THE INTERNATIONAL LIBRARY OF ESSAYS IN LAW AND SOCIETY

TRIALS

Martha Merrill Umphrey

Trials

Edited by

Martha Merrill Umphrey

Amherst College, USA

ASHGATE

Published by
Ashgate Publishing Limited
Gower House
Croft Road
Aldershot
Hampshire GU11 3HR
England

Ashgate Publishing Company
Suite 420
101 Cherry Street
Burlington, VT 05401-4405
USA

Ashgate website: http://www.ashgate.com

British Library Cataloguing in Publication Data
Trials. – (The international library of essays in law and society)
1. Trials
I. Umphrey, Martha Merrill
347'. 07

Library of Congress Control Number: 2007941046

ISBN 978-0-7546-2512-4

Mixed Sources
Product group from well-managed forests and other controlled sources
www.fsc.org Cert no. SGS-COC-2482
© 1996 Forest Stewardship Council

Printed and bound in Great Britain by
TJ International Ltd, Padstow, Cornwall

Trials

The International Library of Essays in Law and Society
Series Editor: Austin Sarat

Titles in the Series:

Law and Religion
Gad Barzilai

Police and Policing Law
Jeannine Bell

Law and Society Approaches to Cyberspace
Paul Schiff Berman

Law and Families
Susan B. Boyd and Helen Rhoades

Regulation and Regulatory Processes
Cary Coglianese and Robert Kagan

Rhetoric of Law
Marianne Constable and Felipe Gutterriez

Law in Social Theory
Roger Cotterrell

Ethnography and Law
Eve Darian-Smith

International Law and Society
Laura Dickinson

Legal Lives of Private Organizations
Lauren Edelman and Mark C. Suchman

Courts and Judges
Lee Epstein

Consciousness and Ideology
Patricia Ewick

Prosecutors and Prosecution
Lisa Frohmann

Intellectual Property
William T. Gallagher

Race, Law and Society
Ian Haney López

The Jury System
Valerie P. Hans

Crime and Criminal Justice
William T. Lyons, Jr.

Law and Social Movements
Michael McCann

The Role of Social Science in Law
Elizabeth Mertz

Sexuality and Identity
Leslie J. Moran

Law and Poverty
Frank Munger

Rights
Laura Beth Nielsen

Governing Risks
Pat O'Malley

Lawyers and the Legal Profession, Volumes I and II
Tanina Rostain

Capital Punishment, Volumes I and II
Austin Sarat

Legality and Democracy
Stuart A. Scheingold

The Law and Society Canon
Carroll Seron

Popular Culture and Law
Richard K. Sherwin

Law and Science, Volumes I and II
Susan Silbey

Immigration
Susan Sterett

Gender and Feminist Theory in Law and Society
Madhavi Sunder

Procedural Justice, Volumes I and II
Tom R. Tyler

Trials
Martha Merrill Umphrey

Acknowledgements

The editor and publishers wish to thank the following for permission to use copyright material.

Anthony G. Amsterdam and Randy Hertz for the essay: Anthony G. Amsterdam and Randy Hertz (1993), 'An Analysis of Closing Arguments to a Jury', *New York Law School Law Review*, **27**, pp. 55–122. Copyright © 1993 Anthony G. Amsterdam and Randy Hertz.

Blackwell Publishing Ltd for the essays: Austin Sarat (1993), 'Speaking of Death: Narratives of Violence in Capital Trials', *Law and Society Review*, **27**, pp. 19–58. Copyright © 1993 Blackwell Publishing Ltd; Kim Lane Scheppele (1992), 'Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth', *New York Law School Law Review*, **27**, pp. 123–72. Copyright © 1992 Blackwell Publishing Ltd; Stéphane Leman-Langlois (2002), 'Constructing a Common Language: The Function of Nuremberg in the Problematization of Postapartheid Justice', *Law and Social Inquiry*, **27**, pp. 79–100. Copyright © 2002 Blackwell Publishing Ltd; David Lipset (2004), '"The Trial": A Parody of the Law amid the Mockery of Men in Post-Colonial Papua New Guinea', *Journal of the Royal Anthropological Institute*, **10**, pp. 63–89. Copyright © 2004 Blackwell Publishing Ltd.

School of Law, Stanford University for the essays: Milner S. Ball (1975), 'The Play's the Thing: An Unscientific Reflection on Courts under the Rubric of Theater', *Stanford Law Review*, **28**, pp. 81–115. Copyright © 1975 Stanford Law Review; Richard K. Sherwin (1994–95), 'Law Frames: Historical Truth and Narrative Necessity in a Criminal Case', *Stanford Law Review*, **47**, pp. 39–83. Copyright © 1994 Stanford Law Review.

