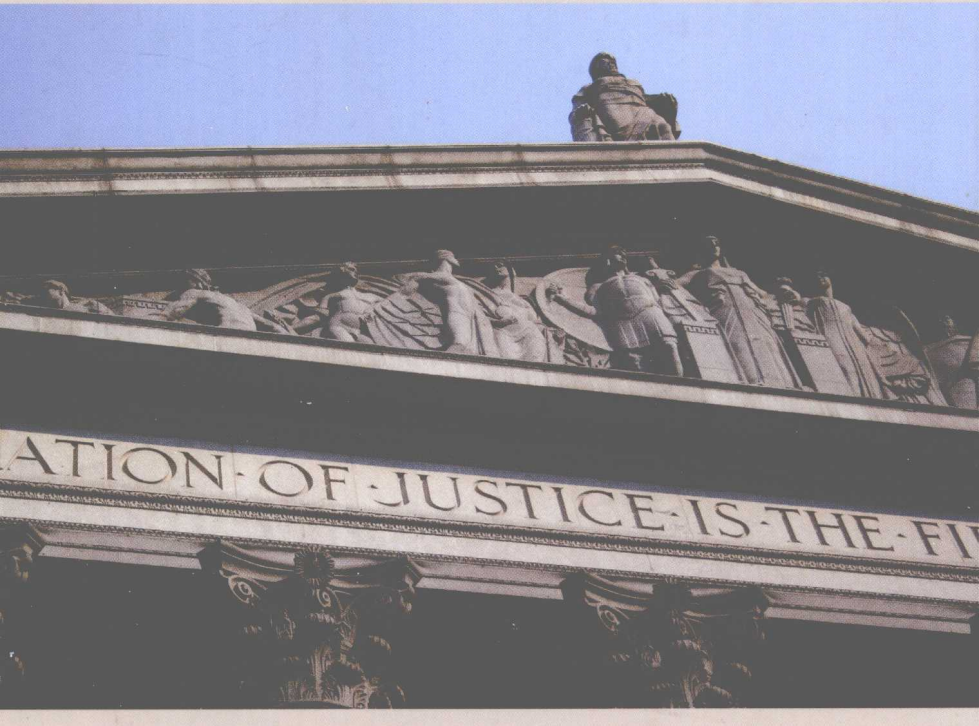
THE CRIMINAL TRIAL IN LAW AND DISCOURSE



TYRONE KIRCHENGAST

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Tyrone Kirchengast
University of New South Wales, Australia

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Preface

The Criminal Trial in Law and Discourse brings together various materials from law, history and policy to demonstrate how the modern criminal trial is a transformative institution of justice. The modern criminal trial is thus more than the popularly conceived notion of the adversarial trial before judge and jury. This does not simply mean that the trial is increasingly circumvented for alternative pathways to justice, such as summary justice. Rather, the criminal trial is transformative because it functions as a decentralised site of sociological engagement. This book explores the notion that the criminal trial is a discursive institution of social power that, consistent with its genealogy and history, transforms to meet new social needs. This book follows the argument that the criminal trial is now open to discourses that, before the advent of victim rights, human rights and the critique of state power, were more narrowly conceived around the locus of the criminal.

The modern criminal trial has responded to the rise of an international human rights movement, a law and order politics, terrorism, the rise of victims' rights, and a movement toward therapeutic and problem-solving justice. As such, the debate has shifted toward the extent to which the criminal trial is transgressive, as evidenced through the debate on the classification of control orders and other forms of preventative law as an exercise of criminal or civil law. A large number of cases canvassed herein suggest that the scope of the criminal trial is negotiated with regard to competing discourses of justice, each of which present ideas as to the form and scope the trial ought to take. As these discourses are competing, there is no generally agreed model as to the criminal trial, and this is being increasingly realised through the jurisprudence of various common law jurisdictions. Arguably, this realisation has spawned a counter movement for the concerted re-assertion of the bounds of adversarial justice, mainly through the rejection of principles of inquisitorial justice. Such a counter argument remains problematic, given that the adversarial trial never took a specific form, and that comparative law tells of the significant overlap between adversarial and inquisitorial models. The point remains, however, that the criminal trial is neither normative nor prescriptive but discursive and decentralised, and its genealogy suggests that this has always been the case.

