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Performing the Law:
A Study of Performance in the Court of Law

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Welcome, sensation seekers

Abstract

This thesis analyses what performance is and what it does in the court, drawing from theatrical performance. In it, I argue that performance plays a constitutive role in the court, that law and performance are intimately entwined and that law is reliant on performance for its production. In so doing, I consider whether theatre and performance studies research and practice can provide new insights into court proceedings. This is significant because whilst legal scholars draw on analogical comparisons with theatre, there is little sustained engagement with theatre and performance research and practice to inform understanding of legal performance. My original contribution to knowledge is to draw from research and practice in theatre and performance to provide new insights into legal performance in court. Central to my discussion of legal performance in court is the role of the audience, which becomes a guiding direction of the thesis and points to my interest in how the legal performance is perceived by the public gallery.

My methodology combines case studies, participant observation and some performance-led research, grounded in theoretical analysis of the intersection of law and performance. Application of performance studies to the law entails a paradigmatic shift in legal research that attends to the practice and performance of law in court. Steering away from the existing work on advocacy as performance, the thesis attends to the audience's experience of the legal performance in terms of space, sound, words, rhythms and digital dimensions.

The chapters are structured as something of an experiential journey through court. I first concentrate on the experience of arrival at court and journey through the liminal spaces of the courthouse. From there, I attune to the sounds and silence of the courtroom. From silence, I turn to the words in court. Still looking at the words, I then explore how these words play out in legal performance in a rhythmic manner. The final chapter examines the increasing use of video-link as a means of attending court and the digital futures of legal performance.

Declaration

This thesis is an original work of my research and contains no material which has been accepted for the award of any other degree or diploma at any university or equivalent institution and that, to the best of my knowledge and belief, this thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

Signature: X

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Date: 30 June 2020

Related Publications

- ‘Can a Literary Approach to Matters of Legal Concern Offer a Fairer Hearing than that Typically Offered by the Law’ (2014) 8(1) *Law and Humanities*
- ‘Review: *Theatre and Law* by Alan Read’ (2017) 42(1) *Alternative Law Journal*
- ‘Acting Law | Law Acting: A Conversation with Dr Felix Nobis and Prof Gary Watt’ (2017) 4(2) *Exchanges*
- ‘Review: *Spacing Law and Politics* by Leif Dahlberg’ (2017) 11(2) *Law and Humanities*
- ‘UK Parliamentary Inquiry Turned Verbatim Musical: A Theatre Review’ (2018) 43(1) *Alternative Law Journal*
- ‘Silence and Attunement in Legal Performance’ (2019) 34(2) *Canadian Journal of Law and Society*
- ‘Performing Sexuality on the Legal Stage’ in Lucy Finchett-Maddock and Eleftheria Lekakis (eds.), *Art, Law, Power: Perspective on Legality and Resistance in Contemporary Aesthetics* (Counterpress, 2020)
- ‘Singing the Law: The Musicality of Legal Performance’ (forthcoming) 24 *Law Text Culture*
- ‘Methodologies of Law as Performance’ (forthcoming) 1 *Art/Law Journal*

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Introduction

Legal Performance

Prologue

I am sitting in a courtroom, reflecting on the connections between the theatre and law.

The following is a collection of ‘free writing’ field notes based on my observations of summary proceedings in the Melbourne Magistrates’ Court on 11 May 2016:

A line of people walk into the room, taking a seat at the bar table. A lawyer’s conversation is audible to the gallery behind who sit mute, in quiet conversation with the person next to them or tapping on a phone. Those at the bar table seem to have walked in and commanded the space, taking prime seating, not muting their conversations like those behind them. They seem to own the space. Perhaps – most likely – they have been here before and understand how it operates. Those who have not seem to be solemn; their eyes shift to different parts of the space – as if to take it in and locate themselves in it. Who are these people watching with me, some taking notes in books? Who is the audience to these legal proceedings and what is it that they want? Why is it that we have public galleries for the law but not for, say, public hospitals or schools? Does the saying that ‘justice must be seen to be done’ require seeing to do justice?

On occasion, the solemnity of the space is broken – by people leaning on chairs, on walls, in a manner you might do if you were comfortable or careless with your movements. What does it mean to move in this space? There are restrictions on movement – you must stand as the Magistrate stands to enter or exit, you must address the court standing behind the bar table, you must sit when told to. There is a constant flurry of walking to and from the clerk’s desk that seems to break these movement restrictions. What is the basis for these rules? Why stand when speaking in court? Why stand?

The Magistrate enters. We stand. She bows. We bow in return. Some up and down at the bar table as lawyers speak. The Magistrate nods and gesticulates as she speaks. The lawyer uses intonation to draw attention to critical matters, words. In almost formulaic fashion, the background to offending and the defendant’s financial circumstances are read out. The defendant rises as the Magistrate speaks to her. There is a pause and a moment of quietness interspersed with ruffling papers, tapping keys, items being placed on a table and the air conditioning hum.

* * *

A crowded gallery in a smaller courtroom. A television screen to the right of the Magistrate plays a small screening of court proceedings to an unknown audience.

The defendant sits behind the defence lawyer, in reach of the watching gallery. An associate speaks to them in hushed tones but audible to the gallery. He is made to stand as the Magistrate speaks to him, dispensing his sentence. The Magistrate occasionally looks up from his desk to address him directly, the upward inflection on one sentence inviting a 'yes' from the defendant. The defendant leans gently to the left, only his back visible from the gallery. The defendant briefly speaks to his lawyer and the Magistrate agrees to stay a payment order.

'Can you hear me, see me?' says the Magistrate to another defendant on the screen. He is unaccompanied by a lawyer. 'I don't think he speaks English,' says the associate. 'Perhaps we could ask a guard if the defendant speaks English.' A guard appears on the screen. He nods to affirm that he can hear but cannot be heard by the Magistrate. There is confusion. The Magistrate speaks to the defendant and the guard in the hope that they can be heard. There is laughter from the gallery at the failed communication.

Another matter and another defence lawyer rising to the table. There is a small dock to the left and the defendant is brought in to the jangle of keys from a security guard. His gaze moves about the courtroom and occasionally down to his lap. He rests his head back on the wall as there is some confusion over the charges playing out between the bar table and bench. The defendant leaves with a smile and a wave to two older women in the gallery.

A pause in proceedings and a buzzing machine spills noise into the courtroom, the flick of papers and fingers on a keyboard.

Another matter is called. A man appears on screen with a large 'Port Phillip Prison' sign behind him. The man swears and he is taken off screen mid-speech. Again, there is the clicking of a keyboard.

All stand and the sitting is adjourned as a tone plays loudly on the police prosecutor's phone. 'You scared the shit out of me,' says the associate.

Introduction

This thesis presents an alternative study of courts. In contrast to previous interdisciplinary approaches that draw from different disciplines to analyse architecture, acoustics, storytelling and virtual dimensions in court, this thesis tells its story through *performance* in courts.¹ This thesis will argue that performance is central to court proceedings but, despite its importance, performance studies research and practice has received very little attention from legal academics. In attending to this absence, this thesis argues that understanding the factors that affect the production and reception of performance in court is crucial to a broader and more nuanced understanding of the practice of law. The approach to a courthouse, the sound within it, the creation of narratives, the musicality of legal language and the advance of digital technologies all have complex effects on the performance of law in courts that deserve to be charted and discussed in light of the scholarship and practice in performance studies.

The notes included by way of prologue highlight some of the ways an audience might recognise certain performative features of court – the staging, narrative patterns and behaviour of those in the court leads to frequent comparisons to the theatre. Performance studies scholars and practitioners have long understood the importance of performance in social relations and this study of performance in court encourages the reader to confront the interplay between performance and the production of law. Studies of the court have tended to focus on discrete aspects of the way in which the law is performed in court through architecture, acoustics, narrative and visibility. My aim is not to challenge the thrust of such accounts, but to bring them together through the ‘interdiscipline’ of performance studies.²

Although this thesis draws heavily on performance studies research and practice the issues it raises are far from being of significance only to those working within the burgeoning field of ‘law and performance’. Many of the practices of performance adopted in courts today evolved over time but are rarely subjected to sustained critique. Legal systems throughout the common law world draw heavily on what law and performance scholar Kate Leader terms the ‘performance of tradition’: a

¹ The definition of ‘performance’ is discussed in further detail in the following section.

² See Dwight Conquergood, ‘Of Caravans and Carnivals: Performance Studies in Motion’ (1995) 39(4) *TDR* 137.

‘constantly re-enacted process of legitimation’³ sustained by a ‘collective belief in the trial [that] relies upon the continuation of the present model’ of doing things.⁴ This has often meant that certain elements of contemporary performance in courts have lacked robust interrogation, though important questions can be asked. How do audiences interact with performance in courts? What effect does space have on the audience approach the court? Why is silence a condition in court? How can alternative voices make their way into court scripts? What does legal speech sound like? Why is presence important to performance in court? In the chapters that follow I attempt to address these and many related questions.

Terminology

‘Law’ and ‘performance’ are terms which are deceptively simple to write but extraordinarily difficult to define and delimit. As this thesis traverses these two fields, its terrain might be unfamiliar to readers from either discipline. Therefore, in this section, I shall flesh out and elaborate on my usage of these terms, and their compound term ‘legal performance’.

Law

The ‘law’ referred to in this thesis is predominantly common law and, in particular, the institutions and practices associated with the common law. Common law is a body of law that originated in England and spread to its former colonies, including Australia. As distinct to the codified structure of civil law system, common law is shaped through case law developed by judges.⁵ Case law is found in judgments, which contain an explanation of the circumstances of the case, an account of the evidence (depending on the stage of the decision, as judgments at trial are very different from judgments on appeal), how the law applies to the given evidence, and the decision or verdict. Once a case is decided, particularly at the highest level of the judicial ladder, its judgment will be adopted as law. My focus on common law as the contextual framework of this thesis is for a number of reasons. It reflects the geographical situation of the thesis, undertaken between Australia and England (with

³ Kate Leader, *Trials, Truth-Telling and the Performing Body* (PhD thesis, University of Sydney, 2008) 40.

⁴ Kate Leader, ‘Bound and Gagged: The Performance of Tradition in the Adversarial Criminal Jury Trial’ (2007) 11 *Philament* 14.

⁵ See the discussion in Marett Leiboff, *Towards a Theatrical Jurisprudence* (Routledge, 2020) xv; Alan Read, *Theatre and Law* (Red Globe Press, 2016) 6.

a brief sojourn in another common law jurisdiction, Canada). Using relatively similar systems with shared features enables meaningful inferences to be drawn.⁶ At times, I refer to Aboriginal law, but this is generally to illuminate the common law system under which it operates or to serve as a contrast.

I also concentrate on the court. In doing so, I acknowledge that ‘most law swirls around us, affecting every aspect of our lives’ through what legal scholar Andreas Philippopoulos-Mihalopoulos terms the ‘lawscape’.⁷ As he describes, ‘while you are reading this, you are in the lawscape. As you walked down the street, or earlier as you came into a building, or even earlier when you woke up at home: it is all lawscape. The question “where is the law?” can only be answered with an ambiguous “all over”’.⁸ We thus start to experience what Julie Peters terms ‘object blur’ whereby the object of study becomes so broad that it is impossible to say something meaningful about it.⁹ To avoid this, I have decided to focus on the courts as the site of study. In choosing to focus on courts, I am aware that I am perhaps giving a misleading weight to their importance within the common law system. Statistically speaking, most legal matters are resolved outside of courts and often negotiated in offices and through written communication. However, the court retains huge symbolic importance in the public imagination. As law and theatre scholar Milner Ball describes it, courts are the ‘local habitation’ of the law.¹⁰ They are the venue where the law is performed before a public audience.

Performance

The ‘performative turn’ has been apparent in social sciences and humanities since midway through the last century.¹¹ However, as performance theorist Richard Schechner cautions, defining performance is a subjective ride determined by the

⁶ Leader, *Trials, Truth-Telling and the Performing Body*, 17.

⁷ Leiboff, *Towards a Theatrical Jurisprudence*, xvi.

⁸ Andreas Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Lawscape, Atmosphere* (Routledge, 2015) 38.

⁹ Julie Peters, ‘Mapping Law and Performance: Reflections on the Dilemmas of an Interdisciplinary Conjunction’ in Simon Stern, Maks del Mar and Bernadette Meyler (eds.), *The Oxford Handbook of Law and Humanities* (Oxford University Press, 2020) 212.

¹⁰ Milner Ball, ‘All the Law’s a Stage’ (1999) 11(2) *Law and Literature* 214. See also Milner Ball, ‘The Play’s the Thing: An Unscientific Reflection on Courts Under the Rubric of Theatre’ (1975) 28(1) *Stanford Law Review* 115.

¹¹ Nicole Rogers, ‘The Play of Law: Comparing Performances in Law and Theatre’ (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 431.

thinking of the day.¹² In grappling with this term, this section will point to some of the key theorists that influence this work.

In his seminal work, *The Presentation of Self in Everyday Life*, anthropologist Erving Goffman describes performance as ‘all the activity of a given participant on a given occasion which serves to influence in any way any of the other participants.’¹³ Just as Philippopoulos-Mihalopoulos says about law, Goffman says that performance is all over. Lest the object of study become too broad to fathom, Schechner takes Goffman to mean not that ‘all the world’s a stage’ but rather that ‘people were always involved in role-playing, in constructing and staging their multiple identities’¹⁴ and that ‘theatre is but one of a complex of performance activities, which also includes rituals, sports and trials (duels, ritual combats, courtroom trials),’¹⁵ situating law along the same spectrum of performance as theatre. There are two key things to take from this. First, performance is necessarily social in that it involves an actor and an audience. As theatre scholar Alan Read puts it, ‘performances are precisely constituted through a conscious act of “showing doing” involving some form of agent and some form of audience.’¹⁶ Second, theatrical performance sits along the same spectrum as performance in court. Thus, theatrical practice can have some bearing on the practice of law in courts: both are performances.

In discussing performance, Schechner points to two theorists who have gone on to consider the connections between performance and law. In *How to Do Things with Words*, John Austin introduced the notion of ‘performative utterances’: words that are capable of transforming a situation – the vows of a wedding, the sentencing of a judge, the oath to tell the truth.¹⁷ As per the title of his book, Austin suggests that performative utterances are ‘doing something with words’. Austin’s notion of the performative dimension of legal speech in part ‘inspired the field of performance

¹² Richard Schechner, *Performance Studies: An Introduction* (Routledge, 2002) 31. See also Elizabeth Burns, *Theatricality: A Study of Convention in the Theatre and in Social Life* (Harper and Row, 1973) 12-13.

¹³ Erving Goffmann, *The Presentation of Self in Everyday Life* (Doubleday, 1959) 15.

¹⁴ Richard Schechner, *Performance Theory* (Routledge, 2003) x.

¹⁵ Schechner, *Performance Theory*, 179. See also Victor Turner, *Dramas, Fields and Metaphors* (Cornell University Press, 1974).

¹⁶ Read, *Theatre and Law*, 9.

¹⁷ Schechner, *Performance Studies*, 123-124. See John Austin, *How to Do Things With Words* (Oxford University Press, 1962).

studies’,¹⁸ and ‘ignited the entire discourse [of performance studies] by expanding the ontological contours of drama to include not just the stage but actions committed in legal and non-legal exchanges in the course of life.’¹⁹

Whilst Austin’s theory may open the gateway to considering the relations between performance and law, he ‘shies [away] from connecting performative language to actual *performance*’,²⁰ and explicitly distinguishes speech in law from that in theatre where the words do not carry social force to effect further action.²¹ Whilst he considers law in terms of the effect of performative utterances, Austin’s theory fails ‘to take into account the reality of a courtroom setting’ and overlooks ‘embodied behaviour by concentrating almost exclusively on language, despite the [court] trial being a site of performance.’²²

Judith Butler takes the notion of performance further than Austin’s theory of performative utterances to suggest that gender is constructed through performance.²³ She argues that ‘gender is at once a kind of action akin to a performative speech act (in Austin’s sense, an act of constituting or creating gender through its performative declaration), and performed (in the theatrical sense).’²⁴ Here, Butler points to two facets of performance: as a performative, gender is doing something, and as a performance gender is a social representation. The two facets are conjoined in the same phenomenon. Law and performance scholar Julie Peters concludes that ‘if all performatives are in some way performances, all performances may, equally, be in some way performatives: acts of creative constitution.’²⁵

In her later work, *Excitable Speech: A Politics of the Performative*, Butler applies her theories of performativity to the law.²⁶ She argues that the judicial decision or judgment is a performance of law. Judges have the power to pronounce the performative utterance of judgment because of their authority. Judges are performing

¹⁸ Cheryl Lubin, *Courting the Stage: Law, Drama and the Performance of Law* (PhD thesis, University of California Los Angeles, 2008) 31.

¹⁹ *Ibid* 33.

²⁰ *Ibid* 17.

²¹ Austin, *How to Do Things with Words*, 19-22 cited in Schechner, *Performance Studies*, 111.

²² Leader, *Trials, Truth-Telling and the Performing Body*, 68.

²³ Judith Butler, ‘Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory’ (1988) 40(4) *Theatre Journal*. See the discussion in Schechner, *Performance Studies*, 130-133.

²⁴ Julie Peters, ‘Legal Performance Good and Bad’ (2008) 4(2) *Law, Culture and the Humanities* 185.

²⁵ *Ibid*.

²⁶ Judith Butler, *Excitable Speech: A Politics of the Performative* (Routledge, 1997).

a political action as they make their decisions that go on to bind future matters through the principle of *stare decisis*, to stand by that which has been decided. These decisions can have far-reaching consequences in that they can uplift or wound those affected, and tend to particularly marginalise minorities. Whilst she is critical of the system of precedent and *stare decisis* in that it can derail any quest for transformative shifts within the law, the fundamental point, however, is that law is created and recreated through performance and is performative. As Peters writes, law both executes something and thus can be said to be performative (a link can be drawn with the idea of ‘performance’ in contract law as the act of doing that which is required by the contract) and law presents social conflict on the courtroom stage and thus can be said to be a performance.²⁷

Of these two dimensions – the performative and the performance – the focus of this thesis is on the latter.²⁸ In discussing performance, Schechner narrows the expansive definition of Goffman somewhat through the idea of ‘restored behaviour’, arguing that performance is – in his famous maxim – ‘twice-behaved behaviour’ as opposed to spontaneous everyday behaviour.²⁹ By this, Schechner means that there is a degree of rehearsal or intentionality to performance.³⁰ Whilst there may be a degree of spontaneity to performance, it operates within scripted constraints. It is in this respect that I turn to another influence and, moreover, key collaborator on Schechner’s ideas of performance: anthropologist Victor Turner. In contradistinction to ‘aesthetic drama’, which includes theatrical performances,³¹ Turner uses the term ‘social drama’ to refer to ‘social events, which seen retrospectively by an observer, can be shown to have structure.’³² Turner argues that social dramas have four broad stages: breach, crisis, redress and either reintegration or irreversible schism if the redress fails.³³ ‘Breach’ covers events that include an overt disruption, such as a crime being committed. The breach creates a ‘crisis’ because of the non-conformity of the action

²⁷ Peters, ‘Legal Performance’, 185.

²⁸ The ‘performative’ dimension of legal trials is well explored in Basak Ertur, *Spectacles and Spectres: Political Trials, Performativity and Scenes of Sovereignty* (PhD Thesis, University of London, 2015).

²⁹ Richard Schechner, *Between Theatre and Anthropology* (University of Pennsylvania Press, 1985) 35-37.

³⁰ *Ibid* 51-52.

³¹ Victor Turner, *From Ritual to Theatre: The Human Seriousness of Play* (Performing Arts Journal Publications, 1982) 12.

³² Turner, *Drama, Fields and Metaphors*, 35.

³³ Turner, *From Ritual to Theatre*, 69.

to the social mores that the community normally lives by. This crisis is dealt with through ‘redress’, which is the impetus for the ritual of social drama, such as court proceedings that are intended to resolve conflict or restore order.

The ‘ritual’ component of Turner’s schema is itself a tripartite process: separation, liminality and re-aggregation. This process provides a useful structure for considering the performance of law as a social drama. For a ritual to take place, the participant has to be separated in some way from their everyday life, usually being taken to a specifically demarcated space. After segregation, the participant then goes through the stage of ‘liminality’, meaning ‘in between’ or on the threshold of performance. After the performance, the participant is reintegrated into the community. I adopt Turner’s framing of the ritual of social drama when discussing the approach to and exit from the court.

For the purposes of this thesis, I use the term ‘performance’ to refer to restored behaviour and, in particular, restored behaviour in law and theatre.

Legal performance

The compound term ‘legal performance’ was coined by Bernard Hibbitts to refer to ‘the “restored behaviour” of the law.’³⁴ Hibbitts argues that law is made in performance through the kind of performative utterances discussed by Austin and Butler, that is to say, it derives its authority from its performance; and law is applied and interpreted in performance through the process of court trials and appeals. As discussed earlier, my primary focus is on the latter facet, thus I use the term ‘legal performance’ to refer to the performance of law in courts.

The term ‘legal performance’ is not just used to describe a particular form of performance associated with the law, but, as Cheryl Lubin argues, is also used to signal the ‘merging and interplay of two disciplines (law and performance).’³⁵ Thus, throughout this thesis, I use the term ‘legal performance’ to refer not only to the performance of the law but also to signal the interdisciplinary approach of this thesis: bringing performance studies to bear on the law.

³⁴ Bernard Hibbitts, ‘De-scribing Law: Performance in the Constitution of Legality’ (Paper presented at Performance Studies Formations: Connections/Contestations/Coalitions Conference, Northwestern University, March 1996).

³⁵ Lubin, *Courting the Stage*, 4.

As an interdisciplinary work, this thesis will use some of the language of theatre to describe the legal performance. As I use a definition of performance that is predicated on the interaction between actor and audience, I use the term ‘actor’ to refer to those performing in court and ‘audience’ to refer to those watching, though I acknowledge that these roles are not necessarily conceptually distinct. Indeed, as Milner Ball points out ‘judge and jury are audience as well as actors.’³⁶ I will discuss the ‘audience’ further in Chapter One.

Theoretical framework

Having defined some of the key terms of this inquiry, I will now go on to consider the theoretical framework of this thesis by way of a review of the literature on law and performance. For the purposes of providing some structure, I concentrate on the key theorists in law and performance scholarship and group the literature into two parts: the body of literature that has grown out of the law and literature movement (the study of law in and as literary texts); and later literature that has emerged from different directions.

From law as literature to law as performance

At the turn of this century, in the finale of a collection of essays on law and literature entitled ‘Law as Performance’, Balkin and Levinson observed that ‘the analogy between law and literature and the literary text has been central to the law-as-literature movement since its inception... Yet every analogy has its limitations, and we think it is time to move on.’³⁷ Drawing from their earlier work,³⁸ and finding the comparison between law and literary texts inadequate, Balkin and Levinson argue that law has much more in connection with the performing arts ‘and to the collectivities and institutions that are charged with the responsibilities and duties of public performance. In other words, we think it is time to replace the study of law and literature with the more general study of law as a performing art.’³⁹

It took some time for their call to be heeded, but it was. In a bold essay, Julie Peters called out law and literature as ‘interdisciplinary illusion’ that ‘is beginning to shed its

³⁶ Ball, ‘The Play’s the Thing’, 101.

³⁷ Jack Balkin and Sanford Levinson, ‘Law as Performance’ in Michael Freeman and Andrew Lewis (eds.), *Law and Literature* (Oxford University Press, 1999) 729.

³⁸ Sanford Levinson and Jack Balkin, ‘Law, Music and Other Performing Arts’ (1991) 139 *University of Pennsylvania Law Review*.

³⁹ Balkin and Levinson, ‘Law as Performance’, 729.

second term and to meld into “law, culture, and the humanities”.⁴⁰ Her later work takes up this charge. In her groundbreaking article, ‘Legal Performance Good and Bad’ later developed in a chapter ‘Law as Performance’, she argues that law is created through performance,⁴¹ and ‘examines legal events and practices’ as performances.⁴² As she explains it, her project is ‘to understand the role of legal performance (as both instrument and concept) in the historical production and reception of law: to see how both legal performance itself and law’s ambivalent relationship to its own theatricality matter.’⁴³ As she later puts it, she is concerned with ‘the role of performance in the historical production and reception of law.’⁴⁴ In this regard, her work traverses the revelation of the Ten Commandments to the Moses at Mount Sinai in ancient times,⁴⁵ to the witch trials in the northern coast of Scotland in the early modern era,⁴⁶ to, in further work, the confirmation hearings of United States Supreme Court Justice Brett Kavanaugh at the end of the last decade,⁴⁷ and beyond.⁴⁸

In her latest work, ‘Mapping Law and Performance’, she turns her critique of law and literature to an interrogation of the emerging discipline of ‘law and performance’. In so doing she breaks ‘the “and” into three different propositions’: *law in performance*, the representation of law in aesthetic performances such as theatre, dance, music, etc.; *law of performance*, the regulation of performance through law such as copyright law, etc.; and *law as performance*, the enactment of law through performance such as trials, policing, punishment, etc.⁴⁹ She then critiques this scheme (for example, the ‘law in performance’ could be read differently than representations of law in theatre, etc.) and acknowledge that ‘these different kinds of performance [are] linked in

⁴⁰ Julie Peters, ‘Law, Literature and the Vanishing Real: On the Future of an Interdisciplinary Illusion’ (2005) 120(2) *PMLA* 451.

⁴¹ Peters, ‘Legal Performance Good and Bad’, 179.

⁴² Julie Peters, ‘Law as Performance: Historical Interpretation, Objects, Lexicons, and Other Methodological Problems’ in Elizabeth Anker and Bernadette Meyler (eds.), *New Directions in Law and Literature* (Oxford University Press, 2017) 205.

⁴³ Peters, ‘Legal Performance Good and Bad’, 182.

⁴⁴ Peters, ‘Law as Performance’, 196.

⁴⁵ Peters, ‘Legal Performance Good and Bad’, 179-180.

⁴⁶ Peters, ‘Law as Performance’, 193-195.

⁴⁷ Peters, ‘Mapping Law and Performance’, 199.

⁴⁸ Julie Peters, ‘Staging the Last Judgment in the Trial of Charles I’ (2018) 143 *Representations*; ‘Theatricality, Realism and the Scenography of Suffering in the Trial of Warren Hastings and Richard Brinsley Sheridan’s *Pizarro*’ (2006) 18 *Law and Literature*; ‘Penitentiary Performances: Spectators, Affecting Scenes and Terrible Apparitions in the Nineteenth-Century Model Prison’ in Austin Sarat, Lawrence Douglas and Martha Umphrey (eds.), *Law and Performance* (University of Massachusetts Press, 2018); and ‘Theatrocracy Unwired: Legal Performance in the Modern Mediasphere’ (2014) 26 *Law and Literature*.

⁴⁹ Peters, ‘Mapping Law and Performance’, 205. See also ‘Law as Performance’, 204.

various ways' and give different meaning to the word 'performance'.⁵⁰ Yet from here, she goes on to critique the interdisciplinary aspirations of law and performance in much the same way as she had earlier for law and literature,⁵¹ and conclude that the different strands of law and performance 'are, in fact, really *different*, and do not need to be yoked together into a single narrative that showing the coherence of the field.'⁵²

Respecting her own ambivalence around the tripartite scheme that she puts forward, it is nonetheless a useful framework to consider my approach against. This thesis is focused on *law as performance* in the contemporary court. Yet, simultaneously, it draws from *law in performance* in advocating that theatrical performance – including and especially theatrical representations of the law – can helpfully illuminate the performance of law in courts. In Chapter Four, I draw from the approach of verbatim theatre-makers to illuminate the practice of judicial scriptwriting. In Chapter Five, I draw from the approach of composers who have adapted legal transcripts into musical scores to illuminate the musicality of legal speech. In this way, I push back gently against the clear demarcation of the two areas, suggesting one can illuminate the other. Chastened but not perturbed by Peters' critique of 'sham interdisciplinarity' and 'flat-footed imitation' of another discipline's methodologies,⁵³ I strive to bring performance studies to bear on the law as a way of revealing new understandings of legal performance. Though this thesis is not largely focused on the area of *law of performance*, I do briefly explore copyright law in Chapter Five in the context of judges listening to musical works to determine copyright infringements; therefore suggesting another connection across two areas: law's which regulate performance are themselves performed. In 2008, Peters concluded that 'there has been no sustained theoretical articulation of the nature of legal performance'⁵⁴ and that 'law's sometimes uncomfortable relationship to its performance medium and the theatrical double that haunts it is still to be written.'⁵⁵ As her later work indicates, the scope of law and performance has grown substantially since then, such that it can be considered its own field of research.

⁵⁰ Peters, 'Mapping Law and Performance', 206.

⁵¹ *Ibid* 209-212.

⁵² *Ibid* 213.

⁵³ *Ibid* 212.

⁵⁴ Peters, 'Legal Performance Good and Bad', 181.

⁵⁵ *Ibid* 200.

From theatrical presence to theatrical jurisprudence

The year 2008 turned out to be something of a turning point for scholarship on law and performance, with the publication of three doctoral theses on law and performance by Nicole Rogers,⁵⁶ Cheryl Lubin⁵⁷ and Kate Leader.⁵⁸ But it was in the decade that followed that law and performance scholarship really hit its stride. Though the scholarship since runs off in varied directions, it may be productive to mark three major publications at the start, middle-point and end of the decade.

At the start of the decade, a special issue of *Law Text Culture* on ‘Law’s Theatrical Presence’ was published. In the introduction to the special issue, its editors, Sophie Nield and Marett Leiboff (whom I will return to later), invite the reader ‘to think beyond the “theatrical” as simply words or playtexts, drama or literature, and beyond the “performative” as a universal referent to any form of enacted public practice’, and instead consider ‘law through the lens of theatrical theory.’⁵⁹ The contributors to the special issue – including Rogers and Leader – approach this interdisciplinary exchange from a number of different angles, which have opened up new directions for work in this field. In what follows, I loosely group the approaches taken under different themes – themes that align with the approaches to legal performance adopted in this thesis.

Midway through the decade, the first general book on law and performance, Alan Read’s *Theatre and Law*, was released. The book was influenced, it is acknowledged, from Read’s attendance at the ‘Performing the Law’ conference held at the Institut Français du Royaume-Uni in London in 2014. It provides an illuminating insight into emerging scholarship on the intersections between the two disciplines and, in particular, how taking a performance studies approach to law may enable us better to understand legal performance. The work is limited by its size (being part of a short-form series on ‘theatre and’ different fields) and thus focuses on identifying associations or what Read terms ‘relations between law and performance’,⁶⁰ rather than performing a close analysis of legal performance of the kind that this thesis attempts. Nonetheless, Read’s ‘rules of engagement’ between theatre and law provide

⁵⁶ Nicole Rogers, *The Play(fullness) of Law* (PhD Thesis, Southern Cross University, 2008).

⁵⁷ Leader, *Trials, Truth-Telling and the Performing Body*.

⁵⁸ Lubin, *Courting the Stage*.

⁵⁹ Marett Leiboff and Sophie Nield, ‘Introduction: Law’s Theatrical Presence’ (2010) 14 *Law Text Culture* 1.

⁶⁰ Read, *Theatre and Law*, 4.

a useful framework to consider the associations between the two disciplines. In what follows, I consider how these rules or relations contribute to each of the themes of legal performance identified in this thesis.

At the end of the decade, Marett Leiboff, one of the editors of the special issue that marked the start of the decade on research on law and performance, released *Towards a Theatrical Jurisprudence*. Theatrical jurisprudence is, as Leiboff writes, not a ‘philosophy or... theory, but... a practice... a jurisprudence that is meant to be done and acted upon, as a practice and a form of conduct that shapes through the formation of the self as aware and noticing, and imbricated through practice, into the consciousness and hence the body of the lawyer.’⁶¹ *Towards a Theatrical Jurisprudence* is something of a training manual or preparation for lawful encounters, for Leiboff argues that it is through training the body that we develop self-awareness and awareness of worlds beyond the self. *Towards a Theatrical Jurisprudence* is the first book to deeply consider the application of theatrical *practice* to the law. In what follows, I consider how Leiboff’s approach informs the themes of this thesis, and later go on to consider its implications for methods of law and performance research.

In what follows, I synthesise the body of academic writings that examine the relationship between law and performance under a series of headings that indicate the different approaches of this thesis.

Audience

In *Theatre and Law*, the first association that Read identifies between law and performance is that ‘law has to be *seen* to be done... law must show itself, must reveal itself in practice.’⁶² As legal proceedings are held in open court in front of a public audience, the role of the audience in law is not simply incidental; law ‘unfolds the way it does *for* public viewing.’⁶³ This harks back to an association between theatre and law first made by Hibbitts, that legal performance is social and ‘depends on the live performer actually appearing before a live audience’ that shape and are shaped by the public performance.⁶⁴ Assuming that law must be seen to be done and

⁶¹ Leiboff, *Towards a Theatrical Jurisprudence*, xi.

⁶² Read, *Theatre and Law*, 8-9.

⁶³ Jessie Allen, ‘Theatre of International Justice’ (2012) 3 *Creighton International and Comparative Law Journal* 128.

⁶⁴ Hibbitts, “‘Coming to Our Senses’”, 957.

that a performance cannot exist without an audience, in Chapter One, *Law's Audience*, I consider *who* constitutes the audience in law.

In *Towards a Theatrical Jurisprudence*, Leiboff introduces the idea of 'encounter' as way of thinking through the interaction between actor and audience in legal performance. In this regard, and throughout the book, Leiboff draws from the practice of theatre-maker Jerzy Grotowski's, which she describes as 'encounter that generate[s] response, responsiveness through the physicality of encounter.'⁶⁵ Encounter, Grotowski says, is 'an extreme confrontation, sincere, disciplined, precise and total - not merely a confrontation with his thoughts but one inviting his whole being from his instincts and his unconscious right up to his most lucid state.'⁶⁶ This notion of encounter as confrontation also resonates with law and the right of the accused to confront the witnesses against them. In Chapter One, I draw from this notion of encounter to consider the *interaction* between actor and audience in legal performance.

In her contribution to 'Law's Theatrical Presence', Karen Crawley explores an incident in a performance of Alex Buzo's *Norm and Ahmed* at the Twelfth Night Theatre in Brisbane, Australia in 1969 where two plain-clothed policeman sat in the audience and, after the last line was spoken, climbed onto the stage and arrested an actor for obscenity. Framing the arrest as a performance, Crawley explores how it 'depends on the recognition of an audience'⁶⁷ and suggests that the audience is a collaborator in the performance in the way that their response shapes the performance and its legitimacy.⁶⁸ Crawley's work, including her later consideration of courtroom audiences,⁶⁹ draws attention to the role of the audience in the performance of law, particular the 'outsider' as audience. In Chapter One, I draw from this idea of the 'outsider' to explore what I term '*outside audiences*' – those who come from the outside in and form the public gallery to legal performance in court – and how this audience (like the theatre audience in *Norm and Ahmed*) plays a constitutive role in legal performance.

⁶⁵ Leiboff, *Towards a Theatrical Jurisprudence*, 90.

⁶⁶ Jerzy Grotowski, *Towards a Poor Theatre* (Methuen, 1968) 57.

⁶⁷ Karen Crawley, 'The Farce of Law: Performing and Policing *Norm and Ahmed* in 1969' (2010) 14 *Law Text Culture* 249.

⁶⁸ *Ibid* 258.

⁶⁹ Karen Crawley and Kieran Tranter, 'A Maelstrom of Bodies and Emotions and Things: Spectatorial Encounters with the Law' (2019) 32 *International Journal for the Semiotics of Law*.

Architecture and approach

Another association that Hibbitts draws between theatre and law is that both are concretised in a physical space.⁷⁰ In her contribution to 'Law's Theatrical Presence', Olivia Barr points out that theatre is not simply 'the staging of a spectacle for spectators, but also refers to a place.'⁷¹ Her contribution explores the connection between place, movement and the taking up office. In her later work, she calls on us to 'notice how, from where, and with what it is that we approach.'⁷² In Chapter Two, *Setting the Law*, I draw from the notion of approach to consider the approach to the courthouse

In *Theatre and Law*, Read notes that in legal performance 'power and its contestation are at stake' as the legal performance necessarily involves 'human animals in... crisis.'⁷³ Here, we can turn to Turner's notion of the 'crisis' as a stage of social drama. The crisis is dealt with through 'redress': the ritual component of social drama, that includes court proceedings that are intended to resolve conflict or restore order. As discussed above, through the ritual of redress, the participant goes through the stage of 'liminality', meaning 'in between' or on the threshold of performance. In Chapter Two, I focus on the role of liminality and liminal spaces – the entrance spaces through which one passes to enter the central performance space – and how the body shapes and is shaped by liminal space.

Acoustics and attunement

In her contribution to 'Law's Theatrical Presence', Sara Ramshaw explores the connection between improvisational theatre and judgment, likening the judge to an actor in improvised theatre. In Chapter Four, I pick up on her provocation to explore the relations between improvisational theatre practice and the scripting of legal judgments. Her work also points to the idea of attunement, as she argues that law requires 'attunement, not only to the singularity of the situation, but also to the context and community within which the judgment is made.'⁷⁴

⁷⁰ Hibbitts, "Coming to Our Senses", 959; Hibbitts, 'De-scribing Law'.

⁷¹ Olivia Barr, 'A Moving Theory: Remembering the Office of the Scholar' (2010) 14 *Law and Culture* 45.

⁷² Olivia Barr, *A Jurisprudence of Movement: Common Law, Walking, Unsettling Place* (Routledge, 2016) ??.

⁷³ Read, *Theatre and Law*, 11.

⁷⁴ Sara Ramshaw, 'Jamming the Law: Improvisational Theatre and the "Spontaneity" of Judgment' (2010) 14 *Law Text Culture* 150.

Another focus of Leiboff's *Towards a Theatrical Jurisprudence* is the idea of 'noticing', that is 'to notice and pay attention and to become aware'⁷⁵ Leiboff argues 'we simply can't notice what it is we have never lived, whether literally or by analogy',⁷⁶ and to be able to notice we need to hold 'events and their experience close enough to respond bodily.'⁷⁷ Implicit within her thesis is that the act of noticing holds potential for change and transformation. Noticing changes the state of the jurist as audience and transforms them into attentive listeners attuned to the performance and its surrounding environment. Through that, transformation and invention can take place. Leiboff's idea of noticing has resonances with Ramshaw's idea of attunement.

In Chapter Three, *Hearing the Law*, I draw from this research, and further research on actor training, to explore attunement in legal performance, specifically through the silence in the court. In Chapter Five, I draw from Ramshaw's later research⁷⁸ – and that of James Parker on acoustic jurisprudence⁷⁹ – to attune to the musicality of legal speech.

Authorship

In *Theatre and Law*, Read contends that 'performance needs *experience* to do what it does [thus] the most obvious level of association between performance and law might be the rendering of such experience in the form of storytelling.'⁸⁰ The interest in legal storytelling has its 'starting more or less from the "storytelling" issue of *Michigan Law Review* in 1989.'⁸¹ Yet, as Scheppele writes in that same volume, law 'has always been concerned with narratives'⁸² for 'to make sense of the law and to organise experience, people often tell stories. And these stories are telling.'⁸³ In Chapter Four, *Scripting the Law*, I consider how law constructs its stories and what implications this has for those who tell their stories in court.

In her contribution to 'Law's Theatrical Presence', Nicole Rogers explores, in part, an incident at the meeting of the Asia-Pacific Economic Cooperation in Sydney,

⁷⁵ Leiboff, *Towards a Theatrical Jurisprudence*, 105 (emphasis added)

⁷⁶ *Ibid.*

⁷⁷ *Ibid* 109.

⁷⁸ Sara Ramshaw, *Justice as Improvisation: The Law of the Extempore* (Routledge, 2013).

⁷⁹ James Parker, *Acoustic Jurisprudence: Listening to the Trial of Simon Bikindi* (Oxford University Press, 2015).

⁸⁰ Read, *Theatre and Law*, 11.

⁸¹ Peter Brooks, 'Narrative Transactions: Does the Law Need a Narratology?' (2006) 18 *Yale Journal of Law and Humanities* 1.

⁸² Kim Scheppele, 'Foreword: Telling Stories' (1989) 87(8) *Michigan Law Review* 2073.

⁸³ *Ibid* 2075.

Australia 2007 where satire group The Chaser infiltrated the security zone around the meeting as part of a stunt for their television program, *The Chaser's War on Everything*. Rogers points to the script that the group had prepared for the performance,⁸⁴ which was subsequently challenged by an 'unscripted sequence of events that followed.'⁸⁵ In Chapter Four, I draw from this idea of the scripts of performance to suggest that the judgment might also be conceived of as a script that is shaped by the events of the legal performance.

As I flagged earlier, Rogers has explored law and performance in her doctoral research. Her article for 'Law's Theatrical Presence' ties in to the questions of her thesis: 'how does the performance of law... compare with two other forms of cultural performance: conventional theatrical performances and performances of protest.'⁸⁶ In 'Law's Theatrical Presence', she writes of protests as performance, and in later work she places her 'focus upon the use of legal texts in theatrical performance, or the (re)presentation of legal performance as theatre.'⁸⁷ (Two other articles in 'Law's Theatrical Presence' focus on law in performance: Caroline Wake on Version 1.0's *CMI (A Certain Maritime Incident)* based on an Australian Senate select committee inquiry of the same name,⁸⁸ and David Williams on Version 1.0's *Deeply Offensive and Utterly Untrue* based on the Australian Inquiry into Certain Australian Companies in relation to the UN Oil-For-Food Programme.⁸⁹) Rogers argues that 'transforming the law into theatrical play' offers the possibility of 'stripping law of its association with force and violence [and] may create a "new use" for law, and new possibilities for justice.'⁹⁰ Whilst I do have reservations about the supposed humanising dimension of theatrical performance vis-à-vis the violence of legal performance, in Chapter Four, I examine the scripts of legal judgment and their relation to the scripts of verbatim theatre where the theatrical script is drawn verbatim from legal transcripts. I argue that the process of judgment is akin to the process that verbatim theatre practitioners go through: drawing diverse and sometimes conflicting narratives together to create a meta-narrative.

⁸⁴ Nicole Rogers, 'Law and the Fool' (2010) 14 *Law Text Culture* 295.

⁸⁵ *Ibid* 296.

⁸⁶ Rogers, *The Play(fullness) of Law*, 3.

⁸⁷ Rogers, 'The Play of Law', 430.

⁸⁸ Caroline Wake, 'Caveat Spectator: Juridical, Political and Ontological False Witnessing in *CMI (A Certain Maritime Incident)*' (2010) 14 *Law Text Culture*.

⁸⁹ David Williams, 'Legal Language and Theatrical Presence: Transforming a Legal Inquiry into Theatre in Version 1.0's *Deeply Offensive and Utterly Untrue*' (2010) 14 *Law Text Culture*.

⁹⁰ Rogers, 'The Play of Law', 443.

Another influence in this regard is Cheryl Lubin whose doctoral research explores ‘how performance (in dramatic plays, as well as street performances and media interviews) can render law transformative in both reality and theatrical representation.’⁹¹ In it, she argues that ‘legal plays have impacted the reality and practice of law, while legal practice has, in turn, inspired the creation and performance of legal plays.’⁹² What Lubin’s thesis points to is the dialogical nature of legal and theatrical performance, that one can inform the other. Her work informs my research on verbatim trial theatre, but also the larger project of bringing two disciplines together to illuminate one another.

In *Towards a Theatrical Jurisprudence*, Leiboff grounds the idea of encounter as a moment ‘response and responsibility.’⁹³ Through response, one has ‘responsibility - to law, and through the theatrical, to the self who is to live and operationalise that responsibility... [and] awareness beyond the self in order to operationalise that responsibility.’⁹⁴ There is, in this, the idea that a lawful encounter provokes a response and, through it, a responsibility to the law, the self and the world around us. This idea of responsibility is also relevant to theatre, particularly verbatim theatre. In Chapter 4, I draw from the idea of responsibility to consider what responsibility scriptwriters have to those whose stories they tell. Here, I believe that insight can be gained from exploring the practices and reflections of verbatim theatre practitioners and how they regard this responsibility.

Audiovisual

In *Theatre and Law*, Read posits that law presents its workings openly and live. Legal proceedings where legal matters are worked out are open to a public audience in person and, increasingly, online. In law, ‘the value of “liveness” at all costs is upheld to the extent that one might think of the law as the privileged site of the “live” in the 21st century.’⁹⁵ In Chapter Six, *Seeing the Law*, I explore how the introduction of mediatisation is radically reshaping open justice and live legal performance.

In *Towards a Theatrical Jurisprudence*, Leiboff reminds her reader of the importance

⁹¹ Lubin, *Courting the Stage*, 4.

⁹² *Ibid* 2.

⁹³ Leiboff, *Towards a Theatrical Jurisprudence*, 91 (emphasis added).

⁹⁴ *Ibid* 102.

⁹⁵ Read, *Theatre and Law*, 14.

of presence to the encounter,⁹⁶ for without it ‘law [becomes] so dissociated from humanity that it’s aware of its consequences, and inevitably produces the loss of humanity in those who operationalise it.’⁹⁷ It becomes disembodied. In legal performance, ‘we are confronted with the liveness of an encounter forced upon us.’⁹⁸ This can usefully be contrasted to the mediated encounter on which the presence is mediated through the introduction of screens.

In her contribution to ‘Law’s Theatrical Presence’, Kate Leader explores the performance of testimony following the advent of media technology in the courtroom. She argues that the premise that a testifier’s ‘live presence facilitates truth-seeking’, and the concomitant ‘concepts of *demeanour* and *confrontation*, where the participants’ presence and their interaction will help indicate to the jury the truth of the matter’, are bound up in belief.⁹⁹ In her doctoral research, she terms this as ‘a collective, mostly unconscious, performance of embodied belief’ or *habitus* whereby ‘legal agents and lay bodies unknowingly perpetuate the performance of tradition by simply doing what they have been taught to do’ without questioning.¹⁰⁰ By contrast, her thesis is a deep exploration of the legal performance and the values inherent in it. Her research raises challenges questions of the beliefs that underpin presence in live performance and their shaky foundations. In Chapter Six, I return to this idea, focusing on the embodied interaction of audience with the digital legal performance of television testimony, providing a sensory account of the preference for live performance of testimony, drawing from my own performance-led research.

Methodology

The different chapters of this thesis also dabble in different methodologies and, as such, in this final part of the introduction, I consider some of the methodological approaches that have been adopted towards the study of law and performance. Despite the growth in scholarship in the broad field of law and performance, there is little critical attention paid to methodologies in the field. In *Theatre and Law* and *Towards a Theatrical Jurisprudence*, the term ‘methodology’ is not even mentioned. In a chapter on ‘methodological problems’ in law as performance, Julie Peters

⁹⁶ Leiboff, *Towards a Theatrical Jurisprudence*, 98.

⁹⁷ *Ibid* 99.

⁹⁸ *Ibid* x.

⁹⁹ Kate Leader, ‘Closed-Circuit Television Testimony: Liveness and Truth-Telling’ (2010) 14 *Law Text Culture* 312.

¹⁰⁰ Leader, *Trials, Truth-Telling and the Performing Body*, 103.

provides limited attention to methodology itself and instead focuses questions on determining the object of study – the legal performance itself, theatrical adaptations of legal performance – and the source material.¹⁰¹ Whilst this is important, it is necessary to take the next step to consider approaches to studying legal performance. As a fledgling interdisciplinary, law and performance is slowly developing its own methodologies drawing from the disciplines of the scholars writing on the topic. In later work critiquing interdisciplinary ‘pathologies’ in law and performance, Peters argues that each discipline has its established methodologies and that attempting the methodologies of another discipline can lead to flat-footed imitation.¹⁰² But what are the methodologies that scholars of law and performance utilise? There is more attention to methodology in three doctoral theses on the topic, but even then it is only brief. With attention to the research undertaken by scholars working on law and performance, I shall consider methodological approaches in the law as performance field, and conclude with an account of my own methodology.

My own work strives to understand what performance is and what it does in the court. In so doing, I draw from research and practice in theatre and performance to provide new insights into legal performance in court. My approach combines case studies, participant observation and some performance-led research. My approach and that of other scholar-practitioners in the field of law as performance may be likened to that of the ‘bricoleur’, a term first used by Norman Denzin and Yvonna Lincoln.¹⁰³ As Lincoln goes on to describe it, a bricoleur is ‘committed to methodological eclecticism, permitting the scene and circumstance and presence or absence of co-researchers to dictate method.’¹⁰⁴ The bricoleur creates a bricolage, which Joe Kincheloe describes as ‘the process of employing methodological strategies as they are needed in the unfolding context of the research situation.’¹⁰⁵ As such, bricolage is the use of multiple methods,¹⁰⁶ and signifies interdisciplinarity where ‘the analytical

¹⁰¹ Peters, ‘Law as Performance’.

¹⁰² Peters, ‘Mapping Law and Performance’, 211.

¹⁰³ Norman Denzin and Yvonna Lincoln, ‘Introduction: The Discipline and Practice of Qualitative Research’ in *Handbook of Qualitative Research* (Sage Publications, 2nd ed, 2000) 3.

¹⁰⁴ Yvonna Lincoln, ‘An Emerging New Bricoleur: Promises and Possibilities’ (2001) 7(6) *Qualitative Inquiry* 694.

¹⁰⁵ Joe Kincheloe, ‘On to the Next Level: Continuing the Conceptualisation of the Bricolage’ (2005) 11(3) *Qualitative Inquiry* 324.

¹⁰⁶ Joe Kincheloe, ‘Describing the Bricolage: Conceptualising a New Rigour in Qualitative Research’ (2001) 7(6) *Qualitative Inquiry* 680.

frames of more than one discipline are employed by the researcher.’¹⁰⁷ Kincheloe argues that ‘the frontiers of knowledge rest in the liminal zones where disciplines collide... the cutting edge of research lives at the intersection of disciplinary borders.’¹⁰⁸ However, much interdisciplinary research can be superficial and difficult to achieve in the time span of a doctoral program, and may really be a lifetime pursuit.¹⁰⁹ Kincheloe instead advocates for a ‘deep interdisciplinarity: the synergy of multiple perspectives’,¹¹⁰ which enables the researcher to ‘uncover new insights.’¹¹¹ Bricolage is ‘a genuinely rigorous, informed multi-perspectival way of exploring the lived world’,¹¹² attendant to dimensions of social justice,¹¹³ but also always inventive and new.¹¹⁴ In what follows, I sketch out some of the different approaches from scholars and practitioners in law and performance that form the bricolage of work within this field, including my own.

Ethnographic observation

As the prologue indicated, this thesis draws from ethnographic observations. Scholars working in the field of law and performance oftentimes draw from ethnographic observations based on watching and participating in legal performances.¹¹⁵ An example of one such scholar who has embarked on this approach is Kate Leader, who adopted a ‘methodology inflected by ethnographic observation of trial processes in Sydney and London between 2004 and 2008.’¹¹⁶ Leader builds on the work of Elizabeth Burns who argues (in Leader’s words) that ‘it is the mode of reception that determines and therefore shapes the construction of an event as performative.’¹¹⁷ Leader situates herself as something of an outside observer of the trial, distanced from the legal agents and closer to the laypersons watching the trial unfold.¹¹⁸ What her work suggests is that, in adopting an ethnographic methodology, the researcher must

¹⁰⁷ Kincheloe, ‘Describing the Bricolage’, 685.

¹⁰⁸ Kincheloe, ‘Describing the Bricolage’, 689-690.

¹⁰⁹ Kincheloe, ‘Describing the Bricolage’, 681; Kincheloe, ‘On to the Next Level’, 333. See also Peters, ‘Mapping Law and Performance’, 213.

¹¹⁰ Kincheloe, ‘Describing the Bricolage’, 686.

¹¹¹ Kincheloe, ‘Describing the Bricolage’, 687.

¹¹² Kincheloe, ‘On to the Next Level’, 337.

¹¹³ Kincheloe, ‘On to the Next Level’, 344-345.

¹¹⁴ Kincheloe, ‘On to the Next Level’, 346-347.

¹¹⁵ See e.g. Leif Dahlberg, *Spacing Law and Politics: The Constitution and Representation of the Juridical* (Routledge, 2016).

¹¹⁶ Leader, *Trials, Truth-Telling and the Performing Body*, 16.

¹¹⁷ *Ibid* referencing Elizabeth Burns, *Theatricality: A Study of Convention in the Theatre and in Social Life* (Harper and Row, 1973) 3-4.

¹¹⁸ Leader, *Trials, Truth-Telling and the Performing Body*, 16-17.

be conscious of their perspective. In my own work, I try to situate myself in the perspective of what I term the ‘outside audience’, which I discuss further later (in Chapter One) but can define loosely as those who come in and out of court and thus have an itinerant experience of legal performance. I am also acutely conscious that I am not a full outsider to the law. I have training in and understanding of it that differs to most laypersons. Sometimes in my ethnographic observations, I have brought friends along who do not share my same background in the law so that I can understand more from their perspective as outsiders to the legal performance. At other times, I have drawn from accounts from those in the public gallery of courtrooms to inform my perspective.¹¹⁹

Some methodological texts draw a distinction between participant and non-participant observation based on whether the observer is or is not part of the observed field.¹²⁰ Sometimes, the distinction based on anthropology versus ethnography. Tim Ingold argues that the aim of ethnography ‘is to render an account – in writing, film, or other graphic media – of life as it is actually lived and experienced by a people, somewhere, sometime’¹²¹ and that ethnography itself is not *a* method, but *has* methods.¹²² He argues that all observation involves some degree of participation – ‘observation is a way of participating attentively’¹²³ – but that the degree of detachment required in ethnographic observation can blur the researcher to practice,¹²⁴ in a way that anthropology does not. On the other hand, Uwe Flick argues that ‘interest in the method of participant observation has increasingly faded into the background, while the more general strategy of ethnography, in which observation and participation are interwoven with other procedures, has attracted more attention’¹²⁵ and that ethnography was ‘imported from anthropology.’¹²⁶ Ethnographic observation can generate case studies (a methodology discussed further below), or sometimes the observation forms one case under study. However, within this observational work

¹¹⁹ See, e.g., Jamelle Wells, *The Court Reporter* (ABC Books, 2018) ch 17.

¹²⁰ Uwe Flick, *An Introduction to Qualitative Research* (Sage Publications, 4th ed, 2009) 222-223; Barbara Tedlock, ‘Ethnography and Ethnographic Representation’ in Norman Denzin and Yvonna Lincoln (eds.), *Handbook of Qualitative Research* (Sage Publications, 2nd ed, 2000) 457.

¹²¹ Tim Ingold, ‘Anthropology Contra Ethnography’ (2017) 7(1) *HAU: Journal of Ethnography* 21.

¹²² *Ibid* 23.

¹²³ *Ibid*.

¹²⁴ *Ibid* 24-25.

¹²⁵ Flick, *An Introduction to Qualitative Research*, 233.

¹²⁶ *Ibid* 234.

there are risks of ‘going native’, though some may argue that this is what the sub-field of auto-ethnography is all about.¹²⁷

In earlier work, Barbara Tedlock describes ethnographic observation as having a strong connection to fieldwork based on personal, first-hand experience.¹²⁸ Like Flick and contra Ingold, she situates ethnography as ‘a philosophical paradigm within anthropology.’¹²⁹ She argues that ‘by entering into close and relatively prolonged interaction with people (one’s own or other) in their everyday lives, ethnographers can better understand the beliefs, motivations and behaviours of their subjects.’¹³⁰ She contends that because covert observation has been deemed to be unethical, there has been a rise in participant observation,¹³¹ though – like Ingold – she holds that ‘because we cannot study the social world without being a part of it, all social research is a form of participant observation’ and that, further, observation is fundamental to *all* research methods.¹³²

Michael Angrosino and Kimberly Mays de Perez argue that, even in participant observation, the researcher still maintains a degree of objectivity over the object of research, for to lose objectivity would be to ‘go native’.¹³³ They describe observation is a form of eye-witnessing,¹³⁴ in which choices are made over what is observed and what is recorded that reflect the idiosyncrasies of the researcher.¹³⁵ They note that, with ethnographic observation, it is often difficult to identify *a* community under study and ‘in some cases, the ethnographer might even be said to *create* a community simply by virtue of studying certain people and by implying that the links he or she has perceived among them constitute a society.’¹³⁶ Thus, an insider versus outsider dialectic forms, which parallels the ethnographer versus anthropologist distinction,¹³⁷ which Ingold draws attention to.

¹²⁷ *Ibid* 229-231; Tedlock, ‘Ethnography and Ethnographic Representation’, 457-459.

¹²⁸ Tedlock, ‘Ethnography and Ethnographic Representation’, 455.

¹²⁹ *Ibid.*

¹³⁰ *Ibid* 456.

¹³¹ Tedlock, ‘Ethnography and Ethnographic Representation’, 464. See also Michael Angrosino and Kimberly Mays de Perez, ‘Rethinking Observation: From Method to Context’ in Norman Denzin and Yvonna Lincoln (eds.), *Handbook of Qualitative Research* (Sage Publications, 2nd ed, 2000) 677.

¹³² Tedlock, ‘Ethnography and Ethnographic Representation’, 465.

¹³³ Angrosino and Mays de Perez, ‘Rethinking Observation’, 674.

¹³⁴ *Ibid.*

¹³⁵ *Ibid* 676.

¹³⁶ *Ibid* 682.

¹³⁷ *Ibid* 684.

Leif Dahlberg's 'study combines ethnographic and phenomenological approaches in order to produce a "thick description" of contemporary courtroom procedure.'¹³⁸ Anthropologist Clifford Geertz pioneered the thick description method as a mode of observing not just a certain phenomena itself but its context.¹³⁹ As Dahlberg describes it, it is a way to 'simultaneously describe, explain and interpret social behaviour in the courtroom in relation to its cultural context so that it becomes meaningful to an outsider.'¹⁴⁰ Another author regards thick description as a means 'to make visible what is there for us already to see through description.'¹⁴¹ And another, as a means to 'get further inside the experience and visceral effects of law.'¹⁴² As these quotes suggest, Geertz's thick description method has a particular appeal to law as performance scholars for its ability to reveal legal performance in a manner that is meaningful to a wider audience. Dahlberg combines this with a phenomenological approach that tends to focus on the phenomena itself. In doing so, it posits a challenge for the research to concentrate on both the phenomenon itself and its social context.

Dahlberg's work starts with 'an ethnographic study of the lower level court in Stockholm, conducted in 2008 and 2009... [and] gives a thick description of the interior design and the dramaturgy of the courtrooms and court buildings'¹⁴³ and concludes with 'an ethnographic study of the Stockholm appellate court (Svea hovrätt) conducted in the fall of 2010.'¹⁴⁴ Like Leader, Dahlberg considers where he situates himself in his ethnographic observations. He 'spent considerable time "hanging around" in waiting areas and in the courthouse café, with the purpose of immersing [himself] in the field'¹⁴⁵ and writes about how this feels: 'When entering a courtroom as a visitor of a neutral observer, it is easy to feel that you should not be there at all... During my field studies this feeling of estrangement gradually diminished but never quite disappeared.'¹⁴⁶

Matilda Arvidsson builds on this ethnographic methodology to adopt an auto-ethnographic approach in two of her early career articles concerning her experiences

¹³⁸ Dahlberg, *Spacing Law and Politics*, 3.

¹³⁹ Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (Basic Books, 1973) 5-10.

¹⁴⁰ Dahlberg, *Spacing Law and Politics*, 17.

¹⁴¹ Matilda Arvidsson, 'Embodying Law in the Garden: An Autoethnographic Account of an Office of Law' (2013) 39 *Australian Feminist Law Journal* 23 n 11; and also 25 n 26.

¹⁴² Peters, 'Law as Performance', 197.

¹⁴³ Dahlberg, *Spacing Law and Politics*, 10-11.

¹⁴⁴ *Ibid* 13.

¹⁴⁵ *Ibid* 16.

¹⁴⁶ *Ibid* 17.

at the District Court of Lund in Sweden. She adopts this approach in order both to ‘come to understand my own as well as others’ practices on law’¹⁴⁷ and ‘to recognise the ethical responsibility when embodying law through offices of law.’¹⁴⁸ Arvidsson describes auto-ethnography as both ‘the giving of an account of oneself’¹⁴⁹ and, perhaps more deeply, ‘a cultural introspection – which means a study of the culture which one[‘s] self has taken part of, through an analysis of the self-experienced.’¹⁵⁰ It is self-reflexive.¹⁵¹

Carolyn Ellis and Arthur Bochner note that researchers are forever ‘using a passive voice that erases subjectivity and personal accountability.’¹⁵² However, auto-ethnography privileges personal narrative,¹⁵³ including sensory and emotional experiences.¹⁵⁴ In a later work, Stacy Jones describes auto-ethnography as ‘a lived felt experience’,¹⁵⁵ that is experiential, emotional, embodied, self-absorbed and revelatory, and also situational and contextual. As a form of storytelling, auto-ethnography is not as concerned with extrapolating from the individual case to make generalisable claims but instead creating an evocative tale that ‘repositions the reader as a co-participant in dialogue and thus rejects the orthodox view of the of the reader as a passive receiver of knowledge.’¹⁵⁶ Further, as Jones argues, auto-ethnographic work can inspire action and change.¹⁵⁷ In works ‘largely free of academic jargon... the authors privilege stories over analysis, allowing and encouraging alternative readings and multiple interpretations’, which has led to criticism in some quarters.¹⁵⁸

¹⁴⁷ Matilda Arvidsson, ‘The Presence of Absence of Personal Identity: Everyday Conditions of Practicing Law’ in Matilda Arvidsson and Elsa Onnefors (eds.), *Jag Strackr Mig In I Framtiden* (Corpus Iuris Forlag, 2007) 4.

¹⁴⁸ Arvidsson, ‘Embodying Law in the Garden’, 25.

¹⁴⁹ *Ibid* 25 n 27.

¹⁵⁰ Arvidsson, ‘The Presence of Absence of Personal Identity’, 4.

¹⁵¹ Tedlock, ‘Ethnography and Ethnographic Representation’, 467.

¹⁵² Carolyn Ellis and Arthur Bochner, ‘Autoethnography, Personal Narrative, Reflexivity: Researcher as Subject’ in Norman Denzin and Yvonna Lincoln (eds.), *Handbook of Qualitative Research* (Sage Publications, 2nd ed, 2000) 735.

¹⁵³ *Ibid* 739. See also Stacy Jones, ‘Autoethnography: Making the Personal Political’ in Norman Denzin and Yvonna Lincoln (eds.), *Handbook of Qualitative Research* (Sage Publications, 3rd ed, 2005) 773.

¹⁵⁴ Ellis and Bochner, ‘Autoethnography’, 741-742.

¹⁵⁵ Jones, ‘Autoethnography’, 764.

¹⁵⁶ Ellis and Bochner, ‘Autoethnography’, 744.

¹⁵⁷ Jones, ‘Autoethnography’, *passim*.

¹⁵⁸ Ellis and Bochner, ‘Autoethnography’, 745. See, for example, Paul Atkinson, ‘Narrative Turn or Blind Alley?’ (1997) 7(3) *Qualitative Health Research*.

However, Ellis and Bochner question ‘haven’t our personal stories always been embedded in our research monographs?’¹⁵⁹

As Arvidsson describes it, auto-ethnography is a process that requires a degree of ‘physical displacement. One has to enter the field from having been somewhere else.’¹⁶⁰ Alongside this, it requires ‘dislocation *from* the field’; one has to leave the field in order to be ‘able to analyse and write about’ it.¹⁶¹ Presumably, this is to allow for a degree of critical distance. As Arvidsson concludes, ‘autoethnographical convention has it that getting out of one’s field is not done as a simple geographic exercise: there is no proper exit.’¹⁶² At times, in my own research, I explore my own participation in performances of law and theatre, reject ‘distinction between the researcher and the object of research’,¹⁶³ and acknowledge the subjectivity of my analysis.

An ethnographic observation methodology has appeals to scholars of law as performance, including myself. It invites a concentration on not just the production of legal performance but also its reception by diverse audiences, and allows the researcher to situate themselves in the perspective of an audience to the legal performance. It also invites scholarly attention to the questions of reception and forces the researcher to think through their own perspective on their performance and their relation to it. The thick description method, utilised by many researchers in this field, enables a rich account of the legal performance, but it poses a challenge between exploring the performance itself and its social context. This demands of the researcher a constant oscillation between the specific and the broad. As an audience to the performance or as a participant (though the distinctions are not so clear), the researcher also has to do a dance between being both outside and in and adopt critical estrangement when dealing with the object of their study whilst simultaneously recognising the subjectivity of their own analysis. Challenging as this might be, it also brings attention back to the human experiences of law and how law makes one feel. Whilst ethnographic observations inform the entire thesis, they are perhaps most evident in Chapter Two, where I take a walk through court, drawing from my observations of attending courthouses across the globe.

¹⁵⁹ Ellis and Bochner, ‘Autoethnography’, 746-747.

¹⁶⁰ Arvidsson, ‘The Presence of Absence of Personal Identity’, 17.

¹⁶¹ *Ibid* 18.

¹⁶² Arvidsson, ‘Embodying Law in the Garden’, 43.

¹⁶³ Rogers, *The Play(fullness) of Law*, 3.

Case study

The use of case studies occurs throughout the thesis. This approach is adopted by Nicole Rogers. As she describes it, case study methodology enables a ‘focus on the specific and particular... by working outwards’ from the case to explore the relationship between law and performance.¹⁶⁴ The hope is that ‘the case studies can tell us a little bit about’ a broader issue,¹⁶⁵ or be representative of a broader trend.¹⁶⁶ As Rogers herself acknowledges, there is a degree of selectivity to a case study approach in that the case studies are typically chosen to best elucidate a particular point but there is always subjectivity in the choice, whether that be by selecting case studies in which the researcher was personally or tangentially involved or selecting case studies that have a particular resonance with their imagined readership.¹⁶⁷

In *Case Study Research*, Robert Yin describes the case study methodology as a way ‘to understand complex social phenomena’¹⁶⁸ through techniques of description, explanation/illustration and generalisation/illumination,¹⁶⁹ which enables an exploration of the how and why of phenomena.¹⁷⁰ As opposed to a history, a case study often includes ‘direct observation of the events being studied and interviews of the persons involved in the events’ that are relatively contemporary.¹⁷¹ In this sense, it is easily to conflate case studies with ethnographic observations.¹⁷² Yin asserts its difference and defines a case study as ‘an empirical inquiry that investigates a contemporary phenomenon in depth and within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident.’¹⁷³ Using case studies can assist law as performance scholars to elucidate particular points, through focusing on the specific and then outwards to illuminate the intersections of law and performance more generally.

Rather than adopting this historical approach of some other scholars in this field (such as Julie Peters), this thesis concentrates on contemporary case studies that speak to

¹⁶⁴ *Ibid* 3-4.

¹⁶⁵ *Ibid* 245.

¹⁶⁶ *Ibid* 247.

¹⁶⁷ *Ibid* 243-244.

¹⁶⁸ Robert Yin, *Case Study Research: Design and Methods* (SAGE Publications, 2009) 4.

¹⁶⁹ *Ibid* 5.

¹⁷⁰ *Ibid* 10.

¹⁷¹ *Ibid* 11.

¹⁷² *Ibid* 17.

¹⁷³ *Ibid* 18.

legal performance in this twenty-first century. However, the case studies are necessarily selective, and speak to themes that guide the greater exploration into law as performance. For example, in Chapter Four, I undertake case studies of judgments that exemplify different approaches to dealing with narratives; in Chapter Six, I discuss two musicals that have adapted legal transcripts into musical scores as case studies of a method of musicalising law.

Narrative

Throughout the thesis, I find myself diverting into stories. This is not uncommon to those writing in the field. Nicole Rogers utilises narrative to explore her own participation in performances of protest and her relationship to the themes of her research, being violence and play, but this necessarily involves owning up to her ‘partiality and biases as a researcher’,¹⁷⁴ including her ‘socio-historical context and... [status] as participant, researcher and observer of the various performances analysed.’¹⁷⁵ That is hard. In attempting to insert self-reflective narrative in her work, she writes of the ‘fear that I have been held back by the various unspecified inhibitions and rigours of my own discipline, and my desire to produce something which is at least marginally acceptable.’¹⁷⁶ I feel this too. Reading over this, I had a pang of remembrance. When undertaking a research thesis in law, I sheepishly suggested bringing perspectives from my background in theatre to bear on the thesis topic of wage compensation and workplace justice for Aboriginal workers and was met with a disdainful stare that held me back from doing so. That’s just not how we do things in the law school, you see, the stare seemed to say to me. That is part of my narrative.

In her article, ‘Why Might You Use Narrative Methodology?’, Lynn McAlpine reminds her reader that ‘we all tell stories about our lives every day since narrative provides a practical means for a person to construct a coherent plot about his/her life with a beginning, middle, end – a past, present and future.’¹⁷⁷ As such, narrative is ‘a research methodology that we all are familiar with to some extent.’¹⁷⁸ A narrative approach that centres the individual can complement a structural approach that

¹⁷⁴ Rogers, *The Play(fullness) of Law*, 3.

¹⁷⁵ *Ibid* 29.

¹⁷⁶ *Ibid* 29.

¹⁷⁷ Lynn McAlpine, ‘Why Might You Use Narrative Methodology? A Story About Narrative’ 2016 4(1) *Estonian Journal of Education* 33.

¹⁷⁸ *Ibid* 34

emphasises how law directs individuals, so long as it balances the ‘close to home’ perspective with broader structural influences.¹⁷⁹ McAlpine discusses the use of ‘narrative cameos and vignettes’,¹⁸⁰ which I often use in my own work as a way of providing this individual, close to home perspective on the legal performance.

In *Towards a Theatrical Jurisprudence*, Marett Leiboff writes that she is ‘beyond hesitant in making claims, far preferring to write stories that will then force responses, as acts of theatrical jurisprudence.’¹⁸¹ Much of her stories draw from personal experience. In ‘Participant Writing as Research Method’, Vivienne Elizabeth discusses the practice autobiographical writing that brings attention to personal experiences.¹⁸² Linking it to the process of autoethnography discussed above, she suggests that there is therapeutic value to this mode of writing, particularly for those that have been subject to harmful experiences.

Narrative can include free writing of the kind that opened this thesis. Throughout the work, I also tell stories from my personal experience. In Chapter Three, for example, I tell the story of how a moment of ‘attunement’ at a conference and the experience of being in an anechoic chamber got me thinking about the connections between silence and attunement and the implications for law. In Chapter Six, I draw from my own experiences of communicating with a loved one through video-link that opened up my thinking of the role that touch plays in communication.

Comparative analysis

Working at the intersection of law and performance, drawing from both performance studies and legal theory, naturally invites comparisons. As Rogers writes, the comparative methodology of ‘comparing law with other, more conventional performance types... [is] consistent with an interdisciplinary project.’¹⁸³ It allows ‘an interrogation of the differences and the interrelationship’ between law and other performance modes.¹⁸⁴ Moreover, it is about allowing these two disciplines space to talk to one another and exploring the conversations that flow from this.

¹⁷⁹ *Ibid* 46.

¹⁸⁰ *Ibid* 36.

¹⁸¹ Marett Leiboff, *Towards a Theatrical Jurisprudence* (Routledge, 2019) xi.

¹⁸² Vivienne Elizabeth, ‘Another String to Our Bow: Participant Writing as Research Method’ (2008) 9(1) *Forum: Qualitative Social Research*.

¹⁸³ Rogers, *The Play(fullness) of Law*, 3.

¹⁸⁴ *Ibid* 35.

Much of the earlier work in the field takes a comparative approach: comparing performances in court to the theatre. (This differs from a comparative law approach, which involves comparing laws in different jurisdictions, though the method of comparison is the same.) Through this approach, sometimes the reader can draw comparisons; sometimes the researcher will point out comparisons.¹⁸⁵ However, concentration on the dimensions of the comparison may lead to analysis neglecting other aspects of the phenomenon including its structures and context.¹⁸⁶ What later scholars of the law as performance field do is utilise the interdiscipline of performance studies to expose deeper understandings of the legal performance. In adopting a comparative analysis in this way, one is not suggesting that one mode of performance – legal or theatrical – is better than the other but that the different approaches can illuminate one another. In this regard, in Chapter Four I draw comparisons with the scripting process of verbatim trial theatre and the writing of legal judgments. In so doing, I suggest that the two are related phenomena and, as such, there is much that judicial scriptwriters can learn from their theatrical counterparts.

Performance as research

Despite the growth in scholarship on law as performance, there is remarkably little – if any – explicit utilisation of performance as research methodology by those working in the field. Baz Kershaw defines performance practice as research as ‘the uses of practical creativity as reflexive enquiry into significant research concerns.’¹⁸⁷ He argues that there was a ‘turn to practice’ in the late-twentieth century and that ‘the main emphasis of this turn was away from abstract theorising and scientific rationality in favour of action-based investigations oriented toward practical engagement in the world.’¹⁸⁸ Practice as research became well established towards the end of the last decade, particularly in Great Britain and Australia, ‘placing creativity at the heart of research implied a paradigm shift, through which established ontologies and

¹⁸⁵ Robert Stake, ‘Case Studies’ in Norman Denzin and Yvonna Lincoln, *Handbook of Qualitative Research* (Sage Publications, 2nd ed, 2000) 444.

¹⁸⁶ Flick, *An Introduction to Qualitative Research*, 135; Stake, ‘Case Studies’, 444.

¹⁸⁷ Baz Kershaw, ‘Performance Practice as Research: Perspectives from a Small Island’ in Shannon Riley and Lynette Hunter (eds.), *Mapping Landscapes for Performance as Research: Scholarly Acts and Creative Cartographies* (Palgrave Macmillan, 2009) 4.

¹⁸⁸ Baz Kershaw, ‘Practice as Research Through Performance’ in Hazel Smith and Roger Dean (eds.), *Practice-Led Research, Research-Led Practice in the Creative Arts* (Edinburgh University Press, 2009) 107.

epistemologies of research... potentially, could be radically undone.’¹⁸⁹ The claim of this methodology is that ‘the performance or theatre event itself may be a form of research.’¹⁹⁰

There is, however, a debate between ‘radical practitioners contending that time-based cultural events – productions, installations, films, live art and so on – may be research “in themselves”, while their more moderate colleagues would expect some kind of supplementary material – articles, journals, interpretive accounts of various kinds – for the “research” to become manifest.’¹⁹¹ Hazel Smith and Roger Dean frame this as a distinction as:

Firstly... that creative research is in itself a form of research and generates detectable research outputs; secondly... that creative practice – the training and specialised knowledge that creative practitioners have and the processes that they engage in when they are making art – can lead to specialised research insights which can then be generalised and written up as research. The first argument emphasises creative practice in itself, while the second highlights the insights, conceptualisation and theorisation which can arise when artists reflect on and document their own creative practice.¹⁹²

Linda Candy and Ernest Emonds surmise this difference as follows: ‘If a creative artefact is the basis of the contribution to knowledge, the research is *practice-based*. If the research primarily leads to new understandings about practice, it is *practice-led*.’¹⁹³ For my own part, my research is predominantly practice-led; that is to say, the practice generates insights into the research questions I am confronting.

That practice or performance is its own research method is somewhat disputed. Some would argue that practitioners use methodologies to guide their practice. However, others would argue that practice is a method in itself. Brad Haseman emphasises the way that practitioners ‘tend to “dive in”, to commence practicing to see what

¹⁸⁹ *Ibid* 105.

¹⁹⁰ *Ibid* 107.

¹⁹¹ *Ibid* 107.

¹⁹² Hazel Smith and Roger Dean, ‘Introduction’ in *Practice-Led Research, Research-Led Practice in the Creative Arts* (Edinburgh University Press, 2009) 5.

¹⁹³ Linda Candy and Ernest Emonds, ‘Practice-Based Research in the Creative Arts’ (2018) 51(1) *Leonardo* 64.

happens’,¹⁹⁴ but at the same time their practice is inflected with other methodologies such as reflexive practice, participant observation, performance ethnography and autobiographical or narrative enquiry.¹⁹⁵ In my own practice-led research, there is a degree of diving in and also planning the dive through utilising other methodologies to understand a key research concern of mine: the experience of the audience to legal performance.

However, it is fair to say that there is a general resistance to creative practice-led research in the law school, a methodology that is more typical in the visual or performing arts. For practitioners, innovative approaches are necessary to overcome this. Carolyn McKay is an artist and legal scholar who settled on not creating artwork through her doctorate, but allowing her ongoing arts practice to respond to her research during her doctorate. Thus, it was not so much practice-led research but practice-influenced research or, indeed, research-influenced practice. McKay describes her practice as ‘a habituation to materially thinking’, radically reconceptualising the software of justice and the technologies of audiovisual link as material objects, and focusing on their tactility or materiality. The hands interacting with a tablet computer, for example, are a material interaction joining hand, eye and mind together. McKay sees this kind of sensorial engagement as a way of creating new knowledge about the technologies of justice; moreover, a form of embodied experiential knowledge. This knowledge making also necessitates a reflexive practice, wherein the creative practitioner critically reflects on and analyses their work. McKay is not the only legal scholar undertaking practice-led research. Jack Tan and others do likewise,¹⁹⁶ and much of their work is cited in this thesis. Embracing creative practice in legal studies may yield new understandings of legal performance.

In Chapter Six, I describe a practice-led research project that I undertook on the ways in which audiences interact with screens, to inform my research on digital legal performance through screens.

¹⁹⁴ Brad Haseman, ‘A Manifesto for Performative Research’ (2006) 118(1) *Media International Australia incorporating Culture and Policy* 100.

¹⁹⁵ *Ibid* 104.