Shoshana Felman for the essay: Shoshana Felman (1997), 'Forms of Judicial Blindness, or the Evidence of What Cannot Be Seen: Traumatic Narratives and Legal Repetitions in the O.J. Simpson Case and in Tolstoy's *The Kreutzer Sonata*', *Critical Inquiry*, **23**, pp. 738–88. Copyright © 1997 Shoshana Felman. This article constitutes the second chapter of Shoshana Felman's book, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century*, Cambridge, MA: Harvard University Press (2002), pp. 54–105.

William Finnegan for the essay: William Finnegan (1994), 'A Reporter at Large: Doubt', *The New Yorker*, 31 January, pp. 48–67. Copyright © 1994 William Finnegan. Originally published in *The New Yorker*.

Every effort has been made to trace all the copyright holders, but if any have been inadvertently overlooked the publishers will be pleased to make the necessary arrangement at the first opportunity.

Series Preface

The International Library of Essays in Law and Society is designed to provide a broad overview of this important field of interdisciplinary inquiry. Titles in the series will provide access to the best existing scholarship on a wide variety of subjects integral to the understanding of how legal institutions work in and through social arrangements. They collect and synthesize research published in the leading journals of the law and society field. Taken together, these volumes show the richness and complexity of inquiry into law's social life.

Each volume is edited by a recognized expert who has selected a range of scholarship designed to illustrate the most important questions, theoretical approaches, and methods in her/his area of expertise. Each has written an introductory essay which both outlines those questions, approaches, and methods and provides a distinctive analysis of the scholarship presented in the book. Each was asked to identify approximately 20 pieces of work for inclusion in their volume. This has necessitated hard choices since law and society inquiry is vibrant and flourishing.

The International Library of Essays in Law and Society brings together scholars representing different disciplinary traditions and working in different cultural contexts. Since law and society is itself an international field of inquiry it is appropriate that the editors of the volumes in this series come from many different nations and academic contexts. The work of the editors both charts a tradition and opens up new questions. It is my hope that this work will provide a valuable resource for longtime practitioners of law and society scholarship and newcomers to the field.

AUSTIN SARAT
William Nelson Cromwell Professor of Jurisprudence and Political Science
Amherst College

Introduction

To examine the trial as a legal form is to explore the landscape of an increasingly endangered species. If trials were ever the norm in resolving disputes in the United States, they now account for a mere fraction of the means of disposition of most legal cases, and their proportion dwindles decade after decade in favour of plea bargaining, settlement and other forms of negotiated resolution (Friedman, 2004).[1] Those more efficient and less dramatic alternative forms have quietly colonized the field of legal judgment in ways that remain remarkably invisible in public culture.[2] Yet if popular culture is in any way symptomatic of a national imagination, Americans (at least) find trials, or certain kinds of trials, utterly compelling in spite of their empirical scarcity. If our public culture appears weirdly obsessed with the tabloid world of Judge Judy, of Court TV, of O.J. Simpson and Michael Jackson, the deep fascination with which we watch these trials signals their potency and symbolic centrality as political arenas where we encounter and intimately engage the most deeply charged troubles in our national psyche (see Fox and Van Sickel, 2001; Rapping, 2003).[3]

Why invest so much meaning in the trial, an unpredictable and antic process predominantly designed to contain and salve the bitter arguments and deep wounds of individual citizens? Taken together, the essays that follow suggest that trials (particularly those in the Anglo-American adversarial tradition, which are the focus of this volume) are sites of a kind of public enchantment. The trials that occupy our attention – and if they are very few, they are nevertheless magnificent in their seeming cultural significance – draw us into a bounded space set apart from everyday life because of their rituals, their rules and their theatricality. In an almost magical way they transform bodily, material and psychological wrongs into dramatic and contested stories that are performed in court, spectacularized in popular culture

---

1 In a study commissioned by the American Bar Association Section of Litigation under the rubric of 'The Vanishing Trial', Marc Galanter (2004) has found that in 2002 only 1.8 per cent of federal civil cases were resolved by trial, down from 11.5 per cent in 1962, and only 5 per cent of federal criminal cases went to trial in 2002 compared with 15 per cent in 1962. Similar declines have occurred in both sorts of trials at the state level. These figures indicate an acceleration of a long trend away from trial as a mode of resolving legal controversy. According to Friedman (1993, p. 253), plea bargaining accounts for over 90 per cent of all convictions.

