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GLASS CAGES IN THE DOCK?: PRESENTING THE DEFENDANT TO THE JURY

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INTRODUCTION

A "fair" trial is typically understood to be one that offers a range of procedural safeguards, such as: involving a public hearing before an independent and impartial tribunal within a reasonable period; presenting the accused with the evidence against him or her, with adequate opportunity to prepare and present a defense; and allowing appeals against trial court decisions.[1] Further, in common law legal systems, having one's case heard by a jury is a fundamental right for defendants charged with serious offences.

Fairness also has an architectural or spatial dimension. Courts are designed not just to achieve functional objectives, such as adequate sightlines and good acoustics,[2] but also to reflect values such as "trust, hope and most importantly faith in justice and fairness."[3] At the same time, design standards are likely to mandate security measures to protect different court participants from harm. This article examines legal debates about one important design question—where fairness and security considerations may appear to conflict at times—where and how to seat the accused. The article focuses on trials in which a jury is present, which tend to be the most se-

* Justice Research Group, University of Western Sydney. Declaration of interest: the author was called as a witness for the defense in the el Omar pre-trial hearings in Sydney, one of the cases referred to below.

Several of the descriptions of court spaces in this article, in part, are based on the author's personal observations of these spaces. Where possible, the author directs readers to other authorities for photos or descriptions of these spaces.

1. *See* UNITED NATIONS, UNIVERSAL DECLARATION OF HUMAN RIGHTS: FINAL AUTHORIZED TEXT, Article 10 (1952) ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him"); *id.* at Article 11 (1) ("Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.").

2. *See* JUDICIAL CONFERENCE OF THE U.S., U.S. COURTS DESIGN GUIDE, 14-1 (2007), *available at http://www.wbdg.org/ccb/GSAMAN/courts.pdf.*

3. *See* INTERNATIONAL CRIMINAL COURT, *Architect's Vision*, http://www.icc-cpi.int/Menus/ICC/About+the+Court/Permanent+Premises/TheBuilding/Architect%E2%80%99s+vision.htm (last visited Mar. 10, 2011) (concerning the winning entry of architects, Bjarne Hammer and Schmidt Hammer Lassen, for the International Criminal Court).

rious matters because a person's liberty is often at stake, although similar issues may also be raised in preliminary hearings or trials without juries.

The issue is a particularly fascinating one because of the radically different approaches jurisdictions have taken to the question. In the United States, the accused generally appears free and unfettered in a privileged position at the bar table. In Ireland and the Australian Capital Territory, the accused sits just behind the bar table, also unconstrained. Meanwhile, in France, Germany, England and Wales, and most parts of Australia, defendants sit in a designated enclosure, and an increasing number of courts are being built with glass-enclosed docks. In Spain and Italy (as well as numerous jurisdictions that do not have juries), the accused may be located behind metal bars in the courtroom.

These developments could be characterized as a story about how security fears may trump individual rights and how the surveillance society has turned the courtroom (in some countries at least) into an extension of the prison. There is, however, another more optimistic counter-narrative that can be recounted. This story is about how courts, spurred on by assertive defense lawyers, have fought back to protect the rights of the accused and have provided a more dignified court setting. Legal issues that were raised in the United States, in the context of getting rid of the dock altogether, reappeared in Europe and Australia in debates about placing the accused within a glass-framed enclosure.

This article is in four parts. Part I provides a background to the development of the dock in courtrooms, from about 1300 to 1850, as well as the United States' experience of abolishing the dock since that period, outlining the court decisions that enabled and reinforced this change. Part II examines a particular form of dock, the glass-enclosed security dock, reviewing its development and the way this was handled in two appeal court processes, one at the European Court of Human Rights and one at the Queensland Court of Appeal and the Australian High Court. Part III looks at how two trial courts in Australian terrorism trials, in Victoria and New South Wales, dealt with applications to remove the glass from the dock. Part IV draws together the lessons from these case studies and develops recommendations about how court design can better reflect fundamental legal values.

I. HISTORICAL BACKGROUND

A. The Bar

In medieval times, a wooden barrier ("barreau," in English "bar") served to designate the space within which justice was done.[4] This judicial space might be under a tree, as it was with the legendary judgments of French kings.[5] In less clement climes, it could be a county hall, church, or other public building. In the new world it was typically an upstairs room in a tavern or any other available space large enough for the occasion.[6]

Initially the dedicated area would probably have contained the judge and court officials; everyone else, including witnesses, defendants, jurors, lawyers, and the public, remained outside. Litigants and defendants would present themselves at "the bar."

Because courts were held in a variety of locations, the configurations of justice spaces and the position of participants varied from place to place. Sometimes the judge might allow others to venture inside the bar. In 1586 Mary Stuart (Queen of Scots) was placed inside the bar for her trial, together with the forty-four noblemen and gentry who were to vote on her guilt, facing the empty chair for the absent Queen Elizabeth.[7] Her grandson, King Charles I, sat outside the bar for his trial.[8] He sat, however, close enough to the lawyer, John Cook, who was prosecuting the case, to be able to reach across the bar and strike the latter with his staff. The silver head of his cane flew off and rolled on the floor.[9] The position of the accused and the role of lawyers in criminal trials were to be closely linked in the subsequent story. Indeed the term "bar" became associated with the lawyers themselves, and the table at which they sat became the "bar table."

The layout of a courtroom is a reflection of a complex history of legal reform, professional evolution, and political values. The dock, the bar table,

4. ROBERT JACOB, IMAGES DE LA JUSTICE: ESSAI SUR L'ICONOGRAPHIE JUDICIAIRE DU MOYEN AGE A L'AGE CLASSIQUE [IMAGES OF JUSTICE : ESSAY ON JUDICIAL ICONOGRAPHY FROM THE MIDDLE AGES TO THE CLASSIC AGE], 93–94 (1994).

5. ANTOINE GARAPON, BIEN JUGER: ESSAIS SUR LE RITUEL JUDICIAIRE [JUDGING WELL: ESSAYS ON JUDICIAL RITUAL] 25 (1997).

6. MARTHA MCNAMARA, FROM TAVERN TO COURTHOUSE: ARCHITECTURE AND RITUAL IN AMERICAN LAW, 1658–1860 1–2 (2004).

7. For one artist's impression of this trial configuration, see Robert Beale, *Trial of Mary Queen of Scots in the Grand Chamber at Fotheringay Castel, October 1586* at www.heritage.com, Image ID 1-225-253.

8. Lynal E. Doerksen, *Out of the Dock and Into the Bar: An Examination of the History and Use of the Prisoner's Dock*, 34 CRIM. L.Q., 478–502, 485 (1989).

9. T.B. HOWELL, COMPLETE COLLECTION OF STATE TRIALS, Vol. 4 (T.B. Howell & T.J. Howell, ed. 1997).

the witness stand, and the jury benches all encapsulate particular sets of social relations, some bearing traces of earlier eras. For court regulars within each tradition, the position of each of these players is seen as obvious and inevitable; a comparison of different traditions shows this is far from the case. The following sections provide a brief review of three different histories—English, American, and French. Most other western court systems with jury trials use a variant of one of these.

B. Segregated Spaces in Courts[10]

Until the nineteenth century, jurors and witnesses in English courts are likely to have intermingled with members of the public. Indeed on at least one documented occasion, defendants awaiting trial became jurors for an earlier case.[11] In the Old Bailey in the eighteenth century, the jury would sometimes be scattered, some inside and some outside the bar, according to the available space.[12] In some New England courts, jurors occasionally mingled with patrons of the taverns in which they were deliberating.[13] In France until 1789, criminal trials were held in secret, so there were no public courts.[14]

The nineteenth century saw the building of special-purpose courts in the three countries, with spaces becoming more clearly demarcated. Designated areas for witnesses, defendants, and jurors developed during the first part of the nineteenth century.[15] In this process of differentiating spaces, the area demarcated by the "bar" was extended to include all the major players and to distinguish the participants from the spectators.