¹⁹⁶ See, e.g., Jack Tan, ‘Law’s Imagination: Towards an Understanding of Legal Aesthetics through Performative Practice’ (PhD Thesis, University of Roehampton, 2019).

Adopting a performance lens

In the introduction to the special issue on ‘Law’s Theatrical Presence’, Nield and Leiboff describe the contribution as looking at ‘law through the lens of theatrical theory.’¹⁹⁷ This resonates with the method of this thesis, which is to look at, listen to, touch and explore legal performance through the lens of performance studies research and practice. Through adopting a performance lens, one is able to draw in a diverse array of methods to examining the legal performance.

As I have set out, each chapter has its unique methodological inflections, but they are drawn together under the lens of performance. In some ways, the approach of this thesis forms a subtle rebuttal to the call from Peters to stay within one’s own disciplinary tracks, but it is born out of a belief that performance research and practice can offer a new way of looking at the law more attentive to its material and aesthetic dimensions.

Directions to the reader

This thesis is structured as an experiential journey through court. In Chapter One, I situate my perspective and the perspective of this work: that of the audience to legal performances. Thereafter, I take you on a journey to the courthouse (Chapter Two), tuning into the sounds and voices in the space (Chapter Three), concentrating on the words themselves (Chapter Four), then – with our ears carefully attuned – listening to the musicality of legal speech (Chapter Five), then opening our eyes – and hands – to the screen in the courtroom (Chapter Six). In the concluding section of the thesis, we exit the courthouse and look back on what the abandoned courthouse building might be doing.

The chronological structure just set is but only one way to navigate this thesis. You might be a visual person, drawn to the screens before the sounds, and race forward to Chapter Six before working your way backwards through each chapter prior. You might be interested in legal storytelling and find your way into Chapter Four first before tentatively dipping your toe into considering the musicality of the stories told in Chapter Six, and your interest in listening piqued you might return to Chapter Three to find out more about how we attune to sounds in law.

¹⁹⁷ Leiboff and Nield, ‘Introduction: Law’s Theatrical Presence’, 1.

I invite you let your curiosity guide you on your reading journey at a pace that suits you, but ask that when you first read, you read chronologically to get the sense of the approach to the legal performance that is being advanced here.

Chapter One

Law's Audience: Audience and Interaction in Legal Performance

Prologue

The role that the public gallery plays as an audience to legal performance is difficult to describe. They are part of any court. Space is provided, usually at the rear, for the gallery to be seated. However, their importance to the performance is difficult to explain. In her letter to two regular audience members (what court reporter Jamelle Wells terms ‘court watchers’), Justice McCallum of the Supreme Court of New South Wales similarly struggles:

I have permitted myself the indulgence of thinking of you both as part of my court. It is difficult to explain how important this has been to me. As I am sure you know, it is a central principle of our system of justice that courts must be open to the public and must carry out their activities in public. This is a fine and important principle, but one which rings hollow if the public to whom it is directed is eternally absent. Without observers to perceive its operation, open justice feels like an empty deal.¹

Noting the expressed difficulty of explaining this in words, it may be constructive to turn to artists to consider how they have, through their work, described this phenomenon. Karen Crawley and Kieran Tranter take this approach by concentrating on the work of Julie Fragar who observed murder trials in the Supreme Court of Queensland that became the basis of her exhibitions, *Next Witness*. As they describe:

The paintings combine primary images of the courtroom space, the architecture, people entering and leaving the court, the media waiting outside, with photographs of the artist herself... her face superimposed on the deceased’s face as his body is laid out in a re-enactment of an image shown in evidence in [*Post-Mortem Injury (Incise Wound)*].²

¹ Cited in Jamelle Wells, *The Court Reporter* (ABC Books, 2018) 207.

² Karen Crawley and Kieran Tranter, ‘A Maelstrom of Bodies and Emotions and Things: Spectatorial Encounters with the Trial’ (2019) *International Journal for the Semiotics of Law* 633.



Figure 1.1: Julie Fragar, *Post-Mortem Injury (Incise Wound)* (2018)

Whilst Crawley and Tranter predominantly explore Fragar's work from a critical legal perspective of law's authority, power and violence,³ I am interested in why the artist superimposes herself in the work. In a press release accompanying the exhibition, Fragar says of *Post-Mortem Injury (Incise Wound)* that 'my body and the body... of someone I care about are combined here with other bodies treated as evidence, bits of facts. I don't know what this really means.' The press release states that 'this superimposition of the artist's presence, engaging directly with the viewer, cunningly breaks the "fourth wall".' By placing herself in the work, Fragar seems to be suggesting, perhaps without meaning it, that the audience breaks the fourth wall in legal performance and becomes imbricated in the performance: the spectator becomes spect-actor.⁴ This experience is, as Fragar describes it, 'uncomfortable.'⁵ The outsider becomes forcibly complicit in the performance.

Introduction: Open justice and the legal audience

In her letter to the court watchers, Justice McCallum cites the principle of 'open justice', namely, that proceedings must take place in open court. There are various arguments for open justice: it confers legitimacy on the proceedings; it signals community support; it enables external scrutiny and evaluation; and it performs an educative function.⁶ In their reflections on the principle of open justice, Crawley and Tranter observe that 'the tradition of English justice depends on an audience... The integrity of criminal proceedings is bound up in their being held in public places in which spectators unconnected with the trial are able to observe justice being done.'⁷ The administration of justice rests upon the maintenance of integrity. Integrity is lost when courts are closed, there is no audience and justice cannot be seen, as 'the concern is that if courts are not on public view, the administration of justice may be corrupted.'⁸ Crawley and Tranter argue that 'visuality is considered a hallmark of a just, functioning criminal law. There is a need to be witnessed, deep in the foundations of criminal law... In needing witnesses, in requiring spectators, the

³ *Ibid* 623-626.

⁴ See the discussion of Boal at the end of this chapter.

⁵ Crawley and Tranter, 'Spectatorial Encounters with the Trial', 632.

⁶ Linda Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (Routledge, 2011) 84-86; Antony Duff et al, *The Trial on Trial: Towards a Normative Theory of the Criminal Trial* (Hart Publishing, 2007) 269-270; Crawley and Tranter, 'Spectatorial Encounters with the Trial', 623.

⁷ Crawley and Tranter, 'Spectatorial Encounters with the Trial', 623.

⁸ *Ibid*. See also Julie Peters, 'Legal Performance Good and Bad' (2008) 4 *Law, Culture and the Humanities* 185.

criminal law exposes the spectacle of the trial to outsiders.’⁹ The very principle of open justice draws from the aphorism that ‘not only must justice be done; it must also be seen to be done.’¹⁰ This dictum raises two questions. First, who is doing the seeing? Second, how is seeing doing (justice)? These questions guide this opening chapter. First, I consider the question of who is doing the seeing by considering the various audiences in court. Second, I consider how the seeing is doing justice by considering how the audience interact with and constitute the legal performance in court.

Crawley and Tranter argue that a ‘trial must have an audience not only for them to observe that justice is being carried out, but to be *co-opted into participating in a performance*.’¹¹ The performance of a legal audience is what I intend to explore in this chapter. Observers are crucial to the system of justice but are often overlooked in legal scholarship. Linda Mulcahy, in her work on legal architecture, offers some reasons for the lack of sustained academic attention to court audiences. She argues that this could be due to the prominence of court reporters as agents of the public viewing the trial.¹² Notably, the Victorian *Open Courts Act 2013* allows news media organisations to appear and be heard on applications for court suppression orders; not – explicitly at least – members of the general public.¹³ Likewise, the Victorian *Court Security Act 1980* only permits news media organisations to record court proceedings, not members of the general public.¹⁴ This could also be because ‘public attendance in trial has reduced significantly’ over the centuries due to ‘changing work patterns and the widespread availability of television as a form of entertainment.’¹⁵ In *R v Davis*, the Federal Court of Australia held that ‘exposure to public scrutiny is the surest safeguard against any risk of the courts abusing their considerable powers. As few members of the public have the time, or even the inclination, to attend courts in person, in a practical sense this principle demands that the media report what goes on in them.’¹⁶ Both the architecture of court buildings and the emergence of other forms of popular entertainment have reduced the public presence in courtrooms over time,

⁹ Crawley and Tranter, ‘Spectatorial Encounters with the Trial’, 622.

¹⁰ *R v Sussex Justices, ex parte McCarthy* [1923] All ER Rep 233.

¹¹ Crawley and Tranter, ‘Spectatorial Encounters with the Trial’, 623 (emphasis added).

¹² Mulcahy, *Legal Architecture*, 83-84.

¹³ *Open Courts Act 2013* s 11.

¹⁴ *Court Security Act 1980* s 4A(3)(a).

¹⁵ Mulcahy, *Legal Architecture*, 105.

¹⁶ *R v Davis* (1995) 57 FCR 512, 514 cited in Crawley and Tranter, ‘Spectatorial Encounters with the Law’, 623.

and positioned the media, in the form of the court reporter, as the prime public audience to court proceedings. Against this tendency to marginalise the public audience to a legal performance, I draw back attention to the public audience and the way in which they interact with the legal performance in diverse ways.

In thinking through the role of the audience to a legal performance, I draw from the history of audience scholarship by performance studies scholars in the context of theatre to frame my discussion. The seminal work in this area is Susan Bennett's *Theatre Audiences*,¹⁷ published at the turn of the century and offering a comprehensive study of audience in both historical and contemporary or non-traditional performances. It is an acknowledged 'central reference point in the field',¹⁸ particularly for bringing 'theories of spectatorship to the analysis of theatre audiences.'¹⁹ In particular, Bennett deeply explores reception theory and its application to theatrical performance. In later work, Bennett branches out to consider other stages beyond the theatrical, such as the cityscape.²⁰ Building on her analysis of audience in social performance, I apply her thinking to the legal performance in courts. I am furthermore influenced by Stuart Grant's phenomenological study of audience. Grant describes audience as 'the mundane experience of sitting or standing, side-by-side together with strangers and familiars in the towards orientation of witness.'²¹ Against semiotic analyses of audience, Grant argues that audience 'is a mode of Being.'²² Audience therefore 'cannot be considered in its "whatness". It is not a substantial thing, a production, a psychological state, but a transcendent lived experience... encounterable only as immersion. It must be lived and reported from.'²³ However, an account from the inside 'can only ever be one situated perspective, and a perspective from within, which will never give the whole shape.'²⁴ Grant advances a phenomenological analysis of the audience influenced by the personal experience of being in audience, and one that pays attention to the mundane experience of being audience. As with the chapters that follow, I explore the seemingly mundane aspects

¹⁷ Susan Bennett, *Theatre Audiences: A Theory of Production and Reception* (Routledge, 1997).

¹⁸ Helen Freshwater, *Theatre and Audience* (Red Globe Press, 2009) 3.

¹⁹ *Ibid* 12.

²⁰ Susan Bennett, 'Universal Experience: The City as a Tourist Stage' in Tracy Davis (ed.), *The Cambridge Companion to Performance Studies* (Cambridge University Press, 2008).

²¹ Stuart Grant, *Gathering to Witness* (PhD Thesis, University of Sydney, 2007) 132.

²² *Ibid* 236.

²³ *Ibid* 147.

²⁴ *Ibid*.

of legal performance based, in part, on my and others' experiences of being audience to legal performance.

Interaction

In *Theatre Audiences*, Bennett suggests that framing is crucial to reception. In doing so, she puts forward a model of audiences' experiences of performance that relies on two frames: the outer frame constitutes all those pre-performance elements that inform the audience's reception of the performance – this is discussed in Chapter Two – and the inner frame is the performance itself in its particular playing space, which is the focus of this chapter.²⁵ Bennett argues that, whilst the audience comes to a performance 'as a member of an already constituted interpretive community and also brings a horizon of expectations shaped by the pre-performance elements':

The audience's role is carried out within these two frames and, perhaps most importantly, at their points of intersection. It is the interactive relationship between audience and stage, spectator and spectator which constitute production and reception, and which cause[s] the inner and outer frames to converge for the creation of a particular experience.²⁶

The audience brings all the information from the outer frame – any foreknowledge of the performance; the experience of travelling to, approach and entering the performance venue; and the feelings, sounds and tedium of the waiting space – to the reception of the inner frame of the performance. The audience experiences a performance through *interaction*: interaction with one another, interaction with the stage, and interaction with the actors on it.²⁷ It is in these moments of interaction where the two frames converge: the interpretation of the performance is informed by the information extraneous to it, such that the experience of the performance and the reception of the performance converge into one.

²⁵ As Karen Gaylord describes, 'the performance takes place on at least two levels of "reality" simultaneously and within at least two frames. The outer frame always embraces both audience and performers. The inner frame demarcates the playing space' and the performance therein: 'Theatrical Performances: Structure and Process, Tradition and Revolt' in Jack Kamerman and Rosanne Martorella (eds.), *Performers and Performances: The Social Organisation of Artistic Work* (Praeger, 1982) 136. The latter draws from anthropologist Victor Turner's description of the 'frame within which images and symbols of what has been sectioned off can be scrutinised, assessed and, if need be, remodeled and rearranged': 'Frame, Flow and Reflection: Ritual and Drama as Public Liminality' (1979) 6(4) *Japanese Journal of Religious Studies* 468.

²⁶ Bennett, *Theatre Audiences*, 139.

²⁷ *Ibid* 151.

Bennett's theory of interaction challenges the assumed passivity of the audience and offers a more participatory account of the audience as co-creator of the performance. Applying this to the legal performance, it is necessary to not just look at *who* the audience is in legal performance but *how* the audience attends to a legal performance and, in so doing, shapes it. The section that follows addresses the first question of identifying the different audiences to a legal performance. The latter question of how the audience interacts with a legal performance guides much of the thesis. This opening chapter points to the (inter-)active role that the audience plays in legal performance and how this, shapes the performance of law in courts. In doing so, I draw from theatre-maker Augusto Boal's concept of the 'spect-actor' as a way of thinking through the interactive dimension of the legal audience.

Naming and framing the legal audience

In considering the role of the audience in a legal performance, I acknowledge that 'audience' is a commonly theatrical term and shaped to a great degree by theatre and performance scholarship. Many theatre practitioners regard an audience as essential to performance. Jerzy Grotowski asks, 'Can theatre exist without an audience? At least one spectator is needed to make it a performance';²⁸ Peter Brook states that all that is needed for performance is where 'a man walks across [an] empty space whilst someone else is watching him';²⁹ and Richard Schechner acknowledges that theatrical performances and courtroom trials both feature audiences.³⁰ Just as justice must be seen to be done, theatrical and legal performance cannot exist without audience. Indeed, performance 'is constituted by its audience'³¹ – audience and performance require each other.³²

Despite the centrality of 'audience' to theatrical performance, it is a term that is hard to define, and also a term that is difficult to translate into legal performance for a number of reasons. The first challenge is the etymology of the word itself. As theatre scholar Helen Freshwater notes, 'the word's origins in the Latin verb *audire* – "to hear" – suggest that audiences have been thought of primarily as listeners, rather than

²⁸ Jerzy Grotowski, *Towards a Poor Theatre* (Methuen, 1968) 32.

²⁹ Peter Brook, *The Empty Space* (Penguin, 2008) 9.

³⁰ Richard Schechner, *Performance Theory* (Routledge, 2003) 16, 266. Though Schechner does argue that other performances may not be dependant on audience.

³¹ Grant, *Gathering to Witness*, 32.

³² Stuart Grant, 'Fifteen Theses on Transcendental Intersubjective Audience' (2010) 10 *About Performance* 70.

viewers, at certain moments in the past.³³ The emphasis on the auditory has resonances with the legal performance as court proceedings are commonly referred to as hearings, drawing from the concept of listening to evidence in court. There is throughout legal history an emphasis on oral argument as the determinative mechanism of hearing. Yet the legal performance is not only a hearing, but also a means for justice to be *seen* to be done. The changing conception of an audience from listeners to viewers reflects a historical shift ‘in our understanding of which senses audiences are predominantly using at performances.’³⁴ Over time, the visual has taken more primacy in conceiving the role of the audience. However, as I discuss in later chapters, being an audience to a performance is a multi-sensorial experience, and the term audience is used in this way, as opposed to other terms such as watchers or observers that tend to indicate only the visual sense.

The second challenge in defining ‘audience’ rests with ‘the term’s association with an assembled group.’³⁵ Freshwater explains that: ‘although it is possible to speak of “an audience”, it is important to remember that there may be several distinct, co-existing audiences to be found among the people gathered together to watch... and that each individual within this group may choose to adopt a range of viewing positions.’³⁶ These viewing positions are informed by the individuals’ ‘own cultural reference points, political beliefs, sexual preferences, personal histories, and immediate preoccupations to their interpretation of a production... What’s more, these differences are present in individuals as well as among them.’³⁷ As Bennett concludes, whilst an ‘audience is a collective consciousness composed of the small groups in which spectators attend... it is also a specific number of individuals.’³⁸ These individuals will inevitably have a ‘diversity of responses’ to the performance.³⁹ With regards to legal performance, individuals attend court for a myriad of different reasons, each with their own horizon of expectations, leading to a fragmentation of responses to the performance. Audience is not a static concept in legal performance. The audience to a court performance is made up of a number of different groups who

³³ Freshwater, *Theatre and Audience*, 5.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid* 9-10.

³⁷ *Ibid* 5-6.

³⁸ Bennett, *Theatre Audiences*, 154.

³⁹ *Ibid* 156.

have an interest in it: whether that interest is in ensuring the administration of justice, being entertained, supporting an actor or waiting for their cue to enter the legal stage.

In the section that follows, I shall adopt Alexander Kozin's labels of the different courtroom audiences and discuss their degree of participation in the legal performance.⁴⁰ Kozin was concerned with the ethnographic study of juries from the position of 'the courtroom benches designated for the general audience' in which he sat.⁴¹ In doing so, he broke down the courtroom audience into a number of discrete 'functional units.'⁴² From his perspective, the demarcation of the different audiences was partially spatial:

All of the "players" have their sitting space fixed; this is to say that it is not subject to change. This space is not distributed evenly but is marked by off-limits physical and symbolic barriers. The first barrier is the door (not everyone is allowed to enter the courtroom; dress, demeanour, as well as psychological state of the entrée are taken into account by the security); the second one separates the courtroom's arena from the audience; the third one separates the jury's box from the arena. These boundaries isolate space as "belonging" to various audiences.⁴³

Three key issues emerge from Kozin's approach to audience analysis. First, that the distinction between actor (or player) and audience in legal performance is unsustainable. As Leif Dahlberg notes in his ethnographic analysis of courtrooms, 'the concept of "audience" is constantly shifting within the courtroom' as different actors take on the role of audience at different times.⁴⁴ Here the audience and the actor shift places with each other during the course of the legal proceeding, hence any arbitrary distinction between them is misleading. Second, each unit of the audience is placed in a particular space that is carefully guarded. The manner in which audiences are distributed in a courtroom is defined by their inability to cross over to other spaces, thereby restricting their movements and participation. Finally, as Kozin goes on to argue, the different audiences can be distinguished by their 'degree of

⁴⁰ Alexander Kozin, 'Constituting Courtroom Space in Body and Speech' (unpublished, on file with author).

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ Leif Dahlberg, 'Emotional Tropes in the Courtroom: On Representation of Affect and Emotion in Legal Court Proceedings' (2009) 3(2) *Law and Humanities* 195.

participation' in the proceeding.⁴⁵ In what follows, I will discuss the different courtroom audiences through Kozin's framework. I take the approach of working backwards, receding from the innermost audience to what I term the 'outside audience' of the court gallery. Following this, I go on to challenge Kozin's notion of the gallery as a passive audience, through exploring the manner in which they interact with the legal performance despite the restrictions imposed upon them.

The judge

The judge 'is separated from the rest of the court on a raised dais and uses a separate entrance.'⁴⁶ The performance proper starts upon the judge's entrance into the space. Throughout the performance, the judge rarely, if ever, strays into the common area, and instead remains 'high up on a dais so that the court has to look up to him' or her,⁴⁷ and behind a bench. From their position, they have vision over the entire courtroom. In different courtrooms, sightlines may vary, but there is one sightline that is remarkably consistent across all courtroom layouts: that between judge and gallery.⁴⁸ The eye of the judge is thus a means for monitoring and restricting any outbursts that may disrupt the performance.

The judge is, of course, not just watching but doing. Throughout the performance, 'the judge may interrupt the proceedings... manipulate them... or stop them for a designated break or other official adjournments.'⁴⁹ The judge is an active audience, mediating the proceedings. In this way, 'the judge forms a special kind of intermediary audience, *audience-inside-the-proceedings*.'⁵⁰

The court clerks

The court clerks are support persons or 'the judge's familiars and act as backstage helpers.'⁵¹ As Kozin describes:

Their participation is limited to a specific function (e.g. recording, keeping peace or ceremonial) and a specific place... [and] unless there is a breach in the proceedings, and the intervention of someone like a bailiff

⁴⁵ Kozin, 'Constituting Courtroom Space in Body and Speech'.

⁴⁶ Daphne Yong, 'The Courtroom Performance' (1985) 10(3) *The Cambridge Journal of Anthropology* 75.

⁴⁷ *Ibid.*

⁴⁸ Mulcahy, *Legal Architecture*, 96-97.

⁴⁹ Kozin, 'Constituting Courtroom Space in Body and Speech'.

⁵⁰ *Ibid.*

⁵¹ Yong, 'The Courtroom Performance', 76.

is required, persons in the supportive position stay in their places to constitute a default audience whose observing is not prohibited or restricted but only required as long as their specific functions are fulfilled. The placements are clearly designed as adjacent (e.g. court reporter and bailiff to the judge's bench in the front; sheriff to the defence desk).⁵²

Whilst they may be spatially located adjacent to the proceedings, their intervention is commonly required. A court clerk will commonly rise from their desk and cross the common area to obtain papers from the lawyers and pass them to the judge. In one instance in court, a court clerk crossed the common area to ask me, as I was sitting in the gallery, to turn off my mobile phone. They are like stagehands, crossing the performance space, assisting the actors with the movement of props across the space, but not participating in the play. They are acting as *audience-for-the-proceedings*.

The lawyers

The lawyers represent 'the adversarial sides of prosecution and defence'⁵³ and 'have to look up the judge as benefits their status as supplicants. Counsel for the plaintiff and defendant do not face each other as adversaries but sit side by side reinforcing their solidarity as fellow lawyers.'⁵⁴

Still an audience, they are full participants in the sense that they address, move around, and communicate with each other to a degree that puts them in an exclusive status of *audience-within-the-proceedings*. In contrast to other kinds of audience, both prosecution and defence not only have designated places; they are also invited to use the common courtroom space for their respective purposes.⁵⁵

This ability to move about the space is significant, as 'not all the audiences but only the audience-within-the proceedings, or the adversarial parties are allowed to go beyond their assigned places and constitute the common space delimited by the boundaries set by other audiences and their spatial locations to their purposes.'⁵⁶ Yet they spend much of the proceedings, especially in summary matters, sitting or standing behind a bar table.

⁵² Kozin, 'Constituting Courtroom Space in Body and Speech'.

⁵³ *Ibid.*

⁵⁴ Yong, 'The Courtroom Performance', 76.

⁵⁵ Kozin, 'Constituting Courtroom Space in Body and Speech'.

⁵⁶ *Ibid.*

The jury

In certain court proceedings, there are the jurors who 'are positioned at the head of the proceedings in the frontal position. They sit on an elevated platform. They enter and exit through a special "jury door", and they arrive last while leaving first.'⁵⁷ They have vantage over the proceedings and imitate the position of judge in their elevation and the ritualistic gestures that accompany them entering and existing the courtroom.

As an audience to the proceedings, the jury has individual receptions and interpretations that are then, after a period of post-performance reflection, coalesced into a homogenous response or collective reception and interpretation of the performance.⁵⁸ The cause of this is partly spatial, as 'clustering them together allows them to be influenced by each other's sounds, movements and body language.'⁵⁹ Over time, this builds up a group coalescence that is strong by the time that they meet together to decide the verdict. The role of a legal actor acting for a defendant in a criminal proceeding is, sometimes, to 'breakdown... that homogeneity of audience response'⁶⁰ and thus to fragment the collective response of the jury. Juries can be hung due to a lack of shared response.

The jury is constantly 'attended to by the key actors' and, as such, Kozin terms the jury the *audience-in-the-proceedings*.⁶¹ This is a similar categorisation as the lawyers, but the difference between 'within' and 'in' is the difference in the degree of participation in the proceedings.

The defendant

In his analysis, Kozin misses that 'the accused might also be said to be a spectator.'⁶² In discussing the framing of theatrical performance, theatre semiotician Keir Elam concludes that the arrangement of the space can contribute to two social outcomes: 'the audience is by definition a unit, responding *en masse* to the spectacle' or 'even though necessarily contained within architectural unit of the auditorium, and thus in theory surrendering his individual function, the spectator has his own well-marked private space, individual seat and relative immunity from physical contact with his

⁵⁷ *Ibid.*

⁵⁸ Keir Elam, *Semiotics of Theatre and Drama* (Routledge, 2002) 87.

⁵⁹ Crawley and Tranter, 'Spectatorial Encounters with the Law', 637.

⁶⁰ Bennett, *Theatre Audiences*, 153.

⁶¹ Kozin, 'Constituting Courtroom Space in Body and Speech'.

⁶² Dahlberg, 'Emotional Tropes in the Courtroom', 195.

fellows. The result is to emphasise personal rather than social perception and response.⁶³ The latter scenario is well captured by the dock where a defendant on remand is positioned. Through their location in the dock, the criminal defendant on remand becomes ‘a focal point for the rest of the audience.’⁶⁴ The defendant is isolated, alone, and separate from the gallery, sometimes surrounded by glass. The glass that sometimes surrounds the dock makes the defendant a focal point of display. Furthermore, their spatial isolation on the dock ‘encourages observing and observation.’⁶⁵ In some courtrooms, the dock is located ‘in the back corner of the courtroom... behind the public gallery.’⁶⁶ In this arrangement, the defendant is overlooking the public gallery and facing the judge – watching and being watched, hearing and seeing law.

The witness

Another audience unit that Kozin misses is that of the witness, though their status as audience is complex. When giving testimony, the witness is located in a box with vantage over the courtroom and particularly those asking questions of them – the lawyers and, occasionally, judge. They may also look the jury in the eye to measure the reception of their testimony and play audience to any reaction or lack thereof. The testimony itself invites the audience to respond as spectator-witnesses.⁶⁷

In her thesis on performing testimony, Julie Salverson advances the notion of the witness as spect-actor. They spectate an event and, through their testimony, they imbricate themselves in the act of witnessing.⁶⁸ This slightly complex thesis rests on the different meanings of ‘witness’. A legal witness is audience to a past event, which they then testify or bear witness to as an actor in the legal performance. ‘Bearing witness’ is one of the key functions of an audience, as I discuss further below, along with the concept of the ‘spect-actor’. After or before their testimony, they may situate themselves in the gallery to witness the proceedings as part of the public audience.

⁶³ Elam, *Semiotics of Theatre and Drama*, 58.

⁶⁴ Bennett, *Theatre Audiences*, 132.

⁶⁵ *Ibid* 133.

⁶⁶ Mark Wilde quoted in Ray Edgar, ‘New Shepparton court building tackles stress through design’, *Sydney Morning Herald* (12 March 2018).

⁶⁷ Marett Leiboff, ‘Theatricalising Law’ (2018) 30(2) *Law and Literature* 359.

⁶⁸ Julie Salverson, *Performing Testimony: Ethics, Pedagogy and a Theatre Beyond Injury* (PhD Thesis, University of Toronto, 2001) 65-67.

The gallery: outside audience

Upon entering the courtroom, the area designated for the accommodation of the audience in court proceedings is the public gallery. The gallery is usually located at the point of entrance to the room and faces the judge's bench with the bar table directly in front. This enables those in the gallery to watch – and be watched by – the judge. The gallery space also contains the public and keeps them at the perimeter of the performance space.

Thinking through the gallery audience as a collective group is challenging, as the gallery is almost always fragmented both by its diverse purposes for attending – whether that be to support a person, to report on proceedings, to wait for another proceeding to commence, or as part of a school trip or project, sometimes with no interest in the proceedings before them – and also by the constant movement in and out of the gallery. Within the gallery, there are what Jamelle Wells terms 'court watchers', regular members of the court gallery, who can be categorised in different ways:

Regular court watchers... are a rare breed of mostly retirees or semi-retirees who, instead of kicking back at home, caravanning around Australia or becoming free babysitters for their grandchildren, come to court each day to see the justice system work and to be entertained. The regular court watchers are... set apart from the occasional court drop-ins and excursion groups who come to cases from time to time.⁶⁹

That is not to say that the gallery is not a group in its own right that can have a common response to the performance as theatre scholars have pointed out, but that that sense of commonality is less strong because of the fragmentary nature of the group. The gallery also changes over time as its members enter and exit the space. Nevertheless, they are united by their intention to see justice being done. They are a collective audience to the performance of justice, 'gathered together with the intent of watching'.⁷⁰

Kozin terms the gallery the *audience-of-the-proceedings*. However, the public gallery to a legal performance might be best described as an 'outside audience' who have an

⁶⁹ Wells, *The Court Reporter*, 195-196.

⁷⁰ Freshwater, *Theatre and Audience*, 6.

itinerant experience of legal performance, coming from the outside in.⁷¹ The term also alludes to the idea that these audiences are what Richard Delgado would term an ‘outgroup’ whose ‘consciousness is other than that of the dominant’ group within the court: the legal professionals.⁷² They are also generally positioned on the margins of the courtroom, closest to the outside, which physically represents their outsider status. In some ways, they operate as a bridge between the court and the outside world that surrounds it, taking back the proceedings from the court to the outside, including through disseminating knowledge of the court proceedings. Whilst this is more obvious with court reporters, court watchers also tend to talk about the proceedings post-performance to the wider public (as discussed at the end of this thesis). In doing so, they contribute to performing the ‘public’ nature of court proceedings.

Audience interaction and (inter)active audiences

The question of how justice is read and experienced by outside audiences pervades much of my thinking on the audience to legal performance. Crawley and Tranter point out that, ‘from the vantage point of the legal outsider, the trial is alien, indecipherable and exotic... For the outsider witnessing the spectacle of the trial it can be seen as a strange affective performance where a maelstrom of bodies and emotions and things manifest within an intense, enclosed space.’⁷³ Are outside audiences ‘consumers’, as some texts refer to them as,⁷⁴ invoking a very materialist – perhaps capitalist – notion of the justice system? Are they excluded others, victims of a powerful justice system? Neither utilitarian construction is appealing. Instead, I am interested in how outside audiences experience the legal performance – what it means to be in an audience – and how they shape the legal performance. I consider this in terms of the relations of the audience to one another (the act of gathering or becoming an audience) and the interaction between audience and performance (that to which they bear witness).⁷⁵ In

⁷¹ It should be remembered that the gallery includes category includes court reporters and court artists. Court reports and artists ‘are translators, nominal outsiders who reinforce the insider’s desire that justice be seen to be done’: Crawley and Tranter, ‘Spectatorial Encounters with the Law’, 631. They are professionals and the other ‘court watchers’ are non-professionals.

⁷² Richard Delgado, ‘Storytelling for Oppositionists and Others: A Plea for Narrative’ (1989) 87(8) *Michigan Law Review* 2412 n 8.

⁷³ Crawley and Tranter, ‘Spectatorial Encounters with the Trial’, 621-622.

⁷⁴ Nicole van Cleve, *Crook County: Racism and Injustice in America’s Largest Criminal Court* (Stanford Law Books, 2016) 201; Caroline Heim, *Audience as Performer: The Changing Role of the Audience in the Twenty-First Century* (Routledge, 2016) 128.

⁷⁵ My approach here is shaped by the ‘interactive relations’ described in Bennett, *Theatre Audiences*, 151, and Grant’s notion of ‘gathering to witness’, *passim*.

doing so, I also draw from my own observations having spent time in court galleries as part of my research.

Becoming an audience

To attend a performance, legal or theatrical, is a social act – people more often attend together.⁷⁶ Theatre scholar Caroline Heim argues that, through the process ‘strangers enter... and – consciously or otherwise – during the course of the... event, adjust their emotional and behavioural repertoire of actions to produce a fertile climate for social interactions and collaborations.’⁷⁷ These erstwhile strangers become a collective audience through a process of emotional contagion and empathy. As Grant describes, it is an experience of being ‘among a plurality of others, who, as individuals, I will most likely never face, but with whom, alongside whom, I am subject to shared imperatives and affective contagions’ and, through this, a ‘lateral affinity of co-immersion with others’ emerges.⁷⁸ Through this experience, ‘the individual audience member becomes part of the audience *collective*’⁷⁹ or community.⁸⁰

The audience are in close physical proximity, experiencing the same event, thinking of what their neighbour is thinking, occasionally engaging in dialogue. Community formation does not, however, have to include dialogue or gestural acknowledgment of the shared experience. Many audience members prefer this silent togetherness. Even if there is no eye contact or spoken words, the mutuality of performing together as an audience ensemble is being apart together.⁸¹

Whilst those in the gallery share seats, some ‘regular court watchers have their favourite seats’⁸² and attempt to ‘reserve’ them, with ‘tension... over who should sit where.’⁸³ In his ethnographic observations of courtrooms, Leif Dahlberg observes that ‘some members of the family [of the parties] would claim certain seats as theirs and demand that others move to a different seat.’⁸⁴ Some audience members will ‘arrive

⁷⁶ Heim, *Audience as Performer*, 115.

⁷⁷ *Ibid* 21.

⁷⁸ Grant, ‘Fifteen Theses on Transcendental Intersubjective Audience’, 72.

⁷⁹ Heim, *Audience as Performer*, 21 (emphasis added).

⁸⁰ *Ibid* 112.

⁸¹ *Ibid* 118.

⁸² Wells, *The Court Reporter*, 202.

⁸³ *Ibid* 203.

⁸⁴ Dahlberg, ‘Emotional Tropes in the Courtroom’, 195.

early and take something to read in the queue outside'⁸⁵ so that they can move swiftly to their preferred seat. In the seats, the audience is in intimate relation to one another:⁸⁶ gallery members are in touching distance from each other, which may contribute to a sense of collective. Yet, as Grant argues, audiences share an affective intimacy through the act of gathering, which is to say that the audience is still affective whether they 'are close or dispersed, perceptible to each other in the same room or spread across distances of time and place.'⁸⁷ In Chapter Six, I will go on to consider the effect of video technology fragmenting the place of legal performance, but here it is necessary to point out that the collective nature of the gallery as audience is not predicated on intra-group communication, but rather the collective experience of gathering.

The gathering of the audience may also be affected by their time of entry. Audience members may enter in the middle of a proceeding and thus have to quickly orient itself with the space. Unlike the theatre – or at least traditional theatrical performance – a gallery audience can walk out of the performance at any time, subject to the customary bowing of the head to the judge (which is in itself a performance of subjugation to the law). This means that, in court, 'the audience... changes moment by moment.'⁸⁸ This constant changing affects the inter-audience relationship and their collective reception of the performance. The movement in and out leads to the seating arrangements constantly changing. The constant changing allows the gallery to accommodate more people in the gathering. The changing can also disturb the collective focus of the audience and disrupt their attunement to the legal performance – or rather cause their attention to snap back if their focus has been drifting (as discussed in Chapter Three).

Another factor in the gathering of the collective is the scale of the audience. Bennett supposes that, in relation to theatre, 'the percentage of seats occupied will inevitably affect reception both through its effect on the quality of actors' performances and through inter-spectator relations.'⁸⁹ I find, having spent a considerable amount of time in court galleries, that I feel more under watch when the gallery is full rather than empty. When it is empty, there is more space to move about; when full, there seems a

⁸⁵ Wells, *The Court Reporter*, 204.

⁸⁶ Elam, *Semiotics of Theatre and Drama*, 58.

⁸⁷ Grant, 'Fifteen Theses on Transcendental Intersubjective Audience', 73.

⁸⁸ John Silvester, 'Inside the people's court', *The Age* (20 April 2018).

⁸⁹ Bennett, *Theatre Audiences*, 131.

more determined sense of purpose to the gallery. This is difficult to describe, but is well captured by Bennett:

The experience of the spectator in a packed auditorium is different from that of one in a half-empty theatre. When a theatre has very few spectators, the sense of audience as a group can be destroyed. This fragmentation of the collective can have a side-effect of psychological discomfort for the individual which inhibits or revises response. When a theatre is at capacity, not only can this enhance an audience's confidence to respond to the performance, but it can also reaffirm the spectators' sense of themselves both individually and as a group.⁹⁰

There is a theatrical convention that the play does not go on if there are fewer people in the audience than in the performance, but so often in legal performance, I or someone accompanying me are the only people in the public gallery. My presence sometimes comes as a shock to the lawyer-actors who are used to performing before the solo audience of the judge. For me, as Grant describes it so well, 'my empathy with the performer is intensified by my solitude, by the absence of other audience members.'⁹¹ It is suddenly a much more intimate performance. There can be an audience of one, but the intra-audience interaction is lost.

This raises the inevitable questions: what happens if the gallery is empty? Is justice being done if nobody is there to see it being done? If I, like other performance scholars, have predicated my definition of performance on the presence of an audience, what happens if there is no public audience? To answer, there is an audience in this scenario: the judge as audience and, when the judge is acting, the lawyers as audience (and the defendant as audience in criminal proceedings). Further, the principle of open justice provides the public with the *opportunity* to audience; the public need not necessarily be present for the principle to be upheld. Nonetheless, where a public audience is present, they shape the legal performance through the act of bearing witness.

⁹⁰ *Ibid.*

⁹¹ Grant, *Gathering to Witness*, 248.

Bearing witness

In the previous section, I considered how the audience gathers as a collective. Once the legal performance commences, the focus is drawn from the audience to the actors. Grant conceives of ‘audience as a fundamentally mutual directedness towards’⁹² and, through the process of audiencing, ‘my own subjectivity becomes attenuated in Audience, as I turn towards the performance and away from my fellows.’⁹³ However, ‘this is not to say that there are not times at which the attention and intention of audience members are drawn to each other.’⁹⁴ Rather, as ‘the side-by-side relation with the other members in Audience retreats’, the audience becomes ‘absorbed in its being witness and in its intentional objects.’⁹⁵ Grant describes this as ‘intentional interpenetration.’⁹⁶ The audience comes into being through its ‘co-functioning intentional co-presence towards the... performance, rather than as an object of intentional relation... leaking into each other through the object.’⁹⁷ Furthermore, ‘in this going out towards, it plays a constitutive role in that to which it goes out.’⁹⁸ In this section, I think through the relation between audience and the performance to which they bear witness in terms of presence and interaction.

There is an importance to *presence*, the proxemic relation between actor and audience in the same space and time. In her groundbreaking work, *Towards a Theatrical Jurisprudence*, Marett Leiboff reminds her reader of the importance of presence,⁹⁹ for without it ‘law [becomes] so dissociated from humanity that it’s unaware of its consequences, and inevitably produces the loss of humanity in those who operationalise it.’¹⁰⁰ It becomes disembodied. In legal performance, ‘we are confronted with the liveness of an encounter forced upon us.’¹⁰¹ It is ‘the live presence of two ensembles [actors and audiences that] provides myriad opportunities for co-creation to occur.’¹⁰² It is not just the actors that are present but also the audience who has a presence – a co-presence – and has to give back as part of this co-

⁹² *Ibid* 70.

⁹³ Grant, ‘Fifteen Theses on Transcendental Intersubjective Audience’, 73.

⁹⁴ *Ibid* 74 n 1.

⁹⁵ Grant, *Gathering to Witness*, 237.

⁹⁶ Grant, ‘Fifteen Theses on Transcendental Intersubjective Audience’, 73.

⁹⁷ *Ibid*.

⁹⁸ Grant, *Gathering to Witness*, 146.

⁹⁹ Marett Leiboff, *Towards a Theatrical Jurisprudence* (Routledge, 2020) 98.

¹⁰⁰ *Ibid* 99.

¹⁰¹ *Ibid* x. See also Heim, *Audience as Performer*, 146.

¹⁰² Heim, *Audience as Performer*, 146.

creation.¹⁰³ Similarly, ‘performance-spectator *distance* will have a significant effect’ on the performance.¹⁰⁴ The distance between and also the position of actor and audience affect hearing and sight. Distance can affect the audience’s reading of an actor’s facial expression, gesture or costume. Distance can break down the connection between actor and audience.

The gathering of bodies together in space, which is significant to the legal performance, is being challenged by the introduction of audiovisual technology and online courts that enable testifiers to give evidence from remote locations beamed into the court or online spaces.¹⁰⁵ Law and performance scholar Kate Leader questions ‘what is at stake in the live presence of bodies together in the same space’ in court proceedings, and concludes that, ‘the most obvious difference between [live and video testimony]... in a traditional trial is the absence of a witness’s body from the courtroom... [T]his ‘absence’ of the body has focused legal attention on the value of ‘presence’.¹⁰⁶ While watching court performances without being watched may be a ‘liberating experience for those... used to the constraints and occasional degradation in public galleries in supervised courts’,¹⁰⁷ reducing presence reduces the affect of the actor on their audience. If mediation reduces presence, it thus affects the audience’s reception of the performance or the encounter. However, the act of witnessing is more intimate than ‘the mere physical presence of the spectator to the work.’¹⁰⁸ With the technological disruption to shared space, Grant argues that ‘whether or not our bodies are directly perceptually available to each other, it [is] our shared or common time which constitutes our participation in Audience.’¹⁰⁹ Furthermore, ‘presence is not simply a measure of being nearby, or perceptually available, or in the vicinity of, but is fundamentally a temporal figure.’¹¹⁰ Whilst audience members may watch, say, a trial recording, at different times, ‘the separate, unsynchronised times of the

¹⁰³ *Ibid* 151.

¹⁰⁴ Elam, *Semiotics of Theatre and Drama*, 59.

¹⁰⁵ Mulcahy, *Legal Architecture*, 104.

¹⁰⁶ Kate Leader, ‘Closed-Circuit Television Testimony: Liveness and Truth-Telling’ (2010) 14 *Law Text Culture* 313.

¹⁰⁷ Mulcahy, *Legal Architecture*, 106. This is discussed further in Chapter Six.

¹⁰⁸ Grant, *Gathering to Witness*, 280.

¹⁰⁹ *Ibid* 292.

¹¹⁰ *Ibid*.

individual audience members pair into the common time.’¹¹¹ The effect of digital legal performance on presence is discussed further in Chapter Six.

In live performance, actors react to their audience, appreciative or disruptive, and this affects the performance.¹¹² The reaction of action to audience and vice versa becomes an *interaction*. The presence of an outside audience in the court can affect the legal performance. Following over 1000 hours of observation of legal performances in the Cook County Courthouse in Chicago, Nicole van Cleve concluded that the legal actors were aware of the audience and altered their behaviour or ‘performed’ for court watchers.¹¹³ The conclusion that actors altered their performance due to the presence of a watching audience both demonstrates that legal actors are conscious of their audience, and that presence of the audience affects their delivery and presentational style. The actors might ‘act up’ when they know they are being watched by an outside audience and “‘perform” the normative professionalism that one would associate with their roles.’¹¹⁴ When the outside audience are absent, van Cleve – who clerked in a prosecutor’s office prior to becoming a court watcher – observed that the legal actors would drop the formality and professionalism and go ‘back to business as usual: the jokes, the banter, the yelling, the berating, and the informality that were native to that courtroom domain.’¹¹⁵ The outside audience provides a form of ‘outside accountability’ to the legal performance.¹¹⁶ Whilst seemingly passive, the audience is, in this instance, interacting with the performance in the way that they shape the performers’ actions.

Whilst the audience is present and often remarkably proximate to the legal actors and, though their presence, can interact with the performance, Bennett argues that there is a frame that separates or distances the audience and actor in live performance, ‘the secure position which permits reception.’¹¹⁷ Despite this frame, this relationship between actor and audience is not merely one of production and reception.¹¹⁸ The audience is actively involved in the production of a performance, not a passive receiver. Sometimes this frame is broken.

¹¹¹ *Ibid.*

¹¹² Bennett, *Theatre Audiences*, 151; Heim *Audience as Performer*, 23.

¹¹³ van Cleve, *Crook County*, 44.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid* 45.

¹¹⁷ Bennett, *Theatre Audiences*, 153.

¹¹⁸ *Ibid* 87.

Breaking the fourth wall

The depiction of the public gallery as an outside audience would suggest a diminished role for them in the legal performance. Kozin argues that the gallery ‘does not participate in the proceedings, except passively.’¹¹⁹ Yet Grant argues that ‘the passivity of Audience is the being given over to’ or submitting to the performance, not mere reception.¹²⁰ Upon entering the courthouse, the gallery is subject to ‘a regime of respectful etiquette; entering and leaving quietly, bowing to the judge, dressing appropriately, avoiding talking, eating and using mobile telephones.’¹²¹ The sense of decorum in a courtroom gallery is dictated by the ‘code of conduct for court public galleries’ often on display through signage and enforced ‘by the uniformed court officers who provide courtroom support and the court sheriffs who look after security and keep things under control.’¹²² This concern with decorum and, particularly, silence on the part of the audience¹²³ betrays ‘an ever-present fear of the collapse of the social order of the court.’¹²⁴ If the audience were to breach the rules, the legal performance would collapse into chaos.

That is not to say that these rules are always followed. Of her experience in the court gallery, Wells observes that, when the code is broken there is a feeling of being at ‘a football match or a concert.’¹²⁵ She describes instances in the public gallery of ‘a couple... sharing a parcel of hot chips in very noisy wrapping paper’¹²⁶ and giving each other a ‘back massage’,¹²⁷ ringtones and talking.¹²⁸ As Heim describes it, ‘the audience performance is a diverse medley of sound and movement. If you were to score it, it would be a set of kinetic, paralingual and verbal contributions that make up the audience’s repertoire of actions.’¹²⁹ They include actions such as sitting, standing, shuffling, squirming, tapping, shaking, chewing, fidgeting, touching, rummaging, laughing, crying, coughing, sighing, snorting, sneezing, hiccupping, groaning, gasping, yawning, mmhmming, whispering, looking, jiggling and stretching. Over

¹¹⁹ Kozin, ‘Constituting Courtroom Space in Body and Speech’.

¹²⁰ Grant, *Gathering to Witness*, 301.

¹²¹ Crawley and Tranter, ‘Spectatorial Encounters with the Law’, 624. This is discussed further in Chapter Two.

¹²² Wells, *The Court Reporter*, 174.

¹²³ Mulcahy, *Legal Architecture*, 92-93.

¹²⁴ *Ibid* 95.

¹²⁵ Wells, *The Court Reporter*, 174.

¹²⁶ *Ibid* 175.

¹²⁷ *Ibid* 176.

¹²⁸ *Ibid* 196.

¹²⁹ Heim, *Audience as Performer*, 28.

time, the audience comes to claim the gallery in which they sit. As Wells evocatively describes, the court gallery is ‘like the cabin of a plane cabin of a long haul flight’; it is ‘neat, clean and well ordered’ at the start of the day but ‘a mess’ by the end, with ‘rubbish on the floor... and air heavy with germs and all sorts of emotions.’¹³⁰ Wells’ description of the public gallery demonstrates how the gallery audience comes to occupy – even own – their space. Recalling that courts are public spaces, here the audience comes to take over their space. Perhaps they are rebelling against the signs that command them to be clean and silent by leaving signifiers of their presence in the space.

The legal audience is watching and being watched, hearing and being heard.¹³¹ In her work, artist and scholar Judy Radul invites her reader to consider the court gallery as a performance space and reflect on how the segregation of the audience turns it into an independent group of performers who are constantly *interacting*: with the stage, with each other and with the actors. In her account of the court, Wells describes moments of interaction between audience and actors, including a moment where gallery members leapt out and attacked the defendant,¹³² becoming violent actors in the legal performance. Moments such as these disrupt assumed notions of audience passivity. Despite their enforced passivity, I explore these moments of disruption and, from them, argue that the audience does play a participatory role in the legal performance. This challenges the frame that Bennett posits as securing the audience’s position as receiver – a frame that can be conceptualised as the ‘fourth wall’. Whilst we often regard the fourth wall as binding the actor such that when they directly address the audience they are said to break the fourth wall, Heim argues that ‘an audience... have the collective power to break the fourth wall at any time they choose. It is not only the actors.’¹³³ Here, I consider some of the myriad ways in which outside audiences break the fourth wall and what implications this may have for the legal performance.

Whilst audience members leaping out of the gallery and charging the defendant is an amplified example of audience participation, the audience can also participate from within the gallery space. Radul provides an example of a sentencing hearing where,

¹³⁰ Wells, *The Court Reporter*, 174.

¹³¹ Judy Radul, ‘What was behind me now faces me: Performance, staging and technology in the court of law’, *Eurozine* (2 May 2007); Wells, *The Court Reporter*.

¹³² Wells, *The Court Reporter*, 201.

¹³³ Heim, *Audience as Performer*, 114.

during the Crown counsel's argument, 'there were hisses and boos from the 60 or so people in the public gallery' and later the gallery stood in memory of the victim and continued standing for more than five minutes while the judge did not react.¹³⁴ Mulcahy concludes that:

Outbursts of angry or distressed supporters are common in certain types of proceedings and can be seen as one manifestation of an active public... Other examples of collective engagement do not necessarily involve disruptive activity. The fact that all those in court stand when the judge enters is a simple routine activity which reflects that members of the public are not totally passive in the modern trial. The wearing of badges by supporters of the victim or defendant is another such instance.¹³⁵

This collective engagement can, indeed, manifest in many different ways. In her article, 'The Newest Spectator Sport', Sierra Elizabeth provides a comprehensive account of spectators' actions in court performances and links the rise of victims' rights to more permissive attitudes to active spectators in the court. Her article details not just active demonstrations, but also silent 'displays, worn [or] held',¹³⁶ such as badges particularly those that include pictures of victims. Elizabeth casts these spectators' demonstrations as of 'concern',¹³⁷ 'divisive',¹³⁸ and an 'unacceptable risk' that may have the prejudicial effect of 'diverting jurors' attention, creating biased priming manipulations, and altering courtroom availability heuristics.'¹³⁹ Even passive demonstrations are capable of conveying a message¹⁴⁰ and influencing decision-makers.¹⁴¹ This suggests that the mere presence of an audience has the power to affect a legal performance or performers. 'Blind' justice can be influenced by visual displays from its audience.

I question whether this is necessarily an ill that can – or should – be cured. Elizabeth acknowledges that a number of factors affect jurors' perceptions, including

¹³⁴ Gerry Bellett, 'Crown urges 6-9 years for beating death', *The Vancouver Sun* (28 January 2005) cited in Radul, 'What was behind me now faces me'.

¹³⁵ Mulcahy, *Legal Architecture*, 86.

¹³⁶ Sierra Elizabeth, 'The Newest Spectator Sport: Why Extending Victims' Rights to the Spectators' Gallery Erodes the Presumption of Innocence' (2008) 58(2) *Duke Law Journal* 278.

¹³⁷ *Ibid* 276.

¹³⁸ *Ibid* 277.

¹³⁹ *Ibid* 279.

¹⁴⁰ *Ibid* 289-290.

¹⁴¹ *Ibid* 96.

unconscious biases based on ‘the defendant’s attractiveness or race or the lawyer’s sex or presentation style... Unlike those factors, however, spectator conduct can be eliminated easily.’¹⁴² These other factors could likewise be eliminated easily. Ban the defendant from the courtroom, mandate that all lawyers must be of the same sex, in fact remove lawyers and have all cases decided on the papers. These would be easy to do, but absurd. The reason why eliminating spectator conduct is ‘easy’ is because their active presence in the trial is given little care or value (at least in Elizabeth’s thesis) as compared to the defendant and the lawyers; they are regarded as extrinsic to the legal performance.

Elizabeth concludes that ‘courts should ban spectator demonstrations completely.’¹⁴³ Some courts have done so. The United States Court of Appeals has held that ‘the guarantee of a public trial does not mean that all of the public is entitled under all circumstances to be present during the trial. It means only that the public must be freely admitted so long as those persons and groups who make up the public remain silent and behave in an orderly fashion.’¹⁴⁴ Enforced passivity and restrictions on the communicative capacity of the public gallery – what United States Supreme Court Justice John Stevens describes as ‘actual or symbolic speech’¹⁴⁵ – whether through restrictions on words, actions or dress may have effects on free speech or freedom of communication in the courtroom. This assumes that gallery members have a right to communicate in trial and suggests a communicative dialogue between audience and actor in the court rather than a one-way actor-receiver monologue. However, ‘trials, of course, are highly structured affairs, in which there appears to be quite little free speech. There are elaborate rules about who goes when, about who speaks, and about who does not speak.’¹⁴⁶ There are restrictions on speech in court, but I would argue that open justice does not simply entail an act of passively viewing – performance demands a communicative dialogue between audience and actor rather than a one-way actor-receiver monologue. Whilst Elizabeth argues that courtrooms should be free from ‘public passion’,¹⁴⁷ the emotional investment of the audience is crucial to a performance. This is recognised by performance scholars who regard the audience as

¹⁴² *Ibid* 305.

¹⁴³ *Ibid* 279.

¹⁴⁴ *Orlando v Fay* 350 F.2d 967, 971 (2d Cir.1965).

¹⁴⁵ *Carey v Musladin* 127 S. Ct. 649, 656 (2006).

¹⁴⁶ Frederick Schauer, ‘The Speech of Law and the Law of Speech’ (1997) 49 *Arkansas Law Review* 689.

¹⁴⁷ Elizabeth, ‘The Newest Spectator Sport’, 309 citing *Irving v Dowd* 366 U.S. 717, 728 (1971).

not merely a consumer, but a co-creator.¹⁴⁸ Audience creativity can manifest in different ways, be it a way of dressing, tears or vocal outbursts. To regulate such displays would lead to a blank and purposeless audience, divested from any interest in the performance.

The conceptualisation of audience displays and actions as disruptive is problematic in that it assumes that a passivity is the right condition of an audience to a legal performance without taking into account needs and desires of the audience as interactive participants in the legal performance. The very concept of the audience as disruptor also attests to argument that I am making that the audience is not passive but plays a participatory role in the legal performance, but the discourse surrounding it has been used to restrict public access to the court.¹⁴⁹

Audience as interactive spect-actor

Linda Mulcahy advances the thesis ‘that as the public have become increasingly constrained within the courthouse the possibility of participatory justice has also been seriously constrained as a result.’¹⁵⁰ She argues that ‘greater efforts must be made to involve the public in the justice system as participants rather than mere spectators’¹⁵¹ because ‘the most effective legal rituals are not those which are performed for spectators but those which involve them in a collective experience as participants.’¹⁵² In this section, I shall argue that the distinction between actor and spectator is not so clear in legal performance, and that legal performances are a collective experience in which the audience is actively involved. The public gallery is certainly an audience to the legal performance, but they are not ‘mere spectators’, rather they are spect-actors.

In her prescient article, ‘When Actor and Spectator Meet in the Courtroom’ concerning the war crimes trial of Nazi military leader Adolf Eichmann, Leora Bilsky challenges the distinction between actor and spectator¹⁵³ and argues for ‘the impossibility of an actor/spectator divide’ in this legal performance.¹⁵⁴ Bilsky’s analysis primarily focuses on the judge, arguing that what is occurring in the role of

¹⁴⁸ Heim, *Audience as Performer*.

¹⁴⁹ Mulcahy, *Legal Architecture*, 92.

¹⁵⁰ *Ibid* 83.

¹⁵¹ *Ibid* 84.

¹⁵² *Ibid* 85.

¹⁵³ Leora Bilsky, ‘When Actor and Spectator Meet in the Courtroom’ (1996) 8(2) *History and Memory* 159.

¹⁵⁴ *Ibid* 158.

the judge is ‘a reciprocal movement between the perspective of actors and spectators’ in the manner in which the judge exercises both reflective and determinative judgment.¹⁵⁵ However, Bilsky goes on to argue that the courtroom space also creates this duality in all its participants: ‘every trial creates an artificial public space where each participant is endowed with a juridical person. On the basis of these equal terms, the participants are called upon to communicate to each other their distinctive voices... The common humanity that is assumed in every trial is based upon our ability to occupy both roles of actor and spectator, i.e. our ability to “go visit”.’¹⁵⁶ Leiboff also considers the conjoining of actor and spectator. In *Towards a Theatrical Jurisprudence*, she refers to scrawled note on her edition of Grotowski’s *Towards a Poor Theatre*: ‘Law insists on... Text + Script... Loses The Actor/Spect/or.’¹⁵⁷ She later links this to Grotowski’s idea of the ‘holy actor’,¹⁵⁸ what she terms as an ‘amalgam of actor and spectator.’¹⁵⁹ Here, both Bilsky and Leiboff – unintentionally, it seems – express the notion of the legal audience as what theatre-maker Augusto Boal refers to as ‘spect-actors’: that is, ‘those who observe... in order then to act.’¹⁶⁰ Despite this connection, there is limited engagement with the ideas of Boal in the legal literature on audience.¹⁶¹ Bilsky does not mention Boal at all; Leiboff, only in passing;¹⁶² and, in another example, Arnaud Lucien describes the civil law judge as a ‘spect-actor’,¹⁶³ but without any reference to Boal and, again, only in passing. In what follows, I shall provide a brief summary of Boal’s approach to performance and then go on to discuss it in the context of legal performance.

Boal was a Brazilian theatre practitioner and political activist. He is known for developing a radical mode of performance practice, the Theatre of the Oppressed, a broad term encompassing his various different forms of interactive theatre communications whereby there is a dialogue and interaction between spectator and

¹⁵⁵ *Ibid* 161.

¹⁵⁶ *Ibid* 162.

¹⁵⁷ Leiboff, *Towards a Theatrical Jurisprudence*, 100.

¹⁵⁸ *Ibid* 101.

¹⁵⁹ *Ibid* 99.

¹⁶⁰ Augusto Boal, *Legislative Theatre: Using Performance to Make Politics* (trans. Adrian Jackson, Routledge, 1998) 9.

¹⁶¹ An exception is Gillian Calder, ‘Performance, Pedagogy and Law: Theatre of the Oppressed in the Law School Classroom in Zenon Bankowski and Maks del Mar, *The Moral Imagination and Legal Life: Beyond Text in Legal Education* (Routledge, 2013), but as the name suggests, this is primarily focused on legal education.

¹⁶² Leiboff, ‘Theatricalising Law’, 358; Leiboff, *Towards a Theatrical Jurisprudence*, 104.

¹⁶³ Arnaud Lucien, ‘Staging and the Imaginary Institution of the Judge’ (2010) 23(2) *International Journal for the Semiotics of Law* 199.

actor through which the audience becomes an active ‘spect-actor’ and through their activity can transform the reality in which they are living. One of early forms of the Theatre of the Oppressed was Forum Theatre, a mode of interactive theatre framed as facilitating a learning environment between actor and audience to find a solution to a problem to a point that the audience is invited on stage to perform a way forward, thus becoming a ‘spect-actor’.

After establishing a Centre for the Theatre of the Oppressed in Rio de Janeiro, Boal was elected as a city councilor in Rio. During his time on the council, he proposed 40 laws – 13 of which were approved – developed using Legislative Theatre, a development from Forum Theatre where the subject of the performance is a proposed law to be passed and the ‘spect-actors’ through their participation help with the creation of this law. Despite its potential for law-making, Legislative Theatre was slow to take off elsewhere.¹⁶⁴

The Theatre of the Oppressed, Boal says, ‘has, as its first premise, the intention to democratise the stage space – not to destroy it! – rendering the relationship between actor and spectator transitive, creating dialogue, activating the spectator and allowing him or her to be transformed into “spect-actor”’;¹⁶⁵ that is to say, they are not fully actor, but retain some degree of their position as spectator and can transition between the two positions. Boal’s work is a reaction against the rigidly ceremonial aspects of performance. As he describes it:

The theatrical ceremony has as its first premise the division of the space into one area where the actors move around and another where the spectators are immobilised. Though juxtaposed, they do not penetrate each other, nor is one superimposed on the other, and even when the latter space (the spectators’) is fragmented and the former (the actors’) dispersed around the room, these smaller segments maintain the same relationship to the surrounding space as that of the large stage to the large auditorium. Very occasionally, shows make actors and spectators revolve

¹⁶⁴ For an exception to this, see Geraldine Pratt and Caleb Johnston, ‘Turning Theatre into Law, and Other Spaces of Politics’ (2007) 14(1) *Cultural Geographies*.

¹⁶⁵ Boal, *Legislative Theatre*, 67.

in the same area, embrace one another or perform common tasks in a common space.¹⁶⁶

In reading Boal's perception of the 'theatrical ceremony', which is really limited to traditional theatre, one thing strikes me most strongly. That is, the references to movement or lack thereof – 'the actors move around and... the spectators are immobilised.' It would appear that Boal perceives traditional theatre as a form whereby the actors are in movement and the spectators are in stillness. The references to movement and positions continue – 'though juxtaposed, they do not penetrate each other.' Here, Boal is talking of how the audience and spectator face one another and though the gaze creates the potential of movement, it is not fulfilled. Boal uses a very evocative verb, 'penetrate', to suggest just how piercing it would be if the fourth wall between spectator and audience were breached. He goes on to say that for the two to meet would be for one to be 'superimposed on the other'; in other words, that they would lay over one another, perhaps melding. The alternative is to move away from immobilisation to movement – to 'revolve' and to 'embrace'. This is also captured in Bilsky's idea that spect-actor is able to 'go visit', which she describes as a process of engaging and negotiating 'different viewpoints and... others in conversation.'¹⁶⁷

Despite his work in politics and Legislative Theatre, Boal does not explicitly connect his idea of the spect-actor to the legal performance. Here, I turn to some legal theorists who have. In her article 'From Presence to Participation – the Role of the Juror Reimagined', Jenny Scott applies Boal's theory of the spect-actor to that of the juror, and goes on to advance compelling arguments and methods of participatory justice from a jury perspective. She argues that by integrating a 'Joker' figure in the trial, a facilitator between actor and spectator, so that jurors can participate by way of asking questions through this facilitator. This would provide jurors with a better understanding of how the criminal trial works generally and in a more organically and critically reflective way, and provide researchers with a clearer understanding of what works – and what does not – in respect of jury participation.¹⁶⁸

However, her thesis fails to appreciate the participatory role that the jury-as-audience plays in court proceedings. The juxtaposition in the title of presence and participation

¹⁶⁶ *Ibid.*

¹⁶⁷ Bilsky, 'When Actor and Spectator Meet in the Courtroom', 160.

¹⁶⁸ Jenny Scott, 'From Presence to Participation: The Role of the Juror Reimagined' (2017) 11(2) *Law and Humanities* 305.

is part of the problem. By their presence, the jury is actively participating in the legal performance. Scott argues that the juror ‘whilst she is in the courtroom, may look like she has a similar role as the [Forum] theatre audience but with the crucial distinction that she did not choose to become a part of process, thus... calling into question the notion that they are participating at all.’¹⁶⁹ Though compelled to attend, the same can arguably be said for the judge and other professional actors whose presence is a *demand* of their profession. Thinking through participation in terms of the choice to attend¹⁷⁰ is rather restrictive. The compulsion to attend does not reduce the participatory dimension of an audience to a legal proceeding. Through their presence, the jury is acting to validate the proceedings and, further, is acting as representative of the people in the proceedings. Manfred Holler and Martin Leroch argue that the jury as ‘the impartial spectator is the main actor on the judicial stage.’¹⁷¹ They see and are seen. In their final moment, they undertake the judging process and speak the judgment.

In her indirect application of the spect-actor theory to the judge (Boal is not mentioned directly), Bilsky is much more confident of their participatory role in the legal performance:

The institutional setting of a trial endows the judges with the dual role of actor and spectator. Having to occupy both roles, judges are trained in both determinative and reflective judgment. As actors, they learn to exercise determinative judgment, going back and forth between the facts and the legal categories in order to bridge the gap between them. As spectators, they are trained to remain open to the newness of each case and to bring the perspective of all parties before the court. Indeed, in reaching a decision, good judges will often have to play the case all over again in their imagination from different points of view until it yields a satisfactory judgment.¹⁷²

The beneficial effects of occupying the dual role of actor and spectator are that this endows the judge with different perspectives and the ability to move back and forth

¹⁶⁹ *Ibid* 304.

¹⁷⁰ *Ibid* 288.

¹⁷¹ Manfred Holler and Martin Leroch, ‘Jury on Stage: A Common Law Play’ (2010) 30(2) *European Journal of Law and Economics* 107.

¹⁷² Bilsky, ‘When Actor and Spectator Meet in the Courtroom’, 162.

between them. Moreover, the judge becomes a player, using their imaginative capacity to move between these different perspectives until they are able to yield ‘a satisfactory judgment.’ Whilst this take is predominantly philosophical, in a practical sense the judge moves from the perspective of audience to the proceedings – albeit a powerful audience member that is able to direct the actors within the playing space – to an actor that must ‘exercise determinative judgment’ at the conclusion of proceedings. In legal performance, at least in the role of judge, the roles of actor and spectator are not distinct but dual.

But what of the public audience in the court gallery? Boal considers each person attending a Forum Theatre piece as a participant. As Scott writes, Boal ‘makes the point that just because the spectator does not interact in the forum does not mean to suggest he [or she] is not participating meaningfully for himself [or herself]. The act of attending the theatre (or space where the piece is performed) is an indication of his [or her] proactive participation itself.’¹⁷³ This observation resonates with the court performance. The audience plays a constitutive role in legal performance, and the live encounter with the stage informs the actors’ performance, even if they may not step out of the gallery and into the playing space of the court. The possibility that the audience could interrupt or intercede in the space lends a powerful tension to live legal performance and has been responded to with directions to pacify the audience. Throughout this thesis, I point to many instances of the audiences combating the restraints imposed upon them, breaking the fourth wall and performing. Yet even in their presence in the public gallery, the public audiences interact with – and co-create – the legal performance in diverse ways.

Conclusions

The legal audience is not merely a passive spectator: they ‘are involved in a constant process of conferring or denying the legitimacy of trials’ and scrutinising and evaluating the performance of justice.¹⁷⁴ They are seeing justice so that it is seen to be done. In seeing, they are doing justice. They are bearing witness. As Joanne Whalley and Lee Miller conclude:

The idea of witness offers a certain weight of responsibility, suggesting as it does participation in an action. In a variety of legal processes, from

¹⁷³ Scott, ‘From Presence to Participation’, 304.

¹⁷⁴ Mulcahy, *Legal Architecture*, 86.

marrying to buying a house, a witness is required to allow the exchanges to occur... It is by calling upon those present to witness the ceremony that it can be recognised by law. Thus, the witness is an active participant in the event... Despite their apparent passivity, witnesses are actively engaged as they are encouraged to notice their own sensations and experiences at the same time as watching... To witness is to be central to the proceedings, to be key to the functioning of the event. This imbrication of the performer and spectator allows the roles to be seen as complicit.¹⁷⁵

The audience is also always responding. Leiboff writes that ‘response is carried in the body, and the body responds fast, triggering a response that involves the action of noticing’¹⁷⁶ and that ‘these responses exist *before* the activation of law and its doctrines and principles.’¹⁷⁷ Post-activation, the ‘audiences for the performance... are the true judges of its fidelity and authenticity.’¹⁷⁸ The audience is, in this sense, central to legal determinations,¹⁷⁹ and carries with it the responsibility of judgment. The performance also carries its own responsibility to its audience. As Danish Sheikh reminds us, amongst legal practitioners, there will always be ‘a difference in what we envisioned our responsibility to be, in what we thought we were practicing when we were practicing’, and perhaps in whom we regard our audiences to be.¹⁸⁰ A performance – legal or theatrical – is ultimately *for* an audience, and the audience is seeing and doing (justice).

Even if a mass of public audience is not present, there are, at least in high profile matters, press journalists and sometimes court artists who practice a form of ‘visual journalism.’¹⁸¹ Yet whilst the practice of an open court – and, through it, an audience to the legal performance – is critical for transparency, courts have closed off or restricted access to outside audiences. Perhaps the most potent example of this is the

¹⁷⁵ Joanne Whalley and Lee Miller, *Between Us: Audiences, Affect and the In-Between* (Palgrave, 2017) 13-14.

¹⁷⁶ Marett Leiboff, ‘Challenging the Legal Self Through Performance’ in Simon Stern, Maks del Mar and Bernadette Meyler (eds.), *The Oxford Handbook of Law and Humanities* (Oxford University Press, 2020) 325.

¹⁷⁷ Leiboff, ‘Challenging the Legal Self Through Performance’, 330.

¹⁷⁸ Jack Balkin and Sanford Levinson, ‘Interpreting Law and Music’ (1999) 20 *Cardozo Law Review* 1571-1572.

¹⁷⁹ Peters, ‘Legal Performance: Good and Bad’, 196.

¹⁸⁰ Danish Sheikh, ‘Performing Contempt’ (2019) 2 *Indent: The Body and the Performative*.

¹⁸¹ Janet Hamlin, *Sketching Guantanamo: Court Sketches of the Military Tribunals 2006-2013* (Fantagraphics Books, 2013) 14.

Guantanamo Military Commissions. Like many courts, the Military Commissions place restrictions on the recording of the legal performance by outside audiences. Nonetheless, court artists have been allowed to record the performance from the public galleries. As journalist Carol Rosenberg writes of the work of the court artists, ‘the pictures illustrate war court transparency.’¹⁸² They are doing the work of ensuring that the court proceedings are transparent. However, the view from the public gallery is restricted. The gallery watches through ‘triple-pane, soundproof glass’;¹⁸³ much like that in parliamentary galleries in Israel and the United Kingdom. They have an obstructed view – people, poles, desks and other objects interrupt their sightlines.¹⁸⁴ (Another court artist, Isobel Williams, solves this problem by making people and architecture transparent.¹⁸⁵) Then there are the restrictions placed by the Commissions. As Rosenberg writes, ‘the dilemma was how much... to show to the world. At first, the Pentagon [a metonym for the Department of Defence that oversees the Commissions] insisted that the sketch artist draw the accused as eerie, ghost-like, otherworldly people – by blurring their features, or drawing them from behind.’¹⁸⁶ While this has since been relaxed, the Commissions still stipulate that artists cannot draw certain people, cameras and walls.¹⁸⁷ Furthermore, artists are prohibited to make eye contact with anyone in the court performance space, limiting connection and interaction.¹⁸⁸

As if to exaggerate the Commissions’ control over its audiences, any drawings from court artists have to be approved for public release by court security to prevent the dissemination of confidential information, and are sealed with a stamp of approval to confirm this.¹⁸⁹ In her experience of drawing courtroom sketches at the Commissions, artist Wendy McNoughton found that the security apparatus of the Commissions took a broad approach to what counted as art: not only were her handwritten notes made during the performances classified as drawings and therefore subject to the approval

¹⁸² Carol Rosenberg, ‘Foreword’ in Janet Hamlin, *Sketching Guantanamo: Court Sketches of the Military Tribunals 2006-2013* (Fantagraphics Books, 2013) 9.

¹⁸³ Wendy McNoughton, ‘Drawing the Guantanamo Bay War Court’, *The New York Times* (27 December 2019).

¹⁸⁴ Hamlin, *Sketching Guantanamo*, 14.

¹⁸⁵ Isobel Williams, ‘Drawn to Court: What Does the Unofficial Eye See?’ (forthcoming) *International Journal for the Semiotics of Law*.

¹⁸⁶ Rosenberg, ‘Foreword’, 8.

¹⁸⁷ McNoughton, ‘Drawing the Guantanamo Bay War Court’.

¹⁸⁸ *Ibid.*

¹⁸⁹ Hamlin, *Sketching Guantanamo*, 14; McNoughton, ‘Drawing the Guantanamo Bay War Court’.

process, but even the paper towel she used to clean her paintbrushes needed approval (Figure 1.2).¹⁹⁰



Figure 1.2: Wendy McNaughton, *Untitled*

The resulting artwork, if one can call it that, testifies to the degree to which the Commissions, whilst ostensibly open to a viewing public, control any visual communication out of the Commission. This is a kind of quasi-transparency, where the live audience can see but controls are placed over the reproduction of what is seen. The Guantanamo Military Commissions are, no doubt, an extreme example of controlled transparency. Nevertheless, the examples provided earlier around court communication attest to a broader desire on the part of the directors of legal performance to control – and, sometimes, close – means for the audiences to receive and reproduce legal performances.

The outside audience performs public scrutiny of the legal performance, but also interacts with and co-creates the legal performance in diverse ways. The restrictions placed by certain courts on the activities of outside audiences are one challenge to a participatory audience; the move to virtual courts is another. The increasing mediatization of legal performances has ramifications for the idea of the outside audience and the role that they play in court. In the chapter that follows, we begin our journey to court, exploring how the outside audience is constituted through space.

¹⁹⁰ McNaughton, 'Drawing the Guantanamo Bay War Court'.

Chapter Two

Setting the Law: Space and Liminality in Legal Performance

Prologue

There are a number of gateways to the law, both architectural and human. In *The Trial*, Franz Kafka's protagonist is continuously denied entry to the law. During the experience of waiting, he meets a priest who tells him a fable:

Outside the Law there stands a gatekeeper. A man from the country comes to this doorkeeper and asks to be allowed into the Law, but the doorkeeper says he cannot let the man into the Law just now. The man thinks this over and then asks whether he might be able to enter the Law later. 'That is possible,' the doorkeeper says, 'but not now.' Since the door to the Law is open as always and the doorkeeper steps to one side, the man bends down to see inside. When the doorkeeper notices that, he laughs and says, 'If you are so tempted, why don't you try to go in, even though I have forbidden it? But remember, I am powerful. And I am only the lowest doorkeeper. Outside each room you will pass through, there is a doorkeeper, each one more powerful than the last. The sight of just the third is even too much for me.' The man from the country did not expect such difficulties; the Law is supposed to be available to everyone and at all times, he thinks, but when he takes a closer look at the doorkeeper in his fur coat, with his large pointed nose, his long, thin, black Tartar moustache, he decides he had better wait until he is given permission to enter. The doorkeeper gives him a stool and lets him sit down at the side of the door. He sits there for days and years.¹

The parable was published earlier as *Before the Law*, and is the inspiration for Carey Young's series of photographic images of courthouse doorways. In one of the series, *The Summons* (**Figure 2.1**), a courtroom is glimpsed through an open doorway. The red glow emanating from the courtroom is 'just that sort of immanent "radiance" that tantalized Kafka's protagonist.'² The doorway acts a mode of partition and yet the glow entices the viewer with the expectation of what lies beyond the door. The doorway is a metaphor for the law itself: open and yet so often inaccessible.

¹ Franz Kafka, *The Trial* (Mike Mitchell trans, Oxford University Press, 2009) 153-154.

² Jeffrey Kastner, 'Carey Young fights the law and wins in her imposing new video', *Garage Magazine* (29 September 2017).

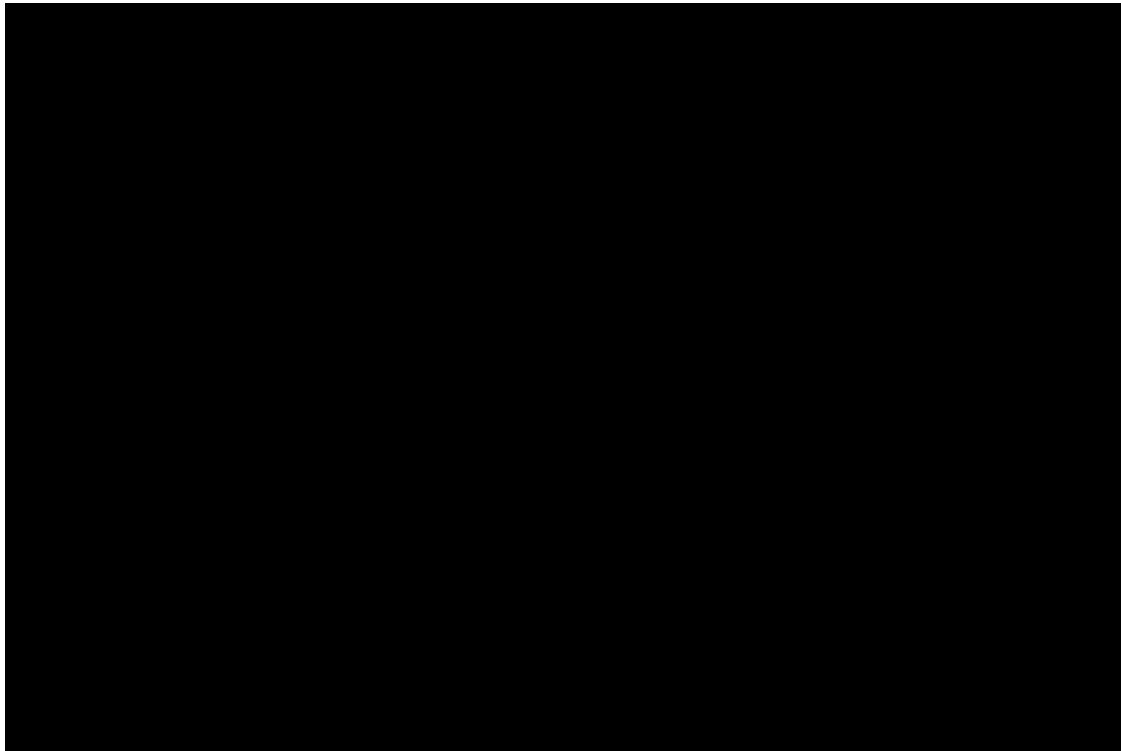


Figure 2.1: Carey Young, *The Summons* (2017)

Introduction: Walking to court

The act of moving is critical to legal performance. An audience, in attending a performance, moves across and through space but also, in moving, constitutes the performance space. Space, in this sense, is not static but is, rather, an affective, material and aesthetic co-production contingent on the materiality of bodies in proximity. As Doreen Massey writes, ‘places are always constructed out of articulations of social relations.’³ In relation to legal places, Leif Dahlberg writes that such places are not ‘just there’ but rather are created through ‘an unfolding spatio-temporal event... that establishes a certain kind of space.’⁴ Moreover, as theatre directors such as Robert Wilson and Anne Bogart have demonstrated, moving through space can create meaning and the body’s intervention can shape or change space. This chapter is structured in part as an experiential journey with reflective responses. My aim is to provoke a critical self-reflection on body and space and to demonstrate the importance of movement through space – seating arrangements, paths, lighting, sound – to the creation of legal performance. In so doing, I also want to invite a focus on the *approach to* legal performance space.