2 On current anti-adjudicative tendencies, see Resnik (1986).

3 While it is difficult to assess empirically the assertion that Americans in general are fascinated by trials, most commentators look to two factors in making such claims: the broad publication across media outlets and genres of reports on a number of sensational trials and public opinion polls gauging the public's familiarity with such trials. Fox and Van Sickel (2001, p. 2), for example, report that in the mid-1990s, more citizens could identify JonBenet Ramsay than the Vice President of the United States, and that roughly six times as many Americans knew the name of the judge presiding over O.J. Simpson's trial as knew the name of the Chief Justice of the US Supreme Court. In other words, the media saturates the public with its coverage of trials, and its interpretation of them, so that even those not specifically inclined towards trial-watching are likely to have some familiarity with notorious cases.

and received by a public both easily seduced by courtroom drama and deeply invested in its own acts of judgment. Those who follow major trials – and that by definition includes most media, to one extent or another –identify (in sometimes shifting ways) with courtroom actors, are made spellbound by emotional stories of scandal and sordid deeds, wait in suspense for the closure that comes with legal judgment and take pleasure in offering their own verdicts, not only on a defendant or a respondent but also on the law itself. Trials enthral us because they have been designed to address us both indirectly and directly as a public, staging social disorder in ways both safe and vivifying.

This volume is designed to bring into view the dialogic relation between trials and culture that enables these particular kinds of enchantment with law. Given their public nature, trials are the sites where law encounters and interacts with the culture in which it is embedded, places where legal rules exfoliate into contested stories performed before audiences both inside and outside the courtroom. Through trials, law constitutes itself via its orientation to its public; and through trials, the public comes to know its relation to legal order and judgment.[4] In collectively inquiring into the contours of that dialogic relation, the essays that follow trace the paths of cultural stories as they circulate in and through trial settings, examine how trials emerge out of particular cultural contexts and moments, and suggest ways in which trials themselves, as both singular events and generic forms, circulate and signify in culture.

The Performative Ethics and Aesthetics of Trials

The analogy of the trial to theatre is not new.[5] If in asserting it one attends inadequately to the actuality of the legal conflict's underlying social events and the very real violence undergirding legal judgment,[6] the analogy nevertheless points to a starting place in any account of the public's fascination with trials. Partly, of course, trials enchant us because of their underlying drama. They offer access to the tensions and wounds of the private sphere – the transgressions of social norms, the rule-breakings, passions, desires and alibis – all framed through the camera obscura of memory and human subjectivity. The pleasures of that access emerge from our capacity to see and hear about what has only been imaginable, or what has been utterly unimaginable. As we follow trials, whether civil or criminal, we are put in the deliciously contradictory position of the ethical peeping Tom, one who can feel the thrill of subversive watching from a sanctioned and safe position (Clover, 1998). And yet other venues offer us these kinds of pleasures – film, literature, even a keen glance at everyday life. Beyond

[4] On dialogism, see Bakhtin (1981); see also Umphrey (1999).

[5] As the analogy was drawn by Sir Edward Parry, for example, 'Even to-day when we think of a trial or a lawsuit we picture it to ourselves in terms of drama, applauding the hero or heroine, execrating the villain of the piece, chuckling at the comedian in the witness-box and expressing approval of the modest demeanour of the small-part man who walks on to the dim bench and gives the necessary cues to the great actors in the limelight. And as we read the report of a law case we recall the familiar scenery of a court house, the traditional costumes of the characters and that dramatic setting which we inwardly approve of as essential to the earliest administration of justice' (1924, pp. 7–8). See Milner Ball, Chapter 1 in this volume, for a more complex rendering of this analogy.

[6] As Robert Ferguson (2007, p. 69) notes, theatricality works through a suspension of disbelief while in trials, facts and the mundane realities from which they arise are everything. On the violence of legal judgment, see Cover (1992).

substance, the very form of the trial attracts and attaches us to it. More elegant than legislative debate or public protest, more engaging than bully pulpit preaching, more dramatic than a classroom, more gripping in its realism than most imaginative culture, the trial enchants us precisely because it is a performative, dialogic and highly stylized genre of public discourse.

Trials are spaces set apart from the everyday, constituted by special rules and epistemic commitments that transform both the underlying 'reality' of any case and the audience that attends it. A trial brings the past to life in language and through stories governed by quite specific generic constraints.[7] Yet it distinguishes itself from other cultural forms that might do similar work – popular and scholarly history, historical fiction, documentary film – in its performative aspects. The performative nature of trials goes well beyond the claim that trials mimic certain dramatic conventions, and is manifest in three distinctive but interrelated ways: the trial's orientation to audience; its immediacy and contingency, or 'liveness'; and its legal conventionality, which is a product of rule-stylization and legal consequentialism. Together, these three characteristics set trials apart from other kinds of cultural forms and confer on any given trial a pointedness, an expressiveness and meaningfulness that brings law alive.

