

# **Trials, Truth-Telling and the Performing Body.**

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## Abstract

In this thesis, I examine the role performance plays in the adversarial criminal jury trial. The initial motivation behind this inquiry was the pervasiveness of a metaphor: why is the courtroom so frequently compared to a theatre? Most writings on this topic see the courtroom as bearing what might be termed a cosmetic resemblance to a theatre, making comparisons, for instance, between elements of costume and staging. I pursue a different line of argument. I argue that performance is not simply an embellishment of the trial process but rather a constitutive feature of the criminal jury trial. It is by means of what I call the *performance of tradition* that the trial acquires its social significance as a (supposedly) timeless bulwark of authority and impartiality.

In the first three chapters I show that popular usage of the term ‘theatrical’ (whether it be to describe the practice of a flamboyant lawyer, or a misbehaving defendant) is frequently laden with pejorative connotations and invariably (though usually only implicitly) invokes comparison to a presupposed authentic or natural way of behaviour (‘not-performing’). Drawing on the work of Michel Foucault and Pierre Bourdieu I argue that, whatever legal agents see as appropriate trial conduct (behaviour that is ‘not-performing’), they are misrecognising the performative accomplishments and demands required of both legal agents and laypersons in the trial. This performance constructs and maintains a gap between legal practitioners and laypersons which is essential to maintaining the status of the legal profession, and which continually positions the trial in legal and popular belief.

I then look at specific moments of ‘anxiety’ where alterations to traditional procedure provoke debate as to the otherwise unnoticed or unarticulated value of live performance. In Chapter 4, I examine the growth of the private advocacy training industry that frequently positions lawyers as actors. Resistance to the idea of acting demonstrates the tainted status of performance terminology as well as legal agents’ belief that lawyers are acting naturally. I argue instead that lawyers have *always* been trained in acting: an habituated performance style I term *legal naturalism*. In Chapter 5, I examine the television broadcasting of trials. Some legal agents argue that broadcasting risks ‘theatricalising’ the trial—causing participants to ‘act up’. However, this overlooks the fact that the court has a long history as a source of popular entertainment. I argue that resistance to broadcasting also stems from a reluctance to remit control of the trial to external producers. Broadcasting invites greater scrutiny into a process that if not always fair, needs to be believed in as fair and has historically been tightly self-

regulated by the legal field, through its reliance on live performance's 'essential' quality—its inability to be captured and subsequent disappearance. In Chapter 6, I examine the debates around CCTV testimony, which demonstrate a consistency of belief in live or 'face-to-face' confrontation to produce juridical 'Truth' that can be traced back over 800 years.

The final chapter of this thesis examines sexual assault trials. This chapter brings together all of these sources of anxiety. Although often termed 'exceptional', sexual assault trials highlight how essential live performance is to manufacturing the authority of 'The Law' through the weight given to demeanour assessment, and because these trials make visible the sustained symbolic violence characteristic of adversarial criminal trials that is particularly traumatic for sexual assault complainants. Examination of sexual assault trials also reveals the double-edged position of performance in the trial. The exploitation of the symbolic value of live performance is the source of much trauma, yet the performance of tradition is also essential to maintaining popular belief in the adversarial criminal jury trial.

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## Prologue

Outside the Darlinghurst branch of the Supreme Court of New South Wales, Taylor Square, Sydney, there are six designated smoking areas; an implicit nod to the stress this building houses, something otherwise not given away by the imposing frontage.<sup>1</sup> Designed by architect Mortimer Lewis in 1844, the courthouse is in Old Colonial Grecian style, dominated by the six-columned sandstone façade. Directly behind the old courthouse stands Darlinghurst Gaol.<sup>2</sup> Built using convict labour from the early 1820s onwards, more than 70 prisoners were executed here in its day. Surrounded by 7-metre high walls, the gaol's makeshift gallows was set up inside the walls at such a point that those watching from the hill at Green Park could witness the executions. There are still underground tunnels linking the gaol to the Court. None of this is visible from the front of the courthouse, however. The wings that flank the central columns of the courtroom were added in the 1880s and they hide the old gaol looming behind.

The courthouse is set back behind a long black fence and green hedges that provide a buffer from the noisy street. Engraved on the sandstone pylons at the street entry to the courthouse are scales of justice. "SCALES OF DRUNK INJUSTICE", someone has graffitied in chalk next to one of them. Over time, the courtroom has ended up in an odd spot, on the corner of a large, busy and ugly intersection, best known as part of the parade route in Sydney's Gay and Lesbian Mardi Gras. Diagonally opposite stands the Courthouse Hotel, and upstairs, the Judgement Bar.

As I sit waiting to enter the courtroom, a man walks to the flagpole and raises the flag of New South Wales, witnessed by a handful of Sherriff's Officers. Not far from him, another man carrying a camera in one hand, with a tripod over his shoulder, wanders down the driveway and begins to set up his equipment, pointing his camera towards the entrance to Court No. 3.

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<sup>1</sup> New South Wales will hereafter be shortened to NSW.

<sup>2</sup> The Darlinghurst Gaol was originally known as the Woolloomooloo Stockade.

Today a woman is on trial for manslaughter; she is accused of deliberately poisoning her six-year old daughter.

Several distinct groups begin to converge outside the courtroom as we sit and wait for the court to open. Firstly, there are the relatives, or at least one person whom I take to be the mother of the defendant. In a floral print dress, she stands stiffly, clutching her book, *The Life You Were Born to Live*. Secondly, there are the journalists. Lounging on the benches, leaning against the sandstone walls and smoking, they are identifiable by their copies of the *Daily Telegraph*, and their expressions of boredom. Finally, there are the legal practitioners, a different breed altogether. The robed barristers billow up and down the driveway, balancing their wigs on top of sheafs of papers in their arms. The solicitors are in sober suits (except for the slightly rakish defence solicitor in purple), and their assistants (invariably in black) wheel around carry-on suitcases like air stewards with nowhere to go. The groups don't talk to one another.<sup>3</sup> The legal practitioners give the journalists in particular a wide berth and baleful looks. The journalists seem unfazed; they largely ignore the lawyers anyway.

As I cross the threshold of the courtroom and the door swings shut behind me, the noise from the street is blocked out and I feel like I have travelled through time. The courtroom is, literally, awesome. I am in a space with high ceilings, clusters of old-fashioned electric lamps and carpet in a rich deep red colour with paisley patterning. The walls are painted in panels of pastels, olive and pale brown and the benches, tables, gallery and dock are all fashioned of glossy dark wood. At the front of the courtroom rises the judge's bench which is illuminated by shafts of light coming from the skylight in the ceiling. Above the bench is the English royal coat of arms: in the centre, the shield represents England, Scotland and Ireland. A lion wearing a crown supports the shield on the left side, whilst a rearing unicorn appears on the right. Above them, the English sovereign in the guise of another lion with a small crown, paws the top of a large coronet on which it is reclining. The crest bears the legend *Honi Soit Qui Mal Y Pense*. Beneath it is emblazoned *Dieu et Mon Droit*.<sup>4</sup>

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<sup>3</sup> Except the defence solicitor who flanks the mother of the defendant during breaks in proceedings.

<sup>4</sup> *Honi Soit Qui Mal Y Pense* is the motto of the Order of the Garter, a chivalric society dating back to 14<sup>th</sup> century England. It translates literally as 'Shame on him who thinks ill of it' (and more generally 'evil on he who thinks evil'). The literal meaning is arguably less important than its continual association with the only remaining order of Knights and Ladies who have pledged loyalty to the Sovereign (Prince William was admitted as a Knight of the Order of the Garter in June, 2008). *Dieu et Mon Droit* literally translates as 'God and my



A sign on the railings dividing the public gallery from the court proper tells us to switch off our mobile phones, which suits the surroundings; this courtroom is not made for mobiles. This particular courtroom has been in continuous operation for well over a hundred years. There is a box for the ‘governor of the gaol’ that remains empty. The boxes the media occupy have ‘jury-in-waiting’ painted on them in fine gold script. There is only a large table for the prosecution and defence. With no room to store their masses of books and papers, the legal assistants park overloaded steel trolleys and carry-on suitcases in the pathways. This gives a slightly *ad-hoc* feeling to the set-up, a small reminder that any trial is simply a fleeting moment in a much longer history of the courtroom itself.

As I sit on the hard wooden bench in the public gallery at the back of the courtroom, my view is dominated by the dock that looms directly in front of me and that is, with the exception of the judge’s bench, the focal point of the room. The dock is like a tall and roofless cubby house, complete with a small flight of stairs. Its large dimensions make it difficult to see the witness or the legal practitioners from the public seating as questioning takes place between the dock and the judge’s bench. I am joined by the defendant’s mother who is the only person sitting with me in the otherwise empty public seating. As we wait, we watch the defendant—her daughter—walk into the courtroom. Dressed in a white pinstriped suit, she smiles at her mother and lets herself into the dock.<sup>5</sup> She swings the door shut behind her, walks up the short flight of stairs and sits with her back to us.

We rise as we hear a ceremonial knock signifying the entrance of the judge, who enters bewigged and in scarlet red. We bow to the judge as he inclines his head slightly, and once the judge takes his seat, we are allowed to sit too. The bow feels awkward and only the robed barristers manage it without looking like extras from *The King and I*. The moment we sit, I realise why the dock is so high. As the defendant resumes her seat, she and the judge lock eyes from across the courtroom, the dock clearly designed to place her in this exact spot; face

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Right’. It was adopted by Henry V as his personal motto and signified his divine right to rule, and has been retained by subsequent English monarchs. Both mottos emphasise the authority of the monarchy, even in a contemporary and considerably less autocratic legal system. The relationship between the crown and the courtroom is traced in Chapter 2 of this thesis.

<sup>5</sup> After four years of attending courtrooms, I have found that, typically, the only members of the public who are ever present are me and the defendant’s mother.

to face, and eye-to-eye with the judge. Not long after the defendant has sat down, she rises again as the jury enters and only resumes her seat when they have shuffled into their chairs. The jury is mostly women, and they are blocked from my view. I can only see one particularly young man who looks barely 18. The defendant looks at them as they enter, but no one really looks at her until she is seated again and looking away. Because her back is to me, I cannot see her expression. The public seats really are the bum seats in the courtroom.

The judge begins this day's proceedings by warning the jury about the surrounding media attention. Pointedly ignoring the journalists occupying the jury-in-waiting box, he tells the jury that although media interest cannot be helped, it is their duty to ignore them. "You are only to regard the evidence you *see and hear* in this courtroom as a factor in your decision-making" he tells them. The journalists do not seem too bothered by this. They come and go frequently, barely bowing and ignoring the irritable expression of the judge. In fact, they seem the least in awe of anyone here.

Most visibly in awe are the witnesses. Before each witness testifies, he or she must be sworn in. This is done standing, and facing the judge. The witness makes eye-to-eye contact with the judge, and the familiar statement heard in so many television shows (i.e. "do you swear by Almighty God that the evidence ...") suddenly takes on the form of a serious, personal vow. Most of the witnesses today swear by Almighty God to tell the truth, with only the expert witness, the forensic pathologist, choosing to swear "solemnly and seriously".

As each witness is questioned at length, I am finding that getting to the relevant information is an exhaustive process, as the barristers first exclude every piece of information that is *not* relevant. For instance, even though the only findings of note for the pathologist are about the deceased's stomach contents, the barrister must first ask the pathologist about every other aspect of the examination to confirm that these are not important. In addition to this drawn-out mode of questioning, there is a surprisingly long pause between witnesses where no one does anything at all. Some jurors glance dully about the room, I look at my feet, and the judge simply stares straight ahead. For a manslaughter trial, it is surprisingly boring.

The proceedings also verge at times, for me, on the absurd. The police officer reads from his previous written statement when answering questions, which means he keeps repeating the expression "owner of the premise" and then informs the court "the vomit was 10 cm in

diameter”.<sup>6</sup> Then there is the intractable forensic pathologist who, unlike the other witnesses who seem eager to respond correctly to the questions asked of them, repositions every question asked him, frequently objecting to the tenor of the questions that require a concrete opinion, such as whether or not the drug in question was responsible for the child’s death. Despite being a witness for the prosecution, the pathologist refuses to state that he is certain as to how the defendant’s daughter died, how much of the drug in question was administered, or when it was given, and whether a pre-existing medical condition may have contributed to her death. He seems irritated at having to give an opinion at all. The prosecution tries to ask him the “main” cause of death. He responds: “that’s so general and hypothetical”, and gives the crown prosecutor a challenging stare.

Conversely, another witness, a doctor at the hospital where the deceased’s brother was treated, seems excited to be there. She speaks very fast and eagerly, but much too softly for the cavernous courtroom. The defence barrister, whipping his billowing black gown over his arm, eventually asks her to speak up, saying dryly: “We’re dealing with a 19th century building. No doubt beautiful, but not very helpful”.

Everyone laughs, including the defendant. Yet, only half an hour later, questioning the pathologist, the defence barrister says: “In regards to the teeth...I’m sorry, I’m making the deceased sound like a horse. I apologise to the accused”. In the brief silence that follows, I wonder how we had all managed to forget that we were talking about the death of a 6-year-old girl. I look at the defendant’s back again, remembering that it is her daughter who has died, and that she is now facing prison and separation from her family. I wonder what she is thinking and wish I could see her expression, as she sits silently, watching from her enclosed tower. I realise then that at this moment everyone in the courtroom is looking at her. Under our collective gaze in this enormous courtroom, shut in the dock, her body seems very small and very exposed.

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<sup>6</sup> Normally in New South Wales, a witness can only use their previous written statement to ‘revive’ their memory if the court allows them. However, police officers are entitled to read from written statements. See the *Evidence Act 1995* (NSW) ss 32, 33.

# I

## Introduction

Whoever planned this auditorium in the newly built Beth Ha'am, the House of the People [...] had a theatre in mind, complete with orchestra and gallery, with proscenium and stage, and with side doors for the actors' entrances.

Hannah Arendt, *Eichmann in Jerusalem*<sup>7</sup>

I enjoyed the courtroom as just another stage—but not so amusing as Broadway.

Mae West, *Goodness Had Nothing to Do With It*<sup>8</sup>

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<sup>7</sup> Hannah Arendt, *Eichmann In Jerusalem: A Report on the Banality of Evil* (New York: Penguin Books, 1994), 4.

<sup>8</sup> Mae West, *Goodness Had Nothing to Do With It* (New York: Prentice Hall, 1959), Chapter 7.

## *Theatricality*

This thesis begins with the pervasiveness of a metaphor. Why is the trial so frequently compared to the theatre? On first impressions, this may be considered unremarkable. After all, many contemporary practices draw the comparison (from sporting events, to war, to fashion). As outlined in the prologue, it is easy for an audience to recognise certain ‘theatrical’ features in the trial; for example, the costuming, staging and the ritualised behaviour required of those in the courtroom. However, what is remarkable is the consistency with which the epithet ‘theatrical’ has been attached to trial practice. References to the trial as ‘theatrical’ occur as far back as the 1580s. Not only is this almost 500 years ago but it is also nearly as long as the formal theatre—in other words, a building where dramas are staged—has existed in England.

Despite the popularity of the metaphor, or perhaps because of it (as what is self-evident hardly warrants further investigation), exactly why and how this metaphor has been used has never been analysed in detail. Closer examination reveals that the metaphor involves more than an acknowledgement of shared features. In fact, usually, the more a trial is deemed ‘theatrical’, the more it is believed by the writer to have strayed from some implicit belief of what the trial is meant to be or meant to do. These largely unstated goals of the trial are positioned as irreconcilable with the goals of the theatre. The metaphor is therefore structured by a dichotomy. The trial is about truth-telling and high stakes, and the theatre is about artifice and entertainment. In other words, the theatre is about ‘performing’, and the trial is about ‘not-performing’ or behaving naturally.

Since the 19<sup>th</sup> century in particular, the courtroom has been styled as a place for dispassionate, impartial weighing of facts to determine an outcome. For legal agents, it is when something disrupts the trial process that the trial can become ‘theatrical’. Theatricality consequently often has heavily pejorative connotations for legal agents, and is associated by them with artificiality and falsehood. This attitude is in keeping with Elizabeth Burns’

argument that a pejorative conception of ‘theatricality’ can only exist if there is an implicit dichotomy being made between natural and theatrical behaviour.<sup>9</sup>

Yet, as Burns argues, what is or is not termed theatrical is a matter of recognition of conventions. Something is ‘theatrical’ if someone watching determines it to be so based on his or her culturally specific knowledge and experience. Burns argues, therefore, that the ‘theatrical’ is not a series of specific definable signs, but rather the “double relationship between the theatre and social life”. For Burns, theatrical practice is “both formed by and helps to re-form and so conserve or change the values and norms of the society which supports it”.<sup>10</sup> Theatre can therefore be conservative or transgressive, but theatre both affects and is affected by society’s collective consciousness, in a relatively dialogic relationship.<sup>11</sup> As a theatre audience, Burns argues that we expect the theatre to challenge our beliefs, or reflect them, or provide a commentary on our social behaviour. However, Burns argues that when this “doubling” takes place outside the formal theatre, it is “commonly unrecognised, or, when recognised, regarded as bizarre, perhaps disreputable, presumptuous, in any case deviant”.<sup>12</sup>

Following Burns, I argue that outside the discursive space of the theatre, transgression of, or deviation from convention—behaviour that stands out—is ‘theatrical’. For laypersons, the trial will seem ‘theatrical’ because of shared conventions such as costume and staging. However, for legal agents, the ‘theatrical’ is behaviour that deviates from habituated courtroom practice: when a defendant ‘acts up’ for example, as opposed to behaving appropriately or naturally (‘not-performing’). What is ‘theatrical’ has traditionally been positioned as an interruption that attempts to derail the trial as a serious place to discover the truth.

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<sup>9</sup> Elizabeth Burns, *Theatricality: A Study of Convention in the Theatre and in Social Life* (New York: Harper and Row, 1973), 3-4.

<sup>10</sup> Burns, *Theatricality*, 3-4.

<sup>11</sup> Burns’ argument is reminiscent of Victor Turner’s argument as to the “spiralling” interrelationship between theatre and social life. See Victor Turner, “Are there Universals of Performance in Myth, Ritual and Drama?,” in R. Schechner and W. Appel, eds., *By Means of Performance: Intercultural Studies of Theatre and Ritual* (Cambridge: Cambridge University Press, 1990), 8-18.

<sup>12</sup> Burns, *Theatricality*, 3-4.

My argument is, however, distinct from those of previous writers. This thesis analyses what performance *does* in the adversarial criminal jury trial. Rather than seeing the role of performance in the trial as a form of embellishment (or a form of deviance), I argue that performance plays a constitutive role in the adversarial criminal jury trial. Understanding how performance operates in the trial is crucial to understanding how the trial both gains and retains its social significance in the broader community. Ultimately, a trial is a collective performance of belief. How this performance, what I call the *performance of tradition*, takes place is the major argument elaborated in this thesis.

My choice of the word ‘tradition’ in performance of tradition is intended to refer to a number of ideas. Firstly, ‘tradition’ evokes long-standing repetitive practices (or customs) that have become relatively naturalised. In this thesis, I am arguing that the trial is full of such markers or symbols of ‘tradition’ that are not only inherited practice but also have distinct ideological and practical purposes that are frequently overlooked by those writing about the trial. Secondly, the term ‘tradition’ refers to Hobsbawm’s concept of “the invention of tradition”, whereby the manufacturing of mythologies enables certain power imbalances to be sustained.<sup>13</sup> Unlike Hobsbawm’s argument, however, this work follows a Foucauldian/Bourdieuian sociological bent whereby ‘power’ is not taken to be permanently located in one place; rather performance plays an essential role in retaining, constructing and naturalising certain power relationships in the trial, and the trial itself in society. I will outline my argument later in the chapter. Firstly, however, it is necessary to define the other terms I am using, and clarify the scope of my investigation.

My slippage of terms from ‘theatre’ or ‘theatrical’ to ‘performance’ in the above paragraphs is deliberate. Throughout this thesis, I use the term performance rather than theatre to distinguish my argument from the traditional pejorative connotations of ‘theatrical’ as employed by other writers. As I will show, ‘theatricality’ as advanced by legal agents relies on what is a relatively narrow understanding of ‘theatre’. My usage of performance is, instead, intended to encompass a broader range of cultural production than that suggested by legal writers, ranging from marked to unmarked forms, and encompassing

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<sup>13</sup> See Eric Hobsbawm, “Inventing Traditions,” in *The Invention of Tradition*, Hobsbawm and Terence Ranger, eds. (Cambridge: Cambridge University Press, 1992).

main-stage theatrical practice as well. As Schechner argues, behaviour is Performance Studies' "object of study".<sup>14</sup>

Schechner notes that almost anything can be a performance for someone, somewhere. Elizabeth Burns also argues that it is the audience which determines what is and is not performative. For both writers, it is the mode of reception that determines and therefore shapes the construction of an event as performative.<sup>15</sup> As such, throughout this thesis, I am delimiting what I believe to be the pivotal role of performance in the adversarial criminal jury trial, based on a reading methodology inflected by ethnographic observation of trial processes in Sydney and London between 2004 and 2008. The distance of my experience from those of legal agents—the cross-disciplinary nature of this thesis—allows me to recognise and analyse certain practices as performative in the trial. However, it is this same distance that means I cannot access the embodied knowledge of what it means to participate in a trial. Instead, I have tried throughout this thesis to get a sense of Michael Baxandall's "period eye" in my analysis of criminal trial processes.<sup>16</sup> This involves interrogating practices that seem particularly strange to me as though I was in a foreign country or time. This method is germane to the trial because, as I will emphasise throughout this thesis, unless you are a legal practitioner (or perhaps a journalist or repeat offender) the courtroom is a very strange place.

As I outlined in the prologue of this thesis, walking into a courtroom is like walking into another world; a world where few actions can be taken for granted and where we laypersons rely on guidance to know what to do. The actions we perform in a courtroom are strange and feel unnatural. There is a sense of self-consciousness throughout, particularly when we are

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<sup>14</sup> Richard Schechner, *Performance Studies: An Introduction* (New York: Routledge, 2002), 1. In choosing to define the terms 'theatre' and 'performance' in this way I do, however, take into consideration Glen McGillivray's argument that the relationship between theatre and performance can be analysed as a value-laden discourse whereby the term 'performance' has gained its eminence by limiting significantly the potential of the term 'theatre' to that of the conventional stage. See Glen McGillivray, "Theatricality: A Critical Genealogy" (PhD diss., University of Sydney, 2004).

<sup>15</sup> Burns, *Theatricality*, 3-4.

<sup>16</sup> Baxandall writes about 15<sup>th</sup> century Italian art, arguing that to understand art from the past requires us to attempt to not only learn about its context but also to learn how to *see* art as people in that time did, rather than presuming that humans have a stable and unchanging way of interpreting and experiencing art. See Michael Baxandall, *Painting and Experience in Fifteenth Century Italy: A Primer in the Social History of Pictorial Style* (Oxford: Clarendon Press, 1972).



asked to bow or when we listen to people swear by “Almighty God”. Although courtrooms are technically open to the public, my experience over several years has shown that the public seating is almost invariably empty, except in the cases of very high-profile trials. Even then, often journalists act as our surrogates. There is nothing natural for laypersons about courtrooms. This ‘strangeness’ for laypersons when they are in a trial is as important to this thesis as the ‘naturalness’ of legal agents. Both are part of a collective performance.

This thesis is limited to examination of the adversarial criminal jury trial, which operates in Britain, the U.S. and most (current or former) Commonwealth countries (except Scotland and Malta). However, my primary (but not exclusive) focus is on Australian processes, as it is only Australian trial processes that I have had access to on a regular basis. Having only spent a limited amount of time in courtrooms in the U.K, and none in the U.S., I cannot with any authority analyse those procedures except as may be inferred from the broadest general features of adversarial trial. Daniel Stepniak, in his book *Audio-visual Coverage of Courts*, notes that:

To ensure that meaningful inferences could be drawn, the chosen jurisdictions needed to share key legal and political traditions. Thus, all five jurisdictions [the U.K., U.S., Canada, Australia and New Zealand] share a British common law tradition, an independent judiciary in which judges perform a comparable role in adversary proceedings and appeal hearings, and have a commitment to democratic rights and a transparent publicly accountable judicial system.<sup>17</sup>

I follow Stepniak, using the relatively similar systems primarily to draw “meaningful inferences”. I am examining a trial process that relies on partisan evidence gathering and determination of facts by a jury. As such, I refer to overseas processes such as those in the U.S. and the U.K. that share these features. Generally, however, this is either to illuminate the source of Australian practice, or to serve as contrast.<sup>18</sup> It is only in Chapter 5, where I

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<sup>17</sup> Daniel Stepniak, *Audio-Visual Coverage of Courts: A Comparative Analysis* (Cambridge: Cambridge University Press, 2008), 7.

<sup>18</sup> This is also because the Australian Law Reform Commission [Hereafter ALRC] interrogates trial methods used overseas when considering Australian processes. This is unlike the U.S. where there is often less willingness to seek alternatives from overseas when discussing law reform. An example of this preference for internal processes in the United States is evidenced by the movement of ‘originalism’, which places the U.S. Constitution as the founding irreducible statute of the nation. Although British common law is acknowledged in this theory as being a source of the Constitution, anything subsequent to the Constitution is extrinsic to U.S.

examine the broadcasting of trials, that I undertake any significant canvassing of overseas processes. This is primarily because Australia itself draws on these examples in the broadcasting debate and because our own experience of broadcasting trials is too limited and *ad hoc* to allow meaningful conclusions to be drawn.

I also concentrate on the criminal jury trial. Only the criminal trial process requires the presence of the accused's body in the courtroom, something I will later argue to be integral to the concept of the performance of tradition.<sup>19</sup> I have chosen to look at only the criminal jury trial (rather than trials presided over by a judge or judges) because the jury trial is the crossover between a specialised area (law) and the laity (the jury).<sup>20</sup> This thesis concerns itself with the collective performance of both laypersons and legal agents and how the relationship between them constitutes and perpetuates certain beliefs about 'The Law'. As 'The Law' operates under the assumption that all legal processes are open to the public (except in exceptional circumstances), this form of trial is the ideal setting in which to analyse the relationship between laypersons and 'The Law'.

In choosing to focus on the criminal jury trial, I am aware that I am perhaps giving a misleading weight to its importance within the legal justice system as a whole. Statistically speaking the trial is a rarity. Due to its heavy cost, plea bargains to avoid it are commonplace, and encouraged. Added to this, the wait for trial, and the complex pre-trial procedures take up far more of anyone's time than the trial itself. Indeed, the experiences of *waiting* for trial are

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State sovereignty and internal legal regulation. See Johnathan O'Neill, *Originalism in American Law and Politics: A Constitutional History* (Baltimore and London: Johns Hopkins University Press, 2007).

<sup>19</sup> In non-criminal matters, a defendant's presence depends on whether he or she is also a witness.

<sup>20</sup> In a criminal jury trial, it is the judge's duty to determine questions of law [e.g. the admissibility of evidence] and the jury's duty to determine questions of fact. A judge has the opportunity of 'summing up' to the jury where he or she can lay out what he or she believes to be the most salient points for the jury to keep in mind during deliberation. A judge can also direct a jury to dismiss a case on the basis of insufficient evidence (this usually occurs after the prosecution has presented their case). However, a judge may not direct a jury to dismiss a case because he or she questions the quality of the evidence and believes a conviction would be unsafe and overturned on appeal. In Australia, the High Court clearly outlines that "[t]he judge has no power to direct the jury to enter a verdict of not guilty on the ground that, in his view, a verdict of guilty would be unsafe or unsatisfactory". The High Court states that the trial judge's power must be limited to determinations of law and law alone, and that there should be no "interference with the traditional division of functions between judge and jury in a criminal trial". See *Doney v The Queen* (1990) 171 CLR 207, 207.

equally, if not more, important in the experience of the justice system. Legal historian John Langbein critiques Douglas Hay's Marxist legal history, "Property, Authority and the Criminal Law," which is preoccupied with criminal procedure and specifically the criminal trial as an example of the systematic power imbalance of the legal system. Langbein quotes Richard Sparks, who describes criminal procedure as:

[a]t the margins of social life [...] the most generally useful laws are likely to be the ones that define [...] ownership and control [of the means of production], and not some ancillary laws that promise to thump individuals for rather trivial kinds of tampering with those means.<sup>21</sup>

Langbein goes on to say:

The criminal law is simply the wrong place to look for the active hand of the ruling classes. From the standpoint of the rulers, I would suggest, the criminal justice system occupies a place not much more central than the garbage collection system. True, if the garbage is not collected the society cannot operate and ruling-class goals will be frustrated, but that does not turn garbage collection into a ruling-class conspiracy.<sup>22</sup>

My focus is a narrow one partially by necessity. Although I have attended criminal appeals, and non-criminal matters, it is simply beyond the scope of this study to overgeneralise as to the nature of criminal trial procedures. However, although I concur with Langbein in acknowledging that the criminal jury trial is a statistical rarity (and that most people may never be involved in a criminal jury trial), I believe that Langbein and Sparks underestimate the importance of what the criminal trial represents. The adversarial criminal jury trial is where the lay and the law meet, not only physically, but also crucially in terms of social beliefs about the legal system. In the public imagination, the trial *is* 'The Law'.

Lastly, as this is a cross-disciplinary thesis, it is important to clarify some legal terminology before proceeding. As I have already outlined, I use the term 'adversarial' to describe our system of law, rather than 'common law' because it better serves the key arguments I make throughout this thesis about the influence partisan evidence gatherers have had in shaping how we understand 'The Law' and our relationship to it. Consequently, I use the term

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<sup>21</sup> Richard Sparks, "A Critique of Marxist Criminology," *Crime and Justice: An Annual Review of Research* Volume 2 (1980): 159, quoted in John H. Langbein, "Albion's Fatal Flaws," *Past and Present* 98.1 (1983): 119.

<sup>22</sup> *Ibid.*, 119.

‘inquisitorial’ to describe European trial processes.<sup>23</sup> When I do use the term ‘common law’, it is to describe judge made law—the body of precedent that judges consult to make determinations regarding questions of law.<sup>24</sup> Finally, when I use the term ‘civil’ throughout this thesis, I am referring to non-criminal matters.<sup>25</sup>

### *Structure*

I begin this thesis with a short history of the English criminal trial. I examine three different phases in the history of the trial: trials by ordeal, the altercation trial and the adversarial trial. I outline the importance of live performance to each form of trial and the premium that is placed on a defendant’s physical presence in the courtroom, arguing that the trial stages a kind of power transaction that helps to naturalise the authority of legal agents—what I term the performance of tradition. Finally, I show how ‘theatricality’ became associated with falsehood in legal writings.

Having traced the role of performance in the trial historically, in Chapter 3 I look at the contemporary writings about the perceived relationship between the theatre and the trial. I show how many of these approaches still tend to see the trial as a form of conflict resolution and theatrical practice as largely cosmetic or deviant intrusions into the process. In the second half of the chapter, I introduce my own theoretical framework, which draws on a number of disciplines, particularly sociological theory and the work of Michel Foucault and Pierre Bourdieu, to examine what I argue to be a crucial gap in understanding between legal agents and laypersons in the trial. This gap is vital in understanding how the performance of a trial helps position legal agents and the trial itself in popular belief.

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<sup>23</sup> The ‘adversarial’ system is distinct from the ‘inquisitorial’ model used in Europe. In the inquisitorial system it is the court, rather than the defence or prosecution, that gathers evidence. The dominance of lawyers in the trial is specific to the adversarial tradition.

<sup>24</sup> The term ‘common law’ has several applications. As Richard Chisholm and Garth Nettheim observe, the phrase “can mean a system of law based on the English system [e.g. Australia is a ‘common law’ country], or rules of law created by the courts rather than by the legislature, or the rules of common law as distinct from the rules of ‘equity’”. In this thesis I am using the phrase ‘common law’ to distinguish judge-made law from parliamentary legislation. See: Richard Chisholm and Garth Nettheim, *Understanding Law: An Introduction to Australia’s Legal System* (Sydney: LexisNexis Butterworths, 2007), 17.

<sup>25</sup> ‘Civil’ can also be used to describe the ‘inquisitorial’ model of European trials, *supra* n.19.

In Chapter 4, I examine the mediation of the trial by legal agents and show how they acquire advocacy skills. I do this by looking at two forms of advocacy training: pupillage and the more recent private advocacy training industry, which is frequently explicitly acting-oriented. The controversy surrounding this approach reflects the tainted status of performance in legal practice. I argue that what lawyers often misrecognise as ‘natural’ or appropriate behaviour it is in fact what I term *legal naturalism*, an embodied performance style adopted and habituated through pupillage. Finally, I show that legal naturalism is not merely a series of semiotic signals, but also reflects and perpetuates a naturalised dominance over laypersons fundamental to the adversarial model of evidence testing.

Having examined mediation of the trial, in the following two chapters I turn my attention to the mediatisation of the trial. In Chapter 5, I look at the television broadcasting of trials, and in Chapter 6, I examine the replacement of a live witness with CCTV testimony. In each chapter, I show that alteration to traditional practice creates significant anxiety. In terms of broadcasting, this is partially because of a belief that televising a trial changes the way in which criminal proceedings will be received by the public (that it may ‘theatricalise’ proceedings). However as I argue, it is also because the legal field relies on the seeming paradox of the closed but open trial. That is, although trials are technically open to the public, they are relatively opaque to the uninitiated. This buffer between public understanding and legal procedure (“practical obscurity”) is considered necessary by many legal agents to protect internal regulation of the trial process from outside influence.

When examining CCTV testimony usage in Chapter 6, I argue that this form of mediatisation poses a challenge to the trial as a live practice. Consequently, this has led to an explicit articulation of the perceived link between live presence and truth-telling. Debates around the use of this technology show that there is a deep reluctance to tamper with traditional methods of evidence testing, even if these forms of evidence testing have become increasingly problematic for the ‘vulnerable witnesses’ for whom the technology was developed. As I demonstrate, belief in the necessity of live bodies sharing the same space is also predicated on the exploitation of confrontation by legal agents who believe that pressure is a positive influence in reaching the truth.

All of the practices outlined above—the exploitation of confrontation, naturalisation of legal agents’ dominance, and the premium placed on live performance—come together in Chapter

7 of this thesis which examines sexual assault trials in NSW and recent legislative reform to this area of law. Although sexual assault trials are often classified as ‘special’, I argue, instead, that they make visible the performative imperative of all trial participants in the adversarial system. I also show how this performance naturalises degrees of abuse and inequity. Finally, I will argue that attempts to reform sexual assault trial practice raise much larger questions about traditional methods of evidence testing in the adversarial trial. These broader questions regarding the double-edged nature of performance and the future of the adversarial criminal jury trial frame the conclusion of this thesis.

## **Trials, Truth-telling, and the Performing Body: a History**

The trial has been *ordained* by the common law as the process by which truth will be distinguished from falsehood.

Chief Justice Peter Underwood, “The Trial Process: Does One Size Fit All?,”<sup>26</sup>

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<sup>26</sup> Chief Justice Underwood, “The Trial Process: Does One Size Fit All?,” *Journal of Judicial Administration* 15.3 (February 2006): 166.

## *Introduction*

Throughout the history of the adversarial criminal jury trial, legal agents have frequently equated performing with lying. I will examine in this chapter how performance became associated with falsehood in the legal world. The pejorative view of performance espoused by legal agents also implies that they generally do not see the trial itself as performative. This is because they have learned to view the trial as a place whose function is primarily to distinguish the truth. In this chapter I go on to argue that this idea of ‘non-performing’ is a misrecognition, resulting from a failure to account for the trial as more than a form of conflict resolution.<sup>27</sup> In the epigraph above Peter Underwood, Chief Justice of the Tasmanian Supreme Court, argues that “the trial has been *ordained* as a process that distinguishes truth from falsehood” and I believe that performance is central to this concept of ordination.<sup>28</sup>

The adversarial criminal jury trial must continually be performed to secure and perpetuate its place within the juridical field and the broader community. I call this process the *performance of tradition*. I will show how the performance of tradition can be observed throughout three major phases in the history of the English criminal trial: trial by ordeal, the altercation trial and the adversarial trial, covering the period of roughly the late 12<sup>th</sup> century up until the current day.<sup>29</sup> These legal models were each formulated under and reflect specific

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<sup>27</sup> *Misrecognition* is a term coined by sociologist Pierre Bourdieu. Bourdieu argues that those working within a particular area of endeavour (or *field*) internalise and naturalise the logics of that field relatively unconsciously. This unconscious embodiment means they may misrecognise what they are doing. For example, a barrister learns that lawyers facilitate conflict resolution and represent clients in court. However, a barrister also unconsciously naturalises (and does not question) the dominance of the lawyer in a courtroom process. Consequently, the power and control a barrister has over lay participants is not something of which he/she is (usually) consciously aware. This is a form of misrecognition. I elaborate on this and other aspects of Bourdieu’s sociological theory in the following chapter. See Pierre Bourdieu, *The Field of Cultural Production: Essays on Arts and Literature* (New York: Columbia University Press, 1993).

<sup>28</sup> Underwood, “The Trial Process,” 166.

<sup>29</sup> This chapter traces the history of the criminal trial as it developed in England. However, as this is where the U.S. and Australia have inherited their trial system (albeit with some modification) the account is relevant for



historical conditions. However, I will show that each process is as much concerned with securing and extending the position of legal agents and the juridical field as it is with resolving conflict (or finding ‘truth’).<sup>30</sup>

Analysis of these three forms of trial shows a shift from explicitly violent control over the body, to a subtler and more implicit form of social violence.<sup>31</sup> I will comment on how this reflects the development and professionalisation of the juridical field as well as (and within) the wider shift in governance from heavy control to the far more self-regulated, embodied and differentiated form of power that marks Liberalism. Although explicit violence in the trial is over time replaced by increasing use of symbolism, I will show that the symbolic has real, violent effects, and that our current adversarial trial process still involves significant control and coercion.<sup>32</sup>

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these countries as well. Both the U.S. and Australia inherited British common law up until the date of colonisation. As such, the U.S. inherited English law as it existed in the late 17<sup>th</sup> century, and Australia inherited English law as it existed up until 1828 (varying from State to State in each country). Regardless of independent developments subsequently (particularly in the U.S. following independence), all three countries had an adversarial criminal jury trial in place by the mid 19<sup>th</sup> century. Australia was the latest country of the three to acquire this, as it was only in the 1840s that the last of the convict states (such as NSW) renounced military tribunals and adopted the jury trial, after repeated requests from the population (the first criminal jury trial was held at Berrima, NSW in 1841). For more information, see G.D. Woods, *A History of Criminal Law in New South Wales: The Colonial Period 1788-1900* (Sydney: Federation Press, 2002). For more information on the development of U.S. law subsequent to independence, see Lawrence Meir Friedman, *A History of American Law: Third Edition* (New York: Simon & Schuster, 2005).

<sup>30</sup> The trial by ordeal is an exception as it was a process of the Church. My analysis of this form of trial shows that it upheld and emphasised the authority of the church (and more accurately the local priest). This reflects the ‘pre-legal’ era where common law and the juridical field were not formalised enough to have their own discrete secular process. Although there were lawyers at this time, they were ecclesiastical lawyers trained through and by the church. Ecclesiastical laws are Canon laws derived originally from the law of the Apostles. This form of law became foundational to inquisitorial law in Continental Europe (known alternatively as ‘civil law’). The adversarial system (or ‘common law’ system) does not share this genealogy, developing distinctly from Roman law.

<sup>31</sup> By using the term ‘social violence’, I mean to incorporate both Foucault’s idea of the disappearance of the body and its replacement with a psychological discourse, as well as Bourdieu’s concept of *symbolic violence*. I outline and extend both of these ideas in the subsequent chapter. See Bourdieu, *supra* n. 27; Michel Foucault, *Discipline and Punish: The Birth of the Prison* (London: Penguin Books, 1975).

<sup>32</sup> To attempt to catalogue completely the historical evolution of the adversarial criminal jury trial is beyond the scope of this thesis. The origins of the adversarial criminal jury trial also remain hotly disputed. Rather I am

Finally, I will reflect on the continuities and discontinuities between previous models of truth-seeking and our current practice. I will particularly comment on the most marked feature of the current adversarial trial: the dominance of the lawyer. I will show how the expanded role of legal agents has led to an increasingly mediated criminal trial. This has had the inverse result of decreased agency for lay trial participants. I argue this is because legal agents have tended to present themselves as ‘protectors’ between ‘The Law’ (presented as a product of state power) and the individual. As I will show, reliance on mediation has become central to our current adversarial criminal jury trial.

### *Some Clarifications about Common Law and Use of Sources*

Although the historical overview I present below concludes in the 19<sup>th</sup> century, this is not to suggest that there have been no major changes since then. However, the basic structure of the adversarial trial—the presence of prosecution and defence lawyers as formalised mediators—does hold from the 19<sup>th</sup> century. The historical account detailed below is informed by three key legal historical works: John H. Langbein’s *The Origins of the Adversary Criminal Trial*, David Cairns’ *Advocacy and the Making of the Adversarial Criminal Trial 1800-1865* and J.M. Beattie’s *Crime and the Courts in England*.<sup>33</sup> This account is also supplemented as far as

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following Foucault’s advice: “Instead of privileging law as a manifestation of power it would be better to try and identify the different techniques of constraint that brings it into play”. This is what I literally set out to do in this chapter: to examine what different techniques of ‘constraint’ are involved in the trial’s model of truth-seeking and how changes to these ‘constraints’ illustrate the changing historical conditions they were formulated under. See Michel Foucault, “Society Must be Defended,” in *Michel Foucault, Ethic: Essential Works of Foucault 1954-1984*, P. Rabinow, ed. (New York: The New Press, 1997), 59.

<sup>33</sup> John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003); David Cairns, *Advocacy and the Making of the Adversarial Criminal Trial 1800-1865* (Oxford: Clarendon Press, 1988); J.M. Beattie, *Crime and the Courts in England 1660-1800* (Princeton, N.J: Princeton University Press, 1986). Whilst this chapter details the experiences of trial participants throughout history, it is worth remembering that the writings I am drawing on are written almost exclusively by men about men. Until relatively recently, women were not allowed to practice law or be involved in the law-making process. Women could also not inherit or own property, as their property belonged to their parents or male relatives when they were single and reverted to their husbands upon marriage. Women also could not bring criminal charges unless it related to the death of their husband. However, women did have the right to be convicted of a criminal felony. For more information about the particular experience for women in the courts, see Jennifer Kermode and Garthine Walker, eds., *Women, Crime and the Courts in Early Modern England* (London: Routledge, 1994).

is possible with contemporary writings dating back to the 1100s as well as transcripts from plea rolls, *The Old Bailey Sessions Papers*, and medieval and Puritan advocacy training writings.<sup>34</sup>

This chapter is concerned with the role of performance in the history of the criminal jury trial. However, no legal historical documents before the late 16<sup>th</sup> century make explicit reference to performance. One of the first times the word ‘theatre’ does appear in legal writing is in 1583 in the writing of Sir Thomas Smith and when it does, he is referring to the Roman theatre.<sup>35</sup> It is only towards the end of the 16th century and later that the idea of ‘theatrical’ comes to circulate in legal documents. As has been outlined above, this relates to a certain kind of performance—one that is linked with artificiality that will be explored later in the chapter.

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<sup>34</sup> *Old Bailey Sessions Papers* are trial transcripts of criminal proceedings. The *Sessions Papers* started as street pamphlets by lay newsmen and were a form of early tabloid press, printed for those who wanted to know what was happening that week in the courtrooms. Legal authorities eventually co-opted these pamphlets when they recognised the value of keeping trial transcripts. The earliest *Sessions Papers* date from the late 17<sup>th</sup> century. These are available online at [www.oldbaileyonline.org](http://www.oldbaileyonline.org). By ‘advocacy training writings’, I refer to material written expressly for lawyers’ benefit. This material has a long history in England and includes guidebooks, glossaries and lectures, the earliest ones referenced here dating back to the 14<sup>th</sup> century. Ancient Greek and Roman advocacy training material naturally dates back much further.

<sup>35</sup> In Thomas Smith’s time, although there was a fixed court at Westminster dating from the reign of King John, most of the courts were on rural circuits and held only periodically (quarter sessions after Michaelmas, Christmas, Easter, and Trinity Sunday). Thomas Smith uses the term ‘theatre’ when he answers those who claim this amount of sessions is insufficient. Smith draws an analogy to Cato and Rome, when Cato was asked if “the pleading place in Rome might be covered over with canuas as their theaters were, to the intent that the plaintiffs and defendantes that were there might pleade their matters more at ease”. Cato responded “Nay, for my part I had rather wish that al the waies to the place of pleading were cast over with Galthrops [caltrops, a thorned plant], that the féete of such as loue so well pleading, should féele so much paine of those pricks in going thither as their heads do of the Sunne in tarrying there”. In other words, as Smith goes on to explain, courts should not be comfortable or pleasant lest this encourages idle pleaders. Smith goes on to comment: “good labourers and quiet men could be content to ende their matters at home by iudgement of their neighbours and kinsfolke”. We may infer from this that firstly, courts are meant to be a place of last resort for disputes that cannot be resolved privately and secondly, that the vexatious litigant was obviously alive and well by the 1500s. See Thomas Smith, *De Republica Anglorum the Maner of Gouvernement of Policie of the Realme of England, Compiled by the Honorable Man Tomas Smyth, Doctor of the Ciuil Lawes, Knight, and Principall Secreatie Vnto the Two Most Worthie Princes, King Edwarde the Sixt, and Queen Elizabeth*, Vol 2.2 (London: Henrie Midleton for Gregorie Seton, 1583), 53.

My analysis of sources relating to the performance of tradition starts in the 12<sup>th</sup> century at the beginnings of an English national secular legal system.<sup>36</sup> This presents particular problems for the current day researcher. As this is more than 300 years before the introduction of the printing press in England, the materials relating to early criminal procedure are extremely scarce and often considerably fragmented. In addition to this, common law or *lex non scripta* (literally ‘law not written down’) is where we derive the vast majority of our legal heritage.<sup>37</sup> The common law tradition emphasises the oral practice of law, and not statute (unlike the civil, or inquisitorial law used in much of Europe). Judges make decisions based on already existing case law. This is referred to as *stare decisis*: the decisions reached by previous judgments that are binding on a judge.<sup>38</sup> Consequently, any documentation of common law is

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<sup>36</sup> Trials by ordeal predate the 12<sup>th</sup> century, however this chapter analyses English national secular legal practice. Although to set a date on when national secular law is permanently established will always be somewhat arbitrary, a generally accepted point is in 1166 with the Assizes of Clarendon. The Clarendon Act permanently established circuit courts staffed by judges appointed by the King, rather than leaving judgements in the hands of local landowners (although there were circuit courts established prior to this, they fell into disuse under King Stephen). This was a deliberate decision by the king at the time, Henry II, to protect and extend centralised power. I have chosen this period, then, to trace the foundation and formalisation of the legal profession and its relationship with the nascent national secular legal system. By the time trials by ordeal were operating in the late 12<sup>th</sup> century they were the end-point of an established secular legal system. However, the legal profession was far from formalised and the King’s Justices were usually members of the King’s Household, with no formal legal training.

<sup>37</sup> Although the literal meaning of *lex non scripta* is “law not written down” (as opposed to *lex scripta* which refers to parliamentary statute), this does not mean that these laws are oral. As Matthew Hale defines it: “I do not mean as if those laws were only oral, or communicated from the former ages to the later, merely by word; for all those laws have their several monuments in writing, whereby they are transferred from one age to another, and without which they would soon lose all kind of certainty [...] but I therefore stile those parts of the law *leges non scriptae* because their authoritative and original institutions are not set down in writing in that manner or with that authority that acts of parliament are; but they are grown into use [...] BY A LONG AND IMMEMORIAL USAGE, and by the strength of custom”. Matthew Hale, *The History of the Common Law of England: And an Analysis of the Civil Part of the Law* (London: H. Butterworth, 1820), 21.

<sup>38</sup> *Stare decisis* refers to the binding nature of appellate court decisions on lower courts. In Australia, decisions by higher courts are binding on lower courts and generally, a court will not overturn a previous finding by itself unless there is a significant reason to doubt the decision. The definition of *stare decisis* and whether it is a binding rule, or a customary practice, does however remain contested and complex. The degree of onus on the judge to follow *stare decisis* also differs across jurisdictions. It is beyond the scope of this thesis to account fully for this debate. However, P.S. Atiyah and Robert Summers make the argument that although the practice of *stare decisis* was interpreted relatively strictly in England in the early 20<sup>th</sup> century, more recently it has become

not a coherent body of rules. This means that general accounts by eyewitnesses of what happened at a particular trial also have to be considered carefully as they tend to present what may be a general and historically specific trend as a concrete practice.

One of the earliest English legal writings (attributed uncertainly to the judiciar Ranulf de Glanville, and referred to as the *Glanville Treatise*) is a good example of this tension. Writing in 1187, Glanville states that “[a]lthough the laws of England are not written, it does not seem absurd to call them laws. For if, merely for lack of writing, they were not deemed to be laws then surely writing would seem to supply to written laws a force of greater authority than either the justice of him who decrees them or the reason of him who establishes them”.<sup>39</sup> Although Glanville extols the virtue of oral practice and the authority of the judge as emblematic of common law tradition, the very act of writing this treatise recognises the power of the written word in terms of formalising a legal system. The need to formalise through writing, however, is never simply documentation. As Paul Brand points out, referring to the Glanville treatise, “national custom [is] also in part a deliberate legislative creation”.<sup>40</sup>

Written accounts of English legal proceedings always involve some form of retrospective smoothing out of inconsistencies. The difficulty that arises from the use of such material is that there is a danger of believing that trial practice has always been as formal and customary as the writing suggests. The text of Glanville itself says “[i]t is, however, utterly impossible for the laws and legal rules of the realm to be wholly reduced to writing in our time, both because of the ignorance of scribes and because of the confused multiplicity of those same laws and rules”.<sup>41</sup> In fact, at best we can only speculate on how much each trial as an oral

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looser, whereby “the authority of a court’s own prior decisions depends largely on the persuasiveness of the reasoning of those earlier courts”. The authors still argue that despite this softening of the literal interpretation of *stare decisis* in England, it remains far stricter than the practice in America. See P.S. Atiyah and R. Summers, *Form and Substance in Anglo-American Law* (Oxford: Oxford University Press, 1987), 118-120.

<sup>39</sup> Ranulf de Glanville, *Tractatus De Legibus & Consuetudinibus Regni Angliae Tempore Regis Henrici Secundi Compositus, Iusticia Gubernacula Tenente Illustri Viro Ranulpho De Glanvilla Iuris Regni & Antiquarum Consuetudinum Eo Tempore Peritissimo. Et Illas Solum Leges Continet & Consuetudines Secundum Quas Placitatur in Curia Regis Ad Scaccarium & Coram Iusticijs Vbicunque Fuerint* (London: A. Islip, 1604) quoted in M. Evans and R. Ian Jack, eds., *Sources of English Legal and Constitutional History* (Sydney: Butterworths, 1984), 21.

<sup>40</sup> Paul Brand, *The Origins of the English Legal Profession* (Oxford: Blackwell, 1992), 17.

<sup>41</sup> Glanville quoted in Evans and Jack, *Sources*, 22.

practice (or, indeed, discrete performance) conformed to the later generalised descriptions of trial proceedings, and whether the limited records that document proceedings accurately reflect the majority of trials. As such, while my analysis of early trial practice will draw on these documents, exactly what took place in the trials of 800 years ago is something of which we can never be certain.

### ***Trial by Ordeal***

In 1201, the third year in the reign of King John, Agnes of Chilleu was murdered. Agnes lived in Eastwivelshire, Cornwall, and suspicion immediately fell upon William Fisman who lived in her village. When the Cornish Eyre (the rural circuit court) was held in 1201, presided over by the King's Justices, the representatives of the 'hundred' of Eastwivelshire gathered at Launceston with the representatives of Kerrier, Powdershire, Triggshire, Pydershire, and Lesnewth.<sup>42</sup> After being sworn, the representatives from Eastwivelshire related Agnes' murder and their suspicions. They stated that Fisman had been heard threatening Agnes of Chilleu's "body and goods" the day before her murder. The 'jurors of presentment', formed from knights from four different villages in the area, declared there to be a reasonable suspicion that Fisman had murdered Agnes.<sup>43</sup> However, as there was no

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<sup>42</sup> F.W. Maitland, ed., *Select Pleas of the Crown: Volume 1—A.D. 1200-1225* (London: Bernard Quaritch, 1888), 3. The 'Eyre' is essentially a grand hearing where the King's Justices travelled to (six) different shires in England to hear from each of these areas ('sheriff' comes from 'shire-reeve'). Representatives (male freeholders) from smaller communities known as 'hundreds'—an old Anglo-Saxon term loosely based on an area of land which supported one hundred settlers (and serve as a reminder that the Eyre is a formalisation of older Anglo-Saxon practice)—travelled to these Eyres to give an account of any crimes in their community. The Eyre was not just for criminal cases, however. Rather it was an opportunity for all disputes to be aired regarding property, taxes, inheritances and any other legal matters. How often the circuit courts were held varied. By Thomas Smith's time, they were held four times a year. Other records indicate that earlier Eyres were held only twice a year. For detailed description of the Eyre, see Daniel Klerman, "Was the Jury Ever Self-Informing?," in *Judicial Tribunals in England and Europe, 1200-1700*, Maureen Mullholland and Brian Pullan, eds., (Manchester: Manchester University Press, 2003), 58-80.

<sup>43</sup> Although they are referred to as 'jurors' in the *Pleas of the Crown*, the 'jurors of presentment' more closely resemble (and indeed are the genesis of) the grand jury that decides at a hearing whether there is enough evidence to charge an accused. In America, the grand jury is required to hear all indictable federal criminal charges. On a State level, about half of America's states use grand juries for criminal and non-criminal hearings. In the U.K., the grand jury was replaced in 1933. In Australia, too, there are no longer grand juries, with the

absolute proof of the crime (Fisman was not seen in the act), and Fisman did not confess at the Eyre he was consequently ordered to “purge himself by water under the assize”.<sup>44</sup>

The rudimentary records of this case that have come down to us go no further than this. However, the details of such an ordeal are well enough known from other sources to provide a detailed example of what might have happened.<sup>45</sup> On the Christian Sabbath, the day of the ordeal, the person accused would be in the company of the local priest, with whom he had stayed since the previous Tuesday.<sup>46</sup> He would be living an ascetic existence, praying and fasting for three days, subsisting on bread, water and watercress.<sup>47</sup> On Sunday, the person accused would rise at dawn to pray with the priest before attending Mass with the whole village. After the mass concluded, he would be stripped naked in the church. A linen loincloth would be tied to hide his genitals. He would then be led in a formal procession from the door of the church to the pool of water set aside for his ordeal. During this procession, the townspeople would pray and chant liturgy with the priest. The pool would be roughly 12 feet deep and 20 feet wide, the surface partially covered by wooden boards on which the priest and the person accused would stand. A rope would then be “bound around his loins” and another knot tied to where the longest hairs on his head reached.<sup>48</sup> His hands would then be tied together under his knees. He would now be naked but for the loincloth, bound, and hunched over on the wooden boards before the priest and the village. The person accused

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exception being provision 354 in Victoria’s *Crimes Act*, which allows private citizens to apply for a grand jury hearing when the Department of Public Prosecutions refuses to prosecute.

<sup>44</sup> It is likely that Fisman was present at this Eyre, as all defendants were compelled to attend. The plea rolls themselves do not always record this information, however, nor do they record whether the sentence passed is carried out. The ‘assize’ is a reference to the 1166 Assize of Clarendon. The Clarendon assize also formalised the ‘jurors of presentment’.

<sup>45</sup> In the following account of Fisman’s ordeal, I am drawing on an account of an ordeal that dates from somewhere between 1070 and 1130. This account can be found in Margaret Kerr et al., “Cold Water and Hot Iron: Trial by Ordeal in England,” *Journal of Interdisciplinary History*, 22.4 (Spring 1992): 573-595.

<sup>46</sup> By using the term ‘person accused’ rather than ‘the accused’, I am making a distinction between the person sentenced to undergo an ordeal and a person committed to a modern trial. Although both have been accused of a crime, in the trial by ordeal, the person is deemed *malcreditus*, or probably guilty. This means that they are not comparable to the defendant of our contemporary trial, who is presumed innocent until found guilty at trial.

<sup>47</sup> As I will detail later in the chapter, the ordeal by water was almost exclusively used to try males, and not females, consequently I will refer to the person accused as a male in this account.

<sup>48</sup> *Ibid.*, 583. The detail about the knot tie is unclear. It may indicate that men at that time had hair that grew past their shoulders and that the knot would be fixed at the spot around his back where the longest hairs reached.

would know that if he sank to where the knot was tied around him, he would be saved and immediately drawn out of the water by the witnesses under order from the priest. If he floated, however, he would be found guilty and subsequently hanged. Lowered slowly into the freezing water by a few villagers, the body of the person accused must have hung from the rope in suspended animation, between being lifted and being lowered, being saved and being damned.

As history does not record what happened to almost any other person sentenced to ordeal under the assize (including Fisman), it is difficult to be certain about exactly what happened during these trials. We do know that in the ordeal by water, the accused was stripped, and we know that he was lowered or thrown into the water. If he sank, he would be saved, and if he floated, he would be damned.<sup>49</sup> We also know that this ordeal was primarily reserved for the peasantry and overwhelmingly for men. Women were usually sentenced to a different ordeal: trial by hot iron.<sup>50</sup>

Another plea roll entry from the same Eyre in Cornwall records a person being sentenced to this ordeal. Wulward of Wadebridge, from Pydwedshire, complains that a marauding gang has robbed him. The jurors of presentment at the Eyre name no fewer than seven suspects. Six of the suspects are male, and one female: “Wulward of Wadebridge was burgled. And Odo Hay, Lawrence Smith, Osbert Mediciner, and Benet his son, William Miller, Robert of Frokemere, and Maud his sister, are suspected of the burglary by the jurors of the hundred and by the four nearest townships, which are sworn”. The sentence of the King’s Justice is “Let the males purge themselves by water under the Assize, and Maud by ordeal of iron”.<sup>51</sup>

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<sup>49</sup> Interestingly, the inverse has also been documented in Europe, where sinking was a sign of guilt (God’s hand pushing the accused under the water) and floating being saved. Although the account of trial by cold water is contemporaneous with Fisman’s sentencing, it is difficult to tell how much any specific example corresponded to broader experience. The account detailed above is highly formalised and detailed, and there are descriptions of trial by water that are far more makeshift, with those undergoing the ordeal simply being flung into ponds or lakes.

<sup>50</sup> There are records of women sentenced to ordeal of cold water. Proportionally, however, women were far less likely than men were to be sentenced to this form of ordeal.

<sup>51</sup> From these plea rolls, we also get a glimpse of an early serial offender. Odo of Hay is one of the men accused of robbing Wulfred, for which he is ordered to undergo ordeal of cold water. However, in the entry immediately before this one, Odo has already been ordered to undergo ordeal of hot iron for slashing Osbert of Reterth with a



Why men and women were sentenced to different ordeals will be explored later in this chapter.<sup>52</sup> It is sufficient to note at this point, however, that Maud of Frokemere's ordeal would have been radically different in practice to that of William Fisman. The framing of the event, on the other hand, would have been remarkably similar.<sup>53</sup> In this ordeal, Maud would be living with the priest, fasting and praying. The ordeal would also take place on the Sabbath. Before Mass, the priest would place the (cold) iron before the altar. Maud would attend Mass along with the rest of the village. This time, however, the priest would remove his chasuble or tunic that forms the outermost layer of his garments.<sup>54</sup> The priest would then use a pair of tongs to take the iron placed before the altar. Singing *Benedicite Omnia Opera* (The Song of Creation) the priest would place the iron in the fire in the church. After sprinkling the iron with holy water, the priest would celebrate Mass while it heated. The villagers would be present throughout the entire ceremony.

After Mass, the priest would then take the iron off the fire and lay it on wood, before reading the gospel. The iron would again be sprinkled with holy water. Only then would Maud be given the iron that she had to carry in her right hand for nine paces. Once this was done, Maud's hand would be bound for three days. On the third day, the priest would examine her hand (again watched by the villagers). If the burn of the iron had festered, this proved her guilt and she would be executed. However, if the wound was clean, this determined that Maud was innocent of all the charges laid against her. In this instance, Maud, the priest and the villagers would "give praise and glory to God".<sup>55</sup>

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sword. Sadly again there is no record as to whether Odo underwent one ordeal, or both. See F.W. Maitland, ed., *Pleas of the Crown*, 5.

<sup>52</sup> One theory advanced to account for the gender difference in trials by ordeal is that women underwent ordeal by hot iron because they did not have to remove any clothing. The evidence for this is a Papal chastisement about "priests who peer eagerly with shameless eyes at the women who have been stripped before them". See Robert Bartlett, *Trial By Fire and Water: The Medieval Judicial Ordeal* (Oxford: Clarendon Press, 1986), 94.

<sup>53</sup> Once again, there are no documents that record the outcome of Maud of Frokemere's ordeal, and so this theoretical account is constructed based on a relatively contemporary account of this kind of ordeal found in Kerr et al, *supra* n. 45.

<sup>54</sup> One wonders whether this is because the priest has to lean over a fire a few times.

<sup>55</sup> Kerr et al., 588.

## *The Body as God's Instrument*

Trials by ordeal, whether by fire, water, battle or (presumably the preferred option) “blessed bread”, flourished during Anglo-Saxon and Norman England until 1215, when a Papal decree banning priests from officiating at ordeals saw the end of this form of trial.<sup>56</sup> There are two striking continuities between the two forms of ordeal outlined above. Firstly, there is the physical violence inflicted on the person accused. Trials of ordeal were quite literal. The body of the person accused was forced to undergo pain and violence to ‘test’ his or her guilt or innocence. These ordeals were trials of the body as God’s instrument, and when a person underwent the ordeal, he or she was submitting his or her body to the Will of God.

The physical body of the person accused was the crucible in which his or her godliness was weighed and judged. Submission was total, and the outcome was entirely left up to Divine Judgement, as God was believed to intercede directly in the outcome. In this respect, the ordeal was similar to undergoing a religious test, like the trials of the saints. Indeed, this resemblance is quite explicit in some forms of ordeal, such as the bearing of the cross (which was not practised widely, if ever, in England). The rigid dichotomy of salvation and damnation in this form of trial suggests that they involved more of a final judgement about the soul of the accused than simply a determination of guilt or innocence in a specific crime.

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<sup>56</sup> Trial by battle was introduced by the Normans after 1066. The right to trial by battle was not formally abolished until 1819 in England. In some ways, this is less like other ordeals as it is what Robert Bartlett calls “bilateral”. In trial by battle, both accuser and the person accused risk life and limb to prove their suit (or the champions they appointed in their stead). Trial by fire and water, however, Bartlett calls “unilateral” ordeals, as the person accused is the only one that undergoes the ordeal. The accuser’s only role is at the Eyre, and even then, he or she does not have to speak in person, as the jurors can act as representatives. See Bartlett, *Trial by Fire*, 2. In the trial by blessed bread, the person accused would swear his/her innocence and then eat bread consecrated by the local priest. If he/she was able to eat and swallow then he/she was innocent, but if he/she choked, this indicated his/her guilt. Sadakat Kadri comments: “It sounds like a procedure that would require a miracle to convict rather than to acquit, but no records survive to confirm or question its effectiveness”. Sadakat Kadri, *The Trial: A History, from Socrates to O.J. Simpson* (New York: Random House, 2005), 27. The end of the ordeals was abrupt, but not greeted with surprise. The Papacy had never particularly approved of ordeals. Although they were lucrative, the Papacy viewed them as a superstitious and local corruption of Catholicism. The idea of God directly intervening in the outcome of an ordeal was also seen as blasphemous.

The danger and violence of each form of ordeal varied, but any method risked the life of the person accused to varying extents. Even in what was probably the safest method—the case of trial by hot iron—the possibility of developing a lethal infection cannot be ruled out. In the ordeal by cold water, as Sadakat Kadri has pointed out in *The Trial*, “[t]hose who sank convincingly enough were vindicated and, with luck, resuscitated”.<sup>57</sup> Underlying these immediate physical ‘trials’ was the very real threat of failing the ordeal. If this happened, the accused would be executed by the state. The body of the person accused was therefore literally in suspended animation: strung between life and death for the length of the ordeal.

The second striking continuity is the heavily religious content and context. Ordeals reveal a great deal about the hierarchies of 12<sup>th</sup> century England. The outcome of a trial by ordeal may nominally have been determined by God’s judgement, but it remained a social process that was organised, performed and judged by the (Catholic) Church or, more accurately, its representative on the ground, the local priest. The performance of the ordeal was not simply emphasising the authority of God (arguably as a means of alleviating blame for inflicting violence). The ordeal also naturalised the crucial role of the priest as mediator between God and the community. It was only through the priest’s attendance, administration, and blessing that God would become part of the ordeal and sanctify the proceedings. In the trial by ordeal the relative passivity of the physical body was used by the Church to illustrate its subservient position as being an instrument of not only God, but also subject to the will of the Church.

This emphasis on the role of the priest as mediator reflects the dominance of the Church in England in the 12<sup>th</sup> century. In this feudal country, very few people would ever travel more than a few miles from their birthplace, and consequently their connection with the two seats of power in the country—the church and the King’s court—was indirect, through their contact with their local priest and feudal lord. However, although the King was (arguably) the apex of the hierarchy, it was the Church as an institution that wielded the most influence at this time.<sup>58</sup> For the villagers on the ground, they would have far more contact with their local

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<sup>57</sup> Kadri, *The Trial*, 27.

<sup>58</sup> Stating that the King was the apex of the hierarchy is an oversimplification, as the competing interests of the Church and the monarch caused a great deal of debate and bloodshed (notably Thomas Beckett’s) in the 12<sup>th</sup> century and for hundreds of years afterwards. The ongoing question was whether the King or the Pope was owed ultimate allegiance by the populace. This led eventually to the English King (Henry VIII) establishing himself as head of the Church in the 16<sup>th</sup> century.

priest than they ever might with their feudal lord. By the 12<sup>th</sup> century, the Church was a “great corporate body” whose reach extended into every village.<sup>59</sup>

The Church was also a developed profession and industry that controlled the distribution of knowledge in the country, due to the literacy and record keeping of the priests. In the 12<sup>th</sup> and 13<sup>th</sup> centuries the population of England was overwhelmingly illiterate (and this condition extended to much of the aristocracy; only the clergy were reasonably certain to be literate) where learning was in the hands of the very few. At this time, transcripts of cases (recorded in Plea Rolls and documentation of the *Curia Regis*) were only just beginning; consequently, there was only a very nascent common law.<sup>60</sup> Added to this, there was no formal secular legal training, with the King’s Justices usually being members of the King’s household who worked part-time (in fact, the only systematic legal training was ecclesiastical law).<sup>61</sup> In terms of law, the only relatively professionalised field was the Church, and it is only the Church that could provide the means of systematic legal recourse to have binding authority over a community member in a feudal society.<sup>62</sup>

### ***The Trial by Ordeal as a Performance of Tradition***

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<sup>59</sup> Bartlett, *Trial By Fire*, 93.

<sup>60</sup> The *Curia Regis* was the main judicial body in England after the Norman invasion. Originally the term for King William’s Council, it became a judicial administrative body and was a precursor to Parliament. Under Henry II, the *Curia Regis* members became King’s Justices. It is from this body that the Court of the King’s Bench, the Court of Common Pleas, and the Court of Chancery formed. Documentation of these proceedings gives insight into early judicial decision-making.

<sup>61</sup> For more information on the background of early King’s Justices, see Anthony Musson, “The Role of Amateur and Professional Judges in the Royal Courts of Late Medieval England,” in Mullholland and Pullan, eds., *Judicial Tribunals*, 37-57.

<sup>62</sup> This is not to say that there was no secular law. The Eyres are prime examples of the role secular law increasingly played, inherited from Anglo-Saxon England and significantly modified under Henry II. However, the carrying out of sentences was at this time still left to the church as they had the organisational clout to see it done, and their influence reached into every village. The Crown literally outsourced ordeals, paying local priests to run them. This suggests that administratively it was far easier and cheaper for the Church to conduct ordeals as they were established in every vill in the country. This also suggests that the Crown did not yet consider it necessary or practical to control punishments, and that the oaths sworn by the landed at the Eyre were enough to establish and maintain royal authority.

From a modern perspective, the trial by ordeal seems a strange and violent practice. Indeed many contemporaries, particularly legal practitioners, would be loath to believe that there is any continuity between this form of trial and our contemporary adversarial criminal jury trial. There are certainly radical differences. For example, if we understand the purpose of any kind of trial to be either conflict resolution or a means of fact-finding, then the trials by ordeal would have to be excluded from this category since evidence and testimony have no role in the proceedings. This function, instead, belongs to the ‘jurors of presentment’ at the Eyre.<sup>63</sup> The trials by ordeal do not further information about the details of the alleged crime itself, and the trials by ordeal do not necessarily specifically determine whether or not the accused has committed the crime. The ordeal’s determination regarding the salvation or damnation (the life or death) of the accused is a broader judgement on his or her soul. Indeed, there are several documented cases where accused people confessed before the ordeal took place and then passed the ordeal.<sup>64</sup>

However, it is also easy to overestimate the violence or strangeness of these ordeals. Popular ideas regarding trials by ordeal tend to see them as a form of torture being applied randomly and baselessly. This is without strong foundation. Ordeals were only ever used when the ‘jurors of presentment’ had strong basis for suspicion. This jury was not simply a clique of superstitious witch hunters. Instead, it was a well-informed selection of local representatives who were likely to have had personal knowledge of the accused, accuser and alleged crime. The plea rolls refer to jurors debating the value of different kinds of evidence, including hearsay and eyewitness testimony. The standards applied then are not dissimilar to now, with hearsay not being considered reliable as proof, and eyewitness testimony being carefully considered.

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<sup>63</sup> The Eyre is the closest equivalent to the trial as we understand it today—a forum which determines the circumstances of the alleged crime and weighs evidence. The Eyre largely determined guilt and innocence. This guilt or innocence was determined by representatives from the local community weighing up evidence before a judge. The Eyre was also the only opportunity for the accused to defend him or herself and tell his or her side of the story. However, remarkably enough, a defendant could not give sworn testimony in this or any form of criminal hearing or trial up until 1891 in Australia and 1898 in England. This is because there was a long-standing belief that defendants would lie to save themselves and consequently imperil their souls. Once the Eyre ended, however, so did the role of evidence and testimony, as well as any active participation for the accused. From that point onwards, the ordeal was solely in the province of the Church and the accused became completely passive.

<sup>64</sup> Kerr et al., 578.

Indeed, some writers take this defence of trials by ordeal even further. For example, in a 1992 article, Margaret Kerr *et al* argue that a case can be made for the trial by ordeal as “therapeutic”.<sup>65</sup> Kerr and her colleagues note that statistically those persons accused were quite likely to ‘pass’ the trials by ordeal and they consequently suggest that the ordeals were somewhat deliberately staged. An example of this alleged ‘staging’ is the very low rate of women sentenced to ordeal by cold water. Whilst we can never be certain why this is, Kerr’s article presents the case that this is because women were far more likely than men to float.<sup>66</sup> In other words, the authors of this article argue that the trial by ordeal (conducted by the church) may well have been a means of protecting people from the dangers of the secular law, where there was little in the way of nuanced sentencing and all felony convictions attracted death by hanging.

However, although there may be some truth to the idea of the church limiting state-sanctioned murder, ultimately the theory of the ordeal as “therapeutic” is unconvincing.<sup>67</sup> This is because of the undeniable violence of the ordeal itself, with proof of guilt or innocence pivoting around possible burns, drowning and other injuries. Beyond this, there is the attached threat of execution. A person accused could not rely on the priest’s moral conscience to pass him/her safely through the ordeal. Coupled with this, the vast majority of those who passed the ordeal were immediately banished by the State. The innocence determined by the ordeal clearly did not translate into acquittal of suspicion. Anyone who was under heavy enough suspicion to be sentenced to ordeal was therefore probably guilty (*malcreditus*), even if there was no absolute proof.

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<sup>65</sup> Ibid., 583.

<sup>66</sup> Conducting a detailed study using 100 people, taking into account body fat content, the authors found more than 80% of men sank satisfactorily, and less than 30% of women did likewise. In the hot iron ordeal, according to the authors of the article, after the iron was removed from the fire the ‘gospel’ was read for an indeterminate time. Obviously the longer this took, the less chance there was of the accused’s hand burning. There is documented evidence that some people did not have *any* burn at all on their hand after carrying the iron. Ibid., 589-90.

<sup>67</sup> It is also interesting to compare this situation with a similar scenario hundreds of years later, where jurors were known to find people innocent in order to protect them from the draconian felony laws of the 18<sup>th</sup> century.

The trials by ordeal were indeed radically different to contemporary trial practice, even if they were not random acts of torture. However, I would nevertheless argue there is continuity between this form of trial and our contemporary adversarial criminal jury trial. Maureen Mulholland observes:

Although these ordeals were tests, they can legitimately be described as trials [...] since they took place in a forensic context, albeit a religious one, and they were conducted by representatives of authority whose jurisdiction was accepted by the participants, and whose definitive decision or judgment would be accepted as binding by them and by the society in which they functioned.<sup>68</sup>

The real value of the ordeal lay in the presence of the community. The village was always present at the ordeal. Although this allowed ordeals to be painted as a form of localised redress (and to some extent it was), not to mention a form of entertainment, what the ordeals also did was enact over and over again the authority of the church over the community.<sup>69</sup> The trial by ordeal was a trial in the sense that it was mounted by an authority that had binding and accepted jurisdiction over the population. Bartlett comments: “The privilege of conducting ordeals enhanced the dignity of their [the Church’s] jurisdiction and, in many cases, placed in their hands the power to decide guilt or innocence”.<sup>70</sup> The priest pronounced whether a villager lived or died based on the signs given from God. The physical body of the accused was visually and violently made subject to the will of God through the Church. Therefore, the ordeal became both a representation and enactment of the power of God’s Judgement (both real and symbolic). An alleged crime was co-opted by church authorities and reconfigured into the discourse of the Church. Guilt or innocence became the dichotomy of being saved or being damned which was then witnessed by the community.

The power and violence of the ordeal arguably displaced the authority of the secular law. By putting the ordeal in the hands of the Church, a clear message was sent to the populace about their role in the social order. In anthropological terms, this function may be read as a form of social control. However, the important distinction I make to this, and to Bartlett’s comment that ordeals “enhanced the dignity” or power of the priests, is that the trial by ordeal did not merely reflect the authority of the Church: it helped manufacture it. This is an amendment to

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<sup>68</sup> Maureen Mullholland in Mullholland and Pullan, eds., *Judicial Tribunals*, 3.

<sup>69</sup> As will be observed throughout this thesis, the trial has been a site of entertainment for the public for a very long time.

<sup>70</sup> Bartlett, *Trial By Fire*, 91.

Chief Justice Underwood's argument as well. The trial is not "ordained", rather trial participants continually reassert the trial's ordination through repeated performance. It was the public doing of the trial by ordeal that lent authority to the Church and the local priest, rather than the trial by ordeal simply being a by-product of authority.

In this way, the trial by ordeal enacted repeatedly the relative frailty of the physical body of the human, the awesome power of God, and (most importantly) the Catholic Church as intermediary. The repeated violent subjection of the body, the cooption of the proceedings by the Church, the heavy use of religious symbols and sacred language emphasised the appearance of antiquity and immovability in what was in fact not a static institution but rather a growing field of practice whose agents (or at least many of the bishops and archbishops if not every local priest) were constantly seeking to extend their power and authority. This constantly re-enacted process of legitimation is what I define as a *performance of tradition*. It is this performance of tradition that remains the consistent feature of all three forms of trial outlined in this chapter, including our contemporary adversarial criminal jury trial.

### ***"Lord how bloody Mother Broom is!": The Altercation Trial***

On the 11<sup>th</sup> of September 1739, John Broom was murdered. Broom, who lived in St. Paul Shadwell, died from a stab wound to his leg. His wife, one Susannah Broom, was arrested for the crime, and subsequently tried. The charge read as follows:

Susannah Broom, of St. Paul Shadwell, was indicted, for that she, not having GOD before her Eyes, &c. on the 11th of September, in and upon John Broom, her Husband, feloniously and traiterously did make an Assault, and with a certain Knife made of Iron and Steel, val. 1 d. which she the said Susannah had and held in her Right Hand, him the said John, in and upon the Inside of the Calf of the Right Leg, did strike, stab and thrust, giving him a mortal Wound of the Length of four Iuches, and the Depth of two Inches, of which mortal Wound he instantly died.<sup>71</sup>

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<sup>71</sup> This is a verbatim extract from the Old Bailey *Sessions Papers*, including the inconsistent spelling of 'iuches' and 'inches'. The use of the term "traiterously" refers to the allegiance a wife owed her husband. A wife murdering a husband was equivalent to a servant murdering their master. Old Bailey Proceedings Online ([www.oldbaileyonline.org](http://www.oldbaileyonline.org), 27 April 2008, hereafter OBSP, all accessed 27<sup>th</sup> April 2008) December 1739, trial of Susannah Broom, (t17391205-2).



Susannah Broom's trial was held at the Old Bailey on the 5<sup>th</sup> December 1739, less than three months after the murder. The following is an extract from the proceedings:

Prisoner: Did you ever see me take up any Edge-Tool, any Scissars, or Knife , to abuse him with?

Coombes: I have seen her beat him several times with the Poker, and have heard him cry out Murder! She came to Mrs. Birch, about a Month before this Fact was committed, in a desperate passion and said, This Man won't pay my Rent, - I shall be murdered for him. I have seen her go down the Street with him, and as she has gone along with him, she has beat his Head against a Sash-Window, and broke it.

Prisoner: Fye upon you! He went to get a Stick to beat me with; - did he not?<sup>72</sup>

No less than eight people testified, including the Brooms' neighbour, William Allen.<sup>73</sup> Allen testified that Susannah Broom was the "wickedest woman on earth" rejecting her defence that her husband physically abused her. All the witnesses accused her of maltreating her husband by locking him out. This was because, according to Susannah Broom, her husband was spending all his money on "whores". The transcript of the trial goes for a number of pages in considerable detail. The depth of information provided by these records allows insight into an unhappy marriage more than 250 years ago. This is because by the 18<sup>th</sup> century, case judgements were assiduously recorded, reflecting the now entrenched place of the secular common law system.

Susannah Broom was found guilty, condemned to death and subsequently executed. However, unlike her predecessors in the trials by ordeal, Mrs Broom was allowed to give her account of the story, as witnessed in the above interchange. The process is what John Langbein calls "altercation", where "the victim and the accusing witnesses engage the

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<sup>72</sup> Ibid.

<sup>73</sup> Allen's testimony was as follows: "William Allen: 'I knew the Prisoner and her Husband: He was an old Man, about Sixty. I live in a Room adjoining to that in which they liv'd. About three Months ago, - I can't tell the Day of the Month, but it was the Night the great Thunder and Lightning happen'd, about One or Two o'Clock, I heard the old Man cry, - For God's Sake don't murder me! for Christ's Sake don't murder me! Several Times he (thus) cry'd out, but I did not go out of my Room, for she was an obstinate Woman, and used to quarrel with him. I have saved him from her a great many Times. I believe that she was at this time in the Room with him, but I did not hear her Voice, - I did not hear her say one Word to him; and after he had cry'd out (as above) for the Space of a Quarter of an Hour, I heard no more of him, nor did I see him till the Coroner's Jury sat upon him, which was the Night following'" Ibid.

defendant in a confrontational dialogue about the circumstance of the alleged offense” with a jury determining a defendant’s guilt or innocence.<sup>74</sup> The earliest written reference to the altercation trial is seen in Sir Thomas Smith’s *De Republica Anglorum* in 1583; however, it was in practice from the mid-13<sup>th</sup> century.<sup>75</sup> In his chapter on trial process Smith says: “These [trials] be set in such a place as they may see the Judges and the Justices, the enquest (jury) and the prisoner, and heare them, and be heard of them all”.<sup>76</sup> The level of detail the trial went into was relatively unrestricted and both accuser and accused could relate their story in full.<sup>77</sup> As Smith comments, the accuser may say (after being sworn): “I knowe thee well ynough, thou robbest me in such a place, thou beatest mee, thou tookest my horse from mee, and my purse, thou hadst then such a coate and such a man in thy companie”.<sup>78</sup>

Normally, as Smith observes: “the theefe will say no, and so they stand a while in altercation”.<sup>79</sup> The altercation trial’s content was a relatively informal argument between the plaintiff and the defendant. Accuser and accused spoke for “himselfe” or herself as did the witnesses. The jury spoke too. There was no counsel and no mediation of any kind, except for the king being represented in the body of the judge. Although by this time the legal profession had formal training, lawyers were not involved in criminal matters.<sup>80</sup> The concept of lawyer as mediator was believed to hinder a fair trial, rather than facilitate it. Lawyer William Hawkins, commented in *Pleas of the Crown* in 1721:

Every one of common Understanding may as properly speak to a Matter of Fact, as if he were the best Lawyer. It requires no manner of Skill to make a plain and honest Defence. The Simplicity and

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<sup>74</sup> Langbein, *Origins*, 13.

