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'The Oresteia': The first criminal jury trial

A drama group in New York recently created a theater piece out of an oral argument in a U.S. Supreme Court case. *Barnes v. Glen Theatre*, 501 U.S. 560 (1991), concerned whether the Kitty Kat Lounge in South Bend, Ind., had a First Amendment right to present nude dancers. (Assuming the club had some Notre Dame clientele, I guess the attorneys' goal was to "Win one for the stripper.")

In describing the show, the critic for the New York Times made this perceptive comment: "A disproportionate number of theatergoers are lawyers. I have no empirical proof to support this — surely none that would hold up in court — but it's an opinion based on a lifetime of ... talking to ... lawyers, who invariably seem more informed about the current theater season than the average person I meet at a party."

And why not? Like characters on a stage, lawyers deal with conflicts in need of resolution. Situations that come in moral tones of black-and-white generally do not make it to a lawyer's desk. Instead, the issues that constitute a lawyer's work often come in 49 or 51 shades of gray. Some appear insoluble; all require a resolution.

There is still no more effective dramatic device than a criminal trial. You are probably familiar with those depicted in "To Kill a Mockingbird," "Anatomy of a Murder" and "Inherit the Wind."

But I want to talk about a play with a murder trial that has more sex, violence and bloodshed than a whole season of "Wives With Knives." And criminal lawyers should be especially interested since it deals with what is usually considered

the first criminal jury trial in Western civilization.

It is the subject of "The Oresteia," a trilogy written by the Greek dramatist Aeschylus in the 5th century B.C.

Here's a quick background. When King Agamemnon led the Greeks to Troy during the Trojan War, he left his wife, Clytemnestra, at home. To obtain from the gods a fair wind for his fleet, he sacrificed their daughter, Iphigenia.

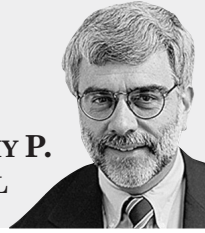
Because she was furious, Clytemnestra took a lover. Because he could, so did Agamemnon. When Agamemnon returned from the war, Clytemnestra and her lover killed Agamemnon and his lover. In doing so, Clytemnestra hoped to avenge the murder of Iphigenia.

Enter Orestes, the son of Agamemnon and Clytemnestra. He has a problem. On the one hand, the gods expect him to avenge the death of his father (although his father had killed Orestes' sister). On the other hand, if he kills his father's murderer, he will also be killing his mother — something strictly forbidden by the gods.

What's a good son to do? Paul A. Cantor, an English professor at the University of Virginia, examines Orestes' tragic dilemma in his new book "The Invisible Hand in Popular Culture: Liberty vs. Authority in American Film and TV" (2012). Cantor applies Georg W. F. Hegel's definition of tragedy to Orestes' situation: "In Hegel's view, a tragic situation involves the conflict of two goods, one legitimate ethical principle clashing with another. In such an ethical dilemma, the tragic hero has no way out without incurring guilt — no matter which course of action he chooses, he will

CRIMINAL PROCEDURE

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violate one legitimate principle or another."

The conflict Orestes faced came from ancient Homeric values. Aeschylus wrenches the story out of the Homeric past and places it in a contemporary Athenian courtroom. As Cantor describes it, "The Oresteia moves from the [ancient Homeric] rule of the family clan to the [modern Athenian] rule of the [city]."

This means "moving from the barbarism of the revenge ethic (championed by the old gods of the earth, the Furies) to the civilizing power of the law court (championed by the new gods, Athena and Apollo)." In the Homeric world, revenge-seeking family clans led to a never-ending cycle of bloodshed. But as Cantor notes, "The city and its legal institutions come into being to bring a violent cycle of revenge to an end."

So Aeschylus has Orestes tried for matricide before a jury of 12 Athenians, with the goddess Athena serving as judge. The prosecutors are the Furies and

they argue it is a clear case of murder. Orestes responds that he had a duty to avenge his mother's murder of his father. But the Furies, in turn, respond that Clytemnestra was properly avenging the murder of her daughter Iphigenia.

The jury comes back split, 6-6. Established procedure provided that Athena, as judge, had to cast the deciding vote. Athena votes to acquit Orestes. The verdict is accepted by all and the crisis is resolved.

Aeschylus shows that the legal procedures of Athens are far superior to the bloody cycles of family clan vendettas. A blood feud is a zero-sum game, but "civic justice tries to offer something to everybody." Cantor notes that Orestes, of course, wins since he is acquitted.

But after the verdict, Athena promises that the Furies will be honored by Athens and asked to remain in the city.

Why? Because, in Cantor's words, Athens "cannot simply reject the irrational forces the Furies represent ... Rather, Athens must find a way to incorporate the Furies within its boundaries and make their power work for the city, not against it."

The Furies supply the emotional outrage that a society must bring to wrongdoing but, at the same time, procedures established by Athens provide a way to properly channel that outrage into justice.

Cantor quotes a classicist who describes the Oresteia as progressing "from Furies to juries." The play is "a hymn to the civilizing power of the city and especially its legal institutions." It is a story that everyone involved in the criminal justice system should regularly revisit and ponder.