The play(fulness) of law

Nicole Rogers
Southern Cross University
The Play(fulness) of Law

Nicole Rogers BA(Hons I)(Syd),
LLB(Hons I)(Syd), LLM(Woll)

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March 2008 © Nicole Rogers
For my brilliant daughters, Freya and Lilly
Statement of Sources

I hereby certify that the thesis entitled ‘The Play(fulness) of Law’, submitted to fulfil the conditions of a Doctorate of Philosophy, is the result of my own original research, except where otherwise acknowledged, and that this work has not been submitted previously, in whole or in part, to qualify for any other academic award.

Signed:

Nicole Rogers

Date:
Acknowledgments

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Abstract

In this thesis, I undertake an investigation into the relationship between play, playfulness and law. Law relies on a certain form of play, rule-bound orderly play; this is demonstrated, for example, in the ceremony of the trial. Furthermore, underpinning every legal system, we find a different form of play: the spontaneous and disruptive performances of revolutionary violence which found every state.

Play can be, in fact, an unpredictable force. Play can disrupt or derail the structured performances of law; play can deflect the violence of the state. I am interested in the dramatic possibilities of using subversive play, or playfulness, as a strategy for negotiating violence.

This is, in many respects, a postmodernist work. I draw upon and use self-reflective narrative, conduct my investigation by way of case studies, seek to expose the relationships of power behind both text and performance, and deconstruct accepted understandings of terms like law and play. It is also an interdisciplinary work, in which I draw upon the ‘interdiscipline’ of performance studies. In integrating performance studies theory with law, and in considering law as yet another cultural performance, I have disregarded the artificial boundaries which positivist legal scholars seek to construct between law and (non)law. Positivists view law as a set of norms and rules; in law, the written text is sacrosanct. I have adopted the approach of performance studies theorists, who view all social and cultural activities as performance and regard culture as a verb rather than as a noun. Law might endure as text, but it is made as performance.

My first set of case studies originate in the contemporary war on terror. Terrorism can itself be viewed as a performative phenomenon and form of (dark) play; it is also, clearly, about violence. I undertake a comparative critique of two different performative responses to the war on terror: namely, the terror trials and the theatre of dissent. I consider the interplay between the violence of terrorism and the violence of law in the terror trials. I also look at the extent to which the theatre of dissent ‘plays’ with different forms of violence in order to disrupt the authority of the state. The different functions and roles of these two forms of
cultural performance become apparent in their engagement with violence and with the state, their portrayal of difference, their exposure to mediatisation, and their relationship with the ‘truth’.

There is little playfulness in the play of the terror trials, or in the play of the theatre of dissent. I turn, therefore, to playfulness in law. I consider eruptions of playfulness in the courtroom. I also look at the transformation of law into play through the phenomenon of documentary theatre. I am intrigued by the subversive and playful possibilities in providing the text of law with a different performative force, and in uncoupling law from violence through re-performance as theatre.

My final set of case studies originate in the playful performances of environmental protest. We find different forms of play characterising and underpinning the rationale for such performances. Play in its pre-rational guise is embraced as a strategy to capture the media’s attention and confound violence against nature. Play, in its ideological association with wilderness, appears in a more solemn guise. Using case studies drawn from the war on the environment, I investigate the relative efficacy and symbolic value of different forms of play, the pre-rational play of direct action and the rational play of legal performances, in countering violence against nature.
Other publications by candidate on matters relevant to thesis


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Prologue

The Play(fulness) of Law

Whether in the theatre space or upon the street – what does it matter? We can see in play alone, what is elsewhere hidden beneath petty talk and need: Freedom and humanity.¹

The politician, activist, lawyer, or terrorist all use techniques of performance … to present, demonstrate, protest, or support specific social actions – actions designed to maintain, modify, or overturn the existing social order.²

The beginning

Everything begins and ends in family.

Christmas Eve for my father’s extended family of half-brother, step-siblings, their partners and descendants has always involved a family gathering. This was a particularly momentous occasion when my exasperating but invariably fascinating grandmother was still alive. I never enjoyed it much as a child. Now I wouldn’t miss it; none of us, in fact, miss it without a cast-iron excuse and a lingering sense of shame. Christmas Eve is a celebration of a family brought together by the Holocaust, and its survival in the face of tremendous odds.

When I was a child, Christmas Eve involved an elaborate performance: a puppet show with hand-painted sets, an original script with multiple Acts, and an interesting array of characters. I was writer, artist, producer, director and performer; I was reminded of my younger self when watching the officious Briony and her preparations for a family play in Joe Wright’s

¹ Hans Mayer, ‘Culture, Property and Theatre’ in Lee Baxandall (ed), Radical Perspectives in the Arts (1972) 301.
2007 film *Atonement*. My cousins made an appreciative audience. They still tell me how much they loved the annual puppet show.

It was at a Christmas Eve family gathering four years ago that the idea for this thesis began to germinate. I was discussing left-wing politics with my like-minded aunt Sue, surreptitiously and somewhat guiltily because we were in the courtyard of my stepmother’s house and she was then a minister in the Howard government. At one point, I mentioned a conference paper which I had recently delivered on the possibility of mounting a common informer suit against the Prime Minister John Howard. I had argued that such a suit would provide an activist with an opportunity to contest Howard’s capacity to continue to sit as a member of Parliament, on the basis of his demonstrated allegiance to a foreign power, the United States. Sue, an artist and playwright, was intrigued. ‘That,’ she stated, ‘would make a fantastic play.’

We toyed with the notion of a play for a year or so. We sketched out the rough draft of a play set in 1950, at the height of the Cold War; in our story, a young idealistic woman brought a similar suit against the then deputy leader of the Opposition, Dr H V Evatt, on the basis of his suspected allegiance to communist Russia. The play was never written. But I began to wonder about what happened to law when it was turned into a play, about the similarities between law and theatre, and about the nature of legal performances generally. At the end of that year, I delivered a conference paper entitled ‘The Playfulness of Law’, in which I charted a preliminary path of investigation into the points of intersection between play, playfulness and law. That was the beginning.

**Research questions and methodology**

**Research questions**

I began this research project with the intention of investigating the first of the research questions set out below, but realised very quickly that the underlying themes which captivated me in this study were those of violence and playfulness, and these themes in fact played a

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significant role in influencing the direction of my research. Consequently, there are three research questions explored in this thesis:

- How does the performance of law, as exemplified in courtroom performances, in inquiries and even in Parliamentary debates, compare with two other forms of cultural performance: conventional theatrical performances and performances of protest?

- What does such a comparison reveal about the way in which legal performances administer and respond to violence, in comparison with theatrical performances and performances of protest?

- What does such a comparison reveal about the way in which legal performances respond to and accommodate playfulness, in comparison to theatrical performances and performances of protest?

Methodology

The research project is non-doctrinal, subjective and theoretical in nature, and thus differs from conventional legal research. I have adopted a postmodern and poststructuralist methodology in keeping with the theoretical and idiosyncratic nature of the research project, and my methods are commonplace in contemporary qualitative research: narrative, case study and comparative analysis. The use of narrative, as I explain later in this Prologue, enables me to demonstrate my partiality and biases as researcher. In utilising narrative to explore my own participation in performances of protest and my relationship to the central themes of violence and play, I am rejecting the positivist distinction between the researcher and the object of research. Comparative analysis is integral to the nature of the research questions; in formulating the questions, I decided that the relatively unexamined concept of law as performance could best be developed by comparing law with other, more conventional performance types. Furthermore, the use of a comparative methodology was consistent with an interdisciplinary project. Case study methodology enabled me to focus on the specific and particular, which is a feature of postmodernist work; postmodernists disdain grand theory and
global truths for the specific, the particular and the local.⁵ I have compared legal performances with other performances, and investigated the relationship between play and violence, by working outwards from the events and incidents in each case study. The selected case studies are illustrative of each mode of performance analysed.

I have also drawn upon the work of Jacques Derrida in using the poststructuralist strategy of deconstruction to explore the interrelationship between law and play, as I explain below. As a work of contemporary qualitative research, the project was designed to be interdisciplinary and thus I draw upon theoretical perspectives from a number of disciplines, predominantly performance studies, history, political theory and law.

In considering the research questions, I first needed to define some of the key terms, including violence, play and playfulness. Some of my reflections on the multiple meanings and significance of these terms appear below. I also had to clarify the extent to which law is performance. Here I have adopted the view of Margaret Davies, who has pointed out that there is no law without performance;⁶ both courtroom performances and Parliamentary performances create law and constitute law as performance. This perspective on law as performance constitutes a departure from the traditional positivist perspective, in which law is a concrete set of rules and principles; it is, however, in its emphasis on performance and disdain for abstractions, particularly the abstraction of law, entirely consistent with poststructuralist and postmodern theory.⁷

In my first set of legal case studies in Act I, which are drawn from the war on terror, I focus on trials as archetypal legal performances; as I point out in chapter one, the dramatic and theatrical qualities of the trial have long been recognised. The war on terror provided a fitting context since within this context we can discern quite readily the multiple dimensions of violence, as administered by lawful authorities and unlawful subjects. However, I also wanted to explore other forms of legal performance and therefore my second set of case studies, in Act II, which form part of the war on the environment, were deliberately selected to highlight the limitations of a diverse range of such performances: legal inquiries, constitutional


litigation in the High Court and environmental litigation, in which the focus was on procedural issues. This choice of case studies was also dictated by the parameters of the research questions. In addressing the third research question, I needed to investigate performances which accommodated playfulness; the performances of protest in the war on the environment, in contrast to the theatrical performances investigated in chapter five, were a vivid demonstration of playfulness in its subversive, rule-breaking mode. Furthermore, the context within which the case studies took place, that of the war on the environment, highlighted yet another form of violence sanctioned by the state: violence directed towards non-human species.

In the sections which follow, I shall explore in greater depth my use of deconstruction in this project, my interpretation of key terms such as law, play and violence, my rationale for embarking on an interdisciplinary project which incorporates performance studies theory, my justification for using narrative as a research method and strategy, and my predilection for an anarchistic methodology.8

Unsettling the dualism of law and play

Mihai Spariosu attributes to Schiller, the first modern philosopher prepared to describe ‘rational heuristic procedures’ as play,9 a theory of play whereby play functioned in opposition to key concepts such as seriousness, work, morality and necessity, and these latter terms took precedence over play.10 Similarly, although some commentators have viewed law as play,11 generally law and play are perceived as opposite terms, as a dualism closely associated with the comparable dualism of work and play. Brian Sutton-Smith has pointed out that work is perceived as ‘sober, serious and not fun’ and play is its frivolous antithesis.12 Law, which is aligned to work, can be similarly characterised.

7 Margaret Davies, Asking the Law Question. The Dissolution of Legal Theory (2nd ed, 2002) 304.
10 Ibid 59.
In interrogating the interdependency of these terms, and in questioning the privileging of law and work over play in Western culture, I have embarked upon a work of deconstruction aligned to the work of thinkers like Schopenhauer, Nietzsche and Heidegger, who reversed the positioning of the privileged term in the dualisms of reason and play, seriousness and play, and work and play. Deconstruction is a tool deployed by poststructuralist thinkers to demonstrate ‘how one particular understanding of the world has come to dominate and subsume others’; it highlights ‘alternative ways of being in and knowing the world’ and ‘seeks to bring those alternatives from the margins to the centre’. In unsettling the dominant positioning of law and work over play, I shall consider what play or playfulness can offer law, as an ‘alternative [way] of being in and knowing the world’. In fact, Sutton-Smith argues that the playful person, and her associate the fool, ‘live in the place where the “writ does not run”’; he thus suggests that frivolous play or playfulness lies outside law’s empire.

My investigation forms part of what Sandra Berns has termed ‘outsider discourse’. She writes that:

The work of outsider scholars endeavours not only to question prevailing laws and interpretations but also, and far more significantly, to deconstruct and render problematical [particular] terms and the ways in which they have been used to legitimate prevailing practices.

I shall discuss in more detail below the implications of my role as outsider scholar.

Play does not assume a subordinate role in relation to work in every discourse. Within the discourse of modern environmentalism, for example, environments dedicated to play are valued far more than environments dedicated to work. Furthermore, certain forms of play, and in particular what Spariosu calls pre-rational play, assume a significant, even central role.
within the discourse of postmodernism (if postmodernism can indeed be considered a discourse) and to a more limited extent within modern scientific discourses.\textsuperscript{19} Postmodernism embraces play, chance, anarchy and anti-form;\textsuperscript{20} in postmodernism, pre-rational play has regained ascendancy over rational play.\textsuperscript{21} Poststructuralist thinkers in particular, including Eugen Fink, Gilles Deleuze and Jacques Derrida, have adopted this notion of play.\textsuperscript{22}

Derrida is particularly well-known for his discussion of the free play of signifiers in the text,\textsuperscript{23} his predilection for language games such as puns and double entendres, and his insistence that his work constituted ‘aesthetic play’.\textsuperscript{24} He is probably the most playful of the poststructuralist philosophers\textsuperscript{25} and his concept of free play possesses, according to Rawdon Wilson, an ‘irresistible charisma’.\textsuperscript{26} Yet other poststructuralist thinkers have also been described as playful, partly because they have abandoned determinism for notions of play,\textsuperscript{27} and partly because their readers cannot readily discern any underlying serious agenda in their work/play. In fact, postmodernists are often accused of nihilism. Joel Handler, for instance, expresses concern that deconstruction politics, with its conspicuous lack of vision, is disabling in a context in which ‘everyone else is operating as if there were Grand narratives’.\textsuperscript{28} Postmodernists have even been accused of a ‘campaign of critical terrorism’.\textsuperscript{29} Another commentator has likened aspects of postmodernity to the ‘barbarous irrationalism’ which created the Nazi death camps.\textsuperscript{30}

\textsuperscript{19} For instance, Spariosu alludes to the work of physicists such as Shrodinger and Heisenberg, which can clearly be seen as playful. Note, for instance, Einstein’s response to Heisenberg’s uncertainty principle: ‘You believe in the God who plays dice, and I in complete law and order in a world which exists, and which I, in a wildly speculative way, am trying to capture’; quoted in Schechner, above n 2, 99. Spariosu nevertheless concludes that most theoretical physicists still embrace the rationalist world view; Spariosu, above n 9, 259.
\textsuperscript{21} Spariosu, above n 9, 66.
\textsuperscript{22} Ibid 125; See also R Rawdon Wilson, \textit{In Palamedes’ Shadow. Explorations in Play, Game, and Narrative Theory} (1990) 15, who states that poststructural textual analysis and in particular deconstruction have produced ‘the single most significant conception of play to have emerged in Western thought during the past half-century.’
\textsuperscript{24} See Spariosu, above n 9, 153.
\textsuperscript{25} Ibid 154–5.
\textsuperscript{26} Rawdon Wilson, above n 22, 17.
\textsuperscript{27} See Sutton-Smith, above n 12, 145.
\textsuperscript{28} Joel F Handler, ‘Postmodernism, Protest and the New Social Movements’ (1992) 26 \textit{Law and Society Review} 697, 726.
\textsuperscript{29} Hutchinson, above n 5, 1554.
\textsuperscript{30} Terry Eagleton, quoted in Harvey, above n 20, 210.
My approach, while certainly repudiating such ‘barbarous irrationalism’, can in its focus on the primacy of play be considered to be postmodernist and poststructuralist, particularly since an emphasis on performance is part of a postmodern approach.\textsuperscript{31} In fact, poststructuralists construe all acts and ideas as performatives.\textsuperscript{32}

**Law, play, violence, and other terminology**

Law and play are terms which are deceptively simple to write but extraordinarily difficult to define and contain in language. In the next section, I shall elaborate further upon different understandings of play. Play is, of course, a singular term but I am considering multiple forms of play, including play which encompasses playfulness. Law, on the other hand, is closely aligned with violence. I realised rather quickly that in looking at law and play, I was in fact interrogating the relationship between violence and power, and play. Again, however, the singular term violence encompasses multiple forms of violence. In assuming that there is an interrelationship between violence and play, I am operating within the framework of pre-rational thought.\textsuperscript{33} The rational mentality separates play and power,\textsuperscript{34} and correspondingly play and violence.

Violence, I have suggested, has multiple meanings, and multiple functions. I am interested primarily in the significance of violence for legal systems, and for the law, although arguably law itself is set aside in the biopolitical violence of the contemporary political landscape, designated as a state of exception by Giorgio Agamben.\textsuperscript{35} I have drawn upon Walter Benjamin’s theories about violence,\textsuperscript{36} as resurrected by Derrida.\textsuperscript{37} Benjamin argues that there are at least two forms of violence relevant to law; these he calls lawmaking violence and law preserving violence. Derrida has pointed out that performative violence marks both the historical origins of any legal system and the ongoing conservation of law.\textsuperscript{38} I also rely on

\begin{itemize}
\item \textsuperscript{32} Schechner, above n 2, 124.
\item \textsuperscript{33} Spariosu, above n 9, 12.
\item \textsuperscript{34} Ibid 88–9.
\item \textsuperscript{35} Giorgio Agamben, *State of Exception* (Kevin Attrell trans, 2005).
\item \textsuperscript{37} Jacques Derrida, ‘Force of Law: The “Mystical Foundation of Authority”’ (Mary Quaintance trans, 1990 ed) in Drucilla Cornell, Michel Rosenfeld and David Gray Carlson (eds), *Deconstruction and the Possibility of Justice* (1992).
\item \textsuperscript{38} Ibid 33.
\end{itemize}
Robert Cover’s interpretation of law as violence, an interpretation which deliberately deflects attention away from textual analysis and understandings to performative considerations. Cover’s focus on what judges do rather than upon what they say is readily reconciled with the approach of performance studies theorists, whose somewhat ambivalent relationship to written texts shall be explored later. Underlying all of this is Rene Girard’s seminal work on the centrality of violence and ‘its vicious and destructive cycle’ to human society. Girard suggests that law is one of the mechanisms which has prevented the uncontrollable spiralling of violence and the consequent sacrifice of scapegoats in ‘pre-rational’ societies; as I argue in my analysis of the terror trials, I am not so sure.

Most of this thesis was written during the last two years of the reign of John Howard, a period in which a number of prominent Australian commentators documented an atmosphere of oppression and proliferating examples of censorship. The rhetoric of Howard’s government was compared to that of Stalin. It is a confronting experience to write about terrorism at a time when the possession of books and other material relating to terrorism was increasingly criminalised, and academic researchers were avoiding particular research projects lest they find themselves charged under anti-terrorism legislation.

It is unsurprising that, at this time, a number of theorists enthusiastically discussed and embraced Giorgio Agamben’s hypothesis that contemporary Western democracies could be designated as states of exception. In a state of exception, the violence of the state is no longer

40 Ibid 1617.
41 Ibid 1609.
administered through the rule of law; it has become absolute, arbitrary and unconditional. I have considered whether the nature and conduct of contemporary legal performances, including the terror trials, gesture towards a state of exception; I have also discussed the viability of performances of embodied resistance in such a context.

I use the term ‘performative’ quite often, as is possibly inevitable in any discussion of performance, and do not always adhere to the meaning originally conferred on this term by J L Austin. Austin used ‘performative’ as a noun to describe a word or sentence which accomplishes something once uttered. Poststructuralists have subsequently appropriated the term and expanded its meaning beyond mere utterances. This group applies it to all bodily acts, all kinds of images and writing, and all ideas. Even gender and race are performative. I have also used the term ‘performative’ descriptively, to suggest that something has performance-like qualities.

The ambiguity of play

Play has increasingly attracted scholarly interest from the end of the eighteenth century. In the twentieth century, play surfaced in many disciplines, including psychology, literature, physics, mathematics, economics, art and philosophy. Despite the recent revival of interest in play, play remains, for the most part, somewhat disreputable. However, some forms of play are less alien than others to the rationalist mind-set which prevails in Western society.

In his classic work, Johan Huizinga identified the central role of play in all human culture, including in law, and coined the term Homo Ludens, or Man the Player. According to Huizinga, culture was ‘played from the very beginning’, he declared somewhat pompously.

50 Schechner, above n 2, 129.
51 See, for instance, Judith Butler, Gender Trouble. Feminism and the subversion of identity (1990).
52 See, for instance, the performance art of Adrian Piper, described in Schechner, above n 2, 130.
53 Here I have borrowed the title of Brian Sutton-Smith’s work; Sutton-Smith, above n 12.
54 Spariosu, above n 9, 1.
55 Schechner, above n 2, 80.
56 Ibid 101.
57 Huizinga, above n 11.
58 Ibid 46.
that ‘for many years, the conviction has grown upon me that civilization arises and unfolds in
and as play.’ Yet, as a number of commentators have observed, Huizinga’s concept of play
as rule-bound contest was a limited agonistic one; his world of play could be shattered by
’spoil-sports’ who broke its rules. Many Western philosophers similarly ascribe an orderly
meaning to play, but for other thinkers, play can assume a different, more chaotic form.

Maria Lugarno calls this alternative form of play playfulness, and describes it as ‘a particular
metaphysical attitude that does not expect the world to be neatly packaged’, a delight in
ambiguity and uncertainty, and an ‘openness to being a fool’. Sutton-Smith also claims that
playfulness, unpredictable and disruptive of all rules and expectations, is quite different from
the ‘deadly serious’, rule-bound character of ordinary play. Playfulness exists outside such
play; it encompasses ‘play[ing] with the frames of play’ itself. Victor Turner described
playfulness as ‘volatile’ and sometimes ‘dangerously explosive’. It is, Sutton-Smith,
concludes the ‘most ambiguous form of play’.

Other thinkers, without using the term playfulness, distinguish between different forms of
play, focusing in particular on the distinction between orderly, non-violent, rule-determined
play such as law, and disorderly, arbitrary, free play such as carnival. Roger Caillois calls
these two forms of play ludus and paedia; Spariosu calls them rational and pre-rational play
and maintains that they have been engaged in an ongoing ‘contest for cultural authority’.
Although Spariosu locates the origins of both forms of play in classical Greece, one could in
fact argue that rational play is associated with the modernist impulse to create order,
boundaries and classifications, while pre-rational play is aligned to postmodernism and the

59 Ibid Foreword.
60 See, for instance, Sutton-Smith, above n 12, 78–80.
61 Huizinga, above n 11, 10–1, 13.
62 Ibid 11.
63 Sutton-Smith, above n 12, 81.
65 Ibid 17.
66 Sutton-Smith, above n 12, 148.
67 Ibid.
69 Sutton-Smith, above n 12, 150.
70 Spariosu, above n 9, 6.
71 Roger Caillois, Man, Play and Games (Meyer Barash trans, 1979) 13.
72 Spariosu, above n 9, 6.
73 He describes the pre-rational mode as Presocratic, and attributes the introduction of the rational mode to Plato and Aristotle; Ibid 62.
work of a group described by Spariosu as twentieth century ‘artist-metaphysicians’,
including Heidegger, Fink, Gadamer, Deleuze and Derrida.

Play in its pre-rational guise also surfaces in the work of some contemporary legal theorists, including critical legal scholars, whose work can be obtuse but is often playful in its subversive approach to established hierarchies and its disdain for authority, rules and conventions. For instance, David Fraser advocates engagement in ‘abnormal discourse’ or ‘moral terrorism’; in the academic workplace, he suggests that

rather than encouraging our students and colleagues to engage in left-wing study groups, where they can escape from the mysteries of trespass on the case to the inherent clarity of Derrida’s Of Grammatology, we should encourage them to learn a socially useful trade – playing the piano, for example – and to abandon law school forever. We can disrupt faculty meetings with various acts of civil or, preferably, uncivil disobedience. We can engage in subversion by memorandum. The possibilities are limited only by the available concepts of the absurd.

In later passages, he elaborates further on the nature of moral terrorism, which he describes as deliberately juvenile: ‘the very point of moral terrorism is to permit us to recapture the halcyon days of our youth’. It is, he continues, ‘a highly personalized attempt to bring street theatre to the workplace.’ His light-hearted references to this playful category of terrorism pre-date, of course, the war on terror.

Within the parameters of conventional legal discourse there is, however, no apparent room for play in its pre-rational guise. The postmodern universe may well be chaotic, non-linear and playful; the world contained and created by the discourse of law remains linear, orderly and rule-bound. One of my central arguments in this thesis is that rational play, which requires seriousness, order and rules, is fundamental to the ceremony and performance of law. Law accommodates and indeed requires such play. Yet law is apparently intolerant of paedia, pre-rational play and playfulness.

74 Ibid 158.
76 Ibid.
77 Ibid 774.
I wonder, however, whether there is some correlation between pre-rational play and justice, which according to Derrida is definitely not rule-bound and is, in fact, ‘rebellious to rule’.\(^{78}\) Perhaps it could be argued that pre-rational play manifests itself in the legal system as justice, which is singular,\(^{79}\) incalculable\(^{80}\) and elusive. After all, Derrida equates justice with deconstruction,\(^{81}\) and deconstruction is invariably playful.

**The 'interdiscipline'\(^{82}\) of performance studies**

Since play ‘transcends all disciplines, if not all discipline’,\(^{83}\) it is appropriate, in investigating the connection between play and law, to apply an interdisciplinary approach and to draw on performance studies theory. Performance studies of itself functions as an interdisciplinary area.\(^{84}\) In integrating performance studies theory with law, and considering law as yet another cultural performance, I have disregarded the artificial boundaries which positivist legal scholars seek to construct between law and non-law. I have adopted the approach of performance theorists who view all social and cultural activities, not just theatrical events, as performance\(^{85}\) and regard culture as a verb rather than a noun.\(^{86}\) Performance studies scholars are interested in, inter alia, the politics of performance and, therefore, the following questions:

- What is the relationship between performance and power? How does performance reproduce, enable, sustain, challenge, subvert, critique and naturalize ideology?
- How do performances simultaneously reproduce and resist hegemony? How does performance accommodate and contest domination?\(^{87}\)

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\(^{78}\) Derrida, above n 37, 22.
\(^{79}\) Ibid 17.
\(^{80}\) Ibid 16.
\(^{81}\) Ibid 15.
\(^{82}\) This term comes from Dwight Conquergood, ‘Of Caravans and Carnivals’ (1995) 29 *TDR: The Drama Review* 137, 137.
\(^{83}\) Spariosu, above n 9, xi.
\(^{84}\) Schechner, above n 2, 19.
\(^{86}\) Dwight Conquergood, ‘Rethinking ethnography: towards a critical cultural politics’ (1991) 58 *Communications Monograph* 179, 190.
\(^{87}\) Ibid.
In analysing law as performance and comparing the performance of law with other performances, I have focused on such questions. As Margaret Davies has pointed out, viewing law as performance means that ‘it is not possible so easily to erase the politics of law and legal theory’.  

Performance studies scholars have a natural affinity for activism and this advocacy of activism corresponds with my own world view. Dwight Conquergood explains that ‘performance studies struggles to open the space between analysis and action, and to pull the pin on the binary opposition between theory and practice.’ Later he describes this ‘binary opposition’ as an ‘apartheid of knowledges, that plays out inside the academy as the difference between thinking and doing, interpreting and making, conceptualizing and creating.’

**Activism and the academy**

This critique resonates deeply with my own experiences as an activist and as an academic scholar. As I explain in a number of reflective narratives scattered throughout the thesis, I have been involved in both feminist and environmental direct action. I was an activist before I became an academic; in fact, one reason why I joined the academy was because life as a solicitor, particularly in a conservative country town like Lismore, was far too restrictive to accommodate activist pursuits. Of course, many theorists, including critical legal scholars and feminists, endorse activism. Some participate in activist pursuits. Foucault notably emphasised in his writings and by example that the task for intellectuals is to work alongside ‘those who struggle for power’. However, one of my difficulties with legal theorists is that, despite an avowed sympathy for and apparent accommodation of activism, this group tends to remain part of what has been dismissively labelled ‘the chattering classes’ rather than integrate activism into their professional lives.

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88 Davies, above n 6, 124.
90 Ibid 153.
This point was forcibly made for me at a symposium in 2007. The symposium, entitled ‘Law and liberty in the war on terror’, was held at the University of New South Wales law school from 4 to 6 July. It had been widely promoted by the organisers, the Gilbert and Tobin Centre of Public Law, and one of the images used to advertise the conference featured a gagged man. Conference speakers included Australian and international academics, barristers and other practitioners, a judge, public servants, and the then Attorney-General, Phillip Ruddock. During Ruddock’s keynote address on 5 July, a member of the audience and registered conference participant, Peter McGregor, approached him with a warrant accusing him of various war crimes, and attempted to make a citizen’s arrest. McGregor was removed by security guards and when he refused to remain outside the campus, arguing that his payment of the conference fee entitled him to be there, he was arrested. McGregor was subsequently charged with unlawful entry on enclosed land and pleaded not guilty.93

I was astounded that the overwhelming majority of conference participants, most of whom had published critical commentary on the negative impact of the government’s anti-terrorism legislation on human rights, displayed no concern for McGregor’s plight. It was only at the insistence of one participant, Michael Head, that a conference organiser agreed to speak to the police and ask that charges not be laid. When Head later attempted to ask questions about the incident at a session entitled ‘Prohibiting speech as a national security strategy’, he was treated in a peremptory and dismissive fashion by the person chairing that session. One of the conference organisers, Andrew Lynch, expressed annoyance at McGregor’s intervention when I voiced my concerns with him in a private conversation. He was irritated that an activist should interfere with the conference proceedings, and disrupt an event which had involved months of meticulous organisation. The possibility of a punitive outcome for the activist did not seem to concern him. I felt at the time, and still feel, that legal academics in their defence of human rights privilege free speech in the form of decorous commentary, whether written or spoken, over activism and direct action.

Performance studies scholars maintain that the performance studies paradigm, in contrast, ‘calls into question the privilege of academic authority’ and is ‘radically democratic and

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counterelitist’. Indeed, critique provided through performances of embodied resistance can be more effective than academic critical commentary in changing law and policy. Robert Cover, an academic legal theorist who was also an activist, makes this point in the following passage:

The community that writes law review articles has created a law - a law under which officialdom may maintain its interpretation merely by suffering the protest of the articles. The community that disobeys the criminal law upon the authority of its own constitutional interpretation, however, forces the judge to choose between affirming his interpretation of the official law through violence against the protesters and permitting the polynomia of legal meaning to extend to the domain of social practice and contract.

There is, I suspect, a connection between my perception of myself as an activist, and my perception of law as performance. Activists experience the legal system as outsiders. Many are prepared to work within the parameters of the law in order to achieve political gains. This necessarily involves, however, the translation of their external viewpoint ‘into the language being used inside the practice, if only to reject the latter or prove that it should be reconstructed’. The values which underpin the legal system are often antithetical to their own values. For instance, as I shall argue in Act II, environmental activists are often motivated by a reverence for other life forms, a sentiment which carries little weight in a discourse which emphasises the primacy of property rights. Activists must therefore play a role in order to pursue their goals through the law; from such an outsider perspective, law can readily be viewed as performance. Insiders, however, who do not question law’s fundamental values, more readily view law as a stable construction. Similarly, ‘insiders’ tend to view gender as a stable construct, whereas ‘outsiders’ are much more prone to view gender as performance.

94 Pelias and van Oosting, above n 85, 221.
97 In Gender Trouble. Feminism and the subversion of identity, Judith Butler discussed gender’s performative and contingent character and the possibility of making ‘gender trouble’ by challenging assumptions of gender that ‘support masculinist hegemony and heterosexist power’; Butler, above n 51, 33–4.
I have found, however, that the roles of insider and outsider intersect. Even as an activist, I bridged the gap between police and protesters, between law and outlaw. I have performed both within and without the law, and my approach to this research derives from this shifting and disorienting conflation of roles, this ongoing negotiation between the violence of law and the play of direct action.

Playfulness, violence and me

My involvement with activism does not, of itself, explain my fascination with the relationship between play and violence and my conviction that a certain form of play, or playfulness, enables us to negotiate violence. Play intrigues me as a form of embodied resistance, and I agree with Sutton-Smith that ‘one can never quite lose while still at play.’\(^98\) Like Maria Lugones, I suspect that ‘I am not a healthy being in the “worlds” that construct me unplayful.’\(^99\) Lugones discusses her fear of ‘getting stuck’ in a world in which she is constructed as a serious person.\(^100\) I fear that my professional immersion in the world of law might destroy my capacity for playfulness, and hence my capacity to resist violence. The theme of playful resistance distinguishes this thesis and yet, how can I explain my own conviction that the frivolity of playfulness can override the multiple violences of law, and that playfulness equates somehow with survival?

In constantly interrogating my partiality and biases as a researcher, I have turned to my family history. I suspect that the reasons why I am an activist rather than a passive observer, I am playful and anti-authoritarian rather than submissive, I write about play rather than positivist legal doctrine, and I believe so strongly in its subversive, and indeed redemptive potential, lie in my family’s experience of the Holocaust. My grandmother’s wilful refusal to submit to the authority of the state, her refusal to obey anti-semitic laws, and most fundamentally, her capacity to be playful, saved her life, saved my father’s life, and made my own existence possible. I have an emotional investment in play. Let me explain.

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\(^98\) Sutton-Smith, above n 12, 212.
\(^99\) Lugones, above n 64, 14.
\(^100\) Ibid.
My grandmother’s story, as told below, is in part biography, in part self-reflective, and in part a meditation on the performative. It highlights the possibilities in play as flirtation and seduction, and also demonstrates the critical importance of the performative in the social construction of race and gender. My grandmother’s refusal to accept the racial identity which the Nazis sought to impose upon her was a subversive act, but so was her gendered performance. There are also ongoing performative implications in the resolute refusal on the part of every individual in my father’s family to take on the role of Holocaust survivors, or even to adopt the role of Jews. The story itself is a piece of performative writing, in that ‘the struggle to write history, to represent events, is an ongoing performative process’. However, the story is also part of my attempt to position myself in relation to my research.

The story of Kati Rosza

I believe that Kati, my grandmother, wrote her memoir of the Holocaust in 1947 in India, where she was reunited with her sister Ansci after the war. She was travelling to Australia with Andras, my father, and Endi, my uncle. At an earlier point in this long journey, she had joined a close family friend in Switzerland; later, in Australia in 1948, she would marry him and thus acquire two stepchildren, my uncle Johnny and my aunt Mary. My grandmother’s intention was to make money from this memoir but it was never published. This was partly because, despite Kati and Ansci’s best endeavours, neither had a particularly good grasp on English at that time.

For my grandmother, as for other Hungarian Jews, the real impact of the Holocaust was not felt until 1944. She had already lost her second husband, who was taken in a forced labour unit to Russia in 1942. She had experienced complete devastation when she learned of his death. However, apart from some minor inconveniences such as the quota system which limited admission to high school for Jewish boys such as my father, and the decree which interrupted her summer holiday in 1943, her life was relatively normal until March 1944, when the German army entered and occupied Hungary. Shortly afterwards, Eichmann arrived in Budapest with the express intention of liquidating the entire Jewish population of Hungary.

As he had done elsewhere in occupied Europe, Eichmann persuaded the Jewish leaders to form a Jewish Council, the Central Jewish Committee,\textsuperscript{103} to assist him in his plans. A new branch line of the railway was built at Auschwitz, which readied itself for the influx of Hungarian Jews by increasing the number of workers in the gas chambers.\textsuperscript{104} Eichmann began rounding up and deporting Jews from rural Hungary; in one of these consignments was Kati’s mother-in-law.

Meanwhile, in Budapest, as the Allied army intensified its bombing attacks on occupied Hungary, the Jewish population was subjected to ‘ever increasing restrictions’.\textsuperscript{105} Jews had to surrender their radios, telephones and cars, wear yellow stars and dismiss servants of Aryan origin. This last restriction was possibly the most irksome, from Kati’s perspective; she wrote:

\begin{quote}
At least we had some occupation, I thought, which kept us from brooding always over our situation. We cooked, washed, scrubbed and polished.\textsuperscript{106}
\end{quote}

In June, came the ‘long-feared order’:\textsuperscript{107} all Jews were to move into houses earmarked for Jews, and surrender their property to officers of the Hungarian and German army.

At this point, Kati’s ‘instinct and rebellious spirit’ took over.\textsuperscript{108} She decided that she and her children would not wear yellow stars, and that they would separately and illegally go into hiding. She was also determined not to hand over her house without a fight. When a Hungarian officer appeared on her doorstep with a letter from the Jewish Committee, she exerted all her charm and won him over: ‘he looked very forbidding but I decided to try to tame him.’\textsuperscript{109} He never moved into her house. Instead, he invited her out to dinner and became an almost daily visitor; he even helped her with her plans for hiding and sent ten Jewish men from the labour camps to help her move her furniture into storage.

\textsuperscript{103} Ibid 178.
\textsuperscript{104} Ibid 182.
\textsuperscript{105} Kati Rosza, \textit{How I saw the war} (unpublished memoir in author’s possession) 5.
\textsuperscript{106} Ibid 6.
\textsuperscript{107} Ibid 8.
\textsuperscript{108} Ibid 5.
\textsuperscript{109} Ibid 8.
At the end of June, eight-year-old Endi was sent to a ‘peasant’ family and subsequently to an orphanage for Protestant war orphans in rural Hungary. Eleven-year-old Andras was taken into hiding by his Catholic stepmother, Margit. Kati found shelter with a sympathetic friend.

Henceforth, Kati ‘changed names as frequently as people change their clothes.’\textsuperscript{110} Although her life in hiding was fraught with obvious dangers, it was not entirely devoid of entertainment. She was invited to dinner by a Nazi officer, and dared not refuse. She wore her beige shantung suit, ‘dressed [her] hair in a ladylike fashion’,\textsuperscript{111} and resolutely enjoyed the food, wine, and music. On another occasion, she and a friend purchased servants’ clothes which suited their new identities; ‘we chose some really tasteless gaudy things, laughed a great deal and generally enjoyed the fun.’\textsuperscript{112} This existence came to an abrupt halt when she was arrested in a restaurant while waiting for an acquaintance. On this occasion, she was wearing a powder blue shantung suit with a brown silk blouse, and was fresh from the hairdresser. She was taken to a police station.

Here began the dangerous game of flirting in defiance of death. Kati’s initial encounter with the district Deputy Superintendent, who ‘expressed his regret that I should have to die so young and so pretty’,\textsuperscript{113} had one positive outcome; he sent her on to the General Police Headquarters rather than to the Gestapo, where she would have been tortured. There she was ‘interrogated’\textsuperscript{114} by an Inspector who also proved susceptible to her charms. He fed her a delicious lunch from a nearby restaurant and, bizarrely enough, took her to her most recent residence for a bath. He tried to kiss her but, rebuffed, did not persevere; instead, he helped her to pack a small suitcase which would prove to be an invaluable asset. They even had a drink at a small inn before returning to headquarters.

The most extraordinary of these encounters, however, occurred at her next destination, the temporary prison from which all Jews were deported to concentration camps. Lined up in the courtyard with the other prisoners, she was noticed by a man who had her pulled out of the line and taken to an office. There he kissed her hand and said:

\textsuperscript{110} Ibid 12.
\textsuperscript{111} Ibid 18.
\textsuperscript{112} Ibid 21.
\textsuperscript{113} Ibid 24.
I asked you to come here because I knew you by sight from a very long time – long before you were even married – I noticed you at dances on the beach and in various places and I always had a great admiration for you. I am distressed to find you here … I want to do everything in my power to save you.\textsuperscript{115}

Kati commented in her memoir that this intervention felt like a fairytale; it certainly sounds quite unbelievable. This man, Dr Josef Dery, who administered a Hungarian coalmine and therefore could bribe prison staff quite easily, saved her life. He ensured that she was not transported with the other Jewish prisoners and, instead, organised an office job within the prison for her. In this capacity, she forged and destroyed papers, smuggled out letters, and saved friends from transportation where possible. Dery kept her Jewish identity hidden; no one except the prison superintendent, Pamuk, was aware that she was Jewish, and he was bribed into silence. Dery brought her food, cigarettes, newspapers, parcels from friends, and organised temporary leave from the prison for a day. He even obtained a Swedish letter of protection for her; Sweden, Switzerland, Spain and Portugal, all neutral countries horrified by the deportations, issued entry permits and extended protection to about 33 000 Hungarian Jews.\textsuperscript{116}

I don’t think that a price was exacted for this bounty. Kati comments favourably on Dery’s ‘kind, refined, gentlemanly manner’.\textsuperscript{117} She portrays him as chivalrous, gallant, genuinely smitten and, quite simply, happy to be her saviour.

However, in those troubled times, no saviour was necessarily invincible. Dery disappeared after the fateful events of 15 October, when the Regent Horthy was deposed and replaced by the leader of the Hungarian fascist party, the Arrow Cross. The Jewish houses in Budapest were emptied and many Jews were shot; in November, others were taken on death marches to Vienna by Arrow Cross men. A Jewish ghetto was established. Hundreds of Jews were brought into Pamuk’s prison, stripped of their possessions and then deported. The prison became a very dangerous place for my grandmother, who hid from Pamuk for as long as she

\textsuperscript{114} Ibid 31.
\textsuperscript{115} Ibid 40.
\textsuperscript{116} Arendt, above n 102, 182.
\textsuperscript{117} Rosza, above n 105, 49.
dared, and then wangled her release with her Swedish letter of protection. She sought refuge with her first husband’s Aryan wife, Margit; in Margit’s house, she was reunited with Andras.

Margit was one of the many Catholic men and women who hid Jews from Nazis across occupied Europe. Although, according to Kati, she was excessively timid and fearful, she did not hesitate to provide shelter for her husband’s first wife, her husband’s mother and her husband’s son, all of whom were Jewish; in addition, she worked tirelessly to assist others in the Jewish ghetto, bribing members of the Arrow Cross to smuggle in food. My grandmother referred to her as Margitka, which is her name softened with an endearment. My father sent her money every month while she lived. Now, he continues to send money to her children.

On Christmas Day 1944, the siege of Budapest began. Budapest experienced horrific fighting and bombardment while the Russians encircled the city and slowly advanced into its centre. The Nazis who remained within Budapest refused to surrender. Instead, my grandmother records that ‘the battle was fought inside houses, from room to room. Every brick was contested, as it were.’ During this period, Margitka’s household was forced to accommodate a Nazi officer called Junglung, who was initially unaware that Kati was Jewish and would politely kiss her hands every night. Kati and the other women reluctantly spent many evenings with Junglung and his friends, eating, drinking, singing German songs and generally ‘partak[ing] in their merrymaking.’ Another Nazi officer, oblivious to Kati’s true identity, proposed to her.

As the bombing of Budapest intensified, the household retreated underground to the basement. It was at this low point that Kati’s courage failed her for the first time. A neighbour told Junglung that Margit’s husband was Jewish, and that his mother and two sons were living in the house, and Junglung exploded with black fury, shouting ‘like a beast’. He was ‘livid with rage’, incensed at having been deceived. He threatened to shoot them all, Aryans, Jews, half-Jews. One by one, the members of the household were summoned for interrogation. Kati consumed a vial of sleeping pills, and passed out for 48 hours. When she

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118 Ibid 86.
119 Ibid.
120 Ibid 87.
121 Ibid.
woke up, a young woman, the fiancé of Margitka’s brother, had consoled Junglung by sleeping with him, and his black rage had subsided.

I find it remarkable that this rabid anti-Semite then continued to co-habit with Jews, but he did. Was it because the normal processes of deportation had completely broken down? Was he incapable of shooting in cold blood the women and children whom he had hitherto befriended, whose hands he had kissed? In fact, Junglung moved out only to flee, in civilian clothes, when the fighting reached the bottom of their street.

The Russians arrived at Margitka’s house on 7 February; shortly afterwards, Kati would see Junglung’s body, lying in the snow. Kati and Margit had saved a few straggly chickens for their liberators but much to Kati’s disappointment, the five Russian officers who lunched with them didn’t like her chicken paprika. (My father, who vividly recalls being sent out with a bucket to sever chunks of flesh from a dead horse for the evening meal, has referred to this part of the story as literary licence.) Over the next few weeks, Kati acquired another admirer, a Russian soldier, who brought them loot purloined from other households. Eventually, he poured out his feelings in a love letter which she scathingly dismissed as full of ‘the kind of sloppy cheap sentimentality a servant girl would receive and appreciate.’ At this point, my long-suffering father commented, ‘Really, Mother, this is too bad, everybody wants to marry us.’

When the siege ended, Kati and Andras crossed the Danube in a Russian boat; the Germans had destroyed all the bridges in their futile attempt to hold off the Russian army. No building was intact. The city was full of rubble and dead bodies: shocking sights for a child. Kati fretted about Endi’s fate in his orphanage. It was not safe to travel, but she couldn’t wait any longer. They walked and hitched rides. She was told that the orphanage had been bombed, but she persevered. Finally, they arrived; children, she wrote, ‘sprang up like mushrooms from the ground’, with Endi in their midst. He clung to her, sobbing, unable ‘to compose himself’. He hadn’t seen his mother or brother for nine months.

122 Ibid 99.
123 Ibid.
124 Ibid 111.
125 Ibid.
In June 1946, as soon as she could, Kati obtained a permit and a Russian car and smuggled her sons out of Hungary.

Reading the memoir

I’ve read this memoir three times, and engaged with it quite differently on each occasion. I first read it in my early twenties, having only recently discovered that my grandmother and father were Jewish. My family’s silence on this critical biographical detail ripples with (necessarily unspoken) ironies. Educated in a staunchly Anglican environment and oblivious to my heritage, I could only stare blankly at my sleek, blonde tormentors when they asked me coldly on Jewish holidays why I was at school. They could correctly interpret my racial background from my face, which resembles that of my Jewish great-grandmother; I could not. I topped the state in Higher School Certificate Modern History, oblivious to my own family’s involvement in one of the defining cataclysmic events of twentieth century European history. Still lamentably ignorant of my own family history, I would proceed to gain a first class honours degree in Modern History from the University of Sydney. It was my great-aunt Ansci who told me that they were all Jewish, on one of her memorably dramatic visits from London, and she revealed this as an interesting aside while recounting the story of her ongoing flirtation with an Irish Catholic priest. I had never thought of them as Jewish. I had never thought of them as Holocaust survivors.

Soon after this revelation, my father clearly judged me ready to read my grandmother’s memoir, a document which had been heavily edited by various interested parties. On first reading it, my reaction was one of mortification. At that time, my mental image of Jewish victims of the Holocaust was heavily influenced by the narrative of Anne Frank; thus, Jewish victims were pure, innocent, occasionally high-spirited but fundamentally passive, and tragically doomed. I could not reconcile my grandmother’s account with this image. It was far too clear that Kati was astute, determined, resourceful and incongruously flirtatious. Play in the form of flirtation saved her again and again.

On my second reading, some ten years later, I was reconciled to the Mills-and-Boon flavour of her romantic encounter with Dr Dery, and the interminable sequence of helpful suitors. Now, as a mother of young children, I was perplexed by her decision to hide separately from
my father and uncle. I knew that she was a loving mother; in the memoir, she agonises over the impact of his horrific experiences on my eleven-year-old father, and tramps across Hungary with a shoe full of blood to retrieve Endi from his orphanage. How could she relinquish her children to the care of others, in that most uncertain and dangerous of times?

Then I came across Bruno Bettelheim’s commentary on Anne Frank and began to understand the pragmatism and instinct for survival which guided her decision to hide her family separately. Bettelheim argued that hiding singly offered the best chance of survival but ‘anxiety, and the wish to counteract it by clinging to each other’ had an incapacitating effect on many Jewish families.\(^{126}\) Indeed, if Kati had gone into hiding with her sons, they too would have been arrested and presumably deported. Could, and indeed, would her saviour have rescued a family with the ease with which he secured Kati’s safety?

It was her hard-headed pragmatism which saved them all. Better nine months in an orphanage for my uncle, better months of being hidden by Margitka for my father, than almost certain death in a concentration camp. In fact, after her arrest, as the policeman walked her through the streets of Budapest and her mind filled with numb panic, even then her fingers were frantically shredding her children’s letters which she kept in her handbag so that, whatever her own fate, they would be safe.

In my latest reading of the memoir, I have enjoyed her authentic voice. She is not Anne Frank, nor is she Anne Frank’s mother. She does not resemble any of the millions of unique individuals who died in the Holocaust. She is herself: describing her outfit the day she was arrested, adopting a moralistic, preachy tone with the prostitutes she encounters in prison, enjoying a bath even though she knows that deportation is almost inevitable, complaining to Margitka about the imminent arrival of her former mother-in-law – ‘Surely you don’t expect me to live in the same house with my ex-mother-in-law!’\(^{127}\) – and this at a time when the Jews of Budapest are being systematically slaughtered, deploiring the fact that her Russian liberators don’t like her chicken paprika, recounting her conquests at a time when, really, she was dancing with death.

I admire her rebellious spirit, her canny decision-making, her refusal to submit, to go docilely into a Jewish house, to wear a yellow star, to follow orders to her death. She never saw herself as a victim. She flirted her way out of trouble. Through her, I recognise the value in certain forms of play.

**Lessons from the memoir**

My grandmother’s memoir was not intended to be the narrative of a Holocaust survivor. Her memoir is entitled ‘How I saw the war’. In 1947, she was completely unaware that she had survived a Holocaust, and she probably never saw herself as a Holocaust survivor. The term ‘Holocaust survivor’ in its original meaning encompassed those who endured Jewish ghettos, concentration camps and slave labour camps. The term now includes any European Jew who survived the war in Nazi-occupied Europe. According to this expanded definition, my grandmother’s memoir is the narrative of a Holocaust survivor, although she never identified herself publicly as a Jew. She was an assimilated Jew who converted to Protestantism immediately before the war, and she would inform her grandchildren that she was an atheist. In her later years, she toyed with Buddhism. It was not her religion which defined her official status during the Holocaust. It was nothing visible, nothing tangible, nothing which impacted upon her sense of self. It was her racial identity, or what was constructed as her racial identity by the Nazis.

The Nazis may have sought to construct my grandmother’s identity in accordance with this arbitrary and dangerous category of race, but she resisted this by trumping race with gender. Her racial identity might have been unacceptable to the Nazis, but her gendered body was highly desirable. Junglung, initially oblivious to Kati’s Jewish identity, often assured the women of his undying hatred of all Jews in the course of their evening ‘merrymaking’; it was, my grandmother records with some smugness, ‘poetic justice that he kissed my hands every night before retiring.’ Her racial identity disempowered her; her gendered identity ensured her survival.

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127 Rosza, above n 105, 81.
129 Ibid 83.
130 Rosza, above n 105, 87.
Baudrillard has written that seduction affords mastery over a symbolic universe in contrast to power, which involves mastery over the real universe. He investigates ‘the capacity immanent to seduction to deny things their truth and turn it into a game, the pure play of appearances, and thereby foil all systems of power and meaning with a mere turn of the hand.’\textsuperscript{131} My grandmother’s story demonstrates how the play of seduction can foil violence and power.

Yet play has its limitations. It is unlikely that play would have enabled her to negotiate and resist violence had she been removed from the dangerous periphery of the Holocaust, where Aryan saviours could still engage with her as a charming and attractive woman, and found herself in its molten core, segregated with the other Jews in what Giorgio Agamben has called ‘the pure, absolute and impassable biopolitical space’:\textsuperscript{132} the concentration camp. In this space, human beings were stripped of their rights, expectations and humanity;\textsuperscript{133} they became, in his terminology, ‘bare life’.\textsuperscript{134} Surely, here, play became irrelevant. How could play in its ‘dangerous harmlessness’\textsuperscript{135} erupt in order to challenge the absolute violence of the camp?

Clendinnen refers to the description of a football match between the Sonderkommando, the Jewish prisoners who worked in the gas chambers, and the members of the SS.\textsuperscript{136} It is significant, however, that the Sonderkommando enjoyed better living conditions than the other prisoners, could dress in the clothes of the victims, and were generally ‘exempt from the visual dehumanization’.\textsuperscript{137} Such manifestations of play were extremely rare. In fact, the paramount role of play in the concentration camps was in the administration of violence.

Clendinnen identifies an omnipresent and ‘manic’ emphasis on theatre and spectacle in the camps.\textsuperscript{138} Members of the SS were well-acquainted with the ‘transformative power of theatre’, and they consciously used theatre to transform the camp environment into a stage on which they strutted as ‘star players’.\textsuperscript{139} At Auschwitz, the spectacular nature of violence was

\begin{footnotesize}
\begin{enumerate}
\item Jean Baudrillard, \textit{Seduction} (Brian Singer trans, 1990) 8.
\item Agamben, above n 48, 123.
\item Ibid 159.
\item Ibid.
\item Turner, above n 68, 169.
\item Inga Clendinnen, \textit{Reading the Holocaust} (1998) 85–6.
\item Ibid 86.
\item Ibid 170–1.
\item Ibid 169.
\end{enumerate}
\end{footnotesize}
displayed in the guise of murderous entertainment.\textsuperscript{140} At Birkenau, the performances of mass killings were staged for the audience of bewildered victims, with ‘a range of possible scripts in the anterooms of death’.\textsuperscript{141} At Treblinka, an inordinate degree of care was lavished on the theatrical setting, with an emphasis on wholly fake but deceptively reassuring props.\textsuperscript{142} Dogs became ‘animal accomplices in the theatre of power’.\textsuperscript{143} Play in the context of the concentration camps had no redemptive characteristics; the oppressors co-opted play into their arsenal of weapons.

Therefore, my grandmother’s memoir cannot necessarily testify to the power of play as a survival mechanism in conditions of extreme and absolute violence; the only conclusion which can be drawn from it is that in her circumstances, a particular form of play worked to deflect violence and to save her life.

But, for me, the memoir explains \textit{my} fascination with violence and play.

\textbf{Performative writing}

It is already clear that I am using a flexible mixture of genres, including self-reflective narrative, in this thesis. I could explain this as an attribute of performative writing, described by Peggy Phelan as writing which

\begin{quote}
[enacts] the affective force of the performative event again, as it plays itself out in an ongoing temporality made vivid by the psychic processes of distortion (repression, fantasy, and the general hubbub of the individual and collective unconscious), and made marrow by the muscular force of political repression in all its mutative violence.\textsuperscript{144}
\end{quote}

It is clear, from Phelan’s own work, that performative writing includes self-reflective narrative as well as fiction, fairy tale and a mingling of ‘critical fictions and factual

\begin{flushleft}
\textsuperscript{140} Ibid 170–1. \\
\textsuperscript{141} Ibid 172. \\
\textsuperscript{142} Ibid 174. \\
\textsuperscript{143} Ibid 177. \\
\textsuperscript{144} Phelan, above n 101, 12.
\end{flushleft}
phantasms’. I could argue that I have attempted to emulate this sort of writing (although the production process sounds somewhat uncomfortable) but I fear that I have been held back by the various unspecified inhibitions and rigours of my own discipline, and my desire to produce something which is at least marginally acceptable within ‘the genre of critical commentary’. However, self-reflective narrative is a component of performative writing, as well as a recognised strategy in posmodernist work.

Such narratives are an acknowledgment of the subjectivity of my writing, and an attempt to situate myself as writer and narrator. I thus anchor the text of the thesis in my socio-historical context and identify myself as participant, researcher and observer of the various performances analysed. I am far from being a disembodied subject. I am a mother who struggles to be a good parent while working fulltime, a woman who has experienced multiple forms of gender discrimination, a second generation Holocaust survivor who anticipates catastrophe, a green activist concerned about the future of the planet, and a legal academic trying to survive in a workplace dedicated to the needs of the benchmark man; all these roles provide me with particular biases and multiple possibilities for performance.

This thesis, in its emphasis on narrative, can be considered a postmodernist, even performative text; it is still, however, a text. Herein lies a conundrum.

**Thesis as text**

A number of performance studies theorists have considered the role of the text in performance studies. Of course, poststructuralists would classify performances as texts; here I am alluding to written texts. According to Conquergood, the performance paradigm enables researchers to challenge the Western reliance on texts; this paradigm provides, he maintains, ‘an alternative to the atemporal, decontextualized, flattening approach of text-positivism’. In the performance paradigm, the ‘embodied experience’ is privileged over the written text.

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145 Ibid 18.
146 Ibid 18.
147 Conquergood, above n 86, 188.
148 Ibid 189.
149 Ibid 187.
In the discourse and discipline of law, on the other hand, the written text is paramount. David Fraser argues that ‘we look for truth in sacred text and hierarchy’ and ‘it is heresy to go beyond the text.’\(^{150}\) In my focus on law as performance, I am challenging the pre-eminence of the written text in law. Law might endure as such a text, but it is made as performance. As with other genres of performance, the ‘full meaning’ of law ‘emerges from the union of script with actors and audiences at a given moment in a group’s ongoing social process.’\(^{151}\) To focus on the performance of law is to downplay the significance of the written text. As W B Worthen has put it, ‘it is not the text that prescribes the meanings of the performance: it is the construction of the text within the specific apparatus of the ceremony that creates performative force.’\(^{152}\)

Yet I am still caught within ‘the text-bound structure of the academy’.\(^{153}\) I am critiquing ‘text-positivism’ but still producing a written text. Furthermore, I have relied on various texts, including the scripts of plays and the media records of particular performances such as the terror trials in compiling my case studies. In fact, according to Conquergood, in thus privileging the text over what he calls ‘active bodies of meaning’, I have been implicated in yet another form of violence: ‘epistemic violence’.\(^{154}\)

Perhaps I can justify the inherent inconsistencies in producing and relying on written texts by gesturing towards the practical difficulties in adopting an alternative approach. It was impossible for me to attend or participate in the wide variety of performances discussed, which were spread out in time and place. Mediatised and other accounts often convey the performative highlights quite effectively (while ignoring the humdrum, mundane and boring features of each event). Furthermore, mediatised accounts are an essential component of the moral panic which, I argue, has shaped the nature and outcome of the Australian terror trials. I am aware that such accounts cannot accurately reproduce or duplicate live performances; Peggy Phelan reminds us that ‘performance cannot be saved, recorded, documented, or otherwise participate in the circulation of representations of representations: once it does so, it

\(^{150}\) Fraser, above n 75, 746.

\(^{151}\) Turner, above n 68, 24; in this passage, Turner discusses how messages in performance genres are transmitted differently depending on the medium and the ‘full reality’ of the performance.


\(^{153}\) Conquergood, above n 86, 190.

\(^{154}\) Conquergood, above n 89, 146.
becomes something other than performance.'  

However, I had little choice. If I wanted to document these performances, I had to rely on mediatised and other representations.

This leaves the question of whether the documentation of performance, and the resultant production of a written text, is a legitimate activity within the field of performance studies. Conquergood has discussed the ‘deeply subversive and threatening’ possibility of performance as an alternative mode for publishing one’s research, and pointed out that some performance studies scholars create performances as well as written texts. However, even this committed performance studies theorist admits that performance can and should provide a ‘complement, alternative, supplement, and critique of inscribed texts’ without replacing them. He does not advocate the ‘discarding’ of texts; rather, he suggests that we adopt ‘research and writing practices that are performance-sensitive’. I have tried to follow this suggestion.

Structure and anti-structure

I have concerns that structure detracts from, and might completely eradicate, playfulness. I would like to write as fool or trickster, that most ‘inversely playful person, who trivializes all things most devastatingly’, rather than as sober reliable narrator. I am drawn to the overt playfulness and indeed subversiveness of the anarchistic methodology of philosopher of science, Paul Feyerabend, who claimed that he was rejecting rule-bound process and scientific rationalism for a Dadaist approach which involved ‘taking things lightly’, being unmoved by ‘serious enterprise’, and remaining open to ‘joyful experiments even in those domains where change and experimentation seem to be out of the question’. In analysing scientific developments in light of this approach, he suggested that scientific theories only made sense

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156 Conquergood, above n 86, 190.
157 Conquergood, above n 89, 152.
158 Conquergood, above n 86 191.
159 Ibid.
160 Sutton-Smith, above n 12, 211.
161 See Spariosu, above n 9, 298.
162 Feyerabend, above n 8, 21.
after a period of ‘unreasonable, nonsensical, unmethodical foreplay’,\textsuperscript{163} and that such theories can be successfully established through ‘contradictory, irrational methods’.\textsuperscript{164}

I fear that I have been as unsuccessful in avoiding structure as I have been in avoiding written texts, or in achieving the playful frivolity of the fool. I must confess to an early fascination with structure, apparent in my aberrant passion for mathematics. My prevailing ambition when I started university was to be a mathematician. I would like to believe that parts of this thesis (and perhaps even this introduction) could indeed be classified as ‘unreasonable, nonsensical, unmethodical foreplay’, but fear that this is not so. I have failed to emulate the playfulness of the ‘gleeful, impudent flight in the face of reason and logic’ which distinguishes, for instance, the work of one of Spariosu’s artist-metaphysicians, Nietzsche.\textsuperscript{165}

Perhaps, however, my predilection for structure and reasoned argument can still be part of an anarchistic and therefore playful methodology. Feyerabend, who clearly also found it difficult to abandon rational argument, consoled himself by pointing out that ‘an anarchist is like an undercover agent who plays the game of Reason in order to undercut the authority of Reason’.\textsuperscript{166} In using structure and reasoned argument in defence of playfulness, I am therefore in my accustomed role of outsider adopting insider tactics. And yet, here again I collide with another form of violence: what Phelan calls ‘the cool violence of (my own) rationality’.\textsuperscript{167}

Accepting that I must have structure, I have structured the thesis as a play. There is an opening Act, which deals with performances, legal and theatrical, in the war on terror. The spectacular violence of terrorism and the corresponding spectacular violence of the state form the backdrop to this preliminary discussion of law and play. The central section of the thesis is a (light-hearted) interlude, in which I interrogate the playfulness of law. Here I consider the phenomenon of documentary theatre and ask whether it is possible to distinguish between theatrical and legal performances which rely on the same text. Clearly, a theatrical performance has a different performative force to a corresponding, textually identical legal performance – but why? Finally, there is a second Act, shorter because an audience’s attention might wander a little after an intermission. In this Act, a scene change has occurred.

\textsuperscript{163} Ibid 27.
\textsuperscript{164} Spariosu, above n 9, 295.
\textsuperscript{165} Ibid 82.
\textsuperscript{166} Feyerabend, above n 8, 32–3.
I look here at performances of direct action in the war on the environment, and their intersection with legal performances. In this Act, I can speak with the authority of a participant as well as an observer; participation is a critical ‘working procedure’ in the discipline of performance studies.\textsuperscript{168}

Plays consist of dialogue and this thesis is, at least in one sense, a monologue. However it is also, within a postmodern framework, a ‘collage/montage’,\textsuperscript{169} a considered but eclectic borrowing from different theorists and different disciplines and hence, a variety of voices are heard. As one postmodernist writer, Roland Barthes, has famously stated:

\begin{quote}
We know now that a text consists not of a line of words, releasing a single ‘theological’ meaning (the ‘message’ of the Author-God) but of a multidimensional space in which are married and contested several writings, none of which is original: the text is a fabric of quotations, resulting from a thousand sources of culture.\textsuperscript{170}
\end{quote}

Imagine the clamour of multiple, indistinguishable voices. There is a sense of expectancy. The light dims. The curtain rises. The performance of the text begins.

\begin{flushleft}
\textsuperscript{167} Phelan, above n 101, 17.
\textsuperscript{168} Pelias and van Oosting, above n 85, 211.
\textsuperscript{169} Harvey, above n 20, 51.
\textsuperscript{170} Roland Barthes, \textit{The Rustle of Language} (Richard Howard trans, 1986) 52–3.
\end{flushleft}
ACT I

Dramatic moments in the War on Terror
Chapter 1

Violence and play in the War on Terror

Rumsfeld: I liked what you said earlier sir. A war on terror. That’s good. That’s vague.
Cheney: It’s good.
Rumsfeld: That way we can do anything.¹

In this first Act, I analyse two different performative responses to the war on terror: namely, the terror trials and the theatre of dissent. In contrasting law with theatre, I am comparing the play of law with another classic and, in many ways, conventional form of play. I shall consider a less conventional and more carnivalesque form of play in Act II, in which I contrast legal performances with the performances of environmental direct action.

I undertake a comparative critique of the terror trials and the theatre of dissent by focusing on case studies. A study of such performative responses to the war on terror can be viewed as an appropriate starting point for an interrogation of the differences and interrelationship between law and play, since terrorism can itself be viewed as a performative phenomenon and form of (dark) play. However, in undertaking this critique within the framework of the war on terror, I cannot disregard the ‘unstated assumptions of morality and legitimacy’² which influence the perception and conduct of this war. The extent to which the terror trials and the theatre of dissent separately engage with various slippery questions of morality and legitimacy, including questions concerning the morality and legitimacy of state violence, is one of the central themes in this Act. In fact, violence overshadows playfulness in the performances

¹ David Hare, Stuff Happens (2004) 24.
which I shall examine. Playfulness, as we shall see, rarely surfaces in the spectacle of the terror trials and the theatre of dissent.

Terrorism is a form of theatre, or play, which does not necessarily adhere to theatrical convention; it is also, clearly, about violence. In this Act, I shall look at the interplay between the violence of terrorism and the violence of law in the terror trials. I shall also look at the extent to which the theatre of dissent ‘plays’ with different forms of violence in order to disrupt the authority of the state. The different functions and roles of these two forms of cultural performance become apparent in light of their engagement with violence and with the state, their portrayal of difference, their exposure to mediatisation, and their relationship with truth and the ‘real’.

However, this is not only a comparative study. In Australia, the war on terror has led to the enactment of legislation which creates a connection between the theatre of dissent and the terror trials; it is now possible that we shall see the theatre of dissent on trial as a consequence of the enactment of the 2005 sedition laws. This particular interplay between law and play, namely the use of law as a mechanism of control to curb and punish expressions of dissent in political theatre, has attracted much criticism but is characteristic of the oppressive legislative regime which has been enacted as part of the war on terror. I shall conclude this Act by examining the phenomenon of theatre, or play, on trial.

Terrorism as play

John Orr and Dragan Klaic have described terrorism as a form of theatre which takes place on a shifting stage, with actors who are frequently invisible, an ‘involuntary’ audience, and an improvised, often catastrophic sequence of events. In fact, Orr describes terrorism as ‘a gruesome theatre of the unexpected’. On the other hand, Kubiak points out that although terrorism may resemble theatre, it is not theatre, and we should avoid conflating these terms.

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4 Anti-Terrorism Act (No 2) 2005 (Cth) sch 7.
6 John Orr ‘Terrorism as Social Drama and Dramatic Form’ in ibid 48.
7 Kubiak, above n 3, 158.
Aida Hozic also believes that it is misleading to describe terrorism as theatre. Instead, it is spectacle, in which irrational but conspicuous deeds of violence contend with the state’s own spectacles: its imposing display of power, authority and weaponry. \(^8\) Show trials form part of this spectacle of state power. She argues that spectacle is designed to separate audience and actors; as part of the symbolic weaponry of the state, it promotes social cohesion and reduces conflict. Theatre, on the other hand, ‘questions everything, reopens hidden conflicts and taboos, and attempts to mobilise, not satisfy, the audience.’ \(^9\) In Hozic’s view, the state viewed the original theatricality of terrorism as dangerous; terrorism was therefore ‘spectacularised’ by the state and its element of theatrical play deliberately eliminated in an attempt to contain its potential to radicalise its popular audience. \(^10\) Terrorists were ‘deprived of their human faces and presented as angry monsters’. \(^11\)

Other theorists have similarly alluded to the spectacular qualities of terrorism. Baudrillard, in commenting on the impact of the destruction of the World Trade Centre in New York in 2001, has written that terrorism has assimilated the weaponry of the state, including spectacle, \(^12\) and that the images of terrorism are the authentic version of the theatre of cruelty originally devised by Antonin Artaud. \(^13\) Kubiak argues in a similar vein that the September 11 attacks ‘mocked our deeply and historically ingrained desire for the spectacle, and for transfiguration through the spectacle’. \(^14\) Baudrillard argues that one cannot distinguish between the images of terrorism and counter-terrorism. \(^15\) However, Kubiak believes that there is an important difference between counter-terrorism, which could also be described as state terrorism, and anti-state terrorism; the former ‘depends upon the spectacular concealment of its violence’ while ‘anti-State terrorism depends upon the spectacular qualities of a visible violence’. \(^16\)

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8 Aida Hozic ‘The Inverted World of Spectacle: Social and Political Responses to Terrorism’ in Orr and Klaic, above n 5, 74.
9 Ibid 68.
10 Ibid 68, 70–74.
11 Ibid 73.
13 Ibid 30.
15 Baudrillard, above n 12, 31.
16 Kubiak, above n 3, 149.
The hypothesis that the terror trials are part of the spectacle of state power, arraigned against the spectacle of terrorism, raises an interesting question: is it appropriate or valid to focus on the performative, spectacular, or even theatrical qualities of the terror trials?