Audience Orientation

In liberal democracies most trials are at least nominally public events,[8] and in their most robust and elaborate form they interpolate multiple audiences – judges, juries and the wider public – who watch, listen and attend to evidence as each side offers it for adjudication. If spectacular trials are the most obviously theatrical in their media-driven, self-conscious histrionics (Friedman, 2004, p. 700), all trials, whether spectacular or banal, are by their very nature dialogic: attorneys and witnesses render competing versions of the past in and through language to their audiences even as they structure those renderings with reference both to the rules governing what can and cannot be said at trial and to the imagined expectations of their listeners. By its mere presence the audience triangulates the proceeding, changing what might have been a negotiated settlement (or an endless cycle of vengeance) between contending parties into an event that both demands judgment and solicits legitimation.

Within the Anglo-American trial tradition, the trial's most symbolically significant audience is the jury. It is imagined as a hybrid of the official and the popular, the crucial link between

---

[7] Certain rituals and conventions must be observed for the trial's ultimate performative, the verdict, to be (in J.L. Austin's terms) a 'felicitous' speech act. Thus, for example, by violating the conventions and decorum of the courtroom, the Chicago Seven called into question the very legitimacy of their prosecution (see Lahav, 2004).

[8] As Lawrence Friedman rightly reminds us, we ought not condense the entire criminal process into one imagining of a trial; historically, public justice was often done in a relatively summary manner (not unlike modes of private or quasi-public 'justice' – duelling, lynching, whitecapping and the like – common through the early part of the twentieth century in the United States). Yet however rudimentary the legal process may be, it is not carried out in secret (see, generally, Friedman, 1993). Recent policies in the United States and elsewhere have highlighted various state strategies to try 'enemy combatants' in non-public military tribunals (see, for example, Cole, 2003). Nevertheless, the US Supreme Court has ruled that federal courts retain jurisdiction over those held as 'enemy combatants', which in essence vindicates the traditional practice of public judicial review in limit cases in which the person held is not a US citizen (see *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749 (2006)).

formal institutions of legality and popular sovereignty. As such, it operates not only to check potential abuses of state power, but also to educate ordinary folk into proper citizenship. Indeed the jury trial has often been taken as a synecdoche for the workings of American democracy itself, occupying a central place in the story of the United States as a self-governing people. As Tocqueville remarked over 150 years ago, the jury is 'above all a political institution', embodying the sovereignty of the people, and the judgments produced at trial are such as to 'instill some of the habits of the judicial mind into every citizen ... the very best way of preparing a people to be free' (1988, pp. 273–74).[9] While debates about the efficacy, efficiency and fairness of the jury trial have grown as the American jury has democratized (see Adler, 1994; Abramson, 2000), those who lionize it remain convinced that it expresses 'the values and commonsense of the people in whose name the law was written' (Abramson, 2000, p. 6),[10] and it remains a significant site of democratic identification.

Those possibilities of identification make possible an easy slippage from jury-as-audience to public-as-audience, and as such it is sometimes clearly the case that legal actors project the trial outward, beyond the bounds of the courtroom. They play to a larger audience. At the extreme, states conduct trials in the manner of pedagogical events, placing a broader community at the centre rather than the periphery of the legal process. Thus in the colonial era, for example, early American trials offered what Lawrence Friedman (1993, p. 25) has called 'divine social theater' occasions for teaching the difference between good and bad, for punishing sin, and for repenting and reintegrating into the community. Justice was done openly and quickly, designed both to impress certain norms upon and into the local community and to demonstrate the power and legitimacy of the state. Show trials, staged as spectacles of justice for a broad public, are only the most overt modern manifestation of this hortatory posture (see Sklar, 1986; Hariman, 1990b; Arendt, 1994). Their self-conscious theatricality in setting and dramaturgy underscores the grand scale of adjudication in play; not only individual defendants, but politics and historical memory come to be judged as part of larger projects of nation-building and state legitimation.[11]

But even under conditions of less notoriety, trials engage, and are intended to engage, a broader public. Sometimes that engagement takes place on specifically political terms. Paul Gewirtz (1996, pp. 149–50) has argued, for example, that even as the punishments meted

---

[9] Tocqueville understood the arena of jury judgment as a critical vehicle for educating people into proper citizenship which, as he defined it in this context, consists of respect for court decisions and for the idea of right throughout all classes, a belief in equity, a tendency to take on rather than shirk responsibility and a feeling that all have a duty towards society and a share in its government. On juries, see also Abramson (2000) and Adler (1994).

[10] News coverage following findings of guilt in the corporate fraud and conspiracy charges levied against Enron executives emphasizes this view of the common-sense decision-making capacity of 'regular' Americans. Again and again in interviews jurors compared the greed and failures of highly-paid executives with their own senses of responsibility and good-faith efforts at work as public school principals, payroll managers, dairy farmers, clerks, dental hygienists and so forth (see, for example, *New York Times*, 2006; see also Burnett, 2001).

