

**The discourse of Jury trial advocacy: the potential for
distortion of meaning in the age of a new social
consciousness**

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Declaration

I declare that this thesis is my own account of my research and contains as its main content work, which has not previously been submitted for a degree at any tertiary education institution.

Sign: _

Abstract

This thesis argues that there is a need to reappraise the significance of a jury in the adversarial criminal trial. A jury can no longer meet a prime criterion of its worth, which is that it brings to its decision making the collective common sense of the community from which it is drawn. In a new culturally diverse society, it is not representative enough to do so. Today's jury does not comprise individuals from a single culture. It represents diverse cultures and sub-cultures, people from each of which will extract their own social meaning from courtroom discourse. This means there is a need for law to embrace a cross-disciplinary approach to adapting the discourse of adversarial law to contemporary society. It should recognize the need for courtroom advocacy to move beyond appraising the formal language competence of contributors. Standard accounts of language are inadequate to reveal the potential for discursive distortion of meaning. In fact, the language of courtroom discourse only promotes an illusion of transparent portrayal of facts, blinding the search for substantive truth in justice with the pragmatic allure of legal truth. Jury trial advocacy has in common with literary invention the power to press language into use to serve the preferred ends of the author. Each applies meaning to words according to context. Each brings to the narrative their own pre-understanding, or prejudices. Each constructs its narrative in contemplation of the minds it seeks to persuade and convince. But, courtroom advocates should not consider witnesses as manipulable characters in the narrative of the case; rather, they are contributors to its development. In this new diverse society, courtroom advocates should draw on lessons from language and literature to interpret, and understand the meaning of the narrative of law that they build in adversarial trials before jury.

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INTRODUCTION:

The jury trial emphasis on language. Discursive manipulation can lead to distortion of meaning.

There is a need to reappraise the value of a jury in the adversarial criminal trial. This is because it can no longer meet a prime criterion of its value, which is that it brings to its decision making the collective common sense of the community from which it is drawn. On the contrary, in the age of a new societal diversity, jury trial advocacy carries the potential for discursive distortion of meaning. This means there is a compelling need for law to embrace a cross-disciplinary approach to adapting the discourse of adversarial law to the new needs of society. It must recognize the need for courtroom advocacy to move beyond appraising the formal language competence of those contributors.

Standard accounts of language are inadequate to reveal the potential for discursive distortion of meaning. Courtroom advocates should not consider witnesses as manipulable characters in the narrative of the case; rather, they are contributors to its development. Law must learn from sociolinguists, who concern themselves with the relationship of social entities with language use. The focus must move from competence in grammar, and syntax to performance. This means understanding the internalization of cultural rules that overlay rules of grammar and lexical choices. Thus, I argue that this new diversity of Australian society creates the need for courtroom advocates to draw on lessons from language and literature to interpret, and understand the meaning of the narrative of law that unfolds before them.

The primary goal of the criminal trial ought to be to find truth in justice. This presumes that the jury will bring community common sense to its task to offset culturally derived differences in perceptions of justice and morality. I argue it is not representative enough to do so. Attempts to make it more representative are costly, and increases in representativeness are marginal. Moreover, I argue that the language of courtroom discourse promotes an illusion of transparent portrayal of facts, blinding the search for substantive truth in justice with the

pragmatic allure of legal truth. Jury trial advocacy has in common with literary invention the power to press language into use to serve the preferred ends of the author. Each applies meaning to words according to context. Each brings to the narrative their own pre-understanding, or prejudices. Each constructs its narrative in contemplation of the quality of the minds it seeks to persuade and convince. Therefore, as I now outline in overview, I argue that there is a need to move beyond a standard analysis of language if law is to understand the potential for distortion of meaning in courtroom discourse.

An overview of how I argue my thesis

The jury began in Britain in Anglo-Saxon times as the Crown's communication conduit to its people. Only later did the Crown extend the jury function to finding facts in criminal trials. Conceptually in its development through successive stages up to the modern era, the jury prevailed, although its form and function changed. However, its successive changes always stemmed from the need of the Crown to sense the mind of the people. It was as champion of the Crown through its people rather than as champion of the rights of an accused that the jury evolved in the Middle Ages.

The notion of the jury as conduit persists today. One of the perceived merits of the jury system is that by importing community values and common sense into the handing out of justice through the courts, it contributes to the legitimacy of the state. What this means is that the state, through its justice system, still champions the jury as conduit. It is a communication channel through which the state receives feedback from its people on whether bureaucratic notions of justice accord with community common sense.¹ I examine this development in Chapter One.

However, what the Crown in Anglo-Saxon Britain at the birth of the jury saw as common sense has little if anything in common with its modern-day restatement. Then, one could

¹ Eric Fisher, 'The quest for a legitimating jury system: is the justice system searching in the right place?' *Unpublished Master's thesis*, (University of Western Australia, 2012)

more aptly equate it with common knowledge. For example, legal historian Theodore Plucknett points out that it was as ‘representative of the countryside rather than as a body of witnesses’ that the jury spoke.² If a felon wounded a person in one county, and the victim died in another, then the felon could not be tried ‘because a jury of the first county will know nothing of the death, and the jury of the second county will know nothing of the wounding.’³ This meant that, rather than relying on facts presented through evidence in the court, jurors were expected to have their own knowledge of what had occurred.⁴ In other words, they brought to the court common knowledge of what had happened. Jurors were the indictors. I elaborate on the role of indictors in Chapter One.

But, in its modern day restatement, the common sense that the court expects jurors to bring to their decision making expressly precludes prior knowledge of the issue in question. They must only discern facts from courtroom testimony. So, the premise that instills public confidence in the adversarial trial by jury is that because jurors hear from witnesses unmediated testimony, to which they apply community common sense, they discern facts, as they exist in the real world. Not as derived principally through legal argument. That is to say, the testimony they hear is unmediated. I believe that premise is flawed. As I discuss in the chapters to follow, counsel’s control of courtroom discourse means that transparent portrayal of facts to the jury is often illusory. And, that illusion is significant because it feeds the presumption of community common sense based, I argue, on another flawed premise. That is, that entrenched social values underlie community common sense. Furthermore, courtroom discourse is the tool counsel as advocates use to appeal to that perceived community common sense to persuade the jury to accept the advocate’s narrative of the case as true. But, as I explore in Chapter Five, a culturally diverse modern community does not contain such a common set of entrenched values. And, faulty perceptions of community values and common

² Theodore FT Plucknett, *A concise history of the common law* (Butterworth, 5 ed, 1956) 129

³ Ibid 128

⁴ Ibid

sense can influence the structure of jury trial discourse. I also discuss the consequence of faulty perception of community values in Chapter Five.

The adversarial trial as an oral event

The adversarial trial is an oral event, which ought to aid the goal of unmediated testimony. It is in the orality of language, and in its use with others in genuine conversation—that is, in partnership with another, as distinct from mere participation with another—that we can explore and resolve omissions, distortions, false claims, and pretensions. But, the orality of the adversarial trial, does not give way to genuine conversation. It suppresses it. In spite of this, the widespread view is that the jury hears witnesses present the facts first-hand, and, therefore, those are ‘raw facts’ because they are unmediated by such things as media excisions and selective emphases. Rules of evidence and criminal court rules of procedure purport to ensure that mediation of courtroom testimony does not occur. However, a power similar to that of media to distort, or mediate, underscores the procedures of adversarial trial discourse. It is just less evident. Opposing counsel, with the judge monitoring and constraining the discourse according to the rules of evidence, collaborate in an unwitting refutation of the legal truism that juries are best suited to finding the truth.

Rarely does the court give the witness the unfettered option to tell their story in their own words, which is the common way one relates a story in interpersonal dialogue. Counsel will want there to be a narrative, but they are to be the authors of it. Witnesses are to feed the plot development, but under the direction—the discipline—of counsel as authors. Arguably, the skill of the courtroom advocate lies in their ability to comprehend a brief, mould it into the language of law, and organize courtroom discourse to persuade the jury to one or the other counsel’s competing narrative. Furthermore, because the adversarial trial with jury is an oral event, rules for witness testimony are founded on language. However, as I contend in Chapter Four, organization of courtroom discourse occurs beyond a level that standard accounts of language can account for.

Obsessed with language, sometimes we cannot see the wood for the trees

When I claim that jury trial procedure is obsessed with language, I do mean that literally. I submit that the power of language strongly influences those who determine rules of evidence. After all, language is law's tool of trade, and from our very early days at school, we learn that, in language, grammar rules. Moreover, we learn that meaning resides in language. In Chapters Three and Four especially, I analyse this monolithic hypothesis of language to reveal its limitations in addressing the nature of courtroom discourse. I suggest that in our rule-focused journey through school, and in our indefatigable search for meaning in the language of law, we sometimes allow the trees to blind us to the wood. And, that metaphor points to the essence of my thesis that Standard, or monolithic, accounts of language and law are inadequate to reveal the potential for discursive distortion of meaning in criminal trial before jury.

The evolution of the jury as Institution—the bastion of individual rights

To explain the nature of the community, which vindicates the thrust of my thesis, I set the historical context by tracing the chequered development of the Anglo-Australian jury. It starts in the Middle Ages, and evolves through often-volatile steps into the notion of jury we have today.

In an earlier paper, I discussed how, in successive eras, the state—the Crown in its early Anglo-Saxon form —had institutionalized the notion of the jury as the bastion of individual rights.⁵ I expressed the view that, in those successive eras, the jury was always a manifestation of the Crown's self-assessed need to affirm its legitimacy. The institution of the jury achieved this by seeming to express the will of the people in the meting out of justice. Therefore, the Crown wanted its conduit to the people to be unmediated by third parties. That is why it was reluctant to allow lawyers to intercede in the feedback process. At first, it would not allow them to appear at all. When, later, it did allow them to appear in criminal trials, it

⁵ Eric Fisher, 'The quest for a legitimating jury system: is the justice system searching in the right place?' *Unpublished Master's thesis*, (University of Western Australia, 2012)

did so reluctantly and with constraints on their involvement. I explain the nature and consequences of this reluctance in Chapter One.

Even the introduction of the jury in criminal trials in the first instance was exigent. It followed the cessation of the trial by ordeal, which the church had banned in 1215. Trial by ordeal was seen to reflect directly the will of God, and the intercession of the jury as a mediator of God's will appealed neither to the Crown nor—counter-intuitively—to the accused, who did not wish to trust their fate to profane human beings. Nor were jurors happy. The reach and power of the Church was ubiquitous. It permeated peoples' lives, reminding them that they must not usurp the will of God, and must not set themselves up as a secular replacement for God's right alone to judge his creatures. Almost overnight, it seemed, the Crown, though, was asking them to do just that. In Chapter One, I reveal how, perversely, the Crown addressed this problem with the introduction of the principle of beyond reasonable doubt, not to protect individual rights, but to ensure more convictions.

Within this history, I examine how the role of lawyers developed in criminal trials, specifically their capacity to mediate the transfer of raw facts from witnesses to jurors. Symbolically, the power of courtroom advocates to manipulate courtroom discourse still mirrors the state's power in the Middle Ages to mediate God the creator's purported admonition to his creatures not to judge. But, the state as self-anointed secular advocate displaced God's invariant truth with the more pragmatic legal truth. Even after the Enlightenment and the humanist assurance that God is now dead, the symbolism of the God-fearing era that spawned the jury remains, and serves the same useful purpose of securing the legitimacy of the state. That is, the state symbolically enlists the power of the people to ensure that subjectivity of secular judicial judgment does not supplant the transcendent truth in justice. And, the justice system has entrenched community common sense as the embodiment of that truth. In the process, though, through its rules of evidence and criminal court procedure, the justice system has invested in courtroom advocacy the authority to direct the meaning of discourse.

In Chapter Two, I use an illustrative case study to examine how counsel⁶ organise courtroom discourse to direct the development of the narrative of the case down paths that best suit counsel's desired outcome. Competing counsel each pitch their preferred narrative outcome to the jury in zealous advocacy of their client's cause. Yet, even in the heat of their oral battle, they do come together in *voir dire* discussion of admissibility of testimony to ensure that control of development of the narrative of the case never passes to witnesses.

Nevertheless, the focus of jury reform remains on making it more representative of a putative homogeneous community and the common sense with which it is imbued. The question, though, is whether common (or community) sense is a vestige of a past that a new reality has replaced.

The nature of community

We can define a community as a particular area or place considered together with its inhabitants.⁷ But, that is unsatisfactory, because an inhabitant is someone who lives in a particular place. Alternatively, we can define it as a group of people having a particular characteristic in common. But, that might merely tell us they live in the same place (they are inhabitants); it tells us almost nothing about shared community values. Geoffrey Walker is more specific. He claims a community is a part of society defined as 'the customs and organization of an ordered community,'⁸ which reflect inherited values.⁹ Professor Geoffrey Hazard writes that those who live in a 'single community', which I interpret as one untrammelled by diversity, have a simpler moral life. Ideals, commitment, and expectations are common because they stem from the same inherited values.¹⁰ This is an ideal community, which listens to everyone's voice. But, in the less than ideal universe from which the jury is

⁶ I use the word counsel to describe courtroom advocates both in the singular and plural. The context will show which sense applies.

⁷ Concise Oxford English Dictionary (9th ed) 1995

⁸ Ibid

⁹ Geoffrey de Q. Walker, *The rule of law: foundation of constitutional democracy* (Melbourne University Press, 1988)

¹⁰ Geoffrey Hazard, *The law and ethics of lawyering, 2nd ed.* (The foundation press, 1994) 1139

chosen, not all voices have the opportunity to be heard. The effect is that the chosen jury is less than ideally representative.

In his foreword to a study by Stephen Parker, *Courts and the Public*, Then Honourable Justice Neil J Buckley, President of the Australasian Institute of Judicial Administration (AIJA), refers to Courts and ‘their public.’¹¹ In his preface to the same publication, Parker, too, refers to the courts and ‘their publics,’ although the title of the study is ‘Courts and the public.’ The difference might seem a semantic quibble; just two ways of referring to the same community that the justice system serves. However, whomever else it does serve, the court is always a public servant. In that role, it is also a resource (principally) to other public servants; it is not only a vehicle in criminal law through which its primary moral obligation is to justice done and seen to be done. Even in its actions as an administrative resource though, it will still need to be representative of the community, but only broadly. However, when looking at the nature of a representative jury in a criminal trial, it is to the community composed of diverse publics to which we ought to attend. It is in this capacity that the jury came into being; it did not start out as a champion of the individual rights of the accused. But, to speak of the jury as representing diverse publics is to think of it as representative of a universal audience, which, however, can only ever be a construct of the rhetor,¹² who, in the form of courtroom advocate, tries to persuade it to a preferred point of view. The reality is that the jury must always be a particular, not a universal, audience, as I will now explain.

The universal audience is a concept, not an aggregation of real people. The arguer conceptualises it as a standard against which to judge what data a particular audience might accept as self-evidently true. Therefore, the better way to ensure the jury does deliver

¹¹ Stephen Parker, ‘Courts and the public’ (Australian Institute of Judicial Administration Incorporated, 1998) <www.aija.org.au>

¹² CH Perelman and L Olbrechts-Tyteca, *The new rhetoric: a treatise on argumentation* (John Wilkinson and Percell Weaver trans, University of Notre Dame Press, 1971) 26
I am using the term ‘rhetor’ in the way Perelman and Olbrechts-Tyteca use it when they talk about the ‘age-old debate between those who stand for truth and those who stand for opinion, between philosophers seeking the absolute truth and rhetors involved in action.’

community values and common sense in its decisions is to improve the ways in which advocates and judges present testimony to it. I argue that this means introducing theories of the social sciences, and literature to augment legal theories to analyse courtroom discourse at a level above language. It is only through such a cross-discipline approach to analysis that one can reveal the opportunity for distortion of meaning in courtroom discourse. To explain the nature of courtroom discourse using only competing theories of law and standard accounts of language is to leave too much to practitioner intuition. I traverse this territory in Chapter Six, in which I consider the value of legal and social theory in moving beyond a monolithic hypothesis of language into discourse, which is beyond language.

Courtroom advocates in criminal trials before jury can learn from legal and social theory

In both New Zealand and Australia, law commissions have talked about the important legitimating role of juries without defining what they understand the term to mean. We need to know what kind of legitimacy describes the relationship of the justice system and the community if we are to understand how a jury contributes to it. If jury-as-symbol is all that the justice system needs for it to be legitimate, it already has that; it can leave well enough alone. If it wants substantive truth in legitimacy, it ought not to waste time and money on marginally improving representation, but look to the workings of the jury decision-making process. This would require that it draw on other disciplines in support of law. On the other hand, if it wants legitimacy in the form of ‘dehumanized’, rational decision-making, it does not need a representative jury. Because, only in dehumanisation can it ignore ‘love, hatred, and all purely irrational, and emotional elements which escape calculation.’¹³ But, those are the things that theorists such as Bruner¹⁴ suggest differentiate decision making by laypersons from decisions made by specialists. Those are the elements that stimulate community common sense.

¹³ Max Weber, 1864-1920 *Economy and society* (Ephraim Fischhoff [and others] trans, Bedminster Press, 1968) 973

¹⁴ Jerome Bruner, *Actual minds, possible worlds* (Harvard University Press, 1986)

However, former New Zealand High Court judge, E.W Thomas maintains that not everyone agrees on the need for theory to intrude into judicial practice. He cites Andrew Halpin's identification of various strands of practitioner's scepticism towards theory,¹⁵ and suggests that 'they are encountered often enough in legal practice. Scepticism is first apparent in the belief that the law has no need of theory. Legal practice is regarded as sufficiently rich to make theory redundant.'¹⁶ Philip Leith and Peter Ingram acknowledge the importance of theory, with a caution. Jurisprudence can aid the legal process only 'if it can be brought out of its back room and away from its limited perspectives: by accepting that a legal theory is little without a social theory.'¹⁷

What is a theory of law? Is it a theory of natural law? Legal positivism? Legal realism? Is it the relative newcomer, Critical Legal Studies? I can do no more than broadly survey them, which I do in Chapter Six. However, one needs to understand how they compete for relevance to answer the question, should law embrace legal and social theory as a way to avoid bureaucratic dehumanization. I discuss Thomas's view that scepticism of theory is misplaced and dangerous. 'Intuition and unquestioned assumptions replace a personal theory of law or a conception of the judicial role. If the judge does have a personal theory, it may be largely unarticulated, or incomplete, or even unsound, or it may be no more than a felt approach reflecting a vaguely understood legal theory.'¹⁸ Does the apparent judicial ambivalence to theory feed the fear that, in criminal trials before judge alone lies the potential for arbitrary judgments? Since the secularisation of law, God is no longer the feared arbitrator of the morality of the judge's decision in a criminal trial. To state it plainly, judges need no longer seek to spread the risk of incurring God's wrath by seeking safety in numbers through the jury. Nevertheless, as the Crown did in the Middle Ages, the justice system still prefers to entrust the task of fact finding to the common sense of a jury, even though cost increasingly

¹⁵ Andrew Halpin, *Reasoning with law* (Hart Publishing, 2001) 20-21

¹⁶ E.W. (Edward Wilfred) Thomas, *The Judicial process* (Cambridge University Press, 2005) 2

¹⁷ Philip Leith and Peter Ingram, *The Jurisprudence of orthodoxy Queen's University essays on H.L.A. Hart* (1988) Introduction

¹⁸ Thomas, above n 16, 2

decrees that it does otherwise. Therefore, I suggest the need to reconsider the principles of narrative construction in courtroom discourse by addressing the following issues.

First, the adversary criminal trial courtroom is what I will call, a meaning filtration system. Those who organize and direct it are the diverse officers of the court who play a part in confirming or confounding the institutionalized¹⁹ belief that juries are best suited to finding the truth because they have access to raw, unmediated facts.²⁰ This raises the question whether the discourse counsel employ in the courtroom is a form of neutral mediation. Or does it create potential for systemic distortion of linguistic meaning?

Second, the question and answer exchange of witness examination—what Brenda Danet describes as the adjacency pair social interaction, governed by the chain maxim (question and answer exchange)—is preoccupied with rules. The application of language in the legal setting, reveals, she contends, ‘a preoccupation with language rather than the relation between language and the world.’²¹ So, does courtroom advocacy consider witnesses as manipulable characters in the narrative of the case; or as contributors to its development?

Third, to comprehend the language competence and performance of witnesses one must also recognize that the jury does not comprise individuals from a single culture. It represents diverse cultures and sub-cultures, each of whom will extract their own social meaning from the courtroom discourse.

Fourth, for the jury to serve the reality of truth in justice, and to be more than merely a symbol of it, requires that we distinguish between ordinary conversations, and the rules of engagement in an adversarial courtroom. Ordinary conversation is a willing exchange

¹⁹ See see Jeffrey S Banks and Eric A Hanushek, *Modern political economy: old topics, new directions*, Political economy of institutions and decisions (Cambridge University Press, 1995) Neil MacCormick, *Institutions of law: an essay in legal theory* (Oxford University press, 2007) 21ff

²⁰ Eric Fisher, ‘The quest for a legitimating jury system: is the justice system searching in the right place?’ *Unpublished Master’s thesis*, (University of Western Australia, 2012)

²¹ Brenda Danet, ‘Language in the legal process’ (1980) 14(3 (Spring 1980)) *Law and society review* 540

between partners in the conversation with the aim of reaching a common understanding.²² The rules of engagement in courtroom discourse pit one agonist against another. It compels the use of language strategically and tactically rather than cooperatively. This raises the question whether the justice system needs to move beyond appraising the formal language competence of witnesses. In this, can it learn from sociolinguists, who concern themselves with the relationship of social entities and language use?

Fifth, there has been significant research into how to improve the jury selection process to reflect the diverse community it represents.²³ However, because of the range of cultures and sub-cultures that this diversity embraces, improvements can at best be marginal. Selection parameters alone make the task unwieldy. Furthermore, the cost for a mere marginal gain is hard to justify.

Therefore,

Sixth, is the better way to ensure the jury deliver community values and common sense, to recast the principle of narrative construction of courtroom discourse? And,

Seventh, the overarching question. In the age of a new social consciousness, does Australia still need the jury?

These questions underscore my discussion in which I traverse the Anglo-Australian evolution of the institution of trial by jury from its origins to the age of a new social consciousness.

²² Hans-Georg Gadamer, *Truth and method* (Joel Weinsheimer and Donald G Marshall trans, Sheed & Ward, 2nd ed, 1993) 404ff

²³ Law Reform Commission of Western Australia, 'Selection, eligibility and exemption of jurors: Project 99, Final Report' (Law Reform Commission of Western Australia, 2010; Law Reform Commission of Western Australia, 'Selection, eligibility and exemption of jurors' (Project 99 discussion paper, 2009; Law Commission, 'Juries in criminal trials' (69, 2001) <<http://www.lawcom.govt.nz>; New South Wales Law Reform Commission, 'Jury Selection' (117, 2007; The Law commission, 'Report 69, Juries in Criminal Trials' (2001; The Law Commission, 'Preliminary paper 32, Juries in criminal trials part one' (1998)

Chapter structure

Chapter One: The origin and evolution of the jury

I address the question, how and why did we acquire a jury system. How did it originate? How did it evolve through successive eras from the Middle Ages up to, and into, the modern era? Why did the jury trial gain the status of Institution?²⁴ I organize the discussion in three parts.

First, I analyse the concept of the jury-as-institution. This is primarily a conceptual discussion, conducted in awareness of Law and Literature foundation member James Boyd White's warning that to accept "concept" as an unassailable truth in which to ground an argument in law is to risk asserting a conclusion grounded in nothing more than a subjective idea falsely promoted into perceived irrefutability.²⁵ Even so, as Michael Chesterman asserts, the High Court of Australia uses its judgments to reassert the 'traditional values and features of the jury trial.'²⁶ In this analysis, I address the question, why is the idea of jury as institution so pervasive?

Second, I provide an overview of the origins and evolution of the jury. Thomas Green holds that the jury arose as an act of 'administrative expediency, after the Church banned trial by ordeal [in 1215].'²⁷ W.S. Holdsworth reveals that, because the Crown was reluctant to relinquish control of the jury, it was not until the beginning of the eighteenth century that it allowed prisoners to call witnesses.²⁸ Moreover, even the now hallowed 'beyond reasonable doubt' did not begin as the accused's safeguard against an ill-considered verdict of guilty.

²⁴ *Cheatle and another v The Queen* (1993) 177 CLR 541

²⁵ James Boyd White, *Justice as translation: an essay in cultural and legal criticism* (University of Chicago Press, 1990) 25ff. [Throughout this thesis, when I refer to any concept generically in my discussion, I signify by using double quotation marks. When I refer to an identified author's reference to any designated concept, I signify by using single quotation marks.]

²⁶ Michael Chesterman, 'Criminal trial juries in Australia from penal colonies to a federal democracy' (1999) 62(1) *Law and Contemporary Problems* 69 102

²⁷ Thomas Green, *Verdict according to conscience* (The University of Chicago Press, 1985) 3

²⁸ W.S. Holdsworth, *A history of English law* (Methuen, 3rd rewritten ed, 1922) 325

So, third, I examine the systemic nature of the jury trial and contend that, the jury is still valued in Australia because of its institutionalized symbolism as guardian of individual rights, in spite of the secularisation of law in the modern era. I explain this increasing secularisation since the Enlightenment by examining the concept of natural law, stemming from its Christian roots, and its clash with a legal positivist claim to a more enlightened view of law without God. For instance, recourse to God is now an option in the courtroom—witnesses may swear on the bible, or avoid religious association by taking an oath of affirmation.

Against this background, I discuss whether courtroom and procedural symbolism still inhibits judges and lawyers from acknowledging the reality of a new social consciousness and from recognising the need to shape courtroom discourse to deal with it. Chapter One, therefore, provides the context for the analysis that follows.

Chapter Two: How advocates control courtroom discourse: an illustrative case study

In Chapter Two, I use a case study of an actual recent criminal trial before jury to show how the rules of evidence and the assessment of the probative worth of testimony facilitate a compromise between contextual and invariant truth. I show that, in my case study, the lawyers have reached an understanding, not of meaning, but of rules. Moreover, often counsel and judge set these rules in the *voir dire*. I discuss the significance of this process, which excludes key partakers in the procedure of finding the facts in witness testimony—the jurors. Furthermore, in setting the rules—albeit with adherence to rules of evidence and criminal trial procedure—counsel also tacitly agree who will control what happens in open court. That is, they decree that development of the narrative of the case must not pass to witnesses, as this illustrative case study shows.

My case study is illustrative, not prescriptive. Its value lies in stimulating the idea that it does promote contemplation of why a witness might want to construct their own narrative, and why counsel might wish to prevent them.

Chapter Three: Why standard accounts of language and law are inadequate to assess the nature of courtroom discourse

Roman Jakobson claims that if we are to get to the essence of the organization of discourse, we must move beyond language. He probes the realm of linguistics to expound a need to revise the notion of “the monolithic hypothesis of language.”²⁹ A monolithic approach would suggest that writing and reading are manifestations of language used in speaking and listening. I explore the reason why this is not an adequate way to analyse the oral performance that is courtroom discourse. I draw on Ludwig Wittgenstein’s assertion that language is a game in which it is only possible to play if one knows the rules.³⁰ But, these rules go beyond the inert rules of grammar. And, as Andrew Halpin explains, when a word is open to diverse meanings, ‘we may fail to grasp what rules are appropriate to govern the proper uses of a particular word’ in different applications of it.³¹

Chapter Four: Creating the illusion of transparent portrayal of facts. The strategic and manipulative use of discourse

The key point I make in this chapter is that the standard accounts of language do not explain adequately the nature of courtroom discourse in criminal trials before a jury. One cannot understand how discourse truly represents the worldview of protagonists in any trial by analysing it from the formalist viewpoint of the grammarian. However, the rules of evidence almost ensure this outcome. They discourage consideration of the social relations of language with the world it represents. Such consideration requires that one acknowledge the inherent

²⁹ Roman Jakobson, “Linguistics and poetics” in Thomas A Sebeok (ed), *Style in language* (M.I.T Press, C 1960) 350. Jakobson attributes this description to Voegelin. C.F. Voegelin, ‘Casual and noncasual utterances within a unified structure’ in Thomas A Sebeok (ed), *Style in lanmguage* (The M.I.T. Press, c1960) 57

³⁰ Ludwig Wittgenstein, *Philosophical investigations* (P.M.S Hacker and Joachim Schulte trans, Wiley-Blackwell, 4th ed, 2009)

³¹ Halpin, above n 15, 125

instability of the processes that diverse receivers bring to their determination of the meaning of the text. Discourse cannot truly represent the worldview of protagonists in any trial if one analyses it from the formalist viewpoint of the grammarian. The court demands of discursive organization in criminal trials that witness testimony reveals the what, when, and how of any action, and that it avoids apparent speculation on the why. Yet, when we extend search for the truth into the “why,” rather than stop at the “what, when, and how,” we then understand that a person exists in performance. So, in testimony we need the person as entity with a psychical attribute that gives them a transcendent presence only in performance of intentional acts. Only then can we have a substantive truth. Only then can we bring a common sense to bear.

Chapter Five: How wrong perceptions of common sense and community values can influence organization of jury trial discourse

Chapter Five is pivotal. In it, I explore the nature of the specific audience—the jury—which counsel attempt to persuade to accept their respective propositions. That is to say, the justice system has drawn the jury from the statistical universe, which is a particular audience. It is not a universal audience. A universal audience is the ideal construct of the rhetor. In the context of the jury, one is talking of a particular audience, with its values and prejudices, which jurors supposedly represent. Gadamer asserts that prejudice is not an impediment to reaching an understanding. On the contrary, two people, who start from their own prejudiced viewpoints, but who converse cooperatively, will arrive at an understanding that informs both participants.³² However, counsel do not play the parts that Gadamer assigns to those who converse in partnership. Each plays to win over the jury to accept their argument. Also, for a person—our juror—to rise to the level of the universal, they must sacrifice their particularity. This means ascent to the universality of substantive truth. To imagine (for that is all the rhetor can do) a universal audience common to diverse communities—one that reflects their agreements on values and standards—is difficult.

³² Francis Mootz, 'Rhetorical knowledge in legal practice and theory' (1998) 6 (Spring 1998) *Southern California interdisciplinary law journal* 491 501

Jürgen Habermas asks ‘How can we reconcile the assumption that there is a world existing independently of our descriptions of it and that is the same for all observers with the linguistic insight that we have no direct, linguistically unmediated access to “brute” reality?’³³ He raises another concern. He notes that analysis of linguistic utterances largely has neglected questions ‘pertaining to theories of communication, action, morality, and the law’.³⁴ He cites an exception, however, quoting Michael Dummett.

Language, it is natural to say, has two principle functions: that of an instrument of communication, and that of a vehicle of thought. We are therefore impelled to ask which of the two is primary. Is it because language is an instrument of communication that it can also serve as a vehicle of thought? Or is it, conversely, because it is a vehicle of thought, and can therefore express thoughts, that it can be used by one person to communicate his thoughts to others?³⁵

The answers are important generally to comprehend how one might best use the power and purpose of language to reach an understanding with another, or to compel or coerce. What is more, the organization of courtroom discourse aims to persuade rather than to convince. It is a theatre of operation in which the abstract principles of argumentation confront the exigency of a real situation.

But, if the state values the symbolic presence of the jury as a legitimating device, then courtroom advocates increasingly will need to tailor their courtroom discourse to an audience that can never be truly universal. Rather, they will be attempting to persuade a particular audience of disparate prejudices and predispositions. It is an audience with a need for stories that are not tightly constrained by rules that aim to move evidence from story into a presumed value-free rational core. The community common sense, which the jury brings to fact-finding, expresses itself best in storytelling, and, the collective memory of the group to which the storyteller belongs influences the nature of community common sense. It is more likely to be consistent in a group of common origin.

³³ Jürgen Habermas, *Truth and justification* (Barbara Fultner trans, The MIT Press, 2003)

³⁴ Ibid

³⁵ Ibid.

Without knowing how the jury deals with the mediated oral cut and thrust of the adversarial trial, it seems imprudent to laud jury secrecy as protecting the purity of the jury verdict and as representing common-sense morality.

Chapter Six: What courtroom advocates can learn from embracing legal and literary theory

Throughout my discussion, I affirm the theme that to understand better the nature of common sense and its relationship to community values, we need a cross-discipline approach to theory to augment theories of law. Historically, Berman says, ‘a social theory of law’ was concerned with ‘the extent to which the Western legal tradition has always been dependent on...belief in the existence of a body of law beyond the law of the highest political authority.’³⁶ It was once called divine law, then natural law, and, more recently, human rights.³⁷ However, there is a view within the judiciary that Law’s own experience so enriches legal practice that it has no need for theory. I challenge that view. It leads to searching for solutions to problems in pragmatism, which might dispel a problem, but not necessarily resolve it.

The pragmatic driver of courtroom advocacy is persuasion to adhere to counsel’s preferred narrative of the case. And the preferred narrative of the case is that which steers clear of perceived ambiguities of substantive truth—the output of the consciousness of witnesses—in favour of the rational certainty of legal truth, which is the output of rules of evidence. Substantive truth bows to legal truth, in pursuit of which courtroom discourse is organized. Legal truth implicitly founds on the premise of equality, in that the rational certainty of legal truth treats all parties alike; they are legal persons ‘free and equal subjects of the law’s address’, with an equal capacity for free will.³⁸ The pertinent question, though, is whether this

³⁶ Harold Berman, *Law and revolution: the formation of the western legal tradition* (Harvard University Press, 1983) 45

³⁷ *Ibid* 45

³⁸ V Kerruish and J Purdy, ‘He “look” honest—big white thief, ’ (1998) 4(1) *Law Text Culture* 146 150

means merely that they are free in the sense that this equality strips them of all their idiosyncratic characteristics.

Though tacit, there is an underlying theme in the views I have cited here. That is, the need for simplicity in reciting the narrative of the case. In earlier chapters, I have discussed broadly the importance of social theories as supplement to legal theory in the organisation of courtroom discourse. A fuller discussion is beyond the scope of my thesis. What is more, the overarching theme of my study is the potential for discursive manipulation of meaning in a trial before a jury. Furthermore, I have stressed that a standard model of language is not adequate to illuminate meaning in courtroom discourse. Therefore, in this chapter, I still probe beyond the constraining paradigm of the sufficient richness of legal practice and venture into the vexed province of law and literature. I argue that courtroom advocates can learn from literature why there is a need to organize courtroom discourse to account for the differing social realities across cultures. In short, why in adversarial trials before juries there is a need for stories.

Chapter Seven: Comprehending a new social consciousness: does Australia still need the jury?

When I reviewed my analysis of my case study, I realised that I kept coming back to Witness's answer to the question why he crossed the road toward, what screams had led him to presume, was the site of a person in danger. It seemed to be an unproblematic question. On the face of it, it was just setting the context for the jury, explaining how the witness found himself at the centre of an assault. He was not part of its development, just an accidental late arrival to it. But, at trial, the prosecutor—challenged by a defence counsel objection because of what was agreed in the *voir dire*—was telling the witness “*what this court is interested in is what you saw and what you heard.*” The court did not want to know what he was thinking. It was not until later that I found that the question, which at first had seemed nothing more than a device to establish the context for what would follow, was loaded with discursive weight.

I was uncovering something beyond my initial objective, which was to reveal the potential for distortion of meaning in courtroom discourse. For that, my focus was discourse as a stimulus-response procedure. But, what constitutes the community common sense that the jury system prizes is much more than a mechanistic stimulus response action of the brain. Kant had made the point in his *Critique of Pure Reason*

The body would thus be, not the cause of our thinking, but merely a condition restrictive thereof, and although essential to our sensuous and animal consciousness, it may be regarded as an impediment of our pure spiritual life.³⁹

We cannot interrogate collective consciousness—the wellspring of putative community common sense—using a stimulus-response, physiological approach. Yet the rules of evidence as they apply to courtroom testimony seem premised on a principle that providing so-called raw testimony to the jury requires courtroom discourse to do just that. But, community common sense resides in collective consciousness; and, what is more, today's jury does not comprise individuals from a single culture. It represents diverse cultures and sub-cultures, each of whom will extract their own social meaning from courtroom discourse. And, that raises the question, has the jury as a putative link in the cohering bonds of the community lost its relevance? In Chapter Seven, I argue this is where we must focus if we are to answer an implicit underlying question, does modern society still need the jury?

³⁹ Immanuel Kant, 'The critique of pure reason' in *Classic philosophy: 4 books by Kant in English translation, in a single file* (B&R Samizdat Express, 2nd, 1787 ed, 1781)

Chapter One: The origin and evolution of the jury. Why Australia still wants it.

Introduction

In this chapter, I set the context for the analysis to follow. I structure this chapter in three related parts. *First*, I discuss the concept of the jury as institution. This discussion is largely conceptual, although I acknowledge James Boyd White's admonition to beware of the seductive allure of 'concept and its cognates.'⁴⁰ To accept concept as an unassailable truth in which to ground an argument in law is to risk asserting a conclusion grounded in nothing more than a subjective idea falsely promoted into a perceived irrefutability of concept. But, to promote a subjective idea into an intersubjective shared idea is a reach too far. For example, if I talk about the concept of freedom, I may think it means one's personal or civic liberty. William James equates it with sensation, in that there is 'no feeling of sensible constraint.'⁴¹ Janis Joplin sings 'Freedom's just another word for nothing else to lose.'⁴² Each of these conceptions of freedom potentially has a meaning that differs from other meanings.

Personal or civic freedom carries the idea of a positive liberty, that is, the power to influence one's own future. Freedom of sensible constraint may mean nothing more than being able to move without the constraint of four walls or physical shackles. Both explanations carry ambivalences that remain unresolved without further qualification. Nevertheless, vague hope resides in each. On the other hand, Joplin sings in Kris Kristofferson's *Me And Bobby McGee*: 'Freedom's just another word for nothin' left to lose And nothin' ain't worth nothin' but it's free ...'. I might interpret those lyrics as an expression of denial from a despairing heart. Someone else might counter that they at least have the virtue of absoluteness even though that absoluteness manifests itself in hopelessness. Saint de Exupery writes of freedom, perversely, as a kind of contentment. 'Yet he who is blind to this havoc of his life grieves not for his bygone plenitude, but is contented with his new-won freedom, which is the freedom of having ceased to exist.'⁴³ How one relates to language determines its consequences. Yet, to

⁴⁰ White, above n 25, 25ff

⁴¹ William James, *Some problems of philosophy* (Harvard University Press, approved ed, 1979).

⁴² Joplin, Janis, "Me and Bobby McGee" on album *Pearl* (1971)

⁴³ Antoine de Saint Exupéry, *The wisdom of the sands* (Stuart Gilbert from the French *Citadelle* trans, Harcourt, Brace and World, inc, 1950) 54

think conceptually of the jury-as-institution has the effect of transforming it into what I will describe as a symbolic reality. We need to understand why, as I discuss below.

Second, then, in this chapter, I delve below the surface symbolism to reveal better the actuality of the origins and evolution of the jury system. I provide an overview of the evolution of the jury from its administrative beginnings in Anglo-Saxon Middle Ages through to the modern era. Its growth is inconsistent. Some of its early history is speculative. However, what will appear as a constant is a picture of a time when God—or His secular agent on earth, the Church—weighed heavily on the consciences of those the Crown called upon to judge their fellow man or woman. So, the power of God or the church had much to do with the way the jury evolved. Moreover, it had much to do with the inconsistent development of the jury as an element of the criminal trial, as I will explain.

This brings my discussion to the *third*, synthesising, part in which I examine the systemic nature of the jury in criminal trials in the modern era. We will see that it is still valued in Australia because of its institutionalized symbolism as guardian of individual rights, but now with recourse to God reduced to an option.⁴⁴ Therefore, within this section, I discuss the concept of natural law, stemming from its Christian roots, and its ultimate clash with a legal positivist claim to a more enlightened view of law without God. However, in spite of the shift to the teaching of law as secular, symbolism inhibits judge and lawyer from acknowledging the new reality of community values, and recognising the need to shape courtroom discourse to deal with it. When we can lay bare this reality, we are better able to understand courtroom discourse as more than the organization of a ‘mere system of rules,’ as Jeanne Gaakeer has described it, but as ‘a culture of argument that addresses the questions of value and community.’⁴⁵

⁴⁴ This option manifests in swearing in witnesses in court; they may choose to swear on the Bible, or swear an oath of affirmation, by which the witness avoids religious association.

⁴⁵ Jeanne Gaakeer, *Hope springs eternal* (Amsterdam University Press, 1998) 26

First, though, in the next section, I explore the perception of the jury as an institution that embodies the community values, expressed as community common sense.

The jury as Institution

The manner in which section 80 of the Australian Constitution influences perception beyond its literal scope illustrates the force of institutionalization. For instance, there is a widespread view in the community that the Constitution guarantees all citizens trial before jury for indictable offences. This is despite the fact that section 80 refers only to offences against the laws of the Commonwealth, and that the requirement for a trial before jury in those circumstances contains nothing about a jury of the peers of the defendant.⁴⁶ What is more, when first formulating their ‘rules’ for the conduct of jury trials, the Australian states were pointed in their exclusions of some citizens as peers. For example, *The Juries Act* (1898) WA did not provide for women to serve on juries, and Parliament did not even discuss the matter.⁴⁷ Moreover, not all men were equal when it came to qualification to serve on the jury. According to section Five,

Every man (except as hereinafter excepted) between the ages of twenty-one and sixty years residing within the said Colony, and who shall have within the Colony, either in his own name or in trust for him, real estate of the value of fifty pounds sterling, clear of all incumbrances [sic], or a clear personal estate of the value of one hundred and fifty pounds sterling or upwards, shall be qualified and liable to serve as a common juror in all civil and criminal proceedings and on any inquisition in the said Colony within a radius of thirty-six miles from his residence.⁴⁸

However, the early history of Australia tells us that just because the legislature decrees it to be so does not mean that broad consensus of who are one’s peers follows. Chesterman writes that, in a colony comprising both free settlers and emancipists, the idea of all colonists as

⁴⁶ Section 80 of the *Commonwealth of Australia Constitution Act (The Constitution)* prescribes that ‘[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.’

⁴⁷ S Walker, ‘Battle-axes and sticky-beaks: women and jury service in Western Australia 1898-1957’ (2004) 11(4) *Murdoch University Electronic Journal of Law* para 1(n2)

⁴⁸ *Ibid* paras 2,3,4

peers of one another came under strain.⁴⁹ Neither group could trust the other group to approach their decision making free of bias. The free settlers argued ‘that Emancipists would be far too willing to acquit and, moreover, that they themselves should not suffer the indignity of trial before jurors who were still tainted by their criminal records, even though they might now be law-abiding people who were able to satisfy a property qualification.’⁵⁰

Chesterman maintains that, in spite of section 80, which applies only to trials of any offences against Commonwealth laws, the High Court is committed to using its judgments to reassert the ‘traditional values and features of the jury trial.’⁵¹ Its judgments serve as ‘strong reminders of the reasons why jury trial travelled from England to Australia in the first place.’⁵² Be that as it may, history does not support a view of the jury having carried through successive periods of development moral values that transcended the exigent needs of the eras through which it passed. I suggest that the judgments more strongly reflect the power of an institutionalized myth, using that word in the sense of a traditional story told and often memorialized, to explain or enshrine cultural practices.

The institutionalization of the jury in the common law has served the state⁵³ well. As a legitimating device, in fact, it reflects the power of ‘the institution.’ This is why, at every stage of the jury’s history, through the changing justifications for it, the most compelling answer to the question, why do we need a jury is symbiosis. That is to say, interdependence. If the community has confidence that a jury represents it adequately, it is content that it has a voice in the maintenance of social order. If the state—through its agent, the justice system—has the confidence of the community, it can reinforce the legitimacy of its right to govern. Yet, what the institution is, and what it ought to be is easily confused.

⁴⁹ Chesterman, above n 26, 70

⁵⁰ Ibid 70

⁵¹ Ibid 102

⁵² Ibid

⁵³ In this and subsequent uses of “state,” meaning polity broadly, I will not capitalise it.

The ambiguity of Institution

The word ‘institution’ (in its morphological variations), recurs throughout my thesis. Writers I cite generally do not define it. For example, in the High Court case of *R v Snow*, Griffith CJ is adamant that the trial on indictment of any offence against any law of the Commonwealth shall be by jury. It represents a ‘fundamental law of the Commonwealth, which ‘ought prima facie to be construed as an adoption of the institution of “trial by jury” with all that was connoted by that phrase in constitutional law and in the common law of England.’⁵⁴ He does not define “institution.” In 1993, in *Cheatle*,⁵⁵ the High Court refers to the ‘institution of trial by jury,’ ‘institution of criminal trial by jury’ or to the diminution ‘the institution’ 21 times, without defining what it means by the word institution.

Writers who do actually define the word give “institution” various meanings. Randall Calvert contends,

This seems especially to have been true in political science, where an institution is variously a set of rules of the game that regulate lower-level political activities; a central and widespread species of interest groups; a highly formalized and elaborated type of organization; a method of preference aggregation; and a set of norms, habits, rules of thumb, and other precepts for decision making and behavioural choices with which a political group is endowed.

Neil MacCormick⁵⁶ expresses these aspects of “Institution” by analogy rather than by explicit definition.⁵⁷ In particular, he examines the difference between informal norms and ‘explicit or

⁵⁴ *R v Snow* (1915) 20 CLR 315 323

⁵⁵ *Cheatle and another v The Queen* (1993) 177 CLR 541

⁵⁶ Professor MacCormick retired 1 February 2008 after completing 36 years as Professor (and later Senior Professor) at Edinburgh University. He was accorded with the honour of a series of lectures in his name by the University's School of Law. He gave his final lecture as Regius Professor, entitled 'Just Law', on Monday 28 January 2008. He continued thereafter in his role as President of the International Association for Philosophy of Law and Social Philosophy. He was president of the International Association for Philosophy of Law and Social Philosophy (a learned society for science and was founded in 1909 as the "Internationale Vereinigung für Rechts- und Sozialphilosophie", the world's central academic organization for the study and advancement of legal and social philosophy.) Neil MacCormick was a member of the Broadcasting Council for Scotland, of the Economic and Social Research Council, of the Research Council of the European University Institute, and of the European Science Foundation, as well as of various government departmental committees inquiring into matters of public concern.

implicit rules that may be introduced and established, or developed and recognized, by persons holding some position of authority.’⁵⁸ In other words, they become institutionalized norms. We sometimes call informal norms “informal social conventions.” However, convention differs from institution, which MacCormick’s example of queuing clarifies. Where there is a queue, he asserts, ‘you ought to take your turn in it, and people do so because in their opinion that is what one ought to do’ in that situation. People do not need a ‘canonically formulated or formulable rule’⁵⁹ about queuing. Moreover, if one were to offer such a rule, chances are it would provoke discussion about whether it was a good rule. Without it, generally people know what to do. And, if they do not, there are plenty of people standing in line who will tell them. That then is a norm. ‘This very orderliness seems explicable by reference to an implicit queuing norm whose articulate understanding would be a matter of interpretive debate among those who acknowledge the practice as an essentially shared or common one and try to “play fair” within it, adequately satisfying each other’s mutual expectations.’⁶⁰ We have now entered the esoteric realm of ‘interpretive concepts.’⁶¹ However, even if we dress it up with a fancy name, it still means the same thing. That is, an innate need for orderliness, prompts a give-and-take attitude to the process.

MacCormick reminds us, though, that queuing is not always an informal social convention. In another situation, someone in authority might have declared that we are required to queue—whether we like it or not.⁶² Think of banks, airport check-in counters. People have to orientate themselves to the queuing, but it is no longer just social convention. Queuing has become a quasi ‘rule’. But, not a real rule.

Unlike informal norms or conventions, explicitly made rules have an expressly promulgated text.

Interpretation of norms in the form of explicit rules necessarily involves attending to the very words

⁵⁷ MacCormick, above n 19, 21ff

⁵⁸ Ibid 31

⁵⁹ Ibid 15

⁶⁰ Ibid 16

⁶¹ Ibid

⁶² Ibid 21

used by the rule-maker, and reflecting on the underlying point of the words only where the words seem unclear or where what seems their obvious meaning leads to what seem weird results in practice.⁶³

The significant point is the difference between explicit and implicit rules. MacCormick cites as a ‘classic example’ of an implicit rule, the doctrine of precedent. The ‘elusive “ratio decidendi” of a case is the implicit rule laid down by the court whose decision in a particular case constitutes a precedent that is applicable generally.’⁶⁴ The rule is effectual to the extent that ‘institutional’ relations exist between the judges and courts. It also needs an institutional attitude to ‘constancy of decisions’ on different occasions over time. To this, MacCormick adds ‘the bare idea of universalizability,’⁶⁵ by which he means widespread or common acceptance. In other words, universalizability suggests constancy in that all people, in a given circumstance, would tend to act or react in a similar way. For our purpose in talking about the jury, that means a common sense of what is right, either morally or as communal duty.

MacCormick argues that the world of human beings includes both ‘sheer physical facts’ and ‘institutional facts,’ which are facts that depend on some normative framework that embraces intersubjective agreement on how one interprets things, events, and behaviour. Institutional facts are ‘omnipresent and inherent elements of social reality.’⁶⁶ In law, such elements will include contract, property, marriage, and so forth. It will also embrace institutionalism of law, through such agencies as the courts, legislature, police force, and so on. Unless we understand what the referent stands for, and how normative order acquires its status, the phrase ‘institutionalism of law’ floats aimlessly in a sea of abstraction. He describes normative order against a background of reciprocity. So that even in informal settings, we will try to interact with others in a way that shows we share an understanding of what is right and wrong conduct, as I have discussed earlier, illustrating with MacCormick’s example of

⁶³ Ibid 23

⁶⁴ Ibid 26

⁶⁵ Ibid

⁶⁶ Ibid 12. cf. “The institutional excuse” in David Luban, *Lawyers and justice: an ethical study* (Princeton University Press, 1988) 129

queuing. That is, an innate need for orderliness prompts a give-and-take attitude to the process.

In a largely homogeneous society, in which a jury is more likely to comprise peers of the accused from the monocultural society of which they are all members, reciprocity—the process of give and take—is likely to have some effect on jury deliberations. In a multicultural society, I submit, this is less true, as I discuss below.⁶⁷ I return to this topic in Chapter Five, in which I examine jury trial discourse and assumptions about common sense and common community values, which the justice system claims inform jury decision making. But do common sense and common community values inform those decisions? Because juror deliberations are secret, all we can claim is that calling upon so-called normative statements to justify acts or omissions might instead be invoking a descriptive epistemology. This means invoking facts not values. Normative jurisprudence, for example, includes discussion of the role of morality in law; the role of conscience in response to unduly repressive or repugnant law; and the approach judges ought to adopt in deciding hard cases, in other words, how people *ought* to think, generally expressed as values. Descriptive epistemology focuses on what people actually do think, in other words, what *is*, which is expressed as fact.⁶⁸

Distinguishing between fact and value in real life can lead to ambiguity of meaning. One way of avoiding the difficulty is to apply the ‘principle of humanity.’⁶⁹ This means that ‘when interpreting another speaker we must assume that his or her beliefs and desires are connected to each other and to reality in some way, and attribute to him or her the propositional attitudes

⁶⁷ I have chosen to use the term monocultural to mean a culture with a shared heritage, belief system, and language. I am less concerned with arguing the precision of my definition than I am with the word’s value as an easily grasped shorthand method of differentiating a culture with those attributed from a multicultural society. So, one should apply that interpretation in this paper, unless I specify otherwise.

⁶⁸ Christopher Hutton, *Language, meaning and the law* (Edinburgh University Press, 2009) 10

⁶⁹ Richard Grandy and Richard Warner (eds), *Philosophical grounds of rationality: intentions, categories, ends* (Clarendon Press 1986)

one supposes one would have oneself in those circumstances.’⁷⁰ The consequence of applying this principle is an assumption that people think what they *ought* to think. The transformation from “is” to “ought” is smoothly seductive. “Is,” which connotes the community standard, becomes “ought,” an attributed community value, and, the “ought” becomes a deontic norm, creating both permissions and obligations, from which the state determines the substantive content of law.

I submit that the institutionalized conception of the jury as capturing community values epitomizes MacCormick’s analysis. For instance, in each Australian jurisdiction, trials before a jury follow rules, which the jurisdiction authority has decreed. The Authority formulates its rules about the jury on an assumption that people think what they ought to think as a member of the community to which they belong. By this, I mean they are part of a community, which is a part of society, which one can define as ‘the customs and organization of an ordered community.’⁷¹

Geoffrey Walker explains ordered community as reflecting inherited values.⁷² This ordered community has much in common with what Geoffrey Hazard calls a ‘single community.’⁷³ Those who live in such a community, he claims, have a simpler moral life, because ideals, commitment, and expectations are common; they stem from the same inherited values. The jury system still relies for its legitimacy on this assumption. However, the nature of the inheritance is not clear-cut. Nor, as we see in the next section, was its development consistent over the ages.

The inconsistent evolution of the criminal trial jury and the power of God

Legal historian, Theodore Plucknett records that as late as 1100 the law in Anglo-Saxon Britain was substantially local. Local sheriffs administered it according to ancient customs,

⁷⁰ Daniel C Dennett, *The intentional stance* (MIT Press, c1987) 343

⁷¹ Concise Oxford English Dictionary (9th ed), 1995

⁷² Walker, above n 9, 27ff

⁷³ Hazard, above n 10, 1139

which were local, not uniform across the country. There was, Plucknett explains ‘very little that could be called “common law.”’⁷⁴ Today, however, the “common law” wears the mantle of the mother of human rights, even up to the High Court of Australia.⁷⁵

In a contrary view, Arthur R Hogue asserts emphatically that medieval common law ‘was not local or particular. We should distinguish it from whatever smacks of a speciality.’⁷⁶ He claims that misunderstanding medieval common law stems from ‘insistence’ on subjecting mediaeval materials to modern definitions.

For example, modern usage tends to distinguish common law from “written law,” or statutory legislation. Again, the modern lawyer, as well as the layman, may think of the common law as a body of principles embodied in or derived from precedents—the decisions of certain courts in England and other common law countries. To add to the misunderstanding of medieval common law there is the occasional modern effort at defining common law as a body of rules based on custom alone.’⁷⁷

There are still others, as Joseph Raz discusses, who see the legitimacy of law residing in the recognition, and justification, of authority, with its commensurate duty to obey.⁷⁸ In this situation, he suggests, there is no need to seek out any kind of normative power. That is defining how something ought to be done from a value perspective.

David Dyzenhaus⁷⁹ acknowledges that there are those who will argue that any claim to the existence of a normative conception of the rule of law is just a figment of judicial imagination.⁸⁰ But, he goes so far as to propose the notion of an unwritten common law constitution sufficient to support a judge’s duty to assert the rule of law over legislative or executive override even when the state has no written constitution and the citizens have no

⁷⁴ Plucknett, above n 2, 15-16

⁷⁵ *R v Snow* (1915) 20 CLR 315 323

⁷⁶ Arthur R. Hogue, *Origins of the common law* (Liberty Press, 1985) 5-6

⁷⁷ *Ibid* 5-6

⁷⁸ Joseph Raz (ed), *Authority* (B. Blackwell, 1990) 116

⁷⁹ David Dyzenhaus, *The constitution of law: legality in a time of emergency*, (Cambridge University Press, 2006)

⁸⁰ *Ibid* 6

bill of rights safeguard. The consequence of such an unwritten law could be that the ‘aspirational’ common law conception leads to the idea of competing supremacies of the judiciary and the legislature; in other words, activist judges.⁸¹ In his hypothesis, the rule of law overrides rule by law to trump unjust legislation. However, in 1998, then Chief Justice of Western Australia, David Malcolm, claimed that the process of judges and courts developing law has been going on for a very long time. He contends that the common law, developed and modified by judges over the centuries, is as much a part of our laws as an Act of Parliament, although he acknowledges that parliament is supreme.⁸²

In the face of such conjecture, we need to explore further the evolution of the jury. In the next section, I delve below the surface symbolism of jury system legitimacy to discuss the origins and evolution of the jury system since the Middle Ages. I provide an overview of the evolution of the jury from its administrative beginnings in Anglo-Saxon times through to the modern era.⁸³

How common are the community’s inherited values?

Plucknett argues that the jury was not initially concerned with judicial proceedings. ‘Like so many institutions, [the jury] was an administrative device, which only later became confined to courts of law.’⁸⁴ Plucknett uses “institution” here to refer to an organization or association, not to tradition or custom to which Griffith CJ tended in his use of the word.⁸⁵ On the contrary, Plucknett explicitly warns against idealizing the origins of the jury for, what he calls, ‘patriotic reasons.’⁸⁶ His detached use of the word as a historian, contrasts with the more dedicated use by commentators on the law today, and illustrates why attempts to modify the jury system often are more tentative than bold. He also argues against a tendency,

⁸¹ Ibid 4, 71-2

⁸² David Malcolm, ‘Does Australia need a bill of rights’ (1998) 5(3 (September 1998)) *E LAW / Murdoch University Electronic Journal of Law* para 15

⁸³ The quest for a legitimating jury system: is the justice system searching in the right place?’ Unpublished Master’s thesis, (University of Western Australia, 2012)

⁸⁴ Plucknett, above n 2, 107

⁸⁵ *Cheatle v R* [1993] HCA 44 para 4

⁸⁶ Plucknett, above n 2, 107

‘in popular thought’ to see the jury as having arisen in Anglo-Saxon times as a ‘safeguard of political liberty.’⁸⁷ Suffice it to say that much murky water flowed under the bridge between the supposed Anglo-Saxon origins of the jury and its more human rights manifestation in the modern era.

Competition for supremacy between Crown and Church

Plucknett asserts that the story of how the jury system evolved is complicated ‘because several different lines of development were being pursued simultaneously.’⁸⁸ Nevertheless, he does explain that competition for supremacy between the Crown and the Church gave impetus to the birth of common law. King Henry II was determined to impose his own ‘lay law,’ and Archbishop Becket was equally unwavering in demanding to apply ‘rigorously’ the Church’s ‘large mass of common law’, breaches of which should be tried only in Church courts.⁸⁹ Plucknett describes it as ‘one of the most critical epochs in the history of common law.’⁹⁰

Yet, in the first instance, criminal law was not in the jury picture. Walter Ullman⁹¹ associates it with ‘native feudalism’ notably the land laws. ‘Because no distinction was as yet possible between legislation (in the technical, narrow sense) and judicial actions, any rule which was considered binding, derived its force—in the contemporary feudal environs—from the (explicit or implicit) consent of the barons and the king in his feudal capacity.’⁹² It was essentially law to administer the rights of property ownership; contract; debt accompanied by an oath, which had attracted ‘spiritual censures for breach of faith; and the conflicting civil jurisdiction over debts.’⁹³ The jury, thus, spoke for the countryside.

⁸⁷ Ibid

⁸⁸ Ibid

⁸⁹ Ibid 17

⁹⁰ Ibid 16-17.

⁹¹ Walter Ullmann, 1910-1983, *Principles of government and politics in the middle ages* (Methuen and Co, 1961)

⁹² Ibid 166-7.

⁹³ Ibid 167

The jury as community representative

Whether the jury was merely a ‘newer sort of ordeal,’ as Plucknett claims was the case in the thirteenth century⁹⁴; or, in a later perception, a safeguard against arbitrary punishment, it was at first as community representative that it undertook its task. Masschaele describes juries between the twelfth and fourteenth centuries in England, as ‘articulation points between institutions and individuals, and as the place for interaction between central government and local society.’⁹⁵ He goes so far as to assert that one cannot understand the relationship between state and its people in medieval England ‘without full consideration of jury service and the nature of people’s engagement in it.’⁹⁶

It is clear then, the jury spoke as representative of the countryside, not as representative of ‘a body of witnesses.’⁹⁷ This meant that, rather than relying on facts presented through evidence in the courtroom, the court expected jurors to have their own knowledge of what had occurred.⁹⁸ Where the jurors were uncertain, the justices would help them decide, in the following form: ‘If the jurors are altogether ignorant of the fact and know nothing concerning the truth, let there be associated with them others who do know the truth. But if even thus the truth cannot be known, then it will be requisite to speak from belief or conscience at least.’⁹⁹ This would change as circumstances changed. Nevertheless, although the evolution of the jury was inconsistent, the power of God, or perhaps more pointedly, the power of the Church was constant.¹⁰⁰

The power of God and the passing of trial by ordeal

In medieval times, God, or the Church, heavily influenced those who were involved in the justice system—either as administrator, or as a defendant. Laurie Kadoch writes that, in civil

⁹⁴ Plucknett, above n 2, 107

⁹⁵ J Masschaele, *Jury, state, and society in medieval England* (Palgrave Macmillan, 2008) 6

⁹⁶ Ibid 6

⁹⁷ Plucknett, above n 2, 129

⁹⁸ Ibid 128

⁹⁹ Ibid 129

¹⁰⁰ Eric Fisher, ‘The quest for a legitimating jury system: is the justice system searching in the right place?’ *Unpublished Master’s thesis*, (University of Western Australia, 2012)

matters, for example, the plaintiff would plead their claim, and the defendant would simply formally deny the claim point by point. 'Because it was God who was judging between the parties, there was no need for the defendant to make any other kind of defence. God would not be misled in the way that a jury later could be by factual situations supporting the plaintiff's claim, but which actually exonerated the defendant' (Footnotes omitted)¹⁰¹. That was all there was to it. The parties could then choose to have their evidence put to proof by compurgation, ordeal, or battle. Compurgation¹⁰² reflects the constitution of the Fourth Lateran Council in which the Council declares its authority to correct offences and reform morals; to determine how and in what way a prelate ought to proceed to inquire into and punish the offences of his subjects; how appeals ought to proceed; and the sanctions that are available to correct sins of omission and commission by invoking the Old and New Testaments.¹⁰³

¹⁰¹ Laurie C. Kadoch, 'So help me god: reflections on Language, thought, and the rules of evidence remembered'. (2007) 9(1) *Rutgers Journal of law and religion* 40

¹⁰² Compurgation stemmed from an ancient custom in which chosen witnesses swore to their opinion that the oath of the accused was reliable. They need not have witnessed the event to which the oath applied.

¹⁰³ Papal encyclicals [online Church Councils, 'Fourth Lateran Council : 1215'](http://www.papalencyclicals.net/councils/ecum12-2.htm) (November 11, 1215) (9 October 2017) <<http://www.papalencyclicals.net/councils/ecum12-2.htm>> 7 "How and in what way a prelate ought to proceed to inquire into and punish the offences of his subjects may be clearly ascertained from the authorities of the new and old Testament, from which subsequent sanctions in canon law derive", as we said distinctly some time ago and now confirm with the approval of this holy council.

"For we read in the gospel that the steward who was denounced to his lord for wasting his goods heard him say: What is this that I hear about you? Give an account of your stewardship, for you can no longer be my steward. And in Genesis the Lord says : I will go down and see whether they have done altogether according to the outcry which has come to me. From these authorities it is clearly shown that not only when a subject has committed some excess but also when a prelate has done so, and the matter reaches the ears of the superior through an outcry or rumour which has come not from the malevolent and slanderous but from prudent and honest persons, and has come not only once but frequently (as the outcry suggests and the rumour proves), then the superior ought diligently to seek out the truth before senior persons of the church. If the seriousness of the matter demands, then the fault of the offender should be subjected to canonical punishment. However, the superior should carry out the duty of his office not as if he were the accuser and the judge but rather with the rumour providing the accusation and the outcry making the denunciation. While this should be observed in the case of subjects, all the more carefully should it be observed in the case of prelates, who are set as a mark for the arrow. Prelates cannot please everyone since they are bound by their office not only to convince but also to rebuke and sometimes even to suspend and to bind. Thus they frequently incur the hatred of many people and risk ambushes. Therefore the holy fathers have wisely

Briefly, compurgation was a swearing on oath by the defendant and their ‘companions’ to the truth of the defendant’s evidence. It was a character test. More so than is the case today, evidence given on oath carried the powerful divine stimulus to tell the truth because the alternative was to feel the wrath of God, which manifested itself in eternal damnation. Therefore, a person with a doubtful reputation for integrity would have trouble finding compurgators, because they had no wish to share the accused’s fate in hell.¹⁰⁴

Trial by battle also relied on the infinite wisdom of God. ‘The battle was conducted under oath. Each party swore to the truth of their position. However, their success depended on their skill in battle and not the number of co-swearers. Barbarian tribes had relied upon this method, and Christianity adopted it readily. It rested on the belief that God would provide victory on the side of right.’¹⁰⁵

Trial by water, which relied on a trussed defendant floating or sinking in a tub of water, also depended on the power of God, until the Church decreed that the whole process was barbaric, and banned priests from taking part. When, in 1215,¹⁰⁶ the Church finally proscribed priests’ participation in the trial by ordeal, it might not have been so much because of its barbaric nature but merely that, in a God-fearing environment, trifling with His mandate to exact vengeance might carry an element of risk. It were as if the Church, which had taken it upon

decreed that accusations against prelates should not be admitted readily, without careful provision being taken to shut the door not only to false but also to malicious accusations, lest with the columns being shaken the building itself collapses.”

