culture*, a relation that he explored for the most part on the basis of interdisciplinary methods, as by drawing on anthropology.

Over the last two decades, he has brought cultural psychology to bear on the study of the law in context. In fact, he has been asked to teach at the NYU School of Law, where he made advances in the study of law and culture, thanks in part to the collaboration of jurists at NYU like Anthony Amsterdam. In 2000, this fruitful collaboration resulted in the publication of a masterpiece on the relation among *mind*, *culture*, and *judicial narratives*.

Professor Bruner's thought is well known even in Italy, where he was invited in 2000 by the University of Bologna to lecture on the relation between law and literature.

His most important contributions to the Law and Literature movement concerns some fundamental epistemological aspects. In fact, at the core of his thought is the idea that language shapes the mind within a cultural framework: to tell a story is, for Bruner, to shape reality. Bruner emphasizes that the mind's narrative structures are the same in the context of the everyday as they are in the context of law: stories in literature and stories in law can accordingly be considered alike, in that both always involve the activity of constructing the reality narrated.

1. *Introduzione*

L'idea di un'intervista a Jerome Bruner nasce dall'esito di un percorso di ricerca a carattere interdisciplinare che ha avuto come suo epilogo l'osservazione del diritto attraverso scienze quali la psicologia sociale e culturale (Di Donato 2008).

* Il contributo è apparso nel 2009 per la prima volta ne "Il Bigiavi", lo Sketchbook curato da Enrico Pattaro dal 2008 al 2010. Lo ripresentiamo in questo volume riunito all'originale introduzione, pubblicata separatamente in ISLL Papers (Vol. 2) con il titolo "Una postilla a Conversing in the Garden on Psychology, Culture, Law, and Narration: An Interview with Jerome Bruner".

© 2009 ISLL - ITALIAN SOCIETY FOR LAW AND LITERATURE
ISSN 2035 - 553X

L'incontro con Bruner si pone non solo in termini scientifici ma anche umani e relazionali. È difficile se non imbarazzante pensare di poter "introdurre" in poche battute uno studioso di fama mondiale e di così molteplici interessi. Uno psicologo sperimentale, un esperto di educazione infantile, e un teorico del diritto, se volessimo considerare i più recenti studi sui rapporti tra diritto e cultura, diritto e narrazioni[1].

Bruner stesso (1983, 23), nella sua autobiografia intellettuale, ricorre alla metafora della "volpe" che preferisce a quella del "porcospino", definendosi come "uno che preferisce conoscere più cose piuttosto che una sola anche se importante".

La dimensione interdisciplinare in materia di conoscenza umana è alla base di ogni tema trattato negli studi bruneriani. Gli *Human Beings* sono da sempre al centro della sua attenzione: l'interesse per gli esseri umani, considerati non nella loro individualità, sia pur apprezzati nella loro singolarità, ma come membri di una cultura.

Fin dai tempi del *Cognitive Project*, che lo vide protagonista ad Harvard tra gli anni '60 e '70, Bruner è interessato a capire come funzionano le interazioni tra natura e cultura, individuo e cultura.

Comincia così ad interrogarsi, con l'aiuto di colleghi di altre discipline – frequente è, ad esempio, il riferimento agli antropologi – sull'influenza della cultura sulla mente e sulla insolubile diadicità tra dimensione esterna e interna di cui esse sono rispettivamente espressione[2].

Una fondamentale risposta gli verrà dallo psicologo russo Vygostkij, che individua nel linguaggio la chiave di accesso alla cultura. È attraverso l'appropriazione del linguaggio che l'individuo entra in relazione con la cultura di cui è parte e comincia a interagire con essa, modellandola. Il linguaggio sarà inteso da Bruner in termini di "forme narrative", come strumento di organizzazione dell'esperienza e della conoscenza e dunque della stessa mente. Strumento di condivisione e costruzione di significati a partire dall'esperienza che ciascun individuo fa del mondo (Bruner 1990). La *costruzione di significati* non è però un'operazione che l'individuo compie in isolamento ma in interazione con gli altri individui, all'interno di una cornice culturale che inevitabilmente finisce per connotarsi come "locale", malgrado le aspirazioni di universalità proprie di ogni dialettica culturale.

---

[1] Sin dagli anni Sessanta, precorrendo quella che ai giorni nostri si è trasformata in una sorta di moda dell'interdisciplinarietà, almeno negli USA, Bruner esprime, attraverso una serie di saggi dedicati alla funzione del mito, del romanzo, dell'arte, l'opportunità che anche la letteratura, l'arte, la poesia, vengano considerate come parte integrante del processo di conoscenza e costruzione della realtà, al pari della fisica, della biologia, della psicologia sperimentale, etc. Cfr. in particolare Bruner 1962.