In part, this book adopts a text and commentaries approach to the organisation of a diverse set of materials relevant to the parameters of

the criminal trial. Case law and policy documents are thus extracted to illustrate the formation of discourses, a method significant to Foucault's approach, to demonstrate the use of statements and the archive from which they draw their reference and power. This book draws upon substantially unpublished materials but does include short extracts previously published across two articles: Kirchengast, T. (2009) 'Criminal Injuries Compensation, Victim Assistance and Restoration in Australian Sentencing Law', *International Journal of Punishment and Sentencing*, 5, 3, 96–119; and Kirchengast, T. (2010) 'Recent Reforms to Victim Rights and the Emerging "Normative Theory of the Criminal Trial"', *Criminal Law Quarterly*, 56, 1 & 2, 82–115.

Tyrone Kirchengast
Sydney

List of Abbreviations

AC	Appeals Cases
A Crim R	Australian Criminal Reports
All ER	All England Law Reports
ALJR	Australian Law Journal Reports
B & Ald	Barnewall and Alderson's English King's Bench Reports
ASBO	Anti-Social Behaviour Order
BHRC	Butterworth's Human Rights Cases
BOCSAR	Bureau of Crime Statistics and Research
CCP	Code for Crown Prosecutors
CDA	Crime and Disorder Act
CJ at CL	Chief Judge at Common Law
CLR	Commonwealth Law Reports
CPS	Crown Prosecution Service
Cth	Commonwealth
Cr App R	Criminal Appeal Reports
CVRA	Crime Victims' Rights Act
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
EHRR	European Human Rights Reports
EWCA	Court of Appeal of England and Wales
EWHC	High Court of England and Wales
F 2d	Federal Reporter (United States Court of Appeals)
F 3d	Federal Reporter (United States Court of Appeals)
FLR	Federal Law Reports
F Supp	Federal Supplement
F Supp 2d	Federal Supplement
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
LCEW	Law Commission of England and Wales
LEPRA	Law Enforcement Powers and Responsibilities Responsibilities Act

LEXIS	LexisNexis
NSW	New South Wales
NSWCCA	New South Wales Court of Criminal Appeal
NSWLR	New South Wales Law Reports
NSWLRC	New South Wales Law Reform Commission
NSWSC	New South Wales Supreme Court
NZ	New Zealand
NZLC	New Zealand Law Commission
NZLR	New Zealand Law Reports
ODPP	Office of the Director of Public Prosecutions
PACE	Police and Criminal Evidence Act
Qld	Queensland
QB	Queen's Bench
QWN	Queensland Weekly Notes
RPE	Rules of Procedure and Evidence (ICC)
SA	South Australia
SASC	South Australian Supreme Court
SSCA	Secretary of State for Constitutional Affairs
SCR	Supreme Court Reports (Canada)
Tas	Tasmania
TEU	Treaty on European Union
US	United States Reports
USC	United States Code
Vic	Victoria
VIS	Victim Impact Statement
VLRC	Victorian Law Reform Commission
VPS	Victim Personal Statement
VR	Victorian Reports
WA	Western Australia
WL	Westlaw
WLR	Weekly Law Reports

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1
Criminal Trials, Foucault, Discourse

> We must question those ready-made syntheses, those groupings that we normally accept before any examination, those links whose validity is recognized from the outset; we must oust those forms and obscure forces by which we usually link the discourse of one man with that of another; they must be driven out from the darkness in which they reign. And instead of according them unqualified, spontaneous value, we must accept, in the name of methodological rigour, that, in the first instance, they concern only a population of dispersed events.
>
> Michel Foucault (1969) *The Archaeology of Knowledge and the Discourse on Language*, p. 22

> Archaeology still isolates and indicates the arbitrariness of the hermeneutic horizon of meaning. It shows that what seems like the continuous development of a meaning is crossed with discontinuous discursive formations. The continuities, he reminds us, reveal no finalities, no underlying significations, no metaphysical certainties.
>
> Hubert L. Dreyfus and Paul Rabinow (1982) *Michel Foucault: Beyond Structuralism and Hermeneutics*, p. 106