¹⁰⁴ Kadoch, above n 101, 29

¹⁰⁵ Ibid 31

¹⁰⁶ Historians generally seem to accept that date as accurate. Innocent III of the Fourth Lateran Council issued the edict banning priests from participating. It read: ‘18. **Clerics to dissociate from shedding-blood.** No cleric may decree or pronounce a sentence involving the shedding of blood, or carry out a punishment involving the same, or be present when such punishment is carried out. If anyone, however, under cover of this statute, dares to inflict injury on churches or ecclesiastical persons, let him be restrained by ecclesiastical censure. A cleric may not write or dictate letters which require punishments involving the shedding of blood, in the courts of princes this responsibility should be entrusted to laymen and not to clerics. Moreover no cleric may be put in command of mercenaries or crossbowmen or suchlike men of blood; nor may a subdeacon, deacon or priest practise the art of surgery, which involves cauterizing and making incisions; nor may anyone confer a rite of blessing or consecration on a purgation by ordeal of boiling or cold water or of the red-hot iron, saving nevertheless the previously promulgated prohibitions regarding single combats and duels.’ <http://www.papalencyclicals.net/councils/ecum12-2.htm>

itself to exercise the wrath of God in consigning evildoers to eternal damnation, had now suddenly wakened to a realization that when God says ‘vengeance is mine’, He means exactly that. Whether the benignity was a divine inspiration to help one’s fellow man is moot. Whatever the motivation, justices, (and jurors) began to fear that if, in usurping God’s right to vengeance, they were unjustly to consign an innocent person to death, they might find themselves sharing eternal damnation with a whole lot of past clients.¹⁰⁷

A more sceptical view was that men, who generally had lower body fat than women did, were too prone to sink, thereby ‘proving’ their innocence.¹⁰⁸ In other words, physics more so than divinity was influencing the decisions that flowed from sending men to the water.¹⁰⁹ The inference is that the process was thwarting the divine will of God. Thomas Green, too, suggests that, ‘even if belief in the divine nature of proof by ordeal had begun to wane long before the decree of 1215 brought its use to an abrupt end, tradition may have sustained its use late in the twelfth and early thirteenth century—tradition and the lack of a divinely endowed alternative.’¹¹⁰ In fact, so strong was the belief in the power of God that, even after the 1215 decree and the resort to the jury, ‘recourse to the verdict of men sworn to say the

¹⁰⁷ Eric Fisher, ‘The quest for a legitimating jury system: is the justice system searching in the right place?’ *Unpublished Master’s thesis*, (University of Western Australia, 2012) 79-80

¹⁰⁸ Which might have been why the water test was not applied to women.

¹⁰⁹ Kadoch, above n 101, 27-8

‘The accused was tied up with knees trussed to the chest and lowered into cold water by a rope. If he sank, God had declared him innocent, and he was pulled from the water. If he floated, he was dragged off for hanging. As with the Ordeal by Fire, odds were on the side of the accused. Records indicate that this test was only applied to men until the later witch-hunting period. Men generally have a lower body fat and studies have shown that a bound man rarely floats in cold water unless he is significantly fat. However, a fit man might float if his lungs filled with air. Nervousness or guilt could lead to a person’s sucking in a lot of air. The manner of trussing the knees to the chest made it very difficult to take in large quantities of air.’

In one reported case, an abbot was to be put to the test by water. To give God a helping hand in proving his innocence, he did many test runs in a large tub of water to ensure he would not float sans air in lungs. ‘But,’ Kadoch records, ‘on the day of the real test, panic caused him to gulp in large amounts of air and he floated. Perhaps his fear that God knew the truth was his downfall.’

¹¹⁰ Green, above n 27, 3

truth could not be had without the suspect's consent.'¹¹¹ If the people were God-fearing, it would owe much to the presence of the Church.

Trial by jury: another act of administrative expediency

So, with the 1215 banning of the ordeal—and, perhaps, with an eye on the hereafter, or on the Church at least¹¹²—the court, as agent of the Crown, had sought to shift responsibility by asking the accused for consent to trial by jury. If the accused refused to plead and ‘put himself upon the country’, the court had only discretion to adopt, what Plucknett calls, ‘one or other of several high-handed courses’.¹¹³ Sometimes ‘...it would cast the responsibility on a larger jury of twenty-four knights; alternatively, it might allow the prisoner to abjure the realm, even for homicide, while for lesser charges a prisoner could purchase (for 20s) the privilege of merely finding sureties.’¹¹⁴ It is clear, that trial by jury arose as an act of

¹¹¹ Ibid 3

¹¹² The church had much to say about how to deal with moral transgressions. The constitutions of the Fourth Lateran council decreed: 7. **The correction of offences and the reform of morals.** By this inviolable constitution we decree that prelates of churches should prudently and diligently attend to the correction of their subjects' offences especially of clerics, and to the reform of morals. Otherwise the blood of such persons will be required at their hands. In order that they may be able to exercise freely this office of correction and reform, we decree that no custom or appeal can impede the execution of their decisions, unless they go beyond the form which is to be observed in such matters. The offences of canons of a cathedral church, however, which have customarily been corrected by the chapter, are to be corrected by the chapter in those churches which until now have had this custom, at the instance and on the orders of the bishop and within a suitable time-limit which the bishop will decide. If this is not done, then the bishop, mindful of God and putting an end to all opposition, is to go ahead with correcting the persons by ecclesiastical censure according as the care of souls requires, and he shall not omit to correct their other faults according as the good of souls requires, with due order however being observed in all things William Paley (1743-1805), *The principles of moral and political philosophy* (Printed for R. Faulder, 1806, 16th ed). For the rest, if the canons stop celebrating divine services without manifest and reasonable cause, especially if this is in contempt of the bishop, then the bishop himself may celebrate in the cathedral church if he wishes, and on complaint from him, the metropolitan, as our delegate in the matter, may, when he has learned the truth, punish the persons concerned in such fashion that for fear of punishment they shall not venture such action in the future. Let prelates of churches therefore carefully see that they do not turn this salutary statute into a form of financial gain or other exaction, but rather let them carry it out assiduously and faithfully, if they wish to avoid canonical punishment, since in these matters the apostolic see, directed by the Lord, will be very vigilant. *Papal Encyclicals Online*, [http://www.papalencyclicals.net/Councils/ecum12-2.htm#The correction of offences and the reform of morals](http://www.papalencyclicals.net/Councils/ecum12-2.htm#The%20correction%20of%20offences%20and%20the%20reform%20of%20morals)

¹¹³ Plucknett, above n 2, 124

¹¹⁴ Ibid 125

‘administrative expediency,’ as Plucknett and Green agree.¹¹⁵ Henry III’s government had to resolve the difficulty created by the Church’s ban on the only method of trying criminals—trial by ordeal. Therefore, in 1219 he issued a writ to the Justices in Eyre¹¹⁶ to employ a temporary instruction by order of the King.

“The King to his beloved and faithful...Justices itinerant...greeting:

Because it was in doubt and not definitely settled before the beginning of your eyre, with what trial those are to be judged who are accused of robbery, murder, arson, and similar crimes, since the trial by fire and water (the ordeal) has been prohibited by the Roman Church, it has been provided by our Council that, at present, in this eyre of yours, it shall be done thus with those accused of excesses of this kind; to wit, that those who are accused of the aforesaid greater crimes, and of whom suspicion is held that they are guilty of that whereof they are accused, of whom also, in case they were permitted to abjure the realm, there would still be suspicion that afterwards they would do evil, they shall be kept in our prison and safeguarded, yet so that they do not incur danger of life or limb on our account. But those who are accused of medium crimes, and to whom would be assigned the ordeal of fire or water if it had not been prohibited, and of whom, if they should abjure the realm there would be no suspicion of their doing evil afterwards, they may abjure our realm. But those who are accused of lesser crimes, and of whom there would be no suspicion of evil, let them find safe and sure pledge of fidelity and of keeping our peace, and then they may be released in our land... We have left to your discretion the observance of the aforesaid order...according to your own discretion and conscience.”¹¹⁷

This environment of doubt about the efficacy of divine judgment, gave rise to the symbiotic relationship between government and the community, for which the jury was the medium. It also gives the first inkling of doubt about the number of members at which (and the circumstances in which) a jury becomes adequately representative. But, according to

¹¹⁵ Green, above n 27, 3

¹¹⁶ Justices in eyre were itinerant justices who were empowered to hear all pleas in the county or counties for which they held a ‘general eyre’. For an account of the role, and importance of, the general eyre in the thirteenth and fourteenth century, see Holdsworth, above n 265-273

¹¹⁷ Plucknett, above n 2, 119

Holdsworth, the Crown only gradually relinquished its power to control the jury. In fact, not until the beginning of the eighteenth century did prisoners have the right to call witnesses.¹¹⁸

Too much discretion was too much of a good thing¹¹⁹. In the thirteenth century and into the early fourteenth century, the judges were ‘very free to follow what procedure seemed best to them in the circumstances.’¹²⁰ Whether or not what ‘seemed best to them’ means ‘what suited them’ is unclear. However, Holdsworth goes on to say that ‘gradually the practice shaped itself under two opposing considerations,’ the interest of the prisoner and the best outcome for the Crown. By juxtaposing these interests in opposition, Holdsworth invites the inference that the Crown surrendered influence over the jury reluctantly and slowly.

What is a best outcome more often than not depends on the predisposition of the decision maker. For the Crown, it was securing convictions. Therefore, the jury, which comprised members of the presentment jury, was preferred. The history of the origins of the presentment jury is not uniformly agreed. But, what is of interest, and generally agreed, is that the presentment jury was required to swear to the court on oath about matters of which they were aware from their own knowledge. They were also to swear that they would not accuse any innocent man or shield any guilty one.¹²¹ That, of course, is the significant point of difference between then, and the modern day requirement that jurors are to have no knowledge of—or are to disregard—relevant matters other than what comes to them through in-court testimony. In the 12th century, the public criminal prosecution followed the path, accusation by jury of presentment→denial→judgment→proof by ordeal¹²².

¹¹⁸ Holdsworth, above n 28, 325

¹¹⁹ This 15th Century quote from Shakespeare’s “As you like it.” (Rosalind: Act 4 Scene 1) captures from literature the pertinent point that too much judicial discretion lead to harm. It presages also my discussion in Chapter Six of the relationship of law with literature in making meaning from discourse.

¹²⁰ Holdsworth, above n 28 324

¹²¹ Naomi D. Hurnard, 'The jury of presentment and the assize of Clarendon' (1941) 56(223) *The English Historical Review* 374

¹²² Roger D. Groot, 'The jury of presentment before 1215' (1982) 26(1) *The American Journal of Legal History*. See also Theodore F. T. Plucknett, *A concise history of the common law* (Butterworth, 5 ed, 1956). He refers

Holdsworth quotes Judge Parning in 1340: “if indictors be not there it is not well for the King.”¹²³ What seems to have been worrying Judge Parning was that were the jury not to include indictors, there was no one to punish should the jury acquit.¹²⁴ However, the interests of the prisoner was to get a boost with the 1351-52 enactment that provided that ‘no indictor should be put on an inquest upon the deliverance of one indicted for trespass or felony, if he were challenged for this cause by the accused.’¹²⁵ Still, the process of freeing itself from the grand jury or jury of presentment was slow. The Crown selected the jury; prisoners were not allowed to call witnesses for a long time after the 1351-52 enactment, and, when they were, it was not until the eighteenth century that those witnesses could be sworn. Even then, they were not able to enlist the aid of counsel; this happened much later. Hence, the inconsistent development of the jury as the Crown sought innovative ways to compensate for the Church’s ruling in 1215.

In the meantime, there was another pressing problem. With the evolution of the trial and jury system, the question arose of the right of the jury in a God-fearing community (literally) to pass judgement on another. Jurors, who daily lived with the threat that if they sinned they would suffer eternal damnation, feared that if they got it wrong and condemned an innocent person to death, God would have revenge. It might seem surprising in today’s more secular environment, but it was a real fear then. The power of the Church in medieval England to instil the fear of God was substantial. This explains the Crown’s reluctance to relinquish its power over the jury. It could not allow the jurors’ fear of God’s vengeance to usurp the Crown’s need for its own secular vengeance against malefactors. Again, the Crown called up an innovative remedy.

to this ‘medial judgment’ as the power to declare what ordeal the justices ought to impose; and Hurnard, above n 121

¹²³ Y.B, 14, 15 Ed III (R.S) 260

¹²⁴ Holdsworth recounts a ‘curious case...in which a man, acquitted of homicide at a sessions of gaol Delivery, was indicted at the Eyre on the same facts; five of the acquitting jury were on the indicting jury, and they were committed to prison as attainted, and ordered not to serve on another jury during the Eyre.’ In Holdsworth, above n 28, 325n4

¹²⁵ 25 Edward III. St. 5 c. 3. Holdsworth writes that the rule ‘seems also to have been extended to treason by the seventeenth century’. Ibid 325n5

Guilty beyond reasonable doubt to the rescue

All their lives, the Church had admonished citizens to judge not, lest they be judged and now the state was asking them to usurp the will of God. According to legal historian, James Whitman, the Crown countered the disquiet with a perverse secular admonition to jurors to render their judgments subject to satisfaction only beyond reasonable doubt. Perverse, because the admonition carries with it the implied imprimatur of God that He did not expect them always to be right, and He was not going to judge them harshly if they sometimes found an innocent prisoner guilty. Whitman suggests, ‘For Christians living in an age of fear and trembling, any “doubtful” act was full of danger.’¹²⁶ Therefore, jurors did not want to convict, even when the evidence of guilt seemed overwhelming. To overcome this timidity, the Crown became midwife to the birth of what society has enshrined as a golden rule of law—satisfaction of guilt “beyond reasonable doubt.” However, unlike later when Blackstone uttered his famous dictum that “it is better that ten guilty persons escape than that one innocent suffer,”¹²⁷ the aim at its formation was to get more guilty verdicts by assuring jurors that God did not expect them always to be absolutely certain. It was a “rule bound up with the fate of those who sat in judgment.”¹²⁸ Judges dreaded their responsibility so much that they avoided entering verdicts if possible, or else sought to diminish their personal responsibility by embracing the old aphorism of safety in numbers, that is, through the unanimous decision of the jury. Beyond reasonable doubt allowed a bit of latitude in construing the New Testament admonition “judge not lest ye be judged.”

¹²⁶ James Q Whitman, James Q Whitman, *The origins of reaonable doubt* (Yale University Press, 2008). See also Hogue, above n 76 To understand the power of this fear, and the difficulty of serving two masters, Hogue’s ‘few oversimplified propositions’ are instructive. ‘First, the Christian Church is universal; its mission is nothing less than the spiritual salvation of all mankind. Second, Christendom is one society, whatever may be the political units into which it is divided for the regulation of temporal affairs. Third, secular rulers cooperate with the Church by policing Christendom to create a well-ordered Christian commonwealth. Fourth, the Church of Rome administers its own affairs under the leadership of a divinely ordained monarch, the pope, who acts through a hierarchy of officials living under their own system of law, judged in their own courts, and supported by their own revenues.’

¹²⁷ *Blackstone commentaries* (University of Western Australia, Blackstone Society, 1969) 352

¹²⁸ Whitman, above n 126, 5

This concession from God was necessary, because the Crown discovered that jurors were more worried about God than they were about the Crown. Therefore, they were allowing too many criminals to walk free. However, in spite of this history, the justice system has engrained the principle of beyond reasonable doubt as a tradition stemming from notions of individual rights. Clearly, though, it had more to do with affirming the state's legitimacy than with the sacrosanctity of individual human rights.

It is arguable therefore, that what has been mythologized—or institutionalized by the justice system—is the *form* of the “ancient institution” of jury, not the function. In other words, as Naomi Hurnard suggests, in enshrining the myth of the jury as the golden light of democracy, a safeguard of liberty, we have overlooked the reality that the petty jury arose through expediency, and generated ‘innovation’ to deal with it.¹²⁹ This raises the question why the jury evolved as it did up to the present where now there is a propensity in the law academy (generically) to look at the social history of law in a way that consigns God to a footnote on superstition. The answer lies in the history of the secularisation of law, which one can derive through a reading of the battle between natural lawyers and the legal positivists, as I explain in the next section.

The systemic jury system and the secularization of the social history of law

In contemporary law, Michael Schutt¹³⁰ contends, we are ‘largely ignorant of the historic Christian resources on law and government. ‘When we are cut off—or cut ourselves off—from our own intellectual roots and Christian foundational thinking about the nature and purpose of law, we force ourselves to build on other foundations or become susceptible to false narratives of what law is and who we are.’ He quotes CS Lewis:

Every age has its own outlook. It is specially good at seeing certain truths and specially liable to make certain mistakes. We all, therefore, need the books that will correct the characteristic mistakes of our

¹²⁹ Hurnard, above n 121, 374

¹³⁰ Michael P Schutt, *Redeeming law: christian calling and the legal profession* (InterVarsity Press, 2007)

own period. The only solution to our own prejudice is to keep the clean breeze of the centuries blowing through our minds, and this can be done only by reading old books.¹³¹

Without those old books, that is, without history, the theories of the legal positivists were always more likely to influence a contemporary social theory of law than were the natural lawyers reading from the historical source of Coke, Blackstone, or Aquinas.

Natural law and a belief in law beyond the law that politicians make

Natural lawyers will argue that a social history of law is concerned with the extent to which the common law tradition began with a belief in a law beyond law that politicians make. Today we might call it human rights. At the birth of its social history, Law recognised it as divine law, and later, as natural law. Natural law cannot condone an action that subjugates divine moral truth and certainty to a secular humanism. On the other hand, legal positivism will have no truck with morality because it deprives law of one of its essential attributes, certainty.

In Anglo-Australian law, Thomas Aquinas is the acknowledged source of the doctrine of classical natural law. Its ultimate source, he asserts, lies in God and in God lies the source of all truth, because God created the universe from nothing. Although Aquinas was positing God from a Christian standpoint, Andrew Phang makes the point that the concept of God may apply with equal force to any 'mainstream' religion that builds its faith on the concept of a god.¹³² This is a useful argument if one is seeking consensus about the application of the doctrine in a pluralist society. From a Thomist point of view, however, it is a self-serving argument with a utilitarian bent, that is, willingness to concede a multiplicity of gods as a trade-off for buying the doctrine.

Aquinas would assert that, if we are sincere in embracing morality as an objective truth, we have to acknowledge only one God and his only authoritative representative on Earth, Jesus

¹³¹ Ibid 76

¹³² Andrew Phang, 'Security of contract and the pursuit of fairness' (2000) 16 *Journal of contract law* 158 175

Christ. Bending one's Christian faith to embrace pluralism involves a relativistic concession that denies the very faith one professes to hold. It is also a logically inconsistent argument that, by its very presentation, reduces morality and truth to the subjectivity and indeterminacy it was supposed to obviate. Unlike some religions that conceive of God as merely immanent (that is, existing in and extending into all parts of the universe), Aquinas talks of God as embracing both the transcendent and immanent. This is an important distinction in validating the continuing relevance of Christian jurisprudence. For Aquinas, the source of all truth lies in God's transcendence, and through which he reconciles faith and reason.¹³³

Although Aquinas posits the natural goodness of humans, he nevertheless acknowledges that some are likely to submit to vice, depravity, and intransigence in adhering to the wisdom expressed in God's words. To ensure that these backsliders do not upset the peace of mind and tranquillity, society may have to resort to the use of force and fear to bring these intransigents willingly to accept the ways of the virtuous.¹³⁴ In the formative years of common law, men such as Blackstone and Coke did consider those criteria incontestable. They 'built on the foundations of Magna Carta and the theological footing of Thomas Aquinas'¹³⁵ and his four types of law: eternal law (which Coke called '*lex aeterna*', and Blackstone labelled 'the law of nature'), natural law, human law, and divine law. Probably the most succinct statement of Coke's position is in his '*obiter dictum*' in *Calvin's case*,¹³⁶ which Schutt summarises:

1. That ligueance or obedience to the Sovereign is due by the law of nature;
2. That the law of nature is part of the laws of England;
3. That the law of nature was before any judicial or municipal law in the world;

¹³³ Ibid 175-6

¹³⁴ Ibid 122fn

¹³⁵ Schutt, above n 130, 28

¹³⁶ Harvey Wheeler, 'Calvin's case (1608) and the McIlwain-Schuyler debate' (1956) 61(3) *The American Historical Review* 587

4. That the law of nature is immutable, and cannot be changed.¹³⁷

Although formally a dispute over land titles, Calvin's case 'turned on the problem of whether allegiance was owing more to the king or to the laws.'¹³⁸ Allegiance, or Ligeance, was the duty of loyalty and obedience that, immediately upon their birth, all persons born within the sovereign's realm owed to the sovereign. They could not relieve themselves of that burden by their own actions.

Coke held that 'ligeance and obedience of the subject to the sovereign [was] due by the law of nature' and 'protection and government [were] due by the law of nature.' In his introduction to '*Treatise on Law*' by Thomas Aquinas, Professor Ralph McInerney states, 'Natural law has eternal law as its measure. Human law has natural law as its measure. In short, there is an unwritten law that stands in judgment on human ordinances.'¹³⁹

Positivist law and God's irrelevance

Unlike the inviolability of truth as the natural lawyer perceives it, HLA Hart perceives rules that are susceptible to 'rules of change.' He explains,

[t]he simplest form of such a rule is that which empowers an individual or body of persons to introduce new primary rules for the conduct of the life of the group, or of some class within it, and to eliminate old rules... . [I]t is in terms of such a rule, and not in terms of orders backed by threats, that the ideas of legislative enactment and repeal are to be understood.¹⁴⁰

'Primary rules' impose on human beings a duty 'to do, or abstain from, certain actions, whether they wish to or not.' But, because such rules tend to be static, no person or body has the capacity to bring about changes to them to accommodate changing circumstances. In other words, he claims, they have the attributes of nothing more than customarily accepted

¹³⁷ Schutt, above n 130, 28

¹³⁸ Wheeler, above n 136, 588

¹³⁹ Aquinas Thomas, Saint, 1225-1274, *The summa theologica of St. Thomas Aquinas / literally translated by Fathers of the English Dominican Province* (Burns Oates and Washbourne, 1917-1925) Introduction, xv-xvi

¹⁴⁰ H.L.A. Hart, *The concept of law* (Oxford University Press, 2nd ed, 1994) 95

standards, with no more certainty than rules of etiquette.¹⁴¹ In a simple social setting, such uncertainty might be manageable. A more complex society needs something more. Hart's 'secondary rules' provide the mechanism through which the duties and obligations of human beings may be changed by providing that 'human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations.'¹⁴² His views on duties and obligations challenge the natural lawyer's lodestar of a divine or natural law. It is a more prosaic view of human life. Mere survival is the end goal. That, he asserts, is the fundamental truth.

Although Natural Law claims an inviolable truth and certainty,¹⁴³ to which, its opponents argue, it is not entitled, Positivist Law also claims to know the truth. However, it is a truth that decrees that God is irrelevant. Natural-law theorist, John Finnis, finds his answer to the question, what is truth, in moral absolutism embedded in a notion of God.¹⁴⁴ His Christian belief favours a non-instrumental reason for action—undertaken because it is humanly valuable.¹⁴⁵ But, Rousseau came to the same conclusion of humanly valuable actions without invoking a notion of God. His conception of a social contract and society's 'articles of association', require 'the total alienation by each associate of himself and all his rights to the whole community.'¹⁴⁶ Perhaps, as Jeremy Waldron claims, 'this is why Kant saw Positive Law as the only logical answer to the dilemma of whether one can posit truth and certainty in Christian understanding.' Waldron sums up. 'The irony of law and politics is that this

¹⁴¹ Ibid 92

¹⁴² Ibid 81

¹⁴³ Especially through Thomist doctrine, as I have explained above.

¹⁴⁴ Australian Rhodes Scholar and natural law theorist, John Finnis, was professor of law at Oxford. His 1980 work, "Natural law and natural rights," is regarded as the seminal reaffirmation of the Thomist natural law doctrine.

¹⁴⁵ John Finnis, Joseph M. Boyle and Germain Grisez, *Nuclear deterrence, morality, and realism* (Clarendon Press, 1987) 370

¹⁴⁶ Jean-Jacques Rousseau, 1712-1778, *The social contract/ translated from the French and introduced by Maurice Cranston* (Maurice Cranston trans, Penguin, first published Contrat Social, 1968) 60

symmetry of self-righteousness is not matched by any convergence of substance—each of two opponents may believe he is right.’¹⁴⁷ So, whilst two agonists battled for the crown of certitude, a pragmatic interloper outflanked them, as I explain in the next section.

The triumph of instrumentalism

With the secularization of the social history in the teaching of law, the gap has been filled by instrumentalism (and its corollary, pragmatism) as reflects the environment in which law today works. Whatever the merits of the competing claims, Instrumentalism has triumphed over religion in university and in the practice of law. The Law academy—generically described—has secularized the social history of law and fundamental human rights into the orbit of pragmatism, which renders God irrelevant.

Thus, veneration of the history of the jury, in which the transcendent godliness of the jury was never in doubt, might substantiate the Barthesian myth (For example, in Australia, the Anzac Myth as our culture’s way of thinking about something, as I discuss later) but ignore the reality. To lift a form of jury trial and the behaviour of jurors, from its contextual history and submit it to evaluation against modern values and standards is suspect.

Nevertheless, although the state embraces the reality of a society without the need of an omniscient God, it is reluctant to dispel the myth that the reliance on God initiated. It is not yet prepared to take the step that James Whitman and John Langbein, for instance, champion; that it is time for radical change to the ‘strange, tradition-ridden system of American jury trial.’¹⁴⁸ Sterling Professor of Law and Legal History at Yale Law School, John Langbein elaborates:

Our criminal justice system has become ever more dependent on processing cases of serious crime through the non-trial procedure of plea bargaining. Unable to adjudicate, we now engage in condemnation without adjudication. Because our constitutions guarantee adjudication, we threaten the criminal defendant with a markedly greater sanction if he insists on adjudication and is convicted. This

¹⁴⁷ Jeremy Waldron, 'Kant's legal positivism' (1996) 109(7) Harvard Law Review 1566

¹⁴⁸ Whitman, above n 126, 209

sentencing differential, directed towards inducing the defendant to waive his right to trial, makes plea bargaining work. It also makes plea-bargaining intrinsically coercive.¹⁴⁹

Albert Aschuler has a different point of view. He muses that perhaps non-American readers of Langbein's assessment of a system irremediably flawed might see the flaw as being peculiarly American.¹⁵⁰

A similar reluctance to take the step suggested by Langbein and his Yale colleague, Whitman is evident in the wording of the *Criminal Procedures Act 2004* (WA). Although the Act acknowledges the reality of trial by judge alone in designated circumstances, it accommodates the reality tentatively. It seems not yet ready to cut the umbilical cord tying the state to the institutionalized symbol of the jury as the preferred route to truth in justice. Just as the Crown in the thirteenth century only fearfully separated the jury from the trial by ordeal, which seemed more certainly to exercise the will of God.

For example, the Act is clear that, when running a trial for an indictable offence with judge alone, the Judge must adhere as closely as possible to the procedures that govern trial before a jury. Section 118(1) provides that if an accused is committed on a charge to a superior court or indicted in a superior court on a charge, the prosecutor or the accused may apply to the court for an order that the trial of the charge be by a judge alone without a jury. Section 119(1) requires that, in a trial by a judge alone, the judge must apply, so far as is practicable, the same principles of law and procedure as would be applied in a trial before a jury. Section 119(3) requires that,

If any written or other law —

- (a) requires information or a warning or instruction to be given to the jury in certain circumstances; or

¹⁴⁹ John H. Langbein, 'Land without Plea Bargaining: How the Germans Do It' (1979) 78(2) *Michigan Law Review* 204 204.

¹⁵⁰ Albert Aschuler, 'Narrative and normativity: Comments on The origins of adversary criminal trial' (2005) 26(1) *Journal of Legal History* 91 97

(b) prohibits a warning from being given to a jury in certain circumstances,

the judge in a trial by a judge alone must take the requirement or prohibition into account if those circumstances arise in the course of the trial.

Especially relevant to my thesis is section 118(6):

Without limiting subsection (4), [the court's discretion to make the order for trial by judge alone] the court may refuse to make the order if it considers the trial will involve a factual issue that requires the application of objective community standards such as an issue of reasonableness, negligence, indecency, obscenity or dangerousness.

Although section 118(6) frames its provision to grant the court discretion in the matter, not as a direction to it to refuse the order, it also carries a strong admonition that the jury is better able to bring community common sense to bear than is a judge alone. *First*, s118(6) implies that, as Keith DeRose writes, a 'fact' is not an absolute, it is contextual; what one might consider true in one context might not be true in another.¹⁵¹

De Rose addresses the way in which speakers use knowledge-attributing and knowledge-denying sentences in ordinary, that is, non-philosophical talk. He differentiates between 'low-standards' and 'high standards' contexts. He argues that in low-standards cases, speakers will claim knowledge based on evidence that they would not consider adequate in high-standard cases. A low-standard case is one in which the stakes are not high. A contextualist will argue that the positive attribution of knowledge in LOW is true, and the denial of knowledge in HIGH is true. An invariantist will argue that there is a single set of standards for what is a true fact (In the context of this discussion, the tautology—true fact—is deliberate). The contextualist argues that the "epistemic standards" can vary according to the speaker's context. The invariantist denies that those standards can vary, not that the standards should not vary, but that they cannot vary. I discuss the importance of the distinction in Chapter

¹⁵¹ Keith DeRose, *The case for contextualism* (Oxford University Press, 2009). I discuss Contextualism in terms of courtroom discourse later.

Five, in which I discuss Jerome Bruner’s proposition that there is a difference between paradigmatic, or logico-scientific argument, and narrative accounts of an event.¹⁵²

Second, ss118 (6) implies that community standards and community values are the same. That is not always true; it is especially not true when moral panic is abroad. I will argue, in Chapter Five, that when moral panic strikes, and fear of threats to personal security runs rampant, social values can give way to community prejudices—often disguised as standards. Understanding this social phenomenon brings about the realisation that in times of moral panic and in times when, misled by the belief that community values are at stake, we are in fact defending community standards—or perhaps, prejudices. In other words, social values are deep seated; collective memory conditions them. Standards are more likely to be pragmatic, and contingent. So one can see that Contextualism is pertinent when applying s118 (6) to the issues of community values and community standards. In this subsection, the list of issues to which objective community standards might apply is not exhaustive. Indeed, “dangerousness” is a catch-all word. What it means will depend on context; it might also depend on the ideology of the user. In Australia, the Federal Court case of *Eatock v Bolt*¹⁵³ provoked controversy, not because the respondents (Andrew Bolt, and the Herald and Weekly Times) felt the wrath of the Court for injudiciously defaming the applicant (Eatock), but because of disquiet at the manner in which the judge rationalized the decision.¹⁵⁴ There is no need to question the moral justice—as distinct from legal justice—of the decision to ponder nevertheless the extent to which manipulation of language played a part in the outcome. I return to this topic in Chapter Four.

¹⁵² Bruner, above n 14

¹⁵³ *Eatock v Bolt* [2011] FCA 1103

¹⁵⁴ Human rights and anti-discrimination bill for discussion. See, James Allen, 'Free speech in sorry and humiliating condition', *The Australian* 2013 <<http://www.theaustralian.com.au/national-affairs/opinion/free-speech-in-sorry-and-humiliating-condition/story-e6frgd0x-1226545827013>> . JT International SA v Commonwealth of Australia [2012]; JJ Spigelman, *Hate speech and free speech: drawing the line*, Human Rights Day (Australian Human Rights Commission, 2012). *Monis v The Queen* [2013] HCA 4 (27 February 2013)

Interest in the nature of truth according to context is not new. Nor is change of meaning to reflect common use pernicious; that is how language evolves. However, it can be a threat to truth in justice when, in seeming to use language according to its ordinary meaning to communicate facts, the judiciary appears to substitute the metaphor for reality.¹⁵⁵ But, the irony of the provision in s118(6) is that the court, which decides whether or not to grant the order to allow trial before judge alone, would usually be a court over which a single judge presides.

Moving beyond the discipline of law to challenge the institution of the jury system

Moving outside the discipline of law to seek theories to aid in the administration of justice, might seem to challenge the institutional status of the justice system. That attitude ought not to prevail in a culturally diverse society. This applies particularly to the jury, which gave rise to a symbiotic relationship between government and the community for which it was the link.

Symbiosis and symbolism

The history of the jury identifies varying triggers for change at each stage of its evolution. Nevertheless, at each stage, the importance of a symbiotic relationship is a constant. If the community has confidence that a jury represents it adequately, it is content that it has a voice in the maintenance of social order. If the state—through its agent, the justice system—has the confidence of the community, its legitimacy to govern is further enhanced. So, to symbiosis we add symbolism. Joseph Gusfield¹⁵⁶ calls it ‘symbolic quiescence,’ which comprises ‘acts [that] provide the spectator with reassurance that his or her values are respected and that his or her goals are being pursued.’¹⁵⁷ I have said that the justice system has institutionalized the form of the “ancient institution” of jury, not the function. I contend that, because of the diversity of cultures and sub-cultures of a modern community, its value is largely symbolic.

¹⁵⁵ I discuss metaphorisation of reality in courtroom discourse in Chapter Four

¹⁵⁶ Joseph R. Gusfield and Jerzy Michalowicz, 'Secular symbolism: studies of ritual, ceremony, and the symbolic order in modern life' (1984) 10(1) *Annual Review of Sociology* 417

¹⁵⁷ Ibid 423

If the majority gains assurance that the jury gives it a voice in the halls of justice, and if the justice system, in the service of the state, confirms its legitimacy through the jury, symbolism has done its work. It perpetuates the tradition of independence, and impartiality. And, it purports to preserve the notion of community common sense. This is why recent studies of the role of the jury focus on improving its representativeness.¹⁵⁸ In the new social reality, I suggest, it can no longer substantiate a claim to community common sense. To suggest that it can, is to accept a premise that the community embraces undifferentiated standards, which the common sense reflects. However, that premise is not sound in a culturally diverse society. The judicial process and the jury in particular, operate in a new social reality. I submit that a theory of law without an accompanying social theory cannot account for the consequences of this new reality.

Conclusion

I began this chapter, by describing the justice system's perception of the jury as the bastion of democracy, which gives effect to the community conscience in deciding criminal trials. I have argued that in institutionalizing this perception, Law and its legislators are operating on an assumption that the common law, in which the modern iteration of the jury is grounded, was the birthplace of human rights. A brief review of the history of origins and evolution of the jury does not support this assumption. Nevertheless, the institutionalization of the origin of the jury in common law has served the state well as a legitimating device. This was the Crown's motivation for introducing the jury in Anglo-Saxon times before common law. Its function in the criminal trial followed later.

I have traced the evolution of the jury historically to reveal a picture of a time when God—or His self-proclaimed agent on earth, the Church—would play on the consciences of those who the Crown called upon to judge their neighbour. I have explained that the power of God or the church had much to do with the way the jury evolved. I have shown that despite the

¹⁵⁸ For example, Parliament of Victoria Law Reform Committee, 'Jury Service in Victoria, Final Report Volume 1 (1997); Australia, Commission, above n 23

absence of the power of God, which permeated the decision-making of the jury of Middle Ages, the state is reluctant to dispense with the institutionalized jury. This is because the symbolism of the jury retains the power to maintain public confidence in the state, just as it did in its Anglo-Saxon beginnings in the Middle Ages.

In the minds of the people, the institutionalized symbol of the jury is still the preferred route to truth in justice. Given this preference, our focus should be on the nature and organization of courtroom discourse. I suggest that, in the criminal trial, the standard accounts of language and law are not adequate for this task. This will be my focus in the chapters to follow, beginning in Chapter Two with a case study of courtroom discourse in action.

CHAPTER TWO: How advocates control courtroom discourse: an illustrative case study.

Introduction

In this chapter, I use a case study to challenge a misconception that, because the jury hears witnesses' testimony first hand, it is hearing raw facts. The widely-held claim is that they are raw facts because lawyers have not transformed the testimony into a legal argument; or, as Gaakeer writes, translated the stories of clients, or parties to a lawsuit into the language of law.¹⁵⁹ Nor at that time have media yet had the chance to decide what part of the evidence and arguments of the trial are of interest to the public.¹⁶⁰ This explains why the focus of the justice system is on a perceived need to inoculate the jury against media distortion of the reality, both before and during the trial.¹⁶¹ Do that, the argument goes, and the jury hears unmediated facts. But, I argue that the same power to distort, or mediate, is inherent in the adversarial courtroom discourse in a criminal trial before jury. It is also less evident than is media manipulation and, therefore, it works its changes more subtly.

Furthermore, although notionally the same power is present in a trial before a judge sitting alone, the propensity for damage to person is greater in a trial before a jury. I will have something to say about the power of pre-supposition to affect the judge alone later. I will suggest that the influence of the jury system is so pervasive that it even influences the judge's approach when, in an indictable offence, the justice system gives the accused the option of trial before judge alone. But, principally in this chapter, I use the case study utterances to focus on how counsel argue to persuade—not necessarily to convince—in a trial before jury.

¹⁵⁹ Gaakeer, above n 45, 10 citing James Boyd White

¹⁶⁰ Which differs from what is *in* the public interest.

¹⁶¹ "Mass mediation: The shaping of the representative jury" in Eric Fisher, 'The quest for a legitimating jury system: is the justice system searching in the right place?' *Unpublished Master's thesis*, (University of Western Australia, 2012) 157-163

Perelman and Olbrechts-Tyteca have studied the discursive techniques that allow one to persuade a receptive mind to accept the proposition one offers for judgment. Their point, which is pertinent for the lawyer as courtroom advocate, is that they do not insist on the ‘the mind’s adherence’ to a thesis that is self-evident. Rather, the need is to induce the mind’s acceptance of theses offered for agreement. That is they structure an utterance so that it seems so logical as to be irrefutable. It is, as I explain later, quasi logical. If all one has to do is to persuade, one can put on hold the ultimate need to examine how, and to what extent, argumentation interferes with substantive truth.¹⁶²

The value of my case study is that it allows me to use actual courtroom discourse, not as substantive support for argument, but as a tool to aid interrogation of the principles, which underpin Counsel’s control of witness testimony. In short, counsel do this through the organization of courtroom discourse. My analysis reveals characteristics of argumentation, starting from the premise that in an adversarial trial before jury, counsel aim to persuade, not to convince. The transcripts of both the trial before the jury, and the *voir dire* hearing, in which the jury is absent, show how courtroom discourse is the antithesis of conversation, which Gadamer contends creates the channel to reaching *an* understanding. He suggests, ‘Men generally understand each other directly, ie they are in dialogue until they reach agreement. Understanding, then, is always understanding about something. Understanding each other means understanding each other on a topic or the like.’¹⁶³

In the *voir dire*, Counsel might reach agreement about what questions, seeking what answers, are proper within the rules of the game, in which they are participants. However, we cannot call them partners in this conversation. On the contrary, almost invariably, the *voir dire* will end when the judge decides in favour of one point of view over another. This runs counter to Gadamer’s claim that to reach an understanding requires a three-way relationship. He argues that it is not a zero sum game in which one participant in disputatious discourse wins, and the

¹⁶² Perelman and Olbrechts-Tyteca, above n 12, 4

¹⁶³ Gadamer, above n 22, 158

other loses. Rather, it means one person coming to an understanding with another about something that they both, therefore, now understand. Moreover, he points out that we learn from language that ‘the topic is not some random self-contained object of discussion, independently of which the process of mutual understanding proceeds, but rather is the path and goal of mutual understanding itself.’¹⁶⁴ But, this is not the nature of the adversarial jury trial. The *voir dire* has merely elicited understanding of the rules of the game, not agreement on the topic. Once the *voir dire* conversation is over, and the protagonists return to open court, the adversarial trial continues before the jury as very much a zero sum game. The goal is to persuade the jury to accept one of two competing viewpoints, albeit now mediated to accord with the rules of the game.

A criminal trial case study: Storytelling and why counsel want to control it

Although ‘storytelling’ might be the most ‘effective tool of persuasion’ at trial,¹⁶⁵ in my case study, we see how Counsel¹⁶⁶ and judges organize courtroom discourse to ensure the locus of control of the narrative of the case does not shift to witnesses. The facts that reach the jury are no longer “raw,” as my case study shows. And, as is clear, the jury becomes an audience that one needs to persuade—not convince through a conversation partnership—to the preferred thesis of counsel in competition.

The advent of this case was timely, coming in the early stages of my laying the groundwork for my thesis. It arose, first, out of my chance encounter at the crime as it unfolded, and second, as a witness giving testimony. I do not present it as a case from which to deduce general principles. I do present it as illustrative of courtroom discourse in criminal trial before a jury. The added benefit arises from my being able to analyse my own self-deliberations as I

¹⁶⁴ Ibid 158

¹⁶⁵ Kadoch, above 101,79

¹⁶⁶ Where I use the word counsel in my thesis, I spell it in its singular form, whether or not I am talking about one or more courtroom advocates. In most cases, it will be clear from the context whether I mean counsel as a single entity or as plural. Where it is not apparent, I clarify. An alternative is to call them advocates. However, in courtroom parlance, generally, counsel is more appropriate.

prepared for the hearing. In addition, I can discuss—albeit subjectively—the way in which I presented my testimony. Did I believe I gave the jury unmediated raw facts? Or, did I feel that the question and answer process inhibited my ability to tell a story of what happened? To what extent did my responses to probing questions reflect a desire to preserve my self-image? In other words, did I rationalize my actions of that day to persuade the jury of my credibility? How did my response, with which I aimed to persuade, differ from my self-deliberations that I used to convince myself of the integrity of my recollections of events?

I concede that even my undertaking to analyse my thoughts as witness invites scepticism. I am about to explain what was going on in my mind at three stages of the introspective journey—from the event, through contemplation in the quiet of my home, to explication in the numinous space of a courtroom. Should the reader expect that even in the fourth iteration of this text I would rationalize? There is no reason why they should not. I will use examples in my case study to show that an act, which seemed instinctive in a moment of emergency, might take on a different character in self-deliberation after the emergency has passed. Inga Markovits suggests, for instance that ‘[a]s individuals, we have no power over our recollections: we forget what we would like to remember, remember what we would like to forget.’¹⁶⁷ Thus, the value of this case study is illustrative. It is not of itself prescriptive.

My case study is a bridge to Chapter Five (through Chapters Three and Four of course), in which I discuss why one must regard the jury as a particular audience, and how it differs from a universal audience. It reveals the forces at work in the communication process, with which the speaker to that audience must deal if they are to adapt to the difference. Therefore, although the case is illustrative, not prescriptive, it does promote consideration of why a witness might want to construct their own narrative, and why counsel are at pains to stop them.

¹⁶⁷ Inga Markovits, 'Selective memory: how the law affects what we remember and forget about the past—the case of East Germany' (2001) 35 *Law and society review* 513

Setting the scene

I was a witness to an assault—into which I reluctantly inserted myself—which led to one of five charges the state laid against a man for inflicting bodily harm on his spouse. Also relevant, as become clear in my discussion of discourse organization, the accused was a high-profile leader of a motorcycle gang.¹⁶⁸ He had recently completed a two-year jail sentence for a much-publicized assault on a crowd controller (“bouncer” in the vernacular) in a well-known nightclub. Television news services had aired the assault, captured on amateur video, many times. Therefore, propensity, and relationship, evidence was to loom large in the mind of counsel for the defence, having regard to section 31A of the *Evidence Act 1906* (WA).

In proofing before the trial began, prosecuting counsel had asked me to recount the incident I had witnessed, and my attempts to intercede on behalf of the alleged victim. He did not lead me through my testimony with a series of questions, he simply asked, ‘tell me what happened’. He was happy with my story, because, as I discovered, it fit nicely into the plot development of the narrative he was constructing. Satisfied that my account would hold up under questioning, and content that it would contribute to the compelling narrative he hoped to present to the jury, he pronounced me a credible witness.

In the event, however, the jury did not hear the unexpurgated story I had planned to tell.

The power of the Adjacency Pair to direct the narrative course

The testimony I was to give in court reaffirmed the written police statement I had provided after the incident. I had described the screams I had heard coming from the house, which I knew to be the home of a well-known motorcycle gang member and his spouse. The screams were such that, in spite of the fact that I had no wish to expose myself to possible threats from this man, I believed I had a citizen’s duty to investigate whether a life was in danger.

¹⁶⁸ Colloquially, although inappropriately, referred to as an outlaw bikie gang.

In fact, of course, my mind did not process the event in this way immediately. Rather, my ensuing actions were instinctive, but perhaps reflected the values I had absorbed from a culture and time in which I had grown up. Alisdair Macintyre says we humans are an amalgam of our past social and cultural fragments.¹⁶⁹ The question is whether we bring the expectations that stem from our cultural way of being to any new experience. I develop this idea further in Chapter Five in which I discuss courtroom discourse and false assumptions about common sense and common community values. I introduce it here only to give context to Witness¹⁷⁰ testimony on his actions when he heard screams from a woman apparently in distress. A dispassionate, reasoned consideration at the time would more than likely have led to a different, decision. Witness' action was instinctive when it happened.

However, at the point of recounting the action in court, he had processed it in his mind and convinced himself that the action was justified. In other words, he had anticipated possible attacks on his credibility from defence counsel, and needed to convince himself that he had acted credibly. He was not a busybody intruding into a mere domestic dispute out of nothing more than curiosity. The significant point that comes from this is that witnesses might also have mediated their testimony. Testimony might not always be a dispassionate informant's account of an event as history.

At the trial, counsel for the prosecution ("Prosecutor") began his direct examination deferentially:

Prosecutor: *Now, Mr Fisher, we're going to ask you some - you're going to be asked some questions about an incident that occurred in 2011.*

¹⁶⁹ Alisdair MacIntyre, *Whose justice? Which rationality?* (University of Notre Dame Press, 1988) 169

¹⁷⁰ To avoid using the personal pronoun, I refer to my testimony, and the presentation of it, as the testimony of Witness with a capitalised [W]. I do this to distinguish between my neutral observations as author, and my thoughts as a witness. I am nevertheless conscious of Barthes' scepticism of the motives of those who, in recounting their part in history, eschew the personal pronoun. I address the scepticism later in this chapter. I also use the capitalised [P] in prosecutor and the capitalised [D] in defence when I need to distinguish between authorial reference to prosecuting and defence roles generically, and to specific actions of counsel as advocate for their clients.

You understand, in a general sense, what this - these questions are all about, do you?

Witness: Yes, I do.

Prosecutor: Can I ask you - well, I'll call it the incident. Just talk us through what you remember about the events that you subsequently spoke to police about?

Up to now, Prosecutor in my case study has deferred to Witness in the less formal, conversational, mode of the pre-trial witness proofing. Proofing had taken place in Prosecutor's office whilst sipping coffee, setting a conversational mood, rather than an interrogative one. In that congenial atmosphere, Witness, an experienced former broadcaster, told his 'story' succinctly, and to the satisfaction of counsel, who had then reviewed the testimony to cover any point on which he was unclear, or which he thought might need elaboration. In court, Witness took Prosecutor's, 'Just talk us through, as an invitation to do the same thing. In the event, as the transcript reveals, counsel for the defence ("Defence") did not want that to happen.

Witness: It was about 7.15 in the morning. I was walking my dog on Davallia Road. I was walking south down Davallia Road on the footpath, which is on the eastern side - in other words, opposite the house in which this incident occurred - when I heard screams. Very loud screams. They sounded like terrified screams, so loud that I could hear them above the sound of three high-powered motorbikes that were going by at the time.

At this point, Defence disrupted the storytelling. Witness did not know that, in a *voir dire*, conducted before the court had received any testimony, the judge had agreed with the defence that this specific part of the testimony was insufficiently probative. However, in Witness'

Witness: *Yes*

Prosecutor: *Could you make out any words?---*

Witness: *Initially, all I heard were the screams. And it were the screams that suggested to me that I needed to see...*

Defence: *He heard screams. What they suggested to him is – it-it – irrelevant...¹⁷⁵*

Defence realised Witness' speculation would be prejudicial. Witness meant it to be; but, of itself, that does not mean it is unfairly damaging. A scream is a communication. And, the nature of the scream determines how a receiver will interpret the communication. It might not have been probative if looked at in the context of that particular event, which was one of five separate, discrete, charges that the prosecution was bringing against the accused. However, the conversational procedure that Witness, with the support of the Prosecutor was trying to sustain, did contribute to a narrative of a relationship based on fear and intimidation. The judge's role in this situation is to negotiate a compromise between the antagonist parties within the constraints of the *Criminal Procedure Act 2004* and the *Evidence Act 1906* (WA).

Prosecutor: *Mr Fisher, it - maybe - what this court is interested in is what you saw and what you heard?*

Witness: *Very well.*

Prosecutor: *And - and - - -?*

Witness: *I understand*

¹⁷⁵ There was more to the objection than a perceived need to ensure that the testimony complied with what, in *voir dire*, counsel and judge had agreed the court would accept as probative testimony in this circumstance. Defence also took this opportunity to raise doubts in the minds of jurors about the credibility of Witness' account of the incident. I discuss this aspect of discourse manipulation later in this chapter.

Prosecutor: Yes. Thank you very much. So you heard - now, I'll go back to the question. Did you actually make out any words?

Prosecutor's oral stumbles at this point indicate that the defence had achieved its objective.

Witness: At that point, no.

Prosecutor: Okay. And what did you do as a result of hearing those screams

Witness: I felt I needed to cross the road because of the nature of the screams.

So, Witness finished at the same ending he would have reached had the storytelling proceeded uninterrupted. But, now, it was not storytelling. It was question and answer—the adjacency pair. What was not clear to the court at this stage is that Defence had another reason for not wanting Witness to explain during the examination in chief why he crossed the road. As I reveal later, Defence wanted to raise the same question in his cross-examination about why Witness crossed the road. However, he had a different objective in mind, as will be clear in the transcript of the exchange with Witness.

By reinstating the chain maxim, which is the core element of the adjacency pair, counsel for the defence had disrupted narrative development. The prosecution had wanted to develop a narrative of fifteen years of sustained violence against the victim. Defence wanted a narrative of fifteen years cohabitation, which had produced nothing more than five instances of physical conflict. On average, this implied a physical conflict only every three years, which the parties had resolved amicably on each occasion. Thus, none was an assault, merely a 'domestic,' in police vernacular. Furthermore, by reinstating the chain maxim, defence counsel had ensured that the locus of control did not shift from the court to the witness.

At what stage Prosecutor might have felt it necessary to stop the storytelling to ensure the narrative developed according to his desired end we cannot say. However, because the

deferential conversational exchange was leading to the type of understanding he hoped to reach with the jury, he was happy to let it run for now. Defence was not. This is the nature of courtroom advocacy; the Adjacency Pair had prevailed. What is more, the authors of the narrative of the case had retained control of plot development. The jury, however, retained the power to decide which of two alternative endings would carry the day.

The Adjacency Pair format gives counsel control. The pervasive power of courtroom semiotics and numinous space gives them authority. Any disruption of the order makes counsel and judge slightly uncomfortable, as I explain in the next section.

Numinous expression and the semiotics of courtroom space

Laurie Kadoch argues that symbolism of the courtroom space affects both interaction and the interpretation of the interaction. The witness is, hopefully, made aware of the solemnity of his/her duty to tell the truth by the characteristics of Etlin's "numinous" space.¹⁷⁶

At one point, Prosecutor asked me to refer to a wall-mounted enlarged photograph of the site of the incident I had witnessed. This meant that I had to stand, move slightly away from the witness box, and use a pointer, which a court orderly had handed to me. Now, I was above the level of the judge's bench, and significantly above the level of counsel. Repositioned from my seated place in the witness box, which diminished my physical presence, I now surveyed the court from a privileged position.

Prosecutor: *What street's that that we're looking at as it goes from bottom to top of the photograph?---*

Witness: *We're looking down Granadilla Road towards Davallia Road.*

¹⁷⁶ Richard Etlin, *Symbolic space : French Enlightenment architecture and its legacy* (University of Chicago Press, 1994) 30. Numinous space in the courtroom is the ambience created by architecture and semiotic placement of an authority figure to invoke a mood suggestive of a presiding deity or spirit. I return to this topic in Chapter Three

And that's Davallia Road. And that's the palm tree.

Prosecutor: The palm tree there. Okay. Can you indicate with your pointer where you say this naked woman was cowering down?---

Witness: Roughly there but perhaps slightly - the - the -that fence goes - that wall, I should say, goes around a little bit and my recollection is that she was just slightly around the corner. In other words, she would not have been visible immediately - in - in line of sight from the gate.

Prosecutor; So just around the corner from that grass on that grassed area -?---

Witness Yes, on - on the grassed area.

Prosecutor: And when you said she was - she was facing the wall, is that the wall that you were referring to?---

Witness; Yes.

Prosecutor: And did you see - I'm not asking - please do take another - a - take a seat. I'm not asking you to speculate, but did you see where the man had come from?—

Witness: It seems clear to me, from the way he appeared, that he must have come out of this gate here.

Prosecutor; Out of the gate. Yes, thank you. Where were you when you first heard the screams?---

Witness: I was on the other side of Davallia Road. You can't see in this picture where I was. There. - There's a bus shelter just about in that position.

During this discussion, I did not return to my seat. I was more comfortable standing. I had a commanding view of counsel, the jury, and judge. Moreover, with a pointer in my hand, for a moment I had assumed the authoritative position, such that the orderly who had handed me the pointer was now smiling and nodding affirmatively as I gave my answers. Prosecution again motioned me to my seat in the witness box. The judge nodded in support of the motion. I complied. Numinous symbolism was back in place.

To appreciate the nervousness of counsel about Witness moving outside the constraints of the rules of courtroom discourse, one needs to keep this first transgression in mind, as I discuss another moment of discomfort shortly after.

Witness had crossed the road, and was approaching the victim of the assault.

Prosecutor: And what happened when you approached her to within two metres? What was the next thing that happened?---

Witness: A man appeared,

*Prosecutor: Okay. Now, for legal reasons, **we're not going to go into the words** that he may have spoken, **if any**, to you?---* (My emphasis)

What the transcript—words on paper—cannot show is the anxiety in the prosecutor's voice as he interjected quickly, 'Okay. Now for legal reasons,' in fear that the witness might again transgress the agreement of the *voir dire* to keep inflammatory, but non-probative, testimony away from the ears of jurors. Moreover, the qualifying phrase, 'if any' is not there for the jury; it is there to

forestall any objection from Defence that Prosecutor had alerted the jury to words that were uttered, which were obviously prejudicial to the interests of the accused.

Witness: I understand.

Prosecutor: When you saw this man - can you describe him?---

Witness: He was a taller man than I, muscular, looked to be about 40.

Defence: Your Honour, there's no - there's no dispute The witness's statement says he knew the man, he knew that Troy Mercanti lived there, he knew it was Troy Mercanti. So there's no dispute about identity. We're...

Witness: If I may, your Honour? I did not say...

Witness was trying to insert himself into a conversation to which he had no right to enter, according to the rules of courtroom discourse organization. In my impatience to resolve a point of contention, which I could have done in one succinct sentence, I had ignored the rules of the game the lawyers were playing. Neither participant in this exchange wanted to reach an understanding with the other. Each wanted to exploit the point of contention for their own objective in persuading the jury to their preferred point of view.

Prosecutor was intent on showing that Witness had not positively identified the man as Mercanti; he had never met him, and he could not match the man in the flesh with the images he had seen of him on television. Defence, on the other hand seemed equally intent on persuading the jury that he 'knew the man.' Why? Witness surmised that Prosecutor wanted to preempt any

particular interpretation has been chosen and accepted, it must be followed.¹⁷⁸

The interpretation of the rules, which has established the place and conversational rights of Witness, had been decided at the *voir dire*. The judge could brook no challenge. To do so would contest the authority of the role. This disruption to building the narrative of the case raises the question whether counsel would be able to play the same ‘game’ in a trial before judge alone.

Judge alone and the absent jury influence

With no jury to persuade, but only a judge to convince would the judge have welcomed a speedy resolution of the dispute from the witness, who, logically, is best placed to provide it? However, the institution of the jury as the champion of democracy is well ingrained. Therefore, a judge sitting alone in a trial in which the accused has exercised the option to forego jury trial must adhere as closely as possible to the same rules of evidence and rules of procedure that operate in jury trials.

There is tension in telling a story by assembling diverse testimonies into a version expressed in terms of a legal conclusion, and the moral imperative of revealing substantive truth. It confronts counsel organising courtroom discourse before a judge alone just as it does for a jury trial. However, they have differing ends in mind.

The lawyer... begins with his client’s story and ends in the court of appeals, arguing a point of statutory interpretation or constitutional law. And the judge must take two or more such arguments—two ways of connecting a particular story with a system or theory that will explain and act upon it—and with

¹⁷⁸ John J Gumperz, *Discourse strategies* (Cambridge University Press, 1982) 159

their aid fashion his own account, a version that concludes with a judgment or order in legal language, with words that work on the world.¹⁷⁹

The point of White's observation is that, ultimately, the judge must take responsibility. This, he maintains, is how the judicial system makes law. Therefore, he asserts that judge and lawyer alike are concerned primarily with converting the 'raw material of life—of the actual experiences of people and the thousands of ways they can be talked about—into a story that will claim to tell the truth in legal terms.'¹⁸⁰ I think this is the difference between counsel organizing courtroom discourse for judge alone, who has one eye on 'the court of appeals' where law might be made, and counsel organizing courtroom discourse for a jury, which does not make law, but only makes unexplained decisions about the facts, to which law is applied. Nevertheless, the jury influence is still evident in trials before judge alone, as I illustrate in the next section.

The State of Western Australia v Rayney

Prominent Western Australian barrister, Lloyd Rayney faced a charge of having murdered his equally prominent lawyer wife, Corryn Rayney on or about 7 August 2007. Having the choice, Rayney chose to have a judge sitting alone try the case, a choice that surprised few people. Constant media speculation; the high profile of both victim and accused as members of the Western Australian justice system; police and Department of Public Prosecutions comments that there was no other suspect; the forensic focus on the family home; and the public image of Corryn Rayney as model mother fed a doubt that a representative jury would come to the trial with minds clear of predisposition or prejudice. Although there is no suggestion that a local judge would have been incapable of putting aside any predispositions they too might hold, the Court appointed former Northern Territory Chief Justice Brian Martin, to try the case. This was to ensure that not only would justice be done, but it also would be seen to be done.

¹⁷⁹ James Boyd White, *The legal imagination: studies in the nature of legal thought and expression* (Little, Brown, 1973) 859

¹⁸⁰ Ibid

In allowing an accused the right to choose between trial by judge alone, or by a jury of their peers, the *Criminal Procedure Act* section 118(4) says, the court can make such an order ‘if it considers it is in the interests of justice to do so but, on an application by the prosecutor, must not do so unless the accused consents.’¹⁸¹ That the court does so with some reservations is evident in section 119, which requires the sitting judge to apply as closely as possible the same principles that would apply to a trial before a jury.

- (1) In a trial by a judge alone, the judge must apply, so far as is practicable, the same principles of law and procedure as would be applied in a trial before a jury.
- (2) In a trial by a judge alone, the judge may view a place or thing.
- (3) If any written or other law —
 - (a) requires information or a warning or instruction to be given to the jury in certain circumstances; or
 - (b) prohibits a warning from being given to a jury in certain circumstances,the judge in a trial by a judge alone must take the requirement or prohibition into account if those circumstances arise in the course of the trial.¹⁸²

In the event, Martin J found Lloyd Rayney not guilty.¹⁸³ Reading his reasons for the decision, one could infer that the absent jury was never far from his mind. Relevantly, he sought to validate his decision:

- 26 The State did not present an eyewitness to the death of the deceased. In order to prove objective facts from which the State contended I should be satisfied that the accused is guilty of wilful murder or manslaughter, the State relied upon evidence of surrounding circumstances commonly known as circumstantial evidence.
- 27 Like direct evidence, circumstantial evidence can be good, bad or indifferent. I am required to decide what facts I find are proven by the evidence and then to determine what inference or inferences I am

¹⁸¹ *Criminal Procedure Act 2004* (WA) s118 (4)

¹⁸² *Ibid* s119

¹⁸³ *The State of Western Australia v Rayney [No 3]* [2012] WASC 404

prepared to draw, and to draw beyond reasonable doubt, from the proven facts. I am required to consider all of the proven facts together and to determine whether those facts in their entirety leave a reasonable doubt or lead me to a conclusion beyond reasonable doubt that the accused is guilty of either wilful murder or manslaughter.

- 28 The drawing of inferences from proven facts is different from speculation. There is no room in the criminal court for speculation or speculative theories. Inferences can only be drawn if facts proven by the evidence properly support the drawing of the inferences.
- 29 The reliance by the State on circumstantial evidence requires that I consider the possibility that the proven facts do not necessarily point to guilt. A verdict of guilty cannot be returned unless the proven facts are such as to be inconsistent with any reasonable hypothesis other than that the accused is guilty. Guilt must not only be a rational inference, but it must be the only rational inference that the proven facts enable me to draw. This principle and the approach to circumstantial evidence was described by Dixon CJ in *Martin v Osborne* (1936) 55 CLR 367
- 31 The accused exercised his right not to give evidence. No inference adverse to the accused can be drawn by reason of the fact that he chose not to give evidence.
- 32 *[Deleted from published reasons]*
- 33 Throughout the trial and my deliberations, and in assessing the evidence and reaching my conclusions, I have applied these legal principles and other principles discussed in these reasons.
- 34 In the context of principles to be applied, I have also borne in mind that many of the statements tendered by consent contain material that is either inadmissible or can only be used for limited purposes.... I have put aside obviously inadmissible material which found its way into evidence in this manner.¹⁸⁴

I have reproduced this explanation in full because it suggests that in Martin J's mind's eye was a jury to whom he was delivering an admonition about the approach it should take in deciding Mr Rayney's guilt or innocence. It shows the influence of the jury as institution in the justice system. It suggests, too, that Martin J shares James Boyd White's generalised view that the final destination of his judgment was to be the 'court of appeals.' However, the jury

¹⁸⁴ Ibid para 26-34

as upholder of democracy does not always deliver what it is supposed to ensure, as another high-profile criminal trial will attest.

State of Western Australia v Martinez & Ors¹⁸⁵

Consider the case of three young men on trial in the Supreme Court of Western Australia before a jury. The case against them was that they launched an unprovoked attack on the victim, punching him, kicking him in the head, and finally throwing him off a footbridge to his death. The first trial resulted in a hung jury. Because of the enormous publicity surrounding the case, and the extent of public emotion it aroused, the accused sought to have the second trial conducted by a judge sitting alone. The judge who heard the application was the judge who was to preside at the second trial. He refused the application. The judge acknowledged the extensive publicity that the case had attracted, but did not believe it warranted a trial by judge alone.