[11] In noting the theatricality of the Eichmann trial, Hannah Arendt writes that 'the show Ben-Gurion had had in mind to begin with did take place, or, rather, the "lessons" he thought should be taught to Jew and Gentiles, to Israelis and Arabs, in short, to the whole world' (1994, p. 9). For an insightful consideration of high-profile trials generally, see Ferguson (2007, Part 1).

out to individuals in trials take the public as an object of general deterrence, the public is also the active agent behind such punishments, which are said to express the morality of the community. And if the public sees trials as expressions of those community values, it also acts as a watchdog placing government power under scrutiny in the open forum of the courtroom. The public may also attend to trials for reasons that feel more psychological or moral than political: we may gain comfort from them because they impose a kind of structure on social disorder and offer a means of addressing, if not always fully resolving, large and contentious social questions (Hariman, 1990a, pp. 23–24; Gewirtz, 1996, p. 151).[12]

The moral gravitas that attends this account of the public's relation to trials is both inseparable from and complicated by the ludic quality of trial proceedings. The great medievalist Johann Huizinga has called attention to the resemblance between a lawsuit and a contest whose agonistic nature necessarily signals a domain of play, a world with a well-defined quality of action different from 'ordinary life'. A trial has many of the components of play Huizinga identifies: it is an enchanted space, set apart from the everyday by virtue of the roles and disguises humans adopt and the rules by which they act (1955, p. 13). In arguing specifically for the linking of law and play, Huizinga conceives of trials as contests that, in their earliest forms, had less to do with conceptions of right and wrong and more to do with fate, wagers and battles of both rhetorical and physical sorts – all expressions of play.[13] If modern trials contain a moral and didactic component, that component is expressed (at least in American trials) through an agonistic adversarial process that communicates social narratives about right and wrong precisely through the vehicle of play. Edification and entertainment converge as the public witnesses two parties in a case do battle over the fact and meaning of past events.[14]

Liveness

If trials are performative because they are conducted before audiences, their 'liveness' forms an essential part of their capacity to enchant (Auslander, 1999, p. 113).[15] Liveness signals

---

[12] In the context of mapping new methodological strategies in cultural-legal history, Ariela Gross (2001, pp. 651–54) has suggested three ways in which treating trials as performances allows us to attend to what might loosely be understood as the cultural dimension of trials: it draws our eyes towards the actual audiences for trials and the ways in which information is presented to and consumed by them; it helps us to understand trials as public performances that exert certain kinds of moral and psychological effects on various communities; and it conceives trials as fora for the performance of certain kinds of identities, and as arenas for the representation of selves.

[13] See generally Huizinga's chapter 'Play and Law' (1955).

[14] Of course, we do not follow routine trials with the same attention we give to spectacular trials, a fact suggesting that their entertainment value lies in more than the pleasures of contest. Certain trials have, since the printing of murder trial narratives in the late eighteenth century, captured the public gaze. Some have concerned political corruption and rebellion; some have exposed the underbelly of the 'respectable' classes; some have dramatized conflict born of social segregation and stratification; some have laid bare the most violent and anti-normative human tendencies. On the history of gothic narratives about murder in particular, see Haltunnen (1998). On spectacular trials generally, see Hariman (1990b).

[15] Auslander (1999, pp. 114–30) explores the ways in which the Confrontation Clause requires that trials be live events, and that as a result testimony is best understood as a performance of recollection.

the irreducible specificity and contingency of trials as texts for public consumption and legal adjudication. In trials, like other forms of contest, the electricity of watching a live performance comes from witnessing, from an immediate perspective, those contingencies as they come into being, without knowing the outcome ahead of time.[16] The trial is thus, in this sense, a place of 'trying' or testing of testimony and evidence, by cross-examination and audience interpretation of the results. Robert Burns emphasizes the significance of the jury's live encounter with the evidence, arguing that performance gives trials an urgency that persuades not logically but histrionically.

> The 'enactment' of the trial provides the material for a dramatic sensibility on the jury's part, a 'primitive and direct' awareness 'before predication,' as Aristotle put it, of the actions and performances displayed before it. ... The trial requires that all the evidence come before the jury in the form of performances which, in this 'primitive' but profound way, ring true or false. (Burns, 1999, pp. 139–40, footnotes omitted)

What matters, argues Burns, is not so much the deliberative nature of the jury, but the fact of live encounter with complicated, self-reflexive, competing narratives – an encounter that, in its intensity and distinctiveness, provokes a kind of intuitive response to the particular fact situation that under the best conditions produces a verdict that 'gets it right'.