The adversarial criminal trial is held out as the model by which accusations of wrongdoing are heard and determined in common law jurisdictions. Debate abounds, however, as to the form that the modern criminal trial ought to take. This debate is characterised by diverse opinions which range from the safeguarding of the adversarial trial as the only means by which defendant rights will be successfully protected against abuses of state power, such as charges brought on the weakest of evidence, police misconduct, false accusations or political

imperative. Others suggest that the scope of the adversarial trial, as an exclusive contest between police, prosecution and defendant, and as presided over by an independent magistrate or judge, represents a model of justice that is in decline, or at least requires rethinking (see Schwikkard, 2008; Summers, 2007; Nonet and Selznick, 1978; Simon, 1978). Such perspectives suggest that the trial and adversarial model more generally ought to be construed in terms of those procedures significant to the functions of justice – the requirement of a 'fair trial' that seeks to balance the competing needs of witnesses, victims, defendants, the community, and state. Various common law jurisdictions have now moved away from the strict requirements of the adversarial trial to other innovative or nuanced modes of determining liability for wrongdoing, or in meting out punishment following conviction.

A movement toward therapeutic courts such as community courts, or modes of sentencing that include the victim and community, such as circle or forum sentencing, provide new ways of doing justice that significantly modify traditional adversarial processes. The broader inclusion of victims in trials, by way of human rights decisions that protect the rights of vulnerable rape or child victims, or in sentencing, by way of victim impact or personal statements, has attracted criticism from those advocating an orthodox approach to the way criminal liability and appropriate punishments ought to be determined (see Sebba, 2009: 65). Those advocating such approaches suggest that the traditional scope of the adversarial trial is under attack from a punitive law and order ideology, such that the key functions of the trial ought to be reaffirmed to countenance the new or innovative developments of law and justice that are manifestly identified as detracting from the rights of the accused (see Wolhunter, Olley and Denham, 2009: 173; Duff, Farmer, Marshall and Tadros, 2007). Alternatively, such perspectives also realise the potential for change, principally within the confines of the adversarial tradition, which may be extended to include inquisitorial or other approaches without unacceptably detracting from the core functions of adversarialism. The rise of victim lawyers as an adjunct to the rights of victims in the criminal justice system may be one such inclusion.

This book moves away from the examination of the criminal trial as an institution constituted by the rules of adversarial justice, for an examination of the transformation of the criminal trial as an institution of social justice and discourse. By examining the history of the trial as a means to justice that sought to include, rather than exclude, the key stakeholders of justice, this book asserts that victims, defend-

ants, police and communities each have a vested and valid interest in justice, characterising the current transformations of law and justice seen across the common law world. Through the consideration of the genealogy of the dominant mode of trial that emerged in the eighteenth century, the adversarial criminal trial, this book suggests the decline in the hegemony of adversarialism is consistent with the history and genealogy of the trial from antiquity. Rather than be seen as an attack on law and justice, changes to the criminal trial in the modern era are consistent with the history and development of the trial as a transgressive institution of social power.[1]

Langbein (2003: 253) notes the emergence of adversarialism with the rise of a professional class of lawyers representing Crown interests, and perhaps most importantly, the interests of the accused:

> Across the half century or so from the 1730s into the last quarter of eighteenth century, the altercation trial gave way to a radically different style of proceeding, the adversarial criminal trial. Lawyers for the prosecution and especially the defence assumed commanding roles at trial. In this prototype of the fully lawyerized trial, solicitors gathered and prepared evidence in advance of trial; counsel then conducted the fact-adducing work at trial, examining and cross-examining witnesses and raising matters of law... In place of the 'accused speaks' trial there had developed a new mode of trial, adversary trial, which largely silenced the accused. With it came a new theory and purpose of the trial, which endures into our day, that trial is primarily an opportunity for defence counsel to probe the prosecution case.