There is no reason to suppose that, suitably warned, a jury would not bring the customary approach of fairness, impartiality and objectivity to this retrial which would be expected. In other words, I do not consider that the publicity which has occurred in the past relating to the death of Phillip Walsham, or to the arrest, charging and prosecution of these accused will prevent a properly directed jury from delivering an impartial verdict. I do not even think that there is a serious risk that that might occur, but I do acknowledge that appropriate directions to any jury empanelled in this case would be essential.¹⁸⁶

He concluded:

In a case of this difficulty and importance there seems to me to be a considerable advantage in requiring the unanimous agreement of a panel of 12 people for a verdict, rather than that of a single person no matter how great his or her experience may be. This seems to be a case, more than others, when a panel of 12 jurors is likely to bring a collective wisdom and evaluation of all the facts proved which would be preferable to that of any single judgment.¹⁸⁷

¹⁸⁵ *The State of Western Australia & Ors v Martinez & Ors* [2006] WASC 25 (17 February 2006)

¹⁸⁶ *Ibid* para 32

¹⁸⁷ *Ibid* para 36

At the new trial, in a highly charged atmosphere of public abhorrence at the nature of the alleged act, the jury returned a verdict of guilty; media reports implied that the result satisfied most people and surprised few.¹⁸⁸

The democratic jury does not always ensure justice

On appeal, after a hearing that ran for ten weeks, the Western Australia Supreme Court of Appeal quashed the convictions.¹⁸⁹ The public was angry. Members of the jury, which had reached the guilty verdict, were incensed. Some of them made their anger public, and labelled the appeal court verdict a ‘farce’.¹⁹⁰ Yet, a reading of the Court of Appeal’s cogently constructed judgment, invites the conclusion that the decision to quash was not only fair, but was also the only just conclusion the Court could have reached. As unpalatable as that verdict might have been to a public wanting someone to pay, it is reasonable to argue that—in spite of the jury in this instance—justice was done. Had the appeal court abdicated its responsibility by punishing what the ‘public deemed worthy of punishing,’¹⁹¹ it would have sacrificed justice in pursuit of its own legitimacy.¹⁹²

Without having heard the complete courtroom testimony, why was the public so adamant that the accused were guilty? According to Robinson and Darley,¹⁹³ social science evidence suggests that the answer lies in intuition, as I discuss further in Chapter Three. I also examine

¹⁸⁸ Although beyond the scope of my thesis, I believe a comparative analysis of the organization of discourse in the first trial, with its hung jury, and the second trial, with its unanimous verdict of guilty, would be informative. So too would be a comparison of the directions given to the jury in the first (hung jury) trial, and the second (‘guilty’ verdict) trial.

¹⁸⁹ *Martinez v The State of Western Australia* [2007] WASCA 143 (6 July 2007)

¹⁹⁰ McCusker MJ, ‘Bad press: does the jury deserve it?’ (Paper presented at the *36th Australian Legal Convention - 18 September 2009* Perth, Western Australia, 2009) Malcolm McCusker was counsel for the Defence in *Martinez*.

¹⁹¹ Paul H Robinson and John M Darley, ‘Intuitions of justice: implications for criminal law and justice policy’ (2007) 81 *Southern California Law Review*

¹⁹² The foregoing account of this case first appeared in, Eric Fisher, ‘The quest for a legitimating jury system: is the justice system searching in the right place?’ *Unpublished Master’s thesis*, (University of Western Australia, 2012)

¹⁹³ Robinson and Darley, above n 191

the question whether intuition—*sensus communis*—is the province of jurors only. That question is important in a trial before jury, where the court will consider questions of law and the probative value of testimony that witnesses will present, in *voir dire*. The judge dismisses the jury from the courtroom during this discussion. Should it become necessary, the judge will explain the rules and the jury's obligation to observe them when they consider testimony that Judge and counsel have sorted out in *voir dire*. In that respect, jurors are no better informed than is the 'lay audience.'

But, implicit in the claim to have sorted out the rules in *voir dire* is that lawyers have discussed them rationally, and that the judge has considered their discussion with an equally rational mien. Intuition, the *voir dire* principle implies, is the province of jurors. Yet, as I explain in Chapter Three, professionals are as prone to exercising intuition—even in the realm of their professional expertise—as are laypersons. Furthermore, if the perceived value of jurors' deliberations is that they apply community common sense to finding the facts, then they should have access to all raw facts to which the witness has access.

The significance of the *voir dire* effect

In the case in which I was a witness, I based my intuitive application of community common sense on all the facts that I knew. Intuitively, therefore, I believed the jury should also have those facts. However, the rules of evidence, to which the court must defer, decreed otherwise. The following exchanges from my case study show the influence of *voir dire* decisions.

The prosecution had wanted to lead evidence of the ferocity of the accused when he emerged from the house by having Witness recount what the accused had said to him. The negotiations on what part of that was admissible took the following form in *voir dire*.

Prosecutor: But what we say is the jury is going to need to understand how Mr Mercanti appeared, and his attitude and demeanour. Did he appear angry during the course of this offence?-

Judge: She can say all that

Prosecutor; But Mr Fisher being an independent eyewitness, your Honour .

Judge: Mr Fisher can describe everything up to, in my view, paragraph 11.

Prosecutor: But is the jury not going to be perplexed if Mr Fisher is not asked, "Well, how did he appear?"

Judge: "How did he appear to you, Mr Fisher?" or "How did he appear to Ms Kingdon?" They're two separate issues.

Prosecutor: But the issue...

Judge: His attitude to Ms - to Fisher is not what he's on - it's got nothing to do with the indictment.

Prosecutor; No, it's not, your Honour, but it does indicate his state of mind and demeanour - because the State says this is relevant. He's come out - because it may be ultimately that they say, "Yes, she was outside naked and he came outside because he was concerned about her".

Now, the State says if the jury hears that Mr Mercanti has come out of his house, hasn't so much glanced at Ms Kingdon, and has abused Mr Fisher, that can rationally affect the jury's assessment of the probability of a fact in issue. That is to say, was he being solicitous for the welfare of his wife and concerned because she was out there for some unknown reason? Or is it because he was in the process of assaulting her?

If a jury is not provided with the information that he appeared to be angry, a jury is going to be completely baffled as to how they're

supposed to interpret this evidence. Whether he was calm, whether he was smiling, whether he was being friendly, whether he was being angry, whether he was raising his voice. A jury is going to wonder why no one's asking him---

...

about this thing. We simply can't lead this evidence in a meaningful way, with respect, if we---

Judge: Well, I mean, you go back to paragraph 3: Even over the noise of the bikes I could still hear the woman screaming, 'Somebody, please help me'.

Prosecutor: Mm.

Judge: I mean seriously, [Prosecutor]. The jury can't follow that and work out what was happening? What is being objected to at paragraph 11 is his attitude to Mr Fisher, "I'll punch your head off, your fucking" -

Punch your head off your shoulders, you fucking maggot.

Well, what's that---

After more argument...

Defence: ...Your Honour, there's got to be an end to this. Your Honour made a ruling.

Judge: Yes, I have made a ruling.

The prosecutor makes a last, futile attempt to retrieve the initiative, which the judge ignores.

*Judge: It's up to paragraph 11, [Prosecutor]. That is my ruling.*¹⁹⁴

The inflammatory testimony lacks probative value, so it is inadmissible.

Although Witness felt unfairly treated because he was unable to recount the full substance of the encounter, the judge's application of the rule mirrors the letter of the law. Professor of Jurisprudence, W.L. Twining claims storytelling can impair the search for rational exposition of the facts.¹⁹⁵ The judge had reasoned—rationally, if one accepts Twining's view—that Witness had revealed relevant facts. The jury 'could work out what was happening.' Adding the accused's dialogue would not make the facts clearer, it would merely add colour to the narrative, in the way a work of fiction would demand. However, had the judge surrendered narrative development to Witness at this point in the testimony, it might well have brought into contention section 31A of the Evidence Act. Relevantly, the section provides,

(1) In this section —

propensity evidence means —

- (a) similar fact evidence or other evidence of the conduct of the accused person;
or
- (b) evidence of the character or reputation of the accused person or of a tendency that the accused person has or had;

relationship evidence means evidence of the attitude or conduct of the accused person towards another person, or a class of persons, over a period of time.

¹⁹⁴ *The State of Western Australia v Troy Desmond Mercanti* (unreported, WADC, Stone DCJ, 25 February 2013)

¹⁹⁵ Twining, William L, *Rethinking evidence: exploratory essays* (Basil Blackwell Ltd, 1990)

- (2) Propensity evidence or relationship evidence is admissible in proceedings for an offence if the court considers—
- (a) that the evidence would, either by itself or having regard to other evidence adduced or to be adduced, have significant probative value; and
 - (b) that the probative value of the evidence compared to the degree of risk of an unfair trial, is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial.¹⁹⁶

In the event, the argument on admissible testimony under s 31A was to take considerable time in the *voir dire* over whether the State should have made a section 31A application, as Defence asserted, or whether the State was able to rely on the Common Law position on relationship evidence. After extensive discussion, the judge sent the two adversaries off to negotiate an agreement on the inadmissible testimony.¹⁹⁷ Kadoch has told us that ‘the jury is reminded... by the judge of their duty to interpret the discourse according to the rules.’ However, this lengthy negotiation of the circumstances in which the rules should apply suggests that the jurors and the ‘lay person,’ with whom Kadoch contrasts them, lack full understanding of the ‘multiple aspects of the discourse equally.’¹⁹⁸

Danet has made a similar observation. She acknowledges that advocacy and argument are ‘paramount’ in all genres of “fact” orientated disputing. However, she maintains that within the “fact” orientated genres, the public claim to be dealing with truth and fact is dubious. On the contrary, she states, practitioners ‘are actually preoccupied with elaborate rules governing the flow of talk and silence and have evolved a highly esoteric professional language,

¹⁹⁶ *Evidence Act 1906* (WA) s31A Propensity and Relationship Evidence

¹⁹⁷ To show how much time this discussion took, I have included the complete transcript of the arguments, and the judge’s interpretations at Appendix One.

¹⁹⁸ Kadoch, above n 101, 18

incomprehensible to those whose fate is at stake that dominates the courtroom.’¹⁹⁹ She refers to this as the ‘thickening’ of language, which forces its referential function to the background. That is to say, rather than using language in its referential function to tell us about the relation between language and the real world, they use it to mystify by highlighting the poetic function.²⁰⁰ In this context, poetic function of language refers to the focus on the message ‘for its own sake,’ as Jakobson explains. ‘This function cannot be productively studied out of touch with the general problems of languageAny attempt to reduce the sphere of poetic function to poetry or to confine poetry to poetic function would be a delusive oversimplification. Poetic function is not the sole function of verbal art but only its dominant, determining function, whereas in all other verbal activities it acts as a subsidiary, accessory constituent.’²⁰¹

Defence: *He heard screams. What they suggested to him is – it-it – irrelevant...*

Judge: *Yes*

Defence: *immaterial.*

In sustaining the objection the judge had cut in quickly to the extent of overriding the uttered “immaterial.” But counsel wanted more – this time, for the jury.

What do they say on television? Anyway, he’s not allowed to say it.

At this point, I will insert a ‘flashback’—as “they say on television”—to when counsel introduced me to the jury.

Prosecutor: *And what do you do for a living?*

¹⁹⁹ Danet, above n 21, 540

²⁰⁰ Ibid 540 I elaborate on thick versus thin speech in Chapter Six

²⁰¹ Jakobson, Roman (1960) "Concluding statement: linguistics and poetics," in Thomas A Sebeok (ed), *Style in language* (MIT Press, C1960) 356

now the present narrator of the event. The first purports to offer an unmediated account of it. This is presumed to be the unspoiled data-mother lode from which counsel construct their narrative of the case. But, for the second, this cannot be so when the witness is both a past actor and a present narrator.²⁰⁴ The “I” of the utterance conjoins with the “I” in the uttering act to threaten objectivity, even when the utterer explicitly appears to be guarding against the threat. Barthes gives an example.

The most famous example of this conjunction of the I in the utterance and the I in the act of uttering is doubtless the he of Caesar's Gallic War. This celebrated he belongs to the utterance; when Caesar explicitly undertakes the act of uttering he passes to the use of we.... Caesar's he appears at first sight to be submerged amid the other participants in the process described, and on this count has been viewed as the supreme sign of objectivity. And yet it would appear that we can make a formal distinction which impugns this objectivity. How? By making the observation that the predicates of Caesar's he are constantly pre-selected: this [sic] he can only tolerate a certain class of syntagmas, which we could call the syntagmas of command (giving orders, holding court, visiting, having things done, congratulating, explaining, thinking).²⁰⁵

Barthes claims that choosing to use an apersonal pronoun is no more than a ‘rhetorical alibi.’ In spite of his alibi, however, the utterer makes clear his self-perceived status with the choice of ‘syntagmas with which he surrounds his past actions.’²⁰⁶

Furthermore, I argue that in witness testimony, the more delayed the act of utterance is from the time of the event, the greater is the risk to objectivity from external influences. In my case study, Witness had made a written statement to the police, which, no matter how impartial he intended to be, was still open to that risk. From my privileged viewpoint as the “I” in the utterance” and the “I” in the uttering act, I (now using the personal pronoun in my authorial

²⁰⁴ Ibid para 8

²⁰⁵ Ibid para 8

²⁰⁶ Barthes is using ‘syntagma’ in this context at a level beyond its elementary constituent status of phoneme, word, phrase or sentence. That is to say, he applies it beyond its lexical level of structuring a combination of words according to the rule of syntax for the language in question. In this example, he applies it at a level of narrative structure.

role) can recollect the mental processes in the first person. Even recounting the event to acquaintances raised the spectre of self-delusion that I acted in good faith. The image of the terrified naked woman distressed me. Yet, when I related the event to men acquaintances, responses from many of them took me by surprise. They ranged from ribald comment about my good luck in coming across a naked young woman in need of help, to questions about whether she was attractive. I started questioning my motives in going to her aid. In my self-deliberations, I reminded myself that I began to cross the road before the naked woman appeared. I convinced myself at that moment that my motives were Samaritan, not salacious.

Yet, on my day in court, it is clear that, unbidden, the need arose to reinforce that point even in the knowledge that, according to the rules of evidence, it lacked probative value. This was in spite of the fact that I made an effort to remain impartial. I was not to appear until five days after the trial began. During that time, I did not read, watch, or listen to, any media reports of the trial; friends and family respected my request that they not discuss media coverage of the trial with me. Nor did I have the opportunity to sit in the courtroom to listen to testimony that preceded my appearance. Yet, if one assumes it only requires honest intent to be impartial, if all one need do to attain that goal is to gather up and present all the facts, then, according to Max Weber, this will still not be enough. ‘Any attempt to understand (historical) reality without subjective hypotheses will end in nothing but a jumble of existential judgments on countless isolated events.’²⁰⁷

Just as we can insist that our judiciary acts impartially, that they treat all parties in a dispute equally, and that they decide without institutional bias, we can insist that witnesses present testimony without intentional bias. Whether by oath or affirmation, we demand the truth, the whole truth and nothing but the truth. The witness, at that moment becomes an impartial bystander, not an advocate. However, we cannot insist that they act objectively, because objectivity is external to the mind; the predispositions and prejudices they bring to court are

²⁰⁷ Jacques Le Goff, *History and memory* (Columbia University Press, 1992) 113-4. Quoting Max Weber.

unconscious, and generally derive from the collective memory of the society to which they belong. Inga Markovits writes,

As individuals, we have no power over our recollections: we forget what we would like to remember, remember what we would like to forget, are at the mercy of such volatile reminders as smell and taste...and have to accept that we recall events not only because they were important, but that events become important just because we remember them. In our individual memories, the past rules over the present.' Public memory works differently, 'the present rules over the past. In every generation, those in positions of authority decide which of the names and events that preceded them are worthy of remembrance.'²⁰⁸

For the philosopher to get value from this witness' reflection on his mental processes in deciding to cross the road, I suggest they would need to have asked the question of him immediately after he made the decision. But, that might still be too late. In that moment of decision, I contend, two alternatives only are in contest: an unreflected response to an appeal for help, versus an instinctive need for self-preservation. "Is it safe?" However, from the moment the philosopher puts the question, one might argue, the trigger for rationalisation has been squeezed. Even more so then, by the time the police officers asked that question, the window of opportunity for pure philosophic contemplation had closed. The witness now grasped the reality that, later, he might have to justify both his response to the appeal for help, and his decision to call the police. Is this the point at which rationalization overcomes sincere contemplation? The rules of evidence operate to guard against that possibility. Therefore, it is valid for Defence to object to that portion of the testimony. In his *The critique of pure reason*,²⁰⁹ Kant expresses a belief that a moral consideration should influence a subject when they reach a judgment. We then cannot subjectively distinguish persuasion from conviction. This is unimportant providing that the judgment remains a 'phenomenon of its own mind.' That is to say, it is merely privately valid. However, it is important if the subject, in

²⁰⁸ Markovits, above n 167, 513

²⁰⁹ Kant, above n 39

endeavouring to convince others, overlooks the 'element of mere persuasion' that informed their own judgment.'²¹⁰

So, Defence's objection is tactical because, as I have explained earlier, Defence will want there to be a narrative, but they are to be the author of it. Witnesses are to contribute to the plot development, but under the direction—the discipline—of counsel as author.

However, in the cut and thrust of cross-examination, even a well-prepared defence counsel can inadvertently yield control to the witness. To illustrate, I return to my case study. Defence is cross-examining.

Witness: And - and that's when I heard the - the screams. And as I started to cross the road I was pretty much - I had crossed the median strip when I saw the woman appear for the first time running down there.

Defence: All right. Thank you. So you're describing a section of the road which is sort of the - sorry, what's that road called again?---

Witness: Davallia Road.

Defence: All right. Well - and Troy Mercanti was someone who you knew of, is that right?

Witness: ---Of course. Yes.

Defence: And because you knew of him, you - putting it bluntly, you didn't want to tangle with him, is that right?

Witness ---If I hadn't wanted to tangle with him -

²¹⁰ Ibid 747

This was not an apology for asking the question, but an indication to the court that he was removing himself from the fray for a moment to prepare to move on. In the next stage, Defence would shift register; questioning would be more aggressive, both in delivery and in message content.

Defence: The young woman that you saw, you saw her come out of the house. Now, by that you mean come out of the property line, is that right?---She - - -Out the front?---

Witness: She appeared a step of two behind the woman who came running towards - towards that palm tree.

Defence: But - but - but she - the young woman wasn't running, was she?-

Witness: --She was keeping pace with the - yeah.

Defence: What, jogging?

Witness: ---You could call it jogging, I suppose, yes.

Defence: Originally your statement read she was wearing a hooded top. This is the young woman?

Witness: ---No.

Defence: And that - that was changed to blue shorts and a white top?.

Witness: Because that statement was incorrect I never - never said that.

Defence: Never said that?

Witness: ---And it was corrected at - at - at my instigation, because what I only ever saw was a woman in blue shorts and white top. And the - the officer who tendered that statement to me had made a mistake, and we corrected it.

The police officer had inserted the correction by hand, and Witness initialled it. Therefore, the opportunity to cross-examine aggressively on the point was opportunistic. A more cautious witness would have demanded that the police officer retype the statement completely to preclude the opportunity.

Defence: Somehow - - -?

Witness: ---There was never any suggestion that she was wearing a hooded top. Never.

Defence: Somehow - hang on. Somehow he got it into his head that you'd said and wrote down she was wearing a hooded top. Right?

Witness: ... and I corrected that though –

Defence: Okay?

Witness: ---, because I did not say that. I did not see it, so I - I could not say it.

This exchange was not serving any probative cause. Defence knew that the corrected version was accurate. It did not matter. His questions had a tactical purpose only: to bring in to doubt the reliability of Witness' recollection of the events. It had re-established the chain maxim, 'a summons to reply, a means to compel, require, or demand a response.'²¹¹

²¹¹ Danet, above n 21, 515

What is more, Defence had regained the initiative quickly. Time to press home the advantage.

Defence: *Now, you say that that woman wasn't saying anything?*

Witness: *---I did not hear her say a word.*

Defence: *Well, whether you heard her saying anything or not, are you
- you're not going to stand there and - and - sit there and
swear that she didn't say anything?*

Witness: *---Of course I'm not. I did not hear her say a word.*

Defence: *Yes. We're going to hear from her. We know that she was the
sister of the naked woman, you understand?*

Witness: *---No, I did not know that she was the sister.*

Defence: *Well, I'm telling you?*

Unnecessarily belligerent?

Witness: *Thank you.*

Unnecessarily sarcastic?

Defence: *She's the sister of the naked woman, and she was sleeping in a
cabana, which is sort of an offshoot of the house, was woken
by - ultimately by noise and went outside, and found her sister
outside. That's what she's going to tell us. Now - and - and
she's going to tell us that she was trying to get her sister to
come back inside. After all, she was stark bollock naked, the
girl - the young woman. Now, you're not suggesting for a
moment that she wasn't speaking with her, albeit you weren't*

able to hear, are you?

Witness: What I am saying is what I saw. And what I saw was a woman standing there looking indecisive, as was I, and not - and not saying anything that was audible to me.

Defence: All right?

At this point, the exchanges between Defence and Witness had become a battle of wills, a little more acrimonious.

Defence: She was a bit nonplussed perhaps?---

Witness: She was like me, I suppose. Yes, nonplussed. Indecisive.

Defence: Indecisive. I mean, I imagine you've never been indecisive in your life, but some people can get nonplussed when they're suddenly confronted by something that really shocks them, can't they?-

Witness: I was indecisive because I didn't know what was the right - right plan of action to - to initiate at that point. Yes, course I was indecisive.

Defence: Thank you?

The last comment signalled the end of cross-examination.

Counsel's belligerence in this exchange is considered; it is feigned, not genuine. Having opportunistically challenged Witness on the veracity of his description of the young girl or woman, his tone, and sarcastic phrasing—*'you're not going to stand there and - and - sit there and swear that she didn't say anything?'*—is designed to persuade the jury that this witness is unreliable. Defence knows he has a tactical advantage. He knows that the court has ruled that witness testimony about verbal exchanges with the accused is inadmissible. Had Witness been allowed to develop the narrative he had in mind, his reply could have been, *'an*

aggressive bikie standing centimetres from one's face bellowing that he is going to "punch your fucking head off your fucking maggot shoulders" tends to concentrate one's mind to the exclusion of all else.' Had he done so, of course, he would have irritated the judge a little more than somewhat. And, the testimony would still have been inadmissible, albeit already uttered and digested.

The exchange illustrates the advantage counsel have in organizing the nature of courtroom discourse. Compare what is happening here with what happened earlier after Judge admonished Prosecution for allowing Witness too much freedom to ad lib his testimony: "*Mr Fisher, it - maybe - what this court is interested in is what you saw and what you heard,*" which, in fact meant not mentioning what he had heard. What Witness heard became through *voir dire* something he did not hear. Now, however, Defence is telling the jury that something Witness did not hear was something he must have heard.

Nevertheless, he was careful not to say the Witness was lying. He used the phrases "*whether you heard her saying anything.*" and, later "*albeit you weren't able to hear.*" He wanted to imply that the accused and the young woman had merely followed the other woman outside to encourage her to return to the house. Had he called the witness a liar, he would have opened the door to a rebuttal, which would have allowed the inadmissible evidence in, to show that, at no stage had the accused directed his attention to the woman on the ground.

Lloyd Weinreb criticizes Counsel's propensity to adopt this approach.

There is no reason why the information that a witness gives need be controlled by someone who is determined to avoid the disclosure of evidence favorable to the other side, however relevant to the inquiry'. There is no reason why an intense, searching examination of a witness's recollections to ensure their accuracy need regularly be accompanied by deliberately manipulative efforts to obscure or discredit his testimony; or why the duty to be a witness at a criminal trial should require submission to almost any abusive questioning tactic that an opposing lawyer may devise. There is no reason why rules of procedure designed to ensure a fair

loud that I could hear them above the sound of three high-powered motorcycles that were going past at the time.'

Prosecutor [P]: Could you make out any words?

The exchange between Prosecutor and Witness is not a conversation in the form of a reciprocal relationship that Gadamer asserts is necessary if a conversation is to reach an understanding. That is, when each participant opens themselves to the other and, in a spirit of reciprocity, weighs the other party's arguments, whilst holding on to their own, until 'it is finally possible to achieve, in an imperceptible but not arbitrary reciprocal translation of the other's position (We call this an exchange of views)—a common diction and a common statement.'²¹⁷ Therefore, this was not a true conversation in which one 'opened himself to the other...' with a view to developing an understanding of the substantive truth. Counsel had already proofed the witness before their performance in court. In other words, counsel had taken from the witness' account in that pre-trial discussion only that which would serve his preferred end. Proofing of a witness is not coaching a witness about what to say. One participant in a conversation might hold the view that something is relevant, whilst the other holds the view that it is not. Finally, they will agree on a common diction and a common statement. What follows in court, then, is no longer a conversation between witness and counsel. It is a performance of that common diction and common dictum arrived at in proofing. Its purpose is to persuade, not to convince. Note that, in this case study, the witness was there because he had gone to the aid of the victim of the attack. He wanted to persuade the jury to his point of view that the incident was not 'just' a domestic dispute. His description of the nature of the screams aimed to influence the jury to this end. On this objective at least, counsel and the witness were as one. Thus, this witness could not claim to be a neutral observer. That, by itself, does not make the witness any less reliable.

²¹⁷ Gadamer, above n 22, 348

Oral exchange number two

Defence: He heard screams. What they suggested to him is – it-it – irrelevant...

Judge: Yes

Defence: ...immaterial. What do they say on television? Anyway, he's not allowed to say it.

Judge: That's right.

Here too we must note that the defence counsel and the judge were not opening themselves up to the other with a view to developing an understanding. The exchange merely confirmed a direction that the judge had given to both counsel in a *voir dire* hearing before the first testimony, and before the court had empanelled the jury.

Oral exchange number three

Judge: But – [Mr Prosecutor] so just – you need to lead the witness carefully.

Prosecutor: I – I do, Your Honour

Judge: Thank you

Prosecutor: I'm obliged, your Honour.

The judge's gentle caution was a reminder that counsel and the court had reached a compromise on this part of the testimony. Counsel for the defence had wanted the judge to declare the reference to high-powered motorcycles inadmissible. The witness had wanted to make the point that the screams were penetrating, suggesting terror, rather than mere fright. Although junior counsel had advised the witness before his appearance that he was not to recount the threatening words the accused had directed at him when he went to the aid of the

victim, she had not thought it necessary to warn the witness about drawing an inference from the intensity of the screams. Defence counsel was right to object. Nor does that, by itself, mean the witness was wrong in trying to get the testimony in.

Oral exchange number four

Prosecutor *Mr Fisher, it – maybe – what this court is interested in is what you saw and what you heard?...*

Witness: *Very well*

Prosecutor: *...And, and...*

Witness: *I understand*

Prosecutor: *Yes. Thank you very much. So you heard – now I'll go back to the question. Did you actually make out any words?*

Witness: *At that point, no*

Prosecutor: *And what did you do as a result of hearing those screams?*

Witness: *I felt I needed to cross the road because of the nature of the screams.*

I have labelled this exchange as number four, rather than as number three-continued because the subject matter has changed from an account of the actions of the witnesses, to become that of a conflict between opposing counsel over what the witness ought to be allowed to say. In light of Defence's vociferous appeals to the judge, Prosecutor might have been happy that Witness' last comment on the matter had, retrieved the essence of the point he wished to make to the jury. That is, the victim was terrified.

The jury, participating only vicariously, more than likely were now listening to this part of Witness' testimony with a different mindset. The task they are set is to act as translator of these four exchanges. Gadamer has invoked the notion of translator as the 'extreme case' of hermeneutical difficulty. That is, difficulty in interpreting or explaining a text.

A translator...must not leave open whatever is not clear to him... He must state clearly how he understands. But since he is always in the position of not always being able to express all the dimensions of his text, he must make a constant renunciation... Every translation that takes its task seriously is at once clearer and flatter than the original. Even if it is a masterly re-creation, it must lack the overtones that vibrate in the original.²¹⁸

When Defence objected, he illustrated Gadamer's point that language, as the medium of understanding must be consciously created by an explicit mediation. 'All understanding is interpretation, and all interpretation takes place in the medium of language which would allow the object to come in to words and yet is at the same time the interpreter's own language.'²¹⁹ The *voire dire* in *Mercanti*, is a demonstration of how a mediated understanding of language sets constraints on counsel as interpreters. The prosecution wanted to use the narrative language of literature to build their case. Defence counsel wanted to use the language of positivist law. Gadamer points out that this kind of explicit process is not the norm in conversation. 'Reaching an understanding in conversation presupposes that both partners are ready for it and are trying to recognize the full value of what is alien and opposed to them.'²²⁰ So, if the witness and the jury were to reach an understanding according to the norms of conversation, they would not have needed counsel as putative translators. Oral exchange number four, therefore, is counsel as translator attempting to retain the meaning of the testimony given in the language of an 'alien' world while constraining it within a new language world decreed by the *voir dire* hearing.

²¹⁸ Ibid 348

²¹⁹ Ibid 359

²²⁰ Ibid 348

Conclusion

Gadamer's analogy is apt. In conversation and in translation, one must aim for empathy. 'As in conversation one tries to get inside the other person in order to understand his point of view, so the translator also tries to get inside his author. But this does not automatically mean that understanding is achieved in a conversation, nor for the translator does this kind of empathy mean there is a successful recreation. The structures are clearly analogous.'²²¹

Counsel share a common world: law and its language in the context of the adversarial criminal court, the laws of evidence, and the criminal trial procedures. This is not the world of the individual juror. It can be an alien world antagonistic in its character and in its expression. It is a world in which the mediation of language impedes the search for the substantive truth.

More than one hundred years ago Oscar Wilde wrote, 'A truth ceases to be true when more than one person believes in it... That would be my metaphysical definition of truth; something so personal that the same truth could never be appreciated by two minds.'²²² As I show in Chapter Three, Roland Barthes has echoed the satirical Mr Wilde more prosaically in arguing that reality is the illusion of the utterer. Both, however, offer useful analogies to the nature of courtroom discourse and to why standard accounts of language are inadequate to assess it.

²²¹ Ibid 348

²²² Hesketh Pearson (ed), *Essays by Oscar Wilde* (Methuen & Co. Ltd, 1950) Introduction, xiii

CHAPTER THREE: Creating the illusion of transparent portrayal of facts

Introduction

I begin this chapter by introducing selected theorists whose work facilitates the exploration of the essence of my thesis; namely, that there is a need to move beyond a standard analysis of language (which I discuss comprehensively in later chapters) to understand the potential for distortion of meaning in courtroom discourse. The chapter comprises two parts. In Part A, I discuss the adversarial trial before jury as a seminal speech event and introduce the key theorists upon whose viewpoints I draw to analyse the linguistic function of the rationalist rule that underpins it. In Part B, I move into an examination of the language “games” that courtroom advocates must play so that they conform to those rationalist rules, and I examine the language tools of their trade with which they accomplish their task. This chapter is pivotal to the elaboration of my thesis in Chapters Four and Five, in which I develop the idea that meaning resides in a state of mind beyond corporeality and beyond grammar.

Introducing some key theorists

Because the adversarial trial before jury fundamentally is a speech event, I begin by discussing the process of communication. That is, the manner in which the sender of a message transmits it to a recipient (the receiver). This process deals primarily with factors of encoding and decoding. The accent is on efficacy and accuracy of transmission. If the manner in which the recipient responds to the transmission differs from what the sender intended, the communication process has failed.²²³ The process of communication is a key element of the standard or monolithic hypothesis of language. But, I argue that analysis of courtroom advocacy must move beyond this standard account of language. Because the adversarial trial

²²³ John Fiske, *Introduction to communication studies* (Methuen & Co Ltd, 1982) 2

is a speech event, one must consider communication as, what Fiske describes as, 'the production and exchange of meanings.'²²⁴ This view moves analysis into the area of semiotics, and especially into the cultural differences in finding meaning in a communicated text. Fiske sums up succinctly the difference between the two approaches.

The process school sees a message as that which is transmitted by the communication process. Many of its followers believe that intention is a crucial factor in deciding what constitutes a message....For semiotics, on the other hand, the message is a construction of signs which, through interacting with the receivers, produce meanings. The sender...declines in importance. The emphasis shifts to the text and how it is "read."²²⁵

John Fiske's discussion introduces Roman Jakobson, the first of the key theorists who develop the notion of communication as the production and exchange of meaning. Jakobson claims that if we are to get to the essence of the organization of discourse, we must move beyond language. He probes the realm of linguistics to expound a need to revise the notion of 'the monolithic hypothesis of language.'²²⁶ A monolithic approach would suggest that writing and reading are manifestations of language used in speaking and listening. I explore the reason why this is not an adequate way to analyse the oral performance that is courtroom discourse.

Jakobson's structural analysis of language leads into my discussion of French literary theorist, linguist, and semiotician, Roland Barthes' work on signs and signification, and on his concept of myth, both of which can influence how one extracts meaning from a text. Barthes' work is significant because he discusses the way in which signs can work culturally in two different orders of signification. Broadly, the first order of signification is denotation, which one can describe simply as the obvious meaning. The second order is connotation,

²²⁴ Ibid 2

²²⁵ Ibid 3

²²⁶ Roman Jakobson, "Linguistics and poetics" in Thomas A Sebeok (ed), *Style in language* (M.I.T Press, C 1960) 350. Jakobson attributes this description to Voegelin. C.F. Voegelin, 'Casual and noncasual utterances within a unified structure' in Thomas A Sebeok (ed), *Style in lanmguage* (The M.I.T. Press, c1960) 57

which, as John Fiske explains, is where the denotative or obvious meaning interacts with the feelings or emotions of the user and the values of the user's culture.²²⁷

Fiske cites Barthes' example of roses, which he used in his 1973 work, *Mythologies*.²²⁸ In its first order, a red rose stands for the signified physical object. But, as Fiske says, if one presents a rose to their 'lady love,' one invests it with a 'type of romantic passion.' So, the presented rose becomes a signifier and a sign. Connotation is mostly arbitrary according to one's culture. Indeed, the red rose as signifier of romance is very much a semiotic cliché according to the values of culture with which I am most familiar. Also, in that cultural sense, the red rose is iconic. It is in my culture a 'motivated' sign for sentiment. But, as Fiske explains, one needs the 'conventional; element' of one's culture to decode it that way. Thus, in the second order of signification, one can find culturally determined symbolic and mythic elements. The rose, for example, is a symbol of sentiment. Similarly, the myth, as Barthes uses that word, is culturally determined. It is a culture's way of thinking about something, a way of conceptualizing or understanding it. Fiske, for instance suggests, '[o]ur sophisticated myths are about masculinity and femininity, about family, about success...about science.'²²⁹

Barthes suggests that in discourse, the reality is very much the illusion of the utterer.

Therefore, it is unsound to regard language as a direct reflection of reality. He concludes this from an observation of narration of history. He acknowledges that the narration of past events 'generally' has the endorsement of historical "science," which deems the exposition bound to the 'unbending standard of the "real" [and, is therefore] "rational".'²³⁰ He explains that this 'formal description of a set of words beyond the level of the sentence (what we call for convenience discourse),' though not new, has taken on a new timeliness because of its relevance to literary analysis.²³¹ But, he asks, 'does this form of narration really differ, in

²²⁷ Ibid 90-1

²²⁸ Roland Barthes, *Mythologies* (Translated from the French by Annette Lavers trans, Paladin, 1973) 112-3

²²⁹ Fiske, above n 223, 223 93

²³⁰ Barthes, above n 203 *Mythologies* (Translated from the French by Annette Lavers trans, Paladin, 1973) 112-3

²³⁰ Fiske, above n 223, para 2

²³¹ Ibid para 1

some specific trait, in some indubitably distinctive feature, from imaginary narration, as we find it in the epic, the novel, and the drama?²³² Barthes' observation is an apt correspondence to the way lawyers in the criminal courtroom listen to, and mediate, witness recollections of past events—their testimony—as they describe them to the jury.

A compelling way to demonstrate the correspondence that Barthes' observation implies is with two illustrative stories (or narrations) from real life. The first story is about signification. It is from the time (the early 1970s) in which Barthes was publishing his concepts of signification in *Mythologies*. It is an account of a television interview, in which discursive manipulation of the denotative sign of rose is analogous to what can happen in courtroom advocacy in a jury trial.

Actor, Jack Lord, whose fame was worldwide as the star of the original television series *Hawaii 50*, was a guest of television station GTV 9 in Melbourne, where, at the time I was General Manager (the CEO in this incident). His character's sign off at the end of each episode—"Book 'em Danno"—had become a catchphrase. Mr Lord had accepted an invitation to appear on the television station's annual Telethon, which raised funds for children with disabilities. A family orientated man, with no off-screen peccadillos to excite attention, some more sensationalist media had seized upon his love of his garden (roses especially) to imply a less than masculine person, quite the opposite of the strong manly character he portrayed on screen. This was an era in which an implication of homosexuality was derogatory. In this instance, it was also without substance.

To promote his appearance on its telethon, Mr Lord was to pre-record a segment for inclusion in that evening's edition of the station's current affairs program. As the host of the program was away on assignment, another journalist was to conduct the interview. But, as the tape rolled to record, the journalist reached under his desk and withdrew a rose, which, with a scornful smirk, he handed to Jack Lord, whilst a second camera focused on the actor's face to

²³² Ibid para 2

capture his shocked reaction. Mr Lord abruptly stood and declined to continue. At this point, the station CEO, who, with Mrs Lord, was watching the taping, immediately called this attempt to embarrass—a “Gotcha” moment in today’s journalistic parlance—inappropriate. In judicial parlance, a judge would have declared it inadmissible. So with the unseemly material removed, and as both men were professionals, the interview pre-recording proceeded. But, of course, unlike the situation in a trial in which the jurors would already have seen the incident, pre-recording had ensured there was no risk that a shadowy doubt would linger despite the declaration of inadmissibility.

The story offers a useful parallel to the judge in the trial in which I was a witness declaring part of my testimony inadmissible. If the television station chief executive officer—for my example, corresponding to a judge—had not declared it inadmissible, the rose as signifier could have, through its intended innuendo, tainted public perception of the actor. As the chief executive officer and major protagonist in this incident, I had the power of a judge. In contrast, I, as witness in a jury trial, had no such power. I wanted to enrich the meaning of the story I was telling by describing the demeanour of the defendant when I approached him. The judge though, sensing that it could create an unfavourable impression in the minds of jurors disproportionate to what he considered its probative weight, disallowed the testimony. But, as I explain in this and the following chapter, truncating a witness’s story can abort its full meaning and deny its proper probative value. That is why I argue there is a need for law practitioners and legal theorists to understand better the functioning of language, and its limits, as the carrier of meaning in courtroom discourse. And, there is a need to move beyond standard accounts of language at the level of sentence into the field of socio linguistics. A need to explore beyond a standard or monolithic hypothesis, of language in the courtroom, into the organization of courtroom discourse.

The second story is about myth. In Australia, the Anzac narrative is an affirmation of all that is good and valued about being Australian. Discursive manipulation, however, can render the Anzac myth as signifier of something else. During World War II, each Anzac Day was a

solemn ritual in which those who were serving in the theatres of war, and those who were at home waiting, reaffirmed their identities as worthy members of a society fighting for a perceived precious ideal. Post-war Anzac Day observances continued the process of affirmation, and helped heal the emotional bruises of those who returned from the fields of battle, as a grateful nation honoured their deeds.

It was different during the unpopular Vietnam War. Anzac Day became a symbol of all that was wrong with war; people directed the anger they felt about Australia's involvement in it to the annual Anzac ritual, calling it a celebration of war. Worse, when the young men, mostly conscripts, returned from Vietnam, they faced denigration rather than ratification as valuable members of the community. Their emotional bruises received no Anzac Day unguent. They had to seek identity in groups of their own kind, through which they would try to re-authenticate themselves as worthy members of the people.²³³

What the contrasting uses of the Anzac image show is not only that the present shapes our reconstruction of the past, but, more broadly, that people might take the iconography of an enduring narrative and impose it on the present in order to make sense of it according to a transient community mood. Furthermore, in a community comprising diverse cultures, the bonds of myth might be frangible.

The notion of taking the iconography of an enduring narrative and imposing it on the present in order to make sense of it harmonises with philosopher and logician, Ludwig Wittgenstein's idea of language games, which I introduce in this chapter. In addressing the reality of language use, Wittgenstein eschews the idea of language-as-concept, and gives preference to the more pragmatic viewpoint that language is a game in which it is only possible to play if one knows the rules.²³⁴ Moreover, the rules can vary according to the nature of the game and the context in which it is played. Thus, he perceived meaning as that which moves beyond the static rules of grammar; beyond the practice that the rules of grammar express. I apply

²³³ Barry Heard, *Well done those men* (Scribe, 2007 ed, 2007)

²³⁴ Wittgenstein, above n 30

Wittgenstein's idea of the meaning of a word gaining coherence through affinity with its context to show how lawyers in courtroom advocacy can change the rules of the language games—more properly, the rules of discourse—in *voir dire* agreement. That is an agreement to which jurors have no input and of which change they have no knowledge. Wittgenstein's notion of how meaning resides in language games provides the link to a third theorist on whom I draw, Hans-Georg Gadamer.²³⁵

Gadamer holds that the truth of any fact already exists. Those who participate in conversation, merely reveal it. He holds the view that true conversation 'has a spirit of its own' that leads, not follows, participants to a conclusion. He contends that the language in which it is conducted 'bears its own truth within it... that it allows something to "emerge" which henceforth exists.' In Gadamer's art of 'real' dialogue, "*an* [with emphasis] understanding" is not the same as "understanding." Understanding a communication means that the words and the grammar comply with language rules as Chomsky explains them.²³⁶ Thus, one can still exercise one's own prejudices without reflection. In contrast, *an* understanding, in Gadamer's opinion, already resides within the language of the conversation; the question and answer process has merely revealed it. In this chapter, I analyse Gadamer's viewpoint as a means of explaining the illusion of transparent portrayal of facts. He describes a participant's prejudices as forming a horizon that moves, moulds, and eventually fuses with the horizon of the other party to yield a shared understanding, which becomes the new reality.²³⁷ For such fusing of horizons to occur, the parties must engage as partners in conversation, not merely as participants. We learn from this that the horizon is not a fixed place, that is, it is not a fixed point of view. However, if there is no shared history and no common horizon, which might be the case in a culturally diverse community, there can be no community common sense. In short, there will be no common basis upon which counsel

²³⁵ Gadamer, above n 22

²³⁶ Noam Chomsky, *Syntactic structures* (Mouton, 1st ed, 1978) 21. It 'is defined by giving its alphabet (i.e., the finite set of symbols out of which its sentences are constructed) and its grammatical sentence.'

²³⁷ Gadamer, above n 22, 271-3

and jurors might carry on the type of hermeneutical conversation that Gadamer envisages. As Mootz explains Gadamer's idea, 'all understanding is founded on a decentring "fusion of horizons," an experience that is placed in sharp relief when two conversationalists find the path of their dialogue taking on a life of its own.'²³⁸

To comprehend Gadamer's viewpoint, one needs to know that his teacher was Martin Heidegger, whose theories, expressed in his influential work, *Being and time*,²³⁹ underpin my discussions in Chapter Four. Heidegger, re-defined on his own philosophical drafting board the nature of human beings as subjects, each ensnared in traditional prejudices, or presuppositions, that shape their consciousness. Thus, his idea of self as *Existential* suggests an entity separate from that about which one wants to know. But, Heidegger rejects any notion of isolation. His rendering of the term human being is 'Dasein', which literally translates as 'being there.'²⁴⁰ We can never be separate from the world. We are at the same time, in it, and outside it. We cannot distinguish ourselves from it. We are *Dasein*. But, Heidegger stresses, Being is finite. Being is time. Being is that path between birth and death. In that sense, death is the horizon to which, if we are authentic human beings, we must project our being. This means that one has to put predispositions at risk if one is to question what it means to be human.

It is clear that Gadamer has built on his teacher's notion of horizon. The idea of projecting oneself towards that horizon is at the centre of Gadamer's arguments, although, he discusses putting one's predispositions at risk from a different perspective than that from which Heidegger defines *Dasein*. Gadamer gives us the idea of 'Bildung,' which he envisages as differing from what a community more generally considers its culture. He views *Bildung* as an essential element of 'man' as a historical being, embodying the collective memory of the

²³⁸ Mootz, above n 32, 502

²³⁹ Martin Heidegger, *Being and time* (John Macquarrie and Edward Robinson trans, Blackwell Publishers, first published *Sein und Zeit* (seventh edition), 1962)

²⁴⁰ Ibid

community, the source of the community's collective consciousness. I analyse the nature of collective consciousness founding on collective memory in Chapter Five.

In the meantime, as I develop the two themes of this current chapter, it helps to understand that, at a different conceptual level, Gadamer's *Bildung* aligns with Heidegger's concept of Dasein. I begin in Part A with an examination of how the trial functions as a seminal speech event. Then, in Part B, I examine the tools of the trade with which courtroom advocates toil.

PART A: How the trial functions as a seminal speech event

The effect of courtroom architecture and the regalia of authority

In her work on the symbolism of courtroom space, Laurie Kadoch writes that the significance of the trial as a ‘seminal speech event’ is that the rules of evidence become the rules of discourse not to encourage storytelling but to deconstruct the story in pursuit of a reasoned outcome. This is the Rationalist Model of adjudication that Professor of Jurisprudence, WL Twining developed. He is a prominent member of the Law in Context movement, and I examine his model later in this section. Briefly, for now, the model aims at rectitude in decision-making, which stems from correctly applying substantive law to ‘true facts,’ obtained ‘through the accurate evaluation of relevant and reliable evidence by a competent and impartial adjudicator applying the specified burden and standard of proof.’²⁴¹ Kadoch asserts that ‘scholarly conversations; about the trial focus primarily on what evidence gets in or can be kept out, rather than upon the effect of the use of a particular mode of language on the thought processes of jurors.’²⁴²

Kadoch observes that the consensus amongst scholars is that ‘storytelling’ is the most ‘effective tool of persuasion’ at trial.²⁴³ However, she argues that, from its beginnings, the Anglo-American trial aspired to achieve a Rationalist Model characterized by rectitude; hence the development of Rules of Evidence.²⁴⁴ The Rationalist Model rests on two premises. The first has its genesis in the social history of law, specifically, the trial by ordeal of the Middle Ages, when God was an essential component of Rationalism’s rectitude. Kadoch argues that rectitude still is an essential component, albeit without the deity’s imprimatur. This leads into the second premise, the linguistic function in managing the orality—or narrative—of the trial, which is dependent upon the presence of numinous symbolism (an

²⁴¹ Kadoch, above n 101, 2

²⁴² Ibid 5

²⁴³ Ibid 79

²⁴⁴ Ibid 2

echo of God’s presence) in the courtroom. She argues that symbolism of the courtroom space affects both interaction and the interpretation of the interaction. Therefore, we need to harness numinous symbolism to help the rules of evidence guide the trial narrative away from storytelling to its ‘rational core.’²⁴⁵ I expand the notion of numinous symbolism in the next section.

The linguistic function to which Kadoch refers ‘is related to and has been dependent upon the presence of God in the courtroom.’²⁴⁶ She contends that the significance of these premises to the oral event—the trial—is threefold. *First*, God or the symbolic presence of God was purposefully transported from the trial by ordeal into the Anglo-American courtroom²⁴⁷ as an integral part of the early attempts to form a Rationalist Model of adjudication. *Second*, as trial procedure gradually developed into a speech event, the need for rules that advanced the goals of the Rationalist Model emerged.²⁴⁸ *Third*, Kadoch proclaims that, ‘although the linguistic function of the rules is so inherent to the rationalist operation of the trial, and the presence of God and the trepidation of spoken language are such integral components of that function, it is surprising how conspicuously absent the topics are from any current scholarly dialogue about the courtroom, the trial process, or the Rules of Evidence.’²⁴⁹ This absence, and the lingering echo of God’s presence, to which she refers drives my discussion, which follows.

Ritualized actions as a “lingering remnant of God’s presence at trial

Kadoch contends, correctly, I believe, that courtroom architecture and the regalia of authority give force to the transmission of the oral message, and shape the reception of it. She explains that ‘the embedded remnant of ancient ritual, belief, and the symbolism that survive’²⁵⁰ still

²⁴⁵ Ibid 79

²⁴⁶ Ibid 3

²⁴⁷ For my discussion of Kadoch’s argument, I accept that the need for rectitude and its consequent rules of evidence apply equally to the development of Anglo-Australian criminal court rules of procedure.

²⁴⁸ William L Twining, *Theories of evidence: Bentham and Wigmore* (Weidenfeld and Nicolson, 1985); William L Twining, *Rethinking evidence: exploratory essays* (Basil Blackwell Ltd, 1990)

²⁴⁹ Kadoch, above n 101, 4

²⁵⁰ Ibid 77

influence the trial and the linguistic rules that guide it. It starts with the oath, which, whether by affirmation or by Bible, is a lingering remnant of God's presence. The very act of giving the witness the opportunity to decline the Bible in favour of an oath of affirmation ensures it. It might only be symbolic, but it begins to define the narrative space. This is an element of Etlin's numinous space. Numinous space in the courtroom is the ambience created by architecture and semiotic placement of an authority figure to invoke a mood suggestive of a presiding deity or spirit. Any presence of a divine authority is, at most today, symbolic. However, the creation of such space, and the firmly observed rituals of court procedure impose an authoritative power that guides, and often controls, interactions between officers of the court and witnesses.

Kadoch draws on Etlin's work to argue, 'the equivalent to the metaphorical character of a place is to be found in the narrative arrangement of the space. Expressive character has its counterpart in the expressive qualities of space that reflect values.'²⁵¹ Etlin also asserts that ritualized actions are significant. They profoundly affect the nature of the interaction between courtroom officials and witnesses. 'Participants take cues from place when determining operative linguistic rules.' She asserts that lawyers know the 'unique rules' of discourse of the courtroom discourse.

The witness is made aware of [their] duty to tell the truth by the characteristics of Etlin's "numinous" space. And the jury is reminded not only by the judge of their duty to interpret the discourse according to the rules provided, but also by Etlin's "narrative and expressive" space. The lay audience, on the other hand, is not made aware that special language is being spoken or of the multiple aspects of the discourse. They may interpret the trial's interactions to be "simply storytelling."²⁵²

However, although the judge will explain the rules, and the jury's obligation to honour them, especially the rules of propensity and relationship evidence, the jurors often will not know

²⁵¹ Etlin, above n 176, 77

²⁵² Kadoch, above n 101, 18

why the rule applies in some circumstances and not in others. My case study attests to this assertion.

Kadoch makes the point that the regalia of authority in the courtroom are a faint echo of the authority that God wielded even in—especially in, it should be stressed—the trial by ordeal. The court does not need expressly to summon God to the bar; it simply needs to retain the numinous symbolism that bespeaks God to underscore a rationalism mode of evidence based on rectitude. God is not “there” in the way he was there in the trial by ordeal, but the trial process retains sufficient of his presence to preserve the pre-eminence of rules of evidence based on rationalism with rectitude.²⁵³ Yet, the justice system, in searching for assurance of legitimacy through the institution of the jury, places great store on community common sense.

In some sense, though, common sense is pragmatic and is at odds with an authoritarian Rationalist Model based on rectitude, with its foundation in the authority of God. The ritual of courtroom discourse, which retains its numinous symbolism, imposes its rules at the same time as it tells the jury to use its community common sense. I examine this apparent conflict in the next section.

A new discussion of the linguistic function of rationalist rules, and trepidation of spoken language.

Did Enlightenment empty and intellectualize the concept of *sensus communis*?

Hans-Georg Gadamer quotes the 18th century German Lutheran theologian, Friedrich Oetinger’s appeal to common sense—*sensus communis*—as a tool to limit the claims of science. “The *sensus communis* is concerned only with things that all men see daily before them, things that hold an entire society together, things that are concerned as much with truths and statements as with arrangements and patterns comprised in statements...”²⁵⁴ That, though, introduces a contradiction. The Rationalist Model that Kadoch describes uses the

²⁵³ Twining, above n 248, 185-6

²⁵⁴ Gadamer, above n 22, 27

trappings of ritual based on God to imbue courtroom discourse with its authority. The trial process allows all who present testimony to promise to tell the truth with or without declaring obeisance to God's omnipotence. That is to say, the process allows them to swear on the bible, or to take an oath of affirmation. However, courtroom architecture and regalia retain the echo (even if gradually softening) of God's essentialness. Rules of evidence maintain the authority of the rationalist method. Trial held before a judge sitting alone vests in the judge the authority to apply the law to the facts to reach a decision. But, trial before jury entrusts interpretation of the rules of the Rationalist Model to *sensus communis*, or common sense. Historically, as we have seen in Chapter One, the perceived omnipotence of God heavily influenced the formation of *sensus communis*, or common sense. Gadamer is aware of the contradiction, as his earlier quoting of Oetinger illustrates. He emphasises his awareness, quoting Oetinger again, "the ratio governs itself by rules, even without God; but this sense [*sensus communis*], always operates with God."²⁵⁵ That is to say, a communal sense invoked the presence of God pre-Enlightenment to grant privilege to "sensible truths" over rational truths.

Heidegger's influence is clear. *Dasein* and *Bildung* similarly define the essential human being. Moreover, the essence of truth—authenticity as Heidegger describes it—is intimated in the respective titles of the seminal works of teacher and student. *Being and time* are connected to the extent of envisaging time from the moment of birth up to the horizon of death. Human as Being can only find their authenticity by considering it in the perspective of the ultimate horizon of death. *Truth and method*—not truth through method it must be emphasised—correlate, but one is not causative of the other. Truth will be realised only through shared horizons in conversation. Method must not subjugate the revelation of truth.

Theologically based *sensus communis* reduced to a post-enlightenment corrective

Christianity was Anglo-Australian law's wellspring, and its reduction to a pool paved the way for a more secular humanism to replace it. During the Renaissance, the faithful could

²⁵⁵ Ibid 28

embrace humanism as an extension of religious belief. God's plan, they believed, was that humankind should pursue the values of humanism, such as the dignity of the individual, the celebration of optimism in the powers of human reasoning, and a rediscovery of the pleasure of life.²⁵⁶ However, propagators of anti-religious influences disdained the God-centred beliefs of medieval times and arrogated humanism to pursue social and political objectives. Humanism had considerable influence because it emphasised human welfare without resort to God. It relied instead on the power of human reasoning. Richard Norman argues that humanism is an alternative to religious belief because of the human capacity for art, literature, and imagination.²⁵⁷ He cites Bertrand Russell's speech, '*Why I am not a Christian*', to the National Secular Society in 1927. 'According to Russell, the natural ally of humanism is not religion but science. Religion and science are seen to be in conflict with one another and a belief in the powers of human beings to make a good world for themselves is contrasted with the craven tendency of human beings to abase themselves before a god.'²⁵⁸ Gadamer acknowledges that by the late eighteenth century, theologically based *sensus communis* certainly had weakened to a corrective. He explains, 'that which contradicts the "consensus" of feelings, judgments, and conclusions—i.e., the *sensus communis*—cannot be correct.'²⁵⁹ This negative function, he claims, shows that the German Enlightenment 'emptied and intellectualized' the concept.²⁶⁰

But, widespread death of God theology gained its secular significance well before the Enlightenment. Mirjan Damaška reminds us, 'Angevin²⁶¹ juries dispensed justice in England

²⁵⁶ Philosophy Dictionary, Answers.com, <http://www.answers.com/humanism&r=67>

²⁵⁷ Richard Norman, *On humanism*, Thinking in action (Routledge, 2004). Norman is a former professor of Philosophy at the University of Kent, and a committed humanist.

²⁵⁸ Ibid 5. See also Kaye Anderson, *Race and the crisis of humanism* (Routledge 2007). She argues that British colonial encounters with Aborigines in Australia from the late 1700s precipitated a crisis in the then current idea of what it was to be 'human'. She says, too, that 'the failure of various efforts to settle and Christianise Aborigines, precipitated the emergence of rival theories of 'unimproveability.' 100

²⁵⁹ Gadamer, above n 22, 29

²⁶⁰ Ibid 29

²⁶¹ Angevin refers to the Angevin Empire period of the 12th and 13th centuries. Its English rulers were Henry II (1154-89), Richard I (1189-99), and John (1199-1216).

long before formal evidence doctrine crystalized.... (partly) in the desire to influence decision-making by occasional, amateur triers of fact.’²⁶² And, as we saw in Chapter One, the Crown instructed these self-informing juries that, when the facts were not clear, ‘it will be requisite to speak from belief or conscience at least.’²⁶³ But, as the self-informing juries ‘retreated before juries which required instruction in court’—God now proving unavailing—corroboration rules ‘were always numerous and acceptable in a variety of contexts. So were mandatory instructions to the jury on evidentiary matters.’ Hence, Damaška adds, ‘Common law was thus never averse to legal instruments specifically designed to affect analysis of evidence.’²⁶⁴

Sir Thomas Smith in his *De republica Anglorum*²⁶⁵ makes clear that, by the 16th century, the common law had embedded the de-emphasis of personal conviction as a decisional criterion. Moreover, an empanelled jury would be hearing many cases on any given day, and for any juror inclined to indulge his faith, there were incentives to encourage him (they were always men) to do otherwise. Smith writes of the jurors departing to consider their verdicts, ‘And there is a bailife to wait upon them, and to see that no man doe speak with them, and that they have neither bread, drinke, meate, ne fire brought to them, but there to remaine in a chamber together till they agree.’²⁶⁶ Fulfilling a social media role of his time, Alexander Pope used his classic mock-epic narrative poem about human frailties, *The Rape of the Lock*, to shock his readers to awareness of jury trial scorn for human rights.

Meanwhile declining from the Noon of Day,
The Sun obliquely shoots his burning Ray:
The hungry judges soon the Sentence sign,

²⁶² Mirjan R Damaska, 'Free proof and its detractors ' (1995) 43(3) *American Journal of Comparative Law* 343-346

²⁶³ Plucknett, above n 2, 129

²⁶⁴ Damaska, above n 262, 346

²⁶⁵ Thomas Smith, Sir 1513-1577, *De republica Anglorum* (Cambridge University Press, 1982)

²⁶⁶ Ibid 114 According to Smith, by the time they have done with hearing the evidence and altercations of all prisoners, ‘it is commonlie dinner time, the Judges and Justices goe to dinner, and after dinner return to the same place.’ If the jury is not ready, they engage in other business ‘to drive out the time’. When the jury is ready, the foreman delivers a one or two word verdict, ‘the one is deadlie, the other acquiteth the prisoner.’ Neither judge nor justice can ‘reverse, alter or change that matter.’

And wretches hang that Jury-men may Dine;²⁶⁷

His is a caustic assessment of the trial process at that time.

The diminution of God's perceived role in the secular affairs of humankind prevailed into the modern era. In the 20th century, Antoine de Saint Exupéry, used metaphor to propose a distinctly secular understanding of the cause and effect of God's putative death. In his contemplative work, *The Wisdom of the Sands*, he presents conflict of beliefs metaphorically to suggest an alternative point of view, 'When faith burns itself out, 'tis God who dies and thenceforth proves unavailing.' He does not present the putative death of God as a cause, but as an outcome. God is not dead, faith is. Implicit in this observation is the possibility that, though faith needs an object, it does not have to be sacred.²⁶⁸ It does not matter whether one believes there is, or ever was God, whether God has died, or whether humankind has always been on its own. Literature, in this example, suggests another way of looking at how the Enlightenment era might have occasioned the emptying and intellectualizing of *sensus communis*.²⁶⁹ It is the faith in something that underpins the *sensus communis* one needs to understand. Profane will work as effectively, just so long as the profane belief is accepted inter-subjectively. As corollary, if there is no sustaining communal belief, there can be no *sensus communis*—sacred or profane. This raises the question of what, after the enlightenment, a jury can reasonably represent. A further question then, is whether common sense reflects deep-seated cultural values or prevailing community standards (perhaps masquerading as values), which can be transient and contingent.

It is problematic to lift a form of jury trial and the behaviour of jurors from its contextual history and submit it to evaluation against modern values and standards. Although one can

²⁶⁷ Alexander Pope, 1688-1744, *The rape of the lock* (Scolar Press, 1969). One reviewer describes it as a 'momentary glimpse of the world of serious affairs of the world of business and law...an echo of the real world.' C.E. Nicholson, 'A world of artefacts: *The rape of the lock* as social history' in Harold Bloom (ed), *Alexander Pope's The rape of the lock* (Chelsea House Publishers, 1988)

²⁶⁸ de Saint Exupéry, above n 43, 48

²⁶⁹ My introduction of example from works by Alexander Pope, and Antoine de Saint Exupéry foreshadows my discussion in Chapter Six about how law might profit from a cross-discipline approach to theory.

say the jury in the trial that Smith describes was representative (geographically at least), his description encourages the inference that it is not a logical leap from there to a claim that representation furthered the cause of justice done and seen to be done. James Whitman observes that ‘English law guaranteed itself a technically adequate accusation, and technically adequate witness testimony, by empanelling a jury to testify and convict.’²⁷⁰ Therefore, the history of a technically adequate trial by judge and jury is elevated to the status of metaphor of justice done and seen to be done; and, the metaphor becomes the reality, on which a social history—especially when illuminated by literature—can throw light.²⁷¹ And, in that form, can help explain a tendency in the law academy of today to look at the social history of law in a way that consigns God to a footnote on superstition.

But, to focus on my earlier question, if there is no communal underpinning of belief—in someone or something—can there be a true *sensus communis* that informs the jury? Or, do jurors merely bring their individual intuitions to bear on their deliberations?²⁷² And, if they do, might intuition be as much an indulgence of lawyers as of laypersons? Might intuition influence courtroom discourse? I address these questions in the next section.

The role of intuition in organization of criminal courtroom discourse

In their work on criminal behaviour, Paul Robinson and John Darley²⁷³ contend that social science evidence shows that judgments people make about deserved punishment—especially

²⁷⁰ Whitman, above n 126, 129

²⁷¹ Le Goff, above n 207. Central to this issue is the decision either to analyse history as *événementielle* [that is, the history of events], or as human, that is, social history. To focus on human history renders the barrier separating objectivity from subjectivity frangible. Le Goff says that it is ‘generally admitted’ that history is human, not natural history. He quotes French archaeologist and historian, Paul Veyne. ‘Human history would become nonsensical if we were to ignore the fact that men have goals, ends, intentions,’ without which there would be no life narrative, only a series of discrete snapshots of moments in time. Ibid 102. On the other hand, Le Goff contrasts this with the viewpoint of French Marxist philosopher and sociologist, Henri Le Febvre, ‘Not man, I repeat, not man, never man. Human societies, organised groups’. Ibid 106-7. But, how can it be other than man or woman when talking about the origins of a jury of one’s peers?

²⁷² In Chapter Five, I examine jury discourse and consider some false assumptions about common sense and common community values.

²⁷³ Robinson and Darley, above n 191

in ‘core’ criminal wrongdoing—are not reasoned, but intuitive. Moreover, even education or life experience does not play much part in these judgments, at which they usually arrive quickly and with ‘strong feelings of certainty.’ Importantly for counsel wishing to understand better how to influence a jury, the authors argue that the reasons people reach this state of certainty with such judgments are ‘inaccessible’ to us.²⁷⁴ The problem—Robinson and Darley maintain—is these judgments are frequently wrong. Furthermore, trained professionals are as likely as non-professionals are to make these intuitive judgments even within their own area of specialization, and then to act on them.²⁷⁵ Therefore, they contend, ‘it is useful to distinguish between decisions arrived at by reasoning, and decisions with similar content but arrived at via intuitive processes.’²⁷⁶ Intuitive decisions are ‘heuristic,’ that is, based on experience, in contrast to reasoning processes, which are conscious and deliberative.

One can deduce from their contention that professionals and non-professionals are equally prone to intuiting wrong judgments, that those who work in the justice system are just as likely as laypersons to be prone to ad-lib judgments. For example, while debating a Bill in the Western Australia parliament²⁷⁷ to reduce the number of allowable peremptory challenges, the Shadow Attorney General admitted, ‘I always thought it was important as counsel, if there was a predominance of men on the jury, to use my challenges to ensure there were some women on the jury, or vice versa, or to try to see some Indigenous people balloted on to the jury when a good mix of the community was wanted.’²⁷⁸ By implication, he reasons that random selection has stacked the jury; he was merely unstacking it, relying on his intuition that women and men, and Indigenous people, will process evidence differently. In each instance, the shadow Attorney General offers no evidence to support the intuition. So, the question is whether the organization of courtroom discourse is heuristic, or conscious and deliberate. Intuitively, one would say they are both. In the next section, I seek a substantive

²⁷⁴ Ibid 4

²⁷⁵ Ibid

²⁷⁶ Ibid

²⁷⁷ Western Australia, Parliamentary debates, Assembly, Thursday, 24 February 2011

²⁷⁸ Ibid p 1107b-1118 (Mr J.R. Quigley (Mindarie))

answer to the question by examining alternative methods of fact analysis in courtroom advocacy.