[2] Sui rapporti tra mente e cultura, cfr. Bruner 1990, 1996; cfr. inoltre Bruner 2007, paper discusso in occasione del Convegno "Liaisons dangereuses. Filosofi, psicologi e teorici del diritto discutono di mente e cultura", organizzato dal Dipartimento di Scienze dell'educazione e dal Dipartimento di Filosofia dell'Università degli Studi di Salerno e svoltosi a Vietri sul mare il 20 giugno 2007. Sugli esiti del convegno, cfr. Di Donato 2007.

È proprio la consapevolezza della dimensione locale dei processi culturali che porterà Bruner a interessarsi alla dimensione contestuale delle pratiche giudiziarie all'interno della stessa cultura americana.

A partire dalla meta degli anni '80 ad oggi, Bruner tiene in qualità di professore presso la NYU - School of Law, seminari sui rapporti tra "diritto e cultura", in collaborazione, tra gli altri, col collega giurista Anthony Amsterdam. Il programma di *lawyering theory*, avviato dai due studiosi all'interno della School of Law, si prefigge, con l'aiuto degli stessi studenti oltre che col contributo di colleghi di diverse discipline, di svelare i significati culturali insiti nelle pronunce della Corte Suprema Americana. Da questa importante collaborazione nasce un volume edito da Harvard University Press, nel 2000, dal titolo *Minding the Law. How Courts rely on storytelling, and how their stories change the ways we understand the law- and ourselves* (Di Donato e Rosciano 2004).

I due studiosi propongono una rassegna di alcune sentenze della Corte Suprema americana in materia di razza, famiglia, e pena di morte con l'intento di dimostrare che le decisioni giudiziarie al di là dall'essere espressioni di posizioni esclusivamente normative si pongono a garanzia di un certo ordine culturale di cui si prefiggono la conservazione[3].

Bruner e Amsterdam analizzano quindi i processi di *categorizzazione*, *narrazione* e *strutturazione retorica* della comunicazione come processi tipici di ogni attività umana, inclusa quella giudiziaria.

A partire anche dagli ampissimi riferimenti al mondo della letteratura, *Minding the Law* sarà considerato come uno dei migliori esemplari di *Law and Literature*, sia nella variante *in* che *as*[4].

Nello stesso anno di pubblicazione di *Minding the Law*, Bruner verrà invitato in Italia a tenere un ciclo di conferenze proprio sui rapporti tra *diritto e letteratura* presso il DAMS di Bologna (Bruner 2002). Presso l'Università di Bologna, una delle più rappresentative sedi italiane in fatto di scetticismo interpretativo, Bruner tratterà di alcune delle analogie tra l'interpretazione letteraria e l'interpretazione giudiziaria. La tesi è che il racconto letterario come quello giudiziario prendono avvio entrambi dalla violazione di un ordine canonico che viene ripristinato attraverso un processo narrativo equiparabile a ciò che Aristotele definiva *peripéteia*. La trama narrativa sia dei racconti giudiziari sia dei racconti letterari è animata da personaggi che confliggono per il raggiungimento di un *télos*. È la collisione tra *télos* ed ostacoli, a causa di un elemento perturbatore – *the trouble* – che provoca uno squilibrio tra gli elementi della trama (agente, azione, ricevente, scena, scopo)[5].

---

[3] È sintomatica la decisione del giudice Scalia di non sottoporre al test del DNA il padre naturale che richiede il riconoscimento dei diritti parentali, in nome di categorie culturali oltre che legali: "California law, like nature itself, makes no provision for dual fatherhood" (Bruner e Amsterdam 2000, 81).

[4] "This book is a gem… [its thesis] is easily stated but remarkably unrecognized among a shockingly large number of lawyers and law professors: law is a storytelling enterprise thoroughly entrenched in culture". Daniel R. Williams, *New York Law Journal*.

[5] Bruner ricorre in questo caso alla Pentade di Burke (1969).

Naturalmente sono diversi gli espedienti che il romanziere e l'uomo di legge evocano per ripristinare l'ordine violato. Se il romanziere cerca di "rendere strano il familiare" stravolgendo le attese del lettore, l'uomo di legge àncora la propria narrazione a categorie riconoscibili: dalle regole di procedure ai precedenti. *Narratività* e *normatività* sono ineliminabili all'interno di ogni racconto, soprattutto quello giudiziario. Nel processo interpretativo che porta alla decisione, le categorie giuridiche, incluse le risultanze probatorie, trovano una collocazione all'interno di una narrazione che vi conferisce un significato. Bruner dubita che si possa essere certi della giustezza di un'interpretazione giuridica. Ciò, non solo per le questioni di diritto normalmente ancorate ai precedenti che vengono scelti con abilità dagli avvocati, con un lavoro simile a quello dei critici letterari, quanto per le questioni di fatto che possono essere altrettanto soggette ad interpretazione e con una rilevanza variabile dei fatti stessi a seconda del contesto e della categoria in cui essi sono inquadrati. Più probabilmente è la categoria della *legittimità* – intuisce Bruner – a rendere un racconto giudiziario più credibile di un racconto letterario. La legittimità che a sua volta non fa che poggiare sulla fiducia dei consociati, sulla ritualità della giustizia, sull'uso dei precedenti, sul linguaggio specialistico proprio del diritto. La conclusione è che il diritto è un sistema come un altro escogitato dagli esseri umani per dare significato al loro vivere comune "[e] per quanto lo sottoponiamo a procedure e lo sterilizziamo, [esso] non può essere efficace quando è visto in disaccordo con la cultura locale"(Bruner 2002, 55).