**Trials as play**

Without doubt, the trial has theatrical qualities, although there is occasionally resistance from court personnel and judges to the perceived theatricality of the trial process.\(^\text{17}\) Trials are often described and analysed in theatrical terms.\(^\text{18}\) According to Kubiak, some trials, like that of O J Simpson, are ineffective theatre, while others, like that of the ‘Oklahoma bomber’ Timothy McVeigh, work because they create an impression of authenticity which overshadows the trial’s performative elements.\(^\text{19}\)

Political playwrights and artists have long recognised and exploited the inherent theatricality of the trial. Arthur Miller drew on the transcripts of the Salem witchcraft trials in his indictment of state-orchestrated witch-hunts in his play *The Crucible.*\(^\text{20}\) Bertolt Brecht planned a theatre which would function like a courtroom and in which famous courtroom trials would be staged.\(^\text{21}\) Dario Fo’s theatre company frequently staged political trials within hours of the original hearings as ‘an alternative system of judicial inquiry.’\(^\text{22}\) Sometimes, these trials would pre-empt the state’s own dramatic performance of the following day.\(^\text{23}\) The tribunal plays produced by London’s Tricycle Theatre have included a re-enactment of the Nuremberg War Crimes Trial, and a mock trial of Prime Minister Tony Blair for crimes of aggression against Iraq. Even outside conventional theatrical settings, activists have used the apparatus of the mock trial to interrogate and challenge state policies and the actions of

\(^{17}\) In two recent examples, a sheriff’s officer pointed out that the court of Deputy Chief Magistrate Helen Syme was neither a café nor a theatre, when people tried to reserve seats at legal proceedings: Kate McClymont, ‘Einfield sent to trial on 13 charges’, *The Sydney Morning Herald* (Sydney), 14 December 2007, 3; and a majority of High Court judges ordered a re-trial on the basis that the re-creation of a hold-up during a District Court trial, in which the accused was asked to re-enact the role of the robber, was unfair: Jonathon Pearlman, ‘Robber disguise ruled unfair’, *The Sydney Morning Herald* (Sydney), 14 December 2007, 7.


\(^{19}\) Kubiak, above n 14, 19.


\(^{22}\) Ibid 194.

\(^{23}\) Ibid 193.
powerful politicians. In other contexts, satirists have turned courtrooms into theatres, utilising their own trial as a mechanism for powerful political commentary.

The theatrical elements of trials are self-evident. There are actors; there is live performance; there are costumes and even wigs, which have been compared to ‘the dancing masks of savages’, and there is an audience which extends beyond the courtroom as a consequence of media coverage. In addition to such superficial similarities, there are more profound connections between the ‘laws of theatre and the theatre of law’, as Kubiak has argued: in their relationship to representation and their claim to truth.

As Foucault has demonstrated, the trial and the sentence have increasingly attracted public interest in a world in which punishment is no longer the spectacle. There is no doubt that the trial forms part of the political performances which are central to the operation of modern democracies, and as Kershaw observes, it is both useful and instructive to analyse political performances. The theatrical and performative aspects of the terror trials invite comparison with other forms of theatre and cultural performance, and such comparisons in turn expose the limitations in legal performances. Elin Diamond has written that ‘critique of performance (and the performance of critique) can remind us of the unstable improvisations within our deep cultural performances; it can expose the fissures, the ruptures and the revisions that have settled into continuous re-enactment.’

The context: The war on terror

Before I consider case studies of the cultural performances in the terror trials and the theatre of dissent, I shall firstly look at the nature of that somewhat paradoxical phenomenon, the war on terror. It is, after all, the war on terror which has provided the context and subject matter for these performances. Rodney Allan points out that, in commencing a war on terror, the

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24 Ibid 200–1, 207.
27 Kubiak, above n 3, 29.
28 Ibid 28.
31 Ibid 256.
United States President George Bush in effect declared war on an abstract noun; many commentators have alluded to the subjectivity with which this abstract noun is applied selectively to acts of violence. In initiating a war on terror, the United States and its allies have drawn a distinction between war and terror, and between war and terrorism. This is inherently paradoxical because ‘on any reading, war is terror’ and, furthermore, the war on terror can itself be portrayed as ‘anti-terrorism terrorism’. Yet in the war on terror, terrorism is subjectively defined and the application of the term is a value-laden process, which enables us to distinguish bad or illegitimate violence from good or legitimate violence.

Chomsky argues that in practice, ‘terrorism is the violence that they commit against us’ and that ‘since the powerful determine what counts as history, what passes through the filters is the terrorism of the weak against the strong and their clients’. Similarly, Judith Butler observes that terrorism is the term used to ‘describe the violence of the illegitimate’; it is the ‘violence waged by, or in the name of, authorities deemed illegitimate by established States’. However, there is no doubt that many states commit acts of violence, and that such acts are not deemed acts of terrorism by such states, but are justified in terms of self-defence, and protection of their fundamental values. Indeed, many aspects of United States foreign policy such as its support of Saddam Hussein’s government and its actions in Nicaragua suggest that the United States could be described as ‘the biggest terrorist’ of all.

The selective application of the term ‘terrorism’ allows governments to distinguish between legitimate and illegitimate forms of violent resistance to oppressive regimes. Some of the difficulties in distinguishing legitimate acts of resistance from acts of terrorism are highlighted in relation to the Jewish resistance in World War II. Vivian Patraka, while reflecting on the historical narrative of the Holocaust constructed by the United States

34 Hocking, above n 2, 10.
35 Allan, above n 33, 157.
36 Ibid 158.
40 Ibid.
41 Allan, above n 33, 158.
Memorial Holocaust museum, was struck by the different account offered by two other visitors to the museum. Both visitors had been involved in Jewish resistance in rural Poland, and they were critical of the museum’s narrative, arguing that the emphasis was on victimisation rather than resistance. One of the museum’s exhibits was a freight car used to deport Jews. However, they remembered planting explosives which blew up German trains. This part of the story of the Holocaust was not told by the Museum. Patraka concluded that the Museum has ‘displaced representations of acts of resistance by Jews in order to embed its narrative in the frame of American liberation.’

This analysis is particularly disturbing in light of the current violence in the Middle East, and United States support for the acts of violence committed by Israel against the Palestinians. The narrative of victimhood has political ramifications. Finkelstein is concerned that this narrative bestows a ‘blamelessness’ upon both Israeli and American Jews which protects them from criticism; indeed, Judith Butler compares the monopoly on victimhood claimed by the United States in the war on terror with Israel’s deployment of a victim narrative to deflect criticism of its own military violence against Palestine. Butler deplores ‘the vocation of the paranoid victim who regenerates infinitely the justifications for war,’ and argues that acts of violence committed by Israelis, as well as violent acts directed against Israelis, should be open to criticism and challenge.

In looking at the implicit moral judgements and subjectivity in the application of the term ‘terrorism’, it is revealing that members of the Jewish resistance are not portrayed as terrorists in the historical narrative of the Holocaust whereas, today, resistance to oppressive regimes on the part of Muslim people is ‘viewed with heightened suspicion’ and tends to attract the label of terrorism.

The term ‘terrorism’ can be, and is indeed used as, a powerful political weapon. It has the ‘capacity to denigrate and dehumanise those at whom it is directed’. It is politically useful in

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45 Ibid.
47 Butler, above n 39, 103.
48 Ibid 150.
49 Ibid 103.
50 Joseph, above n 43, 435.
51 Saul, above n 37, 2.
that its selective application targets particular acts of violence for condemnation and punishment, whereas other violent acts with terrorist characteristics are condoned.\textsuperscript{52}

The selective application of the term ‘terrorism’ highlights the problematic relationship which every state has with violence. Rene Girard has observed that the distinction between good and bad violence is fundamental to human society. He points out that ‘evil and the violent measures taken to combat evil are essentially the same,’ but every society persists in maintaining a largely illusory distinction between so-called beneficial violence, which is positive and desirable, and so-called harmful violence, which is not.\textsuperscript{53} Terrorism is the revolutionary violence which in Derrida’s analysis has no legitimacy until it succeeds in establishing a new state. Derrida, in his highly influential reading of Walter Benjamin’s \textit{Critique of Violence},\textsuperscript{54} has written that ‘the foundation of all States occurs in a situation that we can thus call revolutionary. It inaugurates a new law, it always does so in violence.’\textsuperscript{55} Yet as Girard notes, the violent origins of human culture are rarely acknowledged or recognised.\textsuperscript{56} Terry Eagleton has utilised an appealing metaphor in articulating this point: ‘like a hippie applying to law school, power must disown its transgressive past.’\textsuperscript{57}

All states, therefore, have their foundation in acts of terrorism, which can be equated with rebellion and revolution; in this sense, such acts transcend ordinary criminality. Acts of terrorism originate in political conviction, and an alternative vision of political and social reality to that provided by the state.\textsuperscript{58} By contrast, the acts of violence that are committed by the state in maintaining its authority through the exercise of law are acts of ‘conserving violence’. Derrida explores the distinction made by Benjamin between founding violence, ‘the one that institutes and positions law’, and conserving or ‘law preserving violence’, which ‘maintains, confirms, insures the performance and enforceability of law’.\textsuperscript{59}

\textsuperscript{52} Allan, above n 33, 157.
\textsuperscript{55} Jacques Derrida, ‘Force of Law: The “Mystical Foundation of Authority”’ (Mary Quaintance trans) in Drucilla Cornell, Michel Rosenfeld and David Gray Carlson (eds), \textit{Deconstruction and the Possibility of Justice} (1992) 35.
\textsuperscript{56} Rene Girard, \textit{The Scapegoat} (Yvonne Freccero trans, 1986) 100.
\textsuperscript{59} Derrida, above n 55, 31.
Terrorism represents a challenge to law preserving violence, to law’s assertion of its monopoly over violence. Terrorist acts highlight the moral relativism which inheres in the state’s violent response to violence. Fiona Jenkins has argued that:

The terrorist action might perhaps be said to assert the equivalence of all violence by staging a kind of anti-sacrifice, one improperly conducted, on improper victims, by those who have no right to do so. At the same time, a kind of anti-juridical logic is invoked, again damaging the claim to transcendence of the ‘proper’ authority, by seizing illicitly from the powers to monopolize it, a right to exercise violence based upon the claim not to have been heard or to have been otherwise treated unjustly.60

Terrorism therefore presents a dilemma for the state;61 the state, and its apologist, the courts, must respond to such challenges by asserting their sole right to invoke violence as a legitimate response to violence. In this context the terror trials represent and exemplify law preserving violence. They are a form of cultural performance designed to uphold the authority of the state, and affirm its unique prerogative to claim legitimacy for violent responses to violence.62

In the following analysis of the terror trials, I shall consider the extent to which they succeed in this.

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61 Ibid.
62 See Girard, above n 53, 23.
Chapter 2

Trials and non(trials):
Legal performances in
the War on Terror

Performances can be celebratory; performances can terrorize. Many trials and public executions are both.¹

At the time of writing (2006–2007), a number of terror trials were under way and some had already taken place. In this chapter, I consider two significant trials and one infamous (non)trial. I selected the first trial of Saddam Hussein and his co-defendants as one of these case studies; the legal performance of this trial highlights the complex relationship between multiple types of violence, and multiple forms of play. It was also an obvious choice because of the many media references to its theatricality. The other trial, that of Abu Hamza in England, attracted my attention because it suggested that certain performances have been criminalised in the war on terror. Finally, in the war on terror, the (non)trial of David Hicks, as an extra-legal (rather than legal) performance which was repeatedly postponed and finally derailed by a guilty plea, cannot be ignored. Generally, the treatment of the Guantanamo Bay detainees suggests that indefinite detention without trial is as much a feature of the war on terror as is the highly mediatised terror trial.

In the next chapter, I focus on the legal performance of the Australian terror trials. Of these, I chose to look at the first trial of Jack Thomas in Australia but have also considered contemporaneous Australian terror trials, in particular, that of Faheem Khalid Lodhi.

Since my interest is in the trials as performance, and the effectiveness of the terror trials as performance is largely dependent upon the mediatisation of these performances, I have relied upon media reports about the trials. However, I have also looked at judgments and rulings in the context of the Australian terror trials.

Violence and play in the trial of Saddam Hussein

In 2006, the first Iraqi trial of Saddam Hussein and his seven co-defendants was undeniably the most publicised trial, the show trial, in the war on terror. The first trial of Saddam and his co-defendants, and the executions which followed the trial, have met with strong criticism from various groups and individuals concerned about procedural flaws and unfairness, as well as from governments and groups opposed to the application of the death penalty. Critics of the trial process include Human Rights Watch, an international human rights organisation which consistently monitored the trial proceedings. Human Rights Watch has argued that the trial process was fundamentally flawed, with significant administrative, procedural and substantive legal defects; these defects detract from the credibility of the trial and from its value as part of the historical record of human rights violations under Saddam’s government.

My focus is not on the defects in the trial process. I am interested, rather, in the themes of violence and play, in the extent to which multiple acts of violence surrounded, supported, justified, corroded and were judged in the trial process, and in the central role of different forms of play in this process. Play, in the form of ceremony or spectacle, is integral to the administration of state violence. However, Saddam’s trial also demonstrates the possibilities in play as an antidote to such violence, as a subversive device which can disrupt and undermine the ordered performance of law-conserving violence.

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2 This trial was followed by a second trial, which began in August 2006 before the verdict had been handed down in the first. In the second trial, Saddam and his co-defendants faced charges of genocide in relation to a 1988 campaign against the Kurds, which involved chemical warfare, military assaults, and the destruction of entire villages. Saddam was executed in December 2006, before the second trial ended. The trial of his co-defendants continued after his death.


5 Ibid.

6 Ibid 3.
Violence and play

I shall explore the multiple manifestations of violence in Saddam’s trial by drawing on Walter Benjamin’s distinction between lawmaking violence, and law-preserving violence. Saddam’s trial forms part of the characteristic interplay between these two forms of violence, or what Benjamin described as ‘the dialectical rising and falling’ in these forms of violence. In this ‘oscillation’, lawmaking violence contributes to the origin of every state, which then exercises law-preserving violence in ‘suppressing hostile counterviolence’. Eventually, when ‘new forms of those earlier suppressed triumph over the hitherto lawmaking violence and thus found a new law’, the cycle continues.

The foundation of all states lies in acts of violence which could well be interpreted as acts of terrorism by the displaced regime; if, however, such acts are successful in achieving political revolution, they acquire a belated legitimacy. Derrida, in his influential reading of Benjamin’s essay, has described the moment of the foundation of each state as ‘the ungraspable revolutionary instant’, a moment in which no law applies. Subsequently, each state will construct the ‘proper interpretative models’ to confer legitimacy upon these revolutionary acts of lawmaking violence, and thus affirm its own legitimacy. However, the state will remain fearful of similar acts of ‘fundamental founding violence’ on the part of others which will, if successful, ‘transform the legal relations of law’ and ‘present itself as having a right to know’.

Acts of ‘fundamental founding violence’ can be labelled acts of terrorism, acts of revolution or acts of rebellion, and differ markedly from acts of ordinary criminality. There is ‘a willingness not only to die but also to kill for an understanding of the normative future that differs from that of the dominating power’. They can be distinguished from acts of law-preserving violence, in which the state reinforces its position through legally authorised

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8 Ibid 251.
9 Ibid.
10 Jacques Derrida, ‘Force of Law: The “Mystical Foundation of Authority”’ (Mary Quaintance trans) in Drucilla Cornell, Michel Rosenfeld and David Gray Carlson (eds), *Deconstruction and the Possibility of Justice* (1992) 41.
12 Ibid 36.
13 Ibid 35.
violence. In Saddam’s trial, such acts were judged and condemned by a new government, through a complex legal ritual which culminated in the spectacular violence of the death penalty.

Derrida contests the viability of Benjamin’s distinction between lawmaking and law-preserving violence\(^\text{15}\) and, indeed, Benjamin himself analysed situations in which both types of violence were simultaneously displayed. In particular, Benjamin argued that capital punishment encapsulated not merely law-preserving violence, but also lawmaking violence; in capital punishment, ‘law reaffirms itself’.\(^\text{16}\) Saddam’s trial can be perceived as an exercise of law-preserving violence by a new regime, but takes on an added significance as a legal performance deliberately designed to validate the revolutionary violence and ongoing bloodshed of the Iraqi war. The trial is part of what Derrida described as ‘the discourse of [the new state’s] self-legitimation’;\(^\text{17}\) the Tribunal’s authority was derived from the continuing acts of violence of the Iraqi war and its aftermath, but at the same time, the trial was intended to confer legitimacy upon these acts by demonstrating the excessive criminality of the deposed leader. Thus, the trial can be seen as part of the lawmaking violence which established the new Iraqi state.

Derrida recognises the centrality of performance in lawmaking violence, and in law-preserving violence. The founding moment of law is distinguished by a ‘pure performative act that would not have to answer to or before anyone’;\(^\text{18}\) terrorism, revolution and rebellion exemplify performance in the form of spectacular violence. Yet performance is also central to law’s self-validating practices, as Derrida suggests in his ‘performative tautology’. This tautology ‘structures any foundation of the law upon which one performatively produces the conventions which guarantee the validity of the performative, thanks to which one gives oneself the means to decide between legal and illegal violence.’\(^\text{19}\)

Play in the form of the ceremony of the trial is integral to the administration of law-preserving violence, and the state-directed performance of Saddam’s trial exemplifies this form of play. Yet play, like violence, can have multiple functions. In analysing manifestations of play in

\(^{15}\) Derrida, above n 10, 38.
\(^{16}\) Benjamin, above n 7, 242.
\(^{17}\) Derrida, above n 10, 36.
\(^{18}\) Ibid 36.
Saddam’s trial, I shall distinguish between two forms of play. Roger Callois argued that at one end of the spectrum of play is rule-bound play, or ludus, which is distinguished by ‘arbitrary, imperative and purposely tedious conventions’. Trials and other legal performances display many of the characteristics of this form of play. Mihai Spariosu calls this rational play. At the other end of the spectrum, however, is a very different form of play, ‘frolicsome and impulsive’, ‘anarchic and capricious’ and distinguished by ‘diversion, turbulence, free improvisation and carefree gaiety’; Callois calls this paedia, and Spariosu describes it as pre-rational play. It could also be described as playfulness. In Saddam’s trial, this form of play was deployed by the defendants in response to the law-preserving violence of the state. I am interested in exploring, in the context of Saddam’s trial, the viability of this form of play as an antidote, or a mechanism of challenge, to the law-preserving violence of the state.

The violence of the trial

As I have argued above, the tribunal which tried Saddam relied for its authority on acts of founding violence, the continuing acts of violence of the Iraqi War and its aftermath, which the trial was designed to legitimise. Saddam’s government, however unpopular, was forcibly overthrown in an invasion carried out by the United States and its allies in 2003, and a new Iraqi government, which includes the Iraqi High Tribunal, was established by force. The violence was ongoing outside the heavily guarded parameters of Baghdad’s Green Zone, within which the trial took place. In fact, according to one media report, an Iraqi citizen commented that ‘we don’t really care about the trial though, because the security situation and the massacres now are much worse than under Saddam. They make this massacre (in Dujail) look like child’s play.’ By November 2006, the trial and executions were described as ‘a sideshow’, ‘unable to influence the Iraqis who have turned on each other as well as on coalition soldiers’.

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19 Ibid 33.
20 Roger Callois, Man, Play and Games (Meyer Barash trans, 1979) 13.
22 Callois, above n 20, 13.
Saddam and his co-defendants consistently drew to the attention of the Tribunal the violence which established the new regime, and argued that the regime had no legitimacy. At the outset, Saddam stated that ‘I reserve my constitutional rights as the President of Iraq’ and went on, ‘I don’t recognise the group that gave you the authority and assigned you. Aggression is illegitimate and what is built on aggression is illegitimate.’

In the course of the proceedings, he repeatedly insisted that he was the current President of Iraq and referred to court guards as ‘invaders and occupiers’. He criticised the current Iraqi government for failing to deal effectively with sectarian violence, and when called to give evidence, encouraged the Iraqi people to resist ‘the American-Zionist invasion’ instead of engaging in civil war. Even as the Chief Judge of the Iraqi High Tribunal handed down his death sentence, he was still referring to the Americans as ‘traitors’ and ‘invaders’ and calling for their downfall.

In questioning the authority of the Tribunal, its legitimacy and the legitimacy of the United States invasion which installed the current government, Saddam was highlighting the underlying violence of the trial process but furthermore, was engaged in a futile attempt to contest what could not be contested in that courtroom. The judge repeatedly told Saddam to stop raising political matters when Saddam gave testimony for the first time. The Iraqi High Tribunal was not an appropriate forum within which Saddam could challenge the legitimacy of the founding acts of violence which conferred authority upon it. In refusing to acknowledge and examine these acts of founding violence, the Tribunal was demonstrating the wilful inattention of every legal system to the violence of its origins. Drucilla Cornell has written that ‘what is “rotten” in a legal system is precisely the erasure of its own mystical foundation of authority so that the system can dress itself up as justice.’

26 Simon Freeman, ‘Court hears first evidence against Saddam’, The Times (London, United Kingdom), 28 November 2005 <http://www.timesonline.co.uk>.
29 Dave Clark, ‘Saddam sentenced to hang’, The Sydney Morning Herald (Sydney), 6 November 2006, 1.
30 MacAskill, above n 28.
An international court might have provided an appropriate forum in which such questions could be raised, but Saddam’s trial took place in Iraq, possibly because, as Gwynne Dyer has observed, trying Saddam before an international court ‘would have brought up all sorts of awkward history from the days when the United States and Saddam were effectively allies.’ Instead, the acts of violence on the part of the Western nations in imposing sanctions and waging war on Iraq, and the support which Western nations provided for Saddam’s own acts of violence, were ignored by the Iraqi tribunal. The theatre of the Iraqi trial focused the world’s attention on the misdeeds of a few individuals. In this performance, Saddam was constructed as a scapegoat or, as Terry Eagleton has put it, ‘the figure whom it is impossible to look upon and live,’ ‘who stands for everything that is structurally awry, alienated and exploitative in the polis, onto whom society projects and displaces and disavows its own crimes’. According to Eagleton, the scapegoat is ‘the inverted image of the monarch’, a description which aptly fits the deposed tyrant.

Saddam’s trial not only derived its legitimacy from acts of violence but, in addition, was itself part of a process which was intended to, and did, culminate in the violence of capital punishment. The Chief Prosecutor asked for this penalty against Saddam and three of his co-defendants, on the basis that they were guilty of crimes against humanity. Saddam and two of his co-defendants, Barzan Ibrahim al-Tikriti and Awad al-Bander, received death sentences and were executed in December 2006 and January 2007. The availability of the death penalty is thought to have been another factor in the decision to try Saddam in Iraq. In fact, in order to facilitate the execution, the Tribunal’s rules were changed prior to the trial to lower the standard of proof required, and to require execution within thirty days of judgment, a time frame which made official intervention in the death sentence difficult.

The defendants claimed during the course of the trial that they had already been subjected to acts of violence. In the courtroom, Saddam accused United States soldiers of beating him, and Barzan Ibrahim al-Tikriti argued that denial of appropriate medical treatment was ‘indirect

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35 Bronwen Maddox, ‘Cathartic effect could be more valuable than simple justice’, The Times (London, United Kingdom), 20 October 2005, 7.
murder\textsuperscript{36}; he claimed that ‘I am dying gradually and you are killing me.’\textsuperscript{37} However, such acts of violence were overshadowed by the ultimate demonstration of state violence in the form of capital punishment, acts of state murder which are justified, as Dwight Conquergood has argued, as ‘a form of “poetic justice,” a “revenge tragedy” that operates on the principle of mimetic magic: the belief that only violence can cross out violence.’\textsuperscript{38} Robert Cover has described capital punishment as ‘the most plain, the most deliberate, and the most thoughtful manifestation of legal interpretation as violence’.\textsuperscript{39}

Conquergood, in analysing the dramaturgy of capital punishment, has described how ‘protocols of civility’ and the ‘pretense of courtesy’ are designed to conceal ‘the real violence of state killing’.\textsuperscript{40} Such protocols and pretences also operate in the trial process, in which the violence of execution is not conceded or addressed by the judge or prosecution. In contrast, Saddam and his co-defendants openly alluded to their executions. In December 2005, Saddam stated that ‘I live in an iron cage covered by a tent under American democratic rule. The Americans and the Zionists want to execute Saddam Hussein.’\textsuperscript{41} One of his co-defendants asked the court, ‘Why don’t you just execute us and get this over?’\textsuperscript{42} As Robert Cover has explained, the judge and the defendant, as ‘perpetrator and victim of organised violence’, have ‘achingly disparate significant experiences’.\textsuperscript{43} He continues:

For the perpetrators, the pain and fear are remote, unreal and largely unshared. They are, therefore, almost never made a part of the interpretative artefact, such as the judicial opinion. On the other hand, for those who impose the violence, the justification is important, real and carefully cultivated. Conversely, for the victim, the justification for the violence recedes in reality and significance in proportion to the overwhelming reality of the pain and fear that is suffered.\textsuperscript{44}

\textsuperscript{36} Freeman, above n 26.
\textsuperscript{37} Simon Freeman, ‘Saddam Trial Descends into Chaos’, \textit{The Times} (London, United Kingdom), 13 February 2006 <http://www.timesonline.co.uk>.
\textsuperscript{39} Cover, above n 14, 1622.
\textsuperscript{40} Conquergood, above n 38, 360.
\textsuperscript{41} Stephen Farrell, ‘Pistol whippings, electric shocks and a virtuous woman’s testimony’, \textit{The Times} (London, United Kingdom), 7 December 2005, 35.
\textsuperscript{43} Cover, above n 14, 1629.
In delivering its verdict, the Iraqi High Tribunal displayed the preserving or conserving force of law. In that sense, the violence which characterised the trial process and the executions of three of the defendants is analogous to the violence which was under scrutiny in the courtroom: the acts of violence of which Saddam and his seven co-defendants were accused.

In the first trial, Saddam and his co-defendants were accused of the torture of an unspecified number of people in Dujail from 1982, following an unsuccessful assassination attempt on Saddam. Of a group of 148 people, an uncertain number who survived detention and interrogation were executed after a summary trial before the Revolutionary Court. The evidence in relation to these acts of violence was profoundly disturbing. Many witnesses, fearful of the ramifications of giving evidence, concealed their identity behind curtains and masks. The acts they described comprise only a small number of the many incidents of violence which characterised Saddam’s regime as President of Iraq. There is no doubt that Saddam and his co-defendants were the perpetrators of abhorrent deeds. The human rights violations orchestrated and carried out by Saddam’s Ba’thist government amounted to international crimes, including genocide, crimes against humanity and war crimes.

However, as Saddam argued in the courtroom, the exercise of force in Dujail can be seen as the ‘law preserving violence’ which ‘maintains, confirms, insures the permanence and enforceability of law’. It was the retaliatory response of a government under attack. In the courtroom, Saddam asked why ‘referring a defendant who opened fire at a head of state’ was a crime. He claimed responsibility as leader for the deeds of which he was accused, admitting that he signed all relevant documents in relation to the executions, and pointing out that his actions were legitimate at the time. He argued that ‘these people were charged according to the law, just like you charge people according to the law.’

The executions could be seen as a legitimate exercise of law-preserving violence under Saddam’s regime; similarly, the trial and executions of Saddam and two of his co-defendants following the verdict of the Tribunal can also be seen as a legitimate exercise of law-

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44 Ibid.
45 Human Rights Watch, above n 3, 2, 7.
46 Ibid 3.
47 Derrida, above n 10, 31.
preserving violence under the new regime. Eagleton has argued that ‘there is a collusion between those who operate the law or embody it, and those who transgress it’, in the sense that ‘they both fall outside of it’.\textsuperscript{50} This collusion, and the extent to which these roles are interchangeable, are apparent in the trial of Saddam. The similarities in the exercise of law-preserving violence under both regimes highlight the paramount role of all law-preserving violence in ‘suppressing hostile counterviolence’, even though this function undermines ‘the lawmaking violence it represents’,\textsuperscript{51} and reinforce Benjamin’s point that a primary focus of the law is to maintain its ‘monopoly’ on violence.\textsuperscript{52}

However, it is difficult to distinguish between lawmaking violence and law-preserving violence in the context of Saddam’s trial; this conflation illustrates Derrida’s argument that there is no ‘pure founding violence’, no ‘purely conservative violence’.\textsuperscript{53} Saddam’s trial involved the exercise of law-preserving violence, but it was also part of the justificatory apparatus designed to validate the foundation of a new Iraqi state, by conclusively demonstrating the criminality of Saddam and his co-defendants, and highlighting the evils of the previous regime. Saddam’s trial and execution were critical performances for the new state in asserting its supremacy over the old regime, and establishing the necessity for its violent demise. Yet it is clear from the acts of revolutionary violence which destabilised and undermined the trial that the foundation of the new Iraqi state is still violently contested. The value of the trial as part of the new state’s ‘discourse of … self-legitimation’,\textsuperscript{54} as a legal performance which sought to validate the violent origins of the new state, is thus debatable.

These acts of revolutionary violence corroded the trial process even before the trial began. By the time the trial commenced, at least five people working in the court had been killed.\textsuperscript{55} According to Gwynne Dyer, seven people associated with the trial were assassinated between October 2005, when the trial began, and the end of January 2006.\textsuperscript{56} Two of these were defence lawyers. In June 2006, another defence lawyer, Khamis al-Obeidi, was abducted from his house and shot.\textsuperscript{57} Saddam’s chief lawyer, Khalil al-Duleimi, claimed to have received

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\textsuperscript{50} Eagleton, above n 33, 43.  
\textsuperscript{51} Benjamin, above n 7, 251.  
\textsuperscript{52} Ibid 239.  
\textsuperscript{53} Derrida, above n 10, 38.  
\textsuperscript{54} Ibid 36.  
\textsuperscript{55} Human Rights Watch, above n 3, 20.  
\textsuperscript{56} Dyer, above n 32.  
\end{flushright}
many death threats.\textsuperscript{58} Witnesses and court officials were also murdered.\textsuperscript{59} The failure on the part of the court administration to protect defence counsel was identified by Human Rights Watch as a significant flaw in the proceedings.\textsuperscript{60}

This additional violence, directed against participants in the trial process, demonstrated a profound resistance to the exercise of law and was analogous to the revolutionary acts of resistance in the failed assassination attempt, and to the violence which established the new regime in Iraq and conferred authority on the Tribunal. This particular violence exposed the vulnerability of the underlying ‘structure of cooperation’ which Robert Cover describes as essential to the effective imposition of a sentence in a criminal case. This structure ‘ensures, we hope, the effective domination of the present and prospective victim of state violence – the convicted defendant.’ However, in situations of ‘ineffective domination’, ‘the role of judge becomes dangerous, indeed’.\textsuperscript{61} In fact, the chief judge stepped down from his role in January 2006.

**Play in Saddam’s trial**

The value of the trial and execution as legal ceremonies which reinforced the authority of the new regime was further undermined by play. In Saddam’s trial, we find both rule-bound play directed by the state and, unexpectedly, the unpredictable, arbitrary and capricious form of play which Callois has characterised as paedia, and Spariosu as pre-rational play. The appearance of the latter form of play in Saddam’s trial caused media commentators to invoke theatrical comparisons in describing the trial.

The rule-bound orderly play of legal performance is an essential part of the administration of law-preserving violence by the state. Saddams’ trial was a necessary ceremony which was intended to differentiate Saddam’s own execution from the executions ordered and orchestrated by Saddam and his co-defendants. In reflecting on the theatrical nature of the trial, it is surely of interest that the Iraqi judges and prosecutors were supposedly trained in Britain for their roles with the use of ‘simulated’ trials, ‘fictional scenarios’ and ‘a

\textsuperscript{58} Hala Jaber, ‘Fearful lawyers threaten boycott of Saddam trial’, *The Sunday Times* (London, United Kingdom), 23 October 2005, News 27.

\textsuperscript{59} Paul McGeough, ‘Hell moves a step closer’, *The Sydney Morning Herald* (Sydney), 6 November 2006, 14.

\textsuperscript{60} Human Rights Watch, above n 3, 24.

\textsuperscript{61} Cover, above n 14, 1618.
hypothetical commander’. 62 Rehearsals of the trial took place well before the theatre of the trial commenced.

The theatre of Saddam’s trial was largely orchestrated by the United States. In 2004, the United States director of the war crimes regional office, Professor Michael Scharf, identified the role of the United States in Saddam’s trial as that of ‘puppet master’. 63 One commentator described the courtroom during the first hearing as ‘filled with US military personnel dressed in civilian clothes’ and notes that journalists were vetted by United State authorities, which also censored the sounds and images which were released to the outside world. 64 According to an American member of Saddam’s defence team, the United States government poured hundreds of thousands of dollars into the prosecution case, overviewed all materials brought into the visiting room by the defendants and their lawyers, and maintained close audio and visual surveillance of the defendants during their meetings with their lawyers. 65 A censored version of the trial proceedings was broadcast by a United States company. 66

As Conquergood has observed, ‘the central performance challenge of execution rituals is to differentiate between judicial killing and murder’. 67 In Sarat’s words, ‘show, spectacle, theatre … are central to the rituals of state killing.’ 68 Conquergood refers to ‘regular rehearsals, precise stage directions and obsessive planning and detail’, 69 to ‘protocols of civility’ and the ‘pretence of courtesy’. 70 The ‘private’ moments of execution are characterised by rule-bound play, as is the legal performance of the trial.

Yet the state lost partial control over the performance of Saddam’s death, and the ‘protocols of civility’ and ‘pretense of courtesy’ were conspicuously absent from Saddam’s execution. Prior to the execution, the Iraqi National Security Adviser Mowaffa al-Rubaie announced that

62 Richard Beeston and Francis Gibb, ‘Saddam trial judges were secretly trained in Britain’, The Times (London, United Kingdom), 18 October 2005, 33.
63 Anthony Scrivener, ‘Saddam’s Trial: The US wanted a showcase, but it’s staging a dangerous farce’, The Independent (United Kingdom), 4 July 2004, 12.
67 Conquergood, above n 38, 360.
68 Quoted in ibid 340.
69 Ibid 362.
70 Ibid 360.
no media would be present and that it was unlikely that the official videotape of the execution would be released.\footnote{James Glanz, ‘Saddam may be hanged today, says lawyer’, \textit{The Sydney Morning Herald} (Sydney), 30–31 December 2006, News 9.} Despite such assurances, the executions instantly became a public spectacle due to illegal footage from mobile phone cameras which was broadcast across the world. This footage demonstrated quite graphically that there was nothing civilised or decorous about the behaviour of the representatives of the state who witnessed and carried out Saddam’s execution. Although officially released silent pictures portrayed ‘a much more subdued and dignified event’,\footnote{Paul McGeough, ‘Saddam dead, but no relief for Bush’, \textit{The Sydney Morning Herald} (Sydney), 1 January 2007, 1, 7.} the illegal footage revealed that Saddam was publicly taunted by his hooded executioners. The scene in the death chamber was described as one of ‘sordid chaos’.\footnote{Editorial, ‘After the hanging, what now?’, \textit{The Sydney Morning Herald} (Sydney), 2 January 2007, 8.} In contrast to his masked, jeering executioners, Saddam remained unhooded, composed and dignified.

The execution attracted worldwide criticism from opponents of the death penalty, from Islamic leaders who were critical of the decision to execute Saddam on a Muslim religious holiday,\footnote{Ashraf Khalil, ‘Islamic leaders decry timing of execution’, \textit{The Sydney Morning Herald} (Sydney), 1 January 2007, 7.} and from those who were concerned about the failure to observe procedural fairness in the conduct of the trial, and procedural niceties in the conduct of the execution. The execution constituted part of what Foucault has described as ‘the great spectacle of physical punishment’, which was replaced by ‘sobriety in punishment’ at the beginning of the 19\textsuperscript{th} century.\footnote{Michel Foucault, \textit{Discipline and Punish. The Birth of the Prison} (Alan Sheridan trans, 1977), 14.} Although it is not the only contemporary performance in a ‘resurgent theatre of death’,\footnote{Conquergood, above n 38, 342.} the Iraqi government did not meet the ‘central performance challenge’ of such rituals;\footnote{Ibid 360.} the government failed to create ‘the illusion of order, inevitability, procedure, due process’\footnote{Ibid 361.} and inadvertently allowed images of chaos and disruption to be broadcast around the world. Images of the spectacle penetrated even the sealed world of Guantanamo Bay where, according to the United States military, they were designed for the ‘intellectual stimulation of the detainees’.\footnote{Tom Allard, ‘Pictures of dead Saddam used to stimulate Hicks’, \textit{The Sydney Morning Herald} (Sydney), 3–4 February 2007, News 2.} Far from being a ‘private [performance] for a small, homosocial, invitation-only audience of elites’,\footnote{Conquergood, above n 38, 343.} in accordance with the modern rituals of
execution, the execution was, as human rights lawyer Geoffrey Robertson had predicted, ‘an obscene spectacle’.  

Nor did Saddam’s trial provide a convincing legal performance. Instead, the trial was described by media commentators as ‘a zoo’, ‘a French farce’, ‘a black comedy’, a ‘circus’, a ‘soap opera’ and most frequently, as theatre. One journalist argued that the trial was ‘a surreal piece of theatre’ and Saddam was playing ‘the role expected of him each time the curtain goes up’. Another commentator wrote that ‘there is no doubt about Saddam’s guilt, but the process that confirmed it, and the political and military clowns who starred throughout, are more like scenes and characters from the Barnum and Bailey circus.’

The legal performance of the trial, the rule-bound play which was critical to the validation of the new regime, was undermined by the defiant antics of the defendants. Here we find play in the form of playfulness, as a response to state violence. The defendants enlivened the trial with an apparently consistent flow of abusive and disrespectful comments. Saddam suggested to the chief judge, ‘Why don’t you hit your own head with the hammer?’ and told him, ‘God damn your moustaches.’ He commented that the interior minister ‘doesn’t scare my dog.’ He described the trial as a ‘game’ and ‘a comedy’, and declared, ‘A pox on Bush and his father.’ Saddam’s defiance was apparent when the verdict was read out in the courtroom, and even immediately before his execution. Barzan al-Tikriti was dragged from the court...

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82 See Dyer, above n 32, for all three descriptions.
83 Peter Quayle, ‘New ringmaster won’t let Saddam’s trial be a circus’, The Times (London, United Kingdom), 7 February 2006, Law 4.
85 Ibid.
86 McGeough, above n 59.
87 Brain, above n 84.
88 Freeman, above n 37.
90 Antony Loyd, ‘You are ignorant of the law, says Saddam to judge’, The Times (London, United Kingdom), 14 February 2006, 34.
93 Oliver Poole, ‘One last smile of defiance’, The Sydney Morning Herald (Sydney), 7 November 2006, 7.
94 Sudarsdn Raghavan, ‘Saddam’s brutal days finally end in fraction of a second’, The Sydney Morning Herald (Sydney), 1 January 2007, 7.
kicking and yelling after describing it as ‘the daughter of a whore’. The defendants repeatedly denounced the Tribunal, the judges and the United States. According to Human Rights Watch, the corresponding outbursts from the presiding judge amounted to ‘lapses in judicial demeanour’. The defendants and their lawyers were evicted and on occasion, the defendants and their lawyers walked out, leaving the trial to continue in their absence. They were also forcibly returned to court. The appearance of Barzan al-Tikriti in what was described in some reports as long underwear and in others as pyjamas prompted one commentator to refer to the trial as theatre with ‘costume changes’, ‘plot twists’ and ‘one-liners’, and disconcertingly invoked the appearance of entertainer Michael Jackson at his own trial in 2005 in slippers and pyjamas.

While the United States was responsible for the theatrical edifice of the trial, the defendants exposed its theatrical character with their disruptive antics and constant assertions that they did not recognise the Tribunal’s authority. This suggested to the watching world that the Tribunal’s authority was recognised only by those who chose to recognise it, and that therefore the trial was more properly characterised as spectacle backed by force. The actions of Saddam and his co-defendants deliberately disrupted the façade of order and procedure which the state had constructed. Playfulness derailed the rule-bound play of legal performance and undermined its authority.

Yet how effective is this form of play as a response to state-administered violence? In 1975, members of the Baader-Meinhof group, who were accused of terrorism, employed a similar strategy. During their trial, they directed a constant flow of insults and accusations at their accusers, resorted to ‘disruptive devices’, and frequently left the courtroom. The result, according to John Orr, was ‘modernist melodrama, a fractured Theatre of the Absurd rather than a Hollywood spectacular’. In his view, these tactics were ‘self-defeating’ in the sense that the group failed to communicate their concerns effectively to the world, and remained powerless in the increasingly oppressive conditions of their imprisonment.

95 ‘Saddam Hussein’s chaotic trial’, The Economist (United States), 4 February 2006, 42.
96 Human Rights Watch, above n 3, 66.
97 See, for example, ‘Lawyer forcibly ejected from Saddam trial’, The Guardian (London, United Kingdom), 22 May 2006 <http://www.guardian.co.uk>.
98 Brain, above n 84.
99 John Orr ‘Terrorism as Social Drama and Dramatic Form’ in John Orr and Dragan Klaic (eds), Terrorism and Modern Drama (1990), 52.
100 Ibid 51.
101 Ibid 52.
In Saddam’s trial, similar tactics may well have distracted the media from the many defects, procedural and otherwise, in the trial process; such defects raise real questions about the legitimacy of the trial process and the appropriateness of the verdict. The deployment of such tactics by Saddam and his co-defendants did not prevent their ultimate execution, but perhaps more media exposure of the defects in the trial process might have done so. On the other hand, the defendants’ recourse to play and consequent disruption of the ‘order, control, propriety and inevitability’ of the trial, key elements in the ‘dramaturgy of contemporary executions’ according to Conquergood, may well have had an unexpected outcome.

In the theatre of the courtroom, the task of the prosecutor, according to Conquergood, is to reduce the accused to ‘an effigy composed of his or her worst parts and bad deeds’. The defendant must be ‘stripped of all human complexity’ and reduced to ‘the worst of the worst’. Conquergood describes how ‘these waste parts’ are ‘crafted onto prefabricated figures: stereotypes of the violent criminal, cold-blooded killer, animal, beast, brute, predator, fiend, monster.’

This should not have been a difficult task in relation to Saddam and his co-defendants; the Western media had already achieved this. Ramsey Clark, a former United States Attorney-General who was part of Saddam’s defence team, observed that ‘the United States and the Bush administration in particular, engineered the demonization of Saddam Hussein’. Saddam’s nickname in the Western media was ‘the Butcher of Baghdad’. His seemingly monstrous capacity for cold-blooded killing and torture had been well-publicised. However, in media accounts of the trial, heartbreaking evidence of torture and murder from the prosecution witnesses were juxtaposed with the defiant, often humorous and playful antics of Saddam and his co-defendants. Their playfulness humanised them even as their direct responsibility for multiple acts of violence became clear. This courtroom behaviour may have undone some of the ‘monstering’ achieved by the Western media. According to one commentator, the chaotic environment of the courtroom transformed Saddam into a hero.

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102 See Human Rights Watch, above n 3, 5–6.
103 Conquergood, above n 38, 360.
104 Ibid 353.
105 Ibid.
106 Ibid.
107 Freeman, above n 26.
108 Dyer, above n 32.
Conclusion

An analysis of Saddam’s trial uncovers various manifestations of lawmaking and law-preserving violence, and in addition, two oppositional forms of play. Both forms of violence are expressed through play; play and violence are intertwined. The rule-bound ceremonies of the trial and execution are characteristic forms of play in the administration of law-preserving violence. They can even, as here, form part of lawmaking violence. However, lawmaking violence is more frequently characterised by forms of play which rely less on rules and more on spectacle.

Yet play can also be deployed as a response to violence, or even as a strategy of resistance. Play with an ‘anarchic and capricious nature’\(^{109}\) appeared in the courtroom. Confronted with a hostile court and an assured conclusion, Saddam and his co-defendants resisted the rules of legal performance with defiant playfulness. They exposed the ‘struggle between two kinds of playing’, one ‘rule-bound, where all players accept the rules of the game and are equal before the law’, and the other an arbitrary and flexible game, ‘where the gods can change the rules at any time, and therefore, where nothing is certain’.\(^ {110}\)

Saddam’s trial was intended to validate the Iraqi war, and provide support for the arguments of the Coalition of the Willing that the only effective way to respond to the law-preserving violence of Saddam’s regime was with lawmaking violence. In the trial, the law-preserving violence of Saddam’s regime encountered both the law-preserving, and lawmaking violence of the new regime. Yet Saddam’s trial demonstrates that violence is not the only response to violence. Saddam and his co-defendants resorted to disruptive play in response to the legal performance of state violence.

This form of play is not associated with power; rather, it challenges the authority of the powerful. It can be dismissed as the last resort of the weak and powerless. Nevertheless, such play can disrupt, derail, interrupt and discredit orderly displays of state violence. In Saddam’s trial, we find a demonstration of the ‘dangerous harmlessness’ of play\(^ {111}\) as a response to violence.

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\(^{109}\) Callois, above n 20, 13.


Radical street performance: The trial of Abu Hamza

Many of the common themes in other terror trials can be found in the trial of Abu Hamza: the demonisation of a Muslim person, here, a high-profile Muslim cleric; lack of specificity in relation to the acts of terrorism with which he was allegedly involved; the incriminating nature of terrorist literature; and failure on the part of the court to acknowledge moral relativism in judging acts of violence. What is unique about the Hamza trial is that it was theatre about theatre. Hamza was on trial for his performances, and in particular, his street performances; the prosecution successfully argued that his performances were effective in inciting acts of violence and murder against non-Muslims. One of the most interesting features of the trial was the importance of the changing social and political context in determining the point at which Hamza’s performances, his ‘hate speech’, became legal transgression.

Abu Hamza, an Egyptian-born British citizen, became a preacher in Finsbury Park mosque in north London in 1996. His sermons were notorious for their anti-semitism and advocacy of violence; in one media report, he was described as a ‘fanatical iman’ who was ‘secretly sending a wave of radicals on lethal missions’. He supposedly preached to the ‘failed shoe bomber’, Richard Reid, and to Zacarias Moussaoui, who was the only person brought to trial and convicted for his role in the September 11 attacks. In January 2003, Hamza was banned from preaching in the mosque and began preaching in St Thomas Road, close to Highbury Stadium. He was also threatened with the revocation of his British citizenship. In May 2004, he was arrested and faced extradition to the United States on the basis of nine terrorism charges. At this time, the New York Police Commissioner described him as ‘a freelance consultant to terrorism groups worldwide’. The extradition proceedings were suspended when the British government decided to prosecute him. Hamza was charged with ten counts under the *Offences Against the Person Act 1861*, for soliciting or encouraging others to murder non-Muslims, four charges under the *Public Order Act 1986* involving the use of

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threatening, abusive or insulting words or behaviour with the intention of stirring up racial hatred, one charge under the Public Order Act relating to the possession of videos and audio recordings which he intended to distribute or play to stir up racial hatred, and one charge under section 58 of the Terrorism Act 2000, relating to the possession of a document containing information of a kind likely to be useful to a person committing or preparing an act of terrorism. On 7 February 2006, after a highly mediatised trial in the Old Bailey, Hamza was convicted of eleven of the sixteen charges, and sentenced to seven years in jail.

In the next chapter, I shall discuss the creation of folk devils or scapegoats in the moral panic around terrorism in Australia, and the vulnerability of young Muslim men, particularly those of Middle Eastern backgrounds, as targets in state-orchestrated terror trials. In the previous section, I have referred to the demonisation of Saddam Hussein in the Western media. Abu Hamza, as a radical Muslim cleric in Britain, proved particularly susceptible to demonisation by the media, not only because of his ‘vile views’, to quote the Muslim Labour peer Lord Ahmed,116 but also because his disabilities transformed him into a ‘pantomime villain’.117 According to his barrister, Hamza was ‘the most frequently abused and ridiculed figure in this country’, and the victim of ‘exaggeration, innuendo and fantasy’.118

Hamza, who normally wears a prosthetic hook because both his hands have been amputated, and who has only one eye, was referred to as ‘Captain Hook’, ‘Hook’ and ‘Hooks’, and phrases like ‘Hook off Hookie’ appeared in the media. The trial judge, Justice Hughes, warned the jury that Hamza had been ‘the object of a fair amount of press coverage,’ ‘much of it critical’.119 The lack of sympathy for Hamza’s physical disabilities was apparent when he claimed that he was unable to walk because of his long toenails. One reporter described this as ‘one of the more bizarre reasons for a court no-show’.120 Hamza clearly could not cut his own toenails since he has no hands; he is also a diabetic, which means that he must protect his feet from even minor injuries. These factors were not mentioned in media reports. Instead, he was commonly portrayed as some kind of vicious, sub-human monster, espousing messages

117 Ibid.
of hatred and violence. According to Girard, ‘the more signs of a victim an individual bears, the more likely he is to attract disaster’.\(^\text{121}\) As a radical Muslim and a prominent member of an ethnic and religious minority group, Hamza already bore one mark of the victim.\(^\text{122}\) Physical disabilities constitute another mark.\(^\text{123}\) Hamza was a scapegoat in whom a number of ‘evil characteristics adhere’.\(^\text{124}\)

Hamza, like the defendants in the Australian terror trials, was not charged in relation to specific acts of violence. His barrister described the proceedings as ‘highly unusual’ because ‘unlike most prosecutions for incitement to murder it did not involve someone telling a specific person to kill an identifiable individual.’\(^\text{125}\) However, the prosecution argued that the lack of evidence about murderous acts undertaken by members of Hamza’s congregation or audience was irrelevant. The question was whether Hamza ‘by his words sought to encourage or even embolden or persuade his audience to commit murder.’\(^\text{126}\) In sentencing Hamza, the judge also acknowledged that it was impossible to determine whether his audiences had been inspired by his words to commit acts of terrorism. However, ‘the potential for both direct and indirect damage is simply incalculable.’\(^\text{127}\) Later reports\(^\text{128}\) that the London suicide bombers, who carried out attacks on 7 July 2005, had attended his sermons were apparently denied by Scotland Yard,\(^\text{129}\) but a link between this group and Hamza’s sermons would have allowed the prosecution to focus on at least one specific act of violence inspired by Hamza’s incendiary words. Despite the lack of specificity in the prosecution case, Hamza was convicted.

Hamza’s possession of an allegedly incriminating document also featured prominently in the prosecution case. The ten volume Encyclopaedia of Afghani Jihad contained information on explosives, weapons and terrorist targets, and was dedicated to Osama bin Laden.\(^\text{130}\) Hamza

\(^{122}\) Ibid 17.
\(^{123}\) Ibid 18.
\(^{124}\) Ibid 50.
\(^{125}\) Sean O’Neill, “‘Offensive’ remarks taken straight from Koran, defence says”, *The Times* (London, United Kingdom), 10 January 2006 <http://www.timesonline.co.uk>.
\(^{126}\) Simon Freeman, ‘Muslim cleric “told followers to kill Jews and non-believers”’, *The Times* (London, United Kingdom), 11 January 2006 <http://www.timesonline.co.uk>.
\(^{127}\) Simon Freeman, ‘Abu Hamza jailed for seven years for inciting murder’, *The Times* (London, United Kingdom), 7 February 2006 <http://www.timesonline.co.uk>.
claimed in court that he had never read it.\textsuperscript{131} As we shall see in the next chapter, the possession of dangerous and incriminating literary works, and the lack of specificity in terrorism offences, are common themes in the terror trials.

Another characteristic element in Hamza’s trial was the assumed distinction between state-sanctioned, and thus permissible, acts of violence, and illegitimate acts of violence, or revolutionary violence, carried out by the dispossessed or disempowered. Hamza was advocating revolutionary acts of violence. He made constant references to fighting in Algeria, Bosnia, Palestine, Egypt and Kashmir\textsuperscript{132} and when asked in court if he had encouraged his listeners to kill abroad, he distinguished between ‘murder’ and ‘fighting’. His barrister also argued that there was a difference between acts of murder, and killing ‘on the battlefield’\textsuperscript{133} but this distinction was lost on the court. In the words of the judge, Hamza was convicted because he ‘helped to create an atmosphere in which to kill has become regarded by some as not only a legitimate course of action but also a moral and religious duty in pursuit of perceived injustice.’\textsuperscript{134}

The same accusation could be levelled against some politicians, including the British Prime Minister Tony Blair, whose support of the United States-led invasion of Iraq was portrayed to the British public as ‘a moral and religious duty in pursuit of perceived injustice’. Both men were advocating acts of revolutionary violence, but from different positions of power. Hamza’s advocacy of violence was, in his view a lawful, moral stance, part of the pursuit of justice for Muslim people; as Derrida has written, ‘all revolutionary situations, all revolutionary discourses’ justify violence in light of ‘the founding in progress or to come, of a new law’.\textsuperscript{135} Hamza stated in one of his lectures that he was working towards a worldwide caliphate, which could only be achieved by fighting.\textsuperscript{136} The court paid little heed to the argument that murder is qualitatively different from acts of revolutionary violence, yet this distinction is fundamental to the stability, legitimacy and continued authority of existing governments.

\begin{footnotes}
\item Dodd, above n 119.
\item Jenny Booth, ‘Abu Hamza: “Special Branch said I had freedom of speech”’, The Times (London, United Kingdom), 19 January 2006 <http://www.timesonline.co.uk>.
\item Freeman, above n 127.
\item Derrida, above n 10, 35.
\end{footnotes}
Hamza further argued that the content of his lectures was derived from the Koran. The prosecution claimed that he had twisted and distorted the messages in the Koran, that he had ‘distorted the peace-loving religion to propagate hate’, and that he had failed to meet his responsibilities as a spiritual leader in his dissemination of messages of ‘intolerance, bigotry and hatred’. Yet as the defence counsel pointed out, ‘the language of blood and retribution’ can be found in all great monotheistic religions. The Old Testament is rife with references to acts of violence. Acts of violence which are carried out in pursuit of a religious goal may have a similar impact to acts of violence carried out for baser private motives, but the former resemble state-sanctioned violence in the recourse to moral and religious justifications. In condemning the violence which Hamza advocated as murder, the court did not address the pertinent question of whether state-sanctioned acts of violence could be similarly classified, and whether representatives of the state who encouraged members of the public to participate in and support such acts are similarly guilty of incitement to murder.

The unique aspect of Hamza’s trial was that he was being judged for his performances; the trial was, as stated earlier, legal theatre about the inherent dangers of performance. The prosecution had to demonstrate that he was an effective performer, an influential orator with the gift of being able to sway his audience with the power of his words. To this end, they chose nine tapes from the 2700 audiotapes and 570 videotapes which were found when the police raided his house, and played these in their entirety to the jury. Clearly, it was not sufficient for the jury to read the transcript of the lectures, although the media seized upon the contents of the lectures and published them widely. The question for the jury was whether the power of his performance was sufficient to incite members of his audience to murder.

There is no doubt that the nine tapes selected by the prosecution contain provocative material, characterised by anti-semitic sentiments and violent imagery. In a characteristic passage from one recording, Hamza told his audience, ‘Anything that will help the intifada, just do it. If it is killing, do it. If it is paying, pay, if it is ambushing, ambush, if it is poisoning, poison.’ Yet it was the delivery of these messages which was important, the extent to which his

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137 Dodd, above n 119.
138 Freeman, above n 126.
139 O’Neill, above n 125.
140 Dodd, above n 119.
performances exemplified the ‘oppressive [use] of presence in politics’,\textsuperscript{142} the use of charisma ‘to construct systems of domination’.\textsuperscript{143} There was little of the charismatic orator in Hamza as he appeared in the courtroom; one reporter observed that he was ‘passionate’ and ‘much more animated’ in the videos,\textsuperscript{144} and another wondered whether ‘his very vagueness’ in the courtroom was an intentional part of the defence case.\textsuperscript{145} The judge reproached him for being ‘evasive’;\textsuperscript{146} stating that ‘the picture which is to be gathered from the video recordings of you at the time when you delivered these speeches is very different from the picture that you presented of yourself in the witness box.’\textsuperscript{147} In the courtroom Hamza was described as ‘visibly exhausted and often confused’.\textsuperscript{148}

It is also significant, in considering the impact of his performances, that despite constant surveillance by state officials, there was no attempt to silence Hamza or interpret his performances as sinister until the social and political context altered in 2001 and ‘Britain awoke to the realisation that it had become a haven for violent extremists’.\textsuperscript{149} Hamza claimed in evidence that the Special Branch had reassured him that he had nothing to worry about ‘as long as we don’t see blood on the streets’,\textsuperscript{150} and that M15 officers had told him that they were using preachers ‘to control hot-headed people’.\textsuperscript{151} His performances were condoned for a number of years, and were subsequently criminalised by ‘officially designated agents of social control’\textsuperscript{152} when Britain became swept up in a moral panic about terrorism. I will discuss the phenomena of moral panics in chapter three.

Hamza’s crimes were his words and, according to the prosecution, ‘words are a powerful weapon.’\textsuperscript{153} Ben Saul notes that contemporary terrorism is characterised by ‘particularly

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\textsuperscript{142} Baz Kershaw, \textit{The Radical in Performance. Between Brecht and Baudrillard} (1999) 73.
\textsuperscript{143} Ibid.
\textsuperscript{144} Sean O’Neill, ‘Abu Hamza’s video “call to arms”’, \textit{The Times} (London, United Kingdom), 13 January 2006 <http://www.timesonline.co.uk>.
\textsuperscript{145} Ben Macintyre, ‘Sworn enemies find a common cause’, \textit{The Times} (London, United Kingdom), 8 February 2006 <http://www.timesonline.co.uk>.
\textsuperscript{146} Freeman, above n 127.
\textsuperscript{147} Ibid.
\textsuperscript{148} Macintyre, above n 145.
\textsuperscript{149} O’Neill and McGrory, above n 114.
\textsuperscript{151} Sandra Laville, ‘Suicide bombings a legitimate war tactic, cleric tells court’, \textit{The Guardian} (London, United Kingdom), 21 January 2006 <http://www.guardian.co.uk>.
\textsuperscript{152} Stanley Cohen, \textit{Folk Devils and Moral Panics. The Creation of the Mods and Rockers} (1980), 111.
\textsuperscript{153} Sean O’Neill, ‘“Hate-filled bigot encouraged followers to kill non-Muslims’, \textit{The Times} (London, United Kingdom), 12 January 2006 <http://www.timesonline.co.uk>.
\end{flushleft}
virulent propaganda’. Yet, as Judith Butler argues, the injurious effect of ‘hate speech’ should be seen as a ‘non-necessary’ effect. No one suggested that re-playing the videos of Hamza’s performances in the courtroom would incite a new audience to acts of violence. The playing of the videos, the publication of quotations from his performances in media reports, could be interpreted as ‘a re-staging of the performance of hate speech’, but in its ‘breaking with the prior contexts of its utterance’, the words and performances were assumed to have lost their incendiary impact. Butler points out that it is an over-simplification to attribute acts of violence to the incendiary impact of certain kinds of speech. She looks at two examples: firstly, the arguments in the Israeli press that right-wing rhetoric led to the murder of Yitzhak Rabin and secondly, the arguments that gangsta rap induces criminal violence. Butler argues that

the collapse of speech and conduct thus works to localize the ‘cause’ of urban violence, and perhaps, as in the Israeli concern with incendiary rhetoric, to silence a discussion of the broader institutional conditions that produce right-wing violence.

Similarly, the prosecution of Hamza, with its underlying assumption that acts of violence can be solely attributed to the radical preachings of Muslim clerics like Hamza, diverts public attention away from the extent to which state acts of terror on the part of the Coalition of the Willing, including the support of Israeli violence against Palestine, may have created resentment and a desire for revenge in young Muslims. Such performances may well be self-defeating, in intensifying the grievances of members of this group.

Hamza’s trial thus exemplifies theatre on trial, but theatre in the form of radical performance rather than in its conventional guise. It foreshadows future, perhaps hypothetical, trials which are possible under Australia’s 2005 sedition laws and which I will consider later. In the United Kingdom, the creation in 2006 of two additional offences of encouraging and glorifying acts of terrorism suggests that performances similar to Hamza’s will be even

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155 Butler, above n 113, 39.
156 Ibid 14.
157 Ibid.
158 Ibid 22.
159 Terrorism Act 2006 (UK) s 1.
more susceptible to prosecution in the future. However, radical political performance is clearly much more prone to state censorship and control than are conventional theatrical forms. The re-staging of Hamza’s performances in a theatre would be unlikely to attract prosecution; similarly, the re-playing of his performances in a courtroom for the purposes of prosecution was condoned by the state. It would appear that context is all-important in state decisions on whether performance should be criminalised on the basis of its incendiary impact.

The (non)trial of David Hicks

No discussion of the terror trials would be complete without reference to the plight of David Hicks, who was detained at Guantanamo Bay from early 2002 until early 2007 after his capture in Afghanistan by United States forces in December 2001. Hicks was amongst six detainees declared eligible for Military Commission trial in July 2003, and was charged on 10 June 2004 with three offences: willfully and knowingly conspiring to attack civilians and civilian objects, destroy property and commit murder and acts of terrorism, attempted murder, and intentionally aiding the enemy. He pleaded not guilty.

The first Military Commissions were set up by the executive and were answerable only to the President. They were comprised of military officers who did not all have legal training, and the ordinary rules of evidence did not apply. There was no appeal to the civil court system. The Military Commission was described by Lord Steyn as ‘an irregular tribunal, which makes a mockery of justice’. Critics of the Military Commission process have included Lex Lasry, who was appointed as the Independent Legal Observer of Hicks’ (non)trial by the Law Council of Australia, and Major Michael Mori, a United States Marine Corps lawyer who was appointed to represent Hicks in December 2003. In his first report, Lasry described the proceedings as ‘flawed’ and stated that ‘a miscarriage of justice in this case is highly likely’. He further commented that the Military Commission ‘answers to the Executive of the United States Government’ and did not ‘[resemble] an independent judiciary’. The Australian government, however, asserted that there were ‘sufficient procedural protections in

161 Ibid.
place to afford Mr Hicks a full and fair trial’, and that it would not be possible to prosecute Hicks in Australia, although arguments have been put forward which would suggest otherwise.

There were a number of delays in the Military Commission proceedings. This is due in part to cases initiated by Hicks and other detainees in United States courts, but as Major Mori and others have repeatedly emphasised, the delay is not the fault of the detainees. Hicks’ first (non)trial began in July 2003. When the United States Supreme Court held in *Rasul v Bush* that detainees at Guantanamo Bay could not be held indefinitely and were entitled to due process under the law, the United States government hastily set up the Combatant Status Review Tribunal, which processed detainees including Hicks without permitting access to evidence or legal representation. The tribunal affirmed Hicks’ designation as ‘enemy combatant’ whereupon Hicks’ (non)trial before the Military Commission resumed in August 2004. In November 2004, all hearings were suspended when Judge James Robertson of the United States District Court held that the Military Commissions were illegal. Although the United States Court of Appeals reversed the decision in July 2005, the matter then went on appeal to the United States Supreme Court, and a stay in proceedings was granted pending the outcome of the case. In June 2006, the United States Supreme Court held by a narrow majority that the Military Commissions were illegal and violated Common Article 3 of the four Geneva Conventions, because they did not meet the requirement of a ‘regularly constituted court affording all the judicial guarantees which are recognisable as indispensable by civilised people’.

Although critics of the regime at Guantanamo Bay, and Hicks’ lawyers, family and supporters, all strongly urged the Australian government to insist on his release after the decision in *Hamdan v Rumsfeld*, the Australian government did not act upon such

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164 Devika Hovell and Grant Niemann conclude that ‘the government’s continuing raw assertions that there are no crimes under Australian law with which Mr Hicks can be charged are, at best, inaccurate and at worst, disingenuous,’ Devika Hovell and Grant Niemann, ‘In the Matter of David Hicks: A Case for Australian courts?’ (2005) 16 *Public Law Review* 116, 133.


168 Ibid.
suggestions. Instead, Prime Minister Howard continued to state that Hicks should be brought to trial as quickly as possible in ‘another forum’, and, furthermore, that the forum could not be an Australian one because he was not guilty of crimes under Australian law. \(^{170}\) In October 2006, the Bush government passed through Congress legislation\(^ {171}\) which set up a new system of Military Commissions, arguably almost identical to the last,\(^ {172}\) although now detainees have been stripped of the right to challenge their detention in United States civil courts. One of the more controversial features of the new Military Commissions is that evidence obtained by ‘coercion’, which Richard Ackland has described as ‘torture-lite’,\(^ {173}\) is admissible.\(^ {174}\) A prohibition on evidence obtained by torture applies only to evidence obtained since 30 December 2005.\(^ {175}\) Hearsay evidence is also admissible\(^ {176}\) and the accused can be excluded from parts of the hearing.\(^ {177}\) The detainees are not permitted to invoke the Geneva Conventions as a source of rights.\(^ {178}\) In any event, the legislation contains a declaration that it complies with the Geneva Conventions,\(^ {179}\) and the exclusive power to interpret the Conventions is conferred on the President.\(^ {180}\) If Hicks had been tried and convicted by the new Military Commission, it is highly likely that the years already spent in detention would not have been deducted from his sentence;\(^ {181}\) this surprising outcome further demonstrates the extraordinary nature of detention and punishment at Guantanamo Bay.

The treatment of detainees at Guantanamo Bay has been roundly condemned by politicians,\(^ {182}\) church leaders,\(^ {183}\) ‘some of the most distinguished lawyers of the common law tradition’,\(^ {184}\)

\(^{169}\) Hamdan v Rumsfeld, Secretary of Defense 126 S Ct 2749.
\(^{172}\) Carol Williams, ‘Shut up or else, military tells Guantnamo lawyers’, The Sydney Morning Herald (Sydney), 16 October 2006, 12.
\(^{173}\) Ackland has written that ‘under the new Military Commissions Act we know that torture-lite is all right, but torture-heavy is out’; Richard Ackland, ‘Definition of civilisation is on the rack’, Sydney Morning Herald (Sydney), 17 November 2006, 13.
\(^{179}\) Military Commissions Act 10 USC § 6(a) (2006).
\(^{181}\) Phillip Coorey, ‘Five years’ detention would not be deducted from Hicks’ sentence’, The Sydney Morning Herald (Sydney), 1 September 2006, 7.
\(^{182}\) Including Tony Blair, the Prime Minister of Britain, who has described it as an anomaly, and the British Lord Chancellor.
\(^{183}\) Including the Archbishop of Canterbury.
human rights organisations and many other commentators. Although the Department of Defence states that the conditions at Guantanamo Bay are adequate and that detainees are not abused, this is disputed by lawyers for the detainees. Professor Alfred McCoy has described Guantanamo Bay as ‘an ad hoc behavioural laboratory’ and the detainees as ‘involuntary subjects for human experimentation that refined the CIA’s psychological torture paradigm’. McCoy asserted that Hicks had been subjected to prolonged periods of solitary confinement and denial of sensory stimuli in an unsuccessful attempt by the United States government to elicit a confession from him. Shortly before Hicks’ hearing, revelations of his abuse at the hands of the United States military were made public in the form of a submission to a British court. Immediately before his release from an Australian prison in December 2007, he was reportedly still suffering from agoraphobia and panic attacks induced by the conditions of his confinement at Guantanamo Bay.

Apathy and indifference may have been the most common responses to Hicks’ plight at the outset but, by the beginning of 2007, most Australians believed that Hicks should be brought back to Australia. In late 2006, an online activist group raised $150,000 in 72 hours in order to pay for large billboards which read ‘Bring David Hicks Home’. The Sydney billboard, on a North Sydney office block, was clearly visible to commuters travelling on the busy freeway which runs from the Harbour Bridge to the North Shore. There was a huge billboard on St Paul’s Anglican Cathedral in the heart of Melbourne’s central business district. There was even a David Hicks’ protest float in Sydney’s 2007 Gay and Lesbian


185 Including Amnesty International, which described the facility as the ‘gulag of our times’, the International Red Cross, the United Nations Committee on Torture, and the United Nations Human Rights Commission. See McCoy, above n 167, 26, 29, and Leigh Sales, Detainee 002. The Case of David Hicks (2007) 203.


