Bound and Gagged:

The Performance of Tradition in the Adversarial Criminal Jury Trial[1]

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> It seemed at times that we were all serving the interests of entertainment: American lawyers in London over for their Bar conference would jostle for seats in the public gallery as they might at a theatre, their roars of laughter silenced by ushers booming cries of 'Silence!' followed by the judge's regular threat to clear the public gallery. 'This is a courtroom, not a theatre' he would remind them repeatedly. John Mortimer would leave the courtroom each afternoon for the Vaudeville Theatre (where *A Voyage Round My Father* was being rehearsed) with a sense that he was returning to real life.[2]

> The courtroom, particularly a trial courtroom, seems to be a forum for people, who are so inclined, to behave inappropriately. Something about the theatre aspect of it.[3]

Prominent American celebrity lawyer Melvin Belli once said: "A lawyer's performance in the courtroom is responsible for about 25 percent of the outcome; the remaining 75 percent depends on the facts." Belli's quip, though sarcastic, sums up writings that analyse performance in the courtroom.[4] These writings focus on the courtroom as a site of conflict resolution and therefore tend to concentrate on the dominant role of the lawyer. Consequently, they almost invariably fail to account for the trial as a complex social process.[5] As such, the much more wide-reaching and implicit role that performance plays is overlooked. This paper will argue that performance *is* central to the trial process, but it goes much deeper than theatrical analogy and the role of the lawyer.[6] The adversarial criminal jury trial involves a *performance of tradition* that positions the trial itself in society as a bulwark of justice, antiquity and authority.[7]

The first half of this paper analyses writings by legal academics and practitioners that discuss the relationship between the trial and performance. I call this 'internal analysis' as it is written by those working within the legal profession. This internal analysis serves to illustrate the highly selective and partial nature of these writings, insofar as they tend either to dismiss theatre as mere show, or *use* it to idealise the trial process. The second part of the paper argues, through the

theorisations of Michel Foucault and Pierre Bourdieu, that the criminal jury trial process exploits the symbolic value of live performance as part of its complex, normative function.

Internal Analysis Part 1: The Courtroom is Not a Theatre

The pejorative connotations attached to ideas of performance in the criminal jury trial have a long history. In the 17th century, there was an outburst of disgust at the 'theatrical' nature of legal proceedings, with John Rogers writing: "They [lawyers] insinuate into great places, kings courts etc. and by simulation and fine glozing flattering shewes of humanity and humility, have learned the art of dissembling in the Inns of Courts." [8] For Rogers, and for most of his contemporaries, it was the *lawyers* who turned what was a 'great place' into a theatre by bringing their showmanship with them. Theatricality was constituted by the artificiality and unreliability of the lawyer. This reflected a deep distrust of the increasing mediation of the courts at the time. Where once defendant and complainant told their own stories, increasingly in non-criminal matters (although not until later in criminal proceedings) lawyers were speaking *for* defendants and complainants.[9] Seventeenth-century legal scholar Ferdinand Pulton commented: "If counsel learned should plead [the defendant's] plea for him, and defend him, it may be that they would be so covert in their speeches, and so shadow the matter with words, and so attenuate the proofs and evidence, that it would be hard, or long to have the truth appear."[10] Due to their distance from the alleged crime itself, lawyers were positioned as a form of actor—someone who was invested in the process purely by financial reasons and/or motives that involved career status and was therefore uninterested in anything but winning the client's case.

Today, the dominant use of the analogy between the theatre and the criminal jury trial still foregrounds the role of the lawyer. Theatricality is constituted by the courtroom's association with the artificial and the 'showy'.[11] Peter Murphy writes: "most of us seem to have an undefined feeling that there must be something wrong with acting in court, that the courtroom and the theater are, and must be, different worlds."[12] Most critical writing on the relationship between theatricality and the criminal jury trial concentrates on the resemblance between trial and theatre—with heavy emphasis on costuming, props, ritual procession, symbolism, and space for audience, all of which foreground the potential of the trial to "degenerate into mere theater."[13] This is a relatively simplistic analogy that uses a

limited definition of theatre. This is not to state, however, that these objects and symbols may not serve a real purpose in the trial by reinforcing the authority of the law.[14] However, this paper argues that many writers too readily dismiss theatre as mere entertainment compared to the serious function of trial,[15] and reject analogies between the theatre and the trial, by emphasising that the courtroom is *not* a theatre,[16] because ultimately there are *real* consequences for the trial.[17]

For example, Allan Greenberg argues that confusion between the trial and a theatre is a "fundamental misconception of the values involved,"[18] and Adi Parush says that "obviously a law court remains a law court and theater is after all just theater."[19] This material stresses the inappropriateness of comparing a form of entertainment with a process that has such real effects on people's lives.[20] Larry Geller and Peter Hemenway make the most explicit comment about the apparent limitations of the relationship: "if the stakes weren't so high, courtroom theatrics could often be considered entertainment."[21]

Internal Analysis Part 2: High Drama and the Trial

Interest in investigating the relationship between the criminal jury trial and the theatre has increased significantly in the last 30 years. This period of increased interest has seen the advancement of an alternative position that rejects the pejorative understanding of the theatrical and instead positions theatre as a place that explores human drama through conflict.

Richard Harbinger's article *Trial by Drama* argues that the criminal trial is essentially a play within a play and therefore a 'dramatic thing' rather than a 'legal thing'.[22] There is the 'play without' which he terms the *dramatic* combat of the advocates, and the 'play within' or the 'crime drama' that is the narrative of the alleged crime. He defines 'drama' as being generated by conflict. This double conflict requires resolution or, in his words, 'catharsis'.[23] The end-point of the trial has both conflicts resulting in one winner, and one loser—triumph or tragedy.