Ringrazio Jerome Bruner per aver accettato di "conversare" con me sin dal 2006, quando mi accolse per la prima volta a New York, rendendo possibile la realizzazione di un sogno scientifico.

Avevo avviato i contatti con Bruner poco prima di iniziare il mio percorso di dottorato facendogli arrivare la recensione di *Minding the Law,* fatta in collaborazione con la collega Raffaella Rosciano. Non avevo più avuto significative occasioni di scambio con lui fino a quando, sollecitata anche dal prof. Michele Taruffo, ero giunta alla conclusione che la New York University fosse il luogo di elezione per l'approfondimento dei miei temi di ricerca. La mia richiesta fu accolta senza esitazione da Jerome Bruner.

Ricordo che mi accolse nel suo ufficio, le cui finestre davano sul cortile della School of Law, a Washington Square. Mi mostrò la bellissima magnolia fiorita che era alle sue spalle nel cortile. Aveva preparato una *schedule* di tutti gli eventi significativi che si svolgevano alla NYU in quel periodo ed a cui riteneva dovessi partecipare: dai *lunch seminars,* a carattere rigorosamente interdisciplinare, alle celebrazioni di Facoltà. In ciascuna di queste occasioni, Bruner veniva rigorosamente presentato dai colleghi della School of Law, fieri di averlo tra loro, come uno degli psicologi più famosi del secolo.

Lo scorso anno Bruner ha accettato di trascorrere qualche giorno nella mia casa di Avellino. Appassionatosi alle ortensie del nostro giardino ha acconsentito di farmi registrare la conversazione che ora pubblicata ne *Il Bigiavi* (1, Febr. 2009).

Il testo è stato rigorosamente revisionato da Bruner stesso, quest'estate a Glandore – la baia che lo conquistò mentre attraversava l'Oceano Atlantico con la sua barca a vela trasferendosi da Harvard ad Oxford – entusiasta di poterlo proporre alla nascente ISLL.

Università di Salerno
flora.didonato@unine.ch

2. *L'intervista*

2.1. Parte prima

A first question: How do we learn about the world?

I will tell you that, what the world does, when it impinges upon us is not to deliver reality but rather to confirm or disconfirm some hypothesis that we are entertaining. This is what we call hypothesis theory – that we are always looking at the world with some hypothesis in mind. The mind is active not passive. This view is in the European tradition of Act Psychology and of theorists like Heidegger and Husserl. It is not a passive view in the manner of the British associationists, but an active view.

Who were your early teachers?

The person who had an early effect on me was William McDougal with whom I took my first course in psychology when I was a kid. He was a great British psychologist who called his theory “hormic” psychology, purposive psychology and he also interested Edward Tolman another of my early heroes. It was Tolman who provoked my interest in the purposive nature of cognition. I came increasingly to believe that the development of cognition was in the interest of testing hypotheses about the world, which made one very selective and in need of something to guide your selectivity. So what guides your selectivity? The culture you live in of course: what you take to be ordinary, and you begin to work to confirm what you take to be ordinary.

So how did you study all that?

So, I did a series of experiments then and when I think about them now I must say Flora, that I smile. They were experiments on what I called the “perception of incongruity”. With precious tachistoscope, I presented highly, highly unlikely scenes to my subjects, scenes of somebody doing something almost completely unusual. I presented these at short durations and the first part of the effect was for subjects to normalize them, to perceive them as ordinary; to fill the world with ordinariness. The ordinariness was supported by cultural habits, what they had come to expect in ordinary life.

Again you asked me before to come back to the influence of Robert Oppenheimer: I have to tell you that Oppenheimer and the people at the Institute for Advanced Study including John von Neumann were very much interested in this active constructivist view or the world, trying to take the next step after Albert Einstein. Einstein was there too, but he was an old man. His influence was moving on to the next generation of people like Oppenheimer. I should tell you also a funny thing about me during the years after the war when I was at the Institute in Princeton. I used to go down to Washington once a week. When I was in Washington, Wednesday nights I would stay at the home of Richard Tolman who was the brother of Edward Tolman and a more distinguished scientist than his brother Edward. He, Richard Tolman, was the chief consultant to the famous “Los Alamos” project. Though working on the A-bomb, the Tolmans had a big house in Washington and there I would meet people from all over the world. That’s where I first met Robert Oppenheimer and I told him my theories and he would say things like: “but Jerry that’s just the common sense of modern physics!”