<sup>75</sup> After the ending of trials by ordeal, most of Europe was looking for a new means of trial. The English eventually (after a period of indefinitely detaining those accused of a crime) extended the function of the Eyre into determining final guilt or innocence through use of a jury (who were separate to the jurors of presentment). This form of trial is very similar to adversarial procedure, with the exception of the absence of counsel.

<sup>76</sup> Sir Thomas Smith, *De Republica Anglorum*, 80.

<sup>77</sup> Although considering the average length of these trials was about 15 to 20 minutes, the detail must have been somewhat restricted by the presiding King’s Justice.

<sup>78</sup> Sir Thomas Smith, *De Republica Anglorum*, 80.

<sup>79</sup> *Ibid.*, 80.

<sup>80</sup> Lawyers appeared in litigations and various other non-criminal suits. By the 1400s, they were thriving as a profession, with the establishment of the Inns of Courts leading to a relatively professionalised apprenticeship system that insured a steady growth of legal practitioners. For more information on the development of the legal profession in medieval times, see Paul Brand, *The Origins of the English Legal Profession*, *supra* n. 40.

Innocence artless and ingenuous Behaviour of one whose conscience acquits him, has something in it more moving and convincing than the highest Eloquence of persons speaking in a Cause not their own.<sup>81</sup>

Hawkins' statement affirms the belief in the trial as a means to find the 'truth'. His reference to a "plain and honest" defence arises from the belief that artlessness is innocence, and that simply watching a person conducting his or her own defence (and behaving 'naturally') will allow a jury to make an informed decision as to his or her innocence or guilt. Consequently at this point in history it was a defendant's embodied performance in the courtroom, not simply his or her words, that was believed to be the key to whether he or she was telling the truth. This assessment of credibility through a defendant's embodied behaviour is still a feature of the adversarial criminal jury trial today.

### *The Jury in the Altercation Trial*

The structure of the altercation trial was considerably formalised in comparison to the proceedings of the Eyre from which it developed. In the Eyre, all the landed population had to attend to swear an oath to the King. However, the spatial arrangement of the Eyre was relatively unregulated (as far as we know). In the altercation trial, however, defendants were for the first time deliberately placed facing the Justices and the jurors in a designated space (which later became the dock). The accused and accuser were also formally required to confront one another in this public space. This confrontation of two parties conducting their own prosecution and defence allowed a jury to determine the truth of what happened: "When the Judge hath heard them say inough, he asketh if they can say any more: if they say no, then he turneth his speche to the enquest (jury). Good men (saith he) ye of the enquest, ye have heard what these men say against the prisoner, you have also heard what the prisoner can say for himself".<sup>82</sup>

The way in which the jury deliberated also shifted throughout the time of the altercation trial. The original jury of altercation (in the 13<sup>th</sup> and 14<sup>th</sup> centuries) was almost identical to the jurors of presentment at the Eyre. That is, the jurors were a group of locals with knowledge of the details, circumstances and people involved in the alleged crime. Personal knowledge of

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<sup>81</sup> William Hawkins, *A Treatise of the Pleas of the Crown* (New York: Garland Publishers, 1978), 34.

<sup>82</sup> Thomas Smith, *De Republica Anglorum*, 80.

the defendant was valued as an asset of early juries. Clearly, the assumption was that people who knew the defendant would be more likely to know whether he or she was lying or not. The early jury's assessment of a defendant during his or her trial was considered through a personal knowledge of those involved, as well as grounding in the evidence of the case.

However, the increase in population, and the growth of fixed courtrooms led to the development of hubs, or small legal worlds in specific areas, notably the Inns of Court around the Old Bailey and Westminster.<sup>83</sup> Legal actions were held in these places for administrative ease. This meant that the jurors selected at a trial were no longer necessarily from the accused's area and no longer had personal knowledge of the circumstances of the crime. This resulted in a jury that was not "self-informed".<sup>84</sup> Consequently, juries became far more reliant on the mediation of the courts to inform them as to the circumstances of the case.

What resulted was the concept of 'impartial demeanour assessment': the practice by which a jury is expected to assess the credibility of a witness through observation, despite having no prior knowledge of the person and his or her customary behaviour. I argue that the development of the impartial jury is at least partially a retrospective justification for what was a by-product of economic development and the growth of the juridical field. Whilst legal agents have subsequently valorised the concept of impartiality in the jury, this valorisation also cloaks the jury's increasing passivity. Once juries were no longer personally involved in the case, they no longer provided evidence of their own or debated matters, relying wholly on the courts for information. Consequently, juror interjections in the altercation trials became less and less frequent. Whilst the rise of the lawyer and the adversarial trial sounded the death knell of the active jury, the developments of the altercation trial had already placed the jury on a path to increasing passivity and reliance on legal agents.

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<sup>83</sup> The first permanent court was established at Westminster in 1215. The Old Bailey has been operating continually as a court since 1673. There was an earlier courthouse on the site dating back to medieval times that burned down in the Great Fire of London in 1666. Trials also moved from being held outdoors, or within public buildings in nearby towns, to permanent courthouses by the 19<sup>th</sup> century. That said, however, assizes (where itinerant judges travelled to hear cases) were only replaced in the U.K. in 1971 with the establishment of the Crown Court (equivalent in Australia and the U.S. to District Courts).

<sup>84</sup> See Daniel Klerman, "Was the Jury Self-Informing?," in Mullholland and Pullan, eds., *Judicial Tribunals*, *supra* n. 42.

### *Truth, Demeanour and Storytelling: Reading the Body*

The shift in the role of the jury led to a reconceptualising of the role of the body in the criminal trial. Both trials by ordeal and altercation trials required the presence of the body of the accused. Altercation trials remained trials of the body to the extent that the truth would be determined through demeanour assessment. The major difference in belief structures is that rather than God intervening directly (as in the trials by ordeal), in the altercation trial God's will is carried out by the State, and the wisdom to see the truth (or sniff out duplicity) is given to the triers of fact (the jury and the judge) by God.

The slightly mystical power of demeanour assessment also entails a lack of accountability for the decision; demeanour assessment was not necessarily considered subjective by the King's Justices at the time because what the triers of fact were reading through confrontation was a message revealed by a higher authority.<sup>85</sup> In this respect, it would certainly be incorrect to assume that the rise of the altercation trial somehow alluded to an entirely secular trial. As John Fortescue, writing in the 15<sup>th</sup> century, comments: "For as the Apostle saith: All power is from ye Lord God. Wherefore the lawes, that are made by man, which thereunto hath receiued power fro[m] the Lord, are also ordained of God".<sup>86</sup> This is certainly reflected in the biblical styling of the charges against Susannah where she is accused of not "having GOD before her eyes". The altercation trial is certainly a *more* secular proceeding, relying far more on evidence and testimony than previously, however, the context remained heavily religious,

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<sup>85</sup> This is not to suggest that there was a naïveté as to the possibility of false conviction. There was an (rudimentary) appeal system, and there are historical accounts of defendants complaining that the jurors were prejudiced against them. Under a 1352 statute, defendants were formally given the right to challenge jurors who had also been on the jury of presentment/grand jury who had indicted them. See Anthony Musson, *Medieval Law in Context* (Manchester: Manchester University Press, 2001).

<sup>86</sup> Fortescue goes on: "whereby you are taught, that to learne Lawes, though they bee Mans lawes, is to learne holy lawes and the ordinaunces of God". Sir John Fortescue, *A Learned Commendation of the Politique Lawes of Englande Vyherin by Moste Pitthy Reasons & Euident Demonstrations They Are Plainelye Proued Farre to Excell Aswell the Ciuile Lawes of the Empiere, as Also All Other Lawes of the World, with a Large Discourse of the Difference Betwene The. Ii. Gouvernements of Kingdomes: Whereof the One Is Onely Regall, and the Other Consisteth of Regall and Polityque Administration Conioyned. Written in Latine Aboue an Hundred Yeares Past, by the Learned and Right Honorable Maister Fortescue Knight And Newly Translated into Englishe by Robert Mulcaster*, ed. Robert Mulcaster, (London: Fletestrete within Teple Barre, at the signe of the hand and starre, by Rychard Tottill, 1567), Vol. 9.3.

combining elements of the divine along with elements of the monarchical state. This is in keeping with the belief at the time that the King was ordained by God and represented God's will on earth. The King's authority was the binding jurisdiction over the community who subjected themselves to his will.<sup>87</sup>

### ***The Altercation Trial and the Performance of Tradition***

The altercation trial was not wholly secular, then, but it was far less violent than the Church facilitated trials by ordeal. In the above trial, Susannah Broom did not undergo visible, physical torture to determine her punishment, although the threat of subsequent execution remained (and was fulfilled). Other aspects of trial were also more advantageous to the defence. Susannah Broom had a considerable amount of agency that Maud of Frokemere and William Fisman never had. In the ordeal, a defendant's passive body was the instrument of the voice of God, but, comparatively speaking, in this altercation trial, Susannah Broom had more power and had her own voice.

However, despite this agency, altercation trials remained in many ways quite draconian. Although witnesses, juries, complainants and defendants could all speak, the defendant was still unable to provide sworn testimony. This may have risked a jury inferring the accused was untrustworthy. Added to this, although there were witnesses, their roles were strictly defined. Witnesses for the defence were not allowed to do anything but make assertions about the defendant's character. The only person able to narrate the defendant's story was the defendant him or herself. Susannah could not bring witnesses to support her version of events, which means that the more witnesses summoned by the prosecution, the more overwhelming the testimony seemed against her.

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<sup>87</sup> The altercation trial put into practice the law to the extent approved of, and supporting, the King whose decisions reflect the will of God. However, altercation trials were still used for felonies after the execution of Charles I and the establishment of a constitutional monarchy (as well as a brief period of being a Republic). After 1649, one can argue that altercation trials represented the monarch as representative of the State rather than the King as absolute monarch. This shift is most clearly seen in the events leading up to the trial of King Charles I, where, for example, on 4 January 1649 the English Parliament for the first time declared that they "have the supreme authority of this nation". See Geoffrey Robertson, *The Tyrannicide Brief* (Sydney: Random House, 2005), 140.

This was aggravated after the mid-16<sup>th</sup> century because of the pre-trial role of the Justice of the Peace. Enacted in legislation in 1555 (although undoubtedly in service before this), the JP was charged with helping the accuser prepare materials for prosecution. The JP had the power to execute search warrants and interview witnesses. However, his responsibility was only to gather evidence for the prosecution, not the defence. This resulted in an extremely lopsided situation (as evidenced above by the eight witnesses testifying against Susannah Broom).

Further, in contrast to the assistance given to the accuser by the court, the defendant was, extraordinarily enough, not informed of what he/she was charged with until the arraignment where, for the first time, it was translated from Latin and read aloud in the place of trial. This in particular seems like a major disadvantage to the accused, but as Beattie comments: “It was believed that the truth would be most clearly revealed if the prisoner was confronted with the evidence only in the courtroom so that the jury could judge the quality of his immediate *unprepared* response”.<sup>88</sup> The emphasis on immediacy and spontaneity was central to this mode of trial. A trial seldom lasted more than 15 to 20 minutes and in the court at Westminster the two sitting juries on each side of the courtroom were rotated onto each trial. While one jury deliberated a verdict, the other jury heard a new trial.<sup>89</sup> In this kind of trial, the accused could only answer the charges immediately and honestly and by his or her ‘artlessness’ and ‘honest demeanour’ either acquit him or herself or by his or her untrustworthy exterior and lack of spontaneity and ‘truth’ be condemned.

Whilst altercation trials were not violent forms of torture, they involved a high-stakes form of performance for the defendant. The jury would judge the accused’s demeanour and behaviour during the trial through procedures where the odds were stacked against the accused. These procedures predate any presumption of innocence. They also reflect a kind of economic

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<sup>88</sup> Beattie, *Crown and the Courts*, 271, my italics.

<sup>89</sup> One of the *Sessions Papers* from the Old Bailey in the 1600s refers to the tedious and extraordinary length of the trial of William Priddle, Robert Holloway and Stephen Stephens on the 18th April, 1787: “N. B. This trial began at a quarter past five in the afternoon; and lasted till half past seven the next morning”. OBSP, Priddle, Holloway and Stephens ( t17870418-118). During the altercation trials and early adversarial procedure, jurors were pressured to return verdicts as quickly as possible, and would not be fed or allowed to sleep until they had reached a verdict. See Langbein, *Origins*, 16.

rationalism on the part of the state. While the immediacy of someone's response was presented as a gateway to truth-telling, the question of cost also undoubtedly figured. The incredible speed with which these trials were conducted suggests a legal system trying to get through as many trials as efficiently as possible and it was perhaps initially somewhat convenient to value immediacy as associated with truth-telling although it subsequently became an entrenched belief that is still pertinent in the contemporary adversarial criminal jury trial.

The symbolic context of the altercation trial also further reduced a defendant's poor chances. Firstly, the accused was usually kept in gaol until their appearance. Unless they were wealthy, they did not have access to clothes and means to wash. This meant that by the time they came to trial, they were often filthy. Defendants were also frequently in chains that, like their inability to be sworn, allowed the jury to infer that they were untrustworthy, guilty and/or dangerous. The subjection of the defendant deliberately emphasised his or her frailty before the might of legal majesty which had reached a pitch with the establishment of permanent court buildings, the first at Westminster Hall in 1215, followed by several others in major towns, including the Old Bailey in London. These courtrooms, like those of today, were grand spaces filled with symbols of religious and secular authority. By the 17<sup>th</sup> century (if not before) judges were wearing robes of state and wigs. The purpose of these surroundings was to emphasise and naturalise the law of the land as dictated by the absolute monarch and as orchestrated by the legal profession.<sup>90</sup>

The altercation trial as a *performance of tradition* benefited from orchestrating a defendant's guilt, whereby individuals threw themselves on the mercy of the state, both during the trial and after (if they were found guilty) enacting over and over again their insignificance and dependence. This means that although the proceedings were less explicitly violent, and more symbolic, the symbolism did not replace violence, but rather cloaked it in ceremony. Significant control and coercion continued to underlie the altercation trial.<sup>91</sup> All of this both

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<sup>90</sup> The religious symbols were not replaced by purely secular symbols. This is partially because the King of England is anointed by God and therefore a little god on earth. As I will outline later in the chapter, a recurrent pattern in the development of the trial is legal agents' retention of signification of past authority systems.

<sup>91</sup> The disadvantaging of the defendant in the altercation trial meant that the conviction rate was high. This was because, as John Langbein observes, to get to trial in this pre-police force period meant that a defendant may well have to have been seen committing the crime, and certainly had to be at least heavily suspected. However,



reflected (and helped construct) the power of the King's Law as mediated through legal agents who were part of an increasingly professionalised juridical field.

### *Adversarial Trial: The Rise of the Lawyer*

Adversary procedure presupposed that truth would somehow emerge when no one was in charge of seeking it.<sup>92</sup>

Plaine words are brought, from plow & country plain,  
To finde plaine deedes, a friend to plainnes cace,  
In open court, then plainnes doth complain  
Of wrong receiud, before true Iustice face,  
The pleading there, begins, but hath no end,  
A yeere or twaine, runs on with reasons great,  
Both parties so, much time and wealth doth spend,  
Whiles lawyars talk at barr in cold and heat:  
The matter oft, scarce woorth a lock of hey,  
Begun of nought, doth breed an endlesse pley.<sup>93</sup>

The transformation from the altercation trial into the adversarial procedure, best defined as a trial where the defence probes and tests the prosecution's case, can be attributed to one key factor: the rise of counsel.<sup>94</sup> Over the course of several hundred years, the lawyer slowly infiltrates and eventually comes to dominate criminal proceedings. There is also a direct

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as Langbein goes on to point out, this presumption of guilt was somewhat ameliorated by certain other peculiar features of the trial; namely the 'benefit of clergy' and 'partial sentences'. The 'benefit of clergy' was originally a means by which priests could only be tried under Ecclesiastical Law. However, over time it became a means for first-time offenders to have their sentences reduced. By the 1700s any defendant accused of a crime not excluded from its terms (rape, murder and serious theft were excluded) could claim benefit of clergy and receive more lenient sentencing. 'Partial sentencing' was the practice of juries only convicting defendants on lesser charges, and devaluing stolen goods so as to avoid the defendant being hanged. William Blackstone termed this 'pious perjury'. Because of benefit of clergy and partial sentences, defendants (whether or not they were guilty) were encouraged to plead not guilty so that they could obtain the clemency of the jury and/or court. For more information, see Langbein, *Origins*, 57-61.

<sup>92</sup> *Ibid.*, 333.

<sup>93</sup> Thomas Churchyard, *The Honor of the Lawe. Vyrritten by Thomas Churchyard Gent* (London: By Ar. Hatfield, for William Holme, 1596), 4.

<sup>94</sup> Langbein, *Origins*, 253.

inverse effect for the defendant. Whereas in the altercation trial the defendant told his or her own (unsworn) story in full, over the same several hundred years there is a gradual *silencing* of the defendant. Eventually, by the 1820s Cottu, a French observer of English courts, could remark “the accused does so little in his own defence that his hat on a pole might without inconvenience be his substitute at trial”.<sup>95</sup>

This growth of legal representation by third party specialists is charted revealingly in the Old Bailey Session Papers. By the 1790s the defence counsel are often clearly present, as seen in the 1781 trial of Bennet Harbourne and Henry Haslam for theft. In these *Sessions Papers* Harbourne says “I leave my defence to counsel”.<sup>96</sup> In that same year, Elizabeth Harris was tried and acquitted of murdering her child. The *Sessions Papers* from her trial show clear evidence of cross-examination by a defence counsel. She herself says nothing.<sup>97</sup>

Two major shifts happen during the transformation from altercation to adversarial procedure. Firstly, the job of storytelling is transferred from the defendant to the lawyer. Secondly, the confrontation between the plaintiff and defendant becomes by proxy: while both remain present in the courtroom (although the plaintiff does not have to be unless testifying), it is the lawyers who are effectively on the front line, with the defence testing the case of the prosecution. Direct clashes between plaintiff and defendant become almost non-existent, except in isolated cases where the defendant waives his or her right to counsel.<sup>98</sup>

Previously, the defendant telling his or her own story was his or her lifeline: “There was divers other People who said they had been Juggled out of their Money by her. She had little

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<sup>95</sup> Cottu quoted in Langbein, *Origins*, 6.

<sup>96</sup> OBSP, Trial of Bennet Harbourne and Henry Haslam, May 1781 ( T17810530-13). Interestingly, the *Sessions Papers* make almost no direct reference to the names of counsel until the 1800s, rather it is by deduction that their presence is there (e.g. statements such as “I leave my defence to counsel”). Defence counsel was certainly operating in a limited capacity from the 1730s onwards. See Langbein, *Origins*, 291-306.

<sup>97</sup> OBSP, April 1781, Trial of Elizabeth Harris (T17810425-21).

<sup>98</sup> The possibility of a direct encounter between complainant and defendant was a source of controversy during the sexual assault trials of MSK and MAK in Sydney in 2003, when two brothers accused of rape elected to represent themselves and sought to cross-examine their accusers directly. New South Wales State Parliament passed legislation banning them from doing so under *the Criminal Procedure Act 1986* (NSW) s 294A. I analyse this decision in detail in Chapter 7.

to say for her self, the Jury found her Guilty”.<sup>99</sup> As William Hawkins argued in 1721, it was the “artlessness” of the defendant that was believed to be the key to unlocking the truth. However only one hundred years later, An 1836 Parliamentary inquiry (that resulted in defence counsel being officially allowed into the courtroom) found: “It can seldom happen that an ordinary defendant can in such a situation (as a trial) possess the coolness and talent requisite for the task”.<sup>100</sup> By the mid-19<sup>th</sup> century, the accused was in need of talent and was believed to be disadvantaged without it.<sup>101</sup> Indeed, by 1836 self-representation was seen as virtual suicide, summed up eloquently by William Garrow, notorious 18<sup>th</sup> century criminal defender, and one of the early stars of the Bar, who wrote in the margins of one of his cases: “This prisoner was one of innumerable instances of persons who by making a speech occasion their own conviction”.<sup>102</sup> In the adversarial trial silence became not only beneficial for a defendant but also became subsequently enshrined as a right.<sup>103</sup>

### ***Evening the Odds***

This gradual process of ‘lawyering up’ is attributed by John Langbein to an attempt to even the odds for the defendant. The altercation trials were heavily stacked towards the accuser. The growth of prosecution counsel made the disproportionate representation even more

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<sup>99</sup> OBSP, December 1699, Trial of Mary Poole ( T16991213A-2).

<sup>100</sup> Hawkins, *supra* n. 81; “Second Report from her Majesty’s Commissions on Criminal Law,” *Parliamentary Papers*, vol. 36 (London, 1836): 3. Prior to this parliamentary inquiry, defence lawyers had been appearing informally (as noted) and were frowned upon, discouraged and generally subject to various kinds of bans by judges from representing clients which I will outline later in the chapter.

<sup>101</sup> By this time, the U.S. trial system was developing relatively independently. This means that although the right to defence counsel was adopted by some U.S. States in the 19<sup>th</sup> century, it was only in 1963 that the ‘right to counsel’ was formally acknowledged by the U.S. Supreme Court. See: *Gideon v. Wainwright*, 372 US 335 (1963).

<sup>102</sup> William Garrow quoted in Langbein, *Origins*, 268.

<sup>103</sup> Almost every adversarial jurisdiction has a section in their Evidence Act forbidding the drawing of unfavourable conclusions from a defendant’s silence. In New South Wales, see the *Evidence Act 1995* (NSW), s 89. Under s 20(2) of the same Act, a judge may ‘comment’ on a defendant’s failure to give evidence, but cannot imply that this silence signifies guilt. However, controversially in the U.K., this right to silence was overturned. From 1994 onwards, if a defendant refuses to answer a question put to him, a court and jury “may draw such inferences from the failure or refusal as appear proper”. See: *Criminal Justice and Public Order Act 1994* (U.K.), c 34-37.

extreme. Consequently, barriers to defence counsel in England were slowly lowered with the intention of providing protection for the accused.<sup>104</sup> Initially this defence counsel was only allowed to assist the defendant in cross-examination. The defence counsel was explicitly barred from presenting any kind of narrative (in fact from any kind of speaking *for* the defendant). These restrictions demonstrate the importance attached at this time to the defendant's performance, in terms of his or her physical presence, demeanour, consistency of story and confrontation with the plaintiff. The reluctance to have someone else speak for the defendant is expressed eloquently by English legal writer Ferdinando Pulton, writing in the 16<sup>th</sup> century. Pulton commented: "If counsel learned should plead (the defendant's) plea for him, and defend him, it may be that they would be so covert in their speeches, and so shadow the matter with words, and so attenuate the proofs and evidence, that it would be hard, or long to have the truth appear".<sup>105</sup>

However, as Langbein observes, defence counsel usually managed to evade the legal limitation on narrative by asking long and complicated questions. Inevitably, judges could not control this because the more defence counsel was employed, the more they expanded and naturalised their roles as protectors of the individual from the potential tyranny of the judges and the State. Added to this, the increasingly formal legal procedure and the growing complexity of precedent and case law meant that counsel was required to navigate the proceedings for a layperson who was less and less likely to understand what went on during a criminal trial. The last barrier to fall was the restriction on defence counsel making opening and closing statements. Eventually the defendant was silenced and the lawyer dominated.

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<sup>104</sup> This need for protection was also helped along by the disgraceful Stuart treason trials of the 17<sup>th</sup> century where defendants were arrested, imprisoned, refused counsel and not told what they were charged with. This was, as observed, relatively standard procedure in felony trials but increasingly seen as unacceptable in trials for treason. See Langbein, *Origins*, 67-107.

<sup>105</sup> Ferdinando Pulton, *An Abstract of All the Penal Statutes Which Be Generall, in Force & Yse Wherein Is Contayned the Effect of All Those Statutes Which Do Threaten to the Offendors Thereof the Losse of Life, Member, Lands, Goods, or Other Punishment or Forfaitue Whatsoever: Whereunto Is Also Added in Their Apt Titles, the Effect of Such Other Statutes Wherein There is Any Thing Material and Most Necessarie for Eche Subiect to Knowe: Moreouer the Auctoritie and Duetie of All Justices of Peace, Sheriffes, Coroners, Eschetors, Maiors, Bailiffes, Customers, Comptrollers of Custome, Stewardest of Leets and Liberties, Aulnegers and Purueyours and What Things by the Letter of Seuerall Statutes in Force They May, Ought, or Are Compellable to Do* (London: Christopher Barker, Printer to the Queenes Maiestie, 1578), 107.

## *The Artificiality of Performance*

It is during the slow rise of counsel, from civil court practitioner to the dominant presence in the legal process that the first explicit references to the trial as ‘theatrical’ occur. These references do not predate the mid-1500s, suggesting that those employing the analogy rely on the concept of the ‘theatre’ as meaning a building that puts on plays, as opposed to earlier understandings of the term theatrical.<sup>106</sup> All of these documents in which such references appear directly relate to the legal agent (primarily the lawyer) as performer. These writings also divide into two streams. The first stream is the writings by lawyers where the texts focus on career advice. One of the earliest examples of such advice is written by Jean Bodin, a French jurist. Published after his death in 1606 (and written some time during the late 1500s) Bodin draws on a theatrical analogy, that of role-play, to show how a magistrate should discharge his duties:

As for the Magistrat, for that he is to regard many persons, hee must oftentimes change his port, his gesture, his speech and countenance, for the good performance of his dutie towards all: which no man can well discharge, except he first know his duty towards his Soueraigne prince, as also how to submit himselfe vnto the other Magistrats his superiours, how to respect his equals, and how to commaund his inferiours, how to defend the weake, to withstand the great, and to doe iustice to all. And that is it, for which the auntients commonly said, *Magistracie or authoritie to declare what was in a man*, hauing as it were vpon the stage in the Theatre, and in the sight of all men, to performe the parts of many persons.<sup>107</sup>

Although Bodin is writing about inquisitorial procedure, his writing suggests that the magistrate (who in Europe both questions witnesses and determines guilt or innocence) is analogous to the multi-faceted actor of a theatre. As we can see, there is nothing pejorative in Bodin’s attitude towards the theatre; rather he assumes that both the courtroom and the theatre involve extensive representation, and this representation entails responsibility. For Bodin, magistrates are not simply men performing a function; rather they are representatives

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<sup>106</sup> Prior to the establishment of a fixed theatre building that staged dramas, the term ‘theatrical’ denoted a more philosophical idea of a ‘seeing place’, and was common in the high middle ages as a title for atlases (*Theatrum Mundi*). Glen McGillivray argues that this use of ‘theatrical’ signifies a different and pre-renaissance concept of the self, where humans understood themselves in relation to an all-seeing God who watched over them. See Glen McGillivray, “Theatricality: A Critical Genealogy,” *supra* n. 14.

<sup>107</sup> Jean Bodin, *The Six Bookes of a Common-Weale. VVritten by I. Bodin a Famous Lawyer, and a Man of Great Experience in Matters of State. Out of the French and Latine Copies, Done into English, by Richard Knolles*, Richard Knolles, ed. (London: Printed by Adam Islip impensis G. Bishop, 1606), 309.

of something greater; the State and their Sovereign. He notes that when magistrates are corrupt, they demean not only themselves but dishonour the State and their Sovereign Prince to whom they owe their ultimate duty. The theatrical analogy for Bodin, then, is a reminder to magistrates of the responsibility of representation; all legal agents are on a stage and being judged by the world and God.<sup>108</sup>

The other stream of writings written by non-lawyers about lawyers is also concerned with the accountability of legal agents; however, these tend to take a rather more dim view of the whole profession. In these writings, the courtroom is a theatre in a pejorative sense—a sham, and a show and the lawyers are to blame. Lawyers have been unpopular for a long time in England. As early as the 1300s when they were still only allowed to conduct civil cases, lawyers were seen as needlessly and dishonestly extending the proceedings to line their pockets.<sup>109</sup> This attitude was not restricted to the English. The 14<sup>th</sup> century commentator Marsilius of Padua stated: “what falshed is there so great, whiche is not gayly coloured and paynted, by the subtylite (I wyll not say duplicite) of the lawyers selues”.<sup>110</sup> In fact, the

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<sup>108</sup> As McGillivray notes, there is continuity between the understanding of theatrical as relating to a specific building staging plays, and the earlier definition of ‘theatre’ as a seeing-place. See McGillivray, “Theatricality: A Critical Genealogy,” *supra* n. 14. Bodin’s writing combines both these definitions of ‘theatrical’, as he refers to being literally on stage, and also refers to the more metaphysical aspect, reflecting a conception of self permanently understood through the lens of God as judge.

<sup>109</sup> The image of the lawyer who fleeces their client dates back presumably much earlier. However, written English sources are limited to the period following the introduction of the printing press by William Caxton in the 1470s and earlier texts that were printed later are rare.

<sup>110</sup> Marsilius of Padua goes on to remark: “who is nowe a dayes / whiche is a sueter in the lawe / but that he can dye sooner, then he can se an ende of his suete?” Marsilius of Padua, *The Defence of Peace: Lately Translated out of Laten in to Englysshe. With the Kynges Moste Gracyous Priuilege*, ed. William Marshall, (London: Robert Wyer for Wyllyam Marshall, and fynysshed in the moneth of Iuly in the yere of our Lorde god a. 1535), 2-3. Similar advice is given by Dominicus Mancinus in the late 1400s: “The lawier in pleding / for his pore client Before his owne profite / shulde set Justyce and right” Dominicus Mancinus, *Here Begynneth a Ryght Frutefull Treatyse, Intituled the Myrroure of Good Maners Co[n]teynyng the .iiii. Vertues, called Cardynall, Compyled in Latyn by Domynike Mancyn: and Translate into Englysshe: at the Desyre of Syr Gyles Alyngton Knyght: by Alexander Bercley prest and Monke of Ely* (London : Imprynted by Rychard Pynson, prynter vnto the kynges noble grace: with his gracyous pryuylege, the whiche boke I haue prynted, at the instance of Rychard yerle of Kent, 1518?). John Stephens also comments in 1615 that “an honest lawyer is a precious diamond set in pure gold”. John Stephens, *Essayes and Characters, Ironicall, and Instructiue the Second Impression. With a New Satyre in Defence of Common Law and Lawyers: Mixt with Reprooffe against Their Common Enemy. With*

common medieval opinion was that lawyers were corrupt and avaricious and deliberately spun out proceedings for their own gain.

The falsity of lawyers is frequently proclaimed by critics, such as Marsilius of Padua and, perhaps most spectacularly, the Puritan writer John Rogers who terms all lawyers “ungodly” in his manifesto of 1654.<sup>111</sup> In this work Rogers calls lawyers a “state army of locusts”, and condemns their coming as the coming of the Antichrist.<sup>112</sup> What is significant about Rogers’ attack against lawyers is that he lays another charge at their door: their “art”, and their “craft and cruelty”. This is exemplified in the excerpt: “They (lawyers) insinuate into great places, kings courts etc and by simulation and fine glozing flattering shewes of humanity and humility, have learned the art of dissembling in the Inns of Courts”.<sup>113</sup> There is no question in Rogers’ mind: the lawyers have brought their “arts” into the great place of court and turned the trial process into a “shew”. It is their role as mediator that has driven the truth from the courtroom: “These lawyers never more dissemble (than) when they resemble the faces of men; for they put the fairest faces on the foulest actions”.<sup>114</sup> The courtroom is now a place of performance for lawyers instead of a place to adduce *vere dictum*, or truth spoken. We can understand from this that critics of lawyers believed that lawyers did not simply take over storytelling but also changed the entire nature of it.

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*Many New Characters, & Diuers Other Things Added; & Euery Thing Ammended. By Iohn Stephens the Yonger, of Lincolnes Inne, Gent* (London: E.Allde for Phillip Knight, and are to be solde at his shop in Chancery lane ouer against the Rowles, 1615), 193.

<sup>111</sup> John Rogers’ work is pithily entitled: *Sagrir, or, Doomes-Day Drawing Nigh, with Thunder and Lightening to Lawyers in an Alarum for the New Laws, and the Peoples Liberties from the Norman and Babylonian Yokes: Making Discoverie of the Present Ungodly Laws and Lawyers of the Fourth Monarchy, and of the Approach of the Fifth, with Those Godly Laws, Officers and Ordinances That Belong to the Legislative Power of the Lord Iesus: Shewing the Glorious Work Incumbent to Civil Discipline, (Once More) Set before the Parliemtn, Lord Generall, Army and People of England, in Their Distinct Capacities, Upon the Account of Christ and His Monarchy/Humbly Presented to Them by John Rogers* (London: Printed for Tho. Hucklescot, 1654).

<sup>112</sup> Rogers, *Sagrir*, 1.

<sup>113</sup> *Ibid.*, 24.

<sup>114</sup> *Ibid.*

Rogers' work is emblematic of a shift in attitudes towards the theatre and thus, by extension, any field which is compared with theatre.<sup>115</sup> It is no coincidence that the earliest critics of the lawyer as performer in the trial process are all Puritans writing under Cromwell's reign in the mid-17<sup>th</sup> century.<sup>116</sup> In the 16<sup>th</sup> century commentators such as Bodin can draw on an analogy between legal agents and actors without this having negative associations, but once the Commonwealth under Cromwell is established in England, the theatre, in England, at least, becomes irrevocably tainted.<sup>117</sup> Puritan attacks on the lawyer, such as Rogers', can largely be reduced to the issue of representation. In the new Protestant faith, the idea of God speaking through an intermediary became idolatrous, and the trappings of the Catholic faith signified this blasphemous corruption. An actor purporting to play a God or a King was blasphemous, and lawyers who spoke for other people (when they should speak for themselves) were tainted as well. That there was something distinctly anti-Catholic behind the anti-lawyer writings is demonstrated by the way that the representation and showmanship that Puritan critics termed "theatrical" was condemned in the same language as the Catholic mass was condemned. Consider the following statement from Zacharisu Ursinus, a Dutch Protestant:

The Pope hath done wickedly in taking the breaking of bread from amongst the rites of the Lords supper, as also in barring the people the vse of the cup. He hath also done wickedly in adding so many ceremonies, never commanded by the Apostles. Hee hath fowly transformed the Lords supper into a theatricall masse, that is, into a foolish imitation of Iudaical traditions, & stage-like gestures.<sup>118</sup>

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<sup>115</sup> These documents refer to lawyers pleading in civil suits in the mid 17<sup>th</sup> century, as this is before defence lawyers were operating in the criminal trial. However, it shows that people at this time believed that a lawyer functioning as an intermediary was associated with ideas of corruption, falsity, and idolatry.

<sup>116</sup> Interestingly, although to the Puritans the theatre itself is anathema, the criticism of the theatre seems only partially related to the criticism of the showmanship of the lawyers. Anti-theatre writings during Puritan times usually focus on theatres and actors as sources of 'infection', referring literally to the closed, humid environment of the theatre that encouraged the spread of the plague as well as seeing theatres and actors as transmitters of social disease. Puritan commentators believed the high rates of plague infection to be symptomatic of actors' moral turpitude. See Jonas A. Barish, *The Anti-Theatrical Prejudice* (California: University of California Press, 1981). For the Puritans the law (God's law) is sacred—it is simply the practice that is routinely corrupt and ungodly. However, the whole concept of the theatre runs counter to the Puritan's strictures on frivolous entertainments and idolatrous practice.

<sup>117</sup> One of the first acts of Cromwell's government was the closure of the theatres in 1642.

<sup>118</sup> Ursinus goes on: "But most impious & idolatrous are those devises, to perswade that the masse is a propitiatorie sacrifice, wherein by the Masse-Priests Christ himselfe is offered vp to his father for the quicke and dead: and by vertue of consecration is substantially present [...] For these damnable and abominable idols it is



Puritan critics such as Rogers set the template for the understanding of the term ‘theatrical’ frequently levelled at the courtroom even today. This (primarily pejorative) theatricality is created in the separation between story and storyteller. Once counsel is present, they become a visible actor. As a counsel is not telling his (or, much later, her) own story, the demeanour of the by now passive defendant and the professional lawyer became unreadable in the centuries old understanding of how juridical truth was created and assessed. The defendant’s body as a site of truthful information was replaced with a professional skilled in the complexity of the law.<sup>119</sup> This means that the criminal trial, before legal representation, was not seen as immanently performative. For critics of legal representation, the trial was, rather, a place of truth-telling, corrupted by the advent of the lawyer. It was the lawyer who embodied ‘theatricality’, like the travelling showman, bringing ‘untruth’ and ‘perverting’ the course of justice.

The heavy mediation of our current adversarial criminal jury trial means that the use of the term ‘theatrical’ to describe this process remains ubiquitous (as well as usually pejorative). As John Langbein comments: “The striking peculiarity of the Anglo-American trial is that we remit to the lawyer-partisans the responsibility for gathering, selecting, presenting and probing the evidence [...] The court renders a verdict of guilt or innocence by picking between or among the evidence that the contesting lawyers have presented to it”.<sup>120</sup> What Langbein calls “peculiar” is what Puritan critics found unacceptable. The role of lawyer as representative, partisan and alleged truth obscurer is a significant point of continuity between 21<sup>st</sup> century attitudes and those that date all the way back to the non-criminal trials of the mid-1600s; the trial is ‘theatrical’ because the lawyer takes the stage and turns it into a show.

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very necessary that the masse bee banished from the Christian church”. Zacharius Ursinus, *A Collection of Certain Learned Discourses, Written by that Famous Man of Memory Zachary Ursine; Doctor and Professor of Divinitie in the Noble and Flourishing Schools of Neustad. For Explication of Divers Difficult Points, Laide Downe by That Author in His Catechisme. Lately Put in Print in Latin By the Last Labour of D. David Parry: and Now Newlie Translated into English, by I.H. for the Benefit and Behoofe of our Christian Country-man* (At Oxford : Printed by Ioseph Barnes, and are to be solde [by J. Broome, London] in Pauls Church-yard at the signe of the Bible, 1600), 304-305.

<sup>119</sup> Rogers’ reference to the “art” of the Inns of Court also tells us that by the mid-17<sup>th</sup> century, ‘The Law’ had become a relatively autonomous professionalised field.

<sup>120</sup> Langbein, *Origins*, 1.

## *The Adversarial Trial and the Performance of Tradition*

The dominance of the lawyer in today's adversarial criminal jury trial reflects the control of the entire juridical field over criminal process, secured by the 1840s onwards. Throughout history, following the withdrawal of the church from criminal proceedings in 1215, the juridical field has grown as a profession from informal and unregulated beginnings to a highly complex and relatively autonomous discipline complete with its own language and concept of reason.<sup>121</sup> Whilst earlier incarnations of the trial derived their legitimacy indirectly, through the Church, God or the King, 'The Law' itself has become the 'god' of the adversarial trial, both reified and elevated into a position of ultimate authority.

A complex series of factors led to this elevation of 'The Law'. Industrial development led to the increasing differentiation of labour in the late 18<sup>th</sup> and 19<sup>th</sup> centuries. This meant that fields, such as the juridical field, became increasingly specialised and considerably more autonomous. By the 19<sup>th</sup> century, this relative autonomy of the juridical field was maintained by a largely self-regulating, independent body of specialists (lawyers and, most importantly, judges who by this time *were* former lawyers). Although parliamentary statute overrides judge-made law, today in England and Australia (as well as the U.S.) the majority of criminal law is still not enshrined in formal legislation.

The decline of feudalism and the growth of a new middle class also coincided with a new conception of the individual. This individual had certain 'rights' as well as obligations, enabling what Foucault argued was the embodiment of the law in the individual.<sup>122</sup> By the 19<sup>th</sup> century, there was a shift in the operation of power from the direct control that marks forms of absolutist government, to a voluntary self-regulation.<sup>123</sup> 'Power' was no longer a

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<sup>121</sup> This transformation is only possible through the accumulation of a coherent history made possible by the formalisation of past proceedings. This legal formalisation manifests at the trial in the transition from *ad-hoc* practices to the lengthy, expensive and highly complex proceedings that we have today.

<sup>122</sup> Foucault, *Discipline and Punish*, 24.

<sup>123</sup> Rousseau argues that "man" voluntarily alienates his "natural" rights (which are governed by desire and might) to be part of a collective body known as the "Sovereign". This abrogation of individual rights is exchanged for a greater protection based on collective will. "Since no man has any natural authority over his fellows, and since force alone bestows no right, all legitimate authority among men must be based on covenants". If this consent is broken (e.g. usurped by the Prince) the social contract is instantly dissolved and no

monolithic top-down action, but rather a complex web between people and the fields of knowledge and endeavour (and institutions of these fields) within which they interacted. Liberalism emerged as a dominant philosophy, one of its precepts being that people could only be considered a society if they were governed by their own (collective) consent with consideration to “the nature and limits of the power which can be legitimately exercised by society over the individual”.<sup>124</sup> The State could only have authority over an individual insofar as it needed to prevent people from doing harm to one another.<sup>125</sup> This understanding of ‘The Law’ was consequently an example of Liberal society because it functioned as a check on absolutism, and because it was grounded in ‘reason’ rather than violent enforcement.<sup>126</sup>

This philosophy of reason presupposes the voluntary exchange of individual rights for a greater protection based on the general will of the State. This greater protection also allows a greater equality (compared to the acceptance of ‘natural’ inequality in a more formally stratified society).<sup>127</sup> The shift in operation of power to voluntary self-regulation is reflected by the absence of explicit violence in the adversarial criminal jury trial. The defendant is no longer routinely chained to the floor.<sup>128</sup> Coming to court becomes a responsibility whereby although technically summonsed, the individual seemingly enters the courtroom voluntarily.<sup>129</sup>

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person is obliged to fulfil their previous obligations. Jean-Jacques Rousseau, *The Social Contract*, (Penguin Books: Middlesex, 1968), 53.

<sup>124</sup> John Stuart Mill, *On Liberty* (London: Penguin Books, 1988), 59.

<sup>125</sup> “All that makes existence valuable to anyone depends on the enforcement of restraints upon the actions of other people”. Ibid., 64.

<sup>126</sup> Rousseau, *Social Contract*, 186.

<sup>127</sup> Rousseau is not overly optimistic, pointing out: “Such equality, we shall be told, is a chimera of theory and could not exist in reality. But if abuse is inevitable, ought we not then at least to control it? Precisely because the force of circumstance tends always to destroy equality, the force of legislation ought always to tend to preserve it”. Ibid., 97.

<sup>128</sup> Although this constraint does occasionally happen this is much rarer, usually only in cases when a defendant ‘misbehaves’. One example is the trial of the Black Panther Bobby Seale in the 1970s where the defendant was gagged and strapped to a chair.

<sup>129</sup> According to John Stuart Mill, rules are necessary but always to some degree arbitrary. Rules may feel the product of ‘reason’ but this “all but universal illusion is one of the examples of the magical influence of custom, which is not only, as the proverb says, a second nature but is continually mistaken for the first”. I argue that the trial is a prime site of Mill’s “magical influence of custom”. Mill, *On Liberty*, 15.

The elevation of reason (and ‘The Law’ as representative of this reason) also opens the door to a scientific discourse that increasingly dominates trial practice throughout the 19<sup>th</sup> century. There is a growing recognition of the role of science as a new means of finding ‘truth’ as well as a tool of dispelling superstition. Agents within the juridical field increasingly subscribe to the concept of public reason as the arbiter of the trial, with the trial deriving its legitimacy from collective consent and informed scientific debate.<sup>130</sup> This is illustrated in the adversarial trial whereby each partisan evidence gatherer presents a proposition. They then engage in reasoned debate and the jury determines the outcome. On a micro-level, too, legal language adopts scientific discourse. Now the trial talks about proof and evidence, constructing a science of trial practice and the law. These developments lead to a legal language largely opaque to the uninitiated.<sup>131</sup> Lawyers are consequently no longer merely desirable as ‘protectors’ of the interests of the plaintiff and defendant; rather they are essential guides without whom ‘lay’ trial participants cannot hope to navigate their way through ‘The Law’.

Adoption of scientific discourse allows legal practitioners to believe themselves to be impartial arbitrators and gatekeepers: scientists in pursuit of the truth.<sup>132</sup> However, this belies the role that legal agents play in interpreting and shaping ‘The Law’ which is not a monolithic, reified Liberal ideal, but rather a practice of the ever-changing juridical field. Whilst legal agents may well be the best people to interpret the law, it is also most certainly in their interests to promote this view of their expertise. Pierre Bourdieu calls this “circular reinforcement”, where “[l]ay people are obliged to have recourse to the advice of legal professionals, who little by little will come to replace the complainants and defendants. The latter in their turn become nothing more than a group of individuals who have fallen under the jurisdiction of the courts”.<sup>133</sup> By the time the adversarial criminal jury trial was firmly

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<sup>130</sup> The necessity of ‘reason’ is readily recognised by whom it excludes. Those who cannot ‘reason’ such as women, children and those deemed *non compus mentis* were excluded from having a role in a jury.

<sup>131</sup> “The professionals create the need for their own services by redefining problems expressed in ordinary language as *legal* problems, translating them into the language of the law”. Pierre Bourdieu, “The Force of Law: Towards a Sociology of the Juridical Field,” *Hastings Law Journal* 38.5 (July 1987): 833-834.

<sup>132</sup> Scientific research and scientific discourse were encouraged in England after the restoration of Charles II. Charles II, nominally Protestant, was well-read, and fascinated by scientific developments (observed on the continent during his years of exile). He flooded money into scientific research, founding the Royal Society and the Royal Observatory, so that he could indulge in debates around architecture, astronomy, and horse training. He also patronised royal theatres (presumably to extend his anatomical knowledge of actresses).

<sup>133</sup> Bourdieu, “The Force of Law,” 24.

established, lay participants had indeed become merely individuals “fallen under the jurisdiction of the courts”. In our contemporary adversarial criminal jury trial, the jury is passive (until deliberation), the defendant is silent, and the witness testimony is reconceptualised into legal discourse.

The extensive mediation of our contemporary criminal trial has become naturalised where anyone who is not represented by counsel is not believed to be ‘protected’. However, this protection involves a remittance of power and control to legal agents. Despite the decline of obvious violence of the State over the individual, adversarial trials involve a form of socialised violence whereby the gap between a layperson’s abilities and a legal specialist is increasingly emphasised to maintain a form of lay dependence on legal professionals. This force is not exerted physically, but rather through the layperson considering it in his or her own interest to hire counsel. Consequently, this manifests at adversarial trial in a performance of tradition that enacts repeatedly the sanctity of ‘The Law’ over the individual while legal agents (representing ‘The Law’) dominate passive lay trial participants who voluntarily enter into proceedings in the belief that legal agents are a necessary form of mediation and protection.

### ***Conclusion***

When a layperson enters the contemporary courtroom in Sydney, Australia, be they a defendant, witness, juror or trial observer, they are surrounded by the signification of past authority systems, despite the increasing professionalisation and secularisation of the legal trial. Today, despite the apparent secularity of the courts (in Australia at least), witnesses frequently swear on a Bible (although a non-religious oath is offered). The inscription *Dieu et Mon Droit* also remains prominently displayed in every courtroom in Australia (the U.S. Supreme Court has numerous depictions of Moses and the Ten Commandments). Barristers still wear costumes that are markers of 17<sup>th</sup> and 18<sup>th</sup> century English aristocratic fashion. Pierre Bourdieu terms these forms of signification *homologies*: a continual pattern of tying the present to the past whereby past markers of authority are retained to increase the antiquity and authority of the trial, emphasising its universality and timelessness.<sup>134</sup> These homologies

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<sup>134</sup> Bourdieu, *The Field of Cultural Production*, 44.

have aided the trial's ordination in the public imagination as not just a part of legal procedure, but central to what we understand as 'The Law' itself: the 'fair trial'. Yet despite the trial's steady standing in social belief, the criminal trial does not have a straightforward pattern over history, nor has it always been based on a coherent and consistent body of rules. The trial is not a static institution but rather a practice of an ever-changing juridical field.

What binds this history together is the performance of tradition; the consistent feature of all three forms of trial, from trial by ordeal to our contemporary adversarial criminal jury trial. The performance of tradition in our contemporary trial continues to reinforce the gap between laypersons and 'The Law', positioning legal agents as the gatekeepers between the higher authority of 'The Law' and the uninformed individual. In the following chapter, I will clarify how the performance of tradition operates. In so doing, I will expand on and contextualise a number of themes raised in this chapter: the autonomy of the law, socialised violence and presence. I do this by drawing extensively on sociological and performance theory, arguing that the performance of tradition relies on the exploitation of the symbolic value of live performance.

## Theories of the Trial as Performance

It seemed at times that we were all serving the interests of entertainment: American lawyers in London over for their Bar conference would jostle for seats in the public gallery as they might at a theatre, their roars of laughter silenced by ushers booming cries of “Silence!” followed by the judge’s regular threat to clear the public gallery. “This is a courtroom, not a theatre” he would remind them repeatedly. John Mortimer would leave the courtroom each afternoon for the Vaudeville Theatre (where *A Voyage Round My Father* was being rehearsed) with a sense that he was returning to real life.

Geoffrey Robertson, *The Justice Game*<sup>135</sup>

The courtroom, particularly a trial courtroom, seems to be a forum for people, who are so inclined, to behave inappropriately. Something about the theatre aspect of it.

Anita Blumstein Brody et al., “Women on the Bench,”<sup>136</sup>

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<sup>135</sup> Geoffrey Robertson, *The Justice Game* (London: Vintage, 1999), 27-28.

<sup>136</sup> Anita Blumstein Brody et al., “Women on the Bench,” (Symposium) *Columbia Journal of Gender and Law* 12.2 (2003): 373.

## ***Introduction***

Prominent American celebrity lawyer Melvin Belli once said: “A lawyer’s performance in the courtroom is responsible for about 25 percent of the outcome; the remaining 75 percent depends on the facts”. Belli’s quip, though sarcastic, sums up a significant proportion of the academic writings that analyse the role of performance in the criminal trial. These writings tend to concentrate on the dominance of the lawyer and consequently see the trial only as a means of conflict resolution. I argue throughout this chapter that the role of performance in the adversarial criminal jury trial involves more than the performing lawyer. As outlined in the previous chapter, the adversarial criminal jury trial is a performance of tradition that positions the trial itself in society as an unchanging bulwark of justice and authority.

To clarify my own argument as to how this performance of tradition takes place, I analyse and synthesise the body of academic writings that examine the perceived relationship between the trial and performance. Examination of this material reveals a multiplicity of approaches: some writers see the trial *as* theatre, whilst others see only certain aspects of the trial as theatrical or performative. I begin by examining writings that concentrate on the cosmetic resemblance between the theatre and trials, in which the latter provides a site of ‘drama’. These writings illustrate the highly selective and partial construction of the theatrical analogy that tends to either dismiss theatre as corrupt or mere entertainment, or conversely *use* the theatrical metaphor to idealise the trial process.

I then examine the work of legal academics that uses anthropological, linguistic and sociological approaches to argue for a more fundamental relationship between performance and the criminal trial. These writings suggest that the trial is a social process involving control, coercion and symbolism. However, these approaches may be criticised for the fact that they are often overly functionalist and also tend to draw on loose understandings of performance. In the final section of the chapter, I outline my own argument as to the performativity involved in the criminal trial. Drawing on the work of Philip Auslander, Michel Foucault, and Pierre Bourdieu, I discuss the trial as a site of collective unconscious



performativity. I argue that in the criminal trial process legal agents largely unconsciously exploit the symbolic value of live performance. The unconscious enactment on the part of both laypersons and legal agents sustains the *performance of tradition*.

### ***“Is” Performance/“As” Performance***

Elizabeth Burns writes: “[D]egrees of theatricality are culturally determined. But theatricality itself is determined by a particular viewpoint, a mode of perception”. She goes on:

Behaviour can be described as ‘theatrical’ only by those who know what drama is, even if their knowledge is limited to the theatre in their own country and period [...] Behaviour is not therefore theatrical because it is of a certain kind but because the observer recognises certain patterns and sequences which are analogous to those with which he [sic] is familiar in the theatre.<sup>137</sup>

What anyone chooses to classify as performative involves a particular form of recognition. As Richard Schechner expresses it, “whether an event is theatre or not, performance or not, depends on the dominant thinking of the day”.<sup>138</sup> This chapter, then, is a means of tracing the “dominant thinking” as to what constitutes the theatricality or performativity of the criminal trial. As such, I have grouped the writings below into several categories constructed around similar patterns of thought.<sup>139</sup> My intention in this chapter is not to determine a finite meaning for the theatricality or performativity of the trial. Rather, my intention is to analyse how each approach involves an implicit delimitation of what is meant by theatre or performance. These delimitations reveal the beliefs and values underpinning the writer’s attitudes towards both the trial and the theatre, the shared patterns of recognition that Elizabeth Burns points towards.

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<sup>137</sup> Burns, *Theatricality*, 12-13.

<sup>138</sup> Schechner, *Performance Studies*, 31.

<sup>139</sup> The relationship between the trial and performance is not a topic widely written about and this chapter accounts for much of the material that exists. Although I have divided these writings into categories, it should be acknowledged that they do not represent a coherent or consistent genealogy, but rather are highly disparate in terms of discipline, year, and location. The vast majority is U.S. scholarship, reflecting the disproportionately higher number of American publications as well as the arguably greater interest in cross-disciplinary legal scholarship in America as compared to Australia or the U.K.

One means of tracing these patterns is to follow Schechner's distinction between "'is' performance" and "'as' performance". For Schechner, something "'is" performance when "historical and social context, convention, usage, and tradition say it is". This involves a culturally specific recognisable demarcation of an event. However, any form of behaviour or action can be analysed "as" performance. Performance in this broader sense involves "making belief—enacting the effects [the performers] want the receivers of their performances to accept 'for real'".<sup>140</sup>

Broadly speaking, in this chapter the first two categories of scholarly literature I review, writers who draw on the physical resemblance between the trial and the theatre, and those who stress the drama of the trial, can be seen as working within the "'is" performance" category, whereas the subsequent anthropological and sociological writings fall more under the rubric of "as" performance. The boundaries are not clearly marked however. As Schechner himself notes, this division is vanishing in what he designates (drawing on the work of sociologist Erving Goffman) as the increasing recognition of many activities as performance: "[a]t present, there is hardly any human activity that is not a performance for someone somewhere. Generally, the tendency over the past century has been to dissolve the boundaries separating performing from not-performing, art from not-art".<sup>141</sup>

### ***Trials and Drama***

A large proportion of the academic writings examining the perceived relationship between the trial and performance concentrate on what I termed the 'cosmetic' resemblance between the two processes. That is, for these writers, the term 'theatricality' denotes shared conventions between the trial and theatre, such as costuming, props, ritual procession, symbolism, and space for audience. All of these shared conventions are forms of framing around the most important shared feature: that of the 'actor'. In these writings, the lawyer is

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<sup>140</sup> Schechner, *Performance Studies*, 30-37.

<sup>141</sup> Ibid., 32. Erving Goffman's book *The Presentation of Self in Everyday Life* argues that we are constantly performing ourselves to other people, and that this is a conscious process whereby we are likely to adapt our behaviour to present ourselves as advantageously as possible. See Erving Goffman, *The Presentation of Self in Everyday Life* (New York: Anchor Books & Doubleday, 1959).

invariably compared to an actor in the theatre.<sup>142</sup> Two trends stand out amongst these writings dealing with cosmetic resemblances and the lawyer-as-actor: firstly, there are the writings that draw on the anti-theatrical metaphor, as outlined in the previous chapter. Theatricality for these writers is constituted by the courtroom's association with the artificial and the 'showy'. As Peter Murphy puts it: "most of us seem to have an undefined feeling that there must be something wrong with acting in court, that the courtroom and the theatre are, and must be, different worlds".<sup>143</sup>

These writings draw on a relatively simplistic analogy that uses a particular definition of theatre; that of a traditional playhouse that stages dramatic fiction.<sup>144</sup> This is not to state that the objects and symbols cited (such as props and costuming) may not serve a very real symbolic purpose to reinforce the authority of the law.<sup>145</sup> However, theatre is dismissed as mere entertainment compared to the serious function of the trial.<sup>146</sup> For these writers, all the points of comparison identified foreground the potential of the trial to "*degenerate* into mere theatre".<sup>147</sup>

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<sup>142</sup> See (amongst many): Editorial (Anon), *Central Law Journal* 3 (1876); Gail McGuire and Kristen Ramsey, "Litigation Publicity: Courtroom Drama or Headline News?," *Communication and the Law* 22 (2000): 80.

<sup>143</sup> Peter Murphy, "There's No Business Like..?," Some Thoughts on the Ethics of Acting in the Courtroom," *South Texas Law Review* 44.1 (2002): 111.

<sup>144</sup> Although the pejorative attitude towards the theatre is still largely consistent with that of the Puritan authors outlined in the previous chapter, what is understood by 'theatre' has shifted. Whereas with the Puritans, the issue of representation was the point of unease, for post-Restoration writers, the theatre has become a professionalised leisure activity and therefore seen as increasingly 'stagy' and melodramatic.

<sup>145</sup> As I argue throughout this thesis, we often dismiss traditional symbols, such as those in courtrooms as 'purely symbolic'; that is, detached from any referent. I propose, alternatively, that these symbols continue to affect people unconsciously and/or help to maintain particular ideological ideas that have become naturalised over time. I will extend this discussion further when examining the formation of collective belief later in the chapter.

<sup>146</sup> Of course, there is not a dichotomy between the two. Historically the criminal trial has long been a source of entertainment for a community. Even today, there are still regular court-watchers to be found at the Old Bailey.

<sup>147</sup> Seymour Thompson and the Hon. John F. Dillon, eds., "An International Tribunal," *Central Law Journal* 2 (1875): 635, my italics. The most interesting example of this potential cross-over is a trial in 1916 where, due to overwhelming public interest, the trial was moved from the courtroom to a theatre down the road that could more adequately accommodate the spectators. The defendant's conviction was overturned on appeal due to the overly prejudicial staging of his trial: "At the adjournment of court on one occasion, the bailiff announced from the stage: 'The regular show will be tomorrow; matinees in the afternoon and another performance at 8:30.

As with Geoffrey Robertson's quotation cited at the beginning of this chapter, there is an implicit understanding for these writers that the courtroom is not meant to be a theatre. Theatre is predicated on pleasure and leisure and actors are professional 'fakers'. The courtroom, on the other hand, is a serious place for making important decisions. Consequently, the comparison is unbecoming. Ultimately these writers emphasise that, despite the significant similarities between the two sites of cultural production, the courtroom is not a theatre (or should not be a theatre), because there are 'real' consequences for participants in the trial.<sup>148</sup> Allan Greenberg thus argues that confusion between the trial and a theatre is a "fundamental misconception of the values involved".<sup>149</sup> Or, as Adi Parush insists, "obviously a law court remains a law court and theatre is after all just theatre".<sup>150</sup>

This trend in the literature stresses the inappropriateness of comparing a form of entertainment with a process that has such real effects on people's lives.<sup>151</sup> Larry Geller and Peter Hemenway make the most explicit comment about the apparent limitations of the relationship: "If the stakes weren't so high, courtroom theatrics could often be considered entertainment".<sup>152</sup> There is continuity between these arguments and those outlined in the previous chapter. As Elizabeth Burns pointed out, when theatre is classified as artificial and

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Court is now adjourned until 7:30". Quoted in Milner Ball, "The Play's the Thing: An Unscientific Reflection on the Rubric of Courtroom-as-Theater," *Stanford Law Review* 28 (1975): 84.

<sup>148</sup> Although legal scholars are seeking to make a distinction between a process that puts one's livelihood/future in jeopardy and a site of entertainment, rather than conflating the two, this distinction between the real (in the courtroom) and the entertainment (in the theatre) indicates an assumption that the arrangement of signs in a theatre (e.g. the placement of the stage, curtains, or any other feature common to a proscenium-arch traditional theatre) has no ideological basis. It is arguably this misrecognition (of the benign role of tradition) that means they also overlook similar uses of symbols in the trial process. For a specific semiotic analysis of the courtroom space that draws on theatrical analogy, see Kenneth B. Nunn, "The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—a Critique of the Role of the Public Defender and a Proposal for Reform," *American Criminal Law Review* 32.3 (1995).

<sup>149</sup> Allan Greenberg, "Selecting a Courtroom Design," *Judicature* 59.9 (1976): 12.

<sup>150</sup> Adi Parush, "The Courtroom as Theater and the Theater as Courtroom in Ancient Athens," *Israeli Law Review* 35 (2001): 136.

<sup>151</sup> Gail Ramsey and Kristen McGuire continue this argument, saying: "the courtroom is not ultimately about issues and legal theories but about people and the lives that they live". Ramsey and McGuire, "Litigation Publicity," 80.

<sup>152</sup> Larry Geller and Peter Hemenway, "Argument and Courtroom Theatrics," *National Association of Administrative Law Judges* 16.2 (1996): 179.

somehow deviant, this implicitly relies on an unstated ‘authentic’ and uncomposed behaviour. In this instance, the courtroom is a site of ‘authentic’ behaviour, whereas the theatre remains artificial. Consequently, any intrusion of theatrical process into the courtroom is positioned as potentially corruptive.

Detailed analysis of how the trial comes to have features in common with ‘theatre’ is not attempted in these articles; rather the relationship, predicated on physical resemblance, is taken as an unproblematic given.<sup>153</sup> This unexplored comparison is commonplace, reflecting the pervasiveness of the metaphor. Sheila Murnaghan comments that “the insight that the law can be analysed as a form of theatre has been instructively elaborated in recent decades, so that it has become easy to recognize the theatrical nature of legal procedure and especially of the trial”.<sup>154</sup> Yet Murnaghan’s comments leave a number of details unexplained. Firstly, Murnaghan assumes that law is a form of theatre, the implication being that legal practice is a subset of a broader theatrical spectrum. Secondly, there is a reference to “theatrical nature” without any clear identification of what she means by this. Murnaghan’s article is reflective of many writings in the area that are often vague as to what they mean by ‘theatre’ or ‘performance’.

Murnaghan’s article, however, reflects an increase in interest in investigating the relationship between the criminal jury trial and performance in the last thirty years. This increase in interest has resulted in the second major trend in the literature that focuses on ‘cosmetic’ resemblances between the trial and the theatre. This trend is strikingly different to the anti-theatrical approach as this body of work draws on theatrical analogy, that of ‘drama’, to valorise legal processes. Murnaghan’s article prefaces a journal issue devoted to this perceived relationship between ‘drama’ and the trial. This alternative position, arising from the ‘Law as Literature’ movement, rejects the pejorative attitude employed by other writers towards the theatre.<sup>155</sup> Instead, in these writings scholars position theatre as a place that

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<sup>153</sup> Pnina Lahav, writing in 2004, claims that “compared to the voluminous bibliography on law and literature, there has been little effort at theorizing the meaning of theatre in the courtroom”. Pnina Lahav, “Theatre in the Courtroom,” *Law And Literature* 16.3 (2004): 451.

<sup>154</sup> Sheila Murnaghan, “Staging Ancient Crimes: A Response to Aristodemou, Tieffenbrun, Purkiss and Pantazakos,” *Cardoza Studies of Law and Literature* 11.1 (1999): 77.

<sup>155</sup> The interdisciplinary ‘Law as Literature’ studies of the early 1970s in many respects paved the way for studies of the theatricality of legal processes, as the ‘Law as Literature’ movement produced the first academic

explores human conflict through drama. As such, they see a direct parallel between the courtroom and the theatre.

One of the first articles specifically dealing with this analogy is Richard Harbinger's 1971 article "Trial by Drama". In this article, Harbinger argues that the trial is essentially a play within a play and therefore a "dramatic thing" rather than a "legal thing".<sup>156</sup> There is the "play without", which is what he terms the dramatic combat of the advocates, and the "play within" or the "crime drama" that is the narrative of the alleged crime. When referring to the "play without", Harbinger is essentially referring to the confrontational structure of the adversarial system and when discussing the narrative(s) presented in court, the drama is the story. He therefore defines drama as generated by conflict. This double conflict requires resolution or, in his words, "catharsis". The end-point of the trial has both conflicts resulting in one winner, and one loser—triumph or tragedy.

This is a pseudo-Aristotelian construction that reflects popular understanding of Aristotelian dramatic theory.<sup>157</sup> In this understanding, *catharsis* is where an audience is 'hooked' on a story designed to evoke (and subsequently purge) their pity and terror. This interpretation of Aristotle suggests that if a play is devised or written following certain guidelines, it will achieve the desired end, implying that the actors' performances are little more than a vehicle for the moving story, and that the narrative has an inevitable outcome. By drawing on this theory, Harbinger foregrounds the centrality of storytelling, the power of the lawyer to create this narrative and the passivity of the jury/audience who do not have control over their

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articles to consider the language and structure of the trial process—from this, a number of academics began to note the dramatic structure of the trial. However, because the earliest work in this field developed primarily from a relationship between Law and English Faculties, the concept of 'theatre' grew out of 'drama' as classified in English faculties where 'drama' is primarily based on the written play text. See Richard Posner, *Law As Literature: A Misunderstood Relation* (Harvard University Press: Cambridge, 1988).

<sup>156</sup> Richard Harbinger, "Trial By Drama," *Judicature* 55.3 (1971).

<sup>157</sup> I use the term 'pseudo-Aristotelian' as the dominant understanding of Aristotle in Western dramaturgy is not necessarily reflective of Aristotle's own meaning. Whilst we have interpreted 'catharsis' in a particular way, it is not clear what Aristotle himself meant by this term. Ultimately, this is because we are highly limited in our access to his own writings. For the relevant work that Harbinger is drawing on, see: Aristotle, *Rhetoric and On Poetics* (Pennsylvania: Franklin University Press, 1981).

emotions and are caught in the lawyer's spell.<sup>158</sup> Harbinger also implies that it is a lawyer's (written) script that forms this narrative, downplaying any role the phenomenon of live performance in the courtroom might have.<sup>159</sup>

Ronald Sokol follows this pseudo-Aristotelian line arguing that the "dramatic structure" of the trial arises from conflict, as "the essence of drama is conflict".<sup>160</sup> Sokol argues that 'conflict' is the central concept shared by both the trial and the written play, comparing the conflict between advocates at trial directly to the conflict in a work of fiction. The space of the courtroom is a site for these stories to be realised; however, it is the stories themselves, not their presentation, that are key to the 'drama' of the trial. However, unlike Harbinger, Sokol emphasises that as there is more than one story being told, advocates must employ powers of persuasion to sway the jury. For Sokol the performance of this dramatic conflict is consequently highly important because that is how the outcome is determined (and *catharsis* subsequently achieved). Sokol's stance positions the audience/jury as considerably less passive than Harbinger. However, how this persuasion is achieved, and how the storytelling is enacted in space is not a particular point of interest. Both Sokol and Harbinger refer in passing to the concept of 'presence' as well as to the 'charisma' of the advocate but do not interrogate these concepts further. Both writers imply that each trial, driven by a 'dramatic' conflict, will lead to an inevitable outcome.

Sokol also separates his understanding of 'drama' from the 'theatrical' in his theory of the trial. Writing about political trials, Sokol notes that the political defendant can use the courtroom as a stage to disseminate his views to a captive audience. For Sokol, then, the stage is a potential soapbox. The more the defendant uses the courtroom for these political

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<sup>158</sup> Harbinger's interpretation reflects a conflating of the oral practice of storytelling with dramatic structure that occurs frequently in popular interpretation of Aristotelian theory. Harbinger's interpretation also reflects the historical trends of the silencing of the defendant, the dominant role of the lawyer and the relative passivity of a jury. Previous incarnations of the trial involved jurors questioning the defendant, and defendants themselves questioning the witnesses and telling their (unmediated) stories.

<sup>159</sup> The emphasis on storytelling is actually quite distinct from Aristotle's own theory, where he argues that it is the plot (or the action) that distinguishes drama from epic (narrative): "[...] it is the action in it, i.e. its Fable or Plot, that is the end and purpose of the tragedy; and the end is everywhere the chief thing". See Aristotle, *Rhetoric*, 211.

<sup>160</sup> Ronald Sokol, "The Political Trial: Courtroom as Stage, History as Critic," *New Literary Theory* 2.3 (1971): 500.

ends, the more ‘theatrical’ it becomes. This suggests for Sokol that although the trial is “essentially dramatic”, a ‘full-blown’ theatricality only arises when trial participants ‘play up’ or ‘act out’, thereby theatricalising the proceedings.<sup>161</sup> Sokol deliberately frames the ‘dramatic’ (good) in opposition to the ‘theatrical’ (bad). Sokol’s attitude towards the theatrical is consistent with earlier writers who see theatricality as deviant (and inappropriate for a court of law).

Milner S. Ball, also writing about drama and the trial, does not accept the division between theatrical (bad) and dramatic (good).<sup>162</sup> Whilst Ball also emphasises the “dramatic structure” of the trial, unlike Harbinger and Sokol he draws upon 20<sup>th</sup> century theatre practitioners Jerzy Grotowski and Peter Brook to define performance as “[that which] takes place between spectator and actor”.<sup>163</sup> For Ball the trial is “essentially theatre” and this is constituted by the encounter between spectators and performers/trial participants in a shared space.<sup>164</sup> Consequently, for Ball, the relationship between courtroom and theatre goes beyond dramatic structure. The shared characteristics between the two processes are so strong that he actively defines the trial as “judicial theatre”.<sup>165</sup> What Ball (and, more recently, Lerner, Hoffer, Tow, and Bernstein and Milstein) also does is to use theatrical analogy to idealise the trial process.<sup>166</sup>

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<sup>161</sup> Sokol seems to suggest that it is the defendant who may make the space ‘theatrical’ through his or her (mis)behaviour, whereas the advocates’ behaviour is connected with their professional role, and therefore falls within the realm of drama and storytelling, so escaping being tarred with the theatrical brush. Pnina Lahav argues similarly to Sokol. Focusing specifically on the Chicago Conspiracy Trial (where defendant Bobby Seale was famously bound to a chair and gagged), Lahav’s theoretical framework primarily draws on literary notions of ‘drama’ (text, script, action) as well as drawing on Peter Brook’s work, *The Empty Space*, where she distinguishes between different forms of theatre such as “rough theatre”. Lahav, too, argues that certain kinds of Brook’s theatre are appropriate for law, but that it can frequently “degenerate” into spectacle. As she comments: “rough theatre makes bad law”. The Chicago Conspiracy Trial is an example of the courtroom-theatre being turned into ‘spectacle’; again, the theatricalising of the event occurs when a trial participant ‘acts up’. Lahav, “Theatre in the Courtroom,” 446.

<sup>162</sup> Ball, “The Play’s the Thing”; Milner Ball, “All the Law’s a Stage,” *Fictions of Law* 11.2 (1999).

<sup>163</sup> Jerzy Grotowski, *Towards a Poor Theatre* (London: Methuen Drama, 1968), 32. See also Peter Brook, *The Empty Space* (London: Penguin Books, 1968).

<sup>164</sup> Ball, “All the Law’s a Stage,” 121.

<sup>165</sup> Ball, “The Play’s the Thing,” 86.

<sup>166</sup> Daniel Lerner, “Justice and Drama: Historical Ties and ‘Thick’ Relationships,” *Legal Studies Forum* 22.1/2 (1998); Daniel Lerner, “Teaching Justice: The Idea of Justice in the Structure of Drama,” *Legal Studies Forum* 23.1/2/3 (1999); Peter Charles Hoffer, “Invisible Worlds and Criminal Trials: The Cases of John Proctor and



Ball argues that the trial, like serious theatre, “holds up a mirror to legitimate society” and emphasises the “humanizing dimension of courts”.<sup>167</sup> His adoption of Grotowski’s minimalist definition of performance enables him to locate the courtroom confrontation, the theatrical event, within the trope of a shared, intimate, human encounter.

Ball asserts that “judicial theatre performs and animates a fit form of decision-making for our version of democracy”.<sup>168</sup> For Ball, performative storytelling by legal agents in the trial is central to democratic process. Jurors who deliberate on the competing stories presented to them at trial are obliged to throw off “the corrosive effects of our culture’s devotion to the self and exclusive fascination with individual rights”.<sup>169</sup> As such, performative storytelling functions in an allegorical way, refocusing the purpose of the trial’s participants on the greater good of society. John Gillespie shares with Ball the belief that both the trial and ‘drama’ have a higher purpose. Gillespie writes an article comparing the trial not only with a play, but also more specifically with a mediaeval morality play. Gillespie argues that:

The criminal trial may be considered as a play, allegorical in structure, which has for one of its objects the teaching of some lesson for the guidance of life, and in which the principal characters are personified abstractions or highly universalised types.<sup>170</sup>

For Gillespie, it is not enough to claim that the trial is a theatre simply because people role-play: a “football match is [also] a dramatic event, but it would be absurd to consider it as theatre”. What makes a trial a form of theatre is its structural similarity to the ‘serious’ play, where there is a “political, philosophical, or moral lesson”.<sup>171</sup> The passivity of the jury is therefore a positive thing, because the storytelling process undertaken by legal agents in the courtroom is a form of didactic enlightenment for the jury members.

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O.J. Simpson,” *The American Journal of Legal History* 41.3 (1997); Allan Tow, “Teaching Trial Practice and Dramatic Technique,” *Journal of Paralegal Education and Practice* 13.1 (1997); Mark I. Milstein and Laurence R. Bernstein, “Trial as Theater,” *Trial* 33.10 (1997).

<sup>167</sup> Ball, “The Play’s the Thing,” 110.

<sup>168</sup> Ball, “All the Law’s a Stage,” 121.

<sup>169</sup> Paul Ricoeur, quoted in Ball, “All the Law’s a Stage,” 218.

<sup>170</sup> John Gillespie, “Theatrical Justice (Criminal Trial as a Morality Play),” *Northern Ireland Legal Quarterly* 31.1 (1980): 67.

<sup>171</sup> *Ibid.*, 67.

The argument that Gillespie presents of the allegorical or didactic value of serious drama is dominant throughout scholarly writings dealing with the ‘drama’ of the trial. In these writings, storytelling in the courtroom shares with theatre the ability to reveal the ‘Truth’.<sup>172</sup> Allan Tow describes “dramatic technique” as “humanism”. He states: “as such, acting and law are ultimately manifestations of civilised human behaviour”.<sup>173</sup> Milstein and Bernstein claim that “both trials and live theatre educate as they persuade”. They claim “the jurors have heard with their eyes and seen with their hearts”.<sup>174</sup>

As can be seen from the above, however, writers who valorise the adversarial criminal jury trial through comparing it to the theatre are very careful about how the relationship between the two is positioned. Rather than emphasising the trial being like theatre, these writers stress that the trial has similarities to certain kinds of theatre. The relationship between what might be termed ‘high drama’ (classical tragedy, Shakespeare, Brook’s Holy theatre) and the trial is used to position the trial as a classical theatre that persuades, educates, and imparts wisdom.<sup>175</sup>

Although this analysis is more complex than those which previously used the drama/theatre analogy within the frame of an anti-theatrical prejudice, both kinds of analyses examined above overlook key aspects of the adversarial criminal jury trial process. For all of these writers the role of the lawyer, and his or her narrative of the case within the trial, is what primarily constitutes theatricality.<sup>176</sup> This is partly a matter of positioning; most of the writers above are legal practitioners and, as such, have a vested interest in justifying their position. This manifests in either idealising the trial *and* the theatre or idealising the trial *at the expense of* the theatre. It also reflects the very real dominance lawyers have attained over the last two

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<sup>172</sup> This also links back to Aristotelian writers who emphasise the ‘inevitability’ of the outcome (that seems to sidestep the possibility of judicial error).

<sup>173</sup> Tow, “Teaching Trial Practice and Dramatic Technique,” 96.

<sup>174</sup> Milstein and Bernstein, “Trial as Theater,” 66. This is not a new argument. For an account of the historical ‘humanising’ dimensions of trial, see Julie Stone Peters, “Theatricality, Legalism, and the Scenography of Suffering: The Trial of Warren Hastings and Richard Brinsley Sheridan’s ‘Pizarro,’” *Law and Literature* 18.1 (2006).

<sup>175</sup> “Trials dramatise law and morality”. Lawrence M. Friedman, “Lexitainment: Legal Process as Theater,” *DePaul Law Review* 50.2 (2000): 542.

<sup>176</sup> This is true even of those who concentrate on the resemblance between the trial and the theatre. In these writings, the trappings of resemblance are more often than not posited as a framework for the lawyer-as-actor. This idea of the lawyer-as-actor is expanded in the following chapter on advocacy training.

centuries in the adversarial system. However, by concentrating on the lawyer, the trial is defined by the ‘narrative’ of a particular case, or the behaviour of a legal agent. This means these writings tend to overlook other participants in the trial, and also see the trial’s function as limited to those directly involved in the proceedings.

### ***Ritual and Speech-Act Theory***

For legal anthropologists, the purpose of a trial is not limited to dealing with those who are directly involved in an alleged crime. Rather, legal anthropologists posit the criminal trial’s purpose as collective ritual: a public place to resolve private disputes witnessed by a community. Emiliano Buis states: “Theatre and court are means to represent both collective and symbolic events in a public sphere. Both spectacles are, thus, social rituals”.<sup>177</sup> Very simply, a ritual can be defined as a performed social process that takes place within a demarcated space.<sup>178</sup> This ritual space is a discursive and reflexive social space for a community. Legal anthropological approaches to analysing the trial bear out Schechner’s comments on the difficulty of clearly distinguishing between his categories of “‘is’ performance” and “‘as’ performance”. For these writers the trial *is* a performance, but the trial also functions *as* a performance of collective belief; both of these functions are bound up in the idea of the trial as a ritual.

Anthropologist Victor Turner schematised a structure of ritual and its role in social life in *The Anthropology of Performance*.<sup>179</sup> Turner was interested in identifying the relatively universal impetus behind ritual as well as the patterns he claimed were observable in the life of a society (subject to variation based on social and economic development). Turner argues that this pattern of a community over time is essentially ‘dramatic’, calling it *social drama*. Turner divides *social drama* into the four broad stages a community undergoes in some form when there is disruption in their ongoing communal existence: breach, crisis, redress, and

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<sup>177</sup> Emiliano Buis, “How to Play Justice and Drama in Antiquity: Law and Theater in Athens as Performative Rituals,” *Florida Journal of International Law* 16.3 (2004): 697.

<sup>178</sup> Ransford Pyle states: “I will define ritual as collective, non-instrumental, meaningful behaviour. These three characterisations of behaviour concern me most about the relation of ritual to law”. Ransford Pyle, “Law, Ritual and Language,” *American Legal Studies Association (ALSA) Forum* 8.3 (1984): 382.

<sup>179</sup> Victor Turner, *The Anthropology of Performance* (New York: PAJ Publication, 1988).

either reintegration or irreversible schism if the redress fails.<sup>180</sup> Turner states that: “[t]he social drama is an eruption from the level surface of ongoing social life”.<sup>181</sup> The first stage, “breach”, can cover events that include an overt disruption (such as a crime being committed), as well as take the form of potential developmental crises (for example puberty, where there is a potential, rather than explicit, breach). Regardless of what form this “breach” takes, Turner argues that a community faces a “crisis” because of the non-conformity (or potential non-conformity) to the social mores that the community ‘normally’ lives by. It is how this threat is dealt with—the third stage of social drama, that of “redress”, that Turner argues is the impetus for all ritual.