This is a 'pseudo-Aristotelian' construction that reflects popular understanding of Aristotelian dramatic theory. In popular understanding, *catharsis* is where an audience is 'hooked' on a story designed to evoke (and subsequently purge) their pity and terror.[24] This interpretation of Aristotle suggests that if a play is devised or written following certain guidelines, it will achieve the desired end. This implies that the actors' performance is little more than a vehicle for the moving story, and that the narrative has an inevitable outcome.[25] By drawing on

this theory, Harbinger foregrounds the centrality of *storytelling*, the power of the lawyer to create this narrative and the passivity of the jury/audience who do not have control over their emotions, and are caught in the lawyers' spell.[26] Harbinger also implies that it is a lawyer's (*written*) script that forms this narrative, downplaying any role the moment of performance in the courtroom might have.[27]

Milner S. Ball also uses performance to valorise the lawyer's position.[28] Ball, too, emphasises the dramatic structure of the trial. However, in contrast to Harbinger, he draws upon 20th century theatre practitioners Jerzy Grotowski and Peter Brook to define performance as "[that which] takes place between spectator and actor."[29] For Ball, the trial is "essentially theatre," and this is constituted by the encounter between spectators and the performer/trial participant in a shared space.[30] Consequently, for Ball, the relationship between courtroom and theatre goes beyond dramatic structure. He pushes the idea of shared characteristics to the point where he actively defines the trial process as "judicial theatre."[31]

What Ball also does and, more recently, Larner, Hoffer, Tow and Bernstein and Milstein do, is to use the performative analogy to idealise the trial process.[32] Ball argues that the trial, like s*erious theatre*, "holds up a mirror to legitimate society" and emphasises the "humanizing dimension of courts."[33] His adoption of Grotowski's stripped-back definition of performance enables him to locate the courtroom confrontation within the trope of a shared, intimate, human encounter.[34]

For Ball, jurors who deliberate on the competing stories told during the criminal trial are obliged to throw off "the corrosive effects of our culture's devotion to the self and exclusive fascination with individual rights."[35] As such, storytelling functions in an allegorical way—it refocuses the purpose of the trial's participants on the greater good.[36] The dominance of the lawyer and the passivity of the jury (and defendant) are therefore positive because the storytelling process that takes place in the courtroom is a form of didactic enlightenment. The jurors' decisions will therefore be in pursuit of a higher good.

In these accounts, storytelling in the courtroom shares with theatre the ability to reveal the *truth*.[37] Allan Tow describes "dramatic technique" as "humanistic." He states that "as such, acting and law are ultimately manifestations of civilised human behaviour."[38] Bernstein and Milstein claim that "both trials and live theatre educate as they persuade." They claim that "the jurors have heard with their eyes and seen with their hearts."[39]

As seen from the above, both means of valorising the legal process through theatre are very careful about the analogies employed. Rather than emphasising the trial as being like theatre, these writers stress that the trial has similarities to certain *kinds* of theatre. The relationship between what might be termed *high drama* (classical tragedy, Shakespeare, Brook's holy theatre) and the trial is used to position the trial as classical theatre that persuades, educates, and imparts wisdom.[40]

Although these analyses are more complex than the pedestrian analogies used in the past, both kinds of internal analysis overlook key aspects of the criminal jury trial process. These writings tend to concentrate on the lawyer, and their narrative of the case within the trial. This is a matter of positioning; most of the writers above *are* legal practitioners and, as such, have a vested interest in justifying their position. However, it also reflects the very real dominance lawyers have attained over the last two centuries in the adversarial system. This dominance has come at the expense of the defendant (and, to a lesser extent, the complainant).

Because the dominance of the lawyer is not questioned, what is overshadowed is the experience of other participants at trial. Over the centuries, as barriers to counsel have been slowly lifted there has been a gradual silencing of the defendant. Whereas once defendants were obliged to tell their own story, question witnesses and discuss matters with the jury, now in their own trial they are effectively gagged and can go through the entire process without uttering a word. A 19th century French observer of the English courts, Cottu, remarked upon this, stating: "the accused does so little in his own defence that his hat on a pole might be an adequate substitute for him at trial."[41] This reflects a shift from the position where defendants telling their own stories was the only way they could save themselves, to a position where defendants telling their own stories can lead them into jeopardy, and their silence is protected as a right. The defendant's role is largely unremarked upon in the context of performance. But defendants, too, are performing—a role-play of submission, silence, subjection and constraint.

Continuous Live Acts

The bound and gagged defendant's *performance* is constituted by his or her enforced presence in the criminal trial.[42] Unlike civil cases, a defendant's body must be in the courtroom for the trial to proceed. This is because there is no symbolic value in the silence and constraint of an accused unless the lay public

(both jury and gallery) sees it. Every defendant's public submission to the process signals his or her acceptance of the law's power. This is why anthropologists term the trial a form of 'social control'.[43] The criminal trial uses the defendant's body to publicise its authority by exploiting the symbolic value of live performance.

Performance theorist Philip Auslander interrogates the symbolic value of live performance in *Liveness.* In his book, Auslander investigates what he considers to be the prevailing preference for the 'live' over the mediatised in different areas of cultural production. Auslander devotes a chapter of *Liveness* to the criminal jury trial, arguing that the trial has proved particularly resistant to the introduction of mediatisation (such as CCTV, or video testimony). [44] He claims that criminal trial procedure is "rooted in an unexamined belief that live confrontation can somehow give rise to the truth in ways that recorded representations cannot."[45]

Auslander problematises the dichotomy between live and mediatised, claiming that this is an artificial (and unsustainable) construct usually adopted by performance practitioners and theorists to valorise the 'purity' of the live through the concept of 'presence', and thereby to shore up theatre's position in the face of film, television and new media. This notion of *presence* is expanded on in both *Liveness*, and in another article, "Towards a Concept of the Political in Postmodern Theatre." Auslander points out that *presence* is a problematic construct that can serve to naturalise certain dominant ideologies and reinforce the status quo.[46]

Auslander seeks to demythologise essentialist definitions of live performance as having greater authenticity than mediatised forms of cultural production, yet his claims surrounding presence contradict this. For presence to be insidious, live performance—despite its authenticity being only symbolic—has to have real effects. This is what Auslander overlooks. By concentrating on whether there is a 'real' distinction between live and mediatised, he does not adequately address the role belief plays in maintaining this distinction. The difference between what is 'real' and what is believed to be 'real' is philosophical.