10. This summary is based on published sources available in English or French. Documentation for many of the processes described is limited, and more definitive conclusions would require detailed archival work, along the lines Katherine Taylor has done for the Palais de Justice in Paris. *See generally* KATHERINE F. TAYLOR, IN THE THEATER OF CRIMINAL JUSTICE: THE PALAIS DE JUSTICE IN SECOND EMPIRE PARIS (1993).

11. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States* 61 U. CHI. L. REV. 867, 881 (1994).

12. John H. Langbein, *The Criminal Trial before the Lawyers*, 45 U. CHI. L. REV. 263, 288 (1978).

13. MCNAMARA, *supra* note 6, at 41.

14. The contrast between the secret trial and the public punishment, and the subsequent reversal of this dichotomy is described most famously in MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1977).

15. Katherine Fischer Taylor, *First Appearances: The Material Setting and Culture of the Early Supreme Court, in* THE SUPREME COURT OF THE UNITED STATES: THE PURSUIT OF JUSTICE 357, 371 (Christopher Tomlins, ed., 2005).

C. *The Position of the Accused and the Role of Lawyers*

In eighteenth century English courts, there were often enclosures for accused persons or "bale-docks."[16] The defendants awaiting trial would stand together in the enclosure. Accused persons would move to the bar when their cases were called, usually representing themselves.[17]

Defense lawyers were not generally accepted in criminal proceedings until about 1730[18] and were not allowed to address the jury directly until 1836.[19] The English legal profession developed as something of a caste system, with higher-status barristers authorized to speak in court on behalf of clients (at least for more serious matters); attorneys or solicitors met the clients and took verbal instructions, relaying these to the barristers. This distinction was reinforced by different work arrangements. Solicitors were generally employees in a law firm, while barristers worked as self-employed agents in "chambers."[20] Barristers could also act either for the defense or the prosecution.[21] Prosecution and defense barristers sat side-by-side at the bar table, close to their instructing solicitors.[22] These professionals were now the main actors in the trial and occupied the center of the court. The accused meanwhile had become less central to the case and could be moved to the margins of the courtroom, typically in a dock at the back.

The monopoly of barristers to speak in the court was slowly reduced, in theory, in England and Wales and Australian states, although a divided bar persists in practice in both places in the higher courts.[23] In Canada, Ireland, and New Zealand (other countries that largely inherited the English model) the division between barristers and solicitors eroded to a greater extent. In lower courts, the division between the two levels of the legal profession never developed to the same extent. Solicitors typically represented clients in these courts, often alongside police prosecutors, most of whom were not legally trained.

In the nineteenth century, American courts largely followed English court layouts and placed the accused in a dock. Like their English counter-

16. Doerksen, *supra* note 8, at 482.

17. *Id.*

18. Langbein, *supra* note 12, at 307.

19. John Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 LAW & HIST. REV. 221, 231 (1991).

20. *Id.* at 221–31.

21. *Id.*

22. *Id.*

23. *See generally* JOHN EMERSON, A HISTORY OF THE INDEPENDENT BAR OF SOUTH AUSTRALIA (2006).

parts, American lawyers were developing specializations, including trial attorney, but without the caste difference evident in England. They generally worked in law firms as partners or employees. Defense attorneys who defended a client in court also met their clients in person and took instructions directly; a dock removed from their table was therefore something of an inconvenience. Prosecutors meanwhile were a separate occupational group, employed directly by the state. Sitting next to them was not essential to providing a competent defense, and the growing complexity of cases meant more space was required. The opportunity to deal with both issues together came at the end of the nineteenth century when the process of segregating spaces led to the building of special-purpose grand jury rooms. Before this time the grand jury used a courtroom, with two benches on either side of the room to accommodate up to twenty-three jurors. Only one set of benches was required to accommodate the twelve members of a trial jury, so the other side could now be used by the defense lawyers and their clients. How this transformation became not only possible, but also largely obligatory is taken up in the following section.

In France after the Revolution, juries were introduced by the new regime as part of a process of democratizing justice, so space was made available for them. Not everything changed. Powerful prosecutors had been a key feature of the pre-revolutionary justice process; the *avocat général* in the new courts towered over the other court participants from a position alongside the judges, the position where the king had sat in the *parlement*.[24] The defendant, meanwhile, generally had a designated bench or box facing the jury, with an advocate alongside.[25] The accused remained in this enclosed area during questioning, not moving to the witness stand as their common law counterparts did. But like the emerging United States model, and in contrast to the English practice, this configuration managed to combine co-location of defense lawyer and defendant, with a strong spatial separation between prosecution and defense.

D. Abolishing the Dock in the United States

As American courts were built or redeveloped from the late nineteenth century, the dock was quietly removed and defendants moved to the defense table. This change was supported by a range of judicial decisions, initially based on right to counsel, then expanding to include the dignity of the accused, the presumption of innocence, and the right to a fair trial.

24. *See* TAYLOR, *supra* note 10.

25. *Id.*

A 1914 court ruling in Pennsylvania held that a dock violated the defendant's "common-law right" to consult his lawyer,[26] while in California in 1944,[27] a seating arrangement where defendants were not alongside their lawyers was held to breach the state constitutional guarantee of right to counsel.[28]

The rulings about dignity and the presumption of innocence came in the 1970s and 1980s. In *Illinois v. Allen* in 1970, the U.S. Supreme Court found that the use of shackles affronts the "dignity and decorum of judicial proceedings that the judge is seeking to uphold."[29] In *Estelle v. Williams* in 1976, the Court banned the use of prison garb in court as a violation of due process rights.[30] In 1983, the U.S. Court of Appeals for the First Circuit found the presence of a dock to be prejudicial to the rights of the accused person.[31] The court deemed that a dock was a "brand of incarceration" that they held to be "inconsistent with the presumption of innocence."[32] In *Coy v. Iowa* in 1988, the Court held that an accused person should appear unfettered before a jury, unless there were very strong reasons for doing otherwise.[33] Even in the penalty phase of a capital trial, where the person was now legally guilty, the Supreme Court held in 2005 in *Deck v. Missouri* that the dignity associated with the presumption of innocence now applied.[34] Any form of visible restraint, or mark of confinement, whether prison clothes, shackles, or a dock, would fall afoul of this test.[35]

Note that this is not a right for the accused to *be* unshackled; it is the right to *appear* unconstrained before a jury. Stun belts not visible to the jury were permissible, if required, and various forms of constraint in preliminary hearings (such as handcuffs) were allowed.[36] The right is therefore about appearances—creating a dignified setting for the accused and avoiding any impression that the accused is dangerous, guilty, or visibly different. It is arguably the sensibilities of the jury that are being safeguarded rather than the comfort of the accused.

26. Commonwealth v. Boyd, 92 A. 705 (Pa. 1914).

27. People v. Zammora, 152 P.2d. 180, 211–15 (Cal. 1944).

28. Steven Shepard, *Should the Criminal Defendant Be Assigned a Seat in Court?*, 115 YALE L.J. 2203, 2207 n. 22 (2006).

29. Illinois v. Allen, 397 U.S. 337, 344 (1970).

30. Estelle v. Williams, 425 U.S. 501, 512–13 (1976).

31. Young v. Callahan, 700 F.2d 32, 36 (1st Cir. 1983).

32. Shepard, *supra* note 28, at 2208.

33. Coy v. Iowa, 487 U.S. 1012, 1021 (1988).

34. Deck v. Missouri, 544 U.S. 622, 628–29 (2005).

35. *Id.* at 633.