187 Ibid 25.

188 Tom Allard, ‘Torture and terror: life at Guantanamo, by David Hicks’, The Sydney Morning Herald (Sydney), 2 March 2007, 1, 11. Hicks had attempted to get British citizenship through the British courts.


190 According to a Newspoll survey in December 2006, 70% believed that Hicks should be returned to Australia even if he could not be tried here; David Marr, ‘Australia’s most wanted’, Sydney Morning Herald (Sydney), 13–14 January 2007, News Review 21.

192 Ibid.
Mardi Gras parade, in which Howard and George Bush were portrayed in, respectively, a stars and stripes nappy and orange overalls.\footnote{Joel Gibson and Phil Han, ‘Mori watches footy as gays honour Hicks’, \textit{The Sydney Morning Herald} (Sydney), 5 March 2007, 22.}

Strong statements in January 2007 from respected public figures such as the newly-appointed Director of Military Prosecutions Brigadier Lyn McDade, Australian Federal Police Commissioner Mick Keelty and Malcolm Fraser, and continuing opposition to Hicks’ detention from Liberal backbenchers,\footnote{See Phillip Coorey, ‘Backbench unrest on Hicks hits PM’, \textit{The Sydney Morning Herald} (Sydney), 14 February 2007, 7.} put further pressure on the Howard government to change its position. In addition, in late 2006, eight State and Territory Attorney-Generals, after an address by Major Mori, signed the Fremantle Declaration, a statement of fundamental legal rights, in response to Hicks’ predicament,\footnote{Tim Dick and Phillip Coorey, ‘Fair trials accord adds to pressure over Hicks’, \textit{The Sydney Morning Herald} (Sydney), 11–12 November 2006, News 9.} and sent Attorney-General Ruddock a letter asking for Hicks’ return.\footnote{Jonathon Pearlman, ‘Hicks’s window on the world’, \textit{The Sydney Morning Herald} (Sydney), 28 November 2006, 2.} David Marr observed in January 2007 that the Howard government was ‘all but friendless on this issue’.\footnote{Marr, above n 191.}

It is noteworthy that commentators largely attributed the shift in public sentiment, ‘the sudden quickening of tempo’,\footnote{Ibid.} to the public performances of David’s father, Terry Hicks, and Major Mori. Despite a nervous and amateurish start,\footnote{Ibid n 185, 120.} Mori quickly became a polished performer, an eloquent and impassioned advocate for Hicks; by 2006, he was receiving rapturous applause from various Australian audiences including five hundred members of the New South Wales Bar Association.\footnote{Ibid 221.} It has been argued that part of his appeal lay in the public perception that he was ‘a symbol of the old America’ and its ideals of justice and democracy.\footnote{Brett Solomon, quoted in Marr, above n 191.} At least two commentators compared him to Atticus Finch, the principled, passionate and eloquent advocate in Harper Lee’s \textit{To Kill a Mockingbird}.\footnote{Sales, above n 185, 221.} Mori’s zealous public performances were interpreted as inappropriate politicking by the Chief Prosecutor of the United States Military, Colonel Morris Davis, who suggested in early March 2007 that he
should be charged with breaching the United States Uniform Code of Military Justice.\(^{203}\) Davis objected to Mori’s participation in a public demonstration in Australia, his ‘contemptuous language’ in relation to President Bush, and the damage which he had, allegedly, caused to the relationship between Australia and the United States.\(^{204}\)

Terry Hicks’ performances, on the other hand, derived their power from his decency, ordinariness and belief in family values. Terry Hicks had never been overseas until 2003, when he travelled to Pakistan and Afghanistan with film-makers who were making a documentary about his son\(^{205}\) and protested in a cage on the streets of New York.\(^{206}\) He was a suburban printer without professional qualifications or experience in advocacy.\(^{207}\) The motivating force behind his many public performances was his love for his son.\(^{208}\) He was ‘the Aussie battler who knows what it means to stand by your child, come what may’.\(^{209}\) Terry humanised David for the Australian public; he told anecdotes about a misguided, adventurous, wayward son. Through his tireless campaigning, David was transformed from despicable traitor and enemy into one of us.

The postponed performance of Hicks’ (non)trial was increasingly overshadowed by the counter-narratives in these other performances. If two such honourable men were prepared to fight so hard for Hicks, then Hicks and what he represented must be worth fighting for. Hicks himself of necessity remained silenced and silent.

The Howard government responded to such pressures by moving from ‘apparent indifference’ to ‘professed concern’.\(^{210}\) Howard and Ruddock asked their United States counterparts for an expedited trial before the new Military Commissions. Ruddock went so far as to agree with


\(^{204}\) Tom Allard, ‘Hicks’s defender accused of interfering’, *The Sydney Morning Herald* (Sydney), 24–5 March 2007, 4.

\(^{205}\) Curtis Levy and Bentley Dean, *The President versus David Hicks* (2004).

\(^{206}\) Sales, above n 185, 89–90.

\(^{207}\) Ibid 170.

\(^{208}\) Ibid 171.

\(^{209}\) Fenella Souter, ‘In the name of the son’, *The Sydney Morning Herald Good Weekend* (Sydney), 23 September 2006, 25.

Brigadier McDade’s description of the treatment of Hicks as ‘abominable’,\textsuperscript{211} and Howard commented that ‘the acceptability of him being kept in custody diminishes by the day’.\textsuperscript{212} In January 2007, Howard asked the United States government to charge Hicks by the middle of February, and indicated that Hicks should be returned to Australia if that deadline was not met.\textsuperscript{213} By early February, he was hinting that he would have Hicks brought home if his (non)trial had not begun by July.\textsuperscript{214} Despite this shift in the government’s position, Hicks’ lawyers had began an action in late 2006 in the Federal Court on the basis that the Australian government failed in its duty to protect one of its citizens.\textsuperscript{215}

In February 2007, in response to these requests from the Australian government,\textsuperscript{216} the United States government issued a second charge sheet against David Hicks. He was charged with providing material support for terrorism, on the basis that he had trained with al Qaeda in 2001 and returned to Afghanistan to join the Taliban. This was a charge which had not been available under the previous Military Commission regime;\textsuperscript{217} it was furthermore, according to a number of eminent lawyers, retrospective in its application to Hicks and contrary to international law.\textsuperscript{218} In March, Hicks became the first Guantanamo Bay detainee to appear before the new Military Commission. The pending (non)trial was the object of intense media scrutiny and public interest. Dick Smith, a wealthy Australian businessman, pledged $60 000 towards Hicks’ legal expenses.\textsuperscript{219} Yet the proceedings were a tantalising anti-climax for those who expected Hicks to maintain his position of defiance in the face of the full might and authority of the United States government.

Leigh Sales has described a fraught relationship between the United States military and journalists at previous Military Commission proceedings;\textsuperscript{220} the media was subject to ‘pages of restrictions’ which dictated the strictly controlled, regimented character of these (non)legal

\textsuperscript{211} Cynthia Banham and Edmund Tadros, ‘Hicks case needs to be resolved: Ruddock’, \textit{The Sydney Morning Herald} (Sydney), 5.

\textsuperscript{212} Cynthia Banham, ‘Federal police chief adds his voice to chorus demanding fair go for Hicks’, \textit{Sydney Morning Herald} (Sydney), 5 January 2007, 5.

\textsuperscript{213} Phillip Coorey, ‘It’s time Hicks was back: ALP’, \textit{The Sydney Morning Herald} (Sydney), 30 January 2007, 5.

\textsuperscript{214} Cynthia Banham, ‘Hicks needs fair process, says Howard’, \textit{The Sydney Morning Herald} (Sydney), 9 February 2007, 7.

\textsuperscript{215} Penelope Debelle and Phillip Coorey, ‘Bring me home: Hicks’s court plea’, \textit{The Sydney Morning Herald} (Sydney), 6 December 2006, 5.

\textsuperscript{216} Sales, above n 185, 215.

\textsuperscript{217} Lasry, above n 165, 15.

\textsuperscript{218} Ibid 16.

\textsuperscript{219} Tom Allard, ‘Costello points the finger at Hicks’, \textit{The Sydney Morning Herald} (Sydney), 19 February 2007, 2.
performances.\(^{221}\) Media visits to Guantanamo Bay generally are subject to ‘meticulous stage management’.\(^{222}\) In the 2007 hearings, journalists who observed these proceedings were subjected to five searches, and confined to one pen each. Hicks himself was escorted by military guards who held each of his arms, and his movements in the courtroom were restricted. In his brief appearance before the Military Commission, he was unrecognisable. His hair was long and unkempt; his previously lean, fit body was altered.\(^{223}\) Even his accent had unaccountably changed.\(^{224}\) He was, to the judge’s expressed disapproval, wearing prison clothing rather than a suit and tie.\(^{225}\) Lasry has commented that the judge’s concern that this attire might jeopardise the presumption of innocence was farcical given the presence of the military guards who flanked Hicks in the courtroom, and the extensive political commentary on Hicks’ conduct and culpability.\(^{226}\)

The purpose of the first hearing was to arraign Hicks on the one charge. During this preliminary hearing, the judge held that two of Hicks’ three lawyers were unable to represent him, and they left the courtroom.\(^{227}\) Hicks was arraigned and issues pertinent to the scheduling of the trial, and judicial bias, were discussed and resolved.\(^{228}\) The hearing had concluded, and various observers, including Terry Hicks and his daughter, were in an executive jet about to be flown back to Washington when an announcement was made that the hearing would resume. At this point, Hicks entered his plea of guilty. The transformed Hicks, who for many Australians had assumed the status of scapegoat, was prepared to concede defeat. Four days later, a sentencing hearing was held. For this hearing, Hicks had trimmed his hair and wore a suit.\(^{229}\)

The first, eagerly anticipated performance of a Military Commission (non)trial, with all its procedural irregularities, was thus circumvented by a plea bargain. This unexpected

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\(^{220}\) Sales, above n 185, 175–8.

\(^{221}\) Ibid 174–5.


\(^{224}\) Sales, above n 185, 216.

\(^{225}\) See Lasry, above n 165, 21.

\(^{226}\) Ibid.

\(^{227}\) Lasry, above n 165, 19–21.

\(^{228}\) Ibid 22–6.

\(^{229}\) Mark Coultan, ‘Hicks’s perjury warning’, The Sydney Morning Herald (Sydney), 31 March – 1 April 2007, 2.
development may well have disappointed those who wanted to see the injustices of the new Military Commissions publicly exposed in a proper, or improper (non)trial, and who wished to use this test case in order to challenge the legality of the Military Commission processes. By January 2008, Hicks was still the only detainee to have been convicted in the Military Commission process. Only ten detainees have been charged, and only three of these are currently awaiting (non) trials.

Lasry has criticised the ‘contrived’ nature of the two hearings in March, and concluded that they were a farce, designed to ‘lay a veneer of due process over a political and pragmatic bargain’. He argued that they were ‘played out for the benefit of the media and public’. Lasry suggests that there existed a pre-determined script, with which Hicks complied. Hicks had ‘a speaking role to play which he discharged at the appropriate time’. In fact, the pre-trial agreement had been negotiated between Hicks’ lawyers and the United States Defence Department before the hearings were held, and the courtroom performance was largely irrelevant to the pre-determined outcome. The surprising exclusion of the military prosecutors from the negotiation process was further evidence that this was a political, rather than a legal procedure. Colonel Davis, the Chief Prosecutor who had wanted Mori disciplined for his engagement in overt political campaigning, was outraged by the machinations of the state which had turned Hicks’ (non)trial into an artificial spectacle staged for political gain, and resigned.

Critics from both the left and right agreed that the hearing was a sham. Timothy McCormack, a Professor of International Humanitarian Law at the University of Melbourne, was also an observer of the proceedings, which he has described as superfluous and

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230 Mori could have accepted a guilty plea on his client’s behalf from late 2003, but did not; Sales, above n 185, 224. In Sales’ view, this ongoing refusal was based on principle, not pragmatism, and unnecessarily extended Hicks’ incarceration; ibid 227.
232 Ibid.
233 Lasry, above n 165, 41.
234 Ibid 47.
235 Ibid 41.
236 Ibid 27.
238 Ibid 41.
239 Josh White and Carol Williams, ‘Trial would have done Stalin proud – lawyer’, The Sydney Morning Herald (Sydney), 2 April 2007, 6.
240 Sales, above n 231.
irrelevant: Robert Richter, one of Australia’s most experienced criminal lawyers, compared the proceedings to Stalin’s show trials. Richard Ackland subsequently commented that Hicks ‘pleaded guilty to an offence that did not exist at the time he committed it, before a commission whose legal status was a nullity, and whose regulations for its proper functioning hadn’t been issued.’

This (non)legal proceeding, which failed to comply with many of the accepted rules of legal performances, was staged with one main purpose; it was intended to resolve an outstanding and increasingly embarrassing political predicament for the Australian and United States government. A conviction was obtained without the airing of problematic evidence, and without a courtroom debate on the possible illegality of the charge. Nor did the court have to consider the possible impropriety of Colonel Davis’ complaints about Major Mori’s conduct. Hence the United States government could argue that the conviction had ‘legitimised’ the processes of the Military Commissions. Prime Minister Howard, relieved to have the matter of Hicks’ ongoing detention extinguished as an electoral issue, similarly portrayed the outcome as a vindication of the Military Commission processes. McCormack has pointed out that the outcome also prevented any further adjudication by the Federal Court on the question of whether the Australian government had failed in its duty to protect its citizens by abandoning Hicks to his fate. Lasry concluded that ‘the proceedings themselves, and the press conferences and press releases which followed, were used as a platform for delivering carefully and strategically tailored messages.’

As a consequence of the guilty plea, Hicks was returned to Australia to serve a remaining nine months in an Australian prison. He agreed to refrain from media interviews for a year, a condition which was viewed with some scepticism by commentators who observed that this

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243 Ibid.
244 White and Williams, above n 239.
245 Richard Ackland, ‘If it looks and smells like a corrupted legal process …’, The Sydney Morning Herald (Sydney), 26 October 2007, 15.
246 McCormack, above n 242, 287.
247 Ibid 288.
248 Sales, above n 185, 219.
250 McCormack, above n 242, 289.
effectively prevented Hicks from playing a role in the impending political performance of the Australian federal election. Bizarrely enough, the ‘gag order’ also applied to Hicks’ family, friends and associates; the potential for ongoing mediatised performances on the part of this group was thus removed. Although the plea was perceived as a political victory for both the United States and Australian governments, Hicks arguably retained his status as victim and martyr. His father and Australian lawyer, David McLeod, made it clear to the media that Hicks viewed a guilty plea as the quickest, most reliable route home, and many supporters believed that his confession was motivated by his understandable desire to escape Guantanamo. In other circles, Hicks has continued to be demonised, accused almost immediately after his release from prison of anti-semitism as well as of actively supporting the Taliban. As a free man, he is nevertheless subject to an uncontested twelve month control order, with curfew and reporting requirements.

Judith Butler has described the treatment of detainees and the operation of the first Military Commissions within the context of ‘a law that is no law, a court that is no court, a process that is no process’. In the military tribunal, ‘sovereign power emerges as the power of the managerial “official”’; a situation which she compares to a Kafka-esque nightmare. The trials in the first Military Commission ‘nullify the very meaning of the trial, and they nullify the trial most effectively by taking on the name of the “trial”’. Any trials before the replacement Military Commissions, which will also fail to ‘reach acceptable standards of fairness’, can be similarly described. This is an ‘extra-legal domain’, or as Antonia

251 Lasry, above n 165, 41.
252 The Howard government denied any role in the imposition of the gag order, but Lasry described this as an ‘amazing coincidence’: Sales, above n 185, 228; and Greens Senator Bob Brown called it a ‘political fix’: Mark Coultan and Mark Metherell, ‘We didn’t gag Hicks: PM’, The Sydney Morning Herald (Sydney), 2 April 2007, 1.
254 Sales, above n 185, 219.
255 Ibid 221.
257 Ibid 221.
259 David Marr, ““Jew-killing” accusation just the first”, The Sydney Morning Herald (Sydney), 31 December 2007, 4.
261 Ibid, 62.
262 Ibid 69.
263 McCormack, above n 242, 277.
264 Butler, above n 260, 85.
Quadara has put it, ‘a deliberately demarcated space wherein the discourse of law is translated as having no bearing’. 265

The appearance of Hicks before the Military Commission may well have been a charade, 266 sham and farce, but his (non)trial, had it proceeded, would also have been a cultural performance unlike other terror trials. In such a (non)trial, the customary rules do not apply, the customary actors are not in place, but the underlying violence is the same. This is the exercise of force in an ‘extra-legal’ sphere. In other terror trials, the state intervenes and plays an important, even controlling role. With a few notable exceptions, 267 state acts of violence are generally not queried or questioned within such courtrooms. Nevertheless, the performances of the terror trials are still seen as distinct and separate from the state. As I shall argue in chapter four, the rule of law continues to apply.

In the (non)trials before the Military Commission, the pretence of separation between the state and the (non)court disappears, and the rule of law is corroded. 268 For the detainees appearing before the Military Commission, there is no realm of law which operates independently of the sovereign power of the executive branch of government; in fact, the Military Commissions Act 2006 is designed to protect such spectacles from legal challenges based on the international law of war or international human rights. The Military Commission (non)trials of detainees, if and when they take place, will be state-orchestrated, state-controlled spectacle in one of its most extreme manifestations.

Conclusion

It is clear from these case studies that these terror trials and (non)trial focused on only one sort of violence, and that state acts of terror were not scrutinised. In the trial of Saddam Hussein, the Iraqi Special Tribunal was examining state acts of violence on the part of a deposed government, but attributed responsibility for such acts to individuals. Furthermore, of the terror trials examined, only that of Saddam Hussein looked at specific acts of violence.

266 See McCormack, above n 242, 277.
267 Justice Michael Adams’ scathing indictment of the behaviour of ASIO and the Australian Federal Police in the Ul-Haque case is one example of this: R v Ul-Haque [2007] NSWSC 1251.
These terror trials can be seen as state-orchestrated spectacle, dependent upon the media for the transmission of the spectacle to a wide audience, but very much controlled by the state. It is unsurprising, therefore, that there is no examination of state acts of terror in such performances. In the case studies in this chapter, the defendants were all found guilty and punished in a display of state authority and violence.

In the next chapter, I shall consider the Australian terror trials as legal performance and state spectacle.

268 See Lasry, above n 165, 47. See McCormack, above n 242, 290.
Chapter 3

The Australian terror trials: The dimensions of a moral panic

The war on terrorism is a difficult abstraction … it needs a human face to demonise and fight.¹

In analysing the function of the Australian terror trials and the punitive response of the state to such activities as terrorist training, association with suspected terrorists and possession of terrorist literature, I have drawn upon the work of Stanley Cohen on moral panics, and the theories of Rene Girard on scapegoats and sacrificial crises.

Cohen, in analysing the societal response to the ‘Mods and Rockers’ in the 1950s, identified a recurrent phenomenon which he described as a moral panic. He described a moral panic as some sort of sweeping social illness, in which

a condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to; the condition then disappears, submerges or deteriorates and becomes more visible.²

Cohen analysed the creation of folk devils through ‘stereotyping, myth making and labelling’,3 identified the critical role played by the media in this process, and observed that moral panics influence ‘the whole scope and intensity of the control culture’.4 In the Australian terror trials, the accused terrorists, a group of young Muslim men of predominantly Middle Eastern background, have become the folk devils in a moral panic about terrorism, and the courtrooms in which the terror trials are performed constitute ‘the perfect stage(s) for acting out society’s ceremonies of status degradation’.5

The Australian terror trials, and indeed other terror trials in the war on terror, can also be understood in the context of Rene Girard’s illuminating work on violence, scapegoats and collective persecutions. Violence, according to Girard, is fundamental to human society; it is also mimetic in character and highly contagious.6 In a sacrificial crisis, there is a ‘catastrophic escalation’7 of violence throughout society, which is curbed only by the communal sacrifice of a surrogate victim. In turning on a scapegoat, community members are united in their conviction that the scapegoat is solely responsible for any problems, imagined or real, afflicting the community.

Girard initially contended that the characteristics of a sacrificial crisis are not found in societies with a judicial system,8 although vengeance, sacrifice and the judicial system shared a common identity of violence.9 He argued that sacrificial victims are always innocent, whereas the judicial system targets the guilty, and imposes punishments which are deserved.10 This distinction between ‘primitive’ and juridical systems glosses over the role of the courts in punishing victims who are not responsible for the violent deeds of which they are accused. Indeed, Girard later revised his position on this, and postulated that the sacrificial mechanism could be found in the operation of the judicial system and its imposition of legal punishment.11

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3 Ibid 44.
4 Ibid 86.
5 Ibid 106.
7 Ibid 30.
8 Ibid 15–17.
9 Ibid 25.
10 Ibid 22.
11 Ibid 299.
Girard’s ideas on the function of the surrogate victim, or scapegoat, in diverting and channelling communal violence, can be useful in an examination of the role and significance of the Australian terror trials. In fact, Fiona Jenkins points out that the scapegoating mechanism can also be found in the declarations of war on Afghanistan and Iraq. The terror trials can be explained as part of a collective persecution, in which a scapegoat, or scapegoats, bear responsibility for a crisis and the perceived solution is to destroy or banish such figures.

The first trial of Jack Thomas

Joseph Terence Thomas, also known as Jack Thomas, or ‘Jihad Jack’, achieved notoriety as the first person in Australia to be convicted under the anti-terrorism legislation which was introduced after the September 11 attacks on the World Trade Centre in New York. Subsequently, he became the first person subject to a control order under the 2005 anti-terrorism legislation, and the litigant in a constitutional challenge to this control order. In his first trial, the jury found him not guilty on two counts of providing resources to al-Qaeda. However, he was found guilty of intentionally receiving funds (and a plane ticket) from al-Qaeda, and of a lesser offence not directly connected with the anti-terrorism legislation, namely being in possession of a falsified passport. These convictions were later quashed on appeal.

Jack Thomas, a fifth generation white Australian, became a Muslim convert as part of what his mother has described as a search for ‘inner peace’. He is commonly referred to as ‘Jihad Jack’ in the media, but insists that he chose the Arabic word Jihad to mean ‘Aussie battler or struggler’ rather than for its more sinister connotations of holy war. He married an Indonesian-born Muslim woman and in 2000 met Abu Bakar Bashir, the leader of the militant Indonesian group Jemarah Islamiyah, whose wife was a childhood friend of Thomas’ wife.

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15 Under s 102.7(1) Criminal Code (Cth).
16 Under s 102.6(1) Criminal Code (Cth).
17 Under s 9A(1)(e) Passports Act 1938 (Cth).
In 2001, Thomas and his family travelled to Afghanistan. Thomas intended to fight for the Taliban and in fact attended a training camp, Camp Farooq, for three months. Osama bin Laden visited the training camp on several occasions, and Thomas also met David Hicks there. Although Thomas was sent to the frontline to fight for the Taliban against the Northern Alliance, he never engaged in direct fighting. Later, in Afghanistan and Pakistan, he met with a number of senior al-Qaeda figures and stayed in al-Qaeda safe houses in Pakistan.

Although at one time Thomas made a vague offer to help his Muslim ‘brothers’, he claims to have been horrified when an al-Qaeda representative, Khaled bin Attash, suggested that he work for al-Qaeda in Australia. On a later occasion, as Thomas prepared to return to Australia, bin Attash gave him $3500 and a plane ticket, as well as an email address and a phone number. Thomas believed this to be reimbursement for living expenses and compensation for the delay in leaving Pakistan. He spent at least part of this money on a body building supplement. He has explained that he altered his passport to conceal the Taliban-issued visa to Afghanistan, which he described as ‘a one-way ticket to Guantanamo Bay’.

However, Thomas was arrested by Pakistani authorities in January 2003 before he could leave Pakistan, and detained for five months.

During this period, Thomas claims that he was tortured and interrogated by Pakistani and United States officials. He was also interviewed by the Australian Federal Police, without a lawyer being present. The record of this eighty minute interview was the most significant piece of evidence in the prosecution’s case. In June 2003, Thomas was released from detention and returned to Australia, where he resumed an apparently normal life with his family. He was arrested in November 2004. After a committal hearing, in which a number of matters were dismissed as not substantial enough to go to trial, he was charged with three offences under the anti-terrorism legislation, and one offence relating to the falsification of his passport. Had his training taken place on a later date, he could have been charged as well with
training with a proscribed terrorist organisation. However, at the time he attended Camp Farooq, this was not an offence.

The critical question for the jury in Thomas’ trial was whether it could be concluded, on the basis of his prolonged association with al-Qaeda in Afghanistan and Pakistan, that he was a sleeper agent poised to engage in terrorist acts in Australia. The prosecution argued that Thomas was effectively operating as a sleeper agent in Australia at the suggestion of senior al-Qaeda figures such as bin Attash, and that the appearance of a normal lifestyle was a clever ruse aimed at diverting suspicion from his activities. There was, however, no evidence to suggest duplicity on Thomas’ part. Lex Lasry, Thomas’ barrister, argued that Thomas had not agreed to be an agent and that he had never pledged allegiance to al-Qaeda. He portrayed Thomas as unworldly and obtuse, describing him as ‘a bumbling naïve young man whose conduct was completely contrary to that of a would-be terrorist’. Ultimately, the jury found him not guilty of intentionally providing resources to a terrorist organisation although Justice Cummins made it clear in sentencing Thomas that he did not necessarily agree with Lasry’s description of Thomas as ‘foolish and naïve’.

Thomas was sentenced to five years imprisonment, with a non-parole period of two years. His lawyers appealed the decision on the basis that the evidence contained in Thomas’ interview with the Australian Federal Police in Pakistan was ‘contaminated’ by the circumstances of his detention and prior interrogation, and by the fact that he was denied the right to communicate with a lawyer. The interview in question was conducted in Pakistan in March 2003, after Thomas had been detained for two months. He asserts that during that time he had been threatened with execution, electrocution and torture, and told that his wife would be raped. He had been choked and suffocated while chained to a metal plate with his hands cuffed and his face covered with a hood. He claims that ‘they broke me’ and that he returned to Australia a

24 Under s 102.5(1) Criminal Code (Cth).
26 Ibid.
30 From his evidence at the trial, set out in the Victorian Court of Appeal judgment; R v Thomas (2006) 14 VR 475, 478-86.
‘scared rabbit’.  

He was relieved to see representatives of the Australian Federal Police and felt ‘totally in the wilderness’, ‘dumb’, when asked whether he would participate in the interview. Without legal advice or any legal experience, he resorted to prayer, and decided to cooperate. He has claimed that he felt that he had no real choice about his participation in the interview. Without the interview, as one judge noted, there was ‘scant evidence’ against Thomas. The judge’s ruling that this evidence was admissible was critical to the outcome of the trial.

However, it is difficult to understand why the trial judge, Justice Cummins, was prepared to view Thomas’ answers in the interview as voluntary, and made in the free exercise of his choice to speak or be silent without inducement or duress. It is no doubt true that the interviewing officers behaved lawfully, as the judge concluded; Thomas has not alleged otherwise. In sentencing Thomas, Justice Cummins rejected the suggestion that the interview ‘derived from torture’ and stated that he ‘would have unhesitatingly rejected it had this been the case’. He concluded that ‘the conduct in Pakistan of the Australian officials and officers was at all times proper’. These conclusions depend on the assumption that the interview can somehow be divorced from its context, and that Thomas’ cooperation had nothing to do with the circumstances of his detention and his treatment by Pakistani and United States officials. The fact that postponing the interview would have been ‘poor’ or ‘bad investigative practice’ hardly justifies such conclusions. Furthermore, context became relevant for the judge in looking at the failure to provide a lawyer. He held that it was ‘not unfair’ to admit the interview, despite the absence of a lawyer, given ‘the spatial, geographical and temporal circumstances’ of the interview. The main difficulty was that Thomas was being detained by

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31 Munro, above n 22.
32 From his evidence at the trial, set out in the Victorian Court of Appeal judgment; R v Thomas (2006) 14 VR 475, 492.
33 From his evidence at the trial, set out in the Victorian Court of Appeal judgment; R v Thomas (2006) 14 VR 475, 492.
34 From his evidence at the trial, set out in the Victorian Court of Appeal judgment; R v Thomas (2006) 14 VR 475, 495.
35 Director of Public Prosecutions (Commonwealth) v Thomas [2005] VSC 85 [23] (Teague J).
37 Director of Public Prosecutions (Commonwealth) v Thomas (No 3) [2006] VSC 243 [40] (Cummins J).
40 Director of Public Prosecutions (Commonwealth) v Thomas (No 3) [2006] VSC 243 [20], [22] (Cummins J).
41 Director of Public Prosecutions (Commonwealth) v Thomas (No 6) [2006] VSC 19 [1] (Cummins J).
Pakistani authorities, who had categorically refused to allow Thomas access to a legal practitioner.\textsuperscript{42}

On appeal, the Victorian Court of Appeal quashed Thomas’ convictions, ruling that it was ‘unrealistic’ and wrong for the trial judge to conclude that Thomas had a free choice in relation to his participation in the interviews.\textsuperscript{43} They concluded that ‘obviously, the fact and circumstances of his detention, the various inducements held out and threats made to him, and the prospect that he would remain detained indefinitely, can be seen to have operated upon the mind of the applicant when he decided to participate in the 8 March interview.’\textsuperscript{44}

The Commonwealth Director of Public Prosecutions promptly applied for a re-trial on the basis of new evidence: Thomas’ admissions in two media interviews with Sally Neighbour from the Australian Broadcasting Corporation, extracts of which were screened in a \textit{Four Corners} programme after Thomas had been convicted, a handwritten statement from Thomas which he gave to Sally Neighbour, and an article published in \textit{The Age} on 27 February 2006.\textsuperscript{45} Subsequently, in December 2006, the Court of Appeal ruled that a re-trial could take place. The Court held that the ‘crucial, atypical feature’ in Thomas’ case was that the evidence upon which the prosecution sought to rely was not known to the Crown at the time of the first trial, and could not have been known.\textsuperscript{46} Furthermore, the seriousness of the terrorism offence with which Thomas had been charged and convicted suggested that there was ‘a powerful public interest, militating in favour of directing that a trial be held and the question of guilt be determined by a jury’.\textsuperscript{47}

Meanwhile, an interim control order had been issued under Division 104 of the \textit{Criminal Code} (Cth) on 27 August 2006; Thomas was restricted in his movements, limited in his use of communication services, and specifically prohibited from contacting various terrorist figures including Osama bin Laden. Thomas’ lawyers mounted a constitutional challenge to the control order, on the basis that the issue of the control order by the Federal Magistrate involved the exercise of non-judicial power. The challenge was heard by the full High Court

\textsuperscript{42} R v Thomas [2006] VSCA 165 [37] (Cummins J).
\textsuperscript{43} R v Thomas (2006) 14 VR 475, 498.
\textsuperscript{44} R v Thomas (2006) 14 VR 475, 503.
\textsuperscript{45} R v Thomas (No 3) (2006) 14 VR 512, 514.
\textsuperscript{46} R v Thomas (No 3) (2006) 14 VR 512, 515.
\textsuperscript{47} R v Thomas (No 3) (2006) 14 VR 512, 519.
in December 2006 and February 2007. A majority of the High Court judges ruled that the legislation which empowered a Federal magistrate to issue such control orders was valid.48

Thomas’ second trial is currently underway, but its progress was impeded by the dismissal of Thomas’ original legal team, on the grounds that they might be required to give evidence at the trial.49

‘Derivative’ offences and the Australian terror trials

There are common characteristics shared between Thomas’ trial and the trials or impending trials of other suspected terrorists in Australia. Firstly, as barrister Phillip Boulten has observed, none of the people charged with terrorism-related offences have actually committed acts of violence.50 Thomas has admitted that he thought about working for al-Qaeda, ‘about pledging allegiance many times. And I thought, no I will not do that.’51 He was told in Pakistan that ‘Osama bin Laden wants a white boy’52 and has conceded that al-Qaeda may have intended him to play a role in orchestrating or participating in terrorist acts in Australia. However, he has expressed an abhorrence of violence, and strongly repudiated the idea that he could participate in terrorist violence.53 He has not engaged in such conduct in Australia, and there is no evidence that he engaged in such conduct overseas. His barrister argued that Thomas was on trial for thought crimes.54

Similarly, the prosecution in the trial of Faheem Khalid Lodhi alleged that Lodhi, a Sydney-based architect, was planning a terrorist act, but had no evidence on the exact target, timing or method.55 He was charged with collecting a document connected with preparation for a terrorist act,56 doing an act in preparation of a terrorist act,57 making a document connected

51 Neighbour, above n 18.
52 Munro, above n 22.
53 Neighbour, above n 18.
55 David King, ‘Case against Lodhi was circumstantial,’ The Australian (Sydney), 20 June 2006, 4.
56 Under s 101.5 Criminal Code (Cth).
57 Under s 101.6 Criminal Code (Cth).
with preparation for a terrorist act, and possessing a thing connected with preparation for a terrorist act. He was convicted on three of these counts. The prosecution presented evidence that Lodhi had collected two maps of the Australian electricity system, sought information about materials which could be used to make explosives, downloaded aerial photographs of Australian defence establishments, and had in his possession a document describing how to make various poisons and explosives. Evidence about his purchase of a large amount of toilet paper, which could produce nitrocellulose for a bomb, formed the basis of a further count (later dropped) in the original indictment.

Phillip Boulten, Lodhi’s barrister, argued that there were non-sinister explanations for all of these activities. The aerial photographs were of sites on which he had worked as an architect, and were intended for his curriculum vitae. His enquiries about the chemicals were relevant to a proposed importing and exporting business. The maps related to another planned venture to send generators to Pakistan. The notes on poisons and explosives were taken from a website years earlier, when he was at university, and he had forgotten about them until the police discovered them. Boulten tried to further downplay the significance of the document with its quite bizarre recipes by describing it as a ‘Boy’s own spy kit’ with ‘the mark of Maxwell Smart.’ According to this evidence, Lodhi was a ‘would-be entrepreneur’ rather than a would-be terrorist. Boulten argued that the case against Lodhi was based on speculation. Indeed, according to one commentator, Clive Williams, the verdict in Lodhi’s trial clearly suggested that terrorism convictions could ensue without the commission of actual deeds.

58 Under s 101.5 Criminal Code (Cth).
59 Under s 101.4 Criminal Code (Cth).
65 Wallace, above n 60.
66 King, above n 55.
Chapter 3 – The Australian terror trials: The dimensions of a moral panic

The charge against Izhar Ul-Haque, a medical student who spent three weeks at a training camp in Muzafarapad, was dropped by the Director of Public Prosecutions when Justice Michael Adams ruled in November 2007 that the prosecution’s evidence had been improperly and in fact, illegally obtained by ASIO agents and officers of the Federal police. The charge against Ul-Haque had also related to allegedly preparatory deeds, rather than actual deeds of violent terrorism. Ul-Haque was charged with receiving training from a terrorist organisation, after spending a few weeks in early 2003 at a camp run by Lashkar-e-Toiba. However, participation in a training camp does not necessarily foreshadow the commission of terrorist acts of violence. Ul-Haque pointed out in one of the impugned interviews with the Australian Federal Police that the training camp may be ‘the first step in the ladder’, but a lot of people do not progress beyond it and instead choose to ‘go back to society’.

The trials of eighteen men arrested during raids in Sydney and Melbourne in November 2005 are pending. They have been charged with various terrorism-related offences, without having committed terrorist acts of violence. The prosecution evidence includes hours of recorded telephone conversations. In one of these conversations, played to the court during the committal hearing, a suspect told his wife that he was going away with some friends for some ‘terrorist training’, before adding that it was simply a camping trip. The defence argued that this comment was a joke and pointed out that the surveillance records reveal that there were no sinister undertones to the trip. As in the Thomas case, supporters of the group have maintained that they are accused of thought crime. As in the Lodhi case, the prosecution cannot provide specific information about the alleged target of the planned terrorist act, although it has been suggested by police that the Lucas Heights nuclear reactor was a possibility.

Legislative amendments in November 2005 have made it clear that the prosecution is not required to identify a particular terrorist act relevant to the conduct or intentions of the accused. It was argued by various government representatives that these amendments were

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69 R v Izhar Ul-Haque (Unreported, Supreme Court of New South Wales, Bell J, 8 February 2006) [70].
71 Ian Munro, ‘I was bashed on a trip to court: accused terrorist’, The Sydney Morning Herald (Sydney), 25 July 2006, 6.
necessary because of the ‘imminent threat of a potentially catastrophic terrorist act’; the November 2005 raids took place shortly after the legislation was amended. In the Lodhi case, the New South Wales Court of Criminal Appeal has held that these amendments are not retrospective, but even so, there is no need for specificity in the derivative offences in the original legislation. Spigelman J stated that:

Preparatory acts are not often made into criminal offences. The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime. It was, in my opinion, the clear intention of Parliament to create offences where an offender has not decided precisely what he or she intends to do.

The issue of interim control orders also forms part of the state’s pre-emptive strategies. The Federal Magistrate justified the issue of the interim control order against Thomas on the basis that his terrorist training, vulnerability and alleged links with terrorists made him an ‘available resource that can be tapped into to commit terrorist acts’. Through the imposition of control orders, potential offenders are punished not for their deeds, but because the state believes that there is a strong likelihood that they will commit acts of terrorism in the future. Control orders impose tangible and restrictive constraints on liberty in response to risks which are purely speculative.

The pre-emptive nature of the counter-terrorism legislation has been criticised by a number of commentators. Jenny Hocking has argued that derivative offences, such as providing support to, recruitment of, or providing training to a member of a terrorist organisation, establish a problematic concept of guilt by association in the criminal law. Indeed, in Lodhi’s case, charges were laid after police and security agencies earmarked him as a potential suspect due

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77 Interim control order, issued on the application of Ramzi Jabbour against Joseph Terrence Thomas by Federal Magistrate Mowbray, at Canberra, on 27 August 2006, Schedule 2.
78 George Williams and Edwina Macdonald, ‘This plodding monster faces its own day of judgement’, *The Sydney Morning Herald* (Sydney), 30 August 2006, 13.
to his fleeting association with French terrorist suspect, Willy Brigitte. Ul-Haque was similarly targeted because of his association with Lodhi; he was viewed as a potential informant about Lodhi’s activities. Hocking points out that offences such as possessing things connected with terrorist acts, collecting or making documents likely to facilitate terrorist acts, and other acts done in preparation for, or planning of terrorist acts have only a questionable association with terrorist acts, particularly since such offences do not require the commission of the terrorist act. The width of such offences makes it difficult for juries to distinguish between genuine terrorists, and people who have merely associated with apparently sinister individuals. Furthermore, Hocking is concerned about the discretionary role of the executive in deciding whether such offences should be used against a group of people who would not ordinarily be considered terrorists. McCulloch and Carlton also deplore the wide discretionary powers conferred on the executive government and law enforcement agencies in ‘pre-crime regimes’.

Sarah Joseph has identified disturbing implications for human rights in such a regime, in which neither intent, nor violent outcomes, are necessary elements of derivative offences. The pre-emptive nature of the legislative framework can be viewed as undermining a number of fundamental rights, including the presumption of innocence. McCulloch and Carlton believe that pre-emptive regimes threaten ‘the democratic ideal of a transparent state accountable to subjects that are shielded from arbitrary state power by the due process protections embedded in the criminal justice system’. They echo the concerns of a character in the play *Guantanamo* by drawing analogies between the regime and the Office of Precrime in Steven Spielberg’s 2002 film *Minority Report*.

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81 King, above n 55.
82 Tom Allard, ‘Spies in the eyes of others’ *The Sydney Morning Herald* (Sydney), 17–18 November 2007, 28.
83 Hocking, above n 80, 323.
84 Wilkinson, above n 63.
85 Hocking, above n 80, 323.
88 McCulloch and Carlton, above n 86, 404.
89 Ibid 398.
Minority Report is set in a futuristic world, in which the state arrests and detains people who have not yet committed crimes but who, according to the supposedly accurate visions of future crimes experienced by three psychic ‘precogs’, are about to do so. Even in this world, in which the ability of the three ‘precogs’ to predict future acts of violence has been honed and enhanced by prenatal exposure to a particular drug, occasionally one of the three will contribute a ‘minority report’, or alternative vision of future events. The possibility for corruption, misreading and manipulation of these visions of the future is exposed and realised in the film. Similarly, there is considerable margin for error in a criminal justice system in which control agencies focus on crime prevention by subjecting certain targeted individuals to intense surveillance, and then interpreting the resultant data to suggest criminal intent.

Persecution texts and the terror trials

As performances, therefore, the terror trials define deviance as evil intent rather than as evil deeds. The trials are the culminating performances in what Erikson describes as ‘commitment ceremonies’, in which the ordinary individual is taken out of his normal role in society and classified as deviant. As typical ‘commitment ceremonies’, the trials attract considerable public attention and occur in a dramatic setting. Thus, the trials play a critical role in the domestic war on terror.

A textual analysis could be viewed as inappropriate in an analysis of the terror trials as performances. My premise is that the judgments, as written and performed works, constitute part of the performance of the terror trials. The text of the judgments records not the performances themselves, but the outcome of these performances. The authority of the text is indisputable; nevertheless, the judgments can be deconstructed.

In this section, I shall focus on one judgment in the terror trials and analyse the judgment as one of Girard’s persecution texts. In so doing, I shall argue that the performances of the terror trials are part of a cycle of collective persecution or moral panic, and that the judgment records the ‘illusions’ or assumptions which justify such phenomena. In reading the judgments of the terror trials as persecution texts, we can decipher more clearly the dynamics of collective persecution or moral panic in the domestic war on terror.

I shall focus here on the sentencing judgment in the Lodhi trial. In the trial of Jack Thomas, the prosecution’s argument that Thomas intended to commit future acts of terrorism in Australia failed. Furthermore, it is clear from Thomas’ own admissions to the Australian Federal Police and to the media that he did in fact take money from al-Qaeda, and falsify his own passport. Lodhi, on the other hand, was convicted on the basis that his activities, and the objects found in his possession, revealed an intention to carry out future acts of terrorism in Australia. This conclusion can be found in the judgment in the Lodhi trial, and determined the final punitive outcome of the legal performance. However, there is no necessary association between the activities and objects described by the prosecution, and future acts of terrorism; alternative, equally plausible explanations can be found for these activities and objects. The judge’s and jury’s conclusions on this association can therefore be identified as one of the ‘illusions’ within a persecution text.

In persecution texts, accounts of real collective violence (including, one may assume, the collective violence unleashed by the machinery of law) are justified on the basis of so-called facts. Persecution texts contain an ‘uncritical representation of persecution’, in which scapegoats appear culpable. The distinguishing feature of persecution texts is the author’s lack of awareness that the victim is a scapegoat. Girard points out that we are never able to recognise our own scapegoats in our ‘legitimate enemies’.

Girard located persecution texts within the ‘mainly Western historical domain’, citing accounts of 16th century and 17th century witchcraft trials as examples. In his view, there are no longer witch hunts, and representations of persecution from a persecutor’s perspective are more a historical rather than a contemporary phenomenon. However, playwright Arthur Miller used the accounts of the 17th century Salem witchcraft trials in exposing the scapegoat mechanism at work in McCarthyist America. His belief that ‘terror

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93 Ibid 16.
94 Girard, above n 6, 11.
95 Ibid 9.
96 Ibid 119.
97 Ibid 118.
98 Ibid 41.
99 Ibid 11.
100 Ibid 9–10.
101 Ibid 204.
102 Ibid 201.
was being knowingly planned and consciously engineered’ in McCarthyist America was the inspiration for his play, *The Crucible*. One commentator has pointed out that in both McCarthyist America and 17th century Salem, only evidence of guilt was sought; both societies disregarded evidence which pointed to a different conclusion.

Miller is describing a community gripped by a moral panic and caught up in collective persecution of scapegoats when he marvels at the collective amnesia about the ‘certain elemental decencies which a year or two earlier no one would have imagined could be altered, let alone forgotten’. The phenomenon he describes, which encompasses the deliberate manufacturing of terror or panic, the abandonment of basic ‘decencies’ and human rights, and the presumption of guilt, can be recognised in contemporary Australia. As Jenny Hocking has pointed out, there are ‘obvious political parallels between arguments for enhanced and exceptional security powers during the Cold War and those of the current day’.

My intention here is to draw on the same historical material as Miller in exploring the similarities between the historical accounts of the witchcraft trials in 17th century Salem, and the judgment in the Lodhi trial. In suggesting that the Lodhi judgment is also a persecution text, I shall argue that Lodhi’s perceived deviance or criminality derives not from his deeds but from the marks of the victim which he bears.

I have already alluded to the pre-emptive nature of the charges in the Lodhi trial. The prosecution successfully argued that the collection of maps of the Australian electricity supply, an exchange of faxes about the intended purchase of some chemicals, and the possession of subversive material and, in particular, a handwritten document in the Urdu language with information about poisons, explosives, detonators and incendiary devices, clearly pointed to an intention to commit future acts of terrorism in Australia. The judge and jury disregarded Lodhi’s explanations for the maps, the Urdu document, the other subversive material, and the enquiries about chemicals. According to the judge, it was clear that Lodhi’s intention was to use this material, and the information derived from it and from his own

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105 Quoted in E Miller Budick, ‘History and Other Spectres in Arthur Miller’s The Crucible’ (1985) 28 *Modern Drama* 535, 536.
enquiries, to carry out an act of terrorism in Australia. Without being able to identify a proposed target or, indeed, uncover any details about this act of terror, the judge was quite certain that it would have been ‘a general attack on the community’ which would have changed Australian society forever; if carried out, the act would have ‘instil[led] terror into members of the public so that they could, never again, feel free from the threat of bombing attacks within Australia.’

One of the appellate judges who upheld the convictions on appeal stated that, in his view, the judge’s ‘assessment of the objective seriousness of the offence was not flawed’.

There are a number of similarities between the Lodhi judgment and the accounts of the Salem witchcraft trials. Firstly, in both the text of the judgment and the accounts of the witchcraft trials, great significance is attached to deceptive or false representations as evidence of guilt. In the Lodhi judgment, Justice Whealy found that the real reason for the accused giving a false name when he obtained the maps of the electricity supply system was that he wanted to conceal his identity in preparing for a terrorist enterprise. Similarly, the false name, fictitious address and false signature provided by the accused when he made inquiries about the purchase of particular chemicals suggested guilty intent to the judge, who concluded that ‘the truth of the matter was that he wanted the information to assist in his proposal for planning and carrying out a bombing enterprise within Australia as part of a terrorist act.’

Lodhi’s benign explanations for the misrepresentations were dismissed by the judge as falsehoods. In fact, according to the judge, supplying false particulars demonstrated ‘deliberation and reasonably carefully thought out pre-meditation’.

In the Salem witchcraft trials, spectral evidence was the most controversial form of evidence on which the Court relied in reaching its findings of witchcraft, and this form of evidence also required the assumption of a false identity. In spectral evidence, the Devil or some other demonic creature took on the spectre, or appearance, or shape of the accused. The ‘witches’ themselves did not commit evil or mischievous deeds. Instead, these were undertaken by

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107 Girard, above n 6, 24.
‘intangible spirits’ which assumed the likeness of the ‘witch’. Thus, the use of false identities or ‘shapes’ in the perpetration of evil deeds constituted a critical part of the evidence in both the witchcraft trials and the Lodhi trial. In the witchcraft trials, if a victim could draw a connection between the ‘witch’s’ appearance and the spectral evidence, the court assumed that the ‘witch’ was guilty. However, even commentators at the time, who were far more credulous about the existence of witchcraft than modern commentators, had grave concerns about the reliability of this evidence, and the possibly doubly deceptive nature of false identities. Spectral evidence was emphatically denounced by an influential minister, Increase Mather, in October 1692. He pointed out that the Devil could cause ‘false ideas of Persons and Things to be imposed on the Imaginations of Bewitched Persons’. Shortly after this sermon was delivered, the trials came to an end.

In the witchcraft trials, the prosecution sought to prove that the accused had an intimate association with the Devil. According to Boyer and Nissenbaum, the crime of witchcraft involved a contract with the devil, in which the accused allowed the devil to take on his or her appearance, or instructed the devil to undertake particular mischievous deeds; ‘these private and secret transactions … were exceptionally difficult to prove.’ In Lodhi’s case, the devil took on a human form; central to the prosecution’s case and judge’s findings was Lodhi’s relationship and association with Willie Brigitte, who was detained and deported to France in 2003 and convicted of various terrorism-related offences in March 2007. During Lodhi’s trial, however, he had not yet been charged with any terrorist offences.

At the time of Brigitte’s deportation, there was, as the defence team argued, ‘excessive publicity generated by the presence of Willie Brigitte in Australia’, including ‘examples of sensationalism that have no possible warrant in fact’. The judge dismissed the concerns of the defence team that in light of such publicity, evidence relating to Lodhi’s relationship with

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114 Ibid 11.
116 Boyer and Nissenbaum, above n 113, 18.
117 Ibid 11.
Brigitte might be ‘over-estimate[d]’ and ‘over-value[d]’ by the jury.\textsuperscript{122} Earlier rulings in the Lodhi trial reflect the significance of the association in the eyes of the Court and related to the admissibility of evidence in relation to Lodhi’s relationship with Brigitte;\textsuperscript{123} the connection between this relationship and the preparation for future terrorist acts in Australia was stated by the judge to be ‘the nub of the Crown case’.\textsuperscript{124} As Boulten pointed out to the Court of Criminal Appeal in November 2007, twelve of the twenty eight witnesses at the trial gave evidence solely relating to Lodhi’s association with Brigitte.\textsuperscript{125} In his sentencing judgment, Justice Whealy stated that ‘I am satisfied beyond reasonable doubt that their relationship was not an innocent one’ and that ‘the connecting link between the two men was their joint interest in contemplating and discussing the possibility of some type of terrorist activity in Australia.’\textsuperscript{126} Somewhat ironically, this passage was quoted as evidence of Brigitte’s guilt in Brigitte’s own subsequent trial.\textsuperscript{127} The appellate court agreed that evidence of this association was both admissible and critical in a case with ‘a modest amount of evidence’.\textsuperscript{128}

In essence, it was as difficult to prove conclusively that the association between the two men, and Lodhi’s intentions, were sinister, as it was to prove that an accused witch had contracted with the Devil. Indeed, in 1977, Justice Windeyer quoted the adage that ‘the devil himself knows not the thought of man’ in the context of pre-emptive regimes.\textsuperscript{129} However, Justice Whealy expressed his views without hesitation. Lodhi’s intentions, according to the judge, ‘were held with great vigour and firmness. They were the consequence of a deeply fanatical, but sincerely held, religious and world view based on his faith and his attitude to the extreme dictates of fundamentalist Islamic propositions.’\textsuperscript{130} There was nothing in Lodhi’s own evidence, or the evidence of his family and friends which supported these conclusions. The judge admitted that family friends ‘all attested to his non-violent personality’\textsuperscript{131} and that Lodhi was a ‘person who has hitherto led a blameless life’.\textsuperscript{132} He confessed to being somewhat puzzled by Lodhi’s transformation ‘from an otherwise respectable member of the

\textsuperscript{122} \textit{R v Lodhi} [2006] NSWSC 641 [19], [26] (Whealy J).
\textsuperscript{126} \textit{R v Lodhi} (2006) 199 FLR 364, 366 (Whealy J).
\textsuperscript{128} \textit{Lodhi v R} [2007] NSWCCA 360 [139] (Barr J).
\textsuperscript{129} See \textit{Thomas v Mowbray} (2007) 237 ALR 194, 239 (Kirby J).
\textsuperscript{130} \textit{R v Lodhi} (2006) 199 FLR 364, 373 (Whealy J).
community’ into ‘a dangerous terrorist whose views are coloured by notions of the most extreme and fundamental kind’ \(^{133}\). Although the judge could not resolve such lingering questions, he was convinced that Lodhi’s guilty intentions, and his extreme commitment to jihad, were clearly manifested by his actions, his association with Brigitte, and by the objects found in his possession.

The evidentiary significance of objects such as books, documents and a CD Rom in providing damning insights into Lodhi’s intentions is not unique to the Lodhi trial, and indeed we can draw parallels between the court’s interpretation of the written and other material found in his possession, and the significance which the Salem court attached to the less tangible, so-called Devil’s book in the Salem witchcraft trials. Cotton Mather observed that ‘in the late horrid Witchcraft, the manner of the spectres was to tender books unto afflicted Persons.’ \(^{134}\) In Lodhi’s trial, the material which ‘threw considerable light’ on Lodhi’s intentions consisted of a CD Rom which exalted violent jihad, two volumes of the Lion of Allah, and a Chechnyan videocassette ‘glorifying’ the Chechnyan rebels. \(^{135}\) The judge described these materials as ‘eloquent as to the ideas and emotions that must have been foremost in the offender’s mind’. \(^{136}\) Furthermore, Lodhi’s possession of the Urdu document which formed the basis of the third offence also ‘reflected very clearly’ his terrorist intentions. \(^{137}\) The judge dismissed Lodhi’s explanation that he had forgotten about the Urdu document as ‘simply incredible’, \(^{138}\) and was similarly sceptical about Lodhi’s claims that he had not spent a lot of time reading or listening to the other material. \(^{139}\) The possession of this written and other material removed all ‘reasonable doubt’ about Lodhi’s intentions, \(^{140}\) just as a witch’s familiarity with the Devil’s book was clear evidence of guilt in the Salem witchcraft trials.

A focus on the possession of subversive or dangerous literature as evidence of criminality is a recurrent theme in other terror trials, and indeed in the domestic war on terror. Belal Khazaal was arrested and charged with collecting and making documents likely to facilitate terrorist acts; one of these documents was a book about the rules of jihad, which the Australian

Chapter 3 – The Australian terror trials: The dimensions of a moral panic

Federal Police have claimed was compiled by Khazaal and posted on the internet in 2003. Notebooks with information about weapons and books about fighting a jihad again formed part of the prosecution’s case against Ul-Haque. In the trial of Abu Hamza, which I discussed in the previous chapter, the court accepted the prosecution’s argument that the cleric’s possession of a ten volume Encyclopaedia demonstrated his sympathy for the cause of terrorism. These books, and the Urdu document in Lodhi’s possession, were described as terrorism manuals. In the committal hearing of the men arrested in the November 2005 raids, the prosecution presented evidence about the ‘bomb-making manual(s)’ found at their homes. Most bizarrely of all, a young Muslim worker at London’s Heathrow airport who called herself the ‘lyrical terrorist’ because she thought it was ‘cool’, and wrote poems about beheading non-believers, was convicted of possessing records likely to be useful in terrorism on the basis of her poetry and an incriminating ‘library of material’ discovered in her bedroom.

It is difficult to see why the possession of certain inflammatory books and other material necessarily suggests commitment to a terrorist cause. Such books can offer invaluable information about the nature of terrorism and Islamic extremism, without necessarily converting citizens into terrorists. The New South Wales Council for Civil Liberties has argued that allowing people free access to a wide range of ideas strengthens democracy, rather than threatens it. As one journalist has wryly commented, it was fashionable in his youth to be a Maoist and to own a copy of a bomb-making manual called The Anarchist Cookbook; these would-be Maoists were not prosecuted for their violent intentions and indeed did not go on to commit future acts of violence. Frank Moorhouse has pointed out that it is nonsensical to argue that a book could turn someone into a terrorist, as nonsensical as

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145 Moorhouse, above n 141, 32.
146 Ibid 35.
arguing in court that ‘the Bible made me do it’, and that a complex combination of different factors will determine the impact of a particular book on an individual.¹⁴⁸

Nevertheless, in the wider context of the domestic war on terror, certain books are viewed with suspicion and distrust, as a source of contamination of innocent minds. In 2006, two militant Islamic books were banned by the Classification Review Board on the application of the then Attorney-General Phillip Ruddock. After Ruddock failed in his attempt to have six other books banned, he sought the support of the states for tougher censorship rules in relation to literature which counsels, urges, provides instruction in or praises acts of terrorism.¹⁴⁹ In 2007, he was prepared to amend the Criminal Code without the support of all the states, in his campaign to prohibit books, films and computer games which advocate terrorism.¹⁵⁰ Ruddock also restructured the relevant departments and thereby assumed a supervisory role over the Classification Board and the Classification Review Board.¹⁵¹ He refused to apologise for removing from public view books that could ‘incite impressionable young people’.¹⁵²

The assumption that written words corrupt and contaminate perhaps also explains the refusal on the part of the Guantanamo Bay authorities to allow David Hicks access to acknowledged literary classics such as Breaker Morant and To Kill a Mocking Bird.¹⁵³ The power of spoken or performed words to corrupt and contaminate has already been considered in the previous chapter in relation to Abu Hamza’s trial. As with spoken and performed words, which can be transmitted widely through video recordings, written words can potentially reach a large number of people. In the war on terror, Western governments assume that dangerous books can contaminate many minds insidiously and silently; such assumptions mirror the irrational fears about poison in the persecution texts discussed by Girard. Girard observes that

the accusation of poisoning makes it possible to lay the responsibility for real disasters on people whose activities have not been really proven to be criminal.

¹⁴⁸ Moorhouse, above n 141, 38.
¹⁵⁰ The Criminal Code was amended by the Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007. See Katharine Gelber, ‘When are restrictions on speech justified in the War on Terror?’ in Lynch, MacDonald and Williams, above n 91, 143.
¹⁵¹ Moorhouse, above n 141, 27.
¹⁵² Phillip Coorey, ‘Book ban anger: it will hinder freedoms’, The Sydney Morning Herald (Sydney), 4 October 2006, 2.
Thanks to poison, it is possible to be persuaded that a small group, or even a single individual, can harm the whole society without being discovered.\textsuperscript{154}

In both the witchcraft trials and the terror trials, alternative and quite plausible explanations which do not in any sense suggest a commitment to the cause of terrorism or to a devilish pact can be provided for the evidence presented by the prosecution. However, if the judge, jury and most members of the community share a conviction that there are witches or terrorists in our midst, and that such individuals must be identified, isolated and/or destroyed, there is a tendency to read evidence in such a way as to support this conviction. As Paul Feyerabend has pointed out in his analysis of the myth of witchcraft and demonic possession, ‘how can we possibly test, or improve upon, the truth of a theory if it is built in such a manner that any conceivable event can be described and explained, in terms of its principles?’\textsuperscript{155}

Kai Erikson maintains that deviant behaviour appears in communities ‘at exactly those points where it is most feared’, and ‘men who fear witches soon find themselves surrounded by them’.\textsuperscript{156} The reports of the witchcraft trials, and the sentencing judgment in the Lodhi case, can both be viewed as persecution texts. In interpreting such texts, as Girard tells us, ‘one must either do violence to the text or let the text forever do violence to innocent victims.’\textsuperscript{157}

The violence of the law

In the witchcraft trials and the terror trials, however, the violence of the text is overshadowed by the very real violence of the law. It is one of the many ironies in the conduct of the Australian terror trials that although the defendants have not committed acts of violence, they experience a disproportionate degree of violence in their treatment by the state. Thomas and the other defendants have been subjected to oppressive conditions of imprisonment both before their trials, and subsequently. At his committal hearing, Thomas was accompanied by four guards in body armour and extra court staff wearing sidearms.\textsuperscript{158} He was twice refused bail before finally being granted bail in February 2005. Before his trial, he spent three months in solitary confinement for twenty three, and later twenty one hours a day, in a high security

\textsuperscript{154} Girard, above n 13, 16.  
\textsuperscript{155} Paul Feyerabend, \textit{Against Method. Outline of an anarchistic theory of knowledge} (1975) 45.  
\textsuperscript{156} Erikson, above n 92, 22.  
\textsuperscript{157} Girard, above n 13, 8.  
\textsuperscript{158}
unit, with extremely restricted access to his family. He was shackled with handcuffs and leg irons when he moved around within the prison. Justice Teague, who dismissed the appeal against the making of the bail order, described these conditions as ‘abnormally restrictive and exceptionally so’ and ‘very much more restrictive than for the vast majority of remandees’. The punitive nature of this regime was exacerbated as a consequence of Thomas’ particular vulnerability; one psychiatrist suggested that Thomas suffers from post traumatic stress disorder as a consequence of his imprisonment and torture in Pakistan and his report influenced the Chief Magistrate in deciding to grant bail. In May 2006, it was reported that Thomas had been moved from his high security cell after suffering from an emotional and mental collapse, and by August 2006, when he was released from prison, he had spent several months in a prison mental health unit.

The other defendants have also experienced the most extreme security conditions, virtual solitary confinement, continuous surveillance and extraordinary security when attending court. Justice Whealy understated the situation in describing Lodhi’s conditions of imprisonment as ‘harsh’, and recommended that he should be re-classified ‘at a relatively early stage during his prison term’. Most terrorist suspects have been denied bail, and when Bilal Khazal was granted bail, the New South Wales and Commonwealth governments introduced stricter legislative provisions relating to bail for terrorist suspects. Lodhi appeared at his trial shackled at the ankles, arms and waist. Some suspects, including Lodhi, have been dressed in orange overalls while in custody, thereby evoking comparisons with Guantanamo Bay detainees.

The thirteen men arrested in the November 2005 raids in Melbourne and the nine men arrested in the same raids in Sydney (the Pendennis nine)
attended their committal hearing in a dock encased in armoured glass.\textsuperscript{170} This is not without precedent; the 1961 Israeli trial of the Nazi war criminal Eichmann also featured court appearances of the defendant within a bullet-proof glass box.\textsuperscript{171} A Penrith courtroom, including the dock, was radically remodelled for the purposes of the committal hearing of the Pendennis nine.\textsuperscript{172}

The treatment of terror suspects in prisons and in courtrooms is clearly dehumanising. It corresponds to the process of ‘bestialization of the human’, which Judith Butler has described in relation to the treatment of detainees at Guantanamo Bay. She writes that in such oppressive conditions of imprisonment, ‘there is a reduction of these human beings to animal status, where the animal is figured as out of control, in need of total constraint’.\textsuperscript{173} The violence of the defendants’ experiences of imprisonment and judgment is a form of state-imposed terror. It can be viewed as an assertion by the state of its monopoly over violence,\textsuperscript{174} a visible manifestation of the underlying violence which distinguishes the performance of law from other performances.\textsuperscript{175} It cannot be viewed as a punitive response to acts of violence committed by the defendants, since none of the suspects have committed acts of violence.

The performance of the terror trials is different from performances in other trials. The excessively harsh treatment of suspects in custody and in the courtrooms, and the extensive media coverage preclude the delivery of justice in such performances.\textsuperscript{176} Other problematic features include the reliance on evidence from overseas witnesses held in custody, and a concealment of some evidence from public view.\textsuperscript{177} There is an unprecedented degree of executive intervention through the provisions of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) (hereinafter the National Security Information Act).\textsuperscript{178} Counsel for ASIO and the Attorney-General dominate at the bar table; as Boulten has put it, 

\textsuperscript{172} Kennedy, above n 73.
\textsuperscript{174} Jacques Derrida, ‘Force of Law: The “Mystical Foundation of Authority”’ (Mary Quaintance trans) in Drucilla Cornell, Michel Rosenfeld and David Gray Carlson (eds), \textit{Deconstruction and the Possibility of Justice} (1992) 33.
\textsuperscript{176} Phillip Boulten, ‘Preserving national security in the courtroom: a new battleground’ in Lynch, MacDonald and Williams, above n 91, 97.
\textsuperscript{177} Ibid.
\textsuperscript{178} Ibid 98–99.
‘the state’s security apparatus is an ever-present force’.

People entering the courtroom are confronted by metal detectors; lawyers have had their mobile telephones confiscated. In Boulten’s view, the way in which the trials are conducted makes a ‘forceful and theatrical statement’ about the state’s view of the accused. He has stated that ‘the jury are quick to perceive the nature of the struggle, when the state is waging war on terror in the courtroom.’

The state’s focus on ‘elaborate and excessive precautionary measures’ in its treatment of terror suspects is symptomatic of a moral panic and can be justified only ‘if one conceives of the situation as catastrophic and moreover thinks it will happen again, get worse and probably spread’. The terror trials can be understood within the context of a moral panic, in which the tendency is to over-react, and incidents are re-interpreted as part of a phenomenon: in this case, the phenomenon of terrorism. Furthermore, these characteristics of a moral panic correspond with Girard’s description of a collective persecution, in which ‘the import of the operation is to lay the responsibility for [a] crisis on the victims and to exert an influence on it by destroying these victims or at least by banishing them from the community they “pollute”.’

The Australian terror trials and moral panic

It is worthwhile exploring more closely the purpose and function of the terror trials in Australia, in order to determine whether they are indeed part of a moral panic or collective persecution. Lex Lasry, in his closing statement in the Thomas case, argued that the trial was intended to be a trophy trial. This designation was described by Justice Cummins as ‘unfortunate’ and ‘a hollow forensic flourish’. He stated emphatically that ‘this Court will be no part of trophy trials’ and referred to the ‘precious rights’ which Thomas had been

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179 Ibid 100.
180 Ibid.
181 Ibid 99.
183 Cohen, above n 2, 87.
185 Cohen, above n 2, 81.
186 Ibid 82.
187 Girard, above n 13, 24.
188 Munro, above n 54.
able to exercise during his trial. The clear implication was that Thomas was fortunate to be tried within his own community unlike David Hicks, who on the basis of very similar activities had been detained in Guantanamo Bay and offered only the Military Commission process. However, Lasry’s point was that the terror trial of an individual with no history of violence or participation in acts of violence was more about spectacle than about justice.

According to Jenni Smith, show trials are ‘partial; selective; legally dubious; and their intent is didactic or therapeutic rather than juridical’. Such trials can be viewed as law as propaganda. As state-orchestrated spectacle, the Australian terror trials are intended to reinforce certain messages: specifically, that Australia is at high risk of terrorist attacks, that individuals and groups within Australia are currently engaged in preparing for these attacks, and, furthermore, that terrorist attacks on Australian soil have been avoided thus far by the diligence and hard work of the Australian Federal Police and ASIO, in pre-empting and thwarting terrorist attacks by bringing would-be terrorists to trial. To ensure that such messages are effectively conveyed, the members of the Australian Federal Police have been directed to lay as many charges as possible under the new terrorism legislation.

Such messages can be found in Justice Cummins’ judgment in the Thomas trial, and in the government’s response to the verdict. Justice Cummins held that ‘in the matter of terrorism offences, the principle of general deterrence is of pre-eminent importance.’ The former Attorney-General also emphasised that successful prosecutions of individuals in Thomas’ situation would have a deterrent effect. According to Ruddock, the outcome of the trial demonstrated ‘very clearly’ that ‘if you get involved with terrorists and their activities then you do so at your own peril.’ He stated that the convictions ‘demonstrate the seriousness with which these issues are dealt with by the law and highlights the consequences of becoming involved in these activities.’ The message of deterrence was also clearly conveyed by the government and court in the Lodhi case. After the verdict had been handed

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194 Allard, above n 82.
down, a spokesperson from the Australian Federal Police commented that the conviction ‘sends a very clear message to those involved in terrorism that the AFP and NSW police joint counter-terrorism team, together with domestic and international law enforcement and security agencies, are determined to counter any attempts of terrorist activities on Australian soil.’¹⁹⁸ In sentencing Lodhi, Justice Whealy identified the ‘obligation of the Court’ as being ‘to denounce terrorism and voice its stern disapproval of activities such as those contemplated by the offender here.’¹⁹⁹

The performances of the terror trials are designed to supplement and reinforce the strategies of the state in fighting its domestic war on terror; they are intended to be massively publicised ceremonies in which the victim/terrorist is prosecuted, convicted, and then isolated from the community in extremely punitive circumstances.

The state-orchestrated spectacle of the terror trials is intended to create public support for the stringent measures taken by the government in its response to the threat of terrorism, and to justify what many commentators have described as an attack on civil liberties. Hocking has identified as a ‘key assumption’ in Australia’s counter-terrorism measures the view that ‘civil and political liberties must “bend” in order to respond to terrorism’²⁰⁰ and Hilary Charlesworth has argued that human rights are seen as ‘some kind of fancy optional extra’, which can be ignored in times of crisis.²⁰¹ Principles such as the prohibition on detention without trial, the presumption of innocence, freedom of speech and association, the right to privacy and the right to a fair trial are jeopardised by the counter-terrorism legislation enacted by the Australian government.²⁰² Instead, the emphasis is on the right to security.²⁰³ The terror trials are designed to reassure Australians that such sacrifices of liberty may be unpalatable, but are absolutely necessary.