I would take the train down from Princeton to Washington and arrive in time for dinner. The Tolmans had frequent guests who were doing official things in Washington, and on one particular occasion, there was a gentleman there who had a very strong Danish accent who had a name that I did not recognize. It was a pseudonym and it was only a year or two later that I discovered he was really the physicist Niels Bohr. Just imagine this 26 year old having dinner at Richard Tolman’s home,

talking with Niels Bohr about the active nature of cognition, about how the world got constructed in terms of hypotheses. I felt like the luckiest guy in the world!

Bohr was of a generation of physicists who were increasingly coming to believe in ideas like the uncertainty principle and so on like that; that the role of the physicist was to create physics, not just discover it. So when I first read the book of Edward Tolman, the younger brother of Richard Tolman, called "Purposive Behavior in Animals and Men", I was thrilled and ready and had just gone back to Harvard as an instructor…and Tolman and I got to be very close. I had also worked closely with another psychologist, Ruth Tolman, who was the wife of Richard Tolman.

So I found myself, so to speak, in a family of purposivists. Besides Harvard was still in the long tradition that had started with William James…making it a central place for the study of purposivism reinforced by Harvard's philosophers as well.

They gave me all sorts of support when I started doing all of those experiments with the tachistoscope to find out the role of hypotheses in perception, that was the real start of the cognitive revolution that then turned into the Center for Cognitive Studies and on and on. The other thing that was very fortunate was that at the time one of the great scientists-philosophers was also president of Harvard, and he liked what we were doing and gave good support - James Bryant Conant.

Did you have support from the Foundations?

There was also good financial support. The foundations (particularly the Rockefeller Foundation) liked our ideas and the Rockefeller Foundation helped us to set up the Center for Cognitive Studies with George Miller and me as co-directors. And we soon started bringing in scholars from Europe as well as America and began creating a strong subculture of cognition. Visitors at the Center included people like Noam Chomsky, Barbel Inhelder, Daniel Kahneman. So in a way, we also "cosmopolitanized" American cognitive science.

I have to confess I wasn't fully conscious of all this until last spring (2008) when Harvard "celebrated" the fiftieth anniversary of the cognitive revolution when it all came back into mind.

I also want to say one other thing too. Encouragement came from the Harvard atmosphere outside psychology . I had good literary friends like Albert Guerard and Perry and a new generation of their students who cheered as well.

And what about the linguists and philosophers of language? Did they help you combine your interest in cognition with your interest in language?

That's a very interesting question. I have thought about it a lot. I have always been interested not only in language as such, but also in literature and poetry. As I put it in the title of that book, *On Knowing: Essays for the Left Hand*. "How do you get your right hand and your left hand to work together? Even as I sit here talking to you, it is partly poetic and a metaphor and partly empirical. That's why the concept of "hypotheses" intrigued me so much. It places emphasis not only on the imagination of the human being, but also on what they encountered in the world. The interaction of the two is our experience of the world.

So, now we come to a new period. By now, I am a full professor, still a little bit too young. I always had the feeling that I was growing and changing, reacting to what I encountered but also to a wrong-minded parental generation. How am I going to describe it? Let me put it this way: it was the beginning of constructivism: and I found myself beginning to read the French philosophers, some of whom I had actually met during the war, I'm thinking about Albert Camus, I'm thinking (as we talked earlier) of Jean-Paul Sartre – people who had a notion of a constructed world, not just a world that you received from outside. I also became more interested and more active on the anthropological side as well. Not that I was interested in far away places, but rather in the anthropology of social class and family and community. I began studying how, for example, African Americans and others in an underprivileged position, saw the world, how poor children and rich children perceived the size of coins and money and that kind of thing. So, cultural psychology became very central to me and I started reading more anthropology. I got to know people like Clyde Kluckhohn and so on. They had always been of interest partly because of the fact that as my sister used to say to me "It is a good thing that you became a psychologist, otherwise you would have become a novelist, and you would have been even poorer than you are now"… In any case, I also had a lot of literary friends and indeed my first wife, Katherine Frost had studied to be a literary critic and my own PhD was in social psychology but my interests were wider than that. So when, in the 1960's, when Harvard psychology split into two departments, I did not want to be in one or the other. There was to be a department of Experimental Psychology where I had friends like George Miller and a department of Social Relations where I had friends and colleagues like Talcott Parsons, Roman Jakobson, Clyde Kluckhohn, and Roger Brown. So I was caught between the two, and didn't mind it. Besides, I have to tell that I think the two are incommensurable. Indeed, one of my most recent articles still deals with the fruitful incommensurability of mind and culture.