36. For a description of a stun belt being activated, see L.A. TIMES, July 9 1998, *available at* http://www.ljr.net/latimes/stun/.

Courts retained the right to constrain the accused where there was an immediate reason for doing so. The U.S. Court of Appeals for the First Circuit allowed a dock in 1999, when there were clear "security concerns."[37] Disruptive defendants may be restrained, the *Allen* court found, but only as long as the disruption persists; however, if the disruption persists and the defendant cannot be controlled, the *Allen* court allowed for removal of the defendant from the courtroom during the trial.[38] The dock apparently remained in some courtrooms, to be used when required, but slowly fell into disuse, so that by the early part of the twentieth century, new courtrooms usually omitted them altogether. U.S. federal court guidelines make no provision for docks. Historical courts may retain docks for antiquarian purposes. For example, Massachusetts does have some courtrooms with docks, which are reportedly never used for jury trials,[39] and arraignment hearings sometimes make use of more secure areas within courts for the accused.

II. GLASS AROUND THE DOCK: BACKGROUND AND DEBATES

Glass has a complex history as a building material, changing or even reversing its meaning across time. This can be seen most clearly in hospital design. Windows in open Nightingale wards brought light and air into the ward, to clear away miasmas, a major fear at the time.[40] However, with the development of germ theory toward the end of the nineteenth century, glass took on quite a different role—to separate and isolate, thereby preventing germs from spreading. Isolation cubicles were developed with glass to permit observation by staff. Thus, it appeared that glass, which at one time was a material indicating openness and movement, at a later period denoted confinement and surveillance.

Both of these principles can be seen at work in court design. Expanses of glass, such as those in the High Court of Australia, are seen as representing a commitment to openness and accountability. In French courtrooms, light usually comes from above, most remarkably in the courtroom pods of Richard Rogers' celebrated Bordeaux courthouse, indicating both its link with truth and the need for accountability.[41] However, the glass in

37. Shepard, *supra* note 28, at 2208 n. 25.

38. Illinois v. Allen, 397 U.S. 337, 343–44 (1970).

39. Interview with Andrea P. Leers, Dept. of Architecture, Harvard University, (July 30, 2008).

40. Lindsay Prior, *The Architecture of the Hospital: A Study of Spatial Organization and Medical Knowledge*, 39 BRIT. J. SOC. 86, 94 (1988).

41. MINISTERE DE LA JUSTICE (FR.), LA NOUVELLE ARCHITECTURE JUDICIAIRE: DES PALAIS DE JUSTICE MODERNES POUR UNE NOUVELLE IMAGE DE LA JUSTICE [THE NEW JUDICIAL ARCHITECTURE: THE MODERN COURTHOUSE FOR A NEW IMAGE OF JUSTICE], 76–77 (2002).

the roof is invisible; it acts to convey light, not to draw attention to itself. At the other extreme, glass may become the focus of attention; the grandiose architecture that constituted Mitterrand's legacy, such as Pei's pyramid over the Louvre, made glass itself a spectacle.[42] Adventurous court architects have gone as far as giving glass the role that has traditionally been set aside for wood; in Nanterre, even the bench and the witness stand are made of glass. Glass, together with steel and concrete, became trademarks of the international style introduced by the Bauhaus movement in architecture, illustrated in the high-rise court complexes seen, for example, in Mies van de Rohe's Dirksen Federal Building in Chicago, which was completed in 1964.

Three years before this building was completed, glass took on a new meaning for justice, when Adolf Eichmann was placed in a bullet-proof dock during his trial.[43] What most photos of this fail to show is that this glass cubicle, together with the judges and lawyers, was elevated on a stage; the rest of the courtroom was really a theater.[44] The dock was, thus, analogous to the isolation cubicles of hospitals, permitting observation not just by professionals, but also, thanks to the media, by the world. Cages had been used in court before. For example, during a 1927 mafia trial in Sicily, the defendants in their iron cages were made to look like "wild animals."[45] But after Eichmann, glass became an option for enclosing defendants in high-profile cases while displaying them to the rest of the court. The trials of the Papon war crimes (France), the Lockerbie bombings (Scottish court in the Netherlands), and the Madrid train bombings (Spain) are the most famous.

There are several interpretations for these glass cubicles, including providing protection for the defendant against possible attack (most plausible with Maurice Papon who was already 87 years of age), making the defendant an exhibit or spectacle in the trial (most clearly the case with Adolf Eichmann), hinting at dangerousness (as the Time reporter had suggested for the 1927 mafia trials),[46] and, as with isolation cubicles of late nineteenth century hospitals, permitting maximum surveillance of the ac-

42. Annette Fierro, THE GLASS STATE: THE TECHNOLOGY OF THE SPECTACLE, 164–65 (2003).

43. *See generally* HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963) (showing that Eichmann's trial was a show trial). For a photo of the Eichmann trial court, see Yad Vashem, *Trial of Adolf Eichmann, Jerusalem 1961*, *available at* http://havana5060.blogspot.com/search?q=vashem.

44. *Id.*

45. *Foreign News: Mafia Trial*, TIME, Oct. 24, 1927, *available at* http://www.time.com/time/magazine/article/0,9171,736971,00.html?artId=736971?contType=article?chn=us.

46. *Id.*

cused person. However, it appears that most of the pressure to build glass-enclosed docks arose from security concerns. Any impact on the accused or the jury was unforeseen and probably unintended.

There are various configurations of glass-enclosed docks. In general terms (recognizing that these simplified templates overlap and may not fit every case), these are the models that can be seen most frequently in courtrooms that use glass in the dock.

- *Glass box*. A cube with glass on all sides containing the defendant (and security staff). The Eichmann trial in Jerusalem is the most famous example of this design. Several modern French courts use this template, with space enough for several defendants and a couple of gendarmes.
- *Glass-fronted bunker*. The dock is set into the wall, with a strip of glass connecting the dock to the courtroom. This was the configuration of the courtroom provided for the Sydney terrorism trial and appears to be the model used in some newer English courts.[47]
- *Glass demarcated court zones*. Glass screens are used to separate areas for defendants from those used by other court participants from those used by the public. A prominent example of this is in the special high-security courthouse used for terrorism trials in Düsseldorf.[48] In this courtroom design, the sheets of glass do not fully enclose the accused.
- *Glass-fringed docks*. The front or side of the dock may be retrofitted with one or more sheets of glass. This can vary from a short strip of glass providing an ornamental embellishment (as in one of the restored courtrooms of the Victorian Supreme Court), to battlement-style sheets bolted to the wooden base with slits for passing documents (used in several South Australian courts), to concertina-style glass screens provided in several Adelaide courts, which can be folded out if required. This style may include defendant enclosures with glass toward the public side (but not toward the jury), such as those used for the three French war crimes trials of Touvier, Papon and Barbie, shiel-

47. LINDA MULCAHY, LEGAL ARCHITECTURE: JUSTICE, DUE PROCESS AND THE PLACE OF LAW, 76 (2011).

48. *See* Life Magazine (photograph), *at* http://www.life.com/image/96978717.

ding the aging defendants from possible objects thrown from the public gallery.[49]

- *Fishbowl court.* This is not a dock as such, but a configuration in which all the courtroom participants are inside the glass enclosure and the public views the proceedings through the glass. This is the arrangement in the two war crime tribunals in The Hague, and the Duch trial in Cambodia, but it can also be seen in a range of domestic courts such as some of the Cook County courtrooms in Chicago.