Evidence, proof, and fact-finding in courtroom advocacy

I begin my examination of alternative methods of fact analysis with the question that William Twining asks provocatively. ‘What, if any, are the legitimate functions of narrative in *rational* argument by advocates on disputed questions of law and disputed questions of fact?’²⁷⁹ In *Rethinking Evidence*, he ‘challenges’ the role of storytelling in courtroom advocacy. Contrarily, it seems, in his essay, *Lawyers’ stories*,²⁸⁰ he ‘challenges any suggestion that narrative has a marginal role of dubious legitimacy in legal discourse,’ but, as I consider next, he also ‘challenges the converse idea that constructing stories is “the central act of the legal mind” as White and others have suggested.’²⁸¹

Twining made these observations first in a paper published in 1980, titled *Taking facts seriously*,²⁸² ‘which,’ he subsequently remarked with undue modesty in a much later journal article, ‘is quite well known but has made almost no impact.’²⁸³ In that later journal article, Twining cleared up what he saw as mere polite acceptance of his paper and its place in *Rethinking evidence*²⁸⁴, which he hoped would support his thesis that ‘the subject of evidence, proof, and fact-finding (EPF) deserves a more salient place in the discipline of law.’²⁸⁵ Wryly perhaps, he draws on literature to confess a failure to advocate persuasively. ‘Its fate reminds me of a dictum of Karl Llewellyn: “When Cicero made a speech, you said

²⁷⁹ Twining, above n 248, 220. Emphasis in the original

²⁸⁰ "Lawyers' stories", in *ibid*

²⁸¹ *Ibid* 220

²⁸² Originally published in *Essays on legal Education* (Neil Gold ed., Toronto, 1982) and reprinted in *34J. Legal Educ.* 2 (1984) and William Twining, *Rethinking evidence: exploratory essays* (Oxford, 1990)

²⁸³ William L Twining, 'Taking facts Seriously - again' (2005) 55(2) *Journal of legal education* 21 360

²⁸⁴ Twining, above n 248

²⁸⁵ Twining, above n 283, 360

‘no mortal man so eloquent’, when Demosthenes made a speech, you yelled: ‘WAR!’ It seems, he confesses, to have been a failure of advocacy.²⁸⁶

In *Taking facts seriously—again*, Twining explains his challenging the proper role of storytelling in courtroom advocacy, emphasizing the importance within EPF of, ‘constructing, communicating, and countering persuasive stories.’²⁸⁷ Nevertheless, he adds an important footnote: If one believes that stories play an important role in fact-determination, but are also prime vehicles for cheating, then teaching skills of persuasive story-telling raises some difficult ethical issues...’.²⁸⁸ What is more, he takes issue with the agenda of ‘most legal theorists.’²⁸⁹ He asserts that it is ‘odd’ that the relationship between narrative and argument, ‘between “holism” and “atomism,” and questions of coherence’ are not seen as central to theories of legal reasoning and rationality. Thus, what Twining is challenging is not the relationship between narrative and argument, but failure to acknowledge the ‘centrality’ of stories.

The role of narrative in legal discourse and questions about the relations between narrative, reasoning, argumentation, and persuasion are distorted if narrative and stories are only considered in relation to disputed questions of fact in adjudication. Stories and story-telling are also important in investigation, mediation, negotiation, appellate advocacy, sentencing, and prediction of dangerousness, for example. A general theory of narrative in law and legal argumentation needs to encompass all such questions.²⁹⁰

A key point from Twining’s paper is his argument that the ‘label’ “law of evidence” is too narrow, as is—he claims—Wigmore’s focus on “Trial Rules.” Twining prefers to see trial rules in two parts: principles of proof (or logic of proof), and the law of evidence. He sums up his preference in these words:

²⁸⁶ Ibid 360

²⁸⁷ Ibid 364

²⁸⁸ Ibid 364n

²⁸⁹ Ibid 361

²⁹⁰ Ibid 362

The term “the law of evidence” has too strong an association with the exclusionary rules and often leads to the fallacious assumption that the subject of evidence in law is co-extensive with the rules of evidence. See, for example a successful American casebook entitled *Evidence*, which defines the subject of the book as follows: “evidence law is about the limits we place on the information juries hear” . . . This in turn leads to exaggerating the importance of rules . . . and paying insufficient attention to aspects that are not governed by formal rules, such as relevance, weight, and argumentation.²⁹¹

Twining asserts his ‘quite orthodox’ view that our law of evidence is based on the theory that ‘rules of evidence are a series of disparate exceptions to a principle of free proof, meaning ‘principles of practical inferential reasoning.’²⁹² And, he adds the important condition that rules of evidence ‘need to be conceived within a framework of argumentation.’²⁹³ He points out also, ‘a clear distinction needs to be drawn between learning about reasoning and learning how to reason.’ Twining grants that, in its first iteration, his advocacy of this viewpoint failed. Nevertheless, his viewpoint finds confirmation in the work of Gadamer,²⁹⁴ and that of Perelman and Olbrechts-Tyteca,²⁹⁵ and their views, respectively, on conversing to an understanding, and arguing to persuade, which I consider later in this chapter. Further, as one would expect, Twining also accepts the merit of Paul Roberts’s alternative approaches to fact-analysis, namely narrative, and storytelling. But he claims that ‘the literature Roberts cites consists of discussions *about* these methods rather than vehicles for developing the particular skills involved in constructing arguments about questions of fact.’²⁹⁶ His essential point is that a multidisciplinary approach to teaching evidence raises questions on the subject of transferability of ideas about evidence across disciplines, cultures, and different practical contexts.²⁹⁷ For my purpose here, it is the transferability of “ideas” about evidence, rather than the more narrow relevance criterion that is important. Twining contends that,

²⁹¹ Ibid 369n

²⁹² Ibid 370

²⁹³ Ibid 371

²⁹⁴ Gadamer, above n 22

²⁹⁵ Perelman and Olbrechts-Tyteca, above n 12

²⁹⁶ Twining, above n 283, 373. (Emphasis in the original)

²⁹⁷ Ibid 379

Perhaps the central theoretical question should be: how far can we generalize about evidence and inferential reasoning across disciplines, contexts, and types of inquiry. If so, more specific issues that need to be addressed include:

4. What is the relationship between narrative and reasoning in the context of argumentation? To what extent does that relationship vary according to disciplinary and practical contexts? What exactly is meant by the claim that stories help us “to make sense of the world?” What can legitimately be claimed that can be done by narrative that cannot be done by reasoning? ²⁹⁸

It is the differing ideas across disciplines and across cultures that feed into the development of argumentation, which, as I have explained above, is an important element of Perelman and Olbrechts-Tyteca’s work on arguing to persuade. Twining also acknowledges Roberts and Zuckerman’s recognition of Bayesian theory—a statistics model—and its use in the legal context. ²⁹⁹ Although, he does have reservations: ‘Roberts and Zuckerman under the heading of “taking facts seriously,” devote over twenty pages to introducing basic concepts of inferential reasoning, probabilities, and debates about Bayes’ Theorem in legal contexts. It is one thing to consider such debates, it is another to learn how to manipulate the theorem.’³⁰⁰ And, in an accompanying footnote on ‘Bayesians and “Bayesio-skeptics,”’ Twining writes, ‘The main disagreements are about the conditions for the applicability of Bayes Theorem rather than its validity.’³⁰¹ He differentiates Roberts and Zuckerman’s viewpoint from ‘a less skeptical [sic] view’ of Philip Dawid.³⁰² A statistical model at first seems an unlikely aid to understanding the potential for discursive distortion of meaning in courtroom advocacy, especially if, as Richard Posner claims, most judges would not have heard of it.³⁰³ However, I explain in the next section why Bayesian theory—even if those who apply it do not know it

²⁹⁸ Ibid 379

²⁹⁹ Paul Roberts and Adrian Zuckerman, *Criminal evidence xxvi* (Oxford University Press, 2004) 123-32

³⁰⁰ Twining, above n 283,371

³⁰¹ Ibid 371

³⁰² A.P. Dawid, "Bayes theorem and weighing evidence by juries" in Richard Swinburne (ed), *Bayes's theorem* (Oxford University Press, 2002)

³⁰³ Richard A Posner, *How judges think* (Harvard university Press, 2008) 65

by that name—helps reveal the potency of inference and predisposition in adversarial criminal trials, whether before jury or judge alone.

Bayes' theorem and probability

Bayes' Theorem comprises a mathematical treatment of probability, which 18th century mathematician, Thomas Bayes, devised for use in statistics. His formula defines the likelihood of an event happening, by calling up prior knowledge of what had happened in conditions similar to that of an event now in question. Richard Swinburne describes Bayes' theorem as it is concerned with probability in this way:

When from the seventeenth century onward people began to talk about things being probable in somewhat like modern senses and reflected on what they meant, sometimes they supposed there was only one kind of probability and sometimes they supposed there were two kinds of probability – one a feature of the physical world, and the other the probability on evidence that something was the case in the physical world.³⁰⁴

At first glance, Bayes' theorem, as a statistical concept, is an unlikely tool for analysing the way judges or juries reason. But, as I discuss below, Bayesian theory offers a method of understanding judicial and jury preconceptions. I examine first how the theorem might influence the single judge at trial, either consciously or unconsciously. I begin by drawing on Richard Posner's work, *How judges think*,³⁰⁵ because, as he explains judges' application of the theorem, one might infer that this use of prior knowledge, or preconceptions, can lead to arbitrary decisions. That conclusion can lead to a preference for trial by jury—one of the perceived key benefits of which is the avoidance of arbitrary judgments by relying instead on community common sense.

Using Bayesian theory to understand judicial reasoning

Posner argues that although most judges would not have heard of Bayes' theory, they apply it unconsciously. He uses the theory to explore the possibility that non-legalist influences on a

³⁰⁴ Dawid, above n 302

³⁰⁵ Posner, above n 303

judge act subliminally.³⁰⁶ He discusses the probability of a judge responding to a stimulus, in the form of evidence, in the same way that they have responded to similar evidence in the past. He speaks of the judge having formed an ‘estimate of the likelihood’ that testimony will be truthful.³⁰⁷ The judge might derive that estimate from experience of witnesses in similar cases, on a ‘general sense’ of the honesty of the class to which the witness belongs, or even on the manner of the witness ‘striding to the witness stand.’ He calls this a ‘prior probability’. It might, he points out, be unconscious.³⁰⁸ This is ‘*subjective*’ probability³⁰⁹ (His emphasis).

Posner nominates Bayesian theory as the best aid to understanding judicial preconceptions; although he does acknowledge that judges would not themselves use this theory to describe their thought processes. He describes Bayesian theory ‘as a way of systematising the elementary point that preconceptions play a role in rational thought.’³¹⁰ In *How judges think*, he warns his readers—without apology—that he intends to discuss the way judges think in terms ‘likely to alarm readers of a book about judges.’³¹¹ He adds, ‘I do not apologize for these terms or, more generally, for discussing judicial thinking in a vocabulary alien to most judges and lawyers. Judicial behaviour cannot be understood in the vocabulary that judges themselves use, sometimes mischievously.’³¹² Moreover, he contends that nothing in a judge’s training equips them to deal with non-routine cases. The solution, he asserts lies within the discipline of ‘Law and Economics.’

³⁰⁶ Ibid 65

³⁰⁷ Ibid

³⁰⁸ Ibid

³⁰⁹ Ibid 66

³¹⁰ Ibid 67

³¹¹ Ibid 11

³¹² Ibid Posner’s list of descriptors includes: “occasional legislators”; “dissent aversion”; “reversal aversion”; “ideology drift”; “tolerable windows”; “utility function”; Sartrean bad faith”; “option value”; “risk aversion”; “zone of reasonableness”; “monopsony”; “cosmopolitanism”; “authoritarian personality”; “alienation”; “agency costs”; “rule pragmatist”; and “constrained pragmatist.”

Maintaining the “pretence” that judges just do legal analysis.

Speaking from a ‘law and economics’ point of view, Posner compares judges to workers in the private sector, where ‘management by exception’ is the norm. Workers at ‘the bottom of the organisation’ do only routine work, whilst non-routine matters go up the hierarchical ladder. The difference, though, is that judges at all levels handle both routine and non-routine cases. Managers in the organisation call upon workers at the bottom of the hierarchical ladder to handle routine cases. Those workers do what their role requires. They legitimately invoke, what I explain elsewhere as the institutional excuse.³¹³ Posner argues that judges call on a legal equivalent, ‘legalist techniques.’ In fact, ‘judges are committed to using those techniques and usually do so.’³¹⁴ The reason, he postulates, ‘may be a desire by the judicial establishment to maintain the pretence that judges just do legal analysis, that they are entirely rule-bound. But the result is to leave them not only at large but at sea when confronted with a case that cannot be decided by such analysis.’³¹⁵ He cites Friedrich Hayek’s epistemology to suggest that ‘an individual’s classificatory apparatus is the product of idiosyncratic factors of personality and culture rather than the basic hardwired features of the brain....In other words, people see things differently (literally and figuratively), and the way in which they see things changes in response to changes in the environment (footnotes omitted).’³¹⁶ The answer, he asserts, lies in training judges in economics.

Can Law and Economics be the answer to assertions of subjectivity?

Posner maintains that judges who have ‘basic economic skills’ are well equipped to achieve the objectivity for which legalists aim. By which, I infer, he refers to those who demand a strict adherence to the principles (at least) of law.

In areas such as antitrust, contract law, public utility... financial law, intellectual property, procedures and remedies, large swathes of environmental law...criminal and family law, the courts have adopted an economic approach to the resolution of those issues that are not governed by a rule sufficiently

³¹³ Luban, above n 66, 129

³¹⁴ Posner, above n 303, 76-7

³¹⁵ Ibid 77

³¹⁶ Ibid 67, 8

hard-edged to be applicable to the facts of a case without the need to consider the social consequences of the decision.³¹⁷

But, I submit that, if law is to be more than ‘a mere system of rules’ that must address, what Jeanne Gaakeer describes as ‘questions of value and community’³¹⁸ then economic rationalism is inadequate. One could conclude that judges’ use of prior knowledge, or preconceptions, can lead to arbitrary decisions. That conclusion can lead to a preference for trial by jury, as I have noted above. However, as I explain, both here and later,³¹⁹ community common sense can also be judgmental.

A contrary view on value-free jury decision making

Professor A P Dawid, a prominent proponent of Bayesian statistics, has used the Bayes’ theorem to examine how juries weigh evidence. Although, he acknowledges that statistics and law appear not to have much in common. But, ‘[o]n closer inspection it can be seen that the problems they tackle are in many ways identical—although they go about them in different ways. In a broad sense, each subject can be regarded as concerned with the *interpretation of evidence* (Emphasis in the original)’³²⁰ Dawid echoes the views of Thomas Kuhn in that he describes the current state of legal analysis as being similar to science before Galileo, who had the ‘revolutionary idea’ that scientists should examine how the world works, not how the old books says it *should* work. The authority of Aristotle controlled their thinking; they were ‘loth to concede the need to break away from old habits of thought’.³²¹ Dawid suggests that ‘[i]t may be equally revolutionary to suggest that lawyers might look at

³¹⁷ Ibid 77

³¹⁸ Gaakeer, above n 45, 26

³¹⁹ In this section, citing a contrary view to that of Richard Posner, and, later, comprehensively in Chapter Five.

³²⁰ A.P. Dawid, "Theorem and weighing evidence by juries" in Richard Swinburne (ed), *Bayes's theorem* (Oxford University Press, 2002) 71

³²¹ Ibid

how others have approached the problem of interpretation of evidence, and that they might even have something to learn from them.’³²²

Reid Hastie and his collaborators assert that to conclude that a trial by jury obviates possible arbitrary decision-making by a judge sitting alone is a conclusion too hastily reached.³²³ He gives the ‘shortest shrift’ to, ‘the role of “the juror’s sense of justice” in juror decisions.’³²⁴ He reports that from his and his collaborators’ research, and ‘on the conclusions of many other studies...there is little evidence that jurors depart from the factfinding [sic] task to follow dictates of conscience or to apply their sense of fair play when deciding criminal trial verdicts.’³²⁵ Rather, he selects descriptive models of jury decision-making, based on probability theory, as the preferred ‘academic’ method of evaluating the way jurors process intellectually the evidence before them. He excludes normative theories because, ‘[t]here is little empirical research to evaluate their merits as descriptive theories, and the few results that have been reported suggest they do not describe everyday reasoning processes.’³²⁶ But, he ‘hesitates to generalize’ too far because ‘surely, there are conditions where jurors’ ultimate verdicts are guided by considerations of fairness, equity, and justice that conflict with the “official” legal definition of their task.’ Giving further voice to his hesitancy, he adds, ‘it may be that behavioural scientists have been insensitive to the discrepancies between the “laws of the officials” and the “laws of the community.”’³²⁷ On that note, he acknowledges that there is an unknown factor that influences the application of Bayesian theory. However, he asserts that ‘what constitutes an item of evidence appropriate to input into the belief updating process

³²² Swinburne, above n 302, 72

³²³ Reid Hastie (ed), *Inside the juror: the psychology of juror decision making* (Cambridge University Press, 1993)

³²⁴ *Ibid* 28-9

³²⁵ *Ibid* 29

³²⁶ *Ibid* 29 (emphasis in the original)

³²⁷ *Ibid* 29

[lies] outside the scope of Bayesian theory.’³²⁸ In the next section, I analyse some of the appropriate processes that lie beyond Bayesian theory.

Laws of community beyond the Bayesian scope

In Chapters Five and Six especially, I argue a cross-discipline approach to reminding lawyers and judges to consider questions of value and community. Moreover, in Chapter Six, I contend that literature serves to remind lawyers and judges that interpretation is not passive. It requires that they participate actively in the process, which means being conscious of their own roles in finding meaning.³²⁹ Posner, on the other hand, sees an answer in economics. He does talk about law and literature, but here too he compares them in economic terms. He claims that although a novelist might be an independent contractor, and the judge an employee, the judge’s ‘judicial independence negates this apparent ‘critical difference.’ In fact, it gives ‘him’ greater autonomy than the ordinary contractor has.³³⁰ The risk is that Posner’s metaphor is mistaken for his reality. But, he seems to mix his metaphors by noting an important similarity with literature in the ability of the good judge to ‘influence’ law in the same way as a good writer can influence the development of literature. And, he finds resemblance in ‘the rhetorical cast of their written product.’³³¹ This observation echoes his claim in *Law and literature* that judges use literature only for style—as he thinks they should—not for critical substance.³³² Yet, elsewhere, speaking about judges, he writes,

They might...assess [the same information] differently, for the same reason that their priors were different – because they had different “cognitive structure(s) of organised prior knowledge”, based on such things as prior temperament, personal background characteristics (such as race or sex), life experiences, and ideology... (Footnotes omitted).³³³

³²⁸ Ibid 14

³²⁹ I discuss law and literature comprehensively in Chapter Six.

³³⁰ Posner, above n 303, 65

³³¹ Ibid 64

³³² Richard A Posner, *Law and literature* (Harvard University Press, 1998) 5

³³³ Posner, above n 303, 67

In Chapters Five and Six, I explain how similar considerations that can affect how jurors interpret testimony.

Summary of Part A

To sum up Part A of this chapter. My discussion has revolved around a claim that storytelling is important in extracting substantive meaning from evidentiary testimony. Against this claim, I have posed the view that the probability that interpretation of a story will reveal substantive truth is dependent on diverse—and often divergent—ideas of the reliability. To flesh out this countering viewpoint, I have introduced the discussion of Bayesian theory, which might support a claim that a judge’s Bayesian “priors” (or predispositions) of probability might lead to arbitrary judgments by a judge sitting alone. The question that arises is whether a jury is sufficient safeguard against arbitrary judgment. Intensifying the importance of this question is the admonitory direction that a judge gives to jurors that they must arrive at a verdict that is beyond reasonable doubt. Reasonable doubt imposes a higher threshold, which jurors must cross than probability imposes. I examine the equally challenging consideration that jurors too might have their equivalent of a judge’s “priors” in later chapters, especially, in Chapter Five. The organization of courtroom discourse in trial before a jury must take account of these challenges.

Therefore, in Part B, I expand my argument that standard accounts of language are inadequate to account for the nature of courtroom discourse. Nor, I suggest, is a monolithic hypothesis of language sufficient to interrogate the nature of the language games that the adversarial trial before jury as an oral event encourages advocates to play.

Part B: The language games that courtroom advocates play and the tools of their trade.

Introduction

Wittgenstein advanced the notion that language is a game in which it is only possible to play if one knows the rules.³³⁴ Furthermore, he perceived meaning as that which moves beyond the static rules of grammar, that is, beyond the practice that the rules of grammar express. Andrew Halpin describes Wittgenstein's game as the application of a word multiplying by affinity rather than through applying the rule consistently.³³⁵ Because of diverse meanings given to the word, 'we may fail to grasp what rules are appropriate to govern the proper uses of a particular word. We may fail to see that the same word is being used in different applications governed by different rules of a language game, or even that one word is governed by the rules of a different language game.'³³⁶ So, before going further, I need to consider in some detail the courtroom advocates' tools of trade. I consider them in two parts. First, I consider the rules of the language of the grammarian, that is, as they operate in a monolithic hypothesis of language. In the second part, I examine the social linguists' understanding of language as discourse, which operates at a level beyond the monolithic hypothesis.

The tools of the courtroom advocate's trade

Roman Jakobson talks about a need in structural linguistics to revise the notion of 'the monolithic hypothesis of language.'³³⁷ He explains the need by distinguishing 'scholarly discussion' from—in his example—political conventions, where success is measured by the 'general agreement of the majority or the totality' of those who participate.

³³⁴ Ludwig Wittgenstein, *Philosophical investigations* (P.M.S Hacker and Joachim Schulte trans, Wiley-Blackwell, 4th ed, 2009)

³³⁵ Halpin, above n 15, 124

³³⁶ *Ibid* 125

³³⁷ Jakobson, above n 29, 352 Jakobson attributes this description to Voegelin

The use of votes and vetoes...is alien to scholarly discussion where disagreement generally proves to be more productive than agreement. Disagreement discloses antimonies and tensions within the field and calls for novel exploration...exploratory activities in Antarctica present an analogy to scholarly meetings: international experts in various disciplines attempt to map an unknown region and find out where the greatest obstacles for the explorer are the insurmountable peaks and precipices.³³⁸

Jakobson poses rhetorical questions to those who profess a monolithic hypothesis of language, ‘Have we not realized what problems are the most crucial and the most controversial? Have we not also learned how to switch codes, what terms to expound or even to avoid to prevent misunderstandings with people using different departmental jargon?’³³⁹ He maintains that in any speech community there exists a unity of language with an over-all code, which, however, represents a system of interconnected sub-codes. Moreover, ‘each language encompasses several concurrent patterns which are each characterized by a different function.’³⁴⁰ At the level of linguistic construction, that is beyond the level of sentence, a traditional or monolithic conception of language will not suffice. We need to understand the sub-codes and how they work.

A monolithic hypothesis of language.

A traditional model of language takes a form proposed by Karl Bühler—his “Organon model.”³⁴¹ This is a ‘triadic’ model consisting of an addresser, a message, and an addressee. Bühler limits his model to three communication functions; he names them “Expressive,” “Representation,” and “Conative,” or what he calls “Appeal (*Appell*).”³⁴² Jakobson, for whom Bühler was an influence, refers to the ‘three apexes’ of this model as ‘the first person and

³³⁸ Roman Jakobson, “Linguistics and poetics” in Thomas A Sebeok (ed), *Style in language* (M.I.T Press, C 1960) 350 With this analogy, Jakobson shares with Gadamer the ideas that conversations is then way to reach an understanding of the truth that already exists. I return to this idea later in this chapter. At this point, I am interested in the communication model that Jakobson propounds to optimise message transmission and reception in oral exchanges.

³³⁹ Jakobson, above n 29, 350

³⁴⁰ Ibid 352

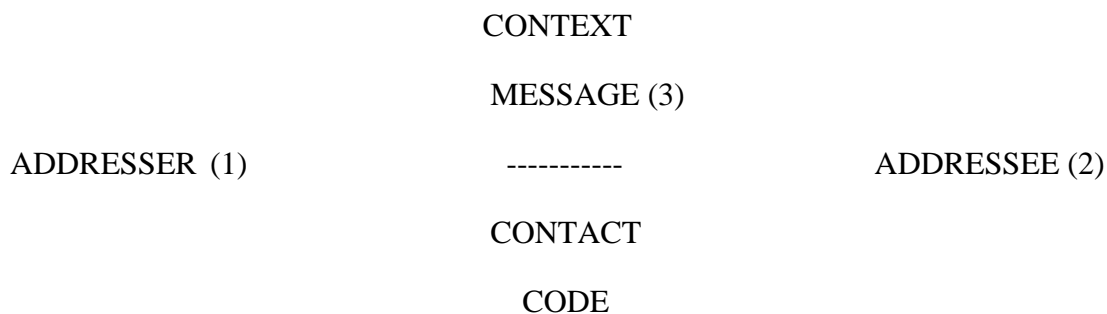
³⁴¹ Karl Bühler, 1879-1963, *Theory of language : the representational function of language / Karl Bühler ; translated by Donald Fraser Goodwin.* (J. Benjamins Pub.Co., 1990) 35

³⁴² Ibid 35

addresser, the second person of the addressee, and the “third person,” properly...someone or something spoken of.’³⁴³

The *Expressive* (Jakobson calls it the ‘emotive function’) is an interjection, or a sound change that expresses something about the attitude of the addresser but does not change the denotative meaning of the utterance. The *Representation* (or referential function) sets the context of the utterance, describes the event, the object, or emotional circumstance of the utterance. The *Conative* aims at the addressee, and is most commonly expressed in the vocative (“I don’t like vegetables, Mum”) or the imperative (“Eat your vegetables, they’re good for you”) form. These are essential elements of a message—the ‘three apexes’—and in the diagram below, I have numbered them one, two, and three to indicate their rank in the hierarchy of constitutive factors of the message.

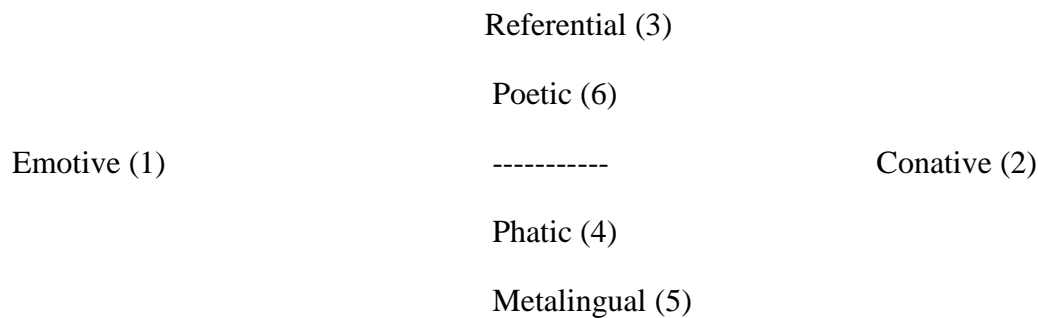
However, Jakobson has modified the model, which now shows that he adds three other constitutive factors and their functions to the triadic model. These are Context, Contact, and Code.



The addresser sends a message to the addressee. But, to communicate the addresser’s intention effectively, the message must have a context, and embrace a code, which is common to the addresser and addressee.

³⁴³ Jakobson, above n 29, 355

Jakobson holds that, the ‘Contact’ is more than a physical channel of communication; it also is a ‘psychological connection between the addresser and the addressee, enabling both of them to enter and stay in communication.’³⁴⁴ This is why he adds the ‘constitutive’ factors, which must be present if communication is to take place.³⁴⁵ Jakobson overlays his constitutive factor on each of the processes in his model to show how they affect the function of language.



The numbers in this diagram reflects ‘the hierarchy of functions.’³⁴⁶ But, they are all essential.

The functions of the constitutive factors

1. Emotive

Through the ‘so-called EMOTIVE or “expressive” function,’ the addresser displays their emotions, that is, their attitudes both to the context and to the addressee. Through this function, the addresser also will signal their understanding of their status and class relative to the addressee. However, Jakobson also notes that the Addresser’s impression of a certain emotion can be true or feigned.³⁴⁷ Therefore, he prefers to use the term ‘emotive’ rather than ‘emotional.’ Whether true or feigned, Jakobson asserts, ‘If we analyse language from the standpoint of the information it carries, we cannot restrict the notion of information to the

³⁴⁴ Ibid 353

³⁴⁵ Fiske, above n 223,37- 9

³⁴⁶ Ibid 38

³⁴⁷ Jakobson, above n 29, 354. (Emphases in the original)

cognitive aspects of language. A man, using expressive features to indicate his angry or ironic attitude, conveys ostensible information.³⁴⁸ Jakobson calls them “expressive tints” and gives as an example the difference between ‘[big] and the emphatic prolongation of the vowel [bi:g].’ He holds that this is a ‘conventional coded linguistic feature. He takes issue with the view that the emotive difference is a non-linguistic feature that, quoting Sol Saporta, is “attributable to the delivery of the message and not to the message.” That point of view, Jakobson emphasizes, ‘arbitrarily reduces the informational capacity of messages.’³⁴⁹

The emotive function is an important element of the oral adversary trial. In the official court transcript of proceedings, the expressive tint of oral discourse is not evident. The context might enable one to infer its presence by merely reading the text, but one can never do more than infer. What is more, the person interpreting the transcript text will bring their own pre-understandings, or prejudices, to the task. Jakobson illustrates the importance of the expressive tint with an anecdote. He tells how an actor auditioning for ‘Stanislavskij’s [sic] Moscow Theatre’ had to make forty different messages from the phrase ‘This evening.’ The actor envisaged forty different emotional situations, and uttered the phrase to suit each situation. The audience had to recognize the emotional situation only from the change in the ‘sound shape’ of the same two words. Jakobson replicated this successful experiment using fifty situations. He records that most of the messages ‘were correctly and circumstantially decoded.’³⁵⁰ An important element of this experiment is that the same actor performed the function in both instances. Moreover, in each instance, the listeners comprised ‘Moscovites’ [sic]. Can one infer a common code? I shall return to the question later. Jakobson accepts Sapir’s claim that in idea generation and communication, the role of language is a paramount

³⁴⁸ Ibid 354

³⁴⁹ Ibid

³⁵⁰ Ibid. Jakobson adds that all the emotive cues ‘easily’ submit to linguistic analysis.

area of study.³⁵¹ However, this does not ‘authorize’ linguistics to disregard the emotive elements of speech.

Jakobson takes issue with linguist, Martin Joos who claims that because one cannot define the emotive elements of speech “with a finite number of absolute categories” they are “vague, protean, fluctuating phenomena...which we refuse to tolerate in our science.”³⁵² He concludes, acerbically, ‘Joos is indeed a brilliant expert in reduction experiments, and his emphatic requirement for an “expulsion” of the emotive elements from “linguistics science” is a radical experiment in reduction—*reductio ad absurdum*.’³⁵³

2. Conative:

The conative is the mental process that the message triggers in the addressee. The message effect might occur by design—as in advertising—or by a direct command. Or, it might be unintended. It might happen because of noise on the communication channel. Noise might stem from faulty communication; the addressee might misread the code the addresser is using, or they might misinterpret the relative status of addresser and addressee. I am talking here only about the oral element of the communication, in other words. I ignore for now such things as gestures, and posture. Appeal court judges are aware of the limitation, which is why they are reluctant to override the opinions about witness demeanour that judges in the original trial have formed.

Jakobson, however, shows how it might work. He describes this ‘emotive stratum in language’ as differing from referential language ‘both by their sound pattern (peculiar sound sequences or even sounds elsewhere unusual) and by the syntactic role.’³⁵⁴ He defines them as being, not components of sentences, but as ‘equivalents’ of them. “Tut! Tut! said McGinty.” Jakobson interprets:

³⁵¹ Edward Sapir, *Language* (1921)

³⁵² Martin Joos, “Description of language design,” (1950) *Journal of the acoustical society of America* 22., 701

³⁵³ Jakobson, above n 29, 353

³⁵⁴ *Ibid* 354

the complete utterance of Conan Doyle's character consists of two suction clicks. The emotive function laid bare in the interjections, flavours to some extent all our utterances, on their phonic grammatical, and lexical level. If we analyse language from the standpoint of the information it carries, we cannot restrict the notion of information to the cognitive aspect of language.³⁵⁵

“Tut! Tut!” works only because Conan Doyle presumes his readers bring the same code to bear on interpretation as he brought to its declaration as words on paper. He can alert his readers to its presence by writing “Tut! Tut! [Tʌt! Tʌt!].” In this demonstration of its function, Jakobson shows he shares the code. Not all cultures do. “Tut! Tut” is, he explains, primarily a British expression. Were counsel in court to rebuke with a “Tut! Tut!” in the form of a two suction click, the court stenographer would need to record it in the form, ‘Counsel interjected with “Tut! Tut!” made by emitting a noise consisting of a two suction click.’ More likely, the stenographer would, as Saporta does, ignore the interjection as merely “attributable to the delivery of the message and not to the message,” unless counsel had uttered the words phonetically—[Tʌt! Tʌt!].

The role of phatic communication

How do we know addresser and addressee do share the same code? Charles Osgood explains that there are as many potential indicators of style in messages as there are features open to variation. For example, he names ‘frequency of the first-person-singular pronoun “I,” pitch variation in speaking, rarity of the vocabulary items employed, frequency of infinitive construction’,³⁵⁶ and so on. Moreover, he claims that potential characteristics of human sources ‘are as numerous as the pooled ingenuity of psychologists and other social scientists can make them.’³⁵⁷ They can include such things as intelligence, occupation, social status, and association alliance.

³⁵⁵ Ibid 354

³⁵⁶ Charles E. Osgood, 'Some effects of motivation on style of encoding' in Thomas A Sebeok (ed), *Style in language* (M.I.T Press, c1960) 294

³⁵⁷ Ibid 294

Osgood differentiates between code styles, according to whether they are idiographic, or nomothetic.³⁵⁸ That is to say, whether the code is particular to specific cases of functioning individuals, or whether it accords with a universal code. Only the nomothetic is bound by rules or laws. The nomothetic style is more evident in the natural sciences, where the primary task is to explain objective phenomena. It tends to generalize, and will not concern us here. The idiographic style is present in the distinctive situation, which is how I portray courtroom discourse. There, idiosyncratic style is also on display. Osgood holds that part of the ‘credo of psycholinguists’ is that events that speakers produce in messages depend upon ‘states and processes in these sources—their habits, their intellectual levels, their motivational and emotional states, their previously developed associations, their attitudes, and so on.’ Other message events are part of the ‘obligatory structure of the code, which [the producer of the message] must learn if they are to communicate at all.’³⁵⁹ One can add variables to this, such as distinction in the ‘momentary situation’ in the speech occasion, or ‘persistent variation in their make-ups as individuals.’³⁶⁰

3. Referential:

This is the third of what are really the self-evident functions of communication. Fiske calls the referential the ‘reality orientation,’ which ought to be the principal aim of courtroom discourse, that is, objective and factual.³⁶¹ Jakobson, although accepting Sapir’s claim that “ideation reigns supreme in language,” argues, “[l]anguage must be investigated in all the variety of its functions.”³⁶² However, context—the referential function—is sometimes ambiguous.

³⁵⁸ Ibid 295 Nomothetic tends toward generalisation. Idiographic tends to specifics.

³⁵⁹ Ibid 294

³⁶⁰ Ibid 294. In Chapter Two, I use a case study to show how this emotive element affects exchanges between counsel and witness.

³⁶¹ Fiske, above n 223, 37

³⁶² Jakobson, above n 29, 353

Keith de Rose³⁶³ claims that context will determine the standard by which we can attribute knowledge of something to a speaker. This is ‘Contextualism.’ Its obverse is Invariantism. As I explained earlier, he argues that a speaker might claim knowledge of something in a context in which they do not think absolute certainty is necessary, but for which they would not think the evidence adequate in another context. One situation requires only a ‘low standard’ claim to knowledge; the other requires a ‘high standard.’ An Invariantist would demand that the ‘high standard’ always prevails. De Rose offers as an example a reply to a question whether ‘Mike is in,’ “yes, I saw his car in the parking lot” as being acceptable if the questioner can substantiate the answer by walking a few paces down a corridor to Mike’s office. However, if the questioner is phoning from the other side of the city and must see Mike urgently to have him sign a document; the acceptable reply would be “I don’t know.” The first situation is low-standard, the second is high standard. Therefore, the contextualist would claim that positively attributing knowledge in the first case is true, and the denial of knowledge in the second case is true also.

He argues that in terms of ‘ordinary language philosophy,’ when a speaker uses ordinary, natural and appropriate language, and is not basing their claim on false beliefs they have about underlying matters of fact, how they naturally and appropriately describe a situation, especially by means of common words, will be a true description. However, in criminal trial testimony, a true description as De Rose describes it, still has the potential to lead a witness into controversy.

For example, in the criminal trial³⁶⁴ in which I was a witness, counsel for the prosecution asked me to point out on an enlarged photographic display the position of the victim of an assault relative to a palm tree outside the home of her alleged assailant. Counsel wanted to establish that my line of sight allowed me to see both the victim and the alleged assailant as I

³⁶³ DeRose, above n 151, 141

³⁶⁴ *The State of Western Australia v Troy Desmond Mercanti* (unreported, WADC, Stone DCJ, 25 February 2013)

approached. As I was explaining this to the court, I noticed a tight-lipped smile, sardonic as I interpreted it, on the face of the accused. He knew, as I did because I live close by, that the palm tree had been removed since the day of the alleged assault, and only days before the trial. Because I was answering the question in Contextualist mode, the fact that the tree was no longer there, seemed irrelevant; it had been there at the material time about which I was testifying. Therefore, I did not think Defence would challenge my testimony on this point, whether or not they knew the tree was no longer there. But, in the intensity of the moment, I interpreted the smile as a smirk, and I reacted to it defensively. I changed from contextualist to invariantist mode. I pointed out that were the court to inspect today the site of the alleged attack, the palm tree was no longer there. Its absence was not pertinent to the facts of my testimony, but my reaction says something about the pervasive power of court semiotics and the numinous space to which Kadoch referred. Seated, whilst counsel stood, and alongside and below the elevated and robed judge, I felt my physical presence diminished. I had come to the court intending to convey the image of an authoritative witness. Irrationally, I now felt I needed to protect my personal authority by answering what I took to be a smirk of superior knowledge of the facts, by showing that I had done my homework. Instead, I had allowed a smirk—which the court transcript could not record—to deflect me from my purpose. In a nanosecond an irrational thought invaded my mind, “what if that tree becomes important, and I am shown to be an elderly man unable to recall situations accurately.” In the event, and self-evident in hindsight, it was a small digression of no consequence, and the invading thought was absurd. However, it illustrates the influence of architecture and regalia, and of numinous space to influence the demeanour of witnesses. It shows that ‘noise’ on the communication channel can take diverse forms.

4. Phatic:

This is the first of what are not-so-evident functions of communication. *The Oxford English Dictionary* describes phatic as words ‘used to convey general sociability rather than to communicate a specific meaning.’ More generally, however, one can describe it as a function to confirm that the channel of communication is still open. One does this when, for example,

there is a silence on the other end of a telephone conversation during one's turn to talk. 'Are you still there?' is our phatic reaction to the disconcerting silence. Thus, as Fiske notes, '[i]t is...orientated towards the ... physical and psychological connection that must exist.'³⁶⁵ How well the phatic communication works is likely to be culturally determined. Bronislaw Malinowski coined the term "phatic communion" in his study of meaning in primitive language, in which he discusses ritualized formulas of which the direct aim is 'binding hearer to speaker by a tie of some social sentiment or other. Once more language appears to us in this function not as an instrument of reflection but as a mode of action.'³⁶⁶ He adds, 'but they are neither the result of intellectual reflection, nor do they necessarily arouse reflection in the listener.'³⁶⁷

The phatic corresponds to Jakobson's 'CONTACT' (His capitalisation) set, and in his use of the term, it has a psychological component that goes beyond ensuring the communication channel is still open. Psychologically, we gain reassurance from an affirmative nod or a murmured "Hmm, hmm" response when we interrupt our own turn in the conversation pair to ask phatically, 'Do you know what I mean?' The expressive tint we apply, and, perhaps, the length of the pause that precedes and follows our question will indicate to the addressee whether we merely seek the affirmation that the channel is still open, or whether we are ceding the conversation turn to them. Clearly, then, an open channel can mean as little as allowing noise to travel through it. However, if one wants understanding, not merely noise, one cannot talk about "contact" without also talking about "Code" and "Context," and the risk of code confusion.

When Andy Warhol exhibited illustrations of 32 varieties of Campbell's soups, the cans changed from a food commodity into a comment on the consumer society of his time. The

³⁶⁵ Fiske, above n 223, 38

³⁶⁶ Bronislaw Malinowski, 1884-1942, 'The problem of meaning in primitive language' in *The meaning of meaning* (Kegan Paul, Trench, Trubner & Co. Ltd, 1946) 296 315

³⁶⁷ Ibid 315. Malinowski emphasises that, although his example is from 'savage' life, the 'binding tissue of words' has its exact parallels in 'every type of linguistic use' in civilized social intercourse.

context (an art gallery) and the framing of the illustrations asked us to look at them aesthetically and metaphorically. Moreover, when I changed “displayed” in my first draft of the opening sentence in this paragraph to “exhibited” in my second draft, I too showed that I knew the code. In a supermarket, cans of soup are displayed; in a gallery, they are exhibited. In the context of discourse organization, understanding how someone talks about what they talk about rather than their lexical choice in what they talk about is important. One is lexical choosing, the other is structural. Of course, in courtroom discourse, we are concerned with both content analysis, and with style. The important point, however, is that when we think we are engaging in content analysis in search of cognitive facts, we more often than not are actually analysing a performance. This is also the province of metaphor, to which I alluded earlier. Counsel has already discerned the cognitive facts; discourse organization is the time to persuade the jury to accept counsel’s interpretation of them.

Later in this chapter, I discuss Gadamer’s ‘art’ of questioning as it applies to the courtroom advocate adage of never asking a question to which one does not already know the answer. The goal of courtroom performance is to persuade the jury to accept counsel’s preferred interpretation of the facts. Therefore, ‘how’ they say it trumps ‘what’ they say, which brings us to metalanguage.

5. Metalingual:

This is using language to discuss language, that is, metalanguage. In the context of my discussion, it identifies the communication code. A can of soup displayed in a sign in a supermarket aisle is food. Photographed, framed, and hung on a wall in an art gallery by Andy Warhol, it is art. Code confusion if not recognized might put addresser and addressee at cross-purposes. Jakobson uses the slogan of the time at which he was writing to make this point. “I like Ike” as a lapel badge did not express personal admiration for Dwight Eisenhower the man, but was a political communication. It said that the wearer supported Eisenhower as a candidate for presidency. The three-word slogan is still common in politics today. It serves the same purpose as the “I like Ike” slogan did when Jakobson wrote.

Jakobson reminds us that we practice metalinguistics every day. Every message we impart or interpret has an explicit or implicit metalingual function. In the famous Andy Warhol example, if we do not share the code, we cannot share his metaphor.

6. Poetic:

Fiske calls the poetic function ‘the relationship of the message to itself.’³⁶⁸ He cites Jakobson’s example of substituting ‘innocent bystander’ for ‘uninvolved onlooker’ because ‘its rhythmic pattern is more aesthetically pleasing.’³⁶⁹ Similarly, I suggest, “Death with dignity” stirs emotions more than the emotionally neutral, “euthanasia.” In its neutrality, it is nevertheless a euphemism for the emotionally disturbing, and criminal act³⁷⁰ of one person aiding another in the taking of his or her own life. “The stolen generation”—a three-word slogan—is emotionally less distressing than a personal account of a child forcibly and permanently wrenched from their parents. ‘Generation’ is a genealogical term that masks the individual human tragedy in each act of separation. The debate moves to the higher conceptual plane of politics, away from the vale of human, personal anguish. Language in context becomes a game. In the courtroom, the story of a little Aboriginal boy stolen from hospital on Christmas day without justification, and ‘given’ to a White foster family will stir emotions and would, more than likely, have persuaded a jury to see it as a foul deed. That the act was a consequence of government policy would not mitigate its foulness.³⁷¹ However, at the abstract level of political debate, the personal tragedy is suppressed. It becomes a different language game, with differing rules.

Language at the level of discourse and the role of shifters.

The tools of the trade of courtroom discourse include what Jakobson labels *shifters*.³⁷² Broadly, shifters are the organizing elements the person who transmits the utterance uses to

³⁶⁸ Fiske, above n 223, 38

³⁶⁹ Ibid 38

³⁷⁰ In Australia, at the time of writing.

³⁷¹ *Trevorrow v State of South Australia (No 5)* [2007] SASC 285 The case, was tried by judge sitting alone.

³⁷² Cf R. Jakobson, *Essais de linguistique generale* (Paris, 1963), Ch. 9

authorize the act by which they do so. The two categories of shifters in the limited application that I need to make my point about the issue of unmediated testimony in adversarial jury trials comprise listening and the explicit signs the utterer—for my purposes, counsel,—employ in their own discourse.³⁷³ I suggest that in the operation of shifters lie the seeds of doubt that the jury receives unmediated testimony.

The listening shifter

Barthes' explanation of how the historian uses the listening shifter is pertinent to counsel working with witness testimony. After all, what is courtroom discourse in a criminal trial but narration of past events, or history? The listening shifter for the historian consists of three relationships. There is the reported event → the act of the informer (in the trial, this would be the witnesses to the event) → and the speech of the historian as utterer (in the trial, this is counsel). In the trial, the listening shifter does most of its work before the trial begins, which means before the court has empanelled the jury. Thus, when the trial gets under way, counsel are not listening in the sense Jakobson uses the word, but engaging in a performative act before the jury as audience.

The performative act is the point at which the second shifter—the explicit signs the utterer engages—determines the nature of the discourse. If an unrehearsed departure from the script threatens the performance, counsel call for an interval—in the form of a *voir dire*—and there, they re-engage the listening shifter. It seems that Barthes regards the informer either as a neutral observer of the historical event, or as a participant in it. In either capacity, the informer gives an unmediated account of it. I suggest that is unlikely to be the case for an informer of history, less likely for a criminal trial witness.

I have focused on Jakobson's listening shifter, which, in the criminal trial before a jury, operates largely before the performative function takes place in the adversarial courtroom. My point is that Counsel interpret the 'core message' of each witness according to cultural

³⁷³ Barthes, above n 203 Under sub-heading One, Barthes explains further “the act of uttering.”

predispositions, or to institutionalized pre-understandings. However, they might not know—or might choose to overlook—the cultural pre-understandings that mould the contextual truth of the witnesses. As they shape the discourse, which best suits their purpose to persuade the jury, they are doing so from an already self-mediated base. Yes, the raw material of counsel's trade is language. However, when they mine it for elements to persuade rather than to convince, are they merely uncovering fool's gold— legal truth?

Word games of contextual truth.

When Australia's first woman Prime Minister, Julia Gillard accused some of her critics of misogyny, her speech attracted worldwide attention.³⁷⁴ Some questioned whether she understood the meaning of the word. A lexicographer from Macquarie Dictionary³⁷⁵ seemed to suggest that it did not matter. Amend the lexicon to conform to the new meaning in social discourse. Interest in the nature of truth according to context is not new, nor is amending the lexicon to give a word a new meaning to conform to contemporary use. It is common in the evolution of language and its semantics. However, ambiguous meaning in courtroom discourse can be more damaging. It can distort communication if the court mistakes the silence (albeit enforced) of the jury as a common understanding of meaning arrived at through use of a shared code when it might actually signal perplexity resulting from code confusion. Worse, the jury might have arrived at a contrary interpretation. The enforced silence of the jury means that phatic communication cannot resolve the potential risk.³⁷⁶

To add to the difficulty of understanding meaning, at least two language games take place in the courtroom. There is one game between—on one side—the officers of the court collectively, and—on the other side—the jury. Then, there is another game—in which only

³⁷⁴ Julia Gillard, *Sydney Morning Herald* (Sydney), 10 October 2012 < <http://www.smh.com.au/federal-politics/political-news/transcript-of-julia-gillards-speech-20121010-27c36.html> >

³⁷⁵ The Melbourne University cites *Macquarie Dictionary* as the authoritative source of Australian English. <http://unimelb.libguides.com/content.php?pid=130967&sid=1123371>

³⁷⁶ When I speak of enforced silence, I am not overlooking the right of the jury to ask the judge to clarify a point of law, or to resolve an ambiguity in testimony. But, because of the nature of confusion over the code—or rules—in play, neither jurors nor counsel might be aware that confusion exists.

the lawyers know the rules—between counsel and witnesses. Take, for example, the exchange between Defence and Witness in the recent criminal trial in the District Court of Western Australia to which I referred earlier.

Witness: Initially, all I heard were the screams. And it were the screams that suggested to me that I needed to see...

*Defence: He heard screams. What they suggested to him is – it-it – irrelevant... Anyway, he’s not allowed to say it.*³⁷⁷

To that last declaration, the collective unspoken retort from the jury might well be—querulously—“says who?” Or, more politely questioning, “why not?” Which reaction counsel evokes might depend on how persuasively counsel has engaged the rules in discourse. And, on how well counsel has engaged with the jury!

Although the witness could have structured the phrase “And it were the screams that suggested to me...” more elegantly, the rules of grammar do not prevent him expressing it that way. In the game the witness was playing (and, more than likely, the jury), the rules allowed him to use the phrase ‘...suggested to me...’ to develop his narrative of the screams as communication. In his game, they screamed “terror,” not merely rage or a reaction to an unpleasant and unheralded occurrence. In the game the lawyers were playing, the rules did not allow for inferences.

There was only one game for the jury as interpreters. An implicit rule of that game was that the witness was to communicate the unmediated facts of the matter of which they had knowledge. Another way of looking at this is that the jurors are spectators of a conversation that leads to a “text,” which they must interpret. That is to say, the interpreter has a conversation with the text, out of which they develop an understanding of a new reality. I will

³⁷⁷ *The State of Western Australia v Troy Desmond Mercanti* (unreported, WADC, Stone DCJ, 25 February 2013)

return to the point later. However, in the illustrative example I have used above, the jury was not to know that in a *voir dire* hearing, which took place before this witness had presented his testimony, the court had decided that witness inferences were not part of the message. The lawyers had changed the rules of the game (importantly, though, not the rules of evidence). But, in playing to those rules, they had pre-understandings that were not available to the jurors. Therefore, the jury must draw its own inference, in spite of the absence of an essential component of the message. Different rules create a different context, and can produce a different truth.

Although Wittgenstein did not offer a completely developed example of an actual word game, Halpin suggests how it might play. We see how the word we are examining works, and decide that, even if its uses are diverse, the use is ‘coherent.’

Suppose that in our observations we come across some inconsistent usage which cannot be accommodated within a coherent body of rules. Wittgenstein allows for this possibility—we simply acknowledge that there are two different games going on: the players of one game although they appear to be playing with the same word are in fact playing a different game to the players in the other game... This means we cannot enter the game through the word.³⁷⁸

This means that Wittgenstein’s language game is not only linguistic, but gains coherence from the practice ‘not merely of what is said, but of what is spoken about, the practice of using words in a particular context.’³⁷⁹

Halpin puts forward a suggested solution. We need only ‘select’ the appropriate practice, and use the word in that context. But, he suggests that if we rely on the practical context to set the parameters of the game, we cannot rely on determining the grammar of the word, or the rules of the language game to show us reality. ‘[T]he confused state of the language game simply reveals our confusion over the way things are in that particular practical context.’³⁸⁰ For

³⁷⁸ Halpin, above n 15, 129

³⁷⁹ Ibid 129

³⁸⁰ Ibid 130

example, in my case law example, because the court does not explain the *voir dire* context to the jury, each individual can be playing different language games.

Prosecutor: *And what happened when you approached her to within two metres?
What was the next thing that happened ?---*

Witness: *A man appeared, yelling loudly at me.*

Prosecutor: *Okay. Now, for legal reasons, we're not going to go into the words
that he may have spoken, **if any**, to you?---* (my Emphasis)

Witness: *I understand.*

•••

Prosecutor: *Okay. But - so this man approached. He was, I think you said,
shouting. **What sort of volume are you talking?**---*(my emphasis)

Witness: *Loud.*

The question and answer exchange I have quoted is a performance; it does not elicit new information. However, although the witness knows it is a performance, and the lawyers know it is a performance, the jury might not also surmise it is a performance. Counsel and judge cannot know whether jurors also realize that.

The phrases ‘If any’ and ‘What sort of volumes are you talking’ point to an ellipsis in the message. It is, as Wittgenstein seems not to resolve, a clash between meaning and training. The lawyer trains to work around the problem of inadmissibility. To insert ‘if any’ and ‘what sort of volume are you talking’ might appear an honest request for facts about which the lawyer has no inkling. On the other hand, it might be deceitful. It is, in my example, an attempt within the rules of the game to imply—with a metaphorical nudge and a wink—to the jury that the accused said something that the court thinks is too inflammatory for them to hear. It is a form of cheating, which, in sporting parlance, falls under the euphemism, “gamesmanship.” In the exchange above, the witness enters into the game only to the extent of offering a single word response. The witness knows that a better description of the

shouting would be “angry” or “enraged,” but he also knows that response would break the rules of this game to which the court has bound him.

In the courtroom contextual game, lawyers reach agreement on rules, not meaning

Wittgenstein’s language games idea explains what is happening. It does not validate it. The lawyers have reached an understanding, not of meaning, but of rules. They have also reached a tacit understanding about the need to control what happens in open court to ensure that development of the narrative of the case does not pass to witnesses.³⁸¹ Thus, within the rules about which they have reached an understanding, they also have reached an understanding about meaning within that context. However, this points to a likely difference between what those operating outside those rules see as the optimum way of communicating meaning to the jury, and the process that the lawyers prefer. I explore that difference in the next section.

The dialogic path to reaching an understanding

I begin my exploration with Gadamer’s proposition that conversation is the way to meaning. Then, I introduce the views of Perelman and Olbrechts-Tyteca on rhetoric.³⁸² I explore Francis Mootz’ statement that Gadamer and Perelman share opinions on ‘the dialogic character of understanding, the inadequacy of neo-Kantianism as an account of knowledge, and the overriding ethical imperative of holding oneself open to questioning and challenges rather than proceeding as if one is possessed of apodictic truth.’³⁸³

Partners in conversation must not talk at cross purposes

Gadamer holds the view that true conversation ‘has a spirit of its own’ that leads, not follows, participants to a conclusion. He contends that the language in which it is conducted ‘bears its own truth within it... that it allows something to “emerge” which henceforth exists.’³⁸⁴ He explains that to engage in dialogue requires that the participants do not ‘talk at cross

³⁸¹ I elaborate, and provide illustrations of how they do this in Chapter Two (above)—the case study.

³⁸² Perelman and Olbrechts-Tyteca, above n 12

³⁸³ Mootz, above n 32, 499

³⁸⁴ Gadamer, above n 22, 345

purposes.³⁸⁵ Therefore, of necessity, dialogue consists of a question and answer format, the first condition of which is that ‘the other person is with us.’ He adds, ‘[w]e know this only too well from the reiterated yesses of the interlocutors in the platonic dialogues.’³⁸⁶ As monotonous as these repeated “yesses” might be, they do signal ‘the inner logic’ that the conversers use to develop their dialogue. He adds,

To conduct a conversation means to allow oneself to be conducted by the object to which the partners in the conversation are directed. It requires that one does not try to out-argue the other person, but that one really considers the weight of the other’s opinion. Hence it is an art of testing. But the art of testing is the art of questioning.³⁸⁷

Gadamer talks of ‘partners’ in conversation, not ‘participants.’ One can participate in a conversation whilst intending to argue the other person down. As a partner in conversation, one works with the other to develop an understanding. His description, “partner,” is apposite to the nature of the communication process—the art of questioning—that he describes. When Gadamer talks of the ‘art’ of questioning, he means something more than a knack or flair. Those terms suit better the performance of the courtroom advocate when they are asking a question to which they already know the answer. That is, when the questioning serves the purpose of persuading the jury, not the purpose of eliciting new knowledge. Gadamer requires more.

For we have seen that to question means to lay open. As against the solidity of opinions, questioning makes the object and all its possibilities fluid. A person who possesses the “art” of questioning is a person who is able to prevent the suppression of questions by the dominant opinion. A person who possesses this art will himself seek for everything in favour of an opinion.³⁸⁸

The question and answer performance from my case example, which I introduced earlier in this chapter, differs from the opening up process that Gadamer promotes. Had the prosecutor

³⁸⁵ Ibid 330

³⁸⁶ Ibid

³⁸⁷ Ibid

³⁸⁸ Ibid

and witness engaged in dialectic—that is, discussion—rather than having to comply with the defence need to make a strong case out of a weak one we would have discussed the actual words the accused used. The rules of evidence—strictly applied—had shut down the opportunity to question all possible meanings of that confrontation. Another viewpoint is that defence had argued more strongly to persuade the judge in the *voir dire* of his need than the prosecutor had argued his rebuttal of the need. One can claim this because the rules of evidence are clear on the need to establish probative value if the court is to admit testimony, but the *voir dire* transcript shows that the means of arriving at that decision are not clear-cut.³⁸⁹ In any event, the decision had reduced the question and answer processing of the witness' testimony to argumentation. The dialectic that Gadamer espouses is, as he states, 'the art of thinking.'³⁹⁰ It is dialogue on the path to *an* understanding.

In Gadamer's art of 'real' dialogue, '*an* understanding' is not the same as 'understanding.' Understanding a communication means that the words and the grammar comply with language rules as Chomsky explains it.³⁹¹ Thus, one can still exercise one's own prejudice without reflection. In contrast, *an* understanding, in Gadamer's opinion, already resides within the language of the conversation; the question and answer process has merely revealed it. From that moment on, therefore, *an* understanding is the new reality. It is common to all partners in the conversation.

Someone who wants to know something cannot just leave it a matter of mere opinion, which is to say he should not hold himself aloof from the opinions that are in question.... The speaker... is put to the question... until the truth of what is under discussion... finally emerges....[T]he art of using words as a midwife, is certainly directed towards people who are the partners in the dialogue, but it is concerned merely with the opinions that they express, the immanent logic of which is unfolded in the dialogue. What emerges in its truth is the logos, which is neither mine nor yours and hence so far transcends the

³⁸⁹ See full transcript at Appendix two

³⁹⁰ Gadamer, above n 22, 330

³⁹¹ Chomsky, above n 236, 21. It 'is defined by giving its alphabet (i.e., the finite set of symbols out of which its sentences are constructed) and its grammatical sentence.'

interlocutors' subjective opinions that even the person leading the conversation knows that he does not know.³⁹²

Of course, 'an understanding,' even if it is common to the partners, can still be prejudiced. An understanding might simply mean that each partner shares a cultural code. For example, earlier I used the expression 'I had done my homework,' which in my culture is code for I had checked my facts. For someone from a different culture, the expression might merely confuse. More insidiously, a shared cultural code can have unjust consequences for an accused who displays the attributes of a feared or misjudged minority group.³⁹³ Thus, an important aspect of Gadamer's idea is that prejudice is not a barrier to fruitful conversation; it is an inherent part of it. He argues that for any participant in a conversation to come to it without prejudices would be to exist outside of history. If there is no history, there is no common basis on which to carry on the conversation.

Indeed, Gadamer claims that only with the advent of the Enlightenment did prejudice acquire its negative meaning of 'false judgment.' He cites German legal practice in which prejudice meant only a preliminary judgment before reaching a final verdict. In other words, it is a preliminary judgement arrived at 'before all the elements that determine the situation have been finally examined.... Thus, "prejudice" certainly does not mean false judgment, but is part of the idea that can have a positive and a negative value.'³⁹⁴ Any negative consequence ultimately depends on the 'positive validity, the value of the provisional decision as a judgment, which is that of any precedent.'³⁹⁵ He describes these prejudices as forming a horizon that moves, moulds, and eventually fuses with the horizon of the other partner to

³⁹² Gadamer, above n 22, 368

³⁹³ I return to this issue in Chapter Five.

³⁹⁴ Gadamer, above n 22, 240

³⁹⁵ Ibid 240

yield a shared understanding, which becomes the new reality.³⁹⁶ We learn from this that the horizon is not a fixed place, that is, it is not a fixed point of view.

The question and answer game that opposing counsel play does not apply the ‘pre-understanding that motivates and shapes all later interpretive encounters,’ which Gadamer proposes.³⁹⁷ The game opposing counsel play is ego centred, which means it is concerned with counsel’s own needs or interest. Each plays to win, that is, to persuade the jury to the cogency of their argument. Conversely, conversation to the point of reaching an understanding is not binary; there is no winner and loser. What Gadamer proposes is ego decentring. As Mootz cites Gadamer, ‘all understanding is founded on a decentring "fusion of horizons," an experience that is placed in sharp relief when two conversationalists find the path of their dialogue taking on a life of its own.’³⁹⁸ Thus, he continues, ‘a conversation yields understanding when two people, working from their own prejudiced starting points, find common ground sufficient to develop a topic that informs both participants.’³⁹⁹ Therefore, the route to understanding through conversation is verbal.

As I wrote in the introduction to this chapter, if there is no shared history and no common horizon in a culturally diverse community, there can be no community common sense. That means there will be no common basis upon which counsel and jurors might carry on the type of hermeneutical conversation that Gadamer envisages. In fact, the trial process generally comprises many conversations in which members of the jury are not participants, let alone partners. Arguably, they are spectators of conversations, which lead to a “text,” which they must interpret. This thwarts a necessary condition of reaching an understanding through conversation. This raises the question of the difference between convincing and persuading, and of the manner in which conversation and argumentation differs. In the next section, I

³⁹⁶ Ibid 271-3

³⁹⁷ Mootz, above n 32, 502

³⁹⁸ Ibid 501

³⁹⁹ Ibid, 502

analyse the difference Perelman and Olbrechts-Tyteca assert exists between ‘persuasion and action’ on the one hand, and between ‘conviction and intelligence’ on the other hand.

Perelman and Olbrechts-Tyteca on arguing to persuade

Perelman and Olbrechts-Tyteca talk of argumentation and its relationship to rhetoric.

Argumentation, they contend, does its work in the realm of ‘the credible, the plausible, the probable, to the degree that the latter eludes certainty of calculations.’⁴⁰⁰ That is also the dominion of courtroom discourse, which exemplifies the Perelman and Olbrechts-Tyteca contention that what is self-evident, does not need arguing. They put it this way: ‘we cannot develop a theory of argumentation if every proof is conceived of as a reduction to the self-evident.’⁴⁰¹ Thus, their study is of the discursive techniques that allow one to persuade a receptive mind to accept the proposition one offers for judgment. Their point, when one applies it to the courtroom advocate, is that the aim is not to insist on ‘the mind’s adherence’ to a thesis that is proportional to the degree of self-evidence of the proposition offered for assent.’ Rather, it is to induce or to increase the mind’s acceptance of (that is, ‘the mind’s adherence to’) theses offered for agreement. That is they structure an utterance so that it seems so logical as to be irrefutable. It is, as I explain later, quasi-logical. In fact, they emphasize, ‘It is good practice not to confuse, at the beginning, the aspects of reasoning relative to truth and those relative to adherence, but to study them separately, even though we might have to examine later their possible interference or correspondence.’ Nor can it require that the adherence identify self-evidence with truth. In due course, we need to consider the extent to which argumentation interferes with, or corresponds to, substantive truth. In the first instance, all we need is to understand the nature of courtroom discourse as persuasion, which means being aware of the theory that underlies it.

⁴⁰⁰ Perelman and Olbrechts-Tyteca, above n 12, 1

⁴⁰¹ Ibid 4

The distinction that Perelman and Olbrechts-Tyteca propose expresses indirectly the connection between ‘persuasion and action’ on the one hand, and between ‘conviction and intelligence’ on the other hand. Persuasive argumentation is only valid for a particular audience; convincing argumentation ‘presumes adherence of every rational being.’⁴⁰² They acknowledge that the distinction between convincing and persuading is ‘unprecise [sic] and in practice must remain so.’⁴⁰³ To make their point, they cite the comment by Claparède in the preface to his ‘*La genèse de l’hypothèse*’ that he only agreed to publishing a manuscript in response “to the request of Madame Antipoff, who persuaded (but did not convince) me that the publication of these investigations was desirable.”⁴⁰⁴ They explain the action Claparède took by suggesting that Madame Antipoff convinced him with her argument, but he did not believe she would convince others with the same argument. That is to say, Claparède did not differentiate—at least for publication—between persuasion and conviction. The differentiation might be slight but in ignoring it, an action that it motivates, might not be so slight. I might argue, for instance that Claparède succumbed to vanity, and then later sought to justify his decision. It was just a momentary surrender to vanity and the consequences did no one any harm.⁴⁰⁵ However, a juror who has been persuaded by an argument that could not convince other jurors has to make a more difficult decision. They can stand firm against the derision—or, in the extreme, hostility—of the other jurors. Or, although not convinced, they can succumb to the persuasive attraction of being at one with their fellows.