Collective belief in the symbolic value of live performance *is* authentic in the sense that it will *have that effect*. Consequently, when Auslander asserts that the trial's emphasis on the live is 'unexamined', he fails to account for two things. First, live confrontation in the criminal jury trial has a symbolic (and real) value because we invest in the belief that it does. This belief is tied to the other possibility of the live that Auslander does not address: the guarantee of openness. By ensuring legal processes are kept *live* a certain degree of openness and

accountability is also ensured. Although Auslander notes that judicial procedure implicitly relies on the potentiality of the moment—the idea that 'anything might happen'—he continues to overlook that this belief itself will produce real flow-on effects.[47]

Secondly, it is in the law's interest to maintain the ontological distinction of the live. The use of live bodies in space performing the will of the court is a powerful symbolic representation of the law's authority in the wider community. The very act of compelling a witness to come to court in person attests to this. If we can see defendants, we can also see that they are subjecting themselves to the will of the state. Therefore, their presence signifies their bodily submission to its role in the hierarchy of the state. This act of submission is repeated *ad infinitum* with each new defendant. Foucault notes that "power is exercised, not possessed."[48] This is the importance of performance. It is the constant repetition of a defendant's submission that allows the law to continue to claim its authority over the body. This authority is not stable, but ever reliant on constant enaction.

Foucault investigated the relationship between authority and the body in his landmark book *Discipline and Punish*,[49] arguing that the non-violent discourse used in legal proceedings and punishment was a deliberate attempt to distance judicial proceedings from their previous role as torturers of human bodies. However, the use of 'psychological language' merely acts as a kind of cloaking device because, ultimately, "it is always the body that is at issue—the body and its forces, their utility and their docility, their distribution and their submission."[50]

Although, up to this point, I have been discussing the role of the *body* rather than the social, I follow Foucault and Bourdieu, and do not conceive of them as discrete, but rather inseparable; as Bourdieu commented, 'the body is in the social world but the social world is in the body."[51] For Foucault, harnessing the "political technology" of the body is the end-goal of the normative function of judicial proceedings. This manipulation uses bodies to self-legitimate, as it were, and this usage is positioned as fitting punishment. This process is inescapably violent; bodies are compelled, constrained, and forced to "perform ceremonies, to emit signs."[52]

While Foucault's work in *Discipline and Punish* focuses primarily on inquisitorial proceedings and the penitentiary, there are echoes for the adversarial criminal jury trial as well. The adversarial trial emphasises *confrontation*. Witnesses, defendant, and (usually) complainant must occupy the same space at the same

time. This confrontation is inherited from English common law and is enshrined in the US Constitution.[53] Peter Halewood observes that a trial requires "[a] defendant's acquiescence to his 'official' role as defendant, and his apparent recognition of the legitimacy of the theater of his own trial, at least in the form of his physical presence in the courtroom."[54] Halewood states that bodies performing acts of domination/submission constitute the 'theater' [sic] of the trial. For him a defendant's apparently willing entry into the courtroom legitimises the trial process. Halewood explicitly frames the criminal trial as a performance for a larger audience—a social process, rather than simply a process of conflict resolution. This performance publicises the authority of the law through a defendant's willing entry. However, I argue that this performed willingness is in fact an act of forced compulsion. Robert Cover observes:

> It is, of course, grotesque to assume that the civil facade is 'voluntary' except in the sense that it represents the defendant's autonomous recognition of the overwhelming array of violence ranged against him, and of the hopelessness of resistance or outcry.[55]

But how does the trial manage this? Earlier in this paper, I outlined the potential impact of the use of symbols, overlooked by many legal scholars who simply see these as sites of similarity between the theatre and the courtroom. As I suggested previously, the symbolic framing of the courtroom is a powerful means of suggestion. This suggestion leaves trial participants with the idea that it is to *their* advantage to behave within certain bounds to achieve the best possible outcome, such as the emphasis on remaining silent.[56] A defendant may therefore be unlikely to question his or her position of subjection in the court, as any form of disruption may hurt his or her case.

Coming to court cloaks submission by orchestrating the acceptance of the fairness of the trial process by the defendant. However, there is no doubt about the real submission of lay participants. Witnesses are placed in a box, can only speak in the language pushed upon them, and are not allowed to speak or move freely. Instead, they are put in position where they can be dominated and bullied by legal practitioners.[57] The judge's power over the bodies of witnesses and defendants is very real, even if they choose not to exercise it (if this sounds like an overstatement, consider Bobby Seale during the Chicago Seven trial of the late 1960s. The presiding judge bound and gagged the Black Panther defendant to a chair, fulfilling literally the implicit position the defendant occupies).

Although Cover's emphasis on the impossibility of resistance is important, he overstates the consciousness of this in those coming to court, and indeed all involved in the trial. Acquiescence to the legal requirement of attendance is not the same thing as being *aware* of the legitimacy any participant lends the trial simply by setting foot in the courtroom. A trial participant will therefore not necessarily recognise coming to court as an act of submission.

Legal performance academic Bernard Hibbitts comments that

> [l]aw's embodiment in performance is not merely physical and outer-directed, however; it is also intellectual and inner-directed. Embodied performance provides a critical means for us to internalize the law; to not only become aware of it but to think it through by acting it out. Ultimately, the embodiment of law in performance authenticates and legitimizes law; we are more likely to accept and endorse a law in which performance literally allows us to take a part.[58]

Although Hibbitts idealises a process considered insidious by other authors, what is important about Hibbitts work is his emphasis on *embodiment*.[59] Hibbitts opens up ideas of internalisation, whereby the trial process uses embodiment on a micro-scale to authenticate and 'legitimise' law. According to Hibbitts, those who are placed within the process are therefore not only representing roles symbolically; they are embodying their position to the extent that certain performance imperatives become seemingly natural. However, contrary to Hibbitts, I would argue that this internalisation is not an immediate response to a courtroom environment (although the courtroom itself is partially responsible); rather it is a process that starts long before entry into the courtroom.