Liveness gives trials an immediacy and contingency that invests them with more suspense than other narrative genres even as the gravity of trial outcomes gives them more meaning than other forms of live contest. Shifting allegiances produced by the adversarial format, surprise evidence, frustrating rulings from the bench, gaffes by attorneys, witness breakdowns – all can produce a thrilling, radical uncertainty for the trial's various audiences, that much more intensified by the trial's demand for closure and judgment. Liveness also imparts what Milner Ball (Chapter 1 in this volume) describes as an important poetic or metaphoric element to trials. '[W]hat the advocate seeks ... is', he suggests, 'the passage from the materials of fact and law (the text) by means of courtroom presentation (the performance) to a persuasive statement of what ought to be done in a given situation (the metaphor)' (p. 13).

Legal Conventionality

But if contingency gives trials a particular electricity, it rarely threatens the entire project of adjudication itself, occurring as it does within the bounds of highly stylized and authority-governed proceedings. Those same rules and structures make the trial something quite different from other kinds of events or fora that attempt to reconstruct past events or render moral judgment. In that specific sense, trials are not mirrors of or windows into the social world. Rather, in trials we see the past through a scrim, some aspects spotlighted, others banished to shadow. Procedural rules regulate what, how and when evidence can be presented to a decision-maker, often excluding information irrelevant or prejudicial that we might otherwise commonly invoke when we discuss and evaluate past events and social conflicts – gossip, general personal histories, patterns of behaviour within and between social groups, and so

[16] As Peggy Phelan has argued, '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' (1993, p. 146).

forth. Trial rules sift through precisely that kind of evidence, excluding it on the basis of the hearsay rule, rules about character evidence, rules about statistical inference and the like.

For some, this legal formalism places the reliability and referentiality of legal proceedings in question (see, for example, Pizzi, 1999). Yet however much the rules of evidence regulate what is laid before the eyes of decision-makers, truth-production in trials is most profoundly governed by their adversarial format, which shapes the rhythm and contours of the stories lawyers tell and the evidence they present. Even when the media may offer more information to the general public than a jury can see, the binarized architecture of the trial process directs the way we understand and interpret the evidence put before us. We are forced into a way of thinking about past events as having happened either this way or not-this way, with its attendant corollaries – for example, either the evidence is directly communicative or there are significant doubts about its handling; either he is lying or he is not; either she is guilty beyond a reasonable doubt or she is not legally guilty. While shades of grey can slip though this structuring, or can be imputed, there is no formal way to articulate a middle ground at trial, only a prosecutorial narrative and its defensive undoing.[17] In other words, particularly in the United States, with its strong investment in a lawyer-driven adversarial trial structure,[18] the truth that trials produce when announcing a verdict (Latin *veredictum*, 'to speak the truth') is a *legal* truth rather than some other kind, whether historical (a best approximation of what 'really' happened), psychosociological (the mental and social causes and effects of an act or event) or sacral (moral truths concerning good and evil).

The Dialogics of the Trial

As Huizinga has suggested, staging knowledge in the form of a contest can be deeply satisfying on an aesthetic and affective level. Some have argued that the trial form may indeed be so powerful as to colour, and even structure, a national public imagination. Film scholar Carol Clover, for example, argues that the very form of the Anglo-American trial has a 'fantastic generativity' that in turn shapes an enormous amount of American popular culture, particularly in television and film. 'The narrative substructure of so much of our cinema rhymes with the narrative substructure of our trial', Clover suggests, to such an extent that even films that do not concern trials exhibit certain of their central formal properties (1998, pp. 99–100).[19] If

[17] Critics of trials (rather than, for example, of the jury) often focus on adversarialism as the source of most of the ills plaguing the system. They suggest that our overreliance on attorneys produces harmful excesses of advocacy and a focus on winning at any cost; that pumped-up adversarial trials are too complex, legalistic and costly to be accessible to most litigants and defendants; and that binary and oppositional presentations of facts hinder rather than encourage our capacity to determine complex truths. In addition to Pizzi (1999), see, for example, Kagan (2001, pp. 61–98) and Menkel-Meadow (1996). And yet in assuming that trials should be evaluated solely on their capacity to do justice in the narrow sense of producing a resolution to specific legal problems, these criticisms exhibit a kind of functionalism about what trials do that misses the remarkable role trials play in culture.

[18] For a comparative critique of American trial processes, see Langbein (2003); see also Pizzi (1999).

[19] Clover argues broadly that the rhythm and structure of particularly Anglo-American films place the cinematic audience in the position of a jury because they tend to be organized in a trial-like way, beginning with opening statements, followed by an evidentiary phase full of jumbled bits and pieces laid

this kind of analysis obscures some of the conventions and specificities of legal proceedings that separate the courtroom from other domains of expression, debate and truth-production, it nevertheless suggests that the trial form has become what might be called a 'floating signifier' that we take up and introject into other sectors of our cultural lives in novel, non-legalistic ways. That task is made simpler by virtue of our positioning as outside-the-jury-room spectators in the first place.