Kant on persuasion as mere illusion

On the other hand, Kant introduces a moral consideration. He claims that when the subject reaches a judgment on a matter, we cannot ‘subjectively’ distinguish persuasion from conviction. However, this does not matter ‘so long as the subject views its judgment simply

⁴⁰² Ibid 28

⁴⁰³ Ibid 29

⁴⁰⁴ Claparède, “La genèse de l’hypothèse,” archives de psychologie, vol. XXIV, introduction. Cited in ibid 45

⁴⁰⁵ Of course, my interpretation might reflect a cultural disposition to see an act from which a personal benefit accrues as intentionally self-serving.

as a phenomenon of its own mind.⁴⁰⁶ It is only when they question whether the grounds for their reaching the judgment would be effective on others that they have means of ascertaining the ‘private validity’ of it, of ‘discovering that there is in it the element of mere persuasion.’⁴⁰⁷

Perelman and Olbrechts-Tyteca distinguish their views on the difference between persuasion and conviction from that of Kant in his *Critique of pure Reason*, in which he concludes,

If a judgement is valid for every rational being, then its ground is objectively sufficient, and it is termed a conviction. If, on the other hand, it has its ground in the particular character of the subject, it is termed persuasion.⁴⁰⁸

Kant calls persuasion ‘mere illusion.’ In the grip of that illusion, a reason for arriving at a judgment is subjective, albeit the one who judges regards it as objective. Therefore, that judgment can be valid only for the one who judges, and, ‘as a phenomenon of the subject’s mind ‘cannot be subjectively distinguished from conviction,’ but only in private. One must acknowledge ‘the element of mere persuasion’ and not try to bind others to that judgment as if, objectively, it were a substantive truth.⁴⁰⁹

The mere illusion of which Kant speaks has something in common with the uncertainty of self-deliberation. When we persuade our self of the morality of a decision to act in a certain manner, how do we know whether we have invoked a substantive truth to arrive at this decision? How do we resolve the potential dissonance of self-interest and the conscience call of moral rectitude? In the next section, I give an example from my illustrative case study of how one might rationalize a decision, and discuss the implications.

⁴⁰⁶ Kant, above n 39, 747

⁴⁰⁷ Ibid

⁴⁰⁸ Ibid

⁴⁰⁹ Immanuel Kant, translated by T.K. Abbott et al, Great Books of the Western World (GBWW), vol, 42, *Kant*, (Great Books of the Western World (GBWW) T.K. Abbott et al, vol, 42 trans, Encyclopaedia Britannica, Inc, 1952) 240

Self-deliberation and the phenomenon of rationalization

Immediately following the incident to which, in my case example, I was witness, I did not consciously think about why I crossed the road to investigate it. My reaction to the scream had been instinctive. It was only after the police later had questioned me directly that I thought about whether I needed to clarify my action, although in neither word nor in manner did they suggest other than that they merely wanted the facts. Nevertheless, I felt a need to justify myself. Was I a neighbourhood busybody? Or, was I the Good Samaritan? In my testimony at trial, I was presenting myself as the Good Samaritan. Defence wanted to discredit me by portraying me as a neighbourhood busybody intruding into what they wanted to depict as a mere domestic quarrel. In opting for the Good Samaritan version, had I persuaded, or had I convinced, myself.⁴¹⁰ In the privacy of my own conscience, it did not matter. In the courtroom, the jury held a man's freedom in their control. Defence counsel had to persuade them that it did matter.

Was Defence's concern real or feigned? Were he and I—as advocate and witness respectively—each playing the game with a clear conscience? This is the essence of Kant's insistence on morality being an element of such a game. Chaignet contends, 'When we are convinced, we are overcome only by ourselves, by our own ideas. When we are persuaded, it is always by another.'⁴¹¹ Perelman and Olbrechts-Tyteca elaborate: 'Just as one attaches more importance to arguments presented in a closed session than to those presented at a public meeting, the secrecy of self-deliberation seems to guarantee its value and sincerity.'⁴¹² However, they dispute the philosophers' suggestion that, because speech directed at another is 'simply appearance and illusion,'⁴¹³ the methods of one's own thought ought to be the only method worthy of a philosopher's interest.

⁴¹⁰ I acknowledge that, a neutral reader of my account might question whether I am rationalizing, or even recollecting selectively in my own interests.

⁴¹¹ Chaignet, *La rhétorique et son histoire* quoted in Perelman and Olbrechts-Tyteca, above n 12 41

⁴¹² Ibid 41

⁴¹³ Ibid; Kant, above n 39, 747

On the other hand, William Twining draws attention to some of the deficiencies of orthodox evidence scholarship.⁴¹⁴ It tells us, he argues, ‘almost nothing about how the rules of evidence operate in practice, about the actual mental processes of witnesses, triers of fact or other participants, nor about any aspects of the actual dynamics of information-processing in litigation.’⁴¹⁵ Twining gets to the core of the problem. If one accepts Chagniet’s viewpoint, self-deliberation is an internal negotiation between persuasion and conviction. How the battle plays out determines the potential for simple ‘appearance and illusion’ to deny the truth of the self-deliberating outcome when we try to present an ideal self to the external world. As I discussed earlier, Isocrates succinct analysis of the quandary is constructive. ‘The arguments by which we convince others when we speak to them are the same as those we use when we engage in reflection. We call those able to speak to the multitude orators, but we regard as persons of sagacity those who are able to talk things over within themselves with discernment.’⁴¹⁶

When the rules of evidence prevent a witness from revealing their mental processes, those rules might also block substantive truth.

Conclusion: The play’s the thing

The premise of the jury receiving ‘raw’ facts is that they receive them unmediated. However, for the jury to reach an understanding of those facts would require a conversation of the type that Gadamer describes. In the case examples I have used, that did not happen. Moreover, the nature of criminal trial procedure precludes that possibility in any adversarial criminal trial.

My discussion so far has suggested ways in which the work of counsel, and the actors as they develop the narrative of their case, mirrors that of a play as a work of art. Gadamer discusses it in terms of self-representation, which he describes as ‘being derived from the idea of play,

⁴¹⁴ Twining, above n 248, 130

⁴¹⁵ Ibid 130 Again, the theory of argumentation crosses over into the practice of competence and performance in language.

⁴¹⁶ Isocrates, Nicocles, § 8 quoted in Perelman and Olbrechts-Tyteca, above n 12, 41

in that self-representation is the true nature of play...The playing of the play is what speaks to the spectator, through its representation, and this in such a way that the spectator, despite the distance between it and himself, still belongs to it.’⁴¹⁷ In this analysis, the role of the jury first as spectator to the performance and, ultimately as interpreter and critic is evident. Therefore, the performance—in my discussion, courtroom advocacy—is not an isolated object for the spectator to judge apart from the play. Gadamer points out that, for the spectator who reflects on the conceptual underpinning of the performance—whether it occurs on a stage or in real life—it is all one if it is to be a meaningful whole. So, if, as Gadamer claims ‘in the performance and only in it—as we see most clearly in the case of music—do we encounter the work itself,’⁴¹⁸ then we must conclude that the performance only resonates perfectly when it is mediated, that is to say, when it is performed. This, in itself is significant to the trial. It resounds more abundantly when one considers the trial’s oft-remarked relationship to religious performance in which the ritual mediates the rite it celebrates.⁴¹⁹

We need to understand discourse as performance and the linguistic tools counsel use to manipulate language as an instrument of communication that aims to persuade. In the next chapter, I discuss how the instrument of language with which lawyers in court toil, can yield differing versions of reality. And, I propose a role for theory in courtroom discourse to help unearth the real gold—substantive truth—that can remain buried in the mediated storytelling of witnesses.

⁴¹⁷ Gadamer, above n 22, 104

⁴¹⁸ Ibid 104

⁴¹⁹ Cf, Kadoch, above n 101

CHAPTER FOUR: Standard accounts of language and law inadequate to assess distortion of meaning in courtroom discourse

Introduction

I have shown that the adversarial trial before jury is a structured oral event founded on ritual, and bound by the rules of evidence. In Chapters Two and Three, I have examined the influence of these constraining influences on the organization of courtroom advocacy. In Chapter Two especially, I have used my case study to show how counsel, arguing from opposite sides of the point in question, and each claiming that a desire to preserve the probative integrity of witness testimony guides them, will try to convince the judge to accept their assessment of what testimony is acceptable. Once the judge has ruled, counsel will each present their narrative of the case to the jury within the newly defined constraints. Counsel, as rhetors, will each try to persuade, but not necessarily convince, jurors to accept their narrative as the embodiment of substantive truth.

A presumed strength of the adversarial trial is its orality. The adjacency pair—chain maxim—process is, on the face of it, an effective way of getting to the certitude of the rational core of witness testimony. However, unlike storytelling, which favours the witness account of events, the adjacency pair approach aims at the “what” rather than delving deeper into the “why” of what happened. As my case study in Chapter Two shows, the rules of evidence suggest that in the “what” lies probative integrity. But, as Martin Heidegger claims, there is no intentional act unless there is a performer.⁴²⁰

It seems self-evident, therefore, that, if an intentional act requires a performer, it also requires a “why.” A “why” requires a consciousness, which is an aspect of the mind, not merely a response to a mechanistic stimulus from the brain. An intentional act exists only when a

⁴²⁰ Heidegger, above n 239

person performs it. Therefore, the act and the performer of it give unity of meaning. On that understanding, in my case study, there is no unity of meaning in Witness's act of crossing the road without the consciousness from which the act emanated. Without that unity, the narrative is incomplete.

Significantly, in my analysis of the illustrative case study, "Witness crossed the road" has become a kind of rhetorical trope; it denotes something beyond that act of crossing from one side of the road to the other. That missing "something" is the need for a narrative of the case to encompass a unity of meaning. Therein lies the potential for discursive distortion of meaning. So, in this chapter, I draw on the thoughts of Martin Heidegger and Hans-Georg Gadamer to address my argument that the new diversity of society creates a need to turn to socio linguistics to interpret and understand the meaning in the narrative of the case, which each counsel tries to persuade the jury to accept. In this way, Gadamer's shared horizons and Heidegger's Being-in-something have in common a need for an *existentiale*.⁴²¹ This is a state of mind beyond corporeality. It is also beyond grammar.

I develop the theme in this chapter, drawing also from Perelman and Olbrechts-Tyteca's notion that the universal audience is merely a concept, a perception of what such an audience might accept as fact and truth, on which counsel base their own worldview. I elaborate on the theme by analysing Gadamer's notion of *Bildung*, which Gadamer envisages differing from what a community more generally considers its culture. He views *Bildung* as an essential element of 'man' as a historical being, embodying the collective memory of the community, the source of community value. In many ways, *Bildung* aligns with Heidegger's concept of *Dasein*. In basic terms, *Dasein* is the peculiarly human experience of being. It involves being aware of one's own existentialism, or chosen way of living. It is within these deeper

⁴²¹ As I discuss below in this chapter, Heidegger relates *Existentiale* to his *Dasein*, which differs from what one might describe as a concrete way of existing. "Being-in-the-world" as Heidegger understands it must not be confused with categorization. It is a state of mind beyond corporeality.

understandings of ways of being that one can find the “why” to an act, and hence reveal its true probative essence.

I explore the concepts I have identified in this introduction under the broad heading of seeking meaning beyond corporeality and beyond grammar. I examine each concept under five sub-headings: 1) managing discourse to direct the narrative, 2) conversing as a route to understanding, 3) developing attitude, and relationship to the world through the living act of speech, 4) rhetor and hearer assigning meaning according to their own understanding of the world, and 5) the structure of assertion as communication.

Meaning resides in a state of mind beyond corporeality, and beyond grammar

1 Managing discourse to direct the narrative

On the surface, persuading the jury seems to be a straightforward challenge for counsel. Understand the nature of the predispositions that the jury, as a particular audience, brings to its decision-making, and play to it. Manipulate the organisation of discourse to persuade jurors that the narrative, which counsel is building for them is the narrative that a universal audience would accept. However, the perception of what a universal audience would accept might itself be a product of counsel’s own ways of viewing the putative world of a universal audience. So, we are now concerned with the nature and organisation of discourse, which requires in the first instance understanding the quality of the collective mind of the target audience.⁴²²

Gadamer distinguishes the particular audience—the jury—from a universal audience by engaging the notion of ‘*Bildung*.’ The essence of his theoretical conception of *Bildung* is that it derives from memory, not memory as a mere psychological function, but as an essential element of ‘man’ as a historical being. In other words, it is the collective memory of the

⁴²² Perelman and Olbrechts-Tyteca, above n 12, 26

community—the source of community values.⁴²³ But, the rules of evidence, and the structured nature of the adversarial trial as an oral event, stand in the way of genuine conversation, which is the essential element of Gadamer’s search for truth through a shared horizon. Furthermore, if counsel misunderstand the nature and extent of cultural diversity in their jury, there is the risk that they organize discourse against a criterion of common sense, which they understand only in terms of their own constructed universal audience. That will magnify the potential for discursive distortion of meaning.⁴²⁴

Manipulating witnesses to fit Counsel’s imagined plot

I have shown in my illustrative case study in Chapter Two how counsel, as authors of the courtroom narrative, seek to manipulate the witness to fit the plot they “imagine.”⁴²⁵ The manipulation might start with the blatant, as in this example from my case study.

Witness: Sworn

Defence: *I’d ask that my learned friend speak up, please. He does have a habit of really mumbling into his socks, and I’d like to be able to hear him.*

Up to this point, Prosecutor had not spoken since Witness entered the courtroom.

Judge: Yes

Defence: *It’s the only grounds(?) that I really - - -*

Judge: *I’m sure [Prosecutor] heard that. So, yes, keep your voice up, please.*

The trial had started on 25 February 2013, and this witness (the authorial “I” of this thesis) testified for the first time on 7 March, leading him to infer that this apparent request was in

⁴²³ I examine community values, and the concept of community common sense in Chapter Five.

⁴²⁴ I return to this risk in Chapter Five.

⁴²⁵ I use the word ‘imagine’ in the analogical way Barthes uses it to explain the narration of history. Cf, Barthes, above n 203, para 2

fact a performance. If Prosecutor's imputed mumbling had been a continuing problem since the trial began—nine days earlier—Defence would have raised the issue before now. Witness knew that Defence had already won a battle—waged in the presence of the judge but in the absence of the jury—to have certain parts of his testimony declared inadmissible. This later performance was for Witness. Defence wanted him to understand where the power in the battle for control of narrative development lay. It was meant to unsettle the witness. Let the Wittgensteinian games begin.

This kind of manipulation is transparent, and Witness, now alerted, can deal with it, as I have shown in Chapter Two. The jury, too, having watched the relative performances of counsel for several days, probably is alert to this obvious attempt to assert command. However, unlike Witness, jurors cannot be aware of the manipulation of his testimony that has taken place in the *voir dire* hearing. They might be aware that counsel and judge have discussed it in their absence. However, from the moment the witness takes the stand, jurors will deal only with what is before them, which includes the flagrant and obvious gamesmanship⁴²⁶ they had just witnessed. I do not concern myself with this overt type of competitiveness in this chapter. I concentrate on the discursive organisation of language, which is subtle, strategic, and manipulative. In most cases, it will be culturally determined, or at least culturally influenced.

A new cultural diversity creates the need for a new rhetoric of courtroom advocacy.

The increasing diversity of society creates the need to draw on lessons from socio linguistics to interpret and understand meaning in the narrative of the case. But, in courtroom advocacy to a jury, meaning—like beauty— is in the eye of the beholder. The apparent straightforward challenge for counsel is not as clear-cut as it might seem. I described it earlier as grasping the nature of the prejudices that inform the jury as a particular audience, and manipulating discourse to persuade them that the narrative counsel puts to them is what a universal

⁴²⁶ This word has a gender bias, but I use it because it is in general use in our culture, and means something more than its euphemism, “competitiveness.” It connotes a tactic that, whilst not illegal, is unconventional. The user seeks not to clarify, but to gain an advantage. Certainly, it fails Gadamer's idea of a shared horizon in conversation, which aims to reach *an* understanding.

audience would accept. However, as I also pointed out, the perception of what a universal audience would accept as truth might be intuitive. But, in counsel's intuition as a product of their own prejudices and predispositions, lies the risk of discursive distortion. The insensitivity of the standard accounts of language to the relationship of social entities with language use means it falls short of revealing this risk.

In Chapter Three, I raised two points that are germane to this topic. First, is Mootz's⁴²⁷ observation that the route to understanding through conversation is verbal (what I call, in the setting of the adversarial trial, "oral," to avoid confusion with a wider understanding of verbal as meaning to express in words). Second, is the notion of horizon, and, as Mootz explains Gadamer's contention, if there is no shared history and no common horizon, there can be no hermeneutical conversation.⁴²⁸ In this circumstance, there can be no revelatory conversation. Gadamer uses the term horizon in the phenomenological sense of historically effected consciousness. That is to say, he is talking of a history of experience as perceived, not necessarily as objectively real. Thus, partners in dialogue willingly put their own historically influenced prejudices at risk to establish a larger context in which to reach an understanding. That is, they agree upon a common framework of meaning, in which to come to an understanding of meaning in a particular circumstance. Gadamer calls this a fusion of horizons. Moreover, as Mootz explains, in this broader understanding, even when interpreting a text, one must appreciate that before there was a text there was first a conversation, in which language is the intersubjective medium.

However, I have also argued that standard accounts of language do not explain adequately the nature of courtroom discourse. I have cited Barthes' contention that we should not regard language as a direct reflection of reality. I have explained why his theory suggests the need to understand better how the manipulative use of language in courtroom discourse leads to mediated meaning, which distorts the raw reality from which it is drawn. Rules of evidence

⁴²⁷ Mootz, above n 32, 610

⁴²⁸ Ibid 501

and court procedures reflect Law's preoccupation with language competence, and with faith in the detached coherent legal viewpoint. Here too is a site of possible conflict between the rational and the reasonable. Counsel will argue that testimony, which does not advance their preferred narrative of the case, and which, in their opinion, does not add to the probative value of evidence ought to be inadmissible. As we have seen in my illustrative case study, the judge—having recourse to the rules of evidence, and to criminal court procedures—will decide. Yet, to use only a standard account of language to assess probative value of testimony is to overlook the relationship of social entities with language use. The justice system needs something more than mere language competence as a measure of the jury trial as legitimate standard-bearer of universality and truth in justice. And, as I argue in the following section, the adversarial trial before jury is not a conversation forum, as Gadamer would envisage it. It is a forum in which counsel argue to persuade, not to convince. I begin by clarifying why it is important to understand the difference between persuasion and conviction when counsel organize their courtroom discourse.

2 Conversing as a route to understanding

Perelman and Olbrechts-Tyteca insist that the rhetor must always have regard to the quality of minds they address. This means that, because the rhetor needs to persuade rather than convince, they must tailor their argument, not only to the occasion, but also, to the quality of many independent minds. In this instance, they argue, 'nothing constrains us to limit our study to a particular degree of adherence characterized by self-evidence, and nothing permits us to consider *a priori* the degrees of adherence to a thesis proportional to its probability and to identify self-evidence with truth.'⁴²⁹ The jury is such a composite of potentially independent minds, which 'must be resolved into its constituent parts for the purpose of argumentation.'⁴³⁰ But, it must be reformulated into a single entity to make a decision.

⁴²⁹ Perelman and Olbrechts-Tyteca, above n 12, 4

⁴³⁰ Ibid 31

In distinguishing their notion of conviction and persuasion from Kant's explanation in the *Critique of Pure Reason*, Perelman and Olbrechts-Tyteca contend that facts and truth are the reality, which is the province of a universal audience. Values, on the other hand, are the preferences of a particular audience.⁴³¹ But, the universal audience is a concept, not an aggregation of real people. The arguer uses this conceptualised universal audience as a benchmark to establish which self-evident data the particular audience will accept. So, the arguer fails to persuade if they base their argument on premises that their audience will not accept.

In framing courtroom discourse to persuade the illusory audience—the rhetor's paradigm of a universal audience—courtroom advocates move beyond practices that standard accounts of language can explain. The jury, as representative of a particular audience, differs from a universal audience, and counsel, as speakers, must adapt to that difference. Yet, at the same time, they must persuade the jury that the verdict they want it to reach is the verdict any reasonable member of the universal audience would reach. However, if counsel is to manage the organization of courtroom discourse to achieve their preferred case narrative outcome, they must first understand the nature of the universe from which their jury is drawn. Although intuitively one might think of the jury as a particular audience and the wider community it represents as the universal audience; courtroom advocates must not understand it this way. In fact, the jury is a specific audience, and the community from which it is drawn, is the statistical specific audience universe. I emphasize that for jury trial argumentation, a particular audience is the statistical universe; the universal audience is a construct of the arguer. Counsel must understand the difference at the conceptual level before they can understand individual differences of the particular audience—of which the jury is a specific representative. They need to understand that community common sense might in fact, not be common.

⁴³¹ Ibid 66

One way of looking at counsel construction of the narrative of the case is that jurors confront two truths in conflict. They must wait for one or the other counsel to persuade them that their truth is the truth that accords with community common sense. How persuasive each counsel is will depend on how clearly they understand the difference between persuasion and conviction as a precursor to action. How persuasive they are will depend also on how clearly they understand the difference between the particular audience—influenced by community standards and values—and the rational universal audience, which is committed to facts. Christopher Tindale suggests, ‘[f]rom the point of view of evaluation, argumentation may address us through our particular involvements, in groups, families, religions, and so on. But if it addresses us simply as reasonable people without recourse to the values of the group or religion, or other involvement, then we are addressed as a universal audience.’⁴³²

Perelman and Olbrechts-Tyteca use this method of evaluation to clarify their rules for constructing universal audiences, as Tindale explains.

In each case, one begins with a particular audience on which imaginative operations are performed. Thus, we might set aside the local features of an audience and consider its universal features. Or we might exclude from the particular audience all members who are prejudiced, or irrational, or incompetent. Or we might combine particular audiences so as to cancel out their particularity (eventually reaching all humanity).⁴³³

The magnitude of the advocates’ task in developing the narrative of the case with a jury chosen from a culturally diverse community is evident. Evident too is the risk that, when they manipulate courtroom discourse to arrive at their preferred narrative outcome, counsel distort meaning. We must also keep in mind that counsel from each side of the adversarial process proceed from the premise that each of them has access to the same raw facts. But, as I have discussed earlier, those facts are raw only to the extent witnesses who have given testimony

⁴³² Christopher W Tindale, *Rhetorical argumentation: principles of theory and practice* (Sage Publications, c2004) 140-1

⁴³³ Ibid 141

have already mediated them before they present them to the court. They are raw, therefore, only in the sense that courtroom mediation has not yet treated them.

The important point for courtroom advocates is that the jury behaves in the particular, not the universal, realm. It is representative, therefore, not of a universal truth, but of the particularity of the statistical universe from which jurors are drawn. Argumentation and its relationship to rhetoric is the domain of courtroom discourse. And, as I have pointed out earlier, Perelman and Olbrechts-Tyteca emphasize, one cannot have a theory of argumentation if one must reduce every proof to the self-evident.⁴³⁴ That is the realm of science, not of persuasive advocacy.

Universal truth residing in conversation

Gadamer too differentiates the particular from the universal within his concept of *Bildung*, or what we name, “culture.” He does not mean culture as in the development of capacities or talents. It is something more. *Bildung* ‘calls rather on the ancient mystical tradition, according to which man carries in his soul the image of God after whom he is fashioned and must cultivate it in himself.’⁴³⁵ It is what a person should be ideally.

Man is characterised by the break with the immediate and the natural that the intellectual, rational side of his nature demands of him. “In this sphere, he is not, by nature, what he should be”—and hence he needs *Bildung*....He cannot turn his gaze from himself towards something universal from which his own particular being is determined in measure and proportion.⁴³⁶

Thus, *Bildung* cannot be a goal. It is, as Heidegger would explain in his words, a way of Being. Clearly, though *Bildung* and *Dasein* in this context have much in common.

Because it has no goals outside itself, *Bildung* ‘transcends that of the mere cultivation of given talents. The cultivation of a talent is the development of something that is given, so that

⁴³⁴ Perelman and Olbrechts-Tyteca, above n 12, 4

⁴³⁵ Gadamer, above n 22, 12

⁴³⁶ Ibid 13

the practice and cultivation of it is a mere means to an end.⁴³⁷ Gadamer describes Hegel's understanding of theoretical *Bildung* as leading 'man beyond what he knows and experiences immediately.'⁴³⁸ It means learning to verify what is different from oneself 'and to find universal viewpoints from which one can grasp the thing, "the objective thing in its freedom," without selfish interest.'⁴³⁹ Gadamer accepts Hegel's concept, but emphasizes the 'general characteristic' of *Bildung*, which means staying open to other more universal viewpoints, without necessarily surrendering to them. In other words, universality does not determine a particular viewpoint conclusively; it is present only as 'the viewpoints of possible others.'⁴⁴⁰

Every single individual that raises himself out of his natural being to the spiritual finds in the language, customs, and institutions of his people a pre-given body of material which, as in learning to speak, he has to make his own. Thus, every individual is always engaged in the process of *Bildung* and in getting beyond his naturalness, in as much as the world into which he is growing is one that is humanly constituted through language and custom.⁴⁴¹

The essence of theoretical *Bildung* is history. Its practical application derives from memory. However, this is not memory in the sense of a capacity to bring to mind something one has learned. As Gadamer explains, someone who uses memory 'as a mere faculty—and all the technical side of memory is such a use—does not yet possess it as something that is absolutely its own.'⁴⁴² Human sciences work from the premise that 'scientific consciousness' is already formed and, therefore, already possesses 'the right, unlearnable, and inimitable tact'⁴⁴³ that bears the judgment and the mode of knowledge of the human sciences.'⁴⁴⁴ He adds, '[i]t is time to rescue the phenomenon of memory from being regarded as merely a psychological faculty and to see it as an essential element of the finite historical being of

⁴³⁷ Ibid 12

⁴³⁸ Ibid 14

⁴³⁹ Hegel, XVIII, p 62, cited in ibid 14

⁴⁴⁰ Ibid 17-18

⁴⁴¹ Ibid 15

⁴⁴² Ibid 16

⁴⁴³ One could perhaps substitute "perception" for "tact" in this context.

⁴⁴⁴ Gadamer, above n 22, 15

man.’⁴⁴⁵ Thus, without contradiction, Gadamer can argue for the importance of prejudices and preunderstandings in conversation.

Bildung in conversation: preparedness to put prejudices and predispositions at risk

When it absorbs history into memory, culture will displace a means of learning that has lost its function to prejudice and preunderstanding. That is, culture in the sense of the practice and cultivation of a talent as a means to an end. On the other hand, in *Bildung*, ‘what is absorbed is not like a means that has lost its function...nothing disappears, but everything is preserved.’⁴⁴⁶ The former is particular; the latter is universal. The fact that everything is preserved, means—Gadamer asserts—that the universal truth resides in conversation. But ‘man’ has to rise above particularity—sacrifice it for the sake of the universal—to reveal it.⁴⁴⁷ That is the nature of conversation as a partnership. It is clearly something more than the nature of conversation as participation. Moreover, because conversation is the route to understanding, he stresses that the ‘process’ is verbal. In his view, the role of conversation in any matter in dispute is to facilitate *an* understanding. It is not a zero sum game. The understanding at which the partners have arrived becomes from that point on something, which they both believe. One can argue; therefore, that Social Media in today’s diverse culture is not a cohering force for a community common sense. It is a cacophony of individual predispositions (or prejudices) each vying for attention. Thus, social media is contrary to Gadamer’s notion of a shared horizon and a common understanding, or common sense, of which a jury can be representative.

The question arises then, whether the jury is representative, not of a community common sense but of a dissonance of individual predispositions. If it is, the courtroom is not a conversation forum in which to resolve those dissonances. In fact, numinous space, procedural rituals, and institutionalized traditions contribute to an acknowledgment of

⁴⁴⁵ Ibid 16

⁴⁴⁶ Ibid 12

⁴⁴⁷ Ibid 13

‘authority’ and an acceptance of ‘methodological discipline as the touchstone of reason, and the safeguard against judgmental error. According to Andrew Halpin, we like it that way.

Even if sceptics question how detached the legal viewpoint can be, and the legal viewpoint is seen as one chosen to favour a particular way of life or vision of society, nevertheless the sense that the legal viewpoint offers a coherent or principled approach to resolving the conflicting interests within society is somehow reassuring.⁴⁴⁸

It might be reassuring in its promotion of certainty, but it has other consequences. The difficulty arises because agreement is attainable when facts are self-evident, such as in putative normal science. However, in courtroom testimony, what the witness puts forward as fact can be in dispute and, therefore, argumentation is inevitable—and necessary. Here is the site of the contest between facts and values—a potential conflict between the rational and the reasonable. Facts are the province of the universal audience. Values are the province of the particular audience.⁴⁴⁹

Earlier, I have discussed how conversation to reach *an* understanding differs from question and answer to reach a desired goal. Conversation to reach *an* understanding favours a partnership in search of meaning, a meaning that participants will share from that point on. On the other hand, argument through question and answer, favours selective questioning to draw a conclusion from competing premises, which helps to confirm the thesis that the questioner propounds. If substantive truth were the goal, counsel would engage witnesses as partners to a conversation, which reveals the unmediated reality. Thus, courtroom advocacy is the antithesis of Gadamer’s notion of conversation that reveals the truth contained within it.

⁴⁴⁸ Halpin, above n 15, 168

⁴⁴⁹ Tindale, above n 432, 137

Moving beyond formal Language competence to the horizon of hermeneutic understanding

On the face of it, there is incongruity in Gadamer's discussion of the oral nature of conversation to the point of an understanding. It arises because, in the first line of his Introduction to *Truth and method*, Gadamer writes, '[t]hese studies are concerned with the problem of hermeneutics,' which he identifies historically as a methodological approach to the understanding and interpretation of texts.⁴⁵⁰ However, he asserts also that the problem of hermeneutics goes beyond the limits that the concept of method sets to modern science. 'The understanding and the interpretation of texts is not merely a concern of science, but is obviously part of the total human experience of the world.'⁴⁵¹ And, as Mootz clarifies, in this broader understanding, language is 'the intersubjective medium of all hermeneutical experience.'⁴⁵² Furthermore, *an* understanding is inter-subjective when two or more minds can access it subjectively. Therefore, Gadamer claims that, in this circumstance, 'understanding' is always 'interpretive.'⁴⁵³

However, the hermeneutic interplay clearly is not the same in a conversation, which takes place between two people, as the interplay in a "conversation," which a person has with a text. This is because the text can 'speak' only through the other participant as interpreter in the conversation. Mootz explains that when interpreting the text, 'the interpreter's horizon is decisive,' but not as a hard and fast viewpoint that they will try to enforce. The interpreter willingly puts it forward and 'at risk,' and only as a 'possibility.'⁴⁵⁴ This willingness to assume risk, Mootz explains, is part of what Gadamer sees as the give-and-take of everyday conversation. 'Beginning with the observation that "the more genuine a conversation is, the less its conduct lies within the will of either partner," he argues that the understanding

⁴⁵⁰ Gadamer, above n 22, 400

⁴⁵¹ Ibid xi

⁴⁵² Mootz, above n 32, 501

⁴⁵³ Ibid 501,

⁴⁵⁴ Ibid 500

emerging from a conversation is "like an event that happens to us."⁴⁵⁵ That "event" helps 'truly to make one's own what the text says.'⁴⁵⁶ To appreciate fully the point Mootz makes, it is useful to consider Gadamer's discussion of the unity between language and tradition, that is to say, language as experience of the world. I analyse the nature of this unity in the following section.

3 Developing attitude, and relationship to the world through the living act of speech

Gadamer builds on Wilhelm von Humboldt's claim that if one is to learn a foreign language, one must acquire a new view of the world that differs from one's own view. However, we cannot do this in 'a pure and perfect way' because we 'always' impose our own worldview—sometimes totally—on the acquisition of a new view.⁴⁵⁷ To the linguist, this is weakness because, in imposing one's worldview, one also imposes one's view of language. For instance, Gadamer claims that when teachers use foreign works of literature to help one learn that foreign language, the literary tradition is 'killed in the process.'⁴⁵⁸

Gadamer's point is that if we want to learn the nature of the worldview by using the language in which it is represented, we cannot approach it with the dogmatism of a grammarian. He contends, '[i]t is not the learning of a foreign language as such, but its use, whether in conversation with its speakers or in the study of its literature, that gives one a new standpoint in regard to the view of the world one had held hitherto.'⁴⁵⁹ He draws his conclusion from the insights of Humboldt, who stresses that 'language was human from its very beginning.' As Humboldt sees it,

Language, indeed, arises from a depth of human nature which everywhere forbids us to regard it as a true product and creation of peoples. It possesses an autonomy that visibly declares itself to us, though

⁴⁵⁵ Ibid 501

⁴⁵⁶ Ibid

⁴⁵⁷ Gadamer, above n 22

⁴⁵⁸ Ibid 400

⁴⁵⁹ Ibid

inexplicable in its nature, and, seen from this aspect, is no production of activity, but an involuntary emanation of the mind, no work of nations, but a gift fallen to them by their inner destiny. They make use of it without knowing how they have fashioned it.⁴⁶⁰

In other words, language is not merely something humankind possesses in this world; rather, ‘on it depends the fact that man has a world at all.’⁴⁶¹ This means, that if we are to understand this other world, which is ‘not only strange, but also different in its relations,’⁴⁶² we need more than an objective relationship to the language. We have to seek this world’s own truth that lies within it, because this also is its truth for us.

[T]o have learned a foreign language and to be able to understand it...means nothing else than to be in a position to accept what it says as said to oneself. The exercise of this capacity for understanding always means that what is said has a claim over one, and this is impossible if one’s own “view of the world and of language” is not also involved.⁴⁶³

Gadamer explains the ‘living act of speech’ as the essence of language. One develops a ‘particular attitude and relationship to the world’⁴⁶⁴ through language. One develops it through being a member of a linguistic community. Therefore, he emphasizes, language can only exhibit its ‘true being’ in conversation, in the understanding between people.’ That means language is not just a communicating tool, ‘it is a living process’ through which a community lives out its life.⁴⁶⁵

Thus, the world is the common ground, trodden by none and recognized by all, uniting all who speak with one another. All forms of human community are forms of linguistic community: even more, they

⁴⁶⁰ Michael Losonsky (ed), *On language* (Cambridge University Press, 1999) 24

⁴⁶¹ Gadamer, above n 22, 400

⁴⁶² Ibid 400

⁴⁶³ Ibid 401

⁴⁶⁴ Ibid

⁴⁶⁵ Ibid 404

constitute language. For language in its nature, is the language of conversation, but it acquires its reality only in the process of communicating. That is why it is not a mere means of communication.⁴⁶⁶

Hence, Gadamer's claim that the truth already resides in the conversation. The conversation partners merely explore until they reveal it, which shows the importance of a shared—and extended—horizon.

The human world is a linguistically constituted world.

Gadamer's assertion that language is a living process, not just a communicating tool, is relevant to our consideration of the adversarial trial before a jury, because we live in a linguistic world. Moreover, we live in a particular linguistic tradition that is synonymous with its culture, which means that one will see the "world" in a way that differs from the "world" as another culture sees it. But, this does not constitute a barrier, or, more pertinently, it should not constitute a barrier. Knowledge can and should "be" in itself. It can and should increase and enhance our insight. No matter which tradition one inhabits, it is, as Gadamer explains, a human world, which means a 'linguistically constituted' world.⁴⁶⁷ But, the different ways of seeing the world are not relative views 'in the sense that one could set them against the "world in itself", as if the right view from some possible position outside the human, linguistic world, could discover it in its being-in-itself.'⁴⁶⁸ However, the nature of the adversarial trial before jury, and the conventions we apply to the formulation of its rules, are implicitly trying to establish just such a world, through discursive manipulation. To do this requires that the adversarial trial rules must avoid genuine conversation. And, without genuine conversation, there is no willingness to put one's horizon at risk in order to uncover the truth that lies within the conversation, the truth that is the essence of *an* understanding.

⁴⁶⁶ Ibid

⁴⁶⁷ Ibid 405

⁴⁶⁸ Ibid

The adversary trial must avoid genuine conversation

According to James Boyd White, ‘All languages threaten to take over the mind and to control its operation, with all this implies for one’s feelings, for one’s sense of self, and for the possibilities of meaning in one’s actions and relations. The art of speech, all expression, thus lies in learning to qualify a language while we use it: in finding ways to recognize its omissions, its distortions, its false claims and pretensions, ways to acknowledge other modes of speaking that qualify or undercut it.’⁴⁶⁹ White makes clear, it is in the orality of language, and, I suggest, in its use with others in genuine conversation—that is, in partnership with another, as distinct from participation with another—that we can explore and resolve omissions, distortions, false claims, and pretensions. The orality of the adversarial trial, however, does not give way to genuine conversation. It subjugates it.

In the following excerpt from a transcript of trial before judge alone, Diana Eades shows how what seems to be a conversation between counsel and an Aboriginal witness is not the genuine conversation that Gadamer requires for the partners to it to reach *an* understanding. The witness is Aboriginal.

Counsel: So the only time when you’ve seen him take the medication is once in the last year?

Witness: Yes, that’s right

Counsel: And **surely** the family would have been concerned – **must** have been concerned to make sure that he take his tablets to prevent him getting ill? [My emphases]

Witness: Well for that question I would say the family knew he was sick in the head and from my experience living in the one house, know him very well, the way he get sick in the head, we could wait for the right time and just cool ourself and just go politely to ask him if he wants a tablet or not.

Counsel: And if he didn’t take them, you just let him get sick in the head?

⁴⁶⁹ White, above n 25, 26

Witness: Yes. If he didn't want to take it he could just walk away.

Counsel: And he'd just get sick in the head?

Witness: Yes.⁴⁷⁰

To anyone sharing the same cultural traditions as Counsel, the family seems unperturbed about the welfare of their relative. Moreover, Counsel has implied that they must share responsibility for him getting 'sick in the head.' Whether it is a deliberate tactic, or a misunderstanding of cultural differences, this cross-examination questions the family's creditability. An alternative construction is that, by not trying to force their family member to take the medication, the family acknowledges his individual right to decide for himself. In the family's culture, it is a sign of respect. To those sharing the cultural code that Counsel assumes is universal, and applying that code to the Wittgenstein 'game,' it is a sign of unsympathetic disregard.

The courtroom transcript, from which I have drawn that conclusion, cannot show intonations, or identify spoken emphases. However, if one shares a cultural code with Counsel, one more than likely would infer from the transcript that oral emphases fell on the words 'surely' and 'must' in Counsel's second question, to create a sense of incredulity that the family could have felt no sympathy. In other words, the exchange is not a genuine conversation in which one puts forward their horizon, 'at risk,' and as a 'possibility only;' it is as linguistic organization towards a desired outcome. Counsel is framing the discourse on an assumption that the final decision maker—whether that is judge alone, or jury—will share the same cultural code. How each interprets and assigns meaning to a narrative will depend on the understanding of the world they bring to it.

⁴⁷⁰ Cooke, M, 'Aboriginal evidence in the cross-cultural courtroom', Diana Eades (ed), *Language in evidence* (University of NSW Press, 1995) 88.

4. Rhetor and hearer assign meaning according to their own understanding of the world.

In this section, I draw on the thoughts of Martin Heidegger⁴⁷¹ to analyse how both rhetor and hearer bring their own understanding of the world to interpreting and assigning meaning to texts. This is where the philosopher's search for absolute truth and the rhetor's pragmatic focus on action can clash.

Heidegger asserts that understanding does not come from interpretation. On the contrary, he claims that in interpretation, understanding becomes itself. He means that interpretation does not lead to the acquisition of information. It is the 'working-out of possibilities projected in understanding,'⁴⁷² which means possibilities within the ambit of our understanding of the world, as we perceive it. We consummate our perception when one '*addresses* oneself to something as something and *discusses* it as such (emphases in the original).'⁴⁷³ This is what he calls interpretation 'in the broadest sense.' That act of interpretation makes one's perception determinate.

What is thus perceived and made determinate can be expressed in propositions, and can be retained and preserved as what has been asserted. This perceptive retention of an assertion about something is itself a way of being-in-the-world; it is not to be Interpreted [capitalised in the original] as a "procedure" by which a subject provides itself with representations...of something which remain stored up "inside" as having been thus appropriated, and with regard to which the question of how they "agree" with actuality can occasionally arise.⁴⁷⁴

He explains how interpretation can take two forms. He uses the German term *Auslegung* to cover any action through which one will 'interpret something "as" something.'⁴⁷⁵ *Auslegung* translates into English as interpretation (lower case). However, he differentiates that from Interpretation (Upper case), which applies to 'more theoretical or systematic' processes, such

⁴⁷¹ Heidegger, above n 239

⁴⁷² Ibid 189

⁴⁷³ Ibid

⁴⁷⁴ Ibid

⁴⁷⁵ Ibid 1

as the exegesis of a text.⁴⁷⁶ Heidegger is saying that we interpret by applying a value to the thing interpreted that reflects our understanding of the world. What he emphasises is that whenever we interpret an entity, we ground our interpretive act in a perception we have already made determinate because of the way we see our world. It is something *we have in advance*—in a *fore-having* [Italics in original].⁴⁷⁷

I perceive Heidegger's notion of having an understanding in advance, not as foresight (or fore-conception, which is what he calls it), but as preconception. In English, one thinks of foresight as foreknowledge, insight, or even wisdom. Preconception, on the other hand, one thinks of as predetermination, presumption, or prejudice, which—in his terms—we have made determinate. 'This fore-sight "takes the first cut" out of what has been taken into our fore-having, and it does so with a view to a definite way in which this can be interpreted.'⁴⁷⁸ In other words, this "fore-sight" sets the pattern for how to understand the totality of the entity from that point on.

In such an interpretation, the way in which the entity we are interpreting is to be conceived can be drawn from the entity itself, or the interpretation can force the entity into concepts to which it is opposed in its manner of Being [capitalised in the original]. In either case, the interpretation has already decided for a definite way of conceiving it, either with finality or with reservations; it is grounded in something we grasp in advance—in a *fore-conception* [Italics in original].⁴⁷⁹

Heidegger describes the Being [capitalized] as fundamental to every inquiry, and stresses the 'necessity for explicitly restating the question of being.'⁴⁸⁰ Yet, he states that at the beginning of this investigation, 'it is not possible to give a detailed account of the presuppositions, and

⁴⁷⁶ Ibid

⁴⁷⁷ Ibid 191

⁴⁷⁸ Ibid

⁴⁷⁹ Ibid

⁴⁸⁰ Ibid 2

prejudices which are constantly reimplanting and fostering the belief that an inquiry into Being is unnecessary.⁴⁸¹

It suffices for my discussion that we understand that the Being of an entity, as Heidegger views it, is not itself an entity. In other words, we do not get the answer to what Being is in this context by tracing entity back to its origins in some other entities. Rather, if our inquiry is about the entity's Being in the world, it is the entity itself that one interrogates. Thus, one must have 'obtained and secured in advance' the correct way of gaining access to the entity. Heidegger maintains that everything we talk about, everything 'to which we comport ourselves in any way, is being [sic]; what we are is being [sic], and so is how we are.'⁴⁸² And what we are, as entity, he labels Dasein.

Dasein: the peculiarly human experience of being

Simply put, Dasein is the peculiarly human experience of being. It involves being aware of one's own existentialism, or chosen way of living, one's own morality and the potential paradoxes of negotiating one's own moral stance with regard to others, whilst, nevertheless accepting that one is alone in their Being.

Looking at something, understanding, and conceiving it, choosing, and access to it— all these ways of behaving are constitutive for our inquiry, and therefore are modes of Being for those particular entities which we, the inquirers, are ourselves. Thus to work out the question of Being adequately, we must make an entity—the inquirer—transparent in his own Being.... This entity which each of us is himself and which includes inquiring as one of the possibilities of its Being, we shall denote "Dasein." If we are to formulate our question explicitly and transparently, we must first give a proper explication of an entity (Dasein), with regard to its being. [All capitalisations in the original].⁴⁸³

Now, here is the crux of Heidegger's explanation as it pertains to the jury trial rhetor. If we apply it to courtroom discourse, the possibility of circularity arises in that the inquirer as

⁴⁸¹ Ibid 2-3

⁴⁸² Ibid 26

⁴⁸³ Ibid 26-7

Being needs to frame their inquiry to elicit the entity as Being as of the world of the inquirer. However, Heidegger argues there is no circular reasoning, only a ‘remarkable “relatedness backward or forward” which what we are asking about (Being) bears to the inquiry itself as a mode of Being of an entity [All capitalisations in the original].’⁴⁸⁴

If the aim of this presupposition of Being is merely ‘taking a look beforehand’ to facilitate the entity’s provisional articulation in their Being; this ‘guiding activity of taking a look at Being’ beforehand is sufficiently explanatory. However, if we were to presume that the aim of the inquirer primarily is to frame that question to ensure an answer that is compatible with Dasein, then every question becomes a leading question. In other words, in identifying the object of interrogation, the matter of Being thus requires that the inquirer determines in advance the ‘right way of access to entities’ if it is to fit into the inquirer’s world, because whatever we talk about is being, ‘and so is how we are.’⁴⁸⁵

If both *what* we are, and *how* we are is Being, we need to consider Alisdair MacIntyre’s claim that the expectations we bring to any new experience stem from our cultural way of being, ‘an amalgam of our past social and cultural fragments,’⁴⁸⁶ which means culture that conforms to Gadamer’s *Bildung*. Geoffrey Hazard makes a similar claim. We do not come to a new experience neutrally. We have an already-formulated moral standpoint, ‘a relatively coherent set of ideals, commitments and expectations.’⁴⁸⁷ These coherent ideals are at the heart of the purported community common sense, which the juror brings to their task, an important consideration to which I return in Chapter Five. However, they are also at the heart of Counsel’s view of morality, or—which is just as relevant for the task of persuading—what Counsel thinks are the moral values of the jurors, or even of a judge sitting alone. Recall

⁴⁸⁴ Ibid 28

⁴⁸⁵ Ibid 26

⁴⁸⁶ MacIntyre, above n 169, 169 Which is really a restatement of Gadamer’s thesis.

⁴⁸⁷ Hazard, above n 10, 1139

Counsel's accusatory comment in Eades' example, 'And if he didn't take them, you just let him get sick in the head?'⁴⁸⁸

Hazard acknowledges that, in a 'single community'—which I take to mean a community whose common language informs its culture—the expression of these ideals is simpler. Therefore, in Heidegger's terms, that fact of Being is going to 'shape the kind of questions that we ask, and, in a sense, determine what we are able to discover.'⁴⁸⁹ We understand the 'ready-to-hand' by a 'totality of involvement' that we do not need to grasp through thematic interpretation. He means by ready-to-hand something we use to achieve something else without the need for further theorising. That is, we operate as a Being who already understands. He states,

As the appropriation of understanding, the interpretation operates in Being towards a totality of involvements which is already understood—a Being which understands. When something is understood but is still veiled, it becomes unveiled by an act of appropriation, and this is always done under the guidance of a point of view, which fixes that with regard to which what is understood is to be interpreted. In every case interpretation is grounded in *something we see in advance*—in a *fore-sight*.⁴⁹⁰

This is an important point when considering how an individual might interpret an experience—be it a text or an observation of a new event—from a standpoint of fore-structured, or pre-suppositional, reality. As I explain in the next section, Heidegger is saying that 'in every case,' interpretation operates in this fore-structure.

Foresight is not neutral.

Ready-to-hand differs from present-at-hand⁴⁹¹ (that is, unreadiness-to-hand) in which one adopts a scientific approach of observing something without preconceptions. It is a neutral attitude. The observer looks at the thing—or concept—only as it presents itself so that they

⁴⁸⁸ Eades (ed), above 470, 88

⁴⁸⁹ Timothy Ashworth, *Paul's necessary sin* (Ashgate Publishing, 2006) Introduction, xx

⁴⁹⁰ Heidegger, above n 239, 191

⁴⁹¹ Or 'unreadiness-to-hand. See *ibid* see esp 103-4

might hypothesize. However, the neutral mindset is elusive. The ready-to-hand gets in the way.

In our dealings with the world of our concern, the un-ready-to hand can be encountered...as something...which stands in the way of our concern. That to which our concern refuses to turn, that for which it has 'no time', is something *un*-ready-to hand in the manner of what does not belong here, of what has not yet been attended to. Anything which is un-ready-to-hand in this way is disturbing to us, and enables us to see the *obstinacy* of that with which we must concern ourselves in the first instance before we can do anything else. With this obstinacy, the presence-at-hand of the ready-to-hand makes itself known in a new way as the Being of that which still lies before us and calls for our attending to it (Emphases in the original).⁴⁹²

Heidegger, too, advances the similar notion that interpretation is never a 'presuppositionless apprehending'⁴⁹³ of something we approach to understand. 'If, when one is engaged in a particular concrete kind of interpretation, in the sense of exact textual Interpretation, one likes to appeal [beruft] to what "stands there", then one finds that what "stands there" in the first instance is nothing other than the obvious undiscussed assumption [Vormeinung] of the person who does the interpreting.'⁴⁹⁴

That is to say, we take for granted ("gesetzt") any aspect of understanding that we have already resolved to our satisfaction in our 'fore-having, our fore-sight, and our fore-conception.'⁴⁹⁵ Thus, what our interpretation is revealing is not new knowledge, but the possibilities that exist within the entity, the character of which corresponds to the 'kind of Being of the entity which is understood.'⁴⁹⁶ In other words, Heidegger contends that all interpretation operates in the fore-structure. In Heidegger's use, fore-structure means reality that stems from the individual's experience of everyday living. This allows the observer to

⁴⁹² Ibid 103-4

⁴⁹³ Ibid 192

⁴⁹⁴ Ibid 192

⁴⁹⁵ Ibid

⁴⁹⁶ Ibid

interpret external occurrences in a preliminary way. So, for interpretation to contribute to understanding, it must already have ‘understood what is to be interpreted.’⁴⁹⁷

Criminal courtroom discourse is not a search for scientific knowledge

Heidegger’s contention helps us to understand the formulation of discourse, and the types of questions that counsel pose. Criminal Courtroom discourse is not a search for scientific knowledge. Heidegger argues—as do Perelman and Olbrechts-Tyteca⁴⁹⁸—that such knowledge demands rigorous demonstration to support it. One cannot presuppose the proof for which science searches to support its hypotheses. Therefore, it is not interpretation. But, how can interpretation, which must operate within the bounds of what is already understood, ‘bring any scientific results to maturity’ without moving in a vicious circle (*‘circulus vitiosus’*) especially if the presupposed understanding still functions within ‘our common information about man and the world?’⁴⁹⁹

Recall, for example, the shadow attorney general (a former lawyer) to whom I referred earlier,⁵⁰⁰ trying to justify his unstacking of a jury, which—he implied—random selection has stacked, by applying such presupposed understanding.

I have mentioned before that I would also use the peremptory challenge very occasionally, not to gender stack a jury, but quite the opposite, because I think it is the height of arrogance for any lawyer to see someone coming forward and determine that he will not be able to talk to or relate to that person.... However, I always thought it was important as counsel, if there was a predominance of men on the jury, to use my challenges to ensure there were some women on the jury, or vice versa, or to try to see some Indigenous people balloted on to the jury when a good mix of the community was wanted.⁵⁰¹

⁴⁹⁷ Ibid 194

⁴⁹⁸ Perelman and Olbrechts-Tyteca, above n 12, 1

⁴⁹⁹ Heidegger, above n 239, 194

⁵⁰⁰ Western Australia, Parliamentary debates, Assembly, Thursday, 24 February 2011

⁵⁰¹ Ibid p1107-1118 (Mr J.R. Quigley (Mindarie))

But, his use of the peremptory challenge relies on intuition, and on an assumption that women and men will process the evidence differently. He has tried to persuade parliament that his practice of unstacking the jury stemmed from knowledge gained through experience. It does nothing more than suggest that, in all his appearances as counsel, he has relied on cultural predeterminations, the point Heidegger makes.

Heidegger argues that, because we have enclosed our understanding of what we are interpreting in this circle of common knowledge about our world, the fact already exists. Therefore, in seeking possibilities for appropriation of these facts, how we interpret must depend on our point of view as observer. He maintains,

If the basic conditions which make interpretation possible are to be fulfilled, this must rather be done by not failing to recognize beforehand the essential conditions under which it can be performed. What is decisive is not to get out of the circle but to come into it the right way. This circle of understanding is not an orbit in which any random kind of knowledge may move; it is the expression of the existential *fore-structure* of Dasein itself.⁵⁰²

According to Heidegger, there is a positive possibility of ‘the most primordial kind of knowing’ hidden in the circle. However, we ‘genuinely’ only grasp this possibility in our interpretation when we acknowledge that our ‘constant task’ is not to allow ‘fancies and popular conceptions’ to influence our ‘fore-having, fore-sight, and fore-conceptions. What we must do for authentic understanding is to see these fore-structures in terms of the things themselves. In other words, we must secure them scientifically.

However, the very notion of Dasein confounds in principle the rigour of ‘exact sciences,’⁵⁰³ because, unlike the natural sciences, human sciences relate to one’s own self-understanding’. It exists, but in our reality.⁵⁰⁴ In this respect, I understand Heidegger’s “primordial” as being synonymous with truth or authenticity. In other words, it relates to the essence of Being. It is

⁵⁰² Heidegger, above n 239, 194-5

⁵⁰³ Ibid 195

⁵⁰⁴ Ibid 26

in its everydayness the essential nature of Being; it needs no further interrogation. So, the authentic understanding already exists, but Heidegger implicitly promotes the importance of openness to uncover it. This means openness to experience, and to alternative possibilities. It means, then, openness to others. It has that in common with Gadamer's notion of shared horizon, that is, a shared history.

In this way, as I wrote in the introduction to this chapter, Gadamer's shared horizons and Heidegger's Being-in-something have in common a need for an *existential*. This, as I have argued earlier, is a state of mind beyond corporeality. And, beyond grammar. Nor is "being-in" connected with spatiality in the sense of a physical relationship to something. It signifies familiarity with, or some state of, being with which one is comfortable. In other words, it is a pervasive mood that comes from familiarity with the Being, and which permeates all one's encounters with the world.

What one's state of being means to understanding and interpretation

Fore-having, as Heidegger, uses the term, prescribes a dominant mood of Being. It acquires its dominance—its concreteness—from one's basic experience. The time and place in which one is thrust into their world determines the possibilities that are open to one. For instance, travel into space is a possibility today. It has not always been so. This is an overly optimistic illustration that determinate possibilities are technological. But, they are also socio-economic, political, and cultural. Moreover, Heidegger reminds us, in the world into which we have entered, language determines how we understand it. Dasein means Being-in-the-world, but 'Dasein as discursive Being-in, has already expressed itself. Dasein has language.'⁵⁰⁵

But, he posits an articulation that is beyond, and before, the sentence. For him, the doctrine of signification 'is rooted in the ontology of *Dasein*,'⁵⁰⁶ specifically, in Dasein's existentialia. *Existential* as Heidegger relates it to *Dasein* differs from the average concrete or definite

⁵⁰⁵ Ibid 208

⁵⁰⁶ Ibid 209

way of existing. The ‘average everydayness’ of *Dasein* constitutes characteristics that are not just “categories.”⁵⁰⁷ Fundamentally, in the ‘Being-in-the-world’, they are states of mind and understanding. What is more, when one understands, one harbours the possibility of interpreting that, which is now understood.⁵⁰⁸

Heidegger turns to the Greeks to show what he means by reaching an understanding. He explains that, in discourse terms, they did not found grammar in language. In fact, they had no word for language. Nevertheless, ‘their everyday existing was largely diverted into talking with one another.’⁵⁰⁹ He describes ‘man’ as the entity, which talks, but he is not referring to the capacity to create a ‘vocal utterance,’ but as ‘the entity which is such as to discover the world and *Dasein* itself... They understood this phenomenon “in the first instance” as discourse.’⁵¹⁰ Thus, grammar ‘sought its foundations in the “logic” of this *logos*’ (Emphasis in the original).⁵¹¹

I take it that, in his application of *logos*, Heidegger is talking about the principles of order of speech, reason, and with a focus on discourse. However, he also argues that grammar sought its foundations in the logic of science, from which, he asserts, we must ‘liberate’ it.⁵¹² He goes further. He maintains that, since ancient times, assertion is the ‘primary and authentic “locus” of *truth* (his emphasis).’⁵¹³ The difficulty, however, is that he posits truth as ‘problematic,’ and we can only resolve it through analysing the structure of assertion.

⁵⁰⁷ Ibid 70

⁵⁰⁸ Ibid 203

⁵⁰⁹ Ibid 208

⁵¹⁰ Ibid 208-9

⁵¹¹ Ibid 209

⁵¹² Ibid

⁵¹³ Ibid 196

5 The structure of assertion as communication

Heidegger's three significations of the structure of assertion

To assert something in English language is to proclaim something as if one holds the truth of the assertion to be self-evident. Synonyms include words like “declare,” “emphasize,” “insist on.” An assertion is suggestive of a self-evident *truth*. But, in this use, one does not assert truth as a possibility for mutual exploration of its validity. An agonist might rebut it, certainly. But, it is imperious rather than an invitation to discuss. That is, it does not invite—it does not welcome—a contrary point of view. We saw this in my illustrative case study. Heidegger, however, moves beyond language and its grammar. He identifies assertion as structure that encompasses three significations. He identifies these as ‘*pointing out*,’ ‘*predication*,’ and ‘*communication*.’ They are, he explains, ‘drawn from the phenomenon which is thus designated, they are connected among themselves, and in their unity they encompass the full structure of assertion.’⁵¹⁴ I now examine these significations in more detail.

‘Pointing out,’ the starting point for determining entity as more than an objectified self

The first signification he defines as ‘*pointing out*,’ by which he means we adhere to a primordial identity of the entity as itself. In that signification, the entity is a ready-to-hand. It is not ‘merely represented.’ Nor is it the ‘psychical condition in which the person who makes the assertion “represents” it.’⁵¹⁵ To explain adequately the significance and limits of Heidegger’s ‘pointing out’ to my thesis, I must refer back to my “Introduction” to this thesis, where I noted that standard accounts of language do not explain adequately the nature of courtroom discourse in criminal trials before a jury. This is because the rules of evidence discourage consideration of the social relations of language to the world it represents. The court demands that discursive organization reveals the “what,” “when,” and “how” of

⁵¹⁴ Ibid

⁵¹⁵ Ibid

witness testimony. It should not speculate on the “why.” But, as I elaborate later in this section, it is when we understand why the witness acted, that we understand that a person exists in performance. In other words, we need to understand that it is the person with a psychological attribute that gives them a transcendent presence beyond the physical act. This is substantive truth, which rises beyond legal truth.

One can see that Counsel’s adjacency pair—the chain maxim—method of distilling putative true facts from witness testimony tries to remove the psychological condition (that is, of a person transcendent as to experience) because of a view that this mediates truth. A contrary viewpoint, however, is that, for instance, in my case study, the act of witness crossing the road falls short of revealing substantive truth if we do not understand why he did so. Heidegger helps us understand why.

Heidegger challenges the notion that in any ‘serious and scientifically-minded “philosophy of life,” (this expression says about as much as “the botany of plants”) there lies an unexpressed tendency towards an understanding of Dasein’s Being.’⁵¹⁶ The problem with this approach, he points out, is that life itself ‘as a kind of Being does not become ontologically a problem.’⁵¹⁷ By dismissing the phenomenal content of life ontologically, we do not have to consider the ‘reification of consciousness,’ nor talk about the soul, the consciousness, or the spirit of the person. We think merely of ‘the unreified Being of the subject, without orientating our thinking to the ‘psychical elements and atoms,’ or trying to ‘piece the life of the soul together.’⁵¹⁸ This means understanding ‘life as a whole,’ which, I take to mean accepting the everydayness of Dasein as our starting point.

He cites Max Scheler’s viewpoint of a person as ‘never to be thought of as a Thing or substance; the person “is rather the *unity* of living-through [Er-lebens] which is immediately experienced in and with our experiences—not a Thing merely thought of behind and outside

⁵¹⁶ Ibid 72

⁵¹⁷ Ibid

⁵¹⁸ Ibid

what is immediately experienced” (Italics and capitalisation in the original).⁵¹⁹ The essential element of this explanation is how its emphasis is on the fact that a person is not a ‘Thing,’ nor a substance or an object. A person has a ‘Constitution’ that differs essentially from that unity of ‘Things of Nature.’⁵²⁰ However, Scheler adds an important rider to his explanation. He states, nor is an act an object. The very Being of acts requires that they “are Experienced [Capitalisation in the original] only in their performance itself and given in reflection.”⁵²¹ They have no psychical condition.

Essentially the person exists only in the performance of intentional acts, and is therefore essentially *not* an object. Any psychical Objectification of acts, and hence any way of taking them as something psychical, is tantamount to depersonalisation. A person is in any case given as a performer of intentional acts which are bound together by the unity of meaning. Thus psychical Being has nothing to do with personal Being. Acts get performed; the person is a performer of acts’ (Emphasis and capitalisation in the original).⁵²²

This leads Heidegger to the question, ‘What...is the ontological meaning of “performance”?’ How is the kind of Being which belongs to a person to be ascertained ontologically in a positive way?’ The answer goes to the unity of the body, soul, and spirit. ‘But,’ Heidegger explains, ‘What stands in the way of the basic question of Dasein’s Being (or leads it off track) is an orientation thoroughly coloured by the anthropology of Christianity and the ancient world, whose inadequate ontological foundations have been overlooked by the philosophy of life and by personalism.’⁵²³

The Christian definition in modern times has cast off its Christian theology, but, as Heidegger points out, ‘the idea of “transcendence”—that man is something that reaches beyond himself—is rooted in Christian dogmatics, which can hardly be said to have made an

⁵¹⁹ Ibid 73. Max Scheler (174-1928) was a German philosopher, whose work was grounded in phenomenology, ethics, and anthropological inquiry into the essence of human nature.

⁵²⁰ Ibid

⁵²¹ Ibid

⁵²² Ibid

⁵²³ Ibid 74

ontological problem of man's Being. The idea of transcendence, according to which man is more than a mere something endowed with intelligence, has worked itself out with different variations.⁵²⁴ Christian dogmatics versus personalism rooted in a declaration of 'man's autonomy, values, and reality show something of the nature of those variations, but they need not concern us here. As the Christian Bible tells us, "sufficient unto the day is the evil thereof."

If I apply the notion of sufficiency to my case study, I do not need to delve into an ontological exploration of the unity of body, soul, and spirit. I only need to accept that a person is something more than an objectified self, that a person exists in the performance of intentional acts. So, when Scheler argues acts require that they are experienced only in the performance itself and given in reflection, he is claiming that they are bound together by a unity of meaning.

Thus, in my case study, when Witness heard screams, and crossed the road because he heard them, the action was not instinctive, even if it seemed on reflection to have been. The stimulus-response—Scream→cross the road—is not involuntary. It is the act of 'man...that reaches beyond himself.' It is "man" transcendent. Whether it is a result of values rooted in Christian dogmatics, or in personalism is contemplation for another day. What is relevant is that, contrary to what Defence asserted (in the English language sense), the integrity of Witness' Act is bound up in the unity of meaning occasioned by transcendent witness performing the act. The meaning of the act of crossing the road is incomplete without acknowledging the transcendence that triggered it. At this point of the first signification, *pointing out*, we go no further than identifying "Witness" as entity. However, in testimony, when counsel established that "Witness crossed the road," this is at the point of the second signification.

⁵²⁴ Ibid

'Predication,' adding a definite character to entity

The second signification is '*predication*.' In this signification, the articulator still puts forward the entity itself as the assertion. However, in adding a predicate, the articulator has now narrowed the content of the assertion put forward in the first signification, by adding a definite character to it. Heidegger uses as example the assertion, 'the hammer is too heavy.' It is still a "pointing out" and, therefore, is founded on the first predication. However, when we give something a definite character, as in Heidegger's second signification, we do not discover the entity as itself for the first time. But, when we give it this definite character, 'our seeing gets *restricted* to it in the first instance, so that by the explicit *restriction* of our view, that which is already manifest may be made *explicitly* manifest in its definite character' (emphasis in the original).⁵²⁵ So, we arrive at the truth by—in Heidegger's words—'dimming entities down' to focus first on the subject (the hammer in his example) to which we can now determine the manifestation of the definite character (too heavy).