A. Appeals Against a Glass-enclosed Dock

If putting the accused in any enclosed space affronted American legal sensibilities, it was not until the accused was put in a glass cage that European and Australian courts addressed the issue. In both places, the initial cases allowed the existing arrangements to continue.

The year 1994 saw two appeals against the use of glass cages in courts. One was in Strasbourg at the European Court of Human Rights, involving the United Kingdom, or more specifically England, the source of the common law. The other was in Brisbane, at the Queensland Court of Criminal Appeals, a matter which later came before the High Court of Australia.

B. European Court of Human Rights Judgments

A glass-enclosed dock was the focus of the *Stanford* case against the U.K. at the European Court of Human Rights in 1994.[50] An applicant claimed he had been denied a fair trial in Norwich because he could not hear all the evidence against him, due to being in a "glass-fronted dock."[51] This is likely to have been similar to the glass-fringed dock described above, with glass retro-fitted to a dock placed near the back of the room. While recognizing the right of the defendant to "hear and follow the proceedings" and accepting that the defendant did have difficulties hearing the evidence, the court ruled that counsel should have brought this matter to the attention of the trial judge at the time.[52] Since there was no evidence that the lawyer had failed to provide a competent defense, the court would not

49. *See* Noelle Herrenschmidt, *Image n°2: Courtroom, Papon Trial, Law Courts in Bordeaux* (1997) (watercolor), *available at* http://traitsdejustice.bpi.fr/home.php?id=52.

50. Stanford v. U.K. (No. 16757/90), Eur. Ct. of H.R. (1994).

51. *Id.* at 7.

52. *Id.* at 26.

intervene.[53] Nevertheless, the court agreed that a fair trial did require that a person be able to hear the evidence presented against him or her.[54] To the extent that a glass screen limited the person's ability to hear, this may have constituted a violation of what, in the United States context, would have been seen as confrontation rights.

If restricting hearing was one objection to glass screens, paradoxically, *allowing* hearing was a second problem the European Court of Human Rights found with glass screens. In an earlier case in 1991 involving Switzerland, the court, dealing in this matter with lawyer-client communication in a detention facility rather than a court, had re-affirmed the rights of clients to confidential communications with their lawyers.[55] In 2007, in *Castravet v. Moldova*, the court applied this principle to glass screens.[56] It found that the lack of opportunity for the client to talk to his lawyer "without being separated by a glass partition" constituted a violation of the "right to defence."[57] There was some evidence that security staff could overhear the conversations, or, at least, there were reasonable grounds for suspecting this was happening.[58] In a previous matter that came before the court, also involving Moldova, a detainee had been questioned by security staff about complaints he had made about the facility in private to his lawyer.[59] "The [c]ourt concluded that the impossibility for the applicant to discuss with his lawyers issues directly relevant to his defence and to his appeal against detention, without being separated by a glass partition, affected his right to defence, in violation of Article 5 § 4."[60]

In 2007, the European Court of Human Rights considered yet another case involving Moldova.[61] In this case, *Sarban v. Moldova*, the accused was placed in a "cage," made of not just glass, but also metal bars.[62] Added to this were visible restraints in the form of handcuffs and the additional humiliation of medical treatment administered in public view,[63] both of

53. *Id.* at 30.

54. *Id.* at 32.

55. S. v. Switzerland (No. 13965/88), Eur. Ct. of H.R. 48–50 (1991); *see also* Brennan v. United Kingdom (No. 39846/98), Eur. Ct. of H.R. 67 (2001).

56. Castravet v. Moldova (No. 23393/05), Eur. Ct. of H.R. 60 (2007).

57. *Id.*

58. Oferta Plus S.R.L. v. Moldova (No. 14385/04), Eur. Ct. of H.R. 50 (2006).

59. Modârcă v. Moldova (No. 14437/05) Eur. Ct. of H.R. 44 (2005).

60. *Id.* at 8.

61. Sarban v. Moldova (No. 3456/05), Eur. Ct. of H.R. (2005).

62. *Id.* at 88.

63. *Id.*

which would have fallen short of the "dignity and decorum" rule identified by the U.S. Supreme Court in *Allen*.[64] In *Sarban*, the court noted that

> Mr. Sarban was brought in handcuffs to court and held in a cage during the hearings, even though he was under guard and was wearing a surgical collar around his neck. His doctor had to measure his blood pressure through the bars of the cage in front of the public. The Court held that such safety measures were unwarranted and were humiliating. All those acts took place in full view of the media.[65]

Together with the failure to provide medical treatment when required, these acts constituted degrading treatment within the meaning of Article 3 of the European Charter of Human Rights, the section prohibiting inhuman treatment or punishment.[66]

C. *Queensland Court of Appeal: The Case*

The same year the European Court of Human Rights deliberated the acceptability of a glass dock in *Stanford*, the Queensland Court of Criminal Appeal considered a case that involved the accused being placed not only inside a floor-to-ceiling glass screen but also shackled with handcuffs attached to a body-belt.[67] In this case, Farr and five colleagues were accused of beating a fellow inmate to death inside a maximum-security prison.[68] Most of the witnesses were to appear similarly constrained by handcuffs attached to a body belt.[69] The issue was balancing the right to a fair trial for the accused on the one hand with security of the courtroom on the other.[70] The court examined several objections to the security arrangements: powers of the trial judge, current need, possibility of alternatives, and impact on the jury.[71] The three judges agreed that any doubt about the matter should be resolved in favor of the decision made by the trial judge:

> It is obviously proper to approach the question raised here with a powerful predisposition in [favor] of the correctness of the directions given by the judge who is to preside at the trial . . . It is not for us to be unduly courageous about risks that do not threaten us personally.[72]

64. Illinois v. Allen, 397 U.S. 337, 344 (1970).
65. *Sarban*, *supra* note 61, at 88.
66. *Id.* at 104.
67. R v. Farr [1994] QCA 266, 2 (Austl.).
68. *Id.* at 14–15.
69. *Id.* at 2.
70. *Id.*
71. *Id.* at 1–3.
72. *Id.* at 7–8 (JA McPherson).

Here, the court reasoned that the trial judge was in the ideal position to "gauge the extent of security precautions which are necessary in the circumstances" and had the necessary authority to make the decision, and an appellate court should intervene only "in the most exceptional of circumstances."[73] The authority of the judge in administrative (as opposed to judicial) matters was "absolute," and the judge had no obligation even to consider defense applications to vary them.[74]

The measures were necessary because one or more of the accused had been involved in a violent altercation in a previous phase of the case, which had been video-recorded and shown first to the trial judge, and then to the appeal bench.[75] The only alternative to the use of the glass cage was reportedly manacling of the feet, something the trial judge had considered, but dismissed as "barbarous."[76] The appellate judges saw the two options as being "very largely one of opinion" and not a matter on which they should consider over-ruling the trial judge.[77]

The final issue the court considered was the likely impact on the jury. In considering security precautions in court, the High Court had previously ruled that such precautions should be "no more obvious than necessary" and that every attempt should be made "to avoid or mitigate the prejudicial effect which such precautions may have on the mind of the jury."[78] Given that the accused, and most of the witnesses, were maximum security prisoners and that the matter involved the killing of a fellow inmate, it was argued that the jury would not find it surprising to see the accused in handcuffs and body belts.[79] The trial judge had taken all possible steps to mitigate any prejudicial effect by ensuring that all the witnesses from the prison were presented in a similar manner; this would avoid the accused looking different from their peers.[80]