…and what about the influence of Vygotskij?

Not only Vygotskij but also Alexandr Romanovic Lurija. I had my first meeting with Lurija in the early 1970s. Lurija became a kind of father figure to me. He was the inheritor of Vygotskij, Bhaktin,

and scholars who did not impose a distinction between the scientific and the literary. The process of researching the two was something that made psychology such an interesting field! So I made my first trip to Moscow in 1970 and also came under the influence of another Russian living in America, the great linguist Roman Jakobson.

Jakobson was a genius. Indeed he became a visiting member of the Center for Cognitive Studies – our Russian influence. He was trying to combat the simplistic behaviorism of Pavlov, stimulus and response and reinforcement as its fundamentals. What I liked particularly about Vygotskij was that he appreciated the intersection of mind and culture and how mind internalized culture. To me, that was the issue.

That takes us into the Kennedy years and let me use a little detour here. Kennedy, as you may know, was a good friend of mine. I had known him first was he was a student at Harvard. And when he ran for the first time to become a congressman as a candidate for 11th district of Massachusetts (which is where I lived), I helped him in that campaign and we remained good friends until he was assassinated, which was devastating for me. But then, because of the fact that we had talked about these things when he was a student, he started bringing me down to Washington to discuss matters like the impact of poverty on mental development – from which later grew Head Start. I was also beginning to do more work on developmental psychology. So the idea of what you could do to prevent children from growing up mentally deprived was very much on my mind, how to give them a head start before school began.

I think that you were also influenced by the pragmatists in Oxford.

All the pragmatists have had a strong influence on me. Pragmatism of course, is deeply in the Harvard tradition. Its two founders are William James and C.S. Peirce, both very Harvard.

2.2. Parte seconda

We were talking about pragmatists, especially at Harvard…

Especially at Harvard because there was a very strong tradition that had grown out of an early opposition to the religious absolutism of the puritans. So Harvard starting in about the 1830's began moving in a pragmatic direction. "What do you mean values?" They can only be judged by what works to guide us – basic pragmatism. The building in which my office was at Harvard, was called "Emerson Hall" after the pragmatic Ralph Waldo Emerson. And the joke that some of my students

used to tell was that Jerry Bruner is trying to show that rats are like people, whereas before psychologists were trying to make it seem as if people were just like rats. Pragmatism was in the foreground.

I have to mention one other figure, with whom I did my rat work in the early days. He was Karl Spencer Lashley. He was the great neuropsychologist of this period and for him the brain served not just to register what things were associated with each other but what was the overall pattern, what was, as he put it, the cognitive map that was being formed through learning.

So, we have spoken about the influence of Vygotskij, Tolman and Lashley. What else?

Well, there was politics too. I was also very Leftist in politics in those days. When I was still an undergraduate at Duke, there was a mathematician there, whose course in advanced algebra I took. Politically, I think he was a member of the Communist Party. He inspired me to become a member of the Young Communist League as it was called. And of course, coming from a rather well-to-do family this was also part of my rebellion against their bourgeois world. I realize that my politics and my science were related in some indirect way. This is what probably led me to that study showing that poor kids saw coins as bigger than rich children. I wanted to show that the world looks different depending on your position in it. I did not have a good idea of what I meant by culture then, but I was beginning to read, particularly Bronislaw Malinowski. I have gone back to re-reading his books and realize how dramatic an influence he had on me. He turned me onto cultural psychology. And of course social psychology was taken for granted once the Department of Social Relations was established.

And was it this rebellion that finally drove you to your interest in the law?

I think so, probably. It particularly led me to what to me was the most evil part of American law: the death penalty. The idea that people would put somebody to death, in punishment for a crime.

How did you meet the law?

It's a very odd encounter. I first became interested in the fact that we settle legal cases by telling stories at the trial. So, I began studying narrative in the courtrooms and people at NYU Law School, which as you know, is a superb place, became very much interested in that work, and they asked whether I'd like to join them – around 1983. I said, "Well, maybe, but I don't really know anything about the law," which wasn't completely true but true enough. So, Tony Amsterdam said to me "ok!

You teach me about your kind of thing and I'll teach you what you need to know about the law." He, as you know, is a specialist in capital crime and soon I was deeply into the process of the death penalty. And I'm still there.

What do you think your contribution has been in these years at NYU School of Law to the theory of law?