This being so, changes to the dominant mode of eighteenth century adversarialism that include persons relevant to justice are only possible because the trial, as an institution of social justice, is flexible enough to adapt to new and innovative social conditions. The trial, in this way, is a sociological institution of power. This view of the transformation of the trial is consistent with important new movements toward the recognition of rights in the context of fundamental human rights; to the inclusion and protection of victims; to the emergence of expedient means to justice in the form of infringements and summary disposal; to the emergence of new forms of trial that seek to protect the community from serious, recidivist offenders; to changes to the law of evidence that allow vulnerable witnesses including children to be protected from potentially harsh trial processes; and to the modification of

rights long taken to be constitutive of the 'fair trial', including the modification of the rule against double jeopardy and the right of self-representation. No doubt many of the changes that comprise this non-exhaustive list are controversial in the way they negotiate the extent to which certain defendants may be afforded protection under the law. Alternatively, arguments have emerged for the need to consider other perspectives alongside those of the defendant. What is clear is that this list brings together competing voices and perspectives that comprise the polemic of the modern criminal trial, and a strict adherence to the tenets of adversarial justice may only seeks to complicate, rather than resolve the tensions. What is needed is a different perspective than that offered amongst normative theorists. Rather, the trial needs to be conceived as an institution of power contested between relevant agents or stakeholders of justice.

Drawing from Foucault's (1969, 1982, 1984, 1994; also see Dean, 1994: 15–16) use of hermeneutics as challenging the certainty of truth of language and doctrine, the history of the adversarial trial is displaced for an institution understood as multidimensional, as an institution founded on people, conflict, change and social inclusion. Thus, the history of the trial is not interpreted narrowly in terms of the requirements of adversarial justice that focus on the needs of defendants as against the state. As Goodrich (1992: 44–45) articulates, through the realisation of the power of discourse, the historical function of law as self-referential and exclusive of the interests of society may be displaced:

> In genealogical terms the above historical fiction combines two questions of extreme interest to the inhabitants of an era and discourse that has challenged the veridical language, the truths, and the certainties of doctrinal transmission.... The genealogical reconstruction of doctrine, however, interestingly implicates legal doctrine in a series of other discourses. It will be argued in historical detail that far from being a technical and internal development the new jurisprudence responded to and was molded by a series of discourses external to law. Jurisprudence was marked by external discourses and desires, and its subsequent reformulations still carry those marks even though the historians of law prefer to recycle the juridical fiction of a true discourse and its authoritative judgments.

In this genealogical perspective, the trial is more than the repository of legal power that holds wrongdoers to account for their conduct in

particular ways. Trials provide for a sociological process that influences the development of the criminal law by affirming principles of liability, rules of evidence and standards of proof that, in the modern adversarial context, indicate who is 'heard' and who is 'silenced'. This is particularly so in the adversarial tradition, which is said to currently characterise the whole of the criminal law in common law jurisdictions, including both pre and post trial phases of inquiry (see Summers, 2007: 3–20). This being said, the criminal trial is not without some structural specificity. Foucault (1969) could not be said to be a pure hermeneuticist in that he is not seeking to engage in what Dean (1994: 16) describes as 'inexhaustible decipherment' of things past and present. Rather, Dean (1994: 16) suggests:

> [i]t is no longer the task of history to memorise monuments of the past and thus to transform them into 'documents' of a reality and a consciousness of which they are but traces. Rather, history has become, he suggests, that which transforms documents into monuments, into a mass of elements to be described and organised.

The history of the criminal trial is fundamental to any interpretation of the modern criminal trial as an inclusive and flexible institution of justice. It is not that the trial comes to be whatever we hold it out to be. Rather, the modern criminal trial is characterised as an institution of adversarial justice only because the characteristics of adversarialism developed out of conditions that were palpably unfair to key stakeholders of justice, namely defendants and those accused of crime. Langbein's (2003) account of the rise of the adversarial criminal trial attests to conditions in which the accused was denied rights we now see as wholly constitutive of the trial process: access to counsel; the right to remain silent; to proceed before an independent magistrate or judge; to discover the accusation and evidence against the accused; and, where available, to confront the accuser in court. Foucault's (1969) method, therefore, is not to completely revise the past only to produce an interpretation of events entirely disconnected from anything previously imagined. Rather, hermeneutics assists us in our awareness that history makes the adversarial trial what it is today. The lack of defendant rights and an overly powerful state render the modern lawyer with a certain appreciation for the rights which defendants enjoy today. Most lawyers spend their entire careers defending access to those rights as a result. The point is that this mode of operation is a product of the history of the trial. However, other aspects overshadowed or silenced