At the trial, the jury found four of the accused guilty.[81] Three of them appealed to the Queensland Court of Appeal.[82] The appeals court found that one of the convictions was unsafe (on technical grounds) and ordered a retrial, while one of the judges wrote a dissenting statement, arguing that

73. *Id.* at 18 (J Williams).
74. *Id.* at 6 (JA McPherson).
75. *Id.* at 10.
76. *Id.* at 11.
77. *Id.*
78. *Smith v. The Queen*, 159 CLR 532, 532 (1985).
79. *Farr*, [1994] QCA 266 at 10–11.
80. *Id.* at 8 (JA McPherson).
81. *See R v. Alexanderson*, 86 A. Crim. R 77, 2 (1996).
82. *Id.*

all three convictions should be overturned.[83] This dissenting judge, Justice Dowsett, commented on the security arrangements, stating "Although our law insists that accused persons are innocent until proven guilty, that does not mean that in all of the arrangements incidental to their management in custody and at trial, such an assumption must be made."[84]

The presumption of innocence did not need, in his view, to inform the design of the courtroom. Nevertheless, this was a dissenting view not germane to the key issues, and in the context of a statement that found many other aspects of the trial unfair. Justice Dowsett provided his response to the claim that a fair trial had been compromised:

> To an extent, the appellants' argument depends upon an assumption of naivety in juries, which assumption I believe to be unjustified. It assumes that a jury is unable to understand that the judicial system may decide to protect the public against the risk that a person may be dangerous even where there is a real possibility that he is not. My own experience suggests that jurors are worldly enough to understand that while the Crown, in prosecuting an accused person, is asserting that there is evidence sufficient to justify a conviction, the jury must determine whether or not that conclusion is the correct one in the circumstances. If juries cannot understand that, then our whole system is based upon a false premise. If jurors are capable of understanding that basic proposition, then there is no reason to believe that they are not also able to understand that security arrangements at a trial may reflect one possible view of the evidence and nothing more.[85]

There are several assertions that deserve attention here. One is the claim that jurors would not be influenced by unusual security arrangements; they were "worldly enough" not to draw inferences about guilt from the courtroom configuration.[86] The second interesting statement is the source of evidence for this claim: the judge's own personal experience, or, rather, his experience of watching juries.[87] The third point is that the security arrangements reflect "one possible view of the evidence," namely, the prosecution's case that the person on trial is guilty, rather than the court's evaluation that the accused might be disruptive or violent in the courtroom. These three claims are relevant in this context because they were issues that were raised again in the two terrorism trials discussed below.

83. *Id.* at 14, 21.
84. *Alexanderson*, [1996] QCA 41, 78 (Austl.) (J. Dowsett, dissenting).
85. *Id.* at 78–79.
86. *Id.* at 78.
87. *Id.*

A footnote to the trial was an application to the High Court of Australia, Australia's highest court of appeal, for special leave to bring the case to the court. This case was not accepted. However it did involve an exchange between the lawyer for the prisoners and one of Australia's most eminent jurists, Michael Kirby.

Justice Kirby noted three principles relevant to the matter: any security measures should be no more than necessary, they should not interfere with a fair trial, and they must not threaten the inherent dignity of the accused.[88] The first two principles had been well established; the concept of "inherent dignity" may have been implicit in the earlier debates, but it was Justice Kirby, drawing on international human rights language, who made this an explicit principle. The lawyer for the accused argued that an ankle restraint in an ordinary dock (i.e., a dock without the Perspex frame) would have been sufficient.[89] This was an option previously considered by the Queensland Court of Appeal and regarded as a "matter of opinion" that was properly in the domain of the trial judge.[90] The High Court similarly accepted the view that the trial judge was in the best position to consider the specific facts of the case and make a decision.[91] As Justice Kirby put it

> I am sympathetic to the point that you are making, but I just do not see that there is much enlightenment that could be given by this Court on such a matter. It is inherently something that depends on the particular facts, the nature of the event that has led to the security and the particular restraints used in a particular case.[92]

A similar statement could have been made in *Allen* or *Deck*; the trial judge had access to the relevant information and knew the particular facts of the case in more intimate detail than any appeal court could. Yet, the U.S. Supreme Court overturned the decisions in those cases. What was different was the standard required for the Australian High Court to take on the case. In the submission of the barrister leading the case: "the special leave point is that it was not within the discretion of the trial judge to apply that kind of restraint."[93] Since the Queensland Court of Appeal and a long line of authorities established that a trial judge did indeed have this power, it took a brave lawyer to make such a case. The substantial issue of whether

88. Farr v The Queen, [1996] HCA Trans 252 (Austl.) *available at* http://portsea.austlii.edu.au/au/other/HCATrans/1996/252.html.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

the security arrangements breached fair trial standards was not under consideration.

There are some factual differences between *Farr* and the U.S. cases. Farr and his colleagues had already displayed violent behavior in court so they could be argued to have been a current danger to others, which was not present in the U.S. cases reviewed. Further, the judge in the *Farr* case considered very specific evidence about the accused and developed a customized approach, not one based on general categories or speculative inferences. However, using the same absolute administrative power and specific information about the accused in these cases, trial judges in two other Australian states reached a different conclusion and ordered the removal of glass screens around the dock.[94] In these cases, *Benbrika* and *Baladjam*, effectively the appeal processes did not resolve the substance of the issue; instead, the appellate judges endorsed the same general principles that the U.S. Supreme Court and the European Court of Human Rights had espoused, leaving the matter in the hands of trial judges.[95] These cases are discussed in more depth in the next section.

D. Islamic Terrorist Cases and the Glass Cage: Benbrika *and* Baladjam

In two Australian cases, *Benbrika* and *Baladjam*, a group of Muslim men in Sydney and Melbourne were charged under federal anti-terrorism legislation developed in response to the September 11, 2001 terrorist incidents in the United States.[96] The prosecution in these cases argued that the men were conspiring to carry out terrorist incidents and produced circumstantial evidence based on telephone intercepts, sales of chemical and other materials, and digital material found on the men's computers, including beheading videos.[97] In *Benbrika*, twelve of the men were tried in Melbourne. In *Baladjam*, five were tried in Sydney. The courtrooms were, therefore, readied for multiple defendants, both during the long pre-trial process and the trial itself.[98]

94. *See* R v. Benbrika, 182 A. Crim. R 205, 226 (2008) (Austl.); R v. Baladjam et al., [2008] NSWSC 1462, 22 (Austl.).

95. *See Benbrika*, 182 A. Crim. R at 220–23; *Baladjam*, [2008] NSWSC at 21–28.

96. *Baladjam*, [2008] NSWSC at 19.

97. *Id.* at 19–20.

98. The Sydney terrorism trial itself will be referred to as Regina (C'Wealth) v el-Omar & Ors [2010] NSWSC 10 (Austl.), while the pre-trial process will be referred to as R v. Baladjam et al., [2008] NSWSC 1462 (Austl.). Omar Baladjam was the first-listed accused during the lengthy pre-trial process. Before the actual trial, the name of the case changed to that of another accused (el-Omar) because Defendant Baladjam pleaded guilty after the pre-hearing stage. Because this article focuses on pre-trial process, i.e. the debate about the glass dock, I refer to *Baladjam*, i.e., the pre-trial stages, in most contexts.