³ Doreen Massey, ‘Places and their Pasts’ (1995) 39 *History Workshop Journal* 183.

⁴ Leif Dahlberg, *Spacing Law and Politics: The Constitution and Representation of the Juridical* (Routledge, 2016) 1-2.

Throughout this chapter, I draw connections between the legal performance space of the court and theatrical performance spaces, acknowledging that such spaces are not uniform and that the connections may also rub against each other uncomfortably at times. A number of legal scholars have provided diverse accounts of walking down a road in Brunswick, Australia;⁵ walking in London;⁶ walking through the University of Warwick campus;⁷ walking along the Rue de la Loi ('the Street of the Law') in Brussels;⁸ and perhaps most pertinently, walking through the liminal spaces of a Swedish courthouse.⁹ This account focuses less on the act of walking,¹⁰ and more on the experience of approaching and being in legal space. Again, a number of scholars have provided accounts of legal space, including Swedish courthouse gardens;¹¹ a Canadian law faculty atrium;¹² and the courtroom generally.¹³ Where I differ from the existing scholarship is to bring performance studies approaches to bear on this account of approaching the legal performance.

Performance theorist Susan Bennett argues that when analyzing space, 'the lens of performance studies is useful'¹⁴ because it invites attention to how space is composed

⁵ Olivia Barr, 'Mourning Place' in Chris Butler and Edward Mussawir (eds.), *Spaces of Justice: Peripheries, Passages, Appropriations* (Routledge, 2017).

⁶ Andreas Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Lawscape, Atmosphere* (Routledge, 2015) 94-103.

⁷ Gary Watt, 'The Moving Experience of Legal Education' in Zenon Bankowski, Maks del Mar and Paul Maharg (eds.), *The Arts and the Legal Academy: Beyond Text in Legal Education* (Routledge, 2012) 138-145.

⁸ Renske Vos, 'A Walk Along the Rue de la Loi: EU Facades as Front- and Backstage of Transnational Legal Practice' in Lianne Boer and Sofia Stolk (eds.), *Backstage Practices of Transnational Law* (Routledge, 2019).

⁹ Matilda Arvidsson, 'The Presence of Absence of Personal Identity: Everyday Conditions of Practicing Law' in Matilda Arvidsson and Elsa Onnefors (eds.), *Jag Strackr Mig In I Framtiden* (Corpus Iuris Forlag, 2007) 9-15.

¹⁰ Nevertheless the process of walking through space affords me the opportunity to slow, pause, engage and remember: Olivia Barr and Laura Peterson, 'An Opening Pathway: Public Art is Public Law' (Paper presented at the Conference of the Law, Literature and Humanities Association of Australasia Conference, Melbourne, 12 December 2017). The act of walking is discussed in rich depth in Barr's monograph on the topic, which also points to what she terms 'walking artists', such as Richard Long and Hamish Fulton: *A Jurisprudence of Movement: Common Law, Walking, Unsettling Place* (Routledge, 2016) 10 n 30.

¹¹ Matilda Arvidsson, 'Embodying Law in the Garden: An Autoethnographic Account of an Office of Law' (2013) 39 *Australian Feminist Law Journal* 36-40.

¹² Sarah Turner and Des Manderson, 'Socialisation in a Space of Law: Student Performativity at "Coffee House" in a University Law Faculty' (2007) 25 *Environment and Planning D: Society and Space* 25; Des Manderson and Sarah Turner, 'Coffee House: Habitus and Performance Among Law Students' (2006) 31(3) *Law and Social Inquiry*.

¹³ Victoria Brooks, 'Interrupting the Courtroom Organism: Screaming Bodies, Material Affects and the Theatre of Cruelty' (2019) 15(2) *Law, Culture and the Humanities*.

¹⁴ Susan Bennett, 'Universal Experience: The City as Tourist Stage' in Tracy Davis (ed.), *The Cambridge Companion to Performance Studies* (Cambridge University Press, 2008) 77.

through performative scenes ‘that attract visitors’ spectatorship.’¹⁵ She contends that ‘the infrastructure of an area, cultural or otherwise, becomes a series of performances directed at specific audiences.’¹⁶ Though Bennett is referencing walking through a theatre district, and I am focusing on the experience of approaching court, I draw from Bennett and other performance theorists (including those who have provided accounts of courthouses¹⁷) and apply their discussion of approaching performance venues to legal performance. The framing lens of our approach is quite similar. In particular, Bennett’s notion that space is composed through performative scenes has implications for the analysis of legal performance space. It would seem to suggest that the stages of approaching the courtroom are performances in themselves and directed for particular audiences – audiences public and personal, including the person approaching the courtroom themselves.

Through this account I explore the role of space in legal performance, as my working hypothesis is that space impacts the legal performance and the legal performance’s intended effect. In this respect, I am building on existing scholarship on the architecture of courts, including Linda Mulcahy’s *Legal Architecture* that argues that the architecture of the court shapes the proceedings therein.¹⁸ As architecture scholar Martha McNamara writes, ‘understanding the various elements of a particular landscape – its architectural form, its geographic arrangement, and its social construction – illuminates the links between physical space and abstract ideas that define social relations.’¹⁹ As Bennett puts it, ‘all such elements of the gathering process are bound to influence the spectator’s preparation for the theatrical event, and... set in place the theatrical frame.’²⁰ She borrows the notion of ‘theatrical frame’ from Richard Schechner, who goes on to write that ‘too little study has been made of

¹⁵ *Ibid* 78.

¹⁶ *Ibid* 77. For further discussion, see Judith Adler, ‘Travel as Performed Art’ (1989) 94(6) *American Journal of Sociology*; Tim Edensor, ‘Performing Tourism, Staging Tourism: (Re)producing Tourist Space and Practice’ (2001) 1(1) *Tourist Studies*; Tim Edensor, ‘Staging Tourism: Tourists as Performers’ (2000) 27(2) *Annals of Tourism Research*. Similarly, I am quite influenced by Schechner’s description of attending a performance space as a ritualistic ceremony wherein he describes it as ‘a series of shows’: Richard Schechner, *Performance Theory* (Routledge, 2003) 169-208.

¹⁷ Michael McKinnie, ‘The State of This Place: *Convictions*, the Courthouse, and the Geography of Performance in Belfast’ (2003) 46(4) *Modern Drama*.

¹⁸ Linda Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (Routledge, 2011).

¹⁹ Martha McNamara, *From Tavern to Courthouse: Architecture and Ritual in American Law 1658-1860* (John Hopkins University Press, 2004) 4.

²⁰ Susan Bennett, *Theatre Audiences: A Theory of Production and Reception* (Routledge, 1997) 125.

how people – both spectators and performers – approach and leave performances.’²¹ Legal scholar-cum-walker Olivia Barr also observes, ‘it is the journey that matters. It is the manner of approach, the conduct of preparation, movement and entry that is significant, not the meeting itself... It is worth stepping back from the meeting itself... and think[ing] more carefully about how we approach; how law approaches.’²² This is to say that within the broad field of law and performance scholarship, there is a recognised need to investigate the way we approach the law and performance, the legal performance. Moreover, Bennett observes that ‘research has not looked at the reciprocal effects of architecture on the audience’,²³ so this study takes up this charge.

Liminality

In investigating the approach to the legal performance, I pay particular attention to the liminal: both in the spatial sense as a space through which the audience passes to enter the main performance space and which frames the performance and the approach to it, and also in the experiential sense as a process of transition.²⁴ ‘Liminal’ derives from the Latin word ‘limen’ meaning threshold.²⁵ In this chapter, I argue that, for the legal performance, the liminal process starts before the entrance to the courtroom and incorporates everything from planning the journey to entering to the court precinct to entering the courthouse to entering the courtroom. I thus embrace a conceptualisation of legal performance as more than what takes place inside the courtroom but also a process that culminates in that particular space.²⁶ Whilst liminality is discussed extensively in performance scholarship, it is somewhat at the margins of legal scholarship.²⁷ My aim is to bring the focus on the margins centre stage and to take the liminal seriously as a space for critical appreciation.

²¹ Schechner, *Performance Theory*, 190. Schechner is here drawing from Erving Goffman, *Frame Analysis: An Essay on the Organization of Experience* (Northeastern University Press, 1986). The framing of a performance has a critical effect on its reception.

²² Barr, *A Jurisprudence of Movement*, 21.

²³ Bennett, *Theatre Audiences*, 128.

²⁴ David Evans, ‘Theatre of Deferral: The Image of the Law and the Architecture of the Inns of Court’, (1999) 10(1) *Law and Critique* 8-9.

²⁵ *Ibid* 9; Schechner, *Performance Studies: An Introduction* (Routledge, 2002) 66.

²⁶ See Schechner’s discussion of performance as a process in *Ibid* 221-262.

²⁷ A notable exception to this is Evans, ‘Theatre of Deferral’, from whence I borrow the term ‘liminal spaces’. The term is also used in Paul Rock, *The Social World of an English Crown Court: Witness and Professionals in the Crown Court Centre at Wood Green* (Clarendon Press, 1993) 204, though the author tends to use the term ‘transitional spaces’.

Liminal spaces prepare and condition the audience for the core performative act. The experience of the liminal, of passing through and passing time in liminal space, constitutes an important aspect of the legal performance. Liminal spaces are also, as I will argue in my conclusion, places of transformation, passages between the ‘real’ world and that of the performance.²⁸ Here I draw from anthropological ideas of the liminal as a period of transition and transformation in role during certain rituals,²⁹ and apply it to the legal performance space. As David Evans describes it, the liminal ‘is the period of transition entered after being disengaged from one social role and before entering another.’³⁰ It is also intimately connected to space, as Victor Turner writes, ‘the passage from one social status to another is often accompanied by a parallel passage in space, a geographical movement from one place to another.’³¹ This change in status can be ‘a real and permanent change’ such as that from boy to man in tribal societies,³² but I argue that this change also occurs for those coming to court and attending legal performances.³³ In legal performance, the liminal is an in-between zone betwixt the courtroom and its surrounding environment. Schechner argues that, ‘during the liminal phase, the work of rites of passage takes place. At this time, in specially marked spaces, transitions and transformations occur.’³⁴ I want to expand on this to suggest that the liminal space of the legal performance has the effect of constituting visitors to the court as a legal audience. They change from individuals to a collective audience.

Schechner continues, stating that there are two dimensions to the liminal phase:

First, those undergoing the ritual temporarily become ‘nothing’, put into a state of extreme vulnerability where they are open to change. Persons are

²⁸ Evans, ‘Theatre of Deferral’, 8.

²⁹ *Ibid* 9 referencing Victor Turner, ‘Betwixt and Between’ in *Blazing the Trail: Way Marks in the Exploration of Symbols* (University of Arizona, 1992).

³⁰ Evans, ‘Theatre of Deferral’, 9 referencing Turner, ‘Betwixt and Between’, though Evans explores this from the perspective of barristers entering the Inns of Court. Turner describes the liminal process elsewhere as to ‘pass through a period and area of ambiguity, a sort of social limbo’: Victor Turner, *From Ritual to Theatre: The Human Seriousness of Play* (Performing Arts Journal Publications, 1982) 24. See also Schechner, *Performance Studies*, 66.

³¹ Turner, *From Ritual to Theatre*, 25.

³² *Ibid*.

³³ It is worth noting the distinction that Turner draws between ‘liminal’ and ‘liminoid’. Turner argues that in post-industrial societies, there are only experiences like the liminal, as they do not have the same obligatory nature and role in the society as pre-industrial rituals. He terms such experiences ‘liminoid’ and associates them with leisure. See *Ibid* 29-55. Turner noted that he was still in the exploratory phase of mapping distinctions between the ‘liminal’ and ‘liminoid’ shortly before his death, so it is hard to guess how he would place the experience of going to court.

³⁴ Schechner, *Performance Studies*, 66.

stripped of their former identities and positions in the social world; they enter a time-place where they are not-this-not-that, neither here nor there, in the midst of a journey from one social self to another. For the time being they are powerless and identityless. Second, during the liminal phase, persons are inscribed with their new identities and initiated into their new powers.³⁵

Schechner's emphasis on the loss of identity and sense of self may be because he – and Turner from whom he drew – was writing from the perspective of having borne witness to rituals in pre-industrial societies, particularly rituals symbolising the transition from boyhood to manhood,³⁶ a change in identity from which there is no return. As most rituals do not enact a permanent transformation of identity and there is not, as a general observation, the same loss of sense of self during the liminal phase. Nevertheless, his account of the transformative power of the liminal can be usefully applied to legal performance.

In respect of the legal performance, I argue that there are two key sites/stages within the courthouse that enact this transformation in role. First, there is the security apparatus that puts persons in a 'state of vulnerability where they are open to change.' Second, there is the foyer or waiting space where 'persons are inscribed with their new identities' as a legal audience. In this sense, through becoming a legal audience, there is perhaps a loss of self or at least individuality. Where I build upon Schechner is to apply his account of the liminal, which is focused on the actor, to the audience of a legal performance.³⁷ In doing so, I attempt what McNamara describes as a 'linking of architecture... and legal performance',³⁸ exploring the effect of liminal architecture on the audience to a legal performance. The way that the law expresses itself in space is sometimes surreptitious. In his exploration of the connections between space and law, Andreas Philippopoulos-Mihalopoulos argues that it is law's 'wet dream' to be

³⁵ *Ibid.*

³⁶ Turner, *From Ritual to Theatre*, 26-30.

³⁷ Though I do acknowledge that the approach to space is quite different for an audience attending a theatrical play than an audience attending a legal performance. For the former, see McKinnie, 'The State of This Place', 586-588 and Gay McAuley, *Space in Performance: Making Meaning in Theatre* (University of Michigan Press, 2002) 40-44.

³⁸ McNamara, *From Tavern to Courthouse*, 1.

invisible.³⁹ Perhaps even to become *subliminal*, below the threshold of consciousness or sensation.

Before embarking, it should also be noted that courthouse design operates ‘to create insiders and outsiders.’⁴⁰ In his ethnographic study of a Crown Court in North London, sociologist Paul Rock suggests that the social organization of the court ‘may be likened to an array of concentric rings... whose outer reaches were open to all but whose inner recesses were restricted indeed.’⁴¹ The inner circles consist of the judges and court staff, the next circle consists of lawyers and police,⁴² and the outer circle consists of ‘an uneasy agglomerate of spectators... [including] jurors before they were sequestered in their own quarters, defendants on bail, defence and prosecution witnesses, supporters, families, and friends.’⁴³ That is not to say that the contours of these boundaries are always clear, but rather that there are degrees between insider and outsider.

This duality between insider and outsider raises questions of power and control, and how this sits with the principle of open justice.⁴⁴ Mulcahy, writing on legal performance spaces, observes: ‘the principle of open justice is in serious danger of being undermined when the public are first searched, and then channeled through space and finally positioned within tightly controlled zones in the courtroom.’⁴⁵ There is a kind of to-fro between these aspirations for liminal spaces – openness versus control, connection versus separation – that are a recurring theme of this account and the architecture of legal performance space.⁴⁶

³⁹ Philippopoulos-Mihalopoulos, *Spatial Justice*, 107.

⁴⁰ Mulcahy, *Legal Architecture*, 1. This is explored in great depth in Rock, *The Social World of an English Crown Court*, 181-196 and also in relation to the courtroom itself in Brooks, ‘Interrupting the Courtroom Organism’, 3-4.

⁴¹ Rock, *The Social World of an English Crown Court*, 181.

⁴² Rock observes that some in this ‘circle would find themselves attending the Court with relative frequency, getting to know and be known by staff, identified not only by name but sometimes by nickname. They court become *habitués*... The *habitués* were able, if they wished, to cross the boundary and advance a little’: *Ibid* 193. Judging from personal experience, this is especially true of court runners.

⁴³ *Ibid* 194.

⁴⁴ The principle of open justice is discussed extensively in Mulcahy, *Legal Architecture*, 83-97.

⁴⁵ *Ibid* 20. Similarly, Peter Brook, writing on theatrical performance spaces, poses the question of liminal spaces: ‘Are these, in symbolic terms, links or are they to be seen as symbols of separation?’: *The Empty Space* (Penguin, 2008) 141.

⁴⁶ Rock, *The Social World of an English Crown Court*, 196; Mulcahy, *Legal Architecture*, 1.

Taking a walk-through court

The sections that follow provide an account of the liminal within legal performance. The sections are structured as a walk-through of the approach to the courtroom. In theatre, actors will often conduct a walkthrough to familiarise themselves with the set. I take up that approach to familiarise you with the legal space. In doing so, I focus principally on the two key sites/stages within the court that enact this transformation in role – the security apparatus and the waiting space – and explore how the spatial architecture of the courthouse creates segregated spaces for its performers and audience, shapes movement and takes time to navigate. After exploring these aspects of the liminal space in legal performance, I conclude with some observations on the ‘transformative powers’ of the liminal in legal architecture.⁴⁷ In all these accounts, the self – however much abstracted – is very much present, as it is in the other accounts of walking and legal space referenced in the opening of this chapter.

Journey and arrival

In this first section, I consider the foreknowledge that one brings to the legal performance, and then how one travels to, approaches and eventually enters the courthouse – the journey to and arrival at court. Mulcahy argues that ‘the journey from street to courtroom provides participants with visual prompts’ that prepare participants for what is to come.⁴⁸ In this section, I consider particular prompts outside the courthouse, including the cityscape, the justice precinct and the court façade, and what these visual prompts signify.

Foreknowledge

To begin our journey, the experience of a performance space starts when first contemplating the performance. Even before attending, paratextual information – that is, information beyond the performance space or text – is gleaned from the court’s website and the text and images thereon; this is all part of the pre-performance framing.

⁴⁷ McNamara, *From Tavern to Courthouse*, 1.

⁴⁸ Linda Mulcahy, ‘The Unbearable Lightness of Being?: Shifts Towards the Virtual Trial’ (2008) 34(4) *Journal of Law and Society* 477.

My focus is less on the *intentions* of the designers or architects of the legal space and more on its atmosphere and *affect* on the audience that comes through it,⁴⁹ and how the space appears to a viewer who may not carry knowledge of its history to inform their vision. In part, this is practical, as a passer-through can never really know what design elements are intentional and what are not. In this respect, I question statements of the sort that ‘the design of a courtroom, a library, or a lecture hall is a *statement of intent* about hierarchy, democracy and power.’⁵⁰ I question – somewhat provocatively, I recognise – whether it *really* matters what the architect or designer’s intent was when one is exploring space. Of course, an audience is programmed to search for intent in the program notes to a theatre piece. Just as the labels next to an artwork are designed to guide interpretation and ensure that said audience is seeing the things – and thinking the ways – that were intended. However, in the absence of a clear signpost of architectural intent, the audience can allow its imaginations to guide them. I follow in the spirit of Gary Watt who tries in his walk to capture a sense of the uncaptioned journey of Alice in Wonderland.⁵¹

Nevertheless, it is true that the history of a space infects its current presentation. As Michael McKinnie argues, ‘the material history of the state [is] articulated in space.’⁵² The space is its own story. As Dvora Tanow suggests:

Spaces are at once storytellers and part of the story being told. As storytellers, they communicate values, beliefs, and feelings using vocabularies of construction materials and design elements. Space stories are told through these vocabularies rather than through literal language – although messages of the materials and spatial codes may be confirmed or contradicted by written, oral, and nonverbal languages (e.g. agency or company literature, managers’ speeches and acts)... At the same time, spaces are settings for organisational acts. In their use, they become

⁴⁹ On atmosphere, affect and the sensory dimensions of the lawscape, see Philippopoulos-Mihalopoulos, *Spatial Justice*, ch. 3.

⁵⁰ Turner and Manderson, ‘Socialization in a Space of Law’, 764 (emphasis added). See also Vos, ‘A Walk Along the Rue de la Loi’, 144.

⁵¹ Watt, ‘The Moving Experience of Legal Education’, 136.

⁵² McKinnie, ‘The State of This Place’, 582; and also 590-592. See also McAuley, *Space in Performance*, 38.

characters in these stories' plots. In this way, organisational spaces are both medium and message.⁵³

I am interested in the stories that legal spaces tell to those audiences that come into contact with them rather than the stories their constructors intended them to tell. That is to say, how the space speaks to its audiences. I find that as I walk to and eventually approach the courthouse space, my inquisitiveness increases and my senses become more heightened.

Travelling to the courthouse

The period and mode of travelling to the legal performance shapes the audience's experience. Prior to attending a court, I look up how to get there on Google Maps, which provides me with an itinerary, which 'translates the spatial order of a map into a temporal sequence' according to different modes of transport.⁵⁴ A courthouse is typically located in the centre of a town or city, accessible by private and public transport. The audience approaches this space by foot, cycle, public transport or car. Each of these approaches to the precinct frames the performance in a different way. Each has different routes and passes by different landscapes. There may be changes in the transport mode, where the audience travelling to the courthouse move from passive transport modes and then walk or wheel into the courthouse. It may require a period of extended travel for those coming from further outside the city centre. The congestion associated with city centres may make the journey difficult, and weather and other factors can also slows the journey down.

As other scholars have noted, 'these prosaic aspects of visiting... [are] by no means insignificant.'⁵⁵ In her article on 'Travel as Performing Art', Judith Adler suggests that travel 'yields observations, encounters and episodes that are free to function as relatively abstract signifiers.'⁵⁶ This is to say that views and experiences during travel can signify in different ways. Whilst Adler's article focuses more on travel as a pastime rather than as 'geographical movement... merely incidental to the

⁵³ Dvora Yanow, 'Space Stories: Studying Museums as Organisational Spaces While Reflecting on Interpretive Methods and their Narration' (1998) 7(3) *Journal of Management Inquiry* 215.

⁵⁴ Adler, 'Travel as Performing Art', 1369.

⁵⁵ Jan Furnee, 'Visiting the Theatre: Spatial Regulation and Segregation Around Theatre Halls: Amsterdam and the Hague, 1750-1900' (2013) 38 *Histoire Urbane* 134.

⁵⁶ Adler, 'Travel as Performing Art', 1369.

accomplishment of other goals’,⁵⁷ I conjecture that the views and experiences during travel to the courthouse can impact the audience’s experience and reception of the legal performance.

Approaching the courthouse

Courthouses and other performances spaces are often prominently located within the civic landscape.⁵⁸ A courthouse in particular is often located within a legal precinct or what legal scholar Peter Rush describes as ‘the landscape of law.’⁵⁹ Courthouses are often situated in urban settings surrounded by other government buildings.⁶⁰ The precinct itself ‘constructs a concentrated force of community, a modality of entrances and exists, a complicity of bindings and interiorities. Law is not only quartered, it becomes a precinct – a material signifier of professional belonging, an administrative centre and government ordering.’⁶¹ The courthouse stands in relation to the cityscape that surrounds it. As another legal scholar Patricia Branco describes, ‘both city and court building look at each other, both shape each other, they belong to one another. They reflect on each other, in a specular way.’⁶² In some cases, the construction of a courthouse leads to the construction of a city and a legal precinct around it and continues to shape the city in such a way that ‘the courthouse building still serves as a reference point in/of the city.’⁶³ The legal precinct may be designed in such a way that the court building is indistinguishable from the legal offices that surround it, which are in turn indistinguishable from financial and corporate buildings.⁶⁴ This could serve to invisibilise the courthouse and its legal precinct.

Despite the location of the courthouse within the legal precinct shaping its signification, as Mulcahy writes, ‘it is often ritual rather than location which render the proceedings significant... [as] ritual allows the special place of law to be created

⁵⁷ *Ibid* 1368.

⁵⁸ Mulcahy, *Legal Architecture*, 24-34; Schechner, *Performance Theory*, 179-183; McAuley, *Space in Performance*, 45-46.

⁵⁹ Peter Rush, ‘The Forensic Precinct: Notes on the Public Address of Law’ (2016) 20 *Law Text Culture* 216.

⁶⁰ Piyel Haldar, ‘In and Out of Court: On Topographies of Law and the Architecture of Court Buildings’ (1994) 7(20) *International Journal for the Semiotics of Law* 193; Vos, ‘A Walk Along the Rue de la Loi’, 142.

⁶¹ Rush, ‘The Forensic Precinct’, 216-217.

⁶² Patricia Branco, ‘City/Courthouse Building: A Mirror Game. Examining Connections Between Courthouse Buildings and Location in the Urban Environment’ (2019) 32 *International Journal for the Semiotics of Law* 598. See also Luke Scott, ‘Court: The Place of Law and the Space of the City’ (2016) 1(1) *ARENA Journal of Architectural Research*.

⁶³ Branco, ‘City/Courthouse Building’, 607.

⁶⁴ *Ibid* 612.

in the minds of those present.’⁶⁵ There are, of course, parallels here to Schechner and Turner’s conception of the liminal in relation to ritual. It could be argued that the ritual dimensions of approaching and passing through the liminal are crucial to the creation and wonder of the courthouse space: that ‘an extended threshold choreographs a ritual transition to the place of the trial; a ceremonial route from the territory of the public body to a court of the state.’⁶⁶ As Mulcahy continues:

Ceremony played a crucial role in rendering a local public place a legal place in which justice was administered... As more elaborate and distinctive purpose-built courthouses were constructed it could be argued that it was architecture which was increasingly employed to mark a location out as a special place. Ceremony and ritual remain incredibly important to the administration of justice today but their centrality to proceedings has been undermined as architecture adopted the role of marking out specific spaces as dedicated to law.⁶⁷

The focus here is on the grandness of courthouse buildings, their ‘elaborate’ and ‘special’ nature, which provoke wonder in the passer-through. Mulcahy argues that the architectural features of the court have undermined the role of ceremony and ritual in endearing effects on the passers-through. McNamara similarly argues that the ‘physical settings for court proceedings [have become]... a means of legitimating legal authority’ in the way that ritual processions formerly operated.⁶⁸

Historic examples of such ceremonies and rituals include ‘the pageantry surrounding the arrival of itinerant Assize judges from medieval times until the 1970s’ that focused on their approach to the courthouse⁶⁹ or the ‘procession of judges arriving at Westminster Abbey from the Royal Courts of Justice’ to mark the start of the legal year,⁷⁰ a tradition that continues to today. Processions routinely preceded the judges’

⁶⁵ Mulcahy, *Legal Architecture*, 27. Going to court has antecedents in ritual. As Anthony Roebler writes, historically, ‘it was not in printed opinions of authors, but in ritual actions, in face-to-face familiar meetings in the courthouse, that the reality of law unfolded’: ‘Authority, Law and Custom: The Rituals of a Court Day in Tidewater Virginia, 1720 to 1750’ (1980) 37(1) *The William and Mary Quarterly* 31. Even in the modern era, most people’s experience of the court will not be through reading judgments but through attending court live or in a mediated manner through television or other media.

⁶⁶ Scott, ‘The Place of Law and the Space of the City’, 6.

⁶⁷ Mulcahy, *Legal Architecture*, 29.

⁶⁸ McNamara, *From Tavern to Courthouse*, 8.

⁶⁹ Mulcahy, *Legal Architecture*, 28.

⁷⁰ *Ibid* 29.

entrance at the courthouse threshold.⁷¹ Prior to processions, judges were routinely ‘met at the county line and escorted to the shire town.’⁷² Movement and approach are a recurring motif of rituals to mark the creation of legal space. However, with the modern rise in professionalisation, ‘lawyers no longer needed to derive legitimacy from ritual such as court processions.’⁷³ Instead, McNamara argues that ‘rather than emphasizing public displays of authority and justice, court proceedings became performances designed to highlight the professional demeanour and legal acumen of the leading characters – the lawyers who occupied the bench and bar’⁷⁴ and thus focused on ‘the restrained movements of lawyers and justices in the courtroom.’⁷⁵ Perhaps it might be more correct to say that this is still a performance of authority but that authority is derived more from lawyers’ professional demeanour and restrained movements than the flamboyant ceremonies and rituals that marked the opening of court.

Whilst the pageantry and ceremony may have diminished, the aspects of movement and approach are still central to the creation of legal spaces, even given the increasing role that architecture plays in its delineation. As one approaches the space, there is a building sense of anticipation of the unknown that is to come. The experience is heightened upon the arrival at the space. Knowing this, performance spaces are often deliberately constructed to ‘create the sense of arrival’⁷⁶ and ‘to create a sense of a transition zone from the public space of a highway to the rarefied interior.’⁷⁷ British court design standards state that ‘there should be a generous external gathering space outside the entrance’,⁷⁸ which would provide opportunity for people to congregate before entering.

Rock refers to this as a ‘frontier’ zone.⁷⁹ The ‘frontier’ has connotations of being at the limit or boundary. Similarly, architecture scholar Roderick Lawrence describes this as a ‘transition zone between the public world (the outside, social, profane) and

⁷¹ McNamara, *From Tavern to Courthouse*, 58.

⁷² *Ibid* 59.

⁷³ *Ibid* 3-4.

⁷⁴ *Ibid* 3.

⁷⁵ *Ibid* 5.

⁷⁶ Judith Strong, *Theatre Buildings: A Design Guide* (Abingdon, Routledge, 2010) 45.

⁷⁷ Mulcahy, *Legal Architecture*, 23.

⁷⁸ See *Court Standards and Design Guide* (Her Majesty’s Court Service, 2010) 1 [6.18]. Note that this guide has since been withdrawn and not formally replaced.

⁷⁹ Rock, *The Social World of an English Crown Court*, 201.

the private world (the inside, personal, sacred).⁸⁰ Lawrence's description highlights the ritual connotations of the transition between public and private space as a move from the profane to the sacred. This is complicated by the courthouse's status as a public building that is also in many ways a private space. The courthouse is a place of public gathering but barriers aimed at restricting public access such as security checkpoints and segregated waiting areas, as discussed further below, invest the space with a sacred dimension. Those outside come inside but many are still cast as outsiders. Piyal Haldar comments that there is an interesting oscillation between inside and outside in these transitional spaces.

What frames the law must by its very nature bear some sort of relationship with the outside. Evidence of the outside world must surely enter through the constructed portals that are both exit and entrance, to and from; a passage through which these materials are incorporated within... Whatever is constituted as the frame lies in between interior and exterior, it has no particular place of enjoying inside or outside.⁸¹

Haldar refers to the 'surrounding framework' of the court as 'parergonal space', with an emphasis on the frame. The liminal space is thus a framing of the legal performance. Haldar continues in saying that 'a court cannot be held in an open space, there can be no work without frame.'⁸² Of course, a court can – and sometimes is – held in an open space, but then the frame is composed through ritual and pageantry of the kind discussed above. The frame is the very epitome of the liminal: it is this boundary between inside and outside; it is the outer limit. Haldar concludes that, 'far from being an accessory the paregonality of architecture becomes necessary in determining what constitutes the inside, the topos of legal judgment.'⁸³ Thus the frame of space determines what goes on within it.

Evans, in his 'Speculations on the Body of Law', describes this space as the skin.⁸⁴ It is the first interaction with the audience and the body of law; an outward expression of the inner manifestation of law, it invites access and it is a thoroughfare through which the audience enters. It defers what is to come. So many may pass the

⁸⁰ Roderick Lawrence, 'Connotation of Transition Spaces Outside the Dwelling' (1981) 2(4) *Design Studies* 203.

⁸¹ Haldar, 'In and Out of Court', 190-191.

⁸² *Ibid* 190.

⁸³ *Ibid* 191.

⁸⁴ David Evans, 'The Inns of Court: Speculations on the Body of Law' (1993) 1 *Arch-Text* 10.

courthouse by and never go in, yet this imposing skin stands as a surface in the civic landscape. The folds of skin – the doors and windows – offer an invitation to come inside. Yet it could just as easily be peeled away from the legal body/space it encloses.

As I approach a courthouse, I can see the architecture of the building, signs that label the building a ‘court’, signs that indicate the hours of opening and direct the movement through the building.

Entering the courthouse

The entrance to a performance venue can ‘encourage a transformation in the attitude of the visitor.’⁸⁵ Just as the architecture affects the attitude of the visitor, the visitor brings a particular attitude through their presentation in the space. This is the first time a person will be seen in the court and thus there is a conscious sense of performance in this entrance. The entrance is the face of the courthouse that an audience must themselves face.⁸⁶ Their faces could be captured at any moment by security cameras or the photographic lenses of media interested in a high profile trial. Court designs are typically grand ‘to reflect the status of Law in society and engender respect for the decisions made in the court.’⁸⁷ Yet this face can also mask what goes on within. The entrance performs a part in ordering access and determining who may see what goes on within, as discussed further below. The architecture of the entrance is not merely a signifier authority but also a medium for ordering approach and negotiating ‘the revealed and known and the unknown.’⁸⁸

Most performance spaces display signs that help patrons locate the building from a distance.⁸⁹ Sometimes, however, signs may be difficult for an outsider to locate or even absent entirely. An absence of signage may also reflect a desire on the part of the spatial architects (and perhaps even the users) to avoid visual signifiers of a court building. Interestingly, Mulcahy notes that when court users were consulted on the design of the Neighbourhood Justice Centre in Collingwood, Australia, it ‘led to a design which reflected their preference for a low key entrance hall which had none of

⁸⁵ Mulcahy, *Legal Architecture*, 23.

⁸⁶ Evans, ‘The Inns of Court’, 10-11.

⁸⁷ See, for example, *Court Standards and Design Guide*, 1 [6.18].

⁸⁸ Evans, ‘The Inns of Court’, 12.

⁸⁹ McKinnie, ‘The State of This Place’, 588.

the signs or signifiers of a court building.’⁹⁰ It could be argued that a lack of signage is a means of deterring prying eyes that may be interested in the legal proceedings therein.

Four kilometers southeast of the Collingwood Neighbourhood Justice Centre, the entrance to the Melbourne Magistrates’ Court is often filled with video cameras, photographic lenses and a swarm of journalists when high profile matters are being heard. The audience attending has to negotiate their way through a tight city street and a mass of bodies to get inside. This is well depicted in Julie Fragar’s artwork, *Appearing Before the Hawks...* (**Figure 2.2**) that depicts the throng of media surrounding the entrance to the Supreme Court of Queensland. In reflecting on the artwork, Karen Crawley and Kieran Tranter note that the ‘cameras and tripods in the painting seem crouching, animalistic, even predatory, in a kind of cinematic visual narrative that recalls the Martian tripods from H. G. Wells’ *War of the Worlds*.’⁹¹ The entrance to a courthouse can also sometimes be filled with protestors waving placards and speaking on megaphones, with police being required to assist the attending audience in negotiating their passage into the courthouse. The entrance to a courthouse is thus a potential place of conflict.



⁹⁰ Mulcahy, *Legal Architecture*, 157.

⁹¹ Karen Crawley and Kieran Tranter, ‘A Maelstrom of Bodies and Emotions and Things: Spectatorial Encounters with the Trial’ (2019) 32 *International Journal for the Semiotics of Law* 635.

Figure 2.2: Julie Fragar, *Appearing Before the Hawks, the Hounds and Those who Tell the Stories* (2018)

Another clash thus emerges over the need for openness and accessibility against an apparent desire to protect the privacy of those attending – and perhaps even participating in – court proceedings. It is a common refrain that ensuring proceedings within the building are visible and having eyes on the court will expose perceived inadequacies and injustices in the court. If signage is removed, it arguably reduces the eyes on the court and the aspirations for justice to be seen to be done. Yet a prominent entrance can become a space for media and protestors to gather and mount displays attesting to the spectacle of justice.

Security at the threshold

The doors to the courthouse act as a separator: ‘The door is otherwise a single opening; yet what lies beyond divides two totally different worlds.’⁹² This division is not only visual but also acoustic.⁹³ The movement from the outside in is a movement from intense sounds to relative quiet. Yet the noise of the civic landscape is always out there, occasionally intruding in. The entrance to any building has great significance. Lawrence states that ‘the entrance hall is the place... before and after crossing the threshold between these two domains’ of the public and the private and that there is a presentation of self in this space.⁹⁴ Walking through the entrance to the courthouse, one confronts the security apparatus of the court. This is an instance of what McKinnie terms ‘spatial confrontations.’⁹⁵ The transition from the street to the courthouse can be ‘abrupt and intimidating’, including the passage through entrance and the height of the surrounding walls.⁹⁶ Since the eighteenth century, the court is ‘a monopolistic place that was designed to be physically and symbolically separate from its environs.’⁹⁷ Whilst courts are commonly part of the civic sphere, they are also rendered separate through their architectural attributes.⁹⁸ The intention of this architecture is ‘to maintain strict control over who may enter and exit.’⁹⁹ The

⁹² Evans, ‘The Inns of Court’, 17.

⁹³ *Ibid* 13.

⁹⁴ Lawrence, ‘Connotation of Transition Spaces Outside the Dwelling’, 203. See also Erving Goffman, *Presentation of Self in Everyday Life* (Doubleday, 1959).

⁹⁵ McKinnie, ‘The State of This Place’, 589.

⁹⁶ *Ibid*.

⁹⁷ *Ibid*.

⁹⁸ Mulcahy, *Legal Architecture*, 26-29.

⁹⁹ McKinnie, ‘The State of This Place’, 589.

movement into space is thus one of ‘crossing’ the securitised threshold.¹⁰⁰ There are obvious relations to the liminal in ritual – being a crossing between before and after – but the added dimension of securitisation is embedded in the architecture and technology of modern legal performance spaces, creating a sense of confrontation at the threshold.

Whereas previously security in performance spaces – legal and theatrical – was unobtrusive and conducted through closed circuit television monitored in a control room,¹⁰¹ security measures are now often a visible aspect of performance spaces. The heightened presence of security is often a reaction to an event. Security measures are increased in times of greater actual or perceived threats against institutions of state. The ‘heightened security concerns in the aftermath of 9/11’ have effected increased security in legal performance spaces¹⁰² and, to a lesser degree, theatrical performance spaces.¹⁰³ As Mulcahy concludes, ‘fear has motivated changing concepts of court design.’¹⁰⁴ This fear has led to a greater securitisation of space.

As one enters a courthouse, one often passes through a walk-through metal detector or manometer that scans the body;¹⁰⁵ not unlike those one is used to pass through at an airport. When it beeps, a person is asked to remove something – shoes perhaps – and go back through again. This process of removing clothing or possessions literally strips one of something. The act of stripping is, as Turner describes, a key aspect of the liminal.¹⁰⁶ As Lawrence writes, ‘the custom of ritual behaviour’ such as ‘the removal of a hat or shoes’ indicates ‘the passage from one spatial domain to another’ and ‘the strong association between the activities of dressing and undressing at the time of entering and leaving... [is an] indication of the importance of the passage between inside and outside.’¹⁰⁷ The ritual of the security check and the stripping of clothes or other accoutrements that this ritual entails invests this moment of passage between the outside and the in with a degree of importance. Moreover, through this

¹⁰⁰ *Ibid.*

¹⁰¹ Strong, *Theatre Buildings*, 62.

¹⁰² Mulcahy, *Legal Architecture*, 150. See also Jon Gould, ‘Security at What Cost? A Comparative Evaluation of Increased Court Security’ (2007) 28 *Justice System Journal* 64-65

¹⁰³ Georgia Snow, ‘Theatres across UK step up security in wake of Manchester bombing’, *The Stage* (30 May 2017).

¹⁰⁴ Mulcahy, *Legal Architecture*, 9.

¹⁰⁵ Gould, ‘Security at What Cost?’, 62, noting that ‘little formal evaluation has been conducted of the effects of heightened security on... court users, including... the general public.’

¹⁰⁶ Turner, *From Ritual to Theatre*, 26.

¹⁰⁷ Lawrence, ‘Connotation of Transition Spaces Outside the Dwelling’, 203.

ritual of approaching the threshold and being stripped of possessions or clothes, one does in a way, become captive to the space.¹⁰⁸ Stripped of one's possessions, one is stripped of individuality.¹⁰⁹ In this moment, the naked individuality of the human is contrasted to the uniformity of the system; those that enact the stripping are dressed in uniform and move us about in a regimented fashion.

Interestingly, artist Marina Abramovic turned this on its head in her 1977 work *Imponderabilia* ([see here](#) and **Figure 2.3**) where she and her artistic collaborator Ulay stood naked at the entrance to an art gallery, creating a small gap in which the entering audience had to squeeze through. Their naked bodies operated as body scanners in an era in which walk-through metal detectors were just beginning to be introduced into airports and other venues. As Schechner describes, the individual stripped is in a 'state of vulnerability where they are open to change'¹¹⁰ and, indeed, transformation. By contrast, Rock describes security apparatus as enacting osmosis.¹¹¹ In this sense, the audience is not individualized but rather assimilated. Again, there is an interesting oscillation in this space between '*in nuce* freedom'¹¹² and controlling mechanisms of conformity. The space arguably performs both these functions.

¹⁰⁸ See also Rock, *The Social World of an English Crown Court*, 203 on the controlling mechanisms of court security generally.

¹⁰⁹ For a more fulsome discussion of the act of stripping in legal performance, see Gary Watt, *Dress, Law and Naked Truth: A Cultural Study of Fashion and Form* (Bloomsbury, 2013).

¹¹⁰ Schechner, *Performance Studies*, 66.

¹¹¹ Rock, *The Social World of an English Crown Court*, 204.

¹¹² Turner, *From Ritual to Theatre*, 54.



Figure 2.3: Marina Abramovic, *Imponderabilia* (1977)

The presence of security in a space causes the body to constrict.¹¹³ As opposed to the ambition for spacious entrances to allow a free flow of bodies, security scanners deliberately constrict the body and slow down the passage of outsiders into a performance spaces. The security scanner individualises the body: people cannot move into the courthouse *en masse* but must move in one by one. This could be a means of enforcing calm and patience, though it can often result in frustration and anger over the delay. If there is not adequate covered area outside the courthouse entrance, it can also expose those waiting to any inclement weather outdoors.¹¹⁴ Whilst the queues that accompany security checks and resultant bottlenecks pose a security risk,¹¹⁵ it would seem that these kind of security checks are about protecting people inside and providing security *from* rather than security *for* outsiders. In his study of courthouse security in American county courts, Jon Gould found that whilst security cameras and scanners may be present, they were often not set up and adequately used or monitored. As a result, he suggests that ‘it could be argued that there is little harm to court... users in believing that they are more secure in these courthouses than they really are; in effect, what they do not know cannot hurt them’,

¹¹³ Philippopoulos-Mihalopoulos, *Spatial Justice*, 100-101.

¹¹⁴ Gould, ‘Security at What Cost?’, 72.

¹¹⁵ See, in a different context, ‘Serious concerns that tough new security measures at stadiums in Australia may have inadvertently created more danger’, *7 News Sydney*, 28 May 2017.

though he concludes that the court should avoid giving false impressions as to security of those who enter.¹¹⁶ In essence, it is really more about the appearance of security for outside court users than their actual security! There is a battle between these opposing aims of spatial architecture – openness versus security – that is tested by the need for security to be visible in order to convey its message of deterrence.¹¹⁷

The process of walking through security is an embodied performance of authority versus submission; the body stripped of possessions and/or clothes against the uniformed body officiating the process. Rock describes court security as an ‘elaborate machinery of control.’¹¹⁸ It should be noted, however, that security apparatus in performance spaces are not uncommon and are probably widely accepted as a necessary mechanism for regulating movement into and through space. Nevertheless, it is a dehumanizing process, this processing of bodies. The passers through are constituted as a legal audience through a production line, expressed in the drone-like and semi-automatic movement through the scanners. Once moved through the scanners, the status of the bodies has changed to constitute the legal audience. I am reminded here of artist Anna MacDonald’s work, *Progression (Walking)* ([see here](#) and **Figure 2.4**), in which a line of children move through a freestanding doorway. There is a noticeable difference in their demeanour before and after moving through. The mundane regularity of the system only serves to underscore the point.

¹¹⁶ Gould, ‘Security at What Cost?’, 73.

¹¹⁷ Mulcahy, *Legal Architecture*, 150-151. See also Gordon Wright, ‘Due Process’ (2004) 45(4) *Building Design and Construction*.

¹¹⁸ Rock, *The Social World of an English Crown Court*, 204.

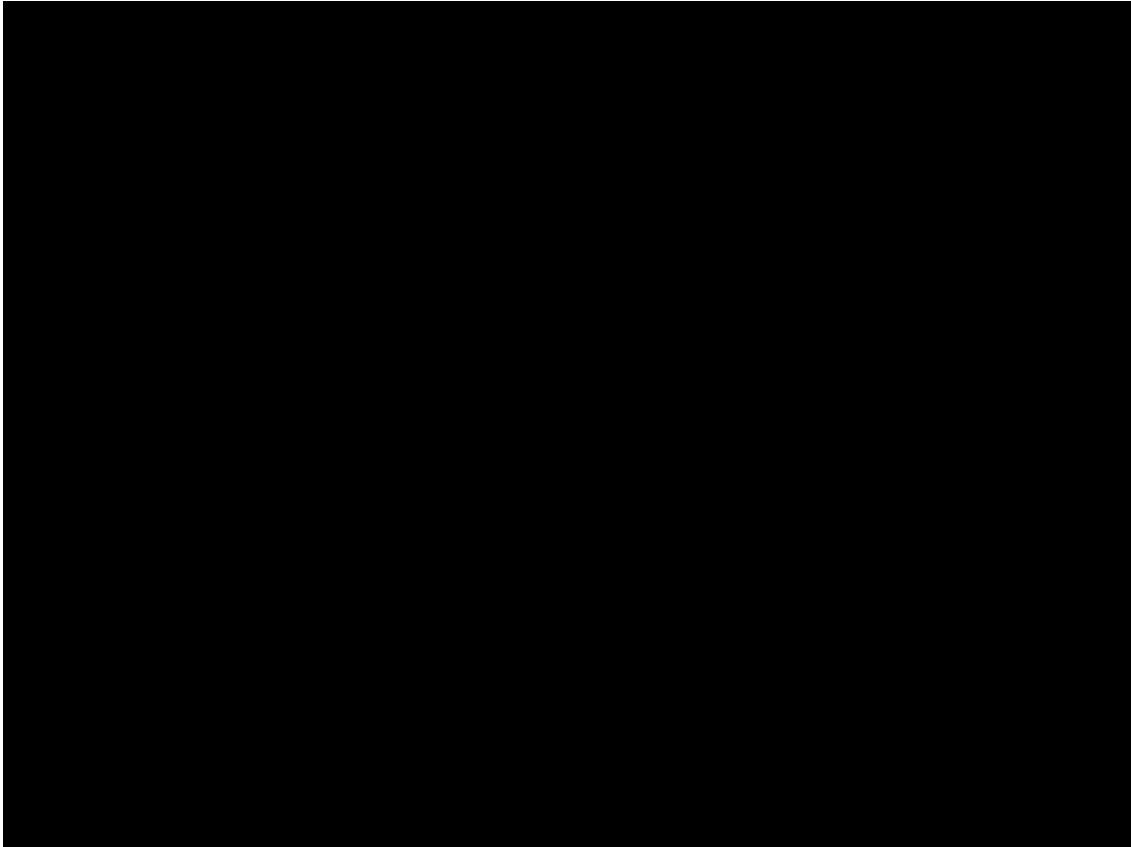


Figure 2.4: Anna MacDonald, *Progression (Walking)* (2017)

A detour: Passageways

Stepping out of the security inspection, one paces through various passageways. The passageway is ‘an essential part of the courtroom process’¹¹⁹ and ‘a kind of in-between space used to engender a sense of gradual transition from the random freedom of the outside to the meticulous hierarchy within.’¹²⁰ Evans says, of walking through the alleyways in legal performance spaces, that the ‘endless succession of bifurcating thresholds and passages produces a vertiginous sensation of being at once inside and out.’¹²¹ A passageway enables controlled movement through space.

In her *Jurisprudence of Movement*, Barr argues that ‘losing one’s way with walking, not Romantically, but literally and physically, is precisely what needs to be done.’¹²² However, to lose oneself in a courthouse would be antithetical to the purpose of the building; it is not designed for wandering. Instead, the passageways are structured such that, even if there are no signs by which to orientate myself, their structure

¹¹⁹ Brooks, ‘Interrupting the Courtroom Organism’, 4.

¹²⁰ Mulcahy, ‘The Unbearable Lightness of Being?’, 478.

¹²¹ Evans, ‘Theatre of Deferral’, 4.

¹²² Barr, *A Jurisprudence of Movement*, 6-7.

channels me in particular directions. After all, ‘the more legible the building the less need there will be for a proliferation of signs.’¹²³ There is a strange sense of relief in control, in the spatial architecture of the passageway directing my movement, telling me where to go – out into the waiting area. I realise that this may be a rather odd reaction to say that the absence of choice as to the direction of my movement is comforting rather than, say, confining. Perhaps it derives from being in a foreign space, not knowing where I am going, and finding relief in the clear and linear architectural direction of the passageway. As Victoria Brooks observes, the assemblages of legal space can create a paradoxical feeling of comfort in discomfort.¹²⁴ This feeling of freedom and yet unease is characteristic of the liminal.

Evans likens the labyrinthine passageways of legal spaces to the inner ear.¹²⁵ The passages enclose various spaces within the space, rooms within the courthouse. The passageways thus articulate and circumscribe the space and how one may enter into it. They break up discrete spaces within the courthouse space and position the courtroom as the central performance space within the architecture of the courthouse. Walking through the passageway, expectation arises and builds as glimpses are caught of what is at the end, the weight of what is to come. People move up and down these passageways, in and out. The passageways act as a kind of utricle, a balancing mechanism to help the audience deal with the gravity of the law. The walls that surround the passageways are a kind of spine,¹²⁶ cleaving the building.

The waiting space

Through the passageways, one reaches the foyer or waiting area, which typically accounts for about a quarter of the built area and about a third of time in a performance space.¹²⁷ Despite the liminal having ‘a peculiar quality of... temporariness’,¹²⁸ liminal performance space is the area in which a significant amount of time is spent. Carey Young, talking on her work *Palais de Justice* and drawing perhaps from Kafka who was an inspiration for her earlier series *Before the Law*, has observed that ‘people are always outside’ the law and that law’s ‘users’ only ever get

¹²³ Strong, *Theatre Buildings*, 60.

¹²⁴ Brooks, ‘Interrupting the Courtroom Organism’, 9.

¹²⁵ Evans, ‘The Inns of Court’, 15.

¹²⁶ *Ibid* 19.

¹²⁷ Strong, *Theatre Buildings*, 33-34.

¹²⁸ Schechner, *Performance Studies*, 67. A point that Turner also picks up on in describing the temporal precarity of the liminal: *From Ritual to Theatre*, 44.

glimpses of the law as the public are seen as dangerous to the courtroom atmosphere.¹²⁹ Both the works cited are situated within liminal space as if from the position of an outsider looking in. The creative focus on this space perhaps draws from a realisation that this is where the audience to a trial or court matter is so often situated, awaiting admittance to the central performance stage of the court. There is a freedom in this space, but also a sense of exposure, of being watched.¹³⁰

Seats

People take seats to situate themselves within the waiting space, to rest their legs and to communicate with others. Seating in waiting areas needs to ‘simultaneously accommodate needs for communication and privacy.’¹³¹ Again, there is an oscillation between the desire for privacy and the desire for sociable interaction with others. Dahlberg points to an interesting phenomenon of court visitors appropriating seating space, noting that ‘some members of the [accused’s] family would claim certain seats as theirs and demand that others move to a different seat.’¹³² This leads to an ‘insertion – or even intrusion – of private space in a public setting.’¹³³ There is a strong desire to find a private space and a fleeting sense of home in this public area.

The arrangement of the space and the fact that people can freely move about from seat to seat ‘offers a change of atmosphere, from the triangular confrontation of the courtroom to possibilities for more intimate dialogue’ where the parties are face-to-face rather than side-by-side.¹³⁴

Coffees

Sometimes there will be cafes in courthouses that are an ideal location for people watching.¹³⁵ As Merima Bruncevic and Philip Linne write, being in a coffeehouse is ‘a mixture of being outside and being home, being able to see people, feeling like

¹²⁹ Carey Young, ‘Palais de Justice’ (Law Research Seminar Series, Birkbeck, University of London, 22 March 2017).

¹³⁰ Mulcahy, *Legal Architecture*, 55.

¹³¹ Julie Baker and Michaelle Cameron, ‘The Effects of the Service Environment on Affect and Consumer Perception of Waiting Time: An Integrative Review and Research Propositions’ (1996) 24(4) *Journal of the Academy of Marketing Science* 347.

¹³² Dahlberg, *Spacing Law and Politics*, 36, in reference to seating in the courtroom proper. Rock also makes a similar observation: *The Social World of an English Crown Court*, 227.

¹³³ Dahlberg, *Spacing Law and Politics*, 36.

¹³⁴ *Ibid* 37.

¹³⁵ *Ibid* 16.

being in the centre of the world while at the same time being hidden from it.’¹³⁶ Whilst Bruncevic and Linne distinguish the coffeehouse from the café, which they argue all look the same, are numb and insensitive and filled with city dwellers connected to wi-fi,¹³⁷ the cafe can still function as a place for people to think and talk¹³⁸ – even if it is through virtual forms. The coffee itself both keeps the drinker awake and alert,¹³⁹ and makes the drinker talkative.¹⁴⁰

Whilst the waiting space is open, its very openness also creates a feeling of exposure; there is no place to escape to for private conversations. Rock describes the waiting space as dangerous because discussions ‘about strategy, criminal history, witnesses, and evidence are all regularly exposed to eavesdropping by outsiders in the public area of a court... [and the] ever-present possibility of... being overheard.’¹⁴¹ Sometimes there are small meeting rooms that parties can escape to ‘to avoid contact with the other party or to discuss the case with their lawyer’,¹⁴² but without this the lack of segregation opens up the dangerous possibilities of eavesdropping and being (over)heard.

Toilets

The only private spaces in the waiting area are the toilets. Courthouses ‘have very few places in which someone can reasonably believe they are not exposed to potential scrutiny from others’,¹⁴³ and this is one such space. Toilets have a marked impact on people’s perceptions of a space. There is very little written on courthouse toilets. A notable exception to this is Matilda Arvidsson’s walk through the Lund District Courthouse in Sweden, wherein the bathroom mirror captures her attention as an object through which to ‘gaze at oneself.’¹⁴⁴ Courthouse toilets do appear – sometimes very prominently – in depictions of legal performance in film, television and theatre: the unisex bathroom in *Ally McBeal*; the scene in *Liar Liar* in which Jim

¹³⁶ Merima Bruncevic and Philip Linne, ‘A Taste of Law and Coffee – From Tastescape to Lawscape’ in Andrea Pavoni et al (eds.), *Taste* (University of Westminster Press, 2018) 216.

¹³⁷ *Ibid* 218 n 29.

¹³⁸ *Ibid* 216.

¹³⁹ *Ibid* 216.

¹⁴⁰ *Ibid* 217.

¹⁴¹ Paul Rock, ‘Witnesses and Space in a Crown Court’ (1991) 31(3) *British Journal of Criminology* 276. See also Dahlberg, *Spacing Law and Politics*, 37.

¹⁴² Dahlberg, *Spacing Law and Politics*, 18.

¹⁴³ Mary Rose, Shari Diamond and Kimberly Baker, ‘Goffman on the Jury: Real Jurors’ Attention to the “Offstage” of Trials’ (2010) 34 *Law and Human Behaviour* 311.

¹⁴⁴ Arvidsson, ‘The Presence of Absence of Personal Identity’, 12.

Carrey's character, a lawyer who is unable to lie, assaults himself in the courthouse bathroom to avoid telling the truth in court; or Darragh Carville's play *Male Toilets* which is set in the bathroom of the Crumlin Road Courthouse in Belfast.

Toilets function both as private spaces, sanctuaries even. As Les Moran argues, the fear of inappropriate social contact is written into the architecture of public toilets:

in the use of frosted glass that might provide natural light but prevent a public display; in the design of the stalls; in the erection of barriers between the stalls to secure individuality during the private act of urination; in the separation of space into individual private cubicles; in the provision of lockable doors to secure that individual space; the installation of ceiling to floor partitions to ensure the division of one from another; in the use of brick and stone to guarantee the separation of bodies.¹⁴⁵

In part this arises from the risk of the toilet becoming a beat or a place where sexual acts occur. Despite this, courthouse toilets are also often social spaces. Meetings can also occur in toilets, for example, the *ex parte* meeting between the judge and a prosecution witness that took place in a courtroom bathroom during the second rape trial of one of the Scottsboro Boys.¹⁴⁶ Toilets also offer a space for private words, for example, Robert Durst's confession to the murder of Susan Berman that was inadvertently recorded when he was in a bathroom and apparently forgot he was wearing a microphone whilst being interviewed for the documentary *The Jinx*.¹⁴⁷ The difficulty is that these private conversations can be sometimes heard. In another example, a plaintiff claimed to have a limp, but jurors observed that he was not limping when in the bathroom and seemed to start limping whenever he saw a juror.¹⁴⁸ Finally, sex can occur in courthouse toilets, though such incidents are 'rare'.¹⁴⁹

¹⁴⁵ Les Moran, *The Homosexual(ity) of Law* (Routledge, 1996) 141-142.

¹⁴⁶ Matthew Heise, 'The Scottsboro Boys Trials and Judge Horton's *Ex Parte* Meeting: History's Verdict' (2009) 7 *Dartmouth Law Journal*.

¹⁴⁷ Ronald Rychlak, 'Sound in the Courtroom: Audio Recordings at Trial' (2015) 39(1) *American Journal of Trial Advocacy* 17.

¹⁴⁸ Rose, Diamond and Baker, 'Goffman on the Jury', 316, 318.

¹⁴⁹ Philip Caulfield, 'Man caught having sex with 15-year-old girl in courthouse bathroom', *New York Daily News* (27 June 2012).

Courthouse toilet walls are often a location for graffiti.¹⁵⁰ As Edward Humes describes in his account of the Inglewood Juvenile Court in Los Angeles, ‘the bathroom are graffiti museums, the mirrors so thoroughly etched with gang insignias that the lawyers brave enough to enter cannot see enough of their own reflections to straighten their ties’¹⁵¹ – much unlike the bathroom mirror in the Lund District Courthouse. Courthouse bathroom graffiti is also well captured in Sarah Endacott’s poem, *Back of the Courthouse Toilet Door* (Figure 2.5).¹⁵²

A.P. How long do we have to wait? 4 --Until you do something else Wrong J.P. FUCK You A.P. LOVES J.P.
= ania loves jacek who fUcK You ap4jp cares fuck you ALL POLICE SHOULD fUcK you fUcK YOU BE
SHOT AT BIRTH FUCK YOU --before birth (abortion) I'll Shit fuck YOU --how can you say this? how die
Happens Fuck you you know if you could have a in fuck YOU baby that it turns out to be a there Ania Placek
fuck YOU policeman? 4 Fuck you I'D SPEW abort Jacek Placek fuck YOU Police are CUNTS Fuck ya I
AGREE I AGREE TOO I didnt get to Fuck yOU say anything fUcK yO bonds FUCK YOU are a joke POLICE
ARE THERE TO fuck PROTECT YOU - RESPECT THEM you too AND THEY WILL TAKE LAWYERS fuck
you again CARE OF YOU 4 FUCK --Yeah! - after JUDGES FUCK YOU, youwanker they rape yo WANK
OFF, FUCK YOU howcan we pay then POLICE the \$2800? they charge 4 FUCK YOU you with pro
LAWYERS fuck you fuck s POLICEfuckingFUCK YOU 4 police fuCk yOU FUCK!

Police are cunts cunts POLICE Fuck YouAnia4Jacek4EVA POLICE fuck you fuck youfuck you fuck you 4 HE
GOT OFF fuck fuck fuckfuckuck fuck JUDGES fuckfuc I'M YOURS 4EVA SimOn BOmOM IS (LOVEANIA)
anniaplaceklovesjacekplacek a lieing barStarD uckfuck nofuckng toiletaparfuck fuck this place stinks fuck
FucKinG Jenny Farrow's boyfriend Only Got 3Months LOCKIE WINS AGAIN IN THE WAR AGAINST THE
PIGS My darling Jacek, all the things that have gone wr ong and I stood by yoy all that time and now I will
always stand byy you no matter what happens in the future. We wil always be together my darling husband
and I will aiwa love you to the end of time and 4 yrs is not forever and I can love you it doesn't matter Ja
uwielbiam Ciebie, moj kochany I love you, my Daring Sarah Carmela Helen Endacott

Figure 2.5: Sarah Endacott, *Back of the Courthouse Toilet Door* (1995)

In this quasi-private space, the walls can be adorned with private reflections. What the poem above captures is the sense of frustration about waiting, returning, the police, bonds, judges, lawyers, the lack of toilet paper, the smell of the place. The act of writing on the back of the toilet door is also a way of claiming some degree of ownership in the small private retreat in an otherwise public space. It exemplifies how the toilet is simultaneously a private space but also a place of subtle communication.

Segregation and suspense

In the waiting space, the outsiders – the general public – are segregated from the insiders – judges, prosecutors and court staff – that have their own backstage facilities separated by walls. Mulcahy describes an emerging intention of legal insiders (judges, barristers, sometimes even separated from each other) to circumnavigate the halls

¹⁵⁰ Edgar Sandoval, ‘Brooklyn courthouse bathrooms are a haven for lewd graffiti artists’, *New York Daily News* (21 December 2010).

¹⁵¹ Edward Humes, *No Matter How Loud I Shout: A Year in the Life of Juvenile Court* (Simon and Schuster, 2015) 14.

¹⁵² Sarah Endacott, ‘Back of the Courthouse Toilet Door’ (1995) 21(1) *Hecate*.

used by the general public or the greater public arena.¹⁵³ What emerges is a kind of backstage versus front of house dichotomy¹⁵⁴ and ‘consciously hierarchical networks of space.’¹⁵⁵ There are beneficent reasons for this segregation, for example, avoiding perceptions of undue influence.¹⁵⁶ There may be even dramatic reasons for this segregation, as Mulcahy describes:

By keeping participants apart from each other their entry into the adjudicatory arena is endowed with much more importance. When participants no longer meet with their environs of the court but only on its stage the drama of the occasion is undoubtedly heightened by selective revelation of key figures. Having congregated in the courtroom suspense is also engendered by the judge who enters last of all and without whom the spectacle cannot proceed. These theatrical devices are particularly well suited to the adversarial trial.¹⁵⁷

As Mulcahy observes, there is a similar separation between actors and audiences in legal and theatrical performance spaces. The judges’ chambers or the barristers’ robing room are akin to the actors’ green room, being ‘spaces in which you gather yourself and constitute yourself in a new costume but also in a new frame of mind.’¹⁵⁸ However, there are some instances of actors breaking into the foyer space and, less often, audiences intruding into actors’ spaces. Schechner talks of making the green room visible to the audience in his Performance Group’s 1974-77 production of *Mother Courage*, but the experiment failed as the performers maintained character in the ‘public’ green room or retreated to a ‘private’ makeshift green room away from the audience.¹⁵⁹ What this demonstrates is that there is a real desire on the part of actors for a separate space away from their audiences so that they can drop the façade of their role in private.

¹⁵³ See the further discussion in Mulcahy, *Legal Architecture*, 54 about ‘a desire on the part of the elite to have spaces to which they could withdraw from the hurly-burly of the public spaces of the courtroom and *sal[l]e de pas perdu*.’

¹⁵⁴ *Ibid* 49.

¹⁵⁵ *Ibid* 50.

¹⁵⁶ *Ibid* 51-52.

¹⁵⁷ *Ibid* 52.

¹⁵⁸ Gary Watt in Sean Mulcahy, ‘Acting Law | Law Acting: A Conversation with Dr Felix Nobis and Professor Gary Watt’ (2017) 4(2) *Exchanges* 196.

¹⁵⁹ Richard Schechner, *Between Theatre and Anthropology* (University of Pennsylvania Press, 1985) 104-105; *Performance Theory*, 195. For further examples of performances in which the separation between the liminal space of the foyer and central performance space is played with, see Stephen Purcell, *Shakespeare and Audience in Practice* (Palgrave MacMillan, 2013) 79.

The segregation creates an element of suspense. Fear and anxiety also motivate segregation.¹⁶⁰ An accused held on remand, for example, will come through a different, even more securitised route, to enter the courthouse and room. The segregation heightens the anxiety of the waiting. In his observations of people in legal performance waiting areas, Dahlberg noted, ‘whereas most seem anxious or eager for their cases to begin, others appear bored.’¹⁶¹ Whilst Dahlberg reads this boredom as relaxation, there is a palpable tension in the waiting area – the anticipation of what is to come. It is as if breath is held in this space.¹⁶² People speak in hushed tones, with the sounds of extraneous noises occasionally intruding in to the silence. The hushed whispers reverberate around the space. The collective held breath in this space anticipates the action that is to come.

Movement and sound

From the constrictive movement through security scanners and alleyways, movement in the waiting area ‘is more fluid and flexible.’¹⁶³ Defendants’ family members, who form a major part of the audience to the proceedings, negotiate the space and walk about seemingly aimlessly. It is the *salle de pas perdu*, the ‘hall of lost steps’, where the noise of steps is lost not in the vastness of the space but on the soft patter of feet on the floor and the gentle whisper of voices. In Carey Young’s work, *Palais de Justice*, the click clacking of heels on the marble floor of the *salle de pas perdu* of the Palais de Justice in Brussels is clearly audible.¹⁶⁴ Similarly in the old parliament house of Andorra, Casa de la Vall, the creaking floorboards of the *salle de pas perdu* create their own underfoot soundscape. The noise of heels may reflect a desire of the wearer to be heard or to advertise their presence – and power – in the space using the sensory modality of sound over vision.¹⁶⁵ The soundscape also reminds the listener that this is a place that people walk through, a thoroughfare of sorts, and thus it is very much not a private space. (For a discussion of the soundscape in the courtroom, turn to Chapter Three.)

¹⁶⁰ Mulcahy, *Legal Architecture*, 54-55.

¹⁶¹ Dahlberg, *Spacing Law and Politics*, 37.

¹⁶² Evans, ‘The Inns of Court’ 12.

¹⁶³ Dahlberg, *Spacing Law and Politics*, 37.

¹⁶⁴ Linda Mulcahy, ‘Before the Law’ in ‘Carey Young’s *Palais de Justice*’ (2018) 21(2) *Law and Humanities* 292.

¹⁶⁵ Beca Grimm, ‘Why women love loud shoes’, *Racked* (18 October 2016).

Time and tedium

This space is also a *waiting* space. It waits for what is to come. As Schechner writes, 'there is before every kind of performance... a liminal time, sometimes brief, sometimes extended, when performers prepare to make the leap from "readiness" to "performance". This leap is decisive, a jump over a void of time-space. On one side of the void is ordinary life, on the other, performance.'¹⁶⁶ The same might be said for the audience who play a constitutive role in the legal performance. The waiting space thus operates as a liminal void at which the audience builds readiness for the performance to come. Nerves and doubt circulate through this vertiginous space; eyes dart about. It is in the choice to proceed forward from this space into the courtroom that visitors to the court are inscribed with their new identity as a legal audience.

A great deal of time in the courthouse is spent waiting. As sociologist Barry Schwartz notes, 'in some courts, in fact, all parties whose cases are scheduled to be heard on a particular day are instructed to be present at its beginning when the judge arrives.'¹⁶⁷ A close commencement time brings a sense of urgency, whereas a later commencement may mean that time needs to be killed perhaps in the foyer or an in-house or nearby café where different paratextual information is available which will impact their perception and, through it, interpretation of the legal performance. This also suggests the power in waiting. The time is structured around the judge, as it 'ensures that the judge (whose bench is separated from his [or her] office or working area) will not be left with idle time that cannot be put to productive use',¹⁶⁸ whereas the other players are left with idle time. The time spent waiting for a performance to commence may take the other players away from other activities in their everyday life, activities they regard as more important. Schwartz provides empirical evidence to suggest frustrations at the delay from court officers, lawyers and others and the impact that this has on their productivity.¹⁶⁹ The waiting, in some cases, may end up taking all day. There may be – and often is – repetition: performance after performance each with its own waiting time before and between until the matter finally concludes. The audience will move in and out of the waiting space over a

¹⁶⁶ Schechner, *Performance Studies*, 240.

¹⁶⁷ Barry Schwartz, 'Waiting, Exchange, and Power: The Distribution of Time in Social Systems' (1974) *American Journal of Sociology* 853.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid* 853-854.

period of time and experience their transition through the courthouse's waiting space anew each time.

Liminality as transformation

Barr talks of how law moves and how we – being colonial legal objects – carry the law with us as we move into different places,¹⁷⁰ but I am interested in how we move *into* law and how law comes to be carried in our body; that is to say, how law is inscribed upon us as part of our progress through the liminal. Marett Leiboff argues that law is 'predisposed against the body', pointing to the way the bodies of legal professional actors are effaced by robes and suits and an emotionless demeanour, and the way in which concepts such as self defence due to reasonable apprehension of harm instantiate a separation between body and mind.¹⁷¹ Against this thesis, I instead argue that law is deeply concerned with and embedded in the body, that the legal performance is an embodied process. I suggest that as much the body infects place with law through its movement, the experience of moving through place – in particular the liminal spaces of a legal performance – readies the body for the legal performance and transforms the audience into a law-filled, lawful body.¹⁷² Certain aspects of the liminal compel the audience to a legal performance to think through their body – the security scanner, the passageways and the waiting space where their body is being read. Furthermore, we carry places in our body. As philosopher Edward Casey puts it, one's 'lived body is the locatory agent of lived places.'¹⁷³ The body starts to take on the constrictions that the security scanner imposes on it and carries this constriction through into the legal performance space, the courtroom. The space has a way of making those that come through it feel a certain way and that feeling carries itself in the body in different ways.¹⁷⁴

There is another crucial aspect to the liminal space and that is its transformative power as a 'place of possibility.'¹⁷⁵ Turner describes this in remarkably vivid terms as

¹⁷⁰ Barr, *A Jurisprudence of Movement*, 5.

¹⁷¹ Marett Leiboff, 'Towards a Jurisprudence of the Embodied Mind – Sarah Lund, *Forbrydelsen* and the Mindful Body' (2016) 2(6) *Nordic Journal of Law and Social Research* 83.

¹⁷² Similarly, Schechner describes how, through the liminal process of workshop/rehearsal, dance is inscribed in the body: Schechner, *Between Theater and Anthropology*, 110.

¹⁷³ Edward Casey, *Getting Back into Place: Toward a Renewed Understanding of the Place-World* (Indiana University Press, 1993) 105.

¹⁷⁴ McAuley, *Space in Performance*, 52-53.

¹⁷⁵ Dahlberg, *Spacing Law and Politics*, 37. See also Schechner, *Performance Studies*, 72; Turner, *From Ritual to Theatre*, 54.

‘an instant of pure potentiality when everything, as it were, trembles in the balance.’¹⁷⁶ In walking through legal space, an audience is transformed into legal bodies. Liminal spaces are an important aspect of performance preparation. ‘The physical environment of the courthouse has... been used to prepare those involved in legal proceedings for the trial and to encourage the need for reflection’;¹⁷⁷ to set a tone for the performance;¹⁷⁸ and to discipline the body.¹⁷⁹ Mulcahy concedes that ‘one reaction to such concerns about how space is used to engender discomfort might be to suggest that courts are supposed to be daunting places in which participants are encouraged to reflect on the gravity of law’¹⁸⁰ and, further, it may be that ‘it is the very inconvenience or effort of attending a gathering that should be seen as investing attendance with importance.’¹⁸¹ Peter Brook refers to this as the conditioning of the audience.¹⁸² Moving through the threshold and into the liminal space – through the threshold of the Law, the security barriers where one is stripped of possessions and sometimes clothes, the labyrinthine passageways, and into the waiting area that is a place of changing – transforms the audience into a constitutive player in the legal performance ritual. Schechner describes how the liminal process induces ‘the feeling of openness, of experimentation, of transition.’¹⁸³ This is a deeply somatic process. The audience may not tremble in the way that Turner describes, but it is noticeable that at these threshold points, voice quietens, movements slow and rigidify, and heartbeats pick up with anticipation. As much as the body affects place, place affects the body;¹⁸⁴ the liminal space transforms the passers-through into a legal audience.

Conclusions

It is from the waiting area that one enters the central performance space of the courtroom through the kind of doorway – though rarely as plush – as that depicted in Carey Young’s *The Summons*, which opened this chapter. The courtroom door marks a frontier between the disorderly public space of the waiting area and the orderliness

¹⁷⁶ Turner, *From Ritual to Theatre*, 44.

¹⁷⁷ Mulcahy, ‘The Unbearable Lightness of Being?’, 477.

¹⁷⁸ *Ibid* 480.

¹⁷⁹ Judy Radul, ‘Video Chamber’ in Marit Paasche and Judy Radul, (eds.) *A Thousand Eyes: Media Technology, Law and Aesthetics* (Sternberg Press, 2011) 127.

¹⁸⁰ Mulcahy, *Legal Architecture*, 83.

¹⁸¹ Mulcahy, ‘The Unbearable Lightness of Being?’, 487.

¹⁸² Brook, *The Empty Space*, 146. Similarly, Schechner frames the workshop/rehearsal process in theatre as liminal. See Schechner, *Between Theatre and Anthropology*, 99-106, 109-113; Schechner, *Performance Studies*, 66.

¹⁸³ Schechner, *Between Theatre and Anthropology*, 103. See further at 112-113.

¹⁸⁴ Bennett, *Theatre Audiences*, 128.

of the court and signals ‘the transition that must be made when people quit public space for an area reserved for a set of very special activities, when they leave the... sometimes bustling world of the waiting areas for the decorum of the court.’¹⁸⁵ It is at this moment that I will end. As the focus is on the liminal space, this account ends at as one reaches the courtroom, but not without some final reflections on the nature of the liminal space of the legal performance, and the chapter that follows provides an acoustic account of legal performance in the courtroom.

Before finishing, however, it would be remiss not to consider how the architecture of justice is experienced by those attending court via video-link. Writing on the physical architecture of the courthouse, Mulcahy avers that ‘the positioning of walls, windows, and stairwells is used to prepare people for the drama of the trial.’¹⁸⁶ Whereas, for a person giving evidence through video, their “arrival” in the courtroom is activated by the transfer of their image along an information highway but they remain physically static. Preparation for the giving of evidence remains a cerebral one... The ritual of a journey to court and away from it are denied them.’¹⁸⁷ Whilst the liminal space of the courthouse prepares the body for what is to come; a person testifying through video has no such preparation and is instead beamed into a foreign space with no spatial orientation beforehand. They have not had the upbeat in the heart that comes with walking. As Mulcahy concludes, ‘the distribution of bodies, walls, lights, and gazes into particular arrangements reveals conceptualisations of the relationship between the witness and other actors in the trial which have been thoughtfully determined over hundreds of years.’¹⁸⁸ It would be folly to move towards further mediatisation of court proceedings without considering the importance of space to the legal performance.

Whilst Mulcahy argues that ‘the administration of justice and the respect in which the justice system is held are best promoted when trials are located in distinctive, prominent and dignified buildings’¹⁸⁹ as ‘buildings are viewed as an appropriate medium through which to represent prevailing ideals of justice’,¹⁹⁰ this is perhaps a nostalgic view of justice, and at least very debatable in a digital world. The holding of

¹⁸⁵ Rock, ‘Witnesses and Space in a Crown Court’, 275.

¹⁸⁶ Mulcahy, ‘The Unbearable Lightness of Being?’, 466.

¹⁸⁷ *Ibid* 480.

¹⁸⁸ *Ibid* 476.

¹⁸⁹ *Ibid* 477.

¹⁹⁰ *Ibid* 476.

court within buildings forms a literal barrier to open justice,¹⁹¹ yet alone the construction of segregated separation routes that separate the outside public from the legal insiders.¹⁹² As Mulcahy later acknowledges, the control mechanisms in the liminal spaces of legal performance – the legal insiders are kept in a separate space akin to a green room away from the outside audience that waits in the foyer – ‘undermine the contention that courts are “open” to the public.’¹⁹³ The liminal space of the court is deliberately designed in such a way as to invest the hearing within with authority. Were the two groups – the insiders and the outside audiences – to meet it would disrupt the illusion that is essential to performance. There is a sense of now you see you me, now you don’t, a kind of *fort-da* between openness and closed-off authority in the liminal spaces of the court. Indeed, this oscillation exists in the liminal spaces of many performance venues.

Through their passage through the liminal space, those attending court are constituted as the legal audience and prepared for the legal performance to come. In the chapter that follows, I open the door to the courtroom and consider how the legal audience, and actors, can attune to the speech and sounds of the court.

¹⁹¹ Mulcahy, *Legal Architecture*, 87.

¹⁹² *Ibid* 89.

¹⁹³ *Ibid* 83.