Although the terror trials have not, thus far, generated a large number of convictions, they play a critical role in the moral panic about terrorism, and support the ideological apparatus which underpins the government’s response to terrorism. They are intended to demonstrate

¹⁹⁸ King and O’Brien, above n 67.
¹⁹⁹ R v Lodhi [2006] NSWSC 691 (Unreported, Whealy J, 23 August 2006) [92].
²⁰⁰ Hocking, above n 106, 92.
that there are real terrorists in our midst. In 2006, the Director-General of ASIO stated that the Lodhi case ‘exemplified the reality that a terrorist attack could occur in Australia’ and went on to claim that ‘there are people living within society who are intent on causing indiscriminate harm to other members of the community through lethal attacks.’

Although, as I shall discuss in the next section, a particular racial and religious group is primarily targeted in the war on terror, the official message is that potential terrorists are not easily identifiable. The government has downplayed the extent to which the religious identity of the defendants is a common feature in the Australian terror trials. The ASIO Director-General has stated that it is impossible to predict who will become a terrorist, that ‘radicalisation’ could happen very quickly, and that people could move from being apparently ordinary members of the community to being much more actively involved in terrorist activities.

The government’s insistence on the presence of evil-minded imposters within the Australian community recalls the 1950s in America, when ‘the paranoia of the Cold War led to nightmares of double agency and evil twins’. It is hardly surprising that the film *Invasion of the Body Snatchers*, in which alien spore invade replica human bodies, appeared at this time, nor that a re-make of this film has recently been released.

Even when the government identifies the traitor in our midst, the ‘Bin Laden in the suburbs’, punitive action can only be taken against a small number of potential terrorists. In 2005, ASIO Director-General Dennis Richardson claimed that ‘the great majority of people in Australia’ who have trained with terrorist organisations ‘remain free in the community’ because the anti-terrorism legislation does not have retrospective effect.

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204 Tom Allard, ‘Threat has not diminished, says spy chief’, The Sydney Morning Herald (Sydney), 31 August 2006, 7.
205 See Waleed Aly, ‘Muslim communities: Their voice in Australia’s anti-terrorism law and policy’ in Lynch, MacDonald and Williams, above n 91, 202.
208 Ibid.
209 *The Invasion*, produced by Joel Silver and directed by Oliver Hirschbiegel, was released in the United States in 2007, and in Australia in early 2008; see Philip Horne, ‘Spawn in the USA, infecting the planet’, The Sydney Morning Herald (Sydney), 3 October 2007, 18.
210 This phrase appears in Scott Poynting, Greg Noble, Paul Tabar and Jock Collins, Bin Laden in the Suburbs. Criminalising the Arab Other (2004).
Such comments in conjunction with the terror trials have helped to create a widespread perception that there is a high risk of terrorism in Australia. According to a 2005 survey, 70% of Australians believed that a terrorist attack was likely to occur in Australia in the next two years. However, Christopher Michaelsen has pointed out that there have been very few detailed assessments of the terrorist threat to Australia and that a terrorist attack on Australian soil is unlikely to fit within the objectives and agenda of al-Qaeda. The absence of important targets, upgraded security and geographical peculiarities also reduce the risk. Even more significantly, Australia does not appear to have ‘a terrorist human infrastructure’. Michaelsen refers to two Islamic extremists who tried and failed to establish a terrorist network within Australia, and also cites the failure on the part of Jack Roche to recruit an ‘operational cell’ in Australia due to a general lack of interest.

If, as Michaelsen argues, the risk of a terrorist attack in Australia is low, and the ‘terrorist human infrastructure’ does not exist, why, we might ask, has the Australian public accepted the scapegoating of individuals in the terror trials? If the war on terror were to be waged with any consistency, there would be more acknowledgment of government complicity and less of a focus on individuals who have not, in fact, committed acts of violence, and whose intentions in this regard are difficult to gauge. As Julian Burnside has commented, the well-publicised $300 million payment by the Australian Wheat Board to Saddam Hussein’s regime has contributed more to terrorism than the activities of individuals like Thomas. Indeed, the counsel assisting the Cole inquiry into the ‘oil for food’ affair concluded that the Australian Wheat Board’s financial contribution to Saddam Hussein may well have financed terrorism. However, the terror trials can be viewed as trials of difference, and the racial profiling in the implementation of the anti-terrorism legislation resonates with a deep-rooted xenophobia in the Australian community. A popular discourse in which the terms ‘Arab’ or ‘Muslim’ were associated with the term ‘terrorist’ was well-established even prior to the

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214 Ibid 331.
215 Ibid 331–2.
216 Ibid 333.
217 Ibid 334.
218 ‘Thomas: Osama didn’t mind hugs’, above n 196.
September 11 attacks.\textsuperscript{220} The spectacle of the terror trials has played upon, and reinforced, a popular perception that the terrorist is a young Muslim man, of Middle-Eastern background, with a fervent and idealistic belief in the need for a holy war.

It is clear that the defendants in the terror trials symbolise something far more powerful, far larger than themselves; in the eyes of the public, they embody the evils of terrorism. They are the ‘folk devils’ or scapegoats in the moral panic about terrorism, ‘visible reminders of what we should not be’,\textsuperscript{221} and in the courtroom of the terror trials can be found the ‘dramatization of deviance’.\textsuperscript{222}

Racial and religious profiling

By late 2005, all the people who had been questioned under the new ASIO powers and charged under the anti-terrorism laws were Muslims.\textsuperscript{223} Philip Boulten has observed that in the first criminal trial involving terrorism related charges under the new laws, all prosecution witnesses were sworn in on the Bible and all defence witnesses on the Koran.\textsuperscript{224} Thomas is a Muslim like the other defendants in the terror trials, but unlike most of them, he voluntarily embraced difference. His decision to convert to the Islamic religion followed a sequence of other unconventional choices, including a short-lived ballet career and a period of time with a punk band called Lobotomy Scars.\textsuperscript{225} He could strategically downplay his outsider status as an idealistic Muslim convert,\textsuperscript{226} and in fact, did so by removing his beard for the trial at his mother’s request. Unlike the other defendants, he has a white Australian family (although his wife was born in Indonesia and wears a hijab). This worked in his favour. In sentencing Thomas, Justice Cummins stated that he had ‘been most impressed by [his] parents, who have

\textsuperscript{219} David Marr, ‘Report ties Iraq terrorism to payoff’s’, \textit{The Sydney Morning Herald} (Sydney), 6 October 2006, 1.
\textsuperscript{220} Scott Poynting, ‘“Bin Laden in the Suburbs”: Attacks on Arab and Muslim Australians before and after 11 September’ (2002) 14 \textit{Current Issues in Criminal Justice} 43, 44.
\textsuperscript{221} Cohen, above n 2, 9.
\textsuperscript{222} Ibid 108.
\textsuperscript{223} Boulten, above n 50, 3. Although the suspects in ongoing terror trials are mostly Muslims, a Brisbane schoolteacher ironically called John Howard Amundsen was charged with a number of terrorist offences in 2006; he does not appear to fit within the racial and religious stereotype of the Australian terrorist.
\textsuperscript{224} Ibid.
\textsuperscript{225} Munro, above n 22.
attended court every day. They are decent, good citizens.’ 227 His wife, who had also attended the court, was not included in this description, although Justice Cummins did comment more generally that Thomas had ‘a supportive and good family’. 228 Although Thomas can be distinguished from other defendants in the terror trials, he is a Muslim, and an idealistic Muslim, and in that sense, conforms to the stereotype of the terrorist as folk devil. The significance of the verdict in Thomas’ trial was, according to his solicitor Rob Stary, that ‘if you are a Muslim person in this country and you co-operate with the authorities in these sorts of issues you do so at your own peril.’ 229

The potential for racial profiling in the implementation of the anti-terrorism legislation has been a cause for concern for many commentators. Christopher Michaelsen has noted that the likely effect will be ‘to alienate and marginalise Australia’s Muslim community’ 230 and Jenny Hocking has commented that the potential for racial profiling is exacerbated by the imprecise legislative terms and the consequent opportunities for discretionary interpretation on the part of the executive government. 231 In 2005, the Chief Executive of the Police Federation of Australia stated that a focus upon Muslims and upon individuals of a Middle Eastern appearance might be ‘inevitable’. 232 In 2006, the Parliamentary Joint Committee on Intelligence and Security noted the negative impact of the anti-terrorism laws on Muslims. 233

The targeting of Muslim defendants in the terror trials is part of what Scott Poynting calls ‘populist politics exploiting xenophobia’, in which ‘Arabs can become conflated with Muslims, Muslims with terrorist, “boat people” with Middle Eastern, Middle Eastern with Arabs, Arabs with terrorist, and so on in ineliminable permutations’. 234 Alastair Nicholson alludes to this conflation of identities in arguing that those who commit the relevant offences should be characterised as criminals rather than as terrorists, since this ‘draws a much sharper distinction between them and members of the community or religious persuasion from which they largely come’. 235

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230 Michaelsen, above n 213, 335.
231 Hocking, above n 80, 322.
233 Tom Allard, ‘Call to axe terrorism measures’, The Sydney Morning Herald (Sydney), 5 December 2006, 5.
234 Poynting, above n 220, 59.
In the public imagination, the Muslim defendant in the terror trials represents the ‘violent and criminal Arab other’, the ‘pre-eminent folk devil in contemporary Australia’. The labelling of particular racial and religious groups is symptomatic of a moral panic; as Cohen has pointed out, ‘the object of attack’ tends to be ‘both highly visible and structurally weak’. Girard also highlights the susceptibility of particular racial and religious groups to persecution, pointing out that ‘there are very few societies that do not subject their minorities, all the poorly integrated or merely distinct groups, to certain forms of discrimination and even persecution.’ In contemporary Australia, a number of events, including the asylum seeker issue, the ‘race rapes’, the activities of ethnic gangs, and, of course, the threat of terrorist attacks, have contributed to ‘a series of cycles of moral panics’ centred around the Arab other. Even before the September 11 terrorist attacks, the Arab other had assumed the status of a folk devil.

The central importance of the spectacle of the Australian terror trials lies in the messages which they promulgate. The terror trials help to fuel a moral panic about terrorism which the government has exploited, and stamp on the public imagination an image of the terrorist as young, male, Muslim and, given the circumstances of his detention, somewhat less than human. Yet this is state-orchestrated spectacle, with a confusing blend of media sensationalism and secrecy. The involvement of the media in broadcasting the spectacle of the terror trials, and simultaneously challenging the control of the executive government over this spectacle, is one of the most intriguing aspects of the Australian terror trials.

**Mediatisation of the terror trials**

The trial of Jack Thomas, and the other Australian terror trials, have been highly mediatised. In Richard Flanagan’s 2006 novel *The Unknown Terrorist*, the central character becomes the target of a witch hunt orchestrated by a prominent journalist. She reflects that

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236 Poynting, Noble, Tabar and Collins, above n 210, 3.
237 Cohen, above n 2, 198.
238 Girard, above n 13, 17–18.
239 Poynting, Noble, Tabar and Collins, above n 210, 11.
240 Ibid 28.
the chorus of radio and television, the slow build of plasma image and newspaper and magazine photograph, the rising leafstorm of banners and newsflashes not only made any error impossible to rectify, they made errors the truth, the truth became of no consequence, and the world a hell for those whom it randomly chose to persecute.\footnote{Ibid 290.}

The role of the media in identifying and defining the accused terrorist as Other is not an invention of the novelist.\footnote{See, for instance, Tanja Dreher’s description of the sensationalised and racialised reporting which occurred after Dr Mohammed Haneef was detained in July 2007, in ‘News media responsibilities in reporting on terrorism’ in Lynch, MacDonald and Williams, above n 91, 211–212.} Extensive and sensationalised media coverage of the trials, and of events prior to the trials including raids and arrests, has led to expressions of concern about the impact of this coverage on the trial process. Stephen Hopper, Lodhi’s solicitor, commented that the exposure of the jury to speculation about Lodhi’s guilt in the media had precluded the possibility of a fair trial.\footnote{Gregor Urbas and Miriam Gani, ‘The attributes of a fair trial in Australian law’ (2004) 16 LegalDate 3, 6.} Lodhi’s barrister pointed out at a conference in 2007 that it is difficult to establish conditions for fairness in the conduct of a trial when the accused himself is ‘arrested in a blaze of publicity, and his detention depicted as an illustration of government competence’.\footnote{Boulten, above n 176, 103.} Furthermore, the jury had also been exposed to extensive media coverage about the allegedly sinister intentions of Lodhi’s associate, Brigitte. At Lodhi’s trial, his barrister tendered 1571 published references to Brigitte, including newspaper articles published in Sydney and elsewhere in Australia, and radio news broadcasts, and argued that this degree of publicity, and the highly sensational nature of the allegations made about Brigitte, unfairly prejudiced the minds of the jurors against Lodhi.\footnote{\textit{Lodhi v R} [2007] NSWCCA 360 [143] (Barr J).} This argument was dismissed by the trial judge, and later by the Court of Criminal Appeal, who agreed with the judge that firm directions to the jury ensured that the defendant was not adversely affected.\footnote{\textit{Lodhi v R} [2007] NSWCCA 360 [153] (Barr J).}

Similar concerns arose in the Thomas trial. The ‘saturation media publicity’\footnote{Director of Public Prosecutions (Commonwealth) v Thomas [2005] VSC 525 [1] (Cummins J).} of the November 2005 arrests created, according to Justice Cummins, a ‘pregnant and oppressive’ situation which justified an adjournment of the Thomas trial.\footnote{Director of Public Prosecutions (Commonwealth) v Thomas [2005] VSC 525 [4] (Cummins J).} In presenting arguments
against a re-trial, Thomas’ lawyers claimed that the volume and intensity of media coverage following the Court of Criminal Appeal’s decision to quash his convictions, and the issue of the control order, meant that a fair re-trial would be impossible.\textsuperscript{250}

Ironically, after some well-publicised investigative blunders in 2007,\textsuperscript{251} ASIO and the Australian Federal police have also experienced negative media coverage. In January 2008, Mick Keelty, the Australian Federal Police Commissioner, proposed that public discussion of terrorism investigations be deferred until court proceedings had concluded.\textsuperscript{252} He was not concerned about media-orchestrated witch hunts against terrorism suspect; his concern, rather, was that ‘there has been a discernible shift towards campaigns being run in the media to engender support for accused persons or persons under investigation’.\textsuperscript{253} His controversial recommendation was roundly criticised by lawyers, civil liberties groups and politicians, with new Labor Attorney-General Robert McClelland emphasising the need for media coverage and public discussion in a ‘healthy and vibrant democracy’.\textsuperscript{254}

Media coverage of the trials is currently subject to few legislative restrictions. The main restriction arises from the closure of trials under the \textit{National Security Information Act}. The implementation of this legislation has created a paradoxical situation in which the trials are highly mediatised but at the same time shrouded in secrecy, with disturbing restrictions on the availability of court documents and closed hearings.

Under the \textit{National Security Information Act}, the Attorney-General must be notified and can intervene in federal criminal (and civil) proceedings if it appears that evidence will relate to or affect national security. If the Attorney-General issues a ‘criminal non-disclosure certificate’\textsuperscript{255} or a ‘witness exclusion certificate’,\textsuperscript{256} a closed hearing will be held.\textsuperscript{257} In closed

\textsuperscript{251} These included the detention without charge, and subsequent charging of Mohammed Haneef, in July 2007, on the basis of inaccurate evidence, and improper investigative practices in relation to Ul-Haque. In both cases, charges were dropped against these terrorist suspects.
\textsuperscript{252} Connie Levett, ‘Keelty defends pre-emptive tactics in terrorism cases’, \textit{The Sydney Morning Herald} (Sydney), 30 January 2008, 3.
\textsuperscript{253} Mick Keelty, ‘Court of public opinion wrong place to test law’, \textit{The Sydney Morning Herald} (Sydney), 30 January 2008, 11.
\textsuperscript{256} \textit{National Security Information (Criminal and Civil Proceedings) Act} 2004 (Cth) s 28.
\textsuperscript{257} \textit{National Security Information (Criminal and Civil Proceedings) Act} 2004 (Cth) ss 27, 28(5).
hearings, the defendant and possibly his or her lawyer may be ordered to leave the court.\textsuperscript{258} Certainly such proceedings cannot be reported in the media. The judge can make orders about the disclosure of documents or information in these hearings,\textsuperscript{259} orders which can differ from the restrictions set out in the Attorney-General’s certificate.\textsuperscript{260}

Although Justice Whealy has held that the trial judge has an ‘intact’ discretion in relation to the making of such orders, he or she is required by the legislation to give the ‘greatest weight’ to the Attorney-General’s certificate;\textsuperscript{261} Boulten describes this requirement as ‘the real sting in the tail of the Act’.\textsuperscript{262} Concerns have been voiced about this unprecedented level of executive interference in Australian courtroom proceedings but constitutional challenges to the Act in the New South Wales Supreme Court\textsuperscript{263} and the New South Wales Court of Criminal Appeal\textsuperscript{264} have been unsuccessful. In late 2007, the Court of Criminal Appeal held that there is no legislative usurpation of judicial power; instead, the legislature has merely ‘tilted the balance’ in favour of national security interests, which is constitutionally permissible.\textsuperscript{265}

Justice Whealy has held that the Court can appoint a special advocate to represent the defendant in a closed hearing, if the Court is ‘satisfied that no other course will adequately meet the overriding requirements of fairness to the defendant’.\textsuperscript{266} The judge also held that the legislation does not impinge ‘in any fundamental way upon the ordinary process of the establishment of guilt or innocence by judge and jury’ and that ‘the traditional protections given to an accused person are not put aside by the legislation’.\textsuperscript{267} However several commentators have drawn somewhat different conclusions about the impact of the legislation on the trial process.

\textsuperscript{258} National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) s 29(3).
\textsuperscript{259} National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) s 31.
\textsuperscript{261} National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) s 31(8).
\textsuperscript{262} Boulten, above n 176, 98.
\textsuperscript{264} Lodhi v R [2007] NSWCCA 360.
\textsuperscript{265} Lodhi v R [2007] NSWCCA 360 [66] (Spigelman J).
In Patrick Emerton’s view, the legislation is designed to permit conviction on the basis of evidence which is not fully disclosed and therefore cannot be adequately contested. He points out that the legislation permits an unprecedented degree of executive interference in the conduct of criminal trials, and that the Attorney-General’s powers are open to abuse. In his view, the legislation detracts from the accused’s right to a free trial, and sanctions arbitrary imprisonment. Joo-Cheong Tham and Jude McCulloch agree that the legislation permits convictions based on secret evidence, and Michael Head, resorting to literary analogies, has described the operation of the National Security Information Act as part of a ‘chilling advance toward a “big brother’s state” reminiscent of George Orwell’s fictional dystopia in Nineteen Eighty-Four’. According to barrister Julian Burnside, the Act is ‘the most alarming piece of legislation ever passed by an Australian government in a time of peace.

The concern of most commentators is that the National Security Information Act takes away the defendant’s right to a fair and open trial. However, the impact of the legislation on the public’s understanding of the war on terror is also of concern. Tham’s comments in relation to the security offences in the ASIO Legislation Amendment Act 2003 (Cth) are relevant in this context. He has argued that ‘increased governmental control over the flow of security information risks distorting the public’s understanding through the selective disclosure of information.’

In 2006, the first constitutional challenge to the National Security Information Act was brought by seven media organisations during the Lodhi trial. The media organisations unsuccessfully argued that the legislation infringed the implied freedom of political communication and conferred power on a Chapter III court which was incompatible with the exercise of judicial power under Chapter III of the Constitution. Clearly, the media would prefer to have unrestricted access to the spectacle of the terror trials. However, some

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269 Ibid 162–3.
270 Ibid 166.
271 Joo-Cheong Tham and Jude McCulloch, ‘Secrecy, Silence and State Terror’ (2005) 77 Arena Magazine 46, 47.
commentators have expressed concerns that the media’s focus on ‘the state’s right to control access to public information in an era of mediated democracy’ might well divert attention away from the impact of this exercise of state power on the rights of vulnerable terrorism suspects.  

In Jack Thomas’ trial, much of the committal hearing was conducted in a closed court. Justice Cummins made twenty two orders for closure and non-publication, on the basis that the court was ‘embarking upon uncharted waters’. However, the judge decided not to continue these orders in the jury trial, although the Attorney-General sought their continuation. He referred to the importance of public open trials in his ruling, citing Bentham, various judicial authorities and, somewhat surprisingly, Kafka’s *The Trial*. In his view, ‘the public through the media has a real and legitimate interest in concurrent publication of proceedings. Retrospective and edited publication fails to fulfill that interest.’ In later rulings, he continued to refer to the community’s ‘powerful interest in the proceedings being public and fully public’.  

By contrast, closed hearings distinguished the committal hearing and the trial of Lodhi. During parts of the committal hearing, Lodhi was removed from the courtroom and orders were made prohibiting the publication of evidence. The New South Wales Court of Criminal Appeal dismissed an appeal against Justice Whealy’s decision to close the court during the trial, holding that the judge had approached his decision correctly in weighing ‘the principles of open justice and the objective of providing a fair trial with the need to protect the security and defence interests of the Commonwealth’. Justice Whealy stated in the course of the trial that ‘my preference is that as a conservative traditionalist anything that should

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276 This argument has been put forward in relation to Guantanamo Bay. See Dean Wilson, Amanda Third and Sharon Pickering, ‘Media, Secrecy and Guantanamo Bay’ (2004) 16 *Current Issues in Criminal Justice* 79, 82.  
277 *Director of Public Prosecutions (Commonwealth) v Thomas* (No 7) [2006] VSC 18 [3] (Cummins J).  
278 *Director of Public Prosecutions (Commonwealth) v Thomas* (No 7) [2006] VSC 18 [5] (Cummins J).  
279 *Director of Public Prosecutions (Commonwealth) v Thomas* (No 7) [2006] VSC 18 [77] (Cummins J).  
280 *Director of Public Prosecutions (Commonwealth) v Thomas* (No 7) [2006] VSC 18 [13] (Cummins J).  
281 *Director of Public Prosecutions (Commonwealth) v Thomas* (No 7) [2006] VSC 18 [13] (Cummins J).  
282 *Director of Public Prosecutions (Commonwealth) v Thomas* (No 8) [2006] VSC 31 [10] (Cummins J).  
283 Under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), and also under the *Crimes Act 1914* (Cth) and the *Criminal Code Act 1995* (Cth).  
284 Boulten, above n 50, 8.  
happen, should happen in open court.’ However, the proceedings were distinguished by peculiar restrictions. The judge commented that lawyers had difficulties in filing submissions, presumably due to the extreme security precautions. Even court staff who handled exhibits had to undergo security clearances.

The peculiar combination of media sensationalism and secrecy in the terror trials creates an environment in which members of the public retain their keen interest in the proceedings even though parts of the proceedings are concealed from their view. The media has played a role in the spectacle of the terror trials in mounting a challenge to the validity of the National Security Information Act. The broader role on the part of the media in disseminating information about the spectacle is critical if the terror trials are to effectively convey their message about the force and power of the state, and its battle with terrorism. As Cohen has observed, the media defines and shapes social problems, and is ‘a main source of information about the normative contours of our society’. Importantly, the media provides the community with a face for terrorism: it is ironic that Jack Thomas is being re-tried on the basis of his admissions in a media interview. However, the media can also expose flaws in the state’s handling of an investigation, as in the case of Mohammed Haneef. Furthermore, media interviews can be suppressed by the state. A radio interview with Thomas’ lawyer Rob Stary was seized by the Australian Federal Police in a raid on a Melbourne radio station, because Stary had supposedly contradicted statements made in court.

Conclusion

This investigation of the terror trials suggests a number of common themes. The pre-emptive nature of the trials ensures that they are not about acts of real violence, although the trials constitute a spectacle of violence, in that violence distinguishes the treatment of the defendants. This is law as spectacle, designed to focus the public’s attention on particular individuals or folk devils who share a common religious and often racial identity. In the terror

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288 Wallace, above n 168.
289 Cohen, above n 2, 16.
290 Moorhouse, above n 141, 25.
trials, terrorism, an otherwise uncontrollable phenomenon, can be contained within the bodies of easily identifiable individuals.

Antonia Quadara describes terrorism as ‘absolutised, faceless, virtual’ and always in need of ‘particular bodies to make visible the threat’.\(^{291}\) The terror trials are the performances which ‘[bring] to light/[construct] the enemy’s “true face”’.\(^{292}\) They provide ‘a recognizable image of the enemy’\(^{293}\) by targeting particular folk devils or scapegoats: young Muslim men of mostly Middle Eastern background, a radical Muslim cleric with the appearance of a ‘pantomime villain’, a deposed Middle Eastern leader long despised in the West for his tyrannical and violent regime. The message of the trials is that terrorism can be defeated, and its evils contained, by unleashing the violence of the state on individuals with the marks of the victim. Antonia Quadara’s description of a hypothetical Australian trial of David Hicks as ‘an official performative sacrifice at the hands of the law’\(^{294}\) has a wider application to the very real terror trials of Thomas, Lodhi and other accused terrorists.

The executive government increasingly intervenes in this ‘performative sacrifice’ in its role as director of proceedings. The spectacle of the terrorist trials is highly mediatised; without the media, it would not reach its appropriate audience. Although the terror trials can be viewed as a form of state-imposed terror, they do not permit an examination or a critique of state-imposed terror.

Yet do the terror trials succeed in reinforcing the simplistic dichotomies of good and evil, and us and them, in the official war on terror discourse? Are the courts in such performances simply apologists for the state? In the next chapter, I consider other legal performances involving the sovereign and the terrorist in addition to the terror trials, and analyse such performances in light of Giorgio Agamben’s contention that we are currently living in a state of exception.

\(^{291}\) Ibid 146.
\(^{293}\) Ibid 109.
\(^{294}\) Antonia Quadara, ‘David Hicks in/as the event of terror’ (2006) 24 Australian Feminist Law Journal 141, 147.
It is, surprisingly, in the spectacle of the terror trials rather than in other legal contests between the state and the terrorist that we find the continued application of the rule of law.
Chapter 4

Terrorist v Sovereign:
Legal performances in a state of exception

Stephen Sewell’s play, Myth, Propaganda and Disaster in Nazi Germany and Contemporary America\(^1\) (hereinafter Myth), which I shall consider in the next chapter as one of my case studies in the theatre of dissent, depicts a world of arbitrary and terrifying violence in which the rule of law has become an irrelevance. The title of this play is drawn from the hero, Talbot’s, own work-in-progress and, as it would suggest, in that book Talbot draws a number of parallels between Nazi Germany and contemporary America. The accuracy of Talbot’s observations is highlighted by the violence which is unleashed upon him as a consequence of his politically unacceptable views. Talbot’s book is part of a work of fiction, but various scholars, including Naomi Woolf, have similarly argued that there are similarities between the Third Reich and the Bush Administration.\(^2\) Woolf has not, as far as we know, been subjected to the brutality experienced by Talbot but it has been reported that a United States academic, who referred to the victims in the World Trade Centre as ‘little Eichmanns’, lost his job.\(^3\)

The world which Sewell describes, in which legal rights have been superseded by acts of brutality orchestrated by the executive, and individuals have no recourse to the protection offered by fundamental human rights, resembles the exception or emergency situation first investigated by German theorist and Nazi supporter Carl Schmitt. Schmitt’s work is ‘experiencing a timely or untimely renaissance’\(^4\) in a political environment characterised by loss of liberties, an unprecedented level of executive control, a ‘recasting of the balance’ between the executive and judicial arms of government,\(^5\) and a consequent erosion of the rule

\(^1\) Stephen Sewell, Myth, Propaganda and Disaster in Nazi Germany and Contemporary America. A Drama in 30 Scenes (2003).
\(^3\) Author of September essay is sacked’, The Sydney Morning Herald (Sydney), 26 July 2007 <http://www.smh.com.au>.
of law. Jenny Hocking reminds us that the use of exceptional legislation is characteristic of all
counter-terrorism measures, not merely the recent onslaught of such enactments.\footnote{\textit{Ibid} 73–6.} However, a
number of theorists, including Georgio Agamben, believe that our current political landscape
is best characterised as a state of exception, which now prevails as ‘the dominant paradigm of
government in contemporary politics’.\footnote{Giorgio Agamben, \textit{State of Exception} ( Kevin Attell trans, 2005) 2.}

According to such reasoning, the state of exception described in \textit{Myth} is not, therefore, merely
a work of fiction. In particular, Guantanamo Bay is portrayed as a contemporary state of
exception, a legal black hole which is ‘entirely removed from the law and from judicial
oversight\footnote{Ibid 4.} although this view is not universally held. Fleur Johns has argued, for instance,
that the regime at Guantanamo Bay displays an ‘over-abundance of legal procedures, and
regulatory effects’\footnote{Fleur Johns, ‘Guantanamo Bay and the Annihilation of the Exception’ (2005) 16 \textit{European Journal of
International Law} 613, 614.} and is far from being representative of ‘Schmittian exceptionalism’.\footnote{Ibid 631.}

In this chapter, I will interrogate Agamben’s thesis on the contemporary state of exception by
exploring the function and role of a number of recent legal proceedings in Australia, the
United Kingdom and the United States, including the Australian terror trials. I shall
investigate whether the terror trials and other legal contests between the state and the accused
terrorist support his thesis. I am interested in exploring the role of such legal performances in
what may, or may not, be a state of exception.

The Sovereign, Homo Sacer, and the State of Exception

Carl Schmitt believed that the exception lay outside the legal order\footnote{Carl Schmitt, \textit{Political Theology. Four Chapters on the Concept of Sovereignty} (George Schwab transl, 1985) 7.} and that the rule of law
was not applicable within the framework of the exception. His ideas have attracted a
considerable amount of attention in the contemporary Western political environment, in
which recurrent references to exceptionalism can be found in popular and official discourses,
and suggestions that the rule of law should be set aside have been made by representatives of
both the Blair and Bush governments.\footnote{David Dyzenhaus, \textit{The Constitution of Law. Legality in a Time of Emergency} (2006) 1.} Various legal theorists, including Bruce Ackerman,
Cass Sunstein and Oren Gross, have endorsed Schmitt’s views and argued that judges have only a minimalist role to play in the current state of exception. Furthermore, Agamben has been accused of an uncritical engagement with Schmitt’s theory of exception.\(^\text{13}\)

According to Agamben, the distinguishing feature of the state of exception is that, within this realm, law merges with life. The state of exception is exemplified by the concentration camps of Nazi Germany;\(^\text{14}\) Guantanamo Bay is a contemporary example. The critical point made by Agamben is that, far from being the exception, the state of exception has ‘reached its maximum worldwide deployment’\(^\text{15}\). In the modern configuration of the state of exception, individual liberties are no longer protected by constitutional guarantees or constitutional norms, and the executive’s powers are significantly enhanced such that its decrees have the force of law.\(^\text{16}\) The distinction between legislative, executive and judicial powers becomes blurred or disappears.\(^\text{17}\) As the state of exception acquires an increasingly universal political relevance, ‘bare life’ has become a central part of the political order\(^\text{18}\) and the camp has become ‘the fundamental biopolitical paradigm of the West’.\(^\text{19}\)

Agamben draws upon or arguably completes Foucault’s work on biopolitics,\(^\text{20}\) which encompasses the ‘growing inclusion of man’s natural life in the mechanisms and calculations of power’.\(^\text{21}\) In doing so, he contemplates the role and nature of his ‘protagonist’, homo sacer or bare life.\(^\text{22}\) Homo sacer, originally an ‘obscure figure of ancient Roman law’,\(^\text{23}\) is the scapegoat without legal status; excluded from the ‘city of men’; abandoned by the law; ‘exposed and threatened on the threshold’ between life and law\(^\text{24}\) like an unwanted foundling. This vulnerable figure can be killed with impunity, and the violence of his killing falls outside ‘the sanctioned forms of both human and divine law’.\(^\text{25}\)

\(^\text{13}\) Sharpe, above n 4, 101.
\(^\text{15}\) Agamben, above n 7, 87.
\(^\text{16}\) Ibid 5.
\(^\text{17}\) Ibid 7.
\(^\text{18}\) Agamben, above n 14, 9.
\(^\text{19}\) Ibid 181.
\(^\text{20}\) Ibid 9.
\(^\text{21}\) Ibid 119.
\(^\text{22}\) Ibid 8.
\(^\text{23}\) Ibid.
\(^\text{24}\) Ibid 28.
\(^\text{25}\) Ibid 82.
Significantly, Agamben places homo sacer outside ‘the mediations of the law’ but as Fitzpatrick points out, at least two of the Roman authors on which Agamben relies argued that homo sacer could be incorporated within the legal order and judged, possibly by way of trial. He also argues that the ‘conceptual apparatus of sacrifice’, including, one would assume, Girard’s theories on violence and sacrifice, cannot be applied to homo sacer. According to Agamben, a sacrificial ideology has no application in modern biopolitics.

However, Girard’s theories can be reconciled with Agamben’s exploration of the state of exception. It is true that the use of legal machinery in administering punishment in modern Western societies has no sacred overtones; nevertheless, Girard’s ideas on the persecution of scapegoats as a method for controlling violence and disruption in communities have a contemporary relevance in the context of the terror trials, as I have already argued.

Agamben asserts that ‘we are all virtually homines sacri’ but it is easier to discern the characteristics of homo sacer in a more discrete group: the individuals accused of terrorist offences or suspected of involvement in terrorism related activities. These individuals, stripped of basic rights, surveilled by the state, subjected to house arrest or even more extreme forms of violent detention by the state, can be readily identified as the contemporary incarnation of homo sacer. However, since such individuals are able to mount legal challenges against these forms of surveillance and control by the state, they do not share the central defining characteristic of homo sacer: that of being outside the law.

Agamben distinguishes his approach from that of Foucault in that he focuses on the connection between biopolitics and sovereignty, or the ‘hidden point of intersection between the juridico-institutional and the biopolitical models of power’. He acknowledges an unlikely symmetry and relationship between homo sacer, controlled and disciplined by the biopolitical mechanisms which characterise the contemporary political era, and the sovereign, who creates and administers such biopolitical strategies. Both homo sacer and the sovereign are, for different reasons, outside the law, and thus they represent ‘the two poles of the

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26 Peter Fitzpatrick, ‘“These mad abandon’d times” ’ (2001) 30 Economy and Society 255, 258.
28 Agamben, above n 14, 113.
29 Ibid 114.
31 Agamben, above n 14, 115.
32 Ibid 6.
sovereign exception’. 33 This point is made with some poignancy by Terry Hicks, the father of David Hicks, who, for so long, in his extended incarceration in Guantanamo Bay, exemplified homo sacer; Terry has marvelled over the fact that his son’s name is so frequently mentioned by President Bush. 34 Others have observed that the sovereign and the terrorist are linked in the war on terror discourse. Anna Szorenyi and Juliet Rogers argue that ‘the sovereign in contemporary legal discourse is located vis-à-vis the terrorist’ and that terrorism, which is ‘an injury to the body sovereign’, provides meaning for the sovereign figure. 35

There is no doubt that legal contests between the accused terrorist and the sovereign are occurring with some frequency in the state of exception which arguably characterises contemporary Western societies. Their very occurrence could be perceived as an anomaly, given the theoretical parameters of the state of exception as a lawless void. However, Agamben describes a relationship of mutual dependency, in which the judicial order ‘must seek in every way to assure itself a relation’ with this ‘space devoid of law’. 36 In any event, some of these ‘legal’ performances, for instance those staged by the Bush administration in processing the Guantanamo Bay detainees, are quasi-legal proceedings, and not necessarily representative of the rule of law. Fleur Johns rejects this conclusion and contends that the regime at Guantanamo Bay is, in fact, ‘a profoundly anti-exceptional legal artefact’, 37 with no space for option, doubt and responsibility in the legal procedures which apply therein. This description, however, suggests bureaucracy rather than law, the sort of murderous bureaucracy which engendered mass genocide during the Third Reich: the ‘governmental violence that – while ignoring international law externally and producing a permanent state of exception internally – nevertheless still claims to be applying the law’. 38

In fact, the legal performances which are taking place in the contemporary state of exception can be divided into three categories. In the first category, we find the true legal black holes, in which the courts refuse to judge the actions of the executive. Yet such performances are limited in number. More common are the second category of legal performances, in which the

33 Agamben, above n 14, 110.
34 Terry Hicks has been quoted as saying: ‘It’s like … surreal. The President of the United States knows my son’; Fenella Souter, ‘In the name of the son’, The Sydney Morning Herald Good Weekend (Sydney), 23 September 2006, 33.
36 Agamben, above n 7, 51.
37 Johns, above n 9, 615.
38 Agamben, above n 7, 87.
courts conduct only a procedural review and ignore the substance of the rule of law.\textsuperscript{39} From these performances emerge what David Dyzenhaus has labelled the legal grey holes, far more dangerous, in his view, than the black holes,\textsuperscript{40} because in deferring to the executive, the judiciary ‘place a thin veneer of legality on the political’.\textsuperscript{41} Into this category fall challenges by accused terrorists to varying circumstances of non-criminal detention, rigorous conditions of surveillance, and extreme restrictions on their freedom of movement and association. In the final category, however, we find legal contests between accused terrorists and the sovereign in which, despite the deployment of biopolitical strategies and an overt display of intimidatory force on the part of the sovereign, the courts have demonstrated a surprising adherence to the rule of law and a resistance to the Kafka-esque qualities of the state of exception. In this final category of legal performances, the Australian terror trials, the sovereign indeed appears to be constrained by the rule of law.

Black holes

The existence of legal black holes is apparent in two legal performances in which political activists argued that the decision on the part of the United States and its allies to wage war on Iraq lacked legitimacy. The courts made it clear that such decisions could not be reviewed by the courts. One of these cases resulted in a Statement of Reasons as to why a law student could not bring a common informer suit against the Prime Minister of Australia in relation to his role in the Iraqi war; the other case was a House of Lords decision on whether the alleged illegitimacy of Britain’s act of aggression in Iraq provided a defence for activists accused of various criminal acts carried out at military and air bases in England.

In 2004, Eric Bateman, a law student, attempted to bring a common informer suit against the Australian Prime Minister, John Howard, under the \textit{Common Informers (Parliamentary Disqualifications) Act 1975} (Cth). In a statement of claim, which the High Court Registry ultimately rejected, Bateman argued that Howard’s actions, including, most importantly, his decision to follow the United States into war in Iraq, amounted to an acknowledgment of allegiance to a foreign power. This, according to Bateman, disqualified the Prime Minister

\textsuperscript{39} Dyzenhaus, above n 12, 35.
\textsuperscript{40} Ibid 50.
\textsuperscript{41} Ibid 39.
from continuing to sit as a member of the Australian Parliament under section 44 of the Australian Constitution.

The High Court Registry, as directed by Justice Kirby, refused to issue the writ of summons and the attached statement of claim without the leave of a Justice. The view of the Registry was that the writ on its face appeared to be frivolous, vexatious and/or an abuse of process. Bateman then sought leave to have the writ issued, and filed an affidavit in which he argued that the proceedings were not frivolous, vexatious or an abuse of process. He argued that there was a genuine legal question to be heard. The affidavit was filed and on 30 April 2004, Justice Gummow published his reasons for refusing Bateman’s application.\(^{42}\)

The statement of reasons is short and scathing in parts. For instance, Gummow J makes the comment that ‘the proposed proceeding … is drafted in a form which, in any event, is embarrassing in the technical sense so as to render the proposed proceeding frivolous or vexatious and an abuse of process.’\(^{43}\) A lack of technical expertise is unsurprising given that Bateman was a law student with no practical experience in High Court litigation. However, the proposed proceeding was embarrassing not just in the technical sense, but also politically. The most revealing passage in the statement of reasons reads as follows:

The proposed statement of claim alleges statements and acts and omissions by the Prime Minister in the conduct of public affairs which, if proved, would, it is contended, found a conclusion that, whilst a member of the House of Representatives, the Prime Minister has acknowledged his allegiance, obedience and adherence to the United States of America. However, that conclusion would not necessarily enliven s 44(i) of the Constitution.

The question which the Constitution would present is not whether the Prime Minister has conducted himself in a particular way but whether, as a matter of law, he is ‘under’ any acknowledgment of ‘allegiance, obedience or adherence to a foreign power’ within the meaning of s 44(i).\(^{44}\)

\(^{42}\) *In the Matter of an Application by Eric Bateman for leave to Issue a Proceeding* (Unreported, High Court of Australia, Gummow J, 30 April 2004).

\(^{43}\) Ibid 3.
Of course, the Constitution does not ‘present’ a question so clearly. The High Court was expressing, rather, a clear reluctance to judge the legal consequences of the political decision-making of the executive arm of government, a reluctance which is mirrored in the next case study. The 2006 House of Lords decision in *R v Jones* also suggests that the courts are not prepared to support attempts by activists to challenge the decision of their government to engage in war.

In February and March 2003, the appellants carried out various criminal acts on English military air bases including damaging fuel tankers and bomb trailers, damaging a runway and aircraft, destroying a fence, trespassing, and chaining themselves to tanks and vehicles. Although such acts involved force and the perpetrators had political motives, they were not prosecuted for terrorist offences or labelled ‘terrorists’. The appellants argued that their actions were lawful ‘because they were aimed at preventing a greater evil, namely the war in Iraq and its probable consequences’. \(^{45}\) The House of Lords dismissed this argument. Lord Hoffman expressed the strongest sentiments in response to the defendants’ arguments.

Lord Hoffman acknowledged the ‘theoretical difficulty in the Courts, as part of the State, holding that the State has acted unlawfully’. \(^{46}\) Furthermore, ‘the decision to go to war, whether one thinks it was right or wrong, fell squarely within the discretionary powers of the Crown to defend the realm and conduct its foreign affairs’. \(^{47}\)

Lord Hoffman commented that one of the defendants had portrayed herself as ‘a lonely individual resisting the acts of a hostile and alien State to which she owes no loyalty’. \(^{48}\) He found this puzzling, given that the state in question had ‘protected and sustained her’ and ‘the legal system which had to judge the reasonableness of her actions was that of the United Kingdom itself’. \(^{49}\) Here the judge drew a distinction between the British state, which he perceived as benevolent, and oppressive regimes such as the Nazi regime in World War II.

\(^{44}\) Ibid 2–3.

\(^{45}\) *R v Jones and others, Ayliffe and others v Director of Public Prosecution; Swain v Director of Public Prosecutions* [2006] 2 All ER 741, 761-2.

\(^{46}\) *R v Jones and others, Ayliffe and others v Director of Public Prosecution; Swain v Director of Public Prosecutions* [2006] 2 All ER 741, 767.

\(^{47}\) *R v Jones and others, Ayliffe and others v Director of Public Prosecution; Swain v Director of Public Prosecutions* [2006] 2 All ER 741, 767.

\(^{48}\) *R v Jones and others, Ayliffe and others v Director of Public Prosecution; Swain v Director of Public Prosecutions* [2006] 2 All ER 741, 769.

\(^{49}\) *R v Jones and others, Ayliffe and others v Director of Public Prosecution; Swain v Director of Public Prosecutions* [2006] 2 All ER 741, 769.
This distinction, according to Agamben, is illusory; he argues that in the age of biopolitics, there is an ‘inner solidarity between democracy and totalitarianism’\(^5^0\) and, in fact, democracies and totalitarian regimes are indistinguishable and interchangeable.\(^5^1\) Given the judge’s partial view of the state, it is unsurprising that he and the other judges condemned the use of force by citizens in an attempt ‘to see the law enforced in the interests of the community at large’ and stated that ‘the law will not tolerate vigilantes’.\(^5^2\)

Lord Hoffman concluded his judgment with strong criticism of the strategy of activists to use the courts as a forum for challenging the legitimacy of state acts, including acts of war; he called this ‘litigation as the continuation of protest by other means’.\(^5^3\) The Court’s refusal to look behind the state’s use of force and interrogate the legitimacy of the decision to go to war delineates a classic legal black hole: an area into which the rule of law does not extend.

**Terrorist v sovereign: The grey holes**

In the United Kingdom, the United States and Australia, accused terrorists have mounted a succession of legal challenges to their indefinite detention by the executive, or to extreme restrictions on their freedom of movement and association. The courts have been prepared to concede that they have jurisdiction to hear such challenges, even in situations in which there have been no clear precedents. However, in general, the courts have adopted a procedural approach: ensuring that the executive can exercise such powers over accused terrorists provided that such powers are conferred in validly enacted legislation. Thus the rule of law is diluted, and the courts have deferred to ‘the executive’s judgment about what is required’.\(^5^4\) Dyzenhaus believes that such judgments are far more destructive for the rule of law than is the judicial recognition and acknowledgement of legal black holes.\(^5^5\)

A good example of the potentially broad ambit of the courts’ jurisdiction in relation to such challenges can be found in the Australian Federal Court’s ruling in *Hicks v Ruddock*.\(^5^6\) In this

\(^{5^0}\) Agamben, above n 14, 10.

\(^{5^1}\) Ibid 122.

\(^{5^2}\) *R v Jones and others, Ayliffe and others v Director of Public Prosecution; Swain v Director of Public Prosecutions* [2006] 2 All ER 741, 771.

\(^{5^3}\) *R v Jones and others, Ayliffe and others v Director of Public Prosecution; Swain v Director of Public Prosecutions* [2006] 2 All ER 741, 772.

\(^{5^4}\) Dyzenhaus, above n 12, 19.

\(^{5^5}\) Ibid 5.

\(^{5^6}\) *Hicks v Ruddock, Attorney-General and others* (2007) 239 ALR 344.
ruling, the court held that David Hicks’ challenge to the refusal on the part of the Australian government to request his release in Guantanamo Bay was justiceable, and dismissed the Commonwealth’s argument that it was not appropriate for the Court to rule on the lawfulness or otherwise of particular political decisions and actions on the part of the Australian and United States governments. Justice Tamberlin concluded that ‘there are no bright lines which foreclose, at this pleading stage, the arguments sought to be advanced in the present case’.  

However, the judge emphasised that his decision by no means paved the way for a successful outcome to Hicks’ challenge; the significance of the case was simply that Hicks’ challenge could be heard. Hicks’ subsequent release from Guantanamo Bay has left unanswered the question of whether the Court would have been prepared to curtail the discretionary powers of the Australian state in relation to accused terrorists, and declare certain actions and decisions on the part of the Australian and United States governments unlawful. The critical issues underpinning the challenge, ‘the relationship between the Judiciary and the Executive’, or between the rule of law and the executive, and ‘the relationship between the protection of individual liberty and the national interest’, will not now be resolved by the court in the context of Hicks’ detention. After his release from Guantanamo Bay, Hicks instructed his lawyer David McLeod to discontinue all court challenges.

The court has been prepared to apply the rule of law in some of the challenges brought by accused terrorists against the executive. Stephen Humphreys cites the cases of A v Secretary of State for the Home Department and Rasul v Bush as examples of decisions which ‘hold out – however temporarily – against the encroachment of rule by exception’. In the first of these cases, the House of Lords ended the indefinite detention of non-citizen terrorist suspects in Belmarsh prison on the basis that the government was acting in a discriminatory fashion. In the second, the United States Supreme Court held that non-citizen terrorist suspects detained at Guantanamo Bay were entitled to habeas corpus review within the United States judicial system. Humphreys argues that in both cases, the courts were conferring rights on homo

60 Penelope Debelle and Phillip Coorey, ‘Quite a trip, quips the man in orange’, The Sydney Morning Herald (Sydney), 21 May 2007, 1, 4.
sacer, ‘an outcome which suggests at least the relevance of a judicial role to Agamben’s story’.  

In most cases, however, in which challenges to executive power have been mounted by an accused terrorist, there has been no substantive victory for the rule of law but rather the rule by law approach deplored by Dyzenhaus, with its careful attention to procedure. *Hamdan v Rumsfeld* (hereafter *Hamdan*), which involved a challenge by a Guantanamo Bay detainee to the exercise of sovereign power by the United States executive government, provides an example of this approach. The case could be read as an attempt on the part of the court to rein in the power of the sovereign and assert the pre-eminence of the rule of law. Certainly Justice Stevens held that ‘in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction’. However the decision of the United States Supreme Court did not effectively curtail the power of the executive; in ruling that military commissions contravened the international law of war as contained in Common Article 3 of the Geneva Conventions and were thus invalid, the majority judges nevertheless invited the President to seek an appropriate authorisation for such military commissions from Congress. The judges pointed out that the requirement for compliance with Common Article 3 could be waived by Congress, and that ‘the rules of most relevance here are those pertaining to the authority of Congress and the interpretation of its enactments’. President Bush acted upon this suggestion in securing the passage of the *Military Commissions Act 2006* through Congress in October 2006, and thereby established an almost identical replacement regime of military commissions.

In *Hamdan*, therefore, the glaring procedural problems with the first military commissions, including the excessive degree of executive interference in, and control of, the proceedings, and the failure to observe fundamental standards of fairness, were problematic only because Congress had imposed a statutory requirement in the Uniform Code of Military Justice that military commissions must conform to the law of war. The case did not contain a clear statement from the highest court in the United States that the executive must always respect

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64 Ibid 687.
65 *Hamdan v Rumsfeld, Secretary of Defense* 126 S Ct 2749, 2798.
66 *Hamdan v Rumsfeld, Secretary of Defense* 126 S Ct 2749, 2799.
67 *Hamdan v Rumsfeld, Secretary of Defense* 126 S Ct 2749, 2799.
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fundamental legal safeguards; instead, by resorting to principles of statutory interpretation, the majority judges decided an ‘extraordinary’ case in accordance with ‘ordinary rules’.\textsuperscript{68}

However, the minority judges reacted with outrage to even this minimal (and temporary) curtailment of the powers of the executive. According to the minority, the court was bound to respect ‘the Executive’s judgement in matters of military operations and foreign affairs’;\textsuperscript{69} in such matters, ‘the Executive’s competence is maximal and ours is virtually nonexistent’.\textsuperscript{70} Under the constitutional framework, ‘the President’s decision to try Hamdan before a military commission for his involvement with al Qaeda is entitled to a heavy measure of deference’\textsuperscript{71} and ‘the plurality’s willingness to second-guess the determination of the political branches that these conspirators [the detainees] must be brought to justice is both unprecedented and dangerous.’\textsuperscript{72}

The minority thus suggested that the majority judges had radically curtailed the executive’s powers in an area in which the court had little or no jurisdiction, and the rule of law no application; this overstates the significance of the majority decision which did not, in practical terms, curtail the executive’s powers but rather required the executive to seek congressional authorisation before these powers were exercised.

In considering the validity of control orders on accused terrorists or terrorist suspects, the courts have also adopted a procedural approach. Control orders, which fetter an individual’s freedom of movement, communication and association in varying degrees of severity, are, as Humphreys has pointed out, clearly biopolitical strategies;\textsuperscript{73} as the name would suggest, the sovereign seeks to control homo sacer through disciplinary techniques and continuous surveillance. Control orders reflect the central focus in modern democracies on ‘bare life’ as the ‘political subject’.\textsuperscript{74} In challenges mounted by accused terrorists to control orders, the courts have accepted that control orders are a valid component of the new legislative framework developed in response to the threat of terrorism.

\textsuperscript{68} Hamdan v Rumsfeld, Secretary of Defense 126 S Ct 2749, 2799.
\textsuperscript{69} Hamdan v Rumsfeld, Secretary of Defense 126 S Ct 2749, 2823.
\textsuperscript{70} Hamdan v Rumsfeld, Secretary of Defense 126 S Ct 2749, 2822.
\textsuperscript{71} Hamdan v Rumsfeld, Secretary of Defense 126 S Ct 2749, 2824.
\textsuperscript{72} Hamdan v Rumsfeld, Secretary of Defense 126 S Ct 2749, 2839.
\textsuperscript{73} Humphreys, above n 63, 687.
\textsuperscript{74} Agamben, above n 14, 123.
In a key constitutional decision in 2007, *Thomas v Mowbray*, the High Court upheld the validity of Division 104 of the Criminal Code, pursuant to which a Federal Magistrate had issued an interim control order against Jack Thomas within a week after his conviction was overturned by the Victorian Court of Appeal. Dyzenhaus maintains that the case provides grounds for pessimism in regard to the willingness of the Australian judiciary to uphold the rule of law during a time of national emergency.\(^{75}\)

Although Ruddock claimed that ‘the issue is about protecting the Australian community and not punishing a person for an offence’,\(^{76}\) the imposition of the control order looked like the latest attempt on the part of the state to identify Thomas publicly as a terrorist, and impose special restrictions which isolated him, at least to a limited degree, from the rest of the community. As Justice Kirby noted, ‘this sequence of events inevitably gave rise to an appearance, in the plaintiff’s case, of action by the Commonwealth designed to thwart the ordinary operation of the criminal law and to deprive the plaintiff of the benefit of the liberty he temporarily enjoyed pursuant to the Court of Appeal’s orders’.\(^{77}\) As McCulloch and Carlton have pointed out, ‘once coercive force or punishment has been deployed, governments and State agents have a vested interest in the continued vilification of those harmed, as any admission of innocence or doubt would reverse the moral order sought to be inscribed by the punishment.’\(^{78}\) In fact, the control order was hardly the most effective way to protect the community from terrorism; if Thomas were indeed a sleeper agent, it would have been more strategic to engage in covert surveillance and track down Thomas’ associates. One commentator observed that the control order made Thomas ‘an investigative dead end’.\(^{79}\) In any event, as Justice Hayne pointed out during the hearing, it would be highly unlikely that anyone planning a terrorist act would obey a court order.\(^{80}\)

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\(^{75}\) David Dyzenhaus and Rayner Thwaites, ‘Legality and emergency – the judiciary in a time of terror’ in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (2007) 11.


\(^{77}\) *Thomas v Mowbray* (2007) 237 ALR 194, 244 (Kirby J).


The restrictions placed on Thomas’ freedom of movement, association and communication were considerable, as were the authorised levels of state surveillance. He was expected to stay home between midnight and 5am each day and to report to the police three times a week; he was also prevented from leaving Australia without police permission. The legislation was challenged on the grounds, firstly, that there was no head of legislative power to support it, and secondly, as contrary to Chapter III of the Constitution, which ‘gives practical effect to the assumption of the rule of law upon which the Constitution depends for its efficacy’.  

A significant consideration for the majority judges was the existence of a sequence of analogous court orders which curtailed the liberty of individuals but did not amount to detention. However, such reasoning was rejected by Justice Kirby in his dissenting judgment, in which he described the impugned legislative provisions as ‘unique’, ‘exceptional’ and ‘an attempt to break new legislative ground’. Justice Kirby was scathing in his condemnation of the ‘legal and constitutional exceptionalism’ which, in his view, characterised the legislative scheme. In particular, he deplored the subservience of the courts to the will of the executive: he stated that ‘in effect, and in substance, the federal courts are rendered rubber stamps for the assertions of officers of the Executive government’. Here we find a powerful judicial critique of legal grey holes, in which the courts provide a façade of legality for the actions of the executive while the rule of law is undermined.

Interestingly enough, one of the majority judges, Chief Justice Gleeson, suggested that a problematic consequence of placing control orders outside the powers of the federal judiciary would be the consignment of this area to the executive, an outcome which would not be conducive to the protection of human rights. However, the second dissenter, Justice Hayne, indicated that in his view, legislation which conferred an equivalent power to issue control orders on the executive would not necessarily be valid.

In a sequence of English judgments which were handed down at approximately the same time as Thomas v Mowbray, the House of Lords looked at the legality of non-derogating control

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82 Thomas v Mowbray (2007) 237 ALR 194, 205-6 (Gleeson CJ), 222, 229-30 (Gummow and Crennan JJ).
85 Thomas v Mowbray (2007) 237 ALR 194, 296-7 (Kirby J).
orders issued against six respondents suspected, but certainly not charged with or prosecuted for terrorist activity. A number of issues relating to application of the European Convention on Human Rights were considered by the court, and a detailed examination of these lies beyond the scope of this chapter. What was revealing, in exposing the biopolitical thrust of modern democracies, was the willingness on the part of the law lords to consider exactly how many hours of involuntary confinement to one’s house amounted to a deprivation of liberty. Eighteen hours of confinement, and associated restrictions on movement, communication and visitors, were considered excessive by a narrow majority in the case of JJ.\(^88\) However, a fourteen hour curfew in the case of AF\(^89\) was not, nor was the twelve hour curfew imposed on E.\(^90\) Lord Brown of Eaton-under-Heywood in particular was quite prepared to state that ‘the acceptable limit was 16 hours [of confinement], leaving the suspect with 8 hours (admittedly in various respects controlled) liberty a day’.\(^91\) The peculiarly biopolitical strategy of attaching electronic tags to suspected terrorists was also accepted by the law lords.

The above discussion reveals that, in general, the courts are prepared to limit their scrutiny of dealings by the executive with accused terrorists to procedural reviews, in which substantive issues are glossed over. The biopolitical tactics deployed by the state in supervising and controlling the movements and activities of accused terrorists have not been invalidated by the courts. The abundance of legal grey holes in this area lends support for Agamben’s claim that the state of exception has now become the norm. However, somewhat surprisingly, in other forms of legal contests between the state and the accused terrorist, the rule of law has been applied. I return now to the Australian terror trials.

**Sovereign v terrorist: the terror trials**

I have already discussed the terror trials themselves, and the messages which they are intended to promulgate. In the trials themselves, and in the preliminary proceedings, we find a representation of the accused terrorist as homo sacer. Accused terrorists are shackled, subjected to solitary confinement, unable to move freely even within the courtroom. They are even encased behind glass. This representation of accused terrorists as less than human

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\(^88\) *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45.

\(^89\) *Secretary of State for the Home Department v MB (FC); Secretary of State for the Home Department v AF (FC)* [2007] UKHL 46.

\(^90\) *Secretary of State for the Home Department v E and another* [2007] UKHL 47.
corresponds with one of the mythical archetypes of homo sacer, the werewolf: ‘a monstrous hybrid of human and animal’; Agamben argues that in the state of exception ‘the city is dissolved and men enter into a zone in which they are no longer distinct from beasts’.

It is not simply the conditions in which the trials are conducted, and the visible degradation of the accused terrorists to beings less than human, which suggest a state of exception. The evidence provided by the prosecution in the terror trials also supports a conclusion that the courts are operating within a state of exception, in which an apparently innocent sequence of events can inexplicably trigger prosecution and the imposition of harsh punitive penalties. Agamben repeatedly describes the state of exception as a place in which fact is indistinguishable from law. Peter Fitzpatrick has questioned whether the legal question can ever be strictly distinguished from the factual question. However, this merging of fact and law is certainly apparent in the Lodhi trial, in which the evidence regarding Lodhi’s activities was not necessarily incriminating. His conduct could not be described as transgressive, and was clearly capable of innocent explanation. Yet it is in accordance with the arbitrary decision-making processes of the state that the author of such conduct is labelled a terrorist. This confusion between transgression and compliance with the law, ‘such that what violates a rule and what conforms to it coincide without any remainder’, is a central paradox of the state of exception.

Yet despite the apparently absolute control which the state exercises over these legal performances, despite the representation of the defendants as homo sacer and the state’s labelling of seemingly innocuous conduct as transgressive, at least two of these trials have in fact assumed the form of law as failed propaganda, and the rule of law has prevailed. The evidence amassed by the state against two men accused of terrorism, Jack Thomas and Izhar Ul-Haque, has been dismissed as tainted by, respectively, the Victorian Court of Appeal and the New South Wales Supreme Court.

92 Agamben, above n 14, 105.
93 Ibid 107.
94 Agamben, above n 7, 29.
95 Fitzpatrick, above n 26, 262.
96 Agamben, above n 14, 57.
In the *Thomas* case, the Victorian Court of Criminal Appeal set aside the two convictions on the basis that the prosecution had relied on statements obtained from Thomas under conditions of inducement and pressure, and these statements were therefore inadmissible.\(^97\)

In the case of Ul-Haque, Justice Adams was scathingly critical of the interrogation methods utilised by ASIO officers and members of the Federal Police. According to Justice Adams, the ASIO officers were guilty of criminal offences of false imprisonment and kidnapping\(^98\) and the conduct of both ASIO and Australian Federal Police officers was oppressive.\(^99\) In Justice Adams’ view, the state is clearly subject to the rule of law. The violations and ‘gross interference with the accused’s legal rights as a citizen’, rights which, according to the judge, Ul-Haque possessed despite being an accused terrorist and a Muslim,\(^100\) not only destroyed the evidentiary case against Ul-Haque, but led to the announcement of three inquiries into the practices of ASIO and the Australian Federal Police\(^101\) and the real possibility of the instigation of future civil proceedings for compensation on the part of Ul-Haque.\(^102\)

Sewell deliberately cross-references Kafka’s *The Trial* in his portrayal of a state of exception in his play and, in fact, Agamben argues that Kafka depicted a state of exception in his novels in which ‘the most innocent gesture or the smallest forgetfulness’\(^103\) could lead to the imposition of a death sentence. Guantanamo Bay is described as Kafka-esque in the play *Guantanamo*, one of the case studies in the next chapter. It is interesting, therefore, to find explicit references to such Kafka-esque conditions, and a repudiation of Kafka’s fictitious world, in both one of Justice Cummins’ rulings in Thomas’ trial\(^104\) and Justice Adams’ ruling in the case of Ul-Haque.\(^105\)

Such judicial repudiation of a Kafka-esque state of exception has not met with unanimous approval. The heated debate\(^106\) which ensued after the quashing of Thomas’ convictions and the issue of the interim control order suggests that there is a division in the community.

\(^100\) *R v Ul-Haque* [2007] NSWSC 1251 [95] (Adams J).
\(^103\) Agamben, above n 14, 52.
\(^104\) *Director of Public Prosecutions (Commonwealth) v Thomas* (No 7) [2006] VSC 18 [13] (Cummins J).
between those who believe that the rule of law should be upheld in the war on terror, and those who believe that the law should be ‘servant, not master’ in such critical times.\textsuperscript{107} As the President of the Human Rights and Equal Opportunity Commission commented in a lecture in September 2006, ‘the culture of trial by media is a recipe for outrage when the courts reach a different verdict.’\textsuperscript{108} The reaction by much of the media and many commentators to the quashing of Thomas’ convictions and the issue of the control order gestured towards a moral panic, or collective persecution. Some opted for an emotive response; \textit{The Australian}, for instance, featured the appalled reactions of relatives of the Bali victims under the heading ‘Fury after Jihad Jack walks free’.\textsuperscript{109} Jack Thomas, the scapegoat, was represented as doubly culpable, responsible not simply for his own misdeeds in ‘travelling to Afghanistan to serve the cause of terror’, but also, somehow, responsible for the flaws in the legal system which permitted him to ‘[avoid] punishment for this evil act’.\textsuperscript{110} Rhetoric appropriate to wartime was used. The decision was ‘a victory for our enemies’ and ‘a defeat for commonsense and Australia’s national security’.\textsuperscript{111}

Despite such emotive responses, one commentator, Gerard Henderson, accused the ‘civil liberties lobby’ of resorting to ‘hyperbole’, exaggeration and dramatic but unrealistic comparisons;\textsuperscript{112} in his view, Australians capable of drawing rational conclusions from the facts before them supported the imposition of the control order. Here, rational discourse is privileged over emotive discourse, which according to Henderson is part of the weaponry of the misguided ‘civil rights lobby’. Similarly, another commentator described the critics of anti-terrorism measures as having ‘a tenuous understanding of reality’.\textsuperscript{113}

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\textsuperscript{106} Andrew Lynch outlines the dimensions and some of the implications of this debate in ‘Maximising the drama: “Jihad Jack”, the Court of Appeal and the Australian media’ (2006) 27 \textit{Adelaide Law Review} 311, 324–334.
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\textsuperscript{107} Miranda Devine, ‘Raw truths about the great divide’, \textit{The Sydney Morning Herald} (Sydney), 31 August 2006, 13.
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\textsuperscript{111} Ibid.
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\textsuperscript{112} Gerard Henderson, ‘Unanimous verdict in democracy divided’, \textit{The Sydney Morning Herald} (Sydney), 22 August 2006, 11.
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\textsuperscript{113} Chris Merritt, ‘No suburban burglar, this is war’, \textit{The Australian} (Sydney), 29 August 2006 <http://www.theaustralian.news.com.au>.
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Deep misgivings were expressed about the role of what was described as ‘the blackest of black-letter law’ but in reality was the application of a fundamental legal prohibition against the use of evidence obtained through torture. The ‘civil libertarian types’, according to Henderson, ‘focus on legal process’; they believe that ‘the rule of law trumps all’ in contrast to their critics, who ‘believe the law is servant not master’. Here, the implication is that the law should be a ‘servant’ to the Australian community rather than produce unpopular results like a capricious tyrant. Such statements are extraordinary because in normal circumstances, positivism in the law, or adherence to black letter law and its legal technicalities, meets with the approval of conservative thinkers, who direct their criticism towards legal activism.

However, these are not ordinary times, as this second group reminds us. Chris Merrit in The Australian has written that ‘Jihad Jack is on the wrong side in a war. And in war, different standards apply.’ More surprisingly, a barrister, Peter Faris, also suggested that the rule of law should not apply in wartime and that ‘we are at war, this is a war of terror’. This revealing faux pas was then quickly corrected: ‘a war against terror, I should say’. In his view, in such critical times, it was inappropriate and undesirable for seven High Court judges to ‘effectively run the war against terror and tell us what we can do and what we can’t do’. One of these High Court judges, Chief Justice Murray Gleeson, subsequently pointed out at the annual judicial conference in Canberra that courts sometimes had the unpopular task of upholding the law ‘in the face of public impatience and fear’; he also stated that the rule against forced confessions may be viewed as an ‘inconvenience’, but the alternative is ‘a price we are not prepared to pay in order to secure convictions’.

The contribution of such an eminent public figure to the debate temporarily stymied some (but not all) critics of the ‘civil rights lobby’. However, extreme intolerance of dissenting views is one of the more alarming characteristics of the war on terror; those who fail to punish the ‘terrorist’, or support the government in its efforts to see the ‘terrorist’ punished, are

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114 Editorial, above n 110.
115 Henderson, above n 112.
116 Devine, above n 107.
117 This point is made by Lynch, above n 106, 330, who accuses such critics of ‘hypocrisy’.
represented as traitors whose misguided views and actions handicap the government in its attempts to fight terror and thereby endanger the Australian community.

The indignation and outrage which greeted the decision of the Victorian Court of Appeal to quash the convictions of Jack Thomas was illuminating: when the legal performances of the terror trials fail to condemn and isolate the accused terrorist, the rule of law comes under attack from commentators and community members. Surprisingly, there was no commensurable public outcry after the Ul-Haque ruling, although one conservative commentator argued that the civil rights of the ASIO agents had been disregarded, and their professional careers adversely affected. Other commentators interpreted the judicial admonishment of the executive in the ruling as the latest episode in a highly-publicised sequence of similar scoldings. However, one extraordinary response came from a senior bureaucrat from the Attorney-General’s Department, Robert McClelland, who lodged a complaint about Justice Adams with the New South Wales Judicial Commission.

Conclusion

In a state of exception, legal performances work within the power apparatus of the state. In the majority of legal performances considered above, we find support for Agamben’s contention that the state of exception prevails in the contemporary Western societies, and the rule of law carries little meaning. Biopolitical strategies utilised by the state to control and monitor the activities of the contemporary form of homo sacer, the accused terrorist, are accepted by the courts. The executive, with appropriate legislative endorsement, can exercise

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121 See, for instance, David Marr, ‘Spooked in court, by those naïve upstarts insisting on the rules’, *The Sydney Morning Herald* (Sydney), 7 November 2007, 13. One example of the judiciary reining in the executive’s exercise of power against suspected terrorists was the Federal Court judge Justice Spender’s decision that the Minister for Immigration, Kevin Andrews, had acted improperly in cancelling the work visa of Gold Coast doctor Mohammed Haneef in July 2007; *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273. Haneef had been detained for twelve days before being charged with supporting a terrorist organisation. He was released on bail, only to have his visa revoked. The charge against Haneef was later dropped when the government failed to find any substantial evidence of his involvement in an act of terrorism. In December 2007, the Federal Court decision was upheld by the appellate court in *Minister for Immigration and Citizenship v Haneef* [2007] FCAFC 203. A judicial inquiry into the handling of the ‘Mohammed Haneef matter’ was announced in January 2008: Mick Keelty, ‘Court of public opinion wrong place to test law’, *The Sydney Morning Herald* (Sydney), 30 January 2008, 11.
an extraordinary degree of power over the body of the accused terrorist. Legal performances confer legitimacy upon this regime.