In both cases the court authorities used glass in the dock, but in somewhat different ways. The dock in Melbourne could be described as a glass box, or, rather, a series of Perspex (transparent thermoplastic) boxes, located at the back of the courtroom, consistent with the Victorian convention for courtroom layout. The Perspex (hereafter, "glass") was retro-fitted into the Victorian County Court's ceremonial courtroom, the only courtroom large enough to house the twelve accused, fifteen jurors (three spares to allow for attrition over a long trial), fifteen counsel plus instructing solicitors, and a sizeable number of security guards. The dock modification was a temporary arrangement, scheduled for removal at the end of the trial. Each of the accused was placed in an individual pod, with an additional seat for a guard, surrounded on three sides by glass, which was about 1.8 meters high. Pre-trial argument lasted thirteen months, and the trial itself lasted seven months. Of the twelve men on trial, seven were found guilty, four were acquitted, and the jury was unable to reach a verdict for the remaining one.

The dock in the Sydney West Trial Courts was a glass-fronted bunker—in the judge's words, a "glassed-in room to the side of the court."[99] Following general practice of New South Wales, the dock was at the side of the court facing the jury, with the courtroom purpose-built for high security trials. All the accused sat together in the dock, initially nine during the eight months of pre-trial argument and then five for the ten months of the trial.

The trial in Melbourne, the *Benbrika* case, was held first. The defense team argued that the arrangements were "burdensome and oppressive," bringing together the arguments used in most of the European Court of Human Rights cases about lawyer-client communications, the matter of personal comfort of the accused raised in the U.S. Supreme Court case of *Crawford* and the Queensland Court of Appeal case of *Farr*, together with the argument about the presumption of innocence developed most fully in *Deck*.[100] The prosecution did not oppose the application, although Corrections Victoria was allowed to argue its case for retaining the current arrangements. In doing so, the agency did not produce specific evidence about the classification of individual defendants, but based its argument on general considerations, such as the charges defendants faced and their supposed links to international terrorist organizations.[101]

99. *Baladjam*, [2008] NSWSC at 2.
100. R v. Benbrika, [2007] VSC 524, 5–6 (2007).
101. *Id.* at 7.

The court accepted the defense arguments, and the glass screens were ordered to be removed.[102] Justice Bongiorno recalled, as his Queensland predecessors had done, that as trial judge he had "absolute authority" in matters of security, though he qualified this by saying that such authority should be exercised in order to promote a fair trial.[103] He found that the screen arrangement isolated "the dock and its occupants from the body of the Court" making it impossible for a client to talk to his lawyer unless the latter entered the dock, while also impeding communication between the accused themselves[104]—an issue not previously raised in the other cases examined here.

Comfort was also a concern. The "cells" in which the accused were placed were cramped with "the occupant's knees . . . jammed hard against the Perspex necessitating frequent postural adjustment to achieve even a moderate degree of comfort."[105] But it was not just physical comfort that was addressed in the judicial ruling. Visual comfort was also considered, with the restricted visibility resulting from TV monitors in the dock being a source of concern.[106]

In protecting the opportunity for the accused to talk to each other, the trial judge was addressing the psychological needs of the accused, an issue he dealt with in more detail when he ruled on transport, screening, and prison accommodation issues.[107] One of these rulings reported on psychiatric problems two of the accused faced, apparently precipitated by the harsh conditions.[108] He gave an ultimatum to the state Department of Justice, ordering them to improve the treatment of the accused, or the trial would not proceed.[109] This conflict between the court and the department reflected the latter's focus on security considerations, at the expense of what Justice Kirby in *Farr* had referred to as "inherent dignity."[110] The ruling contained an extensive review of relevant English cases, and a reference to a judgment of the European Court of Human Rights.[111]

102. *Id.* at 11–12.

103. *Id.* at 10.

104. *Id.* at 4, 12–13.

105. *Id.* at 4.

106. *Id.* at 11.

107. *See e.g.*, *Benbrika*, 182, A. Crim. R at 216–17.

108. *Id.* at 218.

109. In Australia state corrections authorities have custody of federal prisoners; there are no federal prisons.

110. Farr v The Queen, [1996] HCA Trans 252 (Austl.) *available at* http://portsea.austlii.edu.au/au/other/HCATrans/1996/252.html.

111. *Benbrika*, 182, A. Crim. R at 218–22.

Justice Bongiorno found that the arrangement of the dock would "materially diminish" the right of the accused to "the presumption of innocence."[112] He reviewed the submission of the defense to remove the screens:

> [The defense lawyer] submitted that, given the level of security proposed, it would be difficult for a jury to be persuaded that they were not being asked to convict the accused in circumstances where "the authorities" or "the Government" had already decided they were a danger to the community—thus causing severe and irremediable prejudice to their case.[113]

Thus the impression left on the jury by how the defendants were seated in court was a key consideration, as it had been in *Allen*, *Crawford*, *Deck*, and other U.S. Supreme Court and lower court decisions on which they were based. In this case it was the glass cages that were at issue rather than the presence of a dock as such, but the issue of likely jury response was the same. Justice Dowsett, in the Queensland Court of Appeal, had dismissed this argument, claiming that jurors were "worldly enough" to distinguish between the message given by the security precautions that the accused were dangerous and the instructions of the court that they were to be presumed innocent.[114] Bongiorno took a different view.

The *Baladjam* pre-trial process[115] was, in a sense, the second chapter of *Benbrika*. The *Baladjam* pre-trial involved defendants who were alleged to be members of the same terrorist group, and the defendants had the same prosecution team led by the same prosecutor acting for the Commonwealth Department of Public Prosecutions. Justice Whealy had spent some time in Melbourne with his counterpart to develop some of the logistics of managing a long and complex trial. So it was not surprising that the rights to a screen-free dock given to the accused in Melbourne should be similarly afforded to their counterparts in Sydney. There were, however, a couple of differences between the two cases.

In Sydney, the courtroom in the Sydney West Trial Courts had been specifically designed for such cases, and the dock followed the design brief specified by the state government. It was not a temporary fixture. However the design guidelines prescribed double docks, comprising both a glassed-in and an open area, with the Court able to place the accused where it

112. *Benbrika*, [2007] VSC at 12.

113. *Id.* at 6.

114. *Alexanderson*, [1996] QCA 41, 78 (J. Dowsett, dissenting).

115. For an explanation of the *Baladjam* pre-trial process versus the actual trial as the terms are used in this article, see *supra* note 98.

deemed appropriate. Given the space constraints for a dock that could accommodate a dozen defendants, this particular courtroom had only the glassed-in dock.

A second unusual feature of the dock in Sydney was the lack of adequate provision for lawyers to talk confidentially to their clients. In Melbourne, the lawyer had to go into the dock, but could at least talk privately. In other high-security courts (such as that in Düsseldorf), gaps in the glass allow lawyers to speak in confidence to their clients. In the Sydney high-security courtroom the lawyer had to go into a cubicle alongside the dock (like a telephone box) and talk through a mouthpiece to the client, with the conversation often audible to others in the dock including security personnel. To attract the attention of counsel, an accused person had to knock against the glass or engage in what one of the lawyers described (and the judge repeated in his ruling) as "histrionic waving."[116]

Like Justice Bongiorno in *Benbrika*, Justice Whealy considered visual issues associated with the arrangement of the dock.[117] The sightlines were limited by the design of the dock, with solid wall both below and above the slit of glass that connected the bunker to the courtroom. Unlike other glass docks (such as those in the Eichmann trial), which emphasized visibility, the bunker design restricted both the view out from the dock and the view into it from the jury box, the bench, and the public gallery.