Some costs may attach to that structurally illicit but inevitable positioning. Paul Gewirtz (1996, p. 152), for one, has expressed scepticism about the kinds of generalized and unchecked judgments made beyond the structured space of the jury room, built upon an intermittent and mediated relation to the actual trial ('I feel, therefore I may judge'). The conditions that produce those kinds of judgments can turn a trial into a mass political event rather than a carefully choreographed legal exercise, skewing lawyers and judges towards the media and the public reactions its coverage engenders, to the detriment of the courtroom process itself. (O.J. Simpson's criminal trial for the murder of Nicole Simpson Brown is a paradigmatic example of just such a dynamic.) As a result, the very public nature of trials – particularly those that are spectacular and highly mediated – can undermine the public's faith in representative legal institutions (see Brummett, 1990; Sherwin, 2000; Rapping, 2003; Ferguson, 2007, Part 3).

And yet trials, whether they are undertaken in the highly formalized manner of the contemporary United States or in less formal settings elsewhere and at other times, offer a way to articulate conflict, anxiety and injury and at least promise a path beyond, traced publicly and performatively. Much as we may desire it, they may not bring a case to satisfying 'closure'; yet they may nevertheless offer one form of what anthropologist Victor Turner (1986) calls the redressive stage of 'social dramas'. Turner argues that the very performativity of trials is central to this socially redressive potential. Trials, he argues, are generative of narrative in and beyond their bounds, narrative which helps to resolve social breaches in one direction or another. These processes of redress are both reflective and reflexive – that is, they both draw us in and make us aware of the fact of their performance. They are, moreover, ultimately indeterminate insofar as their meanings issue from the gestures of *particular* performances. Turner suggests that this indeterminacy is at bottom what makes such redressive processes and performances socially valuable. Redress 'reveals that "determining" and "fixing" are indeed processes, not permanent states or givens. They proceed by assigning meanings to events and relationships in reflexive narratives.' This indeterminacy should not be regarded as the absence of social being, Turner suggests: '... it is not negation, emptiness, privation. Rather it is potentiality, the possibility of becoming' (1986, p. 77).

The Essays

The essays in this collection invite us to reflect on the ways trials pose and enact this dynamic, indeterminate, symbolically potent dialogic relation between law and culture. As such, this volume is conceived not as a defence of trials as part of a system of legal justice (though some of the essays make such a defence) so much as a foray into a rich exploration of their symbolic centrality and circulation in culture. Taken together, the authors included here conceive of

out in the back-and-forth rhythm of direct and cross-examination, gathered together again in opposing closing arguments, followed by the coda of a (not always satisfying) verdict.

the trial as a site of performance, a critical public space in which positive law (legal rules, principles and theory but also representational practices and epistemologies) and democratic culture (norms, representational practices, epistemologies, geographic and social locations) interact to produce a dialogized domain of legality that is responsive to and productive of both the legal and the social. As part of that project, the works here variously inquire into how trials display a distinct culture, how they take up culture and how they are taken up in culture.[20]

This volume is organized in three parts. The first, 'Trials as Sites of Performance and Narrative', focuses on the internal dynamics of trials. Milner Ball's classic 'The Play's the Thing: An Unscientific Reflection on Courts under the Rubric of Theater' (Chapter 1) moves us directly into an inquiry about the theatrical nature of trials. Taking seriously the form and format of the trial, Ball argues that their performative aspects both function as aids to judgment for decision-makers and are good in themselves insofar as they create a special world that helps to legitimize the legal process and dramatize an ideal political community. In Chapter 2, 'The Lawfulness of the American Trial', Robert Burns builds upon Ball's claims, presenting a phenomenological account of the trial as a complex, consciously structured hybrid of languages and performances. Decision-makers encounter evidence in the courtroom through the rule-guided (but not determined) performances of legal actors, and that encounter elevates the decision-making process in ways that serve the values of the rule of law.