Well, I'd put it this way, I started reading the theory of law and became enormously impressed by the theories that had been presented at the end of the 19th century and at the beginning of the 20th century by American legal theorists like Oliver Wendell Holmes. The purpose of law was to cut down on the cycling of revenge, that the most destructive thing that can happen when therÈs bad behavior is not that somebody has stolen my wallet with 400 dollars in it, but that I will then get that son of a bitch and kill him for doing that to me. And then his friends and his relatives will say "he killed him, get him!" So, you get this cycling revenge and as you know from the Amsterdam and Bruner book, we are very much concerned about the way in which law provides a means somehow of looking at violations of the morally expected even pragmatically expected and finds ways to calm them down, to cut down revenge. It does it by ritualization, it does it by the use of formulae like, for example, *stare decisis*, you know *stare decisis*? It is the general rule of following a precedent. A trial is not an occasion for rage and revenge, but for reason and precedent. Law attracted me because it tends to focus us to institutional issues and institutional continuity. It is long term. Law provides an absolutely splendid means of expressing the long-term institutional and moral norms of the society. Yet, I am still puzzled as to what it is that makes people accept the law…perhaps a fear of the consequences of not having the law. That's to say lawlessness is just too dangerous. Does that make any sense? But I want to get away now from the death penalty.

Yes…

Let's consider such things as property law, particularly intellectual property. The law, to begin with, recognizes that human beings are not perfect. So then comes the question of how we can live together when we are not perfect. So law specifies which expressions of our imperfections are forbidden, sets parameters for punishing these and establishes means for doing so. Law is about what is forbidden. But I find it difficult to discuss law in general. I want to talk about law in a democratic society.

I want to begin by noting two important functions of law in a democracy. The first has to do with resolving disputes in a way that is fair rather than vengeful, to avoid the cycle of revenge. There must be a general agreement about what it is that the people must <u>not</u> do, what constitutes a violation

of the law. But it is often a question of uncertainty and how to reverse it. Here we rely on precedent. Here we rely upon *stare decisis*, as I mentioned. The law must rely on a past body of consistent decisions. The old baronial court precedents of Anglo-Saxon law first became consistently formalized in British law as writs, for example: you may not trespass upon my property, that is, you may not come on my property unless you have my permission. So, rather than try to state this in the most generalized kind of way, I state it by giving this case as an example and it becomes generalized the writ of private property. A writ specifies what constitutes a violation of property. But suppose you're walking by my property and you're a little bit tired and you say "oh, I'll stop for a moment and sit on his fence and have a smoke!" Have I violated his property? The person whose property is contained by the fence takes it to court and pleads his right of property. But was I violating property rights, sitting on his fence and doing him no harm? So intention enters. But suppose that in walking by your property I throw a lighted cigarette butt into your field. Have I violated your property? Well, yes. But if that cigarette butt was to start a fire, then it might support a charge of negligence against me.

By using this system of writs and by emphasizing law as a set of prohibitions of the forbidden, you allow freedom to exist within the society, for the law is not telling you what you <u>should</u> do but telling you that there are certain <u>limits</u> to what you can do. And in time, these particular writs get organized into a system of law in which underlying rights are specified as well as particular violations. And eventually these rights are defined by the precedent cases that are decided upon by references to them.

But what are the rights and how are they determined? Sometimes they are explicitly stated as in the first ten amendments to the United States Constitution guaranteeing freedom of speech, freedom of property, freedom from arbitrary arrest etc. And they represent the precedents that are to guide judgement. And from this process we construct a system of law. But as the system gets more orderly, as my dear friend Taruffo points out, it may overly extend its prohibitions and come to restrict the basic freedom of the individual. Under those circumstances, we say that the punitive aspect of the law has extended itself to the point where it is not only punitive but it is also cutting down the freedom and rights of individuals.

Come now to the issue of penalty. Take capital crime. We say, in deciding on punishment, that we must look not only at the nature of the act, but we must also look at the circumstances, the motives, the cultural setting, etc. If it turns out that the person found guilty of murder was provoked by certain humane circumstances we take these circumstances as "mitigating" – if for example, he has murdered somebody who has stolen his inheritance or raped his wife, or kidnapped one of his children. Yes, he is guilty of murder "but" under such circumstances we will not permit the death penalty and even leave open the possibility, perhaps, of eventual parole. So, what is our theory of penalty? And how does the notion of mitigating circumstances fit into the doctrine of capital punishment? What is

"mitigation?" It is based on "*just deserts"* or on a notion of strict liability – or on the notion of punishment as potentially rehabilitative, or what? We remain amazingly vague. It is certainly not simple, the vengeful business of he killed him and well kill him back.

Or come now to the less extreme forms of restriction – like the prohibition against liquor in the United States in the repealed 18th Amendment. It is that "we will curtail peoples liberty because there is a very high chance that, if we don't, they might do things that are bad". But, I say to you, maker of such a law, "What right have you telling me how to live my life?" You can punish me if I do wrong, but you can't tell me that I can't have a cocktail." Yet, I can say that you may not carry a gun – but not that you may not own one and keep it at home. Is the object of such laws to reduce dangerous uncertainly?