In reaching his decision to have the glass removed, Justice Whealy repeated the arguments made in Victoria, identifying the right to a fair trial and communication with lawyers as being compromised by the arrangements.[118] The jury would see this difficult communication, which, together with the screens themselves, would create the impression that the men were "dangerous."[119] As in Victoria, he dismissed Corrective Services arguments about dangerousness that was generic rather than specific to each of the accused.[120] But he went further in several of his remarks, which displayed recognition of the wider social and political context of the trial.[121]

He foresaw a jury group that was influenced not just by their everyday experiences, but by expectations of courts formed by television. However, it was not popular television programs such as *CSI* or *The Bill* that he was

116. *Baladjam*, [2008] NSWSC at 3.
117. *Id.* at 1–2.
118. *Id.* at 25–26.
119. *Id.* at 26.
120. *Id.* at 24.
121. *Id.* at 27.

thinking of. The jurors would associate the glass screens with real trials elsewhere:

> Images of other trials in far distant countries will inevitably present themselves to members of the jury when they first see the situation of the accused behind a fixed screen.[122]

The "far distant countries" were not specified. But the reference to other legal systems suggests that negative associations with the design of the dock might extend beyond the individuals in the glass cage to the justice system that placed them there. Thus, it was not just the credibility of the defendants that could be at stake, it was also the legitimacy of the court itself.

The judge reviewed the potential prejudice against the accused that could result from their own choices; he mentioned specifically that they did not stand up when the judge entered or left the room, and he referred to their beards and Islamic costume.[123] This placed them at a disadvantage from the outset. But rather than dismissing these as self-inflicted problems, he argued that the court should counter the prejudicial effect of the defendants' own behavior by removing the "layer of prejudice" that was within its control—the design of the dock.[124]

> Their dress and appearance may present them as 'outsiders.'... In my opinion, the presence of the glass screen is but one more layer of prejudice (perhaps one that is more significant than any of the others), and it is an aspect of prejudice that can be avoided altogether by relatively simple and comparatively inexpensive means.[125]

Like Justice Bongiorno, he was doubtful that jurors would be able to put aside any prejudice resulting from the glass screens.[126] Further, he was skeptical that judicial instructions could cure this problem.

> Generally I take the view that juries pay heed to the trial judge's direction. But I do not feel entirely comfortable, or by any means satisfied, that directions regarding the presence of the fixed screen would be sufficient.[127]

What evidence did he have about the likely impact of the screen on jurors? In the absence of any conclusive evidence, he drew on his own pers-

122. *Id.* at 26.
123. *Id.* at 27.
124. *Id.*
125. *Id.*
126. *Id.* at 25–26.
127. *Id.* at 27.

pective as "an experienced trial judge," and "while they should not be determinative," his own personal impressions. He stated:

> I must confess that when I first saw the fixed screen dock I was immediately concerned about its impact on the jury. Similarly, when I first saw the accused in the fixed screen dock, I was rather taken aback by the apparent separation of the accused from everybody else in the courtroom. The immediate impression was that they were separated in that way because they posed a threat to people in the courtroom. . . . Even jurors who have not been in a criminal trial before are likely to be startled by the presence of a completely separate dock.[128]

The impressions were similar to those expressed by members of the defense team, also based on their own experience. The prosecution focused their arguments on other matters, such as the "permanent" nature of the dock and its consistency with court planning protocols.[129] But in the end the arrangements for presenting the accused to the jury were modified based on how the judge thought the jury might respond.[130]

Thus, in both major terrorism trials in Australia where court authorities had sought to place the accused behind glass screens, trial judges, at the instigation of defense teams, had ordered the glass removed. These decisions confirmed that Australian judges were able and willing to intervene in the layout of courts in order to protect the defendants' right to a fair trial. While both judges were careful to state that their decisions applied just to those cases, the relevance of their arguments to all jury trials where defendants are placed in glass cages can scarcely be doubted. Indeed, the extreme circumstances in *Farr* and the availability since that case of less visible means of constraint, underlines how much glass cages can violate basic principles of dignity and the presumption of innocence laid down by courts in the United States, Europe, and Australia over many years.

CONCLUSION

A. The Routine Use of Glass Cages

It can be argued, as the New South Wales court design guidelines do, that flexible dock arrangements should be provided, allowing judges to decide in the circumstances of each case whether the accused should be in the open or closed dock. This is consistent with the control judges have, in Australia and in other common law countries, over their courtrooms. As the

128. *Id.* at 22.
129. *Id.* at 23.
130. *Id.* at 28.

U.S. Supreme Court opined in *Allen*, the judge should use constraint of the defendant for the minimum time necessary and can choose between constraints within the courtroom or removal of the accused from the court completely when there is an impossibly disruptive witnesses.[131]

One of the features of all three Australian cases reviewed was the way the trial judge decided the matter on the specific facts of that case, restating the principle that each case should be handled according to its specific set of facts. The implications of these decisions for routine use of glass screens in jury trials are quite significant. They suggest that the severity of the charges, or the security classification used in prison, are not relevant to the decision to use a glassed-in dock in court. Only specific information about current danger or potential disruption by the particular individual is relevant, and it must be substantial enough to outweigh the possible prejudice produced by the extra constraint. In *Farr*, there was clear evidence in the eyes of the trial judge, and the court upheld on appeal, that at least some of the accused could be dangerous in the courtroom. In *Benbrika* and *Baladjam*, the trial judges found that the accused could be managed with less severe security measures. In the absence of specific evidence about dangerousness or potential disruption, this argument runs, the accused should be as unconstrained as possible. In some jurisdictions this means sitting in an open dock; in the U.S. it means sitting at the bar table. If defense lawyers take up this matter, there are likely to be a considerable number of challenges to the default use of security docks in several states of Australia, New Zealand, England and Wales, and in several provinces of Canada. While French, German, and other civil law countries do not endow presiding judges with "absolute" power over their courtrooms, the link between a fair trial and the way the accused are presented in court has been established by European Court of Human Rights jurisprudence as discussed above.

Using the common law standards outlined above, it may be that jury trials that use glass docks, such as are used in places like England and Wales, France, and Spain may be found unfair. For example, in France, a glassed-in defense dock may be particularly oppressive, both because the accused does not move to an open witness box during questioning and also because the accused typically plays a more active part in the trial than in jurisdictions that follow a common law tradition. Ironically, in the two Australian states where the challenges to the glass docks came, Victoria and New South Wales, most jury trials do not involve the use of glass

131. Illinois v. Allen, 397 U.S. 337, 344 (1970).

screens around the dock, although glass may be used between the public gallery and the courtroom.

Most of the cases discussed here have dealt with occasions when a jury is present, so any extension of the principles to non-jury trials or preliminary stages of jury trials would have to be considered separately. However, the European Court of Human Rights cases reviewed here — *Stanford*, *Castravet*, and *Sarban*—did deal with non-jury matters in relation to confidential communication with lawyers and the inherent dignity of the person. So, these aspects of the right to a fair trial may at least have general application.

B. The Right to a Fair Trial—Subject to Good Behavior?

The general import of the cases reviewed in this article was that placing the accused in a glass cage could undermine the presumption of innocence. However, given the power of the trial judge to control the security of his or her courtroom, this could mean that only orderly defendants, or those deemed at low risk of violence within the courtroom, might benefit from this presumption. So does this mean that the presumption of innocence is a qualified right, one based on the behavior of the defendants themselves? If they are deemed to be dangerous, as Farr and his colleagues were found to be,[132] then the defendants may have only themselves to blame for any prejudice the jury might feel toward them. If they are generally well-behaved, as the accused in the two Australian terrorism cases were found to be, then the extra "layer of prejudice" produced by the glass screens may be removed.[133] In other words, only some defendants are entitled to have their inherent dignity reflected in the courtroom setting and to the benefit of the presumption of innocence. This runs counter to the principle that Justice Whealy outlined: it is precisely defendants whose own actions make them seen as outsiders that courts should most diligently seek to protect, by removing "layers of prejudice" that are within their control.[134]

This dilemma can be addressed, if not solved completely, by providing security in less obtrusive ways. Where an accused person is disruptive, the preferred option might be considered—linking the accused to the court by video link. A second channel (phone or electronic messaging) could be available for ongoing private communication with lawyers.