'Setting down the subject, setting down the predicate, and setting down the two together, are thoroughly "apophantical" in the strict sense of the word.'⁵²⁶ Apophantic judgments are sometimes seen as reliable ways of obtaining the truth, because they do not rely on subjective comparisons. That is, there is no attempt to compare putative true and false entities. The truth is seen to reside in the entities itself. Thus, Heidegger makes his point about resolving the problematic of *truth* (his emphasis) by avoiding subjectivity, which accompanies comparative assessment. In my case study, "Witness" as subject, and "crossed the road" as predicate adds definite character to the assertion. We now need to engage with the first and second significations by communicating what we see, which leads into the third signification.

'Communication,' sharing with an 'other' the definite character of entity

The third signification is assertion as *communication*. 'Speaking forth, which is to say, communicating, means engaging with the first and second significations by pointing out to

⁵²⁵ Ibid 197

⁵²⁶ Ibid

Conclusion

The key point I have made in this chapter is that the standard accounts of language do not explain adequately the nature of courtroom discourse in criminal trials before a jury. This means that one cannot understand how discourse truly represents the worldview of protagonists in any trial by analysing it from the formalist viewpoint of the grammarian. Yet, when one applies this viewpoint to adjacency pair interaction—which is governed by the chain maxim that is preoccupied with rules—this is what one does. The rules of evidence almost ensure this outcome. They encourage the reduction of testimony to its essential language, but discourage contemplation of the social relations of language with the world it purports to represent. Twining calls the process deconstruction. But, I suggest it is not. Because deconstruction requires that one recognize the inherent instability of the process that diverse receivers bring to determining the meaning of a text. The courts demand of discursive organization in criminal trials only that it reveals the what, when, and how of any action, but that it avoids apparent speculation on the why.

Yet, without the “why,” there is no meaning in action. Gadamer clarifies that apparent enigma. There is no objective right view of world that exists outside the human linguistic world. And, the linguistic tradition that shapes that world is of its culture, which means that one culture will see the world in a way that differs from the way another culture will see it. Each culture’s view is limited to its particular horizon, but the knowledge of that world exists as an entity itself. So, to get to truth, which resides in that knowledge, each protagonist has to be willing to risk the certitude of their horizon’s authenticity to get to that truth, and, thereby, to get to an understanding of it. But, Gadamer asserts, the protagonists can only do that as partners in conversation. They willingly share—and risk—their horizons to find the truth. Only as partners in conversation, not as opponents in conflict, can they avoid the discursive manipulation that omits, distorts, and claims falsely. Only in genuine conversation can partners meet at that shared horizon. But, as I have discussed, the oral adversarial trial does not embrace genuine conversation, it suppresses it.

When we search for the truth in the “why,” rather than stop our search at the “what, when, and how,” we then understand that a person exists in performance. So, in testimony we need the person as entity with a psychical attribute that gives them a transcendent presence only in performance of intentional acts. Thus, we need to see communicating as a means of pointing out that what we see has a definite character. This is sharing with an “other” through which, in genuine conversation, we can avoid subjectivity. Only then can we have a truth that both participants share—a substantive truth. Only then can we bring a “common” sense to bear.

I began my discussion in this chapter by putting forward something of a strawman argument. Know the predispositions that a jury brings to decision making, and play to it. Manipulate discourse to persuade a jury, as a particular audience, that the case narratives counsel is building would convince a universal audience. As I revealed the fragility of the strawman, my focus has been on language; I argued that standard accounts of language do not explain adequately the nature of discourse. I included in my discussion a caution that perception of what a universal audience would accept as persuasive might well be a product of counsel’s own predisposed way of viewing the world. Against this own view of the world, one can self-reflect that an argument is convincing when it is merely internally persuasive. That, Kant states, is sufficient for internal reflection, but not otherwise. The corollary is that counsel cannot presume a consensual jury view of the world. The jury is still a specific audience that potentially harbours conflicting values and perceptions of what community common sense ought to be. In Chapter Five, therefore, my focus is on the jury. I discuss the nature of collective consciousness and collective memory. I examine how they function within a jury that represents disparate cultures and sub-cultures. For counsel not to understand the nature of this function can lead to misdirection of advocacy discourse.

CHAPTER FIVE: How wrong perceptions of common sense and community values can misdirect jury trial discourse

Introduction

The principal jury selection criterion is that the jury must be representative of the society from which it is empanelled. In a progressively more diverse society, this means bringing together twelve people whose cultural traditions possibly differ. Therefore, in Chapter Five, I focus on the nature of collective consciousness and collective memory, and how they most likely function in a jury comprising disparate cultures. I conclude that failure to account for these differences in the organization of courtroom discourse can lead to distortion of meaning. Or, to state it more compellingly, in the search for substantive truth, to lead to misunderstanding.

I structure my discussion on how wrong perceptions can arise under five sub-headings

1) *Good and bad prejudices of narrative style lay reasoning*. I examine the merits of logico-scientific reasoning versus a good story. I use Jerome Bruner's cognitive learning theory as the basis of my analysis of differences between legal and lay methods of reasoning. Legal reasoning, he would describe as logico-scientific; lay reasoning is of the nature of storytelling, or narrative. The importance of his theory is his claim that learning is an active process in which the reasoner forms new ideas by cognitively organizing past knowledge with current knowledge to derive meaning from them. Thus, he suggests, a lay reasoner judges the goodness of a story against criteria that differ from the criteria for assessing logical or scientific argument.⁵³²

⁵³² Bruner, above n 14, 11-12

“Story” and “narrative” are not necessarily the same. One can tell a story that does not contain the structured elements that constitute a narrative. The essential elements of a narrative comprise a beginning, in which the author sets the scene and introduces the key characters of the plot (the exposition). From within this situation the author (as narrator) will develop a conflict; and for the narrative to develop into a good story, the conflict will be one that entices the reader to want to know more. This leads to a third element, in which with action of rising intensity, the narrator leads the listener into a climax—the fourth necessary element of a narrative. The climax is the pivotal point of the narrative. The intensifying action comes to a head in one way or the other for the key protagonists. The climax is pivotal, but it is not the end of the story. The actions of the climax must have a consequence. So, in the next essential element of a narrative, action continues but less intense, as the narrator reveals these consequences. There will usually be a winner and a loser when the matter is resolved. In most instances (or, in a good story), this narrative will end with the hero of the plot prevailing. Finally, there will be a denouement in which all the dangling strings of the plot line will be brought together and, figuratively, tied into a neat bow that leaves the listener (or reader, in context) sated. If there is a moral to the story, this is the point at which the narrator explicates it, either implicitly or, explicitly.

A story, on the other hand does not necessarily have all those elements, as is the case in the Witness’s testimony in my case study. His story lacks the necessary intensifying action because the rules of evidence have rendered the narrating of some of those actions inadmissible. Moreover, his story ends when defence counsel says ‘no further questions,’ leaving so much of the plot unresolved. In addition, clearly, at that point there is not yet a denouement. Bruner’s theory has implications for considering the organization of witness testimony in jury trials. Furthermore, it invites scrutiny of the role of collective consciousness in forming past knowledge—prejudices or predispositions.

2) *The nature of collective consciousness and the power of collective memory.* I discuss how collective memory accounts for our morality, and I consider the nature of collective

memory as a social construct. I explain that French sociologist Maurice Halbwachs coined the term “collective memory” to represent knowledge of the past that an identity group shares. It is a social construction, not a universally objective phenomenon. As such, it is reinforced by the ‘collectivity’ that acknowledges it. Significantly, although collective memory is the source of common sense, the collectivity that embraces a common memory can be as small as an informal group through to a nation state. But, it is common only if that nation state is a single, culturally coherent society.

3) *Manipulating social values through commemoration.* I explore this as a tale of two histories: history as collective memory, and as the work of historians. It is a competition for social relevance. That is, a conflict between, what Jacques le Goff labels ‘the unconquerable flow of time,’⁵³³ which moulds the memory and forgetting experience of individuals and societies, and the objective discipline of history. It is the self-proclaimed duty of historians to preserve that discipline. But, le Goff acknowledges that the historian also is not immune to seduction by the unconquerable flow of time. This leads to my discussion of the role of commemoration as the tool of the state (using the term state generically) to preserve collective memory in the form that best preserves internal sovereignty. I do not equate witness testimony with these differentiated concepts of history, of course. Rather, discussion of the differences goes directly to the need to be aware of the influences on collective memory that is the base upon which community common sense stands. So, because community common sense is the desired attribute that jurors bring to their undisclosed deliberations, counsel need always to be mindful of them when organizing courtroom discourse. In the context of this particular discussion, an advocate needs to be heedful that the state also has a role in preserving collective memory according to its needs. And, as we have seen, the state might from time to time see its need as superior to the needs of discrete identity groups to preserve their own internal coherence.

⁵³³ Le Goff, above n 207

An internally coherent collective memory is more likely in a single community with a common set of values. The notion of two histories competing for social relevance directs my discussion to the next sub-heading—and to a provocative question.

4) *Is the adversarial trial a relic of a now irrelevant past?* I propose the argument that the trial narrative is a story of individuals, not a journal of collective responsibilities. This thought provokes the question whether it is reasonable therefore to expect a jury to embody deep-seated social values.

I sum up these four sub-headed discussions together under a hortatory fifth subheading.

5) *The risk of misunderstanding community common sense as universal.* I have already discussed the difference between persuasion and conviction, which means being aware of the audience which one addresses. But, as I reveal in this sub-section, the jury is not an audience comprising ordinary citizens bringing common sense based on undifferentiated community standards to its decision-making. It is an audience potentially bringing to its task twelve differing expectations. Or more. For example, an indigenous woman juror belongs to two groups at least, members of which might, in one way or another, feel discriminated against according to race, to gender, or to both. There are other potentials for perceived discriminations of course. Expectations might frequently be modified both in the reading of the text as it evolves in the courtroom, and, later, in eleven interlocking and overlapping conversations with fellow jurors. And, at the level of discourse, we do not satisfy this consideration merely by establishing whether their grasp of the English language is adequate to the task to which jury selection assigns them.

In sum then, I explore how differing community standards arise, how they shape expectations of what justice ought to deliver, and why courtroom advocacy needs to be conscious of the differing expectations of justice that can exist undetected in the jury room.

How community standards shape expectations of justice

Before proceeding to this comprehensive analysis, I put forward two presumptions. First, the jury deliberates with the intention of reaching a unanimous decision. Second, it retires to consider its verdict in good faith.

A presumption of the need for unanimous decisions

In prescribed circumstances, in some jurisdictions, the court will have discretion to accept a majority decision. The presiding judge will have told the jury what those circumstances are. Nevertheless, we should presume that a good faith jury would have understood that as being a compromise position.⁵³⁴ Therefore, with the goal of unanimity in mind, counsel must convince each juror that any reasonable member of the selection universe of which they are a part would have the same goal.⁵³⁵

In a 1996 judgment in the Supreme Court of Canada, in *R. v. G (RM.)*, Cory J eloquently explained the traditional requirement of unanimity in jury decisions.

There is a centuries-old tradition of juries reaching fair and courageous verdicts. That tradition has taken root and been so well and fearlessly maintained that it has flourished.... Our courts have very properly stressed the importance of jury verdicts and the deference that must be shown to those decisions. Today, as in the past, great reliance has been placed upon those decisions. That I think flows from the public awareness that 12 members of the community have worked together to reach a unanimous verdict.⁵³⁶

Earlier, and independently, the New South Wales Law Commission had determined that, ‘It is simply not valid to say that if a doubt is entertained by only one among 12, then it cannot

⁵³⁴ S114 (1) of the Criminal Procedure Act 2004 (WA) prescribes, “Subject to this section, the verdict of a jury must be the unanimous verdict of its members.” Sections 2, 3, 4, and 5 outline the exceptions, but each exception, stipulates that majority decisions, when applied, must be the decision of ten or more jurors.

⁵³⁵ Cf, Claparède, “La genèse de l’hypothèse,” archives de psychologie, vol. XXIV, *introduction* . cited in Perelman and Olbrechts-Tyteca, above n 12, 45

⁵³⁶ *R. v. G. (R.M.)*, [1996] 3 S.C.R. 362 para 13

be a reasonable doubt. We think it inescapable that the existence of a dissenting voice casts a shadow of doubt over the validity of the verdict.’⁵³⁷

In 1993, The High Court of Australia held in *Cheatle*,⁵³⁸ that ‘[t]he requirement of a unanimous verdict ensures that the representative character and the collective nature of the jury are carried forward into any ultimate verdict.’⁵³⁹ It added, ‘to abrogate the requirement of unanimity involves an abandonment of an essential feature of the institution of trial by jury.’⁵⁴⁰ Nevertheless, the High Court noted that ‘[t]here is no actual decision of the Court establishing that s.80's guarantee of trial by jury carries with it an immunity from conviction except by the unanimous verdict of the jurors.’⁵⁴¹ However, the clear weight of authority supports the conclusion that the requirement of unanimity is an essential feature of the institution of trial by jury adopted by s.80.’⁵⁴²

It is the case that after *Cheatle*, some jurisdictions have turned to majority verdicts in criminal trials, but with restricting conditions on which the court may accept them—and at the discretion of the judge.⁵⁴³ This perhaps is a triumph of pragmatism; it results in quicker

⁵³⁷ New South Wales Law Reform Commission, 'Report 48 (1986) - Criminal procedure: The jury in a criminal trial' (1986) 9.37. The *Jury Act 1977* (NSW), s55F, does now allow majority verdicts in prescribed circumstances.

⁵³⁸ *Cheatle and another v The Queen* (1993) 177 CLR 541

⁵³⁹ *Ibid* para 7

⁵⁴⁰ *Ibid* para 18

⁵⁴¹ The Court is referring to the *Commonwealth of Australia Constitution Act (The Constitution)* s80, which reads, “The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.” S 80 also makes clear that it applies to crimes against the Commonwealth.

⁵⁴² *Cheatle and another v The Queen* (1993) 177 CLR 541. para 9

⁵⁴³ For example, s46 of *Juries Act 2000* (Vic) details the conditions under which a judge *may* accept a majority verdict:

46. Failure to reach unanimous verdict in criminal trials

(1) In this section, majority verdict means-

(a) if, at the time of returning its verdict, the jury consists of 12

jurors-a verdict on which 11 of them agree;

(b) if, at the time of returning its verdict, the jury consists of 11

jurors-a verdict on which 10 of them agree;

(c) if, at the time of returning its verdict, the jury consists of 10

jurors-a verdict on which 9 of them agree.

(2) If, after deliberating for at least 6 hours a jury in a criminal trial-

(a) is unable to agree on its verdict; or

(b) has not reached a unanimous verdict-

the court may discharge the jury or, subject to subsections (3) and (4), take a majority verdict as the verdict of the jury.

(3) A court must refuse to take a majority verdict if it considers that the jury has not had a period of time for deliberation that the court thinks reasonable, having regard to the nature and complexity of the trial.

(4) A verdict that the accused is guilty or not guilty of murder or treason or an offence against section 71 or 72 of the

Drugs, Poisons and Controlled Substances Act 1981 or an offence against a law of the Commonwealth must be unanimous.

(5) If in a criminal trial-

(a) it is possible for a jury to return a verdict of not guilty of the offence charged but guilty of another offence with which the accused has not been charged; and

(b) the jury reaches a verdict (unanimously or by majority verdict) that

verdicts, and saves money. A problem, however, is that jury secrecy ensures that the public cannot know why dissenting jurors did dissent. Nevertheless, my second presumption: is that jurors do not set out to obstruct justice; they act in good faith.

The jury retires to consider its verdict in good faith

We ought to presume that a jury retires to consider its verdict in good faith. It has heard witness testimony, listened to counsel build their respective cases, and taken notice of the judge's directions on the law. However, even a jury negotiating in good faith to a mutual understanding can be wrong in law. Moreover, if all twelve jurors, bringing the vaunted but putative community common sense to bear, agree with Mr Bumble in *Oliver Twist* 'the law is a [sic] ass,' the judge's directions might count for nothing, as the following famous case bears out.

In 1649, in an era when the power of God weighed heavily on community common sense, Lieutenant-Colonel John Lilburne faced the court on a charge of treason.⁵⁴⁴ He argued that the trial proceedings were illegal. The judge was adamant that they were not.

[B]ut you must know that the law of England is the law of God.... It is the law that hath been maintained by our ancestors, by the tried rules of reason, and the prime laws of nature, for it does not

the accused is not guilty of the offence charged; and

(c) the jury is unable to agree on its verdict on the alternative offence

after a cumulative total of at least 6 hours deliberation on both

offences-

a majority verdict on the alternative offence may be taken as the verdict of the jury.

In Western Australia, S114 (1) of the *Criminal Procedure Act 2004* (WA) prescribes, "Subject to this section, the verdict of a jury must be the unanimous verdict of its members." Sections 2, 3, 4, and 5 outline the exceptions, but each exception, stipulated that majority decisions, when applied, must be the decision of ten or more jurors. Majority verdicts are not accepted in murder trials.

⁵⁴⁴ Thomas Green, *Verdict according to conscience* (The University of Chicago Press, 1985) 171

depend upon statutes, or written and declared words or lines.... Therefore I say again, the law of England is pure primitive reason.... A pure innocent hand does set forth a clear unspotted heart.... If you refuse to [hold up your hand] you do wilfully deprive yourself of the benefit of one of the main proceedings and customs of the laws of England.⁵⁴⁵

Lilburne, however, declared that ‘his jurors’ were ‘judges both of law and fact.’⁵⁴⁶ The court ridiculed his claim because it had no basis in common law; it tried to invoke God and custom. The jury took less than an hour to find Lilburne not guilty. The multitude outside the court cheered and lit celebratory bonfires. The community struck a medal bearing the names of the jurors. Its inscription read, ‘John Lilburne, saved by the power of the Lord and the integrity of his jury, who are judge of law as well as fact’.⁵⁴⁷ Was this a jury that did not consider its verdict in good faith? Was their decision wilful defiance? Or was this a jury that gave voice to community common sense? This last is the attributed value of the jury that our justice system has entrenched.

However, because the jury decision-making discussion is secret, one can only surmise that the jury has reached a verdict against the evidence—jury nullification. Thomas Green has suggested that, at the time of the Lilburne case, jurors had their own ideas of justice, which might well have reflected the values and standards of their community. He reasons that they did not see homicide in the binary manner that law saw it. They would want to take into account circumstances that went beyond the act, to examine such things as pre-existing relations between the perpetrator and the victim. The Crown would not condone this theory of meting out justice, but, nor could it prevent it.⁵⁴⁸ Therefore, one can argue that, as representatives of their community, in its nullification, the *Lilburne* jury, through its independence, simply let the rulers know what the ruled thought. They were keeping the rulers in touch with the real world. They were deciding in good faith, but as representative of

⁵⁴⁵ Green, above n 27, 171 *State Trials* 4:1270-83

⁵⁴⁶ *Ibid* 170

⁵⁴⁷ Brailsford, *Levellers and the English Revolution*, p 602, in *ibid* 176

⁵⁴⁸ Cited in Masschaele, above n 95,7

the people, not of the Crown. Green writes, jury verdicts against the evidence—jury nullification—could be ‘merciful’ or based on assessment of facts found before trial. And, he notes, ‘simple merciful nullification, especially in close cases, was often sheltered from view and frequently protected by the jury’s duty to acquit where the evidence was uncertain.’⁵⁴⁹

However, accepting these two presumptions, does not entitle us to accept also that jury decision making is value free. On the contrary, I submit that a jury selected from a culturally diverse community is likely to comprise a mix of values and standards of the disparate identity groups they each represent. This suggests that for courtroom advocates to think of a jury as comprising like-minded ordinary people is liable to lead to misdirected jury trial discourse, which I examine in the following sections.

1 Good and bad prejudices of narrative style lay reasoning

It is tempting to accept the lay reasoning of the jury as a common sense correction to the methodologically constrained use of reason in judicial decision-making. However, being free of methodological constraints does not mean that the narrative style of reasoning, which Jerome Bruner imputes to lay reasoning, is value free. It is not immune to predispositions and prejudices, which can be either good or bad. To determine which they are, we need to delve deeper into the nature of common sense reason and the prejudices or predispositions that help to shape it.

Logico-scientific reasoning versus a good story

Thomas Green’s suggestion that jurors of the Middle Ages were more willing to take account of circumstances surrounding a felony⁵⁵⁰ has its echoes today in Jerome Bruner’s analysis of the differences between legal and lay modes of reasoning.⁵⁵¹ Bruner argues that there are two modes of thought, one is paradigmatic, or logico-scientific, the other is of the nature of narrative. A good story and a well-formed argument are different; one can use either to

⁵⁴⁹ Green, above n 27, 27

⁵⁵⁰ Ibid 27

⁵⁵¹ Bruner, above n 14, 11-12

convince another person. However, what they convince the other *of* is fundamentally different: ‘arguments convince one of their truth, stories of their lifelikeness.’⁵⁵² Each is a transformation of fact from exposition to a statement of implied causality. Bruner suggests we judge a story for its goodness as a story ‘by criteria that are of a different kind from those used to judge a logical argument as adequate or correct.’⁵⁵³ The paradigmatic or logico-scientific argument ‘attempts to fulfil the ideal of a formal, mathematical system of description and explanation.’⁵⁵⁴ For example, in a newspaper story, we have the facts. Two young boys die in unexplained circumstances in a house. The headline reads, “Two boys die. Police take mother into custody.” As Bruner might present that headline, “Two boys die, and then the police take the mother into custody.”

In one sense, the statement ‘leads to a search for universal truth conditions; in the other, for the likely particular connections between the two events.’⁵⁵⁵ In this case, a well-formed argument can support the logical proposition—a universal truth—that one event followed the other. However, as a narrative account, the word “then” operates differently. It leads to a search for likely causal relationships between the two events, in this case, the possibility of foul play. On the other hand, were we content to accept only the high level of truth of paradigmatic argumentation, “then” has no explanatory value at the lower level of the particular.⁵⁵⁶

In my case study, when the witness testified that he heard screams and that the nature of the screams convinced him to cross the road, the logico-scientific essence of the message is that Witness heard screams, and then he crossed the road. Defence Counsel’s interjection at this point shows that he wanted to constrain testimony at this higher level of universal truth. He did not want Witness to move into narrative—into the particulars of a story. In this

⁵⁵² Ibid 11

⁵⁵³ Ibid

⁵⁵⁴ Ibid

⁵⁵⁵ Ibid

⁵⁵⁶ Ibid 13

courtroom, the reason is obvious. If Witness launches into storytelling, he becomes the author of the plot, which means he might drive the story in a direction that runs counter to Defence Counsel's preferred ending. Therefore, Counsel will try to limit Witness to logico-scientific truth until—in cross-examination—he can direct the plot to his preferred ending through question and answer. That is, through the adjacency pair social interaction governed by the chain maxim, which Danet claims is preoccupied with rules.⁵⁵⁷

Logico-scientific or paradigmatic reasoning relies solely on logic. And, Bruner asserts, '[t]here is a heartlessness to logic: one goes where one's premises and conclusions and observations take one, give or take some of the blindness that even logicians are prone to.'⁵⁵⁸ So, if logic is heartless, and if 'blindness' is the unconscious influence of predispositions—and prejudices—that can infect even logical decision making, can lay reasoning of the jury compensate? Can we argue that lay reasoning is community common sense?

If one were to embrace the Enlightenment prejudice against prejudice, which is Gadamer's criticism of it, one would have to deny the value of community common sense, which the jury brings to the task of finding facts. Why should the justice system suppose that a jury—selected as representative of the common sense of the universal citizen—has derived its common sense through critical thinking? How could peremptory challenge, or challenge for cause, screen the jury pool for its critical thinking acumen? It cannot. The most one could argue in favour of the jury over a judge sitting alone is that it spreads any risk of flawed critical thinking. And, as I have discussed earlier, spreading risk was a reputed reason for appointing the jury in the Middle Ages; it would diffuse the focus of God's wrath, which judges feared if they should wrongly condemn an innocent person.

Still, since the Enlightenment, and the secularisation of law that followed, the symbol of the jury as a protector of individual humans endures. Its justification, though, is forged in a romanticised past going back to the Magna Carta. But, Lord Auld asserts that there is nothing

⁵⁵⁷ Danet, above n 21, 540

⁵⁵⁸ Bruner, above n14, 13

in Magna Carta on which to base the trial by jury ‘as we know it today.’⁵⁵⁹ He supports earlier speculative history that the rights, which the Magna Carta ‘may have indicated’, seem to have had ‘an earlier origin.’⁵⁶⁰ Moreover, he agrees with legal historians that a free person’s right to lawful judgment by their ‘peers’ did not mean trial by jury.⁵⁶¹ Charles Plucknett, more decisively than Auld does, also dismisses that claim as romanticising by ‘more patriotic British.’ It did not stem from any guarantee of rights, privileges, and liberties embodied in Magna Carta.⁵⁶² In spite of these arguments, the romanticised version is the one that survived transportation to Australia.

Yet, if the need for story ‘is encoded in our genes,’⁵⁶³ and if this need drives lay reasoning, as Bruner claims, then community common sense—the wellspring of lay reasoning—has its roots in collective consciousness. But, this also is the source of presuppositions, or prejudices, or pre-understandings as Gadamer calls them. To recognize them as pre-understandings invites one to infer a more neutral meaning than if one were to see them as prejudices. In fact, Gadamer distinguishes what he calls legitimate prejudices from prejudices that, he states, critical reason has the ‘undeniable task’ to overcome.⁵⁶⁴ Both, Gadamer claims, are conditions of understanding. Both have their roots in collective consciousness, which is a product of collective memory. And, collective memory is the source of community values. Collective memory is how we account for our morality.

2 The nature of collective consciousness and the power of collective memory

Collective memory is more pervasive in a culturally coherent society than it can be in a culturally diverse community. According to Geoffrey Hazard, ‘We account for our morals, unintentionally, by naming what we belong to.... Moral life is simpler if one is brought up in

⁵⁵⁹ The Right Honourable Lord Justice Auld, 'Review of the criminal courts of England and Wales' (2001) <<http://www.criminal-courts-review.org.uk/auldconts.htm>> 138

⁵⁶⁰ Ibid 138 He agrees that the Normans imported the jury notion.

⁵⁶¹ Ibid, citing Forsyth, *History of the jury trial* (1852) 108. See also W.R. Cornish, *The jury* (Allen Lane, 1968)

⁵⁶² Auld, above n 559

⁵⁶³ Kadoch, above n 101, 79

⁵⁶⁴ Gadamer, above n 22, 246

a single community in which one's moral language expresses a relatively coherent set of ideals, commitments and expectations.⁵⁶⁵ Yet, collective memory is also the wellspring of the community common sense, which the jury purportedly brings to its task as finder of fact. But, if cultural diversity is drying up this spring, we need to question whether community common sense still can represent deep-seated social values. On the other hand, community common sense in a culturally diverse community might merely represent a negotiated composite of sometimes competing present-day social standards, which pass for values.

Why community standards can differ from social values

I have discussed earlier Alasdair MacIntyre's assertion that many of us are not educated into a coherent way of thinking and judging, but into one constructed out of an amalgam of social and cultural fragments inherited from different traditions from which our culture was originally derived.⁵⁶⁶ Thus, in a multicultural society, culturally derived differences in perceptions of justice and morality might be 'disguised by a rhetoric of consensus.'⁵⁶⁷ That rhetoric of consensus is fragile, and changing circumstances can shatter it, especially when moral panic is enlivened. Therefore, whether or not one accepts Will Kymlicka's view that many who advocate a multicultural curriculum are trying to reverse the historical exclusion of some groups,⁵⁶⁸ one ought to acknowledge that, when talking about culture in the context of the jury, the concept of identity group from which collective consciousness emanates, comprises complex and fluid concerns.

Collective consciousness lies quiescent in us—subliminal—until an event, or new set of circumstances, propels it above the liminal threshold to influence our reactions to the triggering event, or to the changed set of circumstances. Collective consciousness is a product of collective memory. Yet, in the Durkheim sense, collective memory is manipulable, as I will expound later in this chapter.

⁵⁶⁵ Hazard, above n 10, 1139

⁵⁶⁶ MacIntyre, above n 169, 4

⁵⁶⁷ Ibid 2

⁵⁶⁸ Will Kymlicka, *Multicultural citizenship: a liberal theory of minority rights* (Calrendon Press, 1995) 18

French sociologist, Maurice Halbwachs, strongly influenced by Durkheim, introduced the term collective memory to denote 'knowledge of the past that is shared, mutually acknowledged, and reinforced by a collectivity. These range from small informal groups, to formal organisations, to nation states and global communities.'⁵⁶⁹ He believes one sees the world through categories that are social constructions rather than through categories that are universally objective. One can see that a collectivity differs from a group in that it does not require, nor comprise, regular and consistent interaction between members. Relevantly, he asserts that present day interests help shape the way we understand the past.⁵⁷⁰ That is why community standards can differ from social values.

The term Society connotes an inclusive community in which social values represent the sum of all human conditions and activity; it is an ordered community in the sense that customs and organisations reflect inherited values.⁵⁷¹ The values might change over time, but only incrementally. However, I submit that social values, unlike community standards, exist in a conjectural society; one untrammelled by moral panic and perceived threats to personal security. Moreover, when moral panic strikes, and fear of threats to personal security are abroad, social values give way to community prejudices, which often assume the status of standards. When that happens, the community defines itself by its geography, not by consensual social values. It demands that the sources of community panic and personal security fears be rooted out. Some minorities who up until this time had been part of that ordered sum of human conditions might become outsiders. If in the process of rooting out the cause of the community panic those newly labelled outsiders suffer, that is merely collateral damage, incurred in pursuit of the greater good. Changing circumstances or shifting public perceptions might result in a minority group that the community considers worthy of protection at one point in time, becoming a minority group to fear or revile at another point in

⁵⁶⁹ Joachim J Savelsberg and Ryan D King, 'Law and collective memory' (2007) 3 (December 2007) *Annual Review of Law and Social Science* 189–191

⁵⁷⁰ *Ibid* 191

⁵⁷¹ Walker, above n 9, esp 27ff

time. Moral panic can inflame the fear. On the other hand, the state might foster fears because it perceives a need to cultivate national unity against a sovereign threat. The threat might be real or imagined, and the objects of fear and condemnation might change, but the basic instincts that drive these emotions do not.

Collective memory as a social construct

Collective memory is a social construct, not ‘some mystical group mind.’ This means, as Halbwachs reminds us, that, whilst ‘the collective memory endures and draws strength from its base in a coherent body of people, it is individuals as group members who remember.’⁵⁷² If the rhetoric of consensus is merely a thin veneer masking competing identity group values and standards, a juror who is truly independent of the influence of others will be hard to find. It is the milieu of the group that influences how they remember. Therefore, Halbwachs asserts, in any society there are as many collective memories as there are groups and institutions. They include more than ethnic or racial minorities. For example, they include social classes, declared and ascriptive groups, as well as families, trade unions, corporations, religion, and military.

Amy Gutmann defines ascriptive identity groups as those ‘organized around characteristics that are largely beyond a person’s choice; for example, race, gender, class, physical handicap, ethnicity, sexual orientation, age, and nationality.’⁵⁷³ The characteristic of the ascriptive group may be involuntary, but the decision whether or not to join is voluntary. Belonging to a group that members distinguish by a particular characteristic is clearly different to the majority assigning a particular characteristic to persons, and declaring them to belong to a particular group defined by that same characteristic. That is a declared group. One can choose whether to join an ascriptive group; but, for membership of the other, one does not have a

⁵⁷² Maurice Halbwachs, 1877-1945 *On collective memory / Maurice Halbwachs ; edited, translated, and with an introduction by Lewis A. Coser.* (Lewis A. Coser trans, University of Chicago Press, 1992) 22

⁵⁷³ Amy Gutmann, *Identity in democracy* (Princeton University Press, 2003) 117

choice. One entails freedom of association, under which one may subsume all minority groups. But, it is others who assign the characteristics that set apart declared groups.

Free association is adequate to explain how ascriptive groups form. However, it is inadequate to explain fully the nature of group identity formed from the influence of the collective narrative. It overlooks, too, the importance of collective memory in advancing that narrative. Without the continuity that melds the past with the present, one's personal narrative would disintegrate into a series of discrete images of a present that is—putting it idiomatically—here today and gone tomorrow. That is to say, without one's life narrative, living is a series of jarring experiences one enjoys or endures in the moment, but which contribute nothing to the development of one's reason for being. In other words, offering a life without purpose other than to survive. If Society—meaning The People—were the major influence on collective memory, disparate groups with competing, or at least distracting, allegiances might disrupt the internal sovereignty to which nation states aspire and which they guard zealously when they have achieved it. This means guarding social values with the same zeal.

We need to understand how entrenched social values are, and how primed is society's propensity to abandon them in times of moral panic. Gutmann quotes a member of the National Association for the Deaf (NAD) who, responding (using sign language) to a television interviewer's question whether he would want a cochlear implant, said, 'If I were able to hear and speak, I wouldn't be deaf anymore. That means my identity would be gone, and I'd be a completely different person, and I don't want that.'⁵⁷⁴ On the other hand, the 2008 Beijing Olympic Games official guide for assistants acknowledged that Paralympians were members of an ascriptive group of people with disabilities. But, it went beyond that self-evident description of people with a common characteristic choosing to form a group. They have 'unique personalities and ways of thinking.' It adds, 'some physically disabled are isolated, unsocial and introspective. They can be stubborn and controlling...defensive and have a strong sense of inferiority. Sometimes they are overly protective of themselves,

⁵⁷⁴ Ibid

especially when they are called crippled or paralysed.’⁵⁷⁵ In other words, that official guide assigned the members to an overarching group of people with characteristics that can be a threat to social equanimity. The authors of it, in the manner of a jury, had applied their meaning to the designation “people with disabilities.”

More controversially, did the perceived behaviour characteristics of people with disabilities reflect the cultural preconceptions of the community in which the Games took place? If it did, given that the Guide was to inform assistants who were residents of that community, it might be reasonable to frame the guide to accord with those known preconceptions. In other words, pragmatically, is it better to accord with the preconceptions rather than to use the Guide as a tool to overturn them? Social engineering is a long-term project. The circumstance and the alternative ways of dealing with it are analogous to the questions confronting courtroom advocates seeking to persuade, rather than to convince their audience. This is the point at which pragmatism and social justice can clash.

Clearly, the young man who chose to belong to NAD, and athletes with disabilities who chose to join the Paralympics team were exercising their perceived right to freedom of association. Like the young man who was deaf, the athletes did not choose disability. The question is whether belonging to a ‘group’ that others defined as ‘disabled’ contributed to their self-identity. Or, was it a special interest group through which—in Olympic competition—they sought to assert themselves as equal members of the mainstream community. And, in their group membership, did they seek to accomplish the collateral goal of helping to banish the stereotypes, which the guide to assistants embraced as representing the collectivity? The difference between an ascriptive group and a special interest group is that an ascriptive group is enduring, and therefore a source of a collective memory. A special interest group exists only for as long as the special interest remains relevant. In the case of the

⁵⁷⁵ Connor Ashling O, 'Games guide angers disabled', *The Australian* Wednesday, 28 May 2008
<<http://www.theaustralian.com.au/archive/news/games-guide-angers-disabled/news-story/fdd24352407b9da28d62d31fde85f2d4>>

Paralympians, the special interest probably was the 2008 Beijing Paralympics. But, the assignment of them to a declared group, with characteristics that are potentially unsocial remains after the Games are over. If the opinion that people with disabilities can be unsocial were to become a universal perception within the community, this could materially affect how a jury perceives them if they were to appear in a trial either as an accused, a plaintiff, or as a witness. Moreover, if counsel were to see them that way, would they unfairly challenge them as potential jurors at empanelment. That is, would counsel try to “unstack” the jury, as that former lawyer, to whom I referred earlier, claimed he was doing?

Amy Gutmann writes that identity groups act in ways that both aid and impede democracies in enacting and expressing the basic principles of democratic justice, which she identifies as civic equality, liberty, and opportunity. She adds, ‘[t]he benign neglect of identity groups by political scientists and the hypercriticism of popular commentators are not terribly helpful in understanding or assessing their role in democratic societies.’⁵⁷⁶ I submit that benign neglect is a product of a complacent majority when free from threats to personal security, and free from moral panic. Hypercriticism is the tool of commentators in mainstream media when fear and moral outrage are abroad.

Halbwachs favours the ‘group’ as the pre-eminent influence on the formation of collective memory in society. However, unlike Durkheim, from whom he draws inspiration, he does not speak of ‘Society’ (with a capital S). His is, as Lewis Coser remarks, a much more cautious approach to explaining why collective memory needs ‘the support of a group delimited in space and time.’⁵⁷⁷ If Society—the People—were the major influence on collective memory, then disparate groups—with competing, or distracting, allegiances—might be a threat to internal sovereignty. A nation state might seek to guard internal sovereignty through commemoration of significant moments in its history. However, taken together, state-sanctioned commemorations also influence social values as I explain in the next section.

⁵⁷⁶ Gutmann, above n 573, 5

⁵⁷⁷ Halbwachs, above 572, 22; cf Jeffrey Blustein, *The moral demands of memory* (Cambridge University Press, 2008) 127-31

3. Manipulating social values through commemoration

If, as Halbwachs claims, the social mechanism that prevents collective memory from atrophying is commemoration, then the state best secures internal sovereignty by ordaining, or at least overtly encouraging, commemoration that serves that purpose. He maintains that, given we ‘can grasp only the present,’ we need ‘participation in commemorative meetings with group members of the current generation’ to recreate through imaginative re-enactment a past that would otherwise ‘disappear in the haze of time.’⁵⁷⁸

A tale of two histories competing for relevance

Barbara Misztal follows a similar theme in her discussion of Durkheim’s understanding of social memory in early societies.⁵⁷⁹ Although he did not explicitly make use of the idea of collective memory, Durkheim did emphasize the importance of commemorative rituals, and religious rites, in enshrining the notion of shared morality and social cohesion. Misztal writes, ‘Seeing the myth of origin as one of the most powerful means of establishing a community’s unity also assumes the existence of connections between collective memory and institutions guaranteeing collective beliefs and identity.’⁵⁸⁰ She asserts that his ideas of the role of law and memory in sustaining organic solidarity are relevant today in understanding social processes in today’s society.

In early Anglo-Australian society, religion—with its rituals and rites—fulfilled the role of affirming beliefs and values. Misztal writes that in an undifferentiated society,

Religion provides an all-embracing structure of beliefs, impresses on individuals a sense of the sacredness of something outside of them, and institutes a common destiny and identity not only with contemporaries but also with past and future generations. Sacred symbols and celebrations of past

⁵⁷⁸ Halbwachs, above n 572, 24

⁵⁷⁹ Barbara Misztal, ‘Durkheim on collective memory’ (2003) 3(2) *Journal of Classical Sociology*

⁵⁸⁰ Ibid 125

events help the recall of great events of the past that hold the community together, and, in turn, these ties to the past are cultivated by means of periodic commemoration rites.⁵⁸¹

However, a problem arises when society becomes too different, and divorced from the conditions that had given rise to these traditions in the past. It will no longer ‘find within itself the elements necessary to reconstruct, consolidate, and repair these traditions.’⁵⁸² Group narrative does provide the means by which we attempt to understand the present by recalling the past. However, using the present to understand the past may lead to redefining the nature of the group identity and, in fact, in turning the group narrative into a kind of palimpsest. By overlaying one text onto another, we blur the truth, the consequence of which is two histories competing for relevance.

On the other hand, Barbara Misztal asserts that those who endorse “forgetting” as a condition for justice invoke liberals like Rawls who argue, “Social amnesia is...a foundation of society because it allows society to start afresh without inherited resentments.”⁵⁸³ But, as she notes, this means that ‘the writing of a historical narrative necessarily involves the elimination of certain elements.’⁵⁸⁴ I will elaborate, and return to her specific example, in the next section. It illustrates an important truth for courtroom advocates in an increasingly diverse cultural community that the past does not cease to exist, because the state decrees it should die. Nor do inherent values cease to exist because the state considers them outmoded.

Jacques le Goff has drawn awareness to the idea that there are two histories, one consisting of collective memory, the other of the work of historians. He explains:

Memory is the raw material of history. Whether mental, oral, or written, it is the living source from which historians draw. Because its workings are usually unconscious, it is in reality more dangerously subject to manipulation by time and by societies given to reflection than the discipline of history itself.

⁵⁸¹ Ibid 125

⁵⁸² Halbwachs, above n 572, 24

⁵⁸³ Cited in, Barbara A Misztal, 'Memory and democracy' (2005) 48(10) (First published June 1, 2005) *The American Behavioral Scientist* 1320, 1324

⁵⁸⁴ Ibid 1325

Moreover, the discipline of history nourishes memory in turn, and enters into the great dialectical process of memory and forgetting experienced by individuals and societies. The historian must be there to render an account of these memories and of what is forgotten, to transform them into something that can be conceived, to make them knowable. To privilege memory excessively is to sink into the unconquerable flow of time.⁵⁸⁵

Later, he injects a doubt: ‘But is the historian himself immune to an illness that proceeds, if not from the past, at least from the present, or perhaps from an unconscious image of a dreamt-of future?’⁵⁸⁶ In each instance—as historian or as layperson—collective memory plays its part. Even an unconscious image of a dreamt-of future must originate from...where? A sort of consciousness big bang? From an unconscious recollection that ‘mythic, deformed and anachronistic collective memory’ also has shaped?⁵⁸⁷ Why should we expect legal or legislative ‘historians’—especially those who lean too heavily on precedent or ideology—to be immune to this ‘illness’? These are not merely questions for philosophers. In the diverse cultural reality that is the jurisdiction of the justice system today, they are questions, the answers to which determine how, and in what circumstances, justice does prevail. The answers give rise to a larger question. In what mode of adversarial trial is justice more likely to prevail: trial before Jury? Or a trial before judge sitting alone?

There is a still larger question, which I raise, not to answer with unwarranted certitude in this thesis, but as a field of further inquiry. In an increasingly culturally diverse society: is the adversarial trial a relic from a now irrelevant past? Is Society demanding more of the adversarial trial by jury than it can deliver? In the next section, I discuss these, and other, issues, which are germane to this question.

⁵⁸⁵ Le Goff, above n 207, preface xi-ii

⁵⁸⁶ Ibid 111

⁵⁸⁷ Ibid 111

4. Is the adversarial trial a relic of a now irrelevant past?

Narratives constructed through legal proceedings are chronicles of individuals, not of ‘historical trajectories, larger social and cultural forces, and collective responsibilities.’⁵⁸⁸ What is more, Savelsberg and King argue that a trial will focus on the defendant, relegating the victim to the function of a ‘tool’ to facilitate the delivery of justice.⁵⁸⁹ They advance the notion that ‘Law may affect collective memory indirectly as it regulates the production of, access to, and dissemination of information about the past.’⁵⁹⁰ In raw terms, one can couch this argument as distinguishing between preferred carriers of the collective memory—the state, (as I will explain, they use Germany as their example), or ‘disparate groups,’ as in the United States.⁵⁹¹ When the state appoints itself carrier of collective memory; that is, when it institutionalizes collective memory, the state coercively influences what individuals remember. What they remember influences what they accept as proper. What they accept as proper influences their attitudes and behaviour towards those who belong to an outside group.

With the Holocaust as their archetype, in which Jews were incontrovertibly the victims, Savelsberg and King reason that the focus of judicial deliberation is the perpetrators. Therefore, they argue, the trial does not present an opportunity for the judiciary to advance the victim group’s narrative. However, considered at a level of abstraction beyond the heinous particularity of the Holocaust, defendants have life narratives as impelling as the narratives that impel plaintiffs. In other words, if, as a member of a group, a defendant acts from the stimulus of the group’s collective memory, it is not enough to punish the individual simply to deter others, to protect society, or to assuage the anguish of the victim. The next necessary step is to understand the nature of the stimulus. If that stimulus derives from past real or perceived injustices, enforced isolation, or social disenfranchisement, the legislature is

⁵⁸⁸ Savelsberg and King, above n 569, 206

⁵⁸⁹ Ibid 194

⁵⁹⁰ Ibid 206

⁵⁹¹ Ibid 204

the effective forum in which to act to change the nature, or redirect the force, of the stimulus in the interests of all.

In the trials of the Holocaust perpetrators, a now informed and shocked world judged that next step unnecessary because the facts were incontrovertible. The perpetrators were guilty. The only issue that captured the attention of the world was the need to ensure that punishment fit the crime. But that is not the only issue; the other is to ensure such a crime never recurs. One must go beyond the vile uniqueness of the Holocaust to understand why more generally that extra step *is* necessary. Generally, to focus on the victims' narrative without also considering what propelled the defendants, would be to create the risk of bringing about the very consequence against which the trial and punishment of perpetrators claims to guard.

At this point, I offer two salutary expressions of why this other step is important—one is parochial, the other global.

First, Introducing first year law students to the functions of the court, the Law School Dean invited a justice of the Supreme Court of Western Australia to talk to the students. When the judge invited questions, a young student asked, how does it feel to have the 'scum of the earth' parade before you every day? Fielding this provocative question with equable poise, the Supreme Court Justice told of a case over which he had presided. A young Aboriginal boy had brutalised and murdered an elderly woman in her home. The Court had no reasonable option than to punish him according to the law for the abhorrent crime.

Although he had no reservations about performing his judicial duty, the judge nevertheless felt despair and sadness that the life itself of the young boy had been so brutal and dehumanising that its consequence was almost inevitable. Although he did not make it explicitly, his implicit point was that confining our focus to the trial and punishment of the offender to satisfy the community's legitimate demand for law and order means that the collective narrative of the majority community is missing an important element: the reality of a minority group shaped by despair and social isolation. Perhaps, too, it is missing an

important truth: putative ‘scum of the earth’ are not born as such. In a sense, the trial and punishment becomes a commemorative event. We recall the history; follow the historic precedent, and, each time history repeats, the morally panicked people seek increasingly draconian punishment to deal with it. But, in the process, we risk public demonization of the minority to which the accused belongs.

Second, Barbara Misztal provides an example on a global scale, moving outside the discipline of law to do so. She cites Ingmar Bergman’s film *The Serpent’s Egg* (1977) as a ‘fairly historically accurate’ view of life in post-World War I, pre-Nazi, Germany. Brutal inflation was crushing the people and the world had ostracized Germany. The people were desperate, and Nazism opportunistically presented itself as the saviour. It also offered up a minority group as scapegoat. Misztal emphatically asserts we do not have to condone the outcome of this situation to acknowledge it, but ‘[i]n understanding...the wounds suffered by abusers (or those they lead), one can sometimes gain a perspective or sense of meaning about the cruel actions of abusers, sadist, tyrants, and despots.’⁵⁹²

The message from the Supreme Court Judge’s account of the case that had come before him, and from Misztal’s resort to filmic fiction to make her point is compelling. In both instances, had society understood the stimuli, and acted to mitigate them when they first presented themselves, horror and tragedy in both situations—one parochial, the other global, but no less human—might have been avoided.

Savelsberg and King argue that regulating access to, and use of, available information is typically justified by appealing to a concern for the dignity of individuals or vulnerable groups. They cite Germany’s Criminal Code (as it was when Misztal wrote), which prohibits the distribution of symbols of groups that the state has decreed are unconstitutional. The Code also forbids the production, exhibition, and dissemination of writings that incited racial hatred to persons under the age of eighteen. In addition, the law allows for prosecution,

⁵⁹² Misztal, above n 579, 1327

without petition from the victim, of any person who insults or slanders another person who suffered persecution during the Nazi regime, or against a deceased person who died because of acts perpetrated by the Nazis.⁵⁹³

In Australia, the wish to regulate access to information about past misguided separations policy for Aboriginal children could have been argued as a desire to preserve the inner peace of a cohesive society. On the other hand, people could have argued, and many did argue vigorously, that it was a misguided attempt to preserve a false version of Australia's history. In other words, it was politically inspired. The government of the day, the argument held, wished to avoid attributing blame to a current generation of voters for actions for which they had no direct responsibility.

Whatever the motivation, in each situation—in Germany or in Australia—the aim was to shape collective memory to have it accord with the image that the ruling elite preferred. Blustein quotes F R Ankersmit, “testimony and commemoration have become the much preferred matrices in our relationship to the past.” He adds, ‘neither is conducive to creative politics that require identification with a nation and a robust sense of a shared, national past. Testimony personalizes or privatizes the past, embodying a privileged and intimate connection between the witness and an historical reality, whereas commemoration transforms memory into empty rituals or objects devoid of historical significance and incapable of galvanizing collective action.’⁵⁹⁴

I return for a moment to Halbwachs' idea that since we can only grasp the present, we use it to reconstruct our version of the past, which we can do only through commemorative rituals. If it is truly the case that the ‘beliefs, interests, and aspirations of the present shape the various views of the past,’⁵⁹⁵ then all of us must lead inauthentic lives. This would mean we endure our lives with ceaseless apprehension as we await the next, but unforeseeable, event

⁵⁹³ Le Goff, above n 207, 199

⁵⁹⁴ Blustein, above n 577, 17

⁵⁹⁵ Halbwachs, above n 572, 25

that will impose a jarring reconstruction of the life narrative on which we rely as a guide for present and future functioning.

Changing circumstances or shifting public perceptions might result in a minority group that the community considered worthy of protection at one point in time, becoming a minority group to fear or revile at another point in time. The fears might be real or merely perceived. Moral panic can inflame them. Or, the state might nurture fears because it perceives a need to foster national unity against a sovereign threat—real or imagined. The objects of fear and condemnation might change, but the basic instincts that drive these emotions do not. If the rhetoric of consensus is merely a thin veneer masking competing identity group values and standards, then a juror who is truly independent of the influence of others will be hard to find.

Is it reasonable to expect a jury to embody deep-seated social values?

Earlier, I discussed Alisdair MacIntyre's contention that we are a blend of our past social and cultural fragments⁵⁹⁶ and I posed the question whether we bring the expectations that stem from our cultural way of being to any new experience. If we do, then those expectations must exert an enormous force on our interpretation of any text. Timothy Ashworth contends that, faced with the task of interpreting such a text, those expectations 'shape the kind of questions that we ask, and, in a sense, determine what we are able to discover.'⁵⁹⁷ He quotes Gadamer:

A person who is trying to understand a text is always projecting. He projects a meaning for the text as a whole as soon as some initial meaning emerges in the text. Again, the initial meaning emerges only because he is reading the text with particular expectations in regard to a certain meaning. Working out this fore-projection, which is constantly revised in terms of what emerges as he penetrates into the meaning, is understanding what is there.⁵⁹⁸

⁵⁹⁶ MacIntyre, above n 169, 169

⁵⁹⁷ Ashworth, above n 489, introduction, xx

⁵⁹⁸ Hans-Georg Gadamer, *Truth and method*, in, *ibid* introduction, xx

One might argue that the courtroom discourse is not a text in the sense of being a ‘permanently fixed expression of life.’⁵⁹⁹ It is not a sequence of ‘written marks’ that are to be changed back into meaning through the interpreter.⁶⁰⁰ Yet, within the spirit of Gadamer’s analogy, it is a text, if one understands the discourse as text becoming one partner in a hermeneutical conversation, which speaks only through the jury as interpreter.

I submit that it is appropriate to use Gadamer’s analogy to liken the hermeneutical conversation to ‘a real conversation in that it is the common object that unites the two partners, the text, and the interpreter.’⁶⁰¹ In his judgment, it is perfectly legitimate to speak of a hermeneutical conversation, because, ‘[just] as the translator makes mutual understanding in the conversation possible only by becoming involved in the subject under discussion so in relation to a text it is indispensable that the interpreter involve himself with its meaning.’⁶⁰² This means the interpreter’s own thoughts have gone into determining meaning.

The difference between the language of a text and the language of the interpreter, or the gulf that separates the translator from the original, is not merely a secondary question. On the contrary, the fact is that the problems of linguistic expression are already problems of understanding. All understanding is interpretation, and all interpretation takes place in the medium of a language, which would allow the object to come into words and yet is at the same time the interpreter’s own language.⁶⁰³

This brings us to the nub of the problem as Gadamer sees it, and—by extension—brings us to the dilemma of the jury reaching an understanding. That is, the need to put one’s own prejudices and preunderstanding at risk in conversation to reach an understanding.

⁵⁹⁹ Gadamer, above n 22, 349

⁶⁰⁰ Ibid

⁶⁰¹ Ibid

⁶⁰² Ibid

⁶⁰³ Ibid 350

Prejudices as a condition of understanding, or transient community prejudices masquerading as standards?

Gadamer draws on the Enlightenment theory that there are two kinds of prejudice; one derives from ‘over-hastiness’ the other from ‘authority.’ According to this theory, ‘over-hastiness’—or impulsiveness—brings errors of judgment because one applies one’s own reason. ‘Authority’ results in one not using one’s own reason at all.⁶⁰⁴ Gadamer suggests that a person assumes a position of authority, not through ‘blind obedience to a command,’ but with recognition of the knowledge of the other. That is to say, ‘he has a wider view of things or is better informed... because he has superior knowledge.’⁶⁰⁵ Their judgment, therefore, takes precedence.

In the type of understanding that Gadamer puts forward, the Enlightenment invoked the methodologically disciplined use of reason to avoid the error of overhastiness, which is the product of one’s own reason. On the other hand, ‘authority’ is responsible for not using one’s own reason. Gadamer challenges the Enlightenment exhortation to fight the ‘false prepossession in favour of what is old, in favour of authorities.’⁶⁰⁶ In fact, he suggests that those who argue against those prejudices that favour authorities could overlook some that might be true. ‘If the prestige of authority takes the place of one’s own judgment, then authority is in fact a source of prejudices. But this does not exclude the possibility that it can be a source of truth, and this is what the Enlightenment failed to see when it denigrated all authority.’⁶⁰⁷

Anthony Daniels, writing under the pseudonym “Theodore Dalrymple,” puts forward an argument to counter the ‘cruel effect of not instilling right prejudices’. He draws on his experience as a doctor in a women’s prison, where he encountered the plight of ‘girls who come from the pitiable homes they were in the process of reproducing.’ He explains:

⁶⁰⁴ Ibid 246

⁶⁰⁵ Ibid 248

⁶⁰⁶ Ibid 246

⁶⁰⁷ Ibid 247

Emerging from a loveless environment – in which hostility, not just to people, but to the world in general, is always more marked than tenderness – the girls seek to assuage their need for love by bringing into the world a being upon whom they can lavish that unsatisfied emotion that dwells in their heart.⁶⁰⁸

Later,

Is it right—is it kind or decent, let alone realistic or sensible—to expect a girl who describes in the following fashion her decision to have a child to generate moral principles for herself?

“ ‘Cos I wanted children – and I wasn’t – you know – doing anything else really – I wasn’t working and – so it wasn’t – nothing just – nothing getting in the way really – so – I was, like lost – I didn’t know what to do with myself, ‘Cos I was just working and thinking, this is pointless – I’m not enjoying this, or I’m not enjoying what I’m doing at the moment”⁶⁰⁹

Daniels (Dalrymple) describes her as a girl in need of a right prejudice. ‘To overturn a prejudice is not to destroy prejudice as such. It is rather to inculcate another prejudice. The prejudice that it is wrong to bear a child out of wedlock has been replaced by the prejudice that there is nothing wrong with it at all.’⁶¹⁰ This, he argues, is a prejudice against prejudice.

Many years earlier, Gadamer had reached the same conclusion. ‘What is necessary is a fundamental rehabilitation of the concept of prejudice and a recognition of the fact that there are legitimate prejudices, if we want to do justice to man’s finite, historical mode of being.’⁶¹¹ In fact, individual prejudices, more than individual judgments, are the historical reality of man’s finite, historical mode of being. He asserts that history does not belong to us; we belong to history.

Long before we understand ourselves through the process of self-examination, we understand ourselves in a self-evident way in the family, society, and state in which we live. The focus of subjectivity is a

⁶⁰⁸ Theodore Dalrymple, *In praise of prejudice: the necessity of preconceived ideas* (Encounter Books, 1st ed, 2007) 30

⁶⁰⁹ Ibid 32

⁶¹⁰ Ibid 25

⁶¹¹ Gadamer, above n 22, 246

distorting mirror. The self-awareness of the individual is only a flickering in the closed circuit of historical life. That is why the prejudices of the individual, far more than his judgments, constitute the historical reality of his being.’⁶¹²

Counsel in a trial before jury do not have to do justice to ‘man’s finite historical mode of being,’ nor do they have to find a universal truth. They must work with what they have—the particular audience with which the jury selection process has presented them. They can worry no further about whether their audience is a statistically valid sample of its universe.⁶¹³ Nevertheless, counsel must act as if the particular audience is universal and marshal their arguments to appear to be master of that universe. However, that mastery might not lead to revealing substantive truth. It is on this point that the focus on ensuring that a jury adequately represents the community from which it is drawn can lead us astray from the search for substantive truth.

5 The risk of misunderstanding community common sense as universal

The universal truth of which Gadamer,⁶¹⁴ and Perelman and Olbrechts-Tyteca⁶¹⁵ write is not a synonym for the lay reasoning of the community, which the jury purportedly represents. Nor is the universal audience of which they write synonymous with the statistical universe from

⁶¹² Ibid 245

⁶¹³ In statistical terms, a representative selection is one drawn from a population in such a manner that every person in the population has an equal chance of selection. This is the universe. Moreover, the selection process must be such that any one person is not—in any relevant way—tied to the selection of another. This is random sampling. But, random sampling is not necessarily truly representative of the population, or universe. A truly representative jury would come from using a stratified sampling technique, which categorizes the population by sub-groups to find what proportion falls into each category. The sub-groups could be socioeconomic; professional; skilled and unskilled work; geographic, ethnic, voting practices, and so on. This is its universe. A jury drawn in such a manner would be more representative than one drawn from a random sample. If a stratified random sample is, in practice for jury selection, an unrealizable ideal, it nevertheless provides a benchmark against which to assess attempts to improve the process. Generally, the criterion the justice system relies on is a sample that is broadly representative of the population as a whole. See Joy Paul Guildford, *Fundamental Statistics in Psychology and Education* (McGraw-Hill, 5th ed, 1973)

⁶¹⁴ Gadamer, above n 22

⁶¹⁵ Perelman and Olbrechts-Tyteca, above n 12

which the jury is drawn. The statistical universe that is the source of the jury comprises individuals, whose prejudices, not judgments, constitute their self-evident historical reality.

One can idealize community common sense as a kind of universal common sense, which has a historical context in that it is beyond immediate experience. But, this only tenuously accords with the real audience that courtroom counsel must persuade. The universal audience is an imagined audience—that the arguer constructs—comprising all rational human beings. Perelman and Olbrechts-Tyteca seem to recognize this shortcoming.

Indeed, if arguments are not compulsive, if they are not necessarily convincing but only possessed of a certain force, which may moreover vary with the audience, is it not by their effect that we can judge this force? This would make the study of argumentation one of the objects of experimental psychology, where varied arguments would be tested on varied audiences which are sufficiently well known for it to be possible to draw fairly general conclusions from these experiments.⁶¹⁶

Thus, Perelman and Olbrechts-Tyteca redirect their study to the constructed audience of the arguer, where they can examine the methods of proof of ‘advertisers in newspapers, politicians in speeches, lawyers in pleadings, judges in decisions, and philosophers in treatises’ to construct a theory of argumentation.⁶¹⁷

However, Richard Lempert does not see the jury as the solution to judicial ambivalence about competing social values.⁶¹⁸ He argues that if social science wants to wield influence, to do something ‘worthwhile’, in finding ‘the solution to a real-world problem...a sense of accomplishment in being cited by the Court is misplaced, for most social science research is only cited in the footnotes, and these footnotes are seldom, essential to court opinions.’⁶¹⁹ He suggests that, worse, ‘they may have been added by law clerks long after the decisions they support in fact were reached, and the Court’s reading of the social science is frequently

⁶¹⁶ Ibid 9

⁶¹⁷ Ibid 10

⁶¹⁸ Richard O. Lempert, ‘Why do jury research?’ in Reid Hastie (ed), *Inside the juror* (Cambridge University Press, 1993)

⁶¹⁹ Ibid 243

imperfect if not downright wrong.’⁶²⁰ He advocates targeting the legislature and legislative committees. This is ‘less common than it should be if influencing the law is the goal.’⁶²¹ He claims that, ‘generally speaking’ the legislature is ‘better equipped’ than courts to use research intelligently.

They have professional staffs, some members of which may have graduate social science training, and they are better situated than courts to make systematic studies of issues. Legislatures have the additional advantages of setting their own agendas, which not only can make social science relevant but may also be influenced by social science research in the first place.⁶²²

But, the legislature does not hold a cure for judicial ambivalence on social values. A problem with ‘own agendas’ as a working philosophy is that they might not be value free. They can be influenced unduly by the power of constituents—voters—on whom members of the legislature rely to remain in office.

A debate in the Western Australia Parliament about a Bill to change the *Juries Act* shows that voter reaction to legislation was important in the minds of those debating the Bill. The Attorney General had introduced the Bill to alter the *Juries Act* to reduce the number of permissible peremptory challenges to prospective jurors during the empanelling process. He had drafted the Bill after considering research, which the Law Reform Commission of Western Australia had carried out. The parliamentary debate, conducted mostly by former lawyers—which might have contributed to the problem—centred largely on personal anecdote, and intuitive judgments based on their experiences.

The Attorney General found peremptory challenges unsettling because of the potential damage they could cause to the self-esteem of those who were challenged. The Shadow Attorney General retorted that, therefore, the proposed change was merely a ‘whim’. He also was concerned that a need for efficiency was driving the reduction in the number of

⁶²⁰ Ibid

⁶²¹ Ibid

⁶²² Ibid

peremptory challenges. It was an unnecessary drive, he said, because, ‘the peremptory challenge takes less than thirty seconds: ‘counsel says “challenge” and the person does a U-turn and goes back into the balance of the pool sitting at the rear of the court. A peremptory challenge does not hold up any time in the court.’⁶²³

The Attorney General praised the Law Reform Commission for its work. Nevertheless, he tempered his praise:

I detect there is sometimes a tendency for the general public, through the media, to consider that if a body outside Parliament—even one commissioned by the Parliament—comes up with an answer, it must be the perfect answer, and any variance from that recommendation represents some kind of wrong-headed ideology, obstinacy or a failure to see truth and reason. I caution some care about that kind of concept.... If the Law Reform Commission made a recommendation that was latterly instituted by government and it turned out to be not practically functioning terribly well, I can guarantee that people would not be complaining to the Law Reform Commission.⁶²⁴

His slight praise, with which he does not quite damn, highlights the agenda-setting priorities of the legislature. His summing up is dogmatic.

We all want to enjoy a properly functioning criminal justice system, but, at the same time, statistics clearly show that a huge swathe of us want nothing to do with it. We complain vociferously if things turn out in a fashion and produce outcomes that we do not think, based on the little knowledge we have of them, are right. But we also have a predilection to divorce ourselves completely from it. What this legislation tries to do is put through the Parliament a set of rules about jury duty that hopefully will change something of a mindset and impress on people that excuses must be real and narrowly defined; the reason being that this is terribly important and everyone must be a part of it to make it work.⁶²⁵

Social research in the interests of truth in justice was not in consideration in this context. The focus was the fair distribution of jury service. Clearly, the gulf between the art of the possible

⁶²³ Western Australia, Parliamentary debates, Assembly, Thursday, 24 February 2011, p1107-1118 (Mr J.R. Quigley (Mindarie))

⁶²⁴ Ibid p1107-1118 (Mr C.C Porter (Bateman--Attorney General))

⁶²⁵ Ibid (Mr C.C Porter (Bateman--Attorney General))

that constrains the legislature and the sometimes-abstruse domain of the social scientist exists. Social research in the interest of justice was not on this agenda. From this standpoint, legal practice is, as the term suggests, practical. Therefore, we have two principles in potential conflict. There is the principle of individual human rights, which the institution of the jury supposedly symbolizes. And, there is the principle of formal justice, which requires that ‘beings in the same category should be treated in the same way.’⁶²⁶

Rules of formal justice and the problem of precedent as quasi-logical argument

The rules of formal justice require consistency without recourse to expediency or to the idea of might as right. There is no consideration of where the power resides. This is rational decision making, with appeal to a universal audience. The rule of justice requires that the final arbiter of justice give identical treatment to people and circumstances of the same kind. Perelman and Olbrechts-Tyteca describe this as deriving from the ‘principle of inertia,’ which explains ‘the importance that is given to precedent.’⁶²⁷ Thus, in *The New Rhetoric*, they say, ‘[t]he rule of justice furnishes the foundation which makes it possible to pass from earlier cases to future cases. It makes it possible to present the use of precedent in the form of quasi-logical argument.’⁶²⁸ -Which means that precedent, when presented as *stare decisis* (let the decision stand) becomes more than merely quasi logical. Judicial history has implied it is truly logical.