But consider another kind of issue that brings us a bit closer to civil law. The whole project of life is based on our reliance upon ordinary expectations. But what do we mean by ordinary expectations? Expectation is established by some sort of business contract or by implicitly acknowledging an obligation. I say that I will deliver a manufactured product by a certain date or we sign a contract to that effect. If I violate the agreement I may be liable before the law either to fulfill this obligation or pay you punitive damages. Or you may plead extenuating circumstances and if you do so successfully, you may have your obligations reduced. So, now I must raise the question, what kind of a system of law is this? One thing is clear. A system of law, criminal or civil needs to be procedurally specified. You cannot be vaguely spontaneous in the law. Law is designed to deal with conflict and vagueness is not permissible. Law is fundamentally different from everyday behavior, yet it must be seen as adjudicative of it. So, we have formal courts of law and we have judges who wear white wigs and we have a distinctive legal language.

And all of this imposes legitimacy, a most interesting cultural concept. Legitimacy requires not only official authority, but also a symbolic form. We need a system of law in which judges and juries are known to be disinterested in the outcome, that they are judging it entirely from the point of view of doing justice. And ritually, the judge sits on a bench higher than everybody else and is garbed in a beautiful black gown. The courtroom is orderly and ritualized. Jurors must be found to be impartial in advance, before being selected.

In addition, there is also the testimony, when appropriate of guaranteed neutral "friends of the court," the so-called *Amicus curiae,* who give the court presumably his or her "objective view". He or she is not speaking from prejudice, but is a distinguished scholar who has studied these matters and has a high reputation for both his expertise and his neutrality. Bringing in an amicus is a highly ritualized business.

The management of what constitutes legitimate evidence is also governed by procedural rules and rituals. Indeed, the rules of evidence are as complex and searching as anything in the law. Partly

because of the cognitive revolution, the notion of objective evidence is always open to question, including expert testimony. The law now has to take into account the psychology of witnesses, of judges, of the jury, and of the procedures used. I come increasingly to the conclusion that what we call the official normative structure of the law, its very notion of legitimacy, depends to some extent on anthropological and psychological conditions. Half the lawyers in the country would like to banish psychology from the law, while the other half would say “bravo!” Now many people say: “well maybe the law isn’t so different from the rest of life” and distinguished law schools like mine must appoint a psychologist or two. Even here in Italy now! Increasingly today, law is taken to be an expression of the culture in which it exists. Things are changing! One effect of all this has been the increased use of ADR – Alternative Dispute Resolution – in place of the classic judge-jury court. In ADR you use arbitration and mediation – and discussion. We are moving away from single yes/no legal procedure and moving toward a more balanced conception of conflict and its resolution.

Jury? No…not the jury…

No, it’s not the jury system…where you bring a group together to discuss the issues and to talk them out. Arbitration is one way and then therÈs another kindred form call mediation. So, we introduce a notion of bringing the opposite sides together not just adversarially, but to consider the complexities and to discuss the ambiguities and, needless to say, we do it first in the realm of civic law. I suppose it started first in labor relations where you don’t have one judge…you have a group that comes together and the arbitrator tries to get things going. We do not yet have it in capital law and in many parts of criminal law. But I tell you, if I were to make a prediction about the way in which things would change over the next 100 years; my guess would be that criminal law procedure, particularly in the sentencing phase, will move in the direction of a more arbitrational kind of thing; that’s my prediction.

You are speaking about ADR. Will court ritual change?

Yes, it will certainly change. That’s why we speak of alternative dispute resolution, ADR. It is growing because of the importance of cultural context is getting more appreciated. Already I’m struck by the fact that even in criminal law cases, even in Italy, Spain, and France, that there is more discussion of points of view and that it’s not enough to say “guilty or not guilty.” It’s developing first, as I said, in civil law but I think it’s beginning to spread to criminal law as well.

But let me close by introducing another topic: the importance of narrative in legal procedure. In court; tell stories, good stories because I want to appreciate the cultural setting and the plight of all those involved. It is not just factual testimony but testimony in a narrative form with appropriate

context: not just yay-nay, guilty-not guilty, but providing an appropriate narrative context. Take a murder trial in Seattle, Washington where the accused boy murdered a guy who stole something from him in anger, a boy who had been exploited all his life, between the ages of 4 and 15. When the murder was committed, had moved house16 times, a poor family kicked out because they couldn't pay their rent, moving from one neighborhood to the other. Always the new kid in the neighborhood always exploited. So, one more was already enough, and he picked up a baseball bat and killed the guy trying to rob him. So, the Prosecution said that anybody with a temper like that should get the death penalty. But maybe a kid who has had to move 16 times should be permitted to make a charge against the society. Is it this kid or society? Who's guilty?

So, at NYU we introduced seminars on legal narrative and they are popping up all over the country. To do legal analysis requires more than legal analysis, but to look as well at the alternative ways in which a narrative structure can be organized. You need to consider alternative ways of proceeding.

Now, mediation! Mediation brings in another issue – a new feature of law, the establishment and use of norms. Some say mediation is "softer."