132. *Farr*, QCA 266 at 10.
133. *Baladjam*, [2008] NSWSC at 24–25, 28; *Benbrika*, 182 A Crim R at 224.
134. *Baladjam*, [2008] NSWSC at 26–27.

Where the accused is deemed to be at risk of violence, constraints within a dock invisible to the jury could be used. One approach, used successfully in the New South Wales King Street courts, is a hinged flap that closes down over the defendant's lap when the person is seated, and can be locked if required before the jury comes in.[135] These measures prevent all but the most unusually agile person from getting out of the dock.

In court systems that permit the accused to sit at the bar table, such as the American system, this seating arrangement avoids the problems listed above. There are no legislative or security reasons why this configuration could not be used in the jurisdictions that follow the English model, given that it has worked successfully in the United States for a century or more. However it could well be resisted by a legal profession that privileges communication between prosecution and defense over communication between defense lawyers and their clients.

C. Designing "Fair" Courtrooms

We have seen how in three rather different legal environments—the United States, Europe, and Australia—courts have recognized the impact that the seating arrangements of the accused has on their right to a fair trial. The built environment of the courtroom is, thus, a human rights issue, one in which defense lawyers and trial judges have played an important role.

There are ongoing design challenges for meeting the needs of all court participants. Having enough space to store and display evidence, providing clear sightlines and adequate acoustics, having fresh air and a safe environment—all are part of the minimum standards to which court designers aspire. Juries, witnesses, and other court participants increasingly are having their physical and psychological needs addressed through court design.

There is something more fundamental, however, about the rights of the accused. Many trials, which might be generally accepted to be fair, have taken place in cramped surroundings with poor acoustics, limited jury facilities, and no victim support services. However, a fair trial cannot take place, as the court rulings discussed in this article suggest, without meeting certain basic standards for the accused. These include the opportunity of the accused to consult counsel in confidence, to hear the court proceedings, to have a place to sit with maximum standards of dignity, to appear unconstrained before a jury, and, more generally, to be presented in a way that preserves the presumption of innocence.

135. Interview with Diane Jones, PTW Architects (lead architect for the King St. courts project), Sydney, (July 30, 2008).

The judicial decisions reviewed here have identified how an "unfair" courtroom affects the rights of the accused, but what would a "fair" courtroom look like? Design standards have provided detailed guidance about enhancing safety and efficiency, but are almost silent on operationalizing fairness for the accused. Merely removing one barrier does not mean that the resulting dock arrangements will provide a fair trial.

While any definitive guidelines would require careful investigation and testing, some general principles can be suggested as a basis for further consideration:

- Courtrooms should be explicitly designed to promote key community values, including the presumption of innocence, equality of arms, transparency, and public access.
- Judges and defense lawyers should be actively involved in the initial design of courtrooms, not just in relation to their own needs, but also to obtain their advice about the way defendants should be accommodated. Other stakeholders, like prosecutors and victims' and prisoners' groups are also likely to have valuable insights in this consultation process.
- Courtrooms should be flexible enough to be changed for different types of trials, with varying levels of security requirements. Judges and counsel should have the opportunity to have the courtroom configured within this range of options to provide the minimum constraints required for each case.
- Defendants should not be constrained in order to address problems with unruly supporters, witnesses, or other members of the public. Measures to manage these groups should not result in barriers between the accused and the jury.

D. Presenting the Accused to the Jury

While most of the debate about how to place the accused in court relates to the rights of the accused, increasingly this is seen through the prism of the jury—how are jurors likely to react? The inherent dignity of the accused and the presumption of innocence refers to how the jurors might perceive these; little matter that the accused might be sitting at the bar table with a stun belt or in a dock with a locked flap that prevents them from standing. Even the communication with lawyers was assessed in one of the cases reviewed by how the jurors would interpret this.

So how do we know how jurors are likely to react? One consistent feature of all the judgments in the cases reviewed in this article was the lack of

empirical evidence for the decisions. Judges used their own observations, plus the views of lawyers, and the opinions of previous judges who had considered the matter. To some extent this reflects the common law tradition of using precedent, but it also reflects shared cultural expectations. In the United States, the dock is "inherently prejudicial,"[136] elsewhere it is not. It is likely that some dock configurations are indeed prejudicial—most of the English docks reviewed by Mulcahy are likely to fall into that category, the nineteenth century fortified constructions as well as contemporary glassed-in booths.[137] However, other configurations for giving the accused their own designated space in a courtroom might be considered quite respectful. Many newer French courts would fit into this category, with the accused having a clear vantage point to see and hear all the other participants and having closer proximity to their advocate, even if some of these courtrooms have been subsequently disfigured by the introduction of glass screens.

This comparison suggests that it is not just the design of the dock that is at issue, but the underlying philosophy of the courtroom. Is the accused to be presented as a fellow citizen of the jury, in which case the seating arrangements for the accused should look as similar as possible to that of the jury? Or is the accused to be put on show and treated as something less than an equal citizen? Is the person deemed to be a rational subject capable of giving instructions and being briefed on what is happening, and, if so, should they be alongside or adjacent to their legal teams? Or are they persons who should be isolated and consulted only when necessary? Are they part of the circle of humankind and given a place in the action area of the courtroom, or are they to be relegated to the margins? Juries may make their decisions partly on the visual impressions they form of the accused, particularly where the evidence may be evenly balanced. Regardless of how "worldly" jurors are, they are able to read the architecture of the room sufficiently to know who is thought by the court to be a dangerous criminal and who is a fellow citizen entitled to the presumption of innocence.

A comparison of three different traditions of courtroom design allow us to see the way legal values are written into the physical layout of the room. The right to consult counsel is best reflected in the French and U.S. designs that provide for co-location. The presumption of innocence is probably best represented in the U.S. practice of placing the accused at the bar table, although an argument can be made for elegant docks that give the

136. *See, e.g.*, Musladin v. Lamarque, 427 F.3d 653, 656 (9th Cir. 2005).

137. LINDA MULCAHY, LEGAL ARCHITECTURE: JUSTICE, DUE PROCESS AND THE PLACE OF LAW, 68–72 (2011).

accused their own space and emphasize their common humanity with the jury though consistent materials and design. Meanwhile, the adversarial nature of the contest is best expressed by French and U.S. designs that separate the parties, and place the accused in the defense zone rather than isolating them away from the main action of the court.

The designs of courtrooms that place defense lawyers alongside prosecutors and cut them off from their clients—the English model copied in Australia—is not the product of immemorial tradition, but a nineteenth-century practice that reflected the interests of the emerging caste of barristers. It is the worst of the three configurations for promoting lawyer-client dialogue, for preserving the presumption of innocence, and for signifying that the trial process is a contest rather than a conspiracy. In addition, placing the accused in a glass cage further undermines the right of accused persons to a fair trial. If placing a defendant in the dock at all is inherently prejudicial, then putting a defendant in a glass cage adds yet another layer of prejudice. This practice is likely to be ended when defense lawyers follow the lead of their Melbourne and Sydney counterparts and ask for the screens to come down and for dignity to replace fear as the key principle of courtroom design.