However, when a judge alone uses precedent as a quasi-logical argument or as an “implicit rule” to support formal justice rules, it brings into question how the judge processes precedent. Is there a moral consequence in following past judicial opinions without considering whether the judge arrived at it by ‘sound or defective’ reasoning?⁶²⁹ Or, if that

⁶²⁶ Chaim Perelman, *The idea of justice : and the problem of argument* (Routledge and Kegan Paul, 1963) 15.
Cited in Perelman and Olbrechts-Tyteca, above n 12,219

⁶²⁷ Perelman and Olbrechts-Tyteca, above n 12, 218-9

⁶²⁸ Ibid 219

⁶²⁹ James Boyd White, 'What's an Opinion for?' (1995) 62(4 (Autumn 1995)) *The University of Chicago Law Review* 1363 1367

decision was arrived at by applying the rational reasoning of a universal audience, has the inherent character of a universal audience changed since that decision? The precedent (using the word in its sense as guide rather than the *stare decisis* literal meaning of “let the decision stand”) is only the carrier of the narrative that judges must interpret before deciding how to continue it. For a conscientious judge, this is an onerous task because the ritual force of institutionalized law is coercive. It offers the institutional excuse.

The coercive power of the institutional excuse.

David Luban calls the propensity of role agents to shelter behind the morality of the institution, the ‘institutional excuse;’⁶³⁰ it justifies the role agent performing the requirements of their role to the end that the institution determines. So, the motivation to act transmutes into a mantra—‘my station and its duties’—which relieves the role agent of any responsibility for their act. The institutional excuse has its roots in Luban’s ‘theory of justification.’ It proposes a series of justificatory levels, each of which justifies its existence and function by appealing to the demands of the level (or link) above it. It works as follows:

Link one - Institutions: justified by demonstrating its moral goodness;

Link two - Roles: justified by appealing to the structure of the institution;

Link three - Obligations: justified because they are essential to the role;

Link four - Role Acts: justified because the obligations require it.

So long as the role agent at any level is convinced that the institution is morally good, they can justify their role act by appealing to the level above them. The weakness in the institutional excuse lies in the justificatory independence of each level in the hierarchy. It does not matter to the role agent at that level whether there is a weak or strong moral justification for the level above it. All that ‘my station and its duties’ requires is that the role

⁶³⁰ Luban, above n 66, 129

act crosses a minimum threshold of justification to warrant performing it. Therefore, all the role agent needs to do to invoke the institutional excuse is to accept that their institutional roles are morally desirable. They have then shifted responsibility for their role acts to the institution.⁶³¹ In hard cases, judges might face the need to contort themselves intellectually to distinguish facts from precedential cases if they wish to continue the legal narrative in the most satisfactory way. They must do this without damaging the twin bastions of judicial convention: precedent and *stare decisis*. Sometimes they must contort the facts to conform to judicial orthodoxy to avoid charges of judicial adventurism.

Ronald Dworkin, who champions the idea of 'law as narrative,' sees the judge's role being to advance the story that the legislature or other judges have begun. He rejects the opinion that judges should decide cases wholly independent of morality, and asserts that the judge has a moral obligation to sharpen the fuzzy boundaries, and close the gaps, that strictly positivist law leaves in its wake.⁶³² The inference one can draw from Dworkin's proposition is that we carry out our reconstruction of the past through language woven into narrative, which, in the judicial process, manifests itself in *stare decisis*. However, as I interpret Dworkin, he is arguing that judicial precedent has to be more than a sort of marking template that judges use to compare or distinguish the evidentiary facts of the case before them. So, one also can infer from Dworkin's reading that a judge sitting alone ought to view precedent as an element of the judicial narrative that stimulates thoughtful deliberation, and does not stifle it. Moreover, it must not diminish the worth of the individual.

The rules of justice can decree broadly the criteria against which to assess categorisation. However, they cannot dictate if, or when, two specific people are in the same category and in identical circumstances. This is the province of argumentation. Hence, it raises the further

⁶³¹ Ibid 129

⁶³² Ronald Dworkin, 'The judge's new role: should personal convictions count?' (2003) 1(1) *Journal of International Criminal Justice* 4 5

question of whether the jury is an essential safeguard against arbitrary application of the rules of *stare decisis*.

The jury as shield against the coercive power of bureaucracy

The jury is a safeguard against arbitrary decision making by the bureaucratic state. That is its justificatory mantra. But, this is appeal to a particular audience, from which the jury derives. And, as the Lilburne case shows—perhaps to an extreme extent—this can appeal to self-interest. Perelman and Olbrechts-Tyteca acknowledge that the particular audience is self-interested. This means the audience carries prejudices. However, they argue that the presence of a universal audience within it mitigates their effect. The rhetor must use it to win adherence to their thesis. Tindale points out that “effective” rhetoric ‘is often seen to have license (or to take license) to exploit such traits.’⁶³³ However, he also points out that Perelman and Olbrechts-Tyteca resist this. ‘While the success of their rhetoric is the ability to gain the adherence of an audience, they do not sacrifice reasonableness to effectiveness.’⁶³⁴

What Perelman and Olbrechts-Tyteca propose is that, in appealing to the particular audience to accept the proffered thesis, the rhetor ‘presupposes the partial identification of beings by putting them in a category and applying a treatment foreseen by members of that category.’⁶³⁵ The aim is to present to the particular audience what is unquestionably reasonable, as the audience members would see it according to their values. Perelman and Olbrechts-Tyteca use an example from Demosthenes, *On the Treaty with Alexander*, to illustrate:

Would they claim, perhaps, that a treaty which is unfavourable to our city is binding, and yet refuse to recognize it if it gives us any guarantees? Do you find this just? What? If a clause of the treaty is favourable to our enemies but unfavourable to us, they insist that it is valid; but if, on the contrary, they

⁶³³ Tindale, above n 432, 147

⁶³⁴ Ibid 147

⁶³⁵ Perelman and Olbrechts-Tyteca, above n 12, 219

find in it a clause which is just and advantageous for us and disadvantageous to them, they think they must oppose it vigorously.’⁶³⁶

Perelman and Olbrechts-Tyteca contend the rationality of this is so evident that, ‘since they are parties to an agreement, their behaviour to each other should not be different.’ By putting to the audience an incontrovertible fact from a rational universal audience, the deep-seated values underpin the community of the particular audience; the rhetor allies the thesis to that fact, and wins them over to the rhetor’s preferred thesis. However, the universal audience that underpins the particular audience will change over time as attitudes about what is reasonable change. But, as Tindale points out, the degree of change will depend on the communities in question and ‘the ways in which they come to agree with or challenge the views of others.’⁶³⁷ We should use the term communities in its widest sense, which means seeing cultural diversity within a single jury universe, as well as acknowledging differing viewpoints of diverse identify groups, whether ascribed or assigned.

The jury represents a particular audience defined by its values and standards. So, what counts as reason—community common sense—has ‘a bedrock of attitudes, opinions, and beliefs that are stable and widely accepted.’⁶³⁸ Christopher Tindale draws on Perelman and Olbrechts-Tyteca to depict demonstration as rational, and dependent on mathematical reasoning, which works from self-evident and immutable truths. Reasonable is ‘the domain of the holistic inquirer, who draws on experience and dialogue with others.’⁶³⁹ Here, then, he diverges from Perelman and Olbrechts-Tyteca—who do not find emotion necessary to their discussion of argumentation—to suggest that, whereas the rational person finds support in ‘*logos*’, the reasonable person ‘supplements this with pathos and ethos.’⁶⁴⁰ In this context, ‘*logos*’ means reason and judgment. What is important is that, in applying these elements of values

⁶³⁶ Cited in *ibid* 219

⁶³⁷ Tindale, above n 432, 148

⁶³⁸ *Ibid* 146

⁶³⁹ *Ibid* 134

⁶⁴⁰ *Ibid* 134

elements, the ‘human reasoner’ transforms the logos that the rational person espouses. He asserts, ‘[u]nlike the “rational person” in whom reason is separated from other human faculties, the reasonable person judges reason as only one component within the project of human development, as something that is instantiated in real audiences. *They*, actual reasoners in real audiences, are the source of the principles of good argumentation (emphasis in the original).⁶⁴¹

However, Tindale raises the concern that reason underlies itself and is ‘its own justification in some form or another.’⁶⁴² He adds, that ‘[t]he arguer, audience, and argument itself exist in relation to a situation that is defined by them and defines them.’⁶⁴³ So, should this constitute authority for identifying the characteristics of a universal audience that reside in a particular audience? Should an observer judge the audience reasonable or unreasonable according to this uncertain authority? Is the universal audience in this case nothing more than ‘a product of the arguer?’⁶⁴⁴ In other words, does the arguer merely construct a universal audience that is the ‘imagined community’ of all rational beings?⁶⁴⁵ In fact, Tindale contends, it is possible—or perhaps he could say, reasonable—to infer that all rhetorical audiences are constructed ‘whether universal or particular.’⁶⁴⁶

If both universal audiences and particular audiences are constructs of the arguer, then the distinction comes down to arguer choice whether the discourse focuses on the real or the preferable, on facts or values. Tindale argues that, ‘[i]n addressing the real, a speaker...considers the men and women in the audience not in terms of their nationality or religion, for example, but as rational human beings. Discourse focused on values can never appeal to the universal audience because particular values do not bind all humans.’⁶⁴⁷ On this

⁶⁴¹ Ibid 134

⁶⁴² Ibid

⁶⁴³ Ibid 134-5

⁶⁴⁴ Ibid 138

⁶⁴⁵ Ibid 137

⁶⁴⁶ Ibid

⁶⁴⁷ Ibid 138

interpretation, one can suggest that counsel construct a universal audience, using their own notion of reasonableness. What is more, as I have discussed earlier, counsel in the courtroom might arrive at their notion of reasonableness intuitively.

Conclusion

In a significant way, argumentation to persuade differs from the notion of conversation, the goal of which is to reach an understanding. As I have shown earlier, Gadamer talks of ‘partners’ in conversation, not ‘participants.’⁶⁴⁸ Furthermore, he argues that prejudice is not an impediment if the partners, although they start from their respective prejudiced standpoints, converse cooperatively with the aim of arriving at an understanding that informs them both.⁶⁴⁹ However, my case study shows that counsel are not partners in conversation. They are courtroom adversaries. They are participants in oral combat, each playing to persuade the jury to accept their argument. Also, we have seen that for a person—our juror—to rise to the level of the universal, they must sacrifice their particularity. Gadamer would submit that Truth already resides in the conversation. A conversation in partnership merely reveals it. But adversarial discourse operates to advance one prejudiced standpoint at the sacrifice of the other. Thus, it inhibits ascent to the universality to which the juror ought to aspire. Those who seek to win their jury audience need to understand these influences.

To imagine (for that is all the rhetor can do) a universal audience common to diverse communities—a universal audience that reflects their agreements on values and standards—is difficult. Tindale suggests that a rhetor can do no more than construct a universal audience that makes possible a ‘common insight’⁶⁵⁰ into what characteristics of reasonableness the diverse communities share. I suggest that is a reach beyond grasp for courtroom advocates in a theatre in which the conceptual principles of argumentation confront concrete reality. In the circumstances, the goal of the advocates—counsel—will be persuasion, not conviction. The motivating force is pragmatism, easy to misjudge as common sense. The justice value at risk

⁶⁴⁸ Gadamer, above n 22 330

⁶⁴⁹ Mootz, above n 32, 501

⁶⁵⁰ Tindale, above n 432

is substantive truth. But, if the state and its people value the symbolic presence of the jury, as I have discussed in Chapter One, then increasingly courtroom advocates will need to tailor their courtroom discourse to an audience that can never be truly universal. Rather, they will be attempting to persuade a particular audience comprising disparate prejudices and predispositions. It is an audience with a need for stories, which are not tightly constrained by rules that aim to move evidence from story into a presumed value-free rational core.

To sum up the thrust of Chapter Five in one sentence, I have proposed a need to draw on social disciplines beyond law if the justice system is to understand better the nature of community common sense in an age of a new social consciousness. This summing up captures the essence of Law and Literature foundation member James Boyd White's opinion that 'theory as a product of reflection' should take its meaning from the original Greek word '*theorin*,' which means 'to review a situation and try to learn something from it.'⁶⁵¹

This has been my focus in Chapter Five—engaging social theory to review our understanding of community common sense. Now, theory as a product of reflections provides my link to Chapter Six in which I sharpen my focus particularly to Law and Literature theory to harness better the power of courtroom discourse in jury trials. I do not try to elevate literature to a higher plane of cultural performance. I do embrace White's express wish to encourage a transformation of law to 'a compositional art, as a set of activities by which minds use language to make meaning and establish relations with others.'⁶⁵²

⁶⁵¹ Gaakeer, above n 45,10

⁶⁵² White, above n 25, 17

CHAPTER SIX: What courtroom advocates can learn from embracing legal and literary theory

Introduction

I closed Chapter Five with James Boyd White's observation that he was not trying to elevate literature to a higher plane of cultural performance. But, he did wish to encourage a transformation of law to 'a compositional art, as a set of activities by which minds use language to make meaning and establish relations with others.'⁶⁵³ In this chapter, I focus on that dictum and explore especially how understanding the nexus between law and literature can help those who operate within the adversary trial system to make meaning through discursive advocacy. I emphasise that my focus is the potential for discursive distortion of meaning in an adversarial trial before a jury, not in a trial before a judge sitting alone.

In helping to understand how distortion of meaning can occur, and what insights one needs to counteract that potential—whether calculated or accidental—my emphasis in this chapter is on law and literature. But, it is not literary analysis nor discourse analysis; and this is an important qualification. Earlier, I cited James Boyd White from *Justice as Translation*, in which he expressed his view that, simply comparing law with literature can evoke the depressing thought that law 'can be made to seem a dead, bureaucratic, over conceptualised, unfeeling language...'.⁶⁵⁴ Any personal sampling of the performance of courtroom advocacy will reward the researcher with compelling evidence that—at least in so far as its use by courtroom advocates—the language of law need not be dead or unfeeling. That, of course, is why it can distort meaning. On the other hand, it can mould meaning to conform to understanding in what I have referred to as this new age of social consciousness. Therefore, I

⁶⁵³ Ibid 17

⁶⁵⁴ Ibid

need a description of “literature” that sits more comfortably within the milieu of advocacy to an audience of laypersons.

A literary dictionary defines literature as ‘that body of works which —*for whatever reason* (my emphasis)—deserves to be preserved as part of the current reproduction of meanings within a given culture (unlike yesterday's newspaper, which belongs in the disposable category of ephemera).’⁶⁵⁵ This definition is wide enough to include non-fictional works in philosophy, history, biography, criticism, science, and politics. On the other hand, if one considers only genre Point of Sale (P.O.S) signage in a bookshop—those that do still sell books comprising printed word on paper—one is likely to see such signs as “Popular Fiction;” “Non-fiction” (and subsidiary category signs); and, in a small section to one side of the main people traffic aisles, “Literature.” There one will find a diverse assortment of works that are creative, imaginative, fictional, or (definitely) non-practical. Sometimes, within this P.O.S categorization, there will be a smaller sub-section labelled “classics.” Publication date (longevity) seems to be the main determinant of what constitutes a classic. Even *Harry Potter* does not yet seem to have threatened this criterion.

Whatever definition one prefers, the common criterion against which to evaluate the work is that it deserves to be preserved. Who decides? For what reason? In my discussion, which follows in this chapter, I do not follow the myriad leads to a perceived definitive statement of what literature is. Many of those leads tend towards “ought” statements rather than “is.” Instead, I stay with a broad definition of literature as a body of written works, as my footnote references shows.⁶⁵⁶ But even that definition merely defines a universe; it consciously avoids constraints like “Law as Literature.” Yet, one might counter with the question, but have you not been discussing law *as* literature especially in Chapters Three and Four? Yes, but not hogtied by formalistic constraints, as I will now explain.

⁶⁵⁵ Literary dictionary, <http://www.answers.com/topic/literature>

⁶⁵⁶ <https://www.britannica.com/art/literature>

I believe that taking the narrower view of literature is why some legal theorists see difficulties with law as literature. William Lewis,⁶⁵⁷ for instance reasons, ‘The possibilities of achieving White’s conception of a more open, more humane, more communal, more rhetorical law are limited by the generic constraints of official judicial discourse and by the ideological constraints shaping the composition and interpretation of judicial opinion.’⁶⁵⁸ Lewis decides from this that the ‘law-as-literature project is ‘insufficient to the goals it seeks’ because ‘trials are available for public display only within well-defined generic bounds.... The political result is that trials are likely to reinforce the legitimacy of the law and to conceive the nature of a particular case within relatively narrow ideological constraints, and that in a way to reinforce the dominant structures of power and authority’.⁶⁵⁹

Although ‘celebrating’ White’s fundamental recognition that language shapes perception and directs action, and that texts create communities, Lewis believes that White claims too much when he asserts that those who control our languages have the greatest power of all. Lewis’ concern is that ‘he [White] does not account for the resistance to change that is built into social form and the social practice of legal discourse.’⁶⁶⁰ But, he does share with White the belief ‘that it is vital to insist upon the activity of language and its social embeddedness, especially within the legal community which so often attempts to establish and reinforce its authority by maintaining the illusion of transparent representation.’⁶⁶¹ What makes him sceptical about the efficacy of law as literature is the ‘as yet unanswered question [of] how to maintain the romantic vision basic to the art of building communities (from which the meaningfulness of both narrative and law derive), and, at the same time, recognize the oppressiveness of authority, the reality of inequality, and the existence of dissensus and

⁶⁵⁷ William Lewis, ‘Law’s tragedy’ (1991) 21(3 (summer, 1991)) *Rhetoric Society Quarterly*

⁶⁵⁸ Ibid 11

⁶⁵⁹ Ibid 13

⁶⁶⁰ Ibid 11

⁶⁶¹ Ibid 19

incommensurability.’ That, he argues is law’s essential tragedy: ‘the constitution of community that is law’s greatest strength and also its fatal flaw.’⁶⁶²

Thus, Lewis, although sharing White’s view that language and texts create communities, rejects the idea of law as literature. He views its efficacy against a romantic vision of the ‘art’ of building communities. On the other hand, though, Lewis’s ‘romantic vision’ suggests impractical idealism, and his ‘art’ suggests beautiful or thought provoking works. This, I submit, is because he speaks of law as literature, whereas White discusses law as narrative. A narrative is a descriptive story, which better portrays the practical act of building communities than does speaking of literature as a romantic vision. This romantic vision, I believe, is the converse of White’s viewpoint. He does not argue that judges and lawyers need to be well versed in the plot lines of extrinsically validated written texts as literature. He suggests only that they draw from the theory of creating literature—defined widely—to appreciate the significance and centrality of narrative in applying law.

Yes, a supplementary question might demand, but doesn’t the only slightly looser “*Law and Literature*” hogtie you just as effectively? I answer that question now.

Richard Posner in *Law and Literature*⁶⁶³ emphasises the differences between law and literature, which are ‘rooted in different social functions.’⁶⁶⁴ Nailing his colours to the mast, Posner launches into his discussion of the commonalities and intersections of law and literature from the position that ‘[l]aw is a system of social controls as well as a body of texts, and its operation is illuminated by the social sciences and judged by ethical criteria. Literature is an art, and the best methods for interpreting and evaluating it are aesthetic.’⁶⁶⁵ As pragmatist—and, perhaps not surprisingly, as advocate of the association of law with economic rationalism—he looks to validate the respective roles of law and literature

⁶⁶² Ibid 20

⁶⁶³ Posner, above n 332, 332

⁶⁶⁴ Ibid, back cover.

⁶⁶⁵ Ibid 7

according to practical consequences. This might explain why he discusses the novel predominantly as a ‘substitute for history and social science,’⁶⁶⁶ which is at odds with White’s view that the importance of literature is that it, raises the significance and centrality of the idea of law as narrative.

For instance, Posner dismisses *A Passage to India*⁶⁶⁷ as a useful tool for judicial interpretation. He accepts, without a need to justify his selection, that EM Forster’s novel is literature. Correctly, I think, he identifies the trial of Dr Aziz on a charge of assault as the pivotal point of the novel. Perceptively, he draws from Forster’s description of the trial the ‘sense of the unbridgeable gap between Western rationality and Eastern mysticism’,⁶⁶⁸ and the inexorability of a passage to independence. I suggest that his interpretation, as astute as it is, does not go far enough. Posner acknowledges that some commentators believe that *A Passage to India* illustrates the power of narrative to influence attitudes and outcomes. However, he cautions, ‘the numerous factual errors...suggest the perils of using novels as a *substitute* for history and social science even for journalism (My emphasis)’.⁶⁶⁹ Had Posner reviewed *A Passage from India* from the same standpoint as that from which White views literature, he might have come to a different conclusion. It is the value of literature as an enriching aid—not as a ‘substitute’—to understanding that the rational pragmatist misses.

The ending to Forster’s novel acknowledges the power of customary prejudice to thwart the desire of culturally constrained individuals to form unsanctioned personal friendships.

“Clear out, you fellows, double quick, I say...if it’s fifty or five hundred years we shall be rid of you, yes, we shall drive every blasted Englishman into the sea... and then...you and I shall be friends.”

⁶⁶⁶ Ibid 306

⁶⁶⁷ E.M. Forster, *A passage to India* (Arnold, first published 1924, 1978)

⁶⁶⁸ Posner, above n 332, 176n

⁶⁶⁹ Ibid 306

“Why can’t we be friends now?” said the other... “It’s what I want. It’s...what you want.”

But the horses didn’t want it – they swerved apart; the earth didn’t want it, sending up rocks through which riders must pass single file; the temples, the tank, the jail, the palace, the birds, the carrion, the Guest house, that came into view as they issued from the gap and saw Mau beneath: they didn’t want it, they said, in their hundred voices, “no, not yet,” and the sky said, “No, not there.”⁶⁷⁰

The conversation between the two friends—the English schoolteacher and the Indian doctor—also stands as metaphor for the inherent, but often unacknowledged, truth that all law is ultimately personal. When we establish law’s processes as a custom of society, (institutionalise it), we might mask that reality, but we cannot deny its truth. In the process, we risk also establishing prejudices as custom. That last passage in Forster’s novel is a poignant metaphor. Its imagery motivates a viewing of law as narrative to help bring law down from the conceptual plateau of impersonal law—which, when taken at its endpoint is an illusion—to the valley of human vulnerabilities. This is where law works at a very personal level to shape the identities of persons as human beings.

So, I end this introduction to Chapter Six with an apt grace note—EM Forster’s epigraph to another of his works, *Howards End*—“Only connect.” And, I begin the first section of my comprehensive discussion with that same epigraph.

The curious ambiguity of common sense: why the jury needs to hear stories

‘Only connect.’ E.M. Forster

I explained in Chapter Five how wrong perceptions of common sense and community values can lead to misdirected organization of jury trial discourse. It might not be deliberate

⁶⁷⁰ Forster, above n 667, 312

misdirection, but it can be just as damaging. I have suggested that to understand better the nature of common sense and its relationship to community values, we need a cross-discipline approach to theory to augment theories of law. Historically, Harold Berman contends, ‘a social theory of law’ was concerned with ‘the extent to which the Western legal tradition has always been dependent on...belief in the existence of a body of law beyond the law of the highest political authority.’⁶⁷¹ It was once called divine law, then natural law, and, more recently, human rights.⁶⁷² However, there is a view within the judiciary that Law’s own experience so enriches legal practice that it has no need for theory.⁶⁷³ I challenge that view. It leads to searching for solutions to problems in pragmatism, which might dispel a problem, but not necessarily resolve it.

The pragmatic driver of courtroom advocacy is persuasion to adhere to counsel’s preferred narrative of the case. And the preferred narrative of the case is that which steers clear of perceived ambiguities of substantive truth—the output of the consciousness of witnesses—in favour of the rational certainty of legal truth, which is the mediated output of rules of evidence. Substantive truth bows to legal truth, in pursuit of which courtroom discourse is organized. Legal truth implicitly founds on the premise of equality, in that the rational certainty of legal truth treats all parties alike; they are legal persons ‘free and equal subjects of the law’s address’, with an equal capacity for free will.⁶⁷⁴ The pertinent question, though, is whether this means merely that they are free in the sense that this equality strips them of all their idiosyncratic characteristics. In *Mabo (No 1)* (1988) Wilson J (later, Sir Ronald Wilson) said that formal equality before the law does not always achieve effective and genuine equality. He added that the extension of formal equality in law to a disadvantaged group might have the effect of entrenching inequality in fact.⁶⁷⁵ Wilson J was addressing his comments to the imbalances that affect Aboriginal people. Viewed more widely, his

⁶⁷¹ Berman, above n 36, 45

⁶⁷² Ibid 45

⁶⁷³ Thomas, above n 16, 2

⁶⁷⁴ Kerruish and Purdy, above n 38,150

⁶⁷⁵ *Mabo v Queensland (No 1)* (1988) 166 CLR 186 206

comment invites the question whether the language of the law tends to create an all-embracing class of objectified 'legal persons', which denies cultural realities and social inequalities.

Some will argue that to suggest the need to accommodate idiosyncratic characteristics confuses the real world 'is' with a head-in-the-clouds dream world 'ought.' Dennis Patterson, for instance, lauds legal pragmatism of a narrative conception of legal discourse. He opines, 'pragmatism's merit lies [in] the recognition that our collective energies are better spent working within the limits of the possible rather than attempting to transcend the infinite'.⁶⁷⁶ He asserts that, '[t]he success or failure of our conceptual schemes must be judged not relative to "the world" or "reality" (moral or otherwise), but with respect to the degree to which problems are solved (or dissolved)'.⁶⁷⁷

Making a problem disappear is not the same as resolving it. To embrace pragmatism reflects a preference for the bureaucratised culture with which White takes issue.⁶⁷⁸ The inextricability of social rights and political legitimacy is a case in point. When individual human rights are at stake, the role of law ought not only to be to seek 'efficacious' solutions, but to seek solutions that are rooted in justice and morality. As Patterson uses the word, efficacious is a synonym for pragmatic.⁶⁷⁹

Serena Parekh presents a contrasting view to 'contemporary justification of human rights [that] either look for an objective foundation or simply assert the pragmatic importance of human rights as their justification.' She asserts that 'in times of moral crisis, conscience is a better safeguard against human rights violation than moral norms alone.'⁶⁸⁰ She offers her view as alternative to that of Hannah Arendt, who argues that 'the realms of morality and

⁶⁷⁶ Dennis M. Patterson, 'Law's pragmatism: law as practice & narrative' (1990) 76(5) *Virginia Law Review* 937-996

⁶⁷⁷ Ibid 996

⁶⁷⁸ White, above n 25, 20

⁶⁷⁹ Patterson, above n 676

⁶⁸⁰ Serena Parekh, 'Conscience, morality and judgment' (2008) 34(1-2) *Philosophy & Social Criticism*

political judgment are strictly separated...because the standard of morality is the integrity of the self, while the purpose of politics is the world.’ This means that politics has to think beyond ‘the harmony of the self.’⁶⁸¹ However, Parekh argues that ‘[t]hough conscience is concerned with a unified self that may be at odds with the world, it was formed not through a purely subjective or introspective experience, but by taking the world into account. The self is a unity but remains linked to plurality.’⁶⁸²

Parekh’s notion of the self as unity but as still part of plurality—or the collective—underlies my discussion in Chapter Five of courtroom advocates’ need to understand the nature of community common sense. Not to understand the shades of meaning of substantive truth that reside in the testimony of witnesses, and in the consciousness of jurors, is to misunderstand the nature of community common sense that is the purported heart of jury relevance.

Former New Zealand High Court judge, EW Thomas claims that judicial scepticism of theory stems from a belief that ‘legal practice [is] sufficiently rich to make theory redundant.’ He adds, ‘While it is acknowledged that theory can provide an ancillary role in limited areas of practical skills, those skills remain transcendent’⁶⁸³ He lays much of the blame for this reaction on the arcane language theorists use, as well as on the relevance and remoteness of much of the legal theory they espouse. He argues that scepticism of theory generally is misplaced and dangerous.’⁶⁸⁴

James Boyd White adds another dimension to that viewpoint. He believes theorists should express their theories in plain English, which avoids mystifying abstractions, and judges should ‘integrate’ at least some of these legal concepts into their reasoning.

⁶⁸¹ Ibid 177

⁶⁸² Ibid

⁶⁸³ Thomas, above n 16, 2

⁶⁸⁴ Ibid 2

Former Australian High Court Judge, Michael Kirby makes the point that creatively departing from precedent requires a judge to exercise ‘skill, ingenuity and courage.’⁶⁸⁵ But Kirby’s warning carries in it a deference to precedent, which might merely be judicial deference to a concord that, because it has withstood the test of time, precedent is an elemental truth. Yet, this deference might itself only be judicial pragmatism. That is, it is safer to rely on the idiom, “better the devil you know” than the devil you don’t know, which waits in an appeal to a higher court.

Laurence Goldman⁶⁸⁶ seems to endorse White’s caution about the seductive allure of concept and its cognates.⁶⁸⁷ Goldman observes that pre-literate society did not debate a concept according to some developed linguistic register. Nor did they reify concepts into specific legal terminology, as literate society does. They simply expressed them in normal, everyday language. He is dismissive of those who ‘theorise in splendid isolation’ about whether or not a society has a particular legal ‘concept.’ The relevant question is what the society does with the ‘concept’; who does it, in what context, and with what effects.⁶⁸⁸

Though tacit, there is an underlying theme in the views I have cited here. That is, the need for simplicity in reciting the narrative of the case. In earlier chapters, I have discussed broadly the importance of social theories as supplement to legal theory in the organisation of courtroom discourse. The overarching theme of my study is the potential for discursive distortion of meaning in a trial before a jury. Furthermore, I have stressed that a standard model of language is not adequate to illuminate meaning in courtroom discourse. Therefore, in the rest of this chapter, I probe beyond the constraining paradigm of the sufficient richness of legal practice to argue that courtroom advocates can learn from literature why there is a need to organize courtroom discourse to account for the differing social realities across

⁶⁸⁵ Michael Kirby, The Hon Justice, 'Judges as reformers' in *The boyer collection* (ABC Books, 2001) 309

⁶⁸⁶ Goldman, Laurence "Accident and absolute liability," in John Gibbons (ed), *Language and the law / edited by John Gibbons*. (Longmans, 1994)

⁶⁸⁷ White, above n 25, 25ff

⁶⁸⁸ Goldman, Laurence, "Accident and absolute liability" in Gibbons, above n 686, 97

cultures. In short, why in adversarial trials before juries there is a need for stories. So, I begin the next section by telling a story. My story—a fragment of real life—shows why the way we perceive community common sense can be ambiguous. It leads us into discussing how literature can highlight this ambiguity in a non-threatening way and guide us to a resolution of it.

A morality tale

It was about 10 o'clock in the morning. I was standing with another senior executive and a group of fellow employees in a fourth-floor office of a major bank in the central city. We were watching a real life-drama playing out on a narrow ledge of a building, which was awaiting demolition, across the road.

A young woman sat on the ledge with her feet dangling over the edge staring into the street below. Every now and then, she would raise a brown paper bag to her face and seemingly sniff its contents, oblivious to the entreaties of those inside a nearby window. At times, she would lean forward perilously as if contemplating the next ultimate move. On the roof of the building, a team of police officers was searching for anchor points for abseiling equipment; the plan was for two of them to abseil down the face of the building—one on either side of the young woman—and grasp her before she became aware of their presence.

Suddenly, the tense silence in our office was shattered: 'Jump you stupid bitch, you're no use to anyone.' Incredibly, the source of this insensitive outburst was my fellow executive. Almost instantaneously, my Personal Assistant who was standing alongside me clutched my arm and pulled me into the corridor saying that she needed to speak to me urgently. When we were outside, she explained that she knew I was about to explode, and she felt she should stop me. Her reason: I could not change the attitude of my fellow executive, and I would only create an unseemly confrontation in front of staff, for no useful outcome. Bowing to her pragmatically astute judgment, I remained silent and watched whilst the police officers successfully executed their rescue plan.

This human drama did not make the nightly television news services; it would have been different had the young woman jumped or fallen to her death. But, she survived—for the moment at least—and, therefore, was not news; just a drug addict squatting in the shell of a deserted city building with street kids and homeless people, and according to one confidently proclaimed judgment at least, of no use to society. Nothing to see here.

Viewed microcosmically, the incident was a vignette of communitarian repudiation of individual human rights that perceives the self as ‘an antecedently individuated subject,’⁶⁸⁹ and an affirmation of a moral authority under which ‘we cannot conceive of our personhood without reference to our role as citizens, and as participants in a common life.’⁶⁹⁰ To my erstwhile colleague, this young woman had debased her role of citizen by violating the behavioural norms of society. His retribution was to invoke the moral authority of ‘his’ community to pronounce her worthless, thereby surrendering to his moral panic, or what in criminal legal theory one would call, moralisation. Extrapolating to the community at large, his morally panicked reaction emblematises a wish to remove a problem when it threatens the ‘common life’, or the security of individuated ‘personhood’, rather than to understand and resolve it. What is more, my pusillanimous silence was a wordless synecdoche for the conscience paralysis that pervades the community when individual or group behaviour threatens the collective equanimity. Level headed analysis of the cause is likely to give way to a pitiless urge to remove the behaviour for the greater good. In this way, moral panic can create isolated, feared, or disvalued minority groups.

At its rational core, which is the focal point of rules of evidence, the incident described objectively is a female sitting on a ledge high up on a building, threatening to jump, or risking falling, to her death. Two police officers abseil down from the roof directly above, and grasp her.

⁶⁸⁹ Robert B. Thigpen and Lyle A. Downing, 'Liberalism and the communitarian critique' (1987) 31(3) *American Journal of Political Science* 637- 640

⁶⁹⁰ Ibid 637-8

At the rational core, at the probative level, that is as much as a jury needs to hear from an objective witness standing in the office from which I viewed the incident, to decide that the woman had broken more than one law. She is a lawbreaker, who police officers have now arrested. That for our observers is where the story ends. “All right, everybody, back to work.” Common sense prevails. But, add the actions of the three characters of the sub-plot of my narrative, who were watching from their shared vantage point across the road, and the incident takes on a social dimension.

The businessman opts for the pragmatic solution. ‘Jump you stupid bitch.’ Had she jumped, the problem is resolved. No need to “transcend the infinite” by wasting community resources on finding out why. The woman is a disvalued member of a minority group of drug addicts, which the community fears or despises. She has gone; the greater good is served.” Common sense carries the day.

To those choosing to “transcend the infinite,” she is a victim of a pitiless society, which has failed to recognise her emotional needs, driving her to seek solace in her addiction. She is not guilty; we—society—are to blame. But. As Hannah Arendt explains, “when the collective does nothing to right an injustice, we can subsequently wring our hands and say ‘we are all guilty,’ but, she points out, ‘when we are all guilty no one is.’”⁶⁹¹. Pragmatic! All right, nothing we can do. Everybody back to work” Common sense wins out.

But, whose common sense? In which solution lies community common sense? For which would the community strike a medal bearing the names of the jurors, as they did for John Lilburne’s jurors?

Using story to conflate truth and usefulness.

For democracy to be truly just, would demand that there is ‘a single best conception of justice, which can serve as the reference point for defining a non-arbitrary standard of

⁶⁹¹ Hannah Arendt, *Responsibility and judgment* (Random House, 2003) 147

political competence.’⁶⁹² Richard Arneson suggests that there is no guarantee that fully reasonable persons will be able to select that reference point. He reasons ‘...that the fact that several conceptions of justice are equally acceptable for all we can know is fully compatible with there being a plethora of popular and decisively unreasonable views concerning the requirements of justice, any of which might command a majority of votes in a democracy.’⁶⁹³ Thus, any vote of a representative sample chosen democratically might well represent community common sense. That, however, does not necessarily make the vote the morally best outcome. What is more, John Berger gives us pause to be sceptical of common sense.

Common sense is part of the home-made ideology of those who have been deprived of fundamental learning, of those who have been kept ignorant. This ideology is compounded from different sources: items that have survived from religion, items of empirical knowledge, items of protective scepticism, items culled for comfort from the superficial learning that *is* supplied. But the point is that common sense can never teach itself, can never advance beyond its own limits, for as soon as the lack of fundamental learning has been made good, all items become questionable and the whole function of common sense is destroyed. Common sense can only exist as a category insofar as it can be distinguished from the spirit of enquiry, from philosophy.⁶⁹⁴

He adds that common sense is static, belonging to the ideology of those who are socially passive, ‘never understanding what or who has made their situation as it is.’⁶⁹⁵ Berger’s view is, perhaps, jaundiced and elitist. Yet, the state has so institutionalised community common sense as the *raison d’être* of the jury system that it presumes twelve jurors will neutralise conflicting ideologies and prejudices, and arrive at a value-free best outcome.

⁶⁹² Arneson, R, ‘Democracy is not intrinsically just,’ in Keith Dowding, Robert. E Goodin and Carol Pateman (eds), *Justice and democracy : essays for Brian Barry* (Cambridge University Press, 2004) 53

⁶⁹³ Arneson, R, ‘Democracy is not intrinsically just,’ in *ibid* 41

⁶⁹⁴ Berger, John, ‘A fortunate man’, Colin Samson, *Health studies: a critical multidisciplinary reader* (Blackwell, 1999) 256.

⁶⁹⁵ *Ibid* 257

But, Arneson argues, even direct democracy can be unjust. Thus, he supports an instrumentalist approach that favours granting legislative decision-making power to those most capable of securing the ‘best outcome.’ whether or not the decision-making power is democratically determined. He draws on Bertolt Brecht’s ‘propagandist play’, *The Caucasian Chalk Circle*,⁶⁹⁶ which, Arneson claims, aims to justify the morally unjustifiable—Stalinism. Brecht has ‘the singer’ (in effect a solo from the Greek Chorus) close the play with a verse containing the line: ‘That what there is shall belong to those that are good for it...’.⁶⁹⁷ Arneson uses this line to support his interpretation of Brecht’s plot as justifying removing disputed valley land from its owner, who is using it inefficiently, and giving it instead to someone who can use it more productively, something that resonates with Arneson’s instrumentalism.

The climactic action of the play—the action that gives the play its name—supports his assertion. To decide which of two women should have the child whose custody they are disputing, Brecht’s morally dissolute judge reprises Solomon’s test and uses a variant of it—the Caucasian chalk circle test—to decide that the young boy should stay with the servant who truly loves and cares for him, rather than with the boy’s grander, but self-centred, biological mother. The Singer ends the play:

Take note of the ancient song
That what there is shall belong to those that are good for it, thus...
The children to the maternal, that they may thrive;
The carriages to good drivers, that they may drive well;
And the valley to the waterers, that it shall bear fruit.⁶⁹⁸

⁶⁹⁶ Bertolt Brecht, *The caucasian chalk circle* (James and Tania Stern with W.H. Auden trans, Arcade Publications, Ist Arcade pbk ed, 1994).

⁶⁹⁷ Ibid scene 6, 97

⁶⁹⁸ Ibid

That sounds like a parable of community common sense. But, the interpretative process is not straightforward. To ally this parable to community common sense, one can choose from two alternative viewpoints. The first is a communist morality tale that secularises, and presents an anti-Christian interpretation by portraying Christ as the drunken, venal judge Azdak. The second is to analyse the plot no further than the triumph of Christian morality in awarding custody of the child to the truly caring one of the two woman claimants.

This raises the question whether, when determining a best outcome, we bring to the task preconceived expectations from our cultural and social life narrative that ‘shape the kind of questions that we ask, and, in a sense, determine what we are able to discover.’⁶⁹⁹ Arneson’s choice of *The Caucasian Chalk Circle* to support his instrumentalist preference exemplifies the process by which a role agent’s expectations, derived from preconceptions, are central to consideration of the law-morality divide and to one of its potentially invidious consequences: role morality. What David Luban calls, the ‘institutional excuse’ grounded in his ‘theory of justification,’ as I discussed in Chapter Five.

Arneson accepts the ‘political legitimacy’ of the principle Brecht espouses because it conforms to his instrumentalist preference for political power to reside in those who can use it ‘according to the standards of best results.’⁷⁰⁰ Unfortunately, he then leaves it ‘an open question’ what is the moral standard for determining which of a range of possible results is best, which leaves him free to talk about moral outcomes in utilitarian terms, although he does not use that term. However, he does contend that, ‘[n]o one has an ascriptive right to a share of political power...it is wrong to hold that each member of a modern society just by being born has a right to an equal say in political power and influence.’⁷⁰¹ His desired outcome is one that best promotes the common good over the long run, which is an outcome with a decided utilitarian bent. J.S Mill makes the same point:

⁶⁹⁹ Ashworth, above n 489, introduction, xx

⁷⁰⁰ Arneson, R ‘Democracy is not intrinsically just,’ in Dowding, Goodin and Pateman, above n 692, 41

⁷⁰¹ Ibid

Everybody has a right to feel insulted by being made a nobody, and stamped of no account at all. No one but a fool, and only a fool of a particular description, feels offended by the acknowledgment that there are others whose opinions, and even whose wish, is entitled to a greater amount of consideration than his.⁷⁰²

To subscribe to this viewpoint is to give substance to a claim that the justice system does not need the jury. Alternatively, if the state feels it needs merely to justify its legitimacy, the jury need be no more than symbolic—a modern day Greek Chorus. Even if, in the less-than-one-percent of cases tried before a jury, the jurors get it wrong, as they did in *Lilburne*⁷⁰³ and in *Martinez*,⁷⁰⁴ the people have expressed their will. It does not matter if an appeal court overturns the finding. The people can fulminate, but still feel that the process works, because the formless ‘they’ have had their say.⁷⁰⁵

The Greek Chorus analogy is apt. With all its artfulness, it is a metaphor for contemporary social and political practice, in which—no less than in the intrigue of ancient Greek tragedy—it is a useful tool for those who wish to give the impression of hearing, but who are not really listening. The role of the Greek chorus, which grew out of the tragic dramas of the ancient Greek theatre, was to help the audience follow what was happening on stage by explaining the story, suggesting how an ideal audience might react, and communicating the unspoken fears, hopes, and other secrets of the characters. Over the centuries, the role evolved into a commentary on the moral of the story, which meant separating the chorus from the dramatic action. However, in neither period could the chorus change the narrative to achieve a denouement that differed from that which the author had prescribed.

⁷⁰² Ibid 52

⁷⁰³ State Trials, 4:1270-83 Green, above n 27, 171

⁷⁰⁴ *The State of Western Australia & Ors v Martinez & Ors* [2006] WASC 25 (17 February 2006)

⁷⁰⁵ Thurman Wesley Arnold, 1891-1969, *The symbols of government* (Yale University Press, 1935)

Determining the value of an idea by its success in action

Implicit in the justice system's commitment to the jury is a sense that it is a safeguard against any public perception of value judgments of a trial judge sitting alone. Or, what might seem like arbitrary judgments, even when the judge purports to ground their judgment in the principle of best outcome. However, seldom is a best outcome criterion value-free.

Furthermore, if a role-agent invokes a theory to support their preferred outcome—whether grounded in the 'institutional excuse',⁷⁰⁶ or their unconsciously embedded predispositions—they are begging the question. To relieve the moral indecision that a conflicting opinion on what constitutes a best outcome may cause, the role agent needs to think of a theory as real and tangible if it is to be authoritative. That is, it must become the rule that provides the institutional excuse to perform the task. On the other hand, reification of a rule that has supplanted justification—even if properly validated—is a bedevilled act. It leads to the question, what are the practical consequences when moral truth transmutes into ideology.

How does ideology shape and constrain the ideologue's sense of obligation to all persons that is inherent in the conception of democracy for all. How can a rule be 'true' if, as Hart discusses, it is vulnerable to the vagaries of open-textured language? How can a judge's common sense application of precedent be 'true' if common sense comes down to, as Hart contends, 'striking a reasonable balance between the social claims which arise in various unanticipatable forms'?⁷⁰⁷ When a trial judge sitting alone seeks to strike a balance between what the law states, and the social claims of the majority, best outcome is a product of judicial discretion. However, in a trial before jury, do jurors too seek to strike a balance between what the law states (as the judge directs), and the social—majoritarian—common sense they profess to represent? But, if we are uncertain about what common sense comprises, we are ill prepared to assess the truth of the common sense of others. Richard

⁷⁰⁶ Luban, above n 66, 129

⁷⁰⁷ Leith and Ingram, above n 17, 13

Gregory aptly captures this uncertainty in his observation that philosophers ‘frequently’ question ‘common sense with a curious ambiguity.’⁷⁰⁸

The instrumentalist approach is a variant of pragmatism, requiring, as philosopher John Dewey holds, that truth of an idea lies in its usefulness, that is, ‘thinking is an activity which, at its best, is directed toward resolving problems rather than creating abstract metaphysical systems.’⁷⁰⁹ In practical terms, this seems to mean using ideas only to resolve a problem to relieve the unbearable weight of trying to understand it. It merely determines the value of an idea by its success in action, which does not require the cognitive effort of determining whether a theory is true. It argues that removing the problem is sufficient in itself, without applying the cognitive effort to address or even acknowledge underlying issues. Little wonder that philosophers question common sense with curious ambiguity.

Where does community common sense lie on the legal positivism—natural law continuum?

In human rights, is a Greek chorus role for the jury adequate to the task of ensuring justice? Hard-line positivists would assert, yes—especially those who think that decision makers in the judicial system who appeal to moral principles are ‘trespassing on the roles of priests, statesmen and moralisers, and violating their responsibilities to decide cases according to what the law is, not what it should be.’⁷¹⁰ Furthermore, if the answer is yes, then one might infer that the role of the jury ought to be symbolic only. Natural lawyers, on the other hand, will argue that the social history of law cannot ignore the common law tradition, which began with a belief in a law beyond that which politicians make. It began with Divine Law. Divine Law became Natural Law. Today, we more secularly recognise it as human rights.

⁷⁰⁸ R.L. Gregory (ed), *The oxford companion to the mind* (Oxford University Press, 2nd ed, 2004) 193

⁷⁰⁹ John Dewey. (n.d.). Retrieved May 20th, 2017, from <http://biography.yourdictionary.com/john-dewey>
Read more at <http://biography.yourdictionary.com/john-dewey#bhiW8oVohZMzItR7.99>

⁷¹⁰ Dworkin, above n 632, 5

Hard-line legal positivism and transcendent natural law lie at either end of a continuum of legal theories. In between, we confront conflicting, extrapolative, and tangential theory viewpoints that complicate search for truth and certainty in law. This means the justice system ought to work to an inclusive understanding of the collective narrative that inspires minority identity groups. It means a shared understanding of the nature, and rights entitlements of identity groups to aid in the organization, rules, and procedures of criminal trial courtroom discourse. Otherwise, the jury is merely a symbolic Greek Chorus.

Yet, Valerie Hans's research reveals that her respondents would prefer 'overwhelmingly' to face a jury rather than judge alone if facing a criminal charge.⁷¹¹ Conversely, in a radio interview (*The Law Report*, Radio National Tuesday, 4 September 2007), then WA District Court judge, Justice Valerie French said that if she were guilty of a crime she would prefer a trial by jury. If she were innocent, she would prefer a trial by judge alone, because judges are more likely to focus on the real issues. Her comment is but another way of saying what Justice Thomas proposed: we judges know the law; we deal with reality, not with emotion. But, what if the judge fails to see that what they take as the reality is really the metaphor? In the next section, I examine the potential of law and Literature theory as an aid to analysing courtroom discourse. This means understanding the relationship of Law's language of narrative to the language of literature.

Law and literature as an aid to analysing courtroom discourse

Law and literature is a field much ploughed, and seeded with competing theories. Yet, no single theory has found a universal receptive market for its produce. William Lewis⁷¹² puts forward resistance to change as an obstacle. Perhaps this is because it is difficult for change to blossom in the shadow of legal formalism. Legal formalism is the resort of those seeking certainty in law. The theory holds that when the state constructs the rules, judges apply them

⁷¹¹ Valerie P. Hans, 'Jury systems around the world' (2008) 4(1) *Annual Review of Law and Social Science* 275
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⁷¹² Lewis, above n 657

to the facts without regard to public policy or competing moral theories. Formalism is the domain of legal positivism and the viewpoint that a judicial decision that is correct according to the law is just. It is just—the theory holds—not only for the beneficiary of the ruling, but also for the unwilling benefactor. It is just, and it is certain according to HLA Hart.⁷¹³ He asserts that, ‘If it were not possible to communicate general standards of conduct, which multitudes of individuals could understand, without further direction, as requiring from them certain conduct when occasion arose, nothing we now recognise as law could exist.’⁷¹⁴

Richard Posner is another who is sceptical about the value of literary theory to the practice of law, but for a different reason. He maintains that the influence of literature on law is primarily on style.⁷¹⁵ His formalist views are at odds with the opinions of founding law and literature proponent, James Boyd White, who is dissatisfied with the ‘bureaucratized culture [that] reduces human actors to very narrow roles, human speakers to very thin speech.’⁷¹⁶ But, thin speech is exactly what the rationalist wants.

One can best describe the difference between bureaucratic thin speech, and inter-personal thick speech through relationships. Avishai Margalit explains that, thick relations are those that we have with family and friends, lovers and neighbours, our tribe and our nation—and they are all dependent on shared memories.⁷¹⁷ But, we also have ‘thin’ relations with total strangers, people with whom we have nothing in common except our common humanity. He explains, ‘thin relations rely on some aspects of being human, such as being a woman or being sick,’⁷¹⁸ which differs from our thick relationships to our ‘near and dear.’ He suggests that when the self-as-individual transforms ‘I’ to an element of a collective entity, the ‘true’ individual ‘self-resides as an element a ‘single’ social whole—the majoritarian collective

⁷¹³ Hart, above n 140

⁷¹⁴ Ibid 124

⁷¹⁵ Posner, above n 332, 5

⁷¹⁶ White, above n 25, 20

⁷¹⁷ Avisha Margalit, *The ethics of memory* (Harvard University Press, 2004)

⁷¹⁸ Ibid 7

group.⁷¹⁹ He asserts that when state resources destroy, or discourage a ‘thick’ relationship with the ‘near and dear’ of a personal identity group, influences that clash with the objectives of the state have less force. This is the province of thin bureaucratic speech that White claims reduces human actors to very narrow roles. A role for which—in that view—resort to storytelling is a distraction.

Eschewing the story in search of the rational core

I have noted Laurie Kadoch’s observation that storytelling is the most effective tool of persuasion at trial. At the same time, however, she also suggests that rules of evidence and numinous symbolism combine to guide the trial narrative away from storytelling to get to its rational core. This, she suggests, is because the Anglo-American trial seeks to achieve a Rationalist Model ‘characterized by rectitude.’⁷²⁰ Thin speech, which eschews the notion of ‘thick’ relationships with any personal identity group, gets to the rational core. To relate that to my illustrative case study example of Witness wanting to explain why he crossed the road, one can frame it as an admonition from the judge, along the lines of ‘tell the court that you crossed the road; don’t tell it what you were thinking as you did so.’ Perfunctory, and probative according to the rules of evidence. And, unhelpful to developing the story Witness wanted to tell.

Literature as an aid to testifying free of Bureaucratic strangulation

Because he is dissatisfied with bureaucratized culture, James Boyd White turns to literature to identify a process through which people have the opportunity to tell their stories free of bureaucratic strangulation. He wants to reveal the ‘cultural inheritance that is analogous to what we call the law.’⁷²¹ That is, ‘that set of resources of speech and thought that is in function like the body of cases, statutes, and other precedents that define a lawyer’s situation by offering him certain occasions upon which, and certain material with which to speak (and by

⁷¹⁹ Ibid

⁷²⁰ Kadoch, above n 101, 79

⁷²¹ White, above n 25, 18

denying him others).⁷²² What he seeks in reading literature as law, and law as literature, is a less assertive, more open and tentative approach; to find ‘voices of our own that will more fully reflect what we know to be true of ourselves, our minds, our languages, and our cultures.’⁷²³

Understanding the relationship of the language of law and the language of literature

As I have explained, White sees a mutual relationship between language and identity. And, when he asserts that *who* we are helps to remake language, he stresses that we do it both as individuals and as a collective entity, because we construct language socially. Language defines the community to which we belong. ‘Our language *is* (White’s emphasis) the set of shared expectations and common terms that enable us to think of ourselves as a “we”—and that language too can be transformed.’⁷²⁴ This is especially relevant to law, which, because of its preeminent position, has the power to institutionalize the collective narrative that binds a community. ‘As an ethical or political matter, then, the structure of the legal process entails remarkable possibilities—little enough realised in the event—for thinking about and achieving that simultaneous affirmation of self and recognition of other that many...think is the essential ethical task of a discoursing and differing humanity.’⁷²⁵

In the preamble to *The Legal Imagination*, and later, in *Justice as Translation*⁷²⁶, White notes that simply comparing law with literature can evoke the depressing thought that law ‘can be made to seem a dead, bureaucratic, over conceptualised, unfeeling language...’ He then asks rhetorically ‘What does it mean to devote your life to speaking such a language, in such forms, and with such voices?’⁷²⁷ He wants to achieve something more than unfeeling language. He wants to encourage a transformation of law to ‘a compositional art, as a set of activities by which minds use language to make meaning and establish relations with

⁷²² Ibid

⁷²³ Ibid 21

⁷²⁴ Ibid 23

⁷²⁵ Ibid 24

⁷²⁶ Ibid 17

⁷²⁷ Ibid

others,⁷²⁸ that is, to create a new reality. For White, understanding the relationship of the language of Law and the language of literature is a necessary step to a better appreciation of law's role in society.

Jeanne Gaakeer too poses a question rhetorically: 'is law a mere system of rules or is it a culture of argument that addresses the questions of value and community?'⁷²⁹ If it is the latter, then the role of literature, as a medium through which questions of value and community are raised, is to remind lawyers and judges that interpretation is not passive; it demands their active participation in the process, which means being conscious of their own roles in grasping meaning. Antoine de Saint Exupéry expresses it poetically. 'When you write to Man, you freight a ship. But few such ships reach port. They founder in mid-course. Few are the phrases that go echoing through history. Much, perchance, I may have signified, but little have I grasped.'⁷³⁰

James Boyd White contends that '[t]he work of the lawyer in general, and the judge in specific, is...literary'.⁷³¹ He stresses that 'central to the enterprise of law is the idea of translating the stories of clients, parties in a lawsuit, into the language of law, and where the judge is concerned, of translating these stories into a new reality for the parties involved.'⁷³² Here lies both opportunity and risk. White proposes that "law as literature" is important as a vehicle to raise the significance and centrality of the idea of law as narrative. He believes that language and identity operate reciprocally. In some respects, language makes identity; in other respects *who* we are remakes our language, and influences how we use it. Language, he points out, is the set of shared expectations through which we think of ourselves as 'we,' or 'us.'⁷³³ The correlative next step—and risk, I believe—is to view a group that does not share

⁷²⁸ Ibid

⁷²⁹ Gaakeer, above n 45, 26

⁷³⁰ de Saint Exupéry, above n 43, 122

⁷³¹ Gaakeer, above n 45, 10, citing James Boyd White

⁷³² Ibid 10

⁷³³ White, above n 25, 23

our view of language as our expectations as ‘not-us’—but as an ‘other’—which ‘we’ should view with suspicion at best, repulsion at worst.

Richard Posner argues that legal and literary interpretation have nothing *useful* (his emphasis) in common.⁷³⁴ He rejects Dworkin’s notion of the judge contributing to a judicial chain novel, because, the chain novel analogy places no constraints on the ‘authors’ of chapters subsequent to the first. ‘Each author can in the first sentence of his chapter kill off all the existing characters and start anew,’⁷³⁵ even if this would not be ‘cricket.’⁷³⁶ He submits that the answer lies in training judges in economics, as I have discussed earlier. Yet such is the power of literature, and the use of metaphor, which enriches it, that Posner, resorts to ‘cricket’ as a metaphor for fairness to make his point meaningfully. One can infer that he did so because he was writing to a specific cross-Atlantic audience who, on the British side, embrace the game of cricket as a cultural institution.

The metaphorisation of reality in courtroom discourse

Gadamer maintains it requires “partners” in conversation to reach an understanding of meaning, not just “participants.” It requires an alliance in search of a mutual object. Again, I seek illustration of the difference in metaphor. Antoine de Saint Exupéry expresses it this way:

But it was then I understood how different is that alliance linking two together from mere good-comradeship, and sharing in common. All of them, I told myself, accost each other using a half-fledged language, which though it hardly signifies professes to convey. Wherefore you see them busy plying their scales and measuring tapes. All have logic on their side, but too much logic; they are but right and therefore mistaken. They make dummies of each other for their shooting practice.⁷³⁷

Both Gadamer the philosopher, and de Saint Exupéry, the contemplative writer, illustrate the point that the Rationalist Model of adjudicating eschews, namely, that storytelling is the best

⁷³⁴ Posner, above n 332, 150

⁷³⁵ Ibid 246

⁷³⁶ Ibid

⁷³⁷ de Saint Exupéry, above n 43, 127

way to persuade an audience. Laurie Kadoch is more emphatic, claiming that some go so far as to proclaim that, “[w]ithout story, all delivery in the world is meaningless” because as [e]volutionary anthropologists tell us . . . our need for story is encoded in our genes.”⁷³⁸ This might be so, but it is the Rationalist Model that guides the formation of adversarial discourse. In *The Legal Imagination*,⁷³⁹ James Boyd White contends that the work of lawyers is literary. But, he sees a distinction between the mind that tells the story, and the mind that gives reasons; ‘one finds its meaning in representations of events as they occur in time, in imagined experience; the other, in systematic or theoretical explanations, in the exposition of conceptual order or structure. One is given to narrative, the other to analysis.’⁷⁴⁰

This suggests that the work of a lawyer in analysing the actual experiences of people, as they recount them, to form a story that demonstrates the legal truth, differs from the work of the jury. As we have seen, the courtroom advocate is given to narrative. Their task is to mediate the raw facts of witness testimony, then mould the mediated remainder into a believable narrative of those facts that will persuade the jury of the truth of those facts. In this process, the jury applies the law as given to facts as found. But, those mediated facts as found become the legal—not necessarily substantive—truth. This is because a story that persuades has to cross a lower threshold of substantiveness than a story that convinces. So, to what extent does the “imagined experience” of the storyteller differ from the persuasive narrative that the courtroom advocate moulds from the mediated remainder of witness testimony? As I suggested in my introduction, not as much as one might think. For example, both the imagined experience of the storyteller, and the systematic explanation of the reasoning mind, use metaphorisation, not just for style, but also for substance. And, as David Punter writes, metaphor, when used in legal or political discourse is ‘rarely if ever innocent; it has designs on us.’⁷⁴¹

⁷³⁸ Kadoch, above n 101, 79 (Footnotes omitted)

⁷³⁹ White, above n 179

⁷⁴⁰ Ibid 859

⁷⁴¹ David Punter, *Metaphor* (Routledge, 2007) 14

In literature, one expects, and indeed looks for, metaphor as a means of adding poetry to perhaps an otherwise prosaic account of an action. A metaphor used beyond style in legal or political discourse has an unstated intent to manipulate meaning to a preferred end.

According to Punter, within the metaphor lurk ‘latent’ and ‘manifest meanings’,⁷⁴² a kind of ‘sleight of hand by means of which meanings can be smuggled into apparently innocent discourse.’⁷⁴³ ‘[W]e *expect*...to discover... [it] stands in for something else’ (Emphasis in the original).⁷⁴⁴ Thus, metaphor can obfuscate. It can reduce a complex contention of doubtful veracity to a powerful image that does not have to withstand the glare of objective, deconstructing scrutiny. And, when metaphor becomes the reality, it can change the way people see their collective responsibility.

Gaakeer stresses the active role of interpreting. ‘Since interpretation is always an act, the outcome of any process of interpretation is never given beforehand, neither in literature, nor in law. We work out meaning, we do not find it ready-made; we make, rather than find law.’⁷⁴⁵ That we make, rather than find, law is a broad claim. I submit that what we can state reasonably is that we do not find *meaning* ‘readymade,’ so we find it difficult to apply readymade law to something about which the justice system is hesitant enough in indictable criminal trials to choose to find meaning by applying community common sense through the jury. This means that we cannot force meaning into a procrustean bed of readymade accounts of language. We have to remake the bedstead, not just change the bed linen, which is an apt allegory with which to discuss the power of metaphor to enrich or to distort meaning.

Harnessing the compelling manipulative power of metaphor

Novelist James A Michener moves into Litterateur mode in his novel *Legacy*⁷⁴⁶ to show how to use the power of metaphor intentionally to neutralise an annoying moral irritant in order to

⁷⁴² Ibid

⁷⁴³ Ibid

⁷⁴⁴ Ibid

⁷⁴⁵ Gaakeer, above n 45, 29

⁷⁴⁶ James A Michener, *Legacy* (Random House, 1987)

create a different reality. Michener's fictional narrator is Major Norman Starr, who is to appear before a congressional committee to answer questions about his alleged part in the Iran contra deal and its spin-off scandals. The political scandal was real; it occurred in the second term of the US President Ronald Reagan's Administration. In the novel, the fictional Starr spends a tense weekend contemplating whether he should join a long list of other 'heroes', including Oliver North, in 'pleading the 5th' or whether he should do what he knows is morally right, and deal honestly with whatever the committee throws at him, whether or not that results in gaol time. While he grapples with the moral dilemma, he thinks back on the long line of his high achieving American forebears, including one who, novelist Michener imagines was present at the 1787 convention that decided the wording of the proposed US Constitution. At this point in his novel, Michener tantalises us by seeming to slip from novelist to historian. He records, or speculates on—it is up to the reader to decide which—how the framers tortured the English language to yield words that would satisfy slave owners without adulterating the noble cause of the Constitution.

A potential stumbling block⁷⁴⁷ in the discussion was the conflict of views between North and South about how to deal with the issue of slaves. The South wanted to include them in the count in deciding the number of representatives it should have in the congress, but did not want slaves included when determining tax collections. Moreover, they wanted to enshrine in the document the North's responsibility to return any escaped slave to their rightful owner in the South. However, when they reached a compromise and started to write the document, they balked at using the word 'slave' in a constitution that also enshrined the nobility of freedom. They overcame their squeamishness about defiling the document with such ignoble thoughts by resorting to a piece of eloquent circumlocution. Instead of slaves imported from

⁷⁴⁷ I choose the biblical metaphor purposely, not only because it came to mind as a dead metaphor. As David Punter suggests, I had designs on the reader. In its biblical use, it is a metaphor for behaviour that leads to sin or to engagement in destructive behaviour.

Africa, the South now had ‘such persons as any of the States now existing shall think proper to admit.’ Nor did it appear seemly to ask that the North should return fugitive slaves to bondage. The delegates resolved this dilemma not so much by circumlocution as by obfuscation. ‘No person held to Service or Labour in one State, under the laws thereof, escaping into another, shall, in consequence of any Law or Regulation therein, be discharged from such Service or labour, but shall be delivered up on claim of the Party to whom such Labour or Service may be due.’⁷⁴⁸ The document did not define slaves out of existence by spuriously equating their worth with that of all other citizens, because they were, after all, valuable property, not citizens. However, the metaphor within the document did seem to define slaves out of moral consciousness. Michener’s narrator reflects, ‘...it was the best that could be worked out in 1787, and would preserve the nation until 1861, when a civil war would rectify the matter—in blood.’⁷⁴⁹

The manipulative power of metaphor a double-edged sword

In the preceding section, had I not wanted to persuade the reader to view the choice of language as egregious, I could have used an emotively neutral word instead of describing the act as having “tortured” the English language. I might have said the framers chose alternative words that would satisfy the needs and rights of landowner-employers of labour. That would be the bureaucratic way, eschewing emotive words likely to inflame without adding probative value. But, as David Punter might challenge me, I had designs on the reader’s emotions. Just as Witness did in my case study when he wanted to tell the jury that the man confronting him wanted to punch, “your fucking head off your fucking maggot shoulders,” rather than to tell them more sensitively that the man was “yelling loudly.” That was the triumph of bureaucratic restraint over discursive exactitude, but each choice was proposed to the court in a claimed pursuit of justice.