Burns's focus on narrative and performance as essential to the truth-producing function of the trial is elaborated in the three essays that follow. Anthony G. Amsterdam and Randy Hertz's 'An Analysis of Closing Arguments to a Jury' (Chapter 3) offers a careful, theoretically informed reading of the narrative structures and techniques employed by the prosecution and defence in the closing arguments of one particular trial, a close case in which the rhetorical strategies of attorneys could determine the outcome. They attend not just to the overt thematics of each legal argument, but also to the implicit narrative and dialogic structures and microstructures each attorney uses, with relatively wide latitude, to produce a persuasive account of the trial's underlying events. In Chapter 4, 'Law Frames: Historical Truth and Narrative Necessity in a Criminal Case', Richard K. Sherwin resituates Amsterdam and Hertz's interest in narrative strategy by placing trial storytelling within the context of postmodern cultural impulses. Analysing the multiple narrative strategies taken up in Errol Morris's film *The Thin Blue Line*, Sherwin worries over the disconnect between the public's desire for linear, coherent stories and our increasing encounters with acausal, nonlinear, contingent and morally relative ways of knowing the world. He expresses hope that legal storytelling can be postmodern and yet retain a relation to knowledge that is not sceptical of the very task of truth-production. And yet his cautious optimism must be balanced, as Austin Sarat suggests, with careful attention to the political dimensions of multiple narrativity in courtrooms. Chapter 5, Sarat's 'Speaking of Death: Narratives of Violence in Capital Trials', focuses on a single capital case, analysing the ways in which attorneys represent violence linguistically, and argues that narrative processes themselves can do injustice, making physical violence vivid while muting the effects of structural and state violence. The imbalance among these three narratives of violence becomes particularly acute in racially charged cases, and

[20] 'Culture' is, of course, a highly contested term. Here I invoke it, as Naomi Mezey has suggested, as a 'set of shared signifying practices ... by which meaning is produced, performed, contested, or transformed' (2003, p. 42).

Sarat's analysis of the social dimensions of trial narrativity enrich the more formal analyses of trial performance and narrative offered by Ball, Burns, Amsterdam and Hertz, and Sherwin.

The essays in Part I address what we might call the production side of meaning-making in trials, offering ways of conceiving the staging of narratives within the courtroom. Part II, 'Evidence and the Production of Truth', engages us with questions about the *relation* between the production and reception of legal meaning in and beyond the space of the trial. Kim Lane Scheppele's 'Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth' (Chapter 6) echoes Sarat's attentiveness to the political dimensions of trial narratives in her analysis of the gendered nature of truth-finding in sexual violence cases. Scheppele suggests that people most often believe a witness's first-told tale rather than subsequent, varying reiterations; but 'facts', she argues, are not neutral. Rather, presumptions about the credibility of evidence in cases of sexual trauma often work against women, who frequently delay talking about their abuse or change their stories over time. We ought to attend more, she suggests, to asking how socially-situated stories are rendered believable by the audience that hears them.

Questions about the nature of perception and truth-production are taken up in a somewhat different way by Jennifer Mnookin and Nancy West in Chapter 7, 'Theaters of Proof: Visual Evidence and the Law in *Call Northside 777*'. Mnookin and West offer a reading of Henry Hathaway's film, which is based upon an actual case, in order to consider the relation between the high truth-value we place on visual evidence and the role of filmic re-enactments in courtrooms. In effect, they argue, re-enactments have a strong affinity with trials insofar as both offer an account of 'what happened'; and insofar as *Northside 777* is itself a re-enactment, it can be understood as offering a popular commentary on the power of the visual in both film and law alongside a cautionary tale about audience *naïveté* concerning the truth-value and transparency of images. For Mnookin and West, visual proof is a matter, in the end, of theatre. In Chapter 8, 'Film as Witness: Screening *Nazi Concentration Camps* Before the Nuremberg Trial', Lawrence Douglas offers a similar meditation on the power of visual imagery in his examination of the role of a particular film, *Nazi Concentration Camps*, in the 1945 Nuremberg trials. In those unprecedented trials, the prosecutors used the film as a way of putting into evidence knowledge about atrocities that could not be adequately represented in words. Prosecutors framed the film with a directive narrative voice, yet it nevertheless proved a disrupted and disruptive piece of evidence at trial. In examining the film's use and reception both inside and outside the courtroom, Douglas lays bare the fragility and limits of law in adjudications of genocide. In focusing on those limits Douglas's analysis resonates on a theoretical level with William Finnegan's microhistorical *New Yorker* piece 'Doubt' (Chapter 9). Finnegan, a reporter who served on a jury and uneasily convicted a young man of robbery, moves from the receiving end of legal stories in the courtroom out into the world of journalistic investigation. Having the privilege of a double view of trials, both inside and outside, Finnegan gives us a window into the production of evidence and legal truth, and the ways in which certain trial rules ironically injure the defendants they nominally should benefit.

Finally in Part III, 'Dialogics of Law and Culture', we situate trials more broadly in their historical and cultural contexts and examine the social meaning and circulation of trials in culture. In Chapter 10, 'Story and Transcription in the Trial of John Brown', Robert Ferguson analyses the famed 1859 trial of the abolitionist in order to trace the ways in which legal