Ritual itself, for Turner (following the work of Arnold Van Gennep), is a tripartite process: separation, liminality and re-aggregation.<sup>182</sup> According to Turner, for a ritual to take place, the participant has to be separated in some way from his/her normal life, usually by being taken to a specifically demarcated space. This functions as a kind of ‘removal’ of the participant from temporality and normality. Once within this space the ritual takes place. For a ritual to be successful, a state of ‘liminality’ has to be reached. Liminality means, literally, ‘in between’ or on the threshold. Turner goes on to say: “just as the subjunctive mood of a verb is used to express supposition, desire, hypothesis, or possibility, rather than stating actual facts, so do liminality and the phenomena of liminality dissolve all factual and commonsense systems into their components and ‘play’ with them in ways never found in nature or in custom, at least at the level of direct perception”.<sup>183</sup> The liminal phase involves a heavy use of symbolism, costume, and is a place where a community “tells stories about themselves”.<sup>184</sup> Turner argues that without forms of redress, such as ritual, a community faces ongoing upheaval and potential revolution. Ritual functions not only as a means of public satisfaction

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<sup>180</sup> See Victor Turner, “Are There Universals of Theatre, Dance and Drama,” in Richard Schechner and Willa Appel, eds., *By Means of Performance: Intercultural Studies of Theatre and Ritual* (Cambridge: Cambridge University Press, 1990).

<sup>181</sup> Turner, *The Anthropology of Performance*, 90.

<sup>182</sup> Arnold Van Gennep’s 1909 book, *The Rites of Passage*, outlined a tripartite ritual structure of “preliminal rites (rites of separation), liminal rites (rites of transition) and postliminal rites (rites of incorporation)” although he goes on to say that “these three types are not always equally important or equally elaborated”. See Arnold Van Gennep, Monica B. Vizedom and Gabrielle L. Caffee, trans., *The Rites of Passage* (London: Routledge, 1977), 11.

<sup>183</sup> Turner, *The Anthropology of Performance*, 25.

<sup>184</sup> *Ibid.*, 25.

of private wrong (in the case of a crime being committed) or enfranchisement (for “prophylactic” or pre-emptive forms of redress) but also as a means of normativity and entrenching the dominant values of those in authority. Bringing the outsider successfully back under the umbrella of the community not only averts crisis but also bolsters the authority of the status quo.

For Turner, ritual is one of a series of means of potential redress, which includes political processes, or forms of legal-judicial redress. Although ritual is often cited as a separate category in Turner’s work from “judicial-legal forms of redress”, referral to Turner’s work suggests he sees each form of redress as interlocking processes, all of which, to some extent, partake of one another. Turner explicitly argues that legal ritual has a distinct ‘family resemblance’ to other forms of ritual. Drawing on the work of legal anthropologists Sally Falk Moore and Barbara Myerhoff, Turner argues that order remains an overriding concern in legal forms of redress. Ultimately legal ritual, according to Falk Moore and Myerhoff, “gives form to that which it contains—for ritual is in part a form, and a form which gives meaning (by ‘framing’) to its contents”.<sup>185</sup> In the case of crime, the aim of legal ritual, for Turner, is the reintegration into the community of the wrong doer and the concomitant restoration of balance that occurs in stage four of Turner’s social drama (if successful; however if the redressive process is unsuccessful this results in the alternative fourth stage of social drama—that of irreversible schism).

Although Turner’s term *social drama* charts the broad means by which a community collectively attempts to resolve disputes, Turner sees this process as an entirely necessary one by which a society may forge its identity and uphold its values. Consequently, although *social drama* is the means by which a community responds to a “crisis”, society repeatedly undergoes different forms of ‘social drama’ over time, and through sustaining itself as a community is strengthened in its beliefs through successful redress. Turner’s emphasis on a theory of a society repeatedly reasserting its identity reflects his increasing moves towards a theory of “culture as process” as outlined by Sally Falk Moore. Falk Moore’s book, *Law as Process*, argues that rather than seeing what she calls “indeterminacy”, and “situational adjustment” as interruptions to ongoing social life, analysis of social life should see processes

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<sup>185</sup> Sally Falk Moore and Barbara G. Myerhoff, *Secular Ritual* (Amsterdam: Van Gorcum & Co, 1977), 8.

of continuity, indeterminacy and situational adjustment as co-existing, and intergenerative. Falk Moore states:

[...] strategies used in situational adjustment [...] if repeated sufficiently often, by sufficient numbers of people, may become part of the processes of regularization. Analogously, if new rules are made for every situation, the rules cease to be part of the processes of regularization and become elements of situational adjustment. Thus each of these processes contains within itself the possibility of becoming its schematic opposite.<sup>186</sup>

She goes on to say:

whether these processes of regularization are sustained by tradition or legitimated by revolutionary edict and force, they act to provide daily regenerated frames, social construction of reality, within which the attempt is made to fix social life, to keep it from slipping into the sea of indeterminacy.<sup>187</sup>

Whilst Turner was increasingly drawn to this idea of constant ‘situational adjustment’, Lowell Lewis argues: “Turner himself was unable to articulate fully a theory of culture as process, developing a model of dynamic change based on the alternation between structure (as daily life) and anti-structure (as ritual process)”.<sup>188</sup> However, Turner did increasingly emphasise the value of inversion, play, and the liminal/liminoid. The most important aspect of ritual for Turner, then, is its “dialectical and reflexive” qualities. For Turner, successful ritual (and other forms of cultural performance that are the heirs of ritual in a contemporary society) involves creating a space of public reflexivity.<sup>189</sup>

Ritual and drama involves selves, not self; yet the aggregate of selves in a given community or society are often thought of, metaphorically, as a self. Nevertheless, in practice, the plural reflexivity involved

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<sup>186</sup> Sally Falk Moore, *Law as Process: An Anthropological Approach* (London: Henley and Boston, 1978), 51.

<sup>187</sup> Falk Moore, *Law as Process*, 41.

<sup>188</sup> Lowell Lewis, “Toward a Unified Theory of Cultural Performance: A ‘Reconstructive Introduction’ to Victor Turner,” in Graham St. John (ed.), *Victor Turner and Contemporary Cultural Performance* (New York: Berghahn, in press).

<sup>189</sup> Turner’s schematic approach means that it can be easy to fall into the trap of seeing each stage as a functional “thing”—whereby, for example, simply physically removing people from their daily lives into an extra-daily space will achieve this potential transformation. Although this removal may assist in creating a different way of understanding the society to which one belongs, for Turner it is primarily a state of collective “mood” that does not necessarily have to be signified by a physical shift, and is not always achievable, and also varies amongst those experiencing a ritual.

allows freeplay to a greater variability of action: actors can be so subdivided as to allocate to some the roles of agents of transformation and to others those of persons undergoing transformation.<sup>190</sup>

For Turner, to reach a stage of ‘limen’ involves a radical repositioning of “the world and society” and how we may understand ourselves as individuals and members of a community.

Philip Meyer follows Turner’s theory of ritual, arguing that courtrooms are “liminal theatres” that provide “transportation” for a community.<sup>191</sup> For Meyer, the trial is a place for the members of a community to reflect on and reinforce their shared values. Meyer’s use of the term “transportation” suggests that the trial is a means of focusing a community on the higher good through sharing and discussing the ideals of that community. There is some cross over between pseudo-Aristotelian interpretations of catharsis and ritual transformation. Both are about a form of didacticism mobilised by legal agents for a community’s own good. Milner Ball uses the term ‘ritual’ in his work, although he does not elaborate explicitly on what he means by this. Milstein and Bernstein argue that “jurors have been taken from everyday affairs and placed in [this] ritualistic setting”. Then they also note, following from Aristotelian theory, that the trial is founded on “hopes for a communal transformation”.<sup>192</sup>

However, Meyer’s interpretation of Turner’s ritual theory idealises the process as always for the “higher good” of the community. This ignores Turner’s insistence that ritual is a form of social control. Although the trial (that Meyer styles as the liminal phase) is a place of inversion, masking, and practices that border on subversion, it is important to note that these practices of inversion are always strictly proscribed. Ultimately, Turner points out that liminal performance is culturally conservative, since it “may invert the established order, but never subverts it”. Further, Turner reminds us, although the liminal phase is “propelled by passions, compelled by volitions, overmastering at times any rational considerations [...] reason plays a major role in the settlement of disputes which take the sociodramatic form”.<sup>193</sup>

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<sup>190</sup> Turner, *The Anthropology of Performance*, 25.

<sup>191</sup> Philip Meyer, “‘Fingers Pointing at the Moon’: New Perspectives on Teaching Legal Writing and Analysis,” *Connecticut Law Review* 25.3 (1993): 788.

<sup>192</sup> Milstein and Bernstein, 66.

<sup>193</sup> Turner, *The Anthropology of Performance*, 90.

Turner states that “there is a structural relationship between cognitive, affective and conative components”, claiming that although all four stages of social drama involve each of these components, one always dominates at each phase. In the redressive stage, it is the “cognitive” component, suggesting that although much of the liminal phase implies a loss of regulation, and process designed to be sensorially evocative, it is actually very structured. Knowledge, and how it is inscribed through normative performances of authority is central to the ritual that *plays* with form but ultimately functions to guard against serious disruption (often by the implication that “true chaos” would be untenable, demonstrated through flirting with upheaval which the liminal phase is deliberately conceived to do).<sup>194</sup>

As other legal anthropologists are keen to emphasise, ritual functions as a form of social control. Ransford Pyle explicitly argues that “both the rules that legal authority makes and enforces and the legitimacy of the authority itself are arbitrary and in some sense unjustifiable”. He goes on to remark that “ritual imbues both with power (some might say ‘magic’) and this is an effective way to control public response”.<sup>195</sup> Rather than ritual by necessity being about the higher good, the performance of the ritual itself lends authority to, and helps naturalise, an outcome constructed as legitimate. The criminal trial therefore legitimises the authority of legal agents to arbitrate through the seductive and potentially insidious quality of ritual.<sup>196</sup>

Mark Cammack also comments on the ideologically suspicious underpinnings of ritual. Cammack cites Turner, who argues that the ritual “makes visible [...] beliefs”. Intangible communal ties and belief systems are rendered visible by the trial.<sup>197</sup> Yet, as Cammack goes on to note, “[r]itual depiction of abstract social, legal and political ideas make them seem both real and somehow given or inevitable”.<sup>198</sup> For Cammack, the enactment of the ritual is a

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<sup>194</sup> Ibid., 44.

<sup>195</sup> Pyle, 381.

<sup>196</sup> Obviously saying that the criminal trial legitimises itself is a passive construction. However, this is deliberate as I argue later that structural theory, such as Turner’s ritual theory, frequently leads to these kinds of passive constructions. Later in the chapter, I deliberately draw on Pierre Bourdieu and Michel Foucault to reintroduce agency into theories of the trial as performance.

<sup>197</sup> Victor Turner quoted in Mark Cammack, “Evidence Rules and the Ritual Functions of Trials: “Saying Something of Something,” *Loyola of Los Angeles Law Review* 25.3 (1992): 785.

<sup>198</sup> Cammack, 785.



means of naturalising particular social norms.<sup>199</sup> Geoffrey Miller also concurs with this, commenting that: “ritual appears to be a matter for private conscience, spirituality, and placing the participant in contact with unseen or transcendental forces. Notwithstanding its unusual or esoteric content, however, ritual is very much of a part of the overall system of social control”.<sup>200</sup>

The role of ritual as a means of naturalisation is also the focus of Andrew Cappel’s article entitled “Bringing Cultural Practice into Law: Ritual and Social Norms Jurisprudence”. However, Cappel demarcates his understanding of ritual from Turner’s by defining the trial as “secular” ritual, following Falk Moore.<sup>201</sup> Cappel also draws on ethnography, particularly Clifford Geertz’s work, to emphasise that Turner’s universal tripartite structure fails to interrogate the particulars of the local ideological sensibility informing the process.<sup>202</sup> Ritual, according to Cappel, is highly orchestrated and deliberate and relies on exploitation of the distinction between those that facilitate a ritual, and those that undergo it. This division is rendered natural through the manipulation of ‘presence’. For these writers, the trial is a ritual that uses symbolism and performance to consecrate its judicial decisions in the wider community as sacred. Consequently, this performance exploits presence and for some legal anthropologists has insidious overtones. This is somewhat in contrast to Turner, who argues, via Goffman:

We play roles, occupy statuses [...] don and doff many masks, each a “typification”. But the performances characteristic of liminal phases and states often are more about the doffing of masks, the stripping of statuses, the renunciation of roles, the demolishing of structures, than their putting on and keeping on.<sup>203</sup>

Although Turner is clear about the normative, conservative function of ritual, Turner implies in this extract that in ritual the truth is revealed through stripping away of “artifice”. As

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<sup>199</sup> Emiliano Buis also argues that law is a “performed ritual” of “reaffirming ideology”, although Buis is not explicit about what kind of ideology is being ritualised. Buis, 697.

<sup>200</sup> Geoffrey P. Miller, “The Legal Function of Ritual,” *Chicago Kent Law Review* 80.3(2005): 1187.

<sup>201</sup> Falk Moore, *Law as Process*, 41.

<sup>202</sup> Andrew Cappel, “Bringing Cultural Practice into Law: Ritual and Social Norms Jurisprudence,” *Santa Clara Law Review* 43.2(2003): 389. See also Charles Reid’s review essay of Peter Linebaugh’s book *The London Hanged: C.J. Reid Jr, “Book Review: Tyburn, Thanatos, and Marxist Historiography: the Case of ‘The London Hanged,’ By Peter Linebaugh.”* *Cornell Law Review* 79.5(1994).

<sup>203</sup> Turner, *The Anthropology of Performance*, 107.

Lowell Lewis argues, however, “the liberatory, redemptive strain of Turner’s theorising should probably be brought into some kind of greater balance”. Lewis goes on to say that these rituals or “special events” do not necessarily create “‘transparent’ reflection at all, but may instead create obfuscation, mystification, confusion, sensational excess, or rampant escapism”.<sup>204</sup> As the other legal anthropologists argue, ritual does not ‘reflect’ or reveal authority or ‘Truth’, but rather helps *manufacture* it. It is the performance of a trial that allows legal agents’ judicial decisions to be accepted (and beliefs to be normalised, rather than ‘made visible’).

Legal anthropologists’ attitude towards performance in the criminal trial is consequently in stark contrast to writers outlined earlier in the chapter who imply that live presence has an inherently authentic quality (Ball, for example, who argues that the trial “performs and animates a fit form of decision-making for our version of democracy”).<sup>205</sup> Yet although legal anthropologists acknowledge the importance of ritual to ‘authority’ and ‘norms’, what most of these writers designate as ‘norms’ are laws and how they are reinforced through judicial decisions, community problem-solving at times of “crisis”. As such, this theory, like Turner’s, remains rooted in the structural whereby the trial is a forum for dealing with discrete moments of conflict resolution, disruptions to the “ongoing life of a society”. This conflict resolution does not include how the trial contributes to a broader form of socio-legal regulation.<sup>206</sup> Sally Falk Moore and Barbara Myerhoff suggest the link between conflict resolution and a broader form of regulation:

Every ceremony is par excellence a dramatic statement against indeterminacy in some field of human affairs. Through order, formality, and repetition it seeks to state that the cosmos and social world, or some particular small part of them are orderly and explicable and for the moment fixed. A ceremony can allude to such propositions and demonstrate them at the same time.<sup>207</sup>

However, although Falk Moore and Meyerhoff’s ideas of ritual involves a complex manufacturing of ‘power’ through performance, this approach leads again to the concept of the trial as conflict resolution only (a means of ensuring acceptance of judicial decisions by

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<sup>204</sup> Lowell Lewis, 4.

<sup>205</sup> Ball, *supra* n. 156.

<sup>206</sup> The exception to this is Cappel, whose article goes on to use the work of Foucault and Bourdieu to discuss the power transactions involved in ritual. These ideas are explored later in the chapter.

<sup>207</sup> Falk Moore and Myerhoff, *Secular Ritual*, 17.

those in ‘authority’). This reflects structuralist ritual theory’s basis in pre-industrial societies.<sup>208</sup> Yet this concept of ‘authority’ becomes less and less helpful in highly complex industrialised societies where institutions of authority are diversified and specialised. The adversarial criminal jury trial does not take place in a discrete community but rather a differentiated and diverse population and those conducting the trial are not the leaders or elders of a community, but rather specialists from a particular field.

Ritual theory also does not explain how the manipulation of ‘presence’ takes place. Although Cammack, Cappel and Buis, in particular, are keen to critique the manipulation of ‘magic’ in the trial, they do not explain how the trial can have that effect on participants, without resorting to vague terms themselves, such as ‘transcendent’. Because of the structural nature of ritual theory, there is little attention paid to the particular agency of the participants. This means legal anthropologists are not able to explain how this collective performance may operate in practice. Consequently, they are effectively claiming that the trial has a transcendental or ‘magic’ effect, albeit an insidious one. ‘Presence’ may be ideologically suspicious for these writers, but it is also still imbued with mysterious inherent qualities.

*How* participants in the trial may contribute to ritual or create ‘presence’ is outlined more explicitly by those writers who analyse the trial as a series of performed linguistic processes, or ‘speech-acts’. For these writers, a trial participant’s access to certain modes of speech defines their agency within the process. What is emphasised in linguistic approaches to the trial is the relationship between the law’s power and its expression in performance. Following John Austin’s work, these writers argue that the performance of legal agents is central to creating meaning within the trial.<sup>209</sup> The work of legal academic and practitioner Bernard Hibbitts exemplifies this approach. Hibbitts writes extensively on enactment and the importance of bringing performance back into legal education, arguing that the law deliberately sidesteps its own entrenched need for performance.<sup>210</sup>

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<sup>208</sup> Victor Turner, “Are There Universals,” *supra* n. 168.

<sup>209</sup> J.L. Austin, *How to Do Things with Words* (Oxford: Oxford University Press, 1962).

<sup>210</sup> Hibbitts states that: “[legal performance] has variously been viewed as particular to “primitive” legal systems heavily dependent on ritual, as a contemporary phenomenon confined to the courtroom, as vaguely vulgar or deceitful, or as relevant to law only in a metaphorical sense (law as ‘theatre’, or ‘game’).” In this statement we encounter reference to the trial as a ritual and also as something tainted by the pejorative ‘theatrical’—that of “vaguely vulgar or deceitful”. Bernard J. Hibbitts, “Describing Law: Performance in the Constitution of

Hibbitts stresses the need to go beyond metaphor when examining the relationship between the trial and performance. He argues, following Austin, that legal pronouncements only have authority through performance: “As John Austin has noted, certain of these texts, for example, statutes and wills, are already instantiations of performance insofar as they make things happen by virtue of their illocutionary force alone (‘we hereby ordain and establish...’).”<sup>211</sup> Consequently, performance is vital in the criminal trial, and this performance is primarily constituted by what might be termed ‘role-play’ whereby a legal agent representing his or her office enacts real effects through his or her performance.

Performance, argues Hibbitts, is an expression of concrete power. This performance must be framed in a ritualistic space, which expresses “culturally determined meaning to prospective jurors”.<sup>212</sup> In effect, this makes this approach an offshoot of ritual theory, as those who write about speech-acts argue that it is the framing of the trial ritual that enables this ‘power’ to exist. John Austin makes the relationship of speech-acts to ritual quite explicit in his published lectures, where he states that “all acts are heir [to a form of speech act] which have the general character of ritual or ceremonial”.<sup>213</sup>

For Hibbitts, this ritual framing of a legal agent’s performance is a positive aspect of the law. For example, Hibbitts points out that:

Unlike a legal text, a legal performance takes place both in space and in time. Performance gives law a here that makes the rules of distant legislatures near and a now which makes past precedents present. The here and the now of performed law command attention and respect while rendering law accessible to human understanding. The performance of law also locates law by creating a space and time for it which places it outside and above routine human experience. In this context, legal performance—like

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Legality,” (paper presented at *Performance Studies International Conference*, Northwestern University Illinois, March 1996), unpublished. Retrieved 11 June 2008 from: <http://faculty.law.pitt.edu/Hibbitts/describ.htm>

<sup>211</sup> Austin describes different kinds of speech-acts in his work. “‘Exercitive’ acts are findings by a legal or executive body that are ‘an assertion of influence or exercising of power’”. Austin, *How to Do Things with Words*, 163.

<sup>212</sup> Hibbitts, “De-Scribing Law”.

<sup>213</sup> Austin, *How to Do Things With Words*, 18-19.

other types of performance—transforms the ordinary into the extraordinary, the self into other, and the transient into the timeless.<sup>214</sup>

He goes on to argue that:

Law's embodiment in performance is not merely physical and outer-directed, however; it is also intellectual and inner-directed. Embodied performance provides a critical means for us to internalize the law; to not only become aware of it but to think it through by acting it out. Ultimately, the embodiment of law in performance authenticates and legitimizes law; we are more likely to accept and endorse a law in which performance literally allows us to take a part.<sup>215</sup>

Hibbitt's work is important, as he is one of the few writers in this area to introduce the concept of agency via "embodiment". The performance of legal agents, according to Hibbitts, is not rooted in artifice but, conversely, rooted in the authenticity of the law. Hibbitts states that because the trial is a performed event, and therefore open, immediate and public, it is made accessible through performance in a way that the literate tradition of the law is not. The trial process is fundamentally democratic or egalitarian and 'brings law alive'. Hibbitts appears to idealise live performance as a transcendental means of accessing a shared truth, contending that live performance has authenticity because the act of performing is an embodied expression of the legitimacy of the law. For Hibbitts, the power of 'presence' functions as a means to ensure the truth and fairness of the proceedings.

Hibbitts implies that speech-acts (any words pronounced by judges) represent the authority of 'The Law' and are consequently beyond reproach. The role of power for Hibbitts is simply the authority of those in command, who have the 'right' to arbitrate. As other writers remind us, however, 'presence' is not inherently benign. Ransford Pyle argues that legal language is used in a practical, performed way within an ideologically embedded space. Pyle regards the law as "somewhere between the sacred and the profane", commenting that the law deliberately (if perhaps unconsciously) uses ideas of the sacred to secure its own authority and consequently to achieve social control.<sup>216</sup>

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<sup>214</sup> Hibbitts, "De-Scribing Law". As we can see from this, Hibbitts' attitude is very much linked to ritual theories like Turner's that relate to communal transformation.

<sup>215</sup> Ibid.

<sup>216</sup> Pyle, 384.

Levinson and Balkin claim “[i]t has become clear that many acts of interpretation are performative utterances which simultaneously constitute acts of power”.<sup>217</sup> For a speech-act to have efficacy the speaker relies on an underlying system of authority that legitimises his or her words and allows them to have concrete effects. They point out that “the legal act of interpretation, which clothes power through an act of cognition is the normal paradigmatic act of interpretation while an imagined quiet ‘powerless’ text on Keats is the exception”.<sup>218</sup> The “clothing” of power is the obscuring/naturalising of a judge’s pronouncement that is a means of enactment of authority, rather than a reflection of it. Kenneth Nunn in particular is wary of the speech-act interpretation of performance in the criminal trial, as it fails to account for how this power is manufactured in the first place. This theory takes for granted the judge’s natural right to have this authority.<sup>219</sup>

In summary, the work of Bernard Hibbitts idealises the trial process, a process considered more problematic by other writers influenced by speech-act theory. Yet whatever their differing attitudes towards the implications of speech-acts, there are three issues raised by their approach. Firstly, the writings on speech-acts often fail to take into account the reality of a courtroom setting, where the discourse is not a constant high-minded and rigorous legal debate, but frequently involves a great deal of less formal dialogue. These theorists overlook the vast majority of language employed when they concentrate only on what they deem to be significant ‘speech-acts’.<sup>220</sup> Secondly, they also overlook embodied behaviour by concentrating almost exclusively on language, despite the trial being a site of performance. Thirdly, by emphasising the role of the legal players in the trial process (those who have the

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<sup>217</sup> Sanford Levinson and J.M. Balkin, “Law, Music and Other Performing Arts,” *University of Pennsylvania Law Review* 139.6 (1991): 1613.

<sup>218</sup> Levinson and Balkin, 1613. See also Robin. L. West, “Adjudication is Not Interpretation: Some Reservations about the Law-As-Literature Movement,” *Tennessee Law Review* 54.2 (1987).

<sup>219</sup> Kenneth Nunn, *supra* n.121.

<sup>220</sup> Austin himself outlined five broad categories of speech acts: *verdictives*, *exercitives*, *commissives*, *behabitives* and *expositives*, although he was not entirely happy with these delimitations, particularly the last two, noting that almost any utterance could potentially constitute a form of speech-act. However, the writers outlined above are primarily interested in Austin’s initial two categories: *verdictives* and *exercitives*. *Verdictives* “involve delivering of a finding [...] upon evidence or reasons as to value or fact”. A verdictive includes the conviction or acquittal of an accused by the judge and/or jury. *Exercitives* are “the sentence as opposed to a verdict”. They include such speech-acts as ‘I sentence you’, ‘I order you’ and so on. For a more detailed explanation of each of Austin’s categories, see Austin, *How to Do Things With Words*, 152-163.

power to make these pronouncements), the experience of the lay bodies is lost from view. This is significant because for speech-acts to be effective, it is necessary for a legal agent to exercise this authoritative speech-act on/over a lay body.

Writers drawing on speech-act theory overlook the other side of this linguistic transaction of power: the subject body who is equally necessary for a speech act to be effective. Over the centuries, as barriers to counsel appearing in the criminal trial have been slowly lifted there has been a gradual silencing of the defendant. Whereas once defendants were obliged to tell their own story, question witnesses and discuss matters with the jury, now they can go through the entire trial process without uttering any word beyond their initial plea of guilty or not guilty. Yet, as legal sociologists argue, the defendants, too, are performing, a role-play of submission, silence, subjection and constraint.

### ***Sociology and the Trial***

Sociological approaches to the trial redress this neglect of the defendant by examining the trial as an exercise of power. Much of this work seeks to come to terms with the role of the body in the criminal trial and how it is exploited through representation. Robert Cover's 1986 article "Violence and the Word" was highly influential in this regard. Cover emphasises the one-sided dimension of writings on legal interpretation as performed practice:

The violence of the act of sentencing is most obvious when observed from the defendant's perspective. Therefore any account which seeks to downplay the violence or elevate the interpretive character or meaning of the event within a community of shared values will tend to ignore the prisoner or defendant and focus upon the judge and the judicial interpretive act.<sup>221</sup>

When the defendant's position is examined, the role of performance is very different: "the function of ideology is much more significant in justifying an order to those who principally benefit from it and who must defend it than it is in hiding the nature of the order from those who are its victims". For Cover, the irreducibly important point is that "the defendant's world is threatened".<sup>222</sup> Cornelia Vismann follows Cover's distinction, arguing that the courtroom is

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<sup>221</sup> Robert Cover, "Violence and the Word," *Yale Law Journal* 95 (1986): 1601.

<sup>222</sup> *Ibid.*, 1601.

an “encounter between power and knowledge” that exploits the separation between the lay and the law. Vismann states that:

The event of a trial—the courtroom scene—according to Foucault, is best represented as an encounter between power and knowledge. On the side of a witness, there is a certain knowledge but no power; on the other side there is the insatiable desire to know as well as the power to retrieve this knowledge that the witness bears.<sup>223</sup>

The lack of power and the real threat to the defendant help to explain the hesitation to see analogies between the trial and performance. At the core are ‘real’ human consequences flowing from the (albeit ‘dramatic’) proceedings of a trial. Vismann questions “whether the probative theatre metaphor of a trial blinds the insight to the mediating strategies of a courtroom setting which is of course about nothing else but the question of representation”.<sup>224</sup> Vismann suggests that conceptualizing the trial as performance or role-play under-emphasises the real violence and exploitation of the body involved in the trial proceedings.

It is, after all, the defendant’s body that is the crux of the criminal trial. The presence of the defendant’s body in the courtroom is fundamental to criminal proceedings. As Peter Halewood states, “both the modern and pre-modern conceptions of legal legitimacy and legal interpretation define themselves against the backdrop of the body, the corporal subject of punishment, discipline and confinement”.<sup>225</sup> Halewood argues that the display and consequent signification of a defendant’s body is central to the ‘power’ of the trial process.

Edward Morgan also focuses on the body rather than speech or language. Morgan sees parallels between the criminal trial and the theatre of Jean Genet, arguing that Genet’s theatre is one of domination and submission, represented and signed without words: “theatre, according to Genet, is a profound web of active symbols capable of speaking to the audience a language in which nothing is said but everything portended”.<sup>226</sup> The complexity of performance—the multiplicity of non-verbal signs mobilized—is a parallel to the complexity

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<sup>223</sup> Cornelia Vismann, “‘Rejouer Les Crimes’; Theater Vs. Video,” *Cardoza Studies of Law and Literature* 13.1 (2001): 119.

<sup>224</sup> *Ibid.*, 120.

<sup>225</sup> Peter Halewood, “Violence and the International Word (Conceptualizing Violence: Present and Future Developments in International Law),” *Albany Law Review* 60.3 (1997): 567.

<sup>226</sup> Edward M. Morgan, “Retributory Theater,” *American Journal of International Law and Policy* 3.1 (1988): 2.



of the trial which uses a multiplicity of means to signify certain ideologies. For Morgan and Halewood, discourses of domination and submission are embedded in the structure of the criminal trial, and are written on the body. If analysis of a trial only pays attention to language, writers will miss the vast majority of ways that ‘power’ is represented or enacted.

Morgan argues that this submission (particularly of the defendant, though it includes other lay bodies as well) is played out by the trial participants in an overarching performance of domination and submission. For legal sociologists, bodies performing acts of domination/submission in a public sphere constitute the theatre of the trial. Performance itself naturalises this power imbalance because the defendant plays their role seemingly voluntarily. Morgan, by raising the issue of ‘voluntary’ vs. ‘involuntary’ performance helps to answer Visman’s earlier question as to whether ‘role-play’ theory trivializes the experience of the defendant. Vismann’s argument is only sustainable if performance is always conceived of as voluntary or as a form of self-representation. What legal sociologists argue is that the seemingly voluntary nature of a defendant’s performance is the crux as to how the ‘power’ of the trial manifests itself. The defendant’s body being exploited to signify and represent is a form of performativity of self; but it is *not* one created or actively controlled by the defendant.<sup>227</sup>

As Peter Halewood observes, a trial requires “[a] defendant’s acquiescence to his ‘official’ role as defendant, and his apparent recognition of the legitimacy of the theater of his own trial, at least in the form of his physical presence in the courtroom”.<sup>228</sup> A defendant’s seemingly willing entry into the courtroom legitimises the trial process. And yet this performed willingness is in fact an illusion. As Robert Cover observes:

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<sup>227</sup> This follows Elizabeth Burns’ argument outlined in the beginning of this chapter: what is classified theatrical or performative is always about recognition or reception. Therefore, it is the *audience* that interprets it, rather than the performer him or herself. This is in contrast to the conscious performativity of self that Erving Goffman theorised, and more in keeping with Judith Butler’s theories of performativity of self (that draw on Michel Foucault). See Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990).

<sup>228</sup> Halewood, 566.

It is, of course, grotesque to assume that the civil facade is “voluntary” except in the sense that it represents the defendant’s autonomous recognition of the overwhelming array of violence ranged against him, and of the hopelessness of resistance or outcry.<sup>229</sup>

For the legal sociologists examined here, the trial process forces the defendant to perform acceptance of the legitimacy of the process. By making it appear voluntary, the actual violence of compulsion (and the underlying real threat) is cloaked.

However, because these writers are keen to expose the underlying violence of the trial they do not acknowledge what this domination/submission model is intended to achieve—instead tending to perceive the trial over-simplistically as a repressive state institution. Further to this, they overstate the consciousness of those involved in the process, suggesting that the defendant is fully aware of the legitimacy he or she lends the process by entering the courtroom, and that legal agents are also fully aware of their exploitation of authority. Yet acquiescence to the legal requirement of attendance is not the same thing as being aware of the legitimacy any participant lends the trial simply by setting foot in the courtroom.

Bernard Hibbitts implies that it is the space of the courtroom that triggers an acceptance of the process (which he identifies as positive). According to Hibbitts, those who are placed within the process are therefore not only representing roles symbolically; they are embodying their position to the extent that certain performance imperatives become seemingly natural. In the majority of cases this will suggest to trial participants the idea that it is to their advantage to behave within certain bounds (this is similar to, yet almost an inversion of, Goffman’s earlier argument) to achieve the best possible outcome. A defendant is therefore unlikely to question his or her position of subjection in the court, as any form of disruption will hurt his or her case. As I outlined in the beginning of this chapter, symbols and objects certainly help uphold the authority of the law: this framing is a powerful means of suggestion.<sup>230</sup>

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<sup>229</sup> Cover, 1607.

<sup>230</sup> This is observed explicitly by Robert Cover: “When judges interpret, they trigger agentic behavior within just such an institution or social organization. On one level judges may appear to be, and may in fact be, offering their understanding of the normative world to their intended audience. But on another level they are engaging a violent mechanism through which a substantial part of their audience loses its capacity to think and act autonomously”. *Ibid.*, 1615.

However, contrary to Hibbitts, I argue that this suggestion is insufficient to account for this internalisation and naturalisation of role, which is not an immediate response to a courtroom environment (although the courtroom itself is partially responsible); rather it is a process that starts long before entry in the courtroom. As I will outline in the second half of this chapter, the role of the unconscious and embodiment are crucial to understanding how discourses of power are both internalised and naturalised by all participants in the process, and consequently go relatively unquestioned in the criminal trial.

Each of the above approaches acknowledges the ‘power’ of performance to create certain effects in the criminal trial. For those scholarly writers who concentrate on the physical resemblance between the court and the theatre, the ‘theatrical’ has the potential to corrupt the important processes of trial through its inherent artificiality. The writers who see the trial as essentially ‘dramatic’ conversely argue that the theatre of the trial is a means of inspiring and bringing together the audience/jurors. Lawyers and actors (through dramatic narratives) affect jurors and show us certain ‘Truths’ about ourselves. Performance in a trial is consequently transcendent and affirms each participant’s role as collectively part of something bigger.

In writings by legal anthropologists everyone participates in the collective ritual, although some are more in charge and others less so. In this conception, it is the judges and legal agents who are the prime performers and the other trial participants (including jury and audience) are more like initiands. This performance must take place in a specifically demarcated space to function effectively. The combination of authority and symbolism that frames this performance allows the experience of it to be imbued with ‘magic’ for the participants, where the actions of those facilitating the ritual seem imbued with ‘natural’ authority or ‘presence’. These writers argue that those undergoing the trial experience it as a collective transformation, even though this ‘transformation’ functions as a form of social control.

In writings that draw on speech-act theory, the concentration is squarely on isolated incidents of performance, rather than an overarching performative rubric. The trial is not a performance, but judges are performers as their speech has concrete effects. When a judge says ‘I sentence you’, he or she relies on a genuine chain of authority that enables these words to not merely be symbolic markers of authority, but acts of power in and of

themselves. Although these incidents of performance require a symbolic framework, a judge is still posited as having real power and ‘natural’ authority that the courtroom activates.

In sociological approaches to the trial, however, performance revolves around the defendant’s performativity of self, or how a defendant’s body is represented. For these writers a defendant’s performance is a form of subjection. Rather than looking at the judge as a performer of speech acts, these writers examine the power dichotomy between legal agents and the defendant. The judge requires the defendant’s enforced presence to inscribe their efficacy and authority. This is because there is no symbolic value in the silence and constraint of an accused unless the lay public (both jury and gallery) sees it. Every defendant’s public submission to the process signals his or her acceptance of the law’s power. In these writings, the entire trial is an overarching performance of authority that exploits the body of the defendant to concretise this dominance. This is done through the seemingly voluntary submission of the defendant.

Despite their disparate approaches, each of these interpretations as to the performativity or theatricality of the trial revolves around a concept of the *symbolic value of live performance*. All acknowledge that performance is integral to enact/create or represent authenticity. Yet none of these approaches theorises in detail what this ‘presence’ might be, and why and how live performance has this extraordinary (magic) power. Consequently, most writers tend to rely on essentialist ideas as to the inherent qualities of ‘presence’. It is this mysterious quality of ‘presence’ that I seek to problematise in the rest of this chapter where I outline my argument as to the performativity of trial participants and how they create a *performance of tradition*.

### ***The Symbolic Value of Live Performance***

To explore essentialist claims about the ‘power’ of performance, I will draw on the work of performance theorist Philip Auslander. Auslander interrogates the symbolic value of live performance in his book, *Liveness*. He investigates what he considers to be the prevailing preference for the ‘live’ over the mediated in different areas of cultural production. Auslander devotes a chapter of *Liveness* to the criminal jury trial, arguing that the trial has proved particularly resistant to the introduction of mediation (such as closed-circuit

television testimony or video testimony). He claims that criminal trial procedure is “rooted in an unexamined belief that live confrontation can somehow give rise to the truth in ways that recorded representations cannot”.<sup>231</sup>

Auslander questions the dichotomy between the live and the mediated, claiming that this is an artificial (and unsustainable) construct usually adopted by performance practitioners and theorists to valorise the ‘purity’ of the live through the concept of ‘presence’, and thereby to shore up theatre’s value and viability in the face of film, television and new media. This notion of presence is expanded on in both *Liveness* and an article, “Towards a Concept of the Political in Postmodern Theatre”. Auslander points out that ‘presence’ is a problematic construct that can serve to naturalise certain dominant ideologies and reinforce the status quo.<sup>232</sup>

Auslander seeks to demythologise essentialist definitions of live performance, which credit it as having greater authenticity than mediated forms of cultural production, pointing out that live presence has no quantifiable ‘real’ value; rather this value is only recognised in opposition to mediated forms. Yet his claims surrounding presence contradict this. For presence to be insidious live performance, despite its authenticity being ‘only’ symbolic, has to have real effects. This is, arguably, what Auslander does not account for sufficiently. By concentrating on whether there is a ‘real’ distinction between the live and the mediated, he does not adequately address the role belief plays in maintaining this distinction. The difference between what is ‘real’ and what is believed to be ‘real’ is arguably not that important.

Collective belief in the symbolic value of live performance *is* authentic in the sense that it becomes self-fulfilling. Consequently, when Auslander asserts that the trial’s emphasis on the live is “unexamined”, he fails to account for two things. Firstly, live confrontation in the

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<sup>231</sup> Philip Auslander, *Liveness* (London and New York: Routledge, 1999), 128-129.

<sup>232</sup> Philip Auslander, “Towards A Concept of the Political in Postmodern Theatre,” *Theatre Journal* 39.1 (1987). It is noteworthy that those who valorise the lawyer’s position in court focus on concepts such as ‘persuasion’, ‘presence’ and ‘charisma’, with an emphasis on the inevitable outcome of a narrative process. However, this is not exclusively the case. For an alternate approach that critiques the concept of ‘charisma’ in the advocate, see Laurie Kadoch, “Seduced by Narrative: Persuasion in the Courtroom,” *Drake Law review* 49.1 (2000).

criminal jury trial has a symbolic (and real) value because we invest in the belief that it does. This belief is tied to the other possibility of the live that Auslander does not address: the guarantee of openness. By ensuring legal processes are kept live a certain degree of accountability is also ensured (fulfilling *habeas corpus* for example). Although Auslander notes that judicial procedure implicitly relies on the potentiality of the moment, the idea that ‘anything might happen’, he continues to overlook the possibility that this belief itself will produce real flow-on effects.

Secondly, it is in legal agents’ interests to maintain the ontological distinction of the live. The use of live bodies in space performing the will of the court is a powerful symbolic representation of the law’s authority in the wider community. The very act of compelling a witness to come to court in person attests to this. If we can see defendants, we can also see that they are subjecting themselves to the will of the state. Therefore, their presence signifies their bodily submission to their role in the hierarchy of the state. This act of submission is repeated *ad infinitum* with each new defendant.

Although up to this point, I have been discussing the role of the *body* rather than the social, I follow Michel Foucault and Pierre Bourdieu and do not conceive of them as discrete entities, but rather inseparably intertwined. As Bourdieu comments, “the body is in the social world but the social world is in the body”.<sup>233</sup> Whilst sociological approaches to the trial are certainly correct in their assertion that that the trial exploits human bodies, the trial process is not a simple equation of dominance and submission; rather it is a means of naturalising a broader form of social regulation. Michel Foucault notes:

We must show that punitive measures are not simply “negative” mechanisms that make it possible to repress, to prevent, to exclude, to eliminate; but that they are linked to a whole series of positive and useful effects which it is their task to support.<sup>234</sup>

For Foucault, harnessing the “political technology” of the body is the end-goal of the normative function of judicial proceedings. This manipulation uses bodies to self-legitimize, as it were, and this usage is positioned as fitting punishment. The process is inescapably

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<sup>233</sup> Pierre Bourdieu & J.D. Wacquant, *An Invitation to Reflexive Sociology* (Cambridge: Polity Press, 1992), 20.

<sup>234</sup> Foucault goes on: “and, in this sense, although legal punishment is carried out in order to punish offences, one might say that the definition of offences and their prosecution are carried out in turn in order to maintain the punitive mechanisms and their functions”. Foucault, *Discipline and Punish*, 24.

violent; bodies are compelled, constrained, and forced to “perform ceremonies, to emit signs”.<sup>235</sup>

According to Foucault “it is always the body that is at issue—the body and its forces, their utility and their docility, their distribution and their submission”.<sup>236</sup> A courtroom is consequently a place for the power of the state to continually inscribe, subject and assert authority over (and on) the body. Foucault states that “power is exercised, rather than possessed”.<sup>237</sup> Here lies the importance of performance. It is the constant repetition of a defendant’s submission that allows ‘The Law’ (or rather, legal agents) to claim its authority over the body. This authority is not stable, but ever reliant on constant enactment. Contrary to the sociological approach outlined above, the trial does not reflect the authority of the law over the body; it enacts it and helps to perpetuate it through performance.<sup>238</sup> This performance has real ‘power’ even if it is not because performance itself is inherently ‘powerful’.

The ongoing willing submission of a defendant’s body (and other people’s bodies) is imperative to the trial process as a means of constructing/maintaining its power as an institution that can arbitrate over individuals. Collective belief in the symbolic value of live performance allows this submission to seem natural, whereby actual violence is cloaked in the ceremonial and because we embody this obedience, we do not recognise the significance of this act of submission, nor the very real danger it places a defendant in. This performativity of self reflects the power shifts outlined in the previous chapter. For Foucault, individuals embody socio-legal structures and then reproduce them (or are aware of transgressing them) through their actions.

How this manifests in the criminal trial involves collapsing the dichotomy of agency and structure. What is termed the structure of the trial by the above writers is for Foucault a

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<sup>235</sup> Ibid., 25.

<sup>236</sup> Ibid., 25.

<sup>237</sup> Ibid., 26.

<sup>238</sup> While Foucault’s work in *Discipline and Punish* focuses primarily on inquisitorial proceedings and the penitentiary, there are echoes for the adversarial criminal jury trial as well. The adversarial trial emphasises confrontation. Witnesses, defendant and (usually) complainant must occupy the same space at the same time. This confrontation is inherited from English common law and is enshrined in the U.S. Constitution. The meaning and implication of confrontation will be further analysed in Chapters 5 and 6 of this thesis.

manifestation of discourse—discourse being Foucault’s term to describe a set of knowledges produced by people under specific conditions. Analysis of a criminal trial does not reveal a stripped back frame but rather a practice performed by many people that reproduces the ideological beliefs of the legal field and a broader form of power. The trial is consequently not a stable structure at all, but rather a shifting ideological frame that involves the collective beliefs of human agents.

To understand the criminal trial’s use of the body and performance involves understanding exactly how and what it is legitimising about the legal field. For Foucault this is largely its right to arbitrate and dominate. However, this focus on domination returns us to Foucault’s primary focus, which is “to create a history of the different modes by which, in our culture, human beings are made subjects”.<sup>239</sup> For Foucault the trial is a reflection of the means by which humans are constrained through their own docility and complicity. Yet Foucault’s own methodology does not fully explain how human agents help create and sustain these beliefs. While he is clear that performance’s role is in the repetition of enactment that manufactures ‘power’, the acquisition of belief systems is something he largely leaves unexplored.

This is where the work of sociologist Pierre Bourdieu is pertinent. Bourdieu uses the term *habitus* to describe this acquisition and embodiment of belief systems. *Habitus* is a concept to help explain how we acquire, and naturalise life-knowledge obtained through education and socialisation. This knowledge takes the form of unconscious dispositions towards things and plays a large role in what we value.<sup>240</sup> Bourdieu argues that our primary *habitus* is formed largely by family or the relationship between a child and their parents. For Bourdieu, the

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<sup>239</sup> Michel Foucault, *Power – Essential Works of Foucault 1954-1984* (London: Penguin Books, 1994), 208.

<sup>240</sup> This does not mean that Bourdieu believes that we are the product of our social environment. This is a common misunderstanding of Bourdieu’s work. For example, anthropologist Michael Jackson follows Michel de Certeau’s critique that “Bourdieu follows in the structuralist tradition of locating generative forces outside the immediate, lived reality of the lifeworld”. However this is an incorrect reading of Bourdieu who constantly stresses *habitus* as a conceptual device (not a ‘thing’ itself) that is forever generating/generative in a process of inter-subjectivity whereby we embody, naturalise and then unconsciously reproduce social structures (which are themselves formed and reformed by human agents and are contingent rather than concrete). See Michael Jackson, “Introduction,” *Things as They Are: New Directions in Phenomenological Anthropology* (Indianapolis: Indiana University Press, 1996): 21.



earliest lesson a child learns is the need for recognition from others.<sup>241</sup> This search for recognition drives our movement in the world. Our perpetual desire is to acquire ‘recognition’ or capital in an area we value. The kind of recognition we want depends on what we choose to value. What we choose to value will depend on our background, but we will value participation in certain areas or *fields* and therefore gravitate towards them.

A field for Bourdieu is a site of struggle in which people (*social agents*, in Bourdieu’s terms) compete with one another for capital of shared value that is not necessarily monetary yet not entirely unrelated to money (as all fields sit within, and are autonomous—by degree—to the field of economy). The process of accruing capital is strategic, and because our primary desire is for recognition we must invest in the field we move towards, and we must ‘play the game’. Bourdieu argues that agents internalise the logics of fields unconsciously through education and socialisation. Applying these concepts of Bourdieu, Paul Moore writes on such a process of socialisation:

If we have learnt to share a particular value, we will compete for it and seek recognition of our success, as this increases our sense of purpose and belonging, and we will follow rules governing accumulation as these are experienced as the ‘natural’ way of doing and reinforced by the group’s unconscious collusion [...] In Bourdieu’s terms, we will attempt to maximise our “capital” within particular “fields” of human endeavour, as determined by those dispositions we have embodied.<sup>242</sup>

Because this process works on a largely pre-cognitive level, the actual field-specific logics become ‘naturalised’ and agents rarely reflect upon them as a way of being in the world. So those coming into the field are unlikely to question the field logic itself.<sup>243</sup>

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<sup>241</sup> “He is continuously led to take the point of view of others on himself, to adopt their point of view so as to discover and evaluate in advance how he will be seen and defined by them. His being is a being-perceived, condemned to be defined as he ‘really’ is by the perception of others”. Pierre Bourdieu, *Pascalian Meditations* (Stanford: Stanford University Press, 1997), 166.

<sup>242</sup> This section on the work of Pierre Bourdieu has been formulated through many discussions with Dr Paul Moore who specialises in Bourdieu’s sociology. See Paul Moore, “Longing to Belong: Trained Actors’ Attempts to Enter the Profession” (Ph.D. Diss., University of Sydney, 2005), 46.

<sup>243</sup> This is not absolutely the case. Again, Bourdieu uses these terms as conceptual aids, rather than structural absolutes. Bourdieu also argues that those newly entering the field have less to lose, and may in fact benefit from challenging the implicit rules as they can then set themselves up in opposition.

According to Bourdieu, the juridical field is a “site of competition” where the aim is to obtain a “monopoly” in determining the law, and legal agents do this by interpreting legal theory and practice in a manner that reflects a relative autonomy and is also influenced by internal hierarchies. Because they are acted out on a largely pre-cognitive level, the actual field-specific logics become naturalised and unquestioned. Struggle occurs for both Foucault and Bourdieu not “on behalf of the truth” but “about the status of truth and the economic and political role it plays”.<sup>244</sup> Within any field, then, the aim of this struggle is to create a hegemony of interpretation that is argued to be ‘true’ (and *felt* to be true by the agents working within this area of endeavour). This thinking is in keeping with Foucault, who specifies that ‘truth’ is not something to be “discovered and accepted”; rather truth is “[t]he ensemble of rules according to which the true and the false are separated and specific effects of power attached to the true [...]”.<sup>245</sup> Legal ‘truth’ is a field-specific construction, however legal agents are likely to believe that their understanding of ‘truth’ and ‘reason’ is (or should be) relatively universal.

An example of this conversion from field-specific construction to ‘truth’ is legal framing. Bourdieu argues that this is one of the primary means of enforcing the notion of legal autonomy (and therefore enabling the law to perform in terms of its own laws) and one that is particularly visible at trial. Legal framing is where any action, system of thought, or person from another field (science, anthropology, plumbing, kite-making et cetera) is reconfigured within legal terminology. Status established within another field does not necessarily have currency within the courtroom—thus all other field-specific knowledges fall under the rubric of ‘all are equal in the eyes of the law’.<sup>246</sup> This rubric illustrates the legal field’s vested interest (if not a particularly conscious interest) in diminishing all hierarchies that are not legal.

‘The Law’, as demonstrated by the behaviour of legal agents and the trial process, is interested in what is judicially true or false and this is defined largely internally according to the internal hegemonies in the juridical field. Robert Van Krieken, writing an article

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<sup>244</sup> Michel Foucault, “Truth and Power” in *Power/Knowledge: Selected Interviews and Other Writings 1971-1977*, Colin Gordon, ed., (New York: Pantheon Books, 1998), 132.

<sup>245</sup> *Ibid.*, 132.

<sup>246</sup> Consequently, a renowned expert witness’s testimony is subject to re-testing through cross-examination and debate even if their views hold wide acceptance outside the courtroom.

analysing both the work of Pierre Bourdieu and Niklas Luhmann comments, regarding Luhmann's work:

There are no extra-legal "truths" exempted from the juridical gaze and cross-examination, no facts which have any autonomous status, all knowledge is mere testimony in favour of one party or another. All science is merely "opinion", the reliability of any area of knowledge is always open to the courts' critical scrutiny.<sup>247</sup>

For Bourdieu, Luhmann overstates the case somewhat. The category of 'expert witness' relies on legal recognition of extra-legal status. The absence of any extra-legal status in the courtroom suggests that everyone in the courtroom is seen as absolutely equal—this is overly idealistic.<sup>248</sup> This said, the law purports to level all hierarchies established within other fields as though it were alone in being immune to hierarchical influences and the exercise of power. This process allows 'The Law' to subsume all other systems of knowledge, therefore maintaining its normative function, and upholding its seeming autonomy. This leads to what I consider the defining feature of legal practice—legal agents' claim to be able to shine a light into and illuminate any other field (and arbitrate) despite not having any field-specific knowledge in those other areas.<sup>249</sup>

Despite the juridical field being a site of struggle between legal agents competing for capital, Bourdieu says that legal agents mostly unconsciously cooperate in the assumption/construction of legal autonomy. So although, according to Bourdieu, there is "perceived tension" between the pure legal theorist (who deals in the theory and philosophy of legal practice) and the judge (who deals in practicalities), they are linked by a "chain of legitimation" whereby a judge's decisions are taken and reconfigured, formalised, and systematised by theorists and/or lawmakers. This ultimately presents a cohesive body of rules and where at the same time the judge can believe justice is not arbitrary but reasonable,

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<sup>247</sup> Robert Van Krieken, "Legal Reasoning as a Field of Knowledge Production: Luhmann, Bourdieu, and Law's Autonomy," (paper presented at the *Law, Power & Injustice: Confronting the Legacies of Sociolegal Research, Law & Society Association Conference*, Chicago, 2004), unpublished. Retrieved 15 June 2008 from Sydney University's eScholarship Repository: <http://ses.library.usyd.edu.au/handle/2123/967>

<sup>248</sup> Although equality before the law is one of the foundations of Liberalism, the fact that a trial participant's socio-economic status may determine the quality of legal representation they can obtain calls this ideal into question.

<sup>249</sup> This reaches its zenith in the trial, where judges often preside over complex medical or scientific disputes, or are expected to understand complex methodology in the space of several days, weeks or months.

sourced from a collective agreement as to what is appropriate in any given circumstance. For Bourdieu this is because there is an unavoidably arbitrary streak at the heart of juridical decisions that cannot be revealed to the layperson or to the participants themselves.<sup>250</sup> Bourdieu comments that: “Judicial decisions can be distinguished from naked exercises of power only to the extent that they can be presented as the necessary result of a principled interpretation of unanimously accepted texts”.<sup>251</sup>

Bourdieu is not questioning the ability of trial judges to reach reasonable decisions. Reason itself involves degrees of reflexivity and self-awareness that are only produced under specific historical conditions. The ability of a judge, and the particular status of reason, will vary over time and social space. However, the law is a highly unreflexive field. In order for the law to appear governed by reason and therefore objective, how decisions are reached must be presented as stemming from a coherent self-contained body of rules that are impartial.

Of course, Bourdieu is clearly talking at this point about inquisitorial processes (civil law). In this system of trial, most law is contained in written legislation, rather than precedent (although this is not absolutely the case). This means that under inquisitorial trial process, the judge is theoretically meant to only interpret and apply the law, rendering usually very short decisions. Bourdieu’s critique is that inquisitorial processes have to stress a continuity between different cases falling under the same laws, despite the fact that no two cases will be exactly alike. Yet this argument is also pertinent to common law, because common law in its reliance on precedent confers a certain authority on judges to interpret what is relevant and

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<sup>250</sup> This argument as to the inherently arbitrary nature of judicial decisions is one rejected by formalist judges who often claim that their job is to apply the law, not to interpret it in a new way. However, how a judge interprets a particular case may depend on a current hegemony of interpretation, but arguably always also involves (to some degree) the subjective choice and opinion of the judge in how he/she chooses to apply this interpretation. There are conflicting views over the accepted role of a judge. Some argue that judges must rigorously and literally apply statute and common law as closely as possible. Others argue that judicial activism is useful to keep common law up-to-date with the contemporary climate in which decisions are being made. Finally there is the so called ‘dynamic’ approach to law-making ,where a judge uses his or her judicial function to provoke a change in law in Parliament. For more information, see: Enid Mona Campbell and H.P. Lee, *The Australian Judiciary* (Cambridge: Cambridge University Press, 2001).

<sup>251</sup> Bourdieu, “Towards a Sociology,” 818. This arbitrary streak is arguably even more readily apparent in the adversarial system (Bourdieu is writing primarily about the inquisitorial system) due to the presence of a jury whose decision-making processes are veiled from the public and legal agents.

what is not. Although theoretically a judge (particularly in a lower court) must follow the precedent of a higher court, *what* they choose to find relevant will always to some degree be arbitrary. Even interpretation of statute involves a varying degree of interpretation.<sup>252</sup>

Despite varying room for interpretation depending on the legal jurisdiction, judges need to demonstrate the fairness and impartiality of their decisions. In the criminal jury trial this is essential as the judge's role is to preside and remain neutral.<sup>253</sup> Consequently, a judge's determinations on points of law (involving admissibility of evidence and summation/directions to the jury) must be seen to be relatively impartial.<sup>254</sup> Consequently, judges tread a fine line when it comes to interpretation of common law. However, this process must be rendered consistent in public. This 'making consistent', or 'universalising' and 'transcendentalising', is something Bourdieu argues generally happens in all fields of cultural production, although rarely having such an expansive impact on an entire society (and this point I would argue to be equally valid in adversarial practice as it is in

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<sup>252</sup> For example, currently in Australia, New South Wales, South Australia and Victoria are referred to as 'common law' jurisdictions in terms of criminal practice. This is because although each state has a criminal code, the bulk of their criminal law remains in common law. Conversely, Queensland, Tasmania, Western Australia, the Northern Territory and the Australian Capital Territory have detailed statutory codes for dealing with criminal offences. Consequently, the judge's responsibility and practice in each of these states vary. Arguably, this means that in places like New South Wales, the judge has freer interpretation in his or her determination of what is relevant. Case law, of course, can also be overturned, but this is not a particularly common practice in Australia or the United Kingdom.

<sup>253</sup> "The judge is to take no part in that contest [the adversarial trial], having his own role to perform in ensuring the propriety and fairness of the trial and in instructing the jury in the relevant law". *Ratten v The Queen* (1974) 131 CLR 510 at 517 (Barwick, CJ). For more information on the role of the judge in the criminal trial, see Murray Gleeson, "The Role of a Judge in a Criminal Trial," (paper presented at the *LawAsia Conference*, Hong Kong, 6 June 2007), unpublished. Retrieved 11 June 2008 from: [www.hcourt.gov.au/speeches/cj/cj\\_6jun07.pdf](http://www.hcourt.gov.au/speeches/cj/cj_6jun07.pdf)

<sup>254</sup> This is crucial to the concept of 'separation of powers' whereby the judiciary cannot simply be seen as an extension of the government. Rather the concept of the 'independent judiciary' is fundamental to preserving public belief in the fairness of the trial. Ironically, of course, this means that judicial decisions that are opposed to government policy will lead to claims of 'judicial activism'. However, following slavishly the dictates of all legislation may cause the judiciary to compromise their independence. These tensions between the different perceived responsibilities of a judge (including whether an unelected judge can "make" law) result in frequent controversies in common law jurisdictions and are beyond the scope of this thesis. For further discussion see: Enid Mona Campbell and H.P. Lee, *supra n.* 250.

inquisitorial).<sup>255</sup> For Bourdieu, then, the criminal trial is a practice of the juridical field that seeks to manufacture and perpetuate its autonomy and its right to arbitrate. The means by which this is made possible is through what he terms *symbolic violence*.

*Symbolic violence* is the exploitation of and dominance by those in a relatively powerful position over those who have less capital. For this violence to be effective there has to be a shared understanding of the value of this capital. In the case of the criminal trial, the unconscious exploitation by legal agents of the gap between the lay and the law is a form of symbolic violence:

In reality, the institution of a “judicial space” implies the establishment of a borderline between actors. It divides those qualified to participate in the game and those who, though they may find themselves in the middle of it, are in fact excluded by their inability to accomplish the conversion of mental space—and particularly of linguistic stance—which is presumed by entry into this social space.<sup>256</sup>

This is central to the process of the criminal trial, as observed by all the writers outlined in this chapter. The significant disadvantaging of the defendant’s body within the trial is marked by his or her inability (which will obviously vary by degree from defendant to defendant) to comprehend the opacity of legal processes. Legal agents unconsciously enact and re-enact their own dominance over all other fields (as gatekeeper between lay and ‘The Law’) when they guide laypersons. Consequently, a layperson’s dependence on counsel signifies his or her already naturalized submission.<sup>257</sup>

Bourdieu continues:

The difference between the vulgar vision of the person who is about to come under the jurisdiction of the court, that is to say, the client, and the professional vision of the expert witness, the judge, the lawyer, and other juridical actors, is far from accidental. Rather it is essential to a power relation upon which two systems of presuppositions, two systems of expressive intention—two world-views—are grounded.<sup>258</sup>

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<sup>255</sup> Bourdieu, “Towards a Sociology,” 819.

<sup>256</sup> Ibid., 828.

<sup>257</sup> This is not, of course, always the case. In instances where a criminal defendant is a highly skilled professional, they may have less sense of inferiority before legal agents.

<sup>258</sup> Bourdieu, “Towards a Sociology,” 828.

Whilst other writers examined in this chapter have argued that this gap is exploited, Bourdieu explains how this ‘magic’ occurs—via the operations of *habitus* and collective belief. It is not enough that legal agents within the trial process exploit bodies visibly. Experiencing the criminal trial as transcendental relies on a naturalized disposition to see agents within the juridical field as impartial gatekeepers between the individual and ‘The Law’:

This complicity is not granted by a conscious, deliberate act; it is itself the effect of a power, which is durably inscribed in the bodies of the dominated, in the form of schemes of perception and disposition (to respect, admire, love, etc.), in other words, beliefs which make one *sensitive* to certain public manifestations, such as public representations of power.<sup>259</sup>

A collective, mostly unconscious, performance of embodied belief enables this magic: “*habitus* is the *vis insita*, the potential energy, the dormant force, from which symbolic violence, and especially that exercised through performatives, derives its mysterious efficacy”<sup>260</sup>.

Every legal agent and layperson within the trial has a specific role and function. But for Bourdieu this is partly unconscious. In other words legal agents and lay bodies unknowingly perpetuate the performance of tradition simply by doing what they have been taught to do. This tells us that legal theory will not necessarily reflect legal practice, but may unconsciously idealise practice to the layperson and legal agent, concealing the way the trial functions as a state site of “legitimised symbolic violence”<sup>261</sup>.

The exploitation of the symbolic power of live performance cloaks the complex and contingent functions of the criminal trial, transforming the trial into a process that is apparently cohesive, universal and unquestioned, not only by the layperson, but also by most of the legal agents who work within it:

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<sup>259</sup> Bourdieu, *Pascalian Meditations*, 171.

<sup>260</sup> *Ibid.*, 169.

<sup>261</sup> “What is at stake in this struggle is monopoly of the power to impose a universally recognized principle of knowledge of the social world—a principle of legitimised *distribution*. In this struggle, judicial power, through judgements accompanied by penalties that can include acts of physical constraint such as the taking of life, liberty, or property, demonstrates the special point of view, transcending individual perspectives—the sovereign vision of the State. For the State alone holds the monopoly of legitimised symbolic violence”. Bourdieu, “Towards a Sociology,” 838.

Symbolic force, that of a performative utterance, and especially of an order, is a form of power which is exercised on bodies, directly, and as if by magic, without any physical constraint; but the magic works only on the basis of previously constituted dispositions, which it “triggers” like springs. The criminal trial “triggers” submission before it from all participants.<sup>262</sup>

The repetition of this collective belief, its repeated enactment:

[...] is the canonical form of (all this) social magic. It can function effectively only to the extent that the symbolic power of legitimation, or more accurately of naturalization (since what is natural need not even ask the question of its own legitimacy), reproduces and heightens the immanent historical power which the authority and the authorization of naming reinforces or liberates.<sup>263</sup>

### ***Conclusion: Symbolic Violence and the Performance of Tradition***

Performance lies at the heart of the criminal trial’s ability to perpetrate and perpetuate the significant gap between lay and law and to cloak it in tradition. The *performance of tradition* is, therefore, far from ‘mere’ theatrics; rather it is a process that, through its exploitation of live performance, functions to sustain the mythology of a (fair) trial. Yet, as Bourdieu points out, despite the (largely unconsciously perpetrated) symbolic violence and inequity of the trial that assist legal agents in maintaining their position within a (semi-)autonomous juridical field, this collective performativity is also vital to maintain belief in the trial. The trial as a live performance must be continually enacted; played out over and over and over again. This repetition manufactures, almost as a by-product, the power of ‘The Law’.

Having outlined the role of the unconscious in my argument as to the performativity in the trial, in the following chapter I examine in detail how legal agents acquire and habituate these unconscious behaviours. This involves examining legal education to show how advocates acquire and habituate belief in the adversarial model of truth-telling. I will show that despite changing models of legal education for advocates, with a growth in performance and acting-oriented advocacy training, any form of advocacy education continues to perpetuate practices

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<sup>262</sup> This is not always the case, however. As has been mentioned earlier, there is always the possibility of resistance, as with Bobby Seale in the Chicago Conspiracy Trial. See Pnina Lahav, “Theatre in the Courtroom,” *supra* n.153.

<sup>263</sup> Bourdieu, “Towards a Sociology,” 840.



that sustain the symbolic violence employed within the trial, a process necessary to the *performance of tradition*.

## Advocacy Training

As we have not hesitated to speak of Mr. Beach's deficiencies as an advocate, so we shall allude to what seems to us Mr. Porter's main defect. He always strikes us, on reflection, as an actor. He is just as effective in a bad case as in a good one. The cause lends him no aid; he makes the cause. At the moment we yield, just as the jury does. If he has the last word, the day is his. But we suspect that if he is to be answered by a strong man, his wondrous spell might fade.

Editorial, *Albany Law Journal*, 1875 <sup>264</sup>

The great advocate is like the great actor; he fills the stage for his span of life, succeeds, gains our applause, makes his last bow, and the curtain falls. Nothing is so elusive as the art of acting, unless indeed it be the sister art of advocacy.

Judge Edward Abbot Parry<sup>265</sup>

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<sup>264</sup> Editor (anon), "Three Great Advocates," *Albany Law Journal* 12.1(1875): 5.

<sup>265</sup> Judge Edward Abbot Parry, *The Seven Lamps of Advocacy* (London: T Fisher Unwin Ltd, 1923), 11.

## *Introduction*

Whereas once we, as members of the public, largely spoke for ourselves as witnesses, now legal counsel speaks for us.<sup>266</sup> We rely on advocates to perform effectively in court. But what is effective performance for an advocate? In the previous chapter, I argued that legal agents unconsciously exert significant control over witnesses. In this chapter, I examine how advocates acquire courtroom skills. I begin by critically reappraising the popular rubric of ‘storytelling’, arguing that this term, while explicitly constructing the advocate as narrator, also naturalises the high level of control legal agents have over lay bodies. This control will go unquestioned by the vast majority of practising advocates.

I then analyse two different kinds of advocacy training: the traditional model of pupillage and the more recent model derived from the private advocacy training industry, which frequently draws direct parallels with actor training and the theatre. Long-standing legal bias against theatricality means that purporting to teach an advocate to ‘act’ is controversial; hence, while some advocates argue that there is an affinity between acting and advocacy, others continue to associate performing with lying. I argue that criticism of acting-focused advocacy training material is at least partially misplaced, based on a failure to recognize pupillage as an earlier method of performance training. Drawing on acting theory, I argue that advocates have always been trained in performance. This is often misrecognised as natural behaviour, but is in fact what I call *legal naturalism*—a performance style that has become habitual.<sup>267</sup>

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<sup>266</sup> This is excepting defendants in criminal trials who, as outlined in the second chapter of this thesis, could only provide unsworn statements to the court and could not testify under oath on their own behalf until 1891 in New South Wales (and 1898 in the U.K.). See *n.* 63.

<sup>267</sup> I use the general terms ‘advocate’ and ‘counsel’ to avoid confusion as this encompasses the Australian, American and English practitioner who advocates in court. In America, an attorney deals directly with the client and also stands in court. Traditionally in Australia and the U.K., a barrister stands in court under instructions from a solicitor who deals directly with the client. However, the distinction between solicitor and barrister is becoming less clear in Australia. For example, only NSW, Victoria and Queensland maintain a clear distinction between barrister and solicitor, while the other states have a ‘fused profession’. Despite this increasing blurring of roles, every Australian state has an independent Bar organisation that regulates the standards and qualifications of those who advocate in court.

I show in this chapter that the ambivalent attitude towards performance training is consistent with the belief that advocates are ‘not-performing’ in the courtroom: that is, that his/her behaviour is simply an acquisition of legal skills to get to the ‘Truth’. This misrecognition of the nature of advocacy practice by both advocates and the public maintains lay dependency on legal practitioners and sustains the performance of tradition. As I conclude, these methodological debates about models of education overlook the fact that any form of advocacy training involves an unconscious naturalisation of coercion and force that is essential to the adversarial model of evidence testing.

### ***Legal Naturalism***

It is April 2005 at a moot at Sydney University Law School.<sup>268</sup> The prosecution begins:

May it please the court....er...I....sorry, I withdraw that.

Looking around the classroom there is no Clarence Darrow in sight. There is not even a *Law and Order* McCoy, a Johnny Cochran, or a Geoffrey Robertson. Instead, there is a terrified 22-year-old wearing what looks like his father’s too big blazer, trousers that ride up far above his sock-line, and who is carrying a large red umbrella and a slightly cheap looking mock-leather briefcase. His choice of clothing, clearly meant to make him look professional, instead renders him looking more like a 14-year-old extra from *Modern Times*. Perhaps, of course, it is the location as well. I am in Lecture Room 6, two storeys underground. We are in a small dark classroom, and the entire building smells like damp washing. It is hard to take anyone seriously under these conditions. This frightened 22 year old man in his father’s blazer wants to be a barrister, like many other law graduates who every year sit for their Bar exams and try to make their way into the profession. Yet this student is so far removed from the advocates of popular imagination it seems an impossible leap. So how can a law student with a golfing

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<sup>268</sup> A moot is a form of mock proceedings widely used for legal educational purposes as far back as the 15<sup>th</sup> century. Mooting is based on appellate court proceedings, as opposed to mock trials, which simulate lower court proceedings. This means mooting involves debating points of law before a ‘judge’, rather than examining witnesses as is the case in mock trials.

umbrella in a basement improve? What does this young law student need to do to become an effective advocate?

Advocacy training—methods and advice for advocates on how to improve their skills—has existed in one way or another for (literally) ages. As far back as the 1500s, there were printed English manuals of advice for legal practice.<sup>269</sup> These manuals themselves often drew on ancient Greek and Roman advice for pleaders that dates back thousands of years, and there is a steady stream of books on decorum and procedure through the centuries.<sup>270</sup> This material has boomed since the 1970s.<sup>271</sup> The more recent material has also become increasingly multidisciplinary, with a multitude of material whose focus is on performance and persuasion.<sup>272</sup> This includes a growing body of work directly focused on perceived affinities between acting and advocacy.

This boom in materials means our 22-year-old law student has options that he did not have previously. Now, to improve his advocacy skills, he could for example take a course run by *TalkingBrief*, an Australian company started by two professional actors that provides ‘performance’ skills for the courtroom. Their website tells us that: “*TalkingBrief* workshops for advocates gives you the ‘tools’ of the acting profession, ensuring a compelling case, a

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<sup>269</sup> Examples of early English advocacy advice include Abraham Fraunce and Ramus Petrus, *The Lavviers Logike Exemplifying the Praecepts of Logike by the Practise of the Common Lawe* (London, Imprinted by William How, for Thomas Gubbin, and T. Newman, 1588); Thomas Powell, *The Attourneys Academy, or, the Manner and Forme of Proceedings Practically Vpon Any Suite, Plaint or Action Whatsoever, in Any Court of Record Whatsoever, within This Kingdome: Especially in the Great Courts at Westminster, to Whose Motion All Other Court of Law or Equitie...Are Diurnally Mooued: With the Moderne and Most Vsual Fees of the Officers and Ministers of Such Courts* (London: Printed for Beniamin Fisher: and are to be sold at his Shop in Pater-noster Row, at the signe of the Talbot, 1623).

<sup>270</sup> This thesis does not cover the ancient Greek and Roman oratory advice in detail. For more information see Justine Lewis, “Performance in Legal Advocacy” (Ph.D. diss., University of California Los Angeles, 1995).

<sup>271</sup> As I will outline later in the chapter, this expansion is attributable to a significant increase in law degrees and law students, a shift in the syllabus to focus on electives rather than vocational training, and an academic interdisciplinary expansion (such as the Law as Literature movement mentioned in the previous chapter). Much of the material is American and has filtered through to Australian practice.

<sup>272</sup> Advocacy training material in the last 30 years has drawn on psychology, linguistics, and literature as well as acting theory. In addition to this multidisciplinary take on advocacy training, there has also been growth in generalised ‘communication skills’ that are presented as applicable to multiple careers, most frequently lawyers and salespersons.

spell-binding performance and a jury gripped by your powers of persuasion”.<sup>273</sup> *TalkingBrief* runs workshops designed to “enhance presence” and give the participant “weapons of mass persuasion”. Despite the populist rhetoric, they, like a number of other private professional advocacy companies teaching acting techniques, advertise their workshops on the NSW Bar association website. Legal professionals are required to update their skills in order to retain their license. This is done through the accumulation of Continuing Professional Development (CPD) points of which there is an annual quota. Attendance at a *TalkingBrief* workshop is a means of acquiring CPD points suggesting, if not an explicit endorsement of the content, at least a willingness on the part of the Bar to outsource some aspects of legal education to non-legal professionals.

A *TalkingBrief* workshop is, however, a pricey option. At \$AUS 400 for 4 hours, it may be a bit out of our law student’s range. Nevertheless, it is cheaper than purchasing a U.S. four-part DVD over the internet called *What Can Lawyers Learn from Actors*, listed at \$US495. This DVD series is a filmed workshop run by two American actors who sell their merchandise through the website for the U.S. National Institute of Trial Advocacy (N.I.T.A.). A visit to N.I.T.A.’s website would also allow our student to purchase a book. For \$US65 (plus shipping), he could get a copy of *Theatre Tips and Strategies for Jury Trials* by David Ball, a book whose publicity states that:

You may not be Al Pacino, but you can be just as convincing to your jury with these subtle techniques that the best attorneys in the world employ. This practical step-by-step guide will transform you into a seasoned performer, with guidance for voir dire, openings and closings, testimony, and focus groups. You’ll also become a director—preparing your cast of witnesses to testify clearly, credibly, and memorably. Become a master of improvisation to navigate your way through the surprises that creep up in jury trials (instead of being blindsided by them). Did law school teach you how to act in a courtroom? This book will.<sup>274</sup>

The specific focus on acting in this kind of advocacy training material is not without its critics in the legal world, due to the longstanding association between acting and artificiality.

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<sup>273</sup> Promotional material from the *TalkingBrief* website. Retrieved 1 May 2007 from: [www.talkingbrief.com](http://www.talkingbrief.com)

<sup>274</sup> The publicity material for these books is detailed on the NITA website. Retrieved 12 October 2006 from: [www.nita.org](http://www.nita.org)

Milner Ball draws attention to this underlying pejorative attitude towards acting in “The Play’s the Thing”:

The identification of juridical proceedings as theatre requiring live presentation would seem unexceptional but for the fact that the label has been rejected, as though theatrics were an expendable, intrusive embarrassment to the scientific and businesslike austerities of the courts.<sup>275</sup>

As detailed in the first chapter of this thesis, along with witnesses ‘misbehaving’, it is frequently the advocate who is believed by commentators to have the potential to interfere with the austerity of the courtroom through his or her ‘theatrical’ behaviour. This means that negative connotations are also attached to the notion that advocates can and should learn to act.

Accusing advocates of performing is an insult that can be traded in the courtroom (“you have obviously ‘rehearsed’ your witness well”, or “I will not attempt to match my learned colleague’s ‘theatrical’ style”). The accusation implies that advocates are attempting to manipulate the jury and/or are lying. For many legal agents, whilst advocating effectively for a client is essential, ‘acting’ is not effective advocacy as it involves emotional manipulation and histrionics rather than an appeal to rational thought. Acting is more like ‘acting up’—emotional and inappropriate.<sup>276</sup> This means that some of the advocacy training advice listed above, far from assisting our law student, could prematurely stunt his career.<sup>277</sup> So what is appropriate and effective performance for an advocate in a contemporary Australian court?

In 1992 in *Lyons v R*, the judge found that counsel should “avoid hyperbole and not seek to sway the jury by trickery, prejudice or emotion”.<sup>278</sup> However, the judge also stressed that

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<sup>275</sup> Milner S. Ball, “The Play’s The Thing,” 82.

<sup>276</sup> Overt ‘theatricality’ by an advocate also signifies to his or her colleagues that he or she does not understand the proper decorum of the courtroom. I will unpack the underlying assumptions behind this later in the chapter.

<sup>277</sup> Without having enough experience and knowledge of American courtrooms, I cannot make any claims as to the suitability of material to that particular environment. Certainly, in Australia and the U.K., there is limited tolerance for any kind of flamboyancy. There is also, literally, less room for manoeuvre, as in Australia (and the U.K.) an advocate is confined to questioning a witness from behind the Bar table whereas in the U.S. an advocate may move around the space between the Bar table, jury box and judge’s bench.

<sup>278</sup> *Lyons and Lyons v R* (1992) 64 A Crim R 101, quoted in Les McCrimmon and Ian Maxwell, “Teaching Trial Advocacy: Inviting the Thespian into Blackstone’s Tower,” *Law Teacher* 33 (1999): 44.

counsel “is not required to reduce his rhetoric to dull and lifeless factual propositions”.<sup>279</sup> Legally, then, an advocate is permitted to breathe life into the evidence he/she presents, but must be careful to avoid a breach of ethics, including any overt emotional manipulation of a jury. The remarks in *Lyons v R* were specifically about Crown counsel (advocates for the prosecution), not defence counsel. Unfortunately, criminal law reports are highly unlikely to give specific advice about defence counsel behaviour (as defendants rarely mount appeals against their own defence).

However, the implication is that advocates are always limited in how they may behave, and that the prosecution is even more limited, having less right than the defence to advocate stridently (because the Crown acts for the public and the state, not for a private client).

A prosecuting counsel stands in a position quite different from that of an advocate who represents the person accused or represents a plaintiff or defendant in a civil litigation. For this latter advocate has a private duty—that of doing everything that he [sic] honourably can to protect the interests of his client. He is entitled to ‘fight for a verdict’. But the Crown counsel is a representative of the State, ‘a minister of justice’, his function is to assist the jury in arriving at the truth.<sup>280</sup>

A case in point of the limitations on strident advocacy on the part of the prosecution is that of *McCullough v R* in 1982, appealed in the Supreme Court of Tasmania. In this case, a defendant was convicted of murder, but had the conviction quashed by the Supreme Court because of inappropriate conduct by Crown counsel. The prosecuting advocate in this case compared the defendant with the Yorkshire Ripper, Peter Sutcliffe, and stated:

We have a man in this Court who acts like—as I said before—like somebody who would swat a fly or flick out a match; that’s how he regarded the life of another man. I suggest that it’s not unreasonable to claim that he had about as much need to protect himself from Owen Adcock, from death or grievous bodily harm at the hands of Owen Adcock, that Peter Sutcliffe had in England to protect himself from his twenty female victims.<sup>281</sup>

The appeal judges found that:

[t]here was a real risk that the jury were improperly influenced by those remarks. We consider that the trial process was compromised in that the possibility cannot be excluded that in convicting the applicant

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<sup>279</sup> *Ibid.*, 44.

<sup>280</sup> James Kenny, *Kenny's Outlines of Criminal Law* (Cambridge: Cambridge University Press, 1952), 611-612.

<sup>281</sup> *McCullough v R* (1982) 6 A Crim R 274, 284.



the jury were actuated, partly at least, by indignation, disgust and fear aroused by the intemperate language employed by counsel for the Crown. That is enough to demonstrate that a miscarriage of justice [...] occurred and that the verdict cannot be allowed to stand.<sup>282</sup>

From this case we can discern two important points. Firstly, what is essential to uphold this ground for appeal (the allegedly inappropriate conduct by counsel) is whether the jury may have been improperly influenced by the behaviour of the advocate. As observed by Justice Giles JA in *Gonzales v R* in 2007, “An important matter in considering unfairness is whether the Crown Prosecutor's conduct distracted the jury from rational consideration of the Crown case and the defence”.<sup>283</sup>

Secondly, the reliance by Appeals Courts on the effect on the jury (‘improper influence’) tells us that there are no uniform boundaries as to what constitutes inappropriate advocacy. Rather both the prosecuting and defence advocates are bound by invisible lines in the sand. Les McCrimmon and Ian Maxwell argue that “there are lines over which an advocate should not cross” and that the use of trickery, prejudice or emotion constitutes over-zealous advocacy. They also acknowledge, however, that this is a difficult position to determine, stating: “in practice [...] it is often difficult to establish the boundary between zealous advocacy and unethical conduct”.<sup>284</sup> As one New Zealand case established, the “feel and atmosphere of one trial may make it reasonable and even necessary for tactics to be employed that would seem out of place and disproportionate to the circumstances of another”.<sup>285</sup>

My argument throughout this chapter is that this boundary of appropriate advocacy is difficult to firmly establish in large measure because it is not historically static. Conventions and expectations of an advocate change not only in differing situations but also over time. As such, what is recognised as appropriate behaviour (that does not constitute trickery, prejudice or emotion) is not ‘natural’ behaviour, but rather a particular style that advocates must learn through induction into the social universe of the law. This nebulous area of appropriate

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<sup>282</sup> *Ibid.*, 274, 288, 289.

<sup>283</sup> *Gonzales v R* [2007] NSWCCA 321, Paragraph 100.

<sup>284</sup> McCrimmon and Maxwell, “Teaching Trial Advocacy,” 44.