And yes, soft may be the right word, but I would also say mediation is more comparative. That is to say you'd take more of a comparative perspective on the matter and it would become then somewhat more relativistic but not relativistic in the bad sense, but in the good sense of relating different points of view and not feeling that from the start, the moment you raise your hand: "the whole truth, nothing but the truth…". that from the start, law should take it into account. That there is a question of how you decide between two accounts of how things happened and the way in which you have accounts of how things happen is through the narratives that people organize. So, that's the second point.

And the third point is that, because of this, what happens is that law itself becomes less rigid, less yes/no, not just writs. What happens is that context takes on a new importance and under those circumstances the whole notion of *stare decisis* requires looking not only at the past judicial decisions but also looking at the past ways in which things were narratively interpreted and to recognize, for example, that narratives during the 19th century, during our grandparents' times, were different from the way they are now, and were taken into account then and they have always been. The effect somehow to rule them out is stupid: rule them in! Be aware of what you are doing rather than saying I am gonna close my eyes…so that develops a humanization of the law. Some people say that this leads us to be soft on crime. But what's the evidence for that? I compare for example the United States, which is anything but soft on crime, as compared for example with Italy or France or other countries which I know fairly well.

I am looking at the American situation and talking from an American point of view. In American, we now have something close to six hundred people per one hundred thousand in prison, and we still have the death penalty, though very ambivalent about it. We have about 3500 people on death row but we only execute 60 a year, so "why do we need this?" "What is this thing about?" And some say that it is a continuation in legal form of American race prejudice and I think that there is some truth to this, because the much higher percentage of African Americans are on death row. I mean 35 per cent of people in American prison death row are black. So, I see…the American case is such that we want to have yay and nay, I mean, I am not interested in the story, I am interested in "is he guilty or is he not guilty", because I think it's probably primed by a combination of things, one of which I mentioned as race prejudice, I mean, we can't lynch the black man, all we can do is to put him in jail for the rest of his life or execute him, needless to say…a much higher…about 40 per cent of the people who are given the death penalty in America are Black and it makes me feel deeply humiliated…I hate it. And when I try to tell this story around the country and people say "You're going soft on crime" …Soft on crime, the United States having six hundred people per hundred thousand in jail while in Italy there are only forty people per hundred thousand in jail. Yet the crime rate in the two countries is about the same. So, where do we gain? The main official justification for being tough on crime by using the death penalty is just not true! Instead our racism is keeping alive a sense of revenge, a false sense of racial revenge that has little to do with our criminal problem, but is chiefly political and racial. It's hard to believe that it should be so in America, the home of democracy, where people have come to escape from countries that are too autocratic. They come here to America for the opportunity to get more democracy…But our system of criminal justice divides America. Does this make any sense? The country is more divided today, I think, than it has been since the Civil War. Talking seriously about what is means to be an American has become painful these days. Our judicial system would be a good place to start repairing things.

Riferimenti bibliografici

Bruner, Jerome. 1962. *On Knowing. Essays for the Left Hand*. Cambridge: Belknap Press of Harvard University Press.
-------. 1983. *In Search of Mind: Essays in Autobiography*. New York: Harper & Row. Tr. 1997. *Alla ricerca della mente. Autobiografia intellettuale*. Roma: Armando.
-------. 1990. *Acts of Meaning*. Cambridge: Harvard U.P. Tr. 1992. *La ricerca del significato. Per una psicologia culturale*. Torino: Bollati Boringhieri.
-------. 1996. *The Culture of Education*. Cambridge: Harvard U.P.
-------. 2002. *La fabbrica delle storie. Diritto, letteratura, vita*. Roma-Bari: Laterza.
-------. 2007. Culture and Mind: Their Fruitful Incommensurabilità. *Paper*. Convegno *Liaisons dangereuses. Filosofi, psicologi e teorici del diritto discutono di mente e cultura*. Università di Salerno 20 giugno 2007.
Bruner, Jerome, and Anthony Amsterdam. 2000. *Minding the Law. How Courts rely on storytelling, and how their stories change the ways we understand the law- and ourselves*. Cambridge: Harvard U.P.
Burke, Kenneth. 1969. *A Grammar of Motives*. Berkeley: University of California Press.
Di Donato, Flora. 2007. Liaisons dangereuses. Un incontro interdisciplinare su mente e cultura. *Sociologia del diritto* 2: 181-88.
-------. 2008. *La costruzione giudiziaria del fatto. Il ruolo della narrazione nel "processo*". Milano: Angeli.
Di Donato, Flora, e Raffaella Rosciano. 2004. La *costruzione giudiziaria* tra categorie legali e culturali. In *Quaderni del Dipartimento di Filosofia dei Diritti dell'Uomo e della Libertà di Religione*, 237-54. Napoli: Jovene.