Bourdieu used the term *habitus* to outline this process.[60] *Habitus* for Bourdieu describes how we have embodied and naturalised experience, through socialisation and education. This learning becomes so ingrained that it is unreflected upon. As such, in Bourdieu's argument, *habitus* functions on a largely unconscious basis.[61] Our *habitus* will shape what we value and consequently the areas that we are drawn to. Bourdieu calls these different areas of endeavour *fields*, and those who function within them *agents*. Bourdieu argues that agents internalise the logics of fields unconsciously through education and socialisation. Applying Bourdieu, Paul Moore writes on such a process of socialisation:

> If we have learnt to share a particular value, we will compete for it and seek recognition of our success, as this increases our sense of purpose and belonging, and we will follow rules governing accumulation as these are

> experienced as the 'natural' way of doing and reinforced by the group's unconscious collusion … In Bourdieu's terms, we will attempt to maximise our 'capital' within particular 'fields' of human endeavour, as determined by those dispositions we have embodied. [62]

The juridical field is a 'site of competition' where the aim is to obtain a 'monopoly' in determining the law, and legal agents do this by interpreting legal theory and practise in a manner that both reflects a 'relative autonomy' and is influenced by internal hierarchies.[63] Because they are acted out on a largely pre-cognitive level, the actual field-specific logics become naturalised and unquestioned.

Struggle occurs for both Foucault and Bourdieu not "on behalf of the truth" but "about the status of truth and the economic and political role it plays." The aim is to create hegemony of interpretation that is argued to be *true*.[64] Foucault specifies that truth is not something to be "discovered and accepted," but rather truth is "[t]he ensemble of rules according to which the true and the false are separated and specific effects of power attached to the true."[65] Bourdieu argues that one of the primary means of enforcing the notion of legal autonomy (and therefore enabling the law to perform in terms of its own laws) that is particularly visible at trial is legal framing where any action, system of thought, or person from another field (science, anthropology, plumbing, kite-making, etc.) is reconfigured within legal terminology. Status established within another field does not necessarily have currency within the courtroom, pursuant to the rubric that 'all are equal in the eyes of the law'.[66] This rubric covers the legal field's vested interest in diminishing all hierarchies that are not legal. It also belies the partisan nature of the adversarial trial where both prosecution and defence will seek to present their expert witness as more credible. The law is interested in what is *judicially* true or false and this is defined largely internally, and largely through struggle. Robert Van Krieken, writing an article analysing both the work of Pierre Bourdieu and Niklas Luhmann comments, regarding Luhmann's work:

> There are no extra-legal 'truths' exempted from the juridical gaze and cross-examination, no facts which have any autonomous status, all knowledge is mere testimony in favour of one party or another. All science is merely 'opinion', the reliability of any area of knowledge is always open to the courts' critical scrutiny.[67]

For Bourdieu, this overstates the case somewhat. The category of expert witness relies on recognition of status and the idea of no extra-legal status in the courtroom suggests that everyone is seen as absolutely equal, which is overly idealistic.[68] This said, the law purports to level all hierarchies established within other fields, as though it were alone in being immune to hierarchical influences and the exercise of power. This process allows all other systems of knowledge to be subsumed under 'the law' that is then able to maintain its normative function and uphold its seeming autonomy. This leads to what I consider the defining position of the law—its claim to be able to shine a light into and illuminate any other field (and arbitrate any disputes within that field), despite legal agents not necessarily having any field-specific knowledge in that area.[69]

To return to the current example in this paper, that of the body, this process is evidenced by the demarcated attire of legal agents—whereby their particular status within the court and in relationship to one another is clear—whereas there is no means of distinction between lay participants, whose 'costumes' are visually indistinguishable from one another. This is also echoed in the positioning of witness and defendant, their restricted language and their limited movements. All of these distinctions between lay and law serve to illustrate the ability of legal agents to interrogate any trial participant who (with the exception of the 'expert witness') has no particular status beyond a member of the general public once they are in a courtroom.[70]

For Bourdieu this emphasis on legal autonomy and *distinction* is because there is an unavoidably arbitrary streak at the heart of juridical decisions that cannot be revealed to the layperson or to the participants themselves.[71] Bourdieu comments that "[j]udicial decisions can be distinguished from naked exercises of power only to the extent that they can be presented as the necessary result of a principled interpretation of unanimously accepted texts."[72] Bourdieu is not, however, questioning the ability of trial judges to reach reasonable decisions. Reason itself involves degrees of reflexivity and self-awareness that are only produced under specific historical conditions. The ability of a judge, and the particular status of reason, will vary over time and social space. However the law is a highly unreflexive field. In order for the law to appear reasonable, objective and the ultimate social demarcator, impartiality is implied through subscription to a discipline consisting of a coherent self-contained body of rules. This ongoing practice allows legal agents to transform the historically contingent to the timeless

and the universal. This universalising and transcendentalising process is something that Bourdieu argues generally happens in all fields of cultural production, although it rarely has such an expansive impact on an entire society.

Most legal agents will genuinely believe that the theory and practise of the law *is* autonomous:

> The *communis opinio doctorum* (the general opinion of professionals), rooted in the social cohesion of the body of legal interpreters, thus tends to confer the appearance of a transcendental basis on the historical forms of legal reason and on the belief in the ordered vision of the social whole that they produce.[73]

However,

> [i]n reality, the institution of a 'judicial space' implies the establishment of a borderline between actors. It divides those qualified to participate in the game and those who, though they may find themselves in the middle of it, are in fact excluded by their inability to accomplish the conversion of mental space—and particularly of linguistic stance, which is presumed by entry into this social space.[74]

Here we return again to the marked division between lay and law in the criminal jury trial. The significant disadvantaging of defendants' bodies within the trial is marked by their 'inability' to comprehend the opaque processes. Legal agents unconsciously enact over and over again their own dominance over all other fields (as gatekeeper between lay and law). Consequently, a layperson will have already internalised and naturalised his or her relative position in the trial, signified by their dependence on counsel.[75]

Bourdieu continues:

> The difference between the vulgar vision of the person who is about to come under the jurisdiction of the court, that is to say, the client, and the professional vision of the expert witness, the judge, the lawyer, and other juridical actors, is far from accidental. Rather it is essential to a power relation upon which two systems of presuppositions, two systems of expressive intention—two world-views—are grounded.[76]

The power relations within the trial process reflect the wider processes of the juridical field, in disempowering the defendant and granting counsel the coercive powers of court. The legitimacy this lends the trial process itself will be unconscious on the part of *both defendant and counsel* and cannot simply be reduced to an authority/institution versus layperson dichotomy.[77] This means that many

counsel do not realise how difficult it is for their clients to change their mode of speech to the legal language required of them, and are also unaware of the symbolic power the coercive nature of their role lends them. The trial process has effectively positioned itself as a 'bulwark of justice' such that defendants and counsel may well believe that the trial is their chance to achieve/secure justice.