<sup>285</sup> *R v Roulston* (1976) 2 NZLR 644 at 654.

behaviour is what I call *legal naturalism*: a performance style that indicates competence, skill and honesty to other legal practitioners and to a jury, and whose parameters alter over time.<sup>286</sup>

*Legal naturalism* functions on a largely unconscious level whereby advocates habituate what they have learned (as well as absorb relatively unconsciously how to behave) to the point where their behaviour feels, to an experienced advocate, like it is natural and looks, from an outside perspective, like it is simply a professional persona. Although many legal agents consciously associate acting with artificiality, and construct a dichotomy between acting and his or her own practice of ‘not performing’ (being ‘natural’), this is a form of misrecognition, resulting from advocates’ failure to recognise their own embodied courtroom behaviour as a performance style. Legal naturalism is, in the courtroom context, simply a case of ‘good acting’ rather than ‘over-acting’.

This is one of the reasons why I have employed the term legal naturalism, which explicitly references naturalistic acting. For an actor, playing another character naturalistically involves adapting one’s way of being in the world, one’s *habitus*, to “sign another”. Paul Moore writes on such a process:

Although not by name, the *habitus* as an idea is one that many actors may be familiar with. A good deal of training, which typically spans three of four years and continues into professional life, involves rigorous exercises aimed at neutralising physical expressions of this conceptual apparatus. ‘Symptoms’ of *habitus*, such as accent, colloquialisms and bodily expression, all of which help to locate our past in the present, are suppressed, allowing the actor to temporarily sign another. The more completely actors master the ability to do this on a precognitive level, the more successful and comfortable their attempts at performance are likely to be.<sup>287</sup>

Naturalistic acting involves an actor not only attempting to become conscious of, and modify one’s own ‘symptoms’ of *habitus*, but is also an attempt to understand and navigate a different way of being in the world and concomitant sign system. Naturalistic actors do not only mimic external characteristics; rather they attempt to present themselves as fully embodied characters. The effort behind this accurate representation is ideally invisible in an

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<sup>286</sup> *Legal naturalism* is a term that covers a spectrum of practices. Although from this point on I am not separating the prosecution from the defence, it does not mean that the defence and prosecution are behaving (or should be behaving) identically.

<sup>287</sup> Paul Moore, “Longing to Belong,” 43.

effective performance, where an audience does not notice the disjunction between an actor and the character he/she is playing. The enormous effort and high level of preparation for an actor involved in naturalistic performance is transformed by an audience's experience, where he or she simply seems 'natural'.<sup>288</sup>

Legal naturalism as I am defining it is similar to naturalistic acting. Both actors and advocates must neutralise symptoms of their *habitus*—reducing obvious markers of their past that may jar with audience reception. However, whereas actors only have one audience, advocates must play to two very different audiences inside a courtroom: their colleagues and a jury. To a jury, an advocate must seem like a human being, able to communicate with them without patronising them or being pompous. The outcome of a case depends to some extent on an advocate winning a jury's trust. However, advocates must also meet the expectations of their colleagues. All lawyers and judges present in a trial are officers of the court. That is, they are all bound by certain rules and duties to the court, which outrank/outweigh their individual responsibilities to their clients. This means that advocates cannot overstep these boundaries for the sake of their client (for example by trying too hard to win sympathy, or 'play' to the jury).

To their peers (and superiors), advocates must seem competent, professional and disinterested. This is not only, as observed above, because behaviour that may sway a jury may also potentially constitute grounds for appeal. It is also because, just as a witness's credibility is under scrutiny in a courtroom, so too is an advocate, who is continually being assessed by his/her peers as well as by the jury. Legal naturalism is necessary not only to be persuasive in a case, but more largely to ensure an advocate's competence to compete for capital in the juridical field.

### ***Storytelling and Persuasion***

The need to reach the audience, coupled with the negative connotations frequently attached to acting, means that a common rubric has developed to describe advocacy practice:

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<sup>288</sup> This idea is in keeping with Konstantin Stanislavski's dictum that it takes an enormous amount of effort to seem effortless. See Jean Benedetti, *Stanislavski and the Actor* (Methuen Drama: London, 1998).

storytelling. Advocates often learn to see themselves as storytellers.<sup>289</sup> The goal of this storytelling is ‘persuasion’. Queen’s Counsel Chester Porter, who wrote a book called *The Gentle Art of Persuasion*, says “Stories are very often a highly effective means of making a point in a speech”, though he qualifies this by pointing out that “it is best for the story to be brief”.<sup>290</sup> New South Wales Crown Prosecutor Mark Tedeschi says that advocacy involves a “fireside story”.<sup>291</sup> Queen’s Counsel George Hampel points out that storytelling is a means of reminding the advocate that he or she wants to “avoid sounding as though [he or she has] recently escaped from a mooted contest in an intellectual property dispute”.<sup>292</sup>

In the adversarial criminal jury trial, to be able to communicate with (or persuade) the jury effectively requires a downplaying of the professional, specialised language of the law into language that is communicable to laypersons. The term ‘storytelling’ is used by legal practitioners to explain the necessity of negotiating (although not collapsing) the gap between lay and law, whereby advocates can retain their professionalism and distinction without being overly opaque to a jury. Chester Porter makes this explicit, saying that “the secret of successful storytelling is the ability to judge what will be interesting to the audience, and then to tell it in an interesting way”.<sup>293</sup>

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<sup>289</sup> By storytelling, I also mean to encompass ‘orator’, ‘oral pleader’ and other related terms as well. The use of the term has been criticised by people such as legal professor Laurie Kadoch who questions the ethics of using narrative as a tool of persuasion, seeing it as manipulative and populist. See Laurie Kadoch, “Seduced by Narrative: Persuasion in the Courtroom,” *supra* n. 232. Yet references to the advocate as storyteller in adversarial jurisdictions do date back to the early 20<sup>th</sup> century. See, for example, Justice Edward Parry’s 1923 book *The Seven Lamps of Advocacy* *supra* n. 265. Considering that defence advocates have only been formally allowed in criminal procedure since 1836, the fact that storytelling has been in use throughout at least an entire century gives some insight into its importance as a description of how advocates understand their own practice.

<sup>290</sup> Chester Porter, *The Gentle Art of Persuasion* (Sydney: Random House, 2005), 99. Queen’s Counsel is now known as Senior Counsel or SC, and is known colloquially as ‘taking silk’. It is an honour applied for and bestowed on senior barristers (usually of at least a decade’s experience). How barristers are chosen is controversial, however, and it is increasingly being argued that the practice is snobbish and an excuse to drive up the rates a barrister may charge.

<sup>291</sup> Robert Wainright, “The Case for the Prosecution (Interview with Mark Tedeschi SC),” *Sydney Morning Herald*, 9 September, 2006.

<sup>292</sup> Max Perry and George Hampel, *Hampel on Advocacy: A Practical Guide to Basics* (Melbourne: Leo Cussen Institute, 2002), 35.

<sup>293</sup> Chester Porter, *The Gentle Art of Persuasion*, 190.

Storytelling places a premium on being brief, clear, and using ‘sensorial’ language. As George Hampel points out: “‘He hit my client several times, occasioning him severe injury’ does not suggest nearly as much to the Tribunal as ‘he punched my client hard to the face, and broke his nose’ [...] such imagery can quickly catch a court’s attention and direct it to the concerns which the advocate wishes to develop”.<sup>294</sup> Because the criminal trial process remains primarily oral (and judges have discretion—albeit rarely used—to prevent jurors from taking notes), storytelling is also about presenting an argument in a way that is simple and memorable.<sup>295</sup>

The term storytelling is also distinctly classical.<sup>296</sup> Advocates have a long history of drawing on classical writings as a means of illustrating the skills of persuasion needed for today’s trial.<sup>297</sup> English manuals on advocacy training (dating back to well before the 1300s) frequently draw on legal advice for pleaders in ancient Greece and Rome, particularly Aristotle’s writings on rhetoric. More recently, Justine Lewis’s dissertation writes about the rhetorical skills necessary for advocacy.<sup>298</sup> This classicising of contemporary legal proceedings is partly about the creation of tradition. By concentrating on the advocate’s (literal) antiquity, the contemporary advocate can trace a line from their profession back to the pleaders of ancient Rome and Greece by seeing themselves as ‘storytellers’ who practice the ‘art of persuasion’.

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<sup>294</sup> Perry and Hampel, *Hampel on Advocacy*, 21.

<sup>295</sup> Although it seems self-evident that note-taking will assist jurors, arguments advanced against note-taking have included the possibility that a juror who takes notes will have more sway in deliberations than those who do not, that note-taking may distract other jurors, and that a juror will neglect to observe the demeanour of witnesses if he/she is too busy writing. See: New South Wales Law Reform Commission [hereafter NSWLRC], *Criminal Procedure: The Jury in a Criminal Trial*, Discussion Paper No. 12 (1985) [6.1].

<sup>296</sup> At times storytelling is even positioned as primordial and instinctive. Writers such as Gerry Spence stress the parallels between tribal practice and contemporary trial procedure: “Of course it is all storytelling—nothing more. It is the experience of the tribe around the fire, the primordial genes excited, listening, the shivers racing up your back to the place where the scalp is made, and then the breathless climax and the sadness and the tears with the dying embers, and the silence”. Gerry Spence, “How to Make a Complex Case Come Alive for a Jury,” *American Bar Association Journal* 72.1 (1986): 63.

<sup>297</sup> See, for example, Robert F. Hanley, “Brush Up Your Aristotle,” *Litigation* 39 (1985-1986); Jennifer Fowler-Hermes, “Improving Persuasive Effects in the Courtroom: An Application of Rhetorical Theory,” *American Journal of Trial Advocacy* 24 (2000).

<sup>298</sup> Justine Lewis, “Performance in Legal Advocacy,” *supra* n. 270.

This, however, belies the fact that these two separate legal universes are in fact alien to one another.<sup>299</sup> The law, and the criminal jury trial itself, in Australia or any other adversarial jurisdiction, is radically different from these classical origins. Although the emphasis on oral processes remains, what is meant by ‘oral’ has shifted. The culture of residual orality in Ancient Greece and Rome was strong enough that the law was not so bound to literacy, as it is in our contemporary legal system. As Walter Ong points out in *Orality and Literacy: Technologizing the Word*, oral cultures have a completely different conception of the world.<sup>300</sup> Writing is not simply a means of recording oral processes; rather it has utterly changed the way humans think.

While common law traditions have their origin in (relatively) preliterate societies, the mechanisms and structures of the trial are predicated on literacy. Legal documents do not have a narrative structure; rather they are navigable only with reference to other written material such as cases, supplementary texts and statutes. In a trial process, this remains true. The construction of a defence or prosecution relies on reference to written evidence, precedent and procedure. Storytelling (primarily based on Aristotelian theory) functions on the premise of a beginning, middle and end. Although in the contemporary criminal jury trial advocates still rely on the spoken word, storytelling in a contemporary trial is not a simple chronological oral account, but rather a translation of a mass of material into something resembling a narrative structure that is presented primarily orally. This is immediately apparent on entering a courtroom where vast amounts of documents sit in suitcases and on trolleys in the aisles of the courtroom as there are no facilities for storing documents.

Examining the meaning of ‘orality’ exposes a conceptual gap between the theory and practice of the criminal trial. The traditional courtroom operates on a legal belief in the law’s orality; yet the trolleys full of books undermine this belief. Trial procedure is not classical; in fact, its progress mirrors the post-enlightenment scientific model that is also embedded in the

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<sup>299</sup> For example, Les McCrimmon and Ian Maxwell point out that advice for pleaders that can be traced back to Quintillian, Plato and Tacitus is of little use in the courtroom. Quintillian advised “visiones”—simulating emotion to the point where genuine emotion would overcome the advocate. This requires a great deal of grand gesturing. Far from being naturalistic, many of these writings became the basis for neo-classical Restoration acting, which was exactly the form of histrionic performance that legal agents associated with artificiality. See McCrimmon and Maxwell, “Teaching Trial Advocacy,” 56-62.

<sup>300</sup> Walter Ong, *Orality and Literacy: The Technologizing of the Word* (London: Routledge, 1982).

language. There is no beginning, middle, and end to a legal case that a partisan evidence gatherer does not artificially delimit in a courtroom. Each (prosecution or defence counsel) presents a hypothesis that is then tested through the opposing counsel; a decision is then rendered by a jury as to which hypothesis is more compelling.

As we remit evidence gathering to partisans, it is unlikely that either hypothesis is the ‘Truth’, although the prosecution in particular is bound to strive for this goal. It is not in either side’s interests to admit any interpretation of evidence that may hinder a jury’s acquittal/conviction.<sup>301</sup> The goal of advocacy is consequently to compel the acceptance of one story over the other, truth becoming (as previously noted from Foucault) “the ensemble of rules according to which the true and the false are separated and specific effects of power attached to the true”.<sup>302</sup>

Despite the prevalence of advice from legal practitioners about speaking simply and clearly, an advocate is never simply relating what happened. Rather, advocates translate and shape a past event into a legally acceptable narrative. ‘Storytelling’ is therefore a form of legal framing where an event must be reconfigured in legal discourse to have meaning in a criminal trial. As George Hampel points out, storytelling involves drawing attention to particular ‘concerns’ an advocate wishes to develop.<sup>303</sup> I stressed in the previous chapter that the role of the preconscious was integral in sustaining the symbolic violence of the courtroom process. As I will outline, ‘storytelling’ and ‘persuasion’ are also relatively euphemistic terms that cloak significant coercion.

Just as using pseudo-Aristotelian theory allows writers to posit the courtroom as a classical theatre, so does the term storytelling allow advocates to believe that they are simply aiding

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<sup>301</sup> I stress that I mean that this is a matter of *interpretation* of evidence, and not about wilful deceit or disregard of contradictory evidence, which is forbidden in the Bar rules. (See rule 58 in *The New South Wales Barristers’ Rules* (s57a of *Legal Profession Act 1987* by NSW Bar Council, retrieved 11 June 2008 from: [http://www.nswbar.asn.au/docs/professional/legislation/leg\\_index.php](http://www.nswbar.asn.au/docs/professional/legislation/leg_index.php)). The prosecution, in particular, as an agent for the State, is bound to take into account any mitigating circumstances, and must share any evidence advantageous to the defence. This does not mean, however, that the prosecution and defence are not interested in presenting the evidence so as to outline the worst-case scenario or best-case scenario for the benefit of a conviction/acquittal.

<sup>302</sup> Foucault, “Truth and Power,” 132.

<sup>303</sup> Perry and Hampel, *Hampel on Advocacy*, 21.

their client to present their story as best as possible.<sup>304</sup> The paradigm of storytelling has become such a common expression that it is easy to overlook the elision of other parties that this term suggests. Advocates do not just construct a narrative out of an alleged crime; they use other bodies—witnesses—to elicit this narrative.

Anne-Marie Büllow-Møller remarks: “no adequate account of courtroom communication can be given without starting from the premise that the real communication is not between the primary speakers, i.e. counsel and witness, but rather between counsel and his audience—the judge and jury”.<sup>305</sup> Büllow-Møller draws our attention to the dominance of the advocate and the relative passivity of the witness, a significant historical development in the trial as outlined in the second chapter of this thesis. Forensic linguist John Gibbons also focuses on this power transaction. Gibbons describes the advocate’s story as the “master narrative” and the witness accounts as “satellite narratives”. Gibbons argues that witnesses’ accounts fold in to the “master narrative” and that advocates achieve this through fragmenting the witness’ story and eliciting it through control.<sup>306</sup> Gibbons calls the alleged crime the “second reality”, subsumed within the primary reality of the trial process itself, and argues that advocates’ “master narrative” involves transforming the events into legal language and additionally using a broader legal frame of chronology, all of which is constructed through the witness.<sup>307</sup>

This allows a past event the jury did not witness to become digestible and compelling. The clearer and more cogent the witness is through the advocate’s translation, the more credible he/she is to a jury. Consequently, the onus on the advocate is to present a narrative through a witness as concisely and chronologically as possible. This alteration is in a witness’s own interest, if he/she wishes to be believed by the jury. However, it diminishes (to varying degrees) a witness’ ability to give his/her account of what happened.<sup>308</sup>

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<sup>304</sup> Which, of course, they are, in keeping with how juridical truth is determined in the adversarial criminal trial.

<sup>305</sup> A.M Büllow-Møller, “Trial Evidence: Overt and Covert Communication in Court,” *International Journal of Applied Linguistics* 1.1 (1991): 40.

<sup>306</sup> John Gibbons, *Forensic Linguistics: An Introduction to Language in the Justice System* (Oxford: Blackwell Publishing, 2003), 95-108.

<sup>307</sup> Gibbons, *Forensic Linguistics*, 155-56.

<sup>308</sup> This can be seen as another kind of ‘levelling’ of forms of knowledge that are external to juridical knowledge as outlined in the previous chapter. A witness’s experience can only have meaning (or evidentiary value) in a criminal trial if it is reframed into legal discourse (and therefore it must be translated by a legal agent). This



For example, although the examination-in-chief theoretically allows a witness to tell his/her story, this method is highly controlled, if less explicitly so than cross-examination. The advocate determines what questions will be asked and will have been specifically trained to ask questions that will shape a witness' narrative into legal discourse. The kind of questions being asked are usually "Can you tell us what you did first?" followed by "then what happened?" 'Then' is a frequent sentence opener as an advocate translates the complexity of a witness' memory into a chronological (and therefore legally credible) understanding of events. This means that examination-in-chief is highly controlled as advocates must carefully shape a witness's statement through their choice of questions without putting words into the witness' mouth ('leading' the witness). As John Gibbons points out, leading questions (or leading statements) despite technically being disallowed in examination-in-chief, are actually frequent and to some degree unavoidable.<sup>309</sup> As he notes, "When counsels attempt to adhere rigidly to this [no leading statements] rule, there can be agonizing exchanges where the witness misses the point of the questioning, because if the lawyer made the question more precise or pointed, this would involve leading the witness".<sup>310</sup>

Cross-examination is more readily recognisable as control by both laypersons and legal practitioners. A frequent piece of advice given to an advocate cross-examining a witness is never to ask the witness a question that the advocate does not know the answer to. Witnesses undergoing cross-examination can (usually) only answer with one-word or very short answers (most commonly 'yes' or 'no'). Gibbons terms these 'polar questions'. This means, in practice, that 'questions' in cross-examination are not necessarily recognisable as such. Rather they are leading statements. John Gibbons points out that along with the limiting nature of insisting on "polar" questions, a means of augmenting this control is to "embed" several pieces of information into a question. For example, Gibbons uses the example: "Can you tell me what colour that nightdress was?" As Gibbons goes on to note, the question has

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remittance of knowledge allows legal agents to define 'The Law' as having a status above all other epistemologies and as being relatively timeless, even though how knowledge is produced by legal agents operating within the juridical field is historically contingent.

<sup>309</sup> Leading questions/statements are disallowed in examination-in-chief unless permitted by the court. However, leading questions/statements are permitted in cross-examination unless forbidden by the court. See *Evidence Act 1995 (NSW)* ss 37, 42.

<sup>310</sup> Gibbons, *Forensic Linguistics*, 108.

additional information embedded in it because it already assumes the existence of said nightdress. This means that because a witness can only make a one-word reply (such as ‘red’) the said witness will be singularly unable to object to the other information embedded in the question without becoming confused, contradicting him/herself or being admonished by legal agents for not simply answering the question.<sup>311</sup>

For example, the 1995 NSW Department of Women report into sexual assault trials, *Heroines of Fortitude*, documents where a defence counsel asks the witness: “And it was then that you pushed your pants and your underpants down?” to which the witness can only cry “No”. The “no” remains ambiguous because of the multiple propositions embedded in the question.<sup>312</sup> This means that the constructed primary narrative of the advocate will only partially resemble what happened. A “satellite narrative” in the first place describes a witness translating a complex experience into a verbal account. An advocate then reconfigures this account into legal discourse, meaning that their narrative is a twice-translated step from what happened during an event/alleged crime. As Gibbons comments:

The packaging of complex and multifaceted reality into a linear narrative carries obvious dangers of distorting the secondary reality. However, the need to make the secondary reality “graspable” for a varied audience usually outweighs these concerns.<sup>313</sup>

The rubric of storytelling—making ‘what happened’ “graspable”—cloaks the advocate’s dominance over the proceedings at the expense of the witness.<sup>314</sup> Even the most ideal behaviour of an advocate—when he or she is simply applying the skills that he or she has learned—involves significant control of a witness, which can diminish the witness’s capacity to give an account of his or her experience. This can be upsetting and traumatic without even considering the further possibility of hostility and provocation by a defence advocate (as

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<sup>311</sup> This is one of the reasons why there is the opportunity for re-examination after cross-examination. During re-examination, the side the witness belongs to can attempt to repair any damage to his/her credibility done by a witness’s admission(s) under cross-examination.

<sup>312</sup> New South Wales Department for Women, *Heroines of Fortitude: the Experiences of Women in Court as Victims of Sexual Assault* (Gender Bias and the Law Project, Sydney, 1996), 158.

<sup>313</sup> Gibbons, *Forensic Linguistics*, 154.

<sup>314</sup> Interestingly, as outlined in Chapter 2 of this thesis, it was the advocate’s taking over of narrative that was of most concern during the transition from altercation to adversarial trial. The last provision restricting defence advocates (prior to the Parliamentary Act of 1836 where they were first formally allowed to represent clients) was a restriction on delivering opening and closing statements. See John Langbein, *Origins*, 296-300.

provoking a witness to anger can diminish his/her credibility, particularly if he/she contradicts him/herself or makes an admission). Most advocates are not conscious bullies, but it is certainly the case that cross-examination in particular can become forceful at times.

Gibbons, looking at the controlling nature of witness questioning, comments that “these types of disadvantage, which have deep social roots, cannot be remedied only by linguistic means”.<sup>315</sup> Following Gibbons, I argue that although these disadvantages manifest themselves in the language, they are emblematic of the systemic gap between lay and law that sustains the adversarial trial process in its current form. As I outlined in the previous chapter, symbolic violence is only possible through the unconscious support of both ‘perpetrator’ and ‘victim’: the assumption by both parties that ultimately advocates are acting in everyone’s best interests. In this situation, symbolic violence is perpetuated because both legal agents and laypersons believe that the adversarial model of criminal trial is a reasonable means to determine the ‘truth’ of a case, and consequently examination-in-chief and cross-examination are accepted (and relatively unquestioned) means of evidence-testing.<sup>316</sup>

Consequently, although I believe the metaphor of storytelling is faulty, the fact that advocates continue to draw this parallel means that this perceived relationship is important in itself for revealing how advocates understand their own practice. By seeing him/herself as a storyteller, every practising advocate has internalised and embodied certain ideas about the trial, truth-telling, and the role of ‘The Law’. Advocates do not question their dominance or the relationship between *what happened* and the ‘story’ that they construct in the courtroom (the story that reflects the field-specific model of adversarial juridical ‘Truth’). Instead, advocates believe ‘The Law’ is relatively neutral, and that the lay public relies on professional assistance. These assumptions sustain the performance of tradition.

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<sup>315</sup> Gibbons, *Forensic Linguistics*, 227.

<sup>316</sup> Overly hostile cross-examination is certainly frowned on in the legal world but there is no doubt that once again there is an invisible line between the “coercive” powers of the court and an advocate becoming a bully. As many legal agents point out, however, the risk for an advocate of bullying a witness is that the jury perceives the advocate as hostile and the trauma of the witness as engendering sympathy. This negotiation of the duties of an advocate towards their client as well as their duty to the court is explored in detail in Chapter 7 of this thesis, which examines sexual assault trials.

Having determined what appropriate performance is for a contemporary Australian advocate, I will now examine two different kinds of advocacy training. In the first section, I will examine private advocacy material that explicitly purports to teach advocates how to act. Secondly, I will examine pupillage, the traditional apprenticeships for advocates. Through this analysis I establish that an advocate's performativity is considered natural if it fits into the contemporary parameters of legal naturalism and artificial if it subscribes too closely to explicit acting. As I will argue, however, this dichotomy can better be understood as 'good acting' vs. 'bad acting'. 'Bad acting' is recognisable because it diverges from legal naturalism; this means that those advocates employing explicitly acting-oriented advocacy advice may seem too much like they are acting. 'Good acting', on the other hand, is missed completely as a performance style by the vast majority of legal agents because it seems natural. As I will ultimately show, however, despite this divide any form of advocacy training continues to reassert and perpetuate the dominance of an advocate over the witness.

### ***'Bad Acting': Private Advocacy Training***

Acting focused advocacy training is often a collection of strategies and tips, rather than an overarching methodology. It is also primarily based in the U.S.<sup>317</sup> A visit to the National Institute of Trial Advocacy website reveals such book titles for sale as *100 Vignettes for Improving Trial Advocacy Skills*, *31 Ways to Winning Advocacy*, and *How to Try a Jury Case: Trial Tactics*.<sup>318</sup> Keith Evans, who has written both U.K. marketed and U.S. marketed advocacy books, states in the introduction to his U.K. advocacy guide that advocacy training

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<sup>317</sup> The U.S. has the largest collection of private advocacy training material because of two reasons: firstly, its sheer size in terms of population and legal practitioners and secondly, because there is no formal advocacy experience required to practise in the U.S. beyond passing the Bar examination and (usually an ethics exam, called the Multistate Professional Responsibility Exam). More recently, some U.S. states, such as Vermont, have introduced forms of apprenticeship; however, this is still not the usual practice for most American law graduates. As I will go on to argue, the private advocacy training industry tends to arise out of a vocational training gap.

<sup>318</sup> David Sonenshein, Anthony Bocchino and Joanne Epps, *100 Vignettes for Improving Trial Advocacy Skills* (NITA Publications: 2005); Frank D Rothschild, *31 Ways to Winning Advocacy* (DVD Series: 1996); John F. Kimberling, *How to Try a Jury Case: Trial Tactics* (NITA Publications: 2007).

is about technique. He goes on to say: “‘technique’ is a Greek word that means a bag of tools. We shall start to look at some of those tools”.<sup>319</sup>

The kind of tips and strategies these guidebooks give revolve around pitch, tone, dress, and gesture; what might be termed style and decorum. For example, Evans stresses the importance of striving “to keep the interest of your audience”.<sup>320</sup> Evans suggests that altering one’s voice does this, warning that otherwise “its pitch may be dreary and its tone monotonous”.<sup>321</sup> John Barkai, who writes an article on the importance of “nonverbal communication”, prescribes the best methods of standing, sitting and leaning for the advocate seeking to build a relationship with the client at trial or during an interview:

The forward lean posture is also very good for making observations. The close distance provides a better opportunity for the lawyer to observe minute changes in the client. The forward lean also narrows the field of view and therefore reduces other distractions.<sup>322</sup>

James McElhaney suggests in *Trial Notebook* that an advocate should “every 10 to 15 minutes do something to get the witness standing up and moving around. Have the witness point to something on an exhibit or a diagram. Ask the witness to demonstrate how something happened”.<sup>323</sup> As we can see, these materials do not teach an advocate how to be an actor. Instead, there is an emphasis on individual aspects of acting in the theatre—such as voice, gesture, and movement—that can be borrowed to achieve the same effect in a courtroom. The monologism of this approach assumes that these signs—such as the ‘forward lean’—are static (and therefore always appropriate and consistently achieving the same effect). Advocates are told in these materials that certain signs will have certain effects, with no mention being made of the meaning-making processes of the jury who are perceived to be highly passive.

‘Tips and tricks’ advocacy training material can therefore be interpreted as a guide to courtroom semiotics, and this approach foregrounds the importance of style. Using this

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<sup>319</sup> Keith Evans, *Advocacy in Court: A Beginner’s Guide* (Oxford: Oxford University Press, 1995), 6.

<sup>320</sup> *Ibid.*, 24.

<sup>321</sup> *Ibid.*, 24.

<sup>322</sup> John Barkai, “Nonverbal Communication from the Other Side; Speaking Body Language,” *San Diego Law Review* 27(1990): 114.

<sup>323</sup> James McElhaney, *Trial Notebook* (Chicago: American Bar Association, 2005), 400.

advice potentially allows an advocate to assume the mannerisms of, and present him or herself as, a far more experienced advocate than he or she may actually be. This approach verges on the manipulative. These guides teach advocates how to imitate markers of legal naturalism, such as “open arms” and a “steady voice”, yet rather than these signs being the manifestation of an embodied performance, the advocate is assembling a series of tools to trick a jury into believing what he or she says. This approach also encourages artificial behaviour as these signs may seem like awkward “add-ons”. As James Maxwell says:

The approaches suggested by trial practice teachers and writers seem to treat gestures as “add-ons.” At the least, therefore, these tips engender clichéd behaviour and at the worst they encourage the lawyer to disassociate her behavior entirely from her intuitive sense of what is appropriate in the here-and-now.<sup>324</sup>

These materials make performance highly visible, because advocates are not being taught to respond to a dialogic situation. Instead, they are effectively arming themselves with devices to achieve certain effects. This borders on the trickery advocates are warned against in *Lyon v R*.<sup>325</sup>

A potential problem with this material, however, is that authors such as Keith Evans or David Ball tend to assume that the processes in the courtroom and the theatre are the same. In this material, as noted in the previous chapter, we see such lines as “the courtroom is a theatre; thus the trial is the play”, suggesting a simple equivalence between the two practices. In advocacy training material, this relatively simplistic comparison is extended where not only is the trial a play, but the lawyer is consequently an actor: “a courtroom is a theatre. The prepared trial lawyer will know everyone’s lines in the play”.<sup>326</sup> This loose analogy means that the monologic signs may be less likely to come across as natural, and more likely to

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<sup>324</sup> James Maxwell, “Acting and Legal Education,” *Vermont Law Review* 17 (1993): 575.

<sup>325</sup> *Lyons and Lyons v R* (1992) 64 A Crim R 101. Of course, an advocate who uses this advice *well* is even more problematic. A potential threat to advocates from private advocacy training is the means by which younger graduates can equip themselves with skills that took older advocates years to acquire. If, for example, our law student studied McElhaney’s book and proved adept at taking its advice, he could ‘fake it’, adopting signifiers of status without having gone through the years of experience to obtain them. The risk is not that he is using trickery but that in so doing, he will seem natural. This presents a challenge to the structuring of the hierarchy of the juridical field, which relies on a series of unstated signifiers that are methods of exclusion to perpetuate the gap between older advocates and novice advocates.

<sup>326</sup> Tom Riley, “The ABCs of Cross-Examination,” *Drake Law Review* 41.1 (1992): 37.

seem inappropriate in a courtroom where the signs of performance are potentially quite different from the theatre.

Yet, like the term storytelling, the faultiness of the analogy is illuminating in revealing how advocacy-training writers and/or practitioners understand the role of the advocate. The analogy foregrounds the advocate as the key player of the trial, and tips and strategies material sells itself on this idea. The advocate/magician is the central figure who single-handedly turns the courtroom into a stage. David Ball's *Theatre Tips and Strategies for Jury Trials* states: "In the theatre of the courtroom, you are one of the stars" and Laurence Vogelmann describes the lawyer as "author, choreographer, actor and dancer".<sup>327</sup> Keith Evans claims:

You wouldn't want to be a trial lawyer if there wasn't something of an actor inside of you. You'd have gone for another job or another area of law practice. By aiming for the courtroom, you have chosen to go on the professional stage, just as surely as if you'd tried to make it in Hollywood or on Broadway.<sup>328</sup>

Evans suggests that any aspiring advocate is also somewhat of an exhibitionist. James McElhaney says:

I have spent most of my professional life studying, analyzing, teaching, writing about (and doing) trial advocacy. That has meant studying the styles, techniques and ideas of the best trial lawyers in the country—undisputed winners. Everyone of those winners made a decision. She or he decided not to be a run-of-the-mill lawyer, but a winner. That decision led these people to develop (consciously or subconsciously) the qualities necessary to be winners. I am going to tell you what those qualities are.<sup>329</sup>

The authors of tips and strategies guidebooks market themselves by saying that an advocate can win a case based on their advice. Of course, it is obviously in the interests of those writing to do so. However, this approach still suggests that an advocate's performance can persuade a jury one way or the other. Consequently, the implication is that what an advocate is *doing* is more important in affecting an outcome than the facts of a case. This flies in the

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<sup>327</sup> David Ball, *Theatre Tips and Strategies for Jury Trials* (Nita Publications: 2003), 1; Lawrence Vogelmann, "The 'Big Black Man Syndrome': The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom," *Fordham Urban Law Journal* 20.3 (1993): 572. Vogelmann, however, stresses that advocacy is an "art", not a "craft".

<sup>328</sup> Keith Evans, *Common Sense Rules of Advocacy for Lawyers* (St Paul, Minnesota: West Publishing Company, 1994), 38.

<sup>329</sup> McElhaney, *Trial Notebook*, 4.

face of underlying core legal beliefs about methods of evidence testing in the criminal trial. As Chester Porter expresses these beliefs: “there is no substitute for quality and this applies to arguments, however well expressed. The argument that will ultimately prevail will be a valid one. Of course, this is only ultimately, but the object of a persuader should always be truth”.<sup>330</sup>

Arthur Austin, a professor of jurisprudence, notes the dominance of the analogy of the advocate as actor and critiques its use. For Austin, this approach trivializes the processes of court by comparing it to a form of entertainment, where the lawyer is a ‘star’. He also argues that lawyers over-emphasise their own importance in the process:

The theater scenario of litigation [...] is the basic premise of the advocate’s ideology. According to the tradition of adversarial systems, egocentric litigants [i.e. American advocates] function as central characters who direct and star in the law-suit drama.<sup>331</sup>

Although the basis of Austin’s criticism is the egocentricity of the advocate, I argue, however, that this ‘egotism’ is in part a manifestation of how important the advocate has become.

As I outlined in the beginning of this thesis, advocates have come to dominate the trial landscape as the juridical field has become increasingly autonomous and professionalised. The public now places continual trust in legal professionals, remitting to them care of what is frequently a traumatic time in their life. Both the public and the legal profession have naturalised this role beyond questioning. However, both parties have done so under the conscious belief that advocates are mediators—public servants of a kind—who work in service of ‘The Law’. This may sound rather naïve. Indeed, the lawyer’s role in popular imagination, usually the butt of black jokes revolving around deceit and swindling, is a good indication that the public do not necessarily have unbridled faith in an advocate’s honesty. However, although advocates may vary in their abilities and ethics, the public and the legal profession need to believe that the adversarial criminal trial is still a reliable and relatively fair means by which to determine what happened in an alleged crime.

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<sup>330</sup> Chester Porter QC, *The Gentle Art of Persuasion*, xx.

<sup>331</sup> Arthur Austin, “Book Review: *What Makes Juries Listen* by Sonja Hamlin,” *American Journal of Trial Advocacy* 8.3 (1985): 510.



An advocate's performance should not be seen to be the sole means by which the outcome is determined by a jury (as made explicit by the quashing of the conviction in *McCullough v R*). However as the jury only ever sees evidence mediated by the prosecution or the defence, there is no doubt that an advocate's powers of persuasion in the courtroom are very important. As David Berg says (somewhat hyperbolically) in *The Trial Lawyer: What it Takes to Win*: "the degree to which jurors are persuaded is in direct proportion to your performance: You must be a good storyteller. In Marshall McLuhan's famous phrase about television, 'the medium is the message'. In a jury trial, the medium is you".<sup>332</sup>

I am not suggesting that the most charismatic performer will always determine the outcome of an adversarial criminal jury trial. I am arguing, however, that where overwhelming physical evidence is lacking, the role of advocacy is crucial. Advocates control the presentation of evidence and testimony, yet are theoretically meant to be simply mediators that work for their client and the court. For legal agents within the juridical field to maintain credibility in the wider community, they must be able to navigate these two slightly contradictory tasks in such a way that their dominance in the trial goes unchallenged by laypersons and where advocates themselves can maintain their belief that they work in the service of their client and 'The Law'. This balancing act is illustrated by the downplaying of the advocate's dominance in the courtroom as simply a vehicle for truth (where the ethical responsibilities of an advocate are represented by that blurry boundary between "zealous advocacy" and "unethical conduct").

The advocacy training materials above also show awareness of this potential problem by emphasising that their advice on how to win assumes that the advocate presenting their client's case believes what he or she is saying is true. Most state specifically that a jury will know if an advocate is lying: "Speak without conviction and you will lose the jury".<sup>333</sup> All Bar Association rules explicitly state that an advocate cannot knowingly mislead a court.<sup>334</sup> Yet considering that the relationship between an advocate's interpretation of an event and what happened is not simply straightforward (and cannot be, given the constraints of the trial and the distance from the alleged crime itself), the suggestion by these authors that advocacy

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<sup>332</sup> David Berg, *The Trial Lawyer: What it Takes to Win* (American Bar Association: 2003), 129.

<sup>333</sup> *Ibid.*, 132.

<sup>334</sup> "A barrister must not knowingly make a misleading statement to a court on any matter". Rule 21, *New South Wales Barristers' Rules*, *supra* n. 301.

training methods are only helpful when used in pursuit of the ‘truth’ remains a little idealistic and unconvincing.

The return to the jury as arbiter, however, is illuminating. Ultimately, all assessment of advocacy ability and expectation comes back to the jury. The idea that a jury can determine an outcome after witnessing evidence testing by partisan advocates involves subscribing at least to some degree to the widespread faith in a jury’s ability to detect the ‘truth’. Whilst this belief, which has existed for hundreds of years, may consciously be adhered to by both legal and lay trial participants, it is also in the interest of legal agents to confer the authority of judgment to the jury, since in this way the jury process remains shrouded in secrecy.<sup>335</sup> To some degree, the secrecy of jury deliberation in Australia and the U.K. sidesteps the thorny question of just how much power an advocate’s performance in court has in determining the outcome of a case (except in cases where a defendant appeals on the basis of inappropriate conduct by the prosecuting advocate, or Crown Counsel).<sup>336</sup>

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<sup>335</sup> I do not mean by this that an advocate is never culpable for a poor result, or never takes credit for a positive result. Rather I mean the secrecy in which the jury conducts itself (particularly in Australia where jurors are discouraged from talking to the media) means that an advocate will have to guess to some extent why he or she won or lost a case. In New South Wales, public dissemination of information that may identify jurors is forbidden under the *Jury Act 1977* s 68, except where former jurors give their consent. Non-disclosure of what happens during jury deliberations is, however, as the NSW Law Reform Commission observes, a “convention [...] and not a rule of law”. Although courts may criticise jurors who divulge details of their deliberations, no prosecutions have taken place. See NSWLRC, *Criminal Procedure: The Jury in a Criminal Trial*, Report No. 48 (1986) [11.2]. The assumption that jury deliberation should remain secret rests on the belief that “the interest of the community in ensuring freedom of debate in the jury room and finality of verdicts outweighs [the interests of the community and of litigants] in seeing that the accepted rules and formalities of a fair trial are maintained and enforced”. See: *Re Mathews and Ford* [1973] VR 199, 211.

<sup>336</sup> The ability of a jury to arrive at the truth was questioned in January 2007 in Sydney, when the NSW Bureau of Crime Statistics and Research conducted research with 277 jurors immediately after they had returned their verdicts. Although this research was supposedly about the effects of videotaped testimony on juror perception (outlined in Chapter 6 of this thesis), the interviewers began by asking the jurors what verdict they had just delivered. In only six of 25 cases could all jurors accurately state the verdict they had just delivered. In almost a quarter of the trials, at least one juror thought he or she had found someone guilty when he or she had not. See Tim Dick, “Nine Angry Jurors...and a Few Left Confused,” *The Sydney Morning Herald* January 6-7, 2007, 16.

How much influence an advocate has over winning or losing a case is the focus of another form of advocacy training, one exemplified by the convenors of the workshop *What Can Lawyers Learn from Actors*. Unlike the ‘tips and tricks’ advocacy material, this workshop presents itself as a full-blown methodology. Made by *Act of Communication*, a company run by two American actors, this workshop reflects a different approach to advocacy training, in which performance is valorised as a means of revealing, rather than obscuring, the truth. The workshop convenors state their opposition to trickery by arguing that acting is not about artifice; rather ‘real’ acting requires an advocate to strip away clichéd gestures. In the previous chapter, I canvassed trial writings that emphasised the ‘Aristotelian’ process of the trial: the centrality of storytelling, the power of the lawyer to create this narrative, and the passivity of the audience who do not have control over their emotions and are caught in the lawyers’ spell.<sup>337</sup> This kind of storytelling is the methodological core of *What Can Lawyers Learn from Actors*.

The structure the workshop is framed around is pseudo-Aristotelian with the convenors placing emphasis on the importance of the beginning, middle and end of a story. The jury is meant to be highly passive in these workshops and the convenors specifically argue that an advocate must “corral” its attention. Participants are told at the beginning that the workshop is about “triumphs” and “challenges”. The advocate’s challenge is to convince a juror to “allow himself or herself to be taken and moved spontaneously”. The publicity for the workshop reads:

From the theatre, the lawyer can learn how to strip away artifice and get rid of the lawyer persona and be himself/herself [...] [I]n the theatre, the goal is to have a clear, active story that moves people emotionally, intellectually and to action—the identical goal of the courtroom attorney.<sup>338</sup>

The specific focus of this workshop is to move people emotionally and the convenors repeatedly stress the importance of reaching the jury. *What Can Lawyers Learn from Actors* markets itself as bridging the communication gap between legal professionals and the lay public, arguing that the lawyer’s task of communicating with a jury is different from that of communicating with a judge. However, rather than ‘storytelling’ being used to distance an

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<sup>337</sup> This reflects the historical trends of silencing of the defendant, domination of the lawyer and relative passivity of the jury as outlined in Chapter 2 of this thesis.

<sup>338</sup> Allan Blumenfeld and Katherine James, *What Can Lawyers Learn From Actors* (Act of Communication: 1996 DVD Series). Available for purchase online at [www.nita.org](http://www.nita.org)

advocate from acting (as outlined in the beginning of this chapter), in this workshop the convenors argue that acting is not only appropriate, but also essential, to effective storytelling. For the convenors, the common denominator between a courtroom and a theatre is their emphasis on empathy and genuine emotion. As another proponent of these commonalities, James Maxwell, notes: “Actors and lawyers are protagonists who face uncertain, ambiguous, often profound and moving circumstances”.<sup>339</sup>

For the convenors of the workshop, the trial should be approached as an intimate encounter between fellow human beings, rather than a competition between professional teams witnessed by a jury. Acting is a pathway to reaching a jury because real acting is a means of stripping away to reveal the ‘real’ person. In the first workshop exercise, participants begin with an opening statement and mid-way switch to telling a personal story; later they return to their opening statement. Afterwards, the workshop audience shares its reflections on the perceived differences in demeanour. Most respondents claim that they are more interested by the personal story because the advocate telling it is more engaged and relaxed than when he/she is formally delivering his/her opening statement. The workshop convenors use this example to tell participants that an effective advocate’s goal is to bring this engaging human being into his/her professional persona.

The overarching lesson to advocates in this workshop is how to tell someone else’s story like it is their own. For the convenors, the separation between story and storyteller due to the mediation of the advocate means that genuine emotion is lost. Acting is essential because the advocate must introduce the emotion of the experience of their client. *What Can Lawyers Learn from Actors* could perhaps be called Stanislavski-lite. Its emphasis on empathy and stripping away is a crash course in naturalism.<sup>340</sup> The workshop attempts to teach advocates how to access genuine emotion and thoughts from their own associations that will spontaneously produce ‘genuine’ signifiers. For the convenors, this involves imparting the “principles of the theatre”—which they call “storytelling, language, human behaviour, eye contact and body language”. These are not signs detached from referents, but are ideally the product of embodiment. The Stanislavskian slant to the workshop is also stressed when

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<sup>339</sup> James Maxwell, “Acting and Legal Education,” 538.

<sup>340</sup> “The essential factor is *belief*. If I believe something to be true and follow the consequences of that belief through, it becomes ‘true’ and an audience, if it wishes, and if I am convincing, can also believe in that ‘truth’”. Konstantin Stanislavski in Jean Benedetti, *Stanislavski and the Actor*, 5.

advocates are encouraged to form “objectives”. The “objective” of the advocate is to move the jury to action. This ability to move is not simply a form of emotional manipulation (using “sensorial” language) but must also be based on a form of emotional understanding, whereby the advocate must create and project a form of empathy.

This form of advocacy actor training reflects mainstream Western dramaturgical and acting tradition. In the courtroom, the lawyer must take the audience/jury on an emotional journey. The story must be emotionally compelling and persuasive because, unlike in the theatre where measuring one’s ability to move an audience is not fully possible, in a trial the advocate tries to move an audience to opt for a specific result for their client. Consequently, what is crucial in an advocate’s performance (according to these writers) is the creation of empathy, which must not be a simulation (bat eyelashes twice, pause, bow head, use low voice), but must come from a place of ‘truth’. The loss of ‘genuine emotion’ engendered by the professionalisation of storytelling is picked up by other advocacy training writers. Dana Cole writes an article where she advises advocate and client to engage in “psychodramatic” therapy together—whereby the advocate can understand and empathise with his or her client to the extent that this will be transmitted when he or she is standing in court.<sup>341</sup> The ideal advocate is one who is genuinely moved and not disinterested.

The difficulty with *What Can Lawyers Learn From Actors* is the speed with which it purports to teach this acting methodology. Les McCrimmon and Ian Maxwell note that: “theoretically sound instruction on the performative aspects of the advocate’s craft has been conspicuously absent from most advocacy courses”.<sup>342</sup> The fact that courses such as *What Can Lawyers Learn from Actors* purport to teach advocacy-acting skills in four days risks exposing such courses to the same kind of criticisms levelled at the ‘tips and tricks’ material examined earlier in this chapter. The convenors of *What Can Lawyers Learn from Actors* recognize the speed at which they conduct their workshop and mitigate this by stressing that their teaching method is about introducing the notion of rehearsal so that an advocate can continue to work at these skills. Consequently, although the workshop ‘fast-tracks’ the acquisition of acting techniques, the convenors do not seek to present the DVD set as sufficient. Rather the workshop is modelled as an introduction to acting skills that can be learned over time with

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<sup>341</sup> *What Can Lawyers Learn From Actors*, DVD 1.

<sup>342</sup> McCrimmon & Maxwell, “Teaching Trial Advocacy,” 33.

rehearsal and experience. Acting is ‘human’ but it is not so natural that it does not require practice.

The workshop’s focus on moving the jury is another potential source of alienation for legal agents as the direct appeal to emotion and empathy may be considered inappropriate (emotion being one of the markers of inappropriate advocacy). The workshop convenors argues that the way for advocates to improve, is to win the audience—the jurors. An advocate employing this advice ineffectively may seem awkward, but if he/she is effective, he/she may seem overly populist. His/her style will consequently be overt and recognisable as acting. However, *What Can Lawyers Learn from Actors* turns this anti-acting logic on its head. Instead of introducing acting to a ‘serious’ profession, the convenors of the workshop argue that lawyers are (and have been) always performing, but that they are not very good at it. The convenors state upfront that their goal is to remove the “lawyer persona” unconsciously adopted by practitioners. For the convenors, this professional persona *is* a mode of performance; and according to them, an ineffectual and alienating one for a jury. As co-convenor Katherine James says (when asked about whether lawyers are actors): “we know they’re acting. They’re acting like bad lawyers”.

### ***‘Good Acting’: Pupillage***

Legal naturalism, then, is not natural; rather it is a form of performance habituated by legal practitioners. But if legal naturalism is an habituated performance style, how is it acquired? Bourdieu argues that agents’ naturalisation of the internal logics of particular fields happens through processes of education and socialisation.<sup>343</sup> Traditionally, the primary means of

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<sup>343</sup> The acquisition of *habitus* occurs over a lifetime and is, as previously noted, a flexible and adaptable series of dispositions whereby our previous experience of what we value will determine how we interpret and receive certain situations: what Bourdieu terms a “structuring structure”. Bourdieu emphasises this flexibility and complexity, pointing out: “there is nothing mechanical about the relationship between the field and the habitus. The space of available positions does indeed help to determine the properties expected and even demanded of possible candidates [...] but the perception of the space of possible positions and trajectories and the appreciation of the value each of them derives from its location in the space depend on these dispositions”. Bourdieu, *The Field of Cultural Production*, 65.

advocacy training was pupillage, which was effectively a form of apprenticeship.<sup>344</sup> This mode of training derived from English practice and continues today as pupillage in the U.K. and in various derivative forms (usually called ‘readership’) in Australia.<sup>345</sup> Traditionally during pupillage the novice advocates attach themselves to a senior advocate’s chambers and spend roughly one year (sometimes more) under the senior advocate’s guidance. The junior’s first six months is usually spent observing their senior, and in the second six months, the junior will also begin representing the senior advocate in court, doing minor court appearances. Prior to the commencement of pupillage, the junior advocate embarking on this course of training will have minimal experience in a courtroom. Most will have watched a trial in a courtroom, and perhaps some may have done mootings, or bar practice involving mock-trials. However, it is quite possible that a junior advocate will have done none of this. Consequently, junior advocates may have no embodied knowledge of how to behave in a courtroom during a trial.

Pupillage is therefore more than learning how to handle briefs or stand in court (although these are of key importance). It is an introduction to the social universe in which legal agents operate. To make a living, advocates require referrals of briefs from solicitors and clerks within chambers.<sup>346</sup> Consequently, the importance of networking and establishing good working relationships with colleagues and superiors is essential to job survival. Pupillage is the ground-level entry to this world, where the novice advocate can demonstrate his/her competence and/or reliability with the specific goal of creating a good reputation and consequently obtaining work.

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<sup>344</sup> In Australia, Queensland still uses the term ‘pupillage’. I will outline the Australian requirements for ‘readership’ later in the chapter. However, as this section provides a general overview of traditional advocacy training I will use the English term ‘pupillage’ for consistency’s sake.

<sup>345</sup> Pupillage in one of the Inns of Courts in the U.K has been in place for hundreds of years. Prior to the expansion of the role of the university degree, apprenticeship was accepted as the most important means of legal training. However, the proportion of students undergoing it has varied considerably. In the 19<sup>th</sup> century in the U.K, almost all barristers underwent pupillage for 2 years. Yet by the 1950s, it was estimated that only one fifth underwent pupillage. Consequently, it became mandatory in 1959 to complete 12 months of pupillage. See Richard L. Abel, *The Making of the English Legal Profession 1800-1988* (Beard Books: Washington D.C, 1998), 52-54.

<sup>346</sup> As noted earlier, this is the case in the U.K. and most states in Australia, however the move towards a ‘fused profession’ of solicitor/barrister in Australia may mean that barristers are increasingly directly approached by clients.

Junior advocates, consequently, usually work long hours for relatively little pay, and do as much as they can to favourably impress those they are working with.<sup>347</sup> This also involves presenting themselves as professionals: after their apprenticeship, junior advocates will usually be spending heavily, and in some cases paying for expenses like floor fees and business cards, although the work coming in may be very unsteady. Because the world of the graduate advocate is so financially uncertain, getting on, in the legal world, is as much about social education as it is about a legal education. The complexity of the implicit rules must be internalised as graduates aspire to stake out an area in which to work. The competitiveness amongst junior advocates is very high, with large numbers of graduates aspiring to access and position themselves within a relatively limited pool of resources.<sup>348</sup> The strong need to ‘get on’ is an important factor in explaining how rules as to appropriate performance are learned during pupillage.

Pupillage formalises a hierarchy where the senior advocate’s abilities are the paragon for the junior. The acquisition of knowledge by an advocate through pupillage is consequently a form of modelling that is similar to repertory theatre, whereby a novice actor is attached to a company and improves his/her skills through imitation, rather than consciously absorbed verbal instruction. This form of education is in the doing, rather than in explicit training. An

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<sup>347</sup> In Australia, those undergoing readership can expect to earn anywhere from \$AUD 30,000 upwards per annum. Their working hours will also be longer than the average entry-level graduate. Although no specific figures are available as to average junior hours, legal professionals in general work longer hours than the average workforce, working an average of between 48-52 hours per week. See: Australian Bureau of Statistics [Hereafter ABS], *Legal Practises—Australia 2001-2002* Catalogue No. 8667.0 (ABS: Canberra, 2002).

<sup>348</sup> It is difficult to escape the parallels with actors, who also compete with each other for limited resources and whose careers hang a great deal upon impressions made to casters, agents and other cultural producers. The difference is, however, that advocates have a reasonable expectation of higher rewards. Although advocates and actors have financially precarious beginnings, advocates are still paid a considerably larger amount of money, even if sporadically, and can expect to charge increasing rates with experience. However, the stress of the first few years of practising at the Bar means that many new barristers will quit the profession after a few years, either finding it financially uncertain, the hours too long, or simply not having their expectations met as to what a barrister’s existence is like. This is particularly the case for female advocates and solicitors. Many women working at the Bar quit after a short period of time. A study into women employed in legal services found that the number of females working at the Bar for 5-9 years was half the amount of those women working between 1-5 years post admission. See: ABS, *Legal Practises—Australia*, 3.41, *supra* n 347.



advocate's imitation over time becomes part of his or her *habitus*. Law graduates do not leave law school and turn into gifted advocates after passing the Bar exam—they rehearse.

On a conscious level, during pupillage junior advocates learn how to conduct examination-in-chief, cross-examination and give opening and closing statements (as well as other procedural requirements such as writing affidavits). Through imitation of their senior advocate, junior advocates learn how to phrase questions and structure arguments. Yet hand-in-hand with this comes an appreciation for a whole series of implicit social behaviours that regulate the power dynamics of the process, as outlined in the section on storytelling. Because pupillage is entrenched in a junior watching and imitating their senior, a student will be absorbing not only the structure of questions being asked, but also the overarching style of an advocate.

Besides the naturalisation of controlling legal language, what is also transmitted in this form of 'modelling' is regulating behavioural constraints embodied in honorifics, accent, dress, gesture, etc. Usually, if these constraints are consciously acknowledged, they are attributed to the construction of a professional persona. For example, we can examine the question of dress. Wigs and gowns are still worn by advocates in Australia and the United Kingdom. It has frequently been argued by both members of the public and of the legal profession that the dress of barristers and judges is simply an outdated tradition. In fact, since 1992 there has been a series of debates and enquiries in the U.K. revolving around whether to make wigs obsolete and all have concluded that the majority of legal practitioners and members of the public want them retained. Interestingly, as a 2004 report found, "members of the public (non court users and court users) who responded to the consultation were just as conservative in their preferences, if not more so, than the court officials and others who responded".<sup>349</sup>

Lord Donaldson's famous quote sums it up: "There is no urgent need to go discarding something which has been out of date for at least a century". More than simply a humorous quip, this remark points to the fact that wigs are argued to still serve various useful functions. The major argument given for retention of wigs and gowns is that once the wig is on, an advocate (or a judge) exists only as a legal agent with a responsibility to their client and the

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<sup>349</sup> Department for Constitutional Affairs, *Court Working Dress in England and Wales*, Public Consultation by the Department for Constitutional Affairs (Prepared by Lindsay Hermans, ORC International, London, January 2004) [1.1].

court. Wigs are a form of protection and aid the concealment of identity. Although wigs clearly do not obscure judicial officers' faces, wigs do separate an advocate's function in court from his or her private life and personality.

Paul Moore writes that the neutralisation of *habitus* involved in naturalistic acting is essential as it is *habitus* that locates our past in our present. In the case of advocates, when they become officers of the court, and mediators, their personal and subjective beliefs are not meant to be visible.<sup>350</sup> In Australia the continued use of wigs and gowns (as well as other behavioural constraints, such as the adoption of a 'neutral' accent; i.e. educated Australian) serve as a form of levelling and protection. Although varying degrees of status are indicated in a legal costume, these costumes also represent the idea that legal practitioners are officers of the court and sustain this belief in the need to neutralise the personal and subjective in the courtroom. By these small alterations of self-presentation an advocate becomes someone who represents the Court and 'The Law'.

Yet beyond separating the personal from the legal the other, equally essential, aspect of wig-wearing is that it is a means of manufacturing mysticism; wigs are rather impressive and useful for creating that necessary distinction between court functionaries and laypersons.<sup>351</sup> Accent modification also apparently aids the elimination of a specific subjective past, but again it is disputable that the consequent representation is 'neutral'. Advocates may see themselves as simply modifying more jarring aspects of themselves, yet the 'neutral' accent

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<sup>350</sup> "A barrister must not make submissions or express views to a court on any material evidence or material issue in the case in terms which convey or appear to convey the barrister's personal opinion on the merits of that evidence or issue". *The New South Wales' Barristers Rules* no. 25, *supra* n. 301.

<sup>351</sup> This is a point where American and U.K. trial practices diverge significantly. In the U.S., only the judge wears official robes and most American legal agents find the continued use of costume in the U.K. (and Australia) absurd. The abandonment of wigs is famously attributed to Thomas Jefferson, who pleaded with Americans to "discard the monstrous wig which makes the English judges look like rats peeping through bunches of oakum". Jefferson quoted in Charles Warren, *The Supreme Court in United States History: Volume 1 1789-1921* (Beard Books, 1999), 48. Judges no longer wear wigs in Federal Courts in Australia, with the Family Court, the High Court and the Federal Court all abandoning the practice. However barristers continue to wear wigs in the Federal and High Court.

and particular dress does not cease to signify. Rather it perpetuates the expectation that advocates should come from a relatively high status background.<sup>352</sup>

The ‘style’ being learned through pupillage is much more than learning simple signs of decorum and is at the heart of legal naturalism. Modification of *habitus* to behave appropriately, or seem natural, in fact involves learning to signify a very particular idea of what an advocate is, or should be. These ideas are historically contingent and have direct homologies to a certain class and school background. As David Weisbrot observes: “The Australian legal profession does not reflect the socioeconomic class, ethnicity or gender composition of the society at large”.<sup>353</sup> The honorifics and ‘style’ that constitute *legal naturalism* function as forms of exclusion whereby advocates who do not observe this decorum identify themselves as not fitting into the social universe of the law. *Legal naturalism* is also a manifestation of the implicit logics of the juridical field. Investigation of this style that goes unrecognised as a style illustrates how this behaviour perpetuates the gap between junior and senior advocate, as well as between legal agent and layperson. This gap is vital to sustain the hierarchies that structure position-taking in the juridical field, as well as to perpetuate the performance of tradition.

Although the above is the ideal functioning of the apprenticeship system, the experience of pupillage is, and has always been, as diverse as those who undertook it. Some senior advocates provided a great number of opportunities for their juniors whereas some juniors had a relatively unhelpful experience: “While the theory behind articles, as with other apprenticeship training, was that intending lawyers would best learn skills, practices and

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<sup>352</sup> Throughout the dominance of pupillage, this ideal advocate was a private school male (or public school, in the U.K) from a relatively wealthy background. Anyone who did not fit into this type was less likely to be successful. There is limited scholarship in Australia as to the backgrounds of legal practitioners, although there is certainly a traditionally well-worn path in NSW between private schools and Sydney University Law School. In the UK, however, a 2005 study by Sutton Trust found that advocates continued to come overwhelmingly from public school backgrounds and from Oxbridge. In 2004, it was found that at least 82% of barristers had attended either Oxford or Cambridge. “Over 80 percent of the judges in our sample attended Oxford or Cambridge, a figure that had decreased by just seven percent since 1989. It is also interesting to note that in 1989 there were just three female judges. Whilst this figure has increased since then, women continue to be significantly underrepresented – there are now 14 female judges, making up just nine percent of the total”. See: Sutton Trust, *The Educational Backgrounds of the U.K. 's Top Solicitors, Judges and Barristers*, May 2007, 7.

<sup>353</sup> David Weisbrot, *Australian Lawyers* (Melbourne: Longman Cheshire, 1990), 79.

procedures on the job, the reality often involved poor supervision, menial tasks, and limited exposure to a range of different types of work”. This means that the degree to which pupillage assisted in the acquisition of specific skills would have varied considerably.<sup>354</sup>

Regardless of this, acquisition of legal naturalism is a gradual ‘becoming’ of practice and familiarity, akin to the way one learns a trade.<sup>355</sup> This performativity of self echoes Erving Goffman’s idea of presenting the best aspect of oneself to others so as to position oneself for advantage. However, Goffman’s concentration on the conscious aspect and preparation for this overstates how aware an advocate is of what he or she is doing.<sup>356</sup> Ultimately, advocates who undergo pupillage no longer see the skills learnt over a period of years as specific. Instead, advocates will see themselves as having navigated their way normally in the legal universe. This means that although the importance of apprenticeship is recognized, what is learned is less easy to quantify, as it may come to be seen as networking, and ‘common sense’ rather than acquiring highly specialised skills.

Those who undergo pupillage consequently see their practice as either an ‘art’ in the classical sense (oratory and rhetoric) or as ‘natural’. John Mortimer’s lawyer character in *A Voyage Round My Father* claims that being a great advocate relies primarily on “common sense” rather than brilliance.<sup>357</sup> Mortimer’s student, Geoffrey Robertson (a Sydney University Law School graduate), says “advocacy courses [...] now affect to teach a trade which comes instinctively or not at all”.<sup>358</sup> Justice Edward Parry states (rather loftily) that: “the high privilege of lighting the torch at the lamp of eloquence is a gift of the gods, for orators are born, and not made”.<sup>359</sup> As Bourdieu notes, part of the mastery of any ‘art’ form is an obscuring of the conditions through which this mastery was made possible:

[i]gnoring the social and cultural conditions underlying such an experience, and at the same time treating as a birthright the virtuosity acquired through long familiarization or through the exercises of a

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<sup>354</sup> Ibid., 149.

<sup>355</sup> In an article about Australian advocacy training, Marcus Priest calls the legal profession “one of the last great trade guilds”. Marcus Priest, “Raising the Bar,” *The Australian Financial Review*, 27 April 2007.

<sup>356</sup> See Goffman, *supra* n.141.

<sup>357</sup> “No brilliance is required in law, just common sense and relatively clean fingernails”. John Mortimer, *A Voyage Round My Father* (London: Penguin Plays, 1982), Act 1.12.

<sup>358</sup> Geoffrey Robertson, *The Justice Game*, 24.

<sup>359</sup> Justice Edward Parry, *Seven Lamps of Advocacy*, 72.

methodical training [...] for the acquisition of art competence in the sense of mastery of all the means for the specific appropriation of works of art is a self-seeking silence because it is what makes it possible to legitimize a social privilege by pretending that it is a gift of nature.<sup>360</sup>

Unsurprisingly, then, those that subscribe to the notion of the art, talent, or instinct of advocacy are usually older and more senior (often male) judges and legal professionals.<sup>361</sup> Because these legal agents have secured relatively high-status places in the juridical field, it has traditionally been in their interest to promote the mystical abilities of the barrister (if not done consciously), thereby ensuring their own dominant position in the field. This dominance relies on young students entering the field perceiving an almost impossible divide between themselves and senior advocates, as we saw with our 22 year old student at the outset of this chapter.<sup>362</sup>

### *The Decline of Pupillage*

Habituation of legal naturalism is a prime factor in creating ambivalence towards the concept of acting-focused advocacy training. To be as natural as possible involves forgetting the processes by which specific behaviour is learned. Yet formal pupillage was arguably in a period of decline until relatively recently. This is partially attributable to the fusion of the profession of solicitor and barrister. As a 1994 NSWLRC report into Barrister's Practising Certificates notes:

New South Wales and Queensland are the only Australian States that have a formally divided legal profession with no common admission as a barrister and solicitor.<sup>1</sup> Whilst the other states and territories allow a successful applicant admission as both a barrister and solicitor, over the years a practical division has emerged, as after admission an applicant often chooses to practise only as a barrister or solicitor. Separate Bars have consequently come into existence, and individual State and Territory Bar Associations with their own rules of conduct, pupillage requirements, and disciplinary procedures have become established. Whilst such rules are not legally enforceable, peer pressure has, to an extent

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<sup>360</sup> Bourdieu, *The Field of Cultural Production*, 234.

<sup>361</sup> It is important not to generalise, as obviously this does not account for everyone. Rather I am arguing that those who underwent pupillage are more likely to misrecognise their vocational practices as natural.

<sup>362</sup> Effective strategising is not sufficient to cover wholesale incompetence. Of course, it is also unlikely that a smart player would be incompetent. Regardless, conceptual fields are structured by competition, and this is not a "bad" thing, but a necessity to sustain any profession.

ensured that such rules are generally complied with, if a barrister wishes to continue to practise successfully within that jurisdiction.<sup>363</sup>

This means that whilst most states have some form of readership, these requirements are far more nominal than traditional pupillage when barristers and solicitors received distinct training.<sup>364</sup> At the time of writing, in the Northern Territory, readership lasts between 1 and 2 years. NSW readership is a minimum of 12 months and requires a signature from a supervising barrister at the end of this period. In Queensland, a junior advocate undergoes 12 months of pupillage with two pupilmasters, one junior and one senior. In Victoria, it is 9 calendar months under the guidance of an advocate with at least 10 years' experience (although they cannot be a QC or SC). In the Australian Capital Territory (ACT), a junior advocate must complete 10 days of criminal trial appearances and 10 days of civil trial appearances amongst other requirements, however the length of time readership takes is not specified within the guidelines.<sup>365</sup> Other Australian states have no formal requirements before or after admission to the Bar.<sup>366</sup> This potentially creates a problem for new legal graduates who enter a field where the specific skills needed to get on in the legal world are considered unteachable by those who have forgotten that they acquired them.

The decline in traditional methods of pupillage is also due to major shifts in legal education since the heyday of advocacy apprenticeship. In 1968 there were only six university law degrees offered in Australia. The ratio of legal practitioners to the public was 1:1600 people in 1968, yet by 1977 this ratio had shrunk to 1:1000. Today there are 30 university law degrees offered in Australia, and around 40,000 legal professionals, constituting a ratio of

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<sup>363</sup> NSWLRC, *Barristers' Practising Certificates* Report No. 74 (1994) [Appendix B].

<sup>364</sup> As I will outline later in the chapter, there has been a recent effort in both the U.K. and Australia to introduce new forms of rigorous advocacy training methods. This includes the introduction of the Bar Practice Course in most Australian states. This course includes a mandatory section on advocacy training. For more information, see: [http://www.nswbar.asn.au/docs/professional/prof\\_dev/BPC/bpc\\_index.php](http://www.nswbar.asn.au/docs/professional/prof_dev/BPC/bpc_index.php)

<sup>365</sup> For information on specific Australian state readership requirements, see Australian Capital Territory [Hereafter ACT] Bar Council, "The Australian Capital Territory Reading Programme," retrieved April 2008 from ACT Bar Association: [www.actbar.com.au/Reading\\_Programme.doc.](http://www.actbar.com.au/Reading_Programme.doc.); NSW Bar Association website, retrieved 1 July 2008 from: [http://www.nswbar.asn.au/docs/professional/prof\\_dev/reading/reading\\_index.php](http://www.nswbar.asn.au/docs/professional/prof_dev/reading/reading_index.php); Victorian Bar Reading Course, retrieved 1 July 2008 from: <http://www.vicbar.com.au/e.3.3.asp>; W.A. Bar Association Bar Readers Course, retrieved 10 July 2008 from: <http://www.wabar.asn.au/education-training-barreaders.asp>.

<sup>366</sup> For example Tasmania has an independent Bar that cannot issue certificates for practice.

roughly 1:500 of the population, including approximately 5000 barristers.<sup>367</sup> This rapid increase in graduate numbers has led to a diversification of skills where many people undertaking a law degree do not go on to the Bar or become a solicitor.<sup>368</sup> Although a smaller proportion of law students go on to the Bar, the large increase in law students overall means that the number of aspiring barristers has risen significantly. This increase has reached the point where traditional pupillage, which relies on a steady proportion between young graduate and older practitioners, is no longer sustainable. Even in the U.K., where pupillage is still formalised, it is highly competitive, with limited positions available for a vastly expanded number of graduates.<sup>369</sup>

An Australian Law Reform Commission report from 1999, *Managing Justice: A Review of the Federal Civil Justice System*, notes that law graduates in the 1970s:

Almost invariably would have been members of a law society or a bar association, and would have felt that their professional interests were being catered for, and represented externally, by these associations [...] Most 'students-at-law' already worked in the profession as articled clerks, interacted regularly with practitioners (across the solicitor-barrister divide), and received mentoring from senior ('master') practitioners. Students organised their studies around their work responsibilities, with classes held mainly in the evening and taught mainly by practitioners, and with only a small core of full-time academics in the one law school located in each capital city. Law graduates mostly went into the profession, and practised as solicitors or barristers.<sup>370</sup>

This close-knit association between students and the field also involved a “close relationship between the Bench and the Bar” with judicial appointments usually being from the Bar.<sup>371</sup> This means that means of promotion and inclusion within the juridical field consisted of a largely self-contained network of people. The concomitant outcome is that previous hierarchies sustained by a very specific route from law school to the Bar (and then perhaps to Senior Counsel—formerly Queen’s Counsel—and the Bench) are changing. In this new

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<sup>367</sup> ALRC, *Managing Justice: A Review of the Federal Civil Justice System* ALRC Report no.89 (1999) [2.14].

<sup>368</sup> For the most recent overview of the legal profession in Australia, see the ABS Labour Force Survey, *Legal Professionals*, available online at: [www.workplace.gov.au/NR/rdonlyres/E282BFB5-74D2-4C76-98BA-15358371BEFA/0/2521ALLLegalProfessionals.pdf](http://www.workplace.gov.au/NR/rdonlyres/E282BFB5-74D2-4C76-98BA-15358371BEFA/0/2521ALLLegalProfessionals.pdf).

<sup>369</sup> Robert Abel notes that particularly in the 1970s in the U.K. there were twice the number of graduates to the Bar than there were pupilmasters to supervise them. See Abel, *The Making of the English Legal Profession*, 54.

<sup>370</sup> ALRC, *Managing Justice*, [2.115].

<sup>371</sup> *Ibid.*, 2.115.

world, those law graduates who do go on to the Bar will not necessarily have intensive training with an older advocate (and will probably have practised as a solicitor for several years). Consequently, the decorum necessary to maintain a particular historical manifestation of what is ‘good acting’ (and consequently perpetuate certain underlying ideas about what an advocate should be) may not be passed on.

Graduates are today also less likely to have received specific vocational training than in the past. Although almost all junior advocates will now have a law degree, universities were traditionally not the place to learn advocacy skills.<sup>372</sup> In the 1970s, when the universities in Australia began to take the prime role in educating lawyers (before this, as mentioned earlier, most advocates did not attend university, rather simply worked for a number of years as articled clerks) they focused strongly on procedural subjects that were applicable to trial practice (for example, Evidence). Yet since the 1970s, the undergraduate legal curriculum has altered from being practically and vocationally oriented to being a more general degree, with a reduction in core units and a proliferation of electives.<sup>373</sup> The report *Managing Justice* described the curriculum thus:

In Australia, the much lower level of resources available to law schools has meant that only a handful of law schools run clinical programs—and only the University of Newcastle allows students to undertake a fully integrated clinical degree program rather than simply an elective unit. Both for reasons of resources as well as recognition of the importance of non-adversarial forms of dispute resolution, the emerging trend in Australia has been toward the teaching of generic ‘professional skills’—that is, skills which will be needed in any subsequent legal practice, but would be equally valuable in a range of other occupations and professions.<sup>374</sup>

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<sup>372</sup> It is only relatively recently that an advocate has needed a university degree to practise. Michael Chesterman and David Weisbrot note that “even in 1978 nearly one-third of admittees were without university degrees”. See Michael Chesterman and David Weisbrot, “Legal Scholarship in Australia,” *The Modern Law Review* 50.6 (1987): 711. University degrees themselves do not teach advocacy skills although they have vocational emphasis. Particularly in Australia, the focus is on what Chesterman and Weisbrot call “hard law” or “subjects directly relevant to private practice” such as Evidence, in addition to “foundational skills” such as Torts. *Ibid.*, 712.

<sup>373</sup> For an outlining of the history of the role of universities in legal education, see “Legal Scholarship in Australia” *supra* n. 372.

<sup>374</sup> ALRC 89, *Managing Justice*, [2.19].



This means that although legal education is the province of the universities, law graduates are not being trained in procedural or practical trial skills at university.<sup>375</sup> This gap in vocational training is arguably an important reason for the boom in the unregulated, private advocacy training industry.<sup>376</sup>

To counter this decline in traditional forms of pupillage and the generalising of the LLB (Bachelor of Law degree), there has been a recent growth in Australian-based private advocacy training. This has developed in tandem with the development of new vocational requirements attached to admission to the Bar. NSW, for example, now requires Bar graduates to do the Bar Practice Course which runs for around a month (and costs around \$AUS3000). The stated aims of the course are to “teach advanced advocacy, mediation, and other barrister skills, and an awareness of special considerations and requirements of different jurisdictions; provide practical insights into life and practice at the New South Wales Bar; and promote a strong spirit of professional support among new members”.<sup>377</sup> This course includes some practical courtroom training, as well as specific lectures in advocacy. Many other Australian states now require junior advocates to complete an Advocacy Course which may run from one week to several. Universities have also introduced elective undergraduate advocacy subjects, such as *Advocacy, interviewing and Negotiation* offered in 3<sup>rd</sup> year at Sydney University Law School.

The Australian Advocacy Institute (AAI) is a good example of this recent shift in education and attitudes towards advocacy. Founded in 1991, it specifically sets out to counter the belief that advocacy is ‘natural’:

Until the 1970’s there was a common belief that advocacy could not be taught. It was thought that good advocates were born not made. Reading about advocacy and exposure to senior advocates were thought

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<sup>375</sup> Advocacy, as I mentioned earlier, has never been the province of the universities. There is, however, mooting and the occasional elective course, such as *Advocacy, Interviewing and Negotiation* at Sydney University Law School.

<sup>376</sup> It is notable that most material on advocacy training comes from the U.S. where there are no formal advocacy training requirements to practise. The least amount of private advocacy material is found in the U.K. where there is a renewed strong institutional training program. Australia falls somewhere between the two extremes.

<sup>377</sup> The goals of the NSW Bar Practice Course, retrieved 11 May 2008 from NSW Bar Association: [http://www.nswbar.asn.au/docs/professional/prof\\_dev/BPC/goals.php](http://www.nswbar.asn.au/docs/professional/prof_dev/BPC/goals.php)

sufficient for new advocates to learn their skills by observation and osmosis and to develop them by experience. Many did learn, and some who had talent became excellent advocates. However, it often came at a cost to clients. Some did not learn from experience but simply perpetuated bad advocacy practices. Experience does not necessarily equate with competence, far less excellence.<sup>378</sup>

The statement goes on to say that: “The achievement of this balance [between efficiency and good representation] requires preparation, discipline, skill, and a professional approach by advocates capable of analysing the issues and succinctly presenting cases for their clients”.<sup>379</sup>

This form of advocacy training, however, employs distinctly different terminology to the explicitly acting-oriented materials outlined earlier. This side-stepping of specific acting terminology is evident in Australian-produced written advocacy material. George Hampel’s advocacy guide devotes the last six of its 70 pages to conduct in the courtroom. This section on presentation has its sole emphasis on the dignity of the proceedings: “It is important that the behaviour of counsel is not only appropriate to the importance and solemnity of the proceedings, but is also sensitive to those involved as litigants”.<sup>380</sup> Specific advice consists of instructions such as “it is bad manners and detracts from the presence in Court of a good advocate to put feet on chairs, to place hands in pockets, or to slouch on the bar table or lectern”.<sup>381</sup> Max Perry’s extension of Hampel’s advocacy advice spends 15 pages on presentation. Perry suggests modulating monotone delivery. He emphasises that “the courtroom is a solemn and serious place”.<sup>382</sup> Thomas Mauet’s *Fundamentals of Trial Techniques* has a similar line: “Regardless of where you make your opening statement, guard against mannerisms that detract from your delivery. Keep your hands out of pants or coat

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<sup>378</sup> The mission statement of the Australian Advocacy Institute states that it was founded “in response to the ever growing demand by the Australian profession for advocacy training which could no longer be fulfilled by a handful of enthusiastic, committed individuals. It marked the acceptance by the profession of the need to improve advocacy standards and that advocacy skills can be taught at all levels”. Retrieved 1 May 2006 from Australian Advocacy Institute (AAI): <http://www.advocacy.com.au/aaimenu.htm>

<sup>379</sup> Ibid.

<sup>380</sup> George Hampel and Elizabeth Brimer, *Hampel on Ethics and Etiquette for Advocates* (Melbourne: Leo Cussen Institute, 2001), 45.

<sup>381</sup> Ibid., 43.

<sup>382</sup> Max Perry, *Hampel on Advocacy*, 23.

pockets, avoid playing with coins [...] Use upper body gestures, those involving your hands, arms, shoulders, head, and face, since these usually strengthen your speech”.<sup>383</sup>

There is no reference to acting in these materials—rather it is about ‘practical’ skills and ‘hands-on’ experience. This kind of language illustrates the relative status of different terminologies, where acting has low-status in the juridical field because of its negative associations. On the *TalkingBrief* website, there is a testimonial from George Hampel, which states that:

I have always had a strong view that communication and presentation skills are a vital part of the work of an advocate. The Australian Advocacy Institute (AAI), in its teaching places great emphasis on this and we do our best to teach some aspects of communication. Our knowledge however is limited and I have no doubt that people in the acting profession have much to contribute to the development of communication skills.<sup>384</sup>

Using terms such as ‘communication skills’ and ‘practical’, rather than ‘acting’ allows legal practitioners to emphasise the utility of their methods: that there is a tangible practical purpose that is not related to ‘entertainment’. This terminology has considerably more currency in the legal world, particularly as the entire methodology of much institutionally based contemporary advocacy training (such as that offered at NITA and AAI) revolves around problem-solving in particular cases. This terminology also allows legal practitioners to contain advocacy training within his/her own self-defined standards (legal communication rather than naturalistic performance). This avoids having to drawing on another field for illumination of the juridical. Marcus Priest, a journalist who attended a 2006 Australian Bar Association Advocacy course, commented:

The alternative [to Bar Associations conducting their own advocacy training courses] is to allow such teaching to be left to professional teachers, as has happened in America. “There are a lot of people in a lot of jurisdictions who really believe that education of the bar ought to be in the hands of expert teachers who sell their services, because usually they are unemployed lawyers. Beware teachers and beware experts,” rails [Queen’s Council, Edwin] Glasgow [one of the chief advocacy training staff at the course]. But that commitment to training their own can also be seen as a reflection of the elitism that permeates the bar’s traditions. And it is those traditions that senior practitioners are trying to maintain in

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<sup>383</sup> Thomas Mauet, *Fundamentals of Trial Techniques* (Boston, MA: Little, Brown & Co., 1980). One wonders where female barristers are meant to put their hands.

<sup>384</sup> See <http://talkingbrief.com/our-clients.php>

a society that openly questions the need for the historic relics and practices of law's bygone days. As a result, advocacy coaching is not just about teaching the technical skills, but about building an esprit de corps and emphasising the importance of ethical conduct. It would be the equivalent – in another culture – of elders passing down tribal secrets.<sup>385</sup>

However, beyond the terminology, most Australian advocacy training material continues to promote the belief that an advocate should be as effective as possible without deviating from a relatively straightforward presentation. This idea of behaving normally, or 'not-performing' does not interrogate how ideas of a 'good lawyer' are constructed through habitual performance and how, as Priest observes, this perpetuates certain hierarchies in the juridical field (as well as the gap between the lay and law). Continuing to see advocacy in the courtroom as only a matter of observing decorum and/or 'style' demonstrates just how assimilated and habitual these rules are.

For our 22 year-old law student, this leads to conflicting information. Although 'acting' as such is classified as relatively artificial, the 'arts' of communication, storytelling and persuasion are common. The institutions around him, such as Sydney University Law School, or the NSW Bar Association and the Australian Advocacy Institute, have all integrated some aspects of performance or communication skills into their methods of advocacy training.<sup>386</sup> So where does this leave our young law student? He is likely to try and acquire the skills wherever he can, be that private advocacy training, or institutionalised teaching. Alternatively, he will be like many new graduates and simply bumble his way through courtroom procedure until, over time, he will learn what he needs to know through watching and experience.

Yet no matter where this student goes, and no matter what particular methods he attempts to learn, habituate, or naturalise, he will also naturalise unquestioningly the dominance of the advocate and other legal agents over laypersons. This habitual inculcation for advocates ensures the continuance of models of power and domination necessary for the trial process to maintain its current form. Simply reading the Bar Association's Guidelines on the duties of the advocate reveals these complex levels of responsibility and status. They state:

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<sup>385</sup> Marcus Priest, "Raising the Bar," *Australian Financial Review*, *supra* n. 355.