Chapter Three

Hearing the Law: Silence and Attunement in Legal Performance

Prologue

In 1951, Robert Rauschenberg painted a series of canvases in solid white (**Figure 3.1**). Within the work, Rauschenberg reverses positive and negative space so that the negative space becomes the central content, finding presence in absence. Yet the work is not absent; as Rauschenberg himself has said, ‘a canvas is never empty.’¹ Instead, ‘on a canvas of nearly nothing... [can be seen] the complex and changing play of light and shadow and the presence of dust.’² The work is hypersensitive to its surroundings, changing according to the ambient conditions in which it is shown. It ‘brings the viewer’s attention to the everyday, the things so often overlooked’ and compels the viewer to see in a new way.³ The reflective surface of the paint creates ‘a portal of reflection through which the viewer can experience things in a new light.’⁴

Figure 1: Robert Rauschenberg, *White Painting* (1951)

Introduction: Listening to silence in the court

Perhaps the most famous silence in performance is John Cage’s *4’33”*, wherein the performer enters the stage but does not play their instrument for four minutes and thirty-three seconds. In this work, Cage invites the audience to listen to and in silence. Whilst Cage is regarded as a musical composer, he was a true interdisciplinarian, influenced by artist Robert Rauschenberg.⁵ Rauschenberg’s *White Paintings* formed the background to one of Cage’s first ‘happenings’ or performance art events, *Theatre Piece*,⁶ and was in some ways the inspiration for Cage’s silent composition. He declares that ‘the white paintings came first; my silent piece came later.’⁷ There have been many words written about Cage’s silent work, but most salient is composer Kyle Gann’s conclusion that *4’33”* requires ‘a new approach to listening.’⁸

¹ Branden Joseph, *Random Order: Robert Rauschenberg and the Neo-Avant-Garde* (MIT Press, 2003) 21.

² Douglas Kahn, ‘John Cage: Silence and Silencing’ (1997) 81(4) *The Musical Quarterly* 562 referencing John Cage, *Silence: Lectures and Writings* (Calder and Boyars, 1968) 102.

³ David Kauffman, ‘The Theory of Silence’ (2011) 2(1) *Musical Offerings* 4.

⁴ *Ibid.*

⁵ Kahn, ‘Silence and Silencing’, 562.

⁶ William Fetterman, *John Cage’s Theatre Pieces: Notations and Performances* (Routledge, 1996) 71.

⁷ Cage, *Silence*, 98.

⁸ Kyle Gann, *No Such Thing as Silence: John Cage’s 4’33”* (Yale University Press, 2010) 11. It is worth noting here the etymological relation of audience to hearing.

This new approach to listening demands that we hear not only voices. It compels us to *attune* ourselves to the gaps in speech, to the background noises and to the silences. This new approach to listening can be usefully adapted to considering silence in the legal performance in court. In legal studies, unlike in theatre and performance studies, we seldom exercise our conscious capacity to attune ourselves to the various ways in which silence can be meaningful. To riff off Simon and Garfunkel, comprehending the sound of silence requires a listening that goes beyond hearing (yet, ironically, hearing is the word used to describe many legal proceedings). In his seminal work, *Acoustic Jurisprudence*, legal scholar James Parker argues that ‘whereas hearing is a physiological phenomenon, listening is a psychological act... [that] requires effort, care, work.’⁹ Understanding the significance of silence to the legal performance is an ongoing project,¹⁰ and one that requires us to listen – really listen. This process of listening to and then transcribing silence into words is difficult. Parker argues that to do so ‘depends on quite a refined sense of legal oratory, one that is as sensitive to its rhythms and ellipses as its content.’¹¹ Silence is much more open to interpretation than words, and yet any written analysis of silence cannot but reduce the phenomenon to words. As sociolinguist Adam Jaworski writes of silence, ‘paradoxically... its study is only possible when it is broken.’¹²

Despite its difficulty, articulating the dimensions of silence in legal performance is necessary because silence is a recurring element in legal performance in the court – in both speech and space. The silence in court speech is captured in the right to silence¹³ – a right that is ironically often exercised by stating it in words). Yet, as actors well know, silence can be filled with action and unspoken dialogue as much as words or noise can.¹⁴ Indeed, as legal scholar Gary Watt comments, ‘silence is so much more

⁹ James Parker, *Acoustic Jurisprudence: Listening to the Trial of Simon Bikindi* (Oxford University Press, 2015) 6. Jean-Luc Nancy suggests that listening may entail a greater sense of comprehension and sensorial appreciation than mere hearing may: *Listening* (Fordham University Press, 2007) 6.

¹⁰ Katherine Biber, ‘How Silent is the Right to Silence?’ (2012) 8(2) *Cultural Studies Review* 163.

¹¹ Parker, *Acoustic Jurisprudence*, 205-206.

¹² Adam Jaworski, *Silence: Interdisciplinary Perspectives* (Berlin: Mouton de Gruyter, 1997) 392. See also the comment of Simone Voegelin that ‘when I am talking [about silence], the very thing I am describing is erased by my voice’: *Listening to Noise and Silence: Towards a Philosophy of Sound Art* (Continuum, 2010) 90.

¹³ See Biber, ‘How Silent is the Right to Silence?’.

¹⁴ John Pratt, *Mind the Gap: An Examination of the Pause in Modern Theatre* (PhD Thesis, Edith Cowan University, 2012) 55.

eloquent than words’¹⁵ and, as Bret Rappaport suggests, it ‘can be more persuasive than the speech that surrounds it.’¹⁶ Watt goes on to suggest that in deploying silence in legal performance, lawyers need the knowledge and awareness of theatrical actors.¹⁷ Taking up this charge, I apply theatre and performance scholarship to analyse silence in speech in legal performance.

The silence in court space is captured in the demand for silence in the court. Entering into most courts, one is immediately struck with signs calling for silence in the courtroom.¹⁸ Yet, as Cage has demonstrated through *4’33”*, the silence in space – like the white in Rauschenberg’s paintings – is filled with different noises emerging from the ambience of the space, and sometimes noises outside it. Particularly given that most legal scholarship on the topic considers silence as an absence of speech, we can again usefully turn to performance theory to consider the effects of silence in the spaces of legal performance.

Listening to silence in legal performance requires listening both ‘semantically’ to obtain information about meaning and ‘causally’ to obtain information about context.¹⁹ Thus, in this chapter, I listen to the silence in the court and provide both a semantic of analysis of the different silences in speech, and a causal analysis of the different noises that emerge out of the silences in space. The two modes of silence are interlinked – silence in speech provides a space in which to listen to the silence and noises in the sonic environs. Silence creates a listening space and the capacity for attunement or sensitive listening. In this way, silence operates as a means for those in the legal performance to attune to the voices and noises around them. Silence attunes the audience to the legal performance.

¹⁵ Quoted in Sean Mulcahy, ‘Acting Law | Law Acting: A Conversation by Dr Felix Nobis & Prof Gary Watt’ (2017) 4(2) *Exchanges* 193.

¹⁶ Bret Rappaport, “‘Talk Less’: Eloquent Silence in the Rhetoric of Lawyering’ (2017) 67(1) *Journal of Legal Education* 289.

¹⁷ Quoted in Mulcahy, ‘Acting Law | Law Acting’, 194.

¹⁸ Parker, *Acoustic Jurisprudence*, 188-189.

¹⁹ James Parker, ‘Gavel’ in Jessie Hohmann and Daniel Joyce (eds.), *International Law’s Objects* (Oxford University Press, 2018) 215-217 referencing Michel Chion, *Audio-Vision: Sound on Screen* (trans Claudio Gorbman, Columbia University Press, 1994) 25-28. The third mode of listening that Chion describes is ‘reduced listening’, a phenomenological reduction that focuses on the sound-in-itself. This is not attempted here, but for more on this, see, e.g., Brian Kane, ‘*L’Object Sonore Maintenant*: Pierre Schaeffer, Sound Objects and the Phenomenological Reduction’ (2007) 12 *Organised Sound*.

Attunement

In thinking through attunement, I will start with a story.²⁰ I was at a conference, sitting in the hall, waiting for proceedings to begin, when suddenly we were called to silence. During this minute's silence, a calm came over the space.²¹ It almost had a meditative quality to it. I asked the person next to me what that silence was for; I was told it was 'attunement'. It is an opportunity for delegates to reflect, collect their thoughts and prepare for the debate, drawing from the Quaker tradition of silence at the beginning of a meeting.²² After this event, I turned to the legal literature on attunement. In *Justice as Attunement*, legal scholar Richard Dawson argues that attunement is at the heart of doing justice.²³ Though Dawson does not provide a strict definition, he describes attunement as a process of orienting oneself or paying close attention to meaning.²⁴ Attunement means the process of attuning, readying, preparing or warming up.²⁵ It provides a heightened listening and piqued attention.²⁶ Similarly, fellow legal scholar Sara Ramshaw in her work on justice and improvisation argues that attunement to what is beyond the determinate is necessary for law's operation,²⁷ and that the act of listening in law and performance 'demands attunement',²⁸ again without quite defining it. Building on this scholarship, I use the term attunement to mean sensitive listening; that is, a form of listening that is endowed with sensation

²⁰ This is also captured in Mike Sergeant, 'A day in the life of the Green Party', *BBC News* (9 September 2005); Ian Birrell, 'My gloriously "brain-fading" day with Alice in Green Land', *Daily Mail* (8 March 2015).

²¹ Much like that that is observed at the Melbourne Cricket Ground at the minute's silence preceding the ANZAC Day football match when an awesome hush descends over the arena. On this phenomenon generally, see Dennis Kurzon, 'Peters Edition v Batt: The Intertextuality of Silence' (2007) 20 *International Journal for the Semiotics of Law* 292-293.

²² Kurzon, 'The Intertextuality of Silence', 291-292.

²³ Richard Dawson, *Justice as Attunement: Transforming Constitutions in Law, Literature, Economics and the Rest of Life* (Routledge, 2013) 5.

²⁴ *Ibid.*, xvii, though noting that meaning itself 'is in constant motion.' Peter Goodrich notes that "'attunement" suggests popular music (tune), electronics (tuning to frequencies of wavelengths which are unseen but observable by other means), psychological or social concentration (attuned, or sensitive to something unobservable), and transpersonal or religious ecstasy (at-one-ment)': 'The New Age Man: Merlin as Contemporary Occult Icon' (1992) 5(1) *Journal of the Fantastic in the Arts* 62. A similar discussion of the multiple meanings and etymologies of attunement can be found in Lisbeth Lipari, *Listening, Thinking, Being: Toward an Ethics of Attunement* (Pennsylvania State University Press, 2014) 206-207.

²⁵ Dawson, *Justice as Attunement*, 38.

²⁶ *Ibid.* 41.

²⁷ Sara Ramshaw, *Justice as Improvisation: The Law of the Extempore* (Routledge, 2013) 41, 82, citing Peter Fitzpatrick, 'Access as Justice' (2005) 23(1) *Windsor Yearbook of Access to Justice* 9 and Peter Fitzpatrick and Richard Joyce, 'Copying Right: Cultural Property and the Limits of (Occidental) Law' in Fiona Macmillan (ed.), *New Directions in Copyright Law: Protection of Traditional Knowledge and Culture* (Edward Elgar, 2007) 173.

²⁸ Ramshaw, *Justice as Improvisation*, 89.

and acutely aware of and responsive to not only the speaker but also to others in the space and the background noises. Attunement entails an ‘intense form of commitment and responsibility to – as well as interaction with – all that surrounds: people, environments, nature and the sounds of daily life.’²⁹

Attunement entails both a self-focused orientation or attention and an outwardly-focused orientation or sensitive listening to that which surrounds. Silence is a means for attunement. Silence creates a focused space for listening and attunement from which the listener is able to attune to themselves and to disperse their attention to the background noise in the space. Seth Kim-Cohen captures this well in his account of Pauline Oliveros’ notion of ‘deep listening’ or attuning to the sound-in-itself in contradistinction to his notion of ‘surface listening’ or attuning ‘to encompass adjacent concerns and influences.’³⁰

Oliveros describes deep listening as ‘learning to expand the perception of sounds to include the whole space/time continuum of sound – encountering the vastness and complexities [of the sound] as much as possible.’³¹ The deepness of deep listening suggests that ‘something to be quarried, something at the bottom’ of the sound can be discovered through listening.³² Kim-Cohen writes that ‘with shallow listening, there is no there there – or there is no ore’ to be quarried in the sound; instead, shallow listening ‘pools at the surface, spreading out’ to include ‘its often implicit, often ignored, but always present, socio-historic conditions of existence.’³³ He is a critic of listening practices that ‘insist on bracketing out everything but the formal qualities of the sonic’³⁴ and instead insists on listening to sound ‘as part of a matrix of other things: meanings, valences, narratives, beliefs, histories, intentions, desires, and nested and overlapping matrices.’³⁵ He points to Billy Bao’s album *Lagos Sessions*,³⁶ which includes snippets recorded from the band’s trip to the Nigerian capital Lagos,

²⁹ Daniel Fischlin and Ajay Heble, *The Other Side of Nowhere: Jazz, Improvisation, and Communities in Dialogue* (Wesleyan University Press, 2004) 11 quoted in Ramshaw, *Justice as Improvisation*, 89. See also F Smith, *The Experiencing of Musical Sound: Prelude to a Phenomenology of Music* (Gordon and Breach, 1979) 17-18.

³⁰ Seth Kim-Cohen, *Against Ambience and Other Essays* (Bloomsbury, 2016) 134. See also, Seth Kim-Cohen, ‘No Depth: A Call for Shallow Listening’ (Keynote Lecture at Conference on Art, Sound and Radio, Halmsted, 2005).

³¹ Pauline Oliveros, *Deep Listening: A Composer’s Sound Practice* (iUniverse, 2005) xxiii cited in Ramshaw, *Justice as Improvisation*, 89.

³² Kim-Cohen, *Against Ambience*, 134.

³³ *Ibid* 134.

³⁴ *Ibid* 54.

³⁵ *Ibid* 59.

³⁶ See Mattin and Xabier Erkizia, ‘Lagos’ (2014) 365 *The Wire*.

as an example of a site-specific work that demands shallow listening.³⁷ The album is a jarring collection of ambient sounds combined with electronic noise. For me, a stronger example of the need for shallow listening is another Nigerian sound artist Emeka Ogboh's *Lagos Soundscapes*, which also includes sound recordings from Lagos and in part inspired Billy Bao's later album. As I listen in to one track, 'Lagos State of Mind', my attention is constantly diverted to different sounds – voices, traffic – that each demand a simultaneous listening, not deep but dispersed enough to capture each of the overlapping sounds and their social context.

When silence occurs in performance, it provides the space for the listener to attune: both *to* the silence-in-itself in its vastness and complexities and, *through* the silence, to the adjacent sounds that make up the sonic environs of the court. Silence allows the listener to attune inwardly to one's self and outwardly to that which surrounds: both surrounding people and the surrounding space.

These listening practices need not be strictly distinct or sequential. It is productive to turn to performance scholars and practitioners to understand this. Ross Brown contends that listening is a process whereby one focuses on a sound and filters out insignificant noise, but still hears that which is a background presence.³⁸ This is an active process: focus 'is continually directed from and then reinvested in... [an] object... [in] a continual oscillation between engagement and distraction.'³⁹ That is to say, one tunes in and out of different sounds in the soundscape of the performance. As theatre practitioner Phillip Zarrilli describes, attunement is the ability to *both* 'inhabit one's body-mind and remain sensorially and perceptually alert' to 'the performance environment.'⁴⁰ In the moment of attunement created by silence, one is thus both inwardly focused and also publicly aware or alert to the surrounding environment.⁴¹ Zarrilli goes on to argue that attunement creates 'a state of fuller attentiveness' in

³⁷ Kim-Cohen, *Against Ambience*, 131-134.

³⁸ Ross Brown, 'Towards Theatre Noise' in Lynne Kendrick and David Roesner (eds.), *Theatre Noise: The Sound of Performance* (Cambridge Scholars Publishing, 2011) 5. As an aside, as we get older, we lose the capacity to filter out background noise.

³⁹ Brown, 'Towards Theatre Noise', 6.

⁴⁰ Phillip Zarrilli, 'An Enactive Approach to Understanding Acting' (2007) 59(4) *Theatre Journal* 646.

⁴¹ Meghan O'Rourke, 'The noise within', *New York Times Style Magazine* (12 November, 2017) 149. For a further discussion of the concept of the 'body-mind' see Phillip Zarrilli, 'Toward a Phenomenological Model of the Actor's Embodied Modes of Experience' (2004) 56(4) *Theatre Journal* 661-664.

which one is alert to one's surroundings and prepared to react to stimuli.⁴² In attunement, one is present and alive to stimulation. The other senses become elevated and responsive to the surrounding environment.⁴³ Attunement brings attention to the body and also disperses awareness outside of the body to the space that surrounds it. Attunement opens up both deep and shallow listening. The latter is akin to what theatre scholar Adrian Curtin terms socially engaged listening in contrast to the more modern 'rapturous absorbed listening' that is akin to deep listening.⁴⁴ Curtin suggests that shallow or socially engaged listening 'might be considered a more open, honest, and less precious form of listening' that is better suited to the 'inevitable noise' of performance spaces,⁴⁵ echoing Kim-Cohen's remarks. In my view, placing value judgments on different forms and objects of listening is not especially productive. One listening practice does not preclude the other, and a listener may practice both – sequentially, simultaneously or separately. Finally, it should be noted that one can drop out of attunement when one's attention is diverted.⁴⁶ Conversely, attunement can return in a snap moment of arrest or 'habitual pause in a tempo',⁴⁷ like the silence that breaks voice or noise.

Attunement is also an embodied experience. Zarrilli, who is famous for his psychophysical actor training method, draws in part from philosopher Shigenori Nagatomo⁴⁸ whose work, *Attunement Through the Body*, advances the idea that attunement is a 'somatic knowing between the personal body and its living ambience.'⁴⁹ Nagatomo's work suggests that attunement is a way of connecting the body with space. This kind of spatial attunement is well captured in anthropologist Kathleen Stewart's notion of 'atmospheric attunement', which she describes as 'an intimate, compositional process of dwelling in spaces'⁵⁰ and 'absorption, a serial

⁴² Phillip Zarrilli, 'Senses and Silence in Actor Training and Performance' in Sally Banes and Andre Lebecki (eds.), *The Senses in Performance* (Routledge, 2007) 61.

⁴³ *Ibid* 61-62.

⁴⁴ Adrian Curtin, *Avant-Garde Theatre Sound: Staging Sonic Modernity* (Palgrave Macmillan, 2014) 149.

⁴⁵ *Ibid*.

⁴⁶ Zarrilli, 'Senses and Silence in Actor Training and Performance', 62.

⁴⁷ Kathleen Stewart, 'Atmospheric Attunements' (2011) 29 *Environment and Planning D: Society and Space* 452. See also, in relation to musical improvisation, Ramshaw, *Justice as Improvisation*, 61-62, 67.

⁴⁸ Zarrilli, 'Senses and Silence in Actor Training and Performance', 67.

⁴⁹ Shigenori Nagatomo, *Attunement Through the Body* (State University of New York Press, 1992), 196.

⁵⁰ Stewart, 'Atmospheric Attunements', 445.

immersion in little worlds... attending to what might be happening.⁵¹ The attunement to space is experienced through the body. Attunement is an embodied practice not purely in the mind;⁵² it is, as Zarrilli describes it, an experience of the ‘body-mind’. If we accept that silence opens the door to attunement, it may be fruitful to think through how silence carries itself in the body. Silence is synonymous with stillness, which theatre-maker Anne Bogart suggests creates spatial awareness and attention to others within space.⁵³ With its connection to stillness, it could be argued that silence slows the listener down and provides them the space to sit in the moment.

Attunement is experienced through silence; that is to say, silence provides the listening space for attunement. As author Meghan O’Rourke writes, ‘to hear ourselves, we sometimes have to flee ourselves, diving into silence until we’re comfortably alone with the noise within.’⁵⁴ Silence provides a moment to hear oneself.⁵⁵ Perhaps this is why we go searching for silence – or why we avoid it at all costs. Like O’Rourke, I have travelled to the Olympic National Park in Washington, one of the quietest places on earth, and recorded its sounds. I also recall a time being locked in an anechoic hearing test chamber, striving to hear, trying to tune into sound in a space of silence. This experience is not dissimilar to that of Cage when he entered an anechoic chamber at Harvard University – an experience that led to the composition of 4’33’’⁵⁶ and his famous dictum that ‘there is no such thing as silence.’⁵⁷ In the chamber, I attuned in to my body,⁵⁸ not only the noise within but how silence *felt* (slight goosebumps on my skin) and *tasted* (slight metallic taste in my mouth). These sensory manifestations are linked to anxiety and may express the

⁵¹ *Ibid* 449.

⁵² Parker astutely critiques the assumption that ‘hearing has to do with the body, listening the mind’ which is oftentimes based on a contrast between hearing as physiological and listening as psychological: ‘A Lexicon of Law and Listening’ in Andrea Pavoni et al (eds.), *Hear* (University of Westminster Press, forthcoming).

⁵³ Anne Bogart and Tina Lindau, *The Viewpoints Book: A Practical Guide to Viewpoints and Composition* (Theatre Communications Group, 2005) 70-71, 114. The relation between silence and stillness is also discussed in Raymond Schafer, *The Soundscape: Our Sonic Environment and the Tuning of the World* (Destiny Books, 1977) 254.

⁵⁴ O’Rourke, ‘The noise within’, 149.

⁵⁵ Voegelin, *Listening to Noise and Silence*, 79.

⁵⁶ Cage, *Silence*, 8.

⁵⁷ *Ibid* 51.

⁵⁸ Voegelin feels that silence ‘enters me and pulls on me, inside out, stretching my nervous system through thin layers of skin, hooking my inner flesh to the very outskirts of my body’: *Listening to Noise and Silence*, 86.

fear that I felt in being in this dark, quiet, claustrophobic space.⁵⁹ In the silence, my other senses beyond the hearing were elevated, and I could tune in to how the silence made me feel. Composer Sam Kidel reminds us that we listen through our bodies: ‘I don’t just hear sound in my head, it seems to reverberate around my body. Hairs stand up, muscles relax or contract, my body inclines towards certain movements.’⁶⁰ There was a truly multi-sensory listening going on in this space. Literature scholar George Prochnik also suggests that ‘silence is for bumping into yourself.’⁶¹ In silence, I reacquainted myself with my body. From tuning in to my body, I then tuned out to the sounds in the space around me, minute as they may be.⁶² The quietness enhanced my perception and enabled me to hear more acutely.⁶³ I was more connected to my acoustic surroundings; even the most innocuous of noises became something of interest.⁶⁴ Silence attunes – both internally (to the body) and externally (to the space).

The anechoic chamber and the rainforest of a national park are extreme examples of silence. The silence is enhanced because it runs over a sustained period of time without interruption. The absolute nature and extended duration of the silence allows the listener the space to bump into themselves and connect to their acoustic surroundings. I provide these examples as they aptly showcase the internal, inwardly-focused and external, outwardly-focused dimensions of attunement. In what follows, I apply this to the legal performance to suggest that silence in legal performance allows the listening audience to both attune to what is being said and also attune to the sonic environment of the court. Indeed, silence is necessary for all communication. For without silence to demarcate words and sentences, we would not be able to communicate at all. But I suggest that it operates at a deeper level: that it is necessary for attunement to the legal performance and its surrounds.

⁵⁹ When I have experienced anxiety attacks in the past, it has often been accompanied with a metallic taste in the mouth caused in part by rapid breathing. It may have been the confined space that triggered this taste of anxiety. The link between silence and terror, fear and other heightened emotional states is discussed further in Schafer, *The Soundscape*, 256; Voegelin, *Listening to Noise and Silence*, 85.

⁶⁰ Lucia Udvardyova, “‘What Does Anti-Capitalist Ambient Sound Like?’” Sam Kidel Interviewed’, *The Quietus* (27 March 2017).

⁶¹ George Prochnik, *In Pursuit of Silence: Listening for Meaning in a World of Noise* (New York: Doubleday, 2010) 27.

⁶² Voegelin, *Listening to Noise and Silence*, 117-118.

⁶³ *Ibid* 85.

⁶⁴ Susan Sontag, *Styles of Radical Will* (Secker and Warburg, 1969) 13; Lyn Gardner, ‘Silence that speaks volumes in the theatre’, *The Guardian* (4 June 2010).

In *Listening, Thinking, Being: Towards an Ethics of Attunement*, communications scholar Lisbeth Lipari sketches out what I take to be four elements of attunement.⁶⁵ First, there is the relational, the way in which attunement connects us to our bodies, space and the other bodies in space. Second, there is the patience and, I would expand on this, the responsibility that attunement entails. Silence creates the possibility of sensitive listening, and engaging deeply with the other voices and sounds within and around a legal performance space. Third, there is the invention, the possibility of change and transformation that attunement provides. Silence forces one to face an abyss without voice or sound and, as James Boyd White suggests, invent something anew and, in doing so, transform our listening: ‘the moment of silence [is] where transformation and invention can take place.’⁶⁶ Moments of silence create listening spaces, ‘but they also create spaces in which there is potential for changes in state to occur.’⁶⁷ Silence changes the state of the audience and transforms them into sensitive listeners attuned to the performance and its surrounding environment. But one mustn’t be too sententious about this. As Lipari reminds her reader – and this is the fourth element – attunement is impermanent. One is always switching in and out of listening, drifting in and out of concentration, letting things come and go. Listening is necessarily a selective process; it cannot be sustained for too long.

Naming and framing courtroom silence

What follows is an exploration of different types of silence in the language and environment of legal performance. Through this exploration, I question how these different kinds of silence in legal performance can have meaning, and the implications of the audience breaking the silence of the court. Using silence as a means to attune to the different sounds within and outside the legal performance space, I question the embrace of architectural devices to block out extraneous noise intruding into the courtroom and whether silence should be enforced in legal performance.

At the outset, it is useful to distinguish between silence and pause in performance, as theatre scholar John Pratt does in his thesis on this topic. Pratt’s writing draws in part from the practice of playwright Samuel Beckett, who was notorious for his use of

⁶⁵ Lipari, *Listening, Thinking, Being*, ch. 8.

⁶⁶ James White, *Heracles’ Bow: Essays on the Rhetoric and Poetics of the Law* (University of Wisconsin Press, 1985) 174.

⁶⁷ Julie Sutton, ‘The Pause that Follows: Silence, Improvised Music and Music Therapy’ (2002) 11(1) *Nordic Journal of Music Therapy* 31.

pause and the stage directions that indicated the timing of the pauses in his scripts to the second.⁶⁸ As Pratt writes, a pause is a temporary hold or break sometimes indicated by the word ‘beat’; silence has a degree of permanence.⁶⁹ It is the temporality or timing that differentiates the two: ‘for some playwrights the difference is only between the amounts of time given to the suspension of a speech or an action.’⁷⁰ Some playwrights will measure the length of a pause or silence in beats, and there will be a noticeable difference in the number of beats between the two. For example, in the stage directions at the commencement of Daniel Keene’s play, *Terminus*, the playwright indicates that ‘a pause should be no more than two beats, a long pause no more than five. Where a silence is indicated, its duration is open to... discretion.’⁷¹ Beats separate silence from pause; it is the length that creates discomfort.⁷² The difference between pause and silence in theatre is that ‘the pause punctuates the speech, or sets the pace; the silence operates as a theme, or a shift between themes.’⁷³ A pause suggests action will continue; a silence holds no such promise but perhaps a change in the direction of the action.⁷⁴ Dashes, ellipses, full stops and commas are all means of capturing pauses – or breaks – in theatrical and legal scripts (transcripts, judgments, etc.). In theatrical scripts, silences are usually indicated by a separate stage direction, sometimes with descriptive words to indicate the mood, whereas legal scripts seldom contain this level of detail. A stenographer is no playwright. The theatre has a language and conventions for silences, pauses and beats that the law does not have, though these elements are present in legal performance, thus it is productive to turn to the lexical framings of performance scholars to understand silence in legal performance.

Pratt gives countless examples of what can be read into silence: hesitation or reticence, emotion, reverence, shock or awe, transfixion, falsity, authoritarianism, wisdom, ignorance, even madness.⁷⁵ Whilst Pratt is concerned with theatrical

⁶⁸ Pratt, *Mind the Gap*, 49.

⁶⁹ *Ibid* 12, 29-30.

⁷⁰ *Ibid* 30.

⁷¹ Daniel Keene, *Terminus and Other Plays* (Salt Publishing, 2003) 163. The term ‘beat’ can also be used to indicate a shift in action or motivation or a brief pause. As Pratt notes, ‘actors are usually flexible enough to understand both meanings, even in the same script, but the dual purpose of the word is an unnecessary ambiguity’: *Mind the Gap*, 68.

⁷² The same sort of idea exists in musical composition. See Ramshaw, *Justice as Improvisation*.

⁷³ Biber, ‘How Silent is the Right to Silence?’, 163.

⁷⁴ Pratt, *Mind the Gap*, 30, 68-70; Mulcahy, “Acting Law | Law Acting,” 194.

⁷⁵ Pratt, *Mind the Gap*, 78-80.

performance, his writing has implications for our understanding of silence in legal performance. There are always differences in (interpretations of) the meanings of silence not just between audiences but also according to the occasion of reception; a silence could mean something different to the same audience when heard again,⁷⁶ which is to say that its meaning depends on context and is determined largely by intuition.⁷⁷ Indeed, the actor in a legal performance can use pause to effect in a number of different ways that might not be – whether intentionally or otherwise – apparent to their audience. Legal scholar Katherine Biber writes that ‘silence, whenever it occurs in law’s jurisdiction, must be explained and explained and explained... Law’s commentary forecloses the possibility that silence might be deliberately ambiguous.’⁷⁸ Biber further argues that law is reluctant to acknowledge interpretive power’s compulsion: ‘It is only lawyers who demand that silence means nothing. Actually it is not that silence means nothing; it is that the law must *refuse* interpretation. Refusal functions as parsimony in the face of silence’s plenitude. Silence offers a suffocating overabundance of meaning of which the courts primly, wordily, decline to partake.’⁷⁹ We are constantly reading silences and pauses and looking for meaning within them. There is almost a compulsion to interpret and thereby understand.⁸⁰ It seems a fatally flawed exercise to tell a jury to not draw any inferences from a testifier’s silence, especially when it is something we so often do in conversation or performance.⁸¹ Silence can offer a multiplicity of meanings. We should, I believe, embrace the confusion or disorientation that (the interpretation of) silence can cause.⁸² Ambiguity has virtue, including the possibility of inviting differing interpretations.⁸³

Silence in speech

Legal linguist Dennis Kurzon notes that ‘there have been a number of attempts to enumerate types, functions and meanings of silence in social interaction’,⁸⁴ and

⁷⁶ Dawson, *Justice as Attunement*, 5.

⁷⁷ Pratt, *Mind the Gap*, 38.

⁷⁸ Biber, ‘How Silent is the Right to Silence?’, 163-164.

⁷⁹ *Ibid* 161.

⁸⁰ Pratt, *Mind the Gap*, 40.

⁸¹ Dennis Kurzon, ‘The Right of Silence: A Socio-Pragmatic Model of Interpretation’ (1995) 23 *Journal of Pragmatics* 56.

⁸² Dawson, *Justice as Attunement*, 10.

⁸³ *Ibid*, xxxi.

⁸⁴ Dennis Kurzon, ‘Towards a Typology of Silence’ (2007) 39 *Journal of Pragmatics* 1673.

himself outlines ‘a typology of silences in the context of social interaction.’⁸⁵ Adopting Kurzon’s approach can helpfully guide an analysis of silence in legal performance. Kurzon outlines four types of silence. Two – *conversational* and *textual* are considered here – and another – situational – is considered later in the chapter as I contemplate whether silence is, to use the phrase of a former Australian High Court Justice, the ‘right situation’ for court proceedings. Kurzon’s types are drawn from past research into the phenomenon of silence, including that of speech analyst, Thomas Bruneau, from whom I draw a further type – *psycholinguistic* silence⁸⁶ – that Kurzon does not otherwise consider. One type of Kurzon’s that I ignore in this analysis is thematic silence where the speaker is silent on a particular topic, for example a male speaker may be silent about women or a newspaper report may be silent about a particular topic, which may express a broader social issue of the silencing of women and minorities. Kurzon acknowledges that thematic silence ‘a metaphorical form of silence’ that is ‘not on par’ with the other forms of silence, as it is not strictly connected to speechlessness.⁸⁷ As such, I have excluded thematic silence from my analysis. I have also introduced another type of silence – *meaningful* silence. I use this type to cluster pauses that are used by the speaker for a particular effect, be it to allow what has been said to sink in or to build suspense for what is to come next, drawing from Pratt’s typology of pauses.⁸⁸

In talking of silence and pause in legal performance, I do so both from the perspective of the actor and the audience. For the purpose of this chapter, I use the term ‘actor’ when discussing any person who is speaking in a legal performance at a point in time, and ‘audience’ to describe those who are listening.⁸⁹ I must stress, however, that this typology is by no means exhaustive; instead, I offer these types as a way of thinking through silence and attunement in legal performance.

⁸⁵ Kurzon, ‘Towards a Typology of Silence’, 1675.

⁸⁶ Thomas Bruneau, ‘Communicative Silences: Forms and Functions’ (1973) 23 *The Journal of Communication* 23-27.

⁸⁷ Kurzon, ‘Towards a Typology of Silence’, 1684.

⁸⁸ Pratt breaks these down into two – ‘reaction’ and ‘anticipation’: *Mind the Gap*, 78.

⁸⁹ As discussed in Chapter One, audience – and actor – is not a static concept in legal performance; different people take on these roles at different times.

Psycholinguistic silence

The first type of silence is psycholinguistic silence. This refers to ‘necessary and variable impositions of slow-time on the temporal sequence of speech’,⁹⁰ and is ‘illustrated by hesitation in a conversation... self-corrections and stuttering.’⁹¹ As Bruneau describes, ‘hesitations are forms of silence... [and] can also take the form of non-lexical intrusive sounds (such as the “uh” often referred to as filled pause); sentence corrections; word changes; repeats;... stutters; omissions of parts of words; sentence imcompletions; and syllabic lengthenings before junctures.’⁹² Pratt notes that such ‘silences’ are ‘often motivated by a fear of the consequences when approaching a difficult subject – which could be dangerous, risky, risqué or simply delicate.’⁹³ Sometimes they may be intentional, sometimes not. It can occur when an actor forgets their lines⁹⁴ and goes searching for words,⁹⁵ or stumbles crudely over a line, or is delayed in acting due to technical problems such as a jarring video-link.

An example of this kind of silence is Lord Neuberger’s delivery of the judgment in *R (Miller) v Secretary of State for Exiting the European Union*, discussed further in Chapter Four. At one point during the televised delivery of the judgment, His Honour says, ‘The issue in these proceedings have [sic] nothing to do, ah, with whether the UK should exit from the EU’, pausing after ‘proceedings’ and briefly at the ‘ah’ perhaps realising he has misused ‘issue’ in the place of ‘issues’ (and thus ‘have’ in the place of ‘has’) but unable to correct what has been spoken without further embarrassment. The break in speech is ostensibly to allow the actor, Lord Neuberger, to pause, collect himself and attune back into what he is to say.

The interruption of sound – temporally only a very brief pause – also shocks the audience back into sensation. Bruneau argues that such ‘hesitations that slow the speaker at points of uncertainty also permit the listener to catch up... it is also possible that the natural-appearing pauses and other hesitation phenomena influence the listener’s connotative judgment of the speaker, e.g. of the speaker’s “sincerity”.’⁹⁶ In this sense, the hesitation humanises the actor in the ears of the audience, and breaks

⁹⁰ Bruneau, ‘Communicative Silences’, 23.

⁹¹ Kurzon, ‘Towards a Typology of Silence’, 1673.

⁹² Bruneau, ‘Communicative Silences’, 23.

⁹³ Pratt, *Mind the Gap*, 78.

⁹⁴ Gardner, ‘Silence that speaks volumes in the theatre’. See also Pratt, *Mind the Gap*, 57.

⁹⁵ Pratt, *Mind the Gap*, 11.

⁹⁶ Bruneau, ‘Communicative Silences’, 25 citing Howard Maclay and Charles Osgood, ‘Hesitation Phenomena in Spontaneous English Speech’ (1959) 15 *Word* 43.

up the robotic monotony of reading the judgment. On the other hand, listeners may not even hear the pause; it is hard to detect. For the listening audience, it may simply form part of the rhythm of speech.⁹⁷ There are, of course, natural pauses in speech, for example, if you read this aloud, you would pause at the end of this sentence. However, when I listen to Lord Neuberger's speech, I feel 'the anxious silence you get when an actor forgets his or her lines.'⁹⁸ I tune in more closely, willing the actor along. Usually it is noise that perforates silence, but in this instance silence perforates noise.⁹⁹ It jars. The anxious response triggers me to listen more sensitively.

Conversational silence

In almost all legal performances, there is silence as an actor speaks. This form of silence between actor and audience may be referred to as conversational silence, where the actor speaks and the audience is silent except for certain non-verbal reactions such as laughing, clapping and mmhmm-ing that let the actor know they have been heard. Kurzon argues that there is a contract between speaker and listener, that one is silent while the other speaks.¹⁰⁰ This contract is predicated on the idea of turn-taking¹⁰¹ or, as Pratt terms it, floor-sharing: during conversation, one person will remain silent to allow the other to speak.¹⁰² The listener cedes control to the speaker. For a listener to break silence while another is speaking is to breach the conversational contract. The possibility of breach lends a powerful potency to the performance.

This is well depicted in the proceedings of *R v Johnson* where, during the trial, the accused interrupted the speaker by variously breaking out in bird and animal noises and a rendition of Tag Team's *Whoomp! (There It Is)*.¹⁰³ The disruption of the contract of conversational silence is an act of violent defiance and arguably leads the performance into catastrophe. This cacophonous moment is the very antithesis of attunement.

⁹⁷ Bruneau, 'Communicative Silences', 25-26.

⁹⁸ Gardner, 'Silence that speaks volumes in the theatre.' See also Pratt, *Mind the Gap*, 57.

⁹⁹ Sontag, *Styles of Radical Will*, 11.

¹⁰⁰ Kurzon, 'The Intertextuality of Silence', 288-290.

¹⁰¹ Kurzon, 'Towards a Typology of Silence', 1673.

¹⁰² Pratt, *Mind the Gap*, 78.

¹⁰³ As documented in the contempt of court judgment, *DPP v Johnson* [2002] VSC 583 (20 December 2002) [32]-[34], [46].

In contrast to the above, the silence of the listener during conversation allows them to attune to what the speaker is saying. The silence in question is the silence of the listening not speaking, but rather listening to the speaker. Like psycholinguistic silence, it is a quotidian aspect of silence in social interaction. Nevertheless, it is crucial; without it, the disharmonised listener cannot properly comprehend what the actor is saying.

Textual silence

The latter types of silence are predicated on speech. Textual silence is when action occurs in silence. This type of silence ‘may be the result of a mutual understanding among the people in the room’ that the audience is silent while certain acts take place.¹⁰⁴ Textual silence occurs frequently in legal performance. A judge may pause to read documents; the court may pause to look at images in evidence. During these moments, there is silence because it is assumed that the silence aids the contemplation of the material.

A particularly amusing example of this is in the proceedings of *Eight Mile Style v New Zealand National Party*, a copyright infringement case discussed further in Chapter Five. During the proceedings, a barrister acting for music publisher, Eight Mile Style, played Eminem’s *Lose Yourself* and the musical work that was claimed to have infringed its copyright as the court sat in silence to listen.¹⁰⁵ (I say this is an amusing example because the listening featured on satire program *Last Week Tonight*, with host John Oliver exclaiming, ‘the purest definition [of comedy] is a middle-aged Kiwi in a robe playing Eminem’s *Lose Yourself* to a completely silent a motionless courtroom.’) In watching the video footage of this moment of trial, one can see the discomfort and perhaps even bemusement in the audience of lawyers sitting at the bar tables. The camera darts about as if uncertain on where to focus in the absence of action. (As discussed in Chapter Five, the intrusion of song into the legal soundscape is foreign.¹⁰⁶) The gallery audience is blurred in the footage. What one can also see in the video footage is the posture of the judge, Justice Helen Cull. She sits still, leaning forward, her head and eyes downcast. She is attuning, and this is an embodied form of listening that manifests itself in the body of the judge as listening audience. She is

¹⁰⁴ Kurzon, ‘Towards a Typology of Silence’, 1679.

¹⁰⁵ ‘Eminem’s ‘Lose Yourself’ played for lawyers, judge in New Zealand Court’, *NewsHub* (2 May, 2017) <https://www.youtube.com/watch?v=8HuLcgwwTo8&t=95s>.

¹⁰⁶ Parker, *Acoustic Jurisprudence*, 91.

practicing attunement, a form of sensitive listening to the pre-recorded music coming through a laptop.

Another example occurs in *R v Hickey*, a murder trial in the Australian state of New South Wales. In it, the defence sought to establish that the defendant acted in self-defence in response to an attack from her violent partner. The defence lawyer questioned a witness, the defendant's sister, about the span of time between the attack by the deceased and the fatal stabbing by the defendant:

If you can just think for a moment and probably work through in your own mind what happened when you entered the room to the time when you saw your sister pick up the knife. If you could just take a little time to think about how long that took.... just think through the sequence now and tell us when you think that sequence finishes... just go through in your mind all the actions and then tell me when you come to the point where you see your sister pick up the knife... just think in your mind quietly to yourself the sequence of events and then nod to me or tell me when you come to the point where your sister picked up the knife.¹⁰⁷

After this, the witness paused for about forty seconds and then said, 'Now, I walked in the room. About now.'

I invite you to pause now for forty seconds.

I invited you to recreate that courtroom experience so that you could feel it and practice it for yourself. We cannot know what that silence felt like in court; its shape and contours are lost to us such that we can only read it and recreate it *ex post facto*. What the lawyer is inviting the witness to do through this silence is to practice attunement: to tune into the body memory of the event, thinking it through in silence.

What these two examples also demonstrate is the inwardly- and outwardly-focused dimensions of attunement. In *Hickey*, the witness is, through silence, tuning inwardly to herself and her memory. In *Eight Mile Style*, the audience is tuning outwardly to the sound of the music. Both aspects of attunement are necessary to legal performance; the legal audience will at times have to attune outward to take in

¹⁰⁷ Extract from Julie Stubbs and Julia Tolmie, 'Race, Gender, and the Battered Woman Syndrome: An Australia Case Study' (1995) 8 *Canadian Journal of Women and the Law* 148-149.

different sonic information and attune inward to contemplate the material presented to them and how it resonates with their understanding.

Meaningful silence

Just as there is audience silence, there is also the silence of the actor in legal performance, where the actor pauses before or after speaking or moving to create emphasis on the speech or action and affect on the listening audience,¹⁰⁸ According to actor Michael Chekhov, a pause preceding speech or action can build anticipation; a pause following noise or voice can impress the words or actions on the audience.¹⁰⁹ A preceding pause builds anticipation for what is to come and a following pause allows the audience a short space to comprehend what has been said and to ascribe meaning to it. I refer to these as meaningful silences as they have a particular intended meaning and are full. By full, I am referring to the actor technique of filling a pause either with thought or paralanguage such as gesture or facial expression.¹¹⁰ The meanings of the silence may be various.¹¹¹ Meaningful silences are common in speech and used to effect by skilled rhetoricians.¹¹² Here, I examine meaningful silence through a close listening to the pauses in the finale of Nelson Mandela's 'I Am Prepared to Die' speech at his trial for sabotage. I use this example as it also occurs in Dawson's *Justice as Attunement*.¹¹³ Whereas Dawson questions (without answering) how the various courtroom audiences managed the impact of Mandela's speech, I attempt to answer that question through an attention to the silences and how they interlink with attunement. In doing so, this account is based not only on the records of ear-witnesses but also on the audio recordings of the trial, which were only made widely available over half a century after the event.¹¹⁴

Reflecting on the finale of his speech made in lieu of examination, Mandela writes, 'I had been reading my speech, and at this point I placed my papers on the defence

¹⁰⁸ Pratt, *Mind the Gap*, 78. See also Rappaport, 'Talk Less', 299-300.

¹⁰⁹ Charles Leonard, *Michael Chekhov's To The Director and Playwright* (Limelight Editions, 1963) 97-98.

¹¹⁰ Pratt, *Mind the Gap*, 56.

¹¹¹ See the brief discussion of 'meaningful silence' in Parker, *Acoustic Jurisprudence*, 205.

¹¹² For example, radio talk show host Rush Limbaugh complained strongly when pauses were cut from his radio broadcast against his will. See Alex Kuczynski, 'Radio squeezes empty air space for profit', *The New York Times* (6 January 2000). See also the discussion of radio silence in Voegelin, *Listening to Noise and Silence*, 114.

¹¹³ Dawson, *Justice as Attunement*, 227-229.

¹¹⁴ A recording is available at archeophone.org/dictabelt/Mandela_it_is_an_ideal_19640420_007.mp3 cited in Philippe Nessmann, 'Bringing Mandela's voice back to life', *CNRS News* (19 May 2016).

table, and turned to face the judge. The courtroom became extremely quiet.’¹¹⁵ Here, there is a meaningful silence after the actor’s movement. He allows his actions to sink in. During this silence, according to a listener, ‘one could hear a pin drop in the court.’¹¹⁶ In fact, a loud cough can be heard halfway through this seven-second pause. The cough is a discomforting interruption of the silence. It is an incidental noise.¹¹⁷ Nonetheless, it doesn’t break the attunement of the court.

Mandela continues:

I did not take my eyes off Justice de Wet as I spoke from memory the final words... The silence in the courtroom was now complete. At the end of the address, I simply sat down. I did not turn to face the gallery, though I felt all their eyes on me. The silence seemed to stretch for many minutes. But in fact it probably lasted no more than thirty seconds.¹¹⁸

Though it actually only lasted ten seconds, the actor, Mandela, commands the stage and, perhaps more importantly, commands the silence. His gestures – placing papers on a table, turning to face the judge – demand a silence in the courtroom, a silence that is completed through his act of ending speech and sitting. Meanwhile, his audience sits in silence. The expression of intensity of emotion, including through silence, is often met with silence from the audience.¹¹⁹ In the silence, the audience takes a moment to attune to what has been said and to register its impact in the court space. In this moment, ‘silence uses the listener as a tool of the orator instead of just as a passive audience member... [The] silence is powerful because it penetrates the listener’s mind by giving meaning to what was already heard.’¹²⁰ The audience become participant in the shared silence, lending it even greater power.

The silence is then broken, as Mandela describes:

Then from the gallery I heard what sounded like a great sigh, a deep collective ‘ummmmm’, followed by the cries of women... Justice de Wet,

¹¹⁵ Nelson Mandela, *Long Walk to Freedom: The Autobiography of Nelson Mandela* (Little, Brown and Co, 1994) 354 quoted in Dawson, *Justice as Attunement*, 228.

¹¹⁶ Joel Joffe, *The State vs Nelson Mandela: The Trial that Changed South Africa* (Oneworld, 2007) 160. Joffe was a defence attorney for Mandela.

¹¹⁷ Kurzon, ‘Towards a Typology of Silence’, 1683.

¹¹⁸ Mandela, *Long Walk to Freedom*, 354 quoted in Dawson, *Justice as Attunement*, 228.

¹¹⁹ Bruneau, ‘Communicative Silences’, 33-34.

¹²⁰ Rappaport, ‘Talk Less’, 289.

as soon as there was order in the courtroom, asked for the next witness.

He was determined to lessen the impact of my statement.¹²¹

Here the actor's silence is broken by three sounds – the audience's hum, cries and another actor's words. The cries can be read as an emotional reaction to the actor's words and are a significant non-verbal act in their own right, but the hum and judge's words interest me more. I suggest that both are ways of processing this silence. The hum may be read as a release of tension that has built up during the silence but also an attempt to bring noise back to the courtroom where words could not suffice to respond to this powerful silence.

Justice de Wet's words, on the other hand, are a means of cutting through the impact of the defendant's statement, but also breaking the attunement that follows. After a pause of seven seconds, he turned to the defence lawyer and said gently (almost indecipherably in the recording), 'You may call your next witness.'¹²² Dawson asks the question: 'Did Justice de Wet seek to use the next witness to silence either Mandela's words or the silence just after them?'¹²³ I suggest here that Justice de Wet's interruption sought to do both. Ironically, the judge used words to silence the silence, silencing through noise. Silence is not only the absence of sound or noise, but also the act of suppressing the voice or noise of another. Silence is dependant on silencing.¹²⁴ Justice de Wet's words repress the silence in the courtroom. It was not necessary for him to call the next witness; as Mandela describes, 'it was a little after 4 in the afternoon. But... he did not want it to be the last and only testimony of the day.'¹²⁵ He did not want to leave the performance on that note. Yet the noise of the audience and, in particular, the judge served to make the moment of silence all the more powerful. As sound artist Joel Stern has noted in another context, 'the act of muting is also an act of amplification.'¹²⁶ By muting the silence, Justice de Wet

¹²¹ Mandela, *Long Walk to Freedom*, 354 quoted in Dawson, *Justice as Attunement*, 228.

¹²² Kenneth Broun, *Saving Nelson Mandela: The Rivonia Trial and the Fate of South Africa* (Oxford University Press, 2012) 74.

¹²³ Dawson, *Justice as Attunement*, 228.

¹²⁴ Kahn, 'Silence and Silencing', 560.

¹²⁵ Mandela, *Long Walk to Freedom*, 354.

¹²⁶ Quoted in Jacqui Shelton, 'Eavesdropping: Silence is what allows you to hear everything here', *un Magazine* (30 August 2018).

amplified it. This raises the question of what is more powerful or disruptive – holding or breaking silence.¹²⁷

Silence creates tension as noise is momentarily suspended, but it also allows the audience to break and reattune,¹²⁸ what is said to sink in, and the actor to test their reception.¹²⁹ Actor and storyteller Felix Nobis says that silence ‘can recalibrate the listener, it can give the listener opportunity to find themselves within the story... It’s a matter of timing, tuning in to the audience and then finding a moment to... break the tension... There’s an element of orchestrating that suspension of tension and then pulling it back.’¹³⁰ It is interesting how Nobis deploys musical metaphors to discuss the actor’s control over silence. The actor is ‘tuning’ into the audience and ‘orchestrating’ the deployment of silence. There is a level of artistry to what the legal performer does, which is certainly redolent in Mandela’s performance discussed above. It is, as Nobis describes, ‘a matter of timing.’ However, against the discussion of Mandela’s silence as a moment of tension that is broken by the hum of the audience and words of the judge, Nobis inverts this idea to suggest that it is the words of performance that create tension in the audience and the silence of the actor that operates as a circuit-breaker, a space for ‘the audience to move or to cough if they’ve been holding that in for that long.’¹³¹ Silence in performance operates in a dimorphic sense: it can both create and ease tension in the audience and the actor. Silence thus has a beneficial effect on the legal audience and offers them an opportunity to attune and connect to what is being said, especially given the complexity of legal language.

Theatre critic Lyn Gardner observes that, in moments of silence in the theatre, ‘the audience holds its breath’¹³² and it feels like time slows. Nobis talks of giving breath; Gardner of holding breath. Both accounts suggest that silence slows time or, rather, time in silence feels longer. In this moment, the actor’s – and audience’s – sensations are heightened. The actor can feel the gaze of their audience, and the audience holds their breath with a palpable feeling of anticipation for what is to come next. This is

¹²⁷ Sheena Malhotra and Aimee Rowe, *Silence, Feminism, Power: Reflections at the Edges of Sound* (Palgrave Macmillan, 2013) 13.

¹²⁸ Pratt, *Mind the Gap*, 70; Mulcahy, ‘Acting Law | Law Acting’, 194.

¹²⁹ Pratt, *Mind the Gap*, 57.

¹³⁰ Quoted in Mulcahy, ‘Acting Law | Law Acting’, 194. Composers describe silence in a similar way. See Sutton, ‘The Pause that Follows’, 30. See also the discussion of how actors and comedians time and charge their pause in Pratt, *Mind the Gap*, 57-65.

¹³¹ Quoted in Mulcahy, ‘Acting Law | Law Acting’, 194.

¹³² Gardner, ‘Silence that speaks volumes in the theatre’.

particularly potent in moments where an actor blanks or forgets their lines and, as actor Steve Pickering describes, there is a feeling of ‘time going by so slowly it seemed like a freight train could have gone across the stage and everyone in the audience could have gone out for cocktail weenies.’¹³³ In another such situation, actor Michael Simkins writes that ‘the silence was deafening... [and] seemed like an age but it was probably only a couple of seconds.’¹³⁴ The audience, uncertain of when or if this silence will end, sometimes breaks into noise as the tension induced by silence could not possibly be sustained. During performance artist Laurie Anderson’s performance of *Violin Solo* where, during a pause of fourteen seconds, some of the audience laughed nervously and clapped, seemingly uncertain if the piece had finished.¹³⁵

If poorly executed, silence can lapse into *longueur*.¹³⁶ In such moments, silence drags time and the audience’s impatience manifests as restlessness. The audience attune out of what is being said or done and attune in to different noises in the space. Indeed, much of the legal performance is spent in this kind of silence – long breaks in proceedings, pauses to read, waiting for equipment to be set up. In this sense, it might be said that silence is the condition *de jure*.

Silence in space

The discussion so far has focused principally on silence in speech. Silence is not merely the absence of speech; there are other types of silence outside the rhetorical. Thus it is fitting to branch out to focus on other sounds in the courtroom and into the spatialisation of silence. In *Acoustic Jurisprudence*, Parker refers to the International Criminal Tribunal for Rwanda’s Audio-Visual Redaction Manual, which lists different types of silence to determine which should be redacted from audio transcripts of tribunal proceedings.

Dead silence

The first of these is *dead silence*, where there is no noise or sound.¹³⁷ An example of this may be where a tape was recording a court proceeding while the audio was not on in the courtroom. Musician Mike Batt’s work *A One Minute Silence*, which is a

¹³³ Anne Taubeneck, ‘When stage actors forget their lines’, *Chicago Tribune* (26 July 1998).

¹³⁴ Michael Simkins, ‘An actor’s life’, *The Guardian* (5 September 2001).

¹³⁵ Jaworski, *Silence*, 22.

¹³⁶ Pratt, *Mind the Gap*, 57.

¹³⁷ Parker, *Acoustic Jurisprudence*, 205.

recorded minute of silence appearing on his compact disc album *Classical Graffiti* (distinguishable from Cage's 4'33" as no background noise can be heard in the recording), may be another example. As Kurzon describes it, the silence in the recording is 'complete' and 'absolute.'¹³⁸ However, whether one can truly experience dead silence is debatable. Whilst the silence in the recording may be dead, the instrument it is played through can bring noise to life for the listener through, for example, the rotations of the compact disc. Even if these sounds cannot be heard, the silence prompts the listener to tune into themselves and the noises that surround them.

Noisy silence

There is also *noisy silence* – a seeming contradiction in terms – where background noises can be heard whilst nothing is said.¹³⁹ Silence and noise are seemingly antithetical, but silence can often expose noise. This is explored in lawyer-turned-artist Jack Tan's work *Waiting for Hearing to Begin* (**Figure 3.2**), the title of which plays on the notion of hearing as both a legal process and an auditory experience. The work is a printed textile score and choral recording that 'demonstrates the sounds heard in a courtroom prior to the entry of the judge. General chatter, footsteps, doors creaking, pens dropping, bangs and other background noises.' In *Acoustic Justice*, a series of performances, presentations and experiments curated by James Parker and artist Joel Stern (**Figure 3.3**), a stenographer captures this noisy silence in words – 'coughing', 'restlessness', etc.

¹³⁸ Kurzon, 'The Intertextuality of Silence', 301.

¹³⁹ Parker, *Acoustic Jurisprudence*, 205; Kurzon, "The Intertextuality of Silence," 290.

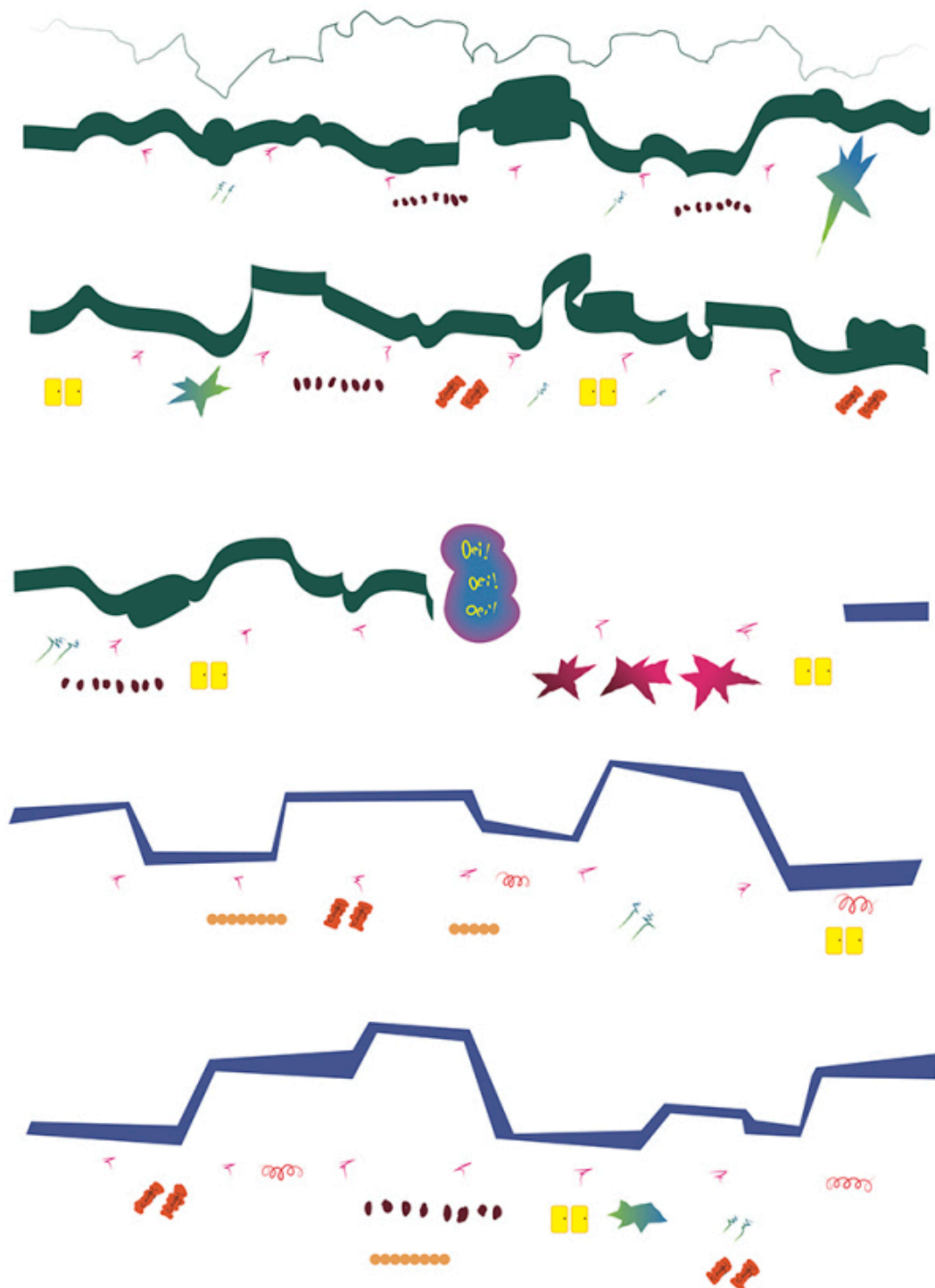


Figure 3.2: Jack Tan, *Waiting For Hearing to Begin* (2016)

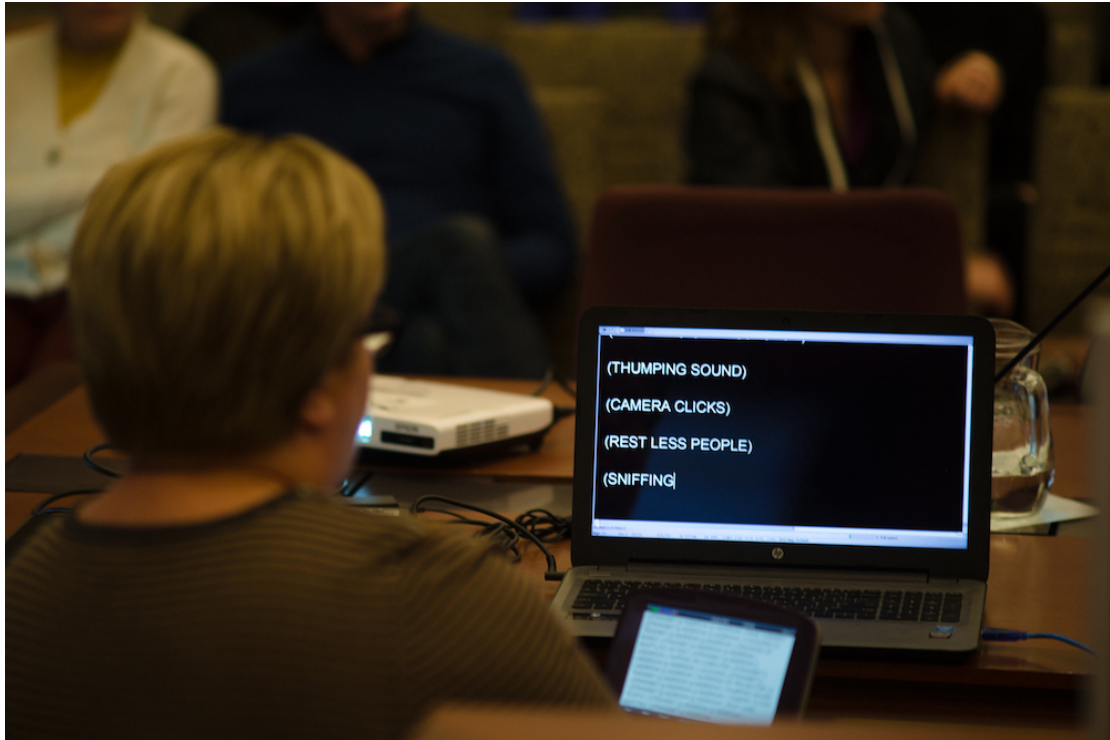


Figure 3.3: Sean Dockray, *Acoustic Justice* (2017)

In *Acoustic Jurisprudence*, Parker attunes to the noises of the courtroom: the ‘humming of the strip-lighting and air-conditioning unit, the slamming of a door off in the distance perhaps, the stirring of one of the journalists sitting along from you.’¹⁴⁰ Parker describes how ‘the constant hum of strip-lighting, air-conditioning units, and computer fans... [anchor the audience in] a very particular kind of institutional space and mode of life. Even though these sounds may not be heard consciously, even though one is able *not* to listen to them.’¹⁴¹ It is in moments of silence that we begin to hear background noise. As theatre scholar John Lutterbie writes:

When a performer does not speak, when there is no text on which to focus, we become more aware of the ambient noise. Sounds rarely heard in pursuit of the everyday... suddenly take focus in our auditory experience. Instead of forming a background against which we privilege the sound of speech, the visual or the noises that impact our well-being most directly, environmental sounds gain intensity, because what we expect to occupy our attention is lacking. The lack of a text... [makes] us

¹⁴⁰ Parker, *Acoustic Jurisprudence*, 184.

¹⁴¹ *Ibid* 183. For other reflections on the sounds of performance spaces, see John Lutterbie, ‘Performance in the Proximity of Silence’ (1999) 4(3) *Performance Research* 13.

yet more aware of the peripheral sounds, the continual and the intermittent.¹⁴²

These sounds form part of the ambience of the court space. Brian Eno, the pioneer of ambient music says in the liner notes to his album *Ambient 1: Music for Airports*, ‘an ambience is described as an atmosphere, or a surrounding influence: a tint.’ This inspiration for his ambient work arose from a sickbed experience in a hospital when a record of eighteenth-century harp music was playing softly and it was raining outside. Eno began listening to the rain against the harp and this presented to him a new way of listening to music as part of the ambience of the environment.¹⁴³ Cage, who was something of an influence on Eno, describes ambient sounds as ‘the sounds that happen to be in the environment.’¹⁴⁴

Composer Raymond Schafer terms such ambient sounds as keynotes.¹⁴⁵ Keynotes ‘constitute the aural background against which our lives play out... We hear even if we do not attend to these sounds.’¹⁴⁶ As Schafer argues, ‘keynote sounds do not have to be listened to consciously; they are overheard but cannot be overlooked, for keynote sounds become listening habits in spite of themselves... Even though keynote sounds may not always be heard consciously, the fact that they are ubiquitously there suggests the possibility of a deep and pervasive influence on our behaviour and moods.’¹⁴⁷ Just after writing this, the air-conditioning units in the library where I am currently working were switched off and I was plunged into silence, reminding me that keynote sounds ‘are more present to us when they go missing or awry. Indeed, as the example of the anechoic chamber suggests, keynotes help bond us into the world, and when they go missing, our sense of place is transformed.’¹⁴⁸ Schafer laments the intrusion of electrical hums into the soundscape,¹⁴⁹ for which he has been accused of having an ‘urban prejudice: a point of view where industrial, commercial and traffic sounds are deemed sonic pollutants and subsequently allotted to the garbage heap.’¹⁵⁰

¹⁴² Lutterbie, ‘Performance in the Proximity of Silence’, 14.

¹⁴³ Riz Kahn, Interview with Brian Eno (Television Interview, 4 June 2011).

¹⁴⁴ Cage, *Silence*, 8.

¹⁴⁵ Schafer, *The Soundscape*, 152.

¹⁴⁶ Thomas Rickert, *Ambient Rhetoric: The Attunement of Rhetorical Being* (University of Pittsburgh Press, 2013) 151.

¹⁴⁷ Schafer, *The Soundscape*, 9.

¹⁴⁸ Rickert, *Ambient Rhetoric*, 151.

¹⁴⁹ Schafer, *The Soundscape*, 79.

¹⁵⁰ Sophie Arquette, ‘Sounds Like City’ (2004) 21(1) *Theory, Culture and Society* 161.

However, these sounds form ‘the continual murmur of everyday life.’¹⁵¹ Robert Willim suggests that such ambient noises can be regarded in one of two ways: in noise abatement movements, as an annoyance to be reduced; or, in ambient music compositions, as a calming and soothing commodity to be valued and appreciated.¹⁵² To bring this back to attunement: it could be argued that ambient sounds interfere with attunement by polluting the listening space with extraneous noises. Conversely, it could be argued that silence in speech makes ambient sounds the object of attunement; when there is silence in the court, the listener has the space to listen to the court’s ambience.

The sounds of courts, like offices or other bureaucratic spaces, influence those within the space, though we seldom consciously listen and attune to them. In later work, Parker returns to ‘that familiar hum of strip-lighting, air-conditioning units, and computer fans, just audible over the soundproofed quiet: what do *these* sounds tell us? What are their effects on those ‘living among them’?’¹⁵³ What follows is my attempt to attune to and explore the sounds that are audible in the courtroom and answer the question posed by Parker: what are ambient sounds doing in the court?

Air-conditioning units and computer fans are ambient sounds or white noises. As Willim says, ‘white noise may be experienced as intrusive, but also as relaxing’ sound that falls into the background.¹⁵⁴ Hillel Schwartz argues that ‘the blow and hum of air conditioning units [is] perfectly suited to the (white noise) job of masking unwanted sounds.’¹⁵⁵ Ben Turner describes it as a ‘subtle yet emotive sound... [that] also carries a heavy atmosphere.’¹⁵⁶ Whereas music designer and researcher Sander Huiberts observes that, for gamers, immersion – which is something of a buzzword in performance practice at the moment¹⁵⁷ – ‘is negatively influenced by sounds of the user environment, for instance, computer fans’,¹⁵⁸ which are extraneous interferences.

¹⁵¹ Rickert, *Ambient Rhetoric*, 153.

¹⁵² Robert Willim, ‘Transmutations of Noise’ in Barbara Czarniawska and Orvar Lofgren (eds.), *Coping with Excess: How Organisations, Communities and Individuals Manage Overflows* (Edward Elgar Publishing, 2013) 119.

¹⁵³ Parker, ‘A Lexicon of Law and Listening’ citing Schafer, *The Soundscape*, 9.

¹⁵⁴ Willim, ‘Transmutations of Noise’, 123.

¹⁵⁵ Hillel Schwartz, *Making Noise: From Babel to the Big Bang and Beyond* (MIT Press, 2011) 838.

¹⁵⁶ Ben Turner, *Acoustic Ambience in Cinematography: An Exploration of the Descriptive and Emotive Impact of the Aural Environment* (M.Mus. Thesis, University of KwaZulu-Natal, 2005) 25.

¹⁵⁷ Brown, ‘Towards Theatre Noise’, 14.

¹⁵⁸ Sander Huiberts, *Captivating Sounds: The Role of Audio for Immersion in Computer Games* (PhD Thesis, Utrecht School of the Arts and University of Portsmouth, 2010) 65 n 82.

There is an ‘uneasy relationship between hearing and listening’ in this¹⁵⁹ – the background noise, because of its intensity, pulls focus from that which is being listened to and ‘can become galling.’¹⁶⁰ Here, we return to the question of whether these ambient sounds or white noises aid or disturb the attunement of the legal audience. Its effect very much depends on the volume or sound quality of the ambient sound.¹⁶¹ A high pitch may disturb whereas a low hum can drift into the sonic background. What these sounds tell the listener is something about the technological apparatus of the court as an institution. The court’s institutional life is powered by computers that store the data of the legal performance, yet it is also a human environment powered by people who require regulation of their body temperature through air conditioning and the ability to see what they are doing through lights. These noises remind the attuned listener of both the technological and human dimensions of the legal performance.

Unlike the ambience of air-conditioners and fans, fluorescent lighting has a sharper buzz to it. Many artists have played with the noise generated by fluorescent lights, but perhaps the most famous composition is David Tudor’s *Fluorescent Sound*, a performance in collaboration with Rauschenberg. (Tudor also played the first performance of Cage’s *4’33”*.) The work involved over 200 fluorescent lights controlled by about 75 switches being turned on and off. The popping, pinging and flickering of fluorescent lights as they are turned on and off has a bell-like quality to it. The inspiration occurred to Tudor when he was attending the museum where the performance piece was to be staged ‘when someone was turning on the fluorescent lights and they didn’t know which to turn on and all of a sudden there was the most beautiful music.’¹⁶² He then rigged up some contact microphones from the lighting bulbs to amplify the sound, and through it he created his first publicly presented composition. As sound scholar Joshua Dittrich argues, ‘one can listen to literally any sounds, and discover a hidden musicality, an implicit aesthetic dimension to any experience that emerges out of the perceptual act itself.’¹⁶³ Tudor’s work is a Cage-like practice of *attunement*, whereby the composer enables the listening audience to

¹⁵⁹ Brown, ‘Towards Theatre Noise’, 7.

¹⁶⁰ Schwartz, *Making Noise*, 834.

¹⁶¹ Willim, ‘Transmutations of Noise’, 129.

¹⁶² Teddy Hultberg, Interview with David Tudor (17-18 May 1988).

¹⁶³ Joshua Dittrich, ‘Toward an Aural Aesthetics of 24/7 Environments: Beethoven, Audio Stretching, and Techno-Indeterminacy’ (2017) 9(1) *Journal of Aesthetics and Culture* 3.

pick up on the tunes of these acoustic sounds, just as Eno did on his sickbed. Through playing with the otherwise quotidian sound, the audience is invited to listen to and appreciate it in different ways. The musicality of the legal performance is discussed further in Chapter Five.

Anthropologist Jonas Bens contends that the sounds in the courtroom are ‘an integral part of the establishment of courtroom atmospheres.’¹⁶⁴ These sounds influence us and influence the way we behave in the space.¹⁶⁵ The keynote sounds of the courtroom – air-conditioning units, computer fans, fluorescent lighting and other sounds that you might hear when you visit court – speak of ‘a form of bureaucratic and technological efficiency’ of work and business.¹⁶⁶ There are also the noises of people – ‘the brisk tip-tapping of footsteps along concrete corridors, the discreet but urgent whispers at doorways, and the occasional throbbing of photocopiers in the hallway’¹⁶⁷ – that remind the listener of the humanity of the legal performance, that is enlivened by human interaction – interaction with objects and with one another. The court is not a space of dead silent efficiency but the murmured noises of performing.

Silence as a condition of court

In the courtroom, noise is inescapable. To quote Cage, ‘there is no such thing as silence. Something is always happening that makes a sound.’¹⁶⁸ In 4’33”, Cage invites his listener to listen to ‘the sounds that happen to be in the environment’ for ‘there is always something to see, something to hear’ in any space.¹⁶⁹ There is always the background noise in space which, when given attention, is transformed from the mundane to the extraordinary, from the background to the fore.¹⁷⁰ Indeed, ‘in any present moment there is always something to attune to.’¹⁷¹ Even when listening to a blank recording, such as Batt’s *A One Minute Silence*, or when waiting for a legal performance to begin, one can still hear noises in the listening environment. A blank

¹⁶⁴ Jonas Bens, ‘The Courtroom as an Affective Arrangement: Analysing Atmospheres in Courtroom Ethnography’ (2018) 50(3) *The Journal of Legal Pluralism and Unofficial Law* 345.

¹⁶⁵ Parker, *Acoustic Jurisprudence*, 183.

¹⁶⁶ Parker, ‘A Lexicon of Law and Listening’.

¹⁶⁷ Parker, *Acoustic Jurisprudence*, 184.

¹⁶⁸ Cage, *Silence*, 191.

¹⁶⁹ *Ibid*, 8.

¹⁷⁰ Dawson, *Justice as Attunement*, 28; Willim, ‘Transmutation of Noise’, 124.

¹⁷¹ Stewart, ‘Atmospheric Attunements’, 451.

canvas or an empty space is still filled with meaning.¹⁷² A performance ‘space is never empty... [but] filled with invisible tensions.’¹⁷³

Despite the inescapability of noise, in certain places ‘silence is the expected response’ and institutionalised in the surroundings.¹⁷⁴ The court is one such place. As Parker writes, ‘relative quiet, it seems, is at once a condition and a sign of the proper administration of justice.’¹⁷⁵ The connection between silence and doing justice is so strong that Australian High Court Justice Michael Kirby describes silence as ‘the right situation’ for court proceedings.¹⁷⁶ Legal scholar and artist Carolyn McKay speculates that the silence of the courtroom is about evoking authority and respect.¹⁷⁷ It could also be about controlling the attunement of the listener, compelling them to focus in on the legal performance itself, not the environment in which it is set. While most courts try to block out environmental noise and create a condition of silence through architectural devices such as glazed windows or insulation, others are re-embracing environmental noise. An example of courts embracing environmental noise is the Neighbourhood Justice Centre in Collingwood, Australia, which is deliberately designed to allow people in court to hear the sounds of children playing in the nearby schoolyard.¹⁷⁸ In an article on the Centre’s website, a visitor during a court tour describes, ‘While some might say that you shouldn’t be able to hear outside noise, that it’s distracting, the sound of normal life is a reminder that the court is part of, not separate to, the life of the community.’ Moments of silence in legal performance at the Neighbourhood Justice Centre allow the audience to attune to the outside and recognise the connection between law and its community. Of course, such sound bleed can also distract from the legal proceedings and, further, undermine the court’s solemnity.¹⁷⁹ Environmental noises outside the court offer a provocative challenge to the authority of the court, whereas other environmental noises within the court such as

¹⁷² Peter Brook, *The Empty Space* (Penguin, 2008).

¹⁷³ Pratt, *Mind the Gap*, 3.

¹⁷⁴ Bruneau, ‘Communicative Silences’, 41; Kurzon, ‘Towards a Typology of Silence’, 1681.

¹⁷⁵ Parker, *Acoustic Jurisprudence*, 189.

¹⁷⁶ Quoted in Kat Crossley, ‘Working Hardly: Random Facts about the Gavel’, *Survive Law* (12 September 2012).

¹⁷⁷ Carolyn McKay, *The Pixelated Prisoner: Prison Video Links, Court ‘Appearance’ and the Justice Matrix* (Routledge, 2018) 79. See also Parker, *Acoustic Jurisprudence*, 133 on silence and authority in the courts, and Bruneau, ‘Communicative Silences’, 39 and Kurzon, ‘Towards a Typology of Silence’, 1683 on silence and authority generally.

¹⁷⁸ See also Linda Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (Routledge, 2011) 29-31.

¹⁷⁹ McKay, *The Pixelated Prisoner*, 79-80.

computer fans and strip lighting instantiate the court's position within the bureaucratic sphere of the state.

Through his work, Cage makes environmental noise an object of art. Gann describes *4'33"* as "an act of framing, of enclosing environmental and unintended sounds in a moment of attention."¹⁸⁰ Silence frames sound and sound frames silence.¹⁸¹ Cage's silence is thus a tool for the creation of a 'listening space' – a space for concentration and attunement.¹⁸² In court, the act of listening demands attunement to background noises of the civic soundscape in which the legal performance is situated.¹⁸³ Whilst knowledge, culture and context affect listening, legal performance participants are often called to forget their background under the pretence that justice is best served blind. As I have argued elsewhere, blinding – or, in this case, deafening – oneself to context 'only serves to hide the human consequences of detached legal(istic) judgment.'¹⁸⁴ Background ambience 'helps orient the hearer within the physical environment.'¹⁸⁵ Blocking out or ignoring background noise can deafen the audience to a contextualised appreciation of the legal performance and its connection to the immediate environment and to the broader civic community. Through *attuning* oneself to the background noise in legal performance and listening, one can instead begin to connect to oneself and others in the space around.¹⁸⁶

Conclusions

Conversational silence allows the audience to attune to what the other is saying; meaningful silence attunes – Nobis says it recalibrates – the audience to the story being told; in moments of psycholinguistic silence when the words are lost, the audience attunes to the speaker, willing them to speak; in textual silence, the audience attunes to the text under consideration; and in noisy silence, the audience attunes to background noise and is thus more likely to appreciate law's location within the civic and bureaucratic space. Silence in legal performance thus operates to attune the audience to the proceedings. This is not to say that silence is the only means of

¹⁸⁰ Gann, *No Such Thing as Silence*, 11.