Every legal agent and layperson within the trial process has a specific role and function; but for Bourdieu this function is partly *unconscious*, such that legal agents and lay bodies unknowingly serve the ideological interests of the juridical field simply by behaving in the way they perceive as the most beneficial to them. This tells us that legal theory will not necessarily reflect legal practice, but will rather tend to idealise it to the layperson *and* legal agent so as to obscure the trial as a state site of 'legitimised symbolic violence'.[78] Hence we return to the beginning: the exploitation of the symbolic power of live performance cloaks the complex and contingent functions of the criminal trial, and its role as a site of 'legitimised symbolic violence'. This results in the transformation of the adversarial criminal jury trial from a particular mode of cultural production that is a manifestation of a *field*, to a process that is apparently cohesive, universal and unquestioned, not only by the layperson, but also by most of the legal agents who work within it.

This process is far from benign—rather it enables the constructed autonomy of the law to assume a quasi-mystical quality of immutability and 'naturalness'. Having unconsciously accepted their roles, trial participants perform and enact a *performance of tradition* that emphasises the history and immovability of the trial, the fairness of the law, legal impartiality and the right of the law to arbitrate over people's lives.

Conclusion: The Performance of Tradition

Performance lies at the heart of the trial's ability to perpetrate and perpetuate the disadvantaging of the defendant and to cloak it in tradition.[79] The performance of tradition is, therefore, far from 'mere' theatrics; rather, it is a process that, through its exploitation of live performance, functions to sustain the mythology of a (fair) trial. The trial's live performance must be continuous; it must be played out over and over and over again. This emphasis on repeated enaction manufactures, almost as a by-product, the power of the law. This is made explicit through the dominance of legal agents in the trial and the binding and gagging of the defendant.

What, however, is the alternative? So long as legal agents fail to understand their own behaviour as coercive, the submission of a defendant's body will continue. Because of the role of the unconscious, the reflexivity required for agents to be able to examine the logics that operate within their own field is rare. This leaves us with no easy answers: so much of our collective belief in the trial relies upon the continuation of the present model of truth-telling. Yet this very model is also what continues to marginalise and silence defendants and other lay participants in the trial. Ultimately, as I have emphasised in this paper, what is at stake is collective *belief*. Whatever form of binding and gagging the criminal trial perpetuates, the public needs to believe in the trial *as* transcendental and as a bulwark of justice, as the alternative is untenable.

I cannot end this paper with any simple summation or suggestion, as alterations in *belief* is not something that comes about overnight. Yet I can end on a slightly optimistic note. While I have been critical of the use of performance in this paper, many positive aspects of the courtroom process—openness and degrees of accountability—are also ensured by the trial's emphasis on the 'live'. Whilst we collectively *believe* that live presence leads to a more 'truthful' outcome, we also uphold the open trial; this, at least, distances us from the worst excesses of totalitarian governments. As Sadakat Kadri commented: "Every prosecution is a performance of communal ideas about justice—and exploitable though the display is, the risks of a show trial are incomparably preferable to the silence of a no-trial."[80]

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[1] The adversarial system operates in Britain, all Commonwealth countries and the US. This is a different system from the inquisitorial model used in Europe. In the inquisitorial system, it is the court, rather than the defence or prosecution, that gathers evidence. The dominance of lawyers is specific to the adversarial tradition. Within the adversarial system, I have chosen to look specifically at the criminal jury trial (routine in the US, and used only in serious criminal matters in Australia and the UK). This is because it is only the *criminal* trial that requires the presence of the accused (in non-criminal matters a defendant's presence depends on whether they are also witnesses), and only the criminal *jury* trial (rather than trials presided by a judge or judges) because the criminal jury trial is the cross-over between a specialised area (law) and the laity (the jury). Because the law operates under the assumption that all legal processes are open to the public, the criminal jury trial is the ideal setting to analyse the relationship between the laity and the law.

[2] Geoffrey Robertson, *The Justice Game* (London: Vintage, 1999), 27–28.

[3] Anita Blumstein Brody et al., "Women on the Bench," (Symposium) *Columbia Journal of Gender and Law* 12.2 (2003), 373.

[4] I use the terms 'theatre' and 'performance' throughout this paper. My use of the terms 'theatre' and 'theatrical' arises when examining legal interdisciplinary scholarship. In this work, I seek to interrogate the pervasiveness of the theatre metaphor. Examination of *how* they use the term 'theatre' suggests that legal agents perceive a relationship between the processes in a criminal court and the fictional, conservative stage—the mainstream Western theatre. I am using the term 'performance' throughout my own argument to deliberately distance my understanding of the performative from this relatively narrow understanding of theatre presented by legal agents (that often manifests in pejorative attitudes towards what they perceive as 'theatricality'). My usage of performance is intended to encompass a broader range of cultural production than that suggested by legal writers. As Schechner argues, behaviour is performance studies' "object of study": see Richard Schechner, *Performance Studies: An Introduction* (New York: Routledge, 2002), 1.

[5] 'Complex social process' is a very general term that I will extend later in the paper, drawing on sociological theory, particularly the work of Pierre Bourdieu. For the present purposes, I use this term to define my work as examining the trial as having a larger social function and role than simply resolving a dispute.

[6] As can be seen from the above, Belli's quote uses the term 'performance' rather than 'theatrics'. However Belli is an exception, as most legal scholars in the area use the term 'theatre' or 'theatrical'. This is why I have summed up these works as using the 'theatrical analogy'. The term 'theatricality' has a long, fraught history. It is beyond the scope of this paper to interrogate the genealogy of this term. However, both Elizabeth Burns and Glen McGillivray have investigated this concept in more detail. Burns argues that the concept of 'theatricality' only makes sense in terms of the spectator. It is the audience member/witness who decides whether or not an activity is *like* theatre. See Elizabeth Burns, *Theatricality: A Study of Convention in the Theatre and in Social Life* (New York: Harper and Row, 1973). McGillivray argues that the relationship between theatre and performance can be analysed as a value-laden discourse whereby the term 'performance' has gained its eminence by limiting significantly the potential of the term 'theatre' to that of the conventional stage. See Glen McGillivray, "Theatricality: A Critical Genealogy" (PhD diss., University of Sydney, 2004).