<sup>386</sup> The Bar Association (as mentioned in the beginning of this chapter) regularly outsources Continuing Professional Development (CPD) programs to seminars such as *The Power of Persuasion Series*. See the NSW Bar Association's on CPD, retrieved 11 May 2008 from: <http://www.nswbar.asn.au/docs/>

A barrister must, when exercising the forensic judgments called for throughout the case, take care to ensure that decisions by the barrister or on the barrister's advice to invoke the coercive powers of a court or to make allegations or suggestions under privilege against any person:

- Are reasonably justified by the material already available to the barrister
- Are appropriate for the robust advancement of the client's case on its merits
- Are not made principally in order to harass or embarrass the person;
- Are not made principally in order to gain some collateral advantage for the client or the barrister of the instructing solicitor out of court.<sup>387</sup>

Even a cursory examination of the above rules, which are the only ones specifically pertaining to oral presentation in court, reveals a number of intriguing language constructions. Firstly, the rules draw attention to the "coercive power of the court" as being a factor that is to be utilized by the advocate. The "coercive power of the court" refers to both the advocate's particular powers of interrogation, as well as the framing of the trial, whereby any advocate's examination of a witness takes place within a somewhat constrained and intimidating atmosphere.

This is supported by the acknowledgement of the potential of an advocate to "embarrass" or "harass" a witness on the stand. The rules state clearly that it is an advocate's responsibility to pursue a client's case "robustly", utilising the "coercive powers of the court", albeit in good faith (an advocate "must give a truthful opinion") and without unnecessary harassment witnesses. The use of the word "principal" also suggests that if evidence or questioning indirectly causes harassment, this is within the bounds of an advocate's duties.<sup>388</sup> These guidelines suggest that advocates are negotiating an ever-shifting and highly nebulous area of appropriate behaviour—which I have termed *legal naturalism*. Advocates must naturalise a complex set of skills so as to be able to present themselves as zealous pleaders, but not unethical ones. Robust cross-examination is an advocate's duty to their client. However, this

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<sup>387</sup> *New South Wales Barristers' Rules*, *supra* n. 301.

<sup>388</sup> The prosecutor is similarly bound: "a prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused". This is a slightly acrobatic positioning whereby the prosecutor can only try a person he or she genuinely believes could be guilty (there being a reasonable amount of evidence, however this 'belief' may be constructed) but within the courtroom must try to win his or her case as if the defendant were guilty. However, a prosecutor is also expected to terminate prosecution should evidence come to light that might exonerate the defendant. See: "Prosecutors Duties," *New South Wales Barristers' Rules*, Section 62-72, *supra* n. 301.

duty is always secondary to his or her (unconsciously acted out) responsibility to the juridical field and the trial process. Advocates act for their client, but above and beyond this, they work for the court.

### ***Conclusion: Legal Naturalism and Winning the Audience***

The Australian juridical field is in a state of flux between different modes of legal education. Dominant forms of understanding advocacy are becoming increasingly outmoded for a variety of reasons, primarily to do with the large increase in numbers of graduates. The diversification of legal education potentially challenges old means of promotion. Newcomers who do not undergo formal pupillage and do not share the same background will not necessarily share the same values as those who are their superiors. They are therefore more likely to challenge the underlying rules of the field by not seeking to be included in the same way. This is manifesting in alterations to legal naturalism where ideas of the advocate appropriate in the 1960s may seem outdated today. With the increasing diversity of graduates, the social ideal of the advocate is shifting along with how this ideal is constructed and perpetuated through advocacy performance.<sup>389</sup>

Along with this, there has been an explosion in the broader community in ‘communication’ theory; popular understandings about persuasion, strategising, and argument (in the line of Dale Carnegie’s *How to Win Friends and Influence People*)<sup>390</sup>. This has led to a fuzzier line than ever before for advocates who must maintain the distinction between lay and law (and the need for advocates to present themselves as a needed professional specialist) and also accommodate a naturalistic, more ‘human’ contact between advocate and jury. Not only is it becoming increasingly necessary for the legal field to provide additional vocational skills for advocates, but advocates must now also respond and adapt to popular ideas of advocacy. This is particularly the case in criminal trials because of the need to persuade a jury. This

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<sup>389</sup> It is important not to overstate this. Statistics from the New South Wales Bar Association do not include details on socio-economic backgrounds. However, the proportion of male to female is still extremely lopsided. As of June 2007, there are 2061 practising barristers: of these, 344 are female. NSW Bar Statistics retrieved 15 June 2008 from: [http://www.nswbar.asn.au/docs/about/barstats/full\\_stats.php](http://www.nswbar.asn.au/docs/about/barstats/full_stats.php)

<sup>390</sup> Dale Carnegie, *How to Win Friends and Influence People* (New York: Simon & Schuster, 1981).

means that advocacy training must also be more open to cross-disciplinary skills such as ‘communication’ and ‘performance’.

I have identified changing education as responsible for a shift in legal naturalism. Yet another important influence on advocacy behaviour is ‘mediatisation’. The expectations of the jury have altered significantly since the 1960s, as television has become the dominant medium of information. The proliferation of courtroom-based television dramas, as well as televised proceedings means the vast majority of jurors’ experiences of courtrooms will be through television. Consequently, their expectations of advocates will be based on actors. This means that not only have agents within the juridical field always been somewhat dependent on the expectations of the jury (and therefore less autonomous than agents within the field present themselves), but also that this relative autonomy of the field is eroding in the face of a mediatised world. Public expectations of what makes a good advocate are now constructed and determined at least in part by television producers.

Today, according to *What Can Lawyers Learn from Actors*, advocates need to behave like human beings. Jurors expect advocates to not be overly different from themselves—rather jurors expect them to be realistic—and this concept of realism is based on signifiers of naturalism. Any deviation from naturalism is likely to jar with an audience who will find their behaviour ‘fake’ or ‘artificial’. Because of its self-evident nature, it is worth observing that this acting style has only been dominant for about a century. Although it has now become the standard (assisted by film and television), any attempts at naturalism on stage prior to the late 19<sup>th</sup> or early 20<sup>th</sup> century would most likely have been met with derision or confusion. Today the most effective means of appealing to a jury have diverged significantly from older ideas, illustrating the historically contingent boundaries of appropriate and effective behaviour for an advocate noted at the beginning of this chapter.

Older, legally sub-cultural markers of status, such as accent, certain ways of dress and speech are now becoming less influential over a jury who may in fact determine them to be pompous.<sup>391</sup> Mediatisation has diminished the autonomy of agents in the legal field to set their own standards of behaviour. I use the term legal naturalism, then, not to simply draw a

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<sup>391</sup> Although interestingly, as I observed earlier in this chapter, surveys show that members of the public usually want legal practitioners to retain wigs and gowns despite the regular criticism of their pomposity in the press.

parallel between acting and advocacy but also to argue that naturalism as a style has transcended the stage and has become the accepted model of performance that signals integrity and honesty. This ascendancy is largely due to the growth of film and TV in the 20<sup>th</sup> century.

The ability to capture and reproduce performance—the creation of an economy of cultural reproduction as it were—has affected all fields. In the following two chapters, I examine the effect of mediatisation on the adversarial criminal jury trial. Chapter 5 examines debates around broadcasting the trial. Some legal agents argue that broadcasting risks ‘theatricalising’ the trial—causing participants to ‘act up’. However, I argue that resistance to broadcasting also stems from a reluctance to remit control of the trial to external producers. Broadcasting invites greater scrutiny into a process that if not always fair, needs to be believed in as fair and that relies on the disappearance of live performance.



## Acting Up: Trials, Broadcasting and Television

[...] justice shines brightest in the sunshine. In today's busy world only a few people can actually attend court proceedings. With so many people relying on television as their primary resource of information televised coverage of trials exposes greater numbers of our citizens to our justice system. A camera in the courtroom enhances public understanding of the judicial world by engendering a deeper understanding of legal principles and processes.

Clara Tuma, "Open Courts"<sup>392</sup>

[...] In the age of the Television Trial, the threat is not that the medium will somehow fail to adjust to the sensitive intricacies of the courtroom, but that the American courtroom itself will become a manifestation of the medium.

Paul Thaler, *The Watchful Eye*<sup>393</sup>

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<sup>392</sup> Clara Tuma, "Open Courts: How Cameras in the Court Help Keeps the System Honest," *Cleveland State Law Review* 49 (2001): 420.

<sup>393</sup> Paul Thaler, *The Watchful Eye: American Justice in the Age of the Television Trial* (Praeger: Connecticut, 1994), 203.

## *Introduction*

In the previous chapter, I examined the extensive mediation of the trial through the dominance of the advocate. In this chapter, I turn my attention to the mediatisation of the courtroom through examining the television broadcasting of trials.<sup>394</sup> The broadcasting of trials provokes strong controversy. This is because mediatisation is more than just another layer of mediation; rather, mediatisation raises broader questions as to the purpose of the trial. Some legal agents argue that televising trials is a means of opening up the court system to the public. Others argue that all trial broadcasts remain television programs heavily aimed at securing audiences and that it is therefore in the interest of television producers to sensationalise proceedings. This sensationalising allegedly turns the courtroom from a serious place into a site of entertainment.

The strong position-taking common in debates around broadcasting frequently involves dichotomies such as ‘real’ or ‘fake’, ‘serious’ or ‘entertaining’. In this chapter, I seek to problematise these dichotomies and reconfigure this debate by examining both television and the criminal trial as modes of cultural production produced by agents working within particular fields. This means that lawyers and journalists are working within their own relatively discrete set of conditions and constraints, as well as with different assumptions and beliefs. These must be taken into account when examining the relationship between television and the criminal trial. For example, many legal agents argue that television potentially corrupts the courtroom, encouraging witnesses to ‘perform’. However, this perceived threat presupposes that the courtroom process is a site of ‘not-performing’ and truth-telling. On the other side of the debate, many journalists claim that the resistance of legal agents to broadcasting courtrooms contravenes the public’s right to the open trial. Yet this posits television and the journalists who produce it as a transparent conduit for the public, rather than agents subject to particular economic and time constraints, such as editing and audience ratings. I argue that only through understanding both television broadcasts of trials and the

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<sup>394</sup> By broadcasting, I mean the transmission of any part of a trial on public television, whether live or delayed. This also includes the usage of snippets of courtroom footage on the news.

criminal trial as practices particular to different fields can we reconfigure a debate that is often stereotyped as ‘the free press v the fair trial’. As I will show throughout this chapter, the press is not free, and the trial is not fair.

Although legal agents who critique broadcasting emphasise its corruption and ‘theatricality’, I argue that a major factor at play is the value of the live trial, which risks being interfered with by broadcasting. Legal agents unconsciously rely on the value of the live trial to protect their right to internally regulate how trial proceedings are conducted. Finally, I conclude that a rigid distinction constructed in debates around broadcasting between ‘live’ law courts and ‘mediatised’ television overlooks the fact that processes of mediatisation have already altered aspects of legal practice even without the physical presence of cameras. The impact of television as the primary medium of information has arguably already reduced the ability of agents within the juridical field to define their own standards of behaviour and truth-telling. This development is characteristic of the general growth in the influence of television since the middle of the 20<sup>th</sup> century.

### *The Free Press vs. the Fair Trial*

In 2000, the Scottish High Court convened a special court in the Netherlands to try the ‘Lockerbie bombers’, two Libyan men who were accused of being responsible for the death of 270 people when they allegedly detonated a bomb on board Pan Am Flight 103 in 1988.<sup>395</sup> There was intense international interest in the proceedings of the court case as the victims were of multiple nationalities (the victims were mostly American, however the plane exploded over Scotland) and because it was considered at that time to be the single most lethal act of terrorism in terms of civilian deaths.<sup>396</sup> Because of the international nature of the crime, the Scottish court proceedings held in the Netherlands were transmitted through a

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<sup>395</sup> This international incident led to more than a decade of sanctions against Libya, and protracted diplomatic wrangling in an attempt to find a trial process that Libyan leader General Qaddafi would agree to. Eventually, in 1999 upon the urging of Nelson Mandela and Crown Prince Abdullah, General Qaddafi agreed to a Scottish court presided over by Scottish judges but which would be held in the Netherlands.

<sup>396</sup> This was surpassed by the attacks in New York on September 11, 2001.

closed signal to the families of the American victims who were unable to attend the trial in person.<sup>397</sup>

In March 2000, the BBC applied to the Scottish High Court for permission to broadcast the trial proceedings. They proposed to intercept the closed signal and transmit it to a television audience. The BBC argued that as the trial would take place in the Netherlands, it would not be accessible to Scottish people who wished to attend in person.<sup>398</sup> The explicit argument made was that of the *open trial*: that the interested public had a right of access to the courtroom. Consequently, they argued, television broadcasting was the most appropriate means of ensuring the public nature of the proceedings.

But what exactly is the function of the open trial? The BBC's argument in this appeal reveals a larger 20<sup>th</sup> century shift in its meaning. Historically the open trial has been the right of a defendant (and tied very closely to the 'confrontation' principle that forms Amendment 6 of the U.S. Constitution) to be confronted with the witnesses against him/ her and to have the trial proceedings known to the public (rather than happening in secret, such as might occur in processes of private torture, or indefinite detention).<sup>399</sup> Over the 20<sup>th</sup> century, however, journalists of both the print and television media have pursued a different interpretation whereby the open trial is a right of the public, rather than that of the defendant.

In the U.S., this was upheld in 1980 by the Supreme Court in *Richmond Newspapers v Virginia*.<sup>400</sup> In this case, the Supreme Court reversed a Virginia judge's decision to grant a

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<sup>397</sup> "The trial is of international significance. Its conduct and outcome are of unique significance for a criminal trial in Scotland having regard to the number of victims, the fact that they are of different nationalities, and its implications for a number of governments including those of the United Kingdom, the United States, Libya and the Netherlands". *BBC Petitioners (No.2)* 2000 JC 419, 427.

<sup>398</sup> "The conduct of the trial is a matter of legitimate public interest in Scotland having regard to the fact that the destruction of the aircraft caused the deaths of persons in Scotland". *Ibid.*, 427.

<sup>399</sup> The 'confrontation' principle is derived from a clause in the Magna Carta. The clause outlines the right of the defendant to be confronted with the witnesses against them in open court. See: U.S. Constitution, amend. 6. 'Confrontation' will be examined in more detail in the following chapter.

<sup>400</sup> *Richmond Newspapers Inc. v Virginia* [Hereafter '*Richmond Newspapers*'], 448 US 555 (1980). In this case, a defendant claimed his trial had been jeopardised by the media circus attending it. His appeal was accepted in Virginia but overturned in the U.S. Supreme Court. The judges found, as is outlined in the subsequent chapter, that the 'confrontation' principle refers to the right of the defendant, and does not guarantee the media's right to attend a courtroom. However, the judges argued that the 1<sup>st</sup> and 14<sup>th</sup> Amendments of the U.S. Constitution

defendant's request to clear the court. The Supreme Court found that the right of the press and public to be there was more important to the fair trial than the defendant's wishes.<sup>401</sup> Although the defendant's wishes had to be taken into account, a trial could only be closed if there were specific reasons suggesting that a public or media presence would prejudice the defendant's chances of a fair trial. In their decision, the judges discussed the value of the open trial, stating that:

Finally, with some limitations, a trial aims at true and accurate factfinding. Of course, proper factfinding is to the benefit of criminal defendants and of the parties in civil proceedings. But other, comparably urgent, interests are also often at stake. A miscarriage of justice that imprisons an innocent accused also leaves a guilty party at large, a continuing threat to society.<sup>402</sup>

The judges state explicitly that the open trial is about the community, in terms of their safety and education, and because trials serve a prophylactic purpose, allowing communities to resolve disputes through legal means.<sup>403</sup> The judges also argue that the appearance of justice being done is vital to the public's belief in the legal system, and they argue that the trial itself represents a miniature sphere of the role of law, as the judge makes decisions that affect the public.<sup>404</sup> Consequently, the retention of public trust is paramount to the criminal trial and is

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(which detail freedom of speech and freedom of the press) *do* guarantee the right of the public and the press to attend, and consequently override Amendment 6 to some extent. In other words, the judges decided that unless there was specific reason to believe that the presence of the press and media would interfere with the defendant's right to a fair trial, it did not matter what the defendant wanted.

<sup>401</sup> The case of *Richmond Newspapers* concerned the presence of reporters in the gallery and was not specifically about televising courts. However, it is this case's decision that has facilitated arguments for court broadcasting because it was the first case to determine that the 'open trial' was a right of the public and not only of the defendant. Although this in an American case, it has ramifications for Australian practice as Australia draws on overseas experiences in debates surrounding broadcasting because of what Stepniak terms Australia's "limited experience" with broadcasting. See Stepniak, *Audio-Visual Coverage of Courts*, 236.

<sup>402</sup> *Richmond Newspapers*, 448 US 555, 596 (1980).

<sup>403</sup> "When a shocking crime occurs, a community reaction of outrage and public protest often follows. Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion". *Ibid.*, 571.

<sup>404</sup> "The trial is a means of meeting 'the notion, deeply rooted in the common law, that 'justice must satisfy the appearance of justice.'" *Levine v. United States*, 362 US 610, 616 (1960), quoting *Offutt v. United States*, 348 US 11, 14 (1954). "But the trial is more than a demonstrably just method of adjudicating disputes and protecting rights. It plays a pivotal role in the entire judicial process, and, by extension, in our form of government. Under

facilitated by a relative transparency of proceedings to distance legal agents from any accusation of arbitrariness or secrecy in the law courts' processes that might result from trials being held behind closed doors.<sup>405</sup>

The judges also give clear commentary on what they perceive to be the role of the media in the criminal trial. Having acknowledged the importance of the open trial to the public's confidence in the legal system, they then go on to observe that the public attendance at trials has waned as a pastime, replaced by, among other things, television:

In earlier times, both in England and America, attendance at court was a common mode of 'passing the time'. [...] With the press, cinema, and electronic media now supplying the representations or reality of the real life drama once available only in the courtroom, attendance at court is no longer a widespread pastime.<sup>406</sup>

The judges argue that because the public are primarily informed as to court proceedings by the print and (particularly) electronic media, these consequently function as "surrogates for the public". This pivotal role in maintaining a degree of transparency in proceedings justifies the media's special right of access to the courtroom.<sup>407</sup>

The basic argument that the media acts as a surrogate for the public has been used subsequently as a justification to broadcast trials on television as a functional substitute for attendance of the public in court. This was one of the arguments advanced by the BBC in the

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our system, judges are not mere umpires, but, in their own sphere, lawmakers—a coordinate branch of government". *Richmond Newspapers*, 448 US 555, 595 (1980).

<sup>405</sup> "Public access to trials acts as an important check, akin in purpose to the other checks and balances that infuse our system of government". *Richmond Newspapers*, 448 US 555, 596 (1980). The judge goes on to quote Blackstone: "open examination of witnesses viva voce, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination [...] where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal". William Blackstone, *Commentaries on the Laws of England* (Philadelphia: Charles & Peterson, 1860) Vol. III, 372.

<sup>406</sup> *Richmond Newspapers*, 448 US 555, 572 (1980).

<sup>407</sup> Media representatives are often provided with special seating and priority of entry so that they may report what people in attendance have seen and heard. This "[contributes] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system." *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 587 (1976). However, they do not have any special status: "no greater or higher right can be established by representatives of the press than is recognized as existing in members of the general public, who have the right of access to the court subject to regulation and control". *Re Andrew Dunn and The Morning Bulletin Ltd.* [1932] Sr R Qd 1, 17.

Lockerbie application. Although the BBC claimed “special circumstances” as it was an international trial (and consequently they argued that people *wished* to attend in person but logistically could not), the BBC still argued that television broadcasting could to some degree replace being in the courtroom.<sup>408</sup>

To argue that television (and the journalists who produce it) provides a functional substitute for physical presence in the courtroom requires reconfiguring the television audience’s role in a particular way: instead of the popular assumption that television involves a one-way transmission to a passive audience, television instead becomes a medium for an active audience, facilitating community participation where those watching a broadcast of a trial are involved in the administration of justice. This is the argument advanced by many journalists, such as *Court TV* reporter, Clara Tuma:

[...] justice shines brightest in the sunshine. In today’s busy world only a few people can actually attend court proceedings. With so many people relying on television as their primary resource of information televised coverage of trials exposes greater numbers of our citizens to our justice system. A camera in the courtroom enhances public understanding of the judicial world by engendering a deeper understanding of legal principles and processes.<sup>409</sup>

Tuma’s statement is interesting in two ways. Firstly, she says that those watching broadcasts are doing so in the name of public justice, distancing *Court TV* from being a source of entertainment rather than education.<sup>410</sup> Secondly, Tuma implies that television is not only a functional substitute for being in the courtroom; it is also a more practical means of fulfilling the requirements of the open trial. She consequently takes a step further than the BBC, who argue only that “special circumstances” prevented people from attending the court in person. For Tuma, the court requires television. Because no one attends trials anymore, the courts

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<sup>408</sup> There is some precedent to the BBC’s argument in the broadcasting of proceedings at Nuremberg. Nuremberg broadcasts had arguably little to do with ensuring the defendants’ rights to a fair trial, and much more to do with a belief that the Nuremberg trials were showing justice to be done to the worldwide community. To some extent these two motives are inseparable. However to simply fulfil the defendants’ rights to an open trial would merely have required the presence of members of the public in the gallery. Here, rather, we see a 20<sup>th</sup> century development of a middle-ages principle, where crimes were punished in the community they occurred in so as to function as a form of deterrent, community redress and an instrument of education.

<sup>409</sup> Clara Tuma, “Open Courts,” 420.

<sup>410</sup> *Court TV* is an American cable channel dedicated exclusively to the broadcasting of court cases.

should adapt. The legal system is, she would argue, consequently out-of-touch with the contemporary population.

This view is not only held by journalists. Over thirty years ago, Jack Weinstein and Diane Zimmerman, a New York judge and a Professor of Law respectively, also argued that “it is time to let the public really observe their courts through the facilities of mass media”.<sup>411</sup> They observed that “today the legitimacy of television as a responsible interpreter of the news has received unquestioned [...] recognition”.<sup>412</sup> In Australia, Justice Michael Kirby has long argued that broadcasting of the courtroom is an inevitability that law courts should adapt to, rather than resist:

Every sensible person can see that, the technology of information having moved along, courts and judges can scarcely expect to keep the cameras out of Australian courts forever. What is the reason for our strong principle of open courts? It is the fundamental belief that the courts belong to the people who have a right at virtually all times to be there. Their presence, or even their right to be present, puts a brake on the potential arrogance of power. It is another means of ensuring accountability so that those who judge are themselves constantly subject to judgment. [...] And if television is the way that most people in Australia nowadays get their news information, it is difficult to see why it should be forbidden.<sup>413</sup>

Kirby’s attitude is shared by South Australian Chief Justice John Doyle.<sup>414</sup> This sentiment is, in fact, echoed across most adversarial jurisdictions by many judges and other legal

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<sup>411</sup> Jack Weinstein and Diane Zimmerman, “Let the People Observe Their Courts,” *Judicature* 61.4 (October 1977): 165.

<sup>412</sup> *Ibid.*, 165

<sup>413</sup> Justice Kirby also argues that going to court is an outmoded practice: “[i]t is difficult to justify limiting the open court principle to straggling groups of partly-interested schoolchildren or to the new brigade of pensioners and foreign visitors who are increasingly brought to sit in the back row to watch our courts until boredom or the incessant demands of the tour guides send them on their way”. Justice Michael Kirby, “The Future of the Judiciary,” (paper presented at the *Australian Lawyers’ Conference*, Thailand, 9-17 July 1995), unpublished. Retrieved 18 June 2008 from: <http://www.lawfoundation.net.au/ljf/app/&id=0929BB3A1318025CCA2571A80020F1EB>

<sup>414</sup> “The public have a right of access to the courts. That means they can walk into the courtroom and listen. But these days, in reality, most people exercise that right of access through the media. [...] And because I see the media as exercising the public’s right of access I think it’s important that we help the media as much as we can, to give the public what you might call good access, to give them good quality information about what’s



commentators.<sup>415</sup> Instead of there being a blanket resistance to broadcasting, as was the case in the past, many legal agents are enthusiastic about the potential of broadcasting technology to assist in upholding the ideals of the adversarial trial. For example, in the BBC's application to intercept and transmit the closed-signal broadcast of the Lockerbie proceedings, the Scottish High Court judge followed the 1992 guidelines that had been specifically developed in Scotland to deal with the question of broadcasting court proceedings.<sup>416</sup> These guidelines stated explicitly that the previous blanket ban on broadcasting was no longer appropriate. Rather, the question a judge should consider is whether there is a "risk to the administration of justice".<sup>417</sup>

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happening". South Australia Chief Justice John Doyle on ABC Radio National, "How Courts Interact with the Media," *The Law Report*, 10 November 1998.

<sup>415</sup> In Canada, these sentiments have been expressed by Justice Cory in *Edmonton Journal v. Alberta (Attorney General)* [1989] 2 SCR 1326, 1339-40. In Scotland, Lord Hope commented: "The public have a right to know and to understand what goes on in court. Access to proceedings by means of a television camera will assist this process." Lord Hope quoted in *The Times* 8 November 1994, 137. In the U.K., resistance has been considerably stronger. However even there, more recently, public consultation and pilot broadcasts have led to a report by Lord Justice Brooke which concluded: "I believe that the televising of proceedings in our appeal courts and in those courts, like the Administrative courts, which do not receive live evidence from witnesses, cannot be far away". See Henry Brooks, "The Legal and Policy Implications of Courtroom Technology; the Emerging English Experience," *William and Mary Bill of Rights Journal* 12 (2004): 704. This distinction between criminal trials involving live witnesses and civil cases is crucial to arguments developed in the subsequent chapter on the use of CCTV testimony as replacement for a live witness.

<sup>416</sup> Sections a) and b) of these 1992 guidelines give a sense of the shift in attitudes: "(a) The rule hitherto has been that television cameras are not allowed within the precincts of the court. While the absolute nature of the rule makes it easy to apply, it is an impediment to the making of programmes of an educational or documentary nature and to the use of television in other cases where there would be no risk to the administration of justice. (b) In future the criterion will be whether the presence of television cameras in the court would be without risk to the administration of justice". See Department for Constitutional Affairs (U.K.), *Broadcasting Courts* (2004) Annexure C, Note 2.

<sup>417</sup> The American Judicature Society amongst others shares this opinion in the U.S.: "AJS [American Judicature Society] has long advocated the need for public understanding of, and involvement in, the judicial process as a means of ensuring respect and support for our judicial system. Access is indispensable to any effort to improve understanding, and increase involvement. In today's technologically driven society, the best way to make the process more accessible is by gavel-to-gavel broadcast of proceedings on television and over the internet". Editorial, *Judicature* 86.1 (July-August, 2002): 4.

Scottish High Court Judge, Lord MacFadyen argues in his judgment in the BBC case that broadcasting an encrypted signal to remote sites for persons involved in the case (or rather, personally affected by the case) poses no kind of risk to the administration of justice:

In these circumstances, it is in my view realistic to regard the remote sites as extensions of the courtroom, and the transmission of the proceedings to those sites as no more than an internal arrangement within the court. That is certainly the way the remote sites are presented in the Remote Sites Guidelines. The force and effect of the point does not, in my opinion, depend on its being literally true that the remote sites are parts of the courtroom. It is sufficient that there is a strong functional analogy to that effect.<sup>418</sup>

Interestingly, the language of Judge Kirkwood in his response to the initial BBC application was even stronger. Kirkwood argued that according to the Remote Sites Guidelines the extension of the courtroom was not even analogy, but was literal. The remote sites were part of the court. Family members viewing the court remotely were consequently present in the court. This suggests that in Scotland television can fulfil the function of live presence to the satisfaction of legal need under certain conditions.

When the BBC failed in their application, it was because in both appeals the presiding judges made a clear distinction between an encrypted signal to those involved in the case, and a public broadcast. Lord MacFadyen comments:

I understand the petitioners' view that the most effective, complete and detailed way for them to report the proceedings of the trial is for them to broadcast the whole proceedings live. If there were no countervailing considerations to be taken into account, that view would be entitled to prevail.<sup>419</sup>

What this tells us is that there is not a strict dichotomy between the advocates of televising courts and legal agents, and that attitudes towards the mediatisation of the courtroom are far from simple. Many legal theorists and practitioners have commented on the potential power of television to improve and uphold trial ideals, and this is reflected in the wide, if uneven, use of cameras in courtrooms across many jurisdictions.<sup>420</sup> However, as Lord MacFadyen

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<sup>418</sup> *BBC Petitioners (no.2)* 2000 JC 419, 438.

<sup>419</sup> *Ibid.*, 440.

<sup>420</sup> For comprehensive and current information as to the regulation of television broadcasting of trials, see Daniel Stepniak, *Audio-Visual Coverage of Courts*, *supra* n. 17.

observes, when it comes to general television broadcasting, there are other considerations to take into account.

### ***The Medium and the Message: Acting Up***

Historically, the ‘other considerations’ referred to by Lord MacFadyen in the Lockerbie appeal have been surprisingly consistent across jurisdictions (i.e. the risk of “interference to the administration of justice”).<sup>421</sup> The first queries surrounding broadcasting’s effect on trial proceedings (in this instance, radio) date back as early as the late 1930s in the U.S. A major recurring argument as to the effect of broadcasting is whether or not cameras alter a witness’s behaviour; an argument which I believe implicitly revolves around the risk of broadcasting ‘theatricalising’ the proceedings.<sup>422</sup> According to the terms of the debate, this alteration in a witness’ behaviour can happen in two ways. Firstly, there is the claim that both the physical presence and use of technology will directly affect and distort the behaviour of those in the court causing them to ‘act up’, and rendering them less likely to be truthful or ‘natural’. The second charge levelled at broadcasting is the potentially detrimental effect on the outside audience who view the proceedings on television. In terms of the first charge—that of the impact of technology on trial participants—some legal commentators have argued that broadcasting may therefore impair the truth seeking capacity of the court. For example in the U.S., in the case of *Estes v Texas* in 1965, Justice Clark stated, when discussing the possible effect of television broadcasting on witnesses, “[e]mbarrassment may impede the search for the truth, as may a natural tendency toward overdramatization”.<sup>423</sup>

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<sup>421</sup> This quote regarding interference to the administration of justice comes from the Scottish Guidelines, *supra* n. 418.

<sup>422</sup> As Daniel Stepniak observes, one of the first major Australian investigations into the effects of broadcasting found the major anxiety stemmed from issues about “disruption, distraction, psychological effect, and invasion of privacy”. Stepniak, *Audio-Visual Coverage of Courts*, 236.

<sup>423</sup> *Estes v Texas* is considered a landmark case in U.S law concerning television broadcasting and is still continually cited as an argument against broadcasting of television. In this case, the defendant Estes appealed his conviction claiming he did not receive a fair trial because of the intrusion of the media. His trial was filmed by television throughout, though only the opening and closing statements and verdicts were broadcast with sound to a TV audience. The appeal was successful, with the judges concurring that the broadcast had an adverse effect on the courtroom environment and impeded his right to a fair trial. See *Estes v Texas*, 318 US 532

This argument that the presence of television cameras risks dramatising or theatricalising the courtroom was still in currency 35 years later in Europe in 2000 when the BBC's appeal to broadcast the Lockerbie bombing trial was rejected. The Lord Director in that instance claimed "[t]here was a risk that the evidence of witnesses might be affected in a variety of ways if the proceedings were televised. A witness might be more affected by nervousness than he would otherwise be. He might play to the gallery".<sup>424</sup>

The potential for "playing to the gallery" is posited not only on the witness performing to the imagined audience, but also on the immediate physical stress broadcasting equipment may cause in the space of the courtroom. In earlier days, the sheer size of the technology gave credence to the argument that witnesses would not be able to behave naturally, as there was no way they could forget they were being filmed. Yet this issue of equipment was raised at the BBC's appeal:

As was expressly stated in paragraph (b) the criterion was to be whether the presence of television cameras in the court would be without risk to the administration of justice. It was to be noted that the language of that paragraph concentrated on the presence of cameras in court. That demonstrated that at least in part the concern was with the impact of the presence of the equipment rather than with the impact of the broadcast output.<sup>425</sup>

This comment contradicts commentators today who assume that these arguments are no longer valid, because cameras can now be so small as to be almost invisible. Media Law academic Susannah Barber states that "[a]rguments that cameras are physically disruptive, distracting, and detrimental to the dignity and decorum of the courtroom have been laid to rest, as have the rather tenuous arguments that cameras turn witnesses into hysterics, lawyers into flamboyant actors, and judges into political sycophants".<sup>426</sup> Yet, despite the significant reduction in size of equipment, its potential for intrusion is still considered relevant by legal agents.<sup>427</sup>

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(1965). However, this decision was superceded by *Chandler v Florida*, 449 US 560 (1981) which found that intrusion of the media did not in itself constitute proof of an unfair trial.

<sup>424</sup> *BBC Petitioners (No. 1)* 2000 JC 419, 430.

<sup>425</sup> *Ibid.*, 416.

<sup>426</sup> Susannah Barber, *News Cameras in the Courtroom: A Free Press—Fair Trial Debate* (New Jersey: Ablex Publishing Co, 1987), 99.

<sup>427</sup> One of the earliest questions debated was whether broadcasting interfered with the trial process. This is discussed in a 1950 journal article in the U.S. The author notes: "the board of governors of the Chicago Bar

What Barber overlooks is that these legal disputes are not about the *size* of the technology. Concerns tend to revolve around the associations that this kind of technology may have for the witness, and how these associations will affect them. Ronald Goldfarb argues:

Sceptics have shifted their criticism of cameras in courts through the years. Several decades ago, the most common objections raised against television in courts was that the cameras were obstructive, noisy and disruptive. Now that the technology is such that camera coverage of court proceedings is invisible and decorous, the argument against television has changed. Today the chief criticism—unprovable, though logical and widely held—is that the presence of cameras inevitably changes the behaviour of the trial participants in negative ways.<sup>428</sup>

As far back as 1937, the introduction of press photography was thought to potentially impair the seriousness of the proceedings:

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.<sup>429</sup>

Television (and press photography/radio before it) can carry significant stigma in the eyes of the law as it is fundamentally a tool of ‘entertainment’ turning the seriousness of the court into a show, through inappropriate behaviour. Broadcasting equipment, then, according to some critics, functions as a behavioural trigger.

Yet the perceived risk that trial participants will ‘act-up’ for the audience, and turn the court into a show, is only justifiable if one presupposes that the current inherited circumstances of the trial are an effective truth-seeking process that allow trial participants to be relatively

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Association overruled its special committee, however, and voted to continue the policy of forbidding any kind of broadcasts, live or recorded. The reason they gave was the fear that the presence of microphones might upset witnesses; but radio newsmen thought that the real reason was apprehension that elected judges might make long speeches for the benefit of voters, rather than for the furtherance of justice”. See Mitchell V. Charnley, “Should Courtrooms Be Broadcast,” *Federal Communications Bar Journal* 66 (1950): 66.

<sup>428</sup> Ronald L. Goldfarb, *TV or not TV: Television, Justice and the Courts* (New York: NYU Press, 1998), 162.

<sup>429</sup> American Bar Association, Canon 35 of its Judicial Ethics (1937). See Richard H. Frank, “Cameras in the Courtroom: A First Amendment Right of Access,” *Hastings Communications and Entertainment Law Journal* 9.4 (1987): 755.

‘natural’.<sup>430</sup> This runs in contradiction to the concept of a performance of tradition that I have introduced in this thesis. Indeed, a study conducted by Paul Mason in 2001 into just such a question yielded an interesting result. Observers were asked to watch a witness testify while that witness was being openly filmed. The study found that:

It was [...] difficult to determine the effect the camera has on a witness: ‘[...] but I think that they are so tense anyway that whether or not there are cameras is not a problem. A witness is really under pressure, that’s also one of the problems with this system, it’s very good because it’s balanced, but on the other hand the witness gets all the pressure, and you have the accused who is sitting on the chair, comfortably watching the proceedings’.<sup>431</sup>

Observers in this study were unable to state with any clarity to what degree the cameras were affecting a witness’ behaviour. This is because it was clear to the observers how affected witnesses were simply through being on the stand and in the courtroom. However, this accusation is longstanding because it is difficult to dispute George Gerber’s claim: “if you change the audience, you change the performers”.<sup>432</sup>

The second charge levelled at broadcasting, as mentioned earlier, deals with the question of the audience—the viewing public who watch the proceedings on television. Theoretically, these people are the modern version of previous court-watchers. As outlined earlier, many journalists and legal agents have argued that watching a trial on television is a simulated and comparable version of ‘being there’ whereby television simply extends the space of the courtroom into a viewer’s living room. Therefore, arguably, this extension facilitates the open trial. Yet many legal agents argue that this audience is watching for the ‘wrong’ reasons, or getting the ‘wrong’ impression of proceedings. Catherine Crier writes in 2006:

Coverage that focuses on the theatre of the courtroom rather than the substance of the case fails Americans for two reasons. First, the adversarial process is reduced to a sporting event, in which personal antics become fodder for chattering commentators who are more akin to ESPN sportscaster Linda Cohn than New York Times Supreme Court reporter Linda Greenhouse. Americans then view our

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<sup>430</sup> This line of argument is in keeping with the concept of the ‘disobedient’ defendant outlined in Chapter 3, who theatricalises proceedings by using their position as a soapbox.

<sup>431</sup> Paul Mason, *Report on the Impact of Electronic Media Coverage of Court Proceedings at the International Criminal Tribunal for the Former Yugoslavia* (The Hague, Southampton, ICTY and Centre for Media and Justice, 2000) [2.11], quoting Court Staff 3.

<sup>432</sup> George Gerbner quoted in New York State Committee to Review Audio-Visual Coverage of Court Proceedings, *An Open Courtroom: Cameras in New York* (New York: Fordham University Press, 1997), 235.

courts as a perverse form of entertainment, rather than a hopefully fair and civil means of dispute resolution. Second, a focus on the legal play rather than the issues at stake deprives Americans of the important education that news coverage should provide.<sup>433</sup>

Crier's use of the term 'theatre' echoes old objections to the introduction of defence lawyers, as she argues that television broadcasting will bring entertainment and theatricality with it, corrupting the courtroom.<sup>434</sup> For Crier this means that television broadcasting of trials cannot be justified as a tool of education for a civic-minded audience, as journalists have sought to do. Robert A. Pugsley too criticises the argument of television facilitating the open trial. Writing in 1997 regarding the OJ Simpson civil and criminal proceedings, he commented:

What was intended, and often realized, as an educational insight for the public into the workings of their criminal justice system often devolved—because of the camera's presence—into an unedifying cynicism-producing spectacle that left many in the audience wondering angrily what any of this had to do with 'truth' or 'justice' of a 'system' and just what exactly their taxes were being used for.<sup>435</sup>

Pugsley blames television for turning the trial into a form of entertainment. Both Crier and Pugsley, admittedly, use extreme examples.<sup>436</sup> A more nuanced study that reached the same conclusion, however, was the Noisette study done in New York in 2003. This study found that 61% of the public surveyed felt that television in the courtroom was a source of entertainment, rather than something to increase their understanding of the trial and how the criminal justice system functioned.<sup>437</sup>

Yet this dichotomy—that because courtrooms on television can be entertaining they cannot be educational—flies in the face of the generally accepted premise that criminal courtrooms have *always* been a site of entertainment, to the extent that, at the height of its popularity, tickets were issued for seats in the public gallery. Those who attended courtrooms were not

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<sup>433</sup> Catherine Crier, "Journalism and the Law," *Syracuse Law Review* 56 (2006): 397.

<sup>434</sup> It is ironic that the introduction of mediatised equipment should be seen to *theatricalise* proceedings, considering that it is their presence that alters the court from being a paradigmatically live performance space.

<sup>435</sup> Robert A. Pugsley, "This Courtroom is Not a Television Studio: Why Judge Fujisaki Made the Correct Call in Gagging the Lawyers and the Parties, and Banning the Cameras from the O.J. Simpson Civil Case," *Loyola of Los Angeles Entertainment Law Journal* 17.2 (1995): 380.

<sup>436</sup> Indeed some writers have argued that the O.J. Simpson proceedings have set back the cause of courtroom broadcasting.

<sup>437</sup> New York State Committee, *An Open Courtroom*, 207.

necessarily always doing so out of a sense of civic duty.<sup>438</sup> If entertainment and justice really were mutually exclusive concepts, the criminal trial would have long since forfeited its social credibility to resolve disputes.

The judges in *Richmond Newspapers v. Virginia* are clear that the public have always been interested in criminal trials for their entertainment value and this, for these judges, still ensures public inclusion in the judicial process.<sup>439</sup> These judges do not separate entertainment from public justice and transparency as they argue that regardless of the public's motives, the proceedings are still made more fair by their presence, even if they are only there to watch avocados being thrown, or to witness the judge having to have certain acts of oral sex explained to him, as happened in the 'Trials of Oz'.<sup>440</sup> In addition to this, just because an audience watching a trial broadcast at home finds it entertaining does not necessarily mean that this audience cannot also find the broadcast informative. This is something the *Noisette* report authors in New York do not acknowledge.

As outlined, the two arguments above regarding the risk of broadcasting reveal continuity with much earlier arguments that intrusions into the trial process constitute a form of deviant theatricality. The inability to either definitively substantiate or refute these claims (perhaps ever, and certainly not without more long-term trials and studies) means that the dispute remains, although both arguments are based on a categorical misrecognition as to the 'not-performing' nature of the trial. However, the argument that the courtroom will be 'entertainment' for a viewing audience does, arguably, revolve around a more well-founded reservation: that television broadcasts will not or do not accurately portray the judicial system, as television producers/journalists have a vested interest in creating entertainment. In other words, dubbing television and the journalists who produce it as a "surrogate for the

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<sup>438</sup> The Superior Court in Santa Barbara California still has a 'lottery' system. When there is excessive demand for the limited seats, the court functionaries conduct a 'lucky dip' to determine who will get a seat.

<sup>439</sup> "[it] is not unrealistic even in this day to believe that public inclusion affords citizens a form of legal education and hopefully promotes confidence in the fair administration of justice". *State v. Schmit*, 273 Minn. 78, 87-88; 139 N. W. 2d 800, 807 (1966) quoted in *Richmond Newspapers*, 448 US 555 (1980).

<sup>440</sup> For the account of thrown avocados, which took place during a sexual assault trial in Sydney in 2003, see Paul Sheehan, *Girls Like You* (Sydney: Pan McMillan Press, 2005). For any of the absurd courtroom interchanges that took place in the 'Trials of Oz' see Geoffrey Robertson, *The Justice Game*, 21-48, or Tony Palmer, *The Trials of Oz* (Manchester: Blond & Briggs, 1971).



public” overlooks the very particular jobs that journalists have and the conditions under which they work.

### *The Journalistic Field*

In *On Television and Journalism*, Bourdieu argues that the driving particularity of the journalistic field is its proximity to the market-place.<sup>441</sup> The model of supply and demand is central to cultural journalistic production. Journalism’s dependence on economic factors means that it has considerably less autonomy than many fields, including the juridical field. This means, despite their claims to a ‘free press’, journalists are largely driven by (perceptions of) audience demand. As Daniel Stepniak observes: “[i]t is difficult to deny that ratings rather than the promotion of greater public understanding of judicial proceedings motivate many media applications”.<sup>442</sup>

To capture an audience requires marketing a show in a particular way. This means television broadcasts have an imperative to be entertaining. Although I have pointed out that courtrooms have long been considered entertaining, this refers primarily to much older trials, as opposed to 20<sup>th</sup> and 21<sup>st</sup> century affairs. Beyond the odd moments of fun (or the occasional extreme examples such as the Trials of Oz), contemporary court processes tend to be extremely drawn out, relatively opaque and rather dull. They have become duller as the proceedings have become more and more legalised and subject to intricate and confusing procedure (after all, it would have been hard to become bored in a 17<sup>th</sup> century 20 minute trial). This means that journalists must undertake what Bourdieu calls the “search for the sensation and the spectacular”.<sup>443</sup> To screen a trial in its entirety would arguably test the patience of the audience (and currently in the U.S. where trials are screened on television regularly, *Court TV* tends to add voice-overs and commentaries to the staid and dull bits of proceedings).

For journalists and/or television producers editing and reframing courtroom processes is necessary because they are currently too convoluted and confusing and would bore the

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<sup>441</sup> Bourdieu, *On Television and Journalism* (London: Pluto Press, 1998), 19.

<sup>442</sup> Stepniak, *Audiovisual Coverage*, 402.

<sup>443</sup> Bourdieu, *On Television and Journalism*, 19.

audience. Bourdieu argues, however, that the journalistic justification of simply meeting audience expectations sidesteps how much television shapes the view of the public: “one thing leads to another, and, ultimately television, which claims to record reality, creates it instead”.<sup>444</sup> As George Gerbner notes “[t]ransporting the sights and sounds of courtroom behaviour into a public arena is qualitative change and not merely journalistic enrichment”.<sup>445</sup>

The possibility of alteration through editing or re-framing is noted in the Federal Court of Australia’s *TV in Courts* report. Recommendation 20 states that:

It is recommended that as the electronic media's capacity to inform and educate is best served through extended coverage, the Court should treat favourably or give preference to proposals for extended coverage over those seeking to broadcast sound bites or snippets.<sup>446</sup>

The risk implied by the above recommendation is that broadcasting trial excerpts out of context can potentially mislead the audience as to how proceedings are conducted. Media theorist Douglas Kellner argues that broadcasting of a trial, whether in part or as a whole, skews the proceedings for the viewer. Writing about the O.J. Simpson trial, he outlines “the triumph of media spectacle over reality and the immense power of media culture to define what is real, important, and worthy of attention”.<sup>447</sup> Where Auslander argues that we exist in a “televsual culture”, Kellner argues that instead it is “technocapitalist”.<sup>448</sup> For Kellner, the inability to disregard the economic drives of a relentless mass media culture presents a fundamental disjuncture between how television can be used as a ‘conduit’ and the reality of opening the door of the courtroom permanently to a form of media inextricably bound in economics and market share. Consequently, the search for the spectacle is an intrinsic part of ‘sexing up’ proceedings to enhance ratings. Bourdieu, too, argues that “television calls for *dramatisation* in both senses of the term; it puts an event on stage, puts it in images”.<sup>449</sup>

In Australia, this tension between entertainment and public information was illustrated in 1995, when the Victorian Supreme Court broadcast the sentencing of Nathan John Avent, a

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<sup>444</sup> Ibid., 22.

<sup>445</sup> Gerbner in Susanna Barber, *News Cameras in the Courtroom*, xiii.

<sup>446</sup> Federal Court of Australia, *TV in Courts Report—Recommendations*, 21 December 1998. Retrieved 10 June 2008 from: [http://www.fedcourt.gov.au/aboutct/media\\_recomm.html](http://www.fedcourt.gov.au/aboutct/media_recomm.html)

<sup>447</sup> Douglas Kellner, *Media Spectacle* (New York: Routledge, 2003), 102.

<sup>448</sup> Auslander, *Liveness*, 2; Kellner, *Media Spectacle*, 11-15.

<sup>449</sup> Bourdieu, *On Television and Journalism*, 19 (his italics).

convicted child murderer. This is one of only two occasions where broadcasting of criminal proceedings has occurred in Australia. Justice Kirby (who as we saw earlier is in favour of broadcasting courtrooms) had these reservations:

[t]he very case which Justice Teague chose for his experiment demonstrates the risks of presenting such material to the community at large. Why was that case chosen? The answer is because it was so newsworthy, even sensational. Why was it newsworthy? Because it involved such a cruel and bloody crime by an unlikely perpetrator from a religious family with horrible suffering both for the families of the victim and of the accused. If the object were to give a window into the operations of the courts, this was scarcely a typical day in the life of the Australian courts. But it was a notable criminal trial in which there was a great deal of public interest.<sup>450</sup>

Kirby's critique of the sensationalism of the broadcast above echoes Bourdieu's sentiment that: "'Current events' are reduced to an impassioned recital of entertaining events, which tend to be halfway between the human interest story and the variety show (for an exemplary case, take the O.J. Simpson Trial)".<sup>451</sup> In other words, something modelled as an informative trial broadcast is in fact deliberately chosen for its sensational value. Interestingly in the Teague case, it was not that the journalists had edited it, but rather that the transportation of a courtroom process into the media realm had somehow vulgarised it.

This sense of the vulgar is emphasised by Paul Thaler, who argues: "By embracing the courtroom camera, we may have entered into a Faustian bargain, where part of the soul of our judicial legacy is traded for what we believe is a measure of progress".<sup>452</sup> Interestingly, all of these writers' arguments reveal certain implicit beliefs about the trial. Both Douglas Kellner and Bourdieu state that the goals of journalism lead to an inevitable 'theatricalisation' of any particular material (Kellner talking specifically about courtrooms, Bourdieu in more general terms). This brings them both in line with earlier critics who suggests that journalism *brings with it* entertainment, corrupting the serious nature of proceedings.

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<sup>450</sup> Justice Kirby, "Televising Court Proceedings," *UNSW Law Journal* 18.2 (1995): 485.

<sup>451</sup> *Ibid.*, 6. "[a] far greater number of TV-oriented moments were played out in the courtroom to a watching world. Besides the verbal clashes in excess of what would probably otherwise have occurred, remember fondly, if you will, both sides' inevitable efforts to dominate the 'cliff hanger moment' that would leave the world in suspense from Friday afternoon until Monday morning. Now, that's television". Pugsley, "This Courtroom is Not a Television Studio," 380.

<sup>452</sup> Paul Thaler, *The Watchful Eye*, xxiii.

Kellner's argument is also framed in Marxian terms, whereby there is an underlying real event affected by an insidious economic imperative. The projected outcome, for Kellner, is that the 'real' event is replaced by the mediatised spectacle. Thaler's remarks also do not reflect on the trial as anything but a truth-seeking transcendental practice. Although it is true that television (in terms of broadcasting trials to the public) is part of the journalistic field and subject to various forms of constraint particular to that field, the same is true of the criminal trial as a practice of the juridical field.

Bourdieu, examining the staging of the Olympic Games, observed that televising it involved a "two-step social construction, first of the sports event, then of the media event".<sup>453</sup> This two-step construction applies here too. The criminal trial itself is a social construction and a cultural production. The television broadcast of the criminal trial is a production of a production. Although the criminal trial itself is 'real', in the sense that it is the legal event, the dichotomy of 'real' vs. 'fake' used by critics of television broadcasting implies that the very existence of the television version threatens the integrity of the 'real' trial. The television broadcast may not just be about public justice, but then, neither is the criminal trial.

Journalism is frequently criticised by Bourdieu for purporting to find the 'Truth' through 'common sense'—in other words, Bourdieu believes journalists expect people from other fields to be able to justify their projects in journalistic terms, which journalists misrecognise as 'common sense'. Bourdieu argues that journalistic discourse is based on a market model and has little to do with stating things as they are. Rather it is "demagogic simplification".<sup>454</sup> Yet television producers and legal practitioners share certain assumptions. Along with the political field, journalism and law are among the few fields which claim that their particular field specific version of 'Truth' applies to and transcends all other fields. Legal agents make similar claims regarding trials to those that journalists make regarding television, expecting those from other fields to speak in a highly specific language (legal or journalistic) that they will believe to simply be 'reason' or 'common sense'. Bourdieu's critique of journalistic

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<sup>453</sup> Ibid., 82.

<sup>454</sup> For example, Bourdieu criticises televised debates by journalists who frequently employ two incompatible speakers to generate argument, rather than real debate. For Bourdieu, "true scientific agreement or disagreement requires a high degree of agreement about the bases for disagreement and about the means to decide the question". Bourdieu, *On Television and Journalism*, 62.

‘truth’ as simplistic has heavy resonances for juridical truth, reminding us that both are constructed and field-specific.

Although I believe that those who fear broadcasting will corrupt the courtroom overstate the inherent integrity of the trial process, legal fears based on the presence of cameras theatricalising proceedings or diminishing the court’s decorum can better be understood as rooted in an understandable mistrust of a medium whose effects in the long term can only be speculated upon.<sup>455</sup> Legal agents do not know the effect of broadcasting in the long-term. Most importantly, this medium, as a product of an external field, brings with it the transformative potential to affect how juridical truth is produced. The fear of entertainment or corruption, rather than being only a case of snobbery (where the ‘real’ trial is messed up by the ‘fake’ television), reflects deeply held beliefs as to the exclusive right of legal agents to determine internally how trials are conducted and received.

Broadcasting potentially means a diminishing of regulation of a largely internally defined practice. As George Gerbner states: “the basic public issue is, therefore, whether linking courts to television will enhance or diminish the integrity and independence of our administration of justice”.<sup>456</sup> The mixed range of acceptance of broadcasting suggests that it is not the technology in and of itself that is the problem, rather it is the regulation and implications of broadcasting trials—including how trial proceedings are interpreted by the public and what effect this may have on the conduct of the trial—which disturbs legal agents.

### ***In Australia: Practical Obscurity***

The reluctance to remit legal proceedings to another field can be inferred from the current state of television broadcasting of trials. In the U.S., despite it being the main broadcaster of criminal trials throughout the world, broadcasting is in fact banned federally under Section 53 of the Supreme Court Guidelines (this means that broadcasting is banned from federal courts but not necessarily state courts). There is also legislation banning cameras from courts in

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<sup>455</sup> “When state courts admit cameras into the courtroom, they set out on a road whose course and destination no one really knows”. George Gerbner in Susanna Barber, *News Cameras in the Courtroom*, xiii.

<sup>456</sup> *Ibid.*, xxiii.

England, Wales, Northern Ireland and some parts of Canada. In Scotland broadcasting has only been possible since the 1990s. The outlining of these restrictions may seem misleading, particularly in regard to the U.S., because, despite the federal ban, broadcasting is permitted in some form in 47 states. Some states have been broadcasting trial proceedings for more than 25 years and, indeed, Americans have a whole cable television channel dedicated to trials, most commonly criminal proceedings, summary proceedings or small claims settlement courts.

However, my intention is to point out that no adversarial jurisdiction has a uniform presumption that broadcasts take place. Rather, where broadcasting is permitted, it is allowed on a case-by-case application by the judge. In almost all jurisdictions public broadcasts are only permitted on condition that the judge retains at least some regulation over the transmission (such as how much is shown and when). As Stepniak points out, even in the U.S., which is at the forefront of broadcasting, there is deep reluctance to overturn the federal ban on broadcasting:

The American experience also reveals that a lack of judicial support can in practice severely restrict the implications of legal rights to record, broadcast and access audio-visual recordings of proceedings. Thus, with few exceptions American courts continue to reject media argument seeking the recognition of a presumptive constitutional right to televise proceedings.<sup>457</sup>

Even in limited (non-public) televising (such as the closed-circuit transmission of the Lockerbie trial to the victim's families), the courts restrict the recording of the transmission: no family member was able to record the proceedings to review them. It was broadcast live and only once. All of these provisions surrounding broadcasting detailed above suggest that the legal field wants to tightly regulate the transmission of trials to stop them from being used out of context.

This is a major feature of Australia's experience too. Although courts such as the High Court of Australia have permitted live streaming over the internet, and footage has been filmed in most kinds of courts, including District and Supreme Courts, this has been on an ad-hoc basis. Australia is somewhat distinct from the other jurisdictions canvassed in this chapter (New Zealand, the U.S., the U.K. and Canada) primarily because it is the only one that does not have any constitutional provision for freedom of speech, such as is found in the U.S. First

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<sup>457</sup> Stepniak, *Audio-Visual Coverage of Courts*, 5.

Amendment, or the Canadian or New Zealand Bill of Rights. The right to an open trial is also not enshrined in statute (although it is such a fundamental part of common law—as it is in the U.K.—that this is arguably unnecessary).

However, this means the terms of the debate in Australia are a little different. Because there is no assumed provision for a free press, or an open trial, the question of broadcasting falls under the laws of contempt. These laws were formulated to prevent any form of risk to the administration of justice and set out what practices may or may not constitute criminal contempt. Daniel Stepniak outlines three forms of criminal contempt he argues are at the heart of Australian questions regarding trial broadcasting. One is *sub judice* which:

[p]rescribes that, subject to a number of important exceptions and qualifications, it is a contempt to publish material relating to “pending” (that is, current or forthcoming) legal proceedings if that material has, “as a matter of practical reality, a tendency to interfere with the course of justice”.<sup>458</sup>

This is the more extreme version of contempt where publication or broadcast of certain material would prejudice the trial, or potentially influence the outcome. Another version of contempt outlined by Stepniak is “conduct which has a tendency to interfere with the administration of justice generally”. That is, the argument would be that broadcasting can provoke excessive publicity that can affect a case and that identification of witnesses on television could make them less likely to testify. Even more strongly enshrined in Australian law (unlike the U.S.) is the principle of anonymity of the jury. Broadcasting can be seen as detrimental to this, as outlined below:

While the Federal Court of Australia does not presently conduct trials by judge and jury, the televising of jurors in Australian courts should be prohibited. To permit electronic media coverage to show or otherwise identify jurors would be contrary to the policy objectives underlying current restrictions on media coverage of juries and would expose jurors to potential risks without enhancing the benefits of such coverage.<sup>459</sup>

This form of contempt also covers disclosure of private proceedings, and anything else that may “undermine public confidence in the judicial process”.<sup>460</sup> Finally and, as Stepniak argues, most significantly there is “contempt in the face of court” which primarily deals with

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<sup>458</sup> *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15.

<sup>459</sup> Federal Court of Australia, “TV in Courts Report—Recommendations” [31], *supra* n. 433.

<sup>460</sup> Stepniak, *Audio-Visual Coverage of Courts*, 214-217.

“improper behaviour” and things that may interfere with “the conduct of judicial proceedings”.<sup>461</sup> These aspects are the ones revolving around distraction, disruption or dramatisation in the courtroom. Stepniak argues that our strong contempt laws and absence of any bill of rights have significantly discouraged media from pursuing television broadcasts and have led to a prevailing “presumption against broadcasting” in Australia.<sup>462</sup> None of these attendant problems are issues that I am disputing; indeed they are important reservations about the consequences and regulation of broadcasting. However, as Daniel Stepniak notes, this does not necessarily justify a presumption against broadcasting, as it is precisely regulation that would enable the transmission of proceedings without violating a fair trial.

What I am arguing is that there is more at stake than has been outlined in this debate. The trial is predicated on live proceedings. Criminal trials, if they are broadcast, enter into an economy of reproduction, where they can subsequently be edited, reproduced, and altered. This runs counter to the entire structure of the trial, predicated on the unrepeatability of live proceedings, memory and immediacy. Although trials can now be broadcast ‘live’, this is a different kind of live to that of the courtroom, which signifies being there in a literal and embodied sense. Live in television terms stresses immediacy (“live coverage”) but does not account for the remoteness of the audience from the place where events are transpiring. The audience’s very remoteness—the question of how the event is received and interpreted—is a major reason for distrust on the part of legal agents. The limited/limiting nature of live presence, the fact that it disappears, and the fact that almost no one attends the courtroom is actually somewhat of a safety mechanism that protects proceedings from being disseminated, recorded or altered.

Here we arrive at the paradox of the closed/open trial. As noted repeatedly throughout this thesis, although theoretically the great strength of the adversarial trial is its openness to the public, in terms of understanding it is almost completely closed to laypersons. In a 2003 speech about the internet and the right to a fair trial, Chief Justice of the NSW Supreme Court, Jim Spigelman, argued that the tension between the right to an open trial and the fair trial revolved around the notion of “practical obscurity”. That is, that total transparency of proceedings is not always the optimum means of conducting a trial and can indeed impair

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<sup>461</sup> Ibid., 217.

<sup>462</sup> Ibid., 211.



this.<sup>463</sup> Justice Spigelman used as an example sexual assault trials and the trauma of a complainant confronting their attacker in open court. Many legal commentators have pointed out that the open trial, or “open justice”, is not perceived as an end in itself. As Justice Kirby pointed out in a 1991 appeal:

Three things at least may be said about the open conduct of the courts. First, it can and does cause pain and loss to individuals. Secondly, the open conduct of the courts is not an end in itself: the principle is adopted because it is seen as a means of achieving the fundamental end, the proper administration of justice. And, thirdly, what is to be achieved is the proper administration of justice but with the least harm to those who, in the course of it, will have harm inflicted on them. The issue in the present case is how this can be achieved.<sup>464</sup>

Justice Spigelman used the term “practical obscurity” to describe the necessary gap between open justice and protection of trial participants.<sup>465</sup> I am, however, employing this term in a different sense, to describe the experience of attending a courtroom for a layperson. The opacity of proceedings belies their apparent open nature. “Practical obscurity” marks, I would contend, the gap between popular belief in the transparency of proceedings and how far it falls short in practice. The reason why journalists may edit proceedings is not simply a sensationalising process; it is also a means of translating an obscure, complex practice to an audience even though they are theoretically meant to be already able to understand it.<sup>466</sup>

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<sup>463</sup> The Honourable Justice Jim Spigelman, Chief Justice of New South Wales, “Seen to Be Done: The Principle of Open Justice,” (Keynote address given at *the 31<sup>st</sup> Australian Legal Convention*, Canberra, 9 October 1999). Retrieved 10 June 2008 from:

[http://www.lawlink.nsw.gov.au/lawlink/supreme\\_court/ll\\_sc.nsf/pages/SCO\\_speech\\_spigelman\\_091099](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_091099)

<sup>464</sup> *John Fairfax Group Pty Ltd v Local Court* (1991) 59 A Crim R 68, 98 (Mahoney JA).

<sup>465</sup> The Honourable Justice Jim Spigelman, Chief Justice of New South Wales, “Open Justice and the Internet,” (paper presented at The Law Via the Internet Conference, Sydney, 28 November 2003), unpublished. Retrieved 10 June 2008 from: [http://www.lawlink.nsw.gov.au/lawlink/supreme\\_court/ll\\_sc.nsf/pages/SCO\\_speech\\_spigelman\\_281103](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_281103). “Practical Obscurity” was originally coined by Justice Stevens of the U.S. Supreme Court to describe the tension between making available what are technically public documents and an individual’s right to privacy. This has increasingly become an issue due to the increased availability of electronic documents. See *Department of Justice v. Reporters Comm. for Freedom of Press*, 489 US 749 (1989).

<sup>466</sup> However, this is not to state that legal agents expect the public to have the same level of understanding of legal procedure as they do. For example, there was a case in NSW in 1994 revolving around the conduct of a juror in a murder trial. Michael Webb and Veronica Hay were convicted of murdering Lance Patrick. However, the jury member in question (after the verdict) gave flowers to the deceased’s fiancé in the courtroom with a request that she pass them on to the dead man’s mother. In the Appeal, Justices Mason and McHugh noted: “In

Broadcasting of trials does not just over-simplify proceedings; it potentially draws attention to this gap between practice and public understanding. As Daniel Stepniak puts it:

Technology and in particular the publication of audio-visual recordings of court proceedings may also serve to redress the lack of openness inherent in proceedings in which the proceedings revolve around written testimony and legal submissions. Deeming paper trials as unsuitable for televising, in that the viewer would experience great difficulty in following proceedings in which the bulk of testimony is tendered in documents rather than being presented in person, is tantamount to conceding that such proceedings are not subject to public scrutiny, as members of the public who attend such proceedings would experience the same difficulties as viewers of broadcasts.<sup>467</sup>

Stepniak is talking specifically about trials that involve heavy use of depositions. However, I believe this lack of openness remains true even for those practices that revolve around oral evidence testing. Public attendance in courtrooms and public understanding of the process are not the same thing. As Chief Justice of Western Australia, Wayne Martin expresses it: “simply leaving the door of the courtroom open is insufficient, of itself, to provide meaningful public access to the proceedings in that Court”.<sup>468</sup>

We return now to where this chapter began; the open trial—what it is and who it is for. We have seen already that many legal agents advocate greater transparency through broadcasting so as to enhance public understanding of legal process. Many legal agents particularly want the public’s legal understanding to increase. Yet there is a risk involved in enabling this. Notwithstanding his clear dislike of the journalistic field, Bourdieu argues that growing journalistic influence presents a threat to the internal autonomy of various fields. In other words, agents are increasingly expected to justify their work in the media, which takes on its ‘surrogate for the public’ role. As Justice Spigelman remarks in a keynote speech, the relative

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considering whether an allegation of bias on the part of a judge has been made out, the public perception of the judiciary is not advanced by attributing to a fair-minded member of the public a knowledge of the law and the judicial process which ordinary experience suggests is not the case. That does not mean that the trial judge’s opinions and findings are irrelevant. The fair-minded and informed observer would place great weight on the judge’s view of the facts. Indeed, in many cases the fair-minded observer would be bound to evaluate the incident in terms of the judge’s findings”. In other words, courts rely on “fair-minded” members of the public who can negotiate the facts without necessarily understanding ‘The Law’ and they must trust the judges to be able to adjudicate fairly. See *Webb and Hay v The Queen* (1994) 181 CLR 41, 52.

<sup>467</sup> Stepniak, *Audio-Visual Coverage of Courts*, 298.

<sup>468</sup> The Honourable Wayne Martin, Chief Justice of Western Australia, “A Mutual Contempt?—How the Law is Reported”. (Dec 2005) 32 (11) Brief 12 at 15.

autonomy of the juridical field is increasingly being challenged by external influence via the introduction of private-sector managerial discourse revolving around “throughput” and “service”:

There is a clear movement towards managerial judging—the direct involvement of judges in the preparation for and the conduct of proceedings. This is in part motivated by new pressures for accountability as to how courts spend public resources. Nevertheless, there are very real limits on the extent to which such involvement can be taken, consistently with the principles of open justice.<sup>469</sup>

He goes on to point out that:

There is no doubt that a much greater volume of cases could be handled by a specific number of judges if they could sit in camera, not be constrained by obligations of procedural fairness or the need to provide a manifestly fair trial, and not have to publish reasons for their decisions. Even greater ‘efficiency’ would be quickly apparent if judges had made up their minds before the case began. There are places where such a mode of decision-making has been, and indeed is being, followed. We do not regard them as role models. Open justice does not provide the most efficient mode of dispute resolution. Nor, indeed, does democracy provide the most efficient mode of government.<sup>470</sup>

Spigelman discusses the increased bureaucratic emphasis on quantitative measurement of “service” by the courts. This means, as Spigelman implies, that instead of legal agents being able to largely control the flow of information (to some extent, as the higher the profile of a trial is, the more the press may be involved), public expectations and the press can fuel a different flow of narrative. In the case of public broadcasting of a trial, the ‘open’ nature of the information means that legal agents may forfeit a degree of control over the reception of a trial. The public may make determinations of guilt or innocence based on television broadcasts and this journalistic pressure will be brought to bear on legal agents. The broadcasting of trials, whether live or delayed, could raise questions as to how judges and juries make their decisions. Whilst public reception is highly unlikely to affect the outcome of a specific trial, the public and media can influence how future trial proceedings are conducted.

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<sup>469</sup> Spigelman goes on: “In particular, the tendency to give quantitative measurements a quite disproportionate influence in the making of decisions, particularly on the allocation of resources, which arises from the very concreteness of statistics against the more amorphous quality of principle, is a tendency that must be resisted. Not all areas of government are capable of being moulded by analogy with the operation of a free market”. Spigelman, “Seen to be Done”, *supra* n. 465.

<sup>470</sup> *Ibid.*

### *Conclusion: Mediatiation without Cameras*

As I have outlined throughout this thesis ‘juridical truth’ is a field-specific construction. Legal language (like journalistic language) stresses the passive, neutral and universal. However the stylisation of legal rhetoric, a result of centuries of professionalising and relative self-containment, has led to a significant and (as Bourdieu reminds us) far from accidental gap between the layperson and the legal agent. This gap is needed to maintain the authority of the trial, where a judge’s sentence based on a jury’s verdict, must be perceived as something that is almost entirely free of personal bias, or broad interpretation. Rather the judge’s sentencing and remarks must be believed to be based on an examination of a coherent set of texts that is drawn on during the trial process to adduce the just outcome.

The public and legal agents can more easily maintain belief in the criminal trial if they view it as a transcendent and independent practice. This is not because it *is*, but because they need to *believe that it is*. In the end, belief is what is at stake. Legal behaviour is not above reproach, but a relative autonomy is necessary for any profession to sustain itself as a viable practice. As Bourdieu argues:

The juridical field is not what it thinks it is. It is not a pure world, free of concessions or politics or the economy. But its image of purity produces absolutely real social effects, first of all, on the very individuals whose job it is to declare the law. But what would happen to judges, understood as more or less sincere incarnations of a collective hypocrisy, if it became widely accepted that, far from obeying transcendent, universal verities and values, they are thoroughly subject, like all other social actors, to constraint such as those placed on them [...] by the pressure of economic necessity or the seduction of media success?<sup>471</sup>

Broadcasting can redress the lack of openness in proceedings. This can foster greater public understanding and confidence in the judicial process. However, excessive scrutiny of trial proceedings can draw attention to the field specific model of dominance and control unconsciously adopted by legal practitioners, as outlined throughout this thesis. Legal agents are gatekeepers between the public and ‘The Law’ and they provide a crucial buffer which helps to maintain faith in what is in fact a partial and at times problematic system. Bourdieu argues, discussing the political field:

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<sup>471</sup> Bourdieu, *On Television and Journalism*, 77-78.

The usual buffers (not necessarily democratic) against these pressures are linked to the relative autonomy of the political field. Absent this autonomy, we are left with a revenge model, precisely the model against which the juridical and even political model of justice was established in the first place.<sup>472</sup>

Ironically, the very openness that trials rely on is in fact predicated on disappearance. The buffer between belief and practice (“practical obscurity”) is maintained through the disappearance of live performance (what performance theorist Peggy Phelan calls its essential nature).<sup>473</sup> The debate about broadcasting writ large is a question of balance: how much transparency is beneficial to aid public understanding, and how much is counterproductive to the interests of legal agents within the juridical field? Legal agents must (and do want to) retain and increase public confidence in legal proceedings. Yet the relative autonomy of the juridical field, sustained by live performance in the trial, must also be maintained to protect public confidence in the criminal trial and the legal agents who conduct it.

I end this chapter by reflecting on the concluding irony of this debate. So many articles, books and words are dedicated to the study of minutiae around this topic—trying to determine precisely how behaviour or public expectation may alter because of broadcasting. Yet there is an enormous omission in these studies. They tend to disregard the fact that the courtroom is already heavily mediatised without the presence of cameras. Whether or not trials are broadcast, public expectations surrounding courtrooms are already formed by television. Jurors and trial participants watch television. In a televisual culture where people no longer attend trials as a form of popular entertainment, many people form their images and ideas of law courts and trials based upon television, whether that be *Judge Judy*, *CSI*, *Law and Order*, or any one of the numerous legal franchises.

Discussions as to the merits of trial broadcasting have operated in a climate that has changed significantly. In the 1940s, broadcasting of trials may well have been the only real televised/broadcast information as to trial practice. Yet today, there are countless television shows, ranging from wholly fictional to nominally ‘real’ that deal with criminal trial proceedings. These saturate televisions in the U.S., Australia and the U.K. Broadcasting of courts is consequently only a small fragment of a much larger phenomenon of turning criminal trial processes into television entertainment.

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<sup>472</sup> Ibid., 64.

<sup>473</sup> Peggy Phelan, *Unmarked: The Politics of Performance* (Routledge: New York, 1993), 148.

Keeping trial courts away from mediatised influence is a lost battle. Whilst the processes of the trial may valorise liveness and its symbolic weight we are, as Auslander observed, living in a mediatised world.<sup>474</sup> As George Gerbner points out: “[t]hough television is only one source of citizen’s knowledge about courts and law, it may well be the single most common and pervasive source of *shared* information and images”.<sup>475</sup> Whether or not cameras are present in courtrooms is largely irrelevant when we seek to determine the effect of television on courtrooms. Leaving aside fictional shows, every trial has the opportunity to be reported by the journalists who frequently cover courtroom proceedings. In addition, there is the familiar presence in Australia of the courtroom sketch artist (as photography remains banned in courtrooms). High profile trials usually become a media event with or without specific broadcast access. If there is broadcasting, television shows will edit them substantially. If there is no broadcast, television producers will either go as far as to ‘create’ a courtroom or simply create many shows pivoting around the trial, be they panels of legal experts, or review of the proceedings in court that day.

‘Trial by media’ can come about without broadcast excerpts from the proceedings itself to achieve this. Indeed, Daniel Stepniak argues that Lindy Chamberlain’s hostile reception by the Australian public could have been countered by broadcasting sections of the trial.<sup>476</sup> As he notes:

Keeping cameras out of the Chamberlain inquest, trial and appeals proved insufficient to avoid trial by media [...] it could be argued that the reason why so many Australians remain convinced about Lindy Chamberlain’s guilt [...] is precisely because the public had been prevented from seeing and hearing the proceedings for themselves.<sup>477</sup>

Stepniak suggests broadcasting would have countered the surrounding media presumption of her guilt.

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<sup>474</sup> The question of the value of the ‘live’ forms the next chapter of this thesis.

<sup>475</sup> George Gerbner in Susanna Barber, *News Cameras in the Courtroom*, xiv.

<sup>476</sup> Lindy Chamberlain was tried and convicted of murdering her baby daughter Azaria, who Mrs Chamberlain claimed was taken by a dingo when the family was camping. The conviction was later overturned as it was based on faulty expert evidence. Despite this, the majority of the Australia population continues to think that she was guilty. For more information see John Bryson, *Evil Angels* (Sydney: Bantam Books, 1988).

<sup>477</sup> Stepniak, *Audio-Visual Coverage of Courts*, 234.

Trial participants have long been responding to altered expectations as to trial behaviour. The evidence for behavioural influence is already there, in the common experience of boredom entering the courtroom; the lack of ‘editing’ in a real trial means most people are unprepared for how long and dull criminal trials can be. Juries and trial participants are also inculcated to be aware of how judges and lawyers behave, based on actors *playing* judges and lawyers. This has arguably led to a shifting of behaviour on the part of legal agents to respond to what a jury wants, as being able to influence the jury is the major goal of the advocate in the adversarial system. Judges and lawyers may well be responding to television shows themselves and are certainly not above the influence of the mass media. The somewhat precious approach that agents within the juridical field take to preserve internal autonomy overlooks the extensive cross-fertilisation that has already taken place.

In the next chapter, I explore another form of mediatisation: the use of remote Closed Circuit Television Testimony (CCTV) as a replacement for a live witness. As CCTV testimony can replace all aspects of evidence testing, except for trial participants being in the same place at the same time, I will show how the development of this technology has led to legal agents articulating for the first time what they believe to be the value of the ‘live’ trial. Examining the most commonly cited examples legal agents use to defend the trial as paradigmatically live space—confrontation and demeanour assessment—I will interrogate the premium placed on the live presence of participants in the courtroom as well as how and why the live trial is believed to be safer and fairer.

## Closed Circuit Television Testimony: Liveness and Truth-telling

A witness who gives evidence orally demonstrates, for good or ill, more about his or her credibility than a witness whose evidence is given in documentary form. Oral evidence is public; written evidence may not be. Oral evidence gives to the trial the atmosphere which, though intangible, is often critical to the jury's estimate of the witness.

*Butera v DPP (Victoria) (1987)*<sup>478</sup>

The legal arena may be one of the few remaining cultural contexts in which live performance is still considered essential.

Philip Auslander, *Liveness*<sup>479</sup>

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<sup>478</sup> *Butera v DPP (1987)* 164 CLR 180, 189.

<sup>479</sup> Auslander, *Liveness*, 9.



## *Introduction*

The live presence of all trial participants in a shared space is a longstanding feature of the adversarial criminal jury trial. Along with this longstanding practice is the equally longstanding belief that live presence facilitates truth-seeking. Going back as far as the trials by ordeal where a witness' body was actually 'read' to reveal the truth, live presence has been believed, in various ways, to make the criminal trial safer and fairer. These ideas currently most commonly revolve around the concepts of *demeanour* and *confrontation*, where the presence of bodies and their interaction will help indicate to the jury the truth of the matter. These beliefs are, however, largely implicit and generally vague: how and why live presence may be valuable has not been clearly articulated until recently. The advent of mediatised technology into the courtroom in the 20<sup>th</sup> century has led to a renewed attempt to account for the value of live performance.

In this chapter, I examine how arguments about the value of live performance (whether or not the term 'performance' is actually invoked) have been pivotal in debates about the use of closed-circuit television testimony (CCTV). I begin by defining CCTV testimony and examining its current use in courtrooms as a means of mediation for a 'vulnerable witness'; that is, a witness who, in the view of the court, would be likely to find traditional modes of delivering testimony overly traumatic for a variety of reasons.<sup>480</sup> I argue that the introduction of CCTV testimony has posed a challenge to deep-seated beliefs about the link between live confrontation and truth-telling, as CCTV testimony is able to replace all aspects of the fair trial (including its need to be open) with the sole exception of the absence of a witness' body. This has provoked to legal debate as to what is at stake in the live presence of bodies together in the same place.

Using performance theory, I will analyse these debates and discuss the contested meaning of 'liveness' and its value, arguing that the legal emphasis on empirical evidence to 'prove' the

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<sup>480</sup> As I will outline, these reasons include fear of confronting their accuser and the potential of being harassed from the gallery.

value of live presence through various studies is problematic as it overlooks the importance of belief. As I conclude, it is also these beliefs revolving around live presence that sustain the symbolic violence and coercion involved in the performance of tradition.

### *The Live Trial*

In 2006 Peter Underwood, then Chief Justice of the Tasmanian Supreme Court, argued that the live trial, where all participants must gather in the same place at the same time, was an outdated, costly and unnecessary historical inheritance:

The process of a modern trial is not something that has been designed, or recently redesigned, to achieve the best result for parties in dispute. Rather, its adversarial nature and characteristics of continuity and orality have arisen from an historic scenario that, by and large, no longer exists. Yet as I have observed, curiously, this process is seldom questioned.<sup>481</sup>

For Underwood, this emphasis on orality should be set aside as this was primarily for the benefit of an illiterate jury, and is now outmoded. It would be far better, Underwood argues, to use depositions more freely, which would allow faster, cheaper resolutions of disputes. Yet, despite Underwood's criticism of the live adversarial trial, he makes it quite clear that he is talking about non-criminal matters only: "I venture to suggest that it is high time the process of the trial in civil disputes is reconsidered in the light of today's needs".<sup>482</sup> Underwood does not claim that this would be appropriate in the criminal trial and does not explain his reasons for this discrepancy.

Underwood's paper thus echoes a longstanding belief amongst both legal agents and laypersons that live bodies sharing the same space make the criminal trial safer, and facilitate access to the truth. Like Underwood's omission as to *why* this is so, statutory evidence for this belief is available only by implication in Australia. The value of live presence can be inferred from the rules regarding the use of depositions in place of witnesses in criminal and non-criminal matters. In non-criminal cases, a witness can submit a deposition in lieu of being there if they are living more than a distance that would cause "undue" difficulties in Australia (or more than 100 miles away in the U.S.). However, in criminal trials the only

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<sup>481</sup> Underwood, "The Trial Process," 167.