The terror trials are designed with a predetermined outcome, in which the guilt and need for containment of the accused terrorists are conclusively established. Yet it is within the context of the Australian terror trials that we find, surprisingly, the application of the rule of law. Despite an attack on the rule of law by prominent members of the community, it seems that the contemporary state of exception is not absolute. The lesson from the Thomas and Ul-Haque cases is that the courts, in reaching a final decision on the guilt or innocence of accused terrorists, are prepared to apply the rule of law.

It is worth noting that in other situations where legal black holes exist, activists have staged extra-legal proceedings in an attempt to hold the executive accountable for its decisions. The current war on Iraq has been compared to the ill-advised Vietnam War, and certainly there was a similar level of widespread public opposition in the West to the Vietnam War. However, the courts in the United States, when confronted with challenges to the Vietnam war, ‘refused to challenge power with law’ and ‘played a deference game, averting their eyes from the wielders of violence’. One such challenge, for example, was mounted by the Chicago Seven, representatives from the major antiwar groups, who tried unsuccessfully to turn their trial into a forum for debate about United States involvement in Vietnam. Consequently, philosophers Bertrand Russell and Jean-Paul Sartre decided to create their own International War Crimes Tribunal, which would determine whether the United States government had committed acts of aggression and whether other governments had been complicit in these acts. Russell and Sartre argued that it was necessary to set up the tribunal because neither governments, nor the people, were prepared to do so.

The proceedings took the form of a trial but there were no punitive consequences; indeed, Sartre opened the trial with the words:

124 The Chicago Seven had been charged with conspiring to incite riots at the 1968 Democratic Convention. See Juliet Dee, ‘Constraints on Persuasion in the Chicago Seven Trial’ in Robert Hariman (ed), Popular Trials, Rhetoric, Mass Media, and the Law (1990) 86–113, for an analysis on why the Chicago Seven failed to achieve this objective.
125 Cover, above n 123, 199.
126 Ibid 200.
We are powerless: it is the guarantee of our independence … What is certain, in any case, is that our powerlessness … makes it impossible for us to pass a sentence.\textsuperscript{127}

The proceedings clearly lacked legitimacy and Russell and Sartre conceded this from the outset. Cover describes them as ‘an anarchist version of a state institutional response’\textsuperscript{128} or ‘a philosopher’s realization of an ideal type’.\textsuperscript{129} He also comments that had the ‘judges’ sought to impose violent punishments for the identified ‘crimes’, the legitimacy of the trial would then have been contested (violently) by the state.\textsuperscript{130} However, this was neither a trial nor a court; rather, it was theatre. Cover describes the process as ‘dramatization, or instruction’.\textsuperscript{131} It can be distinguished from legal proceedings, which can also appear dramatic or didactic, by the fact that the underlying force of the state had not conferred legitimacy upon the tribunal.

In the contemporary context of the war on terror, the self-styled World Tribunal on Iraq considered the legitimacy of the Iraqi war in twenty hearings held in different cities, concluding that the perpetrators of the war were guilty of violations in international law. The Tribunal claimed that its own legitimacy was ‘located in the collective conscience of humanity’.\textsuperscript{132} A more overtly theatrical challenge to the sovereign can be found in the staging of the trial of British Prime Minister Tony Blair, at London’s Tricycle Theatre in April and May 2007. In preparing for Called to Account – The Indictment of Anthony Charles Lynton Blair for the crime of aggression against Iraq – A Hearing, journalist Richard Norton-Taylor and director Nicolas Kent created their own trial of Blair, in which prominent barristers cross-examined witnesses who had been directly involved in the build-up to the Iraq war.\textsuperscript{133}

These examples demonstrate that state acts of terror can be debated and condemned in dramatised proceedings before a tribunal that does not have the backing of the force-of-law, or even of force without law.\textsuperscript{134} Theatre can provide a similar forum; in the theatre of dissent,

\textsuperscript{127} Ibid, 199.
\textsuperscript{128} Ibid 200.
\textsuperscript{129} Ibid 201.
\textsuperscript{130} Ibid.
\textsuperscript{131} Ibid.
\textsuperscript{132} Details of the findings of the World Tribunal and the Final Statement by the Jury of Conscience of the World Tribunal on Iraq can be found on the Tribunals’ website, at <http://www.worldtribunal.org>.
\textsuperscript{133} Alan Riding, ‘A theater holds a hearing on Blair, then stages it’ The New York Times (New York), 26 April 2007, 3.
\textsuperscript{134} Agamben contrasts the force-of-law discussed by Derrida with the force of acts which do not have the value of law and which take place in the State of Exception. See Agamben, above n 7, 38.
we find a more nuanced, more reflexive but not, necessarily, more playful approach to issues of violence and difference. In the next chapter, I shall consider case studies in the theatre of dissent which has evolved in response to the war on terror.
Chapter 5

The theatre of dissent

And so for today, let us … imagine, in every detail, the hundreds of new ghosts that our governments are creating in Iraq. We can make these ghosts real. We can open our doors to them, invite them to sit at our tables. We can talk to them about the theories and ideas that have killed them. And we can make a choice not to let their murder go unrecorded.¹

Introduction

There is no doubt that there has been a significant theatrical response to the war on terror. Playwright David Edgar described in 2003 a ‘burgeoning canon of war-against-terrorism drama’.² The New York Times critic Bruce Weber has stated that ‘not since the political disillusionment of the Vietnam War and Watergate has the theatre seemed to rise up and swell with the kind of shared distress that is evident now.’³ The five plays which I shall examine as case studies address the war on terror in some of its many guises. Only one, Stephen Sewell’s Myth, is entirely a work of fiction. The other four plays draw in part or in whole upon real documents and the words of real characters who have intentionally or otherwise played a role in the ‘war’. They can thus be seen as examples of documentary theatre.

Documentary theatre, a genre established by Erwin Piscator, is theatre which re-enacts actual events, drawing on a variety of historical material.⁴ Its distinguishing features are the incorporation of such primary source material in the dramatic text,⁵ and a ‘battery of

³ Quoted in ibid.
⁵ Ibid.
Chapter 5 – The theatre of dissent

In documentary theatre, ‘the shift is from the appearance of truth to a documented truth’. 6

All five plays considered in this chapter are examples of serious political theatre, but the theatre of dissent in the context of the war on terror can also take the form of satire. Examples of this genre include the London productions of Tim Robbins Embedded, and Justin Butcher’s The Madness of George Dubya, which one commentator has described as a blend of ‘manic comedy with passionate polemic’. 7 Recent Australian productions include Sedition! and Stuff All Happens, which were satirical responses to the enactment of the 2005 counter-terrorism legislation.

It is worth noting that even plays which seem on first impression to have ignored the subject matter offered by the war on terror have been influenced by this phenomenon. John Patrick Stanley’s play Doubt, which was performed at the Sydney Opera House in 2006, is set in the 1960s and looks at the actions of a nun who is convinced that a priest is guilty of paedophilia. On its face, the play is unrelated to the war on terror. However the dramatic theme of the play, in which doubt is pitted against ‘a state of certainty’, 8 reflects a central theme in the war. The playwright has stated that ‘when the United States chose to invade Iraq with insufficient evidence but with such certainty, I knew that I had my play.’ 9

One London critic has concluded that ‘whatever the sins of which you accuse our theatre, silence in the face of war is not one of them.’ 10

Stuff Happens

David Hare’s Stuff Happens opened at the National Theatre in London in August 2004. Critics noted that the venue was an unusual one for the theatre of dissent. Michael Coveney described the production as ‘the final arrival of a fringe, radical idea of theatre at the heart of

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7 Dawson, above n 4, 93.
10 Ibid.
11 Billington, above n 8.
the establishment’. I saw the preview of Neil Armfield’s Sydney production at the Seymour Centre on 16 July 2005. John Howard is mentioned in a line specifically written by Hare for this production.

*Stuff Happens* charts the path to the war on Iraq, using material from the public domain but also setting out imagined private discussions and disagreements between the key political players. David Hare in his author’s note states that ‘nothing in the narrative is knowingly untrue. Scenes of direct address quote people verbatim. When the doors close on the world’s leaders and on their entourages, then I have used my imagination.’ Thus Michael Kustow concludes that ‘in the small space left unilluminated by investigative journalism, memoirs, leaks and scoops, he imagines big scenes of confrontation.’ *Stuff Happens* is therefore not representative of documentary theatre in its purest form, in which the script is drawn entirely from the documented public or private performances of the ‘real’ individuals who have become characters in a play. *Stuff Happens* has instead been described as ‘a hybrid’, as indeed is one of Hare’s earlier plays, *The Permanent Way*, which deals with the sequence of train crashes which followed the privatisation of the British railway system, and the emotional, personal, legal and political aftermath of these disasters. Nevertheless, Hare lays claim to the ‘truth’, and describes his play as a historical recounting of fact, stating that ‘the events within it have been authenticated from multiple sources, both private and public’.

The narrative of *Stuff Happens* is guided by an unnamed actor, who provides succinct commentary, dates, ‘facts’ and context for the speeches and interactions of the main characters. The inclusion of a narrator is characteristic of documentary theatre. The main characters are the familiar, key political players in the drama. We have seen them perform on television; Hare has skilfully woven these performances together into a play. If he has a hero, it is probably Colin Powell, who at the beginning of the play believes in the ‘doctrine’ that

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17 Hare, above n 14, Author’s Note.
18 Dawson, above n 4, 15.
'war should be the politics of last resort';\textsuperscript{19} he tries, and fails, to halt the drive towards war on Iraq. Powell argues passionately for restraint and for United Nations support in the form of resolutions, expressing his own substantial reservations about the wisdom of war, and attempting to mediate between European and other governments, and the Bush administration. Ultimately, however, Powell sacrifices his principles and follows President Bush’s lead into war without United Nations support.\textsuperscript{20} In contrast, other key figures in Bush’s administration, Rumsfeld, Cheney and Wolfowitz, consistently advocate war and view the perceived idealism of British Prime Minister Blair with cynicism and disparagement. Cheney describes Blair as ‘a preacher’, ‘good at the high moral tone’ but as ‘one more to carry’,\textsuperscript{21} while Rumsfeld argues that in the ‘new post-9/11 world’, ‘all grownup people’ understand that the Iraqi war is necessary because ‘we can’t afford the risk that one day [Saddam] might team up with terrorists’.\textsuperscript{22} Within the administration, Condoleeza Rice remains an enigmatic figure; she is a human shield and a mouthpiece for Bush, with the disconcerting habit of prefacing her statements with phrases such as ‘if I can express what the President is feeling’\textsuperscript{23} and ‘speaking with the President’.\textsuperscript{24}

Hare focuses upon the exchanges between the Bush administration, and the British government, headed by Prime Minister Tony Blair. Hare portrays Blair as vacillating and weak. By contrast, Kofi Annan and, more significantly, Hans Blix, as representatives of the United Nations, refuse to capitulate to the pressures from the United States administration to manufacture evidence.\textsuperscript{25} Blair’s acceptance of the deceptions and lies which ostensibly justified the invasion is depicted as the desperate manoeuvring of a politician determined to retain credibility, power and Britain’s most powerful ally. Initially, Blair’s idealism is paramount and he justifies the concept of ‘progressive war’\textsuperscript{26} with rhetoric about the ‘right’ and ‘responsibility’ of the Western nations to intervene and prevent continued human rights abuses in other nations.\textsuperscript{27} By the end of the war, his idealism has been replaced by a pragmatic desire to exploit every opportunity to protect his government. His final statement reveals the extent to which he has sacrificed his convictions and beliefs: ‘After the war, I did

\textsuperscript{19} Hare, above n 14, 5.
\textsuperscript{20} Ibid 91–2.
\textsuperscript{21} Ibid 104.
\textsuperscript{22} Ibid 101.
\textsuperscript{23} Ibid 11.
\textsuperscript{24} Ibid 19.
\textsuperscript{25} See ibid 83.
\textsuperscript{26} Ibid 39.
\textsuperscript{27} Ibid 41.
consider apologising. But I wasn’t sure what I’d be apologising for. And besides, the moment
has gone.\footnote{Ibid 119.}

United States President George Bush is the most powerful, but also the most non-committal
of the characters. His habit of listening to the reservations expressed by Blair and Powell
without voicing an opinion is prefaced at the outset by his observation that:

\begin{quote}
I’m the commander – see, I don’t need to explain. I don’t need to explain why I say things. That’s the interesting thing about being the President. Maybe somebody needs to explain to me why they say something. But I don’t feel like I owe anybody an explanation.\footnote{Ibid 10.}
\end{quote}

In the midst of the political manoeuvrings which led to war, Hare inserts further commentary
from an ‘angry British journalist’, a pragmatic new Labour politician, a Palestinian academic,
a ‘Brit in New York’ and an Iraqi exile. He thus conveys a number of varying responses to the
war, ranging from the railing of the journalist against the self-indulgence of Westerners who
endlessly debate the ‘manner of the liberation’\footnote{Ibid 15.} when the only ‘story’ which ‘obtains’ is that
‘a people hitherto suffering now suffer less’,\footnote{Ibid 16.} to the sad musings of the Iraqi exile, who
reminds us of the ‘uncounted’ Iraqi dead, and of the parallels between Saddam Hussein’s
regime and the United States occupation and reconstruction of Iraq: both, he feels, have
harmed innocent Iraqis.\footnote{Ibid 120.} The lesson to be learned from this, he believes, is that a nation must
‘take charge of itself’\footnote{Ibid.} rather than allow a dictator, or an unscrupulous superpower, to take
charge. Hare also highlights the somewhat ruthless pragmatism of the British politician, for
whom ‘the action itself remains pure’\footnote{Ibid 32.} despite the myriad deceptions; the recognition of
Western hypocrisy on the part of the Palestinian academic, who comments that ‘justice and
freedom are the ostensible cause of the West – but never extended to a people expelled from
their land and forbidden any right to return’;\footnote{Ibid 59.} and the disdain of the ‘Brit in New York’ for
the ‘lethal rhetoric of global wealth and privilege’ which, for Americans, justifies actions which they would undoubtedly not support if undertaken by other nations.

Hare identifies early signs of an intention to invade Iraq in the first meeting of Bush’s National Security Council in January 2001, when aerial photographs produced by George Tenet, Director of the CIA, provoke speculation about Iraq’s production of weapons. Four days after the attacks on the World Trade Centre, in September 2001, Rice explains the proposed attacks on Afghanistan as a ‘demonstration model’ for Iraq, while Wolfowitz points out that an attack on Iraq would provide the ‘maximum result’ for ‘a minimum expenditure of effort’; it is, in his view, a more ‘do-able’ war. At this meeting, Rumsfeld praises the flexibility and vagueness of the phrase ‘a war on terror’: ‘that way we can do anything.’ Indeed when Blair later confronts Bush about the orchestrated escape of bin Laden, Bush retorts ‘terror is bigger than one man.’ Bush asks Rumsfeld to draw up a ‘war plan’ for Iraq only 72 days after September 11, and later, in seeking authorisation for the attack on Iraq from Congress, he maintains that ‘you can’t distinguish between Al-Qaeda and Saddam when you talk about the war on terror.’

Hare describes how the war on Iraq was justified with rhetoric which the narrator likens to a ‘linguistic offensive’, including euphemisms such as Powell’s phrase ‘coercive diplomacy’. In his portrayal of the build up to war, bitter betrayals, cunning manoeuvres, bribery, unplanned mistakes, and, above all, deception all play a critical role. The rhetoric is familiar to all of us. The many references to evil and freedom underlaid the new doctrine of the ‘pre-emptive strike’, according to the narrator, Bush used the word ‘evil’ in 319 speeches between his inauguration as President and 4 June 2003. However, Hare’s account of the behind-the-scenes betrayals and manoeuvring provides far more realistic insights into
the decision-making process than does the simplistic rhetoric; Powell accuses Rumsfeld of betraying him,50 Blair ‘flies into a rage’51 when Rumsfeld states that the United States is prepared to go to war without Britain, France ‘publicly hardens its position’ on military intervention in Iraq, an ‘incident … known in diplomatic circles as “the ambush”’,52 and Blair’s government ‘deliberately [distorts]’ the French President’s words because, as Manning comments, ‘it’s too good not to use’.53

Unplanned mistakes also play a role in the build up to war. According to the narrator, Bush’s reference to United Nations resolutions, his ‘unscripted use of the plural’, ‘[unleashed] a process of diplomacy which [lasted] six months’.54 Above all, however, it is deception which distinguishes the political performances of the Western politicians. Wolfowitz and Rice attempt (unsuccessfully) to persuade Blix to find the evidence which they need.55 Blair and his government manipulate dubious information about the possibility of weapons manufacture in Iraq and release this material to the media in an attempt to win support for their unpopular decision.56 Powell states in the Security Council that he has an ‘eyewitness’ who has provided evidence of ‘mobile laboratories to make biological agents’.57 Wolfowitz describes the reconstruction of Iraq as ‘self-financing’,58 and claims that the Iraqis view the United States as ‘their hoped-for liberator’.59 Hare describes how these assertions are exposed as lies in the aftermath of the war, and furthermore highlights the failure on the part of the key players to acknowledge the significance of their deceptions, and the extent of their complicity in a war which had no legitimacy.

Stuff Happens is a cultural performance which was created in response to the war on terror, and which exposes the extent to which the performances of politicians are designed to manipulate public opinion. It is performance about performance, a theatrical production which re-stages and analyses the essentially theatrical production of modern politics. Other playwrights such as Bertolt Brecht have also exposed the theatricality of modern politics.

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50 Ibid 51.
51 Ibid 110.
52 Ibid 97.
53 Ibid 112.
54 Ibid 67.
57 Ibid 106.
58 Ibid 117.
59 Ibid 115.
Brecht’s 1937 poem, ‘Prohibition of Theatre Cruelty’, he described the Nazi regime as a regime which ‘dearly loves the theatre. Its accomplishments are mainly on the theatrical plane.’

Brecht’s play, *The Resistable Rise of Arturio Ui*, exposes ‘politicians as showmen’ and explores the way in which they manufacture and display their political identity. According to Schechter, the play is ‘a satire of men who exhibit themselves’ in order to govern the public.

Augusto Boal, creator of the Theatre of the Oppressed, consciously created the phenomenon of Legislative Theatre. In January 1993, he was elected as a member of the Brazilian Parliament, and decided to develop ‘theatre as politics’. Boal set up theatre groups designed to canvass popular viewpoints on issues; a theatrical forum allowed for the expression of opinions, and the proposal of solutions in the form of new legislation, which Boal then put forward to the Parliament. Boal, given his background in theatre, was fully cognisant of the theatricality of each session of the Chamber.

The performative nature of politics is also exposed by electoral guerrilla theatre, in which political satirists formally participate in the political process as candidates, and thus ‘infect the electoral public sphere with outrageous “low” performance and rhetoric’. In Australia, these tactics were exemplified in the late 1990s in the performances of Simon Hunt. Hunt responded to the extraordinary political figure of Pauline Hanson, who quickly became renowned for both her embarrassing gaffes and her unabashed racism, with ‘digital sampling, lip-synching, and satirical gender-critical live performance’. As Pauline Pantsdown, dressed in an exaggerated version of Hanson’s outfits, he mocked Hanson’s politics in two songs, ‘I’m a Backdoor Man’ and ‘I don’t like it’, and ran as a candidate for the Senate in New South Wales. Satiric impersonation, according to Joel Schechter, is ‘an act that reveals the person

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60 Quoted in Joel Schechter, *Durov’s Pig, Clowns, Politics and Theatre* (1985) 76.
61 Ibid 78.
62 Ibid 76.
64 Ibid 16.
65 Ibid 22.
66 Ibid 52.
67 Ibid 93.
69 Ibid 75.
70 Ibid 84.
imitated to be a fraud or “gross impostor”. Hunt’s performances during his campaign not only highlighted the performative character of Hanson’s delivery and presentation as a federal politician, but also consistently exposed the performative character of politics. On one occasion, he ripped up his speech and then explained that he had been advised to do this in order to seem more ‘natural’. When asked what he would do if he won. Hunt responded, ‘Well, I guess I’d just hang the wig and the dress up by my seat in Parliament and everyone can take a turn putting them on and being Pauline.’ Hunt was thus suggesting that his (somewhat ludicrous) costume was symptomatic of the contrived performative behaviour of all political figures.

Performances such as these demonstrate the centrality of performance to all political and social processes in modern democracies. Performance, of course, has also been critical in totalitarian regimes. Hitler benefitted from elocution and acting lessons, and cleverly controlled and directed crowd scenes, using contrived settings. Stalin fully exploited this characteristic of political office by engaging doubles, actors who closely resembled him in appearance and mannerisms, to appear as him on public occasions. According to Schechter, a double took his place in the Kremlin even as he lay on his deathbed. Yet in Kershaw’s view, there is a strong correlation between performance, democracy and capitalism; he maintains that ‘performative societies in the contemporary world are found particularly where democracy and capitalism meet’. The performative quality of political power is self-evident and Baz Kershaw maintains that in ‘the new world disorder’, this characteristic is 'shaping the global future as it never has before'.

In the performance of politics, the United States could now be said to lead the world. Harold Pinter has described the United States as ‘the greatest show on the road … As a salesman it is out on its own and its most saleable commodity is self love.’ The President’s role is clearly critical; Lee Baxandall has described him as the key figure in the political spectacle of the

72 Bogad, above n 68, 87–8.
73 Quoted in ibid, 91.
74 Ibid 91–92.
75 Schechter, above n 71, 68–9.
76 Ibid 75–6.
78 Ibid 5.
United States. Hare is thus constructing a theatrical performance from performance. In particular, he exposes the performativestatics of the ‘central authority figure’, President Bush, who remarks with cheerful cynicism that ‘every speech is now “the speech of my life”. I’ve had about six of those from my trusted adviser’s. So now I’m immune to the “speech of your life” stuff.’ The narrator describes his preparations for his ‘mission accomplished’ speech at the end of the military campaign. Bush undertakes ‘an underwater survival training course in the White House swimming pool to prepare for his tailhook landing from an S-3B Viking jet onto the aircraft carrier USS Abraham Lincoln, just thirty miles off the coast of San Diego.’ The narrator then comments that ‘thanks to an artful arrangement of jump-suit jockstraps, George W. Bush, 43rd President of the United States, shows his balls to the world.’ This exercise is designed to highlight the masculinity and power of the leader of the United States; Hare exposes it as performance by re-staging this performance, and thereby invokes Baudrillard’s postmodern world of the hyperreal, in which all is simulation and there is no real, but endlessly generated simulacra.

However, Stuff Happens can be seen as an attempt to restore meaning to a confusing, overly-mediatised sequence of events; in this attempt to confer and create meaning, the play is not a work of postmodernism. Baudrillard sees the role of the media in terms of the overproduction of information and the consequent destruction of meaning. In Stuff Happens, Hare tries to reverse this process by re-organising and editing the vast amount of information generated by the media. He has written that


it is not until you settle down in a theatre to watch the whole passage of the tragedy in one evening … that you realise how different it is to participate in the shared scrutiny of theatre than to sit, as most of us do most of the time, picking like vultures at quickly digested shards of fact and opinion.

80 Lee Baxandall, ‘Spectacles and Scenarios: A Dramaturgy of Radical Activity’ in Lee Baxandall (ed), Radical Perspectives in the Arts (1972) 376.
81 Hare, above n 14, 60.
82 Ibid 115.
83 Jean Baudrillard, Simulacra and Simulation (Sheila Faria Glaser trans, 1994).
84 Ibid 80.
85 David Hare, ‘Stage invades the theatre of war’, The Sydney Morning Herald (Sydney), 15 July 2005, 14.
In Hare’s view, this is an ‘epic story’ which ‘demands an epic medium’. 86 Hare is trying to impose narrative structure, and affix particular meanings to the war on terror through the mechanism of performance. As Sarah Bryant-Bertail has written about the work of Piscator and Brecht, ‘if theatrical means were appropriated in gaining real political power, then the epic theatre could at least reveal the workings of its own machinery of illusion’. 87

Guantanamo: Honour bound to defend freedom

A different narrative, or sequence of narratives, was taken up by Gillian Slovo and Victoria Brittain in their play Guantanamo: Honour Bound to Defend Freedom (hereinafter Guantanamo). In Guantanamo, the theatre takes on the role of a courtroom, or chamber of inquiry, and the audience judges the ‘spoken evidence’; this is a common strategy in documentary theatre. 88

Guantanamo was commissioned by the Tricycle Theatre in January 2004, a month before five British detainees were released from Guantanamo Bay. It was written by journalist Victoria Brittain and novelist Gillian Slovo and, as stated on the cover, is ‘taken from spoken evidence’; it is thus an example of verbatim theatre, a specific type of documentary theatre which has been defined by Derek Paget as ‘a form of documentary theatre firmly predicated upon the taping and subsequent transcription of the interviews with “ordinary” people’. 89 The script is based entirely upon transcripts, interviews and letters. Although the play’s depiction of the surreal nature of the circumstances of detention at Guantanamo Bay has been described as Kafka-esque, 90 this is not a work of fiction.

Guantanamo was first performed at the Tricycle Theatre in London on 20 May 2004, and transferred to the New Ambassadors Theatre in the West End. In January 2005, the British government announced the release of the remaining four British citizens from Guantanamo Bay; one of these, Moazzam Begg, is a central character in the play. Nicolas Kent, the

86 Ibid.
88 Dawson, above n 4, 127.
89 Quoted in ibid 175.
director, has commented that ‘the whole issue was on the tipping point, and the play may have been one hair which just made the scales drop.’

The play has been performed in the United States, Australia and other countries, and in 2006 was performed in the British Parliament by human rights activists. In an odd conjunction of life and art, Clive Stafford Smith played himself in this production. He commented that ‘this is the court of public opinion – the idea is to educate the folks in the House of Commons on what is happening.’ In the United States, community groups have been encouraged to put on readings of the play. Such performances are clearly intended to have a didactic role.

The Tricycle Theatre is well-known for its Tribunal plays, a sub-category of documentary theatre in which the script consists entirely of the edited transcript of legal inquiries and trials. In *Guantanamo*, the material for the play is not drawn from an inquiry. Instead, Slovo and Brittain collected their own evidence, edited it, and wrote a play which masquerades as a form of legal inquiry itself. The authors interviewed released detainees, relatives of detainees, and lawyers of detainees, and used material from heavily censored letters. The interviews with families were conducted over a three week period, usually with one family member, ‘always in their choice of territory’. There were no prepared questions; ‘we wanted the families to decide what they most wanted to say.’ The play is constructed from 25 hours of taped interviews. It could be seen as one-sided, because the views of the British government are not articulated. The authors have noted that despite ‘numerous attempts’ to obtain these viewpoints, ‘no one was prepared to be interviewed’. The perspective of the United States government on the facility is conveyed by Rumsfeld, in a series of bland assertions delivered in response to questions at news conferences.

*Guantanamo* is divided into three Acts. Act One begins with Lord Steyn’s stirring words in a lecture delivered in November 2003, in which he criticises in measured terms the infringement of human rights in the ‘legal black hole’ at Guantanamo Bay. He does not express a sense of personal outrage, but instead warns that ‘what takes place today in the

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92 Paul Majendie, ‘Guantanamo drama turns parliament into main stage’, *The Sydney Morning Herald* (Sydney), 8 February 2006, 16.
93 Ibid., above n 90.
94 Ibid.
name of the United States will assuredly, in due course, be judged at the bar of informed international opinion.\textsuperscript{96} These words resonate within a theatrical production which in itself invites judgement and, indeed, condemnation from its audience.

In the first Act, in three separate but interwoven narratives, Jamal Al-Harith, the brother of Bisher Al-Rawi and the father of Moazzam Begg, together with their lawyers, explain how the three men ended up in Guantanamo Bay. It is clear that none had any connection with terrorism. Jamal Al-Harith ‘was just handed over’\textsuperscript{97} when the truck in which he was travelling was stolen in Pakistan. Despite his efforts to obtain help from the British Embassy through the Red Cross, he was detained by the Americans and sent to Cuba. Moazzam Begg, described by his father as an idealist,\textsuperscript{98} a devout Muslim\textsuperscript{99} and ‘the best son of mine’,\textsuperscript{100} was arrested in Pakistan after he had travelled to Afghanistan to start a school, but instead ended up installing hand pumps in villages.\textsuperscript{101} Bisher Al-Rawi was arrested in Gambia, where he, his brother and two partners were attempting to start a business venture. Wahab Al-Rawi, who unlike Bisher has British citizenship, and one partner, were released after twenty seven days; Bisher and the other partner were moved to Afghanistan, a ‘no-go zone for anybody’,\textsuperscript{102} and then to Cuba.

In the second Act, again a mixture of voices is heard. Moazzam, Bisher and Ruhel Ahmed communicate with relatives through censored letters which are read out by their characters (the censored words are mouthed). These letters increasingly convey the frustration, boredom and monotony of detention, and describe such specific horrors as the Camel Spiders, which crawl over the detainees at a particular airbase and leave festering bites.\textsuperscript{103} Jamal, who was interviewed by the authors after his release from detention, provides a graphic description of his internment, including the chains which gave him dangerously high blood pressure,\textsuperscript{104} and the isolation cell, ‘a freezer blowing cold air for 24 hours’.\textsuperscript{105} In this Act, Rumsfeld makes some of his more revealing comments on the detainees, and their conditions at Guantanamo

\begin{flushleft}
\textsuperscript{96} Ibid 5.  \\
\textsuperscript{97} Ibid 12.  \\
\textsuperscript{98} Ibid 7.  \\
\textsuperscript{99} Ibid 9.  \\
\textsuperscript{100} Ibid 13.  \\
\textsuperscript{101} Ibid 18.  \\
\textsuperscript{102} Ibid 24.  \\
\textsuperscript{103} Ibid 37.  \\
\textsuperscript{104} Ibid 38.  \\
\textsuperscript{105} Ibid 40.
\end{flushleft}
Bay. He asserts that ‘to be in an eight-by-eight cell in beautiful sunny Guantanamo Bay, Cuba is not an inhumane treatment’, a line which, as Nicolas Kent has commented defies invention. Kate Kelloway has added that ‘the power of the line is knowing that it is not satire.’

The superficiality and inadequacy of Rumsfeld’s justifications for the treatment of detainees at Guantanamo Bay are highlighted by the commentary of lawyers Gareth Pierce and Clive Stafford Smith on the role and function of the facility. They describe it a ‘convenience’, an exercise in intelligence gathering, and a ‘massive diversion’ from the far worse conditions experienced by the ‘real bad dudes’ elsewhere. The Act begins and ends with the voice of Tom Clark, an Englishman whose sister was killed in the attacks on the World Trade Centre in New York. His voice is puzzled, at times grief-stricken and angry. He strives to make sense of his sister’s death, to remember her ideals and political views, and concludes that

> if in truth [the detainees] had done nothing wrong, I can’t imagine a worse thing for any person, they deserve all of our sympathies and all of our efforts to sort of make sure they do actually get the justice that they deserve.

Act Three opens with the announcement by the British Minister of State for Foreign Affairs, Jack Straw, that five detainees including Jamal and Ruhel are being released. In part, this Act describes, through their relatives and lawyers, the effects of detention on these people. Their tale, according to lawyer Gareth Peirce, is ‘one of terrible stark medieval horror’. Ruhel’s father says sadly that ‘[I] want to cry but I don’t know how’ when he realises how his son’s eyesight has deteriorated. The plight of Moazzam Begg, still imprisoned in Guantanamo Bay at the end of the play, is further examined in Act Three. His father begs for ‘justice’, not for mercy. Moazzam states in a letter that ‘my experience … has led me to believe that much of my mail to and from home has been deliberately constrained’, and his lawyers

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106 Ibid 35.  
107 Kelloway, above n 16.  
108 Ibid.  
109 Brittain and Slovo, above n 95, 38.  
110 Ibid 33.  
111 Ibid 46.  
112 Ibid 52.  
113 Ibid 50.  
114 Ibid 60.  
115 Ibid 57.
discuss the ludicrous content of his ‘confession’ and his rapidly deteriorating mental health.\textsuperscript{116} Again, the construction of the play as an inquiry is apparent in Clive Stafford Smith’s comments on Moazzam’s confession:

That’s the confession right. Now what do you think? You are the jury. Do you feel that that’s a credible allegation? [I say], if you believe that, you believe in the tooth fairy…\textsuperscript{117}

In this Act, Gareth Pierce and Clive Stafford Smith provide further insights into the political role of Guantanamo Bay and are joined by Greg Powell, who acts for Ruhel, and Major Michael Mori, who acts for David Hicks. Major Michael Mori expresses his strong reservations about the fairness of the Military Commission process. Mori, and Lord Steyn, whose speech on Guantanamo Bay is extracted at the beginning and the end of the play, both argue that the British government has a moral responsibility to act; the government must, in Lord Steyn’s words, ‘make plain publicly and unambiguously our condemnation of the utter lawlessness of Guantanamo Bay’.\textsuperscript{118} Yet in their conclusion, the authors remind us that the British detainees comprise only a small number of the over 650 prisoners at Guantanamo Bay, and most detainees are ‘from countries with even less power than Britain to influence events’.\textsuperscript{119}

\textit{Guantanamo} is a play about the power of language, as contained in the heartrending, heartfelt accounts of relatives and detainees, the obfuscating phrases employed by Rumsfeld, the lawyers’ references to legal principles such as ‘the fundamental protections of a fair trial’,\textsuperscript{120} and the measured, dignified expressions of condemnation used by Lord Steyn. It is also a play about the manipulation of language, which is part of the state’s ‘careful stage management’\textsuperscript{121} of the facility. Rumsfeld describes the detainees as ‘unlawful combatants’,\textsuperscript{122} which as Gareth Peirce explains, is a phrase concocted to avoid obligations which would be owed to prisoners of war.\textsuperscript{123} Suicide attempts are re-classified as ‘Manipulative Self-Injurious Behaviour’;\textsuperscript{124}

\begin{footnotesize}
\begin{enumerate}
\item 116 Ibid 58.
\item 117 Ibid 58.
\item 118 Ibid 62.
\item 119 Ibid 62.
\item 120 Ibid 59.
\item 122 Brittain and Slovo, above n 95, 32.
\item 123 Ibid 32.
\end{enumerate}
\end{footnotesize}
interrogations are euphemistically called ‘reservation[s]’ or ‘exhibition[s]’. The detainees respond with their own codes. They attempt to re-organise themselves with leaders or ‘Emirs’ but refer to them as cooks in order to avoid punishment. Most significantly, the play is about the power of language in the form of the spoken testimony. Gareth Pierce describes the audience and herself as ‘calloused’, inured to ‘atrocities’; ‘we don’t have the capacity to take it in and react in the way we should as human beings.’ Yet the words which ‘come tumbling out [from] young men who were busy at the same time looking at their new mobile phone, and seeing … trying to work out how it works’ have the power to break through such indifference. These are ‘ordinary words’; their power lies in the fact that they are spoken by survivors. The significance of performances of Guantanamo lies in the representation, the speaking of that spoken testimony to a wider audience.

One character in Guantanamo refers to the facility as part of ‘a war on Muslims, a war on Islam’. Similarly, Clive Stafford Smith portrays Guantanamo Bay as an expression of hatred of Muslims, which is ‘creat[ing] a world which is a very very dangerous and unpleasant place’. The religious context within which Guantanamo Bay operates is clear. The play is punctuated by calls to prayer and it is apparent from detainees’ letters that the standard reading material is the Koran. The achievement of the play is to provide these scapegoats, who have been dismissed by Rumsfeld as ‘the most dangerous, best trained vicious killers on the face of the earth’, with a voice. It thus provides an antidote to the dangerous process of hating Muslims.

Commentators have observed that in the environment of Guantanamo Bay, detainees are ‘de-individuated and voiceless’, and that this ‘facilitates the perpetuation of a generalised and caricatured terrorist identity’. Judith Butler refers to ‘the derealization of the human’ at Guantanamo Bay, and indeed, in the play, Gareth Pierce describes the detainees as ‘treated

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124 Ibid 40.
125 Ibid 39.
126 Ibid 45.
127 Ibid 52.
128 Ibid 52.
129 Ibid.
130 Ibid 53.
131 Ibid 43.
132 Ibid 34.
133 Wilson, Third and Pickering, above n 121, 81.
like animals from start to finish’.

The set of the play depicts each man inside a cage. They are ‘less than human’ in the photographs released by the Department of Defence and in Rumsfeld’s rhetoric. Journalist Leigh Sales has written that it was difficult to humanise the detainees in her reports since the United States military deemed it unacceptable for the detainees’ faces to appear in photographs. The detainees are ‘the humanly unrecognizable’, and when three inmates committed suicide in June 2006, the Camp’s commander commented that they had ‘no regard for life, neither ours nor their own’, while a government spokesperson described the suicides as ‘a good PR move to draw attention’. This ‘field of would-be humans, the spectrally human, the deconstituted’ are ‘maintained and detained, made to live and die within that extra-human and extra-judicial sphere of life.’

This reductionism is only possible by the suppression of ‘counter-narratives of internment’. The Australian government threatened to take legal action against Mamdouh Habib, a former Guantanamo Bay detainee, if he wrote a published account of his experiences at Guantanamo Bay. David Hicks was gagged from speaking to the media for one year after his release. While Western governments may prevent the publication of some counter-narratives, others have been widely publicised. Wilson, Third and Pickering refer to the power of the counter-narratives which were published by the media after the release of the British detainees; such counter-narratives exposed the horrific experiences of individual detainees and thus challenged the official narrative about the benign and necessary nature of detention at Guantanamo Bay. In presenting the human face of the detainees (and their relatives), counter-narratives create empathy for the plight of fellow human beings.

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135 Brittain and Slovo, above n 95, 52.
136 Butler, above n 134, 74.
137 Leigh Sales, Detainee 002. The Case of David Hicks (2007) 62.
138 Butler, above n 134, 98.
140 Butler, above n 134, 91.
141 Wilson, Third and Pickering, above n 121, 80.
143 Wilson, Third and Pickering, above n 121, 81. The government’s official narrative about Guantanamo Bay is exemplified in a document entitled ‘Ten Facts about Guantanamo’, which was released by the Pentagon in 2006. In this document, the United States Department of Defence claimed that the detainees could play board games, basketball, volleyball, football and table tennis and had access to up to 3500 books from the library. They received up to 17 640 kilojoules of food every day, and had free medical, dental, psychiatric and optometry care. According to this report, the Harry Potter books were the most popular books in the library: ‘Harry Potter is magic at Guantanamo’, The Sydney Morning Herald (Sydney), 17 September 2006 <http://www.smh.com.au>.
The play provides a powerful experience even for those who have visited the facility and spoken with detainees. After the play opened in New York, Michael Ratner, a New York lawyer who has represented many of the detainees, commented:

I know these stories cold. I know that in some cases the reality is even much worse than it was depicted. But I was still completely moved. It really showed the dead end of their situation.  

Similarly, critics have commented that the portrayal on screen of the experiences of three of the British detainees in the 2006 film *The Road to Guantanamo* has a far greater impact on an audience than the information about conditions in Guantanamo Bay which is regularly transmitted through the media. One critic commented on the impact of witnessing the humiliation and abuse of characters with whom the audience had acquired a sense of familiarity and connection.

The power of the play does not only reside in the individual narratives. The commentary by the lawyers broadens the scope of the play’s examination of issues. Michael Billington has pointed out that the play both ‘localise[s] … and universalise[s]’ ‘a well-documented issue’. While the play focuses on the plight of individuals, it also conveys important messages about the fundamental principles which support and protect democracy.

Since the British government has now procured the release of all British citizens detained in Guantanamo Bay, in one sense the play has lost its urgency. However, British residents and, of course, many other detainees remain confined in Guantanamo Bay. Bisher al-Rawi, one of the characters in the play, was not released until 2007. He had lived in Britain for nineteen years but had an Iraqi passport, and for many years the British government refused to intervene on his behalf.

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In July, August and September 2006, Nigel Jamieson’s production of Honour Bound at the Sydney Opera House provided further theatrical commentary on Guantanamo Bay, by focusing on the experiences of Terry and David Hicks.

Honour Bound

Honour Bound, conceived of and directed by Nigel Jamieson and choreographed by Garry Stewart, premiered at the Sydney Opera House in July 2006, and then moved on to the Malthouse Theatre in Melbourne in September. The production attracted international interest.\(^\text{148}\) I attended a performance in Sydney on 27 August 2006.

The production explores, primarily through movement and dance, but also through images and spoken and written texts, the impact of detention at Guantanamo Bay on David Hicks and his fellow detainees. As in Guantanamo, the performance takes place within a cage; at times, there is a cage within a cage. Even at Guantanamo Bay, there are degrees of restrictive detention.

The production utilises a ‘collage’ of existing texts,\(^\text{149}\) which are variously spoken, read out and even displayed on the large screen at the back of the stage. These texts comprise interviews with Terry and Bev Hicks (David’s father and stepmother), international human rights conventions, documents from the White House and Pentagon, including declassified FBI files,\(^\text{150}\) letters from David, and an affidavit detailing the abuse and torture which he experienced in Guantanamo Bay. The use of existing texts suggests another form of documentary theatre, and the projection of images is characteristic of the stagecraft of a documentary play.\(^\text{151}\) The projected images include the ordinary faces of Terry and Bev, images from the documentary The President versus David Hicks, the familiar shocking scenes of torture and abuse from the Abu Ghraib prison. However, the texts and images are overshadowed by the ‘extreme physical language’\(^\text{152}\) of the production; the production is


\(^{151}\) Dawson, above n 4, 31.

\(^{152}\) Litson, above n 148.
memorable largely because of the physically challenging and disorientating dance movements and aerial acrobatics. While the war on terror can be cynically described as a war on an abstract noun, it is also a war in which real acts of violence are inflicted on real bodies. This point is made very clearly in Honour Bound. The audience witnesses and vicariously experiences the impact of state acts of violence and terror on the vulnerable bodies of the victims.

In Honour Bound, the dancers’ bodies are rendered featureless by black hoods, de-gendered in orange overalls, and isolated from the external reality of the world outside Guantanamo Bay. At times, the bodies are naked but still hooded; at times, the hoods are removed. The dancers represent ‘human bodies stretched to their limits, removed from all the safety rails that normally surround them’; this is manifested through their bodily contortions, their wild movements, and the gravity-defying aerial acrobatics. Their bodies convey the central meaning of the production, and this reflects the focus in what Giorgio Agamben has described as modern biopolitics on surveillance and regulation of bodies. According to Garry Stewart, the body is a metaphor in Honour Bound and expresses disorientating and extreme emotional and physical states. The production portrays the detainees as ‘bare life’, in which human beings are ‘stripped of every right by virtue of the fact that anyone can kill [them] without committing homicide’. In the final image of the production, Hicks’ body literally disappeared, thrown backwards against the wall of the cage into a rectangle of light which shrinks until there is nothing left but darkness.

The production of Honour Bound explores the physical experience of violence and torture. The production is part of what Kubiak has described as a ‘performative history of terror’, an articulation of ‘the terrorism concealed by state representational silence through the spectacle of theatricalized violence’. It cannot reproduce exactly the unrelenting pattern of torture and abuse which corrodes the sanity and spirit of the Guantanamo Bay detainees. Hicks, for instance, was incarcerated for five years, with eighteen months spent in solitary confinement. The production lasts for only a little over an hour. However, in that time we

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155 ‘Guantanamo on Stage’, above n 149.
156 Agamben, above n 154, 183.
158 Ibid 122.
witness brutality, humiliation, degradation, isolation, despair, anguish and mortification. The production does not incorporate real violence, real acts of terror and torture. However, the presentation of pain, terror, degradation and violence in *Honour Bound* may well be more powerful because it remains representation. Kubiak has pointed out that while some performance artists deploy 'physical mutilation, pain and peril as the central image and focus of their work', such violence is not 'a transgressive act when the State no longer inscribes its laws into the flesh and incites the artist, like Kafka’s jailor, to write them there himself.'

Jamieson has explained that his focus was on the treatment of human beings at Guantanamo Bay, not on the military commissions and other elements of the extra-legal edifice designed to process the detainees. However, the interaction between law and the body, or rather, the elusiveness of law in the ‘void’ of Guantanamo Bay, which Jamieson describes as ‘a kind of nowhere’, is eloquently represented in the production. I am haunted by the image of an orange-clad figure desperately trying to climb the rapidly moving text of the United Nations Declaration of Human Rights as it scrolls across the screen; the text flips over and over and the figure tumbles off it, again and again. Finally, the text splinters into fragments, a meaningless jumble of words, or as one commentator describes it, ‘a fractured sea of words for an aerial performer to walk along, climb and fall, time and again’. This is no Kafka-esque tale in which the law is written on the body. The scars borne by these bodies have a (non)legal origin. It is the executive which fashions the rules and metes out acts of terror and violence in Guantanamo Bay. As Rumsfeld’s list of approved interrogation techniques is read out, the dancers graphically enact the inscription of these (non)laws on their flesh, with frenzied movements, shuddering, shaking.

The production is deliberately designed to induce a sense of disorientation in the audience. One critic has described it as ‘an assault on all the senses’; according to another

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159 Ibid 160.
160 Ibid 144.
161 ‘Guantanamo on Stage’, above n 149.
162 Bennie, above n 150.
commentator, ‘dance has never been so harrowing’. The audience’s experience of watching and witnessing acts of violence and terror has its own meaning; it is necessary for the audience to bear witness to simulated acts of violence which mirror those inflicted behind the barbed wire at Guantanamo Bay. In a discussion of Griselda Gambaro’s Information for Foreigners, which offers a similar challenge to audiences in its theatrical representation of torture and violence, Diana Taylor maintains that the playwright is urging the audience ‘to understand what prompts [violence] and how we participate, as either voyeurs, investors, bystanders, or victims’.

_Honour Bound_ is the artistic representation of a world in which ordinary social codes, standards of behaviour, and patterns of interaction have been replaced by degrading forms of torture. The aerial performances contribute to the audience’s sense of disorientation, as dancers run up the walls, hurl themselves against the sides of the cage, and in one instance, hang naked, upside down, suspended from the ceiling by a strap. Occasionally, the audience is blinded by a white light directed outwards from the stage. The perspective of the audience constantly alters. There are jarring moments of humanity and compassion: a dreamlike sequence in which a body floats softly down from the ceiling and kisses David as his letter to an ex-girlfriend is read out, embraces between the dancers as Terry describes a rare moment of physical contact with his incarcerated son. The contributions of Terry and Bev and, in particular, Terry’s decency, his reasonableness, his gift for laconic under-statement, provide a counter-narrative to the experiences of cruelty, abuse and violence depicted by the dancers. However, such counter-narratives make the representations of torture and violence more shocking.

The production of _Honour Bound_ emphasises the interchangeability of victim and torturer. The dancers exchange these roles in an interplay which demonstrates the parallels between the violence of the state in its treatment of alleged terrorists, and the violence of terrorism. The production thus exposes the mimetic character of violence, its dual character as ‘beneficial’ and harmful, and the ‘catastrophic escalation of violence which occurs when

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166 Fenella Souter, ‘In the name of the son’, _The Sydney Morning Herald Good Weekend_ (Sydney), 23 September 2006, 35.
168 Souter describes this as ‘an Australian bloke’s knack for understatement so extreme it’s almost comic’; Souter, above n 166.
the very weapons used to combat violence are turned against their users’. Girard pointed out that ‘the more a tragic conflict is prolonged, the more likely it is to culminate in a violent mimesis; the resemblance between the combatants grows ever stronger until each presents a mirror image of the other.’

Kai Erikson in his study of deviant behaviour drew attention to the same phenomenon; he wrote that ‘the most feared and most respected styles of behaviour known to a particular age often seem to mirror one another – so accurately, in fact, that observers looking in from another point in time cannot always tell them apart.’ He also observed that traitors and patriots ‘are so well attuned to one another that they can and often do reverse roles with minor shifts in the historical climate.’

The strong resemblance between the terrorising strategies of terrorists, and the terrorising strategies of the state, and the ease with which the state and the accused terrorist can exchange roles as torturer and victim, are acted out onstage.

Peace Mom

_Peace Mom_, a one-woman monologue written by Italian playwright Dario Fo, was first performed in a school hall in London in December 2005. Fo described it as a work in progress, and the actor Frances de la Tour performed the monologue with the script in hand. The play is not strictly documentary theatre, but has been described as ‘a tapestry’ of the letters written by Cindy Sheehan to George Bush after the death of her son in Iraq, and Fo’s invention.

Cindy Sheehan is a peace activist who camped for twenty six days outside President Bush’s Texas ranch in 2004, after her son Casey, a United States soldier, was killed in Iraq. President Bush refused to speak with her, but she managed to attract the attention of the world, and subsequently she has been described as ‘the face of war-bereaved mothers’. Her activist strategies continue to be well-represented in the media and her public appearances in themselves constitute a subversive performative challenge to the war on terror. Characteristic

170 Ibid.
171 Ibid 47.
175 Ibid.
of such performances was her appearance with actress Susan Sarandon at a Mother’s Day anti-war rally outside the White House in May 2006, when she wore her son’s army jacket and stated that, ‘You don’t spread peace by killing people.’\textsuperscript{177} She is, at the time of writing, participating in the political performance of the 2008 United States election, and running for Congress against Speaker Nancy Pelosi.

There was no published script of \textit{Peace Mom} at the time of writing. This is characteristic of Fo’s work,\textsuperscript{178} particularly of the plays which deal with topical issues. He constantly updated and revised his most well-known play, \textit{Accidental Death of an Anarchist}.\textsuperscript{179} My discussion of \textit{Peace Mom} is based on extracts from the play as translated by Tom Behan and published online by \textit{The Socialist Review} in December 2005.\textsuperscript{180}

\textit{Peace Mom} describes, in simple and moving language, Cindy Sheehan’s response to her son’s death, and her transformation into a peace activist. When she finds out that her son is dead, she remembers his words: ‘I want to go to university and the only chance I’ve got is to join the United States army.’ She comments that the letter announcing Casey’s death came three days after the arrival of the first cheque; ‘the cheque was of no use now.’ Her description of the reaction to the news of her son’s death suggests the youth and inexperience of Casey’s peers. His friends ‘stammered and mumbled their condolences’ and his girlfriend ‘was as white as a ghost but couldn’t bring herself to cry.’ Sheehan herself contacted some other mothers and found that they all asked the same question: ‘Why did they send my son over there? Why did he die in a country that I didn’t even know existed?’ She travelled to Texas and set up camp at the entrance to Bush’s ranch. She asked a policeman to deliver a letter to the President: in the letter, she explained that she ‘was out here underneath the cattle horns, waiting for a reply.’

Sheehan began sending emails around the world and soon the protest became the focus of media attention. She found herself supported by visitors and other activists. She states that she felt embarrassed in front of the media and thought, ‘I’ve got to be cool, detached. I can’t let

\textsuperscript{177} Ibid.
\textsuperscript{178} David Hirst, \textit{Dario Fo and Franca Rame} (1989) 7.
\textsuperscript{179} Dario Fo, \textit{Accidental Death of an Anarchist} (Simon Nye trans, 1987).
\textsuperscript{180} Dario Fo, ‘Peace Mom’ (Tom Behan trans), \textit{The Socialist Review} (United Kingdom), December 2005 <http://www.socialistreview.org.uk>. There are no page numbers in these extracts from the play.
myself play the part they want to give me – a kind of Joan of Arc mixed up with a bit of Batman’s mother.’ She describes ‘a kind of competition to stick even more labels on me, like “Peace Mom”, “Mother Courage”, “The heroic woman from California”’. Sheehan has been a successful activist primarily because she has kept her own voice despite such categorisation, and it is the singularity of her voice which gives Peace Mom its power as a theatrical performance.

In the play, Sheehan describes how she sent a second letter to Bush; ‘hopefully this time it won’t get lost.’ The letter is distributed over the internet and widely published in the media. The mediatisation of Sheehan’s performance is critical to her success. In this letter, she asks Bush why her son was killed: ‘Can you explain to me what “noble cause” means? Where is the nobility in deaths such as these?’ She asks in relation to the non-existent weapons of mass destruction: ‘How can you destroy something that has never existed?’ She continues: ‘And once more I ask, “Why did you send my son over there to die? Where is the noble cause for which my son and 1800 other American citizens have sacrificed themselves?”’ Later she describes the war as ‘illegitimate and illegal’ and ‘based on a pack of lies’, ‘a war about oil’.

Sheehan’s voice has authority because she is a mother and she believes that she represents other mothers whose sons have been killed in Iraq. Her reaction to the mother whose words were manipulated by the Bush government in an attempt to contain the impact of Sheehan’s activities reflects this belief. This woman was prepared to state that she was ‘proud to have sacrificed [her] son for this country.’ Sheehan comments: “I really didn’t like that phrase, and it’s hardly credible. But after all, I’m biased.’

Sheehan’s criticisms of President Bush have been voiced by others; in Sheehan’s voice, they have a direct emotive impact because of her authority as a bereaved mother. She states that she feels ‘contempt’ for Bush and deplores his dismissal of the people killed in Iraq and Afghanistan as ‘collateral damage … Nothing out of the ordinary. Predictable murders, inevitable … what kind of numbers will create just a slight sense of guilt in you?’ Sometimes she ‘can’t stand it any more’ but then Bush’s ‘arrogance’ ‘keeps [her] going’. She scoffs at Bush’s performance as Commander-in-Chief, including his ‘Mission Accomplished’ speech, and points out that he has never fought in a war himself. However he is ‘in good company with [his] government’, since only one member of Congress has a son in a combat zone. She
concludes: ‘There’s only one thing to say to that – you’re just a bunch of General Custers who never rode out to the Big Horn!’

*Peace Mom* addresses themes which can be found in Fo’s previous plays: the violence of the state, the lack of legitimacy in the state’s retaliatory responses to acts of terrorism, the grief of a mother whose son has fallen victim to the violence of the state. Yet the satirical edge which distinguishes many of his other plays is absent. In 1967, Fo infamously declared that he would no longer be ‘the court jester of the bourgeoisie’ and would instead become ‘the jester of the proletariat’. In 1997, when he won the Nobel Prize in literature, he was still describing himself as a jester and a clown. In his work, he pokes fun at himself as well as at his characters and the state. In the opening pages of his most well-known work, *Accidental Death of an Anarchist*, a policeman states:

> I ought to warn you that the author of this sick little play, Dario Fo, has the traditional irrational hatred of the police common to all narrow-minded left-wingers and so I shall, no doubt, be the unwilling butt of endless anti-authoritarian jibes.

Fo’s work as a jester is undeniably political. In the 1970s and 1980s, he wrote and performed against a context of violence and terrorism in Italy, and ‘the farcical court cases that have dragged on since then’. In 1983, the number of people held in Italian prisons on political charges was estimated at 5000. Fo and Franca Rame, his wife, have been involved in Soccorso Rosso (Red Aid), an organisation which helps political prisoners accused of terrorism-related offences. They have never supported acts of terrorism, although the United States twice denied them visas on the basis of their alleged support. Much of their work addresses the violence of the state’s response to acts of terrorism.

*Accidental Death of an Anarchist* is the best-known of Fo’s works, and is a political satire based on the official investigation into the ‘accidental’ death of anarchist Pinelli, who was

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183 Fo, above n 179, 2.
184 Fo, above n 182.
185 Mitchell, above n 181, 8.
186 Ibid 66.
arrested in relation to an act of terrorism and fell to his death from a fourth floor window of the police headquarters. Fo himself described the play as an ‘exercise in counter information’; one commentator has called it a ‘complex comic statement on state secrecy and abuse of power’. Fo has written that the audiences’ ‘grins froze on their faces’ as they came to realise that they were laughing at ‘real events, events which were criminal and obscene in their brutality: crimes of the State.’ In the sequel to the play, *Knock Knock! Who’s there? Police!* Fo addressed the ongoing police cover ups in the investigation. In the spoken introduction, Fo states that ‘the state is criminal and there’s no getting away from it.’

The playwright again drew on the themes of terrorism and state repression in *Klaxons, Trumpets and Raspberries*, renamed *About Face* for its United States premiere. The play, a ‘comedy of errors’ about a terrorist kidnapping, was written after Fo began and never completed a more serious play based on the kidnapping and murder of an Italian politician, Aldo Moro. Fo was inspired by a letter which Moro wrote to his colleagues, begging them to negotiate with his captors; he has stated that he was reminded of a Greek tragedy. The parallels between this unfinished work and *Peace Mom* are clear. Fo has also recognised ‘an epic quality’ in Sheehan’s letters to Bush and to Barbara Bush, as the mother of the son who killed her son. He has identified ‘a rhythm and tempo in her prose which recalls the great epic writers of Greece’.

*Peace Mom*, in its structure as a one-woman monologue and in its stark depiction of the way in which a mother’s grief can deconstruct the state’s façade of power and its use of violence, also has its antecedents in the three one-woman monologues written and performed by Franca Rame: *I, Ulrike, Cry*, *The Mother* and *I Can’t Move, I Can’t Scream, My Voice is Gone*. One commentator has described these monologues as ‘a powerful medium for the voice of oppressed women to be heard publicly’ and as ‘direct cries from the heart unmediated by any paraphernalia of dramatic representation’. *The Mother*, a monologue delivered by the

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187 Fo, above n 179, xvi.
188 Schechter, above n 60, 153.
189 Fo, above n 179, xvi.
190 Mitchell, above n 181, 67.
191 Ibid 85.
192 Ibid 84.
193 Higgins, above n 174.
194 Mitchell, above n 181, 83.
mother of a terrorist, touches on the same themes as *Peace Mom*. Franca Rame based this work on the testimonies of the female relatives of Italian political prisoners, and the mother who delivers the monologue expresses her pain, helplessness and guilt, and her growing awareness of the state’s role in her son’s destruction. When she visits him in prison, his face is swollen and bruised and he hides his broken hands. She wonders why the state bothers with this protracted punishment and why such prisoners are not simply killed straight away. The monologue ends with her account of a dream. She is in court with her son, who is a child again, and she hands him over to the judge, arguing that she has done her duty as ‘a responsible citizen who trusts our democratic institutions’. However, the son whom she delivers to the state is dead.

In *The Mother*, the central character is disempowered, and initially naïve. In *Peace Mom*, Cindy Sheehan describes herself as an ‘ignoramus’ who belatedly recognises the need to be ‘well-informed – because democracy is a very complicated mechanism’. Both the mother in *The Mother*, and Sheehan in *Peace Mom*, experience the violence of the state in its tangible impact on the bodies of their sons. They learn through this painful experience that it is not enough to be ‘a responsible citizen who trusts our democratic institutions’. *Peace Mom* recounts Sheehan’s growing sense of empowerment. However, her right as a bereaved mother to accuse the government of greed and cowardice is not contested. In contrast, the character in *The Mother* remains disempowered as the mother of a terrorist. The moral outrage which she experiences on being strip-searched for her prison visit cannot be expressed, since she believes that no one would care about this treatment of a terrorist’s mother.

*Peace Mom* explores the symbolic power vested in ‘the mother’ as a figure opposed to the masculinist discourse of war. Traditionally, motherhood has been perceived as oppositional to, and incompatible with, war. Susanne Greenlagh describes ‘the gendering of war and peace’ as ‘one of the most crucial binary oppositions of all’. Cindy Sheehan’s narrative in

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196 Ibid 7.
197 Ibid.
198 Ibid 9.
199 Ibid 9.
*Peace Mom* is anchored in this crucial opposition. As a woman and as a mother, her performative opposition to war is part of the ongoing discourse of women on war. One of the most powerful segments in the play is Sheehan’s recital of her letter to another mother, Barbara Bush.

The discourse of women on war can be found in Aristophanes’ play *Lysistrata*, and more recently, in the protests of the Women in Black in Belgrade,\(^202\) the protests of the Mothers of the Plaza de Mayo in Argentina,\(^203\) and the actions of women at Greenham Common in England.\(^204\) In particular, Sheehan’s performance as a bereaved mother can be likened to the performances of the mothers of the Plaza de Mayo, who met in the Plaza to protest against the junta’s repressive activities which had taken their children from them. Taylor describes the manipulation of the maternal role by these women to create ‘a collective, political performance that would allow women to protest in the face of a criminal dictatorship’.\(^205\) These women were empowered as mothers; it was in fulfilment of their traditional roles as mothers, in exercising their responsibility for their families, that they were compelled to confront the government in their search for their missing children.\(^206\)

Similarly, the power and authority of Sheehan’s performance derives from her capacity to convert her bereavement into a strong political statement about the futility and brutality of the Iraqi war. In *Peace Mom*, Sheehan points out that she has been twice bereaved; she has lost both her son, and the future grandchild, which she ‘just know[s]’ he would have given her. She states that Bush has ‘killed my dreams as well.’ Yet this loss, which causes her so much grief, also empowers her. She is aware that her performances, and in particular her question, which Bush has refused to answer, have caused Bush ‘some irritation’ and possibly ‘derailed all … [his] plans’ and contributed to ‘his sudden drop in the opinion polls’. Sheehan has abandoned passivity and ignorance for activism, and her role as bereaved mother to some extent protects her against the growing hostility of the United States government, although she too experiences state violence. In *Peace Mom*, she recounts how she and other protesters were arrested when the protest was re-located to the White House.

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\(^{203}\) Diana Taylor, ‘Making a Spectacle. The Mothers of the Plaza de Mayo’ in ibid 74.
\(^{204}\) Alice Cook and Gwyn Kirk, ‘Taking Direct Action’ in ibid 160.
\(^{205}\) Taylor, above n 203, 82.
Peace Mom is characteristic of the theatre of dissent on the war on terror in its exposure of the violence of the state, and in giving a louder voice to an individual who, as a bereaved mother, has to fight against being stereotyped in the media and in government propaganda. In Peace Mom, the language of power and the official war on terror discourse are challenged by an alternative discourse based on emotional connection and maternal love. The play extends on, and amplifies, Sheehan’s own performances. She has stated that she hopes that ‘the play can be used as an anti-war tool, to put a human face on this war, to show Casey had a life, was a person.’ 207 This attempt to put a human face on the war on terror distinguishes the case studies of the theatre of dissent.

Myth, Propaganda and Disaster in Nazi Germany and Contemporary America. A Drama in 30 Scenes.

Playwright Stephen Sewell has described Myth as a play which ‘wrote itself’ and as part of a ‘crucial ideological battle’, ‘the cultural attempt to appropriate S11’. 208 In 2003, the play was performed by the Playbox Theatre in Melbourne, the State Theatre Company of South Australia in Adelaide, and the Griffin Theatre Company in Sydney. Sewell claims that he was ‘blocked from Sydney’s mainstages’, a charge which has been refuted by Robyn Nevin, artistic director of the Sydney Theatre Company and Neil Armfield, artistic director of Company B at Belvoir St. 209 I attended a performance of extracts from the play at the Byron Bay Writers’ Festival, in July 2007.

Myth explores the fate of Talbot, an Australian academic working in a New York university, who espouses the theory that ‘every nation is constituted by a set of myths about who we are and where we’re going, and those myths can blind us from the reality of what we’re doing and impel us towards our own destruction.’ 210 Talbot has developed his ideas in a book which shares the same title as the play, and is a historical study comparing contemporary America with Nazi Germany. When his friend Max, a fellow Australian academic, hears the title of

206 Ibid 84.
207 Higgins, above n 174.
Talbot’s book, he asks bluntly, ‘Are you out of your cotton-picking mind?’\textsuperscript{211} Unlike the sycophantic Max, Talbot is prepared to criticise American complacency in the face of acts of terror committed by the United States government, although initially he feels ‘a bitter kind of cynical detachment from the whole thing’.\textsuperscript{212} This detachment, and his enviable assets, described by Max as ‘a American wife, residency, teaching position in one of the most prestigious universities in the United States’,\textsuperscript{213} are stripped from him by the Man, who arrives in Talbot’s life in the guise of an instructor, prepared to reinforce his lessons with brutal violence and threats, and who identifies himself as Talbot’s ‘judge and jury’, his ‘confessor’, with the stated role of ‘facilitat[ing] your return to reality’.\textsuperscript{214}

Talbot’s complaints about his first assault by the Man are not believed by his Head of Department, Jack, who instead fabricates allegations of sexual misconduct against Talbot in order to remove him from his position and ‘protect the integrity of the Department’.\textsuperscript{215} The misuse of the word ‘integrity’ in this context is symptomatic of a world of inverted meanings, in which rhetoric about freedom is used to justify increasingly repressive mechanisms of social control. Talbot’s confused pleas for help are futile. Eventually, he is abducted by the Man, who is not content merely to stamp out subversion and dissent through violence; the dissenter must be brought to a realisation of the futility and wrongness of his ideas. The task of the Man is to reveal to Talbot that he is also blinded by myth and propaganda, in his case the myth of liberalism and its associated rhetoric of human rights, and that it is violence and power which define truth in contemporary America. The Man tells Talbot that he is ‘going to keep drilling into your head till there’s nothing but me left in there’.\textsuperscript{216}

One of Talbot’s firmly-held beliefs is that ‘the Military-Industrial Complex is using the terrorist crisis to stage a takeover’,\textsuperscript{217} but he finds it difficult to understand his own vulnerability and to comprehend that the ‘Military-Industrial Complex’ intends to destroy him because of his ideas and beliefs. Initially, he accuses an Asian businessman, the father of a student, Marguerite, of being responsible for the terrorising activities of the Man. He comes to

\textsuperscript{211} Ibid 34.
\textsuperscript{212} Ibid 16.
\textsuperscript{213} Ibid 10.
\textsuperscript{214} Ibid 20.
\textsuperscript{215} Ibid 51.
\textsuperscript{216} Ibid 68.
\textsuperscript{217} Ibid 32.
realise that it is his own favoured myth, ‘the myth that everything turns out right in the end’, which has led him into this predicament where ‘though I knew exactly what was happening, even though I could plot it step by step, intellectually, I never believed it really; I never believed it really was happening.’

Talbot is, we assume as the audience, eventually murdered by the Man and his henchmen, as the Man initially promised: ‘I’m going to kill you slowly and with considerable brutality, and whether I do it today, or this evening, or maybe even if I did it yesterday is of no real consequence’. Eve, Talbot’s wife, whose appeals for help in the wake of Talbot’s disappearance are also ignored, is killed in a car that has been ‘fixed’ by the Man. Talbot, Eve and the idealistic student, Marguerite, are all labelled as terrorists by the end of the play; Sewell suggests that this is a consequence of their stubborn adherence to ideas and principles which are not only irrelevant, but dangerously so in contemporary America.

Unlike the other plays considered thus far, Myth is fiction and its characters have been invented by the playwright. However, in a sense this is fiction which is also reality. The characters in Myth have difficulty in separating reality from myth. At one point, a tour guide at the Guggenheim talks about the dissolution of the barrier between art and reality. Shortly after this pronouncement, Eve’s impassioned heartfelt outburst is applauded as a ‘performance’ by onlookers.

Sewell reinforces the idea that reality and fiction intersect and are inseparable from one another by deliberately cross-referencing other literary works. The Man quotes the first line of Kafka’s The Trial when he initially visits Talbot, and the parallels between Talbot’s story and that of Joseph K in The Trial become clear. Myth and The Trial are both about the inexorable pursuit, and eventual execution, of an individual by an extra-judicial body which operates outside the legal system. In both works of fiction, the individual is never offered an explanation of his crime, and tries to resist the process by resorting to ineffectual tools: the rhetoric of due process, ordinary legal procedures, and rational argument. Similarly, Talbot’s

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218 Ibid 87.
219 Ibid 20-1.
220 Ibid 80.
221 Ibid 83.
222 Ibid 83.
223 Ibid 21.
fate resembles that of Winston in George Orwell’s *1984*, as is made clear in the course of Talbot’s interrogation and re-education by the Man.\(^2\)

As previously noted, other commentators have referred to the Kafka-esque nature of the treatment of alleged terrorists and the Orwellian characteristics of the legislation introduced as part of the war on terror. In a world in which truth is relative, beliefs are manufactured by the state, and dissent is considered to be an act of terrorism, it is difficult to separate art, fiction and performance from reality. Sewell suggests that the refusal on the part of idealists such as Talbot, Eve and Talbot’s student, Marguerite, to abandon their belief in fundamental principles which are somehow distinct from state-manufactured beliefs is, in itself, a delusion. Marguerite tells us that she ‘couldn’t stand’ Baudrillard’s claim that the Iraqi war was a simulation.\(^2\) Talbot’s adherence to the principles of truth and reason, and to the idea of human rights, is futile, and ultimately leads to his death.