[7] I will detail my definition of *performance of tradition* later in the paper. In the meantime, however, my choice of the word 'tradition' is intended to refer to a number of ideas. First, 'tradition' evokes long-standing repetitive practices (or customs) that have become relatively naturalised. In this paper, I am arguing that the trial is full of such markers or symbols of 'tradition' that are not only inherited practice but also have distinct ideological and practical purposes that are frequently overlooked by those writing about the trial. Secondly, the term 'tradition' refers to Hobsbawm's concept of 'the invention of tradition', whereby the manufacturing of mythologies enables certain power imbalances to be sustained. Unlike Hobsbawm's argument, however, this paper follows a Foucauldian/Bourdieu sociological bent whereby 'power' is not taken to be permanently located in one place; rather performance and the unconscious serve to retain, construct, and naturalise certain power relationships in the trial. This will be explained in more detail later in the paper.

[8] John Rogers, *Sagrir, or, Doomes-Day Drawing Nigh, with Thunder and Lightening to Lawyers in an Alarum for the New Laws, and the Peoples Liberties from the Norman and Babylonian Yokes: Making Discoverie of the Present Ungodly Laws and Lawyers of the Fourth Monarchy, and of the Approach of the Fifth, with Those Godly Laws, Officers and Ordinances That Belong to the Legislative Power of the Lord Iesus: Shewing the Glorious Work Incumbent to Civil Discipline, (Once More) Set before the Parliament, Lord Generall, Army and People of*

England, in Their Distinct Capasities, Upon the Account of Christ and His Monarchy/Humbly Presented to Them by John Rogers (London: Printed for Tho. Hucklescot, 1654), 11.

[9] Although the right to a criminal defence lawyer was not codified in law in the UK until 1836, criminal lawyers had been increasingly visible in trials since the late 1600s.

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

[11] See (amongst many): Anon, "Editorial," *Central Law Journal 3* (1876); Gail McGuire and Kristen Ramsey, "Litigation Publicity: Courtroom Drama or Headline News," *Communication and the Law* 22.3 (2000), 80.

[12] Peter W. Murphy, "'There's No Business Like ... ?' Some Thoughts on the Ethics of Acting in the Courtroom," *South Texas Law Review* 44.1 (2002), 111.

[13] Editorial (Anon), *Central Law Journal 3*, 635.

[14] This leads into a discussion of the symbolic. As I argue throughout this paper, traditions often lead to the symbolic being interpreted as 'purely symbolic'; that is, detached from any referent. I propose, alternatively, that these symbols continue unconsciously to affect and/or maintain particular ideological ideas that have become naturalised over time. I will extend this discussion further when examining the formation of *collective belief* later in the paper.

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

[16] Perhaps the most memorable example of this potential cross-over is a trial in 1916 where, due to overwhelming public interest, the hearing was moved from the courtroom to a theatre down the road that could more adequately accommodate the spectators. The defendant's conviction was overturned on appeal due to the overly prejudicial 'staging; of his trial. At the adjournment of court on one occasion the bailiff announced from the stage: "The regular show will be tomorrow; matinees in the afternoon and another performance at 8:30. Court is now adjourned until 7:30." Quoted in Milner S. Ball, "The Play's the Thing: An Unscientific Reflection on the Rubric of Courtroom-as-Theater," *Stanford Law Review* 28 (1975), 84.

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

[18] Allan Greenberg, "Selecting a Courtroom Design," *Judicature* 59.9 (1976), 12.

[19] Adi Parush, "The Courtroom as Theater and the Theater as Courtroom in Ancient Athens," *Israeli Law Review* 35 (2001), 136.

[20] Gail Ramsey and Kristen McGuire continue this argument, saying: "the courtroom is not ultimately about issues and legal theories but about people and the lives that they live." See Ramsey and McGuire, 80.

[21] Larry Geller and Peter Hemenway, *Last Chance for Justice: The Juror's Lonely Quest* (Dallas: NCDS Press, 1996), 179.

[22] Richard Harbinger, "Trial By Drama," *Judicature* 55.3 (1971).

[23] Ibid, 122.

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

[25] Ronald Sokol follows this pseudo-Aristotelian line. Writing in 1971, Sokol argues that the 'dramatic structure' of the trial arises from conflict, as "the essence of drama is conflict." The space of the

courtroom is a site for conflicting stories to be realised; however it is the stories themselves, not their presentation, that is key to the drama of the trial. See Ronald Sokol, "The Political Trial: Courtroom as Stage, History as Critic," *New Literary Theory* 2.3 (1971).

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

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

[28] Milner S. Ball, "The Play's the Thing"; Milner S. Ball, "All the Law's a Stage," *Fictions of Law* 11.2 (1999).

[29] Jerzy Grotowski, *Towards a Poor Theatre* (London: Methuen Drama, 1968), 32. See also Peter Brook, *The Empty Space* (London: Penguin Books, 1968).

[30] Ball, "All the Law's a Stage," 121.

[31] Ball, "The Play's the Thing," 86.

[32] Daniel Larner, "Justice and Drama: Historical Ties and 'Thick' Relationships," *Legal Studies Forum* 22.1/2 (1998); Daniel Larner, "Teaching Justice: The Idea of Justice in the Structure of Drama," *Legal Studies Forum* 23.1/2/3 (1999); Peter Charles Hoffer, "Invisible Worlds and Criminal Trials: The Cases of John Proctor and O. J. Simpson," *The American Journal of* Legal History 41.3 (1997); Allan Tow, "Teaching Trial Practice and Dramatic Technique," *Journal of Paralegal Education and Practice* 13.1 (1997); Laurence R. Milstein and Mark I. Bernstein, "Trial as Theater," *Trial* 33.10 (1997).

[33] Ball, "The Play's the Thing," 110.