<sup>482</sup> *Ibid.*, 166.

justification for non-attendance of a witness to give live testimony is if they are either dead or dying.<sup>483</sup> Within the court rules, no explanation is given for this discrepancy between non-criminal and criminal process. However, the NSW Law Reform Commission, when investigating the rule against hearsay, commented that:

[b]ecause liberty and reputation are at stake, it is accepted that the law should be tender to the rights of the accused, and be more ready to risk the acquittal of the guilty than the conviction of the innocent. A well-known example is the higher standard of proof demanded in criminal cases.<sup>484</sup>

Any discrepancy between criminal and non-criminal proceedings can be attributed to this need for a higher standard of proof. In criminal proceedings, “the court is not to find the case of the prosecution proved unless it is satisfied that it has been proved beyond reasonable doubt”, whereas in civil cases “the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities”.<sup>485</sup> In criminal trials, then, a witness’ live presence is a means of obtaining/ensuring a higher standard of proof. Adversarial criminal procedure consequently implicitly suggests a preference for a witness’ live presence. Although in non-criminal matters this is not deemed necessary, once the stakes are higher, a witness’ live presence is seen as essential to facilitate a fair outcome in an adversarial criminal trial.<sup>486</sup>

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<sup>483</sup> Admission of a witness’ testimony or statement without their presence in the courtroom is only allowable as an exception to the ‘Hearsay’ rule. Hearsay evidence is allowable if a witness is ‘unavailable’. ‘Unavailable’ in a criminal trial is defined as a witness who is either dead, mentally incompetent, or cannot be traced (or if the witness’s attendance in court would mean breaking the law). In a civil trial, a witness is ‘unavailable’ if going to court would cause “undue expense” or delay. The Hearsay rule and its exceptions in criminal and civil cases can be found in section *Criminal Procedure Act 1986* (NSW) ss 284-285. Related provisions regarding admission of hearsay evidence can be found in *Evidence Act 1995* (NSW) ss 59-68. For definition of ‘unavailable persons’ see *Evidence Act 1995* (NSW), Dictionary Clause 4. Available online at: [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/ea199580/sch99.html](http://www.austlii.edu.au/au/legis/nsw/consol_act/ea199580/sch99.html)

<sup>484</sup> NSW Law Reform Commission, *The Rule Against Hearsay: Some Policy Issues Report Outline No. 29* (1978), Chapter 6. Retrieved 10 June from: <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r29outtoc>

<sup>485</sup> In civil cases, the prosecution case succeeds if it is proved on the balance of probabilities. Inversely, in criminal trials, a defendant’s case succeeds (e.g. they are acquitted) if *their* case is proved on the balance of probabilities. See *Evidence Act 1995* (NSW) ss 140, 141.

<sup>486</sup> Evidence law expert Eilis Magner comments that: “the presumption that evidence given in a common law trial should be offered in oral form is enshrined in the common law”. Eilis Magner, “The Best Evidence—Oral Testimony or Documentary Proof?,” *UNSW Law Journal* 18.1(1995): 70.

The vagueness of these beliefs is referenced in the 1987 case, *Butera v. DPP*, cited in the epigraph that opens this chapter. The judges in this case seek to explain the preference for live oral testimony, by referring to the “atmosphere which, though intangible, is often critical to the jury’s estimate of the witness”.<sup>487</sup> Here we see quite clearly that although the judges use the term ‘oral’, denoting speech, they are clearly talking about presence and performance, as they refer to the importance of the “intangible” atmosphere which relies on the gathering of bodies together at the same time.

In the U.S.A., the value of the ‘live’ trial is enshrined in statute. The Confrontation Clause in the Sixth Amendment of the United States Constitution reads:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the Assistance of Counsel for his defence.<sup>488</sup>

The ‘confrontation clause’ outlines the basic requirements of trial, the most fundamental of which is that it be ‘open’ so that the accused can confront his or her accusers. Here again, however, the U.S. Constitution does not spell out *what* the link between liveness and truth-telling is. We can ascertain from the above, however, that both Australian and American criminal trial procedure strongly suggest that gathering people together in the courtroom is an important means of ensuring a fair trial. The most likely explanation for the ellipses in all jurisdictions surrounding articulation of the value of live presence is that until recently there has been no need to account for it. As Underwood acknowledged, live trials are an inherited tradition and there have been no serious challenges to their existence. This has changed in the second half of the 20<sup>th</sup> century with the advent of CCTV testimony.

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<sup>487</sup> Justices Mason, Brennan and Deane in *Butera v DPP (Victoria)* (1987) 164 CLR 180, 189.

<sup>488</sup> The U.S. Constitution dates from 1787, and this particular clause from 1791. However ‘confrontation’ in American law can be traced back earlier to the 1776 Virginia Declaration of Rights, Section 8: “[i]n all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation to be confronted with the accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land or the judgement of his peers”. See Stephen L. Schechter, ed., *Roots of the Republic: American Founding Documents Interpreted* (New York: Rowman and Littlemore, 1990), 155.

CCTV testimony is where a witness (including a complainant) testifies remotely, rather than being physically present in the courtroom. This remote testimony is transmitted live into the courtroom where a screen is placed.<sup>489</sup> Remote testimony is a two-way transmission, where the witness can also see the courtroom.<sup>490</sup> Advocates do not share the same space with witnesses, rather evidence-in-chief and cross-examination take place by advocates addressing the witness via a screen in the courtroom. CCTV testimony is used in situations where the judge has decided (on evidence argued by the prosecution, excepting the rare jurisdictions where it is assumed) that the presence of trial participants together in the same room may present impediments to a fair outcome.<sup>491</sup> These impediments most often revolve around the concept of the ‘vulnerable witness’. The vulnerable witness is a person deemed by the court as one who would be likely to find the space of the courtroom potentially traumatic to the extent that it would adversely affect his/her ability to give evidence.<sup>492</sup> The most common usage of CCTV testimony occurs in Family Courts, and most rules regarding vulnerable witnesses extend from the situation of children as witnesses.<sup>493</sup>

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<sup>489</sup> I am deliberately using the term ‘live’ here as understood in the context of television; i.e. ‘live coverage’ which means that the image is transmitted immediately (as it is happening) but is still remote.

<sup>490</sup> The witness testifying remotely does not always have to see the accused. This must be technically possible, but is only necessary for the purpose of a witness identifying their alleged attacker: “CCTV involves setting up an audio-visual link between the courtroom and another room from which the witness gives his or her testimony. Monitors for viewing the proceedings are set up in both rooms. Thus, witnesses who use CCTV to give evidence avoid the trauma of a courtroom appearance and contact with the accused, yet the accused can still hear and see the witness and communicate with lawyers as desired. The child can also view parts of the courtroom on the monitor if necessary, for example if identification of the accused is required”. NSWLRC, *People with an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues*, Discussion Paper No. 35 (1994) [7.29].

<sup>491</sup> For example, as of 2004 in New South Wales, all sexual assault complainants have the right to testify via CCTV testimony under section 294B of the *Criminal Procedure Act 1986* (NSW).

<sup>492</sup> In the U.K, the definition of a ‘vulnerable’ or ‘intimidated’ witness is outlined in the *Youth Justice and Criminal Evidence Act 1999*, Part II, chapter 1, sections 16-33. Louise Ellison notes “the principal declared aim behind the 1999 act is to improve the quality of evidence received by the courts”. See Louise Ellison, *The Adversarial Process and the Vulnerable Witness* (Oxford: Oxford University Press, 2001), 7.

<sup>493</sup> Legislation governing the use of CCTV testimony has changed significantly during the course of research for this thesis. As of 2008, NSW allows CCTV testimony as a matter of course in cases of child abuse and sexual assault trials, unless the facilities are lacking, in which case the trial may be moved to somewhere where CCTV testimony facilities are available. In the United States, use of CCTV varies greatly amongst the states, but in the case of child complainants, many U.S. states permit CCTV two-way testimony pending approval from the

The potential trauma of the courtroom is legally defined as the stress for a complainant of sharing the same space as their alleged attacker.<sup>494</sup> There is also the possibility of deliberate intimidation of a witness by the accused. As a 1997 Australian Law Reform Commission report into child witnesses, *Seen and Not Heard: Priority for Children in the Legal Process*, noted:

Child witnesses are particularly fearful of confronting the accused when they come to court. For many child victim witnesses, this may be the first time they have seen this person since the disclosure of the alleged offences. The Inquiry was told of instances where the accused attempted to intimidate the child witness by making threatening faces or gestures in court.<sup>495</sup>

Another acknowledged source of stress is “the trauma of a courtroom appearance”.<sup>496</sup> Legal research suggests that all of these factors can potentially cause a ‘revictimisation’ of a complainant through the trial process. CCTV testimony is posited as a way in which vulnerable witnesses are still able to give evidence cogently, without threat and the concomitant stress that may affect their testimony adversely.

Psychologist Louise Ellison points out in *The Adversarial Process and the Vulnerable Witness*: “This represents a critical acceptance that in some cases traditional methods of proof taking and testing may militate against receipt of the best evidence potentially available”.<sup>497</sup> The existence of CCTV testimony acknowledges that the circumstances of the live trial can be traumatic for some trial participants. Yet the term ‘vulnerable witness’ demonstrates that legal agents frame this resultant trauma (the pressure through confrontation) as a shortcoming

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judge. In the U.K, the *Youth and Criminal Evidence Act 1999* permits “alternative arrangements” which may also involve screens, again pending approval from the judge (*supra n.* 494). In Scotland, as of 1995, the judge has to deem the “emotional impact” high enough before allowing “alternative arrangements”. See *Vulnerable Witnesses Act 2004* (Scotland), Part 1.

<sup>494</sup> Although this form of intimidation between accused and accuser is the most frequently acknowledged, witnesses who are testifying to events between accused and complainant are also subject to potential intimidation by the accused. It is also worth noting that another instance of intimidation arises from abuse towards a witness from the accused’s family in the public seating. See, for example, Paul Sheehan’s account of the gang-rape trials of MSK and MAK. Paul Sheehan, *Girls Like You*, *supra n.* 442.

<sup>495</sup> ALRC, *Seen and Not Heard: Priority for Children in the Legal Process*, Report No. 84 (September 1997) [14.102].

<sup>496</sup> NSWLRC, *People with an Intellectual Disability*, [7.29].

<sup>497</sup> Louise Ellison, *The Adversarial Process*, 7.

of the *witness*, not the trial process itself. A trial participant's weakness or 'vulnerability' makes him or (usually) her unsuitable to the trial process.<sup>498</sup> As such, they are exceptional, and CCTV testimony is a special means to 'work around' them. By defining certain witnesses as 'exceptional', what Ellison terms "traditional methods of proof-testing" escape scrutiny.

Consequently, CCTV testimony is only used in 'special circumstances'. Yet, as Chief Justice Underwood points out, live trials are extremely costly and are often delayed to allow for the extensive organisation involved in gathering everyone together. Criminal proceedings, when they do finally begin, are estimated to cost around \$AUS 20,000 a day.<sup>499</sup> A greater use of CCTV testimony could allow trial participants to testify remotely and reduce significantly the difficulties in organising trial participants' presence, saving time and money in the long-term.<sup>500</sup> So why is CCTV testimony only permissible in exceptional circumstances? What is the value of the live trial?

Up until the 20<sup>th</sup> century, the necessity of a live or open trial was ostensibly so that witnesses, jury and judges could see and be seen, hear and be heard. The challenge of CCTV testimony is that it offers an alternative that no one could have foreseen: a situation where a witness can see and be seen, hear and be heard immediately *without* being physically present in the courtroom. The witness is still under oath and must still account for his/her evidence. He or she must be in a designated place at a specific time. All that differs is the absence of his/her body from the courtroom and other trial participants.

So how much is the live trial to do with bodies sharing the same space at the same time? Can CCTV testimony replace this, and if not, what happens between trial participants in person

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<sup>498</sup> As I will outline in the following chapter, the use of the term 'vulnerable' tends to paint women as passive victims, who are 'vulnerable' to attack. This use of language overlooks that a women cannot be 'vulnerable to attack' unless men have a history of raping women.

<sup>499</sup> This figure is taken from Janet B. L. Chan and Lynne Barnes, *Lengthy Criminal Trials in Australia* (Sydney: Hawkins Press, 1995). More recently, in 2000, the New South Wales Law Reform Commission tallied the costs of a Supreme Court criminal jury trial as \$6,011 per day. However, this figure excludes "Legal Aid; Public Defenders; Corrective Services; Director of Public Prosecutions (including Crown Prosecutors); Legal Counsel; Police Service; opportunity cost of a day in court; and depreciation". NSWLRC, *Contempt By Publication*, Discussion Paper No. 43 (2000) [Appendix B].

<sup>500</sup> The installation of CCTV infrastructure is undoubtedly expensive, but could still reduce court costs in the long-term.

and in the courtroom that could not happen any other way? As I argue throughout this chapter, these questions would never have been raised without the possibility of mediatisation as a means of replacement of the live witness. This echoes Auslander's claim regarding the concept of liveness. Auslander's relational approach, arguing that liveness cannot have meaning or value except in opposition to 'mediatised', is supported by the fact that the legal understanding of the live trial only becomes a subject of debate in the face of CCTV testimony.<sup>501</sup> The advent of CCTV testimony has led to articulation of beliefs surrounding the link between live confrontation and truth-telling.<sup>502</sup>

Whilst I believe Auslander is correct in asserting that the presence of mediatisation has provoked discussion as to the value of 'the live', mediatisation has not created the legal value of the live as a by-product. Beliefs surrounding the live in the history of legal practice are not entirely new, and neither are they historically static. The shifting of belief or practice is part of the evolution of the criminal trial. Throughout adversarial legal history, the practice of the live trial has remained consistent, whilst conscious belief in its purpose has shifted. Following Auslander's proviso that the live must exist in relation to something else (and has no immanent or transcendent meaning), I argue that prior to mediatisation the 'live' in the criminal trial was valued in opposition to that which is written and that which is done behind closed doors.<sup>503</sup> Conversely, the belief in the value of the 'open' or 'live' trial has stayed while trial practices have changed. For example, as outlined in the previous chapter, the specific literacy required to navigate a contemporary trial process arguably means that the present-day trial is less easily understood by a layperson than in the 18<sup>th</sup> or 19<sup>th</sup> century. In this respect, there is a case to be made that the courtroom is not, in fact, 'open' in the sense that the common law intends.

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<sup>501</sup> Although I am arguing that this debate surrounding the value of the live trial is largely engendered by CCTV testimony, this debate has also arisen when discussing the use of screens to shield a witness or complainant from having to view his or her alleged attacker. See, for example, *Coy v Iowa*, 487 US 1020 (1988), which I will discuss later in the chapter.

<sup>502</sup> This is not the first time legal agents have been forced to articulate their beliefs. One parallel situation can be seen in the introduction of lawyers to the criminal trial. There, the alteration to the immediacy of a witness' testimony was argued to diminish (potentially) the effectiveness of evidence testing in the criminal trial.

<sup>503</sup> This is noted by Chief Justice Underwood when he argues that literacy has superceded the need for the live trial. Although his paper is specifically about civil processes, his omission regarding criminal trials is reflective of much legal writing which suggests that the value of the open process is less of a concern in civil cases, but paramount in the criminal trial.



In the next section, I examine the beliefs held by legal agents about the value of the live trial. Because CCTV testimony does not necessarily interfere with the ‘open’ trial (because all witnesses can see and be seen, hear and be heard), the value of the ‘live’ for agents within the juridical field has altered. The new values of the ‘live’ involve ‘confrontation’ and ‘demeanour assessment’. As I will argue, these terms can be defined in performative discourse as embodiment and presence. I will show how these beliefs are vital for the maintenance of the adversarial criminal trial while at the same time facilitating and perpetuating the performance of tradition.

### ***Positive Intimidation***

In the year 2000, The NSW Attorney General’s Office released *People with an Intellectual Disability*. This report stated that:

The criminal justice system assumes that witnesses will not be unduly intimidated by the court process, otherwise the meaning and weight to be properly attributed to their evidence may be distorted. It is increasingly recognised, however, that some witnesses may be unusually intimidated by the court setting or the presence of the accused (and therefore disadvantaged) when giving evidence. Such witnesses often include children (particularly where crimes of sexual and/or physical violence are concerned), those with an intellectual disability, sexual assault victims, and those from minority cultural and/or linguistic backgrounds.<sup>504</sup>

This report, while technically dealing with vulnerable witnesses, also tells us that legal agents openly acknowledge that the courtroom is always a stressful place for a witness to some extent, and that this is a necessary part of the process. It is only problematic if the witness is “unduly” intimidated. That is, general intimidation of a witness aids the truth-telling mechanisms of the adversarial criminal trial. This ‘useful’ intimidation is brought about through the “atmosphere” of a courtroom, which is intended (as outlined in the second chapter of this thesis) to impress upon the witness the solemnity and authority of ‘The Law’. Positive intimidation is also the primary means of evidence-testing. Cross-examination is specifically designed to challenge and discomfort a witness. When a witness undergoes cross-examination successfully (i.e. when they maintain their credibility and do not make any admissions), it is more likely that he/she will be believed: “it has been suggested that the

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<sup>504</sup> NSWLRC, *People with an Intellectual Disability*, [7.20].

elimination of some of the trauma of giving evidence (through CCTV) may unwittingly remove the distress which is perceived as supporting the veracity of the witness's evidence".<sup>505</sup> The passive structure of the sentence means it is not clear *who* is perceiving distress as supporting veracity, whether this is legal agents themselves or if it is what they think the jury thinks. Regardless of this, the value of live presence implied here is that of the pressure of confrontation, whereby the pressure created through the live trial is more likely to lead to the truth.

In America, this belief in truth through pressure is expressed in *Maryland v Craig* in 1990 in the U.S. Supreme Court. In this case, the defendant had been found guilty of child sexual assault at his initial trial. The complainant had given testimony through one-way CCTV transmission, where the court could see the complainant, but she could not see them. This was because, her counsel argued, the complainant was a vulnerable witness. The defendant's conviction was then overturned by the Maryland Appeal Court, who argued that his right to face-to-face confrontation had been violated. The Supreme Court judges, however, reinstated the defendant's conviction, confirming CCTV testimony as acceptable in the exceptional circumstances of a vulnerable witness.

What is interesting about *Maryland v Craig* is that although the Supreme Court reinstated the conviction, they also made explicit that they too believed that the Confrontation Clause in the U.S. Constitution (the sixth amendment) was literal and that therefore CCTV testimony could only act as a substitute in exceptional cases involving vulnerable witnesses. Although CCTV testimony was permissible, it was certainly not preferable. The Supreme Court argued that the 'ideal' trial involves literal confrontation, as prescribed in the sixth amendment, despite the drafters of this amendment not being able to foresee such a technological development as remote, but 'live' testimony.

A dissenting judge in *Maryland v Craig*, Justice Antonin Scalia, took this literal interpretation further, arguing that the value of live testimony was so important that CCTV was unacceptable and always contravened a defendant's right to a fair trial.<sup>506</sup> Scalia quoted

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<sup>505</sup> Ibid., [7.33].

<sup>506</sup> "The State's interest here is in fact no more and no less than what the State's interest always is when it seeks to get a class of evidence admitted in criminal proceedings: more convictions of guilty defendants. That is not an

from an earlier Supreme Court decision in *Coy v Iowa*. Here again we see in legal precedent the value of positive intimidation that the adversarial model of juridical truth relies on:

Unwillingness cannot be a valid excuse under the Confrontation Clause, whose very object is to place the witness under the sometimes hostile glare of the defendant. That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult.<sup>507</sup>

The case of *Coy v Iowa*, another sexual assault trial, revolved around the use of screens. In this case, the right of a vulnerable witness to use a screen contravened a defendant's right to a fair trial because the witness was literally hidden from the defendant's gaze. Scalia's use of this extract suggests that he makes no distinction between CCTV testimony and invisibility. If a witness is not physically present in the courtroom, they cannot be 'seen'. For Scalia, the pressure of confrontation puts the onus on witnesses to tell the truth. In other words, placing a witness in a court opposite the person they are accusing of a crime is an important part of producing juridical truth. He clarified further: the Supreme Court Decision in *Maryland v Craig* "[is wrong because] the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to assure reliable evidence, undeniably among which was 'face-to-face' confrontation".<sup>508</sup>

For Scalia the literal confrontation prescribed by the 6<sup>th</sup> Amendment in the U.S. Constitution is insurmountable, not because a witness's live presence ensures a fair trial, but rather because, like the hearsay rule in Australia outlined earlier, a witness' live presence is a means of facilitating this fair trial. For Scalia, when a witness is present, this does not mean that he or she will tell the truth, but rather that all the circumstances necessary to ensure the best possible evidence are upheld. Again, like the Australian hearsay rule, a witness' live presence is required in keeping with the 'higher standard of proof' of criminal trials.

Justice Scalia, in effect, is arguing that in a live trial something *may* happen that could not happen any other way (as opposed to *will* happen). Scalia's attitude is also reminiscent of the citation I opened this chapter with, where the judges of the High Court of Australia stress the

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unworthy interest, but it should not be dressed up as a humanitarian one". *Maryland v Craig*, 497 US 836 (1990) (Scalia J).

<sup>507</sup> *Coy v Iowa*, 487 US 1012 (1988), quoted in *Maryland v Craig*, 497 US 836 (1990).

<sup>508</sup> *Maryland v Craig*, 497 US 836 (1990).

“intangible” atmosphere of a trial. These references to ‘possibilities’ and ‘atmosphere’ have strong echoes in performance theory where part of the valorisation of the live revolves around chance and suspense. A live trial, where witnesses are put ‘on the spot’ creates a fertile and charged environment where ‘anything could happen’ (in Phelan’s performance-related terms, a “maniacally charged present”), and for Scalia and the Australian High Court, these circumstances are what facilitates truth-telling, not a guileless belief that humans standing face-to-face are inherently more honest.<sup>509</sup>

The rest of the U.S. Supreme Court concurs with Scalia that confrontation does not have a magic effect in and of itself, but rather helps optimise a fair trial. As Richard Friedman notes:

The Confrontation Clause is not a constitutionalisation of the law of hearsay, with all its oddities. It does not speak of reliability or of exceptions. The confrontation right reflects a belief, central to our system of criminal justice, that a witness against a criminal defendant should give testimony under prescribed conditions—under oath, in the presence of the accused, subject to cross-examination, and, if reasonably possible, in open court. And this right should be recognized—as the language of the Confrontation Clause suggests—as categorical and not subject to exceptions.<sup>510</sup>

However, of the members of the Supreme Court in the U.S., only Justice Scalia sees CCTV testimony as interfering with the ‘anything can happen’ circumstances of the live trial. For the rest of the Supreme Court, effective cross-examination can be done remotely in the exceptional circumstance of a vulnerable witness: “the majority concluded that the defendant’s interest in face-to-face confrontation must give way to the state’s interest in protecting child witnesses from the trauma of testifying in the courtroom”.<sup>511</sup>

These beliefs in the U.S. are shared by Australian legal agents, as demonstrated by the High Court of Australia decision. In Australia, too, the live trial supposedly facilitates the best means of cross-examination and consequently ensures the ‘best’ evidence. Australian studies into CCTV testimony draw on these U.S. debates and reach similar conclusions although, once again, Australia has considerably less experience in using this technology than the U.S. and this has consequently limited, to some extent, debates around specific Australian usage of

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<sup>509</sup> Peggy Phelan, *Unmarked*, 148. This is a development from the earlier form of altercation trials where face-to-face contact *was* presumed to be inherently more truthful.

<sup>510</sup> Richard D. Friedman, “The Conundrum of Children, Confrontation and Hearsay,” *Law & Contemporary Problems*: 65.1 (Winter 2002): 247.

<sup>511</sup> *Maryland v Craig*, 497 US 836 (1990).

this technology. Eilis Magner, an Australian legal academic specializing in Evidence Law, notes that effective cross-examination, in whatever guise is deemed suitable, is seen as the key to a fair trial.<sup>512</sup> This is reflected in the hearsay rule, whereby lack of the opportunity for cross-examination of testimony will usually lead to exclusion of this evidence from trial.<sup>513</sup>

This is also evidenced by the rules surrounding the admissibility of videotape deposition. Currently in multiple jurisdictions, a child's evidence-in-chief may be given via pre-recorded videotape.<sup>514</sup> However, the child must be available to be called for cross-examination. This cross-examination can be conducted either via video-link, or *viva voce* in the courtroom.<sup>515</sup> The fair trial then comes down to the importance of live cross-examination. This involves the spontaneity of a witness's immediate response, and a privileging of the immediate evidence as being a more reliable indicator of the truth than, for example, a written statement.<sup>516</sup>

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<sup>512</sup> "Oral evidence presented by a witness in open court is accessible not only to the parties and the tribunal but also to the public in a way that documentary evidence is not. This might indicate a basis for preferring oral evidence, as it preserves our ideal of open justice. Again, this is not a point which has been relied upon by our courts or legislatures. It therefore appears that the nature of the case and the principle of party presentation will alone determine which evidence will be presented to an Australian court. In the end, the evidence that is presented is likely to be the best evidence that is available". Magner, "The Best Evidence," 94.

<sup>513</sup> Louise Ellison notes the close relation of the preference for confrontation (orality) and the Hearsay rule. The Hearsay rule is the requirement that any evidence must be sufficiently tested before being deemed admissible in court. Consequently statements made that cannot be sufficiently tested—such as second-hand reports of what someone may have said—are excluded under its provisions. However, Richard Friedman has written extensively on the problems in this linkage, arguing that the confrontation clause should be kept separate and involves different standards. For Friedman, prior evidence that may or may not fall under the 'hearsay' rule should be considered in the light of whether it is 'testimonial' evidence or not. By 'testimonial', Friedman means evidence that reflects the knowledge of what the evidence is to be used *for*. If the evidence *is* testimonial the confrontation clause should apply, and the defence have the opportunity for cross-examination. However, if the hearsay statement is *not* 'testimonial' it should not be excluded solely due to lack of cross-examination. Richard Friedman, "Conundrum," *supra* n.494.

<sup>514</sup> These jurisdictions include almost all Commonwealth and former Commonwealth countries, including South Africa, New Zealand, Australia and Canada.

<sup>515</sup> Which form is used depends on whether the country holding the trial automatically uses CCTV testimony (such as Australia) or whether it is used pending application as to the 'emotional state' of the potential witness (such as in Scotland or New Zealand).

<sup>516</sup> This tells us that in Australian law CCTV testimony can allow for both spontaneous testimony and effective cross-examination. Indeed, in Australian jurisdictions a judicial warning is all that is considered to be required to offset the potential prejudice to the accused of not confronting witnesses live.

As Jeremy Gans and Andrew Palmer note in *Australian Principles of Evidence*:

This preference for oral testimony—which is not shared by civil [non-adversarial] law jurisdictions—is probably based upon some or all of the following (questionable) beliefs:

- A person is more likely to tell the truth if he or she testifies on oath, and subject to the threat of prosecution for perjury proceedings;
- Any falsehoods or inaccuracies in a person’s account are more likely to be exposed in the person is subjected to cross-examination; and
- The tribunal of fact will be better placed to decide whether or not the person is telling the truth if the person is in court so that his or her demeanour can be assessed.<sup>517</sup>

This suggests that legal agents (excepting Scalia) believe the ‘anything can happen’ circumstances are achieved most effectively through the body of the advocate and the witness sharing the same space. Confrontation, then, is largely about being put ‘on the spot’ or ‘in the hot seat’, relying on this kind of pressure to make a witness less likely to lie, or more likely to reveal themselves as lying. There remains a deep-seated belief, at least in criminal matters, not only that “live confrontation can somehow give rise to the truth in ways that recorded representations cannot”, but also that live confrontation is superior to remote, if immediate, testimony.<sup>518</sup> This is at least partially because construction of adversarial juridical truth pivots around utilizing the coercive powers of courts, and placing bodies in the courtroom facilitates this.<sup>519</sup>

As observed previously, although this coercion is most obvious in the case of a defendant, it is not limited to them. Louise Ellison states that “additional assurances of reliability are assumed to stem from the oath, the observation of a declarant’s demeanour, public scrutiny, and (to a lesser degree) the solemnity and officialty of the courtroom”.<sup>520</sup> Although Ellison states that the “solemnity” of the courtroom only affects reliability “to a lesser degree” compared to oath-taking, demeanour assessment and public scrutiny, the aims above are in

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<sup>517</sup> Jeremy Gans and Andrew Palmer, *Australian Principles of Evidence* (Routledge and Cavendish: Sydney, 2004), 47.

<sup>518</sup> Auslander, *Liveness*, 128.

<sup>519</sup> Louise Ellison comments: “A deep-seated belief that oral evidence is invariably best is also rooted in basic assumptions of adversarial theory regarding the optimal testing of informational sources. Great faith is specifically placed in the capacity of cross-examination to expose the dishonest, mistaken, or unreliable witness, and to uncover inconsistency and inaccuracy”. Ellison, *The Adversarial Process*, 11.

<sup>520</sup> *Ibid.*, 11.

fact inseparable. Witnesses embody trial imperatives, their habitus triggered by the external circumstances in which they find themselves. This has bearing on their testimony, and it is the overall effect that allows legal agents to believe that a defendant/witness will be more likely to tell the truth in the space of the courtroom (the “intangible” atmosphere of the courtroom). Yet a witness being more truthful has no effect if they are not perceived to be so by the trier of fact. Consequently, tied closely to confrontation is demeanour assessment.

### ***Reading the Body Revisited: Demeanour Assessment***

Demeanour assessment is where the trier of fact assesses the credibility of a witness through his/her appearance and manner, as well as the content of his/her testimony. The emphasis on the value of pressure suggests that a witness’s testimony is not limited to what he/she says but also to how he/she says it. Assessing a witness’ credibility is essential for juries to make a decision. Yet despite this, demeanour assessment is a highly controversial part of trial practice with many legal agents (in Australia at least) arguing that it is obsolete. For Chief Justice Underwood, “the idea that it is possible to sift the accurate oral account from the inaccurate oral account from the demeanour of the witness has long been discredited”.<sup>521</sup>

This attitude is echoed by Justice Kirby, who stated in 2000:

In earlier times, great confidence was placed in the capacity of adjudication to discern the truth on the basis of [triers of fact] impression of witnesses. However the trend of modern authority has cast doubts on that supposedly unique perceptiveness. That is why many adjudicators now rest their decisions, so far as they can, on indisputable facts, contemporary documents and the logic of the circumstances, rather than mere impressions.<sup>522</sup>

Despite these views expressed by such senior judges, in Australia currently, an appeal cannot be mounted in a higher court to dispute a finding as to a witness’s credibility that is based on the demeanour assessment of a lower court judge. “[W]here a case is decided upon a trial judge’s findings based on assessment of a witness’s credit or demeanour, the Appellate Court will not intervene. Not seeing the witness is said to ‘put[s] the Appellate judges in a position

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<sup>521</sup> Underwood, “The Trial Process,” 167.

<sup>522</sup> *Johnson v Johnson* (2000) 74 A.L.J.R. 1380, 1389 (Kirby CJ).

of permanent disadvantage”<sup>523</sup>. Unless judges are in the room with the witness at the time, they are unable to make decisions based on credibility. This contradicts both Underwood’s and Kirby’s assertion that demeanour assessment has been long discredited.

This rule also raises questions of documentation in the criminal trial. The embodied performance of a witness emphasises the importance of the adversarial criminal trial as an unrepeatably live event. This is underlined by the suspicion of mediatisation changing the event, as outlined in the previous chapter. Yet currently in Australia although most trials are recorded on audiotape, the transcript that is generated from the audio is produced as a written text that cannot indicate tone, manner or delivery effectively. Despite this, transcript is legally accepted as a reasonably accurate representation of what happened during a trial. This suggests a contradictory position towards the value of the live, whereby confrontation and the ‘anything can happen’ circumstances are valorised, and yet the reliance on written transcript suggests that only limited attempts are ever made to take into account these charged circumstances in record-keeping. As Daniel Stepniak points out, the importance of the ‘live’ (what he terms the visual) is entrenched in adversarial procedure:

The law’s preference for the visual arguably also explains why, despite access to transcripts of proceedings, appeal courts remain reluctant to overrule findings and rulings which were assisted by opportunity for first-hand visual and aural assessment of evidence and its veracity.<sup>524</sup>

One possibility this raises is that by only using written transcript, this contains and makes manageable the complexity of a trial for the purpose of documentation. Yet it is impossible to fully record and represent the live trial without significantly changing it. The insufficiency of transcript to account for the full ‘atmosphere’ of a trial is acknowledged in *Crofts v The Queen* in 1996 where the judge observes:

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<sup>523</sup> Chester Porter, “The Demeanour of Expert Witnesses,” *Australian Journal of Forensic Sciences* 33 (2001): 45. This is reflected in the findings of a New Zealand Law Commission Report: “the demeanour displayed by witnesses and the manner in which they present their testimony are traditionally regarded as relevant to assessing truthfulness. This has contributed to the reluctance of appellate courts to interfere with first instance findings of fact based on a determination of truthfulness. However, a determination of truthfulness by reference to demeanour has a subjective basis which will inevitably reflect the values, experience and cultural norms of the fact-finder”. New Zealand Law Commission, *Evidence Law: Character and Credibility*, Preliminary Paper (NZLC PP 27) 1997 [38].

<sup>524</sup> Daniel Stepniak, *Audio-Visual Coverage of Courts*, 394.



No rigid rule can be adopted to govern decisions on an application to discharge a jury for an inadvertent and potentially prejudicial event that occurs during a trial. The possibilities of slips occurring are inescapable. Much depends upon the seriousness of the occurrence in the context of the contested issues; the stage at which the mishap occurs; the deliberateness of the conduct; and the likely effectiveness of a judicial direction designed to overcome its apprehended impact. As the court below acknowledged, much leeway must be allowed to the trial judge to evaluate these and other considerations relevant to the fairness of the trial, bearing in mind that the judge will usually have a better appreciation of the significance of the event complained of, seen in context, than can be discerned from reading transcript.<sup>525</sup>

As Peggy Phelan puts it, “the electronic paradigm as an epistemic event represents something more than a new way to transmit information; it redefines knowledge itself into that which can be sent and that which can be stored”.<sup>526</sup> This is not limited to the electronic paradigm. Writing also redefines knowledge, and also translates and alters a live event into something reproducible. The problems inherent in this are illustrated by the case of New South Wales magistrate Pat O’Shane. O’Shane’s conduct was investigated after she had fined a defendant \$1,000 for contempt of court. At the defendant’s appeal, a preliminary review of the transcripts led the Court of Criminal Appeal to believe O’Shane had acted “in an inappropriately adversarial way”. However, the Judicial Conduct Commission obtained a sound recording of the proceedings. They found the transcripts to be “partly erroneous” and stated they felt O’Shane had behaved well under “extreme provocation”. The written transcript failed to convey the hostility of the defendant, which altered the interpretation of the incident.<sup>527</sup>

The near impossibility of capturing such nuances in writing bears out Peggy Phelan’s claim as to the nature of live performance; it is an event that “disappears into memory, into the realm of invisibility where it eludes regulation and control”.<sup>528</sup> The interesting feature of the adversarial criminal trial is that the live event both escapes the law and enacts it. Whilst I argued earlier that speech act theory significantly idealises courtroom discourse, there is no doubt that judge’s pronouncements are speech-acts, expressed as live performance, enacted in space and time and having concrete effects. The live performance is essential for its authority

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<sup>525</sup> *Crofts v The Queen* (1996) 186 CLR 427, 440, 441 (Toohey, Gaudron, Gummow and Kirby JJ).

<sup>526</sup> Peggy Phelan & Jill Lane, *The Ends of Performance* (New York: NYU Press, 1998), 8.

<sup>527</sup> See *Makucha v Brian Tucker Associates Pty Ltd* [2005] NSWCA 397.

<sup>528</sup> Peggy Phelan, *Unmarked*, 148.

to be recognised and accepted by participants (as outlined before, the performance of tradition fundamentally involves a Foucauldian transaction of power through tacit performed collective agreement).<sup>529</sup>

Judgements are passed during the live trial that cannot be overturned without a demonstrable error of law on the part of a judge, or new evidence.<sup>530</sup> If a decision is formed by a judge as to the credibility of a witness this generally cannot be disputed. Legal procedure consequently implicitly recognises the richness and complexity of the trial as a performative event. Stepniak notes the contradictory attitude of judges wanting to bar broadcasting because it would overemphasise the ‘visual’ or performative aspect of the trial. Yet as he points out, “while judges and juries continue to rely on seeing and hearing, to prohibit the broadcast of proceedings is to ask the public to accept that justice was done while depriving them of the visual and aural elements which undoubtedly influence the decisions of judges and juries”.<sup>531</sup>

Stepniak raises the question of how accessible the determination of an outcome in a criminal trial is to the general public when nothing remains but a written transcript. In this way, judgment in the criminal trial escapes regulation, as the live trial exploits the value of live performance, but legal agents cannot be called to account for it. Although this seems a cynical position, written transcripts are also (as outlined above, and in the previous chapter) a means of protecting judges from claims of being arbitrary because the transformation into

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<sup>529</sup> “On paper, the words of Justice Cummins of the Supreme Court concluding his sentencing of serial killer Peter Dupas yesterday are unambiguous and condemnatory enough: ‘For the murder of Mersina Halvaxis, I sentence you to life imprisonment. I refuse to set any minimum term. Life means life. Remove the prisoner’. When these words are illuminated, by seeing them said and hearing them spoken in the context of the courtroom, the difference is profound. Facial expression and the cadences of speech add a human side to judicial exactitude”. Editorial, *The Age* (Melbourne), 28 August 2007.

<sup>530</sup> The NSW grounds of criminal appeal are fairly typical of the Australian grounds of appeal in criminal cases. They include an appeal: “against the person’s conviction on any ground which involves a question of law alone”, “with the leave of the court, or upon the certificate of the judge of the court of trial that it is a fit case for appeal against the person’s conviction on any ground of appeal which involves a question of fact alone, or question of mixed law and fact, or any other ground which appears to the court to be a sufficient ground of appeal”, and “with the leave of the court against the sentence passed on the person’s conviction”. Crucially, an appellant cannot appeal on the basis of “fact” alone—that is, any decision reached by the fact-finders during a trial from assessment of evidence. See: *Criminal Appeal Act 1912 No. 16* (NSW), s 5.

<sup>531</sup> Stepniak, *Audio-Visual Coverage of Courts*, 394.

written form allows the judgment to become part of a (relatively coherent) chain of precedent.<sup>532</sup> How a decision is reached by a trier of fact is nonetheless always to some degree contingent and arbitrary, and containing the complexity of live performance in written transcripts is one of those possibly ‘undemocratic’ but necessary buffers between the public and legal agents.<sup>533</sup>

Although continued recognition of the role of demeanour assessment demonstrates, as Auslander asserted, that the law is an ontologically live practice, this valorisation of the live event does not explain why the live is privileged as more likely to access the truth in this day and age.<sup>534</sup> It is plain enough that assessing someone’s demeanour in person is likely to be more reliable than trying to assess demeanour from reading a written transcript of a live event. Nevertheless, can juries really assess whether someone is telling the truth through his/her demeanour on the stand? For a juror to believe this requires him/her to believe that there are certain relatively fixed signs that indicate honesty or dishonesty. Yet this disregards the cultural context within which the signs of a ‘performance’ are interpreted. In 2006, the *Sydney Morning Herald* carried this story: “Garry Coombe’s downfall was his stutter. Charged with assaulting his wife, his speech impediment in court was mistaken for dishonesty. He was convicted after the magistrate did not believe his evidence because there was ‘a noticeable tremor in his voice’”.<sup>535</sup> In this example, a stutter was misinterpreted as an indicator of deceit. Another pertinent example is the reception of Aboriginal Australians on the stand where the way juries often interpret silence by Aboriginal Australians as a sign of lying, whereas this silence within the context of Aboriginal culture may not necessarily indicate deceit as it is believed to in white Australian society.<sup>536</sup>

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<sup>532</sup> Obviously, in a common law jurisdiction the ‘coherence’ of precedent will vary from case to case. However, to even have a jurisdiction based on a combination of statute and case-law relies on a belief that consistencies will emerge in how to deal with specific cases.

<sup>533</sup> See Bourdieu, *On Television and Journalism*, 64.

<sup>534</sup> Auslander, *Liveness*, 158.

<sup>535</sup> Tim Dick, “Court Out: How Slip of Tongue Meant Justice Wasn’t Done,” *The Sydney Morning Herald*, 3 August 2006.

<sup>536</sup> See the section on “Women from Aboriginal Communities” in NSW Department of Women, *Heroines of Fortitude*, 93-112.

Demeanour assessment is consequently a fraught and contradictory area, where legal agents disclaim its value, yet trial practice confirms its validity. In 2004, the New South Wales Law Reform Commission released *Blind or Deaf Jurors*.<sup>537</sup> The authors were specifically commissioned to find out if being blind or deaf hindered a juror's ability to assess the 'truth'. Consequently, the report spends a considerable amount of time weighing the pros and cons of demeanour assessment. Although the report's authors, like Kirby and Underwood, reject the ability of a juror to use demeanour assessment to find the 'truth', they still argue that blind people should be excluded. The report claims demeanour assessment is limited yet "essential":

It is essential to realise that demeanour is relevant to an understanding and assessment of a witness' testimony in at least two senses. First, the witness may use demeanour, as people commonly do in communication, to convey the meaning of what he or she is saying through body language, gestures, smiles, frowns, nods, hesitations, inflexions and the like. This mode of communication can be used deliberately, but is often unintentional or perhaps instinctive. It can be as powerful as the spoken word that it accompanies. For example, it can turn a 'yes' into a 'no' and vice versa.<sup>538</sup>

A blind person cannot 'read' a witness's body language, which excludes him or her from performing his or her role as a juror. Yet this suggests that there is a legal presumption that anyone who is not blind *can* 'read' body language or, to reconfigure it using a non-literary metaphor, jurors are expected to be able to interpret and judge the credibility of a witness through their embodied performance on the stand. The assumed ability of jurors to know is not because there is proof that they do know, but because certain other people cannot know.

The link between live presence and authenticity, which runs through adversarial trial practice, is based on assumptions or, as Auslander claims, untested suppositions. These suppositions are general claims that live presence is 'more' reliable. This is justified not by defining why live presence is authentic, but rather why mediatised testimony is not. Undoubtedly, part of the reason for these assumptions is tradition. By linking the live trial with truth-telling, legal agents do not necessarily believe that the current trial process is flawless; however, it is a time-tested method which legal agents are (unsurprisingly) reluctant to tamper with. Just as with questions surrounding the long-term effects of television broadcasting, the long-term

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<sup>537</sup> NSWLRC, *Blind or Deaf Jurors*, Discussion Paper No. 46 (2004).

<sup>538</sup> *Ibid.*, [3.13].

effects of CCTV testimony are relatively unknown, whereas the live trial, if expensive and slightly unwieldy, still ‘works’.

Beyond inherited tradition, however, the relationship between live presence and authenticity also facilitates and perpetuates the performance of tradition. Although legal agents have argued the trial must be live because it allows for confrontation and assessment of demeanour, one can equally invert this and argue that legal notions of confrontation and demeanour assessment exist because of the necessity of a witness’s live presence. Despite all the alteration in legal practice and belief throughout the centuries, the one thing that has remained constant is the necessity of having all witnesses’ bodies in the courtroom, particularly the defendant’s. Placing a person’s body in the space of the courtroom is always a signal of submission to the process, and through this, a submission that aids the manufacture of the power of ‘The Law’. In the next section of the chapter, I will examine studies that attempt to determine the ‘real’ value of live performance. As I will argue, these studies, by trying to empirically assess what the ‘real’ value of live performance is, frequently overlook the importance of *belief* in creating and sustaining this value.

### ***Speculation and Evidence: The Audience.***

The live trial has no inherent value for juridical truth without the critical interpretation of a jury. Whether someone is telling the truth or not in court only matters in as much as he/she is perceived to be telling the truth. Consequently, jury assessment of CCTV testimony is central to debates as to its usage, and there is an understandable desire to know how the jury will interpret remote testimony. The legal assumption, as outlined above, is that the ideal trial is live, because a human being in a room with another human being will be able to reach a more reliable outcome. Studies have therefore tried to determine how deleterious the effects of CCTV testimony are on the perceived authenticity of live presence. Are they minor and surmountable? On the other hand, could they permanently alter interpretations of credibility, critical in juror decision-making?

It has proved extremely difficult to conduct empirical studies analysing nebulous concepts such as demeanour assessment and confrontation. Many different approaches have been tried: some have arranged for ‘witnesses’ to tell a group of ‘jurors’ identical stories either through

CCTV testimony or in person, and then handed out questionnaires, while others have done the same but have only asked legal agents and judges.<sup>539</sup> Others still have conducted mock trials, using CCTV testimony at all stages in an attempt to determine if and when CCTV testimony makes a difference. These larger studies also focus on whether a final verdict is affected by the medium used for testimony.<sup>540</sup> Most of the studies conducted have used child witnesses, as this remains the primary use of CCTV testimony. Study participants are usually asked to assess the witness' credibility, reliability and honesty both in mediatised testimony and in live testimony.

Ultimately, these studies, like those assessing the effect of broadcasting in the previous chapter, are remarkably ambivalent. It would be highly difficult to determine the appropriateness of CCTV testimony based on the studies done so far, with many of the study results cancelling each other out. For example, one common finding is the consensus that CCTV testimony is significantly less stressful for both child and adult witnesses. This is evidenced by many studies, including Cashmore and De Haas in the ACT in 1992, O'Grady in Western Australia in 1996, and Wilson and Davies in England and Wales in 1999 (drawing on their 1995 study for the London Home Office).<sup>541</sup> All of these studies showed that, to some

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<sup>539</sup> Such as G. Davies and E. Noon, *An Evaluation of the Live Link for Child Witnesses* (London: Home Office 1991).

<sup>540</sup> Such as Holly K. Orcutt, Gail S. Goodman, Ann E. Tobey, Jennifer M. Batterman-Faunce, Sherry Thomas, "Detecting Deception in Children's Testimony: Factfinders' Abilities to Reach the Truth in Open Court and Closed-Circuit Trials," *Law and Human Behavior* 25.4 (August, 2001); T.E. Eaton, P.J. Ball and M.G. O'Callaghan, "Child-Witness and Defendant Credibility: Child Evidence Presentation Mode and Judicial Instructions," *Journal of Applied Social Psychology* 31.9 (2001).

<sup>541</sup> Judith Cashmore and N. De Haas, "The Use of Closed-Circuit Television: Child Witnesses in the ACT," *Australian Law Reform Commission* (Children's evidence research paper no. 1, 1992); C. O'Grady, *Child Witnesses and Jury Trials: an Evaluation of the Use of Closed Circuit Television and Removable Screens in Western Australia* (Report prepared for the Ministry of Justice, Western Australia. 1996); See also B. Hamlyn, A. Phelps, J. Turtle and G. Sattar, *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses* (London: Home Office Research Study 283, 2004); H. Wescott, G. Davies and B. Clifford, "The Credibility of Child Witnesses Seen on Closed Circuit Television," *Adoption and Fostering* 15.1(1991); G. Doherty-Sneddon, A. Anderson, C. O'Malley, S. Langton, S. Garrod, and V. Bruce, "Face-to-Face and Video-Mediated Communication: a Comparison of Dialogue Structure and Task Performance," *Journal of Experimental Psychology: Applied* 3.2 (1997). Kathleen Murray's study in Scotland is an example of an inverse finding, where witnesses on CCTV were perceived by lawyers as less credible. "The lawyers' criticisms of the live TV link were that it interfered with witness rapport, increased the difficulty of cross-

extent, the witness either reported being (or was perceived to be) far less anxious during the proceedings, less likely to be confused, and more likely to recall information when testifying via CCTV.

Many studies, nevertheless, indicate that a witness' credibility (as determined by a trier of fact) is reduced through the usage of CCTV testimony. The Orcutt study found:

In summary, children testifying via CCTV were seen as less accurate, less honest, and less attractive than children who testified in open court, and jurors were less likely to convict the defendant when the child testified via CCTV. Jurors did not report feeling significantly less empathy for the defendant or the child. Thus, testimony via CCTV appeared to result in a more negative view of child witnesses as well as a small but significant decrease in the likelihood of conviction.<sup>542</sup>

There were similar findings in an Australian study by Eaton et al. in 2001.<sup>543</sup>

Eaton et al. analysed CCTV testimony (which is transmitted immediately), live testimony and videotaped testimony (where the witness's testimony is pre-recorded; during this recording, advocates and the witness are in the same place).<sup>544</sup> In their results, jurors displayed a similar

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examination, distorted the impact and import of the evidence, and could detract from the jury's ability to grasp a complete and accurate picture of the witness's demeanour". Kathleen Murray, *Live Television Link: an Evaluation of its Use by Child Witnesses in Scottish Criminal Trials*, Crime and Criminal Justice Research Findings No.4 (London: Home Office, 1995).

<sup>542</sup> Orcutt et al, "Detecting Deception", 357.

<sup>543</sup> Eaton, Ball and O'Callaghan, "Child-Witness and Defendant Credibility," *supra n.* 542.

<sup>544</sup> See also G.M. Davies, J.C. Wilson, R. Mitchell, J. Milsom, *Videotaping Children's Evidence: An Evaluation* (London: Home Office, 1995). the research was conducted following the 1991 introduction of legislation allowing children to testify via videotape. The child must then be available for live cross-examination via CCTV. In this study, child witness' examinations-in-chief were pre-recorded on video and they were then cross-examined by defence barristers via CCTV. This study does not, however, compare in detail the differences between CCTV testimony and videotaped deposition. The aim of the study was to determine whether or not mediated testimony improved the experience of testifying for child witnesses and whether or not the conviction rate increased with the use of mediated technology. The study found that the use of technology (videotaped deposition and CCTV) *did* improve the experience for witnesses but also found that there was no significant increase in conviction rates. The research findings for this study are available online at: [rds.homeoffice.gov.uk/rds/pdfs2/r20.pdf](http://rds.homeoffice.gov.uk/rds/pdfs2/r20.pdf). A further analysis of these findings is available in J.C. Wilson, G.M. Davies, "An Evaluation of the Use of Videotaped Evidence for Juvenile Witnesses in Criminal Courts in England and Wales," *European Journal on Criminal Policy and Research* 7.1 (1999).

reception to both video and live testimony. Yet jurors' reception to CCTV testimony was different. The study noted that

[v]ideodeposition use, compared with court-given evidence, did not affect child-witness credibility and that videodepositions do not appear to prejudice the defendant's case, but conversely resulted in the defendant being viewed as more definitely innocent. Jurors also believed that videodeposition use enhanced both child-witness psychological well-being and ability to testify, compared with court-given testimony, which harmed both factors. Jurors in the present study rated the child witness as significantly less credible when she gave evidence via videolink [ie CCTV testimony] than in court. They also saw the defendant as more definitely innocent when videolink was used, rather than court-given evidence.<sup>545</sup>

This finding suggests that having the advocate and the witness share the same space was a significant indicator of reliability and, in fact, more significant than having the witness share the same space as the trier of fact. An additional complexity in the findings is that, although witnesses were deemed more credible in live court, this did not necessarily mean that jurors were more likely to convict a defendant. Some studies showed defendants were more likely to be convicted if the witness testified in open court.<sup>546</sup> Others, such as that by Holly Orcutt et al. in the U.S., found that this did not make a difference. Orcutt et al's study showed that although jurors were more inclined to convict before they officially deliberated, after the jury had been secluded, any possible effects of the medium seem to have been neutralised.<sup>547</sup>

In Melbourne in 1995, Judy Cashmore and Kay Bussey found there was no compelling evidence that use of CCTV testimony affected jurors' perceptions of child witnesses deleteriously.<sup>548</sup> A Western Australia Ministry of Justice survey conducted in 1995 also found that jurors did not have difficulties understanding the purpose of CCTV, and that this did not

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<sup>545</sup> Eaton et al., 1857.

<sup>546</sup> Ibid. Also, see the U.K. study by Doherty-Sneddon et al, "Face-to-Face and Video-Mediated Communication" *supra* n.506. In this study the gap between live convictions (76.6%) and CCTV (60.8%) is large, with a jury much more likely to convict through live testimony.

<sup>547</sup> This is echoed by Murray, *Live Television Link*, 995.

<sup>548</sup> Judith Cashmore and N DeHaas, "The Use of Closed-Circuit Television: Child Witnesses in the ACT," *supra* n.526. See also Judith Cashmore and Kay Bussey, "Judicial Perceptions of Child Witness Competence," *Law and Human Behavior* 20.3 (June 1996).



affect their ability to reach a verdict.<sup>549</sup> The most recent study, undertaken in 2006-2007 by the NSW Bureau of Crime Statistics and Research, again assessed the effect of remote testimony in the Children's Court, finding that there was no pronounced negative effect on jurors witnessing remote testimony, rather than live testimony.<sup>550</sup>

This means that there is no clear indication either way of whether or not jurors' perceptions regarding credibility through the medium would affect their decision. Studies that asked jurors to self-assess on this particular question almost invariably resulted in them reporting not being biased either way claiming the medium did not affect their decision.<sup>551</sup> Yet self-assessment is arguably of limited use, as it is always problematic to ask someone precisely how he or she reaches a decision. What is interesting is that despite the ambivalence of the studies above, the main source of resistance to CCTV testimony seems to be coming from legal agents. Other agents directly involved in child proceedings, such as social workers, support the use of CCTV testimony. However, it is trial lawyers who object on the basis of what they perceive a juror's reaction *might* be, despite this not necessarily being reflected in juror studies.

Studies specifically targeting legal agents found that legal agents held concerns about whether remote testimony would dilute the impact of testimony on the jury.<sup>552</sup> This is echoed by Murray's 1995 study, which found that legal agents preferred witnesses to be live in the courtroom. This preference, however, did not actually affect the outcome of the study.<sup>553</sup> There seems to be a reluctance to 'risk it', then, on the part of legal agents, suggesting that legal agents preserve the belief in the 'live' because there is no specific reason to jettison it. Tampering with the coercive powers of cross-examination facilitated by shared space and

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<sup>549</sup> Western Australia Ministry of Justice, Strategic and Specialist Services Division, *Results of a Survey of Jurors in Western Australia Conducted Between November 1994 and February 1995* (Perth: Western Australia Ministry of Justice, 1995), 36.

<sup>550</sup> Judith Cashmore and Lily Trimboli (NSW Bureau of Crime Statistics and Research), "Child Sexual Assault Trials: A Survey of Juror Perceptions," *Crime and Justice Bulletin* 102 (September 2006).

<sup>551</sup> See, for example, Cashmore and DeHaas, "The Use of Closed-Circuit Television: Child Witnesses in the ACT," *supra* n.550.

<sup>552</sup> Natalie Taylor and Jacqueline Joudo, *The Impact of Pre-Recorded Video and Closed Circuit Television Testimony by Adult Sexual Assault Complainants on Jury Decision-Making: an Experimental Study*, Research and Public Policy Series No. 68 (Canberra: Australian Institute of Criminology, 2005).

<sup>553</sup> Murray, *Live Television Link*, *supra* n. 543.

immediacy could have unforeseen effects. Legal agents' responses suggest that they do not necessarily believe jurors' self-assessment and are more interested in evidence indicating that live testimony is perceived to be more reliable.

Studies into CCTV show that the live trial has undoubted value to jurors, although it is difficult to assess whether juries need to share the same space as trial participants, or whether it is sufficient for advocates to be examining a witness in a shared space, and for this to be viewed on videotape later. Studies also suggest significant ambivalence for triers of fact towards CCTV testimony. For example, the Australian Institute of Criminology study found that:

Although no systematic differences were found in pre-deliberation perceptions or propensity for jury verdict between face-to-face, CCTV and video conditions, some jurors in the CCTV condition expressed the view that they would have preferred the complainant to be physically in the courtroom. These jurors stated that they felt unable to make an accurate assessment of her character, demeanour and truthfulness on the screen and that they would have liked her to be in the courtroom so that they could watch her non-verbal actions and whether she looked at the accused in giving her testimony.<sup>554</sup>

An Australian Law Reform Commission report, *People with an Intellectual Disability*, cited a number of reasons for this ambivalence, including that CCTV testimony is potentially dehumanising and will affect a jury's perception of a witness. On the other hand, the ALRC report notes that it has also been suggested that the status of television means that, conversely, CCTV will be overly authoritative and have undue influence over a jury: "[I]t has also been questioned whether CCTV actually enhances the status of the evidence by making it seem more authoritative than conventional oral testimony".<sup>555</sup>

There is also the potential problem of distortion of visual images, through an inability of the triers of fact (whether judge or jury) to assess the scale of the image, or through the inability for a trier of fact to see the remote room in its entirety. In the case of child witnesses, because it is often the case that their evidence-in-chief is allowed in video form, the jury and court may never *see* the witness in person. The report notes: "CCTV may not permit the jury to see

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<sup>554</sup> Taylor and Joudo, *Closed Circuit Television Testimony*, [5.7].

<sup>555</sup> ARLC, *People with an Intellectual Disability*, [7.33]

the size of the child and so it may leave the jury unaware of the vulnerability of the child as against the accused”.<sup>556</sup>

Yet again, these debates attempt to assess what is problematic about CCTV testimony without querying what might be problematic about *live* testimony. Because the value of live performance cannot ever be measured and definitively ‘proven’, studies that try to assess CCTV testimony’s effects cannot clearly distinguish which effects are particular to CCTV testimony, and which may be more general reactions to any form of cross-examination. As Orcutt et al.’s study observed:

[T]he reliable cues discriminating liars from truth-tellers are uncontrollable signs of arousal (e.g., pupil dilation) and are not signs of lying per se [...] Cues revealing fear and arousal can be useful in situations where a person should not show fear if he or she is being truthful. In a courtroom, however, a witness afraid of not being believed or a witness afraid of confronting an abuser may display a number of the same behaviours as a liar afraid of being caught.<sup>557</sup>

Even when studies involve so-called ‘control groups’ that only view live testimony, there is no means of knowing how a juror’s preference is reached, particularly in an adversarial culture that advocates the importance of demeanour assessment.

The other problem in these studies’ approach is that they, crucially, overlook the importance of *belief* in the value of live testimony. Many of the studies outlined above do not clarify whether or not confrontation *does* make witnesses more truthful, or whether they are simply more likely to be believed because the jury *thinks* confrontation makes witnesses more truthful (a kind of circularity of belief). If people believe confrontation is inherently more truthful, they are less likely to doubt a witness’ veracity. This means that they only confirm their own beliefs, rather than ‘prove’ the link between liveness and truth-telling. Whether liveness makes people more truthful is not only unprovable but also, arguably, somewhat irrelevant. Popular and juridical beliefs perpetuate a particular model of truth-telling which presupposes that confrontation of bodies in a shared space is more likely to lead to the truth. This consequently has those effects, either because people who believe that courtrooms are places where they must tell the truth are more likely *to* tell the truth, or because people will be assumed to *be* telling the truth.

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<sup>556</sup> Ibid., [7.33].

<sup>557</sup> Orcutt et al., 342.

This circular discussion is similar to debates in Performance Studies regarding the inherent value of live performance. In these debates, theorists such as Phelan have tended to argue for an intrinsic ‘magic’ to live presence, whereas others such as Auslander have argued that the live can only exist in opposition to the mediated. Yet, as I have argued following Bourdieu, the transience of Performance Studies’ object of study (the disappearance of live performance) can be overcome to some extent by recognising the value of the belief itself. That is, it is not about proving whether the live *is* magical, special, or, in the above case, inherently more likely to facilitate the truth. What does matter are the real effects that collective belief in it *has*. Even Auslander concedes the value belief in the magic of the live may have for a performer.<sup>558</sup>

This belief, which sustains faith in the adversarial criminal trial, relies on the ‘authenticity’ of presence, a politically problematic concept that is again a subject of debate in Performance Studies. As long ago as 1972, Joseph Chaikin stated: “When we as actors are performing, we as persons are also present and the performance is a testimony of ourselves”.<sup>559</sup> This performance of self is often described in performative discourse as a kind of revealing.<sup>560</sup> Just as acting theory, such as that canvassed in the previous chapter, posits putting on a character as a form of *stripping away* so does much performance theory emphasise the ‘nakedness’ of live presence, as it were. The human body, which is not hidden behind or altered by mediation, is posited as inescapably itself, and consequently somehow ‘authentic’. For Phelan “presence can be had only through the citation of authenticity, through reference to something called ‘live’”.<sup>561</sup> Live performance is therefore more authentic than mediated performance. It is performance’s ‘present’ that allows presence—where the live body announces its own authenticity and corporeality even while (through performing) symbolically representing something else. Mediation seeks to present itself as a viable substitute for the ‘live’, despite only being a recording that has altered irrevocably the effect of the content, considerably diluting the ‘presence’ of the present. Phelan’s theory of

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<sup>558</sup> Auslander, *Liveness*, 2-3.

<sup>559</sup> Joseph Chaikin, *The Presence of the Actor* (New York: Atheneum, 1972), 5-6.

<sup>560</sup> This was echoed, for example, in the workshop *What Can Lawyers Learn from Actors*. Although this was aimed at legal agents, and not witnesses, the workshop convenors argued that acting was fundamentally a means of stripping away to reveal the authentic self.

<sup>561</sup> Peggy Phelan, *The Ends of Performance*, 10.

presence depends on absence and disappearance, and her definition of liveness (as Auslander has argued) depends on mediatisation.

However in trial practice, the inherent authenticity of a body has been a feature of the trial for centuries. Since the trials by ordeal, where a body in suspension revealed the true nature of the soul within it, the body has done more than simply be a vehicle for a person's oral testimony. Rather, the body itself has been a site for scrutiny and judgement. Trials remain trials of the body today. The symbolic value of the live that the trial depends on pivots on the authenticity of the body in the site of the courtroom. Yet as Auslander has also pointed out, the concept of inherent authenticity is politically dubious, with its link to concepts such as 'charisma' and 'magic' which suggest an audience spellbound and unquestioning of the political framing of the event.<sup>562</sup> The manufacturing of mysticism is (and has been, over centuries) exploited by legal agents consciously and unconsciously.

By now, there is entrenched popular belief in the inherent value of live presence in the courtroom as facilitating the truth. This was evidenced recently in NSW. The state government passed laws in 2007 allowing for inmates to give testimony via CCTV to avoid transport fees. Although defendants are still required/allowed to attend a trial in person, CCTV testimony will now be used for committal proceedings and preliminary hearings for those in NSW gaols. An article, titled "Day in Court is a Fading Right" in the *Sydney Morning Herald* recorded dismay at this decision:

Thousands of defendants may be robbed of their day in court and forced to give evidence by audio-visual link from jail after the NSW Government rushed through a law designed to cut the costs of transporting detainees to court. The radical changes reverse the existing presumption that an accused person has the right to be physically present in court in significant proceedings.<sup>563</sup>

This article articulates an apparent 'right' of the defendant to be actually present for his or her day in court. This situation is distinct from that of the vulnerable witness, for whom CCTV testimony was primarily intended. Nevertheless, the performance of tradition relies on the unconscious exploitation of this 'right'—the popular belief in the authenticity of live presence. What Phelan might term authenticity of the body here is also a body being

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<sup>562</sup> Auslander's comments were related to the concept of postmodernism in the theatre. See Auslander, "Towards A Concept of the Political in Postmodern Theatre," *supra* n. 232.

<sup>563</sup> Adele Horin, "Day in Court is a Fading Right," *The Sydney Morning Herald*, 12 December 2007.

repressed and manipulated and used to, as Foucault said, “perform functions, emit signs” that shore up the authority of the trial.<sup>564</sup>

This is reflected in legal research into CCTV testimony. One of the only things of which we may be relatively certain regarding CCTV testimony is that its usage (using real children’s testimony rather than mock trials) resulted in vastly improved outcomes for the testifier; where the child witness was much more able to cope with his or her surroundings, retain information and respond to questioning. This was because such witnesses felt less pressured without physical confrontation; either in terms of being in the court, or in front of their accuser, or in front of an advocate cross-examining them. CCTV testimony usage means that child witnesses, and others classed as ‘vulnerable’, are probably more likely to come forward and testify. As Cashmore and De Haas’ report notes, the argument that “confrontation and cross-examination increases the likelihood of truth-telling by witnesses” overlooks how much pressure through confrontation may *decrease* the truth-telling likelihood.<sup>565</sup>

Altering how witnesses testify in order to relieve the pressure on them (and potentially increase their ability to tell the truth) risks diminishing legal control over a witness’ narrative and threatens basic assumptions as to the production of juridical truth. This is because the ideal means of the production of adversarial juridical truth is not believed by witnesses to be the ideal circumstances in which to tell the truth. Witnesses may not necessarily believe they will tell the ‘truth’ under pressure. This is not because they will deliberately lie, but because the coercive nature of cross-examination as well as the complexity of legal discourse may result in confusion as well as (as outlined in Chapter 4) a witness being limited in being able to tell his or her story. Yet legal agents believe that pressure and some degree of intimidation will have a positive effect on reliability and function as a safeguard of truth-telling:

Some prosecutors say that a child’s evidence will be seen by a jury as less credible if not adduced in the traditional manner. In addition, some prosecutors are said to believe that the appearance of a visibly distressed child witness makes a jury more likely to convict.<sup>566</sup>

Visible distress is, it seems, a marker of credibility. Yet maintaining the coercive powers of the court does not simply uphold juridical truth; it also exploits the symbolic value of the live

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<sup>564</sup> Michel Foucault, *Discipline and Punish*, 25.

<sup>565</sup> Cashmore and De Haas, “The Use of Closed-Circuit Television: Child Witnesses in the ACT,” *supra* n.550.

<sup>566</sup> ALRC, *Children’s Evidence: Closed Circuit Television*, Report No. 63 (1992) [14.105].

to sustain the trial process. Legal agents unconsciously use the symbolic value of live performance to bolster their own authority, not only in the trial, but also in the broader social world itself. This is done by exploiting (unconsciously) and sustaining the collective belief in the authenticity of live presence.

### ***Conclusion***

For legal agents, bodies sharing the same space, immediacy and the pressure of confrontation aid the production of juridical truth. This belief is based on assumptions as to the authenticity of live presence. Putting a body under pressure is a means of stripping away the ability to lie and revealing what really happened. In legal discourse, this is framed as an inherently more reliable human-to-human contact that is based on tropes of understanding and insight (where traditional methods of evidence-testing are the best means to determine the ‘truth’). However, this argument can only be maintained by downplaying evidence that suggests the courtroom is a site of stress and pressure that may in fact decrease the ability to speak the truth through intimidation, and a place that uses symbolic violence and coercion to signify its authority. The performance of tradition manufactures and maintains the power of the law through the exploitation of live performance. Ultimately, live testimony has a currency which legal agents are not willing to yield up as, like television broadcasting, it potentially limits the self-regulation of the trial by legal agents.

The relative newness of CCTV testimony technology and its increasing use in Australia and elsewhere suggests that CCTV testimony is valued as important. However CCTV testimony is *only* used as a functional substitute, maintain the trial as an ontologically live event. The problem with only assessing CCTV testimony in terms of itself and *not* interrogating live testimony more fully means that we continue to assume that there are no endemic problems in the adversarial model of juridical truth. As stated at the beginning of this chapter, seeing CCTV testimony as only useful for ‘vulnerable witnesses’ contains the shortcomings *in* the witnesses. Yet as has been articulated in this thesis earlier, the manipulation and exploitation of witnesses coupled with their inability to control their own narrative is a routine practice in the adversarial criminal jury trial.

As I will argue in the following chapter, vulnerable witnesses are not ‘exceptional’, rather their particular experience makes more visible the underlying symbolically violent practices involved in the current model of adversarial juridical truth. It is these problematic practices that are the focus of the next chapter, which examines sexual assault trials and sexual assault law reform. I argue that sexual assault law reform exemplifies and makes visible the performance of tradition, including the relative autonomy of the law, exploitation of liveness and authenticity, the burden of performance and the emphasis on coercion producing juridical truth.



## Confrontation and Sexual Assault Legislation in NSW

**Defence counsel**            *You weren't in shock, you were having consenting sexual intercourse on the lounge room floor weren't you.*

**Complainant**            *I was not*

**Defence counsel**            *You see this is a tissue of lies by you isn't it?*

**Complainant**            *It is not (crying) a lie—why would I go to the police station and make a 20 page statement and be there for 8 hours and go through hell for this! (screaming).*

Heroines of Fortitude <sup>567</sup>

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<sup>567</sup> NSW Department of Women, *Heroines of Fortitude*, 170.

## *Prologue*

“Ass of a law means the rights of rapists override those of their victims” shouts the headline in my copy of today’s paper—the *Sydney Morning Herald*. It is the 6<sup>th</sup> of September 2004 and I am flicking through the paper as I sit and wait in the public gallery of the Supreme Court of NSW. Although I should really say ‘row of seats’, not ‘gallery’. This is not exactly the Old Bailey. For all of its grand title, the space itself, in the new Supreme Court high-rise building, resembles nothing so much as a lecture theatre, cluttered with unopened books, unused computers and bored people slouching in their chairs.<sup>568</sup>

Today is the day that two brothers found guilty of gang rape will appeal their conviction and the appeal has stirred up so much interest that outside, six storeys down, the Rape Crisis Centre is holding a demonstration as we sit and wait. The brothers, MSK and MAK, dismissed their barristers and represented themselves, provoking such a reaction in the press and public that the law of the state was altered. Looking around the courtroom however, the general expressions on people’s faces do not reflect that level of interest at all: rather there is a lethargy and slackness of expression that my barrister friend terms the ‘I thought law was exciting but now I’m trapped in a boring courtroom’ look. The other thing I notice is that the majority of people in this room, including the barristers, solicitors and clerks, are women. What I will not find out until later is that amongst them sits one of the raped women. The defence desk, however, stays ominously empty—surely, they will not still be representing themselves?

We all rise as the three judges, wigged, in bright red, file out from the door behind their bench. As they stand in front of their chairs, we bow to one another. Then the door on the right hand side of the court that I have not really noticed before opens and in walks a police officer followed by people whom I take to be barristers—two men in dark suits with gentle but serious expressions. As I wait for them to be followed by the defendants, the door closes behind them and the penny finally drops.

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<sup>568</sup>The ‘new’ building is not particularly new, dating from the early 1980s. However, it is ‘new’ in comparison to the ‘old’ Supreme Court building that stands across the street and dates from the 1820s.

I have read about these brothers—at their trial they were deliberately threatening to their alleged victims, heckling their questioners, laughing throughout the proceedings and leering at the gallery.<sup>569</sup> What I see today are two men who look older than I imagined, who bow and sit quietly and respectfully. I had expected to feel threatened and exposed. I feel let down. These men seem so unassuming, and so like people I know, that it completely throws me. I want them to behave badly.

The judges ‘give leave’ for the defendants to present their submissions, which is done entirely by the elder brother, MSK, while MAK sits silently on the chair in the dock next to him.<sup>570</sup> MAK looks at his hands, occasionally looks at his brother and only speaks two or three words in total to the judges throughout the appeal. MSK is given no table and instead must pile his papers on the floor next to him. He reads out the grounds of appeal quite laboriously and confusingly. He seems to be repeating himself and I am having difficulty recording it. What I do understand is his repetitious assertion that “section 249a of the Criminal Procedure Act is *invalid*” because the right of cross-examination was “cruelly taken away” from the appellant. If a defendant “wishes to defend himself in person” he cannot cross-examine a complainant effectively, therefore the “trial is unfair and any conviction should be quashed”.

MSK talks about the “absolute right” of cross-examination and the disadvantages to defendants if they are restricted from defending themselves. I cannot help feeling he has a point here—*not* regarding his “absolute right” to bully complainants, but regarding the question of self-representation. The odds are so heavily stacked against someone wanting to do this, with a quagmire of legal procedure and jargon that would make little sense to a layperson, even with the best intentions of the judge who has a duty of assistance. Surely, someone representing him/herself should not be treated with horror, amusement, and disbelief if it remains his/her legal right?

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<sup>569</sup> See Paul Sheehan, *Girls Like You*, *supra* n. 442.

<sup>570</sup> Their two younger brothers, also convicted gang rapists, were underage at the time of the offence; consequently all four brothers are referred to only by their initials. Even in 2008, the elder brothers were still only identified as MSK and MAK despite both being nearly 30 and their youngest brother no longer being a juvenile.

What is particularly odd about this appeal is that although MSK and MAK have chosen self-representation I am sure that they have not written this material themselves. It is full of reference to precedents they cannot pronounce, including cases and words with which they are not familiar. It is a quasi lawyer's document read by a layperson—a combination of repetition and impenetrable reference that renders the entire appeal almost nonsensical. The submission goes on for nearly three hours. The long jacketed judge's aides are all nodding off and yawning. Alarming the police officers and two sheriffs are also drooping.

MSK was described by Paul Sheehan in the *Sydney Morning Herald* the next day as grandstanding.<sup>571</sup> Possibly. I also felt that there was a total lack of understanding of the appeal process by MSK. Eventually the appeal was dismissed. When the judges read out their remarks, they clearly read from a document they have had prepared earlier from the written submissions. The oral appeal has not altered what they have to say in any way. So why did everyone bother?

### ***Introduction***

In the previous chapter, I argued that designating certain witnesses 'vulnerable witnesses' suggests that any problems with evidence-testing that may occur during a trial originates within the witnesses themselves. The witness' shortcomings make *them* unsuited to the trial process. This means that legal agents who use the term 'vulnerable witnesses' do not see the need to question traditional methods of evidence testing. In this chapter, I extend this argument by examining sexual assault trials, routinely identified as 'exceptional' because (due to the high level of trauma these women report) sexual assault complainants are classed

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<sup>571</sup> Paul Sheehan was, and continues to be, a regular commentator on sexual assault trial proceedings in NSW, particularly the cases involving MSK and MAK. His book, *Girls Like You*, details the 2003 trials of the brothers and their subsequent appeals and is invaluable for the detail provided through his access to court transcripts. However, Sheehan subsequently uses the final third of his book to make a protracted and dubious argument that MSK and MAK's situation reflects a broader 'cultural timebomb' between Muslim and Christian Australia. This is not a view I agree with and consequently I confine my *Girls Like You* references to the earlier sections of the book.

as ‘vulnerable witnesses’.<sup>572</sup> I argue, however, that much of this ‘trauma’ is in fact due to the focus on confrontation that is central to *all* forms of adversarial criminal jury trial. In other words, above and beyond the traumatic experiences of sexual assault that these complainants have (allegedly) lived through, the trauma experienced during trial is a fundamental characteristic of adversarial practice. Rather than being ‘exceptional’, sexual assault trial practice in fact makes explicit the (often burdensome) performance imperatives of trial participants in the adversarial model of criminal trial.

In a sexual assault trial, the alleged rape victim is forced to occupy the same room as her alleged rapist as well as to undergo cross-examination by the defence. Because the complainant is often the only witness (besides the defendant), her credibility forms the crux of the trial; consequently cross-examination by the defence advocate plays a major role in sexual assault proceedings. This results in a collision with the complainant who has no representation of her own.<sup>573</sup> In addition to this, the complainant must relate a personal event, and her account of this will be assessed through a jury and judiciary who have continually been found in studies to believe in gendered, stereotyped ‘rape myths’ that influence their decision-making. Whilst the gendered nature of sexual assault trials *is* particular, I argue that this is partly because the concept of the ‘reasonable’ or ‘fair-minded’ person who is the symbolic bellwether of public opinion has traditionally been male. There remains, consequently, some difficulty interpreting what is ‘reasonable’ behaviour in situations of gendered crimes—in this case, a crime that is perpetrated primarily by men against women.

I begin this chapter by analysing a piece of legislation passed by the New South Wales Parliament in 2003 preventing two accused gang rapists, MSK and MAK, from cross-examining their accusers directly.<sup>574</sup> It is not my intention to condone in any way the actions of these two violent convicted rapists. However, on paper this legislative reform undermines basic assumptions regarding what is required for effective and fair cross-examination. This potentially disadvantages both defendant and complainant by failing to acknowledge legal

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<sup>572</sup> I will refer to a defendant in a rape case as male, and complainant as female as this reflects the overwhelming majority of sexual assault cases. This is also because, as observed later in the chapter, gender roles are of great importance during sexual assault trials.

<sup>573</sup> As I have outlined earlier, since the take-over of private prosecutions, the prosecutor represents the Crown, not the complainant.

<sup>574</sup> *Criminal Procedure Act 1986* (NSW) s 294A.

agents' and laypersons' deep-seated belief in traditional methods of evidence testing. I conclude by considering the questions sexual assault law reform raises regarding the longstanding adversarial methods of evidence testing and juridical 'truth', both in terms of its sustainability in sexual assault trials and more widely in the adversarial criminal jury trial.

### *The Special Case of MSK and MAK*

In 2003 four brothers—MMK, MSK, MAK and MRK—were committed to trial for aggravated sexual assault, along with a fifth man, RS, who later committed suicide.<sup>575</sup> The two eldest brothers, MSK and MAK, dismissed their legal representation and elected to represent themselves (the two younger brothers' and RS' lawyers immediately asked for a separate trial, which was granted). MSK and MAK's decision became a matter of intense media attention. Their choice of self-representation is something seen rarely in criminal procedure.<sup>576</sup> This is because, since the 19<sup>th</sup> century, not having a lawyer is believed to put a defendant at a considerable disadvantage. The lawyer is a form of protection (a 'right' of the defendant).<sup>577</sup> As observed in earlier chapters, an advocate provides a means of entry into the peculiar space of the trial both symbolically and linguistically.<sup>578</sup>

However, the media attention surrounding MSK and MAK's upcoming trial was not focused on the lack of lawyer as mediator between the defendant and the court. Instead, what became crucial in the ensuing controversy was the lack of lawyer as mediator *between the defendant and the complainant*. This was because MSK and MAK planned to cross-examine the complainants directly. This was within their legal rights as matters stood at the time. As observed in previous chapters, the right of a defendant to 'confront' his/her accusers has

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<sup>575</sup> RS committed suicide in prison after being convicted of sexual assault. By the time this matter I am examining came to trial, they had all also been convicted of another sexual assault.

<sup>576</sup> There is some evidence of a trend towards self-representation in civil litigation, presumably due to the expense of retaining counsel. See New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Assault Trials* Report No. 101 (2003) [1.12], footnote 13.

<sup>577</sup> Again, as previously noted, this 'right' to legal representation is more of a presumption in common law, and not outlined explicitly as it is in the U.S. In NSW, appointment of legal aid depends upon a means test, and sometimes a 'merit test' that estimates whether a defendant's case has a decent chance of succeeding.

<sup>578</sup> The financial burden of counsel is an onerous one for many defendants and it is overly idealistic to assume that the amount of money one can spend has *no* relation to the quality of counsel one can employ.

standing in Australian common law even if it lacks the statutory weight of enshrinement in the American Constitutional clause.

If a defendant represents himself, he has the right to perform the same function as his lawyers—that is, to test the prosecution’s evidence. However, the prospect of alleged rapists cross-examining alleged rape victims on the stand shocked the community (once the media disseminated it widely) and caused public outcry. Consequently, legislation was rushed through the State Parliament of NSW. This legislation was an amendment (294A) to the *Criminal Procedure Act 1986* (NSW), and it banned self-represented defendants from directly cross-examining the complainant in sexual offence cases.<sup>579</sup> Amendment 294A was passed and added to the law on the 3<sup>rd</sup> of September 2003. The trial process for these brothers was scheduled to start on the 11<sup>th</sup> September 2003, and began on the 16<sup>th</sup> September.

There is little doubt that this amendment was passed with MSK and MAK’s particular case in mind.<sup>580</sup> The NSW Shadow Attorney-General, Andrew Tink, made this clear: “The Bill has been introduced with great speed. The reason for that, and it is a matter of public record, is that the legislation be applied in a trial that commences in approximately two weeks”.<sup>581</sup> Section 294A of the *Criminal Procedure Act 1986* (NSW) expressly states that “the complainant cannot be examined in chief, cross-examined or re-examined by the accused person, but may be so examined instead by a person appointed by the court”.<sup>582</sup> The amendment goes on to outline that if such a case happens, the judge must warn the jury not to infer guilt, explicitly stating that the examination of the complainant by a court-appointed

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<sup>579</sup> A similar bar preventing alleged rapists from cross-examining their alleged victims directly had already been enacted in the U.K. in 1999 in *Youth Justice and Criminal Evidence Act 1999* (UK) c 23, s 34. The alternative arrangements are outlined in ss 38, 39. As I will note later, in the U.K. a legal representative is expected to cross-examine the complainant. If the defendant refuses to appoint one, and the court finds that cross-examination is necessary in the interests of justice, then the court itself appoints a legal practitioner, which it pays for. This is unlike Australia where there is no specification that the person appointed by a defendant be a legal practitioner and no obligation on the court to appoint anyone should the defendant refuse.

<sup>580</sup> MSK argued that this law was directly tabled with he and his brother in mind, however this is incorrect. As Justice Wood pointed out: “[t]he law was the product of weighty consideration by the Law Reform Commission, whose members acted on a reference from the Attorney General dated 27 March 2002, i.e. before the very offences for which the appellants stand convicted”. *R v MSK* (2004) 148 A Crim R 453, 468.

<sup>581</sup> See Paul Sheehan, *Girls Like You*, 66.

<sup>582</sup> *Criminal Procedure Act 1986* (NSW) s 294A(2).

must be given the same weight by the jury as any other witness examination.<sup>583</sup> The brothers refused to appoint someone to question the complainants during their trial, and consequently the complainants in their trial were never cross-examined.