Sewell has a bleak vision of the Western world, in which the rhetoric of freedom and democracy shelters individuals who are, in Eve’s words, ‘dangerous children, with our guns and our bombs and our feet-stamping demands to be loved’.\(^2\) In this pre-rational world of arbitrary violence, rational play, including the rule of law, has been extinguished. The inhabitants of this world may be spoilt children, but there is no playfulness here. Instead, they are engaged in the active destruction of the rules and conventions which until recently, kept their unruly impulses in check. They are frightened and disillusioned; Amy states: ‘you tell me one person that wants to live another five minutes.’\(^2\) They are wasteful and extravagant, and think nothing of accumulating extravagant dinner bills,\(^2\) cynical; selfish; unfaithful; and corrupt.

Jack, who according to his wife achieved worldly success through blackmail,\(^2\) ruthlessly attacks Talbot for his ‘frequent and blasphemous cursing and oath taking’\(^2\) and his references to ‘discredited thinker[s]’ such as Marx,\(^2\) when it becomes clear that Talbot is in

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\(^2\) Ibid 81.
\(^2\) Ibid 12.
\(^2\) Ibid 39.
\(^2\) Ibid 72.
\(^2\) Ibid 37.
\(^2\) Ibid 71.
\(^2\) Ibid 58.
\(^2\) Ibid 59.
trouble. His response, when told that Talbot has disappeared, is ‘good riddance’. Stan, the Faculty lawyer, is complicit in this corruption. In this world, which is, Sewell reminds us, our world, corruption is condoned and rewarded while idealism and a belief in the free expression of ideas is not; Jack tells Eve that ‘this is America, and I can live in it quite comfortably.’

This is a world in which, ‘for all our pretence at honour, grace and beauty, we are broken monsters plundering the earth.’

Yet if the majority are ‘monsters’, ‘cheering’ the Man as he tortures Talbot, the idealists are deluded and destroyed by their obstinate adherence to principles and values. Talbot foreshadows his own fate when he points out to Max that he ‘could be abducted off the street, and disappeared into some hell-hole where they could keep you as long as they liked, and then they could take you out and shoot you for no other reason than that they don’t know what else to do with you’. He nevertheless ignores Max’s warnings about the dangerous nature of his research, arguing that ‘academics have a responsibility to stand up for what they believe in’.

Even when confronted by the Man’s escalating violence, he continues to defend his faith in legal principles, truth and reason: ‘you just can’t move into someone’s life and start monstering them.’ Talbot describes the Man’s behaviour as ‘a grave infringement of my rights’, only to be told that ‘you don’t have any rights’, that ‘your world doesn’t mean shit’, and that there is no ‘right to freedom of thought’. The Man tells Talbot that violence and power are all-important and reason is irrelevant; ‘all Reason leads us to is the reason to exterminate human life.’

Talbot, however, faced with the inevitability of his own death, will not abandon his belief in reason; ‘Reason still stands unsullied and Reasons will be there in a thousand years time when this new dark age will itself be no more than a footnote in history’. Talbot is himself caught up in a myth as illusory as Bush’s own rhetoric about freedom and evil, which is heard in the

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231 Ibid 77.
232 Ibid 83.
233 Ibid 91.
234 Ibid 84.
236 Ibid 35.
237 Ibid 46.
238 Ibid 67.
239 Ibid.
240 Ibid 43.
241 Ibid 84.
242 Ibid 91.
243 Ibid 91.
background during one of the Man’s visits, and reiterated by Max at the end in his lecture.\textsuperscript{244} As Marguerite tells him, ‘you’re still inside the dream just like everybody else’.\textsuperscript{245}

Marguerite and Eve are also idealists. Marguerite wants ‘to change things’, ‘to be the voice of [her] generation’, to do good and bring ‘happiness where evil and misery flourished’.\textsuperscript{246} When Talbot describes the Man’s efforts to silence him, she suggests petitions, strikes and appeals to the student body,\textsuperscript{247} and encourages Talbot to ‘think, act, struggle’.\textsuperscript{248} Similarly Eve, even though as a scriptwriter she contributes to the ‘filthy fucking propaganda’ designed ‘to make everyone think everything is normal’,\textsuperscript{249} has ideals; she describes herself as someone who ‘believe[s] in human beings and … believe[s] human beings can change and … believe[s] human beings can find better ways to live.’\textsuperscript{250} In the post-September 11 world described by Sewell, idealists such as Talbot, Marguerite and Eve are terrorists and must be destroyed. In the process, they lose their identity.

The Man assures Talbot that ‘you won’t have a name, Professor; in fact, you don’t have a name now.’\textsuperscript{251} He tells him that he is ‘the worst sort of terrorist of all, the terrorist who hides behind respectability, the terrorist who keeps his hands clean while others go about their filthy business; the terrorist who kills with words.’\textsuperscript{252} By the end of the play, Eve is described as ‘a female bomber’ killed by a car bomb, and ‘a Moslem student’, whom we assume is Marguerite, has been ‘apprehended’.\textsuperscript{253} Although Talbot, Eve and Marguerite have been destroyed and in the process lost their individuality, the agents of the state who carry out these acts of terror also lack identity. We never find out the Man’s name and his henchmen are similarly anonymous.

The violence of the Man’s actions and language, as he pistol whips Talbot,\textsuperscript{254} swears at him,\textsuperscript{255} threatens to rape Eve,\textsuperscript{256} applies electrodes to him, kicks him, hits him, stamps on his

\textsuperscript{241} Ibid 91.  
\textsuperscript{242} Ibid 93.  
\textsuperscript{243} Ibid 64.  
\textsuperscript{244} Ibid 14.  
\textsuperscript{245} Ibid 60.  
\textsuperscript{246} Ibid 63.  
\textsuperscript{247} Ibid 52.  
\textsuperscript{248} Ibid 73.  
\textsuperscript{249} Ibid 91.  
\textsuperscript{250} Ibid 68.  
\textsuperscript{251} Ibid 94.  
\textsuperscript{252} Ibid 77.
hands, and eventually, we assume, murders him, is the most confronting and shocking violence in the play, but other acts of state violence are referred to. Talbot points out that ‘whole nations have been raped, robbed and thrown into slavery so we few can enjoy the pleasures we indulge ourselves with.’ The violence which the play depicts is state violence, intended to silence dissenters.

Unlike the other plays which I have considered, Myth looks at the impact of the war on terror on people like us: educated, articulate, professional people who believe in the freedom of expression. In the war on terror, it is not only the poor, the oppressed and the racially different who are denied a voice, but also those who speak a message of dissent. The play is about more than a dumbing down of the people, who must not be exposed to ‘discredited thinker[s]’; it describes an orchestrated and brutal assault on the ideas which challenge the authority and supportive myths of an increasingly repressive state.

Yet in a world in which ordinary people can be labelled terrorist, in which acts of violence are perpetrated by Western democratic states, and the rhetoric of these states is increasingly divorced from the reality of their conduct, Sewell includes a lament for the shared experience of being human. Talbot tells the Man that ‘we’re the same; you and I are the same because I know that fear, I feel that anger, I’ve felt that dumb animal desire to hurt. We are the same.’

The acknowledgment of our common humanity is a recurrent theme in the case studies of the theatre of dissent which I have thus far considered.
Chapter 6

Comparing law’s violence and theatre’s play

If performance is powerless to affect the socio-political fabric, then why has it been taken so seriously by the successive powers that be?¹

Violence may attempt to remake the world in its own mute image, but theatre allows us to talk back.²

In this chapter, I shall compare and distinguish the terror trials and the theatre of dissent, and look at points of intersection; in particular, I shall look at theatre on trial in Australia. The degree of reflexivity, and the extent to which the trials and theatre separately engage with the moral relativism inherent in the application of the term terrorism, the differing representations of the Other, the confusing interplay between ‘truth’ and fiction, and the contrasting functions and effectiveness of the trials and theatre of dissent are all relevant in a comparative critique of these two forms of cultural performance.

Fiction and truth

Within the discourse of law, the concepts of truth and objectivity remain of paramount importance. As Helen Stacey has observed, truth plays a central role in legal discourse; it is assumed that truth can be uncovered through logic, objective analysis and linear deduction.³

Within the discourse of law, there is a rigorous separation between law and fiction; this is ironic, according to Margaret Davies, because the law participates in, and relies on various

² Mary Karen Dahl, ‘State Terror and Dramatic Consequences’ in John Orr and Dragan Klaic (eds), Terrorism and Modern Drama (1990) 119.
‘meta-legal fictions’. Law’s monopoly on truth, and law’s claim to objectivity, have been contested in postmodernist critiques of the law. According to such critiques, courts and judges construct legal narratives which exclude the voice of the Other. Legal language has been described as reductionist, lacking in complexity and nuance. Finley has pointed out that other forms of communication, including emotional communications, are not accepted by or incorporated within legal discourse. Law’s claim to speak the ‘truth’ confers upon it similar cultural authority to that assumed by science; within the parameters of both legal and scientific discourse, other discourses, which deal with ‘partial truths and untruths’, are perceived as inferior. The legal performances of the terror trials form part of the discourse of law; accordingly, they require the presentation of evidence in order to uncover the ‘truth’ about the guilt or innocence of the defendants.

While law represents itself as being about truth, theatre is anchored in illusion. Kubiak writes that ‘theatre’s truth resides in the knowledge that we can only know that what we see is a lie’. As Herbert Blau puts it, theatre is necessarily duplicitous. By contrast, in the legal hearing, ocular evidence, what is seen, supposedly reveals the truth; hence, great weight is placed on the eyewitness account. Within the discourse of law, the trial investigates the truth. By contrast, the truth of theatre lies in illusion; theatre delivers only the appearance of reality. This apparent distinction ignores the fact that in both theatre and in legal hearings, the same ‘specular distortions’ prevail. Furthermore, the apparent ‘opposition between law (truth) and theatre (lie)’ breaks down in the context of documentary theatre, which consciously re-enacts the real and eschews fiction. It could be argued that in law we find the ‘illusion of truth’ while in certain forms of theatre, such as documentary theatre, we find the ‘truth of illusion’.

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6 Ibid.
10 Kubiak, above n 8, 28.
11 Ibid.
12 Ibid 160.
14 Ibid.
15 These phrases are used by Anthony Kubiak in his discussion of Georg Buechner’s Danton’s Death; ibid 117.
Documentary theatre, in its pure and even hybrid forms, contests the exclusivity of law’s claim to the ‘truth’, and hence challenges the privileging of legal discourse over other forms of discourse, including those associated with the humanities. The practitioner of documentary theatre is attempting to present the documented truth, the ‘real thing’, instead of illusion.\textsuperscript{16} In documentary theatre, we find ‘factual authenticity at work’.\textsuperscript{17} The case studies of documentary theatre which I have examined involve the playwright’s own investigation into the ‘real’, but different questions are asked to the legally relevant questions in the performance of law, and different voices are heard. \textit{Guantanamo} in particular is presented to the audience in the form of a theatrical inquiry into the ‘extra-legal sphere’\textsuperscript{18} of Guantanamo Bay. In \textit{Honour Bound}, although the voices of current detainees are not and cannot be heard, other than through the reading of letters and affidavits, the dancers’ bodies enact their experiences of state acts of torture and terror. \textit{Peace Mom} permits an otherwise marginalised but real voice, that of the bereaved mother, to interrogate the official discourse about the Iraqi war. In \textit{Stuff Happens}, Hare presents the actual words and actions of Western politicians as evidence of the immorality of the Iraqi war, but also provides a space for marginalised viewpoints, most notably those of a Palestinian academic and Iraqi exile. Even \textit{Myth}, which is not verbatim theatre, takes the form of a trial which, as in Kafka’s novel, is not a trial.

\textit{Guantanamo}, \textit{Peace Mom} and \textit{Stuff Happens} enact investigations into ‘real’ events and provide representations of the experiences of witnesses to these events, in order to compel the audience to reach a judgement on the war on terror. In drawing on existing texts and real voices, \textit{Honour Bound} also conducts its own investigation into the experience of incarceration at Guantanamo Bay. As forms of documentary theatre, these works are not, or not entirely, fiction. As alternative forms of inquiry, which engage with the perspectives of those whose voices are not heard in the discourse of law, and do so within a context which is recognisably performative, such plays expose the partiality of legal narratives and invite their audience to question the effectiveness of legal performances within the discourse of law as mechanisms for uncovering the truth and representing the real.

\textsuperscript{17} Ibid 104.
Chapter 6 – Comparing law’s violence and theatre’s play

If theatrical performances provide a space for the Other to be heard, why are such ‘alternative accounts’ excluded from legal performances? Even though theatre ‘can only find its truth in an illusion’, ‘in the staging of representative, mimetic images of life’, it is unsurprising that playwright Stephen Sewell refers to the power of theatre as a space where people can ‘experience something together that makes you feel real’.

Representations of the Other

A number of commentators have identified the strict dichotomy between us and them, self and Other, in the war on terror discourse; within the simplistic parameters of this discourse, ‘we’ are innocent and civilised while ‘they’ are barbaric and evil. Lee Godden points out that this is not a new phenomenon in Australian political life, and such stereotypes resonate with Australia’s xenophobic history. In the war on terror discourse, the Other is ‘given the face and the place of Muslim extremism’.

The dangers in this discourse, and the vulnerability of individuals seen as the Other, are highlighted by Katrina Lee Koo in the following passage, in which she explains that the Other refers to an identity with no voice, no context, no ordinary human genealogy and no idea about what is good for it. Such Others are not known as individuals but rather as generalised identity, as groups, masses or even hordes. More importantly, the Other exists outside our moral community and therefore is not entitled to access our political space or our political values. Furthermore, we are not encouraged to empathise with their experience of politics, nor are we expected

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19 Smart, above n 7, 6.
20 Kubiak, above n 8, 28.
23 Lee Koo, above n 22, [21]; Bergoffen, above n 22, 50.
25 Ibid 93.
to shudder at the violence committed against them. In short, we are not obliged by any ethical responsibility to them.\textsuperscript{26}

The terror trials form part of the official war on terror discourse, and contribute to the further demonising and dehumanising of the Muslim defendants. In the Australian terror trials, Thomas, Lodhi and Ul-Haque, amongst others, have been treated as vicious criminals, although none have engaged in acts of violence. In Britain, the Muslim cleric Abu Hamza was demonised during his trial, a process which was supported by the media commentary on the abhorrent and evil nature of his sermons. David Hicks, as he awaited his (non)trial in indefinite detention, was treated as less than human. It is arguable, however, that Saddam Hussein and his co-defendants resisted the process of demonisation by countering it with a defiant playfulness in the courtroom.

The representation of the Other in the terror trial thus feeds into the moral panic about terrorism, and increases the perceived gap between Westerners and Muslim victims in the war on terror. This sort of representation is counter-productive from the perspective of such victims; as Peggy Phelan has pointed out, in her critique of the ‘ideology of the visible’,\textsuperscript{27} ‘representation is almost always on the side of the one who looks and almost never on the side of the one who is seen.’\textsuperscript{28} Judith Butler deplores the ‘contemporary conditions of representation’\textsuperscript{29} which prevent us from developing an ‘apprehension of the precariousness of the lives we destroyed’\textsuperscript{30} in the war on terror. She asks: ‘what media will let us know and feel the frailty, know and feel at the limits of representation as it is currently cultivated and maintained?’\textsuperscript{31} As Lee Koo suggests, we are required by the official discourse to abandon our ‘ethical responsibilities to others’.\textsuperscript{32}

The theatre of dissent attempts to incorporate the voice of the Other, and suggests that we and our political leaders have ethical responsibilities to others. To a certain extent, this involves an appropriation of that voice, and does not necessarily confer political power on the Other,\textsuperscript{33} or

\begin{thebibliography}{99}
\bibitem{26} Lee Koo, above n 22, [14].
\bibitem{28} Ibid 25–6.
\bibitem{29} Butler, above n 18, 150.
\bibitem{30} Ibid 159.
\bibitem{31} Ibid 151.
\bibitem{32} Lee Koo, above n 22, [29].
\bibitem{33} See Phelan, above n 27, 2.
\end{thebibliography}
even create a sense of empowerment. However, the important achievement of the theatre of dissent in permitting the voice of the Other to be heard is that ‘the first-person narrative point of view’, 34 which Butler identifies as the American response to the war on terror, is thus displaced and the narratives of non-Western victims are heard. In the theatre of dissent, by way of performance, victims are re-defined to include those who are ‘deemed less than human’ in the official discourse of the war on terror; 35 practitioners of Islam become the target of acts of terror committed by the United States, British, Australian and Israeli governments. It is by way of subversive performances which acknowledge state acts of violence as terrorism, and concede that the Iraqi people, Palestinians and Muslim detainees at Guantanamo Bay suffer as much, if not more, from acts of terrorism as do Western victims, that the theatre of dissent challenges the orthodox narratives of terrorism found in government rhetoric, media reports and the performances of the terror trials.

One of the characters in Myth states that for her, the experience of terrorism is ‘personal’: ‘one of my best friends died in the North Tower. It is personal.’ 36 What we learn from the narratives of the Other in the theatre of dissent is that the experience of terrorism for them is also personal. Furthermore, the strict dichotomy between us and them breaks down in the theatre of dissent, in which can be found suggestions that the roles of terrorist and victim are interchangeable. Theatre’s performative exploration of the connection between perpetrators and victims of violence, a connection which has been recognised by theorists such as Girard and Eriksson, acknowledges the potential for disruptive possibilities in the swapping of roles and identities. This theme in the theatre of dissent is also echoed in contemporary popular culture; in three films released in 2005 and 2006, Stephen Spielberg’s Munich, Ana Kokkinos’ The Book of Revelations, and David Slade’s Hard Candy, the conventional role of perpetrators and victims of violence in the contexts of terrorism, rape and paedophilia were inverted.

In contrast, there is no acknowledgment of the difficult moral relativities of violence in the war on terror in the terror trials. Nor do we find, in the terror trials, recognition of innocence and suffering in Others. In the official war on terror discourse, into which the terror trials

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34 Butler, above n 18, 5.
feed, there are no moral equivalents for the violence of terrorism directed against the West.\footnote{See Fiona Jenkins, ‘Dialogue in the Aftermath” On good, evil and responsibility after September 11’ (2004) 3(1) borderlands e-journal <http://www.borderlandsejournal.adelaide.edu.au> [2]–[8].} However, the accused terrorist is only too aware of such equivalence. Mounir el Motassadeq, sentenced to fifteen years imprisonment in January 2007 by a German court for his role as accessory in the September 11 attacks in the United States, turned in the courtroom to the son of one of the victims and stated:

I understand your suffering. The same thing is being done to me, my kids, my parents, my family. My future is ruined.\footnote{Mark Landler, ‘September 11 hijackers’ helper jailed for 15 years’, The Sydney Morning Herald (Sydney), 10 January 2007, 7.}

**Representations of violence**

In what has been described as a war on an abstract noun,\footnote{Rodney Allan, ‘Terrorism and Truth’ (2002) 27 Alternative Law Journal 157, 157.} the role of language in its spoken and written forms in representing and provoking violence has assumed a critical importance. The official political discourse in the war on terror relies on overly simplistic, almost nonsensical phrases: ‘a type of adult-American “baby talk”’.\footnote{Jenny Hocking, ‘National security and democratic rights: Australian terror laws’, The Sydney Papers, Summer 2004, 91.} This ‘facile nomenclature’\footnote{Ibid.} is nevertheless dangerous in justifying and inciting acts of state violence. In the terror trials, words are dangerous as representations of violence. Words also inspire violence. The possession of terrorist literature has been used by the prosecution as evidence of intent to commit acts of terrorism in the trials of Abu Hamza, Lodhi and Ul-Haque. Books and other written material are viewed as potential sources of contamination and the state has sought to ban such literature. The spoken and performed word is equally dangerous, perhaps more so.

In Abu Hamza’s trial, his spoken words, his oratory, supposedly inspired acts of terrorism and he was convicted on this basis. Even in the theatre of dissent, it is Talbot’s use of language which leads to his persecution by the Man, who describes him as ‘the worst sort of terrorist of all’, ‘the terrorist who kills with words’.\footnote{Sewell, above n 36, 68.} In both types of performance, the state acts punitively in response to the perceived dangers of words.
However, language also masks and challenges violence, when the violence emanates from the state. The rhetoric utilised by Bush and other politicians in *Stuff Happens* is intended to disguise the brutality and violence of war. Similarly, the euphemisms for suicides and interrogations at Guantanamo Bay, as described in *Guantanamo*, are intended to conceal the violence of the state in its treatment of detainees. In this, there are parallels to the Nazi Party’s use of euphemisms in relation to the extermination of Jews, which was described variously as the ‘final solution’, ‘evacuation’, and ‘special treatment’. Language is thus manipulated in order to encourage people to suspend normal judgement; such terms have an obfuscating effect on the majority who do not, therefore, equate the actions of the state with the familiar and abhorrent categories of murder and lies.43

Yet, importantly, state acts of terror can also be challenged by language, by the performed language of the plays themselves, by the testimony of detainees and relatives in *Guantanamo*, by Cindy Sheehan’s ‘simple question’ in *Peace Mom*, by powerful statements such as the one made by the Palestinian academic in *Stuff Happens*: ‘We are the Jews of the Jews’.44

Thus the performances of the terror trials and the theatre of dissent take place within the framework of language which can both represent and challenge violence. However, the experience of violence by the performers is quite different. Although the terror trials for the most part are not dealing with real acts of violence, but rather with hypothetical and/or non-specific acts of violence, the trials themselves occur within the violent context of law. As Cover wrote, ‘legal interpretation is either played out in the field of pain and death or it is something less (or more) than law.’45 Theatrical performances, on the other hand, may concern themselves with real and specific acts of violence and incorporate representations of violence, but in the final analysis, they are a form of play. Theatrical interpretation does not take place ‘in the field of pain and death’ and while violence might result from an act of theatrical interpretation or even might occur as part of theatrical performance, it is not a necessary part of the context within which theatre works.

The two forms of performance can be further distinguished by their differing approaches to acts of state terror. The theatre of dissent interrogates acts of state terror directed at victims

such as the Guantanamo detainees, the mothers of soldiers killed in Iraq, the Iraqis, the Palestinians and the ordinary dissenters such as Talbot. The terror trials, with the exception of Saddam Hussein’s trial, focus on the acts of terrorism orchestrated by al-Qaeda and other militant Islamic organisations and carried out by Muslim idealists, and ignore acts of state terror. Since these acts of terrorism are for the most part hypothetical and/or non-specific, there are no real victims. The victims are portrayed as all of us, the members of the Western communities who have and will suffer at the hands of the ‘terrorists’.

There are no moral relativities in the performances of the terror trials. The trials adopt the same simple dichotomies encapsulated within the official war on terror discourse, in which terrorism is evil and the Western nations, representing freedom and democracy, are good. The failure on the part of the courts to examine or scrutinise state acts of terror in the terror trials is apparent even in Hussein’s trial, in which acts of state terror are attributed to evil individuals rather than seen as the responsibility of a regime which was recognised, at the time, as legitimate by the United States and its allies, and which enjoyed United States support and Australian financial backing. By contrast, in the performances of the theatre of dissent, the moral relativism of the war on terror is made explicit by characters who have experienced, or are experiencing state acts of terror. The brother of a detainee at Guantanamo Bay cannot ‘see what difference [there] is between Saddam Hussein and Bush and Blair’.46 The Palestinian academic in Stuff Happens comments that

> justice and freedom are the ostensible causes of the West – but never extended to a people expelled from their land and forbidden any right to return. Terror is condemned, but state-sanctioned murder is green-lit.47

An academic compares the myths which ‘blind [Americans] from the reality of what we’re doing and impel us toward our own destruction’48 with the ‘delusional myth[s]’ that destroyed Nazi Germany. In Peace Mom, a bereaved mother asks President Bush why her son had to die fighting in an illegitimate war. In Honour Bound, while we listen to an American politician condemning the ruthlessness of terrorists who murder the innocent and take joy in their

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47 Hare, above n 44, 59.
48 Sewell, above n 36, 7.
suffering, we can see only the naked, suffering victims of state acts of terror and torture at Guantanamo Bay.

Functions and effectiveness

Legal proceedings in the war on terror, with a few significant exceptions, have generated performances which uphold the authority of the state to commit acts of violence and terror: against other nations, against particular racial groups, and against suspected terrorists. By contrast, the theatre of dissent provides us with performances which challenge the authority of the state to commit such acts, but also highlight the powerlessness of the courts to condemn such acts. In *Myth*, legal standards, human rights and the power of reason become irrelevant in the post-September 11 world, in which dissenters are killed and the state administers punishment without recourse to the courts. This world resembles a state of exception, in which the state is no longer constrained by the rule of law; similarly, *Guantanamo* and *Honour Bound* depict the state of exception which is Guantanamo Bay. Again, legal principles and human rights are flagrantly violated, as characters such as Gareth Pierce, Clive Stafford Smith and Major Mori point out. In *Honour Bound*, legal texts prove to be slippery and unmanageable for the dancer/acrobats who attempt to traverse them. In *Stuff Happens*, the decision of the state to declare war, which the courts have refused to examine in various legal challenges, is interrogated and challenged by a frank recounting of the cold-blooded political manoeuvring which preceded the Iraqi invasion. In *Peace Mom*, that same power is questioned by the disempowered and ordinary American, the mother of one of the countless casualties of the war. Yet why does this distinction between theatrical and legal performances exist, and why do theatrical performances permit more reflexivity than legal performances?

One explanation can be found in the work of Victor Turner, an anthropologist with an interest in cultural performances, who believed that legal performances and theatrical performances play different functions within all human societies in their relationship to what he called social dramas. Social dramas have four phases: breach, crisis, redress and then either re-integration or recognition of schism. Both theatrical and legal performances originate in social dramas. However, legal performances take place within the context of a social drama, in the third phase, and have the specific purpose of conflict resolution and restoration of

order. They assign meaning to the preceding sequence of events and permit some reflexivity, but Turner concluded that ‘the redressive machinery of spontaneous social drama, judicial and ritual, attains only a limited degree of reflexivity, lying as it does on the same plane as the agonistic events being scrutinised.’\textsuperscript{51} Theatrical performances, on the other hand, address the entire social drama, and are ‘secreted from the social drama and in turn surround it and feed their performed meanings back into it’.\textsuperscript{52} They ‘imitate’ and ‘assign meaning’ to social dramas.\textsuperscript{53}

According to this analysis, theatrical performances can provide more reflexivity than legal performances because they adopt an external, rather than an internal, perspective on social dramas. Theatrical performances allow for the possibility of critique from the outside; legal performances work within the power apparatus of the state. Turner concludes that ‘theatre is perhaps the most forceful, active if you like, genre of cultural performance.’\textsuperscript{54}

The contrasting functions of the terror trials and the theatre of dissent can also be explained by applying Hozic’s distinction between spectacle and theatre. As I have already discussed, the two forms of performance have quite a different relationship to the state. According to Hozic’s classification, the terror trials constitute spectacle, which is ‘the exclusive patrimony of the official power’.\textsuperscript{55} She suggests that the phenomenon of spectacle reinforces existing power structures, while theatre inspires its audience to question and challenge such structures.\textsuperscript{56} Such conclusions seem too sweeping in the context of theatrical performances generally. After all, some theatrical performances bolster and support the established order. However, her arguments hold true in the context of the theatre of dissent, which by definition takes an oppositional stance. I shall address the extent to which the theatre of dissent succeeds in realising such goals. But firstly, how effective is the spectacle of the terror trials?

In the context of the war on terror, terror trials which result in a conviction please their audience as a tangible demonstration of the power of the state, and its capacity to punish

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\textsuperscript{50} Ibid 110.
\textsuperscript{52} Ibid 90.
\textsuperscript{53} Ibid 95.
\textsuperscript{54} Turner, above n 49, 104.
\textsuperscript{55} Aida Hozic ‘The Inverted World of Spectacle: Social and Political Responses to Terrorism’ in John Orr and Dragan Klaic (eds), \textit{Terrorism and Modern Drama} (1990) 66.
\textsuperscript{56} Ibid 67–8.
wrongdoers and thus manage the emotionally-loaded phenomenon of terrorism. The
importance of the spectacle of the terror trials was made apparent in the trial of Zacarias
Moussaoui, the only person to be charged with offences relating to the September 11 attacks.
In his 2006 trial, he was found guilty but avoided the death penalty, being sentenced instead
to life imprisonment.

The wars in Afghanistan and Iraq were portrayed as retaliatory responses to the spectacular
violence of the September 11 terrorist attacks: a satisfactory (to many Western eyes)
demonstration of state power over the indefinable but alien forces which had clearly declared
war on the West. Yet the United States was denied the grim satisfaction of a state-staged
spectacle of death-dealing violence in the form of a trial. The perpetrators of the September
11 attacks were destroyed in the conflagration which they orchestrated; subsequently, their
distant operator, Osama bin Laden, eluded capture in Afghanistan. Consequently, the United
States had only the smug braggart, Moussaoui, as scapegoat. Moussaoui, safely ensconced
in a United States jail during September 2001, could not have been directly involved in the acts
of terrorism. Nevertheless his trial, by default, became the necessary spectacle.

It is difficult not to see Moussaoui as a scapegoat, as his mother argued, although he appears
to view himself as a martyr. His provocative courtroom confessions about his involvement in
the attacks were contradicted by evidence given by senior al-Qaeda figures, who have stated
that he was too egotistical and unreliable to participate effectively in acts of terrorism. The
comments of relatives of the victims of the September 11 attacks were revealing. One relative
stated that ‘after four-and-a-half long years, this is our only attempt to get a scintilla of
justice’ and another stated that ‘someone has to pay for it’. Clearly, some sort of spectacle
involving retribution was required. Even more problematic was the use of the trial as a form
of group therapy. It is not unusual, as Conquergood has pointed out, for such trials to be seen

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57 Jerry Markon, ‘Emotions high as death hearing relives terror attacks’, *The Age* (Melbourne), 9 March 2006
<http://www.theage.com.au>
58 ‘Bin Laden denies Moussaoui had 9/11 role’, *The Sydney Morning Herald* (Sydney), 24 May 2006
60 Brian Macquarrie, ‘Families prepare for 9/11 trial’ *The Age* (Melbourne), 6 March 2006
as a necessary part of ‘collective healing and closure’. Moussaoui’s trial was televised to relatives in remote-viewing courtrooms in various parts of the United States. Furthermore, relatives of victims were allowed to testify in the second phase of his sentencing trial.

The importance of the spectacle of the terror trial was also made clear in the outcry which followed the quashing of Jack Thomas’ convictions. It would appear that the terror trials are not primarily about the pursuit of justice; rather, the spectacle of the terror trials is designed for retribution, deterrence and closure.

The extensive mediatisation of the live performances in the spectacle of the terror trial increases the impact of the spectacle. Although the legal system ‘accepts only incursions of mediatisation that do not violate the liveness of the trial’, the ongoing mediatisation of the terror trials outside the courtroom is central to the success of the terror trials as spectacle in a society in which ‘mediatized forms enjoy far more cultural presence and prestige … than live forms’. Ironically, the spectacle of terrorism itself also depends on mediatisation for its effectiveness. The impact of the terror trials as spectacle spreads beyond the limited audience in the courtroom to the much larger number of people exposed to mediatised representations of the live performances in the legal proceedings. By contrast, the theatre of dissent receives little attention from the mass media. This diminishes its effectiveness as a mechanism for mobilising its audience into taking some form of action.

In part, the theatre of dissent resists mediatisation because of its very nature. I have already alluded to Peggy Phelan’s views on performance; she contends that representations of live performance are, if not inferior, at the very least categorically different to the original event. On the other hand, Auslander points out that live performance, including theatre, cannot ‘[operate] in a cultural economy separate from that of the mass media’. Nevertheless, the impact of the theatre of dissent, unlike the terror trials, is largely restricted to its audience, which one critic has described as ‘the converted cognoscenti, rather than a popular

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64 Ibid 162.
65 Phelan, above n 27, 146.
66 Auslander, above n 63, 40.
audience’. 67 Furthermore, according to Baz Kershaw, the ‘commodification’ of theatre, which further restricts the composition of its audiences, ‘stifles radicalism in the moment of its birth’. 68

Commentators disagree on the impact, and hence effectiveness, of the theatre of dissent. One group believes that the theatre of dissent galvanizes audiences into action, and, due to the commonality of the experience and the nature of live performance, does so in a way which cannot be achieved through other methods. Proponents of this view include Nicolas Kent, director of the Tricycle Theatre in London, who is best known for his documentary theatre in the form of the tribunal plays, and who commissioned and directed Guantanamo. Kent argues that political theatre derives its power from the circumstances of its performances; a captive audience is confronted with powerful issues and compelled to address them within a specific period of time. Furthermore, the audience forms a cohesive group for that period. He believes that the ‘group reaction’ of the audience can influence individuals, and deliberately employs the technique of post-show discussions and debates in order to empower members of the audience. 69 Dario Fo has also used this technique.

In response to the claim that the theatre of dissent merely preaches to the converted, Kent argues that it strengthens the commitment of the converted to act, sways the undecided, and influences the handful who are there ‘for completely spurious reasons’. 70 In his view, the documentary plays have healed rifts in the community; he comments that after Guantanamo, he ‘sat amongst a mainly non-Muslim audience and … saw people care about Muslims.’ 71 Tim Miller, an actor who has been involved in gay theatre, has also objected to the dismissive response that the audience for such political theatre is the already converted. He points out that ‘the converted are never wholly converted’ and that there is always a dynamic relationship between even a sympathetic audience and the performance. 72

70 Ibid.
71 Ibid.
72 Tim Miller and David Roman, ““Preaching to the converted”” (1995) 47 Theatre Journal 169, 177.
Others share Kent’s views. Nigel Jamieson, director of * Honour Bound*, has commented that ‘mine is a small voice’ but ‘even a small voice can make a difference’ and Garry Stewart, the choreographer, has described the production as one thing within a ‘whole critical mass of shifting perceptions’. Terry Hicks commented that he found it ‘quite extraordinary that art can get the point across so well’. Playwright Sara Muzio has pointed out that theatre provides a more intense and powerful form of communication than that offered by ‘virtual reality politics’, in which ‘to spin facts seems more important than the facts themselves’. Mary Karen Dahl maintains that theatre can unite and inspire audiences to resist oppressive governments; it can generate a groundswell of support for dissident ideas. This is a Brechtian vision of the theatre of dissent, in which the performance is ‘the beginning of action’. Brecht believed that theatre provides ‘the best “laboratory” for political disruption’.

On the other hand, some commentators believe that the theatre of dissent fails to radicalise its audiences. Kershaw argues that contemporary theatre, constrained by marketplace demands, has failed to provide its audience with truly radical performances. One critic has specifically targeted documentary theatre, arguing that an ‘imagination-free’ reflection of reality is not conducive to social and political change. Another has described *Guantanamo* as ‘a kind of dramatic anger management for the left-liberal cognoscenti’. According to Boal, this is the Hegelian or Aristotelian view of theatre, in which theatre has a cathartic effect and results only in a ‘quiet somnolence’.

There is disagreement, therefore, between those who believe that theatre helps ‘spectators recognize, and therefore respond to, their lethal predicament’, and those who maintain that the

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75 Clare Morgan, ‘Determined father keeps son in spotlight’, *The Sydney Morning Herald* (Sydney), 5 July 2006, 8.
77 Dahl, above n 2, 109, 112.
80 Kershaw, above n 68, 52.
82 Coveney, above n 67.
83 Boal, above n 78.
role of the theatre is merely to ‘offer them [the spectators] the illusion that by attending theatre they are doing something about it’. In the context of the war on terror, it could be argued that theatre offers particular possibilities for an alternative form of critique, and an alternative discourse to the liberal discourse on human liberties which tends to dominate in academic and even popular debates. Indeed, Szorenyi and Rogers have highlighted the pressing need for

an alternate discourse in which the inadequacy of dominant representations of the ‘problem’ called terrorism, and of the legal response to these representations, becomes visible and hearable, a discourse in which the struggles of those with more difficult access to the public domain might find a hearing.

Since theatrical performances can provide such an alternative discourse, and may do so by way of metaphor or fiction, they may be less subject to state control than other forms of critique. The sinister possibilities for the silencing of academic critique, for instance, are explored in Myth.

One measure of the effectiveness of the theatre of dissent may be the extent to which the state views such theatre as a threat and attempts to silence playwrights, directors and actors who participate in it. In the next section, I shall look at the response of the Australian government to such cultural phenomena, and the intersection of the terror trials and the theatre of dissent in the real possibility of theatre on trial.

Theatre on trial

In 2005, the existing sedition laws in Australia, which had effectively been dormant for decades, were amended in Schedule 7 of the Anti-Terrorism Act (No 2) 2005 (Cth). The Attorney-General Phillip Ruddock explained in the Second Reading Speech that the amendments were ‘modernising the language of the provisions and [were] not a wholesale

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86 Ibid.
One commentator, Spencer Zifcak, has described this explanation as ‘nothing more than disingenuousness and dissembling’. Ruddock also announced that he intended to have the sedition offences reviewed; thus far, they have been scrutinised by the Senate Legal and Constitutional Committee in 2005, by the Security Legislation Review Committee which reported its findings in June 2006, and by the Australian Law Reform Commission in 2006. The bipartisan Senate Legal and Constitutional Committee commented in its 2005 report that the vast majority of submissions and evidence received by the Committee were critical of the sedition offences, and in particular, media organisations and members of the arts and entertainment industry had expressed concerns. The Committee recommended that Schedule 7 be removed from the Act in its entirety, pending a full and independent review carried out by the Australian Law Reform Commission, and in the alternative, a number of changes be made, including extending the available defences to cover statements made for journalistic, educational, artistic, scientific, religious or public interest purposes. These recommendations were not adopted.

The Australian Law Reform Commission also recommended a large number of amendments to the new offences, including a narrowing of the offence provisions so that only those who actually intended to incite violence could be successfully prosecuted. The Commission further recommended that context should be relevant in any consideration of the sedition offences, including whether the conduct had occurred in the ‘development, performance, exhibition or distribution of an artistic work’. My focus will be on the potential application of Schedule 7 to the theatre of dissent, and the effect which the enactment of this law has had, and may well have in the future, on this form of theatre.

Schedule 7 of the Anti-Terrorism Act (No 2) created new offences in section 80.2 of the Criminal Code Act 1995 (Cth). It is an offence if a person urges another person to overthrow

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87 Commonwealth, Parliamentary Debates, House of Representatives, 3 November 2005, 103 (Phillip Ruddock, Attorney-General).
90 Ibid 115, Recommendations 27, 28.
93 Australian Law Reform Commission, above n 92, Recommendation 12(2).
by force or violence the Constitution or the Government, urges another person to interfere by force or violence with lawful processes in Parliamentary elections, or urges a group or groups to use force or violence against another group or groups. Recklessness applies in relation to particular elements of these offences, but there is some disagreement over what is meant by recklessness and the extent to which intent is required. Two other offences are created in section 80.2. Under section 80.2(7), a person commits an offence if he or she urges another person to engage in conduct which he or she intends to assist an organisation or country, and that organisation or country is at war with the Commonwealth. Under section 80.2(8), a person commits an offence if he or she urges another person to engage in conduct which he or she intends to assist an organisation or country, and that organisation or country is engaged in armed hostilities against the Australian Defence Force. These two offences do not apply to engagement in conduct by way of, or for the purposes of, the provision of aid of a humanitarian nature. Recklessness does not apply to these last two offences and notably, there is no mention of force or violence as part of these offences. Thus these offences go beyond the regulation of words which ‘are intended to and are calculated to provoke acts of violence’. As David Marr has pointed out, there is no need for a ‘violent outcome’; ‘that perfect peace continues to reign in the nation is no defence to the charge.’ In criminalising behaviour which might indirectly incite acts of terrorism, or be interpreted as supportive of acts of terrorism, the new sedition offences can be seen to share characteristics with the other offences in Australia’s anti-terrorism legislation. As previously discussed, conviction for other offences does not require the prosecution to demonstrate the connection between the defendants’ actions and specific acts of violence.

Under section 80.3, there are a number of defences for acts done in good faith. These include: trying in good faith to show that a number of different members of government, including the

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94 Criminal Code Act 1995 (Cth), s 80.2(1).
95 Criminal Code Act 1995 (Cth), s 80.2(3).
96 Criminal Code Act 1995 (Cth), s 80.2(5).
97 Criminal Code Act 1995 (Cth), ss 80.2(2), 80.2(4), 80.2(6).
99 Criminal Code Act 1995 (Cth), s 80.2(9).
100 Spencer Zifcak, quoted in above n 88.
sovereign, are mistaken in any of his or her counsels, policies or actions;\textsuperscript{103} pointing out in good faith errors or defects in government legislation, the Constitution or the administration of justice with a view to reforming those errors or defects;\textsuperscript{104} urging another person in good faith to attempt to lawfully procure legislative, policy or practical reform;\textsuperscript{105} pointing out in good faith any matters that are producing or have a tendency to produce feelings of ill-will or hostility between different groups in an attempt to bring about the removal of those matters;\textsuperscript{106} doing anything in good faith in connection with an industrial dispute or industrial matter;\textsuperscript{107} and publishing in good faith a report or commentary about a matter of public interest.\textsuperscript{108} This last defence protects media organisations and journalists from prosecution and was inserted in response to outcry from such organisations.\textsuperscript{109} The Court may have regard to a number of matters in considering whether these defences apply,\textsuperscript{110} including whether the acts were done for a purpose intended to be prejudicial to the safety or defence of the Commonwealth,\textsuperscript{111} with the intention of assisting an enemy,\textsuperscript{112} or with the intention of assisting another country or organisation engaged in armed hostilities with the Australian Defence Forces.\textsuperscript{113}

There are clear limitations in relation to the above defences. As the Australian Press Council and numerous others pointed out in the Senate Committee inquiry, the defence does not cover artistic activities, including satire, parody and ridicule, which are not specifically directed towards political reform.\textsuperscript{114} Therefore, it ‘may not cover speech or performance that urges disaffection, disobedience, demonstration or some other form of dissent without making positive suggestions about how things should change’; ‘non-political speech’ and ‘arguments made in the artistic, scientific, academic or religious arenas’\textsuperscript{115} are not protected by such defences.

\textsuperscript{103} Criminal Code Act 1995 (Cth), s 80.3(1)(a).
\textsuperscript{104} Criminal Code Act 1995 (Cth), s 80.3(1)(b).
\textsuperscript{105} Criminal Code Act 1995 (Cth), s 80.3(1)(c).
\textsuperscript{106} Criminal Code Act 1995 (Cth), s 80.3(1)(d).
\textsuperscript{107} Criminal Code Act 1995 (Cth), s 80.3(1)(e).
\textsuperscript{108} Criminal Code Act 1995 (Cth), s 80.3(1)(f).
\textsuperscript{109} Spencer Zifcak, quoted in above n 88.
\textsuperscript{110} Criminal Code Act 1995 (Cth), s 80.3(2).
\textsuperscript{111} Criminal Code Act 1995 (Cth), s 80.3(2)(a).
\textsuperscript{112} Criminal Code Act 1995 (Cth), s 80.3(2)(b).
\textsuperscript{113} Criminal Code Act 1995 (Cth), s 80.3(2)(c).
\textsuperscript{115} Spencer Zifcak, quoted in above n 88; see also Ben Saul, ‘Speaking of terror: criminalising incitement to violence’ (2005) 28(3) University of New South Wales Law Journal 868, 875.
The section has extra-territorial operation, which presumably means that the offence would not have to occur in Australia. The Attorney-General’s consent is required before proceedings commence, but this has been dismissed by one commentator, Laurence Maher, as ‘an illusory safeguard against prosecutorial abuse’. Those convicted of these offences can be sentenced to up to seven years in prison.

The extent of the opposition to the enactment of these offences has already been noted. Sedition generally has a ‘long and undignified history’ in Australia, according to Chris Connolly, who has referred to its use against the rebels and their supporters following the Eureka stockade, its deployment against the Industrial Workers of the World following the expression of anti-conscriptionist sentiment in 1916, and the jailing of Sharkey in 1949 as a consequence of his response to a journalist’s question about whether the Australian public would welcome the Soviets. Sedition has been used against the arts in McCarthyist America; Connolly also cites historical examples of poets, novelists, playwrights, cartoonists and filmmakers who have been threatened or charged with sedition. In fact, in 1597, after Ben Jonson was imprisoned for writing the play The Isle of Dogs, the government shut down the entire theatre community for six months. Connolly concludes that the application of sedition laws seldom has a constructive outcome, and that such laws tend to be abused by governments. Laurence Maher has also explored the punitive impact of Australian sedition laws on left wing radicals. He has pointed out that the use of sedition laws is usually self-defeating, because the allegedly dangerous words can be freely re-published once court proceedings have commenced.

The application of the new sedition laws to the theatre of dissent was one of the concerns raised in the Senate Committee inquiry. Howard has said that the sedition offences are not intended to target legitimate commentary, satirical cartoons or political theatre. However,

117 Ibid 9.
118 Ibid 10.
119 Ibid 18.
120 Ibid.
121 Ibid 9.
122 Ibid 3.
124 Quoted in Commonwealth Senate Legal and Constitutional Legislation Committee, above n 89, 84; see also ibid 310.
the Australian Press Council, and others, discussed the possibility of the offences applying to various performers and creative people, and the need for an exemption ‘for the purposes of artistic expression’. A barrister, Peter Gray, provided an opinion to the Representatives of the Arts and Creative Industries of Australia which was annexed to their submission and in which he directly addressed the question of whether David Hare had contravened relevant sections of the new legislation in writing Stuff Happens.

Clearly enough, the playwright was inviting the audience to mistrust, to disbelieve, and ridicule much of what these characters, the ‘leaders of the free world’ were saying. Would the publication of such indirect criticism of American or British policy and actions of Iraq ‘assist’ the insurgents in Iraq? Or al-Quaida? Arguably so. Might some audience members be encouraged, or ‘urged’, by such a play to engage in conduct (whether acts of terrorism, at one end of the spectrum, or merely the further public dissemination of such criticisms, near the other end) of a kind which would or might contravene ss. 80.2(1), (3), (5), (7) or (8) of the Bill? Quite possibly. Would the writer be aware of the risks that such a result might eventuate? Again, quite possibly.

In his opinion, Gray described other examples of creative and artistic work which ran the risk of contravening the legislation, including plays, films or television programmes which provided sympathetic coverage of groups currently at war with Australia or engaged in armed hostilities with Australia. Even artistic works which simply reproduced the seditious opinions of others could be viewed as infringing the legislation, this suggests that documentary theatre is susceptible to prosecution.

The potential ambit of the sedition offences in the context of artistic and cultural works is alarming. Robert Connolly has pointed out that one of Australia’s best-known films, Gallipoli, could be seen as seditious in its portrayal of incompetent allies, disrespectful troops and courageous enemies, and in the questions it asks about the political expediency of the

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126 Australian Press Council, above n 114.
128 Ibid.
129 Ibid 32.
conflict. Stephen Sewell has described his 2005 play *The United States of Nothing* as potentially seditious, challenging the concept of democracy and discrediting the policies of our most formidable ally. The same description applies to *Myth*. Even less blatantly political works are vulnerable to prosecution due to the multiple meanings which can be attached to such works, and the multiple reactions which such works might provoke. Deborah Doctor has pointed out that certain unexpected and unintentional reactions to artwork might form the basis for the prosecution of an artist. Artists cannot control or even necessarily predict the public’s response to their work.

Liability could extend to writers, directors, producers, editors, publishers and actors in regard to such artistic or creative works. In fact, Chris Connolly has pointed out that since the good faith defence applies only to individuals, the owner of the theatre, the publisher of the script and any organisation that wrote the promotional material are particularly vulnerable to prosecution. Currency Press has indicated that it will no longer publish controversial political plays including Hannie Rayson’s *Two Brothers* and Sewell’s *Myth*, because of the risk of prosecution.

In assessing the likelihood of prosecutions directed at the theatre of dissent, it is important to ask whether and why the government would target theatre and the arts in its war on terror. The change in federal government in November 2007 may have allayed some concerns by commentators about the use of the sedition offences to silence dissenting voices. However, public tolerance of such voices might diminish if further terrorist attacks occur, especially if such attacks occur in Australia. Cultural performances have been perceived as terrorist acts by various governments, including the Pinochet military dictatorship in Chile. Certainly, the tendency in recent years has been towards an intolerance of dissenting voices in the arts.

133 Gray, above n 127, 32.
135 Ibid 16 (Robert Connolly).
136 Spencer Zifcak, quoted in above n 88.
137 Dramatist Benjamin Galemire, quoted in Michael Billington, ‘On with the show’, *The Guardian* (London, United Kingdom), 7 September 2004 <http://www.guardian.co.uk>.
Chapter 6 – Comparing law’s violence and theatre’s play

The sedition laws were enacted at a time of increasing censorship of the arts. Barrister Julian Burnside has drawn attention to the work of artist Azlan McLennan, which focuses on leaders of proscribed terrorist organisations, and which Melbourne City Council refused to display due to concerns about vandalism of the glass cabinets.\textsuperscript{138} Katherine Gelber refers to the removal by the Blacktown City Council of commissioned artwork featuring soldiers and entitled ‘Weapons of Mass Destruction’.\textsuperscript{139} In 2005, the Australian government withdrew a grant to an international film festival in Jakarta, because part of the program involved the showing of four apparently controversial Australian films including a documentary about David Hicks.\textsuperscript{140} The planned outdoor screening of \textit{Gallipoli} at a military base during a Hawaiian International Film Festival was cancelled because the film was seen as anti-war.\textsuperscript{141} Frank Moorhouse has documented (and condemned) numerous instances of censorship of writers, books and even websites.\textsuperscript{142}

Increasing censorship was accompanied by persecution. Actors who play Guantanamo detainees in a British film, \textit{The Road to Guantanamo}, were detained and questioned by police at a London airport. One actor was asked: ‘Did you become an actor mainly to do films like these; to publicise the struggles of Muslims?’\textsuperscript{143} Despite this climate of censorship and persecution, commentators believe that the most significant consequence of the new sedition laws will be self-censorship rather than a wave of prosecutions.\textsuperscript{144} As the Australian Writers’ Guild observed in its submission to the Australian Law Reform Commission, ‘stories will remain untold’ and ‘voices will remain unheard’.\textsuperscript{145} In the area of theatre, Stephen Sewell has expressed concerns that conservative theatre companies will refrain from producing controversial works like his.\textsuperscript{146}

Self-censorship which operates to prevent the publication and performance of political material in the arts has been a feature of various oppressive regimes. In 1979, when Argentina

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\textsuperscript{139} Katherine Gelber, ‘Hate Speech in Australia: Emerging Questions’ (2005) 28(3) \textit{University of New South Wales Law Journal} 861, 866.


\textsuperscript{141} Martin, above n 130.


\textsuperscript{144} See Commonwealth Senate Legal and Constitutional Legislation Committee, above n 89, 92–4.

\textsuperscript{145} Australian Law Reform Commission, above n 92, 162.
\end{flushleft}
was under a military dictatorship, writer Maria Elena Walsh complained that Argentina had turned into ‘Kindergarten-land’, and stated that ‘each of us has a broken pencil and an enormous eraser already encrusted in our brain’. However, Graham-Jones points out that Argentine playwrights defied official restrictions by using ‘encoded’ texts. Dahl comments that:

Even when the import of a staged scene cannot be admitted or stated publicly, the individual spectator can in fact silently appropriate signs to his or her own ends. The special advantage theatre has over reading is that these silent appropriations, or acts of resistance, can be committed in a body, and they may from time to time escape silence and erupt into social action.

Plays which contain encoded messages of resistance, or which operate by way of metaphor, can have a particular and continuing relevance for audiences who are experiencing oppression on the part of authoritarian governments. A number of writers resorted to historical metaphor or a ‘deliberate aesthetic camouflage’ in the United States in the 1950s, when writers could be prosecuted for ‘conspiring to advocate subversive ideas’. One example of such historical metaphor is Arthur Miller’s play *The Crucible*, which was written in the context of McCarthyist America and depicts the politics of paranoia at work in the Salem witchcraft trials. Arthur Miller has written that he ‘can almost tell what the political situation in a country is when [The Crucible] is suddenly a hit there – it is either a warning of tyranny on the way or a reminder of tyranny just past.’ A Chinese writer who spent six and a half years in solitary confinement during the Cultural Revolution told Miller that the events described in *The Crucible*, including the role played by teenagers, mirrored the events of the Cultural Revolution.

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146 Creagh, above n 131.
149 Ibid 21.
150 Dahl, above n 2, 119.
154 Ibid.
Plays which operate by way of metaphor may well continue to appear in an environment of self-censorship. However, documentary and other sorts of theatre which address contemporary events, and in particular, criticise Australian involvement in the Iraqi war,\textsuperscript{155} may not. This possibility has been deplored by the Representatives of the Arts and Creative Industries of Australia, who in their joint submission to the Senate Inquiry argued that we need dissident playwrights like Athol Fugard, Vaclav Havel, Arthur Miller and David Hare.\textsuperscript{156}

In fact, the initial response of some Australian performers to the sedition laws was not self-censorship, but humour and political satire. An assemblage of comedians and commentators, including Max Gillies, Gerry Connolly, Jonathon Biggins, Drew Forsythe, Phillip Scott and Wil Anderson, held a concert entitled \textit{Sedition!} on 13 November 2005 to protest against the sedition laws. Spokesperson Wendy Harmer stated that ‘this coalition of entertainers and commentators believes it is important to defend the rights of all Australians to make comment on their political masters – however rude, irreverent, and as Dame Edna might say, “uncalled for” they may be.’\textsuperscript{157} \textit{Sedition!} consisted of stand up comedy, skits, musical satire, cartoons, video, interviews and speeches;\textsuperscript{158} it featured a particularly impressive depiction of Ruddock’s devilish temptations entitled ‘The Damnation of Ruddock’. The government responded almost immediately; Ruddock argued the next day that artists and satirists were not under threat from the sedition laws.

‘The Damnation of Ruddock’ was subsequently performed as part of the Sydney Theatre Company’s Wharf Revue \textit{Stuff All Happens}, in Sydney at the end of 2005, and in regional centres in the first part of 2006. According to one critic, the show had ‘a daring possibly born from the realisation that many of these sketches could result in criminal charges once we’re all made safe from the dire threat of sedition.’\textsuperscript{159}

Perhaps the revamped sedition offences will remain unused, and satire, parody and political theatre will continue to flourish. As Sewell has argued, art is ‘the one weapon we have to

\begin{thebibliography}{99}
\bibitem{155} Spencer Zifcak, quoted in above n 88.
\bibitem{157} Wendy Frew, ‘Few laughs found in sedition gag’, \textit{The Sydney Morning Herald} (Sydney), 7 November 2005, 8.
\end{thebibliography}
contest the anti-human philosophy the terrorists appear to espouse’. Certainly, many commentators have viewed the change in government with optimism. However, while the legislation remains in force, the possibilities for prosecution are present in the minds of writers, directors, producers and publishers. At this point, it is impossible to know whether the Rudd government will prove to be more tolerant of dissenting voices in art and the play of theatre than its predecessor.

**Conclusion**

In this Part, I have used case studies in the areas of the terror trials and theatre of dissent to highlight differences in these two forms of performative response to the phenomenon of the war on terror. An analysis of the terror trials of Saddam Hussein, Jack Thomas and Abu Hamza, and the (non)trial of David Hicks, exposes common themes in the performances enacted by the state in order to maintain its legitimacy and authority. *Stuff Happens*, *Guantanamo*, *Honour Bound*, *Peace Mom* and *Myth* highlight the different performative strategies in the theatre of dissent, and its role in exposing and thus challenging the legitimacy of the state’s claim to a monopoly on violence.

In analysing these case studies, I found a number of significant differences between these two types of cultural performance. The violence of the state is not scrutinised in the performance of law in the terror trials; however, the trials are anchored in, and supportive of, acts of state violence. By contrast, in the theatre of dissent, the focus is on state acts of violence and we, as the audience, judge those who are responsible for such acts and feel empathy for the victims. The violence examined in the theatre of dissent is real violence, but it is looked at in a playful and non-violent context. The violence which is judged in the terror trials is, in most cases, hypothetical violence, future or non-specific acts which might or might not have taken place. On the other hand, the violent ramifications of the verdicts are very real.

Another important distinction between the terror trials and the theatre of dissent arises from the contrasting representations of the Other. In the terror trials, terrorists are treated as the Other, and stigmatised due to the religious, racial and other characteristics which identify them as different, as the folk devils in the moral panic about terrorism. They are dehumanised

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160 Martin, above n 130.
in these performances, and hence the violent treatment meted out by the state is considered to be acceptable. In the theatre of dissent, ‘terrorists’ are portrayed as the victims of state acts of terror. In these performances, the voice of the Other is heard, and audiences become uncomfortably aware of their shared humanity.

Traditional assumptions that law is about the real and theatre is about invented worlds break down in the context of the war on terror. The construction of legally significant narratives in the terror trials can be considered as a work of fiction. The performances in the theatre of dissent, and particularly in documentary theatre, could be seen to represent the ‘real’ and re-enact past events in pursuit of some notion of the ‘truth’ more effectively than the limited one-dimensional performances in the terror trials.

Finally, the two forms of cultural performance can be seen to have different functions. The terror trials are designed to showcase the authority and power of the state, and therefore maintain public confidence in the government’s capacity to deal with terrorism. The theatre of dissent is intended to create debate, to challenge the established order, and to instigate political and social change. The effectiveness of the terror trials and the theatre of dissent is limited by their nature as live performance. In relation to the terror trials, mediatisation ensures that a simplistic and edited version of the live performance is transmitted to a large audience, and thereby vastly amplifies the impact of the spectacle of these performances. However, mediatisation does not increase the potential audience of the theatre of dissent. In looking at the role of mediatisation, the distinction between the terror trials as spectacle rather than theatre, and the theatre of dissent, becomes clear.

These two forms of cultural performance intersect in the area of sedition. There we see the potentially chilling effect of law on theatre, and theatre’s defiant performative response. This interplay between these two forms of cultural performance provides a fitting conclusion to a comparative study of the two performative responses to the war on terror.

At the concluding moment of Act I, I am aware that playfulness, or pre-rational play, has not thus far played a significant role in my discussion. The legal performances in the terror trials are examples of rational play, although such performances are occasionally sabotaged by unscripted moments of playfulness. The theatrical performances in the theatre of dissent,
while controversial in content, comply with a written script and operate within the rules of conventional theatrical productions. They lack frivolity, lightness and spontaneity.

Most of the theatrical performances in the case studies reproduce the portentous political performances which they seek to critique; this can be done in the spirit of playfulness, but the five performances which I have analysed here are neither satire nor parody. The contrasting form of play in the theatre of dissent has provided a number of valuable insights into the spectacular play of the terror trials and other legal performances in the war on terror, but has not challenged the violence of law with subversive playfulness.

In fact, in this Act, pre-rational play has surfaced most overtly in the undesirable form of acts of terrorism, in which playfulness certainly does not provide an antidote to violence.

It is time, in fact, to return to playfulness in the performance of this text. In the following Interlude, I open with a moment of playful challenge to a legal performance, and then examine the possibility of countering the violence of law through play by investigating the intriguing phenomenon of documentary theatre.
Interlude

Law and Play
Chapter 7

Law and play

In May 1994, a Ballina magistrate, Pat Caldwell, ejected a young breastfeeding woman from his courtroom, suggesting that she might prefer to breastfeed in a private space. This became a media event; I heard of this on the radio. My first reaction was one of outrage. Earlier that year, in my second year of teaching, I had received critical student feedback on my own attempt to combine my private and public roles as breastfeeding mother and lecturer. This latest demonstration that breastfeeding mothers were not tolerated in the public sphere of law made me uneasy. One cannot, after all, lop off a breast and leave it at home with one’s baby while fraternising in the corridors of power.

By 1994, I knew about the power of the theatre of direct action, from my participation in North East Forest Alliance (hereinafter NEFA) blockades. I gathered a group of breastfeeding mothers and supporters,¹ and we arrived at the Ballina courthouse mid-morning on 20 May 1994. My colleague, Greta Bird, had brought along a placard which announced in bold letters, ‘Breastfeeding is not a crime’. Another colleague, David Heilpern, a practising solicitor who was to join the bench as a magistrate in 1999, was also there in the event that the punitive force of law was unleashed upon us.

Although I was committed to my participation in the public performance of breastfeeding my baby in this forbidden space, I found myself reluctant to enter the courtroom. I procrastinated for a while and the other mothers, none of whom were legal practitioners, uttered phrases of mild encouragement. Eventually my baby intervened; tired and hungry, she began to head butt my chest to indicate that she wanted a drink.

In we marched, sat down and unbuttoned our shirts. The babies latched on and began to suck, or mine did, at any rate, with frenzied intent. My great fear had been that the magistrate,

¹ One mother who had recently weaned her toddler came along anyway. ‘I can always persuade him to suck by sticking a lolly on my nipple,’ she said.
notorious for his quick temper, might charge us with contempt of court and separate us from our babies. But he maintained his composure. His face was unreadable. Within a matter of minutes, he adjourned the proceedings, and announced that when the court resumed, it would be closed for a children’s court matter. We all filed out. The media had now arrived and details of our performance were being relayed to a wider audience.

This performance operated on a number of levels. It was incredible how the simple act of feeding a baby could be so imbued with layers of meaning. Our actions were playful, in the sense that Victor Turner describes the phenomenon of playfulness, as a ‘mocker’, ‘a mimic and a tease’. Playfulness is the realm of the child and ‘the child is the epitome of antistructure’; in bringing our babies into the authoritative, masculinist performance space of the courtroom, we were enacting a form of subversive play. Schechner points out that play is dismissed in Western positivist thought as ‘not serious or real’, ‘female and infantile, an activity of the powerless’. According to this dominant mode of thinking, it therefore belongs in the private sphere, as do lactating mothers and babies.

We were challenging the authority of that specific magistrate to exclude a lactating mother from the public sphere. However, on a more theoretical level, we were challenging the exclusionary policies which keep such environments child-free and reinforce the public/private dichotomy. We were contesting the exclusion of the family and the qualities associated with family, such as ‘caring, affectivity and corporeality’, from the public sphere, and we were doing this through play.

But why, I wondered, did I encounter such deep-rooted reluctance within myself to engage in this feminist performance within a courtroom, to contest the authority of a male magistrate, and hence the whole masculinist authority of law, through play? For many years, this question remained unanswered: indeed, I preferred not to even think it through. After all, I had screwed up my courage and done it, even if I could only enter the courthouse knowing that there was a contingency plan in the event that I incurred the wrath of that male authority figure. Then, ten years after the breastfeeding protest, I challenged the decision-making authority of my male

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3 Ibid 130.
manager in the workplace. Again, I found and fought within myself that same deep-rooted reluctance to antagonise a male authority figure, that same politically incorrect cowardice. Who was this male authority figure who, while not necessarily a judge, nevertheless sat in judgement on me? None other than ‘Big Daddy’.

Ellen Donkin and Susan Clements, in writing about the challenges faced by feminist directors, have identified a widespread ‘desire to please, to be pleasing’. This ‘need to please’ was ‘connected to a presence that was complex and contradictory: at once protective, generous, jovial and profoundly disabling. This was not Big Brother. This was Big Daddy.’6 Donkin and Clements focus upon the role of Big Daddy in the world of theatre but, of course, in the strictly hierarchical, male-dominated world of law, the powerful figure of Big Daddy is very much present.

Yet Big Daddy is not always a person; rather, he is best understood as ‘a form of cultural conditioning that floats in and among real men and women’.7 It would be easier to confront Big Daddy if he were always embodied. The omniscient, oppressive presence of Big Daddy explained my own contradictory emotions, my suppressed desire for approval, and the difficulty which I experienced in defying male authority figures, even when motivated by a desire for justice. We prefer, as Donkin and Clements have pointed out, to show Big Daddy ‘what he wants to see instead of exposing the awkward contradictions and ambiguities of being female in a sexist, racist society’.8 Big Daddy frowns upon subversive expressions of playfulness; in bringing play into the courtroom, I had offended Big Daddy.

The breastfeeding protest, therefore, has an additional meaning as part of an ongoing battle on my part to ‘upstage Big Daddy’;9 like all such battles, it was largely conducted inside my own head. However, the protest took place in the public sphere. We were not merely offending Big Daddy by injecting playfulness into the legal performance of the courtroom; we were challenging Big Daddy’s authority. Predictably, as in other courtrooms in which the official performance of law has been derailed by unpredictable, spontaneous and subversive play, we encountered a hostile response.

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7 Ibid 4.
8 Ibid 4.
9 Ibid 5.
Playfulness erupts within the courtroom with the same jarring, discordant force with which festivals of ‘unbridled license’, such as carnival, temporarily disrupt the social and political order. Playfulness is volatile, dangerous and cannot be fully controlled. It has a disorientating effect, challenging our goals and even our concept of reality.

I have already discussed the two very different forms of play at either end of the spectrum of play: rule-bound orderly play, which shares similarities with and arguably encapsulates the rule of law, and unpredictable free play. Richard Schechner maintains that the tension between these two forms of play is incapable of resolution. Mihai Spiriosu calls these forms of play rational and pre-rational; Roger Caillois labels them ludus and paedia. Callois argues that paedia is distinguished by ‘diversion, turbulence, free improvisation and carefree gaiety’. The other principle, ludus, seeks to absorb and discipline paedia.

Consequently, the prevailing judicial response to playfulness in the courtroom is a hostile one. Law may well be a form of play, as Huizinga contends, but it is a highly serious form of play which is subject to ‘the rules of the game’. The law, orderly, predictable and rule-bound, must somehow absorb and discipline an ‘anarchic and capricious’ playfulness which, by its very nature, threatens the guiding principles in legal discourse and indeed, in Western rational thought. Although Turner believed that playfulness is ‘protected in the world of power struggles by its apparent irrelevance and clown’s garb’, this force is antithetical to what Margaret Davies has described as the ‘deadly serious’, though ‘inexplicably self-parodic’, nature of legal performance.

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11 Turner, above n 2, 168.
12 Schechner, above n 4, 26.
13 Ibid 41.
14 Turner, above n 2, 168.
18 Ibid.
20 Callois, above n 17, 13.
21 Turner, above n 2, 170.
The response to our playful protest in the courtroom was characteristic: ‘cultural institutions seek to bottle or contain’ playfulness,\(^{23}\) and thus the magistrate attempted to curb our expression of playfulness as completely as he could. However, it is difficult to contain this phenomenon. The media revelled in the defiant playfulness of our performance, seized upon it, and publicised it broadly. Certainly, the performance received national media coverage and I was told at the time, although I have never had this independently verified, that news of the breastfeeding protest spread as far as New York.

We find the same dynamic of institutional censure and media exposure in other situations in which playfulness has erupted in the courtroom. As I have described in chapter two, Saddam Hussein and his co-defendants introduced playfulness into the courtroom during their 2006 trial; while the judges were irritated by the defendants’ refusal to conform to the rules of the legal performance, the media delighted in these antics. The attempts on the part of the defendants in the infamous Chicago Seven Trial to subvert the proceedings by highlighting issues relevant to the peace movement through ‘satiric theatre events’\(^{24}\), rather than addressing the specific charge of inciting riots at the 1968 Democratic Convention, met with the same mixed response. The judge refused to engage in a wider debate and kept referring to legal rules: ‘I am not trying the Vietnamese War here.’\(^{25}\) Conversely, the media focused on the flamboyant, dramatic and theatrical behaviour of the defendants, ignoring the substance of their arguments.\(^{26}\) Baz Kershaw recounts another adverse reaction to playfulness in the courtroom; a New York judge was incensed by the Living Theatre’s ‘ironic theatricalisation of court ritual’ when the company was charged with tax evasion, and sentenced the directors to jail terms.\(^{27}\)

Sometimes, playfulness can successfully disrupt a legal performance. For instance, Brenda Murphy attributes the eventual demise of the United States House of Un-American Activities Committee (HUAC), which had interrogated supposed Communists in a series of highly publicised hearings in the 1950s, to the playfulness of young activists in the 1960s. These youths recognised the theatricality of the hearings and ‘uninhibited by notions of dignity or

\(^{23}\) Turner, above n 2, 168.
\(^{26}\) Ibid 109.
professionalism, seized control of the performance’. 28 Jerry Rubin documents in his autobiography that, upon receiving a subpoena, he decided to view HUAC as ‘a Costume Ball’. 29 He arrived in the costume of an American Revolutionary soldier and comments that the testimony provided by his colleagues and himself transformed the theatre of HUAC into ‘high comedy’. 30 For his second appearance, he wore a Black Panther beret, Viet Cong pyjamas, bells and bullets, painted his body with psychedelic designs, and carried a toy rifle. 31 When he later attempted to return to HUAC dressed as Santa Claus, the Committee belatedly realised that his colourful costumed defiance could not be effectively disciplined within the hearing rooms, and he was refused entry. 32 This subversive disruption of the performance worked only because the Committee, and its ‘rite of purification’, 33 had lost legitimacy in a changed social and political context.