[34] Jerzy Grotowski was a Polish theatre practitioner who established a Theatre Laboratory in the late 1950s. Grotowski advocated a 'poor theatre' whereby the traditional stage would be stripped of all superfluous materials—what he called Via Negativa—such as costumes, sets, lighting. This was a means of leading to the 'essence' of the theatrical encounter: "The acceptance of poverty in theatre, stripped of all that is not essential to it, revealed to us not only the backbone of ht medium, but also the deep riches which lie in the very nature of the art-form." See Grotowski, *Towards a Poor Theatre*, 21.

[35] Paul Ricoeur, quoted in Ball, "All the Law's a Stage," 218.

[36] This concept of a higher purpose was shared by barrister John Gillespie, writing in Northern Ireland in 1980. Gillespie wrote an article likening the trial not only to a play, but also more specifically to a mediaeval morality play. Gillespie argued that "the criminal trial may be considered as a play, allegorical in structure, which has for one of its objects the teaching of some lesson for the guidance of life, and in which the principal characters are personified abstractions or highly universalised types." For Gillespie, it was not enough to claim that the trial is a theatre simply because people role-play, since a "football match is a dramatic event, but it would be absurd to consider it as theatre." What makes a trial theatre is its relationship to the 'serious' play—where there is a "political, philosophical, or moral lesson." See John Gillespie, "Theatrical Justice (Criminal Trial as a Morality Play)," *Northern Ireland Legal Quarterly* 31.1 (Spring 1980).

[37] This also links back to Aristotelian writers who emphasise the 'inevitability' of the outcome (that seems to side-step the possibility of judicial error).

[38] Tow, "Teaching Trial Practice and Dramatic Technique," 96.

[39] Milstein and Bernstein, "Trial as Theater," 66. This is not a new argument. For an account of the historical 'humanising' dimensions of the trial, see Julie Stone Peters, "Theatricality, Legalism, and the Scenography of Suffering: The Trial of Warren Hastings and Richard Brinsley Sheridan's 'Pizarro'," *Law and Literature* 18.1 (2006).

[40] "Trials dramatise law and morality": Lawrence M Friedman, "Lexitainment: Legal Process as Theater," *DePaul Law Review* 50.2 (2000), 542.

[41] Cottu, quoted in John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003), 144.

[42] From this point I am using the term 'performance' to advance my own argument as to its role in the trial. This concept of the performing body draws on and modifies Goffman's concept of performance in everyday life. Goffman argues that people perform themselves relatively consciously in an attempt to present themselves as favourably as possible, which is a pertinent and useful argument when looking at bodies performing in the criminal trial: "when an individual appears in the presence of others, there will usually be some reason for him to mobilize his activity so that it will convey an impression to others which it is in his interests to convey." See Erving Goffman, *The Presentation of Self in Everyday Life*

(New York: Anchor Books, Doubleday, 1959): 4. However, I argue in this paper that the role of conscious performance is overstated, and that we do not perform ourselves particularly deliberately or consciously. Rather, our performativity relies on certain processes of socialisation and education (in terms of *how* to behave) that operate in a post-liberal environment of self-regulation in Foucauldian terms. This means we set unconscious constraints or limits to *how* we may behave or "perform" in certain contexts which often means we do not question the processes of constraint that we unconsciously participate in. This idea of the unconscious will be examined in more detail later in the chapter.

[43] See Sally Falk Moore and Barbara G. Myerhoff (eds.), *Secular Ritual* (Amsterdam: Van Gorcum & Comp, 1977).

[44] Generally speaking, Auslander notes the largely self-contained and unreflexive nature of the trial system. It is only in the face of CCTV testimony that legal agents have had to consider the legal emphasis on live performance. See Philip Auslander, *Liveness* (London: Routledge, 1999).

[45] Auslander, 128–29.

[46] Philip Auslander, "Towards A Concept of the Political in Postmodern Theatre," *Theatre Journal* 39.1 (1987). It is noteworthy that those who valorise the lawyer's position in court stress concepts such as 'persuasion', 'presence' and 'charisma'—with an emphasis on the inevitable outcome of a narrative process. However this is not exclusively the case. See Laurie Kadoch, "Seduced by Narrative: Persuasion in the Courtroom," *Drake Law Review* 49:1 (2000).

[47] An interesting case to examine the effect of belief is that of CCTV testimony (where a defendant, witness or complainant testifies remotely). The replacement of live testimony with CCTV testimony has led to a number of studies involving mock trials and juries. Although the jurors respond that the evidence itself is not different between one medium and the other, there is some evidence that jurors are less likely to believe the testimony of someone who is not present in the courtroom with them. See Natalie Taylor and Jacqueline Joudo, *The impact of pre-recorded video and closed circuit television testimony by adult sexual assault complainants on jury decision-making: an experimental study*, Australian Institute of Criminology Research and Public Policy Series 68 (2005). Available online at http://www.aic.gov.au/.

[48] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (London: Penguin Books, 1975): 26. Foucault goes on to note: "it is not the 'privilege', acquired or preserved of the dominant class, but the overall effect of its strategic positions—an effect that is manifested and sometimes extended by the position of those who are dominated." Pierre Bourdieu also emphasises the importance of repeated *performance*, commenting: "juridical ratification is the canonical form of (all this) social magic. It can function effectively only to the extent that the symbolic power of legitimation, or more accurately of naturalization (since what is natural need not even ask the question of its own legitimacy), reproduces and heightens the immanent historical power which the authority and the authorization of naming reinforces or liberates." See Pierre Bourdieu, "The Force of Law: Towards a Sociology of the Juridical Field," *Hastings Law Journal* 38.5 (July 1987), 840.

[49] Foucault, *Discipline and Punish*, 47.

[50] Ibid, 25.

[51] Pierre Bourdieu and J. D. Wacquant, *An Invitation to Reflexive Sociology* (Cambridge: Polity Press, 1992), 20.

[52] Foucault, *Discipline and Punish*, 25.

[53] Section 6A of the US Constitution stipulates the right of a defendant to be "confronted with the witnesses against him."

[54] Peter Halewood, "Violence and the International Word," *Conceptualising Violence: Present and Future Developments in International Law* 60.3 (1997).

[55] Robert Cover, "Violence and the Word," *Yale Law Journal* 95 (1986), 1607.

[56] This has echoes of Goffman's argument that we are constantly performing ourselves in a strategic way.