¹⁸¹ Voegelin, *Listening to Noise and Silence*, 88-89; Schafer, *The Soundscape*, 257.

¹⁸² Voegelin, *Listening to Noise and Silence*, 101.

¹⁸³ Dawson, *Justice as Attunement*, 89.

¹⁸⁴ Sean Mulcahy, 'Can a Literary Approach to Matters of Legal Concern Offer a Fairer Hearing than that Typically Offered by the Law?' (2014) 8(1) *Law and Humanities* 112. See also Dawson, *Justice as Attunement*, 7.

¹⁸⁵ Brown, 'Towards Theatre Noise', 7.

¹⁸⁶ Dawson, *Justice as Attunement*, 5-7; Voegelin, *Listening to Noise and Silence*, 110-111.

attunement in legal performance. The motion of rising when a judge enters the court is another powerful call to attention as is the rap of the gavel on the bench.¹⁸⁷ Notably, however, these moments are aimed at inducing silence – the gavel quite directly operates as a silencer and the call to rise is in part an act to create a listening space for the legal performance. The legal audience’s vocal response to both moments is one of silence.

It is also worth noting, albeit briefly, that the introduction of earphones is radically reshaping our acoustic experience. As we listen to recordings, we often do so through headphones. As Parker listens to a war crimes trial in the public gallery or through recordings at home, he does so through headphones.¹⁸⁸ The experience of listening through headphones individuates listening, cuts off ambient noise (particularly in the case of noise cancelling headphones) and to some degree divorces the listener from their surrounding space, placing them at one with the sound.¹⁸⁹ It also creates a more intimate form of listening, reflected in the way that headphones hug the listener’s ears. It could be argued that the introduction of noise-cancelling headphones provides the listener with a heightened sense of attunement to the auditory dimensions of the performance. With extraneous noises in the listener’s soundscape cut out, they are better able to tune in to the legal performance. The listener can increase the volume to better tune into micro-sounds that may occur in the performance that may not be detectable to the naked ear. They can play and replay the proceedings, picking up on different sounds each time.

Through broadcast media, it is now possible to experience a legal performance “acousmatically”, entirely separated, that is, from the trial itself in terms of both time and space.¹⁹⁰ The space in which one listens to a legal performance is divorced from the court space and may be a radically different sonic environment, which will impact the reception of the legal performance.¹⁹¹ However, Salome Voegelin argues that the introduction of headphones leads to a blurring of the two spaces – the recorded space and the space in which the listener listens to the recording.¹⁹² In this sense the headphones create a sense of connection across spaces. There is an oscillation here

¹⁸⁷ The gavel is discussed further in Parker, ‘Gavel’.

¹⁸⁸ Parker, *Acoustic Jurisprudence*, 59.

¹⁸⁹ *Ibid* 182-186.

¹⁹⁰ *Ibid* 202.

¹⁹¹ *Ibid* 207.

¹⁹² Voegelin, *Listening to Sound and Silence*, 97.

between headphones having a distancing effect versus bringing the listener closer to the soundscape of the performance. In both cases, be it blurring or distancing, the recording itself can confuse the acoustic experience: the listener may not be able to place where the sounds they are hearing are coming from, in part because the recording may not pick up ‘the precise volume and timbre of the sounds of the courtroom’ and the extraneous sounds intruding into the courtroom.¹⁹³ This digital mediation could muddle the attunement process, with the listener unsure of how to process the sounds. The introduction of digital mediation into legal performance is discussed further in Chapter Six. It creates challenges to the way that listeners experience silence and noise – and, as discussed in Chapter Six, touch – in legal performance.

An exploration of silence in legal performance leads to the conclusion that silence creates a space of sensitive listening or attunement that enables participants in the legal proceeding to pay attention to meaning and to the surrounding environment. Attunement ‘provides the condition to build understanding’,¹⁹⁴ let the words and noises sink in and, in so doing, to comprehend their meaning. It also entails a form of responsible listening, attuned to all that surrounds,¹⁹⁵ and requires those within the legal performance to ‘be actively engaged in listening to others’¹⁹⁶ – both voices and sounds. The practice of attunement offers a way of understanding silence and noise within legal performance, and a form of sensitive listening that embraces everything in the court’s soundscape.

Through this chapter, I hope to have pointed out some directions to understanding the power of silence in the court and invited you to listen and attune yourself to silence and noise in legal performance. From here, we turn from sounds to words, a focus that carries forward the next two chapters. In doing so, we also turn from the body to the scripts of law, though we return to the body in Chapter 6. With your ears pricked, I now invite you to tune into the stories of law, particularly those outside of and on the margin of legal scripts.

¹⁹³ Parker, *Acoustic Jurisprudence*, 207.

¹⁹⁴ Voegelin, *Listening to Noise and Silence*, 87.

¹⁹⁵ Fischlin and Heble, *The Other Side of Nowhere*, 11.

¹⁹⁶ Nathan Crawford, *Theology as Improvisation: A Study of the Musical Nature of Theological Thinking* (Brill, 2013) 98.

Chapter Four

Scripting the Law: Stories and Scripts in Legal Performance

Prologue

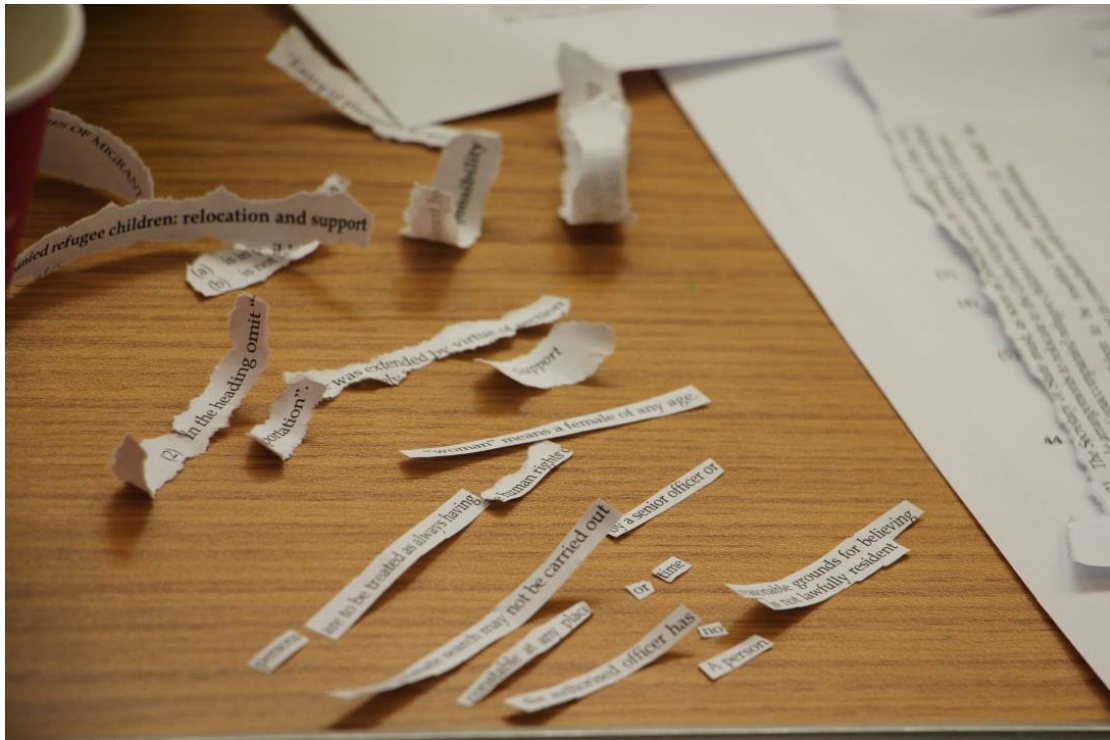


Figure 4.1: Art/Law Network, *Cutting up the Law? An Aid to Statutory Interpretation* (2017)

At a workshop in 2017, a group of artists, legal scholars and practitioners, and activists cut up the law. The group included collaborators with the Art/Law Network, which brings together artists, lawyers and agitators to produce research and work on the intersections of art and law.¹ The collaborators used the ‘cut-up’ method of Brion Gysin and William Burroughs where text is re-ordered to create new meanings. Burroughs describes the technique as follows:

The method is simple. Here is one way to do it. Take a page. Like this page. Now cut down the middle and cross the middle. You have four sections: 1 2 3 4... one two three four. Now rearrange the sections placing four with section one and section two with section three. And you have a new page. Sometimes it says much the same thing. Something quite

¹ For further information on the network, see Finchett-Maddock, Lucy, ‘Forming the Legal Avant-Garde: A Theory of Art/Law’ (forthcoming) *Law, Culture and the Humanities*.

different – cutting up political speeches is an interesting exercise – in any case you will find it says something and something quite definite.²

As he goes on to argue, ‘all writing is in fact cut-ups. A collage of words read heard overheard’; the use of scissors simply ‘renders the process explicit.’³

The cut-up technique has resemblance to collage⁴ – pasting onto a single surface various materials to create a unified whole of often fragmentary objects. Like collaging, writing legal texts is a working process that necessitates the collecting of a mass of source material, fragmenting the material into smaller pieces, and arranging the material into a new form that is both coherent and logical. This may produce some very real uncertainty at the outset. It may also mean the fragmented materials that make up the legal text do not necessarily retain their original meaning. Nevertheless, as the workshop demonstrated, the approach of cutting up legal texts and putting them back together again can practically aid in further understanding judicial statutory interpretation, and how legal text is made, unmade and changed.

Introduction: Telling stories in the court

The workshop took place less than a week after the United Kingdom general election, which had itself followed the passage of the *European Union (Notification of Withdrawal Act 2017)*. The Act was necessitated by a decision of the United Kingdom Supreme Court in *R (Miller) v Secretary of State for Exiting the European Union*,⁵ which ruled that the Government could not initiate withdrawal from the European Union without the passage of an Act of Parliament.

When watching the judgment on the Court’s YouTube channel, I was immediately struck by its similarity to a playscript: the written work that underpins the performance of a play on the stage.⁶ The scene is set in the opening words and the narrative that follows progresses in a roughly chronological structure. It contains a summary of minor narratives in the form of the arguments of the claimant and the Government who have played a part in determining the meta-narrative of the legal

² William Burroughs, ‘The Cut-Up Method of Brion Gysin’ in Noah Wardrip-Fruin and Nick Montfort (eds.), *The New Media Reader* (MIT Press, 2003) 90.

³ *Ibid* 91.

⁴ *Ibid* 90.

⁵ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

⁶ Here I am building on the definition of ‘playscript’ in Richard Hornby, *Script into Performance* (Paragon House Publishers, 1987) ix-x.

judgment. Like other judgments, it ‘narrates its own creation’,⁷ carefully explaining how judgment was reached. The words are scripted by the judge, the then President of the Supreme Court, Lord David Neuberger, but constrained by the rules of court, statute and the common law precedent. Intonation, pauses and camera angles draw attention to the key words. The text of the judgment is made available to all via a freely accessible website. It is open to public critique by a readership. In watching the ‘Brexit’ judgment, I began to see the relation of the scripting process of legal judgment to the scripting of theatrical performances.

I am not the first to pick up on the relation of the scripting of law and theatre. In his speech at the ceremonial sitting of the High Court of Australia on the occasion of the swearing-in of the Chief Justice Susan Kiefel, the Commonwealth Attorney-General said of Her Honour, ‘I am told that when you were admitted, your brother Russell sent you a congratulatory telegram, as people did in those days: “Dear sister, welcome to the acting profession”, to which you replied “Thank you, dear brother, but we write our own lines.”’⁸ Her Honour’s description of herself as a scriptwriter is surprising. Her brother, Russell, was an actor who, whilst better known for his appearances on Australian soap operas *Home and Away* and *Neighbours*, also played the Director of Public Prosecutions in an episode of legal comedy *Rake*. He passed away just days before the announcement of his sister’s appointment as Chief Justice of the High Court. It is in her role as Chief Justice that Her Honour’s script-writing skills are most on display. In a speech on judgment writing when a puisne Justice of the High Court, Her Honour refers to the concept of ‘judicial creativity’:⁹ applying the facts of a particular case to an abstract law requires a degree of creativity. The scriptwriter of judgments like that of theatre is a creative. She is not the only judge to draw on this analogy. Lord Neuberger himself did. In a speech made when President of the Court of Appeals of England and Wales, His Lordship likened the role of the judge to that of the scriptwriter of a long-running soap opera who ‘has to think of not merely what

⁷ Ali-Reza Mirsajadi, ‘Spectrums of Truth: Transcribing Reality in the Documentary Musical’ (PhD Thesis, Tufts University, 2015) 2.

⁸ Attorney-General Brandis, Ceremonial Sitting on the Occasion of the Swearing-in of the Chief Justice the Honourable Susan Mary Kiefel AC [2017] HCATrans 7 (30 January 2017).

⁹ Susan Kiefel, ‘Reasons for Judgment: Objects and Observations’ (Speech delivered at the Sir Harry Gibbs Law Dinner, University of Queensland, 18 May 2012) 3.

seems to him to be a good story, but also how to keep the audience satisfied.¹⁰ He also picked up on the notion of judgment writing as a creative endeavour.¹¹

Inspired in part by the notion promulgated by these esteemed judges of law as scriptwriting, this chapter will draw critical comparisons between the scripting of law and theatre, and argue that the layered process of interpretation and creation of scripts is an essential aspect of legal performance. I look in particular at verbatim trial theatre, which stages (and, in so doing, re-arranges) verbatim trial transcript, and the way that it brings in different voices to challenge the authoritative status of the script of legal judgment, as Jacqueline O'Connor astutely observes:

The playwright is not constrained in the way that trial participants, even those that write their own 'scripts', are constrained by procedure and law. Moments not included or perhaps not even allowed in the real trial or in any trial, as well as an opportunity for a larger multitude of voices to be heard, can be accommodated on stage.¹²

Given that verbatim trial theatre introduces and interweaves testimonies and evidence that many not be admissible at trial, the first challenge to drawing critical comparisons between scriptwriting in law and theatre is the question of authenticity and truth. In her speeches on judgment writing, Her Honour notes that judgments at trial are fundamentally concerned with 'findings of facts.'¹³ The term 'facts' is inevitably tied to notions of truth and an authoritative narrative. Theatre, on the inverse, is tied to a form of artistry distanced from reality where 'representation of reality and truth seems difficult to accomplish, if not impossible.'¹⁴ In her reflections on verbatim tribunal theatre – I will get to the distinctions between trial and tribunal and other terminological differences later – law and theatre scholar Nicole Rogers writes that 'documentary theatre is intended to expose the truth' but 'the "real" remains elusive. We crave authenticity but remain uncertain as to which performance

¹⁰ David Neuberger, 'Open Justice Unbound?' (2011) 10 *The Judicial Review* 265 referencing Ronald Dworkin, *Law's Empire* (Belknap Press, 1986) 228-238.

¹¹ David Neuberger, 'Sausages and the Judicial Process: The Limits of Transparency' (2015) 12 *The Judicial Review* 144.

¹² Jacqueline O'Connor, *Documentary Trial Plays in Contemporary American Theatre* (Southern Illinois University Press, 2013) 109.

¹³ Susan Kiefel, 'Reasons for Judgment', 3.

¹⁴ Mirsajadi, 'Spectrums of Truth', 3.

has the status of the “real”.¹⁵ Rogers raises the question: what is the truth in legal and theatrical scripts? This question is at the core of my exploration of the relations between scriptwriting in law and theatre in this chapter. If truth is elusive, whose truth is being represented in these scripts and for whom are they written? By considering truth as something constructed through narrative, we start to see how adapting different stories to create the script of judgment confers some stories with authoritative truth whilst others are cast aside in the editing process. Particular attention will be paid to the responsibility that both forms of scriptwriting – for law and for theatre – have to the stories told in court – and the storytellers – from which the scripts are drawn, and how scriptwriters regard their obligation (if any) to those who tell their stories and also to the various different audiences of judgment.

Scripts

In his conception of law as a chain novel, legal scholar Ronald Dworkin explicitly likens law to a script. For him, judges are like ‘writers who join the team of an interminable soap opera’ and must ensure that the script they write is consistent with the personalities and plots established in the past.¹⁶ In this sense, the judge is a creative, but the script they create must have ‘some minimal continuity’ with what has been established previously.¹⁷ Dworkin’s focus is on the judgment as script, and that is the focus on this chapter. Though there may be many different scripts within law – the pre-prepared arguments of lawyers, the statements of victims and the transcript of the court proceeding – the predominant focus here is on the judgment as a form of meta-narratives that, like a collage, pulls together the different narratives over a trial into a coherent and logical script. Dworkin’s analogy, albeit in relation to television scripts, can be further explored through considering theatre scripts and, in particular, verbatim theatre scripts.

Verbatim trial theatre

Before I proceed, I need to clarify the terminology that I will use in regards to verbatim theatre. Since its genesis in the last century, verbatim theatre has taken on a number of variations, and different terminology has been used to capture these

¹⁵ Nicole Rogers, ‘The Play of Law: Comparing Performances in Law and Theatre’ (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 438.

¹⁶ Dworkin, *Law’s Empire*, 237.

¹⁷ *Ibid* 229.

variations – documentary theatre, verbatim theatre, theatre of fact, theatre of the real, et cetera – so much so that ‘due to the confusing multitude of labels, scholars have moved toward using many of these terms interchangeably, or within the umbrella terms of “documentary” or “verbatim” theatre.’¹⁸ For the avoidance of doubt, I will use the term ‘verbatim theatre’ interchangeably with ‘documentary theatre’ as an umbrella term for any form of theatre that directly cites documentary source material as content, though conceding that this is an incredibly diverse umbrella.¹⁹

Under this umbrella falls ‘tribunal theatre’ where ‘the plays are edited transcripts (“redactions”) of trials, tribunals and public inquiries... [that] constitute the basis for theatrical representation.’²⁰ Tribunal theatre is itself an umbrella that includes plays based on inquiries, such as Version 1.0’s *CMI (A Certain Maritime Incident)*, based on an Australian Senate select committee inquiry of the same name, and *Deeply Offensive and Utterly Untrue*, based on the Australian Inquiry into Certain Australian Companies in relation to the UN Oil-For-Food Programme; as well as much of the Tricycle Theatre’s work (discussed further below). In part to reduce the overwhelming breadth of the field of inquiry and because the focus of this thesis is on courts, this chapter focuses to ‘verbatim trial theatre’ where the documentary source material is a trial transcript (though in Chapter Five, there is consideration of a musical based on a parliamentary inquiry).

In his pioneering work on verbatim theatre, Derek Paget stipulates that:

Verbatim Theatre... is a form of theatre firmly predicated upon the taping and subsequent transcription of interviews with ‘ordinary’ people, done in the context of research into a particular region, subject area, issue, event or combination of these things. This primary source is then transformed

¹⁸ Mirsajadi, ‘Spectrums of Truth’, 5 referencing Gary Dawson, *Documentary Theatre in the United States: An Historical Survey and Analysis of its Content, Form and Stagecraft* (Greenwood Press, 1999) 10. See also O’Connor, *Documentary Trial Plays in Contemporary American Theatre*, 3.

¹⁹ This concession is offered in response to David Hare railing against ‘inventing some sort of generic dumping-ground for anything [specifically, any play] based on real events and people... and then pretending that, if you do, any two plays work to the same rules’: ‘... On Factual Theatre’ in Robin Soans, *Talking to Terrorists* (Oberon Books, 2005) 113.

²⁰ Derek Paget, ‘The “Broken Tradition” of Documentary Theatre’ in Alison Forsyth and Chris Megsons (eds.), *Get Real: Documentary Theatre Past and Present* (Palgrave Macmillan, 2009) 233.

into a text which is acted, usually by the performers who collected the material in the first place.²¹

Paget contends that taped interviews or aural testimony, as opposed to written primary source material, are ‘the hallmark of the verbatim play.’²² In later work, he argues that the distinction between verbatim theatre and tribunal theatre is ‘very clear and deserves to be preserved.’²³ As I will elucidate through this chapter, that distinction is not so clear, with verbatim tribunal/trial theatre practitioners often supplementing the trial transcripts with interviews with individuals and – as discussed in Chapter Five – using recordings of interviews and hearings to capture the voices of individuals.

Approaches

Carol Martin observes that verbatim theatre ‘self-consciously blends into and usurps other forms of cultural expression such as... courts of law.’²⁴ In verbatim theatre, ‘evidence and testimony are used in ways not unlike a court of law’ as, in both verbatim theatre and law, original stories are presented through the mode of written submissions or oral questioning and always as ‘the narration of memory and experience.’²⁵ Martin is here suggesting that theatre and law share a similar mode of scriptural construction. Verbatim theatre practitioners turn to courtroom transcripts as source material because of their ‘rich dramatic potential.’²⁶ As Gregory Mason writes, ‘the dramatist has in many cases only to edit the documents themselves to produce documentary drama in its finest form.’²⁷ Verbatim trial theatre-writers transform scripts of law into theatrical scripts. In doing so, Martin argues that one of the functions of verbatim trial theatre is ‘to reopen trials in order to critique justice’²⁸ and ‘to re-examine and reconsider evidence.’²⁹ Verbatim trial theatre thus offers a challenge to the authoritative script of legal judgment. This is neatly summarised by law and humanities scholars Harry Derbyshire and Loveday Hodson on their analysis of verbatim theatre:

²¹ Derek Paget, ‘“Verbatim Theatre”: Oral History and Documentary Techniques’ (1987) 3(12) *New Theatre Quarterly* 317.

²² *Ibid* 322.

²³ Paget, ‘The “Broken Tradition” of Documentary Theatre’, 233.

²⁴ Carol Martin, *Dramaturgy of the Real on the World Stage* (Palgrave Macmillan, 2012) 19.

²⁵ *Ibid* 20.

²⁶ Gregory Mason, ‘Documentary Drama from the Revue to the Tribunal’ (1977) 20 *Modern Drama* 269. See also Dan Isaac, ‘Theatre of Fact’ (1971) 15(3) *The Drama Review*.

²⁷ Mason, ‘Documentary Drama from the Revue to the Tribunal’, 269.

²⁸ Martin, *Dramaturgy of the Real on the World Stage*, 22.

²⁹ *Ibid* 23.

Presenting evidence in an imaginary criminal trial encourages the audience to weigh its strengths and weaknesses to reach a conclusion (or verdict) on the issues before it; by contrast, an actual judgment from the... Court addressing the same issue could only be received as determinative of the legal question(s) at issue, closing down rather than stimulating discussion.³⁰

As they suggest, verbatim trial theatre can open up possibilities that are foreclosed in judgment, and invite the audience to act as judge in (re-)assessing the court transcripts. In doing so, the audience can form different judgments than the court scripted.

In her pioneering work, *Documentary Trial Plays in Contemporary American Theatre*, O'Connor writes that verbatim or documentary trial theatre 'comes about through the blending of verbatim excerpts from legal transcripts, media coverage of the events, and first-person interviews.'³¹ As she explains:

The court or hearing room, already evocative of and theorised as a space of performance, takes centre stage quite literally as legal space is transformed into theatrical space. The dramatic elements of a trial are heightened as the playwright and production team edit, arrange and reproduce the court narrative, transforming it into a performance of the events.³²

There is a long tradition of verbatim trial/tribunal theatre and the enactment of verbatim legal transcripts in theatre. Contemporary documentary theatre's 'roots derive from the 1920s theatre work of Bertolt Brecht and, more directly, Erwin Piscator' and their epic theatre techniques that blended different materials – film, music, tableaux, etc. – to call for social change.³³ In the United States, 'these ideas were adopted by the American Living Newspaper, an initiative of the New-Deal-era Federal Theatre Project that staged fictionalised versions of contemporary social

³⁰ Harry Derbyshire and Loveday Hodson, 'Performing Injustice: Human Rights and Verbatim Theatre' (2008) 2(2) *Law and Humanities* 202.

³¹ O'Connor, *Documentary Trial Plays in Contemporary American Theatre*, 4.

³² *Ibid.*

³³ Ryan Claycomb, '(Ch)oral History: Documentary Theatre, the Communal Subject and Progressive Politics' (2003) *Journal of Dramatic Theory and Criticism* 95.

debates' during the Great Depression era.³⁴ Following World War II, German documentary theatre 'frequently drew from court transcripts to expose what playwrights saw as miscarriages of justice.'³⁵ One of the pioneers of this form was Peter Weiss. His play *The Investigation* (1965) drew on documents gathered at the Frankfurt Auschwitz trials, and subsequent publication of his manifesto on documentary theatre proved to be a significant influence on the form.³⁶ In it, he claims:

Documentary Theatre may become a tribunal. There is no need to aim for the authenticity of the Court at Nuremberg, the Auschwitz trial in Frankfurt, a hearing of the American Senate, or the Russell Tribunal [on American military intervention in Vietnam]: but the questions, the attacks of the real court room can be used, and given a new slant. Having achieved distance, arguments can be filled out from points of view not considered in the original courtroom... Documentary Theatre can also draw the spectator into the action, which is not possible in the real courtroom.³⁷

This technique of exploring points of view not considered in the original trial became a major motivation for the verbatim trial theatre that followed. In what follows, I shall sketch out a history of verbatim trial theatre works and the different approaches that they take to the form.

Jury identification

A perceived communist threat contributed to the law-and-order atmosphere of 1950s America, with the battles often playing out in the courtroom. One such of these battles become the subject of the Donald Freed's *Inquest: A Tale of Terror* (1970), namely the trial of accused atom bomb spies, Julius and Ethel Rosenberg, who were convicted of espionage and sentenced to death.

³⁴ *Ibid.*

³⁵ *Ibid* 96.

³⁶ O'Connor, *Documentary Trial Plays in Contemporary American Theatre*, 190 n 28.

³⁷ Peter Weiss, 'The Material and the Models: Notes Towards a Definition of Documentary Theatre' (1971) 1 *Theatre Quarterly* 43.

In his analysis of *Inquest*, Gad Guterman asserts that the play ‘cast the audience in the critical role of members of the jury.’³⁸ This is a common theme in verbatim trial theatre – the audience adopt the role of the jury in the re-staging of the trial – but it is made more explicit in *Inquest* by a juror selection drum that is spun at the commencement of the play,³⁹ and the character of the judge inviting the audience to consider the evidence put forth.⁴⁰ In so doing, Freed considers explicitly who the audience is to legal performance and how they come to make judgment.

In Freed’s work the audience takes the role of the jury and ‘weigh the evidence presented... endeavour to determine what is true and what is not’ and then make judgment ‘and, in so doing, legitimise one version of a contested story over another.’⁴¹ The approach is intended to instil in the audience the feeling of how challenging and difficult it is to make judgment. This level of audience participation causes discomfort, but the audience of the theatre are also introduced to narratives unheard in the trial that may enable them to come to a different conclusion than that of guilt,⁴² though without the real consequences legal performance attracts.

Judicial identification

In 1970s America, verbatim trial theatre centred on activist resistance against the Vietnam War and the trials of groups of protestors that followed. Exemplars of this include Daniel Berrigan’s *The Trial of the Catonsville Nine* (1970) about the trial of nine Catholic activists who burned draft files to protest the Vietnam war, and Ron Sossi and Frank Condon’s *The Chicago Conspiracy Trial* (1979), concerned with the trial of anti-Vietnam War protestors for conspiring to incite a riot outside the Democratic National Convention. The latter trial itself was distinctly theatrical flavour. In one moment of heightened confrontation, following one of the defendant’s Bobby Seale violating the court rules, the judge, ordered that he be bound and gagged.⁴³

³⁸ Gad Guterman, ‘Reviewing the Rosenbergs: Donald Freed’s *Inquest* and its Jurors’ (2007) 48(2) *Theatre Survey* 272.

³⁹ O’Connor, *Documentary Trial Plays in Contemporary American Theatre*, 71.

⁴⁰ Guterman, ‘Donald Freed’s *Inquest* and its Jurors’, 273.

⁴¹ *Ibid* 267.

⁴² O’Connor, *Documentary Trial Plays in Contemporary American Theatre*, 72.

⁴³ Pnina Lahav, ‘Theatre in the Courtroom: The Chicago Conspiracy Trial’ (2004) 16(3) *Law and Literature*.

In her analysis of these two plays, O'Connor argues that they 'share a number of elements and themes, not least among them the centrality of judicial representation and the dominance of the judge's voice as illustrative of and empowered by the rule of law' and the State.⁴⁴ Indeed, almost every verbatim trial theatre piece is critical of the (narratives of the) State: be it in the form of prosecutors or judges. O'Connor suggests, however, that these plays are getting at something deeper: inviting the audience to see judicial figures/scripts not just as illustrative of authority, but as invariably affected by individual emotion and history.⁴⁵ Furthermore, they raise questions around the role of the judge as authors of judgments, which I explore further later.

Intertextual approaches

Emily Mann further popularised verbatim trial theatre through supplementing the trial transcripts with interviews with key actors in the trial or those whose testimony was not captured in it. Her verbatim trial theatre works include *Execution of Justice* (1984), which chronicles the trial of the assassination of openly gay San Francisco city supervisor Harvey Milk, and *Greensboro: A Requiem* (1996), which concerns the civil trial of the Greensboro police and the Ku Klux Klan for an attack by some Klan members on an anti-Klan rally in a black neighbourhood of Greensboro that led to the death and injury of demonstrators.

In her works, Mann moves away from relying solely on trial transcripts. Instead, she supplements the transcripts with interviews of an amalgam of people within the cases or what she terms in *Execution of Justice* 'uncalled witnesses'. Thus the transcripts of the trial *and* the transcripts of her interviews with uncalled witnesses become the verbatim material of the playscripts. By bringing in these different voices, she deftly undermines the authoritative script of judgment. Her intertextual approach is discussed further later.

British approaches: An emphasis on authenticity

In 1990s England, the Tricycle Theatre in northwest London under the artistic directorship of Nicolas Kent began staging tribunal theatre – and verbatim trial theatre

⁴⁴ O'Connor, *Documentary Trial Plays in Contemporary American Theatre*, 24-25.

⁴⁵ *Ibid* 25-26.

– in collaboration with friend and journalist Richard Norton-Taylor,⁴⁶ with whom he played tennis.⁴⁷ Norton-Taylor has suggested to Kent the idea of *Nuremberg* (1996), concerning the Nuremberg War Crimes Trial held after World War II, to mark the fiftieth anniversary of the trial. The prologue to *Nuremberg* is a speech by Richard Goldstone, the first chief prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY), who came to see the play and encouraged Kent to go to the ICTY.⁴⁸ Kent did so, and his play *Srebrenica* (1996) concerns the ICTY’s hearing into the indictments of Bosnian-Serb President Radovan Karadzic and Army Commander Ratko Mladic for atrocities perpetrated against Bosnian Muslims during the Bosnian War. In his account of these two plays – and the Tricycle Theatre’s broader tribunal theatre catalogue – Terry Stoller suggests that the plays were written to ‘open up discussion and “debate”’.⁴⁹ Certainly, the placement of the two plays together – they played together until a separate production the year after their debut⁵⁰ – encourages debate on what has changed in international criminal prosecution since *Nuremberg*. The published playscript of *Srebrenica* includes a section explicitly linking the two trials around this question.⁵¹

Unlike the work discussed previously, the Tricycle Theatre’s tribunal plays adhere strongly to a faithful recreation of the original trials, so much so that Kent was called by the administrator of the ICTY, asking if the Court could use the desks in the play for an upcoming trial.⁵² Kent has commented on plays that combine verbatim text with invented or non-trial/tribunal dialogue:

I absolutely don’t like that form at all. I find that form slightly dishonest... The strength of verbatim theatre is that it’s absolutely truthful, it’s exactly what someone says. It may be edited, but... if you suddenly chuck in something you make up... I think you distort the truth – what you come to may be very illuminating but it isn’t, in my view, the

⁴⁶ Terry Stoller, *Tales of the Tricycle Theatre* (Bloomsbury Methuen, 2013) 134-135.

⁴⁷ Will Hammond and Dan Steward (eds.), *Verbatim, Verbatim: Contemporary Documentary Theatre* (Oberon Books, 2008) 105, 139.

⁴⁸ Nicolas Kent, *Srebrenica* (Oberon Books, 2005) 5.

⁴⁹ Stoller, *Tales of the Tricycle Theatre*, 134.

⁵⁰ *Ibid* 149.

⁵¹ Kent, *Srebrenica*, 6-7.

⁵² Nicholas Wroe, ‘Courtroom dramas’, *The Guardian* (25 July 2004).

absolute truth of what happened and what people said. And my attempt, in using verbatim, is always to get as near to the truth as you can.⁵³

In a takedown of verbatim theatre-writers' claims of authenticity, Stephen Bottoms argues that, whilst 'British dramatists seem to have retained a basic faith in their ready apprehension of "the real"... unmediated access to "the real" is not something the theatre can ever honestly provide.'⁵⁴ Kent's claims rests on the assumption that there is a truth in what is representing what was said in trial; an assumption that is much more open to interrogation than his definitive language suggests. It also fails to acknowledge that, in creating a script from what was said at trial, the writer is manipulating the text to create a particular narrative in a process that is, by necessity, 'highly selective.'⁵⁵

Queer approaches

Bottoms argues that verbatim theatre needs to adopt a theatrical self-referentiality 'to foreground their own processes of representation.'⁵⁶ (61). He sees Moises Kaufman's *Gross Indecency: The Three Trials of Oscar Wilde* (1997) as a model of the kind of reflexivity he is advocating. The play concerns the three trials of Oscar Wilde: the first as plaintiff in a claim of libel against a nobleman who had called him a sodomite, and the second and third as defendant against a charge of gross indecency of which he was ultimately convicted after one trial ended in the jury unable to reach a verdict. The play is based not on the original courtroom transcripts, which have been lost to history, but on shorthand notes from the trials that were later narrativised and turned into a book 'with all the slips, omissions and inaccuracies they are likely to entail.'⁵⁷ Bottoms argues that the acknowledgment of the precarious status of the historical record is the play's strength. It also has resonances with the scripting of legal judgment and the way in which a judge has to deal with different and often competing accounts of events during trial then synthesise these accounts into judgment.

This century has seen verbatim trial theatre concentrating on queer jurisprudence: plays about queers and the law and plays queering the law. Queering the law is a way

⁵³ Hammond and Steward, *Verbatim, Verbatim*, 152-153.

⁵⁴ Stephen Bottoms, 'Putting the Document into Documentary: An Unwelcome Corrective?' (2006) 50(3) *The Drama Review* 57.

⁵⁵ *Ibid* 58.

⁵⁶ *Ibid* 61.

⁵⁷ *Ibid* 62.

of bringing a queer perspective to the law, through inserting queer voices into the law against its heteronormative predispositions, and also exposing the strange oddities of the law as a way of undermining law's authoritative position. Here, I consider two plays that, like Kaufman's work, play with legal texts concerning queer litigants in a queer manner.

Dustin Black's *8* (2011) portrays the closing arguments of the trial that led to the overturn of a constitutional amendment limiting the rights of same-sex couples to marry in California, and 'drew heavily on the transcripts of the case, while weaving in the narratives of the gay and lesbian plaintiffs',⁵⁸ intended 'to provide depth and narrative to the voices in the case.'⁵⁹ The plaintiffs sued county clerks and several state officials when they were denied marriage licenses based on the constitutional amendment. In her careful reading based on her performance of the play, Jasreet Badyal notes that the Court was also interweaving the personal narratives of the gay and lesbian plaintiffs in the case: the judge shares the plaintiff couples' stories about the difficulties of conveying to a bank that they are couple and their loving descriptions of one other;⁶⁰ accounts which are 'mirrored in the play.'⁶¹ However, Badyal is also critical of the play: it is 'too one-sided' (perhaps because the judgment was on the plaintiffs' side) and also focuses 'exclusively on the experience of privileged white queer people' and thus 'was not as transgressive as it could have been.'⁶²

By contrast, Danish Sheikh's *Contempt* (2017) is structured around the unofficial hearing transcripts of the Supreme Court of India on the constitutionality of a section of law that criminalised 'carnal intercourse against the order of nature', and was used primarily to regulate the intimate lives of LGBTIQ Indians: *Suresh Kumar Koushal v Naz Foundation*. As Sheikh writes, 'the portions of the hearings that are featured in *Contempt* constitute a highly edited fraction of the exchanges in the Supreme Court in 2012. Little has been added to what the judges actually said in the courtroom' but the trial transcripts are juxtaposed with affidavits from affected individuals that 'did not constitute a part of the hearings' because, Sheikh argues, 'the architecture of the law

⁵⁸ Jasreet Badyal, 'Perry v Schwarzenegger: An Opportunity to "Do" Law Differently' (2014) 9 *Appeal* 5.

⁵⁹ *Ibid* 10.

⁶⁰ *Perry v Schwarzenegger*, 704 F. Supp. 2d 921, 933, 939 (N.D. Cal. 2010).

⁶¹ Badyal, 'An Opportunity to "Do" Law Differently', 10 n 43.

⁶² *Ibid* 13.

often has little patience for lived experience' particularly the lived experience of "others".⁶³ As Sheikh writes, 'where the courtroom space denies the experience of queer subjectivity, I attempt to place the voices of the very same persons in the courtroom space as an implicit denial of the Court's rhetoric.'⁶⁴ In both plays, the trial transcript is supplemented with – and juxtaposed against – the stories of queer people who have lived experience of oppressive laws, placing these voices within the court space.

Alternative approaches

While this account of verbatim trial theatre has focussed on scripts carefully constructed by playwrights from trial transcripts and supplementary interviews, legal scholar Sara Ramshaw suggests that 'despite all the rules of evidence and procedure, statutes and legal precedents that fundamentally govern the decisions of a judge, it is only through spontaneity that judgment can take place' and that judgment should be conceived of as a form of improvisational theatre.⁶⁵ This approach to documentary materials was taken in Toronto Workshop Productions' *Chicago 70* (1970) concerning the Chicago Conspiracy Trial (that was also the subject of Ron Sossi and Frank Condon's play discussed above). The genesis of this play began with a contributor of the company who was attending the trial and sending back to the company transcripts from memory and his own observations on a near daily basis.⁶⁶ The transcripts of the trial excited the company members, but there was conflict on how to stage it. Whilst the director, George Luscombe, maintained a strong guiding hand over the material, the actors rebelled and started improvising based off the trial transcripts. As a collaborator on the work, Jim Bearden recalled:

We were reading the transcripts of the trial as if we were preparing for a Perry Mason episode. And we hated it, wanted to wake up the material instead of bore people to sleep. Then one day, we all scored and smoked some grass, and went back into rehearsal to have a rather long wrangle

⁶³ Danish Sheikh, 'Contempt' in *Global Queer Plays* (Oberon Books, 2018) ??.

⁶⁴ Danish Sheikh, 'Invisible Judgments: Locating Dissent Between Law and Literature' (2018) 4(6) *Law and Policy Brief* 3.

⁶⁵ Sara Ramshaw, 'Jamming the Law: Improvisational Theatre and the "Spontaneity" of Judgment' (2010) 14 *Law Text Culture* 133.

⁶⁶ Steven Bush, 'George Luscombe Directing *Chicago '70* at Toronto Workshop Productions: An Insider's Subjective Account' (2015) 36(1) *Theatre Research in Canada* 158; Neil Carson, *Harlequin in Hogtown: George Luscombe and Toronto Workshop Productions* (University of Toronto Press, 1995) 108.

with George... I said, "George, you give a lot of lip-service to improvisation, but I never feel free to try anything along that line because I'm afraid you would jump on me for doing it. We would really like trying to do some improvisations along with this material from the trial."... George looked pointedly at his watch and said, "We've got fifteen minutes to coffee break, try anything you'd like."⁶⁷

At this point, 'the company spread the material they had gathered in the first two rows of seats in the theatre, and the actors picked up their "lines" when inspired to do so.'⁶⁸ Their improvisation staged images in the trial transcript – for example, acting out a bar scene that was captured in a witness's testimony of a bar conversation – in a physicalised and musicalised, even anarchical, manner to reflect their idea that the trial was a circus.⁶⁹ As an actor in the work, Steven Bush, writes, 'while the transcripts themselves were sometimes brilliantly theatrical, we wanted to *extend* the theatricality, not sit on it. So we began incorporating *non*-documentary – most notably that "Absurd" trial scene in Lewis Carroll's *Alice in Wonderland*.'⁷⁰ This improvisation and introduction of non-documentary sources 'led to scenes having doubled or layered meanings.'⁷¹ Bush concludes that *Chicago 70* stands 'as a (mostly) successful... model for making engaging theatre from documentation of real events' in part because the improvisational process whereby the trial transcript was physicalised, musicalised and supplemented by non-documentary materials 'provided verbatim material with context and interpretation.'⁷² Or, as Neil Carson put it, the play is a 'mixture of documentary "truth", culled from research into primary materials such as the court transcripts, and a political attitude conveyed by caricature, irony, and deliberate theatrical distortion.'⁷³

Through traversing the history of verbatim trial theatre, there are three recurring themes that emerge. The first relates to authorial control and obligations: what degree of control does the scriptwriter exercise over the transcripts that they are dealing with and, when creating scripts from the transcripts, what obligations might they have back

⁶⁷ Bush, 'George Luscombe Directing *Chicago '70* at Toronto Workshop Productions', 159.

⁶⁸ Carson, *Harlequin in Hogtown*, 109.

⁶⁹ Bush, 'George Luscombe Directing *Chicago '70* at Toronto Workshop Productions', 159; Carson, *Harlequin in Hogtown*, 109.

⁷⁰ Bush, 'George Luscombe Directing *Chicago '70* at Toronto Workshop Productions', 160.

⁷¹ *Ibid* 162.

⁷² *Ibid*.

⁷³ Carson, *Harlequin in Hogtown*, 109.

to the testifiers? The second relates to authenticity. Norton-Taylor notes that ‘there is much talk of verbatim theatre being “honest”, “accurate” or “truthful”’,⁷⁴ but what is the truth in scripts theatrical and legal, and whose truth is being told? The third relates to audience: who is the scriptwriter writing for? In the sections that follow, I consider these questions from the perspective of the judge as scriptwriter, and draw from verbatim trial theatre-writers to illuminate the discussion. I then go on to consider their application in particular legal cases.

Authorial control and responsibility

In his seminal work, *Script into Performance*, theatre academic and performer Richard Hornby explores the relationship between script and performance. Eschewing debates about whether performance is independent of script or whether the two are one and the same, Hornby describes the script-performance relationship in sculptural terms: ‘We generally think of a sculptor as an independent, purely creative artist like a painter or a writer, but he is actually far more constrained [by] the size, shape, colour and texture of his block of marble – and the cost.’⁷⁵ In the theatre, the script plays a commanding role, but the performer and director are – as much as the playwright – its co-creator;⁷⁶ the play script is given life through its production.⁷⁷ Similarly, in law, the judge is constrained by the block of precedent but also carves out of it a unique judgment.

Hornby argues that the work of the director and performer is a reaction to the script, but this is not to suggest that they are merely passive;⁷⁸ indeed, their interpretation shapes the performance of the script. Similarly, the process of judicial decision-making is a reaction to past precedent or the statute a court is called upon to interpret, but the interpretation is an active act of creating a judgment. The debate whether the judiciary are interpreters or creators of law undoubtedly enlivens legal scholarship, but Hornby rejects the distinction upon which that debate is based. He argues that ‘interpretation and creation are not opposites’ but shared acts of imagination.⁷⁹

⁷⁴ Hammond and Steward, *Verbatim, Verbatim*, 131.

⁷⁵ Richard Hornby, *Script into Performance* (University of Texas Press, 1977) 103.

⁷⁶ *Ibid* 99.

⁷⁷ *Ibid* 101.

⁷⁸ *Ibid* 100.

⁷⁹ *Ibid* 99.

As Hornby acknowledges, this sculptural depiction of script and performance ‘suggests all kinds of analogies.’⁸⁰ Others have described the scripts of law and theatre in terms of collage,⁸¹ montage,⁸² jigsaw puzzle,⁸³ composition,⁸⁴ art⁸⁵ and even sausage.⁸⁶ Putting these fruitful diversions to one side, the sculpting analogy is particularly pertinent in two manners: the distinction between interpretation and creation is melded in the stone ‘so that it will be almost impossible to tell whether certain details came from the sculptor’s head or the marble itself’,⁸⁷ and the layering of litigants’ stories is visible in the court judgment as in the theatrical script. Adopting this latter strand, legal judgments may be conceived of as meta-narratives composed of minor narratives – the arguments or stories put in arguments by advocates. In making judgment, the judge is both interpreting scripts (narratives presented in the arguments of advocates, statutes and common law precedents) and creating a script, the meta-narrative of legal judgment. The interpretation and creation of scripts is fused in the process of creating judgment – a meta-narrative drawn from many minor narratives that sometimes seam together and other times collide in their various different layers.⁸⁸ The scripting of judgments is an interpretive and creative process.

It is from legal academic and activist Nicole Rogers that I borrow the concept of layering different stories to create the meta-narrative of law and legal judgment.⁸⁹ Rogers describes this as a ‘process by which courtrooms turn people’s stories, their

⁸⁰ *Ibid* 103. The sculpting analogy is also used in Hammond and Steward, *Verbatim Verbatim*, 10; Clas Zilliaccus, ‘Documentary Drama: Form and Content’ (1972) 6(3) *Comparative Drama* 239; Hare, ‘... On Factual Theatre’, 111.

⁸¹ Discussed above, but see also Derek Paget, ‘Verbatim Theatre’, 323; Karen Mitchell, ‘Seamless Intertexts: Extrinsic and Intrinsic Intertextuality and Emily Mann’s *Execution of Justice*’ (1993) 13(1) *Theatre and Performance Quarterly* 47; Dawson, *Documentary Theatre in the United States*, 46-47.

⁸² Dawson, *Documentary Theatre in the United States*, 46-47; Weiss, ‘The Material and the Models’, 42.

⁸³ Isaac, ‘Theatre of Fact’, 123.

⁸⁴ James White, *Heracles’ Bow: Essays on the Rhetoric and Poetics of Law* (University of Wisconsin Press, 1985) ch 6; Jerome Frank, ‘Words and Music: Some Remarks on Statutory Interpretation’ (1947) 47(8) *Columbia Law Review* 1260.

⁸⁵ David Hare, *Obedience, Struggle and Revolt: Lectures on Theatre* (Faber and Faber, 2005) ch 4. Though some verbatim scriptwriters do not regard themselves as artists: Hammond and Steward, *Verbatim Verbatim*, 130.

⁸⁶ Neuberger, ‘Sausages and the Judicial Process’, 132.

⁸⁷ Hornby, *Script into Performance*, 103.

⁸⁸ As Stephen Bottoms writes, ‘the texts of trials, and the many citations of texts within them, stage a disorienting, performative collision between... discourses’: ‘Putting the Document into the Documentary’, 63.

⁸⁹ Nicole Rogers, ‘The Playfulness of Constitutional Law’ (2005) 9 *Southern Cross University Law Review* 198.

lives, into legal narratives'⁹⁰ and raises questions of whether judges are equipped to create meta-narratives.⁹¹ If the judge decides what makes the script of judgment and 'the process of selecting, editing, organisation, and presentation is where the creative work of documentary theatre gets done', this begs the crucial question, as Martin puts it, of 'what is the basis for the selection, order, and manner of presentation of materials' in judgment?⁹²

The judge as scriptwriter controls the meta-narrative of legal judgment. Whilst Ramshaw contends that the creative process inherent in legal judgment 'is less about the individual will of the judge (or judicial activism) and more about what decision is most just in light of the circumstances and audience concerned',⁹³ this downplays the role of the judge's will and ideas in the creation of legal judgment – a trap that Hornby also falls into in dismissing the affect of 'the director's ideas about life, politics', etc. in the translation of script to theatrical performance.⁹⁴ What the judge is doing in making decisions is crafting something using – and therefore infused by – their own hands, but recognisable to the appreciative community of the public audience. As Julen Etxabe argues, legal narratives are 'imbued with, and will be necessarily affected by, the tacit moral judgment of the people that utter, conceive, and use the law.'⁹⁵ The judgment like the sculpture shows signs of the creator's hands and creative process. His comments reflect that of Christopher Bigsby on verbatim theatre, who says that 'the mere act of placing [real characters] on a stage, taking command of their speech, determining those aspects of their experience, personality, relationships to dramatise, choosing how, when and with whom to juxtapose their actions or utterances, is a *process of invention*.'⁹⁶ This inventive process both shows the creators hands and their choice of materials through which to create the sculpture/judgment – and, necessarily, those materials that are left out. Confronted with an array of material, myriads of documents and volumes of testimony, the verbatim scriptwriter chooses to emphasise some and leave out others, and the process of selection and organisation of material determines the script's point of view and

⁹⁰ *Ibid* 183.

⁹¹ *Ibid* 197-198.

⁹² Martin, *Dramaturgy of the Real on the World Stage*, 18.

⁹³ Ramshaw, 'Jamming the Law', 135.

⁹⁴ Hornby, *Script into Performance*, 104.

⁹⁵ Julen Etxabe, *The Experience of Tragic Judgment* (Routledge, 2013) 28.

⁹⁶ Christopher Bigsby, *Contemporary American Playwrights* (Cambridge University Press, 1999) 160 (emphasis added).

purpose.⁹⁷ The personal accounts which form the basis of verbatim theatre scripts ‘mirrors the private stories told by litigants in the public courtroom and the decisions of lawyers who dictate which elements of the story will be highlighted or performed’ or the decision of judges as to which elements of the story will form part of the meta-narrative of judgment.⁹⁸

In legal settings, the judge will have a duty, to varying degrees, to listen to different stories before deciding. They will then sift through the different stories they hear during a legal proceeding and ‘construct stories based on the evidence presented’,⁹⁹ a form of meta-narrative to the different narratives heard throughout a legal proceeding. There is an active choice on the part of the listener as to which stories they accept and therefore become part of the legal meta-narrative and which they dismiss and consign to the transcript. This process of story-listening and story-telling is culturally embedded and both reflects and constitutes community.¹⁰⁰ By contrast, a solitary focus on judgment as the interpretation and application of legislation or precedent to a given factual scenario can be a way to excuse ‘substantively engaging with the content of the lawyers’ arguments’ and the stories that underpin them, as Sheikh astutely points out.¹⁰¹ Instead, the judicial scriptwriter is responsible for handling various different stories presented through testimony and evidence, and crafting out of these a narrative that both reflects these stories and creates a meta-narrative that can be accepted by the wider community to whom the judiciary is accountable.

In this process of shaping the meta-narrative, it can be asked: what responsibility does the judge have to the stories that have been presented? If we can conceptualise scripting the law as a process akin to that of verbatim theatre, it may be productive to look to what theatre practitioners have said. Verbatim theatre practitioners David Hare and Max Stafford-Clark believe they have a duty not to misrepresent – moreover, a duty to honour – those stories presented to them.¹⁰² Hare describes sending excerpts of a play to those people represented in it, asking, ‘This is what I am going to represent you saying, are you at peace with that?’¹⁰³ Hare goes further to say

⁹⁷ Isaac, ‘Theatre of Fact’, 122.

⁹⁸ Ramshaw, ‘Jamming the Law’, 133, 136.

⁹⁹ Christopher Rideout, ‘Storytelling, Narrative Rationality, and Legal Persuasion’ (2008) 14 *The Journal of the Legal Writing Institute* 64.

¹⁰⁰ *Ibid* 73-74.

¹⁰¹ Sheikh, ‘Invisible Judgments’, 3.

¹⁰² Hammond and Steward, *Verbatim, Verbatim*, 60-62, 71-73.

¹⁰³ *Ibid* 72.

that ‘I had to give people the right to say whether I was reporting accurately or not because it does seem to me if you stand up on a stage and represent somebody you do have a duty to them to get it right and for them to be at peace with how they are represented.’¹⁰⁴ Interestingly, his solution for those who are unhappy with how they are represented is to change their names.¹⁰⁵ However, actors are quick to disavow any obligation directly to the person whose story they are telling or to their audience. Felix Nobis, who has played fictionalised versions of real characters on screen says, ‘as an actor I couldn’t say that there’s a moral obligation beyond doing justice to the script as it’s put together by the writer and director.’¹⁰⁶ For an actor of verbatim theatre, it is about trying to get inside the character and understanding what motivates them and then acting on that motivation, however repugnant it may be.¹⁰⁷

To pick up on Nobis’ notion of doing justice to a script, it should be noted that the accountability of scriptwriters differs between theatre and law. It is widely acknowledged that, ‘if an action takes place within the recognised confines of performance, then, broadly speaking, the propagator of that action is not likely to be held accountable beyond the metaphorical bringing down of the curtain’,¹⁰⁸ whereas in law the judge is held accountable for their decision far beyond the moment of bringing it down. Yet Nobis still feels there is an obligation to the script. Notably, this is not an obligation to the person upon whose story it is based nor the audience, but to the script that has been created by the playwright and director out of a story and put on public stage before an audience. Further, it is an obligation to *do justice* to the script. It would seem uncontroversial to suggest that judges should likewise do justice with their words.

What I would suggest ‘doing justice’ means in this context is that verbatim scriptwriters see themselves as having a duty to accurately present the words *as written or spoken*, but do not see themselves as having a duty – or power – to control the audience’s reception of these words in performance. This becomes a challenge

¹⁰⁴ National Theatre, Interview with various (Online Interview, 29 April 2014).

¹⁰⁵ *Ibid.*

¹⁰⁶ Sean Mulcahy, ‘Acting Law | Law Acting: A Conversation with Dr Felix Nobis & Prof Gary Watt’ (2017) 4(2) *Exchanges* 190.

¹⁰⁷ See the comments of Tricycle Theatre actor William Hoyland who appeared in *Nuremberg* and *Srebrenica* in Stoller, *Tales of the Tricycle Theatre*, 145-149.

¹⁰⁸ John Freeman, *Tracing the Footprints: Documenting the Process of Performance* (University Press of America, 2003) 59.

when, for editing reasons or otherwise, words are cut out.¹⁰⁹ The selection of which words to include in a script is a necessarily creative process that raises ethical questions. These ethical issues can be tackled through making the scriptwriter's intention clear and properly informing those whose stories are to be (re-)told about how their stories will be adapted in the process. The failure of stories to be heard in court should also cause legal practitioners 'to think through... the ways in which we might take a measure of responsibility as a community that works with the law, for what happened... Could we deepen the accounts we brought before the court, and what would these stories look like?' asks Sheikh reflecting on his work, *Contempt*.¹¹⁰ Sheikh puts the failure not solely on the judicial scriptwriter, but the lawyers that bring these stories to the court. The responsibility rests not just with the judge, but with all of us in the law to deepen the accounts we bring to the court.

(Appearance of) authenticity

This reframing of scripting the law as a creative and imaginative process of layering multiple stories to create the meta-narrative of legal judgment clearly raises questions of truth and authenticity often faced by documentary theatre.¹¹¹ In the case of law, whose story is real or true – the victim, the witness, the claimant, the expert? Is the meta-narrative of legal judgment true or, rather, an attempt at truth? Guterman argues that verbatim trial theatre 'shares with a criminal trial an attempt to build a convincing narrative out of the facts at hand, a narrative that will persuade an audience to believe its truth.'¹¹² Taking up this idea, this section will consider how authenticity is constructed in legal scripts through comparison with verbatim trial theatre scripts, and the following section will consider who is the audience that scriptwriters of law and theatre are seeking to persuade.

Paget contends that 'where tribunal theatre is concerned, *mise-en-scene* and acting style alike must be realistic, and "authentic" in that sense. The courtroom of an inquiry must look like a courtroom... Actors must act like real-life originals.'¹¹³ Kent concurs that 'the intention of a tribunal play is always, always to try to arrive at the

¹⁰⁹ Hammond and Steward, *Verbatim, Verbatim*, 60-61.

¹¹⁰ Danish Sheikh, 'Performing *Contempt*' (2019) 2 *Indent: The Body and the Performative*.

¹¹¹ Rogers, 'The Play of Law', 438. See also Martin, *Dramaturgy of the Real on the World Stage*, 2.

¹¹² Guterman, 'Donald Freed's *Inquest* and its Jurors', 266.

¹¹³ Paget, 'The "Broken Tradition" of Documentary Theatre', 234.

truth'¹¹⁴ and, as such, the playwright must remain unbiased.¹¹⁵ In a rebuke to this pretence of truth, Bottoms contends that truth is elusive and that, 'without a self-conscious emphasis on the vicissitudes of textuality and discourse... [verbatim trial] plays can too easily become disingenuous exercises in the presentation of "truth", failing (or refusing?) to acknowledge their own highly selective manipulation of opinion and rhetoric.'¹¹⁶ In contrast to the British approach, Martin observes that, globally, verbatim theatre's 'strategies are often postmodern, especially in asserting that truth is contextual, multiple, and subject to manipulation', including by the scriptwriter themselves.¹¹⁷ Verbatim trial theatre, 'in reminding us that a trial is composed of a collection of narratives that may prove volatile when combined... helps to undermine the assumption that judgment is... unambiguous.'¹¹⁸ The debate over truth and authenticity in verbatim trial theatre has resonant parallels to these questions in law.

Gary Watt suggests that legal judgment is not concerned with exposing the truth but rather dressing itself in proof, a semblance of or substitute for truth. As others have observed, the process of judicial interpretation is not a scientific act but rather a literary, even, 'guessy art'.¹¹⁹ Since 'the actual facts of a case do not walk into court, but happened outside the courtroom, and always in the past, the task of the trial court is to reconstruct the past from what are at best second-hand reports of the facts'¹²⁰ and 'stories about the events.'¹²¹ In an instructive article on legal discourse, Kim Scheppele argues that the 'resolution of any individual case in the law relies heavily on the court's adoption of a particular story, one that makes sense [and] is true to what listeners know about the world.'¹²² Narrative coherence and fidelity plays a significant role in legal decision-making, that is, the decision-maker is influenced by 'whether or not the stories they experience ring true with the stories they know to be

¹¹⁴ Hammond and Steward, *Verbatim, Verbatim*, 155.

¹¹⁵ *Ibid* 153.

¹¹⁶ Bottoms, 'Putting the Document into the Documentary', 57-58.

¹¹⁷ Martin, *Dramaturgy of the Real on the World Stage*, 3.

¹¹⁸ O'Connor, *Documentary Trial Plays in Contemporary American Theatre*, 12.

¹¹⁹ Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton University Press, 1949) 37.

¹²⁰ *Ibid* 37.

¹²¹ Kim Scheppele 'Foreword: Telling Stories' (1989) 87(8) *Michigan Law Review* 2082-8.

¹²² *Ibid* 2080. See also Rideout, 'Storytelling, Narrative Rationality, and Legal Persuasion', 66-8.

true in their lives.’¹²³ In law, ‘the adoption of some stories rather than others, the acceptance of some accounts as fact and others as falsehood—cannot *ever* be the result of matching evidence against the real world to figure out which story is true’ because, much as one may like them to, ‘courts *cannot* do what would be necessary’ to determine what is true given that they are limited in their investigative powers and constrained by court procedures.¹²⁴ Instead, judges are confronted with ‘different stories, some [of which] are accepted and become “the facts of the case” and others [of which] are rejected and cast aside.’¹²⁵ The facts of the case are heavily disputed between litigants because ‘those whose stories are believed have the power to create fact; those whose stories are not believed... [are] sanctioned... discredited and disbelieved.’¹²⁶ Diegetic ‘fault-lines run through apparently stable communities that appear to have agreed on basic institutions and structures and on governing rules’ which underpin the liberal model of majority government, and the liberal theory of ‘consent comes apart over whose stories to tell’ and which set of disputed facts to believe.¹²⁷ While ‘the law purports to operate according to fact ... its facts are found in bare probabilities through an imaginative process of fiction’ where only the judge gets to choose the ending.¹²⁸

A common argument is that truth can be discerned by removing all partial biases. However, it is impossible to abandon all preconceptions;¹²⁹ the process of judgment is shaped by the proclivities of the person appointed to make the decision. In many ways, ‘traditional legal writing purports to be neutral and dispassionately analytical, but too often it is not. In part, this is so because legal writers rarely focus on their own mindsets.’¹³⁰ As New Historicist scholar Stephen Orgel says, ‘we can look only with our own eyes, and interpret only with our own minds, which have been formed by our

¹²³ Walter Fisher, *Human Communication as Narration: Toward a Philosophy of Reason, Value and Action* (University of South Carolina Press, 1989) 64 cited in Rideout, ‘Storytelling, Narrative Rationality, and Legal Persuasion’, 69-70.

¹²⁴ Scheppele ‘Foreword: Telling Stories’, 2082.

¹²⁵ *Ibid* 2083. See also Rideout, ‘Storytelling, Narrative Rationality, and Legal Persuasion’, 64.

¹²⁶ Scheppele ‘Foreword: Telling Stories’, 2079–80.

¹²⁷ *Ibid* 2082.

¹²⁸ Gary Watt, ‘Hard Cases, Hard Times and the Humanity of Law’ in Jonathan Bate (ed.), *The Public Value of the Humanities* (Bloomsbury Academic, 2011) 197.

¹²⁹ Scheppele ‘Foreword: Telling Stories’, 2090.

¹³⁰ Richard Delgado, ‘Storytelling for Oppositionists and Others: A Plea for Narrative’ (1989) 87(8) *Michigan Law Review* 2440-1.

own history.’¹³¹ Similarly, a judge’s perception of testimony and evidence is shaped by their ‘inherited instincts, traditional beliefs, acquired convictions.’¹³² The judge’s individuality affects how they see and hear evidence, for ‘any gaze is always filtered through the lenses of language, gender, social class, race, and ethnicity.’¹³³ Judging is not an objective process, for ‘the judge in almost any case must regard the situation before him [or her] from an essentially personal perspective’,¹³⁴ using his or her intellect, knowledge and conception of society’s values to reach judgment.

While ‘scholarship has unequivocally demonstrated that [judges’] claims to neutrality, objectivity and universality are spurious’,¹³⁵ the courts are slowly coming to realise the same. In the Canadian judgment of *R v RDS*, the court held that ‘judges can never be neutral, in the sense of purely objective’ and that ‘the differing experiences of judges assist them in their decision-making process and will be reflected in their judgments.’¹³⁶ The court cited the words of Cardozo:

All their lives, forces which they do not recognise and cannot name, have been tugging at [judges]—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life... In this mental background every problem finds its setting. We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own.¹³⁷

The court recognised that ‘objectivity was an impossibility because judges, like all other humans, operate from their own perspectives.’¹³⁸ It held that this was a positive, for such perspectives grant ‘society the benefit of valuable knowledge.’¹³⁹ It could be argued that the push for a more gender and culturally diverse judiciary will – whether intended or not – increase the diversity of views or perspectives on the bench. In the

¹³¹ Stephen Orgel, *Impersonations: The Performance of Gender in Shakespeare’s England* (Cambridge University Press, 1997) 64.

¹³² Benjamin Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921) 12–13.

¹³³ Norman Denzin and Yvonna Lincoln (eds.), *Handbook of Qualitative Research* (Sage Publications, 1st ed, 1994) 12.

¹³⁴ Richard Weisberg, *Poethics and Other Strategies of Law and Literature* (Columbia University Press, 1992) 16.

¹³⁵ Margaret Thornton, ‘Discord in the Legal Academy: The Case of the Feminist Scholar’ (1994) 3 *Australian Feminist Law Journal* 53.

¹³⁶ *R v RDS* [1997] 3 SCR 484 [29]. See, *contra*, *Koppen v Commissioner for Community Relations* (1986) 11 FCR 360.

¹³⁷ *R v RDS* [1997] 3 SCR 484 [34] citing Cardozo, *The Nature of the Judicial Process*, 12–13.

¹³⁸ *R v RDS* [1997] 3 SCR 484 [35].

¹³⁹ *Ibid* [38].

converse, ‘blinding [judges] to the nuances of social context... achieves results that popular will would reject... ignores the preferences of affected parties and presents this indifference to its human consequences as a virtue.’¹⁴⁰ While judges will naturally bring their own perspective to the cases before them, it is necessary that they critically examine those perspectives. Similarly, the scriptwriter’s presence and perspectives shape the scripts of verbatim trial theatre. In Emily Mann’s *Greenboro* the playwright/interviewer becomes a character onstage, not omnipresent scriptwriter but an active and visible voice amongst the other voices that she crafts into the playscript.¹⁴¹ This calls into question the assumed objectivity of the script; the script is instead deeply subjective and the perspectives of its writer(s) infuse its creation. To pretend otherwise, in the context of law, only serves to hide the human consequences of detached legal(istic) judgment.

Expectations for truth in law may be unrealistic, as Watt argues that ‘the problem is that the public expects the law to dig down to ‘true’ or ‘absolute’ justice, whereas its evidentiary processes are in practice designed to achieve the more modest aim of producing (we might say ‘fabricating’) formal proofs based on evident appearances.’¹⁴² It is incumbent upon the litigating parties to prove their case, but what is proven or true is in the eye of the beholder. It is to the judge, the jury and the watching the gallery to determine what is proven or not, what is true or false according to the arguments put to them and shaped through their own minds. It is a process of convincing oneself, of removing reasonable doubt.¹⁴³ Analogising proof to clothing, Watt suggests that ‘legal proof beyond reasonable doubt is proof with holes in it, but with holes too small to allow the inquirer to probe to a deeper reality.’¹⁴⁴ Truth in law is thus appearance based. As Justice Kiefel suggests that ‘it is the *appearance* of logic which judges strive for.’¹⁴⁵ Truth is in the eye the eye of the

¹⁴⁰ Guyora Binder and Robert Weisberg, ‘Cultural Criticism of Law’ (1997) 49(5) *Stanford Law Review* 1151. See also Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2002).

¹⁴¹ O’Connor, *Documentary Trial Plays in Contemporary American Theatre*, 122-123; Claycomb, ‘Documentary Theatre, the Communal Subject and Progressive Politics’, 114-115.

¹⁴² Gary Watt, *Shakespeare’s Acts of Will: Law, Testament and Properties of Performance* (Bloomsbury, 2016), 188.

¹⁴³ Gary Watt, *Dress, Law and Naked Truth: A Cultural Study of Fashion and Form* (Bloomsbury, 2013), 71-2.

¹⁴⁴ *Ibid* 72.

¹⁴⁵ Kiefel, ‘Reasons for Judgment’, 7 referencing Michael Chesterman who refers to judgments as a ‘confidence trick’: ‘The Writing of Judgments: A Forum’ (1992) 9 *Australian Bar Review* 131.

beholder. Watt argues that a legal trial does not uncover truth through a process of discovery but rather covers certain facts with proof in a process of fabrication.¹⁴⁶

Law's claims to principles of truth and objectivity are a fiction. However, we should not despair in the notion that objective truth cannot be found in legal process. As Watt suggests by interview:

It's a comfort to me that I don't have to claim that legal trial produces truth – and it's probably a comfort to practicing lawyers as well that they don't have to ascribe any abstract truth to what they're doing... It seems to me that if lawyers can acknowledge that what they're doing is performing proof rather than arguing for truth in an abstract way, they can get on with their job and trust the process.¹⁴⁷

A judge is not an objective oracle but rather a judge of which story to believe, with the legal case being akin to a storytelling competition whereby the person with the better story wins and those who are not believed are pushed to the outside. As John Freeman notes of theatrical scripts 'we do not really believe things to be "true" until such a time as they have been narratologised and archived, re-packaged into news bites and dramatisations.'¹⁴⁸ He later suggests that a speaker dons a mask to tell the truth.¹⁴⁹ For Oscar Wilde, the 'mask tells us more than a face.'¹⁵⁰ And, as Lord Neuberger has observed, 'Oscar Wilde said that truth, is 'rarely pure and never simple', and the same way be said for the law.'¹⁵¹ What these diverse approaches to questions of truth – theatrical, literary and legal – have in common is the notion that truth is constructed – fabricated even – and that it is constructed through the means of narrative. The ethical aspiration is that verbatim legal and theatrical scriptwriters may be attuned to and imagine those outsiders whose stories are not typically heard or acknowledged.

Audience

The final aspect of scriptwriting I shall consider is the question of who these scripts are written for. Scripting judgments 'means looking at the questions of who are the

¹⁴⁶ Watt, *Dress, Law and Naked Truth*, 73.

¹⁴⁷ Mulcahy, 'Acting Law | Law Acting', 193.

¹⁴⁸ Freeman, *Tracing the Footprints*, 10.

¹⁴⁹ *Ibid* 73

¹⁵⁰ Cited in Watt, *Dress, Law and Naked Truth*, 82 who incorrectly attributes this to an earlier essay of Wilde's when, in fact, it was added in a subsequent revision for *Intentions* (Floating Press, 1891) 60.

¹⁵¹ Neuberger, 'Open Justice Unbound?', 261.

audiences and publics for these decisions... and what these audiences (real and imagined) concern themselves with.¹⁵² As retired Australian High Court Justice Michael Kirby once opined, ‘it is interesting to reflect on the fact that, despite the seven century tradition of the common law, there is no agreement on the audience for whom a judge writes his or her judgment.’¹⁵³ The first conference of what is now the Law Literature and Humanities Association of Australia, at which His Honour spoke, deliberately left this question open on a panel on judgment writing.¹⁵⁴ As His Honour noted, ‘we furiously burrow away [at writing judgments] without perhaps asking that question sufficiently for ourselves.’¹⁵⁵

Since that first law and literature conference, the question has received more attention by judges speaking extra-judicially. In her speeches on judgment writing, Justice Kiefel criticises judgments written purely for the audience of the author or ‘for the purpose of proving that a judge has understood the case’,¹⁵⁶ and draws out the different audiences to a judgment: the litigants, legislators and governments, lower courts in the appellate system, legal academics and students, legal practitioners, and the general public.¹⁵⁷ She references another former High Court Justice, Sir Harry Gibbs, who writes that ‘a judgment is a public document, available for all to read’, and the public will have an interest in judgments.¹⁵⁸ Across the pond, Lord Neuberger has been a strong advocate for the public’s access to judgments:

If justice is seen to be done it must be understandable. Judgments must be open not only in the sense of being available to the public, but, so far as is possible given the technical and complex nature of much of our law, they must also be clear and easily interpretable by lawyers. And also to non-lawyers.¹⁵⁹

Though he does note that this is about being open to the public, but not directly engaging them.¹⁶⁰ Despite the uncertainty about who a judgment is written for, there

¹⁵² Marie-Andree Jacob, ‘The Strikethrough: An Approach to Regulatory Writing and Professional Discipline’ (2017) 37(1) *Legal Studies* 149.

¹⁵³ Michael Kirby, ‘On the Writing of Judgments’ (1990) 64 *Australian Law Journal* 692.

¹⁵⁴ ‘The Writing of Judgments’, 130.

¹⁵⁵ *Ibid* 133.

¹⁵⁶ Susan Kiefel, ‘Judicial methods in the 21st century’, *Brief* (July 2017) 31.

¹⁵⁷ Kiefel, ‘Reasons for Judgment’, 1-2; Kiefel, ‘Judicial methods in the 21st century’, 8.

¹⁵⁸ Kiefel, ‘Judicial methods in the 21st century’, 9.

¹⁵⁹ Neuberger, ‘Open Justice Unbound?’, 261.

¹⁶⁰ *Ibid* 268.

is judicial agreement that the general public is one of its audiences. Moreover, having judgments seen – and understood – by a general audience is a necessary ingredient for justice to be done. Communal buy-in to the scripts of judgment is necessary for law to have its legitimacy and authority.

As Ramshaw describes, the scripting of law is about ‘translating individual experiences into a form understandable by the collective.’¹⁶¹ In the Brexit judgment/script that opened this chapter, this can be seen in the speaking judge’s apparent desire to address a public audience in terms of stark sound bites, e.g. the issue is this and not this. The script of law is knowingly responsive to the needs of a public audience, as it must ultimately be relatable to, or at least believable by, a public audience in order to be followed. To some extent the audience is performing a filtering process, determining how the story is familiar or relatable to their own ‘past experiences or memories’¹⁶² and then assessing the story to see if it seems truthful – or has a resonance of truth – to both themselves and the person telling it.¹⁶³ A story is more likely to be accepted if it reflects the listener’s understanding of the world.¹⁶⁴

For verbatim trial theatre scriptwriters, the public audience is always present in their considerations when scripting. Danish Sheikh, the playwright and director of the premiere production of *Contempt*, argues that the legal scriptwriter/director positions the work towards a legal audience who share ‘an investment in questions about how to engage with the law’ whereas the theatrical playwright/director positions the work for a theatre audience who have a particular ‘set of aesthetic political sensibilities.’¹⁶⁵ Superficially, it could be argued that theatre scriptwriters have more of a concern for the aesthetic than judicial scriptwriters who are fundamentally concerned with the application of the law to a particular case. However, as the increasing writing on the art of writing judgments attests, judicial scriptwriters are concerned with aesthetics. Some judicial scriptwriters indulge in painting ‘pretty scenes’, such as the village green upon which cricket is played in the summertime that opened one of Lord Denning’s judgments,¹⁶⁶ and which former New South Wales Supreme Court Justice

¹⁶¹ Ramshaw, ‘Jamming the Law’, 150.

¹⁶² Brian Sturm, ‘The “Storylistening” Trance Experience’ (2000) 113(49) *The Journal of American Folklore* 293.

¹⁶³ Rideout, ‘Storytelling, Narrative, Rationality, and Legal Persuasion’, 64.

¹⁶⁴ *Ibid* 66-68

¹⁶⁵ Sheikh, ‘Performing *Contempt*’.

¹⁶⁶ *Miller v Jackson* [1977] QB 966 at 976 (per Lord Denning MR).

Lancelot Priestley pointed out was actually ‘a scungy little ground surrounded by the most artifacts of modern British industrialism.’¹⁶⁷ Others concern themselves with the length and layout of judgments – also aesthetic considerations. Just as judicial scriptwriters may be concerned with aesthetics, theatrical scriptwriters are not beholden to aesthetics alone; they intend for their verbatim trial plays to have a political effect on the audience. For some, following the epic theatre tradition, the intention is for the audience to take social action¹⁶⁸ or, in post-modern variations, for the audience to question and challenge the perspectives presented and form their own judgments.¹⁶⁹ In the latter form, the scriptwriter is raising questions of how to engage with the law and its judgments. Despite the seeming dichotomy of law and aesthetics, both legal and theatrical scripts are pitched, at least in part, to a public audience and strive to be both aesthetically appealing and socially relevant to the audience.

Narrative(s in) judgments

Having discussed questions of authorial obligations, authenticity and audience, I shall now consider them in relation to two Australian judgments that deploy different narrative techniques to incorporate the minor narratives during the case: one being a native title decision and the other a coronial inquest. In doing so, I consider how verbatim trial theatre-writers have interweaved different narratives into their works, and how these practices could inform judicial scriptwriters. I am influenced by Sheikh’s account of the ‘powerlessness and frustration of the constant gap between what the judges were given [in testimony] and what they would churn out’ in judgment and question: ‘what if the manner in which these limited stories were presented before the Court [in testimony] could be altered?’¹⁷⁰ Though it is not incumbent on testifiers to alter the way they tell their stories, but rather incumbent on the judge to properly hear and where possible integrate their stories into the script of legal judgment.

¹⁶⁷ ‘The Writing of Judgments’, 140.

¹⁶⁸ Sheikh, ‘Invisible Judgments’, 3.

¹⁶⁹ Mitchell, ‘Seamless Intertexts’; Guterman, ‘Donald Freed’s *Inquest* and its Jurors’; Isaac, ‘Theatre of Fact’.

¹⁷⁰ Sheikh, ‘Performing *Contempt*’.

Legal approaches

In *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)*,¹⁷¹ Justice Lindgren published his decision on a native title land claim by the Wongatha People and others in the Goldfields region of Western Australia. Lindgren J held that as the claims were improperly authorised they could not stand—a result his Honour described as unfortunate given that the litigation had been ongoing for nearly five years. However, his Honour did not stop there. He considered the claims on their merits regardless, and he made a final statement in his case summary:

I wish to say something of particular relevance to the indigenous witnesses. They have had to give evidence of their life experiences from their earliest years. It was plain to me that many, perhaps all, of them would have preferred to be elsewhere than to be the centre of attention as a witness. I have greatly appreciated hearing their evidence, and think it most important that they have told their stories. I began summarising their individual testimony for my own judgment writing purposes, and decided to put the summary into the form of a first person paraphrase of the transcript. This took on a life of its own and has become Annexure F to the reasons for judgment. While the indigenous witnesses will be disappointed in the result in this case, I hope they will see Annexure F as a valuable record of their life stories as they have told them in this proceeding.¹⁷²

Then, in 7,388 fascinating paragraphs, Lindgren J tells the stories of the Wongatha People. Stories of a girl's uncle going out to hunt for ducks in a swamp area but sinking up to his knees in mud.¹⁷³ Stories about how even when guns started to be used to hunt kangaroos, it only took one throw of a spear to catch them.¹⁷⁴ Stories of people travelling through the night, burning spinifex to provide light, and wading through salty water to their destination.¹⁷⁵ Stories of how an old woman at the site of a tribal war lay still on the ground and pretended to be dead in order to avoid being

¹⁷¹ [2007] FCA 31.

¹⁷² *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31.

¹⁷³ *Ibid* Annexure F [5143]–[5144].

¹⁷⁴ *Ibid* Annexure F [3007].

¹⁷⁵ *Ibid* Annexure F [6515]–[6516].

killed, and was later found crying and tying wool to trees in the hope that she would never see such violence again.¹⁷⁶ Stories of children being taken away to settlements and leaving their parents behind, how the parents cried and were humbly comforted with a billy of tea and some food but never saw their children again.¹⁷⁷ Stories about the confusion and sadness felt at family reunions and separations.¹⁷⁸ One sad story about a boy (now the lead plaintiff) hanging on to his mother's hair and crying as she handed him over to a missionary believing that was what she had to do.¹⁷⁹ These are extraordinary stories of courage and resilience, of warmth, laughter and care, all in the face of injustice. As Lindgren J puts it, the annexure is a way of giving back a communal story to those people in the face of a disappointing legal outcome.