by our need to protect the vulnerable accused from abuses of power and process are also present. Foucault's (1969, 1984) method thus brings to the fore those discourses that may not present in a contemporary retelling of the rise of adversarial justice. The dynamic perspective of the criminal trial adopted here thus recognises, rather than challenges, the hallmarks of adversarialism. What is challenged is the notion that this is the only 'correct' or 'true' form that the criminal trial may take.[2]

Gaudron J in *Dietrich v The Queen* (1992) 177 CLR 292, a case concerning the accused's right to counsel for serious offences, indicates how the principles that constitute the modern adversarial trial are inextricably linked to the notion of what may be fair in an individual case (at 364):

> The notion of a fair trial and the inherent powers which exist to serve that end do not permit of 'idiosyncratic notions of what is fair and just' any more than do other general concepts which carry broad powers or remedies in their train. But what is fair very often depends on the circumstances of the particular case. Moreover, notions of fairness are inevitably bound up with prevailing social values. It is because of these matters that the inherent powers of a court to prevent injustice are not confined within closed categories. And it is because of those same matters that, save where clear categories have emerged, the enquiry as to what is fair must be particular and individual. And, just as what might be fair in one case might be unfair in another, so too what is considered fair at one time may, quite properly, be adjudged unfair at another.

This view of the criminal trial, informed by Foucault's (1969, 1982, 1984) effective history and hermeneutics of the subject, is one that is, arguably, consistent with the trial as an artefact of history and society. Furthermore, this perspective explains why the trial continues to change its form and function, as an institution of significant governmental power, to meet new social needs and conditions over time. On this view, the modern criminal trial ought to be conceptualised as an institution of social justice that is open to, and influenced by, varying and competing discourses. The modern criminal trial thus emerges as a transformative criminal trial by virtue of the fact that it forged of competing discourses of justice that do not adhere to any particular model of justice. By focussing on emergent issues in legal discourse identified through an international literature, this book will demonstrate how the modern criminal trial ought to be conceptualised as a significant

institution of social justice that is open to, and influenced by, a range of discourses.

The trial as contested territory

Historically, the trial, as the means by which accusations of wrongdoing are tested against an accused, have taken on many and varied forms. Even in the English tradition, the criminal trial has been subject to influence and change over the numerous centuries since conquest. If one delves deeper into the antiquity of the trial, the process that stands as the 'centrepiece' of criminal law is shown to have intermingled roots. Much of what we identify as the hallmarks of the modern criminal trial at common law – presentment of an accusation, an impartial adjudicator or judge, a test of proof involving ordeal or jury – derive from customary practices for the resolution of disputes and conflicts within a village or group. Historically at least, the criminal trial cannot be reduced to an isolated process disconnected from the content of the criminal law, its institutions and custom. The trial was the criminal law, at least in terms of a customary bringing together of individuals for the hearing of accusations of wrongdoing, to which particular punishments were applied.

Deane J in *Dietrich v The Queen* (1992) 177 CLR 292, identifies the modern criminal trial as one that is characterised as an adversarial, accusatorial tribunal, before an independent magistrate or judge (at 334–335):

> A criminal trial in this country is essentially an adversarial process. Where the charge is of a serious crime, the prosecution will ordinarily be in the hands of counsel with knowledge and experience of the criminal law and its administration. The substantive criminal law and the rules of procedure and evidence governing the conduct of a criminal trial are, from the viewpoint of an ordinary accused, complicated and obscure. While the prosecution has a duty to act fairly and part of the function of a presiding judge is to seek to ensure that a criminal trial is fair, neither prosecutor nor judge can or should provide the advice, guidance and representation which an accused must ordinarily have if his case is to be properly presented. Thus, it is no part of the function of a prosecutor or trial judge to advise an accused before the commencement of a trial about the legal issues which might arise on the trial, about what evidence will or will not be admissible in relation to them, about what inquiries