[57] It is beyond the scope of this paper to go into detailed analysis of the spatial dynamics of a courtroom. For a good analyses of this, see J. D. Rosenbloom, "Social Ideology as Seen through Courtroom or Courthouse Architecture," *Columbia Journal of Law and Arts* 22.4 (1998). See also Greenberg, "Selecting a Courtroom Design," 12.

[58] Bernard J. Hibbitts, "Describing Law: Performance in the Constitution of Legality," (Performance Studies International Conference, unpublished conference paper, 1996).

[59] See, for example, Robin L. West, "Adjudication Is Not Interpretation: Some Reservations About the Law-as-Literature Movement," *Tennessee Law Review* 54.2 (1987); or Nunn, "The Trial as Text," 17.

[60] Bourdieu is not the first person to use the term *habitus*. His usage follows the work of Emile Durkheim and Max Weber. Charles Camic examined the usage of 'habit' in a 1986 article, arguing that Bourdieu was relatively alone in reviving Durkheim and Weber's concept of habit/habitus. Camic notes:

"For thinkers like Durkheim and Weber, habit was of significant consequence in economic, political, religious, and moral life, and elsewhere as well; but its consequences are not something one is at all prompted to investigate, or even to notice, when one assumes that action always takes the form of a reflective weighing, by various normative standards, of means to ends." Camic critiques sociology's overemphasis of reflective, or conscious habit at the expense of the unconscious habitual processes that Bourdieu talks about. Here again is the gap between Goffman's theory of performativity, and the more Foucauldian state of self-regulation where humans both internalise and reproduce certain hierarchies unconsciously. See Charles Camic, "The Matter of Habit," *American Journal of Sociology* 91.5 (1986), 1075.

[61] This is similar to Foucault's work in *Discipline and Punish*, however Bourdieu extends Foucault's argument of embodied self-regulation into a much broader argument as to how society is formed by overlapping fields constituted by competition, existing within a wider field of economy. See Pierre Bourdieu, *The Field of Cultural Production: Essays on Art and Literature* (Cambridge: Polity Press, 1993).

[62] This section on the work of Pierre Bourdieu has been formulated through many discussions with Dr. Paul Moore who specialises in Bourdieu's sociology. See Paul Moore, "Longing to Belong: Trained Actors' Attempts to Enter the Profession" (PhD diss., University of Sydney, 2005), 46.

[63] Bourdieu, in his 1987 article on the juridical field, introduces, critiques and rejects what he considers to be the two dominant legal discourses. First, the formalist argument, which is based on the idea that the law is totally autonomous and self contained, and has an 'internal dynamic'. Secondly, the 'instrumental view' of the law, which is a heavily Marxist argument that states that the superstructure is a direct reflection of 'existing social power relations' that are determined by the economic base. Bourdieu argues that this instrumental understanding can only perceive of the law over-simplistically, as a 'tool in the service of dominant groups' (similar to Foucault's positioning of it as a somewhat monolithic apparatus of the state). See Bourdieu, "The Force of Law," 814–16.

[64] Ibid, 820–25.

[65] Michel Foucault, "Truth and Power" in *Power/Knowledge: Selected Interviews and Other Writings 1971–1977*, ed. Colin Gordon (New York: Pantheon Books, 1998).

[66] So a renowned expert witness's testimony is subject to re-testing through cross-examination and debate even if his or her views hold wide acceptance outside the courtroom.

[67] Robert Van Krieken, "Legal Reasoning as a Field of Knowledge Production: Luhmann, Bourdieu, and Law's Autonomy" (paper presented at the Law, Power & Injustice: Confronting the Legacies of Sociolegal Research, Law & Society Association Conference, Chicago, 2004).

[68] Although equality before the law is foundational to its liberal roots, an example of disparity is immediately apparent when considering that a trial participant's socio-economic status will determine the quality of the legal representation that he or she can obtain.

[69] This authority over all other fields is arguably only shared by the political field and the journalistic field.

[70] It is worth inserting a note of caution because this risks again sounding overly idealistic. Although forms of constraint are unconsciously imposed on and participated in by trial participants, it is overstating the case to think that every defendant will be treated equally. If, for example, a prominent politician was on the stand, legal agents are likely to treat him or her differently from an alcoholic who has been charged with assault. Although both defendants may have the same technical, physical limitations that signify their status, this status will be massaged and/or undercut by the performance of legal agents, who may well seek to 'go lightly' on the politician. Alternatively, of course, their very fame may be a reason for a litigator to seek to enhance his or her own position by *not* treating them differently.

[71] This argument as to the existence of an 'arbitrary' streak is one rejected by highly formalist judges, who often claim that their job is to apply the law, not to interpret it in a new way. However, how a judge interprets a particular case may depend on a current hegemony of interpretation, but arguably always involves the subjective choice and opinion of the judge in how he or she chooses to apply this interpretation.

[72] Bourdieu, "The Force Of Law," 818. This arbitrary streak is even more readily apparent in the adversarial system (Bourdieu is writing primarily about the inquisitorial system) due to the presence of a jury whose decision-making processes are veiled from the public *and* legal agents.

[73] Ibid, 819.

[74] Ibid.

[75] This is not, of course, always the case. In instances where a criminal defendant is a highly skilled professional they may have less sense of inferiority before legal agents.

[76] Bourdieu, "The Force Of Law," 828.

[77] In contrast to Goffman who seemed to suggest that our performance of ourselves is not only strategic but fully conscious.

[78] "What is at stake in this struggle is monopoly of the power to impose a universally recognized principle of knowledge of the social world—a principle of legitimised *distribution*. In this struggle, judicial power, through judgements accompanied by penalties that can include acts of physical constraint such as the taking of life, liberty, or property, demonstrates the special point of view, transcending individual perspectives—the sovereign vision of the State. For the State alone holds the monopoly of legitimised symbolic violence." See Bourdieu, "The Force of Law," 838. Symbolic violence is using one's capital to dominate/exploit someone; thus a judge disallowing a defendant from answering anything other than 'yes' or 'no' is an act of symbolic violence.

[79] Anyone who has watched a loved one go through a trial experience will be in no doubt about the level of constraint imposed.

[80] Sadakat Kadri, "Better and Worse Worsts: The Trial in American Life by Robert Ferguson, a Review," *London Review of Books* 24 May 2007, 17–18.