Another unusual outcome was the ‘happy ending’ to the trial of two playful members of a Berlin commune in 1968. 34 These two individuals were arrested and charged after distributing leaflets which advocated the destruction of German department stores as an anti-war gesture. Supposedly, this would enable the European public to experience the harsh realities of the Vietnam War. The defendants were acquitted, after pointing out that the leaflets were intended as political satire, and calling upon various experts in the courtroom to discuss the literary merits of these works of fiction. Mayer described the proceedings as ‘a fully realized play for the courtroom’, in which the ‘existing rules in play’ were replaced with ‘new play forms’. He went on:

This aesthetic transcendence inhered to the nature of the proceedings for literature – a leaflet having satirical intent and not hiding its debt to Swift – had been treated as reality and alloyed into reality by the state’s attorney. In turnabout, the reality of the judicial jargon was displaced into literature, recast in the aesthetic realm. The play went beautifully, according to its wholly new playing rules … 35

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30 Ibid 64.
31 Ibid 203.
32 Ibid 207.
33 Murphy, above n 28, 35.
35 Ibid.
In his appreciative account of playfulness within a courtroom, Mayer, who clearly saw no difficulty in trumping the rules of legal performance with literary cleverness, concluded that a ‘happy ending’ to this play was inevitable. However, play is volatile and unpredictable; it is in the nature of law to try to absorb and discipline the dissident force of playfulness. In later confrontations with the law, Teufel, one of the defendants in the trial, found his theatrics curtailed and punished. Teufel, who described himself as a ‘fun guerilla’ who killed by ridicule, maintained his spirit of defiance even when required, as part of a later sentence, to report to a prison twice a week. The visit was undertaken in a cart, with Tuefel wearing a ball and chain; upon arrival at the prison, he would ring the doorbell and demand to be taken in. This playful request was granted when he defied the requirements of his probationary period in order to attend a political meeting, and was eventually arrested and re-sentenced. Thus, the sequel to the play described by Mayer did not share the same happy ending.

Generally, directors of legal performances will resist incursions of playfulness and when playfulness appears within the courtroom, there is a clear conflict between rational and pre-rational play, between ludus and paedia. However, the playfulness of law takes on another dimension when law is transformed into play outside the courtroom. In the next section, I shall address the question of what happens to law when it is transformed into play, focusing specifically on the sub-genre of documentary theatre which faithfully reproduces legal performances and thus recasts ritual as aesthetic performance.

Law in play

Theatrical performances which (re)present law, and (re)situate law in a theatrical or playful context, are not unusual. In part, this is no doubt due to theatre’s recognition and appreciation of law as a form of cultural performance.
Performance theorists recognise the ubiquity of cultural performances, and encourage the analysis of performances in many diverse fields and disciplines.⁴¹ Some performance theorists have considered the nature of legal performance. For instance, Phillip Auslander, in his study of liveness in performance, has observed that ‘live performance is, in fact, essential to legal procedure’;⁴² he concludes that ‘in a mediatized culture, the legal arena may be one of the few sites left where liveness continues to be valued’.⁴³ Yet the invitation to look at performance in law has been largely ignored by legal theorists. Margaret Davies is one of few such theorists who has recognised and written on the nature of law as performance.

Davies describes the ‘performative utterances of the monarch’ and ongoing judicial performances as ‘the performances which make law of the law’.⁴⁴ Positivists downplay the performative aspects of law, and prefer to think of a law as a set of norms and rules, or what Davies calls ‘ideational creations’.⁴⁵ She contests this, arguing that there is, in fact, no law which exists ‘in the realm of the ideal’,⁴⁶ outside or prior to the performance of law. From this perspective, law is a verb rather than a noun.⁴⁷

Davies comments on the originality of each legal performance; such performances are unique, ‘never merely a rehearsal on a different stage’.⁴⁸ The originality of each performance derives from the distinctive characteristics of each case. While norms or legal precedents may be applied, they must be re-read, re-created or re-constructed for each new set of circumstances.⁴⁹ Yet Davies also observes that the original, live performances of law are ‘imitable’.⁵⁰ In the theatrical imitation or reproduction of these live legal performances, we find, again, the transformation of legal performance into play.

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⁴³ Ibid 157.
⁴⁴ Davies, above n 22, 97–98.
⁴⁶ Davies, above n 22, 129.
⁴⁷ Dwight Conquergood has identified the contemplation of the conceptual consequences in thinking of culture as a verb rather than as a noun as one of the key tasks of the performance theorist. Dwight Conquergood, ‘Rethinking ethnography: towards a critical cultural politics’ (1991) 58 Communications Monograph 179, 190.
⁴⁸ Davies, above n 22, 139.
⁴⁹ Ibid.
⁵⁰ Ibid.
Law in play takes on two different forms. In one form of theatrical performance, the legal performance is partially reproduced and intermingled with fiction; in the other, the legal performance is edited but otherwise faithfully reproduced. There is disagreement over which form of performance is more effective, and also disagreement over whether historical and factual accuracy should take precedence over political impact and aesthetic criteria.

Examples of the first category of law in play include Arthur Miller’s *The Crucible* and Dario Fo’s *Accidental Death of an Anarchist*. The *Crucible* may have been ‘the most influential and effective literary statement that was made about McCarthyism in the fifties’, but it described a much earlier historical event, the Salem witchcraft trials. Miller wrote the play after reading the historical records of the trials, and tried to remain faithful to the real archaic language, which he compared to ‘hard burnished wood’. Parts of *The Crucible* literally reproduce these records. For instance, Reverend Hale’s examination of Tituba closely resembles her testimony at the trial of Sarah Good.

However, Miller clearly meddled with historical fact, most notoriously in raising Abigail Williams’ age so that she could take on the role of a jilted woman, and inventing a relationship between Abigail and John Proctor. When accused of historical inaccuracies, Miller responded that ‘a playwright has no debt of literalness to history’; he wrote that plays which are purely ‘a kind of psychic journalism’ become irrelevant. Miller’s creative re-working of the story of the Salem witchcraft changed the focus of the play. Thus, *The Crucible* does not simply document the tide of hysteria which held the Salem community in thrall and culminated in the legal performances of the witchcraft trials. Melinda Mawson points out that Miller, in centring the story around the jilted, vengeful woman, highlights ‘the dangers of female sexuality’ and the unreliability of women’s evidence, and Penelope Pether comments that it was Miller’s ‘imaginative engagement with the disruptive force of

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53 Murphy, above n 28, 158.
56 Martin, above n 54, 286.
57 Murphy, above n 28, 155.
transgressive sexuality’ which inspired him to write the play. This tinkering with recorded facts is frowned on by practitioners of documentary theatre.

Accidental Death of an Anarchist, part of Dario Fo’s ‘throwaway, journalistic theatre of “counter-information”’, was written in 1971, after a terrorist attack in Milan. The authorities arrested socialists, communists and anarchists in their zeal to find the perpetrators of this crime; one of those arrested, an anarchist named Pinelli, was confined in police headquarters undergoing interrogation when he fell from a fourth floor window of the Milan police headquarters, and died. In Fo’s play, performances within performances highlight the absurdity and self-protective farce of the state’s multiple investigations into this event. Most of these performances are orchestrated by the central character, the Maniac, who has an irrepressible urge to ‘impersonate [people] in “the theatre of reality”’. The Maniac is a ‘documentary clown’ who pokes fun at the police investigation by inventing confusing and increasingly ridiculous explanations for Pinelli’s death, and encouraging the police to adopt them. Fo emulates the state in creating different implausible scripts to account for Pinelli’s death. The final surreal touch appears in two possible endings. In the first, the Maniac uses violence to counter the violence of the state; in the second, devised because ‘we can’t have the ultra-left hooligan winning hands down like that’, the agents of the state commit a final act of violence and the journalist who would otherwise have exposed them is undone by her own moral scruples.

Although the play is a fictitious creation with invented dialogue, it was based on legal documents. In his Author’s Note, Fo explains that he used ‘authentic documents – and complete transcripts of the investigations carried out by the various judges as well as police reports’ in order to ‘[turn] the logic and the truth of the facts on head.’ When the play was first performed, a lawsuit brought by one of the policeman against a newspaper was underway; Fo added and changed lines on a nightly basis as he received fresh material from the hearing. In the end, there were three different editions of the play. Mary Karen Dahl has explained Fo’s explicit appropriation and subversion of the official texts of law in the

60 Penelope Pether, “‘Jangling the Keys of the Kingdom’” (1996) 7 Australian Feminist Law Journal 61, 74.
62 Fo, above n 52, 3.
63 Schechter, above n 24, 154.
64 Fo, above n 52.
65 Ibid, Author’s Note.
66 Mitchell, above n 61, 59.
following way: ‘this then was the strategy – to use the texts created by the state in the process of conducting its business as usual to comment on and condemn that business and its associates’. 68

By contrast with such hybrid works, in which the playwright incorporates authentic legal performances into a fictitious world, makers of documentary theatre eschew fiction. Within the genre of documentary theatre, we find a number of plays which reproduce legal inquiries and hearings. The tribunal documentary drama taps into the ‘rich dramatic potential’ in courtroom transcripts. 69 Eric Bentley, in his play Are You Now or Have You Ever Been, ‘abridged, edited and arranged’ the words of witnesses in the HUAC hearings in the 1950s, 70 he did not add to those words. The Tricycle Theatre in Kilburn, north London, under the direction of Nicolas Kent, has produced a number of highly regarded ‘tribunal plays’ which also draw all their lines from the legal performance of politically controversial inquiries. The 1994 production, Half the Picture, contained edited extracts from the Scott inquiry into arms for Iraq. Sreberenica in 1996 was based on evidence given to the United nations war crimes tribunal about the murder of Muslims by the Serbs in 1995. Nuremberg, also in 1996, was somewhat of an anomaly in that the legal testimony came from the Nuremberg trials rather than from an inquiry; again, however, the audience experienced an ‘unmediated translation of testimony from courtroom to stage’. 71 In this instance, the theatre contextualised the issue of genocide by putting on, at the same time, short plays which focused on war crimes in Bosnia, Rwanda and Haiti. 72

The sequence of tribunal plays continued with The Colour of Justice in 1999, which re-enacted parts of an inquiry into a police investigation into the murder of a black youth. The play was subsequently televised and used for police training purposes. Justifying War in 2003 reproduced the Hutton inquiry into the British government’s justifications for entering the Iraqi war. Most recently, in Bloody Sunday: Scenes from the Saville Inquiry, the edited transcripts from the Saville inquiry into the 1972 shooting of Irish protesters by British soldiers were shown on stage in 2005 before the inquiry handed down its report. One critic

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67 Fo, above n 52, Author’s Note.
68 Mary Karen Dahl, ‘State Terror and Dramatic Consequences’ in John Orr and Dragan Klaic (eds), Terrorism and Modern Drama (1990) 114.
70 Murphy, above n 28, 96.
commented on the uncanny accuracy in the theatre’s reproduction of London’s Guildhall, where the inquiry was conducted; even a creaking door was included.\footnote{Ibid.}

} transcripts of the legal proceedings. The producer, David Williams, has commented that the ‘verbatim-ness’ of this performance project was critical, both politically and artistically.\footnote{David A Williams, ‘Political Theatrics in the “Fog of War”’ (2006) 48 Australasian Drama Studies 115, 125.
} However, this performance did not attempt to duplicate exactly the proceedings of the Senate Committee. There were obvious difficulties in ‘replicating the durational performance’, which had spanned fifteen full days (and nights).\footnote{Paul Dwyer, ‘The inner lining of political discourse: presenting the version 1.0 remix of the Senate Select Committee on a Certain Maritime Incident’ (2006) 48 Australasian Drama Studies 130, 132.
} Furthermore, this was clearly theatre. There was no attempt on the part of the actors to assume the identities of the ‘real’ performers in the Senate Committee, although they spoke their words and called each other by their names.\footnote{Ibid 131.
} Instead, Kubiak’s truth of theatrical ontology, that everything which appears real is in fact a lie,\footnote{Anthony Kubiak, \textit{Stages of Terror. Terrorism, Ideology and Coercion as Theatre History} (1991) 64.
} was deliberately exposed. For instance, the proceedings in the performance were interrupted by the following statement, displayed in a ‘rusty old overhead projector’:\footnote{‘CMI (A Certain Maritime Incident)’ (2006) 48 Australasian Drama Studies 143, 149.
}

\begin{quote}
We know that you know that we are not really the senators who took part in the CMI Senate inquiry. Stephen is a lot shorter than Senator Cook and Deborah who plays Senator Faulkner is actually a woman. We found that out after the audition.\footnote{Dwyer, above n 77, 131.}
\end{quote}

\begin{thebibliography}{99}
\item[Ibid.]
\item[Ibid.]
\item[Liz Hoggard, ‘Out of crises, a drama’, \textit{The Observer} (London, United Kingdom), 27 March 2005 <http://www.guardian.co.uk>.
\item[David A Williams, ‘Political Theatrics in the “Fog of War”’ (2006) 48 Australasian Drama Studies 115, 125.
\item[Paul Dwyer, ‘The inner lining of political discourse: presenting the version 1.0 remix of the Senate Select Committee on a Certain Maritime Incident’ (2006) 48 Australasian Drama Studies 130, 132.
\item[Ibid 131.
\item[Anthony Kubiak, \textit{Stages of Terror. Terrorism, Ideology and Coercion as Theatre History} (1991) 64.
\item[Dwyer, above n 77, 131.
\item[‘CMI (A Certain Maritime Incident)’ (2006) 48 Australasian Drama Studies 143, 149.
\end{thebibliography}
The original political performance was further theatricalised with spinning furniture, an office party and an aerobics session. Internal allusions to the play itself, ‘a great idea for a show, 2,200 pages of Hansard’,\textsuperscript{82} also reminded the audience that this was not merely an accurate re-staging of the original political performance. This was, as Dwyer puts it, a ‘continuously self-referential performance’\textsuperscript{83}. There was no attempt to strive for authenticity, for the semblance of the real; thus, the performance could be distinguished from the earlier performance on which it was based, the Parliamentary performance which purported to uncover the ‘truth’.\textsuperscript{84}

The production in fact interrogated the processes for uncovering the truth.\textsuperscript{85} The play opened with a child, hooked up to a lie detector, reading the words of the defence minister about the ‘veracity’ of claims that children have been thrown overboard. In this theatrical performance, it was clear that political performances are not about the truth. They supply only an incomplete record of events, and fail to address the ‘unspoken and unspeakable’ reality of human suffering.\textsuperscript{86} Naked bodies which lay in the path of members of the audience as they entered the performance space\textsuperscript{87} reminded the audience of the horrific deaths of 353 asylum seekers, in a related and contemporaneous incident involving the sabotage of the SIEV X. At the end of the performance, a machine-generated female voice described the experiences of survivors in their own words; simultaneously, another ‘corpse’ was washed and processed on stage.\textsuperscript{88} Thus the audience was invited to reflect on the deficiencies in the earlier Parliamentary performance;\textsuperscript{89} the Senate Committee’s inquiry into a ‘(non)incident’\textsuperscript{90} was remarkable for its failure to grapple with the associated sequence of events which resulted in these deaths.

Version 1.0 continued to draw upon the genre of documentary theatre in two subsequent productions: \textit{The Wages of Spin} in 2005 in which the phenomenon of political falsehoods was explored, and \textit{Deeply Offensive and Utterly Untrue} in 2007. In the latter production, the

\textsuperscript{82} Ibid 166.
\textsuperscript{83} Dwyer, above n 77, 138.
\textsuperscript{85} Ibid.
\textsuperscript{86} Williams, above n 76, 119.
\textsuperscript{88} McCallum, above n 84, 140.
\textsuperscript{89} Williams, above n 76, 125.
\textsuperscript{90} Dwyer, above n 77, 130.
performance text was the edited transcript from the Cole inquiry, in which a Royal Commission investigated the financial contributions by the Australian Wheat Board to Saddam Hussein’s government. The title of the play came from Alexander Downer; he had described suggestions that Australia’s concern for its wheat markets was a factor in its participation in the Iraqi war as ‘deeply offensive and utterly untrue’.  

The above examples of law in play are mostly reproductions of inquiries. The transcripts of trials have also been used in the creation of documentary theatre. Examples include: Donald Freed’s *Inquest: A Tale of Terror*, about the arrest, trial and execution of Julius and Ethel Rosenberg; 92 Rolf Schneider’s *Prozess Richard Waverley*, drawn from the trial of Hiroshima pilot Claude Eatherly; Daniel Berrigan’s *The Trial of the Catonsville Nine*, constructed from the transcript of anti-war activists who burnt records of draftees during the Vietnam War, 93 and Ron Sossi and Frank Condon’s *The Chicago Conspiracy Trial*, based on the transcript of the trial of the Chicago Seven. 94

Some commentators argue that documentary theatre, in its faithful adherence to the original words or original performances, is inferior to works of fiction. Edmund Morgan, who approved of Miller’s integration of fact and fiction in *The Crucible*, predicted an ‘aesthetic disaster’ if an artist confined him or herself to known historical facts. 95 In his view, the historical record is not enough in itself to generate a work of art. Dominic Dromgoole has lamented the current emphasis on understanding at the expense of the imagination. 96 Playwright Steve Waters states that

> the events docu-theatre precludes from its truths are often the most significant moments of private reflection, moments of immediate choice. Equally, verbatim

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93 Ibid 140.
94 See Schechter, above n 24, 197.
theatre forgoes image and scene: its narrative unfolds in indeterminate space and
time, it chooses to tell rather than show.\footnote{Steve Waters, ‘The truth behind the facts’, \textit{The Guardian} (London, United Kingdom), 11 February 2004 \texttt{<http://www.guardian.co.uk>}.}

He explains why fiction is important: as ‘an addition to the world, creating a parallel universe
alongside, but not identical to, reality’.\footnote{Ibid.}

The duplication of performances in this sub-genre of documentary theatre raises disturbing
questions about our search for authenticity in a world of simulations. As Favorini has pointed
out, it is difficult to ignore the work of Jean Baudrillard when contemplating the relationship
between representation and reality in documentary theatre.\footnote{Attilio Favorini, ‘Representation and Reality: The Case of Documentary Theatre’ (1994) 35(2) \textit{Theatre Survey} 31.} In Baudrillard’s world of
‘contagious hyperreality’,\footnote{Jean Baudrillard, \textit{Simulations} (Paul Foss, Paul Patton and Philip Beitchman trans, 1983) 43.} reality has become a meaningless concept. To (re)perform and
(re)produce what is already performance and, arguably, a complete aesthetic event in itself, is
to subject audiences to the ‘endlessly reflected vision: all the games of duplication and
reduplication’ which create an ‘indefinite refraction’. Ultimately, ‘the real is no longer
reflected; instead it feeds off itself till the point of emancipation.’\footnote{Ibid 144.} Reality ‘has been
confused with its own image’\footnote{Ibid 152.} and art is both everywhere and virtually meaningless.\footnote{Ibid 151–2.}

Victor Turner also finds the ‘endlessly reflected vision’ in the multiple genres of cultural
performance and the proliferation of performances about performances.\footnote{See Turner, above n 2, 107.} Or, as Kubiak has
written, we are fascinated by realism in theatre because it reinforces a ‘repressed
understanding that the illusion of real life constructed upon the stage [is] a reproduction of

Such theorists would suggest that, paradoxically, despite the proud claim of documentary
theatre to authenticity, the phenomenon generates a disturbing vision of multiple
performances, and the ‘real’ remains elusive. We crave authenticity but remain uncertain as to
which performance has the status of the ‘real’; in a ‘culture of the copy’,\footnote{Hillel Schwartz, \textit{The Culture of the Copy. Striking Likenesses, Unreasonable Facsimiles} (1998).} ‘an era of
redoubled events’, we believe that repetition will uncover the truth.\textsuperscript{107} The popularity of documentary theatre reflects our fascination with the ‘real’, and our determination to capture the real through representation. Peggy Phelan reminds us that ‘the danger in staking all on representation is that one gains only re-presentation’.\textsuperscript{108} Is it possible, as one commentator asked after viewing \textit{Nuremberg}, to distinguish between such ‘staged reanimations’ and a televised documentary or current affairs show?\textsuperscript{109}

Documentary theatre involves live (re)presentations of live performances but most (re)presentations in the culture of the copy rely on ‘technologies of reproduction’.\textsuperscript{110} Nicolas Kent, director of the Tricycle theatre, agrees with Auslander\textsuperscript{111} that live performance should not necessarily be privileged over mediatised forms. He has explained that he created the Tribunal plays because the relevant inquiries were not televised, and anticipates that there will no longer be a need for his plays if this changes.\textsuperscript{112} Such reasoning suggests that the Tribunal plays are not intended as enduring works of art. Rather, they partake in our culture’s endless engagement in ‘repetition, replication, simulation’\textsuperscript{113} as we search desperately, and fruitlessly, for the real and the true. Documentary theatre is intended to expose the truth, and in so doing, to change the course of history by educating, inspiring and galvanising the populace into taking action.

\textbf{Distinguishing law from play}

In this confusing interplay of performances, what distinguishes law from play? There does not appear to be any agreement on the important question of which, if either, mode of cultural performance was the original performance, from which other modes of performance developed and evolved.

I have already discussed the work of Victor Turner on social dramas; he found similarities between legal and theatrical performance because all performative genres develop from the

\begin{flushleft}
\textsuperscript{107} Ibid 296.
\textsuperscript{109} McDonald, above n 71, 23.
\textsuperscript{110} See Auslander, above n 42, 13.
\textsuperscript{111} Ibid 43.
\textsuperscript{112} Hoggard, above n 73.
\textsuperscript{113} Schwartz, above n 106, 297.
\end{flushleft}
However, legal performances are functional performances within the social drama, and are the ‘generative source’ of theatrical and other forms of cultural performance. Theatre is ‘a hypertrophy, an exaggeration of juridical and ritual processes’. Whereas re-enactments as part of legal rituals are performances, theatrical re-enactments of social dramas are ‘a meta performance, a performance about a performance’. Turner compares ‘the ensemble of performative and narrative genres’ to ‘a hall of mirrors’, but in the endless cycle of performance and performative commentary on performance, legal performance clearly precedes, and is encompassed by, theatrical performance.

Kubiak, on the other hand, claims for theatre ‘a certain priority … which precedes power’. He suggests that the structures of socio-political power, including legal structures, could not have come into being ‘without some implied and already recognized structure of performance’. Thus, the ‘theatre of state’ with all its varied political and legal performances was inspired by the theatre itself and, furthermore, theatre expresses ‘the very instant of perception that exists before culture and its laws can appear’.

We could indeed lose ourselves in Turner’s hall of mirrors, with theatrical performances endlessly reflecting legal performances and legal performances faithfully reproducing theatre. In this intimate, endless recycling of mirrored images, can we separate law from play? When the text or record of a legal performance is (re)performed without embellishments or narrative augmentation, the words or utterances of the characters do not change. Clearly, however, the performance recurs in a different context, and context and function determine whether a specific performance is legal ritual or theatre. Could it be argued that legal performances have a performative quality, in Austin’s sense of the word, whereas theatrical utterances, performed without the authority and force conferred by law, lack this quality?

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115 Turner, above n 2, 93.
116 Turner, above n 114, 12.
117 Turner, above n 2, 107.
118 Turner, above n 114, 104.
119 Kubiak, above n 79, 5.
120 Ibid 5.
121 Ibid 162.
122 Ibid 15.
123 See Schechner, above n 15, 71.
It is instructive to consider, here, the distinction between trials and pseudo trials, between tribunals and pseudo tribunals. The findings of legitimate tribunals, the verdict in a trial, are authoritative and will be implemented with, if necessary, a full and impressive display of force. However pseudo courts and tribunals which lack legitimacy and authority may find it difficult to gain publicity, and carry out prescribed punishments or implement findings. Aida Hozic describes the ‘public trials’ which were conducted by Italian terrorists in the 1970s; the state clearly did not endorse these trials and they remained ‘theatre’. As theatre, such pseudo trials were reasonably effective; the guilty parties, often managers who exploited their workers, had their heads shaved, were tied to trees, and even crawled around a factory with a pot instead of a crown on their heads.124 However, Orr has described the ‘people’s court’ set up by the Red Brigades to try Italian politician Aldo Moro125 as ‘a masquerade which failed’.126 Similarly, Sartre and Russell’s 1967 War Crimes Tribunal which I have already discussed in chapter four, the mock court in Times Square which conducted the trial of the President of the United States Ronald Reagan and his associates in 1984,127 and the 1983 war crimes tribunal which was set up by the German Greens as a theatrical exploration of the crimes of the nuclear powers in preparing for nuclear war,128 clearly had no power to enforce a verdict or to ensure that particular recommendations were carried out. Contemporary examples of pseudo tribunals and trials, such as the World Tribunal on Iraq and the Tricycle Theatre’s staging of a trial of Prime Minister Blair for the crime of aggression against Iraq, also lack state legitimacy and hence power.

Similarly, utterances in a theatrical performance, unlike utterances in a legal performance, have no binding legal force. According to J L Austin, performative utterances, spoken out of context or by a speaker not authorised to speak, lose their performative quality. Austin famously described theatrical utterances as ‘infelicitous’ or ‘hollow’; they could not be performative as they were uttered in inappropriate circumstances.129

Worthen, however, points out that in a theatrical performance, the conventions of theatre, which Worthen also calls ‘the citational practices of the stage’, convert such utterances into

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124 Aida Hozic ‘The Inverted World of Spectacle: Social and Political Responses to Terrorism’ in John Orr and Dragan Klaic (eds), Terrorism and Modern Drama (1990) 72–3.
125 John Orr ‘Terrorism as Social Drama and Dramatic Form’ in ibid 53–4.
126 Ibid 54.
127 Schechter, above n 24, 200–1.
‘something with performative force’.\textsuperscript{130} Clearly, if the utterances are originally derived from another performance, they have quite a different performative force to that which they originally possessed. Every theatrical performance, according to Worthen, involves ‘an ongoing negotiation of the meaning of artworks in culture’.\textsuperscript{131} Theatrical performances may be pure entertainment; on the other hand, they may galvanise audiences, insult the sovereign, incite disaffection. In documentary theatre, the (re)presentation of legal performances in the specific citational environment of the theatre creates a performance which has been shaped by theatrical conventions into something quite different to the original performance, but which still has its own performative quality. In this sense, the utterances in such theatrical performances are neither ‘infelicitous’ nor ‘hollow’.

Furthermore, the distinction between felicitous and infelicitous utterances, between the real and the acted, is problematic in a culture in which fiction and the ‘real’ collide and are, seemingly, mutually co-dependent.\textsuperscript{132} In the instances of documentary theatre analysed thus far, we find an extraordinary degree of cross-fertilisation between such theatre and the ‘real’ proceedings in inquiries and courts. The programme for \textit{CMI: A Certain Maritime Incident} included an extract from the Senate Hansard, in which two Senators discuss in jovial terms their roles in the theatrical (re)performance of what, according to one of them, was ‘such a surreal inquiry’\textsuperscript{133} and partly a piece of theatre.\textsuperscript{134} Some months before the performance of \textit{Justifying War}, barrister Geoffrey Robertson, appearing in the Hutton inquiry, argued that the inquiry should be televised because nothing could stop its ‘dramatic re-enactment’ in the Tricycle theatre.\textsuperscript{135} When the trial of Slobodan Milosevic was about to commence, Nicolas Kent was asked by the administrator of the United Nations International Criminal Tribunal if he could lend the tribunal the desks used as stage props in \textit{Srebenica}. The desks were reproductions of the actual desks used in the earlier hearings by the tribunal.\textsuperscript{136} \textit{Guantanamo} was staged in February 2006 in a committee room in the British Parliament before parliamentarians, lawyers and human rights organisations, with one of the characters, Clive

\textsuperscript{129} See discussion in Schechner, above n 15, 110, and in W B Worthen, ‘Drama, Performativity and Performance’ (1998) 113 \textit{PMLA} 1093.
\textsuperscript{130} Worthen, above n 129, 1098.
\textsuperscript{131} Ibid 1101.
\textsuperscript{132} See Schechner, above n 15, 111.
\textsuperscript{133} Extract from the Senate \textit{Hansard}, 25 March 2004, 21995.
\textsuperscript{134} Senate \textit{Hansard}, 25 March 2004, 21996.
\textsuperscript{135} Quoted on the Tricycle theatre website <http://www.tricycle.co.uk>.
\textsuperscript{136} Nicholas Wroe, ‘Courtroom dramas’, \textit{The Guardian} (London, United Kingdom), 24 July 2004 <http://www.guardian.co.uk>.
Stafford-Smith, playing himself. In fact, the re-appearance of participants in legal performances in theatrical performances makes it difficult to differentiate ‘actors’ from ‘real’ people. Schechter discusses the proposal of the founder of the San Francisco Mime Troupe in 1970 to perform Ron Sossi and Frank Condon’s *The Chicago Conspiracy Trial*, which was based on the transcripts of the Chicago Seven trial, with the defendants playing themselves. The original judge was invited to appear, but predictably turned down this offer.

Fiction and the ‘real’ thus collide, and theatrical utterances (and stage props) influence the conduct of legal and parliamentary proceedings. Austin’s distinction between theatrical utterances and felicitous utterances may well be inappropriate in such a context. There is, however, a critical distinction between legal and theatrical performances, which may assist us in distinguishing between their mirrored, misleading reflections. And here we come again to violence.

Legal performance is anchored in violence, and theatre is not. Theatrical performance can depict or represent violence quite graphically and shockingly; theatrical performance can even incorporate *real* violence, although Kubiak contends that real violence performed on stage is less ‘efficient’ and effective than ‘its mimetic representations’. However, theatrical performance is not anchored in violence in the same way in which legal performance is.

Kubiak, interested in ‘the performative history of terror’, has explored theatre’s connections with terror. In Kubiak’s bleak vision, the history of theatre is the history of terror, and theatre is intimately implicated in violence. He describes theatre as ‘the site of violence, the locus of terror’s emergence as myth, law, religion, gender, class or race’, and thus contends that theatre was familiar with terror before law was established. Despite this close relationship between theatre and terror, Kubiak maintains that there is still a clear

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137 Paul Majendie, ‘Guantanamo drama turns parliament into main stage’, *The Sydney Morning Herald* (Sydney), 8 February 2006, 16.
138 Schechter, above n 24, 198.
140 In Roman society, for instance, representational plays were replaced by real violence; Kubiak, above n 79, 39. Some modern performance artists use ‘physical mutilation, pain and peril’ in their work; Kubiak, above n 79, 144.
141 Ibid 160.
142 Ibid 2.
143 Ibid 54.
distinction between state acts of violence, whether filtered through the legal system or administered more directly by the executive, and the representation of violence in theatrical performance. He has written that:

It seems a kind of obscenity, once again, to equate what goes on in the interrogation cells of South Korea and South Africa with what happens, no matter how violent, on a SoHo stage. In the final analysis, we are still faced with a theatre whose violence, no matter how ‘real’, still exists primarily as a sign of itself, while the violence of the interrogation cell is precisely that which is unsignifiable.\textsuperscript{145}

He also distinguishes between the experience of a theatrical performance, which is voluntary, and the experience of torture, which is not. Similarly, victims of state acts of violence administered through the legal system do not have a choice about their participation in a legal performance and its aftermath.

Hans Mayer writes that ‘when it comes to giving rise to the reality of dead people and not just stage corpses, the inviolable limits of the play are reached.’\textsuperscript{146} He continues: ‘there is playing in reality, the playing of reality, reality playfully presented; but one cannot play around with reality.’\textsuperscript{147} I have discussed examples of play in the courtroom or ‘playing in reality’, and examples of the ‘playing of reality’, or playful (re)presentation of reality, in the form of documentary theatre. However, these points of intersection between play and law do not involve ‘dead people’. At the end of a theatrical production, the dead will rise and take a bow. At the end of a legal performance, the dead remain dead. In the realm of violence and death, the distinction between play and reality, between theatrical performances of law and legal performances, is quite stark.

Thus, in interrogating the differences between law and theatre, the most obvious conclusion is that one necessarily takes place in a context of violence and the violent consequences endure, sometimes forever; the other takes place in a context of play. To return again to Kubiak and his reflections on theatrical ontology: ‘theatre always seems to leave real violence behind

\textsuperscript{144} Ibid 4–5.
\textsuperscript{145} Ibid 158.
\textsuperscript{146} Mayer, above n 34, 320.
because this is precisely theatre’s function – to conceal real violence even when (or especially when) it is seemingly exposing it in the violent spectacle.’

By contrast, as Robert Cover has told us unequivocally, the performance of law results directly in violence, pain and death. Cover’s work has been described as an ‘admonition in the world of law-and-literature scholarship’; he repeatedly distinguished between the real violence of legal interpretation and ‘the metaphoric characterizations of literary critics and philosophers’. Judges, as dispensers of violence, have quite a different role to poets, critics and artists, and presumably can also be differentiated from playwrights, actors and theatre directors.

Cover’s observation that law is anchored in violence appeared to have the force of a revelation for legal theorists who clearly had no first-hand experience of the violence administered through the legal system, unlike Cover himself. As an activist, Cover had often appeared on picket lines, and had been imprisoned for his activities. Sarat and Kearns have described his work as ‘a crucial, conceptual breakthrough’ and argued that he ‘reinvented the subject of violence and its relationship to law’. His work triggered a wide-ranging discussion about law and violence.

Cover emphasised that the violence administered by judges may be shared, cooperative, delegated and even domesticated, but it is still unmistakeably violence. On the other hand, he was not necessarily critical of the administration of this sort of violence. Indeed, some commentators have referred to him as an apologist for the violence of the state, in his attempt to ‘make peace with violence’ or what has also been described as ‘his mournful

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147 Ibid.
148 Kubiak, above n 79, 160.
151 Cover, above n 149, 1610.
152 Ibid 1609.
155 Ibid 51.
156 Cover, above n 149, 1628.
157 See Jonathon Simon, ‘The Vicissitudes of Law’s Violence’ in Sarat, above n 154, 37; also Sarat and Kearns, above n 154, 50.
158 Simon, above n 157, 42.
embrace of the violence of law’. Yet the administration of violence affects the operation of the legal system; it must remain inflexible and intolerant of difference.

In focusing on the violence of the law, Cover was clearly cognisant of law as performance, anchored in real deeds of violence carried out in real time. McVeigh, Rush and Young make this clear in their description of Cover’s narrative of law as a performance: ‘judges, jailers, executioners, guards, criminals, protesters, citizens, political officials, the condemned – all appear in Cover’s law as so many speaking and acting parts in the institutional “drama of law”.’ Essentially, Cover was challenging the focus of poststructuralist theorists and others on legal texts with his reminder that the performance of law, rather than the text of law, has immediate significance for the human bodies caught up in the remorseless dispensation of legalised violence. The distinction between the dramatic performances of law, and those of theatre, is thus clear. As a real time performance, law has real time violent consequences.

Conclusion

So where does playing with the law leave us? Are we left wandering aimlessly in Victor Turner’s ‘hall of mirrors’, watching legal performances morph into theatre and theatrical performances assume the guise of law?

Giorgio Agamben offers some guidance on the possible outcomes of playing with the law. Although Agamben has been accused of failing to provide a theoretical position from which we can challenge state acts of terror, he does consider the possibility of ‘a passage toward justice’. This possibility arises only when the nexus between law and violence is broken, and can be explored through play. Playfulness does not captivate this very serious theorist. His preferred form of play is ‘studious play’, but it is, nevertheless, play which guides us towards justice.

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159 Austin Sarat, ‘Robert Cover on Law and Violence’ in Minnow, Ryan and Sarat, above n 153, 265.
160 Sarat and Kearns, above n 154, 71.
161 See Carol Greenhouse, ‘Reading Violence’ in Sarat and Kearns, above n 150, 125.
163 See, for instance, Matthew Sharpe, ““Thinking of the Extreme Situation …” On the New Anti-Terrorism Laws or against a recent (theoretical and legal) return to Carl Schmitt’ (2006) 24 Australian Feminist Law Journal 95, 112.
164 Giorgio Agamben, State of Exception (Kevin Attrell trans, 2005) 64.
165 Ibid.
So play in law, and law in play, may offer possibilities for a new apprehension of law. Playing with law, and in so doing, stripping law of its association with force and violence, may create a ‘new use’ for law. Agamben writes:

One day humanity will play with law just as children play with disused objects, not in order to restore them to their canonical use but to free them from it for good. What is found after the law is not a more proper and original use value that precedes the law, but a new use that is born only after it.  

We end, therefore, where we began, with an image of children playing with, and within, the law. However, while our babies nursed under the watchful eye of Big Daddy, the children in Agamben’s image play with impunity; Big Daddy has disappeared.

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166 Ibid.
ACT II

Dramatic moments in the War on the Environment
Chapter 8

The playfulness of protest:
An introduction

Protest can instil the impulse of radical performance into the blood and bones of the body politic.¹

In Act I, my intention was to analyse and critique various trials in the war on terror by comparing these events with other contemporaneous performances. The performances which I chose were performances in the theatre of dissent. Theatrical performances take place within a conventional, culturally permissible context. However, performance studies theorists ‘do not restrict themselves to traditional theatrical events bound by fixed temporal or spatial settings and artistic purposes’.² Some of the problems with the perceived radicalism of traditional theatrical performances are highlighted by Baz Kershaw.

Richard Schechner has described theatre as ‘a beloved but extremely limited genre’,³ a view endorsed by Kershaw, who maintains that theatre is increasingly ‘a marginal commodity in the capitalist marketplace’.⁴ In such a marketplace, he asserts, theatre has lost its radical impulse,⁵ and theatre’s role in instigating or contributing to radical political change is extremely limited.⁶ He turns, therefore, to extra-theatrical performances in pursuit of radicalism, focusing, inter alia, on protest events as performative occasions which offer opportunities for ‘a revivified politics of performance’.⁷ Activist Carlyn Zwarenstein concurs with this assessment; she argues that ‘some of the best theatre around’ occurs outside

³ Quoted in Kershaw, above n 1, 14.
⁴ Ibid 5.
⁵ Ibid 23.
⁶ Ibid 15.
conventional theatrical venues and does not rely on ‘traditional narratives’. Nor do such performances rely on texts.

Such arguments partly explain why, in this Act, I have drawn on political performances of protest, or direct action, rather than traditional theatrical performances, as a contrasting motif to the legal performances which I shall consider. However, another important consideration is that in the performance of protest can be found pre-rational play, or the quality of playfulness, which has thus far proved elusive not merely in the performance of law, but also in the performance of theatre.

I have chosen to focus on environmental protest, in which I have been involved, although I could have persevered with the theme of terrorism and considered extra-theatrical performances which resonated with this theme: anti-war protest events or even acts of terrorism, which could similarly be described as radical performance and pre-rational play. However in such acts, the impact of raw violence can and frequently does overshadow its performative qualities.

I have deliberately used the melodramatic phrase ‘war on the environment’ to depict the context in which such performances take place. This phrase has not been embraced with the same avidity as the ubiquitous ‘war on terror’, but it nevertheless suggests similar possibilities of extreme violence and catastrophe. However we do not find, in the war on the environment, the pre-emptive legal regime and ensuing legal performances designed as a domestic response to the war on terror. There are few precautionary strategies implemented to ward off environmental catastrophe, in contrast to the precautionary approach to terror and the perceived need to ward off the speculative risk of future terrorist attacks. Consequently, the legal performances in the war on the environment are very different to the spectacle of the terror trials, or to other legal contests between the accused terrorist and the state.

Strangely enough, there are nevertheless some points of intersection between the war on terror, and the war on the environment. In a recent incident in January 2008, the Sea Shepherd Conservation Society described the crew of a Japanese whaling vessel as terrorists when they

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8 Carlyn Zwarenstein, ‘All the world’s a stage: theatre as a political tool’ (2001) 23 Fuse Magazine 21, 24.
detained two anti-whaling activists who boarded the vessel.\(^9\) Conversely, environmental activists have been described as terrorists by their opponents.\(^{10}\) Such accusations were reasonably commonplace prior to the war on terror although, as Bonyhady has pointed out, there has been far more violence demonstrated by the timber industry and its supporters than by conservationists.\(^{11}\) Protest events and acts of terrorism share some similarities. Writing well before September 2001, Kershaw argued that both protest events and acts of terrorism were ‘integral to the production of the “society of the spectacle”’,\(^{12}\) both disrupt the spectacle of power\(^{13}\) in performances which, unlike conventional theatrical productions, are clearly designed for mediatisation. Environmentalists who engage in direct action and terrorists are seeking to change the political order; the fundamental difference, however, is that in pursuing this objective, environmental activists engage in acts of spectacular play while terrorists engage in acts of spectacular violence. Yet play and violence can merge in some protests, and some acts of terrorism.

**The theatre of protest**

Protest occurs outside the confines of the theatre estate\(^{14}\) and yet, confusingly, it is often described as a form of theatre by commentators on the environmental movement.\(^{15}\) Indeed, Ricketts maintains that theatre is an important part of the ‘psychological weaponry’ of protest.\(^{16}\) In David Schlossman’s view, the distinction between political activism and theatre is difficult to maintain. In exploring the interrelationship between these two modes of performance, he highlights the extent to which activists ‘recognise and foreground theatricality’\(^{17}\) although, in the world of activism, political content takes precedence over

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\(^{12}\) Kershaw, above n 1, 92.

\(^{13}\) Ibid 94.

\(^{14}\) Ibid 91.


\(^{16}\) Ricketts, above n 10, 77.

aesthetic and artistic qualities. Furthermore, some forms of theatre clearly constitute political activism. One well-known example is Augusto Boal’s Theatre of the Oppressed. Boal believes that theatre is ‘rehearsal for revolution’ and seeks to convert spectators or audience members into actors. There is even a movement towards the development of an ‘eco-theatre’ which complements environmental activism. Una Chaudhuri suggests that the arts and humanities, including theatre, must play an integral role in the necessary transformation of our values and our way of viewing the world.

Despite such intersections between protest and theatre, protest is not theatre. What, however, do I mean by protest? I am uncomfortably aware that I have conflated the terms direct action, protest and activism in the preceding paragraphs, in part due to the deployment of all three terms by various writers. They have, however, different connotations. Direct action is invariably performative while some forms of activism and protest, including lobbying and letter writing, are not. My focus is on the performance of direct action, on protest events. The use of such performances by the environmental movement has changed markedly over time.

Certainly, environmental activists have always utilised the theatre of direct action to draw public attention to environmental issues. Greenpeace pioneered much of this theatre, staging ‘image events for mass media dissemination’. Yet not all environmentalists engage in direct action. Many moderate mainstream groups prefer to pursue more traditional law-abiding strategies in attempting to influence government policy. The appeal of direct action has diminished in particular political climates. Doyle believes that within the Australian environmental movement, outsider politics, including direct action strategies, have been increasingly replaced by what he calls elite activism and the politics of corporatism, featuring roundtables and consensus. This is inherently problematic because, as De Luca has pointed out, mainstream groups which prefer to lobby and negotiate remain within the parameters of institutional politics and the system which they are critiquing.

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18 Ibid 123.
20 Ibid 126.
21 See Downing Cless, ‘Eco-theater, USA: the grassroots is greener. Theater productions which explore environmental issues’ *(1996) 40 TDR: The Drama Review* 79.
22 Una Chaudhuri, ‘There must be a lot of fish in that lake: Towards an ecological theater’ *(1994) 25 Theater* 23.
23 De Luca, above n 10, 3–4.
24 Doyle, above n 15, 160.
25 Ibid 188.
26 De Luca, above n 10, 65.
argues that such strategies have the potential to depoliticise conflict; in her view they dispel the sense of urgency and crisis on which the environmental movement depends, and cushion industry and government from direct challenge by removing politically sensitive issues from the public view. By contrast, environmentalists who utilise direct action strategies are engaged in what De Luca describes as discourse politics; they are challenging ‘the grand narrative of industrialism’ and proposing a radically different relationship between humans and nature. Direct action fosters a sense of urgency and engenders public debate; for these reasons, Beder believes that it conveys the political message of radical environmentalists far more effectively than more moderate strategies.

Direct action produces images which can be powerful tools in deconstructing central ideologies and cultures in contemporary society. De Luca, who has examined the image events of Greenpeace, Earth First! and environmental justice groups, argues that they are ‘a sustained critique of the articulation of humanity, reason, technology, nature, and progress in the discourse of industrialization’. In a mediatised world in which the media focus is on spectacle and the spectacular, image events are a ‘necessary tactic for oppositional politics’, in fact, images are far more powerful than dialogue. In this world, as Claudia Orenstein acknowledges, ‘the visible act of performance itself speaks far louder than any merely didactic argument’.

Consider, for example, two well-publicised image events from the Australian contemporary anti-war movement. Images of the words ‘No War’, sprayed in red paint on one of the sails of the Opera House, and of the naked women who formed a heart and the words ‘No War’ in a green paddock in Goonengerry, and were photographed from the air, spread around the world. This simple message has a far stronger impact when written in red, as if in blood, against the glossy white surface of one of Australia’s cultural icons, or spelt out by the vulnerable bodies of naked women, thus evoking the tradition of women’s opposition to war immortalised in Aristophanes’ play, Lysistrata.

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27 Ibid 71.
29 De Luca, above n 10, 64.
30 Beder, above n 28, 53.
31 De Luca, above n 10, 59.
32 Ibid 92.
33 Ibid.120.
34 Claudia Orenstein, ‘Agitational performance, now and then’ (2001) 31 Theater 139, 151.
The playfulness of protest

The salient characteristics of direct action or protest events have changed over time. Commentators have documented a marked shift, from orderly, linear, law-abiding demonstrations to ‘alternatively playful and aggressive’, non-linear, disorderly spectacle, which first became a feature of protest events in the 1960s. This new style of protest was exemplified in the street theatre of the American youth activists, the Yippies, who dropped money on the heads of stockbrokers in the New York Stock Exchange, nominated a pig for President, and conducted an exorcism of evil spirits at the Pentagon. Rallies and speeches were discarded as ineffective and dull, ‘bad theater’. The evolution in protest styles can be seen as part of a shift from modernism to postmodernism. Contemporary protest events feature multiple references, the inclusion of aphorisms and puns in catchy slogans, satire and caricature, the subversion of traditional images, and irony instead of didacticism. Increasingly, activism involves a strategic use of the internet and cyber-dissent such as that practiced by Get Up!, an activist organisation which enlists new recruits and conducts its campaigns through the internet. Playfulness is the preferred strategy of contemporary protests events.

Although my focus is on environmental activism in Australia, other diverse protests events in the United States clearly highlight this theme of playfulness: the outrageous theatrics of the American AIDS activist group ACT UP, the street parties, both spontaneous and planned, structured and ludicrously formal, of the Reclaim the Streets movement, the clever parodies

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36 See Durland, above n 15, 67.
37 Neustadter, above n 35, 42.
39 Kershaw, above n 7, 274.
40 Kershaw, above n 1, 122.
42 Orenstein, above n 34, 140.
44 See, for instance, Wood and Moore, above n 41, 38.
45 See Orenstein, above n 34, 146–7.
of right-wing groups in Billionaires for Bush (or Gore)\textsuperscript{46} and the Church Ladies for Choice, who with nonchalant irreverence perform outside abortion clinics in mocking imitation of their conservative counterparts, the right-to-lifers.\textsuperscript{47} Participants in such protest events delight in confounding the law enforcement officers who arrive in their wake with the unexpected, the ludicrous, the patently silly. Consider, for instance, the members of Reclaim the Streets/ NY City who, after turning the main avenue of East Village into a riotous, unruly party,\textsuperscript{48} then surprised the battalion of police personnel who turned up to their next celebratory event with a public tea party in formal attire, staged against the musical background of Vivaldi’s Four Seasons.\textsuperscript{49} This is protest as ‘ironic entertainment’, as ‘celebratory and fun’;\textsuperscript{50} a switch from the rational concept of play to the prerational,\textsuperscript{51} from ludus to paidia.\textsuperscript{52}

It is also, however, playful spectacle with a political purpose, strategically designed to maximize media exposure. Protests events may be characterized by spontaneity, improvisation and disorder,\textsuperscript{53} but they must still deliver a coherent political message,\textsuperscript{54} and this message must be capable of transmission to the public through the media. Direct action and protests events, including environmental direct action, differ markedly from conventional theatre in their symbiotic relationship with the media. Schechner describes direct action as the ‘first theatre, or raw material, for a near-universally displayed second theatre, the television newscast which includes (often improvised) responses to the first theatre.’\textsuperscript{55} In contrast to conventional theatre, the audience for protest events encompasses, through mediatisation, millions of potential spectators. Yet the relationship between activists and the media is a complex one and fraught with particular difficulties.

\begin{footnotes}
\item[46] Ibid 149.
\item[47] See Jan Cohen-Cruz, ‘At cross purposes: the Church Ladies for Choice’ in Shepard and Hayduk, above n 38, 234–5.
\item[48] Stephen Duncombe, ‘Stepping off the sidewalk: Reclaim the Streets/ NY City’ in Shepard and Hayduk, above n 38, 223.
\item[49] Ibid 224.
\item[50] Orenstein, above n 34, 151.
\item[52] Roger Caillois, \textit{Man, Play and Games} (Meyer Barash trans, 1979) 13.
\item[53] Kershaw, above n 7, 261.
\item[54] Ibid 260.
\end{footnotes}
The mediatisation of protest

Protest performances must constantly change and evolve in order to capture and re-capture the public’s attention through the media. Imaginative interventions and adaptation to changing cultural imperatives are necessary, yet activists must avoid the ‘infamy’ of performances which are too disruptive or challenging. Kershaw believes that protest can become ‘a prisoner of its own need for exposure, its performances neutered by electronic representation and reproduction’. Protest must somehow transcend the self-evident limitations of electronic entertainment with its predilection for simplistic image in place of complex messages. Activists must penetrate the complacency and passivity of the watching millions. Hazel Notion’s scathing comments on the public’s reception of Greenpeace protest events highlight some of the pitfalls in the courtship between protest and the media; she has described ‘environmental theatre’ as a ‘product [which] is sold by subscription to suburban householders who use it as a palliative for environmental anxiety’. She continues: ‘regular doses appear to allow suburbanites to continue normal producer/consumer lifestyles.’ As Tim Bonhady argued in 1992, ‘Australians have become inured to civil disobedience by conservationists.’

Peggy Phelan’s interrogation of the perceived correlation between visibility and political power is worth considering here. Visibility is critical for environmental groups participating in direct action and equates, in their view, with increased political power. An overwhelming majority of activists have little interest in ‘remaining unmarked’; thus they are caught up within what Phelan describes as the ‘addictive rather than transformative’ pitfalls and traps of visibility politics. Inevitably, despite strenuous efforts on the part of activists to negotiate the terms of their own mediatisation, they thus become ‘part of the labor of the reproduction of capitalism’.

56 Sean Scalmer, Dissent events. Protest, the media and the political gimmick in Australia (2002) 7.
57 Kershaw, above n 1, 91.
58 De Luca, above n 10, 92.
60 Ibid.
61 Bonyhady, above n 11, 54.
63 Ibid 6.
64 Ibid 11.
65 Ibid.
The media is, as De Luca puts it, ‘enemy territory’, therefore supportive of existing political and social arrangements and therefore unsympathetic to the goals of many activists, including radical environmentalists. The media supports and participates in the dominant discourse of industrialism and the parameters of this discourse diminish the ‘radical possibilities’ of image events. Protesters often try to counter negative representations by the media by managing their own representation with photographic and video equipment. It is interesting to read the directive of film maker Emile de Antonio to all potential protesters:

If you or anyone else plans to hammer a nuclear nose cone or blow up a plant or sit down at Shoreham (Nuclear Power Plant) and confront the state, remember to do it with a camera. You are not there unless it is filmed … If you contemplate future actions, film them in the planning stage with someone you can trust … Film the action, film it all.

In fact, protesters or independent photographers somehow aligned to the protesters made their own documentaries in three of the four case studies which I shall consider. The absence of footage of the Chaelundi blockade, which comprises the fourth case study, is not indicative of negligence on the part of the blockaders; the blockade was filmed by an independent photographer who later refused to release the footage to NEFA. However, irrespective of whether contemporary activists decide to make their own documentaries, there are ways of ‘challeng[ing the] interpretative hegemony’ of the media.

De Luca suggests that the diversity of competing discourses at work in society, ‘the irreducible multiplicity of meanings’, can produce surprising results. Activists can consciously manipulate such meanings to their own advantage, despite the ideological hegemony imposed by a corporate-controlled media. For instance, a 1975 Greenpeace encounter with Russian whalers could be read, and probably was intended to be read, as a

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66 De Luca, above n 10, 87.
67 Ibid.
68 Ibid 91.
69 Ibid 92.
72 Scalmer, above n 56, 177.
73 De Luca, above n 10, 145.
74 Ibid 95.
critique of industrialism. Nevertheless, this encounter received sympathetic media coverage in the United States because, at the time, it could be construed as an incident in the Cold War conflict.\textsuperscript{75} De Luca also analyses a (pre-September 2001) documentary on the activities of Earth First!, a group of radical environmentalists; in the documentary, the protesters were portrayed as violent terrorists in need of harsh and punitive treatment.\textsuperscript{76} However, this portrayal was not necessarily convincing. The images of environmentalists did not correspond with the stereotypical image of a Middle Eastern Muslim terrorist\textsuperscript{77} and their activities could be reconciled more readily with the civil disobedience of the 1960s and 1970s than with the discourse of terrorism at the time the documentary went to air.\textsuperscript{78}

Choosing case studies

Already, in the preceding discussion, I have alluded to my rationale for embarking on a comparative critique which considers direct action performances which occur outside a theatrical framework in relation to corresponding legal performances: such performances are arguably more radical, more playful, more politically potent, and reach a far broader audience than performances which take place within the context of conventional theatre. However, my focus on environmental direct action, and my choice of the four case studies, requires further explanation.

In undertaking an interdisciplinary piece of research in which I draw upon the discipline of performance studies, I encountered a dilemma. Most performance studies theorists are actors, producers or dramaturges, or some combination thereof; they draw upon their own experiences in performance in undertaking their research. I lack such a background. On the other hand, I have been a participant in various performances of environmental protest. Timothy Doyle, in his analysis of the Australian environmental movement, states that he selected issues and networks in accordance with his own involvement, and that ‘this approach provides colour, depth and richness missing from more objective accounts’.\textsuperscript{79} I, similarly, have selected performances of environmental protest which I find significant, performances in

\textsuperscript{75} Ibid 95–8.
\textsuperscript{76} Ibid 116.
\textsuperscript{77} Ibid 126.
\textsuperscript{78} Ibid 127.
\textsuperscript{79} Doyle, above n 15, xxx.
which I was personally or tangentially involved or which involved actors, settings and issues somehow connected to me. My choices are entirely, and deliberately, subjective.

The Terania Creek controversy, which is my first case study, is widely considered to be the first environmental blockade in Australian history, or the first time the environment movement utilized non-violent direct action.\(^{80}\) In the Terania Creek inquiry which was set up after the blockade, we find the first involvement of the environmental movement in legal and adversarial proceedings.\(^{81}\) For these reasons alone, the controversy merits consideration in any comparison of protest and legal performances in the context of environmental preservation. However, the Terania Creek blockade has an added personal significance for me. It took place in an area close to where I now live, and close to my workplace, Southern Cross University. I met two of the central protaganists, Hugh and Nan Nicholson, at a later blockade in 2001. Other familiar figures in the Australian environmental movement, including Greens Member of the New South Wales Legislative Council Ian Cohen, were involved in the Terania Creek blockade.

The Franklin blockade, my second case study, is so well-known that perhaps every Australian over a certain age feels a thrill of recognition when they stumble across an image of one of the ‘No Dams’ stickers, or view footage of the magnificent Franklin River. After years of showing the blockaders’ documentary, *The Franklin River Blockade*, to my constitutional law students, a film which features other familiar figures such as singer-activist Lisa Yeates and Bennie Zable, self-proclaimed practitioner in environmental theatre,\(^{82}\) I have come to experience a significant degree of connection with a blockade in which I did not participate.

The Chaelundi blockade, however, is part of my personal history. I first visited Chaelundi State forest in April 1991, for a weekend, and walked along Broadmeadows Road through ancient forest. The protesters’ camps were already established; people gathered around smoking campfires, swapping stories and singing songs. The road was decorated with painstakingly arranged forest art, ‘sticks, feathers, crystals, rocks and painting’,\(^{83}\) which would be crushed by a bulldozer when the blockade began. Thereafter, I visited on weekends

\(^{80}\) Ibid 129.
\(^{81}\) Ibid.
\(^{82}\) Bennie Zable has explained that his ‘role is in environmental theatre, helping to communicate our message visually in a strong and clear way.’ Quoted in Jeni Kendall and Eddie Buivids, *Earth First* (1987) 115.
whenever I could, and my boyfriend moved there in his old blue truck, which he renamed the Chaelundi Hilton. I was there on a week’s holiday from my despised job in a conservative Lismore law firm when the police arrived in late July, and the blockade commenced in earnest. I regarded this as a fortuitous coincidence; my employers, at least one of whom had strong connections to the National Party, viewed my involvement in the blockade quite differently.

The final case study, the 1992 NEFA invasion and takeover of the Forestry Commission office block at Pennant Hills, is also part of my personal history. It took place a few days before my wedding, which was a fundraiser for NEFA; this was unfortunate timing as most guests were probably listening to politicians and media commentators refer disparagingly to NEFA activists as terrorists when they were writing cheques as wedding presents. We were in Sydney preparing for our wedding when the siege occurred, and had participated in the preceding protest outside Parliament House against a proposed natural resources security package. The comic audacity of the siege has always appealed to me. Greta Bird and I use the documentary *Forestry Siege* as a teaching tool in Legal Process, intended to raise questions about the founding moments of legal systems and the legitimacy of authority.

The protests in these case studies took place between 1979 and 1992, and in at least three and arguably four cases, the environmental movement was successful in achieving its objectives. Logging has not taken place in the disputed areas at Terania Creek and Chaelundi. The Franklin dam was never built. John Corkill claims that all of the policies of the People’s Commission for the Forests, which was temporarily installed in office in November 1992 during the invasion, were eventually implemented. These successes suggest that the case studies are perhaps atypical. Protest evolved in this period but would evolve still further, taking on, for instance, the dimensions of mass events against globalization in the WTO protests in Seattle in 1999 and the S-11 protests in Melbourne, which were designed to shut down the three-day meeting of the World Economic Forum in September 2000. The protests in the case studies occurred in more innocent times, in which activists could storm a government building with relative impunity and without encountering any substantial obstacles, and the term ‘terrorist’ could be bandied about without evoking memories of the smoking ruins of the Twin Towers. Thus, the case studies can tell us little about the future of

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84 Ricketts, above n 10, 83.
the performance of protest in the post-September 11 political environment. I shall address the contemporary relevance of protest performances in chapter eleven.

**Violence, play and protest**

Before I turn to the individual case studies, it is appropriate to make some general observations about the ways in which the central themes of this thesis, play and violence, re-surface in the context of environmental activism. As I have already argued, play appears in its pre-rational guise, disruptive, disorderly and designed to halt the violence directed against wilderness and non-human beings. The playfulness of protest places protest outside rational discourse, and this operates as a challenge to the ‘modernist frame of politics’. In replacing reason with passion, order with chaos, and serious rhetoric with image, irony and play, protesters are operating outside the traditional parameters of political culture; they are thus, according to De Luca, ‘contest[ing] social norms and deconstruct[ing] the established naming of the world’. For such reasons, direct action has been referred to as ‘anti-disciplinary politics’ but most forms of environmental direct action operate, nevertheless, within the framework of some fundamental tenets. One of these is the tenet of non-violence.

Some environmental groups, including Earth First!, actively espouse and practise property destruction and most commentators concede that it was, in fact, deliberate violence on the part of a minority, who drove spikes into standing trees and damaged logs, which initially brought a halt to logging at Terania Creek. However, this violence at Terania Creek was condemned by the majority and most environmental protesters consciously eschew violence, preferring to confine their protest performances to ‘the realm of the sign’. In part, this is a strategic decision designed to avoid the mimetic effect of violence described by Girard, and thus enhance the popular appeal of the spectacle of direct action. A trainer in non-violent action at the Franklin Blockade explained this rationale as follows:

85 De Luca, above n 10, 59.
86 Ibid.
87 Scalmer, above n 56, 34.
89 Bonyhady, above n 11, 48.
90 Kershaw, above n 1, 101.
If people resist, if they are abusive, if they are antagonistic even in attitude and thought, the escalation to all-out rabble violence will be sure and quick. That image of violence, leaping in glee from three million TV screens, to momentarily distract Mr and Mrs ‘Middle Australia’ from their pork chops and mashed potatoes, will lose the river.  

However, the adherence to non-violent action is also part of a general objection to all forms of violence. It would involve, at least, some inconsistency and forfeiture of the moral high ground for blockaders to demonstrate their disapproval of state-sanctioned violence against nature by engaging in violent deeds themselves.

The environmental direct action analysed in the four case studies is not only, of itself, playful; it is designed to conserve environments for the purposes of play. Here, we uncover a dimension of environmental activism which has increasingly attracted criticism. In all four case studies, activists sought to protect an area of wilderness. The preservation of wilderness has been a key theme in the Australian environment movement, and thus the case studies are representative of most environmental protests, although Doyle argues that in recent years there has been a shift from concern about wilderness to nuclear issues. Some commentators point out that the preoccupation of environmentalists with wilderness preservation has diverted energy, attention and resources away from the environmental issues, including social justice issues, which affect the more mundane, everyday environments in which the vast majority of people work and live. Cronon, for instance, argues that the concept of wilderness as enshrined in modern environmentalism ‘tends to privilege some parts of nature at the expense of others’. Furthermore, the emphasis on wilderness preservation maintains the problematic culture/nature dualism which characterises the modernist discourse of industrialism, and in addition, leads to the privileging of environments dedicated to play over those associated with work.

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93 Doyle, above n 15, 116–7.
94 Ibid 198.
96 Cronon, above n 95, 86.
De Luca argues that the key challenge for radical environmental groups is to displace this discourse of industrialism, in which human beings are separate from and dominate nature,\textsuperscript{97} and replace it with their own discourse of ecocentrism. The ecocentrism of environmental activists is summed up in the following statement from deep ecologist, John Seed, after participating in the Franklin blockade: ‘We did not save the forest, we were part of the forest saving itself.’\textsuperscript{98} The image events produced by environmentalists who engage in direct action are more than attention-grabbing devices. They are, De Luca maintains, designed to ‘move the meanings of fundamental ideographs’\textsuperscript{99} such as progress and nature.\textsuperscript{100} Protesters, physically enact and demonstrate their interdependence with nature\textsuperscript{101} through the strategic placement of their bodies in areas of threatened wilderness, and thus contest not only the meaning of key ideographs but also the anthropocentric assumption that human beings dominate nature.\textsuperscript{102} This process of displacing key assumptions and contesting meanings is, in De Luca’s view, as profoundly unsettling as Foucault’s experience upon reading Borges’ description of the fictitious, and to the Western brain, wildly improbable categories in a Chinese encyclopaedia.\textsuperscript{103}

Yet radical environmentalists dedicated to saving wilderness are still maintaining the culture/nature dualism, even if they reverse the privileged term.\textsuperscript{104} The continued existence of a culture/nature dualism in modern environmentalism is problematic because, within this philosophical framework, it is difficult, if not logically impossible, to reconcile the continued existence of human civilisation with environmental conservation.\textsuperscript{105} Cronon phrases the central paradox of the ‘romantic ideology of wilderness’,\textsuperscript{106} according to which wilderness is the ‘natural unfallen antithesis’ to civilisation,\textsuperscript{107} thus: ‘If nature dies because we enter it, then the only way to save nature is to kill ourselves.’\textsuperscript{108} The ‘quasi-religious’ focus\textsuperscript{109} on the preservation of wilderness by radical environmentalists and the consequent neglect of issues

\textsuperscript{97} De Luca, above n 10, 45.
\textsuperscript{99} De Luca, above n 10, 52.
\textsuperscript{100} Ibid 46.
\textsuperscript{101} Ibid 56.
\textsuperscript{102} Ibid.
\textsuperscript{103} Ibid 52.
\textsuperscript{104} Ibid 58.
\textsuperscript{105} Cronon, above n 95, 80.
\textsuperscript{106} Ibid.
\textsuperscript{107} Ibid.
\textsuperscript{108} Ibid 83.
\textsuperscript{109} Ibid 80.
affecting inhabited land cannot be reconciled with a truly ecocentric perspective, and De Luca argues that it is the environmental justice groups which focus on the preservation and improvement of environments in which people live and work which are truly radical.110

The concept of wilderness in modern environmentalism also relies on another problematic dualism: that of play/work. In directing their attention almost exclusively to the salvation and preservation of wilderness, environmentalists are concentrating on environments which they associate with play and leisure, rather than with work. Wilderness is perceived by such individuals as the ‘paradise where we leave work behind’,111 as a ‘public playground’.112 Somewhat ironically, given the relatively lowly status of play in contemporary Western society,113 play has become the privileged term in the dualism of play/work for modern environmentalists. Richard White discerns a common narrative whereby play is depicted as allowing a ‘primal and pristine contact with nature that work ruined’.114 In contrast to timber workers and others who gain a living from the wilderness, who perceive wilderness as a work environment115 and environmental direct action in the forests as ‘workplace invasions’,116 radical environmentalists perceive wilderness not only as sacrosanct but as environments suited only for recreational purposes. White argues that saving an old-growth forest or area of wilderness is thus ‘a victory for leisure and a defeat for work’.117

Significantly, the association between wilderness and play is not limited to the discourse of modern environmentalists, but distinguishes even governmental discourse as enshrined in legislation. One finds, for instance, a clear acknowledgment of this association in the incongruously anthropocentric and, in fact, play-centred Wilderness Act 1987 (NSW), in which one of the criteria for identification of an area as wilderness is its capacity to provide opportunities for solitude and appropriate self-reliant recreation,118 and the management of a wilderness area must enhance its potential to deliver such opportunities.119

110 De Luca, above n 10, 81.
111 Richard White, “Are you an environmentalist or do you work for a living?”: Work and Nature’ in Cronon, above n 95, 185.
112 Ibid.
113 Spariosu, above n 51, 22.
114 White, above n 111, 175.
115 See Ian Watson, Fighting over the forests (1990) 51.
117 White, above n 111, 173.
118 Wilderness Act 1987 (NSW) s 6(1)(c).
119 Wilderness Act 1987 (NSW) s 9(c).
We can thus find different forms of play characterising and underpinning the rationale for environmental direct action. In its pre-rational guise, it is embraced as a strategy to capture the media’s attention and confound violence against nature. Yet play also, in its ideological association with wilderness, appears in a more solemn guise. We are already familiar, from Act I, with the rule-bound orderly play of legal performances, and the extent to which they foster, protect and administer the violence of the state in the war on terror. What I shall investigate, in the following case studies, is the relative efficacy and symbolic value of different forms of play, the pre-rational play of direct action and the rational play of legal performances, in countering violence against nature.
Chapter 9

Performance in the wild, a bloodless coup and the legal fallout: Four case studies

Come in Peace and Love and Help Save the Forest.¹

NEFA is a cultural fact of the North Coast.²

Saving Terania Creek

The Terania Creek blockade in 1979 was the first blockade by conservationists with the explicit intention of preventing logging or mining.³ It took place in a volatile social context. In the blockade, the so-called ‘new settlers’, who had eschewed urban and often highly privileged middle-class professional lifestyles in pursuit of an idealistic and utopian dream on the far north coast of New South Wales, directly challenged the work practices and livelihood of loggers who viewed the Terania Creek basin as yet another work environment.⁴ However, the blockade took place only after years of negotiation and lobbying by various organisations, most prominent of which was the Channon Residents’ group (later, the Terania Nature Forest Action Group).⁵ Mainstream environmental groups remained disinterested and the government refused to change its policy on logging. By 1979, direct action was seen as the only remaining option.