Surprisingly, the annexure has not received much mention in reporting on the case.¹⁸⁰ Extra-judicially, Lindgren J has spoken of the need for the 'author-judge' to create 'judgments as intelligible as can be reasonably expected',¹⁸¹ but there has been little engagement with the idea of telling stories through judgment. Earlier in the judgment, Lindgren J writes that early accounts of Australian Aboriginal life 'are limited by the ethnocentric views of the writers and by the limits on their understanding of the language and culture of those about whom they wrote.'¹⁸² It would seem that within the judgment, the judge is implicitly acknowledging the limitations of a white author in understanding others, though commentators have criticised the privileging of early ethnographical material in the case.¹⁸³

Lindgren J was also concerned to assert that 'Annexure F does not contain findings of fact.'¹⁸⁴ The judge also states that what is not directly relevant to the judgment (and hence placed outside of the judgment itself and in an annexure) does not have claim to

¹⁷⁶ *Ibid* Annexure F [4140].

¹⁷⁷ *Ibid* Annexure F [5152].

¹⁷⁸ *Ibid* Annexure F [959], [969].

¹⁷⁹ *Ibid* Annexure F [1869].

¹⁸⁰ The only substantive reference is in Jeremy Dicker, 'The problem with playing golf in the desert' *Australian Policy Online* (15 July 2008): 'Out of a deeply held respect for the Wongatha people, His Honour was careful to include a compendium of life stories recalled by some 90 Aboriginal people on the witness stand, several of whom passed away before the judgment was handed down.'

¹⁸¹ Kevin Lindgren, 'The Rule of Law and Some Aspects of the Current Legal Scene in Australia' (University of Sydney Law School Distinguished Speakers Program, Sydney, 18 July 2013).

¹⁸² *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31, [441]. See also *Daniel on behalf of the Ngarluma People v Western Australia* [2003] FCA 666 [149].

¹⁸³ Craig Muller, 'The "Allurements of the European Presence": Examining Explanations of Wongatha Behaviour in the Northern Goldfields of Western Australia' (2014) 38 *Aboriginal History* 60.

¹⁸⁴ *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31, [441].

fact and is instead speculative. Perhaps the stories in Annexure F merely provide ‘emotional content’,¹⁸⁵ but have little practical benefit – an idea that I shall return to later. In his account of *Wongatha*, Jeremy Dicker notes that the judgment left ‘several broken [Aboriginal] men sitting in silence’,¹⁸⁶ which suggests that the Annexure may not have had the effect intended.

Before going on to consider some alternative methods of integrating outsider stories that could have been adopted in the *Wongatha* judgment drawing from verbatim trial theatre-makers, I want to consider how the Annexure has parallels to narrative judgments used in coronial inquests. As Bray and Martin observe:

The narrative form of coronial findings has long been a strong feature of coronial practice. Australian coroners routinely declare their findings of fact through discursive statements of the circumstances. And while the form of coronial findings varies from jurisdiction to jurisdiction, the robust contextual narration of findings is a common feature.¹⁸⁷

However, such findings have been criticised for being overly prolix¹⁸⁸ and potentially using too much language to avoid directly addressing the issue.¹⁸⁹ These criticisms aside, the narratives can provide a means of humanising the deceased.

In the *Inquest into the death of Luke Geoffrey Batty*, the Victorian State Coroner Judge Gray published a narrative account of the death of Luke Batty who was killed by his father in the cricket nets of a suburban reserve in the outer Melbourne suburb of Tyabb. The level of detail is acute: ‘Luke’s favourite colour was yellow. He loved Lego Star Wars and Lego City, and with them created everything from police trucks, police stations, and boats to aeroplanes.’¹⁹⁰ The body of Luke played a figurative role throughout the inquest. The judge ‘permitted Luke’s picture to remain for the duration of the inquest in front of the witness box with the result that all asking questions and

¹⁸⁵ Here I am borrowing a term used by one of the ethnographers in the case, Craig Muller: ‘The Allurements of European Presence’, 78 n 155.

¹⁸⁶ Dicker, ‘The problem with playing golf in the desert’.

¹⁸⁷ Rebecca Bray and Greg Martin, ‘Exploring Fatal Facts: Current Issues in Coronial Law, Policy and Practice’ (2016) 12(2) *Frontiers in Coronial Justice* 134.

¹⁸⁸ *Keown v Kahn* [1999] 1 VR 69.

¹⁸⁹ David Baker, *Deaths After Police Contact: Constructing Accountability in the 21st Century* (Springer, 2016) 102.

¹⁹⁰ *Inquest into the death of Luke Geoffrey Batty* [2015] VicCorC 139 [25].

looking at a witness could see a picture of the deceased.’¹⁹¹ At one stage during the inquest, Luke’s mother ‘played a slideshow of photographs of Luke.’¹⁹² Whilst these elements could be dismissed as mere emotional content, they are a means of fleshing out the characters in the story and making them relatable. Through humanising the characters in the story, the judicial scriptwriter is humanising the law and remedying its abstraction with attention to the acute details of the characters.¹⁹³

Returning to the findings, the judge then described in vivid detail the killing of Luke¹⁹⁴ and the subsequent death of his father who resisted arrest and threatened ambulance workers with his knife and was shot to death by police.¹⁹⁵ David Baker writes of narrative verdicts in coronial inquests that ‘stories require characters. The assignment of roles in narrative is key to interpreting how they behave in particular circumstances and why certain types of events unfold in the way they do, and this appears to be particularly the case in deaths where force has been used.’¹⁹⁶ In an analysis of narrative verdicts concerning death after police contact in the United Kingdom, he found that narrative verdicts were typically laden with euphemism and ambiguity when describing police conduct¹⁹⁷ as a means of distancing the coronial jury from the ideas that police may use force.¹⁹⁸ Applied to the *Batty* case, one would expect to see this in the judge’s description of the police conduct. In the separate findings regarding the death of Luke’s father, the judge did find that the police officer that shot Luke’s father did use force, though it was ‘justified and necessary in the circumstances’¹⁹⁹ as Luke’s father suddenly lunged at the police officer whilst raising a knife.²⁰⁰ In this sense, the findings are using ‘narratives... constructed on the basis that the deceased to some degree initiates action leading to their own death.’²⁰¹

¹⁹¹ Ian Freckleton, ‘Minimising the Counter-Therapeutic Effects of Coronial Investigations: In Search of Balance’ (2016) 16(3) *Queensland University of Technology Law Review* 26.

¹⁹² Libby Eltringham, ‘Uncovering Truths and Identifying System Failings’ (2015) 1 *DVRCV Advocate* 16.

¹⁹³ Gary Watt, *Equity Stirring: The Story of Justice Beyond Law* (Bloomsbury, 2009) ch 4.

¹⁹⁴ *Inquest into the death of Luke Geoffrey Batty* [2015] VicCorC 139 [67]-[75].

¹⁹⁵ *Ibid* [76]-[90]. See also *Inquest into the death of Gregory Anderson* [2015] VicCorC 144.

¹⁹⁶ Baker, *Deaths after Police Contact*, 96.

¹⁹⁷ *Ibid* 80-81.

¹⁹⁸ *Ibid* 94. It should be noted that coronial inquests in Victoria are not held before a jury and, since reforms in 1999, there is no requirement on coroners to find the identity of any person who contributed to the deceased’s death. See *Coroners (Amendment) Act 1999*.

¹⁹⁹ *Inquest into the death of Gregory Anderson* [2015] VicCorC 144 [93].

²⁰⁰ *Ibid* [56]-[58].

²⁰¹ Baker, *Deaths after Police Contact*, 98.

Baker observes there was noticeable dysphemism in describing the deceased (whom he describes as the ‘lead actor’ in the narrative of coronial inquests) as a means to dehumanise and pathologise the deceased.²⁰² Their personal characteristics are ‘recorded early in the verdict as a way of establishing the individual within the narrative... [and] to situate the individual within a context that requires action to address the situation in which police find themselves.’²⁰³ At times, the judge describes Luke’s father in elegiac terms: ‘Mr Anderson was devoted to Luke; he took him to museums and art shows to broaden his education, taught him maths and purchased educational gifts to help him academically. Mr Anderson regularly took Luke to the beach and parks and taught him how to sail. Luke described his father to others as always having a smile on his face.’²⁰⁴ However, there is significant discussion in the early part of the findings about Luke’s father potentially having a delusional disorder and his unorthodox spiritual beliefs.²⁰⁵ This correlated with tabloid descriptions of him as a monster.²⁰⁶ What this demonstrates is the complex nature of the characters in this case.

What is also significant about the narrative judgment in the Batty case and other coronial inquests like it, is that these personal stories are interwoven into the judgment, as opposed to being placed into an annexure that is explicitly cast as having no findings of fact, as happened in *Wongatha*. The more complex approach adopted in the Batty case could also be attributable to Luke’s omnipresence in the inquest through the picture of him that sat in court – it brought home to the judge the importance of Luke’s story to the script that was the coronial findings. Both these cases grapple with how to interweaving the deeply personal meta-narratives of those who have been affected by the law into legal judgment. In what follows, I draw from verbatim trial theatre techniques to consider ways that this scriptwriting can be more effective – and affective.

²⁰² *Ibid* 95-96.

²⁰³ *Ibid* 96-97.

²⁰⁴ *Inquest into the death of Gregory Anderson* [2015] VicCorC 144 [12].

²⁰⁵ *Ibid* [4], [13]-[17]; *Inquest into the death of Luke Geoffrey Batty* [2015] VicCorC 139 [44]-[52].

²⁰⁶ Alecia Simmonds, ‘Domesticating Violence: Reading the Politics of the Family Court into the Luke Batty Coronial Inquest’ in Camilla Nelson and Rachel Robertson (eds.), *Dangerous Ideas About Mothers* (UWA Publishing, 2018) 35.

Theatrical approaches

Here, I turn to verbatim trial theatre to consider how its scriptwriters have integrated different stories into their scripts, and how these practices might be relevant to judicial scriptwriting. O'Connor describes the process of how verbatim trial theatre-makers handled the trial transcripts which form the basis of their plays:

The chronology and contents of the legal events are rearranged and edited, as thousands of pages of trial transcript recorded over weeks of testimony are reduced to less than a hundred pages of text... The condensation of material need not mean that the judicial conflict becomes less significant than it was in its original form; indeed, its performance, not to mention its impact, is expanded by the dramaturgical changes that have been imposed on the historical material. Editorial distillation may actually make visible issues that are buried within the bureaucratic language and the length of the official transcripts, as the documentary playwright draws our linguistic and thematic patterns in order to underscore ideas or insights that may have been obscured.²⁰⁷

For some verbatim trial theatre-makers, the script is a realistic rendition of the trial proceedings, but others are more creative with their approach. Karen Mitchell describes how Emily Mann, the playwright of *Execution of Justice*, 'like a compiler, collects materials from many sources, fragments them into smaller pieces, and arranges the fragments into a new form': an intertext.²⁰⁸ She combines the trial transcript with interview transcripts of what she terms 'uncalled witnesses' in a way that challenges that authoritative script of judgment, as Mitchell describes:

By inserting the voices of uncalled witnesses into the play, Mann gives credence to those perspectives silenced in the original trial. The "testimony" of these uncalled witnesses shatters the sacred and time-honoured language of the legal system. By placing the language of the average person on the same plane as the language of the legal system,

²⁰⁷ O'Connor, *Documentary Trial Plays in Contemporary American Theatre*, 7.

²⁰⁸ Mitchell, 'Seamless Intertexts', 47.

Mann gives equal time and importance to the opinions of the “people on the street”.²⁰⁹

Mitchell concludes that ‘Mann’s research and collection of intertexts brought the community (context) into the courtroom, something that did not happen in the actual... trial.’²¹⁰ As O’Connor concludes, this technique of overlapping the trial transcripts with personal stories from uncalled witnesses was designed ‘to achieve some measure of resolution by adhering to the legal language and the legal structure in its composition, but by positioning itself outside the structures that hampered the actual case, it has unique capacity for healing the deep wounds created by the murder and exacerbated by the trial.’²¹¹

A different but also effective technique was used in Donald Freed’s *Inquest*. As Gregory Mason describes, ‘in his play, Freed calls for two stage areas, A and B. Stage A presents the courtroom proceedings, while Stage B carries reconstructions dramatising the private lives of the characters... Freed proposes that the theatre of fact cannot stand alone but should be complemented by reconstructions, dramatising the private lives of the characters’²¹² in this case presented in distinct playing areas. Jeffery Fenn contends that this method provides a continuous dialectic between the public trial and the private lives of the defendants.²¹³ The personal stories are not interwoven into the script in the manner of Mann’s intertext, but are set in a different space to the trial to create a dialectic between these stories and those told in the trial. There is one more space: ‘relying on a large, partitioned screen situated upstage and on voice-over recordings. Freed assembled photographs, newspaper headlines, visual evidence submitted in the courtroom, and quotations from public figures’²¹⁴ Like the picture of Luke in the inquest into his death, these images speak to the audience – perhaps in a more visceral way than words.

I will consider the failings of words towards the end of this chapter, but for now conclude that these different techniques deployed by verbatim trial theatre-makers have a relevant bearing on the construction of legal scripts. I preface this with a note

²⁰⁹ *Ibid* 50-51.

²¹⁰ *Ibid* 58.

²¹¹ O’Connor, *Documentary Trial Plays in Contemporary American Theatre*, 111.

²¹² Mason, ‘Documentary Drama from the Revue to the Tribunal’, 272.

²¹³ Jeffery Fenn, *Levitating the Pentagon: Evolutions in the American Theatre of the Vietnam War Era* (University of Delaware Press, 1992) 83. See also O’Connor, *Documentary Trial Plays in Contemporary American Theatre*, 70.

²¹⁴ Guterman, ‘Donald Freed’s *Inquest* and its Jurors’, 265-266.

of caution, as some of the techniques – such as multiple stages and intertexts – could be constrained by rules of admissibility and the architectural confines of the courtroom. Debates on the worthiness of such rules aside, finding a means to interweave different narratives into the scripts of legal judgment could go some way towards healing the hurt experienced in the cases discussed. In what follows, I consider one such method of doing so: victim impact statements.

Scripting alternative voices

In explaining the stimulus for his play, *Contempt*, Sheikh tells a story that has particular resonance to the question of how outsider stories figure in judicial scripts:

In my final year of law school, as the briefs for the case [*Suresh Kumar Koushal v Naz Foundation*] were being prepared, a lawyer I'd interned with reached out to me. He was working on putting together affidavits for this case and wanted to see if I could contribute one drawing on my experiences. I was quite happy to do this, and spent the next week putting together a narrative that explored the ways in which the law had affected my life directly and indirectly. He reviewed the document and mailed it back to me with significant changes – it was, it seemed, too literary, too poetic. The stories of harassment had to be presented much more obviously, the harm had to come through much more prominently, and I couldn't digress from the point. But perhaps the point is lost without the digressions?²¹⁵

Over time, reforms have been introduced to enable outsiders to tell their stories in court. One such example is victim impact statements (VIS), sometimes referred to as victim personal statements. These act as 'mechanisms designed to provide victims with a voice in the hearing and space in which to express their feelings about the impact of the crime'.²¹⁶ In Victoria, legislation provides that 'if a court finds a person guilty of an offence, a victim of the offence may make a statement to the court'.²¹⁷ The VIS may contain 'particulars of the impact of the offence on the victim and of any injury, loss or damage suffered by the victim as a direct result of the

²¹⁵ Sheikh, 'Performing *Contempt*'.

²¹⁶ Tracey Booth, 'Crimes, Victims and Sentencing: Reflections on *Borthwick*' (2011) 36(4) *Alternative Law Journal* 236.

²¹⁷ *Sentencing Act 1991* (Vic) s 8K(1).

offence'²¹⁸ and 'may include photographs, drawings or poems'²¹⁹ and be read aloud in open court by the victim or a person of their choosing²²⁰ or using the alternative arrangements for giving evidence discussed above.²²¹ In short, they are a means for the victim's voice to be heard where it may not be in the trial.²²²

In her study of VIS, Tracey Booth finds that they provide a means for victims 'to communicate their feelings and be heard' and, though 'no judge showed any response to the contents of the report and all maintained affective neutrality' as the statements were read aloud, aspects of the VIS often appeared in sentencing judgments 'to validate the loss suffered by the family victims'; as such, their use in sentencing judgments was 'a significant element by which expressive capacities of the VIS could be served'.²²³

The introduction of victim impact statements raise issues of fairness and, in particular, how to best balance between the rights of the defendant to be heard on sentencing²²⁴ and the legislative requirement 'that the interests of family and victims also be respected'.²²⁵ There is also a difficult balance between the rights of victims and families to speak against the need to ensure that irrelevant or prejudicial evidence be excluded from the trial.²²⁶ Despite this seeming dichotomy, the issues at stake need not be framed in terms of a balance struck between competing interests. Fairness towards the defendant and fairness to the family victims are not mutually exclusive, as Booth concludes:

Fairness required the court to respond empathetically to their situation and acknowledge their emotional responses to court events ... Such sensitivity to the victims' concerns would not have distracted from the defendant's entitlements. Indeed, arguably, the interests of the defendant

²¹⁸ *Ibid* s 8L(1).

²¹⁹ *Ibid* s 8L(2).

²²⁰ *Ibid* s 8Q(1)(a).

²²¹ *Ibid* s 8R(1).

²²² Lisa Sarmas, 'Storytelling and the Law: A Case Study of *Louth v Diprose*' (1994) 19 *Melbourne University Law Review* 726.

²²³ Tracey Booth, *Accommodating Justice: An Exploratory Study of Structures that Shape Victim Participation and the Presentation of Victim Impact Statements in the Sentencing of Homicide Offenders in the NSW Supreme Court* (PhD thesis, University of New South Wales, 2012) 308. See *R v Borthwick* [2010] VSC 613 [21]–[24].

²²⁴ See e.g. *Sentencing Act 1991* (Vic) s 18F(a).

²²⁵ Booth, 'Crimes, Victims and Sentencing', 239.

²²⁶ *Sentencing Act 1991* (Vic) s 8L(3).

might have been enhanced by the reduced emotional tension and conflict during the proceedings.²²⁷

Through an empathetic response, ‘their interests and concerns would have been acknowledged ... [and themselves] accorded ... respect and dignity and arguably a sense of justice.’²²⁸

Despite the beneficial impact of VIS, there has been ‘distress and anger by some victims in relation to their experiences in the sentencing court in recent cases in Victoria’.²²⁹ In one such case, *R v Borthwick*,²³⁰ Leon Borthwick was charged with murder and convicted of the manslaughter of Mark Zimmer:

At Borthwick’s plea hearing in September 2010, the family victims submitted VISs to the court wanting to read them aloud. The defence objected to the content of the statements because sections addressed matters other than the impact of the offence ... The objection was upheld and the court engaged in a very lengthy and public process of editing the statements. Amended versions were then handed back to the family victims who appeared appalled at the outcome. Further conflict occurred in December when the family victims were not permitted to sit in the body of the courtroom with the family of the defendant and were relegated to the public gallery upstairs. Members of the deceased’s family subsequently gave media interviews about their distress and anger at their experiences in the courtroom.²³¹

Subsequent judgments have held that making rulings with respect to individual parts of a contentious VIS is not ‘necessary, or even desirable’.²³² Reforms have likewise been introduced to address some of the troubles encountered in *Borthwick*.²³³ However, a recent study shows that many victims still felt frustrated that ‘their voice was constrained by legislation and filtering processes during the

²²⁷ Booth, ‘Crimes, Victims and Sentencing’, 239.

²²⁸ *Ibid* 239.

²²⁹ *Ibid* 236.

²³⁰ [2010] VSC 613.

²³¹ Booth, ‘Crimes, Victims and Sentencing’, 236.

²³² *R v Dowlan* [1998] 1 VR 123, 140.

²³³ See *Sentencing Act 1991* (Vic) ss 8L(3), 8N, 8Q(3) which provide, cumulatively, that the victim must file their statement with the court and defence a reasonable time before sentencing so that the court can make a ruling on admissibility and advise the victim of this prior to their statement being read in court.

“consultation” period before the hearing.²³⁴ This is reminiscent of Sheikh’s experience of his affidavit being edited down to avoid digressing from relevant questions of legal harm, and his rumination that maybe digressions that detail the personal impact of laws are ‘the point’ of telling stories – through affidavits, in his case, or impact statements, in this.

When I first started thinking through legal storytelling some years ago, I concluded that our motivation should be ‘to listen, to see and to allow others to be heard to the best of our ability as students, teachers and judges of the law.’²³⁵ The more I reflect on it, I come to realise just how difficult this is within the constraints of legal procedure. I have drawn from verbatim trial theatre to offer alternative techniques for scripting law in a manner that is more sensitive to outside voices and their need to be heard in the meta-narrative of legal judgment. In doing so, I also acknowledge the ways in which verbatim trial theatre-makers conceive of their plays as a way to telling stories that could not be told within the law.

Conclusions

Some have argued for an increased attention to the potentials of legal storytelling,²³⁶ both because stories ‘offer a respite from the linear, coercive discourse that characterizes much legal writing’²³⁷ and because they offer possibilities for insiders and outsiders to the law. Storytelling benefits outsiders as it is a process both of internal hearing and of creating a sense of solidarity and ‘I am not alone’.²³⁸ For insiders it causes ‘pangs of conscience’ and creates an incentive for reform.²³⁹ Listening to outsiders’ stories is a deeply humanising experience²⁴⁰ for, through listening, ‘one acquires the ability to see the world through others’ eyes’²⁴¹ and to ‘suspend judgments [and] listen.’²⁴²

²³⁴ Booth, ‘Accommodating Justice’, 307.

²³⁵ Sean Mulcahy, ‘Can a Literary Approach to Matters of Legal Concern Offer a Fairer Hearing than that Typically Offered by the Law?’ (2014) 8(1) *Law and Humanities* 126.

²³⁶ Sarmas, ‘Storytelling and the Law’; Delgado, ‘Storytelling for Oppositionists and Others’.

²³⁷ Delgado, ‘Storytelling for Oppositionists and Others’, 2416.

²³⁸ Delgado, ‘Storytelling for Oppositionists and Others’, 2437. See further Brad Jessup, ‘The Court Hurts: A Personal Reflection on *Commonwealth v ACT*’ (2014) 39(1) *Alternative Law Journal* 48 on the value of the court putting ‘stories of misfortune into the words of its judgments.’

²³⁹ Delgado, ‘Storytelling for Oppositionists and Others’, 2438.

²⁴⁰ *Ibid* 2440.

²⁴¹ *Ibid* 2439. See further Richard Dawson, *Justice as Attunement: Transforming Constitutions in Law, Literature, Economics and the Rest of Life* (Routledge, 2013).

²⁴² Delgado, ‘Storytelling for Oppositionists and Others’, 2415.

However, there is a major difference between storytelling and scripting, and that is the dimension of orality. In the translation of stories to scripts, the power of something being said is lost. Whilst theatre traditionally operates in the mode of text to performance, legal judgment works differently – from performance to text. The mode of scripting the law – written submissions and oral questions distilled into a printed judgment – places a focus on written accounts over other forms of memory such as body memory.²⁴³ To build on the arguments put forth by Cornelia Vismann in relation to files, the written decision is a ‘live transfer of an event’ of judgment and, through its composition, the judge-writer is ‘able to turn communicative acts into writing’, thus endowing the writing with a ‘presentist trait’²⁴⁴ – it is a record of a particular point in time in law and the people subject to it. Vismann’s observations on files could be translated to judgment. Judgments are both oral performance and written record and, as records, can ‘shed light on their own development’ and the *process* of judging.²⁴⁵ They ‘preserve something of the conditions under which things [in this case, the judicial decision] came about.’²⁴⁶ Where this grates is her embrace of the text as an instrument for capturing more than it possibly can: ‘files capture everything that other forms of writing no longer contain – all the life, the struggles and speeches that surround decisions.’²⁴⁷ As surrounding material, these are seldom captured in judgment and not always in files either. The process of judgment necessitates leaving some stories out. Furthermore, the transcription to text does not capture gestures or the situation of words in space.²⁴⁸

The transcription of stories into written scripts may miss the truth of what was said. As Hare says, ‘print is much more manipulative than performance. I think the truth of what is going on is revealed in performance.’²⁴⁹ Describing the shock of representees seeing their spoken words translated into a performed script, Hare observes that things ‘sound different when they’re said’ rather than printed.²⁵⁰ For verbatim trial theatre,

²⁴³ Martin, *Dramaturgy of the Real on the World Stage*, 19-20. See also John Freeman, *Blood, Sweat and Theory: Research through Practice in Performance* (Libri, 2010) 179; Freeman, *Tracing the Footprints*, xxvii-xxviii.

²⁴⁴ Cornelia Vismann, *Files: Law and Media Technology* (trans Goeffrey Winthrop-Young, Stanford University Press, 2008) 8.

²⁴⁵ *Ibid* 8.

²⁴⁶ *Ibid* 9.

²⁴⁷ *Ibid* 10.

²⁴⁸ Stoller, *Tales of the Tricycle Theatre*, 152-153.

²⁴⁹ Hammond and Steward, *Verbatim, Verbatim*, 71.

²⁵⁰ *Ibid* 73.

‘what is outside the archive – glances, gestures, body language, the felt experience of space, and the proximity of bodies – is created by actors and directors according to their own rules of admissibility.’²⁵¹ The performance of the text ‘rescues documentary drama from the atrophy of the spoken word.’²⁵² The performance can reveal different dimensions to the words.

I shall conclude with an example of the problem of over-reliance on text as the locus of legal scripts. In a recent article in the *Melbourne University Law Review*, Amelia Loughlin contends that ‘female High Court judges [are] interrupted far more frequently than their male colleagues’ during oral argument in court,²⁵³ and that ‘female judges are subject to the same dominating behaviours in oral argument that they could expect in everyday conversation with men.’²⁵⁴ She bases these conclusions off an analysis of the written court transcripts. However, in comparing the written transcripts housed on the Australian Legal Information Institute’s website to the video recordings housed on the High Court’s website, it becomes immediately apparent that the written transcript leaves out and sometimes even inserts words that conflict with what was said. They also almost universally leave out the verbal static that intercedes speech (ums and ahs), pauses that sit within speech (as discussed in Chapter Three), paralanguage of speech (including pitch, volume, intonation, tone, emphasis, rhythm etc.) and gestures that accompany speech.

Some interruptions can support what is being said (uh-ha, mmhmm) or support the speaker to finish their sentence (through, for example, completing a sentence that has trailed off). Such interjections in speech indicate that the audience is listening and understanding what is being said. Indeed, as Loughlin acknowledges, such interruptions generally ‘express encouragement and support of the speaker without cutting off their speech.’²⁵⁵ Whether an interruption is affirmative or negative very much depends on intonation, which can be difficult to interpret. Of course, some interruptions can violate the conversational contract (discussed further in Chapter Three), or assert the speaker’s authority. Yet others can build common ground

²⁵¹ Martin, *Dramaturgy of the Real on the World Stage*, 19.

²⁵² Mason, ‘Documentary Drama from the Revue to the Tribunal’, 273.

²⁵³ Amelia Loughlin, ‘Female Judges, Interrupted: A Study of Interruption Behaviour During Oral Argument in the High Court of Australia’ (forthcoming) *Melbourne University Law Review* 3.

²⁵⁴ *Ibid* 13.

²⁵⁵ *Ibid* 14.

between the common ground. Furthermore, gestures can be used to indicate whether the speaker has finished speaking or intends to continue.

The reliance on the written transcript means that Loughlin is unable to attend to the tone of speech and the accompanying movements that impact any reading of courtroom interruptions. One of the greatest challenges of legal scriptwriting is its reflective mode. Unlike a theatrical script that is performed, the script as judgment distils the legal performance to words. In doing so, it cannot possibly capture the multi-sensorial experience of the legal performance. The increasing video recording and broadcasting of trials offers a record of the legal performance that is not so textually bound. However, watching an audiovisual recording still differs from being there at the live performance in court. A person live in court is better able to pick up on vocal and physical cues that avoid or invite interruptions, and to attune not only to *what* is being said, but *how* it is being said. In the chapter that follows, we take the next step to tune into not the scripts themselves, but the musicality of legal speech.

Chapter Five

Singing the Law: The Musicality of Legal Performance

Prologue

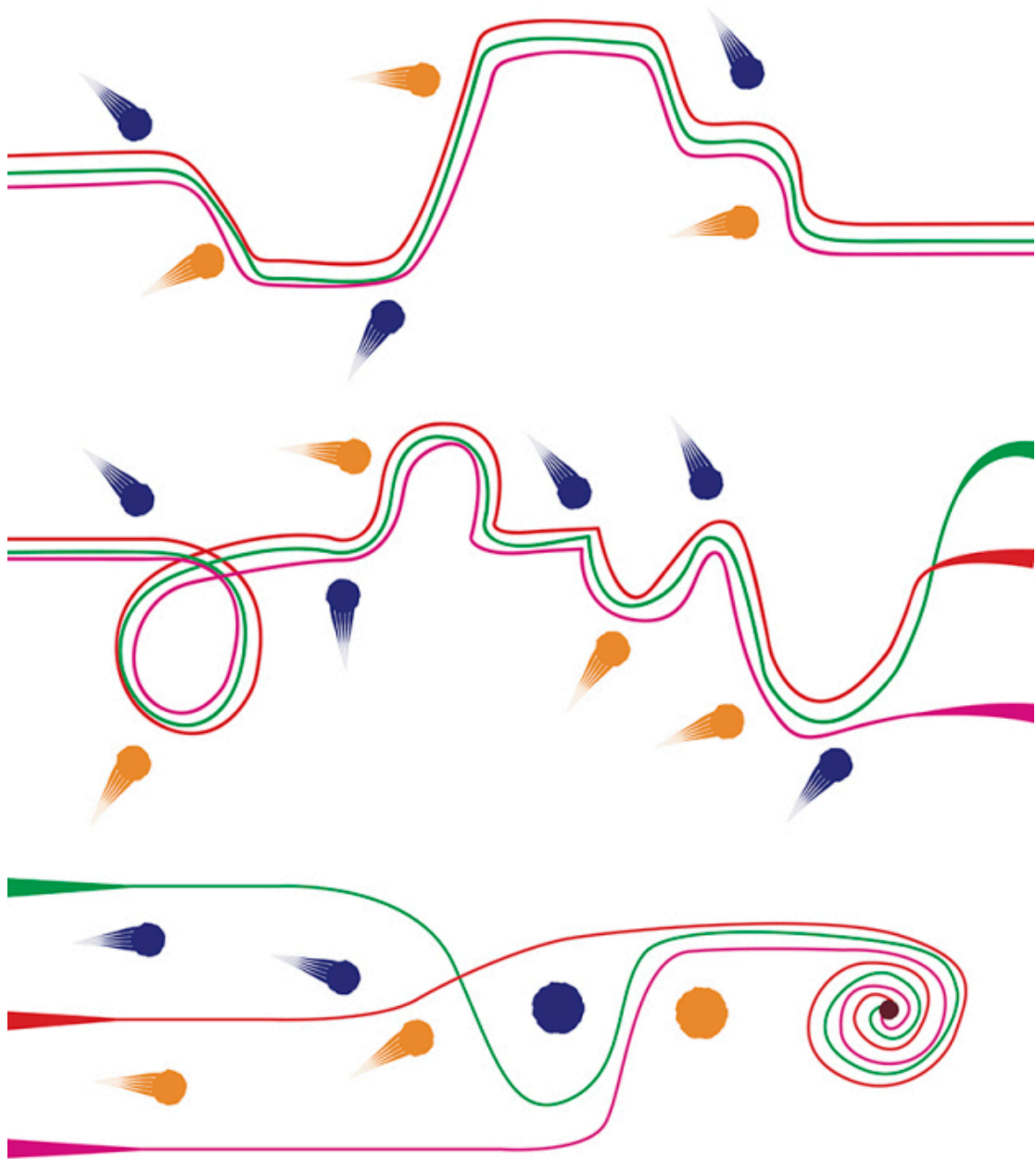


Figure 5.1: Jack Tan, *Appeal and Advocacy* (2016)

Jack Tan's *Appeal and Advocacy* (**Figure 5.1**) depicts a legal argument in the Singaporean Court of Appeal in artistic form (track [here](#)). The work is part of his collection *Hearings* that comprises graphic scores and audio recordings based on the soundscapes of courts in Singapore. The graphic score is a documentation of a

conversation – argument, questions and debate – between the appellant and respondent lawyers and three judges in a Court of Appeal matter. In listening in, Tan was struck by the free nature of the discussion and the dynamic of persuasion and deliberation occurring within it. What is also striking in the graphic is its colours. The graphic, like the choir, presents a motif rather than a literal rendition of courtroom advocacy.

Introduction: Listening to the music of legal speech

Legal trials have featured in many musicals and operas – *Trial by Jury* in the 1870s, *Chicago* in the 1970s, *Les Miserables* in the 1980s, *Parade* in the 1990s, *Legally Blonde* in the 2000s, *The Scottsboro Boys* in the 2010s, to list just some examples. There are, however, discrete instances of what I term ‘verbatim musilegal theatre’, where legal speech has been adapted verbatim from legal transcripts into musical score. In this chapter, I consider two examples of this phenomenon: Opera Australia’s 2002 production of *Lindy* and Donmar Warehouse’s 2017 production of *Committee*, which both turn – under a broad definition – legal transcripts (in the case of *Committee*, this is transcripts of a parliamentary inquiry) into a music score. I am also informed by other works that fall out of my definition of verbatim musilegal theatre: the National Theatre’s 2011 production of *London Road*, that deals with a trial but does not utilise the trial transcript. I explore what the compositional process of verbatim musilegal theatre can reveal about the musicality of legal speech. The musicality of speech, I hypothesise, has a particular affect on legal audiences.

Drawing from diverse strands of scholarship, Des Manderson claims ‘the new field of law and music is slowly but surely... turning into a fully-fledged interdisciplinary claim, with its own methodology and its own epistemology, capable of illuminating not just law or music, but both in light of the other.’¹ His seminal work *Songs without Music* provides criticism of ‘law and music’ writing that tends to treat the two as separate disciplines with arguments proceeding always by analogy or metaphor instead of recognising music as an intrinsic aspect of law.² For example, in his article ‘Words and Music’, Jerome Frank uses music as a metaphor to describe statutory

¹ Des Manderson, ‘Towards Law and Music’ (2014) 25 *Law Critique* 315-316.

² Des Manderson, *Songs Without Music: Aesthetic Dimensions of Law and Justice* (University of California Press, 2000) 32.

interpretation.³ However, for the most part, the article explores law and music not law as music, and is analogical in approach. Similarly, in *Lyrics and the Law*, Aaron Lorenz argues that ‘music is similar to or a reaction to law’,⁴ but does not consider the inverse of this statement: is law similar to music or, perhaps more boldly, is law music? The existing literature on the musicality of legal performance does bring music and law together but has two major flaws. First, there is an obsession with ‘high’ art forms with a particular cultural cache, such as classical⁵ and jazz⁶ to the detriment of other forms, such as musical theatre, house music and pop, which may have something to say about the law. Secondly, music is used mostly for analogical or metaphorical purposes, perhaps based on the piquant observation of James Parker and Joel Stern, that the Greek word for law, *nomos*, also means song or melody.⁷ Even Manderson admits that he is deploying music mainly as ‘a metaphor, a point of historical comparison, a frame of reference, a case study, and a... structural device.’⁸ This is not to denigrate metaphor or analogy, but to recognise that within the literature law and music are treated as if they had a separate identity rather than being inseparably connected.⁹ Can we imagine, having been moved by Manderson and his fellow scholars to consider law and music, going further, to consider law *as* music?

One of the most robust scholarly engagements with law and music is Parker’s *Acoustic Jurisprudence*, which is fundamentally concerned with an instance of convicted war criminal Simon Bikindi ‘singing the law’ at his trial before the International Criminal Tribunal for Rwanda (ICTR).¹⁰ Parker’s conclusion from his study of the trial is that ‘the judicial soundscape is fundamentally oral and discursive, not musical’¹¹ and he goes on to argue the reasons for this. First, the design and technology of the courtroom facilitates conversation rather than (musical)

³ Jerome Frank, ‘Words and Music: Some Remarks on Statutory Interpretation’ (1947) 47(8) *Columbia Law Review* 1267-1268. In another example, the judicial writer is compared to a composer: James White, ‘The Judicial Opinion and the Poem: Ways of Reading, Ways of Life’ (1984) 82(7) *Michigan Law Review* 1686-1687.

⁴ Aaron Lorenz, *Lyrics and the Law: The Constitution of Law in Music* (Vandeplas, 2007) 3.

⁵ See, e.g., Manderson, *Songs Without Music*.

⁶ See, e.g., Sara Ramshaw, *Justice as Improvisation: The Law of the Extempore* (Routledge, 2013).

⁷ James Parker and Joel Stern (eds.), *Eavesdropping: A Reader* (City Gallery Wellington, Melbourne Law School and Liquid Architecture, 2019) 15.

⁸ Manderson, *Songs Without Music*, 49.

⁹ See also James Parker, *Acoustic Jurisprudence: Listening to the Trial of Simon Bikindi* (Oxford University Press, 2015) 29-33.

¹⁰ Parker, *Acoustic Jurisprudence*, 103. See also Peter Leman, ‘Singing the Law: Okot p’Bitek’s Legal Imagination and the Poetics of Traditional Justice’ (2009) 40(3) *Research in African Literatures* 109.

¹¹ Parker, *Acoustic Jurisprudence*, 86.

performance.¹² Secondly, there are cultural factors that militate against song in court. Thirdly, ‘speech actually *sounds* legal, whereas song unequivocally does not.’¹³ Finally, song is a ‘transgression of the ordinary principles of courtroom orality.’¹⁴

In relation to cultural factors, Parker’s central contention is that ‘song is not a permissible idiom in the Western courtroom.’¹⁵ Fellow law and music scholar Hanne Petersen likewise contends that ‘western legal systems and theories... have cut out or ignored the cultural and “musical” components of law.’¹⁶ For example, singing as evidence is permitted under the Australian *Federal Court Rules*,¹⁷ but this is only in relation to native title proceedings. Similarly, the Canadian Federal Court’s *Practice Guidelines for Aboriginal Law Proceedings* permit evidence to be presented through song,¹⁸ though the equivalent *Federal Court Rules* are silent on singing in general proceedings. Singing is very present in non-Western legal traditions.¹⁹ Petersen recalls the Inuit tradition of song duels as conflict resolution,²⁰ and suggests that song duels were utilised perhaps in part because the polysynthetic nature of Greenlandic is more musical than synthetic speech in English and other languages.²¹ Just as song can be used as a way of settling legal disputes, it can also be used as a way of sharing law. In *Delgamuukw v British Columbia*, a female elder sought to sing a song as a means of sharing the oral history of her people and their relationship to country. However, the judge in the proceeding expressed considerable embarrassment at the possibility of singing in court. His Honour variously questioned whether the song was necessary, whether it might detract from the time of hearing, and whether he would be equipped to hear and appreciate the music, concluding ‘this is a trial, not a performance.’²² The embarrassment from the judge at the song in court and his inability to adequately

¹² Parker, *Acoustic Jurisprudence*, 87-89.

¹³ Parker, *Acoustic Jurisprudence*, 91.

¹⁴ Parker, *Acoustic Jurisprudence*, 99.

¹⁵ *Ibid* 93.

¹⁶ Hanne Petersen, ‘On Law and Music: From Song Duels to Rhythmic Legal Orders’ (1998) 30 *The Journal of Legal Pluralism and Unofficial Law* 80.

¹⁷ *Federal Court Rules 2011* (Cth) rule 34.123.

¹⁸ Federal Court of Canada, *Practice Guidelines for Aboriginal Law Proceedings* (April 2016) 33.

¹⁹ Parker, *Acoustic Jurisprudence*, 103-104 n 102-103. See also Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (Weidenfeld and Nicolson, 1990) 182.

²⁰ Petersen, ‘On Law and Music’, 75-77. For a contemporary adaptation, see Jack Tan’s *Karaoke Court*, discussed in Lucy Finchett-Maddock, ‘Forming the Legal Avant-Garde: A Theory of Art/Law’ (forthcoming) *Law Culture and the Humanities* 25-26.

²¹ Petersen, ‘On Law and Music’, 78.

²² Leslie Pinder, ‘The Carriers of No’ (1999) 28(4) *Index on Censorship* 67-69.

comprehend it are revealing,²³ and discussed later in this chapter. My concern, however, is that much of the scholarship too readily pitches the relation between law and music as pre-industrial²⁴ or non-Western and in doing so accepts an idea that modern Western law is antithetical to music. Yet even within the contemporary Western courtroom, legal performers may not be singing per se but the rhythm of speech and background noise has a musical quality to its character. Air-conditioning units and computer fans create ambient noise, fluorescent lighting hums away,²⁵ and the contemporary lawyer's cant sounds like a chant.²⁶

As Parker astutely reminds us, 'language is law's lifeblood.'²⁷ However, as William O'Barr notes in his study of legal language, 'in contrast to the attention devoted to written legal language, little systemic effort... has been focused on spoken language. As a consequence, relatively little is known about the nature of spoken legal language.'²⁸ This would seem a striking oversight given that one of the leading works on evidence claims that 'perhaps the most important feature of a... trial, civil or criminal, is its "orality".'²⁹ O'Barr uses the term 'court talk' to refer to 'language varieties spoken in trial courtrooms.'³⁰ In earlier work, John Atkinson and Paul Drew argue that 'it is clearly *not* "ordinary talk" that takes place in courts of law, and... there is a sharp distinction to be drawn between the kinds of talk that characterise court proceedings and those which are to be heard in various other contexts',³¹ even though 'it might not be easy to provide an exhaustive specification of the similarities

²³ His Honour's comments did not reflect the understanding that in indigenous legal systems, "oral traditions are not documents but rather *verbal messages*" to be spoken, sung or played on musical instruments: Bruce Miller, *Oral History on Trial: Recognising Aboriginal Narratives in the Courts* (UBC Press, 2011) 124 citing Jan Vansina, *Oral Tradition as History* (University of Wisconsin Press, 1985) 27. For discussion of another case of 'legal deafness' to song, *Western Forest Products v Richardson*, see Goodrich, *Languages of Law*, 179-185.

²⁴ Bernard Hibbitts, 'Coming to Our Senses: Communication and Legal Expression in Performance Cultures' (1992) 41(4) *Emory Law Journal* 902-903.

²⁵ Parker, *Acoustic Jurisprudence*, 183.

²⁶ Gary Watt, 'The Character of Social Connection in Law and Literature: Lessons from *Bleak House*' (2009) 5(3) *International Journal of Law in Context* 271. See also Gary Watt, 'Rule of the Root: Proto-Indo-European Domination of Legal Language' in Fiona Smith and Andrew Lewis (eds.), *Law and Language: Current Legal Issues* (Oxford University Press, 2013) 571.

²⁷ Parker, *Acoustic Jurisprudence*, 22.

²⁸ William O'Barr, *Linguistic Evidence: Language, Power and Strategy in the Courtroom* (Academic Press, 1982) 23-24. See also Parker, *Acoustic Jurisprudence*, 30-32.

²⁹ John Heydon (ed.), *Cross on Evidence* (LexisNexis, 2019) [17170].

³⁰ O'Barr, *Linguistic Evidence*, 40 n 14.

³¹ John Atkinson and Paul Drew, *Order in Court: The Organisation of Verbal Interaction in Judicial Settings* (Humanities Press, 1979) 6. However, they do caution that whilst court talk might be characterised by heightened speech, like in a theatre, the assumed contrast between court talk and ordinary talk may not be sustainable: 14-17.

and differences involved.³² Peter Goodrich also remarks that courtroom speech is underpinned by the particularly authoritative nature of legal discourse and language as a whole.³³ Yet, whilst there is generally a ‘strictly controlled order and tone of speech’ in court,³⁴ there is very little *explicit* regulation of the *manner* of talking in court.³⁵ This is despite the fact that ‘presentational style is highly significant in affecting the reception of courtroom testimony’,³⁶ which is to say that form communicates as much as content.³⁷ As O’Barr states, ‘the style in which testimony is delivered strongly affects how favourably the witness is perceived, and by implication suggests that these sorts of differences may play a consequential role in the legal process itself.’³⁸ It is notable that despite the attention to the spoken word amongst this work, there is very little discussion of the *sound* of legal speech, yet alone its musicality. Moreover, the scholarship bewrays an acknowledged tendency to ‘consider the legal system from the viewpoints of lawyers’ and their interests,³⁹ rather than the perspective of the listening audience. This is despite the possibility that the musicality or *cantabile* quality of speech can manipulate the listening audience.⁴⁰

Again, Parker eloquently argues that

Speech and song are coextensive, separated more by degree than by type. It is the voice which presents their common denominator, the means by which the one always approaches the other. Indeed, we could say that the voice is precisely the musical in speech... It is precisely in the voice that music and lyric come together.⁴¹

Largely absent from the scholarship on legal language, this musicality has instead been picked up by composers who have listened to and remixed legal speech in innovative ways. Their work suggests ‘the notion that there is an inherent musicality

³² Atkinson and Drew, *Order in Court*, 9.

³³ Goodrich, *Languages of Law*, 194.

³⁴ Goodrich, *Languages of Law*, 191.

³⁵ Atkinson and Drew, *Order in Court*, 9.

³⁶ O’Barr, *Linguistic Evidence*, xii.

³⁷ O’Barr, *Linguistic Evidence*, 1-2.

³⁸ O’Barr, *Linguistic Evidence*, 71.

³⁹ O’Barr, *Linguistic Evidence*, 119.

⁴⁰ Matthew Lockett, *The Musical Is Drama: Apollonian and Dionysian Dynamics and Liminal Ruptures in the Contemporary Musical Theatre* (PhD Thesis, Monash University, 2014) 190-192.

⁴¹ Parker, *Acoustic Jurisprudence*, 128-130.

to speech’,⁴² including legal speech. Resisting the temptation to draw trite analogies between the composition of music and law well trodden elsewhere, I instead suggest that musical composers are more attuned to the musicality of speech than legal practitioners and thus it may be productive to turn our ears to the work of these composers when thinking about law and its relation to sound. These works can helpfully illuminate the musical dimensions of legal speech and enable us as listeners to better attune to the musicality of legal prose and its effect on us.

Musicalisation as method

David Roesner and Bella Martin’s ‘The Document as Music: Exploring the Musicality of Verbatim Material in Performance’, which was informed by ‘a series of explorative workshops on the relationship between documentary material and its music-theatrical treatment’,⁴³ underpins much of my reflections on the phenomenon of verbatim musical theatre. Like Roesner and Martin, I am interested in ‘the human voice and the musicality of daily speech’ and the notion of the ‘human voice as instrument.’⁴⁴ In particular, I share their interest in ‘the relationship between the *content* of human expression (what we say and how eloquently or otherwise we say it) and the naturally musical *form* of that expression (tempo, rhythm, melody, repetition, etc.)’ and, in considering speakers, ‘not so much *what* they said as *how* they said it sonically and rhythmically.’⁴⁵ My focus here is on the sung words not the musical accompaniment.⁴⁶

In writing of the musicality of legal performance, I adopt Roesner and Martin’s definition of musicality as that which is musical or pertains to music. As they write:

Musicality... points us toward aesthetic forms, as well as modes of perception, cognition, or embodiment, that are informed by notions of music, while remaining well aware that these notions differ depending on historical and social context. In a wider sense, musicality can be a *quality*

⁴² Ali-Reza Mirsajadi, *Spectrums of Truth: Transcribing Reality in the Documentary Musical* (MA Thesis, Tufts University, 2015) 196. See also 201.

⁴³ David Roesner and Bella Martin, ‘The Document as Music: Exploring the Musicality of Verbatim Material in Performance’ (2018) 15 *Journal for Artistic Research*.

⁴⁴ Roesner and Martin, ‘The Document as Music’. See also Christine Buoko’s distinction between ‘voice as sound vs. voice as discourse’: ‘Jazz Musicality in Postdramatic Theatre and the Opacity of Auditory Signs’ (2010) 4(1) *Studies in Musical Theatre* 78.

⁴⁵ Roesner and Martin, ‘The Document as Music’.

⁴⁶ For a good discussion of law and instrumental music, see Rudolf Ondrich, ‘Reading Wilhelm Furtwangler Jurisprudentially: Furtwangler’s Music Making in the Light of Legal Philosophy’ (2018) 31 *International Journal for the Semiotics of Law*.

of creating, with which one might approach any material. However, it may also be a *quality of perception* to be discovered or unearthed in phenomena, like John Cage hearing the New York traffic as music.⁴⁷

The work of the composers that I consider in this chapter are works of musicalisation, which Roesner and Martin describe as ‘a conscious and intentional process of bringing forth or superimposing musical qualities – such as recognisable rhythmic or melodic qualities or distinct formal structures – in material which is not conventionally seen as music per se: spoken text, gesture, movement.’⁴⁸ Building on Roesner and Martin, I argue that musicalisation can be used as a method to unearth the musical qualities of legal speech and how these affect legal audiences.

Verbatim musilegal theatre

In the section that follows, I consider *how* composers use musicalisation to reveal aspects of legal speech. Through examination of their work, a question emerges over of whether the musical composer is bringing forth or superimposing musical qualities. I explore this through the motif of colouring set against authenticity, and case studies of short remixes of legal speech and two works of verbatim musilegal theatre: *Lindy*, based on the 1982 Northern Territory Supreme Court case of *R v Chamberlain*, and *Committee*, based on the 2015 inquiry by the United Kingdom House of Commons Public Administration and Constitutional Affairs Committee into the financial collapse of children’s charity Kids Company. Later, I go on to consider the music itself.

Approaches

Remixing the law

To begin with, I invite you to listen to the following compilation extended play of remixes of ‘legal speech’ drawn from transcripts of courtroom and parliamentary hearings. Just as ‘the phrase “the talk which occurs in court settings” is perhaps misleading if it is taken to suggest that there is only one kind of talk in courts’,⁴⁹ the term ‘legal speech’ should be taken to mean speech in legal institutions – courts and parliaments – not just be legal agents, but by all actors. I have also included as bonus

⁴⁷ Roesner and Martin, ‘The Document as Music’.

⁴⁸ *Ibid.*

⁴⁹ Atkinson and Drew, *Order in Court*, 34-35.

tracks two examples that fall outside my definition of ‘legal speech’ (coming as they do from politicians’ press conferences) that attest to the durability of this broad form in this pandemic culture.

REMIXING THE LAW EP

01 The Gregory Brothers ft. Barack Obama *1999* (track [here](#))⁵⁰

02 MC Conrovian *Fancy Pants* (track [here](#))⁵¹

03 Adam Joseph ft. Maxine Waters *Reclaiming My Time* (track [here](#))⁵²

04 Mykal Kilgore *Reclaiming My Time* (track [here](#))

05 Australian Voices ft. Julia Gillard *Not Now, Not Ever!* (track [here](#))⁵³

06 Ted Hearne *Ch(oral) Argument* (track [here](#))⁵⁴

BONUS TRACKS

01 Mashd N Kutcher ft. Daniel Andrews *Get On The Beers Remix* (track [here](#))⁵⁵

02 Jeff van de Zandt ft. Scott Morrison *Andrew* (track [here](#))⁵⁶

The tracks span a diverse array of musical genres from bitch house⁵⁷ to gospel to auto-tune. In the case of the latter, the process of ‘songifying’ digitally manipulates the recorded voices of politicians through auto-tune to conform to a melody, making

⁵⁰ From President Barack Obama’s final State of the Union address: Shira Karsen, ‘Watch President Obama Drop Mic in State of the Union Remix’, *Billboard* (13 January 2016).

⁵¹ The song has a rather complex genesis. It is a remix of Odd Mob’s *Is It A Banger?* that features Tom Haverford (Aziz Ansari) of *Parks and Recreation*. However, it replaces the lyrics with dialogue from a late night Australian Senate debate wherein Labor Senator Stephen Conroy enthusiastically attacked Greens Leader Senator Richard di Natale over a *GQ* magazine photo shoot, mocking his ‘fancy pants’: Alice Workman, ‘The Senate Literally Didn’t Go To Sleep Last Night and Shit Got Weird’, *BuzzFeed News*, 17 March 2016. The moniker ‘MC Conrovian’ is a nickname for the Senator coined by former Prime Minister Malcolm Turnbull: Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 2013, 2392 (Malcolm Turnbull).

⁵² From the United States House Financial Services Committee hearing wherein Representative Maxine Waters famously repeated ‘reclaiming my time’ to ask for her time back when questioning a verbose testifier.

⁵³ From Prime Minister Julia Gillard’s infamous misogyny speech on the floor of the Australian House of Representatives.

⁵⁴ From oral arguments made in the United States Supreme Court case of *Citizens United v Federal Election Commission*.

⁵⁵ Shive Prema, “‘Get On The Beers’: Premier Dan Andrews’ Falls Victim to a Very Naughty Editing Prank as Victorians Endure Australia’s Strictest Lockdown”, *Daily Mail* (13 May 2020).

⁵⁶ Zac Crenlin, ‘We Spoke to the Aussie Legend Who Went Viral for Dancing to the PM’s Coronavirus Presser’, *Pedestrian* (31 March 2020).

⁵⁷ A style of house music popular in ballroom and club culture in the 1990s that samples vocal phrases. In *Reclaiming My Time*, Joseph spins the bitch track mould by using the transcript of a parliamentary committee meeting as its lyrics.

the politicians appear to sing.⁵⁸ In his analysis of the songify phenomenon, YouTube's Head of Culture and Trends, Kevin Allocca, describes it as 'a creative endeavour that can accentuate the natural absurdist qualities of something, rather than entirely reframe it.'⁵⁹ However, the auto-tuning process can disrupt the natural melisma of (particularly black) voices.⁶⁰ Yet, the Gregory Brothers state that they try to keep to 'whatever the original voice is.'⁶¹

Similarly, in *Not Now, Not Ever!*, the composer Rob Davidson scored both the actual speech itself and the choral accompaniment.⁶² His approach was to write music to accompany 'the rhythms and pitches as I *found* them' within the speech.⁶³ In her analysis of the work, Linda Kouvaras suggests that he is "'getting inside" her voice to voice what she says',⁶⁴ examining her 'speech contours',⁶⁵ and highlighting her 'speech-melody',⁶⁶ which is buried underneath the tone of her speech. In doing so, he 'brings out the musicality within the person.'⁶⁷ Davidson has suggested that, through his composition, he was not only aiming to bring out the latent musicality but also to pick up on the emotional undercurrents of the speech: 'I wanted to put a frame around this slice of time, to heighten my perception of what was being said behind the words, in the intonation of the voice.'⁶⁸ Kouvaras contends that it is his 'highly sympathetic engagement with the emotional tenor of her speech reminds us of the ever-present human dimension.'⁶⁹ In *Not Now, Not Ever*, we can hear the composer's work to bring out the musicality and the emotion latent in legal speech.

There is a recurring question within this work as to whether musicalisation is bringing forth the musicality latent within legal speech or creating a musicality for legal speech; whether the compositional process is a process of discovery – that is to say,

⁵⁸ Claire Suddath, 'Auto-Tune the News', *Time* (27 April 2009).

⁵⁹ Kevin Allocca, *Videocracy: How YouTube is Changing the World... with Double Rainbows, Singing Foxes, and Other Trends We Can't Stop Watching* (Bloomsbury, 2018) ??

⁶⁰ See Jace Clayton, 'Pitch Perfect', *Frieze* (5 May 2009).

⁶¹ Allocca, *Videocracy*, ??

⁶² Linda Kouvaras, '(Post?-)Feminism, "New Topicality" and the "New Empathy": Australian Composers Working with the Concrete' in Dorottya Fabian and John Napier (eds.), *Diversity in Australia's Music: Themes Past, Present and for the Future* (Cambridge Scholars Publishing, 2018) 207-208.

⁶³ Rob Davidson cited in Kouvaras, 'Australian Composers Working with the Concrete', 216.

⁶⁴ Kouvaras, 'Australian Composers Working with the Concrete', 217.

⁶⁵ *Ibid* 222.

⁶⁶ *Ibid* 207.

⁶⁷ *Ibid* 210.

⁶⁸ *Ibid* 206-207.

⁶⁹ *Ibid* 212.

there is flow or rhythm inherent in the legal text that the composer discovers and musicalises – or whether the compositional process is a process whereby flow or rhythm is created instinctively by the composer. These questions reflect, in part, the discoverist versus creationist debate in musical aesthetics.⁷⁰ All the tracks exemplify a bit of both tendencies and cannot be neatly placed into one category or the other. Ambiguity rests in the irresolvable tension between the two tendencies. Consider this: a backing track is added to a legal speech and, over time, the listener cannot hear the original without hearing the beat in their mind's ear. Is this because the speech does indeed have a musical quality to it that the backing exemplifies or is it because the backing alters the qualities of the original to introduce a musicality not otherwise there, a kind of 'speech-to-song illusion'?⁷¹ Resting in this ambiguity for a moment, I shall go on to consider two examples of verbatim musilegal theatre where the musical production that is based entirely or significantly on legal transcripts. Like the legal remixes discussed above, these productions also raise questions of whether the composer is exposing or superimposing musicality in speech, which I consider through the notions of colouring and authenticity.

Lindy

Opera Australia's 2002 production of *Lindy* was drawn, in part, from the Northern Territory Supreme Court trial of *R v Chamberlain* ([excerpt here](#)). One of Australia's most famous legal cases, the 1982 trial concerns the charge against Lindy Chamberlain over the murder of her baby daughter, Azaria, whom she famously claimed was taken by a dingo whilst the family was camping at Uluru in the Northern Territory. Chamberlain was initially found guilty,⁷² however, the conviction was later quashed following the discovery of new evidence.⁷³

⁷⁰ See, e.g., Donald Walhout, 'Discovery and Creation in Music' (1986) 45(2) *The Journal of Aesthetics and Art Criticism*.

⁷¹ Consider the example of Steve Reich's *It's Gonna Rain* where the repetition of a phrase draws out the melodic qualities of the original speech and soon enough it becomes impossible not to hear that melodic dimension. For further discussion, see Rhimmon Simchy-Gross and Elizabeth Margulis, 'The Sound-to-Music Illusion: Repetition Can Musicalise Non-speech Sounds' (2018) 1 *Music and Science*.

⁷² *R v Chamberlain* (Unreported, Northern Territory Supreme Court, Muirhead J, 29 October 1982).

⁷³ *Re Chamberlain* [1988] NTCCA 3 (15 September 1988). For the history of the opera, see Larry Sitsky, 'Relationships-in-Progress: First Time Collaborators Discuss the Evolution of Their Soon-to-be Premiered Operas' (1997) 15(49) *Sounds Australian*; and Miriam Cosic, 'Dingoes and Divas – The Making of an Opera Called *Lindy*', *The Australian Magazine* (19 October 2002).

The trial scene of the opera ‘is very much determined by transcripts of actual events’,⁷⁴ in particular, the defendant’s cross-examination. The composer, Moya Henderson, was working off a trial transcript that was gifted to her by a friend, and it was ‘blindingly obvious’ to her that the story should be turned into an opera.⁷⁵ ‘I was watching it, experiencing that whole saga as it happened and I knew from very early on that it was an opera.’⁷⁶ As critic John Rickard writes, ‘the unfolding of the Azaria case is exactly the kind of epic story that conjures up the possibility of musical drama, while Lindy Chamberlain herself, enigmatically, even tragically self-possessed, suggests a heroine of operatic proportions.’⁷⁷ Henderson says, ‘some of my favourite text is taken from the transcript of the trial’⁷⁸ and regards it as ‘the exhilarating part of the opera.’⁷⁹ In an otherwise critical review of the opera, Chris Boyd writes that it ‘comes alive in the courtroom scenes’ where actual transcripts are used: it is ‘here – when Henderson is most bound – that she shows her greatest creativity and ease.’⁸⁰ Unlike author John Bryson, whose *Evil Angels* was adapted into the film starring Meryl Streep, she did not attend the trial; relying instead on the transcript gifted to her. The trial was not broadcast (though two closed-circuit television cameras were set up in the court to beam the proceedings to the press-room in the building next door to the courthouse⁸¹). On working with words, she goes on to say that ‘so much is given from the text. The mood, the structure is given to you by the actual text.’⁸² However, the ‘music dictates... [and] has to have the final say.’⁸³ What the music offers is ‘an intensity and a prolongation of emotional feeling’ and ‘a way of saying through art.’⁸⁴

Her strict adherence to the text of the trial earned the ire of critics. Matthew Westwood, in his review of the opera, wrote:

⁷⁴ Anne Power, *Voiced Identity: A Study of Central Characters in Seven Operas from Australia 1988-1998* (PhD Thesis, University of Wollongong, 1999) 88.

⁷⁵ Andrew Ford, Interview with Moya Henderson (Radio Interview, 5 July 2015).

⁷⁶ Rebecca Baillie, ‘Azaria Chamberlain story provides inspiration for new opera’, *The 7.30 Report* (22 October 2002).

⁷⁷ John Rickard, ‘Aria for Azaria’ (2002) 12(10) *Eureka Street* 16.

⁷⁸ Linda Kouvaras, ‘Giving Voice to the Un-voiced “Witch” and the “Heart of Nothingness”: Moya Henderson’s *Lindy*’ in Pamela Karantonis and Dylan Robinson (eds.), *Opera Indigene: Re/presenting First Nations and Indigenous Cultures* (Routledge, 2011) 126 n 60.

⁷⁹ Andrew Ford, Interview with Moya Henderson (Radio Interview, 26 October 2002).

⁸⁰ Chris Boyd, ‘*Lindy* the opera goes missing’, *Australian Financial Review* (2 November 2002).

⁸¹ John Bryson, *Evil Angels* (Viking, 1985) 341.

⁸² Ford, Interview with Moya Henderson (2015).

⁸³ Sitsky, ‘Relationships-in-Progress’, 17.

⁸⁴ Ford, Interview with Moya Henderson (2002).

Lindy took the Chamberlain case so literally that it failed to engage as musical theatre. The subject would appear to be rich with possibility... Yet the opera had its characters singing from a court transcript for a libretto. *Lindy* fell into the same trap as the documentary or ‘verbatim’ plays that have become fashionable in recent years. Theatre is a product of the imagination, and one where an audience is invited – and usually consents – to suspend disbelief. The closer a dramatic work comes to documentary realism, the more limited its potential for theatre. It’s the same with opera, but here the gap between life and art is even greater, by virtue of the fact that opera demands people sing.⁸⁵

Westwood misses the fact that what is most interesting about this opera *is* the fact that it is both real and utterly legal. Without *Lindy*’s encounters with the law, there is little of dramatic interest to the story. No (soap) opera. The fact that it is so contemporary and that so much of the case played out in the public eye – and ear – lends the opera a ‘disturbingly still warm immediacy’, albeit controversial.⁸⁶ On the contrary, Linda Kouvaris argues that ‘by sticking to a realist portrayal of events, through the use of transcripts from the court... the opera allows the story... to be set in sonic stone’, giving it its own particular sonic rendering.⁸⁷ Whilst the adaption of the trial transcript into score is a departure from the realist approach of some verbatim legal theatre-makers discussed in Chapter Four, in *Lindy*, the music imposes sonic dimensions to – or exposes the sonic dimensions of – legal speech. John Slavin argues that the score is ‘fatally forced to follow the characters’ speech rhythms, rather than cut across them with its own expressive colouring.’⁸⁸ Criticisms aside, this is one of the real challenges of verbatim musilegal theatre: how it adheres to the rhythms of speech. The question of imposing or exposing musicality of speech is discussed further later. What I suggest is that the process of musicalisation can expose the rhythms inherent in speech and the effects that the musicality of speech can have on the listening audience.

⁸⁵ Matthew Westwood, ‘Has opera lost the plot?’, *Weekend Australian* (25 March 2006).

⁸⁶ This comment comes from Michael Shmith’s review of Victoria Opera’s *Midnight Son*, based on the murder of Maria Korp: *The Age* (18 May 2012). Similar controversies surrounded the Metropolitan Opera’s *The Death of Klinghoffer* based on the murder of Leon Klinghoffer and the English National Opera’s *Between Worlds* based on the September 11 terrorist attacks. For further discussion, see Caroline Baum, ‘Forget Fantasy, Opera Gets Real’, *Weekend Australian* (23 May 1992).

⁸⁷ Kouvaras, ‘Giving Voice to the Un-voiced “Witch” and the “Heart of Nothingness”’, 138-139.

⁸⁸ John Slavin, ‘Ambitious approach, but a thing of shreds and patches’, *The Age* (28 October 2002).

Committee

This idea is drawn out in Donmar Warehouse's *Committee*, composed by Tom Deering ([listen here](#)) from a transcript of the 2015 hearing by the United Kingdom House of Commons Public Administration and Constitutional Affairs Committee into the financial collapse of the children's charity Kids Company, though the play is not strictly chronological.

Many have compared *Committee* to National Theatre's *London Road* ([listen here](#)). However, when dealing with the verbatim script, Deering did not 'transcribe the exact way that it was said' but instead set it as a more traditional libretto.⁸⁹ How the characters speak is infused into the music itself. Deering describes the process from text to melody as 'trying to imagine a "sound world" for these people.'⁹⁰ Each of the characters have a leitmotif 'informed by how they speak; when Camilla [Batmanghelidjh, the then chief executive of Kids Company] says "actually", she says that the same every time, so in the music it has the same phrasing... [Committee Chair] Bernard Jenkin has a very crisp way of speaking and that is infused in the music itself.'⁹¹

The music also picks up changes in character. In discussing his work, Deering has spoken of the desire to 'feel like what [the characters] are saying in the words are reflected in an abstract way through the melody and through the music'⁹² and how this is thought through in the compositional process. He offers fascinating insight into how a composer identifies the music in legalistic dialogue: 'I imagined what it would be like to be Bernard Jenkin, and not to judge him, or Camilla Batmanghelidjh.' On reflecting on the transcript, he says that music 'is the most direct way in.'⁹³ However, he does not specify into what. One assumes, drawing from the discussion of *Lindy*, that music is the most direct way in to the emotional subtext of language. The compositional process is a new way of listening to law, listening with a composer's ear, and thinking through how law sounds musically. As Deering concludes, 'the

⁸⁹ Sophie Watkiss, *Committee: Behind the Scenes* (2017).

⁹⁰ Clare Slater, Interview with Tom Deering (Donmar Warehouse, 7 August 2017).

⁹¹ Watkiss, *Committee: Behind the Scenes*.

⁹² *Ibid.*

⁹³ *Ibid.*

music is already inside there, and it's about discovering the music, rather than sticking some music on top of it.'⁹⁴

Colouring

The compositional process that those working in this field undertake is one of discovery. As Deering says, when dealing with a legal performance, 'there's so much happening under the surface... Music allows you to access all that. You gain a visceral connection to it all.'⁹⁵ Theatre critic Matt Trueman, writing on Deering's composition, says that beneath the veneer of 'a standard meeting room, he sees a room full of powerful people, each with their own personal history and public image, and full of symbols – the state, the liberal elite, charity and poverty' and that his music explores what is happening under the surface like 'colouring in a picture or turning up the contrast on an old television screen.'⁹⁶ As Roesner and Merlin describe in relation to their practice-led research:

Music and sound could be used to *colour* the documentary material through its power to foster conscious or subconscious intertextual connections... In general, these colours lifted the direct resonances of the subjects' words away from their contextual specificity towards a broader affectiveness. Colouring through the use of music seemed, at times, to be more pertinent to an emotional or atmospheric aspect of how we relate to the documentary material.⁹⁷

Drawing from a long line of theorizing in which music vis-à-vis speech is linked to emotion,⁹⁸ Belinda Middlewick writes, 'the addition of music in a simulated courtroom heightens the portrayal of emotion on stage.'⁹⁹ This is not to say that there is a lack of emotion in the original trial, but to say that the music works to heighten, increase or even exaggerate the emotion in the original.

Deering talks of how he tries to create space in music for these sub-textual ideas and expressions of emotion to come out, but oscillates as to whether it is the words or the

⁹⁴ *Ibid.*

⁹⁵ Matt Trueman, 'Tom Deering: "No one is interested in making a musical any more"', *The Stage* (7 July 2017).

⁹⁶ *Ibid.*

⁹⁷ Roesner and Martin, 'The Document as Music'.

⁹⁸ Petersen, 'On Law and Music', 79-80.

⁹⁹ Belinda Middlewick, *Dingo Media? R v Chamberlain as a Model for an Australian Media Event* (PhD Thesis, University of Sydney, 2007) 215.

music that dictates his composition.¹⁰⁰ In composing, he tries to ‘derive a rhythm from what was spoken’ with an attention to the speed of dialogue, varying between recitative (or *sprechgesang*), arioso and aria in song styles.¹⁰¹ In other musicals featuring legal speech, the legal speech is usually delivered spoken or as *sprechgesang* as opposed to sung,¹⁰² with a notable exception being *Parade*, where the legal speech is more recitative.¹⁰³ In their practice-led research, Roesner and Merlin worked with verbatim voices:

We aimed to foreground the voices almost as musical instruments, fitting a simple jazzy beat and baseline underneath. Listening back... our sense was that the discursive content of *what* was being said remained present; at the same time, the musical quality of *how* it was being said, particularly with respect to timbre, cadence and rhythm, became more prominent.¹⁰⁴

It is revealing that the compositional process does not, according to the composers, disrupt *what* is being said but rather highlights *how* it is being said and, in particular, its rhythm. The compositional process also utilises music as a way of accessing the emotional underworld of speech,¹⁰⁵ and contextualising ‘the verbatim material, making the real words more clearer and more profoundly felt.’¹⁰⁶ However, Deering’s opening comment again points to one of the challenges in this field: namely, whether the composer is superimposing music on the words or allowing the words to dictate their own rhythm that is subsequently expressed in song. This is especially troubling for verbatim musilegal theatre, as it can change the reception of the legal transcript. Theatre critic Michael Billington says ‘music is never neutral. By sharing our response to the material, it overlays it with editorial content.’¹⁰⁷ In the next section, I shall consider how composers deal with questions of truth and authenticity.

¹⁰⁰ Slater, Interview with Tom Deering.

¹⁰¹ *Ibid.*

¹⁰² Lockitt, *The Musical Is Drama*, 64, 133, 141, 222.

¹⁰³ *Ibid* 188-194.

¹⁰⁴ Roesner and Martin, ‘The Document as Music’.

¹⁰⁵ Mirsajadi, *Spectrums of Truth*, 201-203, 206.

¹⁰⁶ Mirsajadi, *Spectrums of Truth*, 205.

¹⁰⁷ Michael Billington, ‘Batmanghelidjh and Yentob Face the Music in Kids Company Musical Committee’, *The Guardian* (5 July 2017).

Authenticity

In reflecting on his compositional process in *Committee*, Deering also talks of trying to set the truth of it in composing.¹⁰⁸ However, given that legal performance so often challenges the idea of whose truth is real, this may not be achievable and instead might reveal that there are multiple truths underlying the legal dialogue.¹⁰⁹ In this section I will consider how composers deal with the issue of authenticity in their work in light of the greater question of whether the composer is bringing forth or superimposing musical qualities in their work with legal speech.

National Theatre's *London Road*, with a book by Alecky Blythe and music by Adam Cork, is another such example. Blythe is quite unique in her verbatim playwriting as she often develops a 'sound text' rather than a script,¹¹⁰ 'a kind of score.'¹¹¹ In *London Road*, Cork was involved early in the process through a collaborative theatre workshop at the National Theatre. In their work, which concerns a local community's reaction to the search for and subsequent trial of a serial killer that turns out to be their neighbour, voice is reconfigured 'as sound pattern.'¹¹² I disagree with the thesis, implicit in Lib Taylor's analysis of *London Road*, that music adds inauthenticity and that 'the reworking of speech into song signals the absence of the real.'¹¹³ Instead, reflection on Cork's compositional process reveals a search for the real – how his voice and that of the verbatim subjects has a musical quality to it – and the expression of that in a musical form. Cork says that his compositional process necessitated him listening to audio recordings of Blythe's interviews and, in particular, 'listening very carefully to the way people said things and finding the music in that.'¹¹⁴ In this way, 'the music... had to live truly in the language.'¹¹⁵ He invites others to 'listen to spontaneous speech, just how musical it is, how much a tune is being sung as we speak and how much truth you can sort of divine from it.'¹¹⁶ Here, Cork reveals that

¹⁰⁸ Slater, Interview with Tom Deering.

¹⁰⁹ Sean Mulcahy, 'UK Parliamentary Inquiry Turned Verbatim Musical: A Theatre Review' (2018) 43(1) *Alternative Law Journal* 66, 66.

¹¹⁰ Lib Taylor, 'Body, Voice and the Transmission of the Real in Documentary Theatre' (2013) 23(3) *Contemporary Theatre Review* 370.

¹¹¹ *Ibid* 373.

¹¹² *Ibid* 375.

¹¹³ *Ibid* 379.

¹¹⁴ National Theatre, Interviews with Alecky Blythe, Adam Cork and Rufus Norris (Online Interview, 10 July 2012).

¹¹⁵ Mirsajadi, *Spectrums of Truth*, 195.

¹¹⁶ Mark Lawson, Interview with Adam Cork (Radio Interview, 13 April 2011).

his compositional process is a search for the musical in speech and the truth it is capable of revealing.

As Cork remarks of the final work:

I find that hearing the natural speech patterns sung... can have the effect of distancing the audience from the 'character', and even the 'story', but in a positive way that alters the quality of listening. Making spontaneously spoken words formal, through musical accompaniment and repetition, has the potential to explode the thought of a moment into slow motion, and can allow us to more deeply contemplate what's being expressed.¹¹⁷

What Cork seems to be suggesting is that the musicalisation can force a concentration on the words themselves, rather than the character delivering them or the story they are a part of. This concentration on the words themselves can allow deeper contemplation of what is being said and, I argue, *how* it is being said. It can attune the listener to the manipulative dimensions of spoken words; that is, how they are crafted to have a particular affect on the listening audience. The process of musicalisation provides the listener with a deeper understanding of the affective qualities of legal speech. In his analysis of the work, Demetris Zavros argues that the music in *London Road* 'is a poetic accentuation of the musical attributes that *already exist* in the language.'¹¹⁸

Musicalisation has to understand the words in order to be effective. As Roesner and Merlin describe, 'musicalisation (in the form of rhythmic montage, composition, or musical commentary) could be used to interfere with meaning and the intention of what was said... [or] as a *codebook* with which to arrive at some more latent meanings... [that] lie not solely in *what* people said... but *how* they said it.'¹¹⁹ The process of putting something to music may be a way of uncovering a deeper understanding of its meaning. However, Roesner and Martin's work demonstrates one of the challenges of verbatim musical theatre: is the composer discovering and

¹¹⁷ Alecky Blythe and Adam Cork, *London Road* (Nick Hern, 2011) x.

¹¹⁸ Demetris Zavros, 'London Road: The "Irruption of the Real" and Haunting Utopias in the Verbatim Musical' in George Rodosthenous (ed.), *Twenty-First Century Musicals: From Stage to Screen* (Routledge, 2017) 215.

¹¹⁹ Roesner and Martin, 'The Document as Music'. See the discussion of 'a hermeneutics of demystification' in Ruthellen Josselson, "'Bet You Think This Song is About You": Whose Narrative is it in Narrative Research?' (2011) 1(1) *Narrative Works*.

bringing forth the musicality latent within legal speech or superimposing a musicality on legal speech?

As Roesner and Merlin conclude:

[Musicalisation] deliberately undermines or complicates a more straightforward (and probably naïve) sense of authenticity. It interrogates what authenticity *is*: we felt that a case could be made for an authenticity of experience, rather than authenticity of the factual. In other words, a musical treatment may well encapsulate... atmosphere, sentiment, or intent more accurately than an unedited and faithful rendition... Musicalising the material makes these acts of mediation and interpretation of documents of experience arguably more tangible and transparent.¹²⁰

Applying Roesner and Merlin's thesis to the law the process of transcribing spoken word to text is a form of mediation that lacks the 'atmosphere, sentiment or intent' of those speaking in court. The technique of musicalisation utilised by the composers described can assist us in discovering the more latent meanings of legal speech. It can be a tool to explore the 'fantastically rich and multi-layered messiness of real speech'¹²¹ and 'avoid giving the impression that there is one accurate account... instead presenting the audience with an interpretation that is multilayered and multivocal.'¹²² Musicalisation can thus be conceived of as a methodology that, through compelling a different form of listening, helps the listener to uncover some of the nuance in legal speech. In what follows, I consider specific dimensions of legal speech that musicalisation can uncover.

Legal musilanguage

In her analysis of the cross-examination scene in *Lindy*, Power uses the term 'musical language' throughout, but does not define it. It is this term, however, that excites my imagination. It is composer Brian Elias who describes musical language as the symbiotic relationship between music and language.¹²³ Like Elias, I am not so interested in 'the mere putting of words to music or vice versa', but rather the idea

¹²⁰ Roesner and Martin, 'The Document as Music'.

¹²¹ Will Hammond and Dan Steward (eds.), *Verbatim Verbatim: Contemporary Documentary Theatre* (Oberon Books, 2008) 102.

¹²² Roesner and Martin, 'The Document as Music'.