The brothers' refusal to appoint a questioner was possibly more out of a perverse desire to extend proceedings than from any perceived sense of injustice. Yet, what if they had done so, forgoing direct cross-examination? What are the effects of altering traditional methods of evidence testing? Amendment 294A is an amendment for 'exceptional' circumstances involving vulnerable witnesses, as all sexual assault legislative reform is.<sup>584</sup> Yet the identification of all of these reforms as exceptional involves tacit admission that these circumstances are *not* commensurate with traditional methods of proof testing. Rather, these amendments identify a less than ideal situation that, because of its special nature, can diverge from accepted means of evidence testing to some degree. This may create a degree of uncertainty as to the reliability of the evidence in these cases.

In this case, the pertinent question is whether effective cross-examination (as legal agents understand it themselves) is theoretically possible under the terms of amendment 294A? For legal agents, cross-examination involves the construction of a narrative—storytelling, as advocates often term it. This involves building themes extrapolated from witness' responses, which I have already described, via Gibbons, as a master narrative constructed out of satellite narratives. Effective cross-examination also includes and responds to the immediacy of a witness' response. Yet under amendment 294A, how questioning takes place is unclear. All the amendment specifies is that a third party is to question the complainants. There are no directions as to specifics. It is unclear whether a questioner asks a question, returns to the defendant for more information and then asks the next question, or whether he/she has a prepared list of questions.<sup>585</sup>

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<sup>583</sup> *Criminal Procedure Act 1986* (NSW) s 294A(7)(b).

<sup>584</sup> This line of argument echoes the U.K. legislation where the court must warn the jury to disregard "any inferences that might be drawn from the fact that the accused has been prevented from cross-examining the witness in person". See *Youth Justice and Criminal Evidence Act 1999* (UK) c 23, s 39.

<sup>585</sup> The looseness of the language in the legislation was criticised by Justice Sully during MSK and MAK's trial. His criticisms included, as Chris Craigie SC outlines in a paper from the Public Defender's Office: "[t]he difficulty of determining how and where the trial judge is to find a suitable person to put questions on the behalf of the accused. The qualifications and training of such a person. Whether (as seems reasonable) and how



Either of these possibilities severely limits the chances of constructing a narrative, or exerting control over a witness's responses. The drafters of the amendment consequently overlook the dialogic nature of cross-examination that is so intrinsic to (primarily destructive) cross-examination. An advocate's duty is to respond to a witness' answer *at the time* and improvise around the narrative he/she has already decided on. This involves a 'judicious' use of confrontation—exploiting the pressure from the immediacy of circumstances when questioning a witness. As the New South Wales Law Reform Commission, examining the proposed amendment, noted:

This procedure [questioning under s 294A] is also quite artificial. The dynamics of cross-examination are impeded where a third person relays the questions to the witness. The process is stilted and the impact of the evidence is altered. Further, where each question is asked first by the accused and then repeated by the intermediary, the complainant would have time to deliberate before answering the questions. This may put the accused at a disadvantage.<sup>586</sup>

As I have previously outlined, the linkage of confrontation and truth-telling is longstanding and central to adversarial procedure. Amendment 294A risks impairing this, both by making cross-examination 'stilted' and by lessening the immediacy of questioning, raising doubts about the witness' honesty if she has time to 'prepare' her responses during this 'stilted' questioning. I have elsewhere criticised the uninterrogated association between confrontation and truth-telling. However although this association is problematic, and potentially leads to many abuses, strong belief in the value of this form of evidence-testing through immediacy and pressure means that the implementation of legislation such as this at trial may decrease faith in a defendant's or a complainant's evidence. For example, should a defendant appoint a questioner who is not a legal practitioner and therefore lacks the skill to effectively cross-examine a complainant, this may cause a jury to doubt the defendant. Yet, conversely, in the same scenario a jury may sympathise with the defendant and be more critical of a

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supplementary questions are to be put. The probable necessity to have the jury absent whilst forms of questions are settled". See [2003] NSWSC 849 (Sully J) and Chris Craigie, "Unrepresented Litigants: The Criminal Justice Perspective," Online paper. Retrieved 12 June 2008 from the NSW Public Defender's Office: [http://www.lawlink.nsw.gov.au/lawlink/pdo/ll\\_pdo.nsf/pages/PDO\\_unrepresentedlitigants](http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_unrepresentedlitigants)

<sup>586</sup> New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Assault Trials*, Issues Paper No. 22 (2002) [3.16].

complainant for *not* having undergone cross-examination sufficiently to support the veracity of her claim.<sup>587</sup>

Another factor at play concerning amendment 294A is the disadvantage, both real and symbolic, of self-representation. The New South Wales Attorney General at the time, Bob Debus, suggested in parliament that a questioner under 294A could be a judicial officer's assistant or associate, a court officer or a person employed by the Attorney General's Department.<sup>588</sup> This illustrates a wholesale belief in the neutrality of the court, including the assumption that a defendant's own barrister will do nothing to skew this neutrality.<sup>589</sup> Yet during the course of my attendance at the MSK and MAK's appeal in September 2004, outlined at the beginning of this chapter, it became quite clear at what a disadvantage the brothers were at for representing themselves. During this appeal, as I have mentioned, MSK spent half of his time shuffling through sheafs of papers on the floor, as he was not given a table. This presumably reflects the disadvantage that would have also been apparent at their trial. This is characteristic of the positioning of the body of the defendant as subjected to the will of the state. However when a defendant is also his own advocate, it is difficult to reconcile these roles, particularly as it often means the defence mounts their case from a dock. As Chris Craigie SC, NSW Deputy Senior Public Defender points out:

The theory that a fair trial, from the viewpoint of both the accused and the Crown can always be obtained with a trial judge neutrally conducting proceedings, whilst also satisfying a complex range of explicit and implied obligations to the accused is an ideal not easily achieved. In practice, the absence of legal representation in an adversary system has the potential for grave mischief to all interests.<sup>590</sup>

Craigie goes on to argue that the greatest risk of disadvantage runs against those defendants who are “uneducated, inarticulate, unattractive, intellectually limited, mentally ill or disabled

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<sup>587</sup> For example, as alluded to by the NSW Law Reform Commission above, a jury may decide that a complainant's evidence would not hold up to the closer scrutiny involved in destructive cross-examination.

<sup>588</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 2 September 2003, 2958 (The Hon. Bob Debus, NSW Attorney General).

<sup>589</sup> This was immediately criticized in parliament by Andrew Tink, who pointed out: “A judicial officer's assistant is employed by the Crown. A person employed by the Attorney General's Department is employed by the Crown. A specially trained court officer is employed by the Crown in a direct sense”. New South Wales, *Parliamentary Debates*, Legislative Assembly, 2 September 2003, 2962 (The Hon. Andrew Tink, Member for Epping).

<sup>590</sup> Chris Craigie SC, “Unrepresented Litigants, [16].

accused. At best, such an accused is incapable of making any real contribution to his or her own case and may for reasons of personal characteristics, rather than the strength of the evidence, be in peril of conviction and dire penalties”.<sup>591</sup> As the brothers, MSK and MAK, themselves argued in their appeal, self-representation means that they may look guilty, regardless of whether they are or not.

The Attorney General’s outlining of amendment 294A in parliament also does not recognise the particularities of language and status that are alien to a layperson in court.<sup>592</sup> It is not specified anywhere that the third party-questioner should be a legal practitioner. Indeed the Attorney General at the time, Bob Debus, specifically suggested otherwise when outlining the amendment to parliament.<sup>593</sup> According to Debus, the nominated questioner’s role is repeating questions entirely devised by the accused. As the accused has chosen self-representation, he should not have access to any special legal assistance when devising the method of cross-examination. Consequently, “[n]o specific benefit would therefore be achieved by requiring the intermediary to be a legal practitioner”.<sup>594</sup>

Yet any form of evidence testing, including cross-examination, requires specific skills.<sup>595</sup> As observed in *Dietrich v The Queen*:

[t]he proper conduct of an accused’s defence calls for a knowledge not only of the criminal law but also of the rules of procedure and evidence. Skill is required in both the examination in chief and the cross-examination of witnesses if the evidence is to emerge in the best light for the defence. The evidence to be called on behalf of the accused, if any, must be marshalled so as to avoid raising issues which will be damaging to the case for the Defence. A decision must be made whether the accused is to give evidence

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<sup>591</sup> Ibid., [17].

<sup>592</sup> The amendment itself also has nothing to say on this front.

<sup>593</sup> The Attorney General stated in parliament: “The role of the court-appointed intermediary is simply to repeat the questions sought to be put by the accused to the complainant. The intermediary is not to give the accused any legal or other advice. No specific benefit would therefore be achieved by requiring the intermediary to be a legal practitioner”. New South Wales, *Parliamentary Debates*, Legislative Assembly, 2 September 2003, 2957 (The Hon. Bob Debus, NSW Attorney General).

<sup>594</sup> “The intermediary is not to give the accused any legal or other advice. No specific benefit would therefore be achieved by requiring the intermediary to be a legal practitioner”. Ibid., 2957.

<sup>595</sup> At a NSW Bar Association meeting on the 6 April 2006, convened to discuss sexual assault law reform, a barrister cried out: “cross-examination is almost always an organic process!”

on oath, is to make an unsworn statement or is to remain mute. Competence in dealing with these matters depends to a large extent upon training and experience.<sup>596</sup>

Advocates are, amongst many things, translators rather than simply protectors. Speaking in court requires legalizing actions into juridical codification—for example rape into ‘sexual assault’, resistance into ‘lack of consent’. To do this requires an embodied naturalization of legal language. To presume that a self-represented defendant does not need any legal skills perpetuates a wide misrecognition that trials are as open in understanding as they literally are to the public, rather than a practice of a particular field with their own highly refined and particular rules. Whilst there may be incompetent defence lawyers, and skilled laypersons, the very specific skills acquired in advocacy training (whatever form it takes) involve years of training and an ability to navigate the social universe of the law. Without this, one must be considerably disadvantaged.<sup>597</sup>

The potential for disadvantage to the defendant embedded in the amendment, however, is insufficient grounds for appeal, as MSK and MAK discovered when their appeal was dismissed. As Justice Wood notes, after summarising the brothers’ grounds for appeal, such criticism of legislation is a misinterpretation of the role of the courts when it comes to legally determining the application of a statute under the Australian constitution.<sup>598</sup> He goes on:

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<sup>596</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 352 (Dawson J).

<sup>597</sup> The NSW Law Reform Commission, in their review of amendment 294A, argues that the appointed questioner *should* be a legal practitioner, if only used for the duration of cross-examination. However the report goes on to say: “[o]nce faced with the compulsory appointment of counsel, the overwhelming likelihood is that the accused would seek representation for the entire trial”, suggesting that any disadvantage experienced by a defendant will hopefully be an inducement to hire counsel as he ‘should’ have done in the first place. NSWLRC, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report No.101 (2003) [5.30]. This is precisely the slightly high-handed attitude criticised by Justice Sully who points out that “[c]ertainly, the Court is not entitled to treat them to their disadvantage by way of signalling in any fashion frustration or displeasure of any other kind deriving from the persistent refusal of the two particular accused to accept the persistent advice of the Court, given hitherto, that it would be very much in their own best interests to obtain proper professional legal representation, if not for the entirety of the trial, then the very least to the extent of ensuring that they are properly seized of the matters upon which the Court is now ruling”. *R v MAK*, 11 September 2003.

<sup>598</sup> “The grounds of uncertainty raise issues about the manner in which the provisions concerning a court-appointed questioner will work in particular situations. The legislation is criticized because it is silent as to the legal qualifications of the questioner, who will pay that person, what will happen if the accused ‘could not fit

These “uncertainty” complaints are really thinly-disguised criticisms of the policy of the legislation. As I indicate below, this is not a basis of invalidity under our constitutional law. In any event, courts can and must resolve these and any other issues of interpretation and application of novel legislation.<sup>599</sup>

As Justice Wood makes explicit, statutes are, by necessity, not overly prescriptive, allowing the crucial role of interpretation by the judiciary that is central to the function of common law jurisdictions.<sup>600</sup> Alongside this flexibility is the irreducible fact that judges and courts cannot criticise decisions by the legislature.<sup>601</sup>

MSK and MAK’s appeal could consequently never have succeeded. However, their appeal also revealed something else pertinent to the question of the disadvantaging of the defendant and exceptional legislation: that is, that any disadvantage to the defendant does not in itself necessarily prevent a ‘fair trial’ from taking place. In the Supreme Courts’ summation of MSK and MAK’s appeal, the judges note:

There is a substantial public interest in ensuring that witnesses are not subjected to procedures that might be oppressive or humiliating although they must answer all questions that fairly test their evidence. This is not only to ensure, as far as possible, that potential witnesses are not bullied into giving untrue or inaccurate evidence, but also because such conduct must undermine public confidence in the administration of justice. Without these protections for witnesses, the court would be an instrument of injustice rather than an instrument of justice. The crucial question therefore is not whether the interests

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himself with the court appointee person’, what will happen if ‘improvisation’ is necessary in the detail of questioning, how rulings about the appropriateness of particular questions will be addressed and how the accused communicates with the appointed questioner”. *R v MSK* (2004) 148 A Crim R 453, 462 (Wood, CJ).

<sup>599</sup> *Ibid.*, 462.

<sup>600</sup> As Justice Wood goes on to observe: “The accused is entitled to a fair trial according to law. Any departure from the common law of criminal procedure (such as an unrepresented accused’s right to personally test the Crown evidence) is not necessarily unfair, let alone unfair in a manner attracting constitutional consideration. The New South Wales Parliament may amend the common law, or existing statutory law, by passing constitutionally valid statutes. Where this is done, it is for the legislature, not the courts, to determine the wisdom and extent of the legislative measures that modify or abrogate pre-existing common law or statutory rights. Accordingly, it is not to point to argue that s 294A is harsh or undesirable or that it restricts or removes pre-existing rights”. *Ibid.*

<sup>601</sup> “Judicial pronouncements confirming the supremacy of parliament are rare but their scarcity is testimony to the complete acceptance by the courts that an Act of Parliament is binding upon them and cannot be questioned by reference to principles of a more fundamental kind [...] there can be no doubt that parliamentary supremacy is a basic principle of the legal system which has been inherited in this country from the United Kingdom”. *Kable v DPP* (1996) 189 CLR 51, 73, 74.

of the accused might be prejudiced but whether the fairness of the trial might be called into question if an unrepresented accused is prohibited from cross-examining a complainant in person.<sup>602</sup>

As observed in the previous chapter dealing with closed-circuit television testimony, legislative reforms relating to vulnerable witnesses are not just about a defendant's rights, but are rather predicated on them being able to 'strike a balance' between the needs of particular witnesses and the rights of a defendant.<sup>603</sup> However, this question of 'striking a balance' is problematic at best, as the difficulties with amendment 294A make clear.

When the judges in MSK and MAK's appeal drew attention to the potential for injustice arising from witnesses being "bullied into giving untrue or inaccurate evidence [...] because such conduct must undermine public confidence in the administration of justice" they made the presumption that this potential existed only in direct cross-examination of a complainant by their alleged attacker. This presumption is shared by the NSW Law Reform Commission:

[t]o accommodate the accused's wish to cross-examine the complainant personally is to confer an inappropriate advantage on the accused [...] the most likely motive for refusing representation is the desire to obtain an advantage by virtue of the intense character of direct personal confrontation. This advantage has never been part of the function of a trial.<sup>604</sup>

Yet confrontation is central to the production of juridical truth. The only question is how much the direct nature of it alters the experience for a complainant.<sup>605</sup>

Having summarised the terms of the debate surrounding 294A, I would like to leave MSK and MAK's appeal and return to sexual assault trials more generally. The furore surrounding MSK and MAK's trial was because their case *was* special/exceptional: they (unusually) defended themselves, and thus they would have unduly traumatised the complainants should they have been permitted to cross-examine their alleged rape victims. Yet by concentrating

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<sup>602</sup> *R v MSK* (2004) 148 A Crim R 453, 460 (Wood CJ).

<sup>603</sup> NSWLRC, *Questioning of Complainants*, [3.65].

<sup>604</sup> NSWLRC, *Unrepresented Accused in Sexual Offence Trials*, Report No. 101 (2003) [3.70].

<sup>605</sup> At least one study found that "a complainant may actually find cross-examination by a barrister more distressing than cross-examination by the accused. Having to appear in court and give evidence is likely to be distressing for complainants in sexual offence cases, regardless of whether the accused is represented or not. Numerous reports on sexual assault document how distressing sexual assault trials are for complainants, without even considering the issue of self-representation". *Ibid.*, [3.44].

all this attention on the ‘special’ nature of the brothers’ trial, most participants in the debate overlooked how traumatic *any* form of cross-examination is for a sexual assault complainant.<sup>606</sup>

I do not mean to make an easy comparison between the two forms of cross-examination. There is no doubt that direct cross-examination of an alleged rape victim by an alleged rapist would be extremely traumatic.<sup>607</sup> However, the amendment 294A debate/discussion (in both parliament and the Supreme Court) demonstrates the misrecognition by legal agents and politicians of what cross-examination entails. In this debate, cross-examination is either posited as the creation of a coherent narrative by a skilled practitioner (overlooking the power and control I have outlined in chapter 4 of this thesis), or presented as a means of adducing truth that does not require any form of skill.<sup>608</sup>

Neither approach acknowledges the symbolic violence and exploitation of confrontation that is vital to any discussion of sexual assault trial practice, and that is a fundamental characteristic of adversarial practice. Section 294A consequently illustrates the problems of exceptional legislation that does not seek to address more systemic problems with the current model of juridical truth: most specifically, the belief in the link between live confrontation and truth-telling and consequently the performance imperatives of trial participants. In the next section of the chapter, I examine sexual assault trials, routinely identified as ‘exceptional’. Legal discourse explicitly attributes the ‘special’ nature of sexual assault to the ‘special’ nature of the vulnerable witness. Whilst I do not seek to diminish in any way the

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<sup>606</sup> And, indeed, cross examination may be traumatic to any witness to a greater or lesser extent, depending on how important his/her evidence is to securing a conviction or acquittal.

<sup>607</sup> Indeed, the reason the U.K. passed the 1999 legislation banning such direct cross-examination is because the abuse of this opportunity has happened in criminal proceedings in the past. In one case in the mid-nineties, the alleged rapist cross-examined the alleged rape victim for 6 days and apparently deliberately wore the same clothes he had been wearing when the alleged rape had been carried out. See: *R v Edwards* (England, Central Criminal Court, Goddard J 22 August 1996). It has also happened in Victoria. In *R v Cremmen* (Unreported, County Court of Victoria, 1987), where an accused rapist cross-examined the complainant for four days until the judge interceded. Both cases are discussed in Victorian Law Reform Commission, *Sexual Offences: Final Report*, 25 August 2004 [4.120], [4.121].

<sup>608</sup> For example, the NSW Law Reform Commission whose authors see the ‘trauma’ of a sexual assault trial as simply the process of being in open court before strangers (such as the jury and audience, as well as court functionaries).

terrible trauma frequently endured by complainants in sexual assault trials, I do want to problematise this notion of internalised vulnerability that tends to paint women in legal discourse misogynistically by emphasising their vulnerability, frailty or potential for ‘hysteria’. Instead I argue that it is the “burden of performance” for a complainant in a sexual assault trial that causes trauma; a burden characteristic of adversarial trial.<sup>609</sup>

### *The Special Case of Sexual Assault Trials*

Politicians and the media frequently cite sexual assault trials as being intensely traumatic for complainants; far worse than most other criminal proceedings. Government and non-government reports into sexual assault trials consistently identify cross-examination and confrontation as the major sources of trauma for a complainant. These are, however, a requirement for all adversarial trials, forming the crux of how legal agents and jurors determine juridical truth. So what makes sexual assault trials *worse*?

What is important to sexual assault trials is that a complainant is also often the sole witness.<sup>610</sup> It is highly unusual for there to be indisputable medical proof of sexual assault. Even if there is DNA evidence it is difficult to prove, in the absence of substantial physical trauma, that sexual assault involved force. In a situation where a man rapes a woman, fighting back can put the woman’s life at risk. Many women have been educated over the years not to put themselves in more danger. This makes rape cases more difficult to prove.<sup>611</sup> Even more important to consider is that the vast majority of reported rape is at the hands of a partner, relative, or someone known to the complainant, rather than a violent stranger, despite this

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<sup>609</sup> I have taken this expression from Corey Rayburn’s article “To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials,” *Columbia Journal of Gender and Law* 15.2 (2006).

<sup>610</sup> Although the defendant may also be a witness, he frequently does not testify and is not compelled to do so.

<sup>611</sup> “Prosecutions involving charges of sexual assault, whether related to adults or children as victims, present certain unique features in that only infrequently can they rely upon investigations based upon forensic evidence. Rarely are there any independent witnesses, or anything in the way of corroboration, save in the rare case of a group attack where one accused is prepared to provide assistance, after a plea and sentence, by giving evidence against his co-accused”. Justice James Wood, “Sexual Assault and the Admission of Evidence”, paper presented at *Practice and Prevention: Contemporary Issues in Adult Sexual Assault in New South Wales*, Sydney, 12 February 2003, unpublished. Retrieved 10 June 2008 from: [http://www.lawlink.nsw.gov.au/lawlink/supreme\\_court/ll\\_sc.nsf/pages/SCO\\_speech\\_wood\\_120203](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_wood_120203)



being the pervasive myth of what constitutes ‘rape’ in public opinion.<sup>612</sup> All of this means that the complainant’s evidence-in-chief is sometimes the only evidence tendered in court. Sexual assault trials consequently come down to the issue of consent:

The role of consent makes adult sexual offence trials different from most other criminal proceedings. Behaviour which is ordinarily legal becomes illegal in the absence of consent. Where the alleged offence occurs in private, it often comes down to the word of the complainant against the word of the accused. Even where supporting evidence is available, sexual offence trials often turn on the credibility of the complainant.<sup>613</sup>

In practical terms, this means sexual assault trials pivot around the word of the complainant versus the word of the defendant as mediated through his counsel (where the burden of proof beyond a reasonable doubt is on the prosecution).

A complainant’s testimony has to be convincing and credible enough so as to convince jurors beyond this reasonable doubt. Because cross-examination of the complainant is the only means of defence, a complainant will be cross-examined at length, often in graphic detail.<sup>614</sup>

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<sup>612</sup> For example, some legal agents argue that contemporary juries are affected by what is known as the “CSI Effect” or “CSI Phenomenon”. Those who cite the “CSI Effect” argue that forensic based American television shows such as *CSI (Crime Scene Investigation)* have influenced jurors’ expectations unduly whereby they will be less willing to convict if there is no compelling scientific evidence. Suzanne Blackwell et al’s 2005 New Zealand study found that jurors expected “instantaneously available, highly technical and scientific forensic evidence”. S. Blackwell et al, “Expert Psychological Evidence in Child Sexual Abuse Trials in New Zealand,” (paper presented at the *Children and Courts Conference*, National Judicial College of Australia, 5 November 2005), 13.

<sup>613</sup> NSWLRC, *Questioning of Complainants*, Issues Paper No. 22 (2002) [2.7].

<sup>614</sup> *Heroines of Fortitude* found that the average examination in chief was about 1 hour, while cross-examination averages about 2 hours. This report records a minimal cross-examination of 15 minutes and a maximum of 8 hours and 6 minutes over 2 days. NSW Department of Women, *Heroines of Fortitude*, 156. The evidence tendered in sexual assault trials also involves relating highly intimate details. “And, by its very nature, giving evidence of a sexual assault is like no other evidence. Sexual assault complainant evidence must include precise and explicit details of sexual acts and of intimate sexual violence. Evidence may include swear words, slang usage for body parts, name-calling, derogatory terms or remarks of a personal nature. It is embarrassing and humiliating evidence to give. It can come as no surprise that many victims feel reluctant to come forward and report sexual assaults and, of those that do, their efforts to have their day in court is nothing short of heroic”. New South Wales, *Parliamentary Debates*, Legislative Council, 4 May 2005, 15518 (The Hon. Henry Tsang, Parliamentary Secretary). The significance of the graphic language obviously depends on the complainant herself. Although it may be relatively humiliating and/or embarrassing to most women, certain cultural

The prosecution, too, is solely reliant on the complainant's account to convince a jury. The credibility of the complainant becomes the major focus of the trial, with satisfaction of the burden of proof resting on one person's testimony.<sup>615</sup> Ultimately the sexual assault trial becomes about the complainant and whether *she* is lying, rather than whether the accused is lying.<sup>616</sup> In broad terms, the prosecution must present the complainant to the jury as unimpeachably honest, and the defence advocate must convince a jury that the complainant is confused, malicious or dishonest.<sup>617</sup> What makes a sexual assault trial "worse" is the "burden of performance" for a complainant.

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backgrounds find this particularly difficult to overcome as it is not simply a matter of embarrassment, but rather deep shame at having to reveal something intensely private in public. See NSW Department of Women, *Heroines of Fortitude*, 103-105.

<sup>615</sup> A Queensland study in *Revictimisation of Women in the Criminal Justice System* commented on taskforce findings in 1999: "The law [...] presumes the accused to be innocent until proven guilty, and therefore everything is potentially under challenge. In certain types of offences, such as sexual offences, the presumption that the victim is lying is even stronger" Queensland Office for Women, *Women and the Criminal Code*, Taskforce Report (2000) [8.1].

<sup>616</sup> Currently, although a complainant's motives for lying can be examined in close detail, the prosecution is not allowed to question the defendant as to why the defendant might lie. Until recently, the presiding judge in a sexual assault trial was also required to warn the jury of the danger of convicting someone based on uncorroborated evidence. This warning reduced the chances of a victory for any complainant and helps explain the extremely low rates of conviction. This was overturned with the passing of the *Criminal Procedure Amendment (Sexual Assault and Other Offences) Bill 2006*. This bill inserted provision 294AA into the *Criminal Procedure Act 1986* (NSW). Section 294AA reads: "A judge in any proceedings to which this Division applies must not warn a jury, or make any suggestion to a jury, that complainants as a class are unreliable witnesses".

<sup>617</sup> Often these motives for lying revolve around notions of female 'hysteria' and impaired mental health. The question of why a complainant would lie requires more attention than it has been given. In Chester Porter's recent book, *Conviction of the Innocent*, he asserts that it is very easy to accuse someone falsely of sexual assault and hence rigorous evidence-testing is necessary. However, Porter's point is theoretical: it *is* potentially easier to assert that sexual assault took place when it did not (as opposed to other crimes), however the Bureau of Crime Statistics estimates that there is a roughly 40% conviction rate for sexual assault cases that make it to court, they estimate only 20-27% of sexual assaults in the community are reported. Furthermore, less than half will make it to trial. Their research concludes: "the number of proven sexual assault charges is less than five percent of the total number of sexual assault victims". See Chester Porter, *The Conviction of the Innocent: How the Law Can Let Us Down* (Sydney: Random House, 2007). For statistics on rape reportage in New South Wales, see Bureau of Crime Statistics and Research, "Some Important Facts About Sexual Assault in NSW," available online at: [http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/pages/bocsar\\_facts\\_sexual\\_assault](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_facts_sexual_assault)Australian. See also Australian Bureau of Statistics, *2004 Crime and Safety*, Cat No. 4509.1 (Australian

Detailed below is an excerpt from a sexual assault trial in 1995. This transcript was taken from *Heroines of Fortitude*, a report published by the NSW Department of Women.

Defence counsel	<i>You asked if he would like some toast?</i>
Complainant	<i>I did.</i>
Defence counsel	<i>And what he'd like on it?</i>
Complainant	<i>I did.</i>
Defence counsel	<i>Why?</i>
Complainant	<i>I was in shock, I don't know why</i>
Defence counsel	<i>Oh come on, you can do better than that!</i>
Complainant	<i>I was in shock! (screaming)</i>
Defence counsel	<i>This is a man who'd raped you the night before you've told us</i>
Complainant	<i>I was in shock.</i>
Defence counsel	<i>Who had forced you to have non-consensual intercourse.</i>
Complainant	<i>I was in shock.</i>
Defence counsel	<i>Who'd stuck his fingers in your vagina without your permission?</i>
Complainant	<i>I was in shock (crying).</i>
Defence counsel	<i>And you're making him coffee and toast the next morning?</i>

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Bureau of Statistics: Sydney, 2004). Alternatively, a defence advocate alleges that a complainant is in search of financial gain. Complainants are frequently quizzed as to whether they have ever, or will ever, apply for compensation.

Complainant	<i>I was in shock.</i>
Defence counsel	<i>You're going to stick to that, are ya?</i>
Complainant	<i>Yes I am (screaming).</i>
Defence counsel	<i>Are my questions annoying you?</i>
Complainant	<i>Yes they are.</i>
Defence counsel	<i>Was it annoying you on the night when you said he had non consensual sexual intercourse and put his fingers in your vagina?</i>
Complainant	<i>Yes.</i>
Defence counsel	<i>Does it annoy you as much as my questions?</i>
Complainant	<i>Yes.</i>
Defence counsel	<i>Well, why didn't you yell?</i>
Complainant	<i>Because I was in shock and I was scared.</i>
Defence counsel	<i>You've been yelling at me haven't you?</i>
Complainant	<i>Yes.</i>
Defence counsel	<i>You think your mother would've heard you if you said things in the same loud voice that you've been using here?</i>
Complainant	<i>I don't know. I didn't scream.</i>
Defence counsel	<i>Yes but you know your mother would've heard you if you said things in the same loud voice that you've been using here. And you didn't scream because you didn't want them to come out did you?</i>
Complainant	<i>I was in shock, I was embarrassed, I was humiliated, I felt dirty (crying).<sup>618</sup></i>

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<sup>618</sup> NSW Department of Women, *Heroines of Fortitude*, 156-157.

I have reproduced this excerpt in full as it highlights one of the most contentious aspects of sexual assault trials—hostile cross-examination. In the above transcript, we see what must be considered appalling and brutal questioning by a defence counsel. The defence counsel is deliberately trying to provoke the witness to make an admission and to cast doubt on her behaviour. This is evidenced by his repeated questions even when she does not change her answer. Instead of moving to another subject, he re-couches his inquiry in increasingly graphic language. The entire line of enquiry seems carefully constructed to provoke the complainant to react and perform in a certain way: by making her angrier and angrier and more upset the advocate can then provoke her to yell and then clearly imply that if she was truly attacked she would have yelled *just as she is doing now*. Therefore, she would have been heard. Ergo, she is lying and she was not raped.<sup>619</sup>

This careful construction of narrative by the defence counsel involves attacking credibility through the witness' behaviour and performance at the time *and on the stand*. Firstly, he raises questions as to her behaviour immediately after the alleged assault. He clearly questions her justification of being 'in shock': "You can do better than that!" Yet having raised questions as to her behaviour after the assault, he uses her behaviour in the courtroom to raise questions as to her actions during the alleged assault. The defence counsel provokes her to yell and to scream, and then clearly implies that this is what she should have done during the assault (if it really took place).

I would argue, in contrast to the NSW Law Reform Commission's claim (that "the most likely motive for refusing representation is the desire to obtain an advantage by virtue of the intense character of direct personal confrontation. This advantage has never been part of the function of a trial"), that this transcript is full of the advantage of the "intense nature of direct personal confrontation". Although the NSW Law Reform Commission meant, literally, the alleged rapist and complainant, the encounter between complainant and defence advocate is confrontational in and of itself. It is in the interest of the defence counsel to exploit the pressure of live confrontation to cast doubt upon a complainant's account.

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<sup>619</sup> It is also difficult to believe that such an effectively destructive line of cross-examination would be possible under Section 294A with a nominated questioner. Surely, this barrister is improvising from a more general "script" of questions, which allows him to build up a rhythm, increase the pressure in confrontation and respond to what is clearly a *dialogic* situation; he 'feeds off' the complainant.

What is essentially happening in a sexual assault trial can be read as a high stakes legal game that takes the form of a performance for the interpretation of the crucial audience: the jury. In the transcript, the crown prosecutor wagers on the outcome—that the defence barrister’s performance is in fact turning the jury against him due to his brutal mode of questioning. From the perspective of the prosecution, allowing this distressing line of cross-examination is potentially more helpful in securing a conviction than any intervention on behalf of the complainant would be. Her victimization will increase sympathy because she is now helpless and distressed—a positive performance marker for her in her ‘rape script’.<sup>620</sup> The defence barrister, on the other hand, is hoping the jury has made another kind of performance analysis; that the jury will condemn the complainant for not playing her role as a credible witness effectively.

Corey Rayburn, writing about the “burden of performance” of rape complainants, argues that complainants are forced to play many different culturally prescribed roles during the trial:

The burden of performance is the difficulty witnesses have in persuading a jury by the force of their testimony. The persuasion that takes place is not based on logic or reason. Rather, it depends on the ability of the witness to define her character role and provide a cogent story with fidelity to the jury. To successfully overcome the burden of performance the narrative must fit within the script of the trial and the larger rape metanarratives.<sup>621</sup>

I would argue that this overstates the autonomy of the complainant and her scope to define her own role. Importantly, legal counsel constructs a narrative through a broader social lens. In the previous transcript cited, the defence counsel refers to an assumption that could be made by many jurors: that a complainant in a situation of being raped would ‘scream’ and that she would not make toast for her attacker the next day. For a jury to believe this behaviour is aberrant relies on them having preconceived ideas as to how she ‘would’ behave.

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<sup>620</sup> Shannon Jackson, writing about muggings and sexual assault, coined the term “rape script” when writing about muggings and self-defence classes for women in the U.S. I find this a very useful term when considering what exact role a complainant is meant to play in a trial. Shannon Jackson, “Representing Rape: Model Mugging’s Discursive and Embodied Performances,” *The Drama Review* 37.3 (1993).

<sup>621</sup> Corey Rayburn, “To Catch a Sex Thief,” 460.

An Australian Institute of Criminology study conducted in 2005 (primarily assessing the impact of CCTV on jurors in sexual assault cases) came to some surprising conclusions. Although their goal was to obtain details as to whether the use of CCTV affects a juror's decision-making, what they found was that the mode of presentation made little difference. What *did*, however, make a profound difference was the pre-existing attitudes jurors had before entering the courtroom:

One of the key insights obtained during this study was the high degree to which many jurors believed many of the 'myths' which surround rape in general. Acceptance of these myths means that many jurors have strong expectations about how a 'real' victim would behave before, during and after an alleged sexual assault. These expectations impact on their perceptions of the complainant's credibility.<sup>622</sup>

The study found that belief in these rape myths was predominantly, although not exclusively, found amongst male jurors, suggesting that there is a difference between male and female jurors as to what they believe constitutes 'normal' female behaviour in situations of sexual assault.<sup>623</sup> Women complainants have their behaviour weighed and questioned by jurors as to how it corresponds with what *they* believe is 'normal', despite rape, as a vicious and traumatic assault, being an experience and a crime not equally shared by both genders.<sup>624</sup>

For example, the Criminal Justice Sexual Offences Taskforce (CJSOT), commissioned by the NSW Attorney-General in 2004, summarised a study done by Melanie Heenan in 1997.<sup>625</sup> This study found that factors influencing jury-decision making in a sexual assault trials included: "location, the level of physical injury sustained by the victim, admissions of guilt by the accused, whether a medical examination was conducted and community attitudes towards sexual violence".<sup>626</sup> The CJSOT report went on to note that: "[t]he factors outlined by

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<sup>622</sup> Taylor and Joudo, *Impact of Pre-Recorded Video*, xii.

<sup>623</sup> "Identifying the pre-existing attitudes, biases and expectations which jurors bring into the courtroom and the types of myths surrounding sexual assault that some jurors adhere to would also greatly assist in understanding what types of attitudes lead to what types of outcomes in sexual assault trials. This would also allow avenues for changing beliefs based on myths and incorrect stereotypes through targeted education and awareness campaigns". Taylor and Joudo, *Impact of Pre-Recorded Video*, xiii.

<sup>624</sup> This is not to overlook the rape of a man by another man. However, this crime happens far less frequently than male attacks on women.

<sup>625</sup> M. Heenan, "Sex Crimes and the Criminal Justice System," *The Australian Feminist Law Journal* 9 (1997).

<sup>626</sup> Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (Sydney: New South Wales Attorney General's Department, December 2005), 15.

Heenan seem to be consistent with myths about what constitutes real ‘rape’. They may both reflect and reinforce stereotyped assumptions about women and women’s sexuality”.<sup>627</sup>

Corey Rayburn acknowledges these preconceived ideas as to what ‘normal’ behaviour during a rape is, or who a ‘normal’ rape victim is. He associates these ‘rape myths’ with an American culture he argues is “saturated with rape imagery and pornography”.<sup>628</sup> For Rayburn, construction of ideas of victimhood and sexual assault is primarily determined by television. He argues that every day potential jurors are surrounded with crime shows that often portray highly aggressive and fantastically brutal cases of sexual assault. This means that a jury’s expectation of what sexual assault *is* or how a woman *should* behave is not being met because of the overblown “rape pornography” of crime shows. Rayburn argues that defence counsel use these larger cultural myths and norms to attempt to place the complainant within a certain role: “defence attorneys use the predefined roles and certain rhetorical techniques to compare a particular complainant’s experience with those in society’s collective consciousness”.<sup>629</sup>

However, although Rayburn discusses only defence lawyers, the prosecution is also attempting to portray the complainant in a certain way—as a victim. A complainant’s credibility will be largely determined by how well she can fit the mould of what a jury would consider a credible ‘victim’, despite having limited scope to determine her own performance. The more of a victim a complainant seems, the more likely she is to be believed. For example, the CJSOT study noted that:

Cases were significantly more likely to proceed when: the victim was injured; the victim physically expressed non-consent; the assault was more severe; there was additional evidence linking the defendant to the assault; the defendant used force; the defendant was non-Caucasian; and the defendant was a stranger.<sup>630</sup>

However, when a complainant’s behaviour is not sufficiently victim-like according to prevailing social myths, this can affect whether or not the matter proceeds to trial. As the CJSOT study noted, again drawing on Heenan’s study: “As the probability of conviction

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<sup>627</sup> Ibid., 16.

<sup>628</sup> Rayburn, “To Catch a Sex Thief,” 468.

<sup>629</sup> Ibid., 440.

<sup>630</sup> CJSOT, 17.



relies on the victim's ability to articulate the events and convince a jury that a crime occurred, prosecutors will be reluctant to proceed if the complainant's credibility, character or behaviour is questionable, or open to adverse inference".<sup>631</sup> Stereotypical beliefs about what 'appropriate' victim behaviour is can damage the credibility of a complainant during the trial.

### *Credibility*

Denise Lievore conducted a survey of Crown Prosecutors across five Australian jurisdictions where prosecutors were specifically asked what enhanced a complainant's credibility in a sexual assault trial.<sup>632</sup> The most important factor for prosecutors was confrontation, where a complainant must 'face off' her accusers. Following this, consistency was considered vital: consistency in her statements, consistency between her statements and other witness statements (if there are any), and consistency of her "post-assault behaviour". For the prosecutors this consistency was best communicated by not "gilding the lily", and by giving her account as simply as possible.<sup>633</sup>

The prosecutors' survey suggests that they believe a complainant telling the story as simply as possible shows that "she is herself—she acts, speaks and dresses as she usually would".<sup>634</sup> However, as we have seen, consistency in terms of legal memory is a relatively artificial construction.<sup>635</sup> The complainant's examination-in-chief, while seemingly less fettered than cross-examination where she is answering the questions of a hostile defence lawyer, still involves their satellite narrative being made to 'fit' the master narrative of the prosecutor. Cross-examination is therefore not as much an attempt to distort their true memory as to attempt to impose a new interpretation—a new master narrative on the witness. This may be a

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<sup>631</sup> Ibid.

<sup>632</sup> Denise Lievore, "Victim Credibility in Adult Sexual Assault Cases," *Trends and Issues in Crime and Criminal Justice* 288 (Canberra: Australian Institute of Criminology, 2004).

<sup>633</sup> Ibid., 4.

<sup>634</sup> Ibid., 4.

<sup>635</sup> Inconsistencies in truthful accounts can be the result of a victim's difficulty in understanding lawyers' language, questions asked in a non-chronological order, or because particular types of evidence are inadmissible. Mature, intelligent victims with good English skills might be better able to understand what they are being asked, to respond to questions clearly and effectively and to cope with cross-examination.

highly confusing experience for any witness as it bears little relationship to what might be a more appropriate understanding of memory as partial, complex and fragmented.

The legal model of truth seeking presupposes that legal memories must be retrieved in order, and intact.<sup>636</sup> Any contradiction from a confused witness allows counsel to imply that the witness does not remember at all, or they are lying. A complainant telling her story as simply as possible involves translating experience into an artificial chronological frame. There is nothing natural about this. A complainant must seem to answer honestly, simply and immediately, but this is achieved by previous rehearsal of her “spontaneity”.<sup>637</sup> Yet according to prosecutors, it cannot be overly rehearsed: “internal consistency is important, but little inconsistencies can add to veracity rather than detract from it. Everyone uses somewhat different words from one time to the next of telling a story, but if the victim’s story doesn’t budge from a rote form, it could give rise to the suggestion of fabrication”.<sup>638</sup>

Here we see the spectre of theatricality being raised by prosecutors: where women are accused of ‘performing’ in the courtroom, rather than telling their story ‘simply’. The requirements here reflect the desirability of immediacy of a witness’ response. Consequently, according to prosecutors, a complainant must perform her story as if she were reciting it for the first time. The complainant must behave ‘like herself’. Yet how she performs, while she relates a traumatic, artificially constructed story in the presence of her alleged rapists, under the eyes of numerous people, and under cross-examination, is highly prescribed and suggests playing to the jury/audience. For the prosecutors, a complainant must be emotional so she is not perceived as robotic, but she is not allowed to become “hysterical” because this will affect the appearance of her consistency. She cannot be overly angry as this potentially overshadows her emphasised position as “victim”.<sup>639</sup>

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<sup>636</sup> She also needs to “accurately and coherently describe the events”, and “focus on elements of the offence [...] rather than expressing her opinion of or feeling towards the defendant”. Lievore, “Victim Credibility,” 4.

<sup>637</sup> Ibid., 4.

<sup>638</sup> Ibid., 4.

<sup>639</sup> Added to these constraints are these further crown prosecutor suggestions. In terms of her ‘demeanour’ (and here already it is notable that in sexual assault trials it is the *complainant* whose demeanour is most important, rather than the defendant): “she is not aggressive, or overly ‘smart’, or argumentative towards the defence”. It is also important that “she is confident and relaxed”, and that she is angry but not ‘too’ angry if there is a prior relationship (‘too angry’ indicates a motive to lie). Rather it is good if “she shows some distress, but is not

Ultimately, in a sexual assault trial the ‘rape script’ a witness/complainant is expected to follow is contradictory. As the victim, she must be sympathetic and emotional: that is, she must play her part in front of the jury as a wronged, upset, traumatized woman. She must unequivocally gain the sympathy of everyone in the room as a victim of unwanted sexual violence. Yet as a *witness*, she must primarily be credible and cogent and she must relate what happened to her in clear, perfectly consistent chronological order that is easy to follow. However if she is upset and therefore inconsistent the defence barrister’s job is to leap on any inconsistency and try to draw an admission by demonstrating that the complainant has lied or her memory is at fault. This will potentially discredit her before the jury. And it is important not to forget that above and beyond all of this the complainant is relating something highly traumatic and intensely personal in a room full of strangers, but too much confidence or too much fear will reflect badly on her as well.

To diminish the complainant’s credibility, a defence advocate must construct his or her cross-examination around the issue of ‘consent’—essentially, what he or she must do is debunk the complainant’s alleged status as a victim of a crime. For instance:

Defence counsel	<i>Didn't it all start when you got between that man's legs Miss?</i>
Complainant	<i>No.</i>
Defence counsel	<i>You drove up and down the western suburbs with you sitting between that man's legs in the passenger seat...and during none of this time do you remember where his hands were?</i>
Complainant	<i>They weren't on me.</i>
Defence counsel	<i>It didn't matter to you that in order to sit in front you had to sit between a strange man's legs?</i>
Complainant	<i>No.</i> <sup>640</sup>

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withdrawn or numbed by having to recall and relate the offence”, and she “informs herself about how to withstand cross-examination”. *Ibid.*, 4.

<sup>640</sup> NSW Department of Women, *Heroines of Fortitude*, 161.

In the transcript above, the defence counsel uses the complainant's prior behaviour to intimate that she had behaved suggestively and consequently provoked the alleged attack. The advocate clearly implies that most women would not sit between a "strange man's legs", because they would know that this was a sexual invitation. The defence counsel later deliberately rephrases this to "sitting on his lap" to suggest that the complainant knew she was sitting on "his penis", and consequently was already participating in some form of sexual foreplay.<sup>641</sup> By doing so, the defence counsel constructs a narrative where there is prior consensual sexual contact before the alleged attack; consequently, there could not have been a later sexual assault.

Denise Lievore goes on to say that "a jury might accept that a young woman left a party with a stranger because she is naïve and takes men at face value, whereas an older woman might be expected to be more aware and less trusting".<sup>642</sup> Again, it is primarily the complainant's responsibility to keep herself out of 'harm's way'. For instance, the prosecutors in Lievore's survey also stressed how important it was that a complainant did not underestimate her alcohol consumption as this would be used to portray her as less innocent by the defence.<sup>643</sup> Alternatively, defence counsel may take another approach, and imply that a complainant is acting: faking the emotional impact to 'milk' her 'victim' status:

Defence counsel	<i>Has it been suggested to you how to give your evidence?</i>
Complainant	<i>No Sir.</i>
Defence counsel	<i>Has anybody suggested to you that in giving your evidence you should let your emotions hang out—has anyone suggested that?</i>
Complainant	<i>No Sir.</i>
Defence counsel	<i>Has anybody suggested to you that if you become upset you should let it all hang out?</i>

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<sup>641</sup> Ibid., 161.

<sup>642</sup> Lievore, 5.

<sup>643</sup> The most recent legislation (December 2007) amended the definition of consent including specific provision that states that "self-induced intoxication" is not relevant to the investigation of consent. See *Crimes Act 1900* (NSW) s 61HA.

Complainant

*No Sir. I have just been told to hang in there.*<sup>644</sup>

Again, we are presented with the idea of deviant theatricality, whereby if a woman complainant's testimony deviates from presupposed ideas of how she should behave on the stand, she is being 'theatrical' and therefore is probably lying, rather than being 'natural' or 'who she is' on the stand. The dichotomy of female behaviour constructed in the above extract—the victim or the vamp—is exacerbated by an adversarial system that relies on partisan narrative construction. This is reflected by the long history of questioning about the sexual experience or dress of the complainant at the time of the offence. Such questioning is technically disallowed but nonetheless continues:

Defence counsel

*You also had the white top on that's shown in the photograph?*

Complainant

*Yes.*

Defence counsel

*That material is rather flimsy—is that true?*

Complainant

*Yes.*

Defence counsel

*And you had a body suit underneath the shirt?*

Complainant

*Yes.*<sup>645</sup>

This line of questioning is a very simplistic attempt to debunk a complainant's credibility as a victim by again implying that, as the complainant was wearing 'provocative' clothing, she was tacitly consenting to sexual intercourse. Although defence advocates are technically no longer allowed to cross-examine the complainant on what she is wearing, by integrating it into the background narrative, many are able to argue that this is illustrative of post- or pre-alleged assault behaviour and consequently goes to issues of consent and credibility. Indeed, in 1995 *Heroines of Fortitude* observed that Crown Prosecutors often allowed this line of questioning, in the hope that its callousness would turn the jury against the defence.

It is only in 2008 that, for the first time, there has been discussion about introducing measures to make a defence advocate accountable if he or she harasses a witness on the stand. The need

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<sup>644</sup> NSW Department of Women, *Heroines of Fortitude*, 175.

<sup>645</sup> *Ibid.*, 163.

to institute this accountability reflects the ineffectual nature of prior legislative reforms.<sup>646</sup> For example, when in 2005, the “improper questioning” provision of the *Evidence Act 1995* (NSW) was replaced with s 275A of the *Criminal Procedure Act 1986* (NSW), an onus was for the first time put on the presiding judge to stop questioning relating to sexual history or experience. However, judges were frequently reluctant to intervene, as they did not wish to give grounds for later appeals by the defence over unfair restrictions on cross-examination.<sup>647</sup>

This leads us to an important point: the complainant stands alone. She, unlike the accused, has no mediator or representative to speak for her. It is the crown’s goal to secure a conviction, not to protect her from undue trauma. Consequently, although a prosecutor elicits a master narrative of the complainant’s experience, the prosecutor is not an agent for her. Rather the prosecutor acts for the State. What is particularly difficult about a complainant’s role is that it is in her interest to have no agency and to let herself be cast as a victim (even though she has little say in the process). Every chance she has to win her case (never very high) relies on her being a victim.<sup>648</sup> Her credibility can only be sustained if she is painted as a

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<sup>646</sup> Evidence Act 1995 (NSW) s 41 protected against “improper questioning” which included “misleading” questioning or “unduly annoying, harassing, intimidating, offensive, oppressive or repetitive” questioning. This provision was replaced in August 2005 with s 275A of the *Criminal Procedure Act (1986)* NSW, outlined below.

<sup>647</sup> Amendment 275A includes two additions to the usual “improper questioning” including forbidding questioning a witness “in a manner or tone that is belittling, insulting or otherwise inappropriate” and using questions that have “no basis other than a sexist, racial, cultural or ethnic stereotype”. Even more importantly, the language in s 41 of the Evidence Act states that the court ‘may disallow’ improper questioning, whereas 275A states clearly that a court ‘must disallow’ improper questioning. However, although this puts the onus on the courts, if an “improper” question is asked and no one objects at the time, an appeal cannot be mounted on the basis of this. Two public defenders provided written submissions to the NSW Law Reform review of Section 275a, arguing that judges already have sufficient power to protect complainants from unwarranted questioning: “An unrepresented accused is not given free rein when questioning a complainant. Improper questioning is already covered by section 41 of the Evidence Act 1995 (NSW). Both the prosecution and the judge have the opportunity to prevent abusive or inappropriate questioning and no further protection is necessary”. NSWLRC, Unrepresented accused in sexual offence trials, [3.41] (footnote 83).

<sup>648</sup> “The Australian Bureau of Statistics estimates that 20% of women who are sexually assaulted report the assault. In 2005, there were 9,500 reports of sexual and indecent assault made to NSW Police. It is therefore estimated that 47,000 sex offences were committed in NSW in 2005. There are less than 450 convictions for sex offences annually. This means that about 1% of sex offences result in a conviction”. NSW Rape Crisis Centre,

victim who had no agency at the time of the alleged crime and very little on the stand as well. It is not surprising then that a complainant might find the process revictimising as the adversarial criminal trial by default creates female sexual assault victims who are passive, helpless, and emotional (although not hysterical).<sup>649</sup>

At the end of her survey of prosecutors, Denise Lievore concludes that:

This study cannot rule out the possibility that prosecutor's assessments of victim credibility may be influenced by gender stereotypes, as even prosecutors who do not consciously ascribe to stereotypes may operate on unexamined suppositions. For example, interviewees commonly noted that consistency in post-assault behaviour is an important criterion in assessing credibility. However, as there is no "typical" response to sexual assault, it is possible that typifications of appropriate post-assault behaviour may be based on stereotypical assumptions.<sup>650</sup>

Lievore, while acknowledging the dominance of these myths, claims in her study that "overall the prosecution and the defence don't use gender stereotypes to sway the jury; we would get short shrift from the judge".<sup>651</sup> However, I would dispute this. It seems more likely that because legal agents operating within the juridical field do not operate in an ethical vacuum, the preconceived ideas of jurors are to some degree shared by advocates in court. Although these advocates are testing evidence as they have been trained to, this unfortunately means it is in their interests (and to some degree their responsibility) in sexual assault cases to *use* these stereotypes to obtain acquittals for their clients.<sup>652</sup>

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*Annual Report 2005-2006*. See: [www.nswrapecrisis.com.au/Resources/Annual\\_Report\\_2006.pdf](http://www.nswrapecrisis.com.au/Resources/Annual_Report_2006.pdf). (Retrieved 4 June 2008).

<sup>649</sup> Until 1995, the inequity of a sexual assault complainant was aggravated by the dock statement. The dock statement is a historical carry over from the time when defendants were not allowed to be sworn as a witness, lest they imperil their immortal soul to save themselves. Consequently, a defendant was allowed to tell his or her story in full, and could not be cross-examined on what was said. However, a complainant (whose only status was as a sworn 'witness') could only tender evidence in examination-in-chief and was subjected to mandatory cross-examination.

<sup>650</sup> Lievore, 6.

<sup>651</sup> *Ibid.*, 5.

<sup>652</sup> "The importance of this finding is that jurors' beliefs about sexual assault and the expectations that they have *prior to entering the courtroom* about how rape victims behave or should behave impact on how they perceive and interpret a complainant and her testimony. This is extremely important because, as was shown in this study, perceived credibility of the complainant is strongly associated with perceptions of guilt". Taylor and Joudo, *Closed-Circuit Television Testimony*, 60, my italics.

### *The Burden of Performance*

The trauma of sexual assault trials is often argued to be the result of bad behaviour by defence counsel. Greens senator Lee Rhiannon commented in parliament: “Questioning by the defence is designed to be intimidating. It can be aggressive and humiliating in the hope of portraying the complainant as either ‘asking for it’ or lying”.<sup>653</sup> Whilst not seeking to excuse defence counsels’ behaviour, ‘positive intimidation’ (or, as we can recall from the NSW Barristers’ Rules, “judicious use of the coercive powers of the court”) and the use of ‘rape myths’ are part of an advocate’s arsenal when pursuing ‘persuasive storytelling’. In their quest to convince a jury, advocates can misrecognise the symbolic violence of this process because of their naturalisation of adversarial forms of evidence testing.

However, for advocates to disclaim all responsibility for traumatising or harassing witnesses by arguing that they are simply trying to win over a jury unfairly diminishes their responsibility for perpetuating these ideas. It is true, though, that this exploitation of rape myths *only* has efficacy if the jurors believe the myths the lawyer is tapping into: that of ‘asking for it’, or ‘secretly wanting it’. The trauma of cross-examination is not wholly reducible to bad behaviour by counsel because the success or failure of forms of evidence-testing can only be measured by the findings of a jury. This problematises claims by politicians that the juridical field entirely responsible: “the problems women face in sexual assault trials often stem from the defence team and the judiciary, not the audience in the courtroom”.<sup>654</sup> Although jurors’ expectations are largely formed prior to entering the courtroom, they are *activated* by the ‘storytelling’ symbolic violence of the advocate.<sup>655</sup>

I do not seek to excuse the behaviour of the defence advocates cited in this chapter, however it is worth considering that at least to some degree these advocates are doing what they have been taught to do. That is, they must uphold their duty to the court through correctly

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<sup>653</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 4 May 2005, 15523 (The Hon. Lee Rhiannon, NSW Greens Senator).

<sup>654</sup> *Ibid.*, 15523.

<sup>655</sup> This process is best explained by Bourdieu’s theory of *habitus* where we are constantly internalising and reproducing beliefs rather than having a clear distinction between our actions and our beliefs.



observing appropriate adversarial procedure, and they must ‘robustly’ pursue a client’s best interests and act in accordance with the standards of evidence-testing in the adversarial system. If a defence barrister’s (conscious) duty to his or her client is to secure an acquittal, he or she will pursue this through what he or she has learned is the method of eliciting the truth—pressure and confrontation, and attempts to secure admissions/impeachment. Rather than attributing the trauma experienced by victims of sexual assault under cross-examination to the lack of humanity of defence counsel, it is more useful to consider that the brutality routinely identified in sexual assault trials can at least be partly attributed to the fact that there is frequently a sole witness whose testimony is the only evidence tendered. Although one can choose to view this factor as making sexual assault trials exceptional, one can also argue that these trials are actually a far more revealing prism through which to view the sustained symbolic violence of cross-examination characteristic of adversarial practice.

The continued emphasis by the court on the ‘special’ nature of complainants as ‘vulnerable witnesses’ is misleading. This frame continues to internalise ‘shortcomings’ within sexual assault complainants. By doing so, this classification to some degree implies that sexual assault is a crime that an adversarial system finds difficult to try. By extension, a complainant’s experiences become framed as aberrant, outside the normal scope of experience. To some extent, this must reflect the problem of common law having been accrued over centuries of systematic inequality between men and women. The weight of case law is oriented around male experience as it is men who traditionally constituted jurors, litigants, legislators and legal agents.<sup>656</sup> Hence, ‘exceptional’ provisions are often required to deal with crimes perpetrated by men against women.<sup>657</sup>

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<sup>656</sup> A handful of examples of this male oriented legal scope include the fact that historically, although women could be indicted for criminal offences, they could not make a criminal complaint unless it related to the death of their husbands. In civil matters, women’s property and identity became dissolved into their husband upon marriage. In Australia, women were also not permitted on juries in South Australia until 1966. All of these examples of restrictions illustrate that common law, because of its very virtues of being shaped by those who contribute to it, will overwhelmingly have a history that is male-dominated. For more information about women’s rights in the Australian legal system, see Judith Mackinolty and Heather Radi, *In Pursuit of Justice: Australian Women and the Law, 1788-1979* (Sydney: Hale and Ironmonger, 1979).

<sup>657</sup> The male dominated history of the law has led to what common law understands as being ‘reasonable’ behaviour tending to be based on the male experience. For example, *Hall v Sheiban*, a case of sexual harassment before Justice Einfeld in 1988, was dismissed when he argued that “[w]omen with the normal experience of their own and others’ personal relationships and social lives involving considerable exchanges with other men

However, I argue that the ‘special’ nature of sexual assault trials stems largely from cases coming down to the issue of consent, and there only being one witness (or two, including the defendant if he testifies). This means that live cross-examination in an open courtroom is the only form of evidence testing a jury witnesses.<sup>658</sup> Rather than making sexual assault trials unusual, in many ways sexual assault trials expose the framework of adversarial evidence testing. Without medical evidence, or expert testimony, the assumptions underlying the construction of juridical truth, based on symbolic violence and degrees of coercion, are laid bare. The gender stereotypes relying on women being classified as ‘victim’ or ‘vamp’ is largely due to the adversarial system of partisan structure of the trial that, by default, tends to create a binary opposition between the two possible scenarios of the prosecution and the defence as to what happened during an alleged sexual assault. The presupposition that a female rape complainant must be wholly innocent or wholly guilty is perpetuated in the mechanisms of adversarial trial.

The difficulties arising from sexual assault trials are not due to the weakness of the complainant. Rather the difficulties are to do with the contradiction at the heart of the adversarial trial. Confrontation and live cross-examination are the primary sources of abuse and trauma for sexual assault trial complainants in the courtroom. Yet it is these moments of performance—the most traumatic aspects of trial—that the jury latches onto, in terms of how they determine the outcome of a trial.<sup>659</sup>

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and women, know very well the various ways in which some men occasionally behave”. Consequently having ‘reasonable’ knowledge of male behaviour should mean a woman ought to ‘put up with it’. As Margaret Thornton argues, the male experience in the work place *and in the courtroom* is the benchmark in terms of what is and is not ‘reasonable’ and a woman must adapt her behaviour to accommodate this. See *Hall v Sheiban* (1989) 20 FCR 217; Margaret Thornton, “Sexual Harassment Losing Sight of Sex Discrimination,” *Melbourne University Law Review* 22(2002).

<sup>658</sup> However, as the CJSOT report recommended, new provisions since 2006 allow for the closing of the court when a sexual assault complainant testifies (*Criminal Procedure Act 1986* [NSW] s 291) and automatic use of CCTV testimony (*Criminal Procedure Act 1986* [NSW] s 306ZB). These changes will be discussed at the end of the chapter.

<sup>659</sup> “The worst thing, if you’re acting for a bloke, the worst thing to see in front of a jury is to have an 8 year-old girl crying while she’s talking about Daddy sticking his fingers up her bum [...] I’m in favour of it because I think it will help me get a bloke off”. Christine Eastwood and Wendy Patton, *The Experiences of Child*

The burden of performance, where it hinges on complainants being able to convince a jury of an accused's guilt or innocence despite high levels of constraint on their autonomy, poses serious impediments to the possibility of meaningful reform. Returning to the beginning of this chapter, then, amendment 294A rightly suggests that an accused rapist questioning a complainant would be unnecessarily traumatic. But the NSW Law Reform Commission and most other legal professionals, by treating the case of MSK and MAK as 'special', continue to overlook the very real trauma sustained day to day by every complainant who goes to court. This is not an exceptional situation; the "burden of performance" lies at the heart of collective belief in adversarial juridical truth.

### *The Way Forward*

The impetus for significant reform has only arisen relatively recently, with an influx of new legislation over the last five years.<sup>660</sup> In 2006, the NSW Bar Association held a meeting to educate barristers about the changes in sexual assault law. On arriving, each barrister received a thick booklet detailing the numerous changes occurring since 2003—when the Sydney 'gang rape trials' took place.<sup>661</sup> The booklet canvassed all the major reforms, which include provision for CCTV testimony, limitations on appropriate questioning, making sexual assault trials closed to the public, readmission of previous trial testimony via affidavit, and allowing a complainant a support person while they testified. After going through these amendments, a voice came from the back of the room:

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*Complainants of Sexual Abuse in the Criminal Justice System*, Trends and Issues Report No. 250 (Australian Institute of Criminology: Canberra, 2002), 76.

<sup>660</sup> There have been other sexual assault law reforms prior to this in NSW since the 1970s, such as the *Crimes (Sexual Assault) Amendment Act (1981)*, which defined different types of sexual assault. However, since 2003 at least 10 pieces of sexual assault law reform have passed through parliament, with more imminent at the time of writing (July, 2008). These reforms are arguably a direct result of the attention paid to the gang rape trials held in NSW in 2002 and 2003. Not long after these trials and the passing of 294A (amongst other reforms), the Criminal Justice Sexual Offences Taskforce was commissioned. Their report in January 2006 led to a series of further legislative changes.

<sup>661</sup> Alongside the trials of the K brothers, there was another notorious gang rape trial that saw one defendant, Bilal Skaf, sentenced to 55 years in prison. This was later reduced on appeal. For more information about the gang rape trials, see Kate Gleeson, "From Centenary to the Olympics, Gang Rape in Sydney," *Current Issues in Criminal Justice: Journal of the Institute of Criminology* 16.2 (2004).

“Why bother having a trial?”

The barrister’s question—why bother having a trial?—voices, in very blunt terms, the crux of the problem when it comes to sexual assault trial procedure. This is not a question of the lack of political will to change the law. As I have outlined, law reform is not only possible but, in New South Wales, relatively frequent in recent times. Since 2003, there have been multiple changes to the *Criminal Procedure Act 1986* (NSW) and the *Evidence Act 1995* (NSW).<sup>662</sup> These amendments include such varied alterations to trial procedure as provision for a support person for a complainant when she gives evidence, admittance of previous trial testimony of a complainant should the trial be abandoned midway through proceedings, the automatic use of CCTV testimony for a complainant, and increased restrictions on “improper questioning”.<sup>663</sup>

However, all of these provisions attempt to minimise the burden of performance by downplaying the adversarial characteristics of our criminal trial.<sup>664</sup> In so doing, these reforms

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<sup>662</sup> The *Criminal Procedure Act 1986* (NSW) contains amendments relating to sexual assault trials between ss 290-306ZP. To track when these amendments were passed, go to: [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/cpa1986188/notes.html](http://www.austlii.edu.au/au/legis/nsw/consol_act/cpa1986188/notes.html)

<sup>663</sup> Sections 306A-306G of the *Criminal Procedure Act 1986* (NSW), adopted in 2005, allow the use of ‘recycled’ complainant testimony in re-trial processes. This amendment means complainants do not have to repeatedly testify again in open court, should there be a mistrial or a re-trial. This amendment was extended even further in 2006 from re-admittance of trial testimony to all evidence tendered by a complainant. As previously noted, cross-examination was also reformed with amendment 275A implemented in 2004 which significantly widened the terms of what was ‘inappropriate’ questioning as well as put the onus on the court for the first time to prevent such questioning taking place. This was modified again to make barristers accountable for breaching the provisions of the amendment.

<sup>664</sup> For example, after the passing of amendment 294A (the restriction banning direct cross-examination of a complainant by an accused) the first major piece of sexual assault legislative reform passed by NSW parliament was provision for ‘alternative arrangements’ for complainant testimony, either via CCTV testimony or via screens. The amendment passed in 2004 allowed a complainant to have sway over who is in her line of vision when testifying and is specifically designed so that a complainant does not have to see the defendant when testifying, although he can still see her. Although some provision existed prior to this amendment, it was largely dependent on the technological capabilities of the courtroom and had to be specifically argued for by the prosecution. Amendment 294B of the *Criminal Procedure Act 1986* (NSW) was passed on 12 August 2004. This is because, prior to this *Heroines of Fortitude*, for example, found that CCTV testimony (although

tamper with long-standing means of evidence-testing that are central to legal and popular belief as to how ‘truth’ is determined in the trial. Stephen Odgers SC, president of the NSW Bar Council observed when commenting on the automatic provision for CCTV outlined in a 2003 amendment:

Some Crown prosecutors would prefer it if complainants testify, partly because they might be concerned that a jury will draw an adverse comparison with an accused who does go in the witness box in front of them and testifies, and partly because I think they think that you'll get more empathy with a complainant who's actually in front of the jury, who they can see clearly, and assess their body language, particularly in response to cross examination.<sup>665</sup>

Odgers is a defence barrister and an outspoken critic of sexual assault law reform. However his comment that a “jury will draw an adverse comparison with an accused who *does* go in the witness box” highlights the difficulty of sexual assault law reform. Minimisation of confrontation is a double-edged sword, as observed in the previous chapter. The lessening of trauma sustained by the complainant is offset by the possibility that jurors are less likely to believe her if she is not present in the courtroom when testifying. This risks harming the complainant’s chances of securing a conviction.

An alternative possibility mooted in regards to sexual assault trials has been the formation of a specialised sex court, similar to the Family Court. The danger with this idea is that it is again internalising the problem as being the fault of ‘vulnerable witnesses’. The increasing number of people being classified as ‘vulnerable witnesses’ means that there is no limit to this kind of reform and that eventually there may be a kind of splintering of criminal trials into numerous specialised courts. Alongside the potential discrediting of a complainant is the opposite, equally undesirable, effect: further disadvantaging of the criminal defendant. The right of a defendant to ‘confront’ witnesses against him or her is so entrenched in our values surrounding the trial (and, of course, within common law) that reforms tampering with this confrontation can severely discredit the apparent fairness of a trial as well as the presumption

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available as an option) was only used in 4 out of 108 cases. NSW Department of Women, *Heroines of Fortitude*, 135. There was a further provision added in 2006 which outlines the automatic ‘right’ of vulnerable witnesses to testify via CCTV. See: *Criminal Procedure Act 1986* (NSW) s 306ZB.

<sup>665</sup> Stephen Odgers SC quoted in: “Sexual Assault Victims Need Not Face Court, Report Says,” *The World Today*, ABC Radio, first broadcast Tuesday 22 November, 2005. Transcript retrieved 10 July 2008 from: <http://www.abc.net.au/worldtoday/content/2005/s1514197.htm>

of innocence. Attempts to increase the conviction rate through specialised sex courts may see higher conviction rates at the cost of belief in their ability to determine a trial fairly. As Arthur Chesterfield Evans observed, when debating the merits of amendment 294A:

It is of concern that we continue to debate reactive legislation. If a bill is introduced because of a specific case, it may be that it has not been thought through as carefully as it should have been. In this case it is a question of balancing the rights of the accused with the rights of the victims. As in all these cases, we must be careful to ensure that the rights of the accused are not destroyed by the assumption that he must have committed the offence and, therefore, we want a painless conviction—an assumption that prejudices the situation.<sup>666</sup>

There seem to be no satisfactory answers here. Judge Knox of the District Court of NSW commented at the Bar Association meeting that sexual assault law reform was the fore-runner of any kind of law reform. He claimed that “the dimensions of criminal law are being stretched” and that sexual assault law reform was the “vanguard in the way trials are conducted [...]”. He concluded by saying: “I believe we’ll move away from the adversarial system”.<sup>667</sup>

It is well beyond the scope of this thesis to predict the future direction of the adversarial criminal trial, but it is certainly true that sexual assault law reform raises far broader questions than how to deal with a small and ‘exceptional’ part of criminal legislation. Christine Eastwood observes that:

It is interesting that some lawyers consider the legal system to be so fragile, that *any* suggestion of reform is seen as a threat. Perhaps the central paradigms of traditional jurisprudence are not as unassailable as some would argue. The falsity of claims that the law is objective and neutral, that there is equal treatment of all before the law, and that the truth in any matter can be determined by legal reasoning have been exposed by numerous legal scholars [...]. Such a view is self-deluding and indicative of law’s overinflated view of itself.<sup>668</sup>

Yet as I have outlined throughout this thesis, both legal agents and laypersons *believe* in the model currently in practice. Eastwood suggests that resistance to reform comes from wilful

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<sup>666</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 3 September 2003, 3030 (The Hon. Dr Arthur Chesterfield Evans).

<sup>667</sup> Remarks made by Justice Brian Knox at a NSW Bar Association Meeting, June 2006.

<sup>668</sup> Christine Eastwood and Wendy Patton, *The Experience of Child Complainants of Sexual Abuse in the Justice System*, Report No. 23 (Canberra: Criminology Research Council, July 2002), 131.

blindness, but the role of *habitus* is a better way of understanding how we have all to some degree naturalised, relatively unconsciously, methods of evidence-testing based on confrontation. Sexual assault trials are not exceptional, rather they expose the centrality of performance in the production of adversarial juridical truth, as well as the concomitant abuses that associations between ‘truth’ and ‘performance’ may carry with it.

Instead of treating sexual assault trial experiences as exceptional, effective reform would need to reconsider the adversarial model of juridical truth, and question the association between liveness, confrontation and truth-telling. However, this is not simply a matter of ‘reactive’ legislative reform, it also involves dismantling beliefs entrenched over nearly a thousand years. The misrecognition of how important performance is to adversarial criminal trial (due at least partially to a conscious distaste of its association with acting) seriously impedes sustainable reform to trial procedure.

## Conclusion

Performance implicates the real through the presence of living bodies.

Peggy Phelan<sup>669</sup>

[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as essential to a fair trial in a criminal prosecution [...] It is always more difficult to tell a lie about a person “to his face” than “behind his back”.

Coy v Iowa<sup>670</sup>

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<sup>669</sup> Phelan, *Unmarked*, 148.

<sup>670</sup> *Coy v Iowa*, 487 US 1012, 1017 (1988).



### *Trials, Truth-telling and the Performing Body*

The role of performance in the adversarial criminal jury trial goes well beyond ‘mere’ theatrics. Rather, live performance is a constitutive feature of criminal trials. The method by which evidence is presented and tested in the adversarial system is predicated on an underlying belief in the link between ‘liveness’ and truth-telling. This linkage means that we, including both members of the public and legal agents, put great store in evidence that is tested live in the courtroom and testimony that is delivered in person in front of other people. We also believe that a jury is best positioned to ascertain the truth of a matter by being able to see trial participants and legal agents *in person*.

As I have shown throughout this thesis, however, the evidence for this underlying belief in the link between live presence and truth-telling is essentially inferential. This is partly a question of terminology. As I stated at the very beginning of this thesis, the term ‘performance’ simply does not enter the legal lexicon. Instead, the legal value of what I consider ‘live performance’ is embedded in arguments regarding ‘oral evidence-testing’, ‘the open trial’, ‘immediacy’, ‘demeanour’ and ‘confrontation’. Largely, however, the lack of direct discussion about the value of live performance is because it is only when traditional means of evidence-testing that rely on live performance are interfered with that people begin to articulate what *value* they perceive these practices to have. When this happens, we hear voices begin to try and account for what might happen in this shared collective performative space that *could not happen any other way*.

Often these reasons can be quite vague. For example, studies into the use of mediatised technology have shown that, we are, on the whole, more inclined to believe in someone’s evidence if they are in front of us, rather than if they are testifying remotely, but that we cannot necessarily explicitly identify why this is so. The reasons can also be slightly esoteric, such as when the U.S. Supreme Court judges in *Coy v Iowa*, (as cited in the epigraph to this chapter) argue that it is “human nature” to believe that it is more difficult to lie in person rather than remotely. Yet even the most rational legal agents, who dispute any simplistic link between liveness and truth-telling, concede that the live presence of all participants in the

same space is a safeguard that generally functions to make the trial safer and fairer. For example Justice Michael Kirby, who disavows any ‘magical’ belief in the jury to assess the demeanour of a witness, also argues (in another context) that

[t]he principle of an open trial in public, which is such a hallmark of our system of justice, is not a shibboleth. It exists for a purpose. That purpose is publicly to demonstrate to all who may be concerned the correctness and the justice of the court's determination according to law.<sup>671</sup>

For Kirby, and many other legal agents and members of the public, the continued enactment of the live adversarial trial is a means of ensuring the fairest outcome possible. As Kirby makes explicit, too, the ‘open trial’ does not just ensure a fair resolution to a particular conflict. The open trial is a public demonstration of the justice of adversarial practice in general. Repeated enactment of the live trial both sustains and perpetuates public and juridical belief in the trial as source of justice.

The trial is thus a collective performance of belief. Yet, as the analysis of sexual assault trial practice in the previous chapter makes explicit, this collective performance is not a transparent demonstration of democratic principles. The repeated performance of the trial maintains and naturalises the inequities between lay and law that is embedded in trial procedure. The trial involves a significant degree of symbolic violence, coercion and relatively unconscious exploitation by legal agents of laypersons’ dependence. This *performance of tradition* results in sometimes brutal experiences for trial participants. Ultimately, this potential for trauma and brutality may actually militate *against* the best means of evidence available. The use of intimidation can result in witnesses being unable to maintain their credibility in a courtroom and consequently lead to an unjust outcome.

What is truly problematic about this inequity is that it is very difficult to resolve. Adversarial evidence-testing is not merely a methodology, or a series of tools to get to an outcome; rather it is at the heart of collective belief in truth-telling. So long as we believe live confrontation and evidence testing is more likely to lead to the truth, meaningful reform is doomed to fail. Alongside this, so long as legal agents fail to understand their own behaviour as coercive, the symbolic violence of evidence-testing will continue unabated. Ultimately, reform can only occur with the alteration of belief. Yet this is an enormous ask. Because of the preconscious

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<sup>671</sup> *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414, 417 (Kirby P).

nature of *habitus*, the reflexivity required for agents to be able to examine the logics that operate within their own field is rare. So it is unlikely legal agents will question the methods by which they construct narratives in the courtroom. The trial is also ‘practically obscure’—a practice at times arcane, and generally opaque in understanding to non-legal agents. This means laypersons are unlikely to question their dependence on legal agents. Beliefs that have been shaped over a thousand years of practice cannot be altered overnight.

In addition to this, finally, there are the positive effects of the *performance of tradition*. I have frequently stressed that ‘The Law’ is not a reified ideal, but rather formed by the interactions of juridical agents and consequently fallible and contingent. Similarly, the trial is not a transcendental institution of justice. Rather it is a practice of a particular field with its own specific rules. But we must believe that the trial is more than this if ‘The Law’ is to fulfil its purpose. It is absolutely necessary for ‘The Law’ to maintain its exalted status if we are to continue to invest and reinvest social belief in legal processes that are valued as representative of a liberal and democratic society. What, in the end, is the alternative? This leaves us with no easy answers: so much of our collective belief in the trial relies upon the continuation of the present model of evidence-testing. This very model is also what continues to marginalise and silence defendants and other lay participants in the trial. Ultimately, as I have emphasised in this thesis, what is at stake is collective belief. In the adversarial criminal jury trial, live performance is a double-edged sword.

I cannot end this thesis with any simple summation or suggestion as to how trial procedure might be improved, as alterations in collective belief cannot come about overnight. I can, however, end on a slightly optimistic note. While I have been critical of the ways in which performance is simultaneously exploited and overlooked in this thesis, many positive aspects of the courtroom process—openness and degrees of accountability—are also ensured by the trial’s emphasis on the ‘live’. It is easy to overstate the ‘openness’ of the ‘open trial’, but our collective belief that live presence leads to a more ‘truthful’ outcome means we still keep the courtroom doors open; this, at least, will always be one of the means by which we distance ourselves from the worst excesses of totalitarian governments. As Sadakat Kadri commented: “Every prosecution is a performance of communal ideas about justice—and exploitable though the display is, the risks of a show trial are incomparably preferable to the

silence of a no-trial”.<sup>672</sup>

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<sup>672</sup> Sadakat Kadri, “Better and Worse Worst: *The Trial in American Life* by Robert Ferguson, a Review”, *London Review of Books* 24 May 2007, 17-18.

## Table of Cases

### *Australia*

*Butera v DPP* (1987) 164 CLR 180.

*Crofts v The Queen* (1996) 186 CLR 427.

*Doney v The Queen* (1990) 171 CLR 207.

*Hall v Sheiban* (1989) 20 FCR 217.

*Gonzales v R* [2007] NSW CCA 321.

*Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414.

*Hinch v Attorney-General (Vic)* (1987) 164 CLR 15.

*John Fairfax Group Pty Ltd v Local Court* (1991) 59 A Crim R 68.

*Johnson v Johnson* (2000) 74 A.L.J.R. 1380.

*Libke v The Queen* (2007) 230 CLR 559.

*Lyons and Lyons v R* (1992) 64 A Crim R 101.

*Makucha v Brian Tucker Associates Pty Ltd* [2005] NSWCA 397.

*McCullough v R* (1982) 6 A Crim R 274.

*NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470.

*Ratten v The Queen* (1974) 131 CLR 510.

*Re Andrew Dunn and the Morning Bulletin Ltd* [1932] Sr R Qd 1.

*R v Billings* [1961] VR 127.

*R v Laws* 116 (2000) A Crim R 63.

*R v Lewis* [2001] NSWCCA 345.

*R v MSK* (2004) 148 A Crim R 453.

*R v MAK* [2005] NSWCCA 369.

*R v MAK* [2006] NSWCCA 381.

*R v Morgan* (1993) 30 NSWLR 543.

*Stack v Western Australia* (2004) 151 A Crim R 112.

*Web and Hay v The Queen* (1994) 181 CLR 41.

### **Canada**

*Edmonton Journal v Alberta (Attorney General)* [1989] 2 SCR 1326.

### **New Zealand**

*R v Roulston* (1976) 2 NZLR 644.

### **Scotland**

*BBC Petitioners (No 1)* 2000 JC 419.

*BBC Petitioners (No. 2)* 2000 JC 419.

### **United States**

*Chandler v Florida*, 449 US 560 (1981).

*Coy v Iowa*, 487 US 1020 (1988).

*Department of Justice v Reporters Comm. For Freedom of Press*, 489 U.S. 749 (1989).

*Estes v Texas*, 318 US 532 (1965).

*Levine v United States*, 362 US 610 (1960).

*Maryland v Craig*, 497 US 836 (1990).

*Nebraska Press Assn v Stuart*, 427 US 539.

*Offutt v United States*, 348 US 11 (1954).

*Re Mathews and Ford* [1973] VR 199.

*Richmond Newspapers Inc v Virginia*, 448 US 555.

*State v Schmit*, 273 Minn. 78 (1966).

## Table of Legislation

### *Australia*

#### *Australian Constitution*

ch 3, 80.

#### *Crimes Act 1900 (NSW)*

ss 61H-J.

#### *Crimes Act 1958 (VIC)*

s 354.

#### *Criminal Appeal Act 1912 No. 16 (NSW)*

s 5.

#### *Criminal Procedure Act 1986 (NSW)*

ss 131, 201, 275A(1)-(9), 284(5), 285, 291, 293, 294, 294AA-294C, 306B, 306C, 306E, 306U-W, 306Y, 306Z(A)-(I).

#### *Evidence Act 1995 (NSW)*

ss 24, 24A, 26, 32, 33, 37, 42, 43, 89, 102-104, 140, 141, 143-144.

#### *Jury Act 1977 (NSW)*

ss 55C, 68

### *Scotland*

#### *Criminal Procedure Act 1995*

c 12, s 271.

### *United Kingdom*

#### *Youth Justice and Criminal Evidence Act (UK) 1999*

Part II, c 1, ss 16-33, Part III, c 34-37.