⁷⁴⁸ Michener, above n 746, 46

⁷⁴⁹ Ibid 45

Richard Posner ascribes to those who see literature as an aid to interpreting law as narrative, a brutal intention to overthrow the cold facts of history and social science in favour of fiction. However, I contend that claim is the recourse of the pragmatist, who seeks to validate decision-making by its consequences, as if ‘consequences’ itself is value-free. On the other hand, as I have shown earlier, often those who declare that a consequence is satisfactory are acting instinctively to remove a problem, but without resolving it. In that sense, it works. However, by its nature, instinctive thinking is unreasoned, providing a fecund pasture to transform prejudice into reality—expressed through the compelling manipulative power of metaphor as much in law as in literature.

Conversely, Jeanne Gaakeer perceives a different risk. She believes some commentators, especially law and economics adherents, who claim to eschew metaphor, may fail to recognise that what they think is reality is in fact metaphor. ‘Language becomes the neutral vehicle for the communication of information in which “facts” are entities that can be transmitted by means of words; those encoded thoughts that are our perceptions of these very same facts.’ She adds,

It is precisely this *adequatio rei et intellectus*⁷⁵⁰ that Law and Literature opposes in its view that literature most often shows us that what we thought was reality was “in fact” illusion, and that literature in showing us alternative realities can thus warn lawyers against attributing too much importance to what they think are facts, yet are no more than mere products of our points of view. The idea, in short, that literature teaches us to leave behind the mimetic theory of law and economics, and be receptive to the view that what we think of as reality might only be the metaphor that has proved to be victorious.⁷⁵¹

⁷⁵⁰ “The intellect (of the knower) must be adequate to the thing (known).” In other words, if our perception of the plane of reality on which we are interpreting is muddied by our preconceptions, we are searching for meaning in metaphor, not in reality.

⁷⁵¹ Gaakeer, above n 45,26

Thus, metaphor can disguise, using a powerful image to avoid discomfiting scrutiny, as James Michener shows in his novel, *Legacy*. But, we cannot ignore metaphor, or pretend it does not have a place in legislative or judicial discourse. It does, and pragmatist denial will not remove the influence—some might argue, risk—to which this literary device exposes us.

As I have demonstrated, when lifted from its original context, metaphor can become the reality. It is now open to further metaphorisation through which mutual suspicion of the other's motives become entrenched. Through metaphor, one can manipulate discourse perversely to serve the ends of pragmatists and narrativists (to coin a word) alike. Metaphor's perversity is evident in the manner in which English law pressed it into service to remove a moral irritant, and thus deny the rights of the original inhabitants of Australia. Yet, two hundred years later, the High court of Australia also pressed it into service to right that wrong.⁷⁵²

Metaphor for allusion, and metaphor as illusion.

In this section, I move beyond the use of metaphor for allusion to study in its place metaphor as illusion. Michael Meehan gives as example of a barely relevant application of metaphor as allusion in French J using Coleridge's *Kubla Khan* to present Perth's own pleasure dome, the Burswood Resort Complex situated not on 'Alph the sacred river' but on the foreshore of the Swan.⁷⁵³ Meehan dismisses this kind of allusion as 'mere decoration', which adds no 'essential social, legal and lexicographical information.' Authoritative literary texts, he contends, should offer a 'powerful metaphor, to evidence, the strength and tenacity of community feeling on a certain issue, or to assist in establishing, on the basis of long-standing literary evidence, standards of reasonable behaviour and reasonable legal expectations.'⁷⁵⁴ It must avoid taking refuge in 'style,' and instead draw from literature to

⁷⁵² *Mabo v Queensland (No 2)* (1992)

⁷⁵³ Michael Meehan, 'The good, the bad, and the ugly: judicial literacy and the Australian cultural cringe' (1989-1990) 12(4) *Adelaide Law Review* 431.

⁷⁵⁴ *Ibid* 431-2

gain a deeper understanding of the collective memory that validates for group members their own collective consciousness. Common to both is metaphor—alive and dead.

Alive is how most like to think of, and use, metaphor. After all, where is the gain to one's preferred viewpoint in using a metaphor to make a point if the hearers or readers do not recognize and applaud the user for its creative aptness, for its style? For example, the person who first described a less-than-scholarly person as 'not the sharpest tool in the shed' did so for effect. They wished to add power to their assessment of intellectual inadequacy in the object of their derision. Had they branded that person a "dunce," the applause would not have been forthcoming. That metaphor died long ago.⁷⁵⁵ If we wish to examine the live metaphor in action, we should use as the exploratory mother lode the utterances of court advocates and their courtroom judges who have the last word and, therefore, the better chance of finishing the trial with a metaphoric *bon mot*.

Most of us use metaphors in daily speech. Whether, or how well, they work will depend upon what predispositions the reader brings to their processing of the text. Throughout this document, I will use metaphors, more often than not without intent because our normal, everyday, language is littered with dead or dormant metaphors. I will use them because, unless I go over the text with a fine-tooth comb, it is inevitable that some will have slipped in and will remain. One did slip in just then, but I allowed it to remain. Instead of talking about going over the text with a fine-tooth comb, I might have written in bureaucratic style about undertaking a thorough search of the document in which I examine every detail. In everyday conversation, in my culture, the fine-tooth comb metaphor works. It is a dead metaphor because it supplants in conversational speech the reality in whose place it formerly stood as literary allusion. On the other hand, where the connection between the metaphor and the subject is unclear, the metaphor is only dormant. However, "dead" and "dormant" also are

⁷⁵⁵ The Oxford English Dictionary (OED) describes a dunce as a person slow at learning; a dullard. It explains, dunce took its meaning from John Duns Scotius. He was a scholastic theologian, of the 13th and early 14th century, whose followers were ridiculed by 16th century humanists and reformers as enemies of learning.

metaphors. So, already it is clear that our language is a burial field of dead metaphors through which we trip regularly with gay abandon.

The difference between dead and dormant might seem insignificant. A problem occurs, though, when language users subject dead metaphors to further metaphorisation. In the preceding paragraph, I have used ‘gay abandon’ to signify ‘light-hearted and carefree’, which is how the Oxford English Dictionary, as recently as its ninth edition (1995), defines the phrase. And, it still crops up in its earlier form in the speech and writing of those of a certain age, (which itself is a metaphor).⁷⁵⁶ The OED now opines, ‘the word “gay” cannot be readily used today in these older senses without arousing a sense of double entendre, despite concerted attempts by some to keep them alive.’⁷⁵⁷

The Internet abounds with references to gay, rarely, in recent usage, with its earlier meaning unchanged. Language users have metaphorised it to embrace the modern meaning ascribed to the word gay. Abandon as a noun, however, is where the potential for mischief still lies. In one example on the web, under the heading “living life with gay abandon,” the text starts, “Love bums, not bombs.”⁷⁵⁸ The article described a celebratory parade of members of LGBTI (lesbian gay bisexual transgender intersex) community. They were celebrating a court decision, which decriminalised homosexuality, the consequence of which was that members no longer needed to hide their identity behind masks when parading. They could abandon them with impunity. However, those with a jaundiced view might as readily equate abandon with license, and measure that unfavourably against a right. In any event, gay is a dead metaphor. It means a male homosexual. Such is the power of metaphorisation of this metaphor that it has become the reality. So, it is pertinent to end this section with the observation that because much of what we take as reality is dead metaphor, we need literature

⁷⁵⁶ In its early use, “of a certain age” was used as a polite, but ironic reference to women—usually just beyond the so-called menopause years—to avoid assigning to them an age number that might offend. Now, gender equality decrees that men can be of a certain age too.

⁷⁵⁷ www.oxforddictionaries.com/definition/English/gay

⁷⁵⁸ http://articles.timesofindia.indiatimes.com/2010-11-29/delhi/28254954_1_jantar-mantar-colour-gautam-bhan

to remind us that a dead metaphor can wound as perniciously as, and more subtly than, a live metaphor can.

In the new reality of a culturally diverse society, the criminal law court creates the potential for identity group stereotyping and for reflex responses to them. And, that is also why any theory of law without an accompanying social theory cannot account for the consequences of this new reality.⁷⁵⁹

Drawing from literature to live with a new reality

“Why is it that there are times in history when it’s all right to hate Jews or Americans or blacks or gypsies. There’s always a group deserving of contempt in every generation. You’re even suspect if you don’t hate them. I was taught to hate communists when I was growing up. I never sighted one, but I hated the sons of bitches. I hated blacks when I was growing up because it was a religious belief in my part of the world to consider them inferior to whites.”⁷⁶⁰

In that passage of dialogue from Pat Conroy’s novel, *The Prince of Tides*, Tom Wingo, an English teacher and football coach, is providing background memories of his family’s life in South Carolina to New York psychiatrist Susan Lowenstein. She is treating Tom’s schizophrenic and suicidal twin sister Savannah. Doctor Lowenstein is Jewish. The backgrounding sessions gradually transmute into therapy for Tom. He tries to explain his family’s history of prejudice against Jews, against people who did not belong in the South, against the elevation of the status of woman above the level of men’s property, and against niggers. Although now emancipated from the isolation of the social group of shrimpers that nurtured these prejudices, they still lurk in the lacuna of his consciousness. He cannot form lasting relationships beyond the bonds of love for his sister and his now dead brother. He covers his insufficiency with mordant, cynical humour—no matter how dire the circumstances in which he gives vent to it. His sister expresses her hopelessness in cries for help manifested in successive wrist slashings.

⁷⁵⁹ Leith and Ingram, above n 17, introduction

⁷⁶⁰ Pat Conroy, *The prince of tides* (Book Club Associates by arrangement with Bantam Press, 1987) 202

Lowenstein mocks Tom Wingo's southern heritage.

Does your family hate Jews?

My family hates everyone. It's nothing personal

Did your family use the word nigger when you were growing up?

Of course, Doctor

But there must have been some educated enlightened people who refused to use that odious word

They weren't Wingo's. Except my mother. She claimed that only poor white trash used that word. She prided herself on saying Negro with a long "o." she thought that put her high in the ranks of humanitarians.

Do you use the word nigger now?

I only use that word when I'm around condescending Yankees like you. Then, Doctor, I can't stop myself from using the word. Nigger. Nigger. Nigger. Nigger. Nigger.

I don't allow that word to be used in this office....What religion did your family practice?

Catholic, for godsakes. Roman Catholic.

Why did you say "for godsakes"? There's nothing wrong with being a Catholic.

You have no idea how weird it is to be raised a Catholic in the Deep South.

I might have some idea. You have no idea what it is to be raised Jewish anywhere in the world.

I've read Philip Roth.⁷⁶¹

And so, clearly, has the author—the imaginer—also read Roth, who vicariously has now also become a metaphor.

⁷⁶¹ Ibid 66-8

Illustrative of the power of using literary fiction as paradigm, is Philip Roth's use of irony in his novel *Operation Shylock*, to make the point of the stereotypical Jew. The jacket notes describe the novel in part as a 'meditation on identity, and a confession.'⁷⁶² By positing a 'Philip Roth' imposter as a sort of agent provocateur, Roth seems mischievously to challenge some of the internal conflicts that afflict him as a loyal Jew, echoing Mill's lament that volition can become habit. Roth's character, Kamil challenges a claim he imputes to Woody Allen that Jews are not capable of violence. He recites to the 'real' Philip Roth, 'Tell us another one, Woody. The first bone they break in defence – to put it charitably; the second in winning; the third gives them pleasure; and the fourth is already a reflex.'⁷⁶³ Roth entwines fact and fiction to make a moral point. Literary fiction allows him to invoke anti-Semitism to dramatize Mill's charge against all 'men' that behaviour remains after the original motive has vanished. That, for a Jew, is a provocative act. He escapes the condemnation that would have been his had he raised it solely as a moral issue. Through fiction, he shows how prejudice can become the new reality.

What is more, in using his own identity group to make the point, Roth illustrates Mill's charge against all "men" more potently than the original could do. Because of Roth's prominence as a novelist, and as an observer of society, he can set Mill's charge in the context of the Middle East where nations from beyond that region have behaved reflexively for the greater part of the twentieth century, and all of the twenty-first century to date, to resolve regional cultural differences. In a different region, and impelled by different stimuli, Steven Galloway's novel *The Cellist of Sarajevo*⁷⁶⁴ makes a similar point about how easy it is to succumb to reflex actions.

It is illustrative that in his novel, *The Prince of Tides*, Conroy should gesture to another novelist for support of his claim to understand another stereotyped race. Similarly,

⁷⁶² Philip Roth, *Operation shylock: a confession* (Simon and Schuster, c1993)

⁷⁶³ Ibid 155

⁷⁶⁴ Steven Galloway, *The cellist of Sarajevo* (Riverhead Books, Paperback ed, 2009)

although—or perhaps because—he has written a work of fiction, Conroy has conveyed the sense of narrative that both carries and shapes real-life personal and collective social history.

*‘It’s been interesting to come to New York, Lowenstein, and to be hated because I am a white southerner. It’s rather bracing and refreshing, but odd. It makes me understand your paranoia.’*⁷⁶⁵

The uncomfortable jolt of a shift in linguistic register

I introduced the passage from *The Prince of Tides*, without advance notice that I was about to change register as an example of what I mean by culturally based expectations. This is not the institutionalized way of changing register in formal (or bureaucratic) writing. The surrounding text invites contemplative reading; the unheralded quote from a novel jolts the reader into a different landscape, which requires an unanticipated need to make a decision. Intuitively—reject the quote (with some impatience) as a gratuitous intrusion. Reflectively—study the intrusive quote. And so too, by analogy, the witness, in my case study, absorbed in a contemplative walk with the family dog on a quiet Sunday morning, is jolted into a different register, his new reality and an intuitive response—cross the road. Reflective consideration—upon introspective adjustment to the new reality—physically threatening; stay on this near side of the road.

I did not smuggle in this literary petard to blow away judicial orthodoxy. I am not championing law-as-literature. To do that would be, as James Boyd White notes, to make law seem a dead, bureaucratic, over conceptualised, unfeeling language. I am arguing from White’s standpoint for literature as offering in analogy stories—narratives—as a particular case. White wants to encourage a transformation of law through language to unveil meaning, as it exists in the ‘real’ reality of the valley of human vulnerabilities. Literary analogy can express an idea in a provocative, but non-didactic, way as a means of initiating a willingness to step away from orthodoxy to consider alternative ways of understanding group identity,

⁷⁶⁵ Conroy, above n 760, 195-6

and the real nature of community common sense. I do not proffer law-*as*-literature to usurp history and social science. I proffer law *and* literature as an aid to understanding, and embracing, the ameliorating power of literary theory to translate stories to create a new reality. I suggest that rational pragmatists overlook this power. And, as Pat Conroy and Philip Roth have done, I use literature to draw attention to the danger that often prejudice becomes that new reality.

Kristin Kalsem challenges the views of those who dismiss literature as a device through which those in the law can add style, but not any substantive truth, to their utterances.⁷⁶⁶ In the nineteenth-century, the legal system rendered women subservient to, and dependent on, their husbands. The legal fiction of coverture, ostensibly gave women protection through marriage. In practice, it stripped them of multiple rights, and denied them redress through law. The legal system, in fact, drove women to write ‘outside’ the law to have their voices heard, through pamphlets and, especially, through the novel form. Through the lens of feminist legal theory, Kalsem reveals the value of interdisciplinary study of law and literature. She cites Judith Resnik’s pertinent observation,⁷⁶⁷ “I bring literature to law students to show them what lawyers cannot yet imagine: stories that law has yet to invent, rights yet to be seen, and how to cope with problems seen but that stymie us by their pain.”⁷⁶⁸

We see circumstances as we are predisposed to see them. Sometimes, society conditions us not to see to them at all. Albert Camus long ago captured the essence of this societal conditioning with his account of a person condemned to die beneath the blade of the guillotine.

[F]rom the moment the death sentence is pronounced, the condemned man becomes part of an imperturbable mechanism. He spends several weeks within the cogs and gears of a machine that

⁷⁶⁶ Kristin Kalsem, *in contempt: nineteenth-century women, law, and literature* (The Ohio State University Press, 2012)

⁷⁶⁷ Judith Resnik, 'Changing the Topic' (1996) 8 *Cardozo studies in law and literature* 339-350

⁷⁶⁸ Kalsem, above n 766, 7

controls his every gesture, ultimately delivering him to the hands that will lay him out on the last device of all. The *luggage* is no longer subjected to the operations of chance, the hazards that dominate the existence of a living being, but to the mechanical laws that permit him to foresee in the minutest perspective the day of his decapitation. His condition *as an object* comes to an end on that day. (My emphases).⁷⁶⁹

This is a potent metaphor for the objectified persons of abstract legal discourse. Following the secularisation of law, God is no longer available to judge the morality of the imperturbable mechanism of bureaucratic efficacy. So, as the Crown did in the Middle Ages, the justice system enlists the common sense of a jury as a symbolic gesture to ‘the people’ in order to fortify its legitimacy as an agent of the state.

Life imitates art

Conroy published *The Prince of Tides* in 1986. Set in the time of the Korean War of the early 1950s, his fictional work reflects the fear and generational hatred that spawned McCarthyism and rampant—often-violent—opposition to equal rights for African Americans, especially the opposition to integrated schooling in the South. Almost a decade later—January 1995, Michael Westerman of Guthrie, Kentucky was to give life to Conroy’s fiction and, in the process, give currency to Oscar Wilde’s assertion—more than a century earlier—that life imitates art ‘far more than Art imitates Life,’⁷⁷⁰

Michele Zak cites *New Yorker* magazine writer, Tony Horwitz’s account of the death of Michael Westerman, a 19-year-old from Guthrie KY, who a black teenager shot and killed for flying a Confederate flag from his pickup.⁷⁷¹ A friend of Westerman claimed that he flew the flag to anger ‘blacks.’ The subsequent trial and media reporting of it rekindled the flames of racial hatred in rural Kentucky. Zak analyses Horwitz’s report from a critical theory perspective. According to Westerman’s sister, he flew the Confederate flag as a symbol of

⁷⁶⁹ Albert Camus, cited in, White, above n 179, 135

⁷⁷⁰ Pearson, above n 222, 55

⁷⁷¹ Michele Zak, 'The deep structure of the field' (1996) 33(4) (October 1, 1996) *Journal of Business Communication* 503 509

rebellion, not as an affront to African Americans. In fact, the flag as symbol had what Zak calls a ‘fuzzy source’. The County’s high school sporting teams used the flag as their symbol; moreover, the youth who shot Westerman was unaware of the social significance of the flag; "I thought it was just the 'Dukes of Hazzard'⁷⁷² sign," he said. Only later did he discover the reason for black hostility to the flag.

Read on the surface, this is the story of a young testosterone-driven white male living the fantasy of the young, handsome ‘good ‘ole boys’ of a popular television series, gunned down by a young black male who does not like white Americans. However, only by going below that surface to reveal a deeper meaning can one hope to understand the actions of each of the antagonists in this tragedy. Each is a member of a minority group; each group feels isolated from the majority, misrepresented, and therefore despised. It is a true story that mirrors the feelings of the fictional Tom Wingo in Pat Conroy’s novel:

Compare the fictional Wingo’s self-analysis with how sociologist John Shelton Reed described this population of people who had adopted the Confederate flag as a symbol of white pride. This is a population that ‘has really lost it in the space of a generation,’ not only have they suffered material losses, but also ‘the deepest grievances are cultural. They feel they don’t get any respect, that their culture doesn’t get any respect, and that their ancestors are being dissed (sic).’⁷⁷³

Michele Zak reveals the entwined narratives of Westerman and his African American assailant in a description of the manner in which confederate veterans reacted to Westerman’s death. Her irony is harsh.

An exhibit in a museum owned by the Sons of Confederate Veterans in Franklin, Tennessee, has the Confederate flag from Westerman's coffin on exhibit, along with a photograph of Westerman with a

⁷⁷² *The Dukes of Hazzard* was a television series that ran on the CBS network in the USA between 1979 and 1985. It revolved around the adventures of the Duke boys, cousins who drove around the fictional county of Hazzard in Georgia, in their hotted-up 1969 Dodge Charger stock car, which they named The General lee.

⁷⁷³ Zak, above n 771, 507-8

caption that identifies him as the "Confederate Martyr" who had "succumbed to his wounds" after being "accosted by a carload of black youths who made racist remarks concerning this flag.... A "Confederate Martyr," not a teenage good 'ole boy driving a flashy truck brandishing a symbol of contemporary race hatreds. A "Confederate Martyr" who "succumbed to his wounds" - language drawn from the obituaries of war heroes, not from news reports of a teenage good 'ole boy who died in the front seat of his truck as the victim of a drive-by shooting. A "Confederate Martyr" whose martyrdom must have occurred as a result of his bravely exposing himself to . . . racial injustice?⁷⁷⁴

Her irony is also blatant. One hundred years before, Mark Twain was no more subtle. Perhaps he did not have to be; he lived and wrote in a different reality, as HLA Hart reminds us.

Huckleberry Finn, when asked if the explosion of a steamboat boiler had hurt anyone, replied, 'No'm: killed a nigger.' Aunt Sally's comment 'Well it's lucky, because sometimes people do get hurt' sums up a whole morality which has often prevailed among men.⁷⁷⁵

Elsewhere, I have cited Geoffrey Hazard's claim that the community to which people belong moulds their understanding of what, for them, is morally right. Zak, perhaps, overlooks the point that what drives members of groups that feel themselves isolated is the collective memory of the group to which they belong. To denigrate the actions of members, no matter how apparently bizarre, without a reasoned analysis of the narrative text that stimulates the action is not helpful. This presents the challenge for the judiciary. It must explore the meanings of the symbols that inform judicial narrative to determine along which plot line the path to justice lies

Jeanne Gaakeer raises the possibility that in reaching for a judgment, lawyers and judges are institutionalised into accepting law as 'a mere system of rules' rather than as a 'culture of argument that addresses the questions of value and community.'⁷⁷⁶ To see law as a mere system of rules is to accept the nexus of law with economics, a legal positivist viewpoint.⁷⁷⁷

⁷⁷⁴ Ibid

⁷⁷⁵ Hart, above n 140, 200

⁷⁷⁶ Gaakeer, above n 45, 26

⁷⁷⁷ A viewpoint adopted by Richard Posner

Gaakeer, on the other hand, advances the proposition of the role of literature as a medium through which questions of value and community are raised. Robert Cover has argued that legal meanings are in fact ‘heavily underwritten by extrinsic narratives, by contexts of popular or traditional discourse which supply—as do prejudices—“history and destiny, beginning and end, explanation and purpose.”’⁷⁷⁸ Predispositions and prejudice might determine how any one of us reads either the fictional Wingo or the real-life Westerman narrative. If we look for the sub-textual meaning in each of them, what justifies us measuring the worth of *The Prince of Tides* only against aesthetic criteria, which are usually reserved for art, whilst using social science and ethical criteria for use only in interpreting the judicial texts such as the narrative that moves the story of Michael Westerman and his African American assailant?

Conclusion

The significance of literature is its capacity to encourage awareness that the discourse of courtroom advocacy and adjudication is not as value-free as the institutionalizing of the language of law would imply. Richard Rorty laments, ‘I confess...that I tremble at the thought of Barthian readings in law schools...I suspect that civilization reposes on a lot of people who take the normal practices of the discipline with full “realistic” seriousness. However, I should like to think that a pragmatist’s understanding of knowledge and community would be, in the end, compatible with normal inquiry—the practitioners of such inquiry reserving their irony for after-hours.’⁷⁷⁹

Richard Rorty, described in the June 2003 edition of *Believer* magazine as America’s most influential, controversial and widely read living philosopher expanded his views on pragmatism in an interview with the bimonthly literature, arts and culture magazine,

⁷⁷⁸ Meehan, above n 753, 443

⁷⁷⁹ Sandford and Mailloux Levinson, Steven (ed), *Interpreting law and literature : a hermeneutic reader* (Northwestern University Press, 1988) 155-74

Pragmatism is like Romanticism in its doubts about Platonic, universal Truth and Reason. What differentiates it, on my account, from Romanticism is that the Romantics tended to exalt something called Passion, or the Imagination, or Authenticity, or Depth, which becomes what Habermas called an “other to reason”—that is, something that claims to have an authority trumping that of reason. Pragmatists don’t believe that we have any faculty that has such a priori authority, and, in general, don’t want to ask the question of what has innate authority or legitimacy. Our view is that you can forget whether an ideal is authentic or legitimate or universal or deep, and just ask whether it’s useful for solving the problems of the day. What unites Plato and the bad kind of Romantic is the notion of your ideas having authority because of some privileged source, while the pragmatists say, “the hell with what the source is, let’s look at the consequences.”

He went on to explain his claim that people find pragmatism distasteful because it has no ability to empower.

Yeah, it’s basically negative and therapeutic. It doesn’t have a great, big, powerful, constructive message. You can’t go away inspired by the need to do something or other. You read the pragmatists and all you know is: not Descartes, not Kant, not Plato. It’s like aspirin. You can’t use aspirin to give yourself power, you take it to get rid of headaches. In that way, pragmatism is a philosophical therapy. It helps you stop asking the unhelpful questions.⁷⁸⁰

As Rorty’s expressed hope emphasises it is not enough to be interested only in the legal and social theories that underpin judicial processes. Furthermore, his lament invites provocative questions. Is there a need to descend from airy universe of abstract theory to the concreteness of human vulnerabilities? Does the justice system, as agent for the state, feel vulnerable to community perceptions of judges’ imaginings of social reality? Can a symbolic jury presence—a presence in less than one percent of all cases that pass through the criminal court

⁷⁸⁰ “Pragmatism is a philosophical therapy. It helps you stop asking the unhelpful questions.”
Richard Rorty https://www.believermag.com/issues/200306/?read=interview_rorty

system—assuage the state’s feeling that its justice legitimacy is vulnerable? Or, has modern society, comprising diverse identity groups, rendered the jury a modern day Greek chorus?

In this chapter, I have examined some aspects of legal and social theory that are relevant to what, as I have discussed earlier, some perceive as the need for a judge sitting alone to achieve a balance between social claims, and what the law commands. Others, as I also have considered, deny any obligation other than to administer the law. The correlative question is whether community common sense is but a jury’s way of balancing a social claim against the law’s bureaucratic need for certainty based on legal truth, as the judge has explained it to them. If that is what the jury does, it is no longer merely a modern day Greek Chorus. Moreover, if that is what we—society—expect the jury to be, the rules of evidence must be more amenable to storytelling. It will demand a different approach to comprehending the new social consciousness, which today’s juries must represent. This is the topic of Chapter Seven.

Chapter Seven: Comprehending a new social consciousness: does Australia still need the jury?

Preamble

I introduced my thesis with a view that in an increasingly diverse society, there is a need to adapt the discourse of the adversarial criminal trial before jury. Throughout the discussion, which followed, I explained how the courtroom discourse took on a different dimension in trial before jury from a trial before a judge sitting alone. I examined at length how the perception of the jury as the expression of community common sense changed as the geographic intimacy of the community it represented dissolved.

The discussion, which precedes this final chapter, however, has thrown up an alternative to adaptation of discourse. Inexorably, it has raised the question whether in this age of a new social consciousness the jury is still relevant. For the state, cost, as well as truth in justice, is a consideration. And, it adds poignancy to Richard Rorty's comments on pragmatism. If the state can convince its people that truth in justice can prevail without recourse to the jury trial, pragmatism as an aspirin "against asking unhelpful questions," has appeal.

My thesis has examined this now highly relevant, yet still fraught problem in new ways. I believe it contributes to developing a better understanding of the opportunities and risks of adopting an approach to the worth of a jury based on outcomes, rather than giving undue privilege to sources based on precedent. This is the conclusion to which my discussion in Chapter Seven—this final chapter—leads.

Introduction

When I was reviewing my analysis of the case study in Chapter Two, I realised that I constantly referred to Witness's answer to the question why he crossed the road. He was going to, what screams had led him to presume, was the site of a person in danger. It seemed to be a reasonable question. On the face of it, it was just an attempt to tell the jury how the

witness found himself at the centre of an assault. He was not part of its development, just an accidental late arrival to it. But, at trial, the prosecutor—impelled by a defence counsel objection—was telling the witness “*what this court is interested in is what you saw and what you heard.*” The court did not want to know what he was thinking. It was not until much later after the trial, when I had access to the transcript of the *voir dire* discussions that I found that the question, which had seemed nothing more than a device to establish the context for what would follow, was loaded with discursive weight.

Throughout my thesis, I have frequently returned to this short exchange, often only intuitively in the first instance. Yet, in each instance, this short exchange seemed to embody the essence of what was in my consciousness about the nature, and relevance of the jury trial. Although, that essence was still inchoate. But then, after reviewing the six chapters that constitute my thesis to this point, I realised that I have been analysing something different from my stated aim with which I began this exploration. I started out exploring what I saw as the potential for distortion of meaning in the organization of courtroom discourse. I wanted to move beyond language to discourse, and to Counsel’s strategic and tactical organization of it to appeal to the common sense of the jury. Each of the adversarial counsel wanted to persuade jurors to prefer their thesis as they had embodied it in their construction of their narrative of the case. My focus was the discursive process as a stimulus-response mechanism. But, in that process, I was also uncovering something else.

I was not seeing it because I had trapped myself in a paradigm of late nineteenth to early twentieth century psychology. The essence of that paradigm is the axiom: provide the stimulus and one can predict the response. The corollary: identify the response, and one can presume the stimulus. That, though, is a brain-centred analysis. I now realise that if I want to understand what constitutes the community common sense that the justice system prizes as an attribute of jury decision making, I must look beyond the mechanistic stimulus response action of the brain. Community common sense resides in consciousness; it is not a mechanistic response to a triggering stimulus. More precisely, it exists in collective

consciousness. This is where we must begin if we are to answer the question whether modern society still needs the jury.

Community common sense resides in consciousness

The nature of consciousness

Early twentieth century scientific psychology insisted upon recognition of a clear distinction between, ‘the inherently private, subjective, “first-person” world of human mental life and the publicly observable, objective “third-person” world of physiological events and processes in the body and brain.’⁷⁸¹ Thus, we have, “He heard screams. What they suggested to him is...irrelevant... he’s not allowed to say it.” This is the science of behaviour. It is purely objective, which, in the view of behaviourists, natural science should be. ‘It should “never use the terms consciousness, mental states, mind, content, introspectively verifiable, imagery, and the like.” Its task only is to identify lawful relationships between stimulus and response.’⁷⁸²

In this view, consciousness equates with belief in the supernatural, non-physical exposition, that is, with the spiritual. And the spiritual is a superstitious clutching at a supernatural being to "explain away," not explain, those essences of human behaviour that a physiological stimulus-response mechanism of the brain cannot explain. Modern research challenges that view. It has broken through the wall of a constraining paradigm to reveal the new site of investigation, the relationship between mind and the brain. The problem is that early twentieth century scientific psychology still influences the formulation of rules the justice system uses to decide what witness testimony is admissible. This approach of "old" science is analogous to "old" secular law, which, after the Enlightenment, decreed the irrelevance of God. In the courtroom, persuading twelve jurors is the practical imperative. Consciousness does not belong. Consciousness is for the philosopher to contemplate.

⁷⁸¹ Edward F Kelly, Emily Williams Kelly and Adam Crabtree, *Irreducible mind: toward a psychology for the 21st century* (Rowman & Littlefield Publishers, Inc, 2007) Introduction, xvii

⁷⁸² Ibid introduction, xviii

In a trial before jury, counsel are at pains to construct their narrative of the case, and, in doing so, they support Kadoch's claim that, delivery without story is meaningless. That counsel intuitively sense the need for story also adds weight to her assertion that 'our need for story is encoded in our genes.'⁷⁸³ Yet, in my case study, the witness, by deciding to involve himself in the incident, is no longer an uninvolved observer; he has become a participant. For the recounting of the incident to become a 'good story,' the audience would want to know why he thought he should involve himself in a potentially dangerous situation. The story has moved to another landscape.

However, the rules of evidence operate to deconstruct the story a witness wants to tell so that it conforms to the Rationalist Model of evidence.⁷⁸⁴ But, in the courtroom, the story, for which the rules of evidence seem to invite a deconstructive approach, is fashioned out of testimony from which some facts are abridged, others excluded. Thus, deconstruction cannot ever be a useful or justifiable tool when one is considering the organization of discourse in an adversarial trial contained by rules of evidence and criminal court procedure. It is a tool for literary analysis. But, as I have emphasised throughout, my thesis is not literary analysis, nor is it discourse analysis. Yet, in spite of the constraints that the rules of evidence impose, counsel talk confidently about the narrative of the case, seemingly secure in their own certitude that they understand in a formal sense what it takes to make a good story.

Bruner does not subscribe to such certitude. He argues that one reason we know so little about what makes a good story is that, unlike theoretical arguments, which 'are simply conclusive or inconclusive,' narrative builds on 'concern for the human condition.'⁷⁸⁵ This means the story must build two 'landscapes' at the same time. 'One is the landscape of action, where the constituents are the arguments of action: agent, intention or goal, situation, instrument, something corresponding to a "story grammar."⁷⁸⁶ Simply put, a story grammar

⁷⁸³ Kadoch, above n101, 79

⁷⁸⁴ Twining, above n 248, 185-6]

⁷⁸⁵ Bruner, above n 14, 14

⁷⁸⁶ Ibid

the awareness of those involved in the story is put there by the author'.⁷⁸⁹ This moves knowledge of the world beyond the psychic realities of the protagonists into 'the realm of the implicit,' which means 'matters of supposition...or...of *presupposition* (Bruner's emphasis).'⁷⁹⁰ In the example below from my case study, the judge in another case—incredulously (whether feigned or real is not evident from the transcript)—questions the argument of the prosecutor.

Judge: ***Well, I mean***, you go back to paragraph 3: *Even over the noise of the bikes I could still hear the woman screaming, 'Somebody, please help me'.*

Prosecutor: *Mm.*

Judge: ***I mean seriously...*** *The jury can't follow that and work out what was happening?* (My emphases)

Playing out the Wittgensteinian game to a scoreless draw

The foregoing exchange between judge and prosecutor illustrates a paradox of the rules of evidence. In this instance, the witness on the stand can explain explicitly what he was thinking. That was his psychic reality. But, the rules will not allow him to do that. Instead, the judge's ruling is that the jurors, who are hearing mediated testimony because of truncations and exclusions, are left to suppose or presuppose what the witness was thinking. Hence, 'what was happening' is not now the psychic reality that exists in the consciousness of Witness. It is now implicit knowledge 'put there' by someone other than a protagonist of the action. Courtroom advocates—counsel—put it there. For example, recall later in cross-examination counsel for the defence asking Witness, 'and because you knew of him, you—putting it bluntly, you didn't want to tangle with him, is that right?' On the face of it, that is a logically inconsistent question to put to the witness. Counsel earlier had argued

⁷⁸⁹ Ibid

⁷⁹⁰ Ibid

vehemently, and successfully, that the court should not allow the witness to tell the jury why he crossed the road. Now he is telling the jury that, in his opinion, the witness was fearful of the accused, yet illogically he gives him the opening with that question to explain why, in spite of his fear, he crossed the road. It is illogical because, had I as witness been more astute, He might have answered, “yes, I was fearful, but the nature of the screams was such that I felt a woman’s life was in danger and, therefore, I had no alternative than to cross the road to see if he could help.” Because of counsel’s question, the court would have been obliged to accept my answer. And, that testimony, had I given it, would have added a more persuasive element to the story than the answer I did in fact give, which, because I framed it as a question to counsel inviting him to agree that he too would not want to tangle with the accused, brought the line of questioning to a close. But, it still left the jury to draw its own conclusion. That Wittgenstein-style game, therefore, ended in a scoreless draw, added nothing of probative value, and simply wasted the court’s time.

The flaw in the stimulus response model: the jury does not share the consciousness of protagonists

We saw in Chapter Four how Heidegger’s insight points us to the flaw in the stimulus response model. He dismisses the notion of a serious and scientifically minded philosophy of life that adequately explains what it is to ‘be.’⁷⁹¹ That approach, he suggests, posits “life” as an unproblematic given, ‘as a kind of unreified being.’⁷⁹² To put that into the context of the protagonists in our courtroom narrative of the case, and in the context of the jurors counsel are trying to persuade, we see those persons as real and tangible subjects (and objects). We have no need to raise them abstractly to a level at which we seek to understand them as a whole.

Because, to understand them as a whole we would need to talk about consciousness, the ‘soul’ or the ‘spirit’ of the person in the pre-secular conception of Law. But, to understand the

⁷⁹¹ Heidegger, above n 239, 72

⁷⁹² Ibid

person's 'life as a whole,' we need to consider the 'psychical elements and atoms' of that life if we are to 'piece the life of the soul together,' as Heidegger expresses it.⁷⁹³

To demand of the person testifying that they "tell the court what you did, not what you thought" is to reduce behaviour to a physiological response to a stimulus, which is to constrain it to a mechanistic brain function. This contradicts the very common sense of community that is the purported value of the jury. Common sense resides in the consciousness. Community common sense resides in the collective consciousness of the identity group to which the protagonist belongs. And, as I explained in Chapter Five, collective consciousness derives from collective memory. So, if the jury is to bring common sense to its decisions, it has to be able to share the consciousness of the protagonists in the narrative of the case.

Edward Kelly, researcher in psycholinguistics and cognitive science, writes that although memory is increasingly recognized as central to all human cognitive and perceptual functions, we still understand little about 'where and in what forms our past experience is stored and by what means it is brought to bear upon the present.'⁷⁹⁴ Following ten years working full time in parapsychology, Kelly reinforces in medical and scientific terms what Gadamer had reasoned philosophically in the twentieth century—that 'scientific consciousness' envelops itself in an aura of presumed wholeness. That it is 'already completely formed and already possesses 'the right, unlearnable, and inimitable tact.'⁷⁹⁵ In this context, I infer 'tact' to mean insight. Kelly makes the point that there has been significant progress in understanding "learning" and "memory"—what he calls "habit memory"—in simple creatures to explain the 'automatic adjustments of organisms to their

⁷⁹³ Ibid

⁷⁹⁴ Kelly, Kelly and Crabtree, above n 781, 35 At the time he wrote this, Edward Kelly was Research Professor in the Department of Psychiatric Medicine at the University of Virginia. He had previously spent more than ten years working full time in experimental parapsychology.

⁷⁹⁵ Gadamer, above n 22, 15. One could perhaps substitute "perception" for "tact" in this context.

environment.’ But, he claims, they fall a long way short of explaining satisfactorily ‘the most important characteristics of the human memory system, including in particular our supplies of general knowledge (semantic memory) and our ability to recall voluntarily and explicitly our own past experience (autobiographical or episodic memory).’⁷⁹⁶ In the last century Gadamer argued that we need to ‘rescue the phenomenon of memory’ from its consignment to the status of a mere psychological faculty. In the twenty-first century, Kelly, from a scientific standpoint, makes a similar observation.

Science must always seek an appropriate balance between liberalism and conservatism in the admission of new observations, and it tends naturally and appropriately toward conservatism, amplified in proportion to the depth to which the new observations appear to conflict with expectations based on current understanding. Contrary to the popular mythology of science, however, such judgments often fall short of its professed ideals of dispassionate and open-minded evaluation of evidence. Real science is saturated, like all other human endeavours with human failings.⁷⁹⁷

Kelly believes, ‘especially in recent times, opposition to new scientific ideas comes principally from other scientists, and often on less than satisfactory grounds.’⁷⁹⁸ This reaffirms Thomas Kuhn’s concern that those who cling too fervently to the power of ‘normal’ science impede progress. Kuhn cautions against slavishly binding oneself to a view of normal science as deriving from finished scientific achievements ‘as these were recorded in the classics and... in the textbooks’, in other words, that science is settled. For example, the science paradigm—or normal science, as Kuhn later preferred to call it—is grounded in orthodoxy, which sets boundaries for what science is to observe; what kinds of questions it is supposed to ask; how it is to structure those questions; and how it is to interpret the results of those investigations. In other words, when one assumes that the science is settled, all that one may now do is emulate experiments that science regards as exemplary to, as it were, remeasure the phenomena that were the object of the exemplary experiments. This is normal science, which, by its nature, limits the range of acceptable scientific programs. It is orthodox

⁷⁹⁶ Kelly, Kelly and Crabtree, above n 781, 35

⁷⁹⁷ Ibid introduction, xxv

⁷⁹⁸ Ibid

and doctrinaire. It is also a travesty of the appositeness of history to the present. Kuhn contends that drawing from ‘finished science achievements’ as recorded, first in the classics and later in textbooks, both of which are ‘persuasive and pedagogic’ is ‘no more likely to fit the enterprise that produced them than an image of a national culture drawn from a tourist brochure or a language text.’⁷⁹⁹ We saw, too that Barthes claims that the narration of past events ‘generally’ has the endorsement of historical “science.” And, he emphasizes, normal historical “science” deems the elucidation of that history ought to be bound to the ‘unbending standard of the “real” [and, therefore] “rational.”’⁸⁰⁰

Revealing the real reality.

Where does the ‘real’ reality lie? It lies in consciousness. But, we cannot interrogate consciousness—the wellspring of putative community common sense—using a stimulus-response, scientific physiological approach. Yet the rules of evidence seem premised on a principle that providing unmediated testimony to the jury requires courtroom discourse to do just that. But, that is to suppose that bureaucratic, unfeeling language of law will stimulate a response rich with meaning. Testimony stripped of the ‘love, hatred, and all purely irrational, and emotional elements which escape calculation’⁸⁰¹ might be scientifically rational. But, I have argued, it cannot inspire a common sense layperson response.

Interrogating testimony that a witness offers as fact from the standpoint of the interrogator’s way of being is a challenge for judicial finders of fact. The interrogator will bring their pre-understanding or prejudice to the transaction. Where does the *real* reality lie? Should we bother to ask?

How should they know that in a language which describes but fails to grasp, two truths may be at variance; that I can speak without contradicting myself of “the forest” or “the domain” though my forest extends over several domains without, perhaps, covering the whole of any one of them; and, conversely, my domain includes several forests though, perhaps, none of them is wholly contained in

⁷⁹⁹ Thomas Kuhn, S, *The structure of scientific revolutions* (The University of Chicago Press, 2nd ed, 1970) 1

⁸⁰⁰ Barthes, above n 203, para 2

⁸⁰¹ Weber, above n 13, 973

it? And that these truths do not naysay each other. If my generals, however, hymn the domains, they see to it that the poet singing of the forest is beheaded.⁸⁰²

Literature, like this work by Antoine de Saint Exupery, suggests that yes, we do need to ask. This is a challenge for judicial decision-makers. The risk lies in the fact that, by the time they do confront the life narrative of the object of their decision-making, influences such as media, other institutions, and the legislature might have transformed, glossed, or misrepresented the meaning of that narrative. The decision makers might be analysing the metaphor, not the reality. They might end up beheading the wrong poet.

Courtroom rhetoric and the illusion of self-evident facts.

Earlier, I discussed Perelman and Olbrechts-Tyteca's acknowledgement that their theory of argumentation does not work if it requires that one must reduce every proof to the self-evident. Instead, they relate it to rhetoric or the skill of discourse that enables a writer or speaker to inform, and persuade a specific audience. Classically, rhetoric is the art of influencing a particular audience to think and act in a specific way. Critics will sometimes use the term to describe motivational speeches of politicians. It suggests that, although plausible, the information the speech imparts is not reducible to the self-evident. Harshly, rhetoric suggests that, in this situation, truth might just be an unpremeditated result of the persuasive endeavour. In this view, rhetoric is the tool of the storyteller, but not of the scientist. However, Bruner asserts that scientists too rely on stories to fill in the gaps in their knowledge, '[b]ut their salvation is to wash the stories away' when they can substitute causes for them. This means, that even though the scientist might have used "imagination" (or intuition); they have used it paradigmatically, not in the same imaginative way as the poet or novelist. Rather, they have used paradigmatic imagination 'to see possible formal connections before one is able to prove them in any formal way.'⁸⁰³ But eventually, prove

⁸⁰² de Saint Exupéry, above n 43, 91

⁸⁰³ Bruner, above n 14, 13

them they must. In contrast, the Perelman and Olbrechts-Tyteca theory does not require that the proposition one argues identify with the self-evident.

Courtroom facts are not absolute.

Why did the witness cross the road? As the old chicken faux-joke has it, to get to the other side. That is all the court needs to know to satisfy the probative limit that rules of evidence set. We then cut to a new scene in which the witness is on that other side of the road. In cinematographic terms, it is almost a jump cut; we have elided any depiction of the protagonist in the action (for that is what Witness has now become) contemplating whether to approach or avoid. And the interrogator—counsel for the prosecution— asks, “what happened.” But, “for legal reasons,” he adds that Witness should not tell the jury everything that happened. So, if we reduce that passage of action to what the court decides is its probative essence, we are left with, “I heard screams, I crossed the road, a man approached me, he did not look toward a woman who was lying on the ground. Neither he nor I spoke to the woman. The man and I conversed briefly. I walked away.”

We have satisfied the requirements of a stimulus-response account of the chain of events. But, we have not invested the account of the event with sufficient meaning to satisfy the needs of a storyteller. Moreover, the decision to elide certain facts is discretionary. The judge decides what they will admit as probative. That is the decision by which counsel must abide. But, the judge too brings cultural or ideological presuppositions, or prejudices to her or his decision on what inferences jurors might draw from testimony. Thus, we have another tier of mediation between what resides in the consciousness of witnesses, and what the rules of evidence and of procedure allow to enter the consciousness of jurors. I express it that way to make a point that, as I have discussed in Chapter One, facts in the courtroom are not absolute, despite the arguments of invariantists for the one “true” fact that does not depend on context.

“Apply the law to the facts” is a judicial recitation to jurors as they retire to consider their verdict. However, it is in consciousness that the jurors find their facts and, if they are to bring

their community common sense to the identification, the facts they find will be contextual. In the illustrative case study, the context might be geographic; it might be temporal—time-based—a quiet Sunday morning in a normally peaceful, family-orientated suburb. It might be cultural; would the witness have reacted differently in a suburb populated by culturally different people in whom they pre-suppose a less acceptable standard of behaviour. The judge cannot know. The judge can only surmise that jurors operate to the same cultural code in their deliberations as she or he would.

I have argued that the new reality is a community of diverse cultural origins. The values and predispositions are not common, as they were in the Middle Ages community that spawned the symbol. Then, geography limited the influx of new ideas. Thus, so-called common law in the Middle Ages was local, rather than common. Now, in a community no longer constrained by the shackles of place, can the jury be anything more than a symbol of community involvement in the justice system? If the answer to the question is no, can we discount its value as a legitimating device for the justice system for that reason alone? Alternatively, does the community value the jury as a synecdoche of the state and its legitimacy? If it does, the jury is a symbol that takes on the mantle of myth—as Barthes defines the term—that is, as culture's way of thinking about something, a way of conceptualizing or understanding it.

We have seen that it is too easy to misunderstand the ancient myth of the jury as the bulwark of democracy as having existed always to safeguard the rights of the individual. History tells us otherwise. Certainly, the Crown in the Middle Ages wanted a representative jury, but it wanted to define representativeness in its own image. And, the dilemma of definition still troubles the justice system today. The reality is that through the Middle Ages, the Crown manipulated the justice system and the jury system that serviced it to fulfil its needs during successive eras of changing social conditions. As conditions changed through the epochs, so did the jury's representative nature. But always it was tailored to suit contemporary needs of the Crown. We are still doing that, as attempts to reform the jury selection process attest.

However, as we saw with the hallowed principle of “beyond reasonable doubt,” we should be wary of investing the myth with more substance than it deserves.

Conclusion

Is Jury trial the community’s sacrosanct right?

If one purpose of the representative jury is to guard against an arbitrary verdict of guilty, another is to ensure that a judge sitting alone does not arbitrarily acquit a guilty accused. Therefore, the philosophical question is whether the right to jury trial belongs primarily to the community or to the accused. The community regards its involvement in the jury system as its right. According to Valerie Hans, its preference for jury trial over that by judge alone is universal, and apparently increasing. The jury is the community’s representative in the system to see that justice is done. Justice will be done to the community’s satisfaction only if verdicts and sentences reflect its values, or, expressing it more cynically, if they reflect the prevailing standards that pass for values. If that is what it is, then, as we progressively demythologise our society, would ridding the justice system of the jury be another weakening of the cohering bonds that give community its meaning? On the other hand, there is today no single community, with its simpler moral life, common ideals, commitment, and expectations stemming from the same inherited values.⁸⁰⁴ That would be an ideal community; but it is conjectural. Today’s jury does not comprise individuals from a single culture. It represents diverse cultures and sub-cultures, each of whom will extract their own social meaning from courtroom discourse. In that case, the jury as a putative link in the cohering bonds of the community has lost its relevance. Should the jury trial still be the community’s sacrosanct right? That is the conversation the state must have with its people.

⁸⁰⁴ Hazard, above n 10, 1139

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Appendices

Appendix one: *Voir Dire* argument on application of s 31A of Evidence Act 1906 (WA)

Judge: Yes. All right. [Defence], how long is the argument likely to take?

Defence: Well, your Honour, I must say I was - before I answered it I was waiting for - to hear from the crown as - expecting that there'd be some 31A application. And although we got, quite recently late last week (indistinct) sitting (sic) out how the crown was proposing to run its case, which included referring to - references to the accused being in custody and references to alcohol and drugs and so on.

And I must say I didn't have any quarrel with what was proposed by my learned prosecutor. But what I was, I must say, half expecting was that there'd be some indication of an application under section 31 to lead some material if not under the heading of propensity then under relationship. But - - -

Judge: But it seems the State's not approaching it that way, [Defence]. It seems to me - - -

Defence: Well - - -

Judge: - - - from the way I read the letter, they're simply relying on the common law relationship position, which is very different again from the 31A position.

Defence: Well, they didn't spell that out, with respect, your Honour - - -

Judge: That's how I read it, though.

Defence: - - - in the letter. And - - -

Judge: Yes. Because I would have expected an application the same as you otherwise.

Defence: Yes. I was anticipating that with a statement that's 104 pages long that deals not only with the five counts that are spread over 15 years, of five individual events that - one in 1997 and the last one beginning of 2012. The 104-page statement of the witness, the - shall we say, the second statement, refers to a vast number of other incidents, arguments, physicality between she and the accused. And I can't say that I ever remotely expected them to (indistinct) simply going to say, "We can lead every single paragraph of that without any adjudication by the court"

I mean, it's far too wide and it's far too prejudicial. The very matters that are set out in 31A(2) in relation to probative value and the risk of an unfair trial, in my submission, are so apparent - I'm not saying that that necessarily means that the crown would lose the entire argument. What I'm saying is that there has to be an argument.

Judge: Yes.

Defence: This material has to be considered in terms of, first of all, its probative value and, second, whether it's outweighed effectively by its prejudicial value, the exercise of the discretion that's really set out in subsection (2).

Judge: Well, that's really the - well, that's - - -

Defence: (2)(b)

Judge: Well, that's really the - it seems to me what you're articulating is really the common law position. I'll just check with [Prosecutor].

[Prosecutor], what is the position? I mean, how do you propose to lead, as I understood it, relationship evidence? There's no 31A application before the court.

Prosecutor: No. It is exactly as your Honour has said, on the basis of the common law position in relation - - -

Judge: Which is whether the probative value outweighs the prejudice.

Prosecutor: That would be the principle applying, yes.

Judge: Well, there are then a number of matters in that statement that I would have expected you to anticipate would be the subject of argument, whether his periods of custody, whether he's a member of a bikie organisation, whether that has any probative value in the context of this case. There are a number of matters I would have anticipated that you would have considered.

Prosecutor: We have considered them, your Honour, in advance of an anticipated argument. The position we've adopted though is that this evidence on the face of it, the State says, is admissible because of the common law relationship position. And we don't wish to waste the court's time - - -

Judge: Well, where, for example, [Prosecutor], does she say that she feared Mr Mercanti because he'd been a member of an outlaw motorcycle gang? Where in her statement does she actually say that.

Prosecutor: She doesn't.

Judge: Nowhere.

Prosecutor: No, your Honour. But the State says for some of the evidence, it simply forms part of the inescapable narrative. For example, taking your Honour's point about the motorcycle club, as I'll be referring to it - - -

Judge: Yes.

Prosecutor: - - - some incidents happened at a clubhouse.

Judge: Yes.

Prosecutor: She first meets him - - -

Judge: Why does it have to be spelled out that it's a bikie clubhouse. I mean, I'm just - I don't know whether - what [Defence's] position is on that. But it seemed to me it's a couple that have a volatile relationship. That's the allegation, which is not unusual. And this case could be run without reference to many matters that are on the face of it - the prejudice outweighs the probative.

Prosecutor: Your Honour, the State says rather than a volatile relationship, what this relationship is characterised by is intimidation, brutality, victimisation, loss of self-esteem. It's not two parties going at each other, if I can put it that way - -

Judge: Yes.

Prosecutor: - - - on equal terms. There's the love, there's the helplessness, there's the loyalty. There's all those aspects of it which are going to be significantly probative in terms of the offences charged, because it properly explains, for example, the complainant's reaction to those offences, why perhaps she didn't leave him at the time. It explains the motivation for the commission of some of those offences. The jealousy aspect of it is accepted. So it's all inextricably interlinked.

This story - sorry; this trial will be about the relationship between these two parties. And the State's position is the jury needs to consider all the evidence of that relationship and not consider it in a vacuum, otherwise the incidents themselves the subject of charges will not be comprehensible.

Judge: I've understood the relationship argument. But the extent of it, a lot will depend upon, I think, submissions from either side.

I mean, what are you objecting to, [Defence]? Have you made it clear to the State what it is?

Defence: Well, your Honour, I think the authorities spell out that it's not up to us to lay down the objections. It's up to the prosecution to indicate what it wants to lead. And it's just not good enough for it to say, "There's 104 pages plus some extra - additional proofing. We want to lead all of them". I mean, one of the things that we got in the additional proofing, the last paragraph refers to an incident involving the discharge of a firearm and we'd never heard of it before. We only got notice of that late last week.

The prosecution seems to be saying it wants to lead that in addition to every other page of the statement. In my submission, it has to spell out what it wants to lead. It's not good enough simply to say, "Well, we want to show that she was overborne by the accused, or she was frightened of the accused". I mean, she can say those things. And it may be that they're - it may well be that they're illustrated or at least there's an attempt through the evidence to illustrate it from the evidence pertaining to the counts themselves.

I'm not suggesting that nothing apart from those five dates should - can possibly be led in this case. But we want to know what the limits are, your Honour. We can't possibly - - -

Judge:

I understand that. What [Prosecutor] is saying - what the State is saying is, "We want to lead the entirety of Ms Kingdon's deposition." Under the Criminal Procedure Act, section 96(3)(d)⁸⁰⁵, there's an

⁸⁰⁵ Section 96(3) (d) reads:

(3) Within the prescribed period before the trial date for a charge in an indictment, the accused must lodge and serve the following

...

(d) written notice of any objection by the accused to —

(i) any document that the prosecutor intends to

adduce at the trial; or

(ii) any evidence to be given by a witness whom the

prosecutor intends to call at the trial, and the grounds for the objection.

obligation on the defence to give written notice of any objection by the accused to any document that the prosecutor intends to adduce at the trial, or any evidence to be given by a witness whom the prosecutor intends to call at the trial and the grounds for the objection.

It seems to me that what you need to identify for [Prosecutor], and then ultimately maybe for my adjudication, what it is that you're objecting to. What are the general heads of objection to the statement of Ms Kingdon? I think really that's what it comes down to, [Defence].

Defence: Well, I understand what your Honour is saying. But with respect, sir, in my submission, given the terms of section 31A, it's for the prosecution - despite what the common law position is and was before section 31A - - -

Judge: Yes.

Defence: - - - and it hasn't changed apart from, shall we say, the development of the common law as we all know it can move; somewhat slowly, generally speaking. But 31A, I think it's fair to say, revolutionised the law in this state in relation to both propensity and relationship evidence.

And one only has to look at the textbooks and read the voluminous amount of consideration given to what - well, it's only been a decade or so since it was introduced. A little more perhaps now. But it has

led to a vast amount of appellate consideration and it's led to a considerable amount of disputation as to what it means and where the limits are and so forth. And then of course there are other issues, that hopefully we won't get involved in in this case, about warnings and the directions - - -

Judge: Except in this case - sorry to interrupt you, Mr Lovitt.

Defence: Yes.

Judge: But the State is not relying - - -

Defence: No.

Judge: - - - as I understand it, on 31A at all. So they're not saying that there should be this tendency direction or propensity direction. As I understand it, what they're saying is they are seeking to lead simply the background, the context in which the five alleged offences occurred. In which case it's just simply the common law situation. They've then directed not to follow propensity reasoning and matters of that nature.

Defence: Well - - -

Judge: So it's simply a - as I've understood it, it's the common law position. That's all they're relying on. They are not seeking to rely on 31A. So therefore it comes down to a question of whether the probative value of these additional matters outweighs the prejudice.

Defence: Yes.

Judge: That's my understanding of it.

Defence: Well, your Honour, there are a considerable number of allegations of assaults - - -

Judge: Yes.

Defence: - - - that do not form the subject matter of counts 1 to 5.

Judge: Yes.

Defence: Consequently the prejudice that may well be caused is, in my submission, rather profound. And also it's fairly obvious. But if the prosecution is seriously saying that it can ruminate around the 990-odd paragraphs of the lady's statement, the 104 pages, in order to show that their relationship, without any adjudication from the court, as to probative value, well, obviously we've got an argument ahead of us because it'll be my submission that the - nevertheless it's not for the defence to spell out what parts the - - -

Judge: It seems though, Mr Lovitt, under our Criminal Procedure Act it is for the defence to do so.

Defence: Well - - -

Judge: As I said, under section 96(3)(d) - I can hand it down to you, a copy, unless you - Mr Brennan's got a copy. But it says you are required to give written objection.

Perhaps, Mr Brennan, if you could just pass that to Mr Lovitt?

And all you need there do perhaps is just give them the heads. What are - what is it that you're objecting to? Are you objecting to the periods in custody? Are you objecting to references to the outlaw motorcycle gang? I mean - - -

Defence: I just - - -

Judge: The State are entitled to know what it is.

Defence: Pardon me a moment, your Honour.

Judge Yes, certainly.

Defence: Well, your Honour, I see what's written there and I can understand why it exists. But with respect, it can't possibly mean that the onus is thrown upon the defence in a trial where there is a 104-page - and I keep repeating the number of pages - but there is a very, very long narrative of events spacing some 16 years by the complainant. It can't possibly mean that the defence has to articulate which particular parts it objects to.

The crown's got the burden of proving the case against the accused. There are quite identifiable sections of her statement that relate to the five counts on the presentment. And I anticipate, and I may well concede, that there is some material that the crown ought to be entitled to lead to show the perspectives of certain behaviour and so on.

In my submission, that particular provision doesn't effectively put the onus on the defence whether the crown want to lead - what if the victim's - sorry, what if the victim's statement was 500 pages long? Do we simply have to - regardless of the length and regardless of how much in it is remote from the charges, the defence has to articulate what it objects to. It just seems to me that, particular bearing in mind that the relationship - and it really wants to lead it under the heading of relationship. Section 31 - - -

Judge: I know you keep going back to 31A, Mr Lovitt, but 31A - - -

Defence: I know -

Judge - - actually has no application in this case unless one of the - unless the State makes an application. They're not seeking to lead it under 31A. It is simply the common law position

Defence: Well, then the common law position doesn't give the prosecution carte blanche - - -

Judge: No.

Defence: - - - to lead what it wants.

Judge: No. And that's why you need to - - -

Defence: (Inaudible)

Judge: That's why - sorry.

Defence: Sorry.

Judge: But that's why you need to let the State know what it is you're objecting to so that I can then rule on that.

Defence: Well - - -

Judge: Would it be helpful if the two of you - if I adjourned and you spent some time together?

Appendix two: *Voir Dire* argument on admissibility of witness Fisher's testimony

Prosecution: Your Honour, if I could refer you to Ms Kingdon's statement at page 56 of the brief. If I can refer your Honour to paragraph 456, because what's happening is there's an assault that's occurred inside the house. She's gone outside. He's brought her back inside. She's hobbled back to the garage at 463. Inside, he started in on her again at 464.

Judge: Yes.

Prosecution: He started belting her again at 466. At 470:

I was begging Troy to stop.

Now, we can't possibly say where the bodily harm occurred, whether it was before or in the garage. This is to be viewed as one ongoing assault, if I can put it that way, as the Criminal Procedure Act schedule allows.

Judge: Yes. There's no reason why Ms Kingdon - she can give all of this.

Prosecution: Of course.

Judge: Yes.

Prosecution: But what we say is the jury is going to need to understand how Mr Mercanti appeared, and his attitude and demeanour. Did he appear angry during the course of this offence?

Judge: She can say all of that.

Prosecution: But Mr Fisher being an independent eyewitness, your Honour.

Judge: Mr Fisher can describe everything up to, in my view, paragraph 11.

Prosecution: But is the jury not going to be perplexed if Mr Fisher is not asked, “Well, how did he appear?”

Judge: “How did he appear to you, Mr Fisher?” or “How did he appear to Ms Kingdon?” They’re two separate issues.

Prosecution: But the issue - - -

Judge: His attitude to Ms - to Fisher is not what he’s on - it’s got nothing to do with the indictment.

Prosecution: No, it’s not, your Honour, but it does indicate his state of mind and demeanour - because the State says this is relevant. He’s come out - because it may be ultimately that they say, “Yes, she was outside naked and he came outside because he was concerned about her”.

Now, the State says if the jury hears that Mr Mercanti has come out of his house, hasn’t so much glanced at Ms Kingdon, and has abused Mr Fisher, that can rationally affect the jury’s assessment of the probability of a fact in issue. That is to say, was he being solicitous for the welfare of his wife and concerned because she was out there for some unknown reason? Or is it because he was in the process of assaulting her?

If a jury is not provided with the information that he appeared to be angry, a jury is going to be completely baffled as to how they’re supposed to interpret this evidence. Whether he was calm, whether

he was smiling, whether he was being friendly, whether he was being angry, whether he was raising his voice. A jury is going to wonder why no one's asking him - - -

Defence: You gave me the wrong page number.

Prosecution: - - - about this thing. We simply can't lead this evidence in a meaningful way, with respect, if we - - -

Judge: Well, I mean, you go back to paragraph 3:

Even over the noise of the bikes I could still hear the woman screaming, 'Somebody, please help me'.

Prosecution: Mm.

Judge: I mean seriously, Mr Whalley. The jury can't follow that and work out what was happening? What is being objected to at paragraph 11 is his attitude to Mr Fisher, "I'll punch your head off, you fucking" -

Punch your head off your shoulders, you fucking maggot.

Well, what's that - - -

Prosecution: Well, because the State says - if he - if they accept that evidence then whatever words he used, what he's saying is, "I want you to leave the scene". Now, here if it's a situation where Ms Kingdon is in a situation where she's a danger to herself or whether Mr Mercanti doesn't know what's going on and goodness knows why she's out here naked, one would wonder why a helpful or potentially helpful passerby would be told in no uncertain terms to leave the scene. Now, the State - - -

Judge: Because of what's said at paragraph 10, Mr Whalley:

He was shouting. Then he turned his attention to me.

What happened then, Mr Fisher?---I left.

You don't think the jury wouldn't get the drift?

Prosecution: Well, he was shouting. The jury are going to want to know, "Well, what was he shouting?" Surely. I mean, they're just going to think that we aren't doing our job properly by asking the appropriate question. He was shouting. Well, what was he shouting? Was he shouting, "Come and help my wife, come and help my wife"?

Defence: Well, you can argue what you (indistinct)

Prosecution: "Will somebody please come and help me"?

Defence: Your Honour, there's got to be an end to this. Your Honour made a ruling.

Judge: Yes, I have made a ruling.

Defence: I normally don't cavil with rulings. My friend got, I think, a reasonably - - -

Judge: He was - yes, but - Mr Whalley was trying to work out the parameters of what the evidence -

It's up to paragraph 11, Mr Whalley. That is my ruling.

Defence: Well, your Honour's told him and he's still arguing the point with your Honour.

Judge: Yes.

Prosecution: I'm obliged, your Honour.

Judge: Yes. And with the - yes, all right. We'll leave it at that. Are there any other matters?

Bibliography

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