¹²³ Brian Elias, 'Words and Music' (1989) 5 *Contemporary Music Review* 228.

that music comes from the voice.¹²⁴ Here, I return to a refrain from DJ Adam Joseph that, when listening to voice, the music within calls to us.¹²⁵ The musicality of language is inexplicably felt. As Elias goes on to describe, the rhythms, meter and tempo that mark music are already inherent in prose itself.¹²⁶ In an article on verbatim theatre, Derek Paget suggests that ‘there is something almost musical in these idiosyncratic rhythms [of everyday speech]. Whereas “ordinary” speech requires the actor to learn, interpret and “play” them through his/her vocal skills, here it is a case, indeed, of “the actor as instrument”.’¹²⁷ This musical rhythm latent within language becomes heightened at moments of emotional crescendo when it is as though the speaker needs to break out in song – ‘the need to make utterance’, as Elias describes this moment¹²⁸ – as if song would provide emotional catharsis, as discussed earlier. Latent behind the words is a whole emotional world that comes out in music.¹²⁹

As Atkinson and Drew note, when it comes to analysing legal speech, ‘there are a range of complex and difficult issues concerning what to listen for, which extracts to select for analytic attention, the grounds on which such selections are made, and how conclusions made about them are to be warranted.’¹³⁰ Rhetorician Bret Rappaport argues that there is ‘a complete acoustic experience to legal writing.’¹³¹ Though acknowledging the difference between speech and music,¹³² he suggests that the two overlap¹³³ and uses the term ‘musilanguage’ to describe this overlap.¹³⁴

Rappaport’s wide-ranging account documents how pitch operates as a memory aide,¹³⁵ how repetition creates cadence, crescendo and a responsive listener,¹³⁶ and how changes in syntax can affect emphasis.¹³⁷ In what follows, I consider the particular elements of rhythm, repetition and what I loosely term ‘tone’ (from the

¹²⁴ *Ibid* 225.

¹²⁵ Larry Flick, Interview with Adam Joseph (Radio Interview, 13 September 2017).

¹²⁶ Elias, ‘Words and Music’, 225-227.

¹²⁷ Derek Paget, “‘Verbatim Theatre’: Oral History and Documentary Techniques’ (1987) 3 *Theatre Quarterly* 331.

¹²⁸ Elias, ‘Words and Music’, 225.

¹²⁹ *Ibid* 227.

¹³⁰ Atkinson and Drew, *Order in Court*, 3.

¹³¹ Bret Rappaport, ‘Using the Elements of Rhythm, Flow and Tone to Create a More Effective and Persuasive Acoustic Experience in Legal Writing’ (2010) 16 *Legal Writing: Journal of the Legal Writing Institute* 91.

¹³² *Ibid* 76.

¹³³ *Ibid* 68.

¹³⁴ *Ibid* 72-76.

¹³⁵ *Ibid* 73, 77, 113.

¹³⁶ *Ibid* 79-81.

¹³⁷ *Ibid* 93.

Cambridge Dictionary's definition, 'a quality in the voice that exposes the speaker's feelings or thoughts, often towards the person being spoken to') in verbatim musilegal theatre.

Rhythm

Writing professor Peter Elbow observes that rhythm is 'a source of energy that binds time and pulls us forward'¹³⁸ and that 'rhythm and movement reach inside us.'¹³⁹ Elias goes even further to say 'that it is rhythm that is the principal vehicle for the communication of meaning.'¹⁴⁰ Rappaport observes that there is often a staccato marching rhythm to legal musilanguage,¹⁴¹ a flow leading to a conclusion,¹⁴² emulating the forward motion of the law. Though it can be said that legal musilanguage has a slow tempo to it, particularly where translation is required,¹⁴³ sentence length generally oscillates between short and long, creating balance.¹⁴⁴ It is so in *Committee*, where the beat and the lack of vibrato in the Committee's unison numbers create a brutal accusatory edge, which emulates the State.¹⁴⁵ By contrast, the musical language of Lindy, a legal outsider, is much more unorthodox. It is at times melismatic and lyrical and then snaps into regular rhythm and accentuated articulation at moments of exasperation. There is thus a contrast in the musilanguage of legal insiders versus outsiders.

In analysing *London Road*, Ali-Reza Mirsajadi notes:

Cork decided that the most distinctive quality of the speech in the audio recordings was its rhythm. The pauses and gaps, the stumbling over words and ideas, the variation of slow, decisive speaking and excited, rapid fire gabbing, all of these spoke directly to the inner realities of the interviewed subjects. He found that replicating the rhythm of the recordings would also capture the people's moods and attitudes about what they were

¹³⁸ Peter Elbow, 'The Music of Form' (2006) 57(4) *College Composition and Communication* 624.

¹³⁹ *Ibid* 652.

¹⁴⁰ Elias, 'Words and Music', 227.

¹⁴¹ Rappaport, 'Using the Elements...', 96-99.

¹⁴² *Ibid* 98.

¹⁴³ Parker, *Acoustic Jurisprudence*, 196.

¹⁴⁴ Rappaport, 'Using the Elements...', 86.

¹⁴⁵ Watkiss, *Committee: Behind the Scenes*.

saying... Cork wanted to cement the rhythm and texture of the interview speech within the music, itself.¹⁴⁶

Cork says, that as part of his compositional process in the past, he spoke ‘the words to myself, and transcribed the rhythms and melodic rise and fall of my own voice’,¹⁴⁷ in doing so, the music retains ‘a connection to the rhythms, tone and musicality of the original speech’¹⁴⁸ and is ‘representing the music of the speech.’¹⁴⁹ It was his hope that the ‘score would be like a time capsule inside which the speech rhythms would be captured and contained, frozen and fossilised in music.’¹⁵⁰ His musical director, David Shrubsole, concurs that the music ‘was completely accurate rhythmically and harmonically.’¹⁵¹ In this sense, the compositional response derives from listening or attuning to the words and emulates the speech rhythms of the original.¹⁵²

Cork observes that there is a ‘lack of rhyme or consistent meter or line length in spontaneous speech’ but rather has a ‘labyrinthine’ or ‘anarchic’ quality to it.¹⁵³ This plays itself out in his musical composition for *London Road* that picks up on, in particular, the paralinguistic dimensions of the spoken word. Indeed, Blythe revels in what she terms ‘the gorgeously unwieldy nature of real speech.’¹⁵⁴ Her scripts combine ‘not only the spoken words, but also the vocal utterances (stumbles, repetitions and hesitations), and the accents, emphasis, colour, pitch, pace, intonation and inflexions of the original speakers’, such that the performers repeat the sounds not just the words.¹⁵⁵ These paralinguistic markers are ‘a strongly rhythmic element of everyday spoken language and constitute the individual or collective musicality of a speaker or community.’¹⁵⁶ Blythe contends that ‘it is these that reveal the person’s thought-processes: there is always a specific reason why a person stutters on a certain word.’¹⁵⁷ The music captures the unwieldy dimensions of the speech and highlights the idiosyncrasies of the ways that people communicate orally. What Cork was

¹⁴⁶ Mirsajadi, *Spectrums of Truth*, 197.

¹⁴⁷ Blythe and Cork, *London Road*, viii.

¹⁴⁸ Taylor, ‘Body, Voice and the Transmission of the Real...’, 374.

¹⁴⁹ Blythe and Cork, *London Road*, ix.

¹⁵⁰ *Ibid* ix.

¹⁵¹ George Rodosthenous, ‘Musical Direction in Theatre: Interpreting, Composing and Singing the ‘Real’ – An Interview with David Shrubsole’ (2018) 12(3) *Studies in Musical Theatre* 395.

¹⁵² Blythe and Cork, *London Road*, viii-ix.

¹⁵³ *Ibid* ix.

¹⁵⁴ Hammond and Steward, *Verbatim Verbatim*, 102.

¹⁵⁵ Taylor, ‘Body, Voice and the Transmission of the Real...’, 370. In part, she is drawing from the Anna Devere Smith’s practice. See Hammond and Steward, *Verbatim Verbatim*, 80.

¹⁵⁶ Roesner and Martin, ‘The Document as Music’.

¹⁵⁷ Hammond and Steward, *Verbatim Verbatim*, 97.

seeking to do through his compositional process was to ‘expose the guttural rhythms and the emotions that were contained within what was being expressed.’¹⁵⁸ There is a sense that rhythm registers deep inside our gut and drives the movement of language and the forward propulsion of legal musilanguage.

Others have argued that ‘in insisting on a strictly verbatim use of text – with all its grammatical flaws, half-finished sentences and fillers – Cork and Blythe paradoxically create a sense of defamiliarisation.’¹⁵⁹ These rhythms catch the listener off guard and are ‘at odds with our habituated musical expectations of even meters, clearly structured phrasing and forms.’¹⁶⁰ This is a disorienting experience. What this attention to paralinguistic details does, however, is to force the audience to ‘hear/witness the labour (even as it is stylized) in finding the “right words” to communicate and express opinions and ideas.’¹⁶¹

Interestingly, Atkinson and Drew suggest that court talk has a similar rhythm to baby talk.¹⁶² Through the questioning, the lawyer lulls the testifier into a response. However, adherence to the lawyer’s tempo and rhythm can suggest that the testimony is ‘rehearsed’.¹⁶³ A clash and contrast in rhythm can have different resonances (as discussed further below). Perhaps because of the turn taking of court talk, counterpoint is rare.¹⁶⁴ Court talk tends towards call and response.

Similarly, we tend to think of legal speech as not spontaneous but considered, but there is an oscillation in legal language between linearity (that might be found in pre-written judgments delivered orally) and free flow (that might be found in testimony or argument).¹⁶⁵ However, the non-linear text is seldom captured in transcripts. Thinking through legal musilanguage as non-linear challenges us to find new forms and rhythms to capture legal expression: one such way may be through music. It also invites us to think of what happens when the (musical) rhythm of testifiers clashes with the

¹⁵⁸ Quoted in Mirsajadi, *Spectrums of Truth*, 221.

¹⁵⁹ Roesner and Martin, ‘The Document as Music’. See also David Roesner, ‘Genre Counterpoints: Challenges to the Mainstream Musical’ in Robert Gordon and Olaf Jubin (eds.), *The Oxford Handbook of the British Musical* (Oxford University Press, 2017) 661.

¹⁶⁰ Roesner and Martin, ‘The Document as Music’.

¹⁶¹ Zavros, ‘*London Road*’, 217.

¹⁶² Atkinson and Drew, *Order in Court*, 199.

¹⁶³ Lockett, *The Musical Is Drama*, 189-190.

¹⁶⁴ In this respect, I dispute Gilbert Leung’s conclusion that ‘law is, metaphorically speaking, a fugue’, as whilst I agree that there are different voices in law and recurrence of phrases, the different voices are rarely polyphonous or overlapping and tend to be presented sequentially both in court and in legal argument: ‘Law is a Fugue’, *Critical Legal Thinking* (15 March 2018).

¹⁶⁵ Rappaport, ‘Using the Elements...’, 111.

succinct marching rhythm demanded by the law succinct marching rhythm that Rappaport suggests is demanded by the law.

Repetition

Repetition is crucial to the rhythm of legal musilanguage. Though it is often added for emphasis, as in the case of *London Road*,¹⁶⁶ it is often already in the original transcript whether in the repetition of words or phrases or the repetition of ideas.¹⁶⁷ A popular text prevails upon trial lawyers to ‘drive your important points home by repetition. The more vital the thought, the more often you should repeat it.’¹⁶⁸ Repetition can be used as a device to convince the speaker or the listening audience of the fact of what is being said.¹⁶⁹ In *Committee*, Deering noticed that the character of Camilla repeats the word ‘actually’ throughout the transcript, so gave it the same musical phrasing in the score to emphasise the repetition already there.¹⁷⁰ The repetition of words or phrases may cause the listener to hear melody and rhythm.¹⁷¹ In *Lindy*, as in *London Road*, repetition is used to underscore certain points.

During the Trial Scene in *Lindy*, the Prosecution Counsel poses the question: ‘Mrs Chamberlain, / you say that the child was in the / mouth of a dingo, which was / vigorously shaking its head at the / entrance to the tent. / The dog having taken / Azaria from the bassinet, the bassinet / Mrs Chamberlain, is this correct? / Is this correct? Is this correct?’ This final repetition is not in the transcript of the trial, but perhaps inserted to emphasise the menace of the Prosecution Counsel. The judge sympathetically interjects,¹⁷² and the accompaniment is ‘considerably slower’ as he sings:¹⁷³ ‘Take it steady, Mrs Chamberlain.’ However, the repetition, which is not in the transcript, continues: ‘Is this correct? Is this correct? Is this correct?’ The score indicates that this is sung ‘impatiently.’¹⁷⁴ She replies: ‘Yes, yes, yes, yes, yes, yes, yes, YES!’ Again, the repetition is not in the transcript but inserted perhaps to emphasise her distress. The nature of her reply is read in different ways: she herself

¹⁶⁶ Taylor, ‘Voice, Body and the Transmission of the Real...’, 374; Mirsajadi, *Spectrums of Truth*, 216.

¹⁶⁷ Rappaport, ‘Using the Elements...’, 86-90.

¹⁶⁸ Henry Rothblatt, *Successful Techniques in the Trial of Criminal Cases* (Prentice-Hall, 1961) 163.

¹⁶⁹ Lockett, *The Musical Is Drama*, 193.

¹⁷⁰ Watkiss, *Committee: Behind the Scenes*.

¹⁷¹ See discussion at footnote 71.

¹⁷² Chamberlain-Creighton, *A Dingo’s Got My Baby*, 225.

¹⁷³ Henderson, *Lindy*, 224.

¹⁷⁴ *Ibid* 225.

describes it as clear but distressed;¹⁷⁵ in the libretto, it is ‘distraught’; and yet academic commentators have described it as overwrought¹⁷⁶ or at a high pitch, like a yapping dog.¹⁷⁷ In this way, the musicalisation, particularly in its repetition, confuses the original intent of the spoken word. The monosyllabic answer is repeated over and over, including later in the libretto, perhaps to emphasise her distress and, in its pitch, the dingo instinct within us all.

With a ‘much more measured’ accompaniment,¹⁷⁸ the judge sings, ‘Would you like a spell, Mrs Chamberlain?’ Following this, we hear another example of Lindy’s melodic expression,¹⁷⁹ but the weariness and effort of giving evidence is musically expressed by the fragmentation of the melody¹⁸⁰ and jagged expression,¹⁸¹ as she sings: ‘This has been going on and on for over two years.’ Yet again, there is a repetition not in the transcript, inserted perhaps to suggest her weariness,¹⁸² or that, in her own words, she ‘was definite about that.’¹⁸³ Then the meter breaks back, an example of the rapid movement backwards and forwards in meter,¹⁸⁴ as she continues: ‘I’d like to get it over and done with, Your Honour. / I’d like to get it over and done with.’ Repetition is inserted throughout the score to emphasise the emotional state of the speaker.

As musical theatre scholar Scott McMillan writes, ‘we do not often think about repetition, although it is going on all around us, or in us.’¹⁸⁵ What musical composition does is pick up on repetition and use it to give pulse to the score.¹⁸⁶ As he continues:

Music gains meaning through the accretion of repeated combinations of phrases and rhythms, and dancers give body to these patterns through the repetitive gestures and movements of their own discipline, which reflect

¹⁷⁵ Chamberlain-Creighton, *A Dingo’s Got My Baby*, 225.

¹⁷⁶ Power, *Voiced Identity*, 100.

¹⁷⁷ Kouvaras, ‘Giving Voice to the Un-voiced “Witch” and the “Heart of Nothingness”’, 121.

¹⁷⁸ Henderson, *Lindy*, 225.

¹⁷⁹ Power, *Voiced Identity*, 89.

¹⁸⁰ *Ibid* 87.

¹⁸¹ *Ibid* 100.

¹⁸² *Ibid* 87.

¹⁸³ Chamberlain-Creighton, *A Dingo’s Got My Baby*, 225.

¹⁸⁴ Power, *Voiced Identity*, 100.

¹⁸⁵ Scott McMillan, *The Musical as Drama: A Study of the Principles and Conventions Behind Musical Shows from Kern to Sondheim* (Princeton University Press, 2006) 36.

¹⁸⁶ *Ibid* 45.

the music and reinvent it at the same time. Song brings words into contact with these pulsations by adding its own possibilities of repetition.¹⁸⁷

He concludes that ‘spoken dialogue is not without rhythm, pace, a beat, tone – all the terms one uses of music – but music puts the terms into patterns of repetition that prose has to do without’ and thus makes speech unreal.¹⁸⁸ Whilst McMillan argues that music inserts repetition that speech otherwise lacks, I agree with Zavros that repetition is ‘inextricably part of the nature of “real talk”’,¹⁸⁹ which is thematised by composers to invite ‘a different reflection on every utterance; a different kind of listening perception... The musical treatment of the utterance exposes the culturally performative nature of repetition qua (musical) repetition.’¹⁹⁰

Tone

In this last section, I consider ‘tone’, under which I group elements such as pitch, melody, cadence and contrast. In workshopping *London Road*, Cork originally set the material as it presented itself, without allowing any change to the notes of the speaker. What resulted was a musical form more closely resembling recitative than song. He ‘decided quite early on that rhythm had to be the key thing here and pitch, although it’s important, is secondary.’¹⁹¹ Mirsajadi writes that, ‘in English, conversational speech is often monotonous with little variation in pitch (except for the end of phrases). Replicating the recording’s tonality led to the musically dull recitative version of the score.’¹⁹²

Legal language tends to have a tone of ‘measured rationality.’¹⁹³ Against the instructions of her lawyers to maintain a neutral tone, Lindy’s pitch is at times very high. As its name suggests, the central focus of *Lindy* is on its title character. In her analysis of the opera, music scholar Anne Power argues that ‘the music, as demonstrated in the Trial Scene, is designed to maintain a separateness for the central

¹⁸⁷ *Ibid* 36.

¹⁸⁸ *Ibid* 39.

¹⁸⁹ Zavros, ‘*London Road*’, 215.

¹⁹⁰ *Ibid* 216.

¹⁹¹ Lawson, Interview with Adam Cork (2011).

¹⁹² Mirsajadi, *Spectrums of Truth*, 198.

¹⁹³ Pamela Samuelson, ‘Good Legal Writing: Of Orwell and Window Panes’ (1984) 46 *University of Pittsburg Law Review* 156.

character’,¹⁹⁴ Lindy, particularly through her ‘melodic expression.’¹⁹⁵ As she continues: ‘Lindy’s replies are melismatic. Despite unorthodox rhythm shapes produced by the 5/16 meter, the long phrasing suggests calm. Its tensions are a product of the contour and high tessitura for the soprano. However, it has a floating quality.’¹⁹⁶ The melody ‘occurs when she recalls events from the past, but it does not preclude the kind of exasperation, which can surface... through regular rhythm and accentuated articulation.’¹⁹⁷ It also ‘indicates the moments when Lindy moves outside the time of the courtroom to the time of being at Uluru with her baby Azaria.’¹⁹⁸ Power concludes:

The melodic motif, which has been previously found to create her separate identity in the courtroom, contributes significantly to the way in which the ‘voice’ of the character is revealed. The notion of separateness for an accused person is an essential ingredient of her musical expression; however... it is also a separateness, which Lindy transforms into a source of her strength. When she revises the past in her mind, she renews her memories. This aspect of her identity is directly related to her representation of issues of justice.¹⁹⁹

In *Lindy*, the musical composition of the cross-examination is built on contrast: ‘All through the scene, the accompaniment hurries along in agitated semiquavers. The melody, however, moves calmly.’²⁰⁰ The scene itself is ‘characterised by swift shifts of mood, menace and pace’²⁰¹ and a tension or clash between musical genres. The musilanguage of the two characters is also in sharp contrast: on one hand, the ‘urbane, erudite, skilful’, ‘wily, canny, beautifully trained’ Prosecution Counsel and, on the other hand, the ‘feisty’ and ‘lippy’ defendant, Lindy.²⁰² O’Barr notes that ‘social

¹⁹⁴ Power, *Voiced Identity*, 76. See also Robyn West’s discussion of the legal theory that the framework of law is based on the notion of separation from others: ‘Jurisprudence and Gender’ (1988) 55(1) *University of Chicago Law Review* 2.

¹⁹⁵ Power, *Voiced Identity*, 85.

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid* 89.

¹⁹⁸ *Ibid* 99.

¹⁹⁹ *Ibid* 91.

²⁰⁰ Power, *Voiced Identity*, 86.

²⁰¹ John Carmody, ‘Moya Henderson’s Passionately Polychrome Take on the Lindy Saga’ (2002) 298 *Opera-Opera* 19.

²⁰² Ford, Interview with Moya Henderson (2002 and 2015).

status is reflected in speech behaviour.²⁰³ Class and gender may well have factored into this clash.

The end of the cross-examination scene reaches an unsettling pace.²⁰⁴ It begins with a ‘more measured’ accompaniment, as the PC sings of the dingo, in an ‘ironically suave’ manner, according to the score:²⁰⁵ ‘Your evidence is that you saw it / shaking its head vigorously, / and it was moving the flyscreen of the / tent in the process.’ Lindy replies, ‘I don’t know whether its head was shaking the flyscreen, or whether what it had in its mouth was hitting against it.’ The accompaniment – flute and strings – plays ‘with pathos’, according to the score.²⁰⁶ The PC then increases volume²⁰⁷ – the libretto indicates ‘more aggressively’ with the introduction of two violins playing in a ‘vigorous’ manner – as he sings: ‘And what it had in its mouth, we know now, / according to you, was a bleeding baby.’ Lindy, ‘showing irritation’ and disgust,²⁰⁸ ‘seething’²⁰⁹ and with her voice breaking,²¹⁰ replies: ‘That’s my opinion.’ The PC says ‘Pardon?’ and she repeats again, ‘That is my opinion!’ In his observation of the trial, John Bryson notes that this line was said with care,²¹¹ but the score indicates that Lindy ‘snapped.’²¹² The PC asks: ‘Is there any doubt about it?’ with a dramatic accompaniment by the cello. Lindy’s reply is an example of her melodic expression and retreat into memory,²¹³ as she sings in a ‘defiant’ manner:²¹⁴ ‘Not in my mind.’

Lindy’s musilanguage contrasts and clashes with the Prosecution Counsel’s musical expression: ‘The music varies from his angular vocal line and highly coloured orchestration, to her much calmer and more lyrical, frequently melismatic, replies, which often repeat phrases very precisely but in a different tempo.’²¹⁵ At times, ‘his music “infiltrates” hers, suggesting that he is getting the upper hand.’²¹⁶ The contrast

²⁰³ O’Barr, *Linguistic Evidence*, 71.

²⁰⁴ Power, *Voiced Identity*, 87.

²⁰⁵ Moya Henderson, *Lindy* (Score, Henderson Editions, 1997) 220.

²⁰⁶ Henderson, *Lindy*, 221.

²⁰⁷ Bryson, *Evil Angels*, 469.

²⁰⁸ Lindy Chamberlain-Creighton, *A Dingo’s Got My Baby: Words that Divided a Nation* (InHouse Publishing, 2015) 225.

²⁰⁹ Henderson, *Lindy*, 222.

²¹⁰ Bryson, *Evil Angels*, 469.

²¹¹ *Ibid.*

²¹² Henderson, *Lindy*, 223.

²¹³ Power, *Voiced Identity*, 87.

²¹⁴ Henderson, *Lindy*, 223.

²¹⁵ Michael Halliwell, *National Identity in Contemporary Australian Opera: Myths Reconsidered* (Routledge, 2018) 147.

²¹⁶ *Ibid.*

is exaggerated by the choice of musical accompaniment: as the PC sings, percussion and woodwinds usually accompany him; and as Lindy sings, flute and strings usually accompany her.

Similarly in *Committee*, the unison signing of the Committee, the recitative beat and the lack of vibrato create an accusatory, even brutal, edge, which Deering says ‘sounds like the “State”’.²¹⁷ The use of rounds and layering create the impression of a braying mob and impresses in the listening audience how it feels to be on the other side of a line of questioning.²¹⁸ It also suggests ‘the complexity of the matter and that there is no one right voice.’²¹⁹ Throughout *Committee*, the music changes to show who is in control and to reflect shifts in momentum. In one number, Camila spins the committee staff around as if to infect and command them but also to ‘symbolise the way in which she twists the questions put to her.’²²⁰ In another, according the first draft of the script, ‘Camila summons the music. Somehow. Maybe the mearest [*sic*] nod of the head. Regardless, the musicians are her familiars’, but when it comes to listing her qualifications, her ‘musical fluency [begins] faltering.’²²¹

Henderson says she had ‘no problem’ in finding a singing voice for Lindy.²²² On listening to a recording of a work-in-progress, Lindy herself said it ‘reminded me of a cat with its tail on fire being pulled out through a sieve backward’,²²³ though she later came to appreciate it. Through her composition, Henderson tried ‘to make Lindy’s music “fly”’:²²⁴ ‘I keep using these groups of five bars, a very rippling pattern in the bass all the time, which gives huge energy I think to anything that she sings, but it’s a very soft, lyrical energy, and then every now and then, voom, it gets powerful and angry.’²²⁵ This notion of music as a device to make words fly is also picked up by a musical director of verbatim musical theatre, David Shrubsole: ‘the music... had to be what we could fly with.’²²⁶ In this sense, music takes the listener to another place. Henderson also tends to elongate Lindy’s words during the cross-examination through

²¹⁷ Watkiss, *Committee: Behind the Scenes*.

²¹⁸ I am indebted to James Parker and Daniele Buatti for these astute observations.

²¹⁹ Mulcahy, ‘UK Parliamentary Inquiry Turned Verbatim Musical’, 66.

²²⁰ *Ibid.*

²²¹ Hadley Fraser and Josie Rourke, *Kids Co* (unpublished draft with working title, 2017) 2-4. I am tremendously grateful to Hadley Fraser for sharing this script.

²²² Ford, Interview with Moya Henderson (2015).

²²³ Lindy Chamberlain, *Through My Eyes: The Autobiography of Lindy Chamberlain-Creighton* (East Street Publications, 2004) 769.

²²⁴ Kouvaras, ‘Giving Voice to the Un-voiced “Witch” and the “Heart of Nothingness”’, 126 n 60.

²²⁵ Ford, Interview with Moya Henderson (2002).

²²⁶ Rodosthenous, ‘Musical Direction in Theatre’, 394.

melisma. In part, this is to create contrast to the Prosecution Counsel's questions that are generally set syllabically. Furthermore, 'the elongated words produce a focus on the sonic aspects of the text.'²²⁷

Part of the reason that her testimony was not accepted at trial could be because she did not express herself in the way the law demanded of a woman in her situation. O'Barr argues that 'lawyers quite literally put a language style into the mouths of their witnesses'²²⁸ through 'linguistic leading.'²²⁹ As Lindy herself said afterwards, she tried to follow her lawyer's advice to 'keep as neutral an expression as I could – and my natural expression comes over, unfortunately, as very hard.'²³⁰ Her comment and the musical expression in her voice 'reflects the widely held view that Lindy's seeming composure during the trial suggested her guilt, and this aroused widespread antipathy towards her in the general public.'²³¹ Indeed, O'Barr's research on court talk suggests that testifiers who speak politely are seen as powerless.²³²

Power's conclusions suggest that the musical voice and its rhythm can also reveal the meaning latent within the text of the legal transcript. Singing – or musicalising – the law is thus a methodology to explore meaning latent within legal speech.

²²⁷ Power, *Voiced Identity*, 101.

²²⁸ O'Barr, *Linguistic Evidence*, 82.

²²⁹ *Ibid* 83.

²³⁰ Rosemary Munday, Susan Duncan and Jan Goldie, 'The Lindy Chamberlain story', *Australian Women's Weekly* (March 1986) 8.

²³¹ Halliwell, *National Identity in Contemporary Australian Opera*, 162 n 24.

²³² O'Barr, *Linguistic Evidence*, 67. 72.

Listening to musicality



Figure 5.2: Don Monet, *Untitled*

In the opening of this chapter, I briefly discussed the case of *Delgamuukw v British Columbia*, where an elder sought to sing a song as a means of sharing the oral history of her people and their relationship to country. Richard Daly, an anthropologist retained by the plaintiffs in this native title case, evocatively describes this moment captured in the artwork by cartoonist Don Monet (**Figure 5.2**):

Chief Antgulilibix, Mary Johnson, was asked to sing her wilp *limx'oo'y*, or song of mourning, a crucial feature of legitimacy of territorial proprietorship. This “breaking of frame” with courtroom decorum (albeit by the most solemn values of another culture) alarmed Chief Justice McEachern, who stopped her, saying that in matters cultural he had a tin ear. Antgulilibix did not lose her aplomb, and, in so far as the judge was a

representative of the Queen of England, she consistently addressed him as “Your Highness” as she vainly sought to penetrate his senses. But alas, they were hermetically sealed, as he had warned, in a thick layer of tin.²³³

A number of scholars have gone on to write of the ‘tin ear’ of Justice McEachern as a metaphor for the disconnect between settler law and indigenous law and the inability of the Justice to comprehend the latter,²³⁴ however, I suggest that Justice McEachern’s comment when read in its context reflects his inability to comprehend the musicality being presented in song. In this respect, I argue against Coleman, Coombe and MacAraill’s conclusion that ‘his “tin ear” had nothing to do with his failure to appreciate music.’²³⁵ Instead, I argue it had almost everything to do with it.

Ted Chamberlin expresses this point strongly when he concludes that Justice McEachern was right to say that he has a tin ear as comprehending music does not come naturally and requires not simply hearing but a mode of listening to that beyond the habitual rhythms and melodies of legal speech – and that this kind of listening is not easy.²³⁶ Susan Schuppli argues that ‘the song carried extraneous information beyond its rhetorical content that also needed to be decoded, in order for the judiciary to apprehend its embodied history.’²³⁷ This decoding process is complicated by its particular rhythm and melodies of the song. It takes a particular practice of listening to comprehend the information in the rhythms and melodies of song and learning or tools of the kind represented comically in the cartoon as a can opener. Schuppli concludes that:

Through its public performance, the song might be said to have produced a “legal rupture” and even a surfeit of information – an acoustic resonance and affective remainder – that reverberated within the body of the witness

²³³ Richard Daly, *Our Box was Full: An Ethnography for the Delgamuukw Plaintiffs* (UBC Press, 2005) 51.

²³⁴ See, e.g., Lillianne Cadieux-Shaw, ‘Book Review: *Freedom and Indigenous Constitutionalism* by John Borrows’ (2017) 54(3) *Osgoode Hall Law Journal* 967; Karen Drake, ‘Finding a Path to Reconciliation: Mandatory Indigenous Law, Anishinaabe Pedagogy, and Academic Freedom’ (2017) 95 *Canadian Bar Review* 1.

²³⁵ Elizabeth Coleman, Rosemary Coombe and Fiona MacAraill, ‘A Broken Record: Subjecting ‘Music’ to Cultural Rights’ in James Young and Conrad Brunck (eds.) *Ethics of Cultural Appropriation* (Blackwell, 2009) 194.

²³⁶ Ted Chamberlin, ‘Doing Things With Words: Putting Performance on the Page’ in Laura Murray and Keren Rice (eds.), *Talking on the Page: Editing Aboriginal Oral Texts* (University of Toronto Press, 1999) 76-79.

²³⁷ Susan Schuppli, ‘Computing the Law: Searching for Justice’ in Maria Hlavajova and Simon Sheikh (eds.), *Former West: Art and the Contemporary After 1989* (BAK, 2016) 538.

as well as throughout the trial chamber. It changed not only the tempo and rhythm of proceedings, but also its evidential and testimonial range.²³⁸

Singing is a bodily performance and also a challenge to the typical marching forward rhythm and tempo of legal musilanguage. It is not how we are used to legal speech sounding and, as such, it requires a different kind of listening and comprehension than legal actors are accustomed to undertaking.

Another example occurred in the Geoffrey Rush trial, which concerned a claim of defamation on Rush's behalf for an article published in *The Daily Telegraph* about an allegation of sexual harassment against him. A witness, actress Helen Buday, in answer to a question as to whether she heard Rush describe a fellow actress Eryn Norvill as 'scrumptious', started singing the song *Truly Scrumptious* ([listen here](#)) from the musical *Chitty Chitty Bang Bang*, and later, when denying that she heard Rush describe Norvill as 'yummy', started singing the song *Yummy Yummy Yummy* ([listen here](#)).²³⁹ Justice Wigney, who was presiding over proceedings in the Federal Court of Australia, noted the witness's dramatic performance and asked her to focus on answering the lawyer's questions. On appeal, the barrister for *The Daily Telegraph* argued that the 'tone' of Justice Wigney during trial might have given rise to an apprehension of bias.²⁴⁰ Justice Gleeson of the Full Court of the Federal Court listened to the recordings of Justice Wigney and said she 'wasn't sure what tone I was listening for', and the allegation of bias was subsequently withdrawn.²⁴¹ Though different, these instances are evidently inter-linked, and not only by the trial that holds them together.

James Parker argues that there is an 'aura of impropriety' around song in court,²⁴² in part because of the irrationality of song. 'Legal rationality makes itself felt at trial in the difference between speech and song,' writes Parker. 'Whereas the former stands for sober reason and the promise of dispassionate judgment... the latter becomes a sign of passion, illogic and the ineffable and as such must be either shutdown, ignored

²³⁸ *Ibid* 538.

²³⁹ Matthew Benns and Lucy Jones, 'Geoffrey Rush case: Cast member says actor's use of emoji was an example of mentoring', *The Daily Telegraph* (26 October 2018).

²⁴⁰ Sarah McPhee, 'Recordings from Rush case sought in appeal', *The Courier* (12 June 2019).

²⁴¹ Georgina Mitchell, 'The Daily Telegraph abandons claims that Geoffrey Rush trial appeared to be biased', *The Sydney Morning Herald* (4 November 2019).

²⁴² Parker, *Acoustic Jurisprudence*, 89.

or contained.²⁴³ In the first instance we see Justice Wigney shutting down a witness who is singing. I suggest that this is because he is unable to listen to the song: it is passionate, illogical and, most pertinently, ineffable to the legal ear. It demands a different type of listening than prose. As Cork says, music creates ‘a difference to the quality of listening.’²⁴⁴ On appeal, Justice Gleeson is confronted with the challenge of listening to – and for – the tone of Justice Wigney’s words to pick up any signals of bias. She is unsure of how to listen. The tone of bias is likewise effable. What ties these two instances together is a failure to listen to what is ineffable to the legal ear: the tune and tone of words.

Judges are, however, often compelled to listen to music. In the cases of copyright claims of musical works, judges often have to develop acute listening practices. In Chapter Three, I gave the example of *Eight Mile Style v New Zealand National Party* where the New Zealand High Court sat in silence to listen to Eminem’s *Lose Yourself*. The judgment also extensively discusses the process of listening to determine copyright infringements in music. Justice Helen Cull held that ‘a copy is a copy if it sounds like a copy.’²⁴⁵ Determining whether a piece of music sounds like a copy is a process of ‘aural recognition’ that is ‘focused on what the ear tells the listener.’²⁴⁶ The Court refers to earlier English precedent that describes the listening required as a process of ‘ear recognition’ whereby likeness is ‘recognised by the ear’ such that ‘the ear tells you’ that the two sounds are alike.²⁴⁷ Thus, determining likeness comes down to whether ‘the ear can recognise it.’²⁴⁸ The Court states that music ‘is the effect on the ear of the listener, of the combination of sounds’ not simply a tune or melody.²⁴⁹ As such, the Court had to partake in ‘listening to... the sounds’,²⁵⁰ picking apart the different musical elements,²⁵¹ and paying acute attention to the detail in the music. At times, the judgment draws analogy to the visual.²⁵² As I suggested in an earlier chapter, it is often difficult to capture sonic phenomenon – in that case, silence, in this

²⁴³ Parker, *Acoustic Jurisprudence*, 91.

²⁴⁴ Maddy Costa, ‘London Road: Murder, they sang’, *The Guardian* (11 April 2011).

²⁴⁵ *Eight Mile Style v New Zealand National Party* [2017] NZHC 2603 [59].

²⁴⁶ *Ibid* [129] referencing *D’Almaine v Boosey* (1835) 160 ER 117.

²⁴⁷ *D’Almaine v Boosey* (1835) 160 ER 117, 123.

²⁴⁸ *Eight Mile Style v New Zealand National Party* [2017] NZHC 2603 [130] referencing *EMI v Larrikin* [2011] FCAFC 47.

²⁴⁹ *Eight Mile Style v New Zealand National Party* [2017] NZHC 2603 [199].

²⁵⁰ *Ibid* [65].

²⁵¹ *Ibid* [192].

²⁵² *Ibid* [147].

case, the sound of music – in words and judges in particular may lack the training and vocabulary to do so. In the judgments in music copyright, they often rely heavily on expert testimony to describe musical similarities. Despite the importance of expert evidence, the Court is insistent that it is ‘a subjective test of hearing for a judge to determine.’²⁵³ Again, the Court refers to prior precedent that what is involved is ‘a test of hearing. Certainly it is a subjective test, but it is ultimately the one that must be used.’²⁵⁴ As the precedent acknowledges, however, that ‘writing imposes natural limits on the reproduction of what is perceived on hearing a musical work; it is not possible to accurately reproduce by words the impression made on the ear by hearing.’²⁵⁵

The Court refers, *inter alia*, to two similar cases. The first, *Larrikin v EMI* that concerned similarities between the nursery rhyme *Kookaburra Sits in the Old Gumtree* reproduced in Men at Work’s *Down Under*, held that ‘the test is that of the ordinary reasonably experienced listener.’²⁵⁶ The Court later seems to suggest that it may require ‘a sensitised listener’,²⁵⁷ which, in an earlier chapter, I suggested comes about through the process of attunement, but here could be referring to the idea that a listener can detect the similarity if it is pointed out to them from an expert and, is as such, sensitised to the similarity. The second, *Williams v Gaye* that concerned similarities between Marvin Gaye’s *Got to Give it Up* and Pharell Williams and Robin Thicke’s *Blurred Lines*, was on appeal at the time of judgment, but has been subsequently decided by a 2-1 majority. The majority held that ‘it is unrealistic to expect district courts to possess even a baseline fluency in musicology, much less to conduct an independent musicological analysis’²⁵⁸; as such, it is reasonable for courts to rely on expert testimony. The minority argued that, while the assistance of expert evidence is important,²⁵⁹ the majority (and, presumably, the jury at the district court level) showed an ‘uncritical deference to music experts.’²⁶⁰ The minority held that whilst ‘it can be very difficult for judges untrained in music to parse two pieces of sheet music for substantial similarity... however difficult this exercise, we cannot

²⁵³ *Eight Mile Style v New Zealand National Party* [2017] NZHC 2603 [66] referencing *Grignon v Roussel* (1991) 38 CPR (3d) 4 (FC).

²⁵⁴ *Grignon v Roussel* (1991) 38 CPR (3d) 4 (FC) 20-21.

²⁵⁵ *Ibid.*

²⁵⁶ *Larrikin Music Publishing v EMI Songs Australia* [2010] FCA 29 [172].

²⁵⁷ *Ibid* [207].

²⁵⁸ *Williams v Gaye*, 885 F.3d 1150, 1182 (9th Cir. 2018).

²⁵⁹ *Ibid* at 1196.

²⁶⁰ *Ibid* at 1197.

simply defer to the conclusions of experts.’²⁶¹ In the two cases cited and in *Eight Mile Style*, the court grapples with whether it is equipped to listen itself or whether it needs to rely on experts to do the listening from which it can then inform its own legal listening.²⁶²

Outside copyright law, there was also what Lawrence Hamdan describes as ‘the subliminal listening craze of the 1990s’: a series of cases where it was argued that subliminal messages residing in songs prompted violent actions.²⁶³ In *McCollum v CBS*, *Hamilton v Osbourne* and *Waller v Osborne*, the plaintiffs argued that ‘masked’ lyrics in Ozzy Osbourne’s *Suicide Solution* contained subliminal messages that influenced their sons to commit suicide. In *McCollum*, the Court stated that ‘the lyrics are sung at one and one-half times the normal rate of speech’ and cited the plaintiffs’ evidence that the lyrics ‘are not immediately intelligible. They are perceptible enough to be heard and understood where the listener concentrates on the music and the lyrics being played.’²⁶⁴ It is not clear whether the Court actually listened to the music itself. In *McCollum*, the Court held that there was insufficient evidence that the deceased was listening to or could hear the masked lyrics and, in *Waller*, the Court held that the masked lyrics were not subliminal as they were audible even if unintelligible: ‘the most important character of a subliminal message is that it sneaks into the brain while the listener is completely unaware that he has heard anything at all.’²⁶⁵ The decision in *Hamilton* was unpublished.

In *Vance v Judas Priest*, which concerned whether subliminal messages in Judas Priest’s *Better By You, Better Than Me* constituted one of the factors that caused the self-inflicted deaths of two teenagers, ‘the Court listened to [the] studio demonstrations’ of the song.²⁶⁶ The Court admitted to having an ‘untrained ear’,²⁶⁷ but nevertheless tuned into the songs, ‘listening carefully and repeatedly’,²⁶⁸ and found that, ‘during the various demonstrations on special audio equipment when the

²⁶¹ *Ibid.*

²⁶² The decision of the majority has also been criticised for expanding the basis of copyright claims beyond melody, though earlier decisions had held the same: see Joseph Fishman, ‘Music as a Matter of Law’ (2018) 131 *Harvard Law Review* 1864-1869.

²⁶³ Lawrence Hamdan, ‘Forensic Listening’ in Christopher Cox and Daniel Warner (eds.), *Audio Culture: Readings in Modern Music* (Bloomsbury, 2017) 152.

²⁶⁴ *McCollum v CBS*, 202 Cal. App. 3d 989, 997 (Cal. Ct. App. 1988).

²⁶⁵ *Waller v Osbourne* 763 F. Supp. 1144, 1149 (M.D. Ga. 1991).

²⁶⁶ *Vance v Judas Priest*, No. 86-3939, 1990 WL 130920, at 9 (Nev. Dist. Ct. Aug. 24, 1990).

²⁶⁷ *Ibid* at 20.

²⁶⁸ *Ibid* at 9.

sound was identified, isolated, amplified and the Court's attention drawn to it, the Court could hear the words "do it".²⁶⁹ It found that 'the sounds would not be consciously discernable to the ordinary listener under normal listening conditions' and hence were subliminal.²⁷⁰ Whilst the Court relied on machinery and experts to guide its listening, the Court was also conscious that 'the power of suggestion may serve to make the listener think he hears a certain phrase... even though he would not have perceived the phrase without the power of suggestion'²⁷¹ and that 'it is difficult to sort out in one's mind what is heard from what it was suggested would be heard.'²⁷²

The trial included expert evidence from Wilson Key, a self-proclaimed expert on the subliminal, and Bill Nickloff, an audio engineer, 'who used the most up-to-date digital sonic waveform analysis to wow the judge with a performance of microscopically precise sonic attention' from which the judge could hear the words 'do it'.²⁷³ However, the Court ultimately held that 'the scientific research presented does not establish that subliminal stimuli, even if perceived, may precipitate conduct of this magnitude.'²⁷⁴ Key also testified on the subliminal influence of music in *Commonwealth v Mignogna*, where a defendant successfully argued that subliminals in songs by AC/DC, Judas Priest, Ozzy Osbourne and Motley Crue were a mitigating factor in his murder of two children, though the prosecution argued that there was not a causal relationship between Key's theory and the defendant's conduct.²⁷⁵ Key's theories about the influence of the subliminal have been criticised as 'quintessential pseudoscience; they contain no citation, no references, and no documentation for any of his proclamations',²⁷⁶ and Nickloff's practice has been criticised as he was 'a marine biologist... [whose] supposed expertise was the result of his work as a producer of self-help tapes.'²⁷⁷ Similarly, Victoria Evans, a sound analyst, gave evidence in both *Waller* and *Vance*, though she was a computer science lecturer, had 'no experience in music recording or sound engineering.'²⁷⁸ And Martin Hall, a sound

²⁶⁹ *Ibid* at 8.

²⁷⁰ *Ibid* at 9.

²⁷¹ *Ibid* at 19.

²⁷² *Ibid* at 20.

²⁷³ Hamdan, 'Forensic Listening', 151.

²⁷⁴ *Ibid* at 14.

²⁷⁵ *Commonwealth v Mignogna*, 585 A.2d 1, 14 (Pa. Supr. Ct. 1990).

²⁷⁶ Timothy Moore, 'Scientific Consensus and Expert Testimony: Lessons from the *Judas Priest* Trial' (1996) 20(6) *Skeptical Inquirer* 38.

²⁷⁷ Hamdan, 'Forensic Listening', 151.

²⁷⁸ *Waller v Osbourne* 763 F. Supp. 1144, 1147 (M.D. Ga. 1991).

analyst at the Institute for Bio-Acoustic Research, gave evidence in *McCollum*, *Hamilton* and *Waller* that the song in question contained hemisync tones that stimulate the brain to process information, and preconscious suggestions that motivate or reinforce a specific kind of behaviour, though such claims have been disputed,²⁷⁹ and Hall was ‘not an expert in mastering and mixing music.’²⁸⁰

Through these cases, ‘the fragile and deeply subjective process of listening starts to develop an air of objectivity and legal credence.’²⁸¹ Despite the courts in the copyright cases holding that listening is ‘a subjective test of hearing for a judge to determine’, there is an overwhelming reliance on experts to open up the judges’ ears and sensitise them to the nuances in music. Though such experts may have an air of credence, in the subliminal listening cases, their expertise is dubious. In *EMI*, the Court held that the relevant standard was that of a reasonably experience listener, but the question arises: do judges have the experience to listen? Of course, as the majority *Williams v Gaye* recognised, it is unreasonable to expect judges to be trained in musicology. As such, Justice McEachern’s acknowledgment of his tin ear is somewhat understandable. Yet judges *must* hear. In so doing, they have to rely on their own critical faculties to assess what it is they are listening to, as suggested by the minority in *Williams v Gaye*. Attunement, as discussed in Chapter Three, is a potential way forward. Through careful listening, guided by experts on *how* to listen but not *what* to listen to, judges can tune in to the music. Attunement to musilanguage can open up the ears to a different style of listening. After attending *London Road*, theatre critic Ben Brantley writes:

I heard the city singing as I walked along the South Bank on Monday night. O.K., what I really heard was just people talking – and occasionally yelling, braking or squealing. As usual. But because I had just left a show in which the line between song and speech had been thoroughly dissolved, my ears were suddenly tuned into previously unheard melodies lurking in human conversation.²⁸²

²⁷⁹ Timothy Moore, ‘The Case Against Subliminal Manipulation’ (1988) 5(4) *Psychology and Marketing*.

²⁸⁰ *Waller v Osbourne* 763 F. Supp. 1144, 1147 (M.D. Ga. 1991).

²⁸¹ Hamdan, ‘Forensic Listening’, 152.

²⁸² Ben Brantley, ‘Nothing rings true like authenticity’, *The New York Times* (26 July 2011).

Musicaliation of legal speech can thus be a method of enabling the listener – the judge as audience – to attune to the musicality inherent in speech.

Conclusions

This chapter has pointed to singing as a way of exploring the musicality of legal speech. Manderson describes law and music scholars as ‘new wave’,²⁸³ perhaps invoking the popular eighties music genre. New Wave was a complex and diverse music genre with upbeat tempos and an exciting energy. Much the same can be said of the scholarship on law and music. However, law and music scholarship has not yet advanced to conceive of law *as* music. Even Parker is perhaps too quick to accept that the juridical soundscape is not musical,²⁸⁴ and that the musicality of the voice is ‘ignored, silenced, made irrelevant as a juridical concern.’²⁸⁵ Too much of the scholarship rests on an assumption that law *differentiates* itself from music (and other performing arts) and seeks to disavow its own musicality. The emerging scholarship on law and music should attend to law as music and, in particular, how audiences of legal performances hear it. One of my concerns is that in the transcription of legal texts, the sounds of the legal speech and space are often lost. The increasing intrusion of cameras and other recording devices into the spaces of law creates new listening environments where we can tune in through earphones or speakers in spaces with their own acoustic dimensions. The implications of this demands further study.

Being New Wave, like a wave, this branch of scholarship may recede. However, like New Wave, it may come back again in diverse forms (just like the renaissance of New Wave in the form of Trumpwave²⁸⁶). It is hoped that this contribution, which rides the popular crest of engagement with ideas of law and music, might enliven new directions within the scholarship that acknowledge music’s role in law beyond a metaphorical device, and invite you to attune and therefore listen to the musicality of legal performance.

From sound, we turn to sight in the next chapter, canvassing the introduction of screens and cameras in court, and how these devices are configuring the visual, plus sonic and haptic, dimensions of legal performance.

²⁸³ Manderson, ‘Towards Law and Music’, 314.

²⁸⁴ Parker, *Acoustic Jurisprudence*, 86.

²⁸⁵ *Ibid* 130.

²⁸⁶ Penn Bullock and Eli Kerry, ‘Trumpwave and fashwave are just the latest disturbing examples of the far-right appropriating electronic music’, *Vice* (31 January 2017).

Chapter Six

Seeing the Law: Screens and Haptic Potentiality in Legal Performance

Prologue

Imagine a gallery. In it is a four-hour, seven-channel video work of restaged scenes from international criminal tribunal trials. This is artist Judy Radul's *World Rehearsal Court* (**Figure 6.1**).



Figure 6.1: Judy Radul, *World Rehearsal Court* (2009)

The ‘rehearsal’ in the title of Radul’s work suggests a process of trying things out. The work was created around the time of the development of the International Criminal Court in The Hague. The construction of the court building has its own website with pictures and videos allowing a worldwide audience to witness the construction process for the new court building. The viewing audience was privy to the development of the court, as if watching over a rehearsal process. The term ‘rehearsal’ also has resonances with court processes themselves. As Scott Watson, the curator of the gallery in which *World Rehearsal Court* was first exhibited, writes, ‘the term “court procedure” involves the idea of rehearsal as a trial run that includes notions of repeating and reciting underscored by the need for memory and fidelity to a

text.’¹ The term ‘trial’ itself suggests a rehearsal process in which ideas are played out, kept and scrapped, much like the writing of this chapter.

Each of the seven screens presents ‘one of the characters in court: from left to right, accused, defence attorney, judge, witness, court clerk, prosecutor’ in medium shot with a screen below presenting the witness in a wide shot.² As it is presented over an array of screens, the work creates a ‘rack focus’, where the audience’s attention is diverted away from the individual screens to an overall perception of the court itself.³ The audience tune in and out of the individual images, moving their gaze across and away from the screens. The seven different screens with seven different images of the court characters reveal more to the viewer than one screen alone could. The screens reveal different perspectives. Through taking them in as a whole, the audience can see (almost) all of the court. The audience does not have to negotiate their way to the courthouse, through the myriad of security measures and about the passages – as discussed in Chapter One – they are there or, rather, the court is there for them on the screen.

At the end of each video segment, the court characters rise and exit. At this point, ‘all seven video channels begin to pan in unison slowly around the room’ ([see here](#)).⁴ As Sharon Kahanoff describes in her analysis of the work:

This movement is not seamless, as it would be if a single image had been broken up over a number of different screens. Rather, breaks and ruptures of the space appear on the displays, belying the presence of multiple cameras recording from different views. Still, neither does it seem as though each camera moves independently. The militaristic pace of the pan fixes the cameras together regardless of what position or angle they hold. In the lock-step of the cameras, a technological apparatus emerges, revealing itself on the surface of the images as a force acting upon them all, moving them all, toward, inevitably toward...⁵

¹ Scott Watson, ‘Judy Radul’s *World Rehearsal Court: Trial Run*’ (Morris and Helen Belkin Art Gallery, 2009) 1.

² Sharon Kahanoff, ‘The Will and the Way of the Apparatus in *World Rehearsal Court*’ (Morris and Helen Belkin Art Gallery, 2009) 2.

³ *Ibid.*

⁴ *Ibid* 4.

⁵ *Ibid.*

This idea is expressed in Radul's statement that 'the court is a camera.'⁶ It is 'cameratic', to use a term coined by Kahanoff in response to the work. As she explains, 'the only seeing being done here is by the camera, and in fact, everything has been staged for the camera's sightedness and the camera's view.'⁷ The cameras holds those in their gaze captive through their frames,⁸ yet the 'cameras do not care about their subjects; selection of the image is determined by an arbitrary organizing principle – the camera's cone of vision', that is set in place by its operator.⁹ Etymologically, camera derives from the Latin word for chamber, a framed and enclosed space. The camera operates as a framing device through which the focus of the audience is managed.

Similarly, 'the courtroom is in and by itself a boundary-enacting device... through careful separation, measure and calculation.'¹⁰ The court enacts boundaries through 'formal procedure, including its spatial manifestation in the layout of the courtroom; its particular language and the role play it demands; as well as the use of media technologies it demands.'¹¹ In this way, the court replicates the framing device of a camera.

Whilst the court in some ways replicates the function of a camera, modern courts increasingly utilise cameras: testimony being delivered through video links, video footage being used as evidence, video as a medium to explore evidence (to zoom in or to look inside an object, for example), and trials broadcast on television screens.¹² What Radul's *World Rehearsal Court* suggests, tied as it is to the growth of cameras in courtrooms, is that visual framing is crucial to legal performance.

Introduction: Watching digital performance in court

The visual has long played an important role in law and legal theory, from the non-seeing Justitia¹³ to Bentham's all-seeing panopticon.¹⁴ The visual is critical to legal

⁶ Judy Radul, 'Video Chamber' in Marit Paasche and Judy Radul (eds.), *A Thousand Eyes: Media, Technology and Aesthetics* (Sternberg Press, 2011) 133.

⁷ Kahanoff, 'The Will and the Way of the Apparatus in *World Rehearsal Court*', 8.

⁸ *Ibid*, 9.

⁹ *Ibid* 11.

¹⁰ Anselm Franke, 'Phantom Limb' (Morris and Helen Belkin Art Gallery, 2009) 2.

¹¹ Franke, 'Phantom Limb', 1-2.

¹² Philip Auslander, *Liveness: Performance in a Mediatized Culture* (Routledge, 1999) 115.

¹³ Valerie Hayaert, 'The Paradoxes of Lady Justice's Blindfold' in Stefan Huygebaert et al (eds.), *The Art of Law: Artistic Representations and Iconography of Law and Justice in Context, from the Middle Ages to the First World War* (Springer, 2018).

performance, and through the advent of video and screens in the courtroom,¹⁵ it has advanced to the audiovisual. In the introduction to their book on film and the law, filmmaker Christian Delage and law professor Peter Goodrich write that ‘film and now the plethora of digital forms of virtual relay are having a... drastic if not yet fully explored impact upon the preconceptions and forms of relay of legality.’¹⁶ Goodrich has further written of ‘the emergence of law in the videosphere.’¹⁷ The scholarship on law and film has increased since that was written. However, there are major questions around the impact of a move from live performance to a form of performance mediated through the use of video that remain underexplored. Much of the research focuses on judges’ or juries’ perceptions and lawyers’ or testifiers’ experiences of mediated performance. As legal scholar Linda Mulcahy writes:

Much of the discussion about live links to date focuses on the ways in which it impacts on the rights and experiences of key actors within the trial, such as witnesses, lawyers, and defendants. It is noticeable that there is much less focus on how it impacts on the experience of the trial as a group experience or public ritual.¹⁸

That is to say, there is less scholarship on the effects of video on the audience to the legal performance.

In this chapter, I predominantly focus on the audience’s experience of testimony delivered through the camera onto screens in the courtroom. In so doing, it is important to make some conciliatory points. There is a risk of blindly conflating live video link with recording. Whilst this chapter discusses the use of video generally, the two have some distinctions, mostly temporal, in that a recording occurs at an earlier time whilst a live video is relatively simultaneous with the live performance in the courtroom. There is also a risk of conflating the camera with the screen. Whilst the two are often intertwined – a screen will display footage from a camera – the process of filming and screening are distinct. My focus here is on the screening and the effect

¹⁴ Peter Hutchings, *The Criminal Spectre in Law, Literature and Aesthetics: Incriminating Subjects* (Routledge, 2014) ch 2.

¹⁵ Costas Douzinas. ‘Rehearsals’ (Morris and Helen Belkin Art Gallery, 2009) 3.

¹⁶ Christian Delage and Peter Goodrich (eds.), *The Scene of the Mass Crime: History, Film and International Tribunals* (Routledge, 2013) 1.

¹⁷ Peter Goodrich, ‘Europe in America: Grammatology, Legal Studies and the Politics of Transmission’ (2001) 101(8) *Columbia Law Review* 2075.

¹⁸ Linda Mulcahy, ‘The Unbearable Lightness of Being? Shifts Towards the Virtual Trial’ (2008) 35(4) *Journal of Law and Society* 483.

of the performance on screen on the watching audience, rather than the actor's process of being filmed. But again, these processes are often intermeshed. I will begin by considering theatrical approaches to the rise of what has come to be termed, at least in performance studies scholarship, 'digital performance', particularly the pioneering work of performance studies scholar Philip Auslander on live versus digital performance in the courtroom.

I then go on to consider legal approaches to digital performance in court. Whilst the scholarship to date has predominantly focused on thinking through digital performance in terms of visibility – and, to a lesser extent, acoustics and somatics – I develop an approach of thinking through digital performance in terms of 'haptic potentiality', that is, how the digital performance affects the possibility of touch. I explore this through a piece of performance-led research entitled *Exploring*, an installation followed by a focus group on the sensory experience of digital testimony, and a consideration of how hapticity is experienced through the body, face, eyes and touch of the audience vis-à-vis performer on screen. As presence is a recurring theme in the scholarship on performance, at the end of this chapter I consider how digital performance enacts presence or distance.

Theatrical approaches

It is in his incisive work, *Liveness: Performance in a Mediatized Culture*, that performance studies scholar Philip Auslander questions 'the reductive binary opposition of the live and mediatized' performance.¹⁹ He is fundamentally critical of performance theory that privileges the live. For example, fellow performance studies scholar Peggy Phelan argues that:

Performance's only life is in the present. Performance cannot be saved, recorded, documented, or otherwise participate in the circulation of representations of representations: once it does so, it becomes something other than performance. To the degree that performance attempts to enter the economy of reproduction it betrays and lessens the promise of its own ontology.²⁰

¹⁹ Auslander, *Liveness*, 3.

²⁰ Peggy Phelan, *Unmarked: The Politics of Performance* (Routledge, 1993) 146.

Against this, Auslander avers that ‘regardless of whether the image conveyed by television is live or recorded... its production as a televisual image occurs only in the present moment.’²¹ The screening of a televisual image is a live performance in itself. Actors perform the video technology, pressing play on a device to bring an image to life.²² The image itself is not petrified but rather an element of the live performance, which the audience interprets and interacts with. Live because it is new or novel to its audience, a first meeting between spectator and performer. The audience thus constitutes the liveness. As Costas Douzinas suggests in his response to *World Rehearsal Court*, the cameras and screens are not merely a record of a past performance but a now important element of live performance.²³

Auslander extends this to question whether there are ‘clear-cut ontological distinctions between live forms [of performance] and mediatised ones’,²⁴ and goes on to suggest that ‘the relationship between live and mediatised forms and the meaning of liveness [can] be understood as historical and contingent rather than determined by immutable differences.’²⁵ He instead argues that ‘all performance modes, live or mediatised, are now equal’,²⁶ and that ‘thinking about the relationship between live and mediatised forms in terms of ontological oppositions is not especially productive, because there are few grounds on which to make significant ontological distinctions.’²⁷ In this sense, it may be unproductive to talk of ‘mediatised performance’ as though it is ontologically opposed to live performance, or indeed that such distinct categories of performance can be maintained. Auslander is fundamentally questioning ‘the dichotomy between the live and the mediatised, claiming that it is an artificial (and unsustainable) construct usually adopted by performance practitioners and theorists to valorise... live [performance] through the concept of “presence”.’²⁸

Auslander poses some critical questions about the relationship between live and mediatised legal performance: ‘what kind of presence live performance possesses,

²¹ Auslander, *Liveness*, 44.

²² The ‘play’ of the court is turned into ‘replay’ through video. See Cornelia Vismann, “‘Rejour Les Crimes’ Theatre vs. Video’ (2001) 13(1) *Cardozo Studies in Law and Literature*.

²³ Douzinas, ‘Rehearsals’, 3.

²⁴ Auslander, *Liveness*, 7.

²⁵ *Ibid* 8.

²⁶ *Ibid* 50.

²⁷ *Ibid* 51.

²⁸ Kate Leader, *Trials, Truth-Telling and the Performing Body* (PhD Thesis, University of Sydney, 2008) 93.

how that presence differs from mediatised representations, and just what presence and... temporal and spatial simultaneity... contribute to the legal process.’²⁹ He argues that ‘presence’ is contingent on temporal and spatial simultaneity or being in the same space at the same time. In coming to terms with these questions, there is much we can learn from what performance practitioner Steve Dixon terms ‘digital performance: theatre/performance events in which computer technologies play a key role in content, techniques, aesthetics or forms of delivery.’³⁰ Dixon argues that traditional modes of live performance have been eroded and the digital has increased so much that that there now seems little difference between live and recorded performance.³¹ In his work with the Chameleons Group, a digital performance research company, he experiments with the relative ‘performative presences’ of live and mediatised performers.³² Because the digital has become more culturally dominant, Dixon argues that audiences are more accustomed to and comfortable with seeing performers on screen. As a result, when watching a performance that combines live actors and actors on screen, audiences will pay more attention to the screen.³³ This reinforces Auslander’s argument that the live performers’ presence is like a low-wattage light bulb in comparison to onstage screens that have all the brilliance of fifty-watt light bulbs.³⁴

Despite his critique of the ontological distinctions between live and performance, Auslander maintains this distinction for the law and argues that ‘live performance is, in fact, essential to legal procedure.’³⁵ Auslander was writing at the turn of this century, a time at which he could declare that ‘the courtroom has proved... resistant to the incursion of mediatisation.’³⁶ With the rise in courtroom technology, I return to Auslander’s performance studies approach to ask not why the courtroom has proved resistant to mediatised performance but to question the implications of its embrace of

²⁹ Auslander, *Liveness*, 130.

³⁰ Steve Dixon, ‘Researching Digital Performance: Virtual Practices’ in Baz Kershaw and Helen Nicholson (eds.), *Research Methods in Theatre and Performance* (Edinburgh University Press, 2011) 41.

³¹ *Ibid* 45-46.

³² *Ibid* 46.

³³ *Ibid* 46-47.

³⁴ Auslander, *Liveness*, 41-42.

³⁵ *Ibid* 113.

³⁶ *Ibid* 115.

video, with particular attention to the audience's response to testimony or what Auslander terms the 'live performance of memory retrieval.'³⁷

Legal approaches

These theories of live performance are relatively underexplored in the legal literature. In his analysis of courtrooms, Leif Dahlberg argues that 'modern judicial systems have – and have a history of having – an ambivalent attitude towards both the photographic image – still or moving – and allowing cameras into the courtroom.'³⁸ This is based on the premise that 'the presence of media in the courtroom would interfere with the rituals through which the judiciary establishes and maintains its power.'³⁹ However, modern arguments advance that idea that 'in order to make sure that the legal process in an era of mediated communication is accessible to the public, it is necessary to open it for public mass media',⁴⁰ linking to the concept of justice needing to be seen to be done in order to grant it legitimacy in the eyes of the public. There is an oscillation between, on one hand, the idea of justice needing to be visible versus the idea that a visual broadcast would interfere with the sanctity of justice, turning it into a spectacle.

Here it might be useful to turn to legal scholar Richard Sherwin's notion of 'visual culture'.⁴¹ Sherwin argues that law has an inability 'to cope with the challenges of visual culture',⁴² in particular the idea that visual images serve both as a depiction and as a sign or signifier.⁴³ Sherwin advances the idea that visual images, including the televisual, have a symbolic meaning as well as that which they literally depict. Yet law is unable to cope with this notion. The televisual is often introduced into trials without consideration of the symbolic impact of televisual images as against the impact of live testimony in the courtroom. Sherwin argues that there is a need for visual literacy within the law to counter this. For this reason, it is important to develop a visual rhetoric in which to discuss the law, one that is not simply concerned with what is seen – or not – but *how* it is seen. In later work, Sherwin invites his reader to

³⁷ *Ibid.*

³⁸ Leif Dahlberg, *Spacing Law and Politics: The Constitution and Representation of the Juridical* (Routledge, 2016) 208.

³⁹ *Ibid* 209.

⁴⁰ *Ibid.*

⁴¹ Richard Sherwin, *Visualising Law in the Age of the Digital Baroque: Arabesques and Entanglements* (Routledge, 2011) 1.

⁴² *Ibid* 5.

⁴³ *Ibid* 52.

consider ‘what if law were viewed less as a metric system than a musical composition, a public performance, a work of art: not simply a passive archive of written rules, policies and principles, but also, and perhaps even more importantly, a theatre in which we perform.’⁴⁴ But that thought is left hanging there as a teaser trailer unfulfilled. Certainly, there is increasing engagement by legal scholars with visual art,⁴⁵ and, in Sherwin’s case, with cinema, but less sustained engagement with performance and, in particular, digital performance.

Despite the seeming reticence that some legal practitioners may have to the introduction of virtual technologies in the court and the lack of sustained engagement amongst legal scholars with digital performance practice, Radul’s practice and scholarship attests to the very idea that the modern courtroom is both a theatrical and videographic performance venue.⁴⁶ The modern legal performance is not only live but also digital. This may be read as assuming that the two are ontologically distinct, but rather the two – theatre and videography – are intertwined in the legal performance. The two dimensions grow from and interact with each other in the performance space. As Mulcahy describes, the videographic ‘is a new way of communicating; a hybrid form of media which relies on a mixture of silicon and genes and generates representations of witnesses that we can hear but not smell, see but not touch. In other words, it transforms evidence-giving from the sensual to the sanitised.’⁴⁷ The videographic removes a degree of our sensorial connection with testimony – we cannot touch or smell what is on display in a video; however, it heightens our senses in other respects – our sight, for example, is centred on the screen.

Thinking through the sensorial engagement with digital performances requires consideration of more than just its visual dimensions.⁴⁸ The transformation from live testimony to testimony mediated through screens creates a form of performance that we can ‘see but not touch’, which raises a question of how we experience performance through the sense of touch. Whilst briefly mentioned in Mulcahy’s analysis of videographic testimony, the sense of touch is under-explored in the

⁴⁴ Richard Sherwin, ‘What Authorises the Image? The Visual Economy of Post-Secular Jurisprudence’ in Des Manderson (ed.), *Law and the Visual: Representations, Technologies and Critique* (University of Toronto Press, 2018) 334.

⁴⁵ See, e.g., the other chapters in the collection cited above and Des Manderson, *Danse Macabre: Temporalities of Law in Visual Arts* (Cambridge University Press, 2019).

⁴⁶ Radul, ‘Video Chamber’, 130.

⁴⁷ Mulcahy, ‘The Unbearable Lightness of Being?’, 486.

⁴⁸ Sherwin, ‘What Authorises the Image?’, 334.

research into digital performance, both from legal and performance scholar. However, touch is one of the key ways in which our bodies interact with the world that surrounds us, and the way in which we feel our way through the world, and thus it is constructive to think through how, through touch or its absence, we *feel* digital legal performance.

Haptic potentiality

Thinking through live versus digital performance of testimony through the sense of touch necessitates a consideration of how the move to digital forms of testimony affects the embodied interaction between actor and audience. Here, the notion of the ‘kinesphere’ that actor trainer Phillip Zarrilli uses in his method may be productive. The term comes from dance practitioner and theorist Rudolf von Laban, who describes it as the invisible boundary around an individual body, the encroachment of which by another body may cause anxiety; or, in other words, one’s personal space. In her work on performance composition, theatre-maker Anne Bogart explores the idea of kinaesthetic response or ‘spontaneous reaction to motion which occurs outside you’ or outside your kinesphere.⁴⁹ In live performance, there is an awareness of the other bodies in space and a heightened sense that at any time these bodies could intrude into one another’s personal space or kinesphere. To refine this idea somewhat, I argue that the atmosphere of a performance is felt in terms of the haptic potentiality between actor and audience,⁵⁰ that is, the possibility of touch between the two. Even if unfulfilled, the possibility of touch lends a powerful potency to live performance.

Despite the advances in televisual spaces, ‘there continue[s] to be something special about physical proximity’⁵¹ that is unmet in mediatised interactions. As anyone who has lived away from their partner for an extended period of time can tell you – your author most unfortunately included – there is something lost in the digital interactions that you share with another – the haptic potentiality, the face-to-face interaction, the eye contact. When video is introduced, there is no possibility of touching the testifier, thus it reduces the audience’s relation to them. It feels something like the scene in Baz Luhrmann’s *Romeo and Juliet* where the two lovers meet for the first time, but are separated by a glass fish-tank, distorting their view of one another and inhibiting their

⁴⁹ Anne Bogart and Tina Lindau, *The Viewpoints Book: A Practical Guide to Viewpoints and Composition* (Theatre Communications Group, 2005) 8.

⁵⁰ Auslander, *Liveness*, 129-130.

⁵¹ Mulcahy, ‘The Unbearable Lightness of Being?’, 483.

touch. There might be a very visceral visual reaction, but the connection would not sustain without the touch that follows.⁵²

The research and practice on digital performance, including by Dixon, suggests that touch is a fading sensation in our digital world.⁵³ Indeed, as filmmaker and scholar David MacDougall observes, in the transformation from live to digital performance, the bodies once ‘within touch... dissipate or are transformed before our eyes.’⁵⁴ When watching and experiencing film, the audience does not ‘touch, or feel touched.’⁵⁵ Of course, in live performance the audience may likewise not touch or feel touched by the actors, but there is the *potential* for touch, which adds potency to the live vis-à-vis digital performance.

Thinking through the legal performance tactilely is challenging given the prominence placed on the acoustic and visual senses. Whilst prohibitions on noise in the court are explicit, as discussed in Chapter Three, prohibitions on touching are more tacit. In part, this is because the architectural arrangement of the space prevents most spectators and actors touching the testifier, particularly the testifier being beamed into a screen in the courtroom. Nonetheless, there is the potential for the audience to touch the live testifier, whereas the digital testifier is always at a distance and out of reach.

Recent legal research has pointed to the experience of synesthesia in legal performance, whereby stimulation of one sense leads to experiences in the other senses, being ‘largely absent from the purview of legal studies’.⁵⁶ In taking seriously the conjunction of the visual to the sense of touch, this chapter embarks on an analysis of digital performance that is not purely visual but takes into account the embodied experience of digital performance and how it makes the performer and audience *feel*. As touch is almost always a reciprocal form of communication between that which touches and that which is touched, it is necessary to consider the interaction between actor and audience through the medium of screens.

⁵² *Romeo and Juliet* I.v.93-100.

⁵³ Steve Dixon, *Digital Performance: A History of New Media in Theatre, Dance, Performance Art and Installation* (MIT Press, 2007) 238.

⁵⁴ David MacDougall, *Transcultural Cinema* (Princeton University Press, 1998) 25.

⁵⁵ David MacDougall, *The Corporeal Image: Film, Ethnography and the Senses* (Princeton University Press, 2006) 52.

⁵⁶ Sheryl Hamilton, ‘Invitations and Exhortations: An Epilogue’ in Sheryl Hamilton et al (eds.), *Sensing the Law* (Routledge, 2017) 284. See also Carolyn McKay, *The Pixelated Prisoner: Prison Video Links, Court ‘Appearance’ and the Justice Matrix* (Routledge, 2018) 35.

Performance-led research on interaction with screens

In Chapter One, we explored how the audience interacts with actors through the medium of live legal performance. In the proximate space of the legal performance, there is interaction between the testifier and their judging audience. The presence of the judging audience – be it the judge or jury – is significant. As much as they are watching the performance, they are being watched.⁵⁷ Through this interaction, there develops a rapport between the testifier and their judging audience.⁵⁸ In a live performance, the testifier is able to pick up cues from their audience, sensing whether they are engaged or bored, just as the audience can pick up on cues from the testifier through their speech or body language, thus leading to a kind of autopoietic feedback loop of listening and speaking.

In mediatised performance, the audience's relationship with the person or image on screens is mediated through the camera.⁵⁹ The performance to camera is solitary; the performer is divorced from their live audience,⁶⁰ leading to a loss of human connection.⁶¹ The introduction of mediation radically reshapes the interaction between actor and audience. However, as Dixon reminds us:

All art is an interaction between the viewer and the artwork, and thus all artworks are interactive in the sense that a negotiation or confrontation takes place between the beholder and the beheld... Where digital interactive artworks are performances differ is in the ability of the user or audience to activate, affect, play with, input into, build, or entirely change it.⁶²

In Dixon's view, the interaction between the viewer and the artwork – be it visual or performance art – requires reciprocal dialogue,⁶³ such that the audience becomes a spect-actor: both a spectator of and an interactive agent with the work.⁶⁴ He argues that this form of 'interactive performance concerns mutual obligations and ethics

⁵⁷ Auslander, *Liveness*, 115.

⁵⁸ Mulcahy, 'The Unbearable Lightness of Being?', 484.

⁵⁹ Kahanoff, 'The Will and the Way of the Apparatus in *World Rehearsal Court*', 11.

⁶⁰ Kate Leader, 'Closed-Circuit Television Testimony: Liveness and Truth-Telling' (2010) 14(1) *Law Text Culture* 324.

⁶¹ Mulcahy, 'The Unbearable Lightness of Being?', 486.

⁶² Dixon, *Digital Performance*, 559.

⁶³ *Ibid* 560-561.

⁶⁴ *Ibid* 562.

between performers and spectators’,⁶⁵ such that the audience is put in conversation with the work.⁶⁶ He gives the example of the Centre For Metahuman Exploration’s *Paradise Project* (**Figure 6.2**), a digital performance in which the audience can control the arms of two naked actors using a touch-pad keypad tele-robotically linked to metal braces attached to the actors’ arms. Through this, they can instruct the actors’ to caress one another. In this and other types of interactive performance, including Dixon’s own performance-based research, ‘the spectator’s role is changed from passive viewer to interactive participant’ as the spectator is placed in conversation with – and control over – the work.⁶⁷



Figure 6.2: Centre For Metahuman Exploration, *Paradise Project* (1997)

New technology provides users with new interaction possibilities. Dahlberg writes that, ‘people have a tendency to interact with media and computers in a similar way that they interact with (real) people. Precisely because the mediated quasi-interaction cannot talk back, it allows the user/consumer to develop his or her fantasies without being contradicted.’⁶⁸ Because a screen cannot answer back, the relationship between

⁶⁵ *Ibid.*

⁶⁶ *Ibid* 584-585.

⁶⁷ *Ibid* 508.

⁶⁸ Dahlberg, *Spacing Law and Politics*, 217.

the audience and the screen is unidirectional. The viewer has a great deal more power in this relationship, such that the images on a screen – even if of a testifier – may appear to the viewer as a mere object,⁶⁹ capable of objectification. In the unidirectional relationship with screen, the humanity of the testifier is lost.

Drawing from the performance research of Dixon, part of my methodology in exploring digital legal performance incorporates performance-led research. As discussed previously, performance-led research involves ‘the uses of practical creativity as reflexive enquiry into significant research concerns’,⁷⁰ whereby the creative practice leads to new understandings and insights about the phenomenon under study.⁷¹ As part of my performance-led research, I coordinated *Screening Testimony*, a seminar and installation that sought to explore the use of screens to broadcast testimony in court proceedings and how audiences respond and connect to the actor-testifier on screen. In developing the installation component of the program, I was influenced by the work of artist and legal scholar Carolyn McKay. McKay describes her artistic practice as ‘a habituation to materially thinking’, radically reconceptualising the software of justice and the technologies of audiovisual link as material objects, and focusing on their tactility or materialness. The hands interacting with a tablet computer, for example, are a material interaction joining hand, eye and mind together. McKay sees this kind of sensorial engagement as a way of creating new knowledge about the technologies of justice; moreover, a form of embodied experiential knowledge. This knowledge making also necessitates a reflexive practice, wherein the creative practitioner critically reflects on and analyses their work.

The installation, entitled *Exploring* (**Figure 6.3**), explored contact in digital testimony. Three screens were set up across a gallery-like space with an actor (myself) delivering testimony on a pre-recorded loop looking in three different directions: directly at camera, above camera, and to the side. The audience was invited to interact with the screens – walk around them, touch them and smell them – and then asked, in a group discussion that followed, how they experienced the testimony and how the testimony made them feel in an embodied sense. Though small

⁶⁹ Watson, ‘Judy Radul’s *World Rehearsal Court*’, 5.

⁷⁰ Baz Kershaw, ‘Performance Practice as Research: Perspectives from a Small Island’ in Shannon Riley and Lynette Hunter (eds.), *Mapping Landscapes for Performance as Research: Scholarly Acts and Creative Cartographies* (Palgrave Macmillan, 2009) 4.

⁷¹ Linda Candy and Ernest Emonds, ‘Practice-Based Research in the Creative Arts’ (2018) 51(1) *Leonardo* 64.

in number, the participants were able to provide new insights into the hapticity of digital testimony.



Figure 6.3: Sean Mulcahy, *Exploring* (2018)

Size and place

In *Exploring*, the three screens were placed around the space, such that the audience could walk around them. As other research suggests, the placement of screens in courtroom is important. Delage and Goodrich discuss the placement of screens in the Nuremberg trial such that they become centre stage. The architect of the space ‘moved the judges from the centre to the side of the court’ so that the screens could occupy the ‘focal point, the visual centre of the forum.’⁷² The screens thus become a set property in the legal performance, a key visual element within the performance space. Dahlberg discusses the placement of the screens in Swedish appellate courts. In the court, the parties face each other and above them are ‘two large screens, showing videos projections’, and the court also ‘installed personal screens placed in front of each judge.’⁷³ The participants in the court are likely to interact differently with the large screens on the walls as opposed to the small screens on the judges’ bench. As Dahlberg goes on to note, ‘another possible effect of installing personal screens is related to their size and to the size of the images shown on them, which will be smaller than the images shown on the video projections on the walls behind the parties.’⁷⁴

In *Exploring*, participants stated that they would not have touched the screens if not invited to do so. This very much depended on the device. As the testimony was screened on laptops, the desire to touch was not strong; this may have changed were it screened on a hand-held smart-phone or, conversely, if on a mega screen that endeared a more embodied response in the audience. The size of the screens could thus affect the tactility of the performance. In the courtroom, the architectural arrangement of space prevents most from touching the screens. However, the judges viewing images on a screen at their bench are not so restricted. As the judges’ screens are in a quasi-private location, the judges become voyeuristic audiences who can touch or otherwise interact with the image howsoever they choose without the discomfort that comes with being looked at. They can touch at will.