### *United States*

#### *United States Constitution*

amend V, VI, VII

## Bibliography

- Abel, Richard L. *The Making of the English Legal Profession 1800-1988*. Washington D.C: Beard Books, 1998.
- Abel-Smith, Brian, and Robert Stevens. *Lawyers and the Courts: a Sociological Study of the English Legal System 1750-1975*. London: Heinemann, 1967.
- Alexander, S. L. "Cameras in the Courtroom: a Case Study." *Judicature* 74.6 (1991): 307-313.
- "The Impact of *California v. Simpson* on Cameras in the Courtroom." *Judicature* 79.4 (1996): 169-175.
- Media and American Courts: a Reference Handbook*. Santa Barbara: ABC-CLIO, 2004.
- Alschuler, Albert W. "Narrative and Normativity: Comments on *The Origins of Adversary Criminal Trial*." *The Journal of Legal History* 26.1 (2005): 91-97.
- American Judicature Society. "Editorial: Cameras, the Courts and the Public." *Judicature* 86.1 (2002): 4.
- Anonymous. *Institutions in the lawes of Englande cum priuilegio*. London: J. Byddell, 1538.
- Anthes, Louis. "Publicly Deliberative Drama: the 1934 Mock Trial of Adolf Hitler for Crimes against Civilization." *The American Journal of Legal History* 42.4 (1998): 391-410.
- Arendt, Hannah. *Eichmann in Jerusalem: A Report on the Banality of Evil*. New York: Penguin Books, 1994.



- Aristotle. *Rhetoric and On Poetics*. Pennsylvania: Franklin University Press, 1981.
- Atiyah, P.S., and Robert Summers. *Form and Substance in Anglo-American Law*. Oxford: Oxford University Press, 1987.
- Atkinson, Duncan, and Tim Moloney. *Blackstone's Guide to the Criminal Procedure Rules*. Oxford, New York: Oxford University Press, 2005.
- Atkinson, J. Maxwell, and Paul Drew. *Order in Court: the Organisation of Verbal Interaction in Judicial Settings*. London : Macmillan, 1979.
- Atkyns, Robert Sir. *An enquiry into the power of dispensing with penal statutes together with some animadversions upon a book writ by Sir Edw. Herbert[ ... ]entituled, A short account of the authorities in law, upon which judgment was given in Sir Edward Hales's case / by Sir Robert Atkyns*. London: Printed for Timothy Goodwin, 1689.
- Auslander, Philip. "Towards a Concept of the Political in Postmodern Theatre." *Theatre Journal* 39.1 (1987): 20-34.
- *Liveness: Performance in a Mediatized Culture*. London and New York: Routledge, 1999.
- Austin, Arthur D. "Book Review: *What Makes Juries Listen* by Sonja Hamlin." *American Journal of Trial Advocacy* 8.3(1985): 509-514.
- Austin, J.L. *How to Do Things with Words*. Oxford: Oxford University Press, 1962.
- Australian Broadcasting Company Radio National. "How Courts Interact with the Media." *The Law Report*. 10 November 1998. Transcript available from:  
<http://www.abc.net.au/rn/talks/8.30/lawrpt/lstories /lr981110.htm>
- Australian Bureau of Statistics. *Legal Practices - Australia 2001-2002*. Catalogue No. 8667.0.
- Australian Law Reform Commission. *Children's Evidence by Video Link*. Discussion Paper No. 40, 1989.

- Children's Evidence: Closed Circuit TV*. Report No. 63, 1992.
- Interim: Equality Before the Law: Women's Access to the Legal System*. Report No. 67, 1994.
- Equality Before the Law: Justice for Women*. Report No. 69, 1994.
- The Unrepresented Party*. Background Paper No. 4, 1996.
- Seen and Not Heard: Priority for Children in the Legal Process*. Report No. 4, 1997.
- Managing Justice: A Review of the Federal Civil Justice System*. Report No. 89, 2000.
- Bacon, Francis. *The learned reading of Sir Francis Bacon, one of Her Majesties learned counsell at law, upon the statute of uses being his double reading to the honourable society of Grayes Inne*. London: Printed for Mathew Walbancke and Laurence Chapman, 1642.
- A charge given by the most eminent and learned Sr. Francis Bacon, Kt., late Lord Chancellor of England, at a sessions holden for the verge, in the reign of the late King James declaring the latitude of the jurisdiction thereof, and the offences therein inquireable, as well by the common-law, as by several statutes herein particularly mentioned*. London: Printed for Robert Pawley, 1662.
- Baker, J.H. *An Introduction to English Legal History*. London: Butterworths, 2002.
- Baldwin, Scott. *Art of advocacy: Direct examination*. New York: M. Bender, 1983.
- Ball, David. *Theater Tips and Strategies for Jury Trials*: National Institute of Trial Advocacy (N.I.T.A), 1997.
- Ball, Milner S. "The Play's the Thing: An Unscientific Reflection on the Rubric of Courtroom-as-Theater." *Stanford Law Review* 28 (1975): 81-115.
- "All the Law's a Stage." *Cardozo Studies in Law and Literature* 11.2 (1999): 215-221.
- Barber, Susanna. "The Problem of Prejudice: a New Approach to Assessing the Impact of Courtroom Cameras." *Judicature* 66 .6(1983): 248-255.

- “Televised Trials: Weighing Advantages against Disadvantages.” *The Justice System Journal* 10.3 (1985): 279-291.
- News Cameras in the Courtroom: A Free Press - Fair Trial Debate*. New Jersey: Ablex Publishing Company, 1987.
- Barish, Jonah. *The Anti-Theatrical Prejudice*. California: University of California Press, 1981.
- Barkai, John. “Nonverbal Communication from the Other Side: Speaking Body Language.” *San Diego Law Review* 27 (1990): 101-125.
- Barlow, Thomas, and Daniel Whitby. *A discourse concerning the laws ecclesiastical and civil made against hereticks by popes, emperors and kings, provincial and general councils, approved by the church of Rome with a preface against persecuting and destroying hereticks / by a cordial friend to the Protestant religion now by law established in these realms*. London: Printed for Thomas Basset, 1682.
- Baron, Jane B. “Resistance to stories.” *Southern California Law Review* 67.2(1994):55-285.
- “Law, Literature, and the Problems of Interdisciplinarity.” *Yale Law Journal* 108.5 (1999):1059-1085.
- Bartlett, Robert. *Trial By Fire and Water: The Medieval Judicial Ordeal*. Oxford: Clarendon Press, 1986.
- Baxandall, Michael. *Painting and experience in fifteenth century Italy: a primer in the social history of pictorial style*. Oxford: Clarendon Press, 1972.
- Baxter, Richard. *Compassionate counsel to all young men especially I. London apprentices, II. students of divinity, physick, and law, III. the sons of magistrates and rich men*. London: Printed by T.S. and are to be sold by B. Simmons and Jonath: Greenwood, 1681.

- Beattie, J.M. *Crime and the Courts in England 1660-1800*. Princeton, New Jersey: Princeton University Press, 1986.
- Bell, Ryan Brett, and Paula Odysseos. "Sex, Drugs and Court TV? How America's Increasing Interest in Trial Publicity Impacts our Lawyers and the Legal System." *The Georgetown Journal of Legal Ethics* 15.4(2002): 653-669.
- Bellamy, J.G. *The Criminal Trial in Later Medieval England*. Toronto: University of Toronto Press, 1998.
- Benedetti, Jean. *Stanislavski and the Actor*. London: Methuen Drama, 1998.
- Berg, David. *The Trial Lawyer: What it Takes to Win*. Chicago: American Bar Association, 2003.
- Berman, Paul Schiff. "An Observation and a Strange but True 'Tale': What Might the Historical Trials of Animals Tell Us About the Transformative Potential of Law in American Culture?" *Hastings Law Journal* 52 (2001):123-180.
- Bernstein, Mark I. , and Laurence R. Milstein. "Trial as Theater." *Trial* 33.10 (1997): 64-69.
- Bibas, Stephanos. "Transparency and Participation in Criminal Procedure." *New York University Law Review* 81.3 (2006): 911-966.
- Blackstone, William. *Commentaries on the Laws of England*. Vol. 1-4. Philadelphia: Charles & Peterson, 1860. Original edition 1765-1769.
- Blumenfeld, Allan, and Katherine James. *What Can Lawyers Learn from Actors?* National Institute of Trial Advocacy (N.I.T.A.) Act of Communication DVD Series, 1996.
- Blumenfeld, Alan, and Katherine James. "Use elements of storytelling." *Trial* 41.9 (2005):74.
- Bodin, Jean. *The six bookes of a common-weale. VVritten by I. Bodin a famous lawyer, and a man of great experience in matters of state. Out of the French and Latine copies, done into English, by Richard Knolles*. R.Knolles, ed. London: Printed by Adam Islip impensis G. Bishop, 1606.

- Boon, Andrew. *Advocacy*. London: Cavendish, 1993.
- Boulton, Sir William Whytehead. *A guide to conduct and etiquette at the bar of England and Wales* Edited by J. Webb and C. Maughan. 6th ed. ed, *Teaching lawyers' skills*  
London: Butterworths, 1996.
- Bourdieu, Pierre. "The Force of Law: Towards a Sociology of the Juridical Field." *Hastings Law Journal* 38.5 (1987): 814-853.
- *Pascalian Meditations*. Stanford: Stanford University Press, 1997.
- *On Television and Journalism* London: Pluto Press, 1998.
- Bourdieu, Pierre. *The Field Of Cultural Production: Essays on Arts and Literature* Edited by Randall Johnson. New York: Columbia University Press, 1993.
- Bourdieu, Pierre, and J.D. Wacquant. *An Invitation to Reflexive Sociology*. Cambridge: Polity Press, 1992.
- Brand, Paul. *The Origins of the English Legal Profession*. Oxford: Blackwell, 1992.
- Brennan, Mark, and Roslin E. Brennan. *Strange Language—Child Victims Under Cross-Examination*. Wagga Wagga: Riverina Murray Institute of Higher Education, 1988.
- Brinkelow, Henry. *The complaynt of Roderyck Mors, somtyme a gray fryre, vnto the parliament howse of Inghland his natural cuntry for the redresse of certen wicked lawes, euel customs ad [sic] cruell decreys. A table wherof thou shalt fynde in the nexte leafe*. Imprinted at Sauoy: Per Fransicum de Turona, 1542.
- Brody, Hon. Anita Blumstein, Hon. Ruth Bader Ginsburg, Hon. L. Priscilla Hall, Hon. Lindsey Miller-Lerman, Hon. Felice K Shea, and Hon. Rena Katz Uviller. "Women on the Bench." *Columbia Journal of Gender and Law* 12 (2003): 361-382.
- Brome, Alexander, and Samuel Butler. *A record in rithme being an essay towards the reformation of the law offer'd to the consideration of the committee appointed for that*

*purpose / vvritten by some men of law, at a time when they had little else to doe.*

[London : 1660?]

Bronitt, Simon , and Henry Mares. “The History and Theory of the Adversarial and Inquisitorial Systems of Law.” *LegalDate* 16.3 (2004):1-2.

Brook, Peter. *The Empty Space*. London: Penguin Books, 1968.

Brooke, Robert Sir, and John March. *Some new cases of the years and time of King Hen. 8. Edw. 6. and Qu: Mary; written out of the great abridgement, composed by Sir Robert Brook, Knight, &c. There dispersed in the titles, but here collected under years. And now translated into English by John March of Grays-Inn, Barrister. All which said cases are hy [sic]the translator methodised, and reduced alphabetically under their proper heads and titles. With an exact table of the principall matter contained therein.* Edited by A. S. Fitzherbert. London: Printed by T.N. for Richard Best, and John Place, and are to be sold at Grays-Inn gate, and Furnivals Inn-gate in Holborn, 1651.

Brooke, Lord Justice Henry. “The Legal and Policy Implications of Courtroom Technology; the Emerging English Experience.” *William and Mary Bill of Rights Journal* 12.3 (2004): 699-713.

Brooks, Peter, and Paul Gewirtz, eds. *Law's Stories : Narrative and Rhetoric in the Law*. New Haven and London: Yale University Press, 1996.

Bryson, John. *Evil Angels*. Sydney: Bantam Books, 1988.

——— “You, the Jury.” *The Bulletin* 6 (2004): 22-25.

Buis, Emiliano J. “How to Play Justice and Drama in Antiquity: Law and Theater in Athens as Performative Rituals.” *Florida Journal of International Law* 16.3 (2004):697-725.

Büllow-Møller, A.M. “Trial Evidence: Overt and Covert Communication in Court.” *International Journal of Applied Linguistics* 1.1 (1991): 38-60.

- Bunyan, John. *The doctrine of the law and grace unfolded, or, A discourse touching the law and grace the nature of the one and the nature of the other, shewing what they are as they are the two covenants ... wherein for the better understanding of the reader there is several questions answered touching the law and grace ... : also several titles set over the several truths contained in this book, for thy sooner finding of them, which are those following the epistle / published by that poor and contemptible creature, John Bunyan of Bedford.* London: Printed for Nath. Ponder, 1685.
- Burnet, Gilbert. *The life and death of Sir Matthew Hale, kt sometime Lord Chief Justice of His Majesties Court of Kings Bench. Written by Gilbert Burnett, D.D,* London: printed for William Shrowsbery, at the Bible in Duke-Lane, 1681.
- Burns, Elizabeth. *Theatricality: A Study of Convention in the Theatre and in Social Life.* New York: Harper and Row, 1973.
- Butler, Judith. *Gender Trouble: Feminism and the Subversion of Identity.* New York: Routledge, 1990.
- Cairns, David. *Advocacy and the Making of the Adversarial Criminal Trial 1800-1865.* Edited by A. W. B. Simpson, *Oxford Studies in Modern Legal History.* Oxford: Clarendon Press, 1988.
- Cammack, Mark. "Evidence Rules and the Ritual Functions of Trials: 'Saying Something of Something'". *Loyola Law Review* 25.3 (1992):783-796.
- Campbell, Enid Mona, and H.P. Lee. *The Australian Judiciary.* Cambridge: Cambridge University Press, 2001.
- Cappel, Andrew J. "Bringing Cultural Practice into Law: Ritual and Social Norms Jurisprudence." *Santa Clara Law Review* 43 (2003): 389- 494.
- Carlson, Marvin. *Performance: A Critical Introduction.* London and New York: Routledge, 1996.

- Carnegie, Dale. *How to Win Friends and Influence People*. New York: Simon & Schuster, 1981.
- Cashmore, Judy, and Kay Bussey. "Judicial Perceptions of Child Witness Competence." *Law and Human Behavior* 20.3 (1996): 313-334.
- Cashmore, Judy, and N. De Haas. *The Use of Closed-Circuit Television: Child Witnesses in the ACT*. Children's Evidence Research Papers No. 1. Canberra: Australian Law Reform Commission, 1992.
- Cashmore, Judy, and Lily Trimboli. *Child Sexual Assault Trials: A Survey of Juror Perceptions*. Contemporary Issues in Crime and Justice No.102. Sydney: NSW Bureau of Crime Statistics and Research, 2006.
- Chaikin, Joseph. *The Presence of the Actor*. New York: Athenaeum, 1972.
- Chan, Janet B.L., and Lynne Barnes. *Lengthy Criminal Trials in Australia*. Sydney: Hawkins Press, 1995.
- Chang, Yanrong. "Courtroom Questioning as a Culturally Situated Persuasive Genre of Talk." *Discourse and Society* 15.6 (2004):705-722.
- Charnley, Mitchell V. "Should Courtrooms Be Broadcast?" *Federal Communications Bar Journal* 66 (1950): 64-72.
- Chepiga, Michael J. "Lawyering and Playwriting: Ten Questions for the Author of 'Getting and Spending'—Who Divides His Time Between the Bar and the Boards." *In Theater* 58 (1998):28-29.
- Chesterman, Michael, and David Weisbrot. "Legal Scholarship in Australia." *The Modern Law Review* 50.6 (1987): 709-724.
- Chisholm, Richard, and Garth Nettheim. *Understanding Law: an Introduction to Australia's Legal System*. Sydney: Butterworths, 1984.



Churchyard, Thomas. *The honor of the lawe. VVritten by Thomas Churchyard Gent.*

Imprinted at London: By Ar. Hatfield, for William Holme, 1596.

Clifford, James. "Introduction: Partial Truths." *Writing Culture: The Poetics and Politics of Ethnography*. San Francisco: University of California Press, 1986.

Cole, William. *A rod for the lawyers who are hereby declared to be the grand robbers & deceivers of the nation : greedily devouring yearely many millions of the peoples money : to which is added a word to the Parliament and a word to the Army / by William Cole, a lover of his country*. London : Printed for Giles Calvert, 1659.

Conley, John M., and William M. O'Barr. *Just Words: Law, Language, and Power*. Chicago: University of Chicago Press, 1997.

Conquergood, Dwight. "Rethinking Ethnography: Towards a Critical Cultural Politics." *Communication Monographs* 58.2(1991): 141-156.

Cosin, Richard, and Lancelot Andrewes. *An apologie for svndrie proceedings by iurisdiction ecclesiasticall, of late times by some chalenged, and also diuersly by them impugned. By which Apologie (in their seuerall due places) all the reasons and allegations set downe as well in a treatise, as in certaine notes (that goe from hand to hand) both against proceedings ex officio, and against oaths ministred to parties in causes criminall; are also examined and answered: vpon that occasion lately reuiewed, and much enlarged aboute the first priuate proiect, and now published, being diuided into three partes: the first part whereof chieflie sheweth what matters be incident to ecclesiasticall conisance; and so allowed by statutes and common law: the second treateth (for the most part) of the two wayes of proceeding in causes criminal, viz. by way of accusation, & ex officio iudicis: the third concerneth oaths in generall, but more specially the lawfulnessse of such as be ministred touching supposed offenses, either of themselues that sweare, or of their brethren: respectiuelie submitted to the*

*graue iudgements of the reuerend iudges and other sages of the common lawe: of iudicious professors of the ciuill lawe; and of the right reuerend prelates and other grounded diuines in this realme. Whereunto (for the learneds sake and for similitude of argument and iudgement) I have presumed to adioine that right excellent and sound determination (concerning oaths) which was made by M. Lancelot Androvves ... an. 1591.* Imprinted at London: by the deputies of Christopher Barker, 1593.

Cover, Robert. "Violence and the Word." *Yale Law Journal* 95 (1986): 1601-1629.

Crawford, Richard J. *The Persuasion Edge: Winning Psychological Strategies and Tactics for Lawyers*. Eau Claire, Wisconsin: Professional Education Systems, 1989.

Crier, Catherine. "Journalism and the Law." *Syracuse Law Review* 56.3 (2006): 387-399.

Currie, Susan, and Sally Kift. "Women surviving as victims in the criminal justice system in Queensland: is revictimisation inevitable?" *QUT Law Journal* 15 (1999): 57-76.

Davies, G.M., and E. Noon. *An Evaluation of the Live Link for Child Witnesses* London: Home Office, 1991.

Davies, G.M., C. Wilson, R. Mitchell, and J. Milsom. *Videotaping of Children's Evidence: An Evaluation*. London: Home Office, 1995.

Davies, Margaret. *Delimiting the law: 'Postmodernism' and the Politics of Law*. London & Chicago: Pluto Press, 1996.

de Glanville, Ranulf. *Tractatus De Legibus & Consuetudinibus Regni Angliae Tempore Regis Henrici Secundi Compositus, Iusticia Gubernacula Tenente Illustri Viro Ranulpho De Glanvilla Iuris Regni & Antiquarum Consuetudinum Eo Tempore Peritissimo. Et Illas Solum Leges Continet & Consuetudines Secundum Quas Placitatur in Curia Regis Ad Scaccarium & Coram Iusticijs Vbicunque Fuerint*. London: A. Islip, 1604.

Dick, Tim. "Court Out—How Slip of Tongue Meant Justice Wasn't Done." *The Sydney Morning Herald*, 3 August 2006.

Doddridge, Sir John, and Francis Bacon. *The lavvyers light: or, A due direction for the study of the law for methode. Choyce of bookes moderne. Selection of authours of more antiquitie. Application of either. Accommodation of diuers other vsefull requisits. All tending to the speedy and more easie attayning of the knowledge of the common law of this kingdome. With necessary cautions against certaine abuses or ouersights, aswell in the practitioner as student. Written by the reuerend and learned professor thereof, I.D. To which is annexed for the affinitie of the subiect, another treatise, called The vse of the law.* Imprinted at London : [By Bernard Alsop and Thomas Fawcet] for Benjamin Fisher, and are to be sold at his shop in Aldersgate street, at the signe of the Talbot, 1629.

Doherty-Sneddon, G., A. Anderson, C. O'Malley, S. Langton, S. Garrod, and V. Bruce.

“Face-to-Face and Video-Mediated Communication: a Comparison of Dialogue Structure and Task Performance.” *Journal of Experimental Psychology: Applied* 3.2 (1997): 105-125.

Donovan, Brian, and Kevin Harrie. *Evidence-in-Chief & Cross-Examination.* Sydney: NSW Young Lawyers, Law Society of New South Wales, 2001.

Dugdale, Sir William. *Origines juridiciales, or, Historical memorials of the English laws, courts of justice, forms of tryall, punishment in cases criminal, law writers, law books, grants and settlements of estates, degree of serjeant, Innes of court and chancery also, a chronologie of the lord chancelors and keepers of the great seal, lord treasurers, justices itinerant, justices of the Kings Bench and Common Pleas, barons of the Exchequer, masters of the rolls, Kings attorneys and sollicitors, & serjeants at law / by William Dugdale, Esq.* London: Printed by F. and T. Warren for the author, 1666.

- Eastwood, Christine. *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System*. Trends and Issues in Crime and Criminal Justice Report No. 250. Canberra: Australian Institute of Criminology, 2003.
- Eastwood, Christine, and Wendy Patton. *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System*. Report No. 23/98-99. Canberra: Criminology Research Council, July 2002.
- Eaton, Tania E., Peter J. Ball, and Gemma O'Callaghan. "Child-Witness and Defendant Credibility: Child Evidence Presentation Mode and Judicial Instructions." *Journal of Applied Psychology* 31.9 (2001): 1845-1858.
- Elias, Norbert. *The Court Society*. Oxford: Basil Blackwell, 1983.
- Ellison, Louise. *The Adversarial Process and the Vulnerable Witness*. Oxford: Oxford University Press, 2001.
- Esposito, Steven A. "Source Utilization in Legal Journalism: Network TV News Coverage of the Timothy McVeigh Oklahoma City Bombing Trial." *Communications and the Law* 20.2 (1998):15-33.
- Evans, Keith. *Common Sense Rules of Advocacy for Lawyers*. St Paul, Minnesota: West Publishing Company, 1994.
- . *Advocacy in Court: A Beginner's Guide*. Oxford: Oxford University Press, 1995.
- Evans, M., and R. Ian Jack, eds. *Sources of English Legal and Constitutional History*. Sydney: Butterworths, 1984.
- Falk Moore, Sally. *Law as Process: An Anthropological Approach*. London, Henly and Boston: Routledge & Kegan Paul, 1978.
- Falk Moore, Sally, and Barbara G. Myerhoff, eds. *Secular Ritual*. Amsterdam: Van Gorcum & Comp, 1977.

Farber, Daniel A. "Adjudication of Things Past: Reflections on History as Evidence."

*Hastings Law Journal* 49.4 (1998):1009-1038.

Federal Court of Australia. "TV in Court—Recommendations." Media Release, 21 December 1998. Retrieved 1 May 2006 from: <http://www.fedcourt.gov.au/aboutct/media04.html>

——— "No Wigs for Barristers in Federal Court of Australia." Media Release, 8 December 1998. Retrieved 5 June 2008 from: <http://www.fedcourt.gov.au/aboutct/media03.html>

———"Live Broadcast of Judgment." Media Release, 3 August 2000. Retrieved 1 May 2005 from: <http://www.fedcourt.gov.au/aboutct/media10.html>

Fleming, Justin. *Barbarism to Verdict: A History of the Common Law*. Sydney: Angus & Robertson, 1994.

Fordham, Edward Wilfrid. *Notable cross-examinations chosen and annotated by Edward Wilfrid Fordham ; with a foreword on "The art of cross-examination" by Sir Travers Humphreys and a note by Sir Edward Clarke on "three famous cross-examiners"*. London: Constable, 1951.

Fortescue, Sir John, and Robert Mulcaster. *A learned commendation of the politique lawes of Englande vvherin by moste pitthy reasons & euident demonstrations they are plainelye proued farre to excell aswell the ciuile lawes of the Empiere, as also all other lawes of the world, with a large discourse of the difference betwene the. ii. gouernements of kingdomes: whereof the one is onely regall, and the other consisteth of regall and polityque administration conioyned. written in latine aboue an hundred yeares past, by the learned and right honorable maister Fortescue knight ... And newly translated into Englishe by Robert Mulcaster*. Imprinted at London : In Fletestrete within Temple Barre, at the signe of the hand and starre, by Rychard Tottill, 1567.

———*De laudibus legum Angliae written by Sir Iohn Fortescue L. Ch. Iustice, and after L. Chancellor to K. Henry VI. Hereto are ioind the two Summes of Sir Ralph de Hengham L. Ch. Iustice to K. Edward I. commonly calld Hengham magna, and Hengham parua. Neuer before publisht. Notes both on Fortescue and Hengham are added.* Edited by J. Selden. London : Printed by Adam Islip for the Companie of Stationers, M.DC.XVI [1616].

Foucault, Michel. *Discipline and Punish: The Birth of the Prison*. London: Penguin Books, 1975.

———*Power: Essential Works of Foucault 1954-1984*. Edited by P. Rabinow. *Essential Works of Foucault 1954-1984*. London: Penguin Books, 1994.

———*Ethic: Essential Works of Foucault 1954-1984*. Edited by P. Rabinow. *Essential Works of Foucault 1954-1984*. New York: The New Press, 1997.

———*Power/Knowledge: Selected Interviews and Other Writings 1971-1977*. Edited by C. Gordon. New York: Pantheon Books, 1998.

Frank, Jerome. *Courts on Trial: Myth and Reality in American Justice*. Princeton, NJ: Princeton University Press, 1973.

Frank, Richard H. "Cameras in the Courtroom: a First Amendment Right of Access." *Hastings Communications and Entertainment Law Journal* 9.4 (1987): 749-817.

Fraunce, Abraham, and Petrus Ramus. *The lavviers logike exemplifying the praecepts of logike by the practise of the common lawe, by Abraham Fraunce*. At London : Imprinted by William How, for Thomas Gubbin, and T. Newman, 1588.

Friedman, Lawrence M. "Lexitainment: Legal Process as Theater." *DePaul Law Review* 50.2 (2000): 539-558.

Friedman, Lawrence Meir. *A History of American Law, 3rd Edition*. New York: Simon & Schuster, 2005.

- Friedman, Richard D. "The Conundrum of Children, Confrontation and Hearsay." *Law and Contemporary Problems* 65.1 (2002): 243-255.
- Gans, Jeremy, and Andrew Palmer. *Australian Principles of Evidence*. Sydney: Routledge and Cavendish, 2004.
- Gardner, James A. *Legal argument: the structure and language of effective advocacy*. Charlottesville, Virginia: Michie Co, 1993.
- Garner, Helen. *Joe Cinque's Consolation*. Sydney: Picador by Pan MacMillan, 2004.
- Geertz, Clifford. *The Interpretation of Cultures: Selected Essays*. Basic Books, 1973.
- Local Knowledge: Further Essays in Interpretive Anthropology*. Basic Books, 1983.
- Geller, Larry, and Peter Hemenway. "Argument and Courtroom Theatrics." *National Association of Administrative Law Judges* 16.2 (1996): 175-184.
- Gery, William. *Proposals for reformation of abuses and subtilties in practise against the lavv and in scandall of it. By William Gery, Esq; of Grays Inn, Thomason Tracts*. London : printed for William Shears, at this shop in the New Exchange, 1659.
- Gibbons, John. *Forensic Linguistics: An Introduction to Language in the Justice System*. Melbourne: Blackwell Publishing Ltd, 2003.
- Gibbs, Stephen. "Skaf Sunk as Rape Evidence Re-enacted." *The Sydney Morning Herald*. 19 April 2006.
- Gillespie, John C. "Theatrical Justice (Criminal Trial as a Morality Play)." *Northern Ireland Legal Quarterly* 31.1 (1980): 67-72.
- Givens, Richard A. *Advocacy, the Art of Pleading a Cause*. Colorado Springs, Colorado: Shepard's/McGraw-Hill, 1980.
- Gleeson, Kate. "From Centenary to the Olympics, Gang Rape in Sydney." *Current Issues in Criminal Justice: Journal of the Institute of Criminology* 16.2 (2004): 183-201.

- Goffman, Erving. *The Presentation of Self in Everyday Life*. New York: Anchor Books & Doubleday, 1959.
- Goldfarb, Ronald L. *TV or not TV: Television, Justice and the Courts*. New York: NYU Press, 1998.
- Greenberg, Allan. "Selecting a Courtroom Design." *Judicature* 59.9 (1976): 422-428.
- . "How a Connecticut County Converted a Supermarket into a New Courthouse." *Judicature* 64.6 (1981): 290-291.
- Grotowski, Jerzy. *Towards a Poor Theatre*. London: Methuen Drama, 1968.
- Grove, Trevor. *The Magistrate's Tale*. London: Bloomsbury Publishing, 2002.
- Hale, Matthew. *The History of the Common Law of England; and, An analysis of the Civil Part of the Law, 6th Edition*. London: H. Butterworth, 1820 (First Published 1713).
- Halewood, Peter. "Violence and the international world (Conceptualizing Violence: Present and Future Developments in International Law)." *Albany Law Review* 60.3 (1997): 565-570.
- Hamlyn, B., A. Phelps, J. Turtle, and G. Sattar. *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses*. Research Study No. 283. London: Home Office, 2004.
- Hampel, George. *Aspects of Advocacy: Cross Examination and Pleamaking*. Melbourne: Leo Cussen Institute for Continuing Legal Education, 1982.
- Hampel, George, and Elizabeth Brimer. *Hampel on Ethics and Etiquette for Advocates*. Melbourne: Leo Cussen Institute, 2001.
- Harbinger, Richard. "Courtroom-In-The-Round." *Judicature* 54.2 (1970): 67-72.
- . "Trial By Drama." *Judicature* 55.3 (1971): 122-128.
- Hastrup, Kirsten. "Writing Ethnography: State of the Art." In *Anthropology and Autobiography*. Edited by J. Calloway and H. Okely. London: Routledge, 1992.



Hawkins, William. *A Treatise of the Pleas of the Crown*. New York: Garland Publishers, 1978 (First published 1721).

Heath, Sir Robert. *Maxims and rules of pleading, in actions real, personal and mixt, popular and penal describing the nature of declarations, pleas, replications, rejoinders, and all other parts of pleading, shewing their validity and defects, and in what cases they are amendable by the court, or remediable by the statute-law, or otherwise : likewise, which of the parties in his plea shall first offer the issue, and where special matter may be given in evidence upon the general issue : of demurrers upon evidence, of verdicts, general and special, and of bills of exceptions to the same, of judgments, executions, writs of error and false judgment, and of appeals, indictments, and informations and the pleadings relating thereunto*. London : Printed for Abel Roper, 1694.

Hibbitts, Bernard J. “‘Coming To Our Senses’: Communication and Legal Expression in Performance Cultures.” *Emory Law Journal* 41.4 (1992): 873-960.

———“De-Scribing Law: Performance in the Constitution of Legality.” Paper presented at Performance Studies International Conference, Northwestern University, Illinois, 1996, unpublished. Retrieved 5 June 2008 from: <http://faculty.law.pitt.edu/hibbitts/describ.htm>

Hilton, Dembo, and Laurie Levy. “The Accused : a Documentary of a Jury Trial.” *Brief* 30.3 (2003): 17-19.

Hindley, Geoffrey. *The Book of Magna Carta*. London: The Guild Publishing, 1990.

Hobbes, Thomas. *The Art of rhetoric, with A discourse of the laws of England by Thomas Hobbes of Malmesbury*. London : Printed for William Crooke , 1681.

Hobsbawm, Eric, and Terence Ranger, eds. *The Invention of Tradition*. Cambridge: Cambridge University Press, 1992.

- Hoffer, Peter Charles. "Invisible Worlds and Criminal Trials: the Cases of John Proctor and O.J. Simpson." *The American Journal of Legal History* 41.3 (1997): 287-314.
- Holland, Merlin. *Irish Peacock and Scarlet Marquess: The Real Trial of Oscar Wilde*. London: Fourth Estate, 2004.
- Homans, Sidney. "A Humanist Caught by Law." *ALSA Forum* 3(1978): 9-20.
- Horin, Adele. "Day in Court is a Fading Right." *The Sydney Morning Herald*, 12 December 2007.
- Howie, R. N. (QC), and P.A. Johnson (SC). *Annotated Criminal Legislation New South Wales*. Sydney: LexisNexis Butterworths, 2006.
- Hunter, Rosemary, Richard Ingleby, and Richard Johnstone, eds. *Thinking about Law: Perspectives on the History, Philosophy and Sociology of Law*. St. Leonards, N.S.W: Allen & Unwin, 1998.
- Hyde, Edward (Earl of Clarendon). *A collection of such of the orders heretofore used in Chancery with such alterations and additions thereunto, as the right honorable Edward Earle of Clarendon, lord chancellor of England ... and ... the honorable Sir Harbottle Brimston, Barronet, master of the rolls, have thought fit at present to ordaine and publish for reforming of several abuses in the said courts, preventing multiplicity of suits, motions, and unnecessary charge to the suiters, and for their more expeditious and certain course for relief*. Edited by H. S. Grimston. London: Printed for Henry Chase and are to be sold at his shop and by Humphery Tuckey, 1661.
- Inglis, K.S. *The Stuart Case*. Melbourne: Black Inc, 2002.
- Jackson, Michael. *Things As They Are: New directions in Phenomenological Anthropology*. Indianapolis: Indiana University Press, 1996.

- Jackson, Shannon. "Representing Rape: Model Mugging's Discursive and Embodied Performances." *The Drama Review* 37.3 (1993):110-141.
- Jaconelli, Joseph. *Open Justice: a Critique of the Public Trial*. Oxford: Oxford University Press, 2002.
- James, Katherine, and Alan Blumenfeld. "Telling Your Client's Story." *Trial* 34 .4(1998): 54.
- Johnson, Jeffrey S. "The Entertainment Value of a Trial: How Media Access to the Courtroom is Changing the American Judicial Process." *Villanova Sports and Entertainment Law Journal* 10.1 (2003):131-152.
- Johnson, Paul E., Michael G. Johnson, and Raleigh K. Little. "Expertise in Trial Advocacy: Some Considerations for Inquiry into its Nature and Development." *Campbell Law Review* 7.2 (1984): 119-143.
- Joyce, Peter. *Law, Order and the Judiciary*. London: Hodder & Stoughton, 1999.
- Kadoch, Laurie C. "Seduced by Narrative: Persuasion in the Courtroom." *Drake Law Review* 49.1(2000): 71-123.
- Kadri, Sadakat. *The Trial: A History, from Socrates to O.J. Simpson*. New York: Random House, 2005.
- "Better and Worse Worsts: *The Trial in American Life* by Robert Ferguson, a Review." *London Review of Books*, 24 May 2007: 17-18.
- Kairys, David, ed. *The Politics of Law: A Progressive Critique*. New York: Pantheon Books, 1982.
- Kellner, Douglas. *Media Spectacle*. London and New York: Routledge, 2003.
- Kenny, James. *Kenny's Outlines of Criminal Law*. Cambridge: Cambridge University Press, 1952.

- Kercher, Bruce. "Why the History of Australian Law is Not English: Second Alex Castles Lecture in Legal History, October 2000." *Flinders Journal of Law Reform* 7(2004): 177-204.
- Kerr, Margaret, Richard D. Forsyth, and Michael J. Plyley. "Cold Water and Hot Iron: Trial by Ordeal in England." *Journal of Interdisciplinary History* 22.4 (1992): 573-595.
- Kestler, Jeffrey L. *Questioning Techniques and Tactics*. Colorado Springs, Colorado: Shepard's/McGraw-Hill, 1982.
- Kimberling, John F. *How to Try a Jury Case: Trial Tactics*. National Institute of Trial Advocacy ( N.I.T.A.) Publications, 2007.
- Kirby, Justice Michael. *The Judges (Boyer Lectures 1983)*. Sydney: Australian Broadcasting Corporation, 1983.
- "The Future of the Judiciary." Paper Presented at Australian Lawyers' Conference, Thailand, 9-17 July 1995, unpublished. Retrieved 1 June 2008:  
<http://www.lawfoundation.net.au/ljf/app/&id=0929BB3A1318025CCA2571A80020F1EB>
- "The Future of Appellate Advocacy." *Australian Bar Review* 27.2 (2006):141-160.
- Knox, Malcolm. *Secrets of the Jury Room: Inside the Black Box of Criminal Justice in Australia*. Sydney: Random House, 2005.
- Koopmans, Thijmen. *Courts and Political Institutions: a Comparative View*. Cambridge: Cambridge University Press, 2003.
- Krueger, Carl S. "Constitutional Law: Public Trial in Criminal Cases." *Michigan Law Review* 52.1 (1953): 128-138.
- Lahav, Pnina. "Theater in the Courtroom: The Chicago Conspiracy Trial." *Law & Literature* 16.3 (2005): 381-474.

- Langbein, John H. "The Criminal Trial Before the Lawyers." *University of Chicago Law Review* 45.2 (1978): 263-316.
- "Albion's Fatal Flaws." *Past and Present* 98 (1983): 96-120.
- "The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors." *Cambridge Law Journal* 58 (1999): 314-365.
- *The Origins of Adversary Criminal Trial*. Edited by A. W. B. Simpson, *Oxford Studies in Modern Legal History*. Oxford: Oxford University Press, 2003.
- Larner, Daniel. "Justice and Drama: Historical Ties and 'Thick' Relationships." *Legal Studies Forum* 22.1-3 (1998): 3-19.
- "Teaching Justice: The Idea of Justice in the Structure of Drama." *Legal Studies Forum* 23.1-2 (1999): 201-210.
- "Justice and Drama: Conflict and Advocacy." *Legal Studies Forum* 23.4 (1999): 417-429.
- Lassiter, Christo. "TV or not TV—That is the Question." *Journal of Criminal Law and Criminology* 86.3 (1995): 928-1095.
- Leach, Edmund of London. *The down-fall of the vnjust lawyers, with the monopolizing officers, who have devoured much of the wealth of this nation, and the rising of the just written and proposed in order to the abolishing the chargeableness of proceedings in law-suits*. London: Printed by E. Cotes, 1652.
- Legg, Michael. "Preparing Witnesses Effectively and Ethically." *Law Society Journal* 41.11 (2003): 60-64.
- Leigh, Edward. *A philologicall commentary, or, An illustration of the most obvious and useful words in the lavv with their distinctions and divers acceptations, as they are found as well in reports antient and modern as in records and memorials never*

*printed : usefull for all young students of the law.* London: Printed by A.M. for Charles Adams, and are to be sold at his shop, 1658.

Lemmings, David. "Criminal Trial Procedure in 18th Century England: The Impact of Lawyers." *The Journal of Legal History* 26.1 (2005): 63-70.

———*Professors of the Law: Barristers and the Culture of English Law in the Eighteenth Century.* Oxford: Oxford University Press, 2000

———*Gentlemen and Barristers: The Inns of Court and the English Bar, 1680-1730.* Oxford: Clarendon Press, 1990.

Levinson, Sanford, and J.M. Balkin. "Law, Music and other Performing Arts." *University of Pennsylvania Law Review* 139.6 (1991): 1597-1658.

Lewis, Justine Elizabeth. "Performance in Legal Advocacy." Ph.D. Dissertation, University of California, 1995.

Lewis, Lowell. "Toward a Unified Theory of Cultural Performance: A 'Reconstructive Introduction' to Victor Turner." In *Victor Turner and Contemporary Cultural Performance.* Edited by G. St.John. New York: Berghahn Press, In Press.

Lievore, Denise. "Victim Credibility in Adult Sexual Assault Cases." *Trends and Issues in Crime and Criminal Justice.* Canberra: Australian Institute of Criminology, 2004.

Lipstadt, Deborah E. *History on Trial: My Day in Court with David Irving.* New York: Harper Collins, 2005.

Lloyd, Babb. "Sexual Assault Retrials : New Legislative Procedures." *Judicial Officers' Bulletin* 17.5 (2005): 35-36.

Lohn, Robert D., and Milner S. Ball. "Legal Advocacy, Performance, and Affection." *Georgia Law Review* 16.4 (1982): 853-860.

McCrimmon, Les , and Ian Maxwell. "Teaching Trial Advocacy: Inviting the Thespian into Blackstone's Tower." *Law Teacher* 33 (1999): 31-49.

- McElhaney, James. *Trial Notebook*. Chicago: American Bar Association, 2005.
- McGillivray, Glen. "Theatricality: A Critical Genealogy." Ph.D. Dissertation, University of Sydney, 2004.
- McKechnie, Justice. "Forensic Advocacy: a Survival Guide to Basics in Court Etiquette." *Brief* 20.2 (2002): 14-16.
- McKillop, Bron. "The Position of Accused Persons." *University of New South Wales Law Journal* 26.2 (2003): 515- 539.
- McKinnie, Michael. "The State of This Place: 'Convictions', the Courthouse, and the Geography of Performance in Belfast." *Modern Drama* 46.4 (2003):580-597.
- McLeod, Chris. "Wrestling with Access: Journalists Covering Courts. *Reform* 85 (2004): 15-18.
- Mack, Kathy. "Continuing Barriers to Women's Credibility: a Feminist Perspective on the Proof Process." *Criminal Law Reform* 4.2 (1993): 327-353.
- "Evidence: Challenging Assumptions about Credibility." *Law Society Journal* 39.10 (2001): 60-65.
- Mackenzie, Sir George. *The laws and customes of Scotland, in matters criminal wherein is to be seen how the civil law, and the laws and customs of other nations do agree with, and supply ours*. Edinburgh: Printed by James Glen, 1678.
- Mackinolty, Judith, and Heather Radi. *In Pursuit of Justice: Australian Women and the Law, 1788-1979*. Sydney: Hale and Ironmonger, 1979.
- Magner, Eilis. "The Best Evidence—Oral Testimony or Documentary Proof?" *University of New South Wales Law Journal* 18.1 (1995): 67-94.
- Maguire, Connor (Baron of Enniskillen), and William Prynne. *The vvhole triall of Connor Lord Macguire with the perfect copies of the indictment, and all the evidences against him : also the copie of Sir Philome Oneales commission, the Popes bull to the*

*confederate Catholikes in Ireland, with many remarkable passages of the grand rebellion there, from the first rise thereof to this present : his plea of peerage, and severall answers : with the severall replies made to him by the King's Sergeant at Law and Sergeant Roll. William Prynne, Esquire, and M. Nudigate ; and the copies of the severall testimonies brought in against him at his triall at the Kings Bench Barre.*

Edited by M. Nudigate. London: Printed for Robert Austin, 1645.

Maitland, F.W., ed. *Select Pleas of the Crown: Volume 1 - A.D. 1200-1225*. London: Bernard Quaritch, 1881.

Mancinus, Dominicus, and Alexander Barclay. *Here begynneth a ryght frutefull treatyse, intituled the myrroure of good maners co[n]teynyng the .iiii. vertues, called cardynall, compyled in latyn by Domynike Mancyn: and translate into englysshe: at the desyre of syr Gyles Alyngton knyght: by Alexander Bercley prest and monke of Ely*. London : Imprinted by Rychard Pynson, prynter vnto the kynges noble grace: with his gracyous pryuylege, the whiche boke I haue prynted, at the instance of Rychard yerle of Kent, 1518.

March, John. *Reports, or, new cases with divers resolutions and judgements given upon solemn arguments, and with great deliberation, and the reasons and causes of the said resolutions and judgements*. London: Printed by M.F. for W. Lee, M. Walbanke, D. Pakemen, and G. Beadel, 1648.

Marcus, Paul. "The Media in the Courtroom: Attending, Reporting, Televising Criminal Cases." *Indiana Law Journal* 57.2 (1982): 235-287.

Marsh, Jeanne C., Alison Geist, and Nathan Caplan. *Rape and the Limits of Law Reform*. Boston, MA: Auburn House Publishing Company, 1982.

Marsilius of Padua, and William Marshall. *The defence of peace: lately translated out of laten in to englysshe. with the kynges moste gracyous priuilege*. Edited by U. Zwingli,



London: Prynted by me Robert wyer, for wyllyam marshall, and fynysshed in the moneth of Iuly in the yere of our Lorde god a. M.CCCCC.xxxv. [1535].

Martin, The Hon. Wayne (CJ). "Access to Justice—the Media, the Courts, and the Public Record." Paper presented at the Australian Press Council, 22 March 2007, unpublished. Retrieved 15 June 2008 from:

<http://www.presscouncil.org.au/pcsite/activities/meetings/martincj.html>

Martin-Bowen, Lindsey. "Words From a Teller of Tales: Can Storytelling Play an Effective Role in Feminist Jurisprudence?" *UMKC Law Review* 66.1 (1997): 95-134.

Mason, Paul. *Report on the Impact of Electronic Media Coverage of Court Proceedings at the International Criminal Tribunal for the former Yugoslavia*. Centre for Media and Justice, Solent University, 1999.

——— "Lights, Camera, Justice? Cameras in the Courtroom; an Outline of the Issues."

*Crime Prevention and Community Safety: an International Journal* 4.2 (2000): 23-33.

Mauet, Thomas. *Fundamentals of Trial Techniques*. Boston, MA: Little, Brown & Co, 1980.

Maxwell, James. "Acting and Legal Education." *Vermont Law Review* 17 (1993): 533-593.

Maynard, Sir John. *A guide to juries setting forth their antiquity, power and duty from the Common-law and statutes : with a table / by a person of quality ; also a letter, to the author, upon the same subject*. London: Printed for Tho. Cockerill, 1699.

Meyer, Philip N. "'Fingers Pointing at the Moon': New Perspectives on Teaching Legal Writing and Analysis." *Connecticut Law Review* 25.3 (1993): 777-796.

——— "Lawyers as Storytellers and Storytellers as Lawyers." *Vermont Law Review* 18 (1993): 567-579.

Meyers, Nancy Illman. "Painting the Law." *Cardozo Arts and Entertainment Law Journal* 14.2(1996): 397-406.

Mill, John Stuart. *On Liberty*. London: Penguin Books, 1988.

- Miller, Geoffrey P. "The Legal Function of Ritual." *Chicago-Kent Law Review* 80.3 (2005): 1181-1233.
- Miller, Gerald R, David C. Bender, Frank Boster, B. Thomas Florence, Norman Fontes, John Hocking, and Henry Nicholson. "The Effects of Videotape Testimony in Jury Trials: Studies on Juror Decision Making, Information Retention, and Emotional Arousal." *Brigham University Law Review* 2 (1975): 331-373.
- Moore, Paul. "Longing To Belong: Trained Actors' Attempts to Enter the Profession." Ph.D. Dissertation, University of Sydney, 2005.
- Morgan, Edward M. "Retributory Theater." *American Journal of International Law and Policy* 3.1 (1988): 1-64.
- Mortimer, John. *A Voyage Round My Father*. London: Penguin Plays, 1982.  
 —— *Famous Trials*. London: Penguin Books, 1986.
- Mulholland, Maureen & Brian Pullan with Anne Pullan, eds. *Judicial Tribunals in England and Europe, 1200-1700*. Manchester: Manchester University Press, 2003.
- Munday, Roderick. *Evidence (Third Edition)*. Edited by N. Padfield, *Core Text Series*. Oxford: Oxford University Press, 2005.
- Munkman, John H. *The Technique of Advocacy*. London: Sweet & Maxwell, 1986.
- Murnaghan, Sheila. "Staging Ancient Crimes: A Response to Aristodemou, Tieffenbrun, Purkiss and Pantazakos." *Cardoza Studies of Law and Literature* 11.1 (1999): 77-89.
- Murphy, Peter W. "'There's no business like...?' Some Thoughts on the Ethics of Acting in the Courtroom." *South Texas Law Review* 44.1 (2002): 111-125.
- Murray, Kathleen. *Live Television Link: an Evaluation of its Use by Child Witnesses in Scottish Criminal Trials*. Crime and Criminal Justice Research Findings No. 4. The Scottish Office, 1995.

Neave, Airey *Nuremberg: A Personal Account of the Trial of the Major Nazi War Criminals*.  
Sydney: Hodder & Stoughton, 1978.

Nelken, David, ed. *Law as communication* Aldershot, England : Dartmouth, 1996.

New South Wales Department of Women. *Heroines of Fortitude: the experiences of women  
in court as victims of sexual assault*. Gender Bias and the Law Project. Sydney: NSW  
Department of Women, 1996.

New South Wales Law Reform Commission. *The Rule Against Hearsay (Outline)*. Report  
No. 29, 1978.

——— *Criminal Procedure: Unsworn Statements of Accused Persons*. Report No. 54, 1985.

——— *Criminal Procedure: The Jury in a Criminal Trial*. Report No. 48, 1986.

——— *First Report on the Legal Profession: General Regulation and Structure*. Report No.  
31, 1982.

——— *Community Law Reform Program: Proceedings of Courts and Commissions  
Television Filming, Sound Recording and Public Broadcasting, Sketches and  
Photographs*. Issues Papers No. 4, 1984.

——— *People with an Intellectual Disability and the Criminal Justice System*. Report No. 80,  
1986.

——— *Evidence*. Report No. 56, 1988.

——— *Barristers' Practising Certificates*. Report No. 74 (1994) [Appendix B].

——— *Contempt By Publication*. Report No. 100, Discussion Paper No. 43, 2000.

——— *Questioning of complainants by unrepresented accused in sexual offence trials*.  
Report No. 101, 2003.

——— *Blind or Deaf Jurors*. Report No. 114, Discussion Paper No. 46, 2006.

New South Wales Parliament. *Parliamentary Debates*. Legislative Council, 4 May 2005.

——— *Parliamentary Debates*. Legislative Assembly, 2 September 2003.

- New York State Committee to Review Audio-Visual Coverage of Court. *An Open Courtroom: Cameras in New York Courts*. New York: Fordham University Press. 1997.
- New Zealand Law Commission. *Evidence Law: Character and Credibility*. Preliminary Paper No. 27, 1997.
- Nunn, Kenneth B. "The trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for Reform." *American Criminal Law Review* 32.3 (1995):743-822.
- O'Barr, William M. *Linguistic Evidence: Language, Power, and Strategy in the Courtroom*. New Haven, Connecticut: Academic Press, 1995.
- O'Grady, C. *Child Witnesses and Jury Trials: an Evaluation of the Use of Closed Circuit Television and Removable Screens in Western Australia*. Perth: Ministry of Justice, 1996.
- O'Neill, Johnathan. *Originalism in American Law and Politics: A Constitutional History*. Baltimore and London: Johns Hopkins University Press, 2007.
- Ong, Walter. *Orality and Literacy: The Technologising of the Word*. London and New York: Routledge, 1982.
- Opeskin, Brian & Fiona Wheeler, eds. *The Australian Federal Judicial System*. Melbourne: Melbourne University Press, 2000.
- Orcutt, Holly K., Gail S. Goodman, Ann E. Tobey, Jennifer M. Batterman-Faunce, and Sherry Thomas. "Detecting Deception in Children's Testimony: Factfinders' Abilities to Reach the Truth in Open Court and Closed-Circuit Trials." *Law and Human Behavior* 25.4 (2001): 339-372.
- Oswald Smith, G. "Some Instances of Legal and Academic Ritual." *The Canadian Law Times* 37 (1917): 214- 221.

- Otte, George. "Role Theory and the Judicial Process: A Critical Analysis." *St Louis University Law Journal* 16 (1971): 420-436.
- Palmer, Tony. *The Trials of Oz*. Manchester: Blond & Briggs, 1971.
- Parry, Judge Edward Abbott. *The Seven Lamps of Advocacy*. London: T Fisher Unwin Ltd. 1923.
- Parush, Adi. "The Courtroom as Theater and the Theater as Courtroom in Ancient Athens." *Israeli Law Review* 35 (2001): 114-137.
- Perry, Max, and George Hampel. *Hampel on Advocacy: A Practical Guide to Basics*. Melbourne: Leo Cussen Institute, 1996.
- Pertnoy, Leonard D. "'Lights, Camera, Action': Presenting the Medical Expert on Trial." *American Journal of Trial Advocacy* 17.2 (1993): 443-460.
- "Skills is Not a Dirty Word." *Missouri Law Review* 59.1 (1994): 169-186.
- Peters, Julie Stone. "Theatricality, Legalism, and the Scenography of Suffering: the Trial of Warren Hastings and Richard Brinsley Sheridan's 'Pizarro'." *Law & Literature* 18.1(2006): 15-45.
- Phelan, Peggy. *Unmarked: The Politics of Performance*. New York: Routledge, 1993.
- Phelan, Peggy, and Jill Lane. *The Ends of Performance*. New York: NYU Press, 1998.
- Philipps, Fabian. *The ancient, legal, fundamental, and necessary rights of courts of justice, in their writs of capias, arrests, and process of outlary and the illegality ... which may arrive to the people of England, by the proposals tendred to His Majesty and the High Court of Parliament for the abolishing of that old and better way and method of justice, and the establishing of a new, by peremptory summons and citations in actions of debt*. London: Printed for Christopher Wilkinson, and are to be sold at his shop, 1676.
- Phillips, John Harber. "Practical Advocacy." *Australian Law Journal* 80.5 (2006): 290-292.

- Plato. *The Last Days of Socrates*. London: Penguin Classics, 1993.
- Podlas, Kimberlianne. "Please Adjust Your Signal: How Television's Syndicated Courtrooms Bias our Juror Citizenry." *American Business Law Journal* 39.1(2001):1-24.
- "Blame Judge Judy: the Effects of Syndicated Television Courtrooms on Jurors." *American Journal of Trial Advocacy* 5.3 (2002): 557-586.
- "Should We Blame Judge Judy? The Messages TV Courtrooms Send Viewers." *Judicature* 86 .1 (2002): 38-43.
- "As Seen on TV: the Normative Influence of Syndi-Courts on Contemporary Litigiousness." *Villanova Sports and Entertainment Journal* 11.1 (2004): 1-47.
- "Broadcast Litigiousness: Syndi-Courts' Construction of Legal Consciousness." *Cardozo Arts and Entertainment Law Journal* 23.3 (2005): 465-505.
- Porter, Chester. *Walking on Water: A Life in the Law*. Sydney: Random House Australia 2003.
- The Gentle Art of Persuasion*. Sydney: Random House, 2005.
- The Conviction of the Innocent: How the Law Can Let Us Down*. Sydney: Random House, 2007.
- Porter, Chester, and R.W.R. Parker (Q.C). "The Demeanour of Expert Witnesses." *Australian Journal of Forensic Sciences* 33 (2001):45-51.
- Posner, Richard. *Law and Literature: A Misunderstood Relation*. Cambridge, Massachusetts and London, England: Harvard University Press, 1988.
- Post, Jerrold M., and Lara K. Panis. "Tyranny on trial: personality and courtroom conduct of defendants Slobodan Milosevic and Saddam Hussein." *Cornell International Law Review* 38.3 (2005): 823-836.
- Powell, Thomas. *The attourneys academy, or, The manner and forme of proceeding practically vpon any suite, plaint or action whatsoever, in any court of record*

*whatsoever, within this kingdome : especially in the great courts at Westminster, to whose motion all other court of law or equitie ... are diurnally mooued : with the moderne and most vsuall fees of the officers and ministers of such courts publisht by his Maiesties speciall priuiledge . London: Printed for Beniamin Fisher: and are to be sold at his Shop in Pater-noster Row, at the signe of the Talbot, 1623.*

Priest, Marcus. "Raising the Bar." *Australian Financial Review*. 27 April 2007.

Prynne, William. *Historiarchos, or, The exact recorder being the most faithfull remembrancer of the most remarkable transactions of estate and of all the English lawes ... : as most elabourately they are collected ... out of the antiquities of the Saxon and Danish kings, unto the coronation of William the Conqueror, and continued unto the present government of Richard, now Lord Protector*. London: Printed for Francis Coles, 1659.

Prynne, William, and Edward Anthony. *Practicall law, controlling and countermanding the common law, and the sword of vvarre the sword of iustice against all the late declarations and publications of the army, that they fight for the peoples liberties and lawes*. Printed at Exeter: 1648.

Pugh, Ralph B., ed. *Calendar of London Trailbaston Trials Under Commissions of 1305 and 1306*. London: Her Majesty's Stationery Office, 1975.

Pugsley, Robert A. "This Courtroom is Not a Television Studio: Why Judge Fujisaki Made The Correct Call in Gagging the Lawyers and the Parties, and Banning the Cameras from the O.J. Simpson Civil Case." *Loyola of Los Angeles Entertainment Law Journal* 17.2 (1997): 369-381.

Pulton, Ferdinando. *An Abstract of All the Penal Statutes Which Be Generall, in Force & Yse Wherein Is Contayned the Effect of All Those Statutes Which Do Threaten to the Offendors Thereof the Losse of Life, Member, Lands, Goods, or Other Punishment or*

*Forfaitue Whatsoever: Whereunto Is Also Added in Their Apt Titles, the Effect of Such Other Statutes Wherein There is Any Thing Material and Most Necessarie for Eche Subiect to Knowe: Moreouer the Auctoritie and Duetie of All Justices of Peace, Sheriffes, Coroners, Eschetors, Maiors, Bailiffes, Customers, Comptrollers of Custome, Stewardest of Leets and Liberties, Aulnegers and Purueyours and What Things by the Letter of Seuerall Statutes in Force They May, Ought, or Are Compellable to Do.* London: Christopher Barker, Printer to the Queenes Maiestie, 1578.

Pyle, Ransford C. "Law, Ritual and Language." *ALSA Forum* 8.3 (1984): 381-392.

Queensland Law Reform Commission. *The Role of Juries in Criminal Trials*. Working Papers No. 28, 1984.

Queensland Office for Women. *Women and the Criminal Code*. Taskforce Report, 2000.

Ramsey, Gail, and Kristen McGuire. "Litigation Publicity: Courtroom Drama or Headline News." *Communication and the Law* 22 (2000): 69-84.

Rastell, John. *Les termes de la ley; or, Certain difficult and obscure words and terms of the common laws and statutes of this realm now in use, expounded and explained Now corrected and enlarged. With very great additions throughout the whole book, never printed in any other impression.* London : printed by W. Rawlins, S. Roycroft and M. Flesher, assigns of Richard and Edward Atkins Esquires. For G. Walbanke, S. Heyrick, J. Place, J. Poole, and R. Sare, 1685.

———*The statutes prohemium Iohannis Rastell.* London: Enprynted in the chepesyde at the sygne of the mere mayde next to poulys gate the. xxii. day of Dece[m]ber in the. xix yere of the reynge of oure souerayne lorde kinge Henry the. viii. Per me Iohannem Rastell, A.D.MDXXVII. 1527.



Rastell, John, and William Rastell. *An exposition of certaine difficult and obscure words, and termes of the lawes of this realme, newly set forth and augmented, both in french and English, for the helpe of such younge students as are desirous to attaine the knowledge of ye same. Whereunto are also added the olde Tenures.* London: In aedibus Richardi Tottelli, 1579.

Rayburn, Corey. "To Catch a Sex Thief: the Burden of Performance in Rape and Sexual Assault Trials." *Columbia Journal of Gender and Law* 15.2 (2006): 437-485.

Rees, Professor Neil. "Legal Education and Training: An Evolutionary Approach." *ALRC Reform Journal* 76 (2000): 60-65.

Reid, Charles J. Jr. "Book Review: Tyburn, Thanatos, and Marxist Historiography: the Case of *The London Hanged* (by Peter Linebaugh)." *Cornell Law Review* 79.5 (1994):1158-1199.

Richland, Justine B. "The Multiple Calculi of Meaning." *Discourse and Society* 17.1 (2006): 65-97.

Riley, Tom. "The ABC's of Cross-Examination." *Drake Law Review* 41.1(1992): 35-66.

Robertson, Geoffrey. *The Justice Game.* London: Vintage, 1999.

———*Crimes Against Humanity: The Struggle for Global Justice.* London: Allen Lane/The Penguin Pres, 1999.

———*The Tyrannicide Brief.* Sydney: Random House, 2005.

Rogers, John. *Sagrir, or, Doomes-day drawing nigh, with thunder and lightening to lawyers in an alarum for the new laws, and the peoples liberties from the Norman and Babylonian yoke : making discoverie of the present ungodly laws and lawyers of the fourth monarchy, and of the approach of the fifth, with those godly laws, officers and ordinances that belong to the legislative power of the Lord Iesus: shewing the glorious work incumbent to civil-discipline, (once more) set before the Parliament,*

*Lord Generall, army and people of England, in their distinct capacities, upon the account of Christ and his monarchy humbly presented to them by John Rogers.*

London: Printed for Tho. Hucklescot, 1654.

Rosenbloom, Jonathan D. "Social Ideology as Seen Through Courtroom and Courthouse Architecture." *Columbia Journal of Law and Arts* 22.4 (1998): 463-523.

Ross, David. "Techniques and Duties in Cross Examination." *Australian Bar Review* 27.1 (2005): 84-104.

Rothschild, Frank D. *31 Ways to Winning Advocacy*. National Institute of Trial Advocacy (N.I.T.A.) Publications DVD Series, 1996.

Rousseau, Jean-Jacques. *The Social Contract*. Middlesex: Penguin Books, 1968.

Rushworth, John. *Historical collections of private passages of state Weighty matters in law. Remarkable proceedings in five Parliaments. Beginning the sixteenth year of King James, anno 1618. And ending the fifth year of King Charls, anno 1629. Digested in order of time, and now published by John Rushworth of Lincolns-Inn, Esq.* London : printed by Tho. Newcomb for George Thomason, at the sign of the Rose and Crown in St Pauls Churchyard, 1659.

Russell, Lord. *The Trial of Adolf Eichmann*. London: Pimlico Press, 2002.

Salamensky, S. I. "Re-Presenting Oscar Wilde: Wilde's Trials, 'Gross Indecency' and Documentary Spectacle." *Theatre Journal* 54.4 (2002): 575-588.

Sayler, Robert N. "Symposium: Improving Communications in the Courtroom." *Indiana Law Journal* 68.4 (1993): 1093-1100.

Schechner, Richard. *Essays On Performance Theory 1970-1976*. New York: Drama Book Specialists (Publishers) New York, 1977.

———"Theatre Departments, Rejoin and Reform the Humanities in a Big Way." *New England Theatre Journal* 3(1992):1-13.

- Performance Studies: An Introduction*. New York: Routledge, 2002.
- Schechter, Stephen L., ed. *Roots of the Republic: American Founding Documents Interpreted*. New York: Rowman and Littlemore, 1990.
- Schleiff, Henry. “Cameras in Courts: Allowing TV Cameras into U.S. Court Rooms has Increased Public Confidence in the Justice System and the Same Would Happen Here.” *New Law Journal* 154.7 (2004): 1745.
- Scutt, Jocelyne A. *Women and the Law: Commentary and Materials*. Sydney: The Law Book Company Limited, 1990.
- Seigel, Michael L. “Pragmatism applied: imagining a solution to the problem of court congestion.” *Hofstra Law Review* 22.3 (1994): 567-624.
- Selby, Hugh. *Winning in court: an introduction to advocacy*. Melbourne: Oxford University Press, 2000.
- Selden, John, and Adam Littleton. *The reverse or back-face of the English Janus to-wit, all that is met with in story concerning the common and statute-law of English Britanny, from the first memoirs of the two nations, to the decease of King Henry II. set down and tackt together succinctly by way of narrative : designed, devoted and dedicated to the most illustrious the Earl of Salisbury / written in Latin by John Selden ... ; and rendred into English by Redman Westcot, Gent.* Edited by R. White. London: Printed for Thomas Basset, and Richard Chiswell, MDCLXXXII [1682].
- Shapiro, Martin M. *Who's on Trial : A Legal Education & Training Kit for CASA Workers Advocating for Victim/Survivors of Sexual Assault Project Team : Rhonda Cumberland, Melanie Heenan, Marg Gwynne*, 1998.
- Courts, a comparative and political analysis*. Melbourne, Chicago: Legal and Education Training Team, CASA House, 1998.
- Sheehan, Paul. *Girls Like You*. Sydney: Pan McMillan, 2006.

Sheridan, Thomas. *A discourse of the rise & power of parliaments, of law's, of courts of judicature, of liberty, property, and religion, of the interest of England in reference to the desires of France, of taxes and of trade in a letter from a gentleman in the country to a member in Parliament.* London, 1677.

Sherwin, Richard K. "The narrative construction of legal reality (Lawyers as Storytellers; Storytellers as Lawyers: An Interdisciplinary Symposium Exploring the Use of Storytelling in the Practice of Law)." *Vermont Law Review* 18 .3 (1994): 681-719.

Sloviter, Dolores K. "If courts are open, must cameras follow?" *Hofstra Law Review* 26.4 (1998): 873-889.

Smith, Thomas Sir. *De republica Anglorum The maner of gouvernement or policie of the realme of England, compiled by the honorable man Thomas Smyth, Doctor of the ciuil lawes, knight, and principall secretarie vnto the two most worthie princes, King Edwarde the sixt, and Queene Elizabeth. Seene and allowed.* London: Printed by Henrie Midleton for Gregorie Seton, Anno Domini 1583.

———*The common-vvelth of England and the maner of gouernment thereof. Compiled by the honorable Sir Thomas Smith, Knight, Doctor of both lawes, and one of the principall secretaries vnto two most worthie princes, King Edward, and Queen Elizabeth: with new additions of the cheefe courts in England, the offices thereof, and their seuerall functions, by the sayd author: neuer before published. Seene and allowed.* At London: Imprinted by Iohn Windet for Gregorie Seton, and are to be solde at his shoppe vnder Aldersgate, 1589.

Smith, William. *Innocency and conscientiousness of the Quakers asserted and cleared from the evil surmises, false aspersions, and unrighteous suggestions of Judge Keeling expressed in his speech made the seventh of the seventh month at the sessions-house in the Old-Baily: wherein also is shewed that this law doth not concern them, they*

*being no seditious sectaries, nor contrivers of insurrections, nor evil-doers, therefore no just law is against them.* Printed at London: Published by a lover of truth and righteousness, W.S., 1664.

Sokol, Ronald. "The Political Trial: Courtroom as Stage, History as Critic." *New Literary Theory* 2.3 (1971): 495-516.

Sonenshein, David, Anthony Bocchino, and Joanne Epps. *100 Vignettes for Improving Trial Advocacy Skills*. National Institute of Trial Advocacy: NITA Publications, 2005 .

Spader, Dean J. "Two Models and Three Uses for Mock Trials in Justice Education." *Journal of Criminal Justice and Education* 13.1(2002): 57-86.

Sparks, Richard F. "A Critique of Marxist Criminology." *Crime and Justice: An Annual Review of Research* Vol. 2 (1980): 159-210.

Spence, Gerry. "How to Make a Complex Case Come Alive for a Jury." *American Bar Association Journal* 72.1 (1986): 62-67.

Spigelman, The Honourable Justice James (Chief Justice of NSW Supreme Court). "Open Justice and the Internet." Paper presented at *The Law Via the Internet* conference, Sydney, 28 November, 2003, unpublished. Retrieved 8 June 2008 from:

[http://www.lawlink.nsw.gov.au/lawlink/supreme\\_court/ll\\_sc.nsf/pages/SCO\\_speech\\_spigelman\\_281103](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_281103)

———"Seen to be done: The Principle of Open Justice," Keynote address given at the 31<sup>st</sup> Australian Legal Convention, Canberra, 9 October 1999, unpublished. Retrieved 20 June 2008 from: [http://www.lawlink.nsw.gov.au/lawlink/supreme\\_court/ll\\_sc.nsf/pages/SCO\\_speech\\_spigelman\\_091099](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_091099)

———"The Principle of Open Justice: A Comparative Perspective." *University of New South Wales Law Journal* 29 (2006): 147 - 166.

Stephens, John. *Essayes and characters, ironically, and instructive The second impression.*

*With a new satyre in defence of common law and lawyers: mixt with reproofe against their common enemy. With many new characters, & diuers other things added; & euery thing ammended. By Iohn Stephens the yonger, of Lincolnes Inne, Gent.*

London: Printed by E Allde for Phillip Knight, and are to be solde at his shop in Chancery lane ouer against the Rowles, 1615.

Stepniak, Daniel. *Electronic Media Coverage of Courts: a Report Prepared for the Federal Court of Australia*. Canberra: Commonwealth of Australia, 1998.

———*Audio-Visual Coverage of Courts: A Comparative Analysis*. Cambridge: Cambridge University Press, 2008.

Stepniak, Daniel, and Paul Mason. "Court in the Web." *Alternative Law Journal* 25.2 (2000): 71-75.

Stites, Richard. "Trial as Theatre in the Russian Revolution." *Theatre Research International* 23.1 (1998):7-13.

Stitt, Allan. "Revising the art of persuasion." *Lawyers Weekly*, 12 September 2005, 16-17.

Stone, Frederic. "Acting within the law." *American Journal of Trial Advocacy* 8.1 (1984): 115-120.

Strachey, William. *For the colony in Virginea Britannia. Lavves diuine, morall and martiall, &c.* Printed at London : By William Stansby for Walter Burre, 1612.

Sturgess, Garry. *Judging the World: Law and Politics in the World's Leading Courts*. Edited by Philip Chubb. Sydney, Melbourne: Butterworths, Heinemann, 1988.

Taylor, John. *The vhole life and progresse of Henry Walker the ironmonger first, the manner of his conversation : secondly, the severall offences and scandalous pamphlets the said Walker hath writ, and for which he is now a prisoner in New-Gate : thirdly, the forme of the inditement which is laid against him, by the Kings sergeants*

*at law, and his learned counsell : fourthly, his conviction by the iury : fiftly, his recantation and sorrow for the publicke wrong he hath done His Majesty and the whole kingdome : here are also many remarkable passages concerning the offence, and apprehending the said Henry Walker, with a true relation of his severall escapes and rescues from the hands of justice, &c. / collected and written by Iohn Taylor.*

Printed at London: 1642.

Taylor, Natalie and Jacqueline Joudo. The impact of pre-recorded video and closed circuit television testimony by adult sexual assault complainants on jury decision-making : an experimental study. In *Research and Public Policy Series*. Canberra: Australian Institute of Criminology, 2005.

Taylor, S. Caroline. *Court Licensed Abuse: Patriarchal Lore and the Legal Response to Intrafamilial Sexual Abuse of Children*. Edited by K. Lankshear, Bigum, Peters, *New Literacies and Digital Epistemologies*. New York: Peter Lang Publishing, 2004.

Thaler, Paul. *The Watchful Eye: American Justice in the Age of the Television Trial*. Westport, Connecticut: Praeger, 1994.

Thomas, William. *The regulating of law-suits, evidences, and pleadings an assize-sermon preach't at Carmarthen, March the 16th, 1656 by William Thomas*. London: Sold by Gabriel Bedell and T. Collins, 1657.

Thompson, Isaac Grant. "Three Great Advocates." *Albany Law Journal* 12 .1(1875): 4-5.

Thompson, Seymour D., and the Hon. John F. Dillon. "An International Tribunal." *Central Law Journal* 2 (1875): 730.

Thomson, Isaac Grant. "Commentary." *Albany Law Journal* 5 (1872): 6 35.

Thornton, Margaret. "Sexual Harassment: Losing Sight of Sex Discrimination." *Melbourne University Law Review* 22 (2002): 422-444.

- Tomlins, Christopher. "History in the American Juridical Field: Narrative, Justification and Explanation." *Yale Journal of Law and Humanities* 16 (2004): 323-398.
- Tow, Allan M. "Teaching Trial Practice and Dramatic Technique." *Journal of Paralegal Education and Practice* 13.1 (1997): 59-96.
- Tribe, Laurence H. "Trial by Mathematics: Ritual in the Legal Process." *Harvard Law Review* 84.6 (1971): 1329-1393.
- Tuma, Clara. "Open Courts: How Cameras in Courts Help Keep the System Honest." *Cleveland State Law Review* 49.3 (2001): 417-420.
- Tureen, Afroz. "Learning Trial Advocacy: an Outsider's Experience." *Alternative Law Journal* 30.2 (2005): 90-91.
- Turner, Victor. *The Ritual Process*. Middlesex: Penguin Books, 1969.
- "Are There Universals of Theatre, Dance and Drama." In *By Means of Performance: Intercultural Studies of Theatre and Ritual* edited by R. Schechner and W. Appel. Cambridge: Cambridge University Press, 1990.
- The Anthropology of Performance*. New York: PAJ Publications, 1992.
- Tyrrell, James. *A Brief enquiry into the ancient constitution and government of England as well in respect of the administration, as succession thereof by a true lover of his country*. London: Printed for Richard Baldwin, 1695.
- United Kingdom. Department for Constitutional Affairs. *Court Working Dress in England and Wales*. Public Consultation by the Department for Constitutional Affairs. Prepared by Lindsay Hermans, ORC International. London, January 2004.
- Broadcasting Courts*. Consultation Paper No. 24, November 2004.
- United Kingdom. Parliament. "Second Report from her Majesty's Commissions on Criminal Law." *Parliamentary Papers*, Vol. 36. London, 1836.
- Ursinus, Zacharius. *A collection of certaine learned discourses, written by that famous man*



*of memory Zachary Ursine; doctor and professor of divinitie in the noble and flourishing schools of Neustad. For explication of divers difficult points, laide downe by that author in his catechisme. Lately put in print in Latin by the last labour of D. David Parry: and now newlie translated into English, by I.H. for the benefit and behoofe of our Christian country-man. At Oxford : Printed by Ioseph Barnes, and are to be solde [by J. Broome, London] in Pauls Church-yard at the signe of the Bible, 1600.*

Van Gennep, Arnold. *Rites of Passage*. Translated by M. B. Vizedom and G. L. Caffee. London: Routledge, 1977.

Van Krieken, Robert. "Legal Reasoning as a Field of Knowledge Production: Luhmann, Bourdieu and Law's Autonomy." Paper presented at the *Law, Power & Injustice: Confronting the Legacies of Sociolegal Research*, Law & Society Association Conference, Chicago, 2004, unpublished. Retrieved 15 June 2008 from Sydney University's eScholarship Repository: <http://ses.library.usyd.edu.au/handle/2123/967>

Vaughan, William. *The arraignment of slander periury blasphemy, and other malicious sinnes shewing sundry examples of Gods iudgements against the ofenders. As well by the testimony of the Scriptures, and of the fathers of the primatiue church as likewise out of the reportes of Sir Edward Dier, Sir Edward Cooke, and other famous lawiers of this kingdome. Published by Sir William Vaughan knight. London: Printed for Francis Constable, and are to be sold in Pauls Church yeard at the signe of the Crane, 1630.*

Vergil, Polydore, and Thomas Langley. *The works of the famous antiquary, Polidore Virgil containing the original of all arts, sciences, mysteries, orders, rites, and ceremonies, both ecclesiastical and civil : a work useful for all divines, historians, lawyers, and all*

- artificers compendiously English't* by John Langley. London: Printed for Simon Miller, 1663.
- Victorian Law Reform Commission. *Sexual Offences: Final Report*. 2004.
- Vismann, Cornelia. "Rejouer Les Crimes; Theater vs. Video." *Cardoza Studies of Law and Literature* 13.1 (2001): 119-135.
- Vogelman, Lawrence. "The 'Big Black Man Syndrome': the Rodney King Trial and the Use of Racial Stereotypes in the Courtroom." *Fordham Urban Law Journal* 2.3 (1993): 571-578.
- Wainwright, Robert. "The Case for the Prosecution." *The Sydney Morning Herald*, 9 September 2006.
- Walter, Bettyruth. *The jury Summation as Speech Genre : an Ethnographic Study of What it Means to Those who Use it* . Philadelphia: J. Benjamins Pub. Co., 1988.
- Warren, Charles. *The Supreme Court in United States History Volume 1: 1789-1921*. Beard Books, 1999.
- Waterhouse, Edward. *Fortescutus illustratus, or, A commentary on that nervous treatise, De laudibus legum Angliae, written by Sir John Fortescue, Knight ... by Edward Waterhous, Esquire*. London: Printed by Tho. Roycroft for Thomas Dicas, 1663.
- Webster, John. *The deuils law-case. Or, VWhen vvomen goe to law, the Deuill is full of businesse A new tragecomaedy. The true and perfect copie from the originall. As it was approouedly well acted by her Maiesties Seruants. Written by Iohn VWebster*, London: Printed by A[ugustine] M[athewes] for Iohn Grismand, and are to be sold at his shop in Pauls Alley at the signe of the Gunne, 1623.
- Weinberg, Arthur, ed. *Attorney for the Damned: Clarence Darrow in the Courtroom*. Chicago, University of Chicago Press, 1989.

Weinstein, Jack, and Diane Zimmerman. "Let the People Observe Their Courts." *Judicature* 61.4 (1977): 156-165.

Weisbrot, David. *Australian Lawyers*. Melbourne: Longman Cheshire, 1990.

Wentworth, Thomas (Earl of Strafford), and John Rushworth. *The Tryal of Thomas, Earl of Strafford, Lord Lieutenant of Ireland, upon an impeachment of high treason by the Commons then assembled in Parliament, in the name of themselves and of all the Commons in England, begun in Westminster-Hall the 22th of March 1640, and continued before judgment was given until the 10th of May, 1641 shewing the form of parliamentary proceedings in an impeachment of treason: to which is added a short account of some other matters of fact transacted in both houses of Parliament, precedent, concomitant, and subsequent to the said tryal: with some special arguments in law relating to a bill of attainder faithfully collected, and impartially published, without observation or reflection, by John Rushworth of Lincolnes-Inn, Esq.* London: Printed for John Wright and Richard Chiswell, 1680.

Wescott, H., G.M. Davies, and B. Clifford. "The Credibility of Child Witnesses Seen on Closed Circuit Television." *Adoption and Fostering* 15.1 (1991): 14-19.

West, Mae. *Goodness Had Nothing to Do With It*. New York: Prentice Hall, 1959.

West, Robin L. "Adjudication is not interpretation: some reservations about the law-as-literature movement." *Tennessee Law Review* 54.2 (1987): 203-278.

Western Australia Ministry of Justice, Strategic and Specialist Services Division. *Results of a Survey of Jurors in Western Australia conducted Between November 1994 and February 1995*. Perth, Ministry of Justice, 1995.

Western Australia, Law Society. "A Mutual Contempt?—How the Law is Reported." *Brief* 32.11 (2005): 12-16.

Weyrauch, Walter Otto. "Law as Mask—Legal Ritual and Relevance." *California Law*

*Review* 66 (1978): 699- 726.

Wigmore, J.H. *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*. Boston: Little, Brown and Company, 1940.

Wilson, J.C., and G.M. Davies. "An Evaluation of the Use of Videotaped Evidence for Juvenile Witnesses in Criminal Courts in England and Wales." *European Journal on Criminal Policy and Research* 7 (1999): 81-96.

Wilson, John Nigel. *Lectures on Advocacy and Ethics in the High Court*. Auckland: Legal Research Foundation Inc., 1982.

Winner, Lucy. "Democratic Acts: Theatre of Public Trials." *Theatre Topics* 15.2 (2005): 149-169.

Wolfe, Jeffrey S. "Courtroom Choreography: Systematic Use of the Courtroom." *Trial Diplomacy Journal* 8.1 (1985): 28-36.

———"The Effect of Location in the Courtroom on Jury Perception of Lawyer Performance." *Pepperdine Law Review* 21.3 (1993): 731-776.

———"Toward a Unified Theory of Courtroom Design Criteria: the Effect of Courtroom Design on Adversarial Interaction." *American Journal of Trial Advocacy* 18.3(1995): 593-656.

Wood, Justice James. "Sexual Assault and the Admission of Evidence." Paper presented at *Practice and Prevention: Contemporary Issues in Adult Sexual Assault in New South Wales*. Sydney, 12 February 2003, unpublished. Retrieved 10 June 2008 from: [http://www.lawlink.nsw.gov.au/lawlink/supreme\\_court/ll\\_sc.nsf/pages/SCO\\_speech\\_wood\\_120203](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_wood_120203)

Woods, G.D. *A History of Criminal Law in New South Wales: The Colonial Period, 1788-1900*. Sydney: Federation Press, 2002.