⁷² Delage and Goodrich, *The Scene of the Mass Crime*, 2.

⁷³ Dahlberg, *Spacing Law and Politics*, 200.

⁷⁴ *Ibid* 200 n 31.

Surface

Courtroom screens are commonly glass. Glass is a wall with an appearance of permeability.⁷⁵ Radul uses the metaphor of a window to describe the glass screen: ‘the video monitor is naturalised as a window by way of which what is “outside” can enter the courtroom as evidence.’⁷⁶ A window, strictly speaking, does not let the outside in unless it is opened, but it does allow a clear vision of the outside. The outside will always be out if there is a window, so there is still a distance there. As Mulcahy describes, ‘the screen on which video link evidence is played in the courtroom places a barrier of glass between the witness and other participants that does not exist in the traditional trial.’⁷⁷ As a barrier, the screen inhibits the potentiality of touch. The audience cannot reach out and touch the actors on screen. Such barriers are increasingly common in legal performance, such as the glass screens in front of a defendant being held on remand. The screens around the dock are barriers put in place ostensibly for safety reasons, but the glass video screen is a subtler barrier between the digital actor and their audience.

In *Exploring*, I explicitly invited the audience to touch the screens: the laptop monitors. When touched, the monitor felt like how the audience expected it should. There was no feeling of overheating or the slight tingling sensation that one might get from the static electricity when a laptop is not plugged in correctly. The experience of touching the screen was thus largely unremarkable. By contrast, the experience of touching another person is deeper.

There is also no depth but rather a flatness of images on screen.⁷⁸ There are indications that virtual reality and 3D audiovisual images may be making their way into the courtroom,⁷⁹ but for the moment audiovisual images are overwhelmingly two-dimensional. The flat shape of the screen means the light has to travel farther to reach the edges, creating a pincushion effect whereby the image appears to be bowed towards the centre. This is in part why curved television screens have become more popular as they avoid this distortion and create a more immersive and deeper field of view for the viewer sitting directly facing the screen. The shape of the screens and the

⁷⁵ Radul, ‘Video Chamber’, 117.

⁷⁶ *Ibid* 133.

⁷⁷ Mulcahy, ‘The Unbearable Lightness of Being?’, 485.

⁷⁸ *Ibid* 484.

⁷⁹ Dana Varinsky, ‘Virtual reality is being used to recreate crime scenes in the courtroom’, *Business Insider* (29 November 2016).

manner in which they control the light that illuminates or reflects off them can thus affect the viewer's experience of the image.

Though beyond the scope of my own performance-led research, Dixon has detailed how tactile sensors are now being built into virtual reality devices. In these virtual reality devices, the audience member's 'body becomes part of the virtual world' for, through the experience of touch, the body is anchored in the virtual world.⁸⁰ The flat screens in the courtroom, by contrast, do not invite the same degree of immersion.

Frame

A critical element of the visual is framing. The framing lens of the camera through which it is shot and the framing borders of the screen through which it is displayed create a boundary between what is seen and not seen.⁸¹ The frame operates as a parenthetical device that exposes its inner scene to scrutiny,⁸² but blocks what is out of frame from perception. This leads to a decontextualised perception. Kahanoff, writing on *World Rehearsal Court*, says that 'the frames around the... characters are so still and so tight that it is easy to imagine they lead lives outside their frames, outside their roles in court.'⁸³ The keyword here is: imagine. The audience can only imagine what is happening outside the frame of our vision or once the camera is turned off or the actor exits its field of vision. A tighter frame gives the viewer more scope to imagine what lays outside its remit, whereas a broader frame narrows the need to imagine – more can be seen from which to draw conclusions.

Legal scholar Costas Douzinas argues that:

The criminal trial has always been a framing device. It isolates a particular defendant and a series of facts and homes in on them... Trials are camera-like framing devices: they circumscribe and underline; they include as legally relevant and exclude as incidental, contingent, external; they turn facts into events, random happenings into causal sequences, people into heroes and villains. Trials frame and separate... Trials were cameras and screens well before any technological innovations were introduced into

⁸⁰ Dixon, *Digital Performance*, 366.

⁸¹ Franke, 'Phantom Limb', 2-3.

⁸² *Ibid* 5.

⁸³ Kahanoff, 'The Will and the Way of the Apparatus in *World Rehearsal Court*', 9.

their operations. They mirror, identify, (mis)recognise. Cameras and screens are the *mise en scene* of the trial: they stage and enframe it.⁸⁴

Here Douzinas is putting forward the notion of law and the legal performance as a framing device that is further enhanced by the use of cameras and screens in court. If the legal performance is a framing device, how tight the frame is and what can be let in are both dictated by those that direct the performance. A wide frame can bring more in; a close frame can focus down. The frame is not always true – as Douzinas says, it can misrecognise – and sometimes it creates not a new image but mirrors the audience’s own face back at them through the reflection on the glass screen.

Videos can be contextually framed,⁸⁵ as the camera literally frames the viewer’s cone of vision.⁸⁶ Decisions over how to frame a particular shot, including seeing the face versus seeing the body⁸⁷ or seeing a testifier at profile versus full-face,⁸⁸ have a significant impact on the meaning of the images on screen. A close up that cuts out aspects of the space decontextualises the video footage and may leave the viewer questioning what it is they are not seeing. In hostage videos, for example, there is an ominous sense of seeing the hostage but not being able to identify the space they are in or, often, see those who are keeping them offstage, who may be deliberately relegated to voices off-screen, calling into the frame but unseen. Here it is important to spacialise rather than simply facialise video images;⁸⁹ they capture spaces not just faces. Though the face may be the focus of the camera, the space around it can give the viewer interpretive cues. In *Exploring*, I underestimated the extent to which the audience would pay attention to the space surrounding the body – the carpet, the wall, a door – and read into it. Because the frame was tightly focused, that within its focus captured the audience’s attention to a greater degree than a wider shot may have.

The frame performs a particular haptic effect of cutting off parts of the body or scene from vision. As MacDougall argues, ‘the filmmaker’s gaze touches – and is touched by – what it sees. A film can thus be said to look and touch.’⁹⁰ The filmmaker’s gaze is an act of seeing through touching: ‘I can touch through my eyes because my

⁸⁴ Douzinas, ‘Rehearsals’, 3.

⁸⁵ Sherwin, *Visualising Law in the Age of the Digital Baroque*, 37.

⁸⁶ Radul, ‘Video Chamber’, 123.

⁸⁷ *Ibid.*

⁸⁸ Dahlberg, *Spacing Law and Politics*, 220.

⁸⁹ Watson, ‘Judy Radul’s *World Rehearsal Court*’, 6.

⁹⁰ MacDougall, *Transcultural Cinema*, 50.

experience of surfaces includes both touching and seeing, each deriving qualities from the other.⁹¹ MacDougall theorises touch in film not only from the perspective of the filmmaker, but also that of the audience. He goes on to argue that ‘our film experience relies upon our assuming the existence of a parallel sensory experience in others’;⁹² that is to say, that just as the filmmaker touches, the audience to the film are touched – a form of reciprocal haptic communication. The frame is the filmmaker’s gaze; that is to say, the filmmaker touches that which is within the frame and, through screening, invites the audience to do likewise. What is out of frame is out of touch.

Body

Liveness, presence and the need to view full body are all significant to mediated performance.⁹³ Often what will be in view in videoed testimony are the head, torso and hands,⁹⁴ but the remainder of the body will be restricted from view. Video ‘presents a framed view of things... which focuses on ‘talking heads’ and torsos at the expense of the whole body’,⁹⁵ but the body is so important to live performance.⁹⁶ Furthermore, ‘witnesses using the medium are instructed to avoid unnecessary movement for fear that it will have an adverse effect on the quality of transmission’,⁹⁷ and it may lead to jerky images that are difficult for the audience to decipher or connect to. The framing of the image generally keeps the testifier literally and symbolically at the centre and conceals both the questioner and the camera,⁹⁸ but, in other instances, the whole room is visible.⁹⁹

What is visible affects the audience’s reception and ability to read spatial context and body language. If the frame is enclosed, the emphasis on the voice, eyes and vocals increases, whereas if it is a wider frame there are more visual clues, including body and space. In a wider shot, the audience can see more of the testifier’s dress and make judgments according to that. That may be why there is a preference for close up shots. Actions speak louder than words and often the most active part of communication is the hands, which are out of frame in close up shots. The testifier may alter their dress

⁹¹ *Ibid* 51.

⁹² *Ibid* 52.

⁹³ Auslander, *Liveness*, 124.

⁹⁴ Dahlberg, *Spacing Law and Politics*, 192, 218.

⁹⁵ Mulcahy, ‘The Unbearable Lightness of Being?’, 485.

⁹⁶ Watson, ‘Judy Radul’s *World Rehearsal Court*’, 7.

⁹⁷ Mulcahy, ‘The Unbearable Lightness of Being?’, 484.

⁹⁸ Dahlberg, *Spacing Law and Politics*, 220.

⁹⁹ Mulcahy, ‘The Unbearable Lightness of Being?’, 479.

or body movement if they know that that is not being seen, rather than dressing and moving in conformity with what they are saying. For the audience, the emphasis is narrowed to the voice and face. In the sections that follow, I go on to consider the body of the testifier – face, eyes and hands – drawing from my performance-led research.

Face

The principle of confrontation is a well-established feature of the common law.¹⁰⁰ It refers to the right of the defendant to confront and examine the witness against them in open court. Whilst confrontation suggests the ability to *face* one's accusers, Mulcahy notes that current jurisprudence suggests that 'the right of confrontation has become far from synonymous with face-to-face confrontation in open court.'¹⁰¹ Nonetheless, in her analysis of televisual testimony, Kate Leader argues that there is a *belief* in the value of live testimony, namely, because of the belief that legal practitioners and juries have in the value of live testimony, they are more likely to accept testimony that is delivered face-to-face rather than mediated through screens.¹⁰² This belief gives the face-to-face interaction in live performance particular value.

In his analysis of Swedish courts, Dahlberg describes the face-to-face interaction in the courtroom in considerable depth:

In the Swedish courtroom, the participants are placed so that the parties are facing each other and also the court – the judge(s) and the lay judges – but between them there is a physical distance, so that they are separated by an empty space. The physical distance also makes it possible for the participants to observe one another, necessitating their speaking loud enough so that everybody can hear what you are saying, a fact that in itself makes the social interaction less intimate and more formal. In this way, the physical arrangement emphasises the conflict between the parties – as well as the neutral and elevated position of the judges – and thereby limits the space for open-minded reasoning, compromises or agreement. In short, the architectural and social arrangements in the courtroom

¹⁰⁰ Leader, 'Liveness and Truth-Telling', 319; Mulcahy, 'The Unbearable Lightness of Being?', 472.

¹⁰¹ Mulcahy, 'The Unbearable Lightness of Being?', 472.

¹⁰² Leader, 'Liveness and Truth-Telling', 325-326.

demand of the parties that they act their part in the play, something that many people find difficult – if not impossible.¹⁰³

As Dahlberg's analysis suggests, face-to-face interaction in the courtroom is mediated by the architectural arrangements of the space: the distance between the actor and audience can make the interaction less intimate and more formal. Conversely, being up close could render the interaction more intimate and casual. The spatial arrangements of courtroom creates separation between actor and audience that allows the audience to observe at a distance, and this distance suggests a lack of connection with one another through which compromise and agreement could otherwise arise. As Dahlberg explains, 'in contrast to everyday conversations, the face-to-face interaction in the courtroom is highly formalised, regulated by written and unwritten rules, and hierarchically organised.'¹⁰⁴ This can be contrasted to the waiting space outside the courtroom that, as discussed in Chapter Two, is a more fluid space that may allow for closer face-to-face interactions and the intimate conversations that can lead to agreement.

Face-to-face interaction also enables the audience and actor to assess one another's demeanour and respond accordingly. As Dahlberg continues:

In face-to-face interaction, the participants are immediately present to each other and they share a common spatio-temporal reference system. Participants can use deictic expressions and assume that they will be understood. In face-to-face interaction, communication is dialogical in character, even if the active participation of one of the parties at times may be limited to showing that he or she is following the conversation... The verbal language can be supplemented by non-verbal language (such as winks, gestures, frowns and smiles, changes in intonation, and body posture)... Thus, when a party or witness is speaking in the court, he or she will receive feedback not only in the form of verbal questions addressed to him or her, but also in the form of non-verbal cues such as nods, smiles and frowns.¹⁰⁵

¹⁰³ Dahlberg, *Spacing Law and Politics*, 213.

¹⁰⁴ *Ibid* 212.

¹⁰⁵ *Ibid* 211-212.

There are two things going on here. The audience is assessing the demeanour of the actor based on their appearance and mannerisms and, through that, making judgments as to their credibility. Though the linkage between demeanour and credibility is disputed,¹⁰⁶ it still has a cultural currency amongst legal practitioners.¹⁰⁷ Simultaneously, the actor is assessing the demeanour of the audience, checking in to see how they are responding, and adjusting their performance accordingly.

Like Dahlberg, Mulcahy argues that there is significance to the face-to-face confrontation that occurs in a courtroom – however mediated that is by spatial and social conventions – that is less present in interactions with video through screens.¹⁰⁸ Whilst she argues that there is a need for face-to-face confrontation at trial, face-to-face confrontation can – as the name suggests – be very confronting, particularly for vulnerable testifiers.¹⁰⁹ The frightening nature of the trial can cause some testifiers to be inhibited or react emotionally, thus Mulcahy concedes that video evidence should be used for vulnerable witnesses.¹¹⁰ Against this notion of confrontation as a risk, it is also arguable that the ‘positive intimidation’ of the courtroom can be ‘regarded as an aid to... truth-telling’ and the ‘visible distress [of the testifier]... as a marker of credibility.’¹¹¹ Confrontation is thus essential to enabling an assessment of credibility, and this sense of confrontation is heightened in live performance. The judging audience can infer the truth from visible signifiers, and it is arguably more likely that a testifier will tell the truth because they can see their judging audience and focus on them rather than a camera lens. The space of the courtroom itself is also important to the truth-telling exercise of testimony. Dissociated from the courtroom space, a testifier may not feel the positive intimidation that the space demands to tell truth. Looking at an image on a screen differs from face-to-face interaction in live performance.¹¹²

In *Exploring*, I found that when the audience looked at images of the actor on each of the three screens showing the actor’s face, hands and feet, there was a focus on the face as a powerful centre of meaning capable of deconstruction because of its

¹⁰⁶ Leader, ‘Liveness and Truth-Telling’, 322.

¹⁰⁷ Mulcahy, ‘The Unbearable Lightness of Being?’, 484.

¹⁰⁸ Mulcahy, ‘The Unbearable Lightness of Being?’, 483.

¹⁰⁹ Auslander, *Liveness*, 121-122.

¹¹⁰ Mulcahy, ‘The Unbearable Lightness of Being?’, 469-470

¹¹¹ Leader, ‘Liveness and Truth-Telling’, 321.

¹¹² Mulcahy, ‘The Unbearable Lightness of Being?’, 484.

expressive qualities. As MacDougall argues, the face is the site of recognition: we identify others through their faces, which are ‘the stamp of the self.’¹¹³ The face is also ‘the theatre of the body, registering the inner life of its owner’ through its various different expressions signaling different emotional states.¹¹⁴

In a study of court proceedings using video, Rowden et al observed that ‘the image of [the] remote participant is often distorted’¹¹⁵ in such a way ‘that their face takes up a large proportion of the screen’¹¹⁶ Film scholarship suggests that the technique of the close up can ‘bring the viewer into a position of unusual physical intimacy with the film object’, particularly when it is a close up of the face.¹¹⁷ As Dixon’s work suggests, large, close-up images create intimacy between the audience and the actor on screen and heighten the audience’s emotional reaction. Though not remarked upon in his analysis, the Chameleons Group frequently uses large close-ups of faces or facial features to create a kind of hyper-presence of the images on screens ([see here](#)).¹¹⁸ Every emotional inflection of the face is exaggerated due to its scale. In the final scene of the trailer for *Chameleons 4: The Doors of Serenity*, a tear falls down the digital actor’s cheek and then the footage is rewound and the tear runs back up into her eye. The size also breaks down the distance between the actor and the audience. The actor on screen is hyper-preset, a large, looming figure in the space. Because of the size of the image, the audience is forced into a confrontation with it.

As Dahlberg has suggested, the size of the images on the screen can affect the audience’s interaction with them.¹¹⁹ The Chameleons Group’s large-scale close-up of faces on screens invite touch, but that touch is radically reshaped because of the size of the image. In live performance, the audience’s hand could reach out and cup the actor’s face from jaw to cheekbone. In these large-scale digital screens, the audience’s hand might only be able to touch an aspect of the cheek. The actor on screen dwarfs the audience. Conversely, a smaller image on screen may mean that the space from the actor’s torso to their head is measured in the size of the audience’s hand, such that the audience dwarfs the actor.

¹¹³ MacDougall, *Transcultural Cinema*, 51.

¹¹⁴ *Ibid.*

¹¹⁵ Emma Rowden et al, *Gateways to Justice: Design and Operational Guidelines for Remote Participation in Court Proceedings* (University of Western Sydney, 2013) 9.

¹¹⁶ Rowden et al, *Gateways to Justice*, 30.

¹¹⁷ MacDougall, *Transcultural Cinema*, 51.

¹¹⁸ Dixon, *Digital Performance*, 506.

¹¹⁹ Dahlberg, *Spacing Law and Politics*, 200 n 31.

The practice and research suggests that there is a concentration on the face on the screen and the size of the facial image can affect the experience of confrontation between actor and audience in digital performance. A large-scale image can enable the audience to more closely read the face as part of its demeanour assessment, and break down the distance between audience and actor. The scale of the screen – and the ability to zoom in and interact with the image, which future applications may allow – may challenge the pervading belief in the value of live testimony for demeanour and credibility assessment. It can also open up new ways of looking.

Eyes

The way in which we interact with the visual in the courtroom can be described as looking or gazing. There are various gazes within the courtroom in contrast to the singular focus of a camera.¹²⁰ The camera angle of courtroom creates a particular perspective.¹²¹ It could be argued that the camera is the ‘eye of the law.’¹²² The camera replaces the eyes of the legal audience with a fixed frame from which to interpret matters. On the subject itself, it asserts a legal vision, framing action in a particular way. People tend to be cautious when aware that they are being filmed for legal reasons – security, testimony, interrogation, etc. The lens exerts a pressure on those within its eye,¹²³ reminding them of their duty to comply with the law. This recalls Radul’s earlier provocation that the court is a camera. However, a camera lens cannot move about in the same way as an ocular lens or eye.¹²⁴ Through an eye, the viewer can control what they look at, but through a camera lens, another frames the sight.

In live performance, the audience can look directly into the eyes of the actor and vice versa. In Marina Abramovic’s work *The Artist is Present* (**Figure 6.4**), the artist sits in a gallery space and maintains eye contact between herself and a member of the audience in silence. The work explores the idea that eye contact can communicate meaning, that we look for something – some meaning – in it. There is also something deeply intimate and therefore emotional about eye contact,¹²⁵ but it is also durational.

¹²⁰ Radul, ‘Video Chamber’, 125.

¹²¹ Sherwin, *Visualising Law in the Age of the Digital Baroque*, 34.

¹²² Dahlberg, *Spacing Law and Politics*, 218.

¹²³ Radul, ‘Video Chamber’, 129.

¹²⁴ Watson, ‘Judy Radul’s *World Rehearsal Court*’, 3.

¹²⁵ Joan Kellerman, James Lewis and James Laird, ‘Looking and Loving: The Effects of Mutual Gaze on Feelings of Romantic Love’ (1989) 23(2) *Journal of Research in Personality*.

One can only hold eye contact for a certain period of time before it becomes uncomfortable. The audience can avert their eyes to other parts of the space that they are in, but the gaze of the actor holds their attention. The eye contact and physical proximity instates the artist's presence.



Figure 6.4: Marina Abramovic, *The Artist is Present* (2010)

Direct eye contact is crucial to communication;¹²⁶ it can often be used to test for truth or authenticity. Whilst it is referred to as eye contact, there is no physical contact, but a contact through looking – with two people looking into each other's eyes at the same time. The contact in this sense is not strictly haptic but a reciprocal communication. Nevertheless, there is a haptic potential within eye contact, the sense that by reaching out, you can touch. Whilst an audience member can sometimes have a strong emotional reaction to a video and touch the screen as a way of connecting with the image,¹²⁷ the physical distance remains, fracturing the haptic potentiality. To me, this suggests that eye contact brings a longing for touch that is unfulfilled through digital mediums.

¹²⁶ Radul, 'Video Chamber', 130.

¹²⁷ At the extreme end of the spectrum, see Mona Hatoum's *Corps Etranger*, where the artist filmed her skin and internal organs at close distance then broadcast them on screens for the audience to walk over and touch: Christine Ross, *The Past is the Present; It's the Future Too: The Temporal Turn in Contemporary Art* (Continuum, 2012) 185.

The introduction of videos in court leads to eye witnessing mediated through screens.¹²⁸ In his observations of the Swedish courts, Dahlberg noted that a witness giving video testimony looks into the camera rather than at the person asking them questions, and when they turn to answer a question are directed by the judge to face the camera, creating an unnatural social interaction between the questioner and the testifier, making the testifier uncertain of where to fix their eyes.¹²⁹ The perspective of the camera subordinates the perspective of the actors within the screen by demanding that the testifier look into it, creating a ‘kind of obviousness, truth and reality.’¹³⁰ Looking directly at camera and the presumed audience has a confessional quality to it. It is as though by looking directly into the camera, the actor is looking directly into the audience’s eyes. To look away from the camera destroys the eye contact that is crucial to communication. Technological adaptations are seeking fixes to missing eye contact in video-links,¹³¹ suggesting that there is a loss of contact in the move from live to digital performance.

From the audience’s perspective, the eyes are the apotheosis of the face. As MacDougall describes, eyes are an ‘instrument of revelation’ and are therefore closely watched for what they reveal.¹³² In *Exploring*, the screen with the face of the actor changed from the actor looking directly at camera, above camera, and to the side. It was the image of the actor looking directly at camera that the audience most connected with. When watching a screen, the audience can focus on the screen or look around the space. In *Exploring*, the audience constantly returned to the screen. In looking the actor in the eyes, they were able to pick up that the actor was reading text by the way that the eyes moved from left to right and from this questioned the authenticity of the testimony.

Hands

In *Exploring*, a screen was focused on the actor’s hands, and just the hands. The focus on the hands alone meant that the speech was disembodied. The audience could not see the mouth of the speaker. MacDougall observes that the hands are often ‘studied

¹²⁸ Sherwin, *Visualising Law in the Age of the Digital Baroque*, 7.

¹²⁹ Dahlberg, *Spacing Law and Politics*, 217-218.

¹³⁰ *Ibid* 219.

¹³¹ Franc Solina and Robert Ravnik, ‘Fixing Missing Eye-Contact in Video Conferencing Systems’ in *Proceedings of the ITI 2011, 33rd International Conference on Information Technology Interfaces* (Institute of Electronics Engineers, 2011).

¹³² MacDougall, *Transcultural Cinema*, 52.

for clues',¹³³ and the close-up invited direct attention to them. Just as the face is read for demeanour, so are the hands and the gestures that they create.

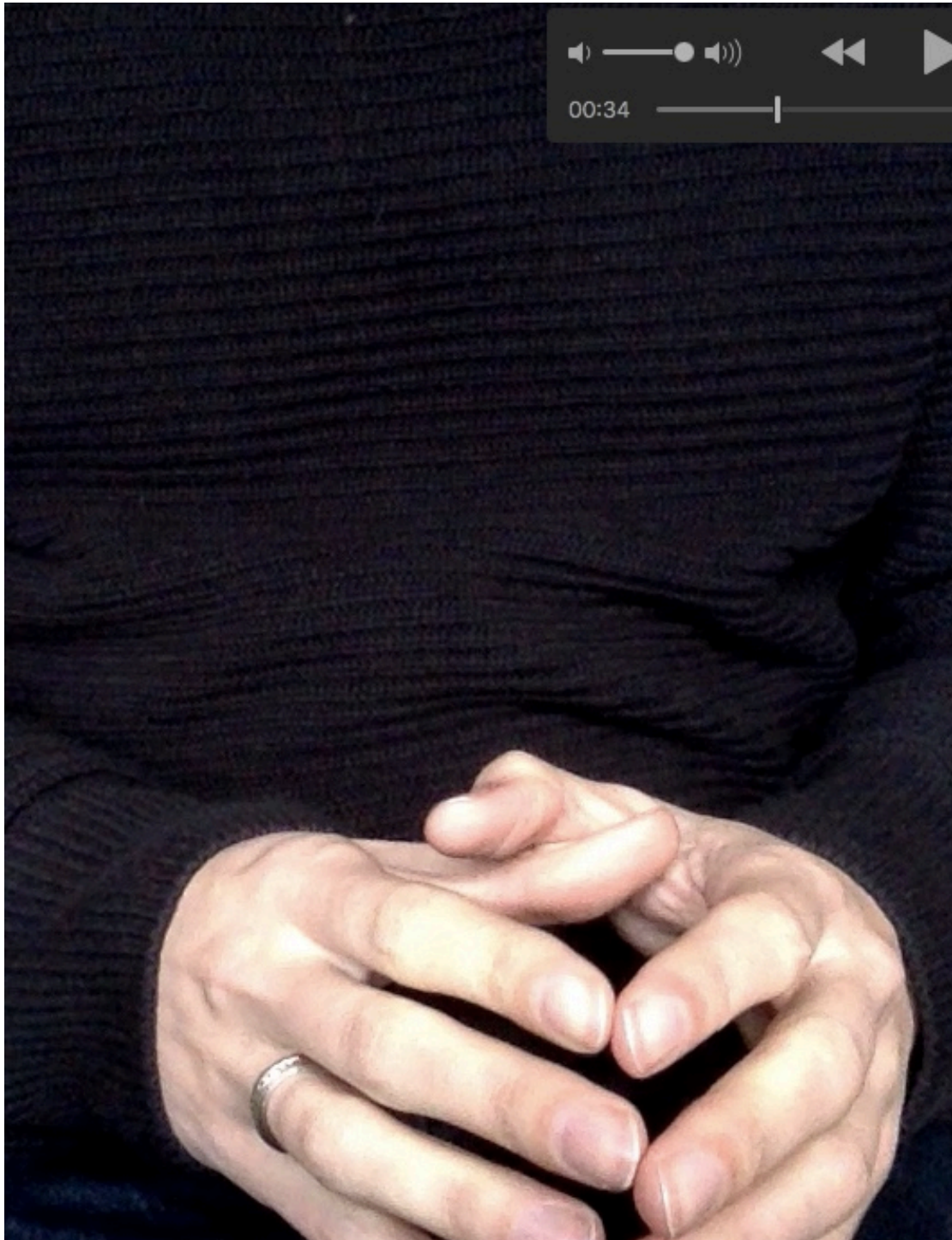


Figure 6.5: Sean Mulcahy, *Exploring (Hands)* (2018)

¹³³ *Ibid.*

The hands are also receptors for touch. In *Exploring*, I invited the audience to touch the screens through verbal instruction, but there was reluctance on their part to do so. To combat this reluctance of audiences to engage with digital performances haptically, some digital performance practitioners have taken different approaches. The words ‘touch me’ appear alongside Lynn Hershman’s *Deep Contact*, and the audience’s touch directs the screen narrative in different directions.¹³⁴ In Alba d’Urbano’s *Touch Me* the touched part of the image is replaced with the viewer’s own image.¹³⁵

It could be argued that the encounter between audience and screen is an embodied interaction,¹³⁶ that video reaches out from the screen to the bodies of the audience and that the audience can imagine what is happening on the screen felt within their own bodies. Sometimes the sense of touch is so potent that the audience can enact and feel the digital image in their bodies.¹³⁷ As Olivia Barr says when watching closed circuit television footage, sometimes ‘it is so impossibly tangible that it can nearly be tasted.’¹³⁸ In *Paradise Project*, the audience watch on through a video monitor showing the point of view of either actor. As Dixon writes, ‘the subjective camera viewpoint enhances the sense of the user’s identification with one of the performers’ so much so that ‘they “inhabit” the bodies of the remote performers to engage in physical interaction.’¹³⁹

Introducing interactivity is one way of bringing the audience closer to the actor or object on screen. MacDougall also suggests that placing objects in close up may evoke the sense of touch.¹⁴⁰ The close up evokes closeness, bringing the image within reach. Whilst I have argued that the introduction of screens removes the potential of touch, this is one way of bringing the sense of touch back into the experience of watching film.

¹³⁴ Dixon, *Digital Performance*, 568.

¹³⁵ *Ibid* 246.

¹³⁶ Kirsty Duncanson, ‘Erotic Conversations about Contract and Consent at the Cinema’ (Seminar delivered at the Criminal Justice Centre, University of Warwick, 26 October 2017). See also MacDougall, *The Corporeal Image* and Sherwin, ‘What Authorises the Image?’, 347-348.

¹³⁷ MacDougall, *Transcultural Cinema*, 53.

¹³⁸ Olivia Barr, ‘Mourning Place’ in Chris Butler and Edward Mussawir (eds.), *Spaces of Justice: Peripheries, Passages and Appropriations* (Routledge, 2017) 76.

¹³⁹ Dixon, *Digital Performance*, 586-587.

¹⁴⁰ MacDougall, *Transcultural Cinema*, 106.

Questions of touch are closely tied to questions of distance. To be out of touch is to be out of reach, and what is out of reach is at a distance. Certain filmic techniques such as the close up can restore some sense of touch. Advances in virtual technology can also open up new ways of interacting with the actor on screen. Yet the distance always remains. In the final chapter, I shall explore how legal performance places value on presence vis-à-vis distance, and how digital performance of testimony is challenging the value of presence to legal performance.

Presence or distance?

There is a deep significance to the act of people gathering in space.¹⁴¹ In the legal performance, the ‘parties gather together in each other’s physical presence.’¹⁴² Leader questions ‘what is at stake in the live presence of bodies together in the same space’,¹⁴³ and concludes that ‘the most obvious difference between the use of CCTV testimony and evidence testing in a traditional trial is the absence of a witness’s body from the courtroom.’¹⁴⁴ She contends that the absence of the body through the introduction of screened testimony has focused legal attention on the value of presence, which is born out by the literature on this topic.

Mulcahy claims that physical presence endows an interaction with more meaning, impact and power,¹⁴⁵ pointing to other events that are conducted through face-to-face interaction: parliamentary debates, weddings, funerals. There is something significant about the gathering together of bodies in space in these moments. Whilst Mulcahy avers that ‘public adjudication will always be enriched by the physical presence of participants... [whereas] the absence of bodies can serve to impoverish the performance of important public functions and rituals’,¹⁴⁶ the absolutism of this statement rests on untested beliefs about the power of presence. Similarly, the High Court of Australia in *Butera v DPP* acknowledged that ‘oral evidence gives to the trial the atmosphere which, though intangible, is often critical to the jury’s estimate of the witness.’¹⁴⁷ Again, the impact of presence is intangible and immeasurable. This

¹⁴¹ Mulcahy, ‘The Unbearable Lightness of Being?’, 475.

¹⁴² *Ibid* 465.

¹⁴³ Leader, ‘Liveness and Truth-Telling’, 313.

¹⁴⁴ *Ibid* 314.

¹⁴⁵ Mulcahy, ‘The Unbearable Lightness of Being?’, 487; Auslander, *Liveness*, 129-130.

¹⁴⁶ Mulcahy, ‘The Unbearable Lightness of Being?’, 487.

¹⁴⁷ *Butera v DPP (Victoria)* (1987) 164 CLR 180, 189.

form of discourse risks running into the cliché of live performance as holding some kind of magical quality, which Leader and Auslander are dismissive of.¹⁴⁸

As Auslander avers, the audience gather together in a shared space to watch the mediated performance.¹⁴⁹ Whilst the actor is in a separate space, the ‘video links act as a conduit between conceptually linked but non-contiguous spaces.’¹⁵⁰ Indeed, the Victorian *Evidence (Miscellaneous Provisions) Act* says that ‘the remote part must be taken to be part of the court... and to be court premises,’¹⁵¹ even though the different locations are spatially distinct and rarely look the same.¹⁵² Video link thus acts as a connecting device interlinks disparate spaces. The testifier has a presence in space by virtue of their image and voice being broadcast into it, perhaps omnipresence unbounded by the physical restrictions of place. There is thus a dialectic forming here between the idea of video cameras enforcing distance between actor and audience versus bringing the audience closer to the actor on screen.¹⁵³

Dahlberg suggests that there is something about the physical presence of the testifier in space that has an affective quality.¹⁵⁴ Moreover, ‘requiring the physical presence of people in court continues to have cultural resonance.’¹⁵⁵ An example of this is the huge public debate over Cardinal George Pell giving evidence to the Australian Royal Commission into Institutional Responses to Child Sexual Abuse from a hotel room in Rome, which was live streamed to the Commission headquarters and the regional town where the Cardinal was once based, with a small audience who travelled to the Rome hotel ‘to look him in the eyes.’¹⁵⁶ The incident spawned protests and a song calling on the Cardinal to ‘come home’ to give evidence in person. Later, when the Cardinal was charged with sexual offences against children, he appeared in court in person.¹⁵⁷

¹⁴⁸ Leader, *Trials, Truth-Telling and the Performing Body*, 211-212; Auslander, *Liveness*, 1999, 55.

¹⁴⁹ Auslander, *Liveness*, 55.

¹⁵⁰ McKay, *The Pixelated Prisoner*, 22.

¹⁵¹ *Evidence (Miscellaneous Provisions) Act 1958* s 42W(1).

¹⁵² McKay, *The Pixelated Prisoner*, 25.

¹⁵³ Radul, ‘Video Chamber’, 132.

¹⁵⁴ Dahlberg, *Spacing Law and Politics*, 192.

¹⁵⁵ Mulcahy, ‘The Unbearable Lightness of Being?’, 465.

¹⁵⁶ Victoria Caw, ‘Cardinal George Pell to face Royal Commission from Rome Hotel’ *news.com.au* (29 February 2016).

¹⁵⁷ Emma Younger, ‘George Pell faces Melbourne Magistrates’ Court on historical sexual offences charges’ *ABC News* (26 July 2017).

As the protests against the Cardinal's initial video appearance at the Royal Commission demonstrate, video radically alters the presence of testifiers. However, as Leader writes, 'when a witness is absent from the courtroom they are still "present" somewhere; it is simply that it is *not* in the courtroom. Consequently, the importance of what happens *in the courtroom* is as fundamental as what is happening in the remote site.'¹⁵⁸ It could be argued that the witness is still present in the court if not actually physically present. They have a presence in the space by virtue of their image and voice being broadcast into it – perhaps even omnipresence, unbounded by physical restrictions of place. At the same time, there is a 'sense of emotional distance promoted by live link'¹⁵⁹ because videos 'undermine the value of physical proximity.'¹⁶⁰ When a person is physically present, it 'makes it easier to evaluate the nuances of body language and demeanour.'¹⁶¹ The distance that intercedes in the transmission of video makes it more difficult to pick up on these physical cues. As I have argued, the screen also fractures the potential for touch between audience and actor, as the actor is out of touch and thus at a distance.

Whilst Dixon argues that the screen allows for distanced contemplation,¹⁶² with interactive virtual technologies it may be easier to pause, zoom in and more closely when a testifier is giving evidence via video. Through hand-held audiovisual devices, we can hold people closer to us than social convention would normally allow, allowing us to see them up-close and from different angles. What we are seeing, though, is an *image* of the body, not the *actual* body. The actual body is not proximate and is instead in a distant other space.

Thinking through live versus digital legal performance haptically, we can come to understand the value that is placed on physical presence in legal performance. The belief in the value of live performance rests, at least in part, on the haptic potential of live performance – the idea that by reaching out, the audience can touch the performer. This haptic potentiality lends the performance more potency, for it can be *felt* in the body of the audience. Whilst digital performance may invite a physical response from the audience and new technological advances can increasingly activate the audience's touch, the interaction with the digital performer and the audience is

¹⁵⁸ Leader, 'Liveness and Truth-Telling', 314.

¹⁵⁹ Mulcahy, 'The Unbearable Lightness of Being?', 484.

¹⁶⁰ *Ibid* 485.

¹⁶¹ *Ibid* 484.

¹⁶² Dixon, *Digital Performance*, 563.

necessarily at a distance, out of reach and out of touch. In digital performance, the artist is not present, at least not in the haptic sense in which a live performer is.

Conclusions

Through this chapter, I have developed a new approach to analyse the effects of digital versus live performance of courtroom testimony: performance-led research focused on the sense of touch, with particular attention to the audience's experience of testimony. This has involved consideration of both the medium of the screen (its size, position, surface and frame) and the embodied interaction between actor and audience through the screen, with particular attention to the face, eyes and hands.

Being *in touch* ties to the question of presence versus distance in live versus digital testimony. The digital futures of courtroom video pose new potential for breaking down distance and instating touch in digital performance. Looking forward, to quote Mulcahy, 'there seems little doubt that... in time images of witnesses giving evidence from remote location will appear as sophisticated 3D holograms within the body of the court.'¹⁶³ As Radul writes, 'the recent emergence of a viable 3D cinema offers a deeper depth, anchoring reality not in the narratives... but through the binocular perceptual apparatus on the viewer.'¹⁶⁴ Images will be deeper, closer to bodies in bodies in space. The viewing apparatus will thus be crucial to determining the construction of the image. The images will be more sophisticated when viewed through certain apparatus, but more distorting when viewed with the naked eye. As technology advances, the ways in which the audience view and interact will change.

Whilst we may be some way from the prophesied virtual court, most courtrooms are now replete with virtual technology devices for communication, which, as artist-scholar McKay writes, 'implicates simulacrum, something abstracted from real human interaction.'¹⁶⁵ McKay's work, *Tecchnosomatica*, explores the transformation from live body to mediatised body in the digital transmission of the courtroom video-link.¹⁶⁶ Drawing inspiration from description of the screen-body coupling as

¹⁶³ Mulcahy, 'The Unbearable Lightness of Being?', 482 n 71.

¹⁶⁴ Radul, 'Video Chamber', 128.

¹⁶⁵ McKay, *The Pixelated Prisoner*, 178.

¹⁶⁶ Carolyn McKay, 'Art, Criminology, Research' in Denise Thwaites (ed.), *Critical Animalia: A Decade Between Disciplines* (Critical Animals, 2013).

‘technosomatic involvement’,¹⁶⁷ it is almost as if the body in the work has blended into the screen and the technological apparatus that belies it. The body has become virtual.

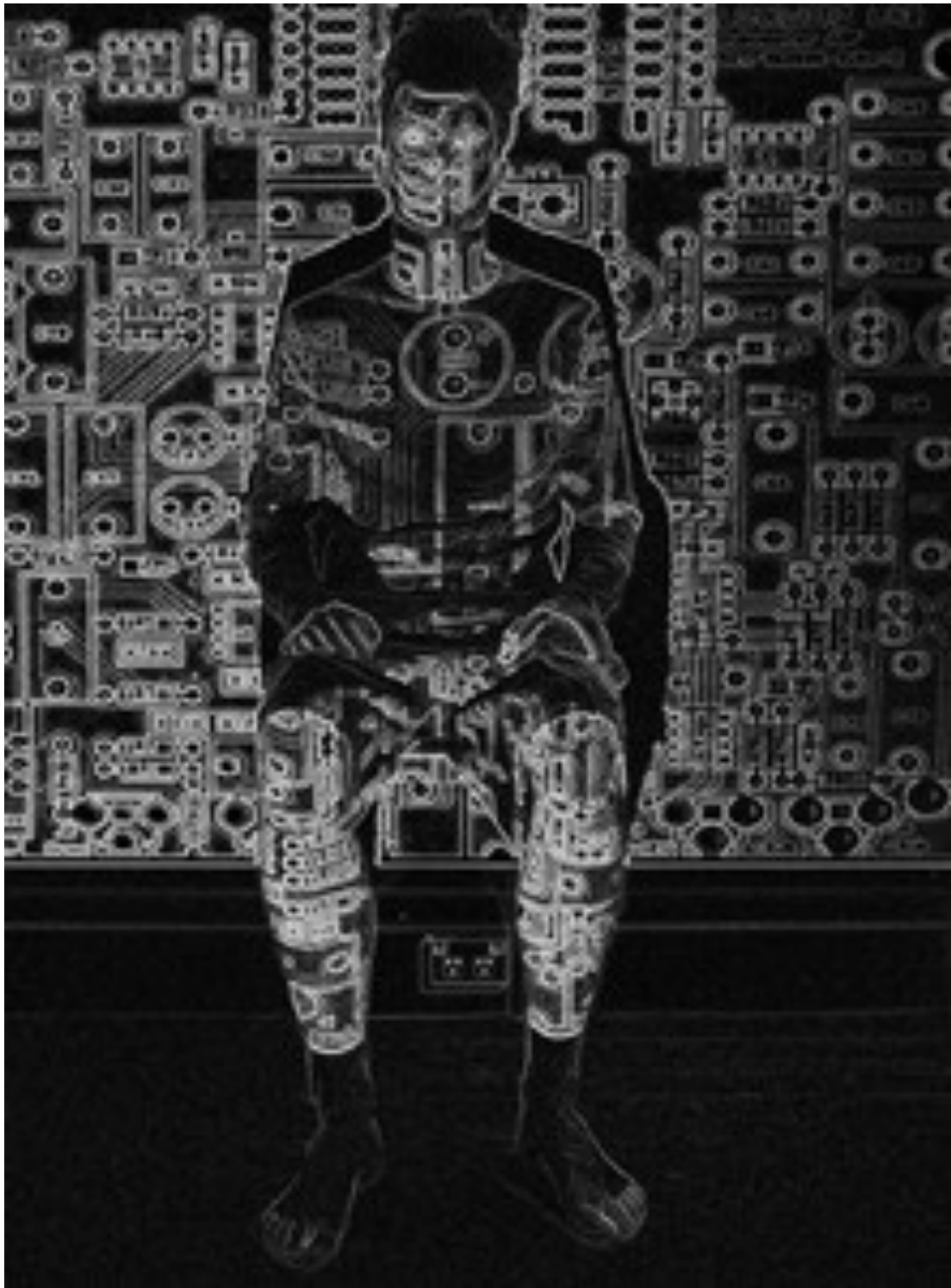


Figure 6.6: Carolyn McKay, *Technosomatica* (2012)

¹⁶⁷ Ingrid Richardson, ‘Faces, Interfaces, Screens: Relational Ontologies of Framing, Attention and Distraction’ (2010) 18 *Transformations: Journal of Media, Culture and Technology* 3-4.

Part of the problem to date is that legal practitioners and scholars have been asked to make sense of the moves to digital performance when there is considerable value in turning to artists and performance-makers. It is critical, as new virtual technology is introduced into the court, that there is consideration of how it reshapes the audience's experience of legal performance. This mode of thinking demands a consideration of performance scholarship and practice, and recognition of the constitutive role that performance plays in the law.

Conclusions

After Legal Performance: The End and Afterlife of Legal Performance

Post-performance

The legal performance ends.

The end of performance, however, is seldom carefully studied. As Richard Schechner writes, the ‘transition between the show and the show-is-over is an often overlooked but extremely interesting and important phase.’¹ It is part of what Victor Turner terms the phase of ‘reintegration’ whereby there is change of status.² In Chapter Two, I argued that the liminal stage/space of the legal performance transforms the individuals attending into a collective audience. Here, it can be argued that, through the reintegration phase, those attending a legal performance transition from audience back to individual.

Schechner suggests that the post-performance reintegration phase has two stages: cool-down and aftermath. In this closing chapter, I propose that in addition to these two stages, exit needs to be a critical part of this inquiry and what it means to leave. As such, building on Schechner’s framework, the post-performance phase has, in my view, three key stages: exit, cool-down and aftermath. These stages take time. As Schechner writes, ‘aftermath can be a slow and unfolding process... cool-down is more immediate.’³ The exact time is always flexible, and the different stages can overlap. The ultimate destination is the return to everyday life. In this concluding chapter, I explore each of the stages of post-performance, and then turn to the end of this thesis with some reflections and future directions for research and practice in the field of legal performance.

Exit

In Chapter Two, I took you on an approach to the courthouse guided in part by an application of performance scholar Susan Bennett’s theories on theatrical spaces to the legal performance space of the courthouse. As Bennett writes, ‘the act of leaving the theatre is always important.’⁴ The same could be said of the courthouse. Yet, despite the importance of the exit to performance, Schechner argues that ‘too little study has been made of how people – both spectators and performers – approach and

¹ Richard Schechner, *Performance Studies: An Introduction* (Routledge, 2002) 211.

² Victor Turner, *Dramas, Fields and Metaphors* (Cornell University Press, 1974) 41-42; Victor Turner, *The Anthropology of Performance* (Performing Arts Journal Publications, 1986) 92.

³ Richard Schechner and Willa Appel (eds.), *By Means of Performance: Intercultural Studies of Theatre and Ritual* (Cambridge University Press, 1997) 5.

⁴ Susan Bennett, *Theatre Audiences: A Theory of Production and Reception* (Routledge, 1997) 164.

leave performances.’⁵ In this section, I will consider how audiences leave the legal performance through two case studies.

Exit is the obverse of entry, but it is often through the same space that one enters and exits. As artist Stephen Young writes, ‘what appears to be an entrance is often also an exit from another experience. As we change and grow, we must experience both entrances and exits and each leaving is also the beginning.’ The exit is the beginning of the post-performance phase of reintegration, just as the entry is part of the liminal phase of becoming an audience. The entrance/exit is also a boundary. In courts, there is careful policing of boundaries between the outside and the inside, though it is collapsing with the introduction of cameras to film and broadcast court proceedings, as discussed in Chapter Six.⁶ Noting that, here I provide two contrasting examples of leaving in live performance to illustrate different approaches to audience exit.

In 1979, Richard Schechner’s The Performance Group staged an adaptation of Jean Genet *The Balcony* at the Performing Garage on Wooster Street in SoHo, New York. As Schechner writes, ‘at the end of *The Balcony* Irma [the lead character] sends the audience home through a different door to the one they came in. They exit directly onto Wooster Street. “You must go home now, where everything – you can be sure – is phonier than here. Go now, leave by that door, through the alley.”’⁷

In the 1990s, architect Bernard Kohn designed the courthouse at Montpellier. In the layout, the courtrooms are positioned as islands within the waiting area. After being shown around the courthouse by Kohn, Linda Mulcahy wrote that, ‘this allows participants who fear confinement of the courtroom to walk around the outside of the courtroom enclosure and understand the spatial dynamics of their subsequent encasement’,⁸ then re-enter the space through one of the doors to the courtroom.

In many ways, these two case studies could not be more different: a theatre production in New York in the 1970s and a courthouse design in Montpellier in the 1990s. Yet, as this thesis has – I hope – demonstrated, these are both sites of

⁵ Richard Schechner, *Performance Theory* (Routledge, 2003) 190.

⁶ Judy Radul, ‘Video Chamber’, in Marit Paasche and Judy Radul (eds.), *A Thousand Eyes: Media Technology, Law and Aesthetics* (Sternberg Press, 2011) 131-136.

⁷ Richard Schechner, *Between Theatre and Anthropology* (University of Pennsylvania Press, 1985) 270.

⁸ See also Linda Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (Routledge, 2011) 154.

performance and meaningful inferences can be drawn through comparing the theatrical performance to the legal. In this case, they both involve the act of exiting.

The example of *The Balcony* is quite unusual. In most of Schechner's other productions with The Performance Group, he says that 'when the drama is over I speak to spectators as they are leaving. I direct many of them to where the performers are so that the experience ends not with a dramatic moment, or even the curtain call, but with discussions, greetings and leave-takings.'⁹ Yet, in *The Balcony*, the audience is thrust out onto the street with a command to go home. The exit is confronting. The exit to *The Balcony* is also confronting in another sense. The closing words of the actor suggest that the reality of everyday life is 'phonier' than the performance they have just experienced, creating confusion in the minds of the audience over the status of the theatrical vis-à-vis the real in terms of truth and authenticity.

The courthouse at Montpellier is also exceptional, but part of a broader push in courthouse architecture to integrate the outside with the inside.¹⁰ In response to the sense of enclosure generally engendered by courthouse design, the architect's 'goal was to create an environment in which everyone would feel they could enter, and more importantly exit, a courtroom with ease.'¹¹ The audience can exit the courtroom, walk around its full circumference, and re-enter. The architecture of the space allows the audience to understand the space through exit and exploration and, in so doing, reduce their fear of confinement. The exit is calming.

Whilst the designers and directors of a space can structure the exit to evoke contrasting feelings of confrontation or calm, the exit into the public realm post-performance cannot be fully stage-managed. As they are often the same space, the exit from a performance venue can be just as crowded with throngs of media as the entrance, enacting a form of confrontation for the departing audience. The audience then has to negotiate their way through the precinct and the travel away.

Cool-down

The cool-down starts generally upon exit, in the foyer. It is the stage in which the initial post-performance receptions are fixed. As Bennett writes, in relation to theatre, 'receptive decisions are made immediately. A performance is judged good or bad,

⁹ Schechner, *Performance Theory*, 195.

¹⁰ Mulcahy, *Legal Architecture*, 151-159.

¹¹ *Ibid* 154.

satisfactory or unsatisfactory, by the collective group.’¹² As Stuart Grant writes, ‘this act confirms the audience’s position as collective’ for it is our mutual reaction ‘that shows our values back to us, that tells us who we are, that we belong’ or don’t and thus are different.¹³ When our separate interactions come into contact, a ‘harmony of validity occurs’, establishing what is the norm.¹⁴ This is why we ‘keep going back to immerse in audience time after time; we need to continuously reaffirm and reassess our judgments’ and ‘we can only attain this reaffirmation in communion with... others.’¹⁵ This can be through applause or discussion; it can be immediate or unfold over time. It can be informed by further reading on the performance. The audience’s response highlights their responsibility to the performance. The performance ‘attains its completion’ in the judgment of audience.¹⁶

The cool-down period ‘may provide a welcome release and the end of the interpretive activity. On the other hand, the buzz of an audience, slow to leave the theatre, continues the interpretive process.’¹⁷ As such, it very much depends on the nature of the audience. Bennett argues that ‘the opportunity to talk about the event afterwards is important socially.’¹⁸ Increasingly, the post-performance phase in theatre includes facilitated discussions between the theatre-makers and the audience, which reflects a desire on the part of audiences to share their ideas about the performance.¹⁹ The post-performance discussion is akin to a debriefing that talks through, reviews and evaluates what has happened. As Schechner argues, talking it through is crucial to reintegration. In discussing how theatre-maker Jerzy Grotowski abandoned reintegration in his later para-theatre work, Schechner writes that because ‘they couldn’t talk about what happened... participants were left hanging: they were separated, stripped down, made into tabulae rasae [‘clean slates’]; they had deep experiences, were “written upon”, made new; but these “new selves” were not reintegrated into the ordinary world.’²⁰ This suggests that talking about the

¹² Bennett, *Theatre Audiences*, 164.

¹³ Stuart Grant, *Gathering to Witness* (PhD Thesis, University of Sydney, 2007) 133.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid* 253.

¹⁷ Bennett, *Theatre Audiences*, 164.

¹⁸ *Ibid* 165.

¹⁹ Caroline Heim, *Audience as Performer: The Changing Role of Theatre Audiences in the Twenty-First Century* (Routledge 2016) 174.

²⁰ Schechner, *Between Theatre and Anthropology*, 106.

performance is integral to the transition back into the ‘ordinary world’ post-performance.

Talking it through does not just occur in person in the foyer further. Audiences often undertake further reading (after-knowledge) that can also affect the reception of the performance.²¹ This occurs increasingly online, through platforms such as Twitter.²² The United Kingdom Supreme Court launched a YouTube channel in 2013 containing summary judgment videos and, in 2015, the videos were also made available on the Court’s website with the President, Lord Neuberger, stating that ‘now justice can be seen to be done at a time which suits you.’²³ However, as Les Moran has noted in his study of the Court’s YouTube channel, ‘the “comment” facility that accompanies videos on YouTube has not been activated.’²⁴ As Ben Wilson, Head of Communications at the Court, explained ‘we have disabled the “comments” because we do not have the resources to interact properly. It would be irresponsible for us to open up the comments and then not monitor them and to be prepared to feedback.’²⁵ Part of the challenge is because ‘central government requires all public sector organisations to monitor social media where the “comments” facility is enabled. This requires constant monitoring and feedback.’²⁶

Whilst Moran argues convincingly that the Court is making itself more open through online communication platforms, these platforms are mostly used for outreach style communications rather than reciprocal dialogue or the kind of post-performance forums that occur in the theatre.²⁷ In short, the post-performance communication of the Court is more presentational than dialogical. Whilst audience members to a legal performance may discuss the performance afterwards in person, online or through other communication methods, it would appear, if the example of the United Kingdom Supreme Court is a guide, that courts do not invite the post-performance

²¹ Bennett, *Theatre Audiences*, 165.

²² Heim, *Audience as Performer*, 174-175.

²³ Owen Bowcott, ‘Supreme Court puts archive of recordings of past cases online’, *The Guardian* (5 May 2015).

²⁴ Les Moran, ‘Visible Justice: YouTube and the UK Supreme Court’ (2016) 5 *The Annual Review of Interdisciplinary Justice Research* 235 n 46.

²⁵ Les Moran, ‘Judicial Institutional Change and Court Communication Innovations: The Case of the UK Supreme Court’ in Richard Davis and David Taras (eds.), *Justices and Journalists: The Global Perspective* (Cambridge University Press, 2017) 260.

²⁶ Moran, ‘Judicial Institutional Change and Court Communication Innovations’, 260.

²⁷ For a discussion on court Twitter accounts, see Margaret Jackson and Marita Shelly, ‘The Use of Twitter by Australian Courts’ (2015) 24(1) *Journal of Law, Information and Science*.

dialogue between actors and audiences that theatres increasingly do. The Court's post-performance communication is much more one-way.

The restrictions often placed on the usage of communication devices in the courtroom re-emphasises the one-way nature of court communication as does the increasing use of suppression orders to stifle discussion of legal performances. Whether it be talking, tweeting or commenting on YouTube footage, 'all these acts have the potential to reshape initial decoding of the production.'²⁸ Also, importantly, talking through enables audiences to process the legal performance. As Anna Kurtz suggests of actors – though it is equally applicable to audiences – the cool down process can aid with limiting the effects of stress, trauma and vulnerability induced by the performance by providing space to process what has happened.²⁹ Closing off methods for the audience to communicate post-performance could exacerbate any trauma experienced during the legal performance. Whilst media may open up performances, including to people that might not otherwise have attended them live, considerably more thought needs to be put into *how* post-performance dialogue through media, particularly online media, is structured.

Whilst communication is important, Schechner argues that the cool-down stage for audiences enables them 'not only to evaluate what they have just experienced, but to resume authority over their own time and body.'³⁰ In his view, 'the cooldown is a bridge, an in-between phase, leading from the focused activity of the performance to the more open and diffuse experiences of everyday life.'³¹ For participants in the performance, this necessitates 'some formal way to conclude the performance and wipe away the reality of the show re-establishing in its place the reality of everyday life.'³² In Chapter One, I argued that the audience to a legal performance in court is active in the performance itself as a form of spect-actor, thus the cool-down methods of theatrical actors could usefully be applied to legal audiences. For theatre actors, the cool-down is a way of stepping out of the role and reasserting the self and may involve physical exercise whereby the actor breathes deeply, wipes their face with

²⁸ Bennett, *Theatre Audiences*, 165.

²⁹ Anna Kurtz, *Completing the Circle: The Actor's Cool Down* (Master of Fine Arts Thesis, Virginia Commonwealth University, 2011) 13-14.

³⁰ Schechner, *Performance Studies*, 211.

³¹ *Ibid.*

³² Schechner, *Performance Theory*, 189-190.

their hands, stretches or changes posture in order to return to a neutral state.³³ Like the warm-up that precedes the performance, this is a means for the actor to touch base with themselves and ‘to reconnect with the real and the actual.’³⁴

As I mentioned at the outset, reintegration is a phase whereby those attending a legal performance transition from audience back to individual. The cool-down is a key stage of this transitional phase. For some attending a legal performance, the performance can be traumatic, so this process will necessarily take more time. Some may not have the opportunity or platform to talk it through, so may take longer to reintegrate. For an audience, as compared to an actor, the cool-down may be more mental than physical. Peter Brook writes in regards to the plays of Samuel Beckett that those audiences ‘who do not set up intellectual barriers, who do not try too hard to analyse the message... [leave] nourished and enriched, with a lighter heart, full of a strange irrational joy.’³⁵ For those that do, they may leave in a different state of emotion and may take longer to cool down – or they may immediately dismiss the play and move on. The degree of emotional investment in a performance may affect the time taken to cool down. The same can be said for the legal performance. If an audience member is deeply invested in the legal performance, it may take them longer to cool down after the performance and transition back to ordinary life. The exercises used by actors playing a role could be useful in this regard.

Aftermath

The final stage of post-performance is the aftermath. As Schechner writes, ‘the continuing life of a performance is its aftermath. The aftermath persists in critical responses, archives, and memories.’³⁶ There is some debate about the status of the afterlife of performance amongst performance studies scholars. Herbert Molderings concludes that ‘whatever survives of a performance in the form of a photograph or videotape is no more than a fragmentary, petrified vestige of a lively presence that

³³ Richard Geer, ‘Dealing with Emotional Hangover: Cool-Down and the Performance Cycle in Acting’ (1993) 3(2) *Theatre Topics* 151-152.

³⁴ Felix Nobis, ‘Un-Telling Myself: Performance (Preparation) as Research’ in John Freeman (ed.), *Blood, Sweat and Theory: Research through Practice in Performance* (Libri, 2010) 189 discussed in Sean Mulcahy, ‘Acting Law | Law Acting: A Conversation with Dr Felix Nobis and Professor Gary Watt’ (2017) 4(2) *Exchanges* 197.

³⁵ Peter Brook, *The Empty Space* (Penguin, 2008) 59.

³⁶ Schechner, *Performance Studies*, 211.

took place at a different time in a different place.’³⁷ On the other hand, Philip Auslander argues that the record or archive ‘is hardly a petrified remnant of some other event... but exists as a lively, and forever unresolved process.’³⁸

To understand how this debate might play out in the afterlife of legal performance, I turn to legal scholar Katherine Biber’s exploration of the cultural afterlife of evidence, *In Crime’s Archive*. In her book, Biber writes that ‘law’s work is evident in the volume of papers it leaves in its wake’ that provide, often in archival format, ‘a trove of material which, in law’s afterlife, provides us with clues, souvenirs and memorials to law’s work.’³⁹ The papers left behind form the material remnants of the legal performance: law’s afterlife. Of course, what is left behind is not just paper but materials that ‘can be digital, ephemeral, a trace left upon one’s memory.’⁴⁰ In many ways, these materials still hold on to the memory on what happened,⁴¹ and the trauma of the legal event.⁴² In this sense, the materials of law still carry on through law’s *afterlife*

To illustrate the afterlife of legal performance, I will share with you a story.⁴³ On 4 August 2011, a Bangladeshi couple applying for asylum in Australia on the basis of their sexuality handed a compact disc containing photographs of them having sex together to a member of the then Refugee Review Tribunal.⁴⁴ When the applicants’ lawyers found out, they called the Tribunal and ‘requested the Tribunal not to view the CD.’⁴⁵ The CD was returned to applicant. The matter was subsequently appealed to the then Federal Magistrates Court, which handed down its judgment, asserting that

³⁷ Hebert Molderings, ‘Life is No Performance’ in Grgeory Battcock and Robert Nickas (eds.), *The Art of Performance: A Critical Anthology* (E.P. Dutton, 1984) 172-173.

³⁸ Philip Auslander, *Liveness: Performance in a Mediatized Culture* (Routledge, 1999) 44.

³⁹ Katherine Biber, *In Crime’s Archive: The Cultural Afterlife of Evidence* (Routledge, 2019) 7.

⁴⁰ *Ibid* 3.

⁴¹ *Ibid* 143.

⁴² *Ibid* 159.

⁴³ For further detail, see Sean Mulcahy, ‘Performing Sexuality on the Legal Stage’ in Lucy Finchett-Maddock and Eleftheria Lekakis (eds.), *Art, Law, Power: Perspective on Legality and Resistance in Contemporary Aesthetics* (Counterpress, forthcoming).

⁴⁴ ‘Case 1’ (17 November 2011), [38]; 1105875 [2011] RRTA [51], [59]; *SZQYU v Minister for Immigration*; *SZQYV v Minister for Immigration* [2012] FMCA 1114 [12].

⁴⁵ ‘Case 1’ (17 November 2011), [11]. This was recorded in the Case Note as follows: ‘I received a message this morning to return a call from the Rep’s office in regards to the case. I contacted the Rep’s office ... I spoke with [redacted] who said that at the hearing on [redacted] that his client had handed a CD to the member. [Redacted] claimed this was done prior to the Rep entering the room and that his client only informed him after. [Redacted] was instructed to call the Tribunal and inform the member not to view it as it contains sensitive material.’

the Tribunal's failure to consider the evidence of what was on the disc amounted to a jurisdictional error.⁴⁶

The matter was then remitted to the Tribunal who reported that, 'following the second hearing, [redacted] provided a "memory stick" containing the sexually explicit photos of the applicant and [redacted].'⁴⁷ The Tribunal viewed the photographs and handed down its decision in the following terms: 'In the Tribunal's view the sexual activity depicted in the photographs submitted by the applicant following the second hearing do not establish that he is gay or that he is in a homosexual relationship.'⁴⁸

In mid 2018, I submitted a freedom of information request to find out what happened to these images of homosexual intercourse. In a notice of decision, a Freedom Of Information Officer at the now Administrative Appeals Tribunal advised that 'the sexual images referred to in the decisions were located on a "memory stick" on the physical file for Case A' which 'contains 49 image files (JPEG)'.⁴⁹ These 49 images still sit on a memory stick in the case file.

As Biber notes, that 'evidentiary objects often live before the trial, and sometimes continue to live afterwards.'⁵⁰ In this case, the images have now become 'information' capable of being published and accessed. Their afterlife is as data held in a file contained on a *memory* stick located in a physical file placed somewhere in the Tribunal's building. The images were, at one stage of their life, relevant evidence – and vital evidence at that. These images were an argument for the sexuality of the applicants. The memory stick on which they are located is not simply an object, but a discursive tool, yet its afterlife is limited by its hidden confinement in the archive. I have not seen, touched, smelt, tasted, or listened to the memory stick, its files, and the

⁴⁶ It said so in the following terms, 'The Tribunal... made no reference to the photographs of the applicants having sex. Before it could find that the applicants were not homosexual the Tribunal had to deal, amongst other things, with their allegation that their relationship had a physical dimension. It did this by concluding that neither of them had sex with a male, including each other. However, in order to reach that particular conclusion, it was necessary that the Tribunal consider the evidence before it relevant to that subject ... It may be that the Tribunal did not consider... the photographs because although the disc had been provided to the Tribunal at the commencement of [the applicant's] hearing, the applicants' advisers later wrote, in both cases, asking the Tribunal not to view what it contained ... The evidence of what was on the disc might have had a bearing on the outcome of the reviews in that the Tribunal's failure to consider it possibly deprived the applicants of a successful outcome to their review applications. A failure to consider such evidence amounts to a constructive failure to exercise jurisdiction and is thus a jurisdictional error': *SZQYU v Minister for Immigration; SZQYV v Minister for Immigration* [2012] FMCA 1114 [60]–[65].

⁴⁷ 'Case A' (24/25 October 2013), [87].

⁴⁸ *Ibid* [100].

⁴⁹ Letter from Tina Bridge to author, 2 August 2018.

⁵⁰ Biber, *In Crime's Archive*, 1.

images therein. Its materiality is lost on me as a scholar. Nor do I know how the memory stick is placed in the archive and thus its material relation to the objects that surrounding it beyond its location ‘on the physical file.’ Without the ability to touch the memory stick, I am limited by my lack of sensorial engagement with the object itself but, through the discovery of the memory stick on the physical file, can try to understand its material relation to law and performance. The images are evidence *for* the law—instruments in legal decision-making—and evidence *of* the law—mementos of the moment of decision, for legal decision-making is always reliant on evidence. Beyond the moment of decision, they constitute the afterlife of law as they sit preserved in the Tribunal’s archive or trove.

The images of the performance in *SZQYU* now contained on files in a memory stick operate as memories of a performance that never convinced its audience; a failed performance whose legal memory exists in the archives or the scant words written about it in the judgment or correspondence kept on the case file. These images are a remnant of a performance, but they still continue to do work in the Tribunal’s archive. They are part of an unresolved process of adjudging the applicants’ sexuality that even if seemingly resolved at the Tribunal’s decision still has ongoing ramifications for the applicants themselves who must now operate in a world where they claim to be homosexual but the Tribunal has determined they are not.

What this example attests to is the powerful afterlife of evidence used in legal performance. The evidence sitting in the Tribunal’s archive is not a petrified remnant, but material that carries the memories of the performance event. Of course, the memory is also carried in those who participated in the performance. The trauma that these memories may carry could slow down the reintegration process.

As the reintegration phase ends, in this next part, I turn the focus to reflections on this thesis and chart some possible new directions for further research in the field of legal performance.

Reflections and future directions

Courts are places of legal performance. Performance is a constitutive feature of law. If law is necessarily constituted through its performance, the juridical community surely has a responsibility to pay attention to its performance. This thesis took root in my impression that the scholarship to date has largely not been up to the task; there is

limited sustained engagement in relation to law and performance. Sometimes the neglect in this respect has seemed almost willful, as if performance de-legitimises law and thusly the performative dimensions of law are not worth considering.⁵¹ In reflecting on the lack of scholarship on law and performance, Kate Leader argues, ‘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.’⁵² Much of the literature has been marked by a kind of innocence when it comes to performance and a failure to acknowledge yet alone engage with the body of performance studies scholarship and practice. It is almost as if performance does not matter: as if the space, sound and visibility of legal performance is marginal to the task of legal practice and unworthy of remark in some quarters of legal scholarship. Despite this, live performance is valued within legal practice, and there is sensitivity towards performance within law, even if it lacks a vocabulary. Leader has written that ‘the term “performance” simply does not enter the legal lexicon’⁵³ – at least not in the ways that performance studies scholars and practitioners conceive of it – but as this thesis and the work on which it rests attests, there is an emerging body of work – textual and artistic, often both – on the intersections of law and performance.

Legal scholars and practitioners must start turning to performance studies scholarship and practice in which we *already* think and work with performance if we are to have any hope of understanding of what performance *does* in courts of law. This requires a degree of self-reflexivity that legal practitioners, with their engrained habits, may lack. As Leader concludes, ‘because of the preconscious nature of *habitus*, the reflexivity required of legal agents to be able to examine the logics that operate within their own field is rare.’⁵⁴ This starts with legal education. What may be required is more education and practical training in performance for legal students, practitioners and scholars, which are beyond the scope of this thesis but well explored elsewhere.⁵⁵

⁵¹ On this argument, see Julie Peters, ‘Legal Performance Good and Bad’ (2008) 4 *Law, Culture and the Humanities*.

⁵² Kate Leader, *Trials, Truth-Telling and the Performing Body* (PhD Thesis, University of Sydney, 2008) 257.

⁵³ *Ibid.*

⁵⁴ *Ibid* 258-259.

⁵⁵ See Zenon Bankowski, Maks del Mar and Paul Maharg (eds.), *The Arts and the Legal Academy: Beyond Text in Legal Education* (Routledge, 2012).

This thesis stands as an invitation to *look at law through the lens of performance*: to start paying attention to the role of performance in the production of law. On one level, this is simply a matter of insisting that law is necessarily performed and, moreover, that it is possible to give a richer account of legal performance by turning to performance research and practice. On a deeper level, however, this thesis has also provided a study of the dimensions of legal performance in courts and a set of methods to approach this study that can be further refined and expanded in the future. This thesis has directed attention to the space, sound, visuality and, perhaps most importantly, audience of legal performance in the court, though there are many other dimensions that could be expanded in further study. This thesis, like any study of legal performance, is necessarily interdisciplinary in approach, drawing from performance theory and practice to illuminate aspects of the law. This thesis brings attention to the ways in which legal proceedings – and the participants therein – are shaped by performance. This thesis hopes to open scholars and practitioners’ ears, eyes and other senses to the diverse ways in which law and performance are bound together in the court, to explore how courts think of and practice performance, and to understand how law is performed.

At its core, this thesis has argued for a fundamental shift in how we think about legal practice. We need to bring performance studies scholarship and practice to bear on legal thought and practice. This thesis is only a beginning. It is by no means a comprehensive account of legal performance. Because the ‘lawscape’ is so impossibly broad and everywhere,⁵⁶ attempting a grand theory of the law-performance relation would be overly ambitious, if not impossible.⁵⁷ As such, this thesis has, by necessity, limited itself to legal performance in courts and courts in common law jurisdictions. In so doing, it has offered some associations with performance and law, building on earlier work in the field,⁵⁸ and based around the experiences of setting, hearing, scripting, singing and seeing. Nonetheless, I do think it worthwhile identifying a number of possible avenues of inquiry when it comes to further research.

First, although legal performance in court will undoubtedly share certain common features from jurisdiction to jurisdiction, there will be important differences. We

⁵⁶ Andreas Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Lawscape, Atmosphere* (Routledge, 2015) ch 2.

⁵⁷ Alan Read, *Theatre and Law* (Red Globe Press, 2016).

⁵⁸ See the associations discussed in *Ibid* 8-19.

could thus advance inquiries into intercultural legal performances, including Aboriginal courts and legal arenas of which I have only briefly alluded to throughout this thesis. Second, we could advance inquiries from courts to other legal performance venues: not only law schools, legal offices and police stations, but also the huge range of contexts or lawscapes in which law and performance encounter each other, even those that we do not tend to think of as being legal.⁵⁹ In both, it would be a matter of tracking how legal performance plays out differently in different contexts, why and with what results. Finally, there is the opportunity for more performance as research into legal performance, opening up collaborations with legal and performance scholars and practitioners around practice-based research.

Epilogue

Throughout this thesis, I have embraced visual and performance art as a leitmotif in the prologues to each chapter. I now return to art as a leitmotif to explore the future of courts. This section is an epilogue, but is less about closing arguments off and more about opening questions on whether courts, which have been the locus of the study, are they about to disappear, and what this might mean for the study of legal performance in the future.

The scholarship on law and performance, including this thesis, has demonstrated that there is a long and important association between the practice of the open court and the principle of transparency.⁶⁰ If you believe some of the prophets, the expansion of virtual technologies in the courtroom will lead to ‘the dematerialisation of the courtroom itself.’⁶¹ If fully virtual courts eventually take off, it will serve to accelerate the abandonment of suburban and regional courthouses already taking place with the increasing urbanisation of populations.⁶² In this final section, I will consider what happens when the courthouse is lost.

In her study of the city/courthouse relation, Patricia Branco argues that the closure of a courthouse can have ‘strong geographic and socio-economic impacts, above all in

⁵⁹ See, for example, the scholarship on politics and performance in Shirin Rai and Janelle Reinelt (eds.), *The Grammar of Politics and Performance* (Routledge, 2014).

⁶⁰ Leader, *Trials, Truth-Telling and the Performing Body*, 255-259.

⁶¹ Robin Widdinson, ‘Beyond Woolf: The Virtual Court House’ (1997) 17(2) *Web Journal of Current Legal Issues*.

⁶² Patricia Branco, ‘City/Courthouse Building: A Mirror Game. Examining Connections Between Courthouse Buildings and Location in the Urban Environment’ (2019) 23 *International Journal for the Semiotics of Law* 612-613.

the cities/municipalities where courts were closed' in part because of their 'connective relationship with the territory.'⁶³ This is based on a 'belief that the presence of a courthouse transmits the idea that the law is present and in operation' and that the courthouse itself is 'a physical incarnation of the relationship between the citizens, the law and their city, in its various dimensions: juridical, political, economical, institutional and culture.'⁶⁴

Whilst courthouses given their particular spatial layout may be seen by some as 'useful for nothing else' at the end of their lives,⁶⁵ many abandoned courthouses have gone on to have diverse new lives. In my home state of Victoria,⁶⁶ six have been converted into theatres (Bright, Carlton, Creswick, Stratford, Ballarat Lydiard Street, Geelong); and ten are used for creative purposes, including a centre for arts and continuing education (Alexandria), a gallery (Charlton), a primary school art room (Koroit), an art gallery and tourist information centre (Seymour), a recital room (South Melbourne), a movie set (Tatura), an artist residence, studio and art hotel (Warracknabeal), a restaurant and art gallery (Warragul), brass band premises (Leongatha), and a music theatre studio (Ballarat Camp Street). Some other odd uses of old courthouses include a plant nursery (Port Melbourne), fire station (Romsey), medical surgery (Rutherglen), pioneer settlement (Swan Hill), church (Cranbourne), bed and breakfast (Euroa and Fryerstown), and a tennis club (Bacchus Marsh).

Other courthouses have been completely abandoned. To take an example, in 1878, a small township was created called Lillimur in the Wimmera district of Victoria near the South Australian border. The Lillimur courthouse was built in 1887 and closed in 1892, used as a post office until the 1980s and since abandoned. It now forms a picturesque ruin on the dry landscape. Here, the courthouse was 'structural to urban development';⁶⁷ its closure signaled the abandonment of the town. In 1887, the same year that the courthouse was built, a railway line was extended to the border of South Australia, but bypassed Lillimur to take advantage of an easier gradient. The event sealed Lillimur's fate: it is now a vanishing rural village. Branco observes that 'if the

⁶³ *Ibid* 613.

⁶⁴ *Ibid* 614.

⁶⁵ Felix Nobis cited in Mulcahy, 'Acting Law | Law Acting', 197.

⁶⁶ See Michael Challinger, *Historic Court Houses of Victoria* (Palisade Press, 2001).

⁶⁷ Branco, 'City/Courthouse Building', 613.

courthouse disappears, the sense is that the city disappears with it.’⁶⁸ Here, it is not in a sense but in reality: the town is disappearing.

As I reflect on the abandoned courthouse, I think of what it is that we leave behind as we exit the legal performance space and it closes for the night, for the weekend, for end-of-year, for renovations or for good. As we leave a performance venue, the building remains, though it may be closed and the lights may be off. Here, I am drawn to Tsai-Ming Liang’s film, *Light* (**Figure 7.1**), depicts an empty reception hall, the lights off, with natural sunlight and fragments of sounds from the surrounding city coming in through the windows. It has an eerie feel to it.

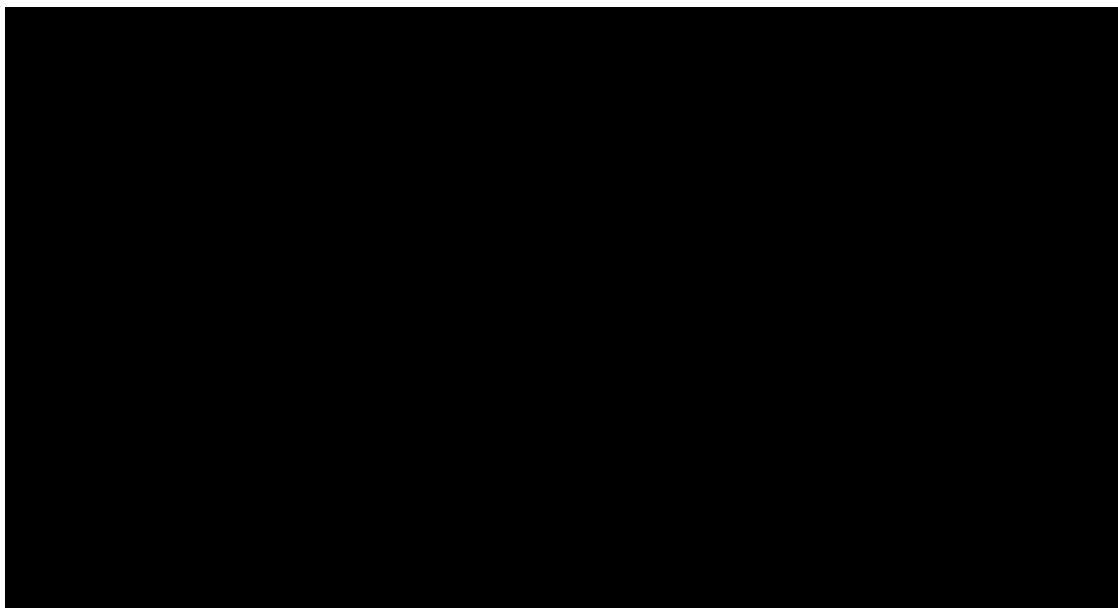


Figure 7.1: Tsai Ming-Liang, *Light* (2018)

Like the concert hall, as the last people exit the courthouse at the end of the day, the lights are turned off and the building is returned to its solitude. Perhaps the courthouse like the archive carries the memories of the performance and those that participated in it. What is most striking though is that the bodies are missing. The absence of bodies calls attention to what happens after the audience exit a performance venue. And what is left behind.

⁶⁸ *Ibid* 614.

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