¹ Hand-lettered sign on the Nicholsons’ front gate during the Terania Creek blockade.
⁴ See Ian Watson, Fighting over the forests (1990) 51, 53.
⁵ Bonyhady, above n 3, 46.
In August 1979, the first protesters began arriving to camp on the property of Hugh and Nan Nicholson. In the days before the internet, word spread through a radio network and telephone tree.\(^6\) The blockade attracted immediate media attention. Protesters blocked the road with their bodies, with vehicles,\(^7\) with logs and boulders, and even flooded it by constructing a dam.\(^8\) They ran in and out of the undergrowth, strung cable between trees,\(^9\) and climbed trees and stayed there while other trees crashed to the ground around them.

The police responded in force. Up to 120 policemen and women attended the blockade daily and with them came 15 police cars, five paddy wagons, a rescue police vehicle, a bus, a radio communications vehicle, and a freezer truck with steaks.\(^10\) Despite this ostentatious display of force and authority, the relationship between policemen and protesters could be, at times, entirely amicable. One photo depicts a grinning policeman receiving a head message from a young woman, who is wearing the policeman’s cap.\(^11\)

The ‘new settlers’ proved to be, as Watson comments, ‘formidable opponents’,\(^12\) highly articulate and with a range of diverse skills in research and media communications. They made their own commercial and documentary,\(^13\) distributed postcards, posters and leaflets, and conducted media interviews. They had chosen to embrace the ‘religion of ecology’\(^14\) and according to Watson, imbued with a corresponding sense of self-righteousness,\(^15\) they consistently failed to grasp the impact of their activities on the working life of their opponents.\(^16\) The blockaders achieved an unprecedented degree of success. The images of protesters being dragged away by police to the accompaniment of songs and chants, and the public response, galvanised the hitherto recalcitrant Wran government into action. The logging operations were immediately stopped and an inquiry established.

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7 Ibid 47.
8 Ibid 48.
10 Kendell and Buivids, above n 6, 50.
11 Photo reproduced in ibid 53.
12 Watson, above n 4, 89.
13 Ibid 89.
14 Ibid 103.
15 Ibid.
16 Ibid 102.
The Terania Creek inquiry, described succinctly by Nan Nicholson as ‘death by inquiry’,\(^\text{17}\) was the most significant legal performance which followed the blockade but legal proceedings also took place in the local court against some of the protesters. These were not particularly successful in terms of punishing or reprimanding the protesters. The magistrate upheld only one charge and this conviction was not recorded. Eventually, all charges were dropped.\(^\text{18}\)

Commentators generally agree that the Terania Creek inquiry was a time-consuming and futile exercise.\(^\text{19}\) It was an excessively legalistic, adversarial legal performance, spanning 116 days of hearings\(^\text{20}\) and spawning numerous piles of yellowing transcript. I am familiar with one of these collections as Hugh and Nan Nicholson donated it to the Law School, and it remained on the floor of my office for a number of years until it found a home in the Rainbow Region archives in Southern Cross University.

The Inquiry was intended to look at the environmental issues arising out of the proposed logging operations in the Terania Creek basin, and to reach a conclusion as to whether logging should proceed. It was presided over by a retired New South Wales Supreme Court judge, Simon Isaacs, who according to one conservationist frequently dozed off during the inquiry.\(^\text{21}\) The Commissioner displayed only a rudimentary understanding of relevant scientific issues and scientific terminology,\(^\text{22}\) and reportedly asked during the inquiry whether taxonomy was somehow connected to the Taxation Department.\(^\text{23}\)

Isaacs inaccurately described the inquiry as informal, but under his direction, the proceedings closely resembled courtroom proceedings. As in courtroom proceedings, he defined the relevant issues very narrowly.\(^\text{24}\) Furthermore, witnesses were characterised as either pro or anti-logging and were subjected to cross-examination, which Isaacs viewed as a reliable route to the objective truth.\(^\text{25}\) Isaacs never grasped the distinction between science as practised by

\(^{17}\) Bonyhady, above n 3, 49.  
\(^{18}\) Ibid 50.  
\(^{19}\) For example, Bonyhady, above n 3, 49.  
\(^{22}\) Taplin, above n 20, 164–5.  
\(^{24}\) Taplin, above n 20, 157.  
\(^{25}\) Ibid 162.
academic ecologists and science as practised by professional foresters. In his view, it was only necessary to ascertain, through rigorous cross-examination, which set of scientific ‘facts’ represented a true picture of the situation.

Isaacs’ pursuit of an unattainable scientific truth reflected both the underlying assumption of positivist lawyers that the legal process offers reliable mechanisms to uncover the truth, and a disturbing ignorance about the nature of scientific knowledge. Scientists view scientific knowledge as the product of social achievements among scientists, rather than as a collection of truths. There are no independent scientific facts, as distinct from opinion or bias, which can be elucidated through the ‘discipline of formal legal procedure’. The limitations of scientific knowledge are now increasingly acknowledged within the legal system, with growing judicial acceptance of the precautionary principle. The precautionary principle evolved in response to the inevitable inaccuracies of scientific assessments of the ‘assimilative capacity’ of the environment. It requires decision makers to adopt a cautionary, and preferably precautionary approach, to avoid and prevent environmental damage where there is scientific uncertainty about the outcome of particular activities. However, despite the endorsement of this principle in policy statements, legislation and judgments, the precautionary approach to environmental damage has not been adopted with the same whole-hearted enthusiasm with which, for instance, a precautionary approach to counter-terrorism has been embraced by Western governments in the war on terror. In the war on the environment, science still retains its much of its ‘cultural authority’ as the ‘provider of objective truth’.

In the end, Isaacs preferred the scientific predictions of professional foresters over those of the ecologists, and recommended that logging operations proceed in the Terania Creek basin. According to his report, the overall environmental impact of logging Terania Creek would be

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29 Ibid 29.
‘marginal and insignificant’.\textsuperscript{34} The Wran government chose to disregard his recommendations in a historic decision in 1983, in which a number of areas, including Terania Creek, were set aside for conservation purposes. As a legal performance, the Terania Creek inquiry proved to be excessively formalistic, frustrating for most participants, and ultimately futile. The blockade, on the other hand, which introduced environmental direct action to an enthralled Australian public, was outstandingly successful.

The Franklin Blockade: Wild rivers running free

If the Terania Creek blockade were Australia’s first environmental blockade, the Franklin blockade was the largest and according to Bonyhady, the ‘most celebrated’.\textsuperscript{35} The famous campaign to prevent the construction of the Franklin Dam may now seem like part of the distant past. Nevertheless, an analogy has been drawn between the dam and the proposed Gunns pulp mill\textsuperscript{36} which was approved with bipartisan support in October 2007, on the eve of a critical federal election. In fact, a key player has been involved in both controversial developments. In 1982, Robin Gray was Premier of Tasmania, infamous for having dismissively referred to the Franklin River as a ‘brown, leech-ridden ditch, unattractive to the majority of people’.\textsuperscript{37} In 2007, Gray was a director of Gunns Pty Ltd, Tasmania’s largest logging company and the proponent of the pulp mill.

The campaign to stop the construction of the Franklin dam began after a 1975 rafting trip, during which Bob Brown noticed construction camps and new roads and was told of the proposed dam. Brown sought to enlist public support with brochures, documentaries and tireless lobbying at state, national and international levels.\textsuperscript{38} The blockade began on 14 December 1982, the day on which south west Tasmania formally became World Heritage.\textsuperscript{39} It was hugely instrumental in influencing public opinion in a critical period prior to the 1983 federal election, in which the Franklin dam became a key issue.

\textsuperscript{33} Nagorcka, above n 31, 213.
\textsuperscript{34} Taplin, above n 20, 174.
\textsuperscript{35} Bonyhady, above n 3, 50.
\textsuperscript{37} Quoted in Michael Coper, \textit{Encounters with the Australian Constitution} (1987) 34.
\textsuperscript{39} The Wilderness Society, \textit{Franklin Blockade by the blockaders} (1983) 18.
The direct action strategies of the activists involved in the Franklin Dam blockade frequently involved acts of trespass on Hydro-electric Commission property although some of these acts, as performances, transcended protest. Ian Cohen recounts with amusement the circumstances in which the more elderly or conservative protesters would choose to be arrested, picnicking with white lace tablecloths and fine glassware at the ‘connoisseur’s arrest site’, St John’s Falls.\footnote{Cohen, above n 21, 63.} However, the Franklin blockade was also, to a significant degree, ‘theatre on the river’.\footnote{Ibid 67.} River confrontations involving duckie flotillas were reasonably common. In some of the later river confrontations, protesters in wetsuits would dive and swim deliberately in the path of barges, playing a chaotic and dangerous game.\footnote{The Wilderness Society, above n 39, 78–9.} On 12 and 13 January, the arrival of a barge which towed a bulldozer down the river triggered one of the ‘most concerted and dramatic events of the Blockade’.\footnote{Ibid 53.} The driver of the barge was undeterred by the protesters’ duckies, which quickly dispersed before the larger and quite formidable vessel; nor did the operators of the barge make any attempt to avoid a scuba diver and his flag.\footnote{Ibid 62.} Protesters were hosed with powerful jets of water.\footnote{Ibid 60.} This event is recorded in the documentary made by the blockaders: \textit{The Franklin River Blockade}.\footnote{The Wilderness Society, \textit{The Franklin River Blockade} (1983).}

The arrival of the barge provides the most moving segment of a documentary which offers insight into the emotional lives of the protesters and their intense experiences of comradeship, endurance and bravery. When the barge lands on Hydro-electric Commission property, the faces of the blockaders, still floating in their yellow duckies, record their raw grief. Stubbornly, they bear witness.\footnote{Ibid.} The unmistakable figure of Bennie Zable, described by Ian Cohen as an ‘icon of Australian protest’,\footnote{Cohen, above n 21, 184.} towers over the scene in his characteristic costume: gas mask, hood, white gloves, black robe inscribed with the words ‘Consume, Be Silent, Die. I Rely on Your Apathy.’ Some protesters cry. Then, Lisa Yeates begins to sing. Her strong voice rises bravely above the scene of mute despair.\footnote{The Wilderness Society, above n 46.} We know now, as we watch the documentary, that the blockaders will prevail in one of the Australian environmental
movement’s greatest victories. But they, of course, filmed in a moment of grief and stubborn defiance, do not.

The largest blockade action, or sequence of sustained multiple performances, took place on Green Day, 1 March 1983, and involved about 400 participants in different locations. A couple climbed on to a crane boom at Strahan. The Hydro-electric Commission in Hobart was decorated with a Wilderness Society flag and a No Dams banner, while the words No Dams appeared on the Mount McCutcheon helipad. Finally, in an overt piece of street theatre, a cage with three prisoners and no door appeared in front of the Hydro-electric Commission building and actors dressed as Prime Minister Malcolm Fraser, a judge and a politician proceeded to act out a simulated trial of Fraser.

How, then, did the state respond to the various well-mediatised performance events of the Franklin blockade? Incongruously enough, the relationship between police personnel and protesters was often an amicable one. In a temporary truce over Christmas, policemen and women and activists shared Christmas lunch and dinner. On Valentine’s Day, one activist left hearts on every boat, bed and cap at the police camp, also decorating helipads and bulldozer seats. On at least one occasion, policemen joined in a dance with blockaders, in a ‘crazy, almost surreal scene of pure unforced hilarity’. Furthermore, the police would bestow upon every hundredth arrestee a gift. Initially, the gifts were food items but gradually, and clearly in a spirit of playfulness, they took on a different character; popular items included cans of deodorant with written instructions, guidebooks on activities in Queenstown (where they would be processed), and toy bulldozers.

On the other hand, the relationship between the Hydro-electric Commission, its employees and supporters, and the protesters was one of unremitting hostility. When Bob Brown sent a telex to the Minister proposing a New Year moratorium over Christmas, he received a curt refusal; the Minister’s stated position was that ‘intending law breakers are in no position to

50 The Wilderness Society, above n 39, 100–1.
51 Ibid 108.
52 Ibid 110.
53 Ibid 112.
54 Ibid 35.
55 Cohen, above n 21, 66.
56 The Wilderness Society, above n 39, 42.
57 Ibid 48.
offer moratoriums. A fishing boat chartered by the Hydro-electric Commission rammed the blockaders’ rafts. Car stickers which read ‘Doze in a greenie – fertilize the south-west’ or ‘If it’s Brown flush it’ are illustrative of the violent antipathy which many dam supporters felt towards the protesters. In this volatile climate, attacks were mounted on the Information Centre and Bob Brown was assaulted.

Furthermore, arrestees confronted onerous bail conditions and, in some instances, treatment deliberately designed to deter them from further activism; one group was brought before a Hobart court disoriented and exhausted after confinement in the wet and cold of the Hydro-electric Commission compound for many hours, and a grueling trip to Hobart in the middle of the night. Of the 2613 participants in the blockade, 1272 were arrested and 1324 charges laid. Over 400 people were imprisoned in Risdon Gaol for refusing to accept bail conditions such as the Wild West condition, which prevented blockaders from returning to the area west of the King River, and the Sunset condition, which gave them 24 hours to leave the area. A later appeal against these conditions would be upheld.

These legal performances in the magistrates’ courts were overshadowed by the High Court performance in Commonwealth v Tasmania, the constitutional decision which decided the fate of the Franklin River. After winning the federal election in March 1983, the Hawke government implemented its election promise to stop the dam by enacting the World Heritage Properties Conservation Act 1983 (Cth) and regulations under the National Parks and Wildlife Conservation Act 1975 (Cth). These Commonwealth enactments were inconsistent with the Tasmanian legislation which authorized the construction of the dam, the Gordon River Hydro-Electric Power Development Act 1982 (Tas), and thereby invalidated it. Tasmania mounted a constitutional challenge to the Federal legislation, and in Commonwealth v Tasmania, the High Court held that the legislation was valid.

Although the High Court could hardly fail to be aware of the political significance of the case, the judges took great pains to ostensibly distance themselves from the political issues and

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58 Ibid 35.
59 Bonyhady, above n 3, 52.
60 Lines, above n 9, 211.
61 Ibid 211.
63 Ibid 9.
64 Ibid 12.
maintained, with the conviction of committed legal positivists, that they were deciding the case purely on its legal issues. This point was clearly made in their preface to their judgments in which they stated that ‘the Court is in no way concerned with the question whether it is desirable or undesirable, either on the whole or from any particular point of view, that the construction of the dam should proceed.’

Even more poignantly, the Court refused to view photographs of the Franklin River, pictures which had ‘turned the Franklin into an icon and a household name’, lest such images ‘inflame the minds of the Court with irrelevancies’ and corrupt their otherwise purist examination of the scope of the external affairs, corporations and race heads of power.

The constitutional reasoning in the case, which concerned the division of legislative power between the Commonwealth and the States, was characteristic of the ‘high level of abstraction’ in constitutional law cases. Margaret Thornton has pointed out that in the process of constitutionalisation, the ‘distinctive private or subjective features’ of each case are ‘sloughed off.’ Although the High Court could separate the private, personal and subjective matters from public, constitutional and legal issues with apparent ease, outsiders viewed the outcome of the constitutional performance as highly political. Bob Santamaria accused the High Court of being more radical than the Communist Party. Other commentators were scathingly critical of the perceived ‘irresponsibility and arrogance’ of the majority judges in ‘rewriting’ the Constitution. However, a blockader, who heard the outcome of the case while maintaining a vigil around a campfire in Tasmania’s south-west was among many who rejoiced when she heard the announcement, in the ‘crackly voice of the newsreader’, that the dam would not be built. She wrote that ‘although the High Court judgement was made

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66 Commonwealth v Tasmania (1983) 158 CLR 1, 1.
67 Lines, above n 9, 188.
69 The Court considered the ambit of the external affairs head of power (s 51(xxix)), the corporations head of power (s 51(xx)), the race head of power (s 51(xxvi)), the trade and commerce head of power (s 51(i)) and the guarantee of just terms compensation in the event of an acquisition of property (s 51(xxxi)). The Court also considered section 100, which prevents the Commonwealth from using any law of trade or commerce to abridge the rights of States or residents of States to the reasonable use of the waters of rivers for conservation or irrigation.
71 Ibid.
72 Kendall and Buivids, above n 6, 71.
73 Cooray, quoted in Coper, above n 37, 187.
without the question of wilderness, with all its intrinsic worth, being raised, it is a positive affirmation of all that is natural, infinite, whole.'

In fact, the High Court performance was neither politically radical, nor any indication that legal discourse was being influenced by the values and tenets of ecocentrism. One commentator describes the decision as ‘at best, a minor setback to the conquest of nature in Australia’. The expanded definition of the external affairs head of power, which provided much of the constitutional significance of the decision, can easily have adverse environmental consequences. Not all international treaties and conventions impose human rights and environmental responsibilities upon nation states. The so-called ‘free trade’ agreements strengthen corporate domination of the global economy at the expense of human rights and at the expense of the environment. It is ironic that an expansive interpretation of section 51(xxix) not only facilitated the domestic implementation of treaties which protect human rights and the environment, but also facilitated the implementation of treaties which intensify the control of multinational corporations over the Australian economy, and weaken our existing standards in the areas of human rights and environmental protection.

Chaelundi, living forest

The Chaelundi blockade and accompanying legal challenges formed part of NEFA’s sustained and impressive campaign to save the old growth forests of the north coast of New South Wales. This campaign began in 1988 and gathered momentum rapidly. The combination of legal and extra-legal direct action performances which prevented logging in Chaelundi State forest were characteristic strategies in this extraordinarily successful campaign.

Protesters set up camp in Chaelundi State Forest on 1 April 1991 and maintained a continuous presence there until August, when John Corkill succeeded in obtaining an injunction from the Land and Environment Court. The blockade began in earnest in late July. However the period from April to July was spent constructively, with activists assembling a formidable array of obstructions. Such obstructions included 42 concrete pipes which were embedded into the

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74 The Wilderness Society, above n 39, 119.
75 Lines, above n 9, 217.
logging roads at strategic intervals. The waiting period also encouraged social cohesion; the camp became a ‘micro-village’, a home, and an unforgettable cultural experience. During this period, the area was christened the ‘Chaelundi Free State’.

By the time of the Chaelundi blockade, the counter-culture influences which had prevailed in 1979 at Terania Creek were not so dominant. The floating population of the Chaelundi Free State was diverse. Journalists, lawyers, musicians, artists, farmers and, most colourfully, punks and ferals represented for veteran activist Ian Cohen a new generation of activists. Instead of the hand-lettered welcoming sign at the Nicholsons’ gate, in which the organisers of the Terania Creek blockade overtly repudiated aggression and enjoined their fellow protesters to ‘come in peace and love and help save the forest’, newcomers to the Chaelundi Free State were greeted with a depiction of cartoon celebrity Bart Simpson, defiantly waving his fist and attached to a speech bubble containing the words ‘Fuck off loggers’. This figure was painted on a concrete pipe halfway between main camp and the remote, ‘adventurous and romantic’ feral camp. Aidan Ricketts, who at the time of the Chaelundi campaign aligned himself with Australia’s most famous outlaw by calling himself Ned, has described feral camp as ‘something akin to a bushranger’s camp’.

The anti-statist and anti-authoritarian impulse behind the establishment of the Chaelundi Free State also distinguishes the events of 18 November 1992, which are described in the next case study. Participants of the Free State, caught up in what Cronon has described as a ‘myth of frontier primitivism’, believed that they had established a community more in harmony with nature than the larger external community, which sustained them through fortnightly social security cheques.

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76 Ibid 125.
79 Cohen, above n 21, 182.
80 Lines, above n 9, 172.
82 Ibid.
However, the blockade also had a strongly practical orientation. By 1991, activists knew that mediatised images of protest events, which had triggered significant political responses during the Terania Creek and Franklin blockades, were no longer fresh, shocking and exciting. Images, icons and symbols were still important, still part of the paraphernalia of the theatre of protest. Indeed, a photo of a small group of protesters, including Ian Cohen, clinging with varying degrees of desperation and determination to each other and to the poles of a tripod, appeared on the front page of *The Sydney Morning Herald* during the first week of the blockade. However, if the blockade was to prove effective as a delaying tactic while Corkill and his lawyers simultaneously played their roles in a legal performance in the Land and Environment Court, the blockaders had to devise and implement a range of different tactics which would physically prevent logging operations from taking place. Doyle describes such active resistance as more like militant direct action than traditional non-violent action. This was performance which was designed to do more than shock and entertain; it was performance with a distinctively militaristic, albeit non-violent slant.

A wide variety of installations were created and constructed: tripods, tripod/bipods, vertical pipes, dragons and sleeping dragons, lock-ons, monopoles and cantilevers. Ian Cohen describes an elaborate and ingenious succession of obstacles including a huge hollow log, called the tunnel of love, to which protesters chained themselves, the so-called Star of David, which featured six poles in the shape of a star on a single bush pole, and the Web of Life, made out of camouflage net and fencing wire. The Rainforest Information Centre van, with a tripod-bipod erected over it, became yet another impediment to the progress of the bulldozer. More traditional strategies were also deployed, including burying bodies in the ground, which involved a feat of endurance in midwinter conditions, and tree sitting. Such strategies, according to De Luca, are performative enactments of the ecocentric values of radical environmentalists in that through such strategies, protesters physically express their sense of connection with nature: the protester buried in the road is literally part of the earth, the protester in the tree has become part of the tree.

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84 See Ricketts, above n 81, 138; Ricketts, above n 77, 77.
86 Ricketts, above n 81, 139.
87 Cohen, above n 21, 195.
88 Ibid 198.
89 Ibid 190.
90 Ibid 199.
The protest was not merely a variety of creative obstacles, which protesters climbed or crawled into, and to which they then padlocked themselves. It featured individual performances of intense drama and excitement, such as when PJ, with unforgettablely graceful choreography, managed to elude his captors for some time and win precious minutes by balancing on a slender pole linking a tripod-bipod. He even jumped on to the fulcrum of a cherrypicker, while his appreciative audience watched and applauded. There were also comic performances. Cohen records the arrival of the Green Grannies, who emerged from their minibus and arranged themselves on the logging road in plastic chairs. Some brought their knitting, while others nursed babies handed to them by young protesters.

Ultimately, however, the fate of Chaelundi depended upon the legal performances instigated and stage-managed by John Corkill in the Land and Environment Court.

The plethora of legal challenges brought by NEFA activist John Corkill against the New South Wales Forestry Commission during the 1990s were extraordinarily successful, and effectively highlighted the Commission’s ongoing disregard for its various statutory obligations. For this period, Corkill, who relied upon the pro bono services of barrister Tim Robertson, remained deliberately asset-free or as one activist has put it, ‘lean, mean and low on the food chain’; this ensured that, in the event of failure, a costs order would have little impact. Standing, which often constitutes an impediment to public interest environmental litigation, was never an issue for Corkill due to the open standing provisions in most New South Wales environmental statutes. In fact, an indicator of Corkill’s extraordinary success and the irritation which it caused the state was the later enactment of the Forestry and National Parks Estate Act 1998 (NSW), which inter alia removed standing for public interest litigants like Corkill who sought to challenge the legality of logging operations.

In relation to Chaelundi, Corkill’s first strategy was to obtain an injunction which prevented the Forestry Commission from logging without an Environmental Impact Statement. Once the (arguably deficient) Environmental Impact Statement was completed, he launched three other legal performances. In one, he successfully argued that the Minister’s refusal to place an

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92 Cohen, above n 21, 189.
93 Ibid 196.
95 See Bonyhady, above n 3, 70–2.
Interim Conservation Order over the forest under the *Heritage Act 1977* (NSW) was an invalid exercise of his decision-making power under that Act. He also instigated a challenge under the *Environmental Penalties and Offences Act 1989* (NSW). Most significantly, he mounted a test case under sections 98 and 99 of the *National Parks and Wildlife Act 1974* (NSW); this case would publicly expose the magnitude of the Forestry Commission’s negligence in relation to endangered species in State forests. Conservationists had been waiting for a forest with exceptional quantities of vulnerable and endangered species in order to bring such a test case against the Forestry Commission; in Chaelundi, unforgettably described by Justice Stein as ‘a veritable forest-dependent zoo’, they had found one.

Justice Stein held that the Forestry Commission’s plans for logging in Chaelundi State Forest would lead to breaches of sections 98 and 99 of the *National Parks and Wildlife Act*. These sections prohibited the taking and killing of protected and endangered fauna. Justice Stein’s decision was upheld on appeal by the Court of Appeal. Prior to these cases, it had been generally assumed that habitat destruction did not fall within the ambit of these offences, and that only intentional destruction of fauna was prohibited. These assumptions proved to be false. Justice Stein expanded the scope of the sections in concluding that ‘taking’ included the reasonable likelihood of disturbing the habitat of listed species so as to call into question their long-term survival or recovery, and pointed out that the proposed logging operations would ‘spell the death knell of the truly exceptional wildlife values of the area’.

Although the Court of Appeal dismissed the appeal by the Forestry Commission, the judges expressed concern about the ‘consequence of particular seriousness’ which could flow from their judgment: the cessation of all logging activities in State forests in New South Wales. The timber industry and the Greiner government shared this concern. Cabinet proposed a Regulation which exempted forestry operations and various other activities from the relevant sections of the *National Parks and Wildlife Act*. However, the Regulation was disallowed by

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96 *Forestry and National Park Estate Act 1998* (NSW), s 40.
97 See discussion in Bonyhady, above n 3, 96.
98 Ibid.
99 Ibid 97.
101 *Corkill v Forestry Commission of New South Wales* (1991) 73 LGRA 126, 139.
the Legislative Assembly, which at that time was controlled by four non-aligned Independents.104

The government’s uncertain balance of power, exacerbated by the resignation of Dr Terry Metherell, permitted the passage of new endangered species legislation at the end of 1991.105 Ironically enough, the crucial votes belonged to fundamentalist Christian stalwarts Reverend Fred and Elaine Nile in the Upper House.106 The Act, introduced as a private member’s Bill, was perceived as a victory for environmentalists and, indeed, incorporated the significant extension of the definition of ‘taking’ in the Corkill decisions. However, the timber industry immediately put pressure on government to protect their economic interests. The government responded to such pressure with the enactment of legislation107 which allowed logging to proceed in some State forests without further delays, irrespective of provisions in other legislation. Furthermore, over time, environmental groups became increasingly concerned about inadequacies in the hastily-enacted Endangered Fauna (Interim Protection) Act. Consequently, they began to lobby for new legislation, and ultimately, the new Carr government enacted the Threatened Species Conservation Act 1995 (NSW).

Bonyhady points out that the sequence of litigation which, in the short term, did in fact protect Chaelundi, created a volatile political climate for a government already struggling with loss of power in both Houses.108 In the end, the cases spawned legislation which protected the interests of the timber industry as well as new endangered species legislation.109

Although undoubtedly successful, the focus in Corkill’s test case on protecting Chaelundi as habitat resulted in a characteristically narrow delineation of issues, such that a ‘single small animal’, or in this case, twenty two such animals, bore ‘the entire burden of defending Eden’.110 Activists engaged in legal performances are constrained by the limitations of existing legislation, which still enshrines the species approach to biodiversity conservation.

104 Bonyhady, above n 3, 99.
106 Bonyhady, above n 3, 99.
108 Bonyhady, above n 3, 102.
109 Ibid, 103.
This, according to John Bradsen, is not merely restrictive, but also illogical and irrational.\textsuperscript{111} He has pointed out that the species approach fails to protect habitat until it is too late, and that the cumulative impact of permissible small-scale habitat destruction, or what he calls ‘death by a thousand cuts’, is catastrophic.\textsuperscript{112}

**Forestry siege**

The invasion of the offices of the New South Wales Forestry Commission by a group of NEFA activists on 18 November 1992 was probably the most controversial of NEFA’s direct action performances. The media, commented one activist, went into a ‘feeding frenzy’.\textsuperscript{113} Described by another participant as a ‘a cross between a siege and a bloodless coup’,\textsuperscript{114} the invasion borrowed heavily from the ‘romantic cult of revolutionary action’ to which many political activists have proved susceptible.\textsuperscript{115} The activists were enacting a simulated revolution, replacing an existing government department with their own People’s Commission for the Forests.

There are many precedents for the playful occupation of government offices by activists\textsuperscript{116} and Neustadter maintains that such actions have been ‘used to delegitimize entrenched conventional power relationships’.\textsuperscript{117} They form part of what Scalmer has called ‘the performance of disruption’.\textsuperscript{118} Such invasions have never met with the approval of the state; now, however, government departments conduct their business with vastly heightened levels of surveillance and paranoia. It is unlikely that similar playful invasions of government departments would be tolerated by the state in the contemporary political climate; it is also

\textsuperscript{112} Ibid.
\textsuperscript{113} Quoted in Rogers, above n 78, 177.
\textsuperscript{114} Ibid 175.
\textsuperscript{115} Sean Scalmer, Dissent events. Protest, the media and the political gimmick in Australia (2002) 66.
\textsuperscript{118} Scalmer, above n 115, 66.
unlikely that activists could infiltrate government offices with the same ease with which NEFA activists temporarily displaced the New South Wales Forestry Commission in 1992.

In the early hours of the morning of 18 November 1992, two groups of NEFA activists entered the office building of the Forestry Commission of New South Wales through the carpark and ground floor entrance. They took over the ground and sixth floors, sealing this area by jamming the lift doors and locking the front sliding doors and the entrance to the stairwell. Others, including a dreadlocked, soft-spoken young man who appears on the protesters’ documentary *Forestry Siege*,\(^\text{119}\) climbed on to the roof of the building and suspended a banner which stated ‘Under New Management’. The activists had to contend with several Forestry Commission employees who were already in the building when they entered. These individuals refused to leave, although requested to do so on several occasions; one claimed that she was held hostage, and the police were permitted to enter the sixth floor in order to investigate this claim and ensure that no one was being subjected to false imprisonment.\(^\text{120}\) The hostage claims were widely publicised by the media.\(^\text{121}\)

Another employee, Charlie Mackowski, refused to leave the building and told the activists that he did not recognise their authority.\(^\text{122}\) Later he would claim that ‘as an officer of the state I was obliged to warn the invaders of their transgression and to demand that they leave.’\(^\text{123}\) The activists disregarded this instruction; Kilvert points out that ‘as far as we were concerned we were the new People’s Commission for the Forest, so it didn’t really matter what Charlie thought.’\(^\text{124}\) A stalemate was thus reached in this simulated founding moment of a new state. While the activists asserted that they had authority and legitimacy in their new role as members of the People’s Commission for the Forests, Mackowski remained obstinately loyal to the old regime and continued to view them as ‘invaders’. The issue of who indeed had authority remained temporarily unresolved until clarified by a decisive display of force on the part of the police personnel, whereupon the activists readily capitulated.

Activists chained themselves to desks and filing cabinets and used office equipment to disseminate information about the occupation, the new Forestry Charter, and the installation

\(^{120}\) Ricketts, above n 77, 82–3.
\(^{121}\) See edited transcript of interview with Andrew Kilvert, in Rogers, above n 78, 177.
\(^{123}\) Quoted in Ricketts, above n 77, 81.
of the People’s Commission for the Forests. In the documentary, the atmosphere in the office appears relaxed; the shabbily-dressed activist performers struggle with recalcitrant fax machines, talk on the telephones, play guitars, and even eat cornflakes. ‘The only thing I’ve ransacked is the chocolate biscuits’, announces one as he lounges behind an office desk. In a later interview, Andy Kilvert contributed an amusing anecdote about a woman who telephoned the office in order to enquire about the safety of her husband, a Forestry Commission employee. ‘“There’s just been a bloodless coup,” [he] explained, “but it’s all sorted out now and working under a new administration.”’

A far less laconic figure is John Corkill, the new People’s Commissioner for the Forests, filmed in the office of the (previous) Forestry Commissioner. He conducts himself in the documentary with the aplomb of a senior bureaucrat and with characteristic intensity. For Corkill, then and now, both the comic and dramatic undertones of the protest are irrelevant. The action was intended to drive home an important message about the Forestry Commission’s mismanagement of State forests, and he is filmed as he cites particular examples of this mismanagement with characteristic fluency, for the benefit of reporters and journalists who were, no doubt, anxious to focus on the more sensational aspects of the protest.

After some hours, the activists were removed from the building by police. They were taken to the Hornsby police station, where they were charged with relatively minor offences: remaining on enclosed lands after being requested to leave and, more significantly, two counts of assault. No physical violence had occurred during the siege.

Doyle argues that militant direct action such as that undertaken by NEFA activists in this performance is ‘of limited use as [a] media-catchin g [device]’ and tends to have ‘more direct negative consequences’. He points out that NEFA’s formal interactions with the state government ceased as a consequence of this protest. Ricketts, however, maintains that NEFA remained an ‘important stakeholder’ in government negotiations about the forest.

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124 See edited transcript of interview with Andrew Kilvert, in Rogers, above n 78, 176.
125 Ibid 177.
126 Doyle, above n 85, 57.
127 Ricketts, above n 77, 83.
Furthermore, John Corkill has pointed out that all of the goals of the short-lived People’s Commission for the Forests were eventually met.\textsuperscript{128} 

The coup was symbolic rather than real, but this did not detract from its impact. Infiltrating the Commission’s offices, and thus importing a political contest into a space regarded as private property,\textsuperscript{129} constituted a powerful symbolic challenge to the Commission’s practice of regarding State forests as, effectively, private property, to be managed as it wished. Ricketts argues that the protesters’ theatrical assumption of authority was remarkably effective in ‘decentering [their] opponents’.\textsuperscript{130} Baudrillard has observed that a simulated hold up may well pose more of a threat to the state than a real one because such simulations ‘suggests … that law and order themselves might really be nothing more than a simulation’.\textsuperscript{131} Political protests which employ symbolism may, indeed, reconfigure the relationship between the symbolic and the real;\textsuperscript{132} political protests which employ symbolism to simulate the founding performative moment of a legal system are particularly potent. Perhaps this explains the vehemence of the state’s response, and in particular, the outraged response of the Forestry Commission, to the ‘bloodless coup’.

Although certain representatives of the state quickly labelled the NEFA activists ‘terrorists’,\textsuperscript{133} the legal performance which followed the siege did not have a particularly punitive outcome for the defendants. Nor did the legal performance enhance or contribute to the performance of protest. The magistrate was notorious for his intolerance of such performances; the thirty activists adopted a strategy designed to avert harsh punitive consequences. They all chose to plead guilty in order to expedite the court proceedings, minimise the sentences imposed, and deflect the court’s attention away from previous criminal misdemeanors of some of the defendants.\textsuperscript{134} The pleas ensured that the Forestry Commission witnesses were not called, and dramatic re-enactments and re-presentations of the original performance did not occur. According to John Corkill, the Forestry Commission wanted drama in the courtroom; the activists did not. Fines were imposed, and the defendants

\begin{thebibliography}{99}
\bibitem{128} Ibid.
\bibitem{129} Scalmer discusses this strategy in Scalmer, above n 115, 73.
\bibitem{130} Ricketts, above n 77, 81.
\bibitem{131} Jean Baudrillard, \textit{Simulations} (Paul Foss, Paul Patton and Philip Beitchman trans, 1983) 38.
\bibitem{133} See, for instance, the comment of Garry West, Minister for Conservation and Land Management, in the New South Wales Legislative Assembly on 18 November 1992; cited in Ricketts, above n 77, 83.
\bibitem{134} John Corkill, lecture in external LLB workshop, Southern Cross University, 21 February 2007.
\end{thebibliography}
were able to avoid payment by undertaking hours of community service, ironically in the area of environmental preservation. Corkill worked off his hours with the Wilson River Landcare group.\footnote{Ibid.}

In fact, the legal performance was a remarkable anti-climax, effectively a non-performance lacking in interest and popular appeal. The decision on the part of these larrikin activists to avoid a further airing of their grievances in the courtroom seems somewhat anomalous. Surely, they could have exploited an additional performative opportunity to bring contentious issues of forestry management to the public’s attention. In an earlier case, NEFA activists charged with entering an area of forest closed for logging were acquitted, after they argued that their actions were a legitimate response to illegitimate behaviour on the part of the Forestry Commission.\footnote{See discussion of case in Bonyhady, above n 3, 58.} A similar defence could have been mounted here.

Other activists have exploited the performative qualities of the courtroom trial in order to extend the impact of their protest activities. A trial of a protester can be a ‘continuation of the resistance that begins with civil disobedience’.\footnote{Joel Schechter, \textit{Satiric Impersonations. From Aristophanes to the Guerilla Girls} (1994) 88.} This is demonstrated in the case of Daniel Berrigan, a Catholic priest who engaged in civil disobedience during the Vietnam War by burning draft card files in an anti-war protest, and later destroyed nuclear weapon parts in a factory.\footnote{Ibid 81.} Schechter suggests that the second of his highly-publicised trials, known as the Plowshares Eight trial, formed an integral part of his political performance. He has argued that

> the performance begins in a weapons factory, then continues in court and on camera, as his trial is re-enacted. Through this process, Berrigan extends his political actions and public defense of them by artistic and legal means.\footnote{Ibid 80.}

Berrigan was convicted but in the process, he ensured that more controversy, debate and interest in the relevant political issues had been generated. This trial was in fact re-enacted for the purposes of a film, \textit{In the King of Prussia}, in which Martin Sheen replaced the original

\footnotesize{\textsuperscript{135} Ibid.}  
\footnotesize{\textsuperscript{136} See discussion of case in Bonyhady, above n 3, 58.}  
\footnotesize{\textsuperscript{137} Joel Schechter, \textit{Satiric Impersonations. From Aristophanes to the Guerilla Girls} (1994) 88.}  
\footnotesize{\textsuperscript{138} Ibid 81.}  
\footnotesize{\textsuperscript{139} Ibid 80.}
judge who declined the offer to appear in the role.\textsuperscript{140} Schechter argues that the film provided ‘an alternative system of justice’.\textsuperscript{141}

A political trial thus affords extended opportunities for performance and various forms of re-enactment. It is interesting, therefore, that the performance of a trial was avoided by a seasoned litigant such as John Corkill and by his co-defendants, who were unlikely to be intimidated by the legal apparatus of the state or by the animosity of the Forestry Commission employees who would have appeared as witnesses in this performance. The legal performance which followed the siege of the Forestry Commission was, in short, unremarkable: a lost opportunity for dramatic re-enactment, passionate oratory and continued media interest.

\textsuperscript{140} Ibid 89.
\textsuperscript{141} Ibid 83.
Chapter 10

Environmental direct action and the performance of law:
A comparative critique

When I was completing this thesis, in January 2008, two anti-whaling activists boarded a Japanese whaling vessel in the Australian Antarctic Territory waters in order to deliver letters, in which they advised the Japanese whalers of a Federal Court ruling on the illegality of their activities.¹ The activists were members of the Sea Shepherd, and their ship, renamed the Steve Irwin in December 2007 after renowned conservationist Steve Irwin, had been patrolling the waters of the Australian Antarctic Territory in pursuit of the Japanese whalers for the previous month.² The decision by the Japanese whalers to detain these activists drew the attention of the world’s media to the controversial issue of whaling. This incident highlighted the strategic possibilities in using direct action performances to complement or enhance the impact of current, past or potential legal performances. Similarly, legal performances can enhance or extend the impact of direct action performances, as I explain in the next chapter. However, in this chapter, I want to focus upon the fundamental differences between the pre-rational play of environmental direct action, which is chaotic, disorderly and anti-structural, and the rational play of legal performance.

The play of environmental direct action is an expression or physical enactment of the philosophical beliefs and value systems of radical environmentalists. On the other hand, there are very few attributes of legal performance, even in those cases which result in a positive outcome for environmentalists, which support an ecocentric discourse. Direct action is psychologically empowering for activists; participation in a legal performance usually is not.

Furthermore, direct action is an outsider strategy while participation in legal performances is an insider strategy. Activists who seek political change through direct action performances can avoid the ideological compromises and pitfalls involved in adapting to the alien terminology of legal discourse. On the other hand, as outsiders, activists are also subject to the punitive impact of law.

Direct action can be viewed as a carnivalesque expression of an alternative value system, an eruption of pre-rational play which does not change the status quo. Rather, such performances have a cathartic effect on participants, and reinforce the existing social and political order. From this perspective, there is an unexpected symmetry, a symbiosis, between direct action performances and the performance of law. Alternatively, direct action can be viewed as an agent of radical social and political change, in ways which the conventional performance of law can never emulate.

Bodies anchored in place: The evolution of an ecocentric discourse

Legal performances require live participation by real actors; live performance is, as Auslander has emphasised, central to the law.\(^3\) Yet the bodies of participants are not intended to be a central part of legal performances. The body of the complainant or litigant disappears; it is ‘a mere spectre behind the text.’\(^4\) The bodies of legal practitioners, the performers themselves, are constrained in costume, appearance and actions, almost anonymous in their uniformity. Participants in legal performances are, in fact, subordinate to that mythical creation, the law. Clearly there is no correlation between the corporeal experience of participants in legal performances, and the legal and other issues at stake.

In environmental direct action, however, the ‘corporeal intervention’ by activists is a critical part of the performance.\(^5\) Foster argues that activists use their bodies to ‘[choreograph] an imagined alternative’.\(^6\) One participant in the Franklin blockade has described the entry of a group on to Hydro-electric Commission land as ‘thirty or so people putting their bodies where

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\(^6\) Ibid 412.
their convictions lay’. It is often the commitment to physical participation in a protest which creates a sense of freedom, self-empowerment and community, and many protesters train their bodies for participation in protest events. As Peta Tait puts it, the bodies of activists are both ‘emotionally provoked and provoking’.

In environmental protests, the engaged body assumes an added significance. Protesters place their vulnerable bodies between death-dealing machinery and other living non-human species in defiant challenge. They are prepared to risk their lives for other species and this is a tangible demonstration of their commitment to the discourse of ecocentrism, according to which humans do not dominate nature but co-exist with and within nature. The bodies of protesters, sitting in trees, buried in earth, perched on tripods, blocking roads, spread across a river in yellow duckies, represent ‘ecocentric bodies’; they are ‘bring[ing] into being an ecocentric perspective’ and thus challenging the dominant discourse of industrialism.

Protesters are prepared to be physically marked by violence from police personnel, loggers and other workers angered by their corporeal interference, and sometimes they are. David Burgess, who later attained notoriety as one of two activists who painted ‘No War’ on an Opera House sail, has described the terrifying experience of being thrown from ‘the first tripod ever used in blockades’ by police personnel and loggers in the south-east forests of New South Wales, and experiencing temporary paralysis in his lower limbs. The violence directed towards other species becomes tangible, threatening and very real for activists who interpose their bodies between machinery and trees. They will not retaliate if manhandled because they have embraced the tenet of non-violence. Yet, in most cases, activists emerge unscathed after being extricated from tripods, bipods, trees, logs, pipes and other obstacles. It is not their vulnerability which deflects violence. Their only weapon is what Victor Turner has called the ‘dangerous harmlessness’ of play.
In the performance of law, violence against nature remains an abstraction. It is usually not even a legal transgression. Patricia Wald states that violence against the environment is ‘only a fledgling idea in the law, implemented sporadically in practice’. The corporatised bodies in the courtroom are interested only in procedural irregularities in the infliction of this violence. There is no physical risk in such performances, no enacted relationship between this state-sanctioned violence and vulnerable living flesh. Direct action shares similarities with political theatre in that, through direct action and theatre, performers attempt to ‘pull away the Phobic mask’ and reveal the violence ‘concealed by state representational silence’; in legal performances, the Phobic mask remains firmly in place.

In environmental direct action, the vulnerable bodies of participants are anchored in place. De Luca writes that ‘place is the keystone to resistance to industrialism now and then.’ Three of the four protest events discussed in the case studies took place in the disputed area of wilderness. De Luca describes the techniques by which radical environmentalists physically embed themselves in a region and create a corporeal, physical relationship with place: ‘burying themselves in the ground, perching in trees, hugging trees and living in these areas until forcibly removed’. At Terania Creek, in south-west Tasmania, and in Chaelundi State forest, blockaders demonstrated a strong and passionate connection to place by adopting such strategies.

In the fourth case study, the protest event was deliberately displaced from the forests and transplanted to the incongruously artificial, man-made environment of the Forestry Commission offices. This was an unusual NEFA protest because it was performed away from a particular contested forest. However, as a participant has explained, the blockaders had been fruitlessly protesting in endangered old growth forest in ‘the hardest fought, most frantic and probably most important year of the New South Wales old growth struggle’. NEFA brought the blockade to Sydney in an audacious performance designed to recapture the attention of the media and the government.

19 De Luca, above n 11, 159.
20 Ibid 160.
21 Edited transcript of interview with Tim Somerville, in Rogers, above n 14, 175.
Legal performances, on the other hand, are overtly separated from place. The Land and Environment Court, the High Court, the magistrate’s court and the inquiry room are far removed from places in dispute; they are what Victor Turner would describe as liminal or threshold spaces,²² physically divorced from the conflicts which are resolved therein. In these spaces, ‘a distanced replication’ of the conflict is presented.²³ Judges and commissioners rarely undertake even fleeting visits to disputed areas and when they do, such visits involve a bizarre superimposition of courtroom procedures on a disputed area of wilderness. Suzi Russell describes with some amusement a short visit undertaken by Justice Angus Talbot and other participants in an ongoing legal performance to Wingham State forest as ‘a two day circus in the bush’; she has commented that ‘basically anything you do with a legal team is a circus, in that you’ve got their three barristers and then there was me, and all their solicitors and of course you can’t put the judge with one side without the others being there so you have to work out the planes and vehicles so they can all be together.’²⁴ The refusal on the part of the High Court judiciary to view photographs of the Franklin River suggests that the separation from place is deliberate. Place, and connection to place, are perceived as irrelevant to the abstract legal issues at stake in legal performances.

Drawing upon the work of De Luca, I have argued that activists engaged in environmental direct action are performatively enacting an ecocentric discourse, demonstrating through the placement or even the embedding of bodies in nature the fundamental tenets of this belief system. Legal performances, on the other hand, are clearly part of the dominant discourse of industrialism and reinforce a more conventional and anthropocentric value system, even when the outcome of such performances is positive for activist litigants. However, David Schlossman has pointed out that ‘activist groups, and the performances they create, can reinforce one dominant ideology even as they resist another’,²⁵ and this is worth considering in the context of environmental direct action. Often, the enactment of an ecocentric discourse through environmental direct action does not encompass feminisms any more than does the enactment of an industrialist discourse through legal performance.²⁶ Blockading takes place in a masculinist environment characterised by quasi-militaristic conflict and even militaristic

²² Turner, above n 16, 34.
²³ Ibid.
²⁴ Edited transcript of interview with Suzi Russell in Rogers, above n 14, 182.
²⁶ The exclusion of feminisms from the performance of law has been documented by many theorists. See, generally, Margaret Davies, Asking the Law Question. The Dissolution of Legal Theory (2nd ed, 2002) ch 6.
terminology. One need only read author Xavier Herbert’s stirring message to the Franklin Dam blockaders:

The only hope, not only of saving Terra Australis from eternal ruin, but of the terrestrial globe itself, rests with you brave hearts going into battle.\textsuperscript{28}

The performance of environmental direct action tends to reinforce a masculinist ideology, in which men are brave heroes and the role of women in providing their creature comforts is secondary. This is certainly the ideological context within which NEFA functioned. The disparagement of caring roles traditionally associated with women is also characteristic of legal discourse. As Margaret Thornton has pointed out, ‘the dominant thinking in the public sphere has been shaped by benchmark men – who traditionally do not care, but are cared for.’\textsuperscript{29}

NEFA spokespeople liked to describe NEFA as non-hierarchical, with little organisation and formality.\textsuperscript{30} However as a participant, I found NEFA to be a hierarchical and formidably masculinist organisation, dominated by a few powerful spokespeople who were, certainly in the early days, all male. NEFA as an organisation was heavily influenced by the masculinist culture of blockading. In putting forward this argument, I am not denying the existence of the ‘rich sense of camaraderie’ of which Aidan Ricketts so appreciatively writes,\textsuperscript{31} or the significant contribution of women like Sue Higginson, Carmel Flint and Suzi Russell, who all assumed leadership roles within the organisation at a later stage.

When the \textit{Good Weekend} magazine decided to write a feature piece on NEFA in 2003, I was horrified when Ricketts showed me a draft of the article. There was no mention of the many women who had contributed to NEFA’s successes. Ricketts, however, had not noticed this omission until I drew it to his attention. In certain respects, the performance of environmental direct action, despite its apparent radicalism, has reinforced particular dominant ideologies as effectively as the performance of law.

\textsuperscript{27} Aidan Ricketts, ““Om Gaia Dudes”: The North East Forest Alliance’s Old-Growth Forest Campaign’ in Helen Wilson (ed), \textit{Belonging in the Rainbow Region. Cultural Perspectives on the NSW North Coast} (2003) 139.
\textsuperscript{28} The Wilderness Society, above n 7, foreword.
\textsuperscript{29} Thornton, above n 4, 770.
\textsuperscript{30} See, for instance, Ricketts, above n 27, 123.
\textsuperscript{31} Ibid 124.
Ecocentric discourse in legal performances

Direct action is thus a performative enactment of various ideologies, including an ecocentric ideology. The vast majority of participants are engaged in performances which express their own values and philosophical position on humans, nature and wilderness. Yet, environmentalists, as we have seen, must also play convincing roles in legal performances in which there is little room for an expression of ecocentric values, performances in which the urgent need to save an area of wilderness must be translated into convincing legal arguments. The legal system is not attuned to considerations of deep or even social ecology. Victory in the courts often rests on minor technicalities, on procedural flaws in the decision-making process,\(^{32}\), on the presence of ‘a single numinous organism’,\(^{33}\) or even on the perceived need to adjust the balance of power between the Commonwealth and States by vastly expanding the ambit of the Commonwealth’s external affairs head of power.\(^{34}\)

In 1974, Laurence Tribe highlighted the ongoing difficulties which environmentalists confront in seeking to have ‘certain kinds of values’\(^{35}\) taken seriously. The anthropocentric, or as he put it, ‘homocentric’\(^{36}\) orientation of our legal system requires environmentalists to frame their arguments for the preservation of wilderness within the framework of human wants and needs.\(^{37}\) An obligation to save wilderness which arises from a reverence for other life forms must be ‘translated into the terminology of human self-interest’.\(^{38}\) Yet this ‘metamorphosis of obligation into self-interest and personal preference’\(^{39}\) is, he argues, far more than simply ‘disingenuous’;\(^{40}\) it is inherently dangerous. An environmentalist, by engaging in such rhetoric for the purposes of a legal performance, thus supports and ‘legitimate[s] a system of discourse which so structures human thought and feeling as to

\(^{32}\) See, for instance, Corkill v Hope (1991) 74 LGRA 33.
\(^{33}\) William Cronon, ‘The trouble with wilderness; or getting back to the wrong nature’ in William Cronon (ed), Uncommon Ground. Rethinking the Human Place in Nature (1995) 82; see, for example, Corkill v Forestry Commission of New South Wales (1991) 73 LGRA 126.
\(^{34}\) See Commonwealth v Tasmania (1983) 158 CLR 1.
\(^{36}\) Ibid 1329.
\(^{37}\) Ibid.
\(^{38}\) Ibid 1330.
\(^{39}\) Ibid 1331.
\(^{40}\) Ibid 1330.
erode, over the long run, the very sense of obligation which provided the initial impetus for his own protective efforts.’ 41

The deployment of insider strategies by radical environmentalists can thus undermine the credibility of the ecocentric perspective. Yet Douglas Litowitz argues that insider strategies can be effectively utilised by philosophers whose external perspective enables them to critique foundational legal concepts, and that such critics must be able to translate their claims into terms which carry weight within the legal system. 42 He provides examples: Foucault and Derrida, while critical of basic legal concepts, nevertheless invoked them in the context of particular controversies. 43 Marxist lawyers take steps to defend rights which they dismiss as ‘bourgeois myths’. 44 In his view, insider strategies can be reconciled with an external perspective. He argues that ‘a person can hold an external perspective on the legal system and yet switch approaches and appropriate the terms and concepts used by players inside the system.’ 45

Furthermore, the distinction between insider and outsider strategies is not always clear-cut. For instance, police liaison officers and legal observers in NEFA blockades are in an anomalous position, neither outsiders nor insiders, as they attempt to negotiate with police and bear witness to interactions between police, loggers and protesters. Aidan Ricketts, who remained outside the Forestry Commission headquarters during the ‘siege’ as NEFA-appointed police liaison officer, described himself as having ‘some kind of diplomatic immunity as [he] provided assistance to the inspector and chided the [state-appointed] Commissioner for Forests.’ 46 The role of NEFA legal observers was later formalised in the 1998 Forest Protests Protocol, an agreement signed by the NSW Police and NEFA, 47 but at my first blockade at Chaelundi, I was unclear about the parameters of my role as police liaison officer. I had brought a copy of my practising certificate with me and kept it in one of my boots; when the police arrived early on a Tuesday morning, I whipped it out and showed

41 Ibid 1331.
43 Ibid 31–3.
44 Ibid 33.
45 Ibid 34.
Inspector Beck my professional credentials. Later, at the Mebbin State forest blockade in 1995, my law school colleague David Heilpern hit upon a far more ingenious way of establishing our legal qualifications and expertise for the benefit of both police and loggers. At that blockade and thereafter, those of us with law degrees wore white t-shirts printed with the words ‘Legal Observer’ in large red letters.

In 1991, however, as a novice solicitor, I lacked both experience and confidence. I stood on the sidelines as the protest unfolded and assiduously recorded the details of all arrests in a notebook. For some reason, this instilled confidence in the blockaders, who frequently expressed relief at having their own lawyer present. My fellow police liaison officer, Ian Cohen, dealt far more adeptly with his dual roles as outsider and insider. After establishing an easy-going camaraderie with Inspector Beck, he made a lightning decision to scramble up a tripod after a difficult day and thus discarded his role as police liaison officer with ease. ‘Can’t you get him down?’ demanded Inspector Beck, irate at this apparent defection. Tempers were frayed all around. ‘What do you expect me to do?’ I snapped back.

The amalgamation of insider and outsider strategies is also evident when activists engage in direct action with the stated aim of law enforcement. NEFA consistently stated that its campaigns were designed to highlight and prevent ongoing breaches of environmental statutes by the Forestry Commission. As I have argued elsewhere, this position can dilute the political impact of their outsider strategies.\(^48\) Furthermore, the outsider strategy of direct action may in fact support the established political, social and legal order. One question which arises here is whether direct action is truly carnivalesque,\(^49\) and thus provides an outlet which protects the established order from challenges of a more revolutionary nature, or whether direct action in fact has a radical and pervasive political and social impact.

\(^{48}\) Nicole Rogers, ‘Law, order and green extremists’ in Rogers, above n 14.
\(^{49}\) Mikhail Bakhtin highlighted the political and social significance of carnival in his seminal work, *Rabelais and His World* (Helene Iswolsky trans, 1984).
The carnival of protest

I return here to the recurrent tension between, and dualism of, very different forms of play: sometimes described as play and playfulness,\(^{50}\) sometimes as rational and pre-rational play,\(^{51}\) sometimes as ludus and paedia.\(^{52}\) As Sutton-Smith has pointed out, some play genres require participants to follow the rules while in other play genres participants play with the rules. These opposite but not necessarily oppositional forms of play are exemplified in, on the one hand, the official, ordered play of law and on the other, the chaotic, disorderly play of carnival.\(^{53}\) Carnival is, as Victor Turner has argued, ‘propelled by \textit{paidia}.’\(^{54}\)

Certainly, there are carnivalesque elements in all direct action. Rawdon Wilson describes carnival as ‘a ritual social event, collective and egalitarian, that plays the unofficial voices of the people against the official voices of authority’.\(^{55}\) In direct action, activists assert their power as ordinary people to contest the authority of the state through riotous, disorderly playfulness. Arguably, protest events are increasingly carnivalesque in an era of postmodernism and globalisation\(^{56}\) and in the next chapter, I shall consider more closely one such contemporary event: the Chaser intrusion at APEC in 2007. The Chaser stunt is representative of the ‘new’ style of protest:\(^{57}\) utilising irony, satire and parody in an ongoing, pointedly reflexive fashion.

The inversion of roles, which characterises much direct action, indeed evokes the topsy turvy world of carnival. An inversion of roles can be found, for instance, in the photograph of a female protester massaging a policeman while wearing his cap, in the simulated trial of Prime Minster Malcolm Fraser by activists during the Franklin blockade, and of course, in the supplanting of a government department and installation of the People’s Commission for the Forests.

\(^{50}\) See Brian Sutton-Smith, \textit{The Ambiguity of Play} (1997) 148–150.
\(^{52}\) Roger Callois, \textit{Man, Play and Games} (Meyer Barash trans, 1979) 13.
\(^{53}\) See Sutton-Smith, above n 50, 81.
In NEFA’s takeover of the Forestry Commission’s offices, activists took on the role of law enforcers and assumed an authority to which they had no legal entitlement. Such inversions, which are reasonably commonplace in direct action, are impossible to imagine within the structured framework of a legal performance. In fact, when activists attempt to step outside their traditional legal roles as applicants and defendants, they can be subjected to subtle and not so subtle pressures to abandon the performance altogether. The experience of Suzi Russell, a NEFA activist without formal legal training, in the Land and Environment Court is enlightening.

Russell decided to represent the Wingham Forest Action Group herself in litigation against the Forestry Commission, after the group lost confidence in their barrister. She was both amused and irritated by the petty rebuffs she experienced from legal practitioners. The morning tea ritual, whereby the judge invited counsel for both parties to his chambers for morning tea, was hastily discontinued when she appeared at the bar table. The barrister representing the Forestry Commission would jangle coins in his pocket when addressing the court; since he stood next to Russell while she remained seated and his pocket was next to her ear, this noise effectively drowned out some of his words. She has commented that, in hindsight, it is clear to her that the judge could never have found in favour of the activist group. Judges rely for their status and authority on the hierarchy of the legal profession; few judges, therefore, would concede that someone without legal training or experience could defeat a barrister in a courtroom performance, irrespective of the merits of the case. A victory for the Wingham Forest Action group would have ‘been like a green light to community people and small people to have a go, take on the legal establishment and go ahead without lawyers.’

Richard Schechner argues that protest events are indeed carnivalesque: ‘festivals where the outcome was unknown’. Yet in his view, the carnival of street theatre is necessarily short-lived and of limited usefulness; carnival can provide a critique of the existing social and

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57 Ibid.
58 See Ricketts, above n 46, 78–9.
59 Edited transcript of interview with Suzi Russell in Rogers, above n 14, 181.
60 Ibid 183.
Chapter 10 – Environmental direct action and the performance of law: A comparative critique

political order but cannot replace it. Schechner observes, with reference to the French Revolution and Robespierre, that ‘the carnival indefinitely in power is the Terror.’

Following this line of reasoning, if protest and direct action events are indeed carnivalesque, they stand in an inverse relationship to legal performances but at the same time, complement and support such performances. As Rawdon Wilson puts it, ‘the official and unofficial are locked together’ in carnival, ‘joined in a discursive dance to make a complete, whole utterance’. This description of carnival and the official performance of the state as somehow interdependent is reinforced in Agamben’s references to carnival. He has suggested that there is a complicity, a ‘secret solidarity’ between law and carnival. According to Agamben, carnival is one of the ‘sudden anomic explosions within well-ordered societies’ which is well-tolerated by the established order, even though it features ‘unbridled license’ and the temporary suspension of the legal and social order. Admittedly, not all commentators find symmetry between the a-legal world of carnival and the continued authority of official performances. Mikhail Bakhtin identified the liberatory and even revolutionary potential of carnival and laughter. He argued that laughter ‘liberate[s], to a certain extent, from censorship, oppression, and from the State’ and that carnival has a subversive effect.

Baz Kershaw believes that Schechner overstates the carnivalesque aspects of direct action. He has pointed out that protest, unlike carnival, is not sanctioned by the state, and that protest events, in further contrast to carnival, are specifically directed towards mediatisation. Kershaw finds Schechner’s description of protest events overly simplistic, arguing that he focuses on the aesthetic impact of such events and underestimates their radical potential to instigate wide-sweeping political and social changes.

If the performance of direct action, whether carnivalesque or not, indeed poses a substantial threat to the established order, one would expect to find it policed, controlled and punished

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62 Ibid. 85.
63 Ibid.
64 Rawdon Wilson, above n 55, 38.
65 See Giorgio Agamben, State of Exception (Kevin Attrell trans, 2005) 71.
66 Ibid.
67 Bakhtin, above n 49, 93–4.
69 Ibid 101–2.
70 Ibid 107–8.
through legal performances designed to have a deterrent effect. In the next section, I shall consider legal responses to direct action.

Law’s response to direct action

Bonyhady has noted that governments across Australia introduced new legislative provisions in response to various protests.\(^71\) For instance, in response to Australia’s first environmental blockade, the Terania Creek blockade, the New South Wales government introduced amendments to the Regulations of the *Forestry Act 1916* (NSW), which enabled the State government to close forests and thus exclude protesters from logging operations.\(^72\)

Although the High Court uncovered a constitutional implied freedom of political communication in two landmark cases in 1992,\(^73\) this freedom does not appear to offer protection to environmental activists from legislative provisions which impede their engagement in direct action. In *Levy v Victoria*,\(^74\) Laurence Levy argued that the *Wildlife (Game) (Hunting Season) Regulations 1994* (Vic), which prevented activists or indeed any members of the public without game licences from entering permitted hunting areas on duck-shooting weekends, infringed his freedom to engage in a form of political communication, and were therefore constitutionally invalid. The judges conceded that political communication included direct action;\(^75\) according to Justice McHugh, political communication encompassed ‘false, unreasoned and emotional communications as well as true, reasoned and detached communications’.\(^76\) This revealing juxtaposition of adjectives suggests that the judge equated emotion, subjectivity and the irrational, qualities which distinguish and enhance the popular appeal of direct action performances, with falsehood; in contrast, reason and detachment, qualities valued in legal performances, were aligned with the truth. Lucinda Finley has noted

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\(^{71}\) Tim Bonyhady, *Places Worth Keeping: Conservationists, Politics and Law* (1993) 55. This sort of legislation is exemplified by the New South Wales *Forestry Regulation 1999*, in which a number of sections (ss 11, 13, 16, 32 and 69) prohibited various blockading and related activities in New South Wales state forests.

\(^{72}\) Ibid 49.


\(^{74}\) *Levy v Victoria* (1997) 189 CLR 579.

\(^{75}\) *Levy v Victoria* (1997) 189 CLR 579, 594–5 (Brennan CJ), 613 (Toohey and Gummow JJ), 622–3 (McHugh J) and 637–641 (Kirby J). Dawson J did not expressly acknowledge this point, and Gaudron J focused on the impact of the Regulations on freedom of movement rather than on their impact on political freedom.

that ‘law is a language firmly committed to the “reason” side of the reason/emotion dichotomy.’

One might also infer from this value-laden comment on the relative merits of different forms of political communication that Justice McHugh was unsympathetic towards activists whose motivation and public appeal is predominantly emotional. Indeed, all the judges displayed little inclination to protect direct action as a form of political communication from legislative interference. According to Chief Justice Brennan, non-verbal conduct may, by its very nature, require more legislative regulation than the speaking of words, which is not ‘inherently dangerous’.

Part of Levy’s argument was that activists opposed to duck-shooting attracted television coverage most effectively by entering prohibited areas in order to tend injured birds, and collect dead ones. The judges were prepared to concede that ‘televised protests by non-verbal conduct are today a commonplace of political expression’, and that the ‘unique communicative powers’ of television meant that ‘the constitutional implication protecting freedom of communication also protects the opportunity to make use of the medium of television’. However all the judges agreed that the Regulations, while effectively preventing the protesters from putting their message in a way that they believed would have the greatest impact on public opinion, or at the very least, diminishing the effectiveness of the protest, were valid. Despite their effect on the protesters’ freedom of political communication, the Regulations were reasonably appropriate and adapted to the legitimate purpose of protecting public safety.

It would appear from this reasoning that most legislation which impedes a protester’s freedom to communicate with the wider Australian public through protest activities will not infringe the constitutional freedom of political communication, provided that the legislation is

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82 Levy v Victoria (1997) 189 CLR 579, 625 (McHugh J), 609 (Dawson J).
appropriate and adapted to the purpose of protecting public safety, or in the public interest. Nevertheless, Bonyhady has recorded that in general few protesters have been convicted under such legislation, that most charges are dropped and that the penalties are usually insignificant.\(^{85}\) Some magistrates have adopted a sympathetic attitude towards protesters; in 1998, a magistrate made the following remarks in relation to the behaviour of Greenpeace protesters who climbed the roof of Kirribilli House to install solar panels:

> I accept that you were acting truthfully in terms of your own convictions and it is a mark of Australia’s devotion to liberty that this sort of thing happens and is respected in our community – I guess Australian society would be a lot duller if there wasn’t some people who were prepared to say what they think.\(^{86}\)

Even in late 2007, a magistrate, in dismissing charges against an environmental activist who had participated in direct action, is reported to have expressed sincere admiration for her zeal and commitment.\(^{87}\)

Furthermore, as I have documented in the case studies analysed, while hostile and/or punitive encounters between representatives of the state and protesters do occur, these are often counterbalanced by amicable expressions of mutual respect. Steve Durland, Action Director for Greenpeace USA, has contributed further heartening anecdotes of a prosecutor refusing to prosecute Greenpeace activists, and policemen who apologised for having to enforce the law.\(^{88}\)

On the other hand, many environmentalists allege that they have been the victims of violence on the part of loggers and the police, and that such violence is under-policed, while their own activities are rigorously monitored and controlled by the state.\(^{89}\) Environmentalists have mounted civil actions against their opponents and against the state in reaction to what they

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\(^{85}\) Bonyhady, above n 71, 59.
\(^{87}\) Steve Butcher, ‘Tree-sitting activist wins high praise from judge’, *The Sydney Morning Herald* (Sydney), 21–3 December 2007, 3.
perceive as ‘official indifference’. McCulloch cites as one example the action brought by seven environmental activists against the Victorian police; the police had used potentially dangerous pressure point holds during a non-violent blockade of a government office. She also analyses the implications of another civil action brought by environmentalists against loggers and the Construction Forestry Mining and Energy Union after a five day picket, perceived by protesters as ‘vigilante violence’, was set up around the protesters’ camp in the Otway State forest. In this incident, the police refused to intervene, much to the distress of protesters who felt that they had failed to respond to legitimate grievances.

Bonyhady has pointed out that civil actions against protesters for damages and injunctions constitute a far ‘greater hazard than the criminal law’. Admittedly, he wrote this before the introduction of the new anti-terrorism legislation; in the next chapter, I shall consider the continuing viability of environmental and other forms of protest in the very different political and legal environment created by the war on terror. Irrespective of whether the re-vamped criminal law is now enforced more vigilantly against protesters, civil actions in the form of SLAPPs (Strategic Lawsuits against Public Participation), including claims for compensation for financial losses suffered as a consequence of protest activities, continue to pose a significant problem for this group.

The phenomenon of SLAPPs was first identified and investigated by Penelope Canan and George Pring in 1984. SLAPPs target those who are active outspoken participants in public life, and are instigated by corporations and even by the state in order to silence such opponents. Typically, a SLAPP removes a public conflict from the realm of politics, redefines it in accordance with a legal or legal issues such as defamation, and relocates it

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90 Ibid 358.  
91 Ibid.  
92 Ibid 364.  
94 Ibid 355.  
95 Bonyhady, above n 71, 59.  
96 For example, in 2002, Harris Daishowa unsuccessfully sought compensation under the Victim Support and Rehabilitation Act 1996 (NSW) from conservationists who had prevented a woodchip carrier from loading at the port of Eden for over twelve hours. A recent claim for compensation for losses allegedly suffered as a consequence of protest activities is discussed in the next chapter.  
98 Sharon Beder, Global Spin. The Corporate Assault on Environmentalism (1997) 64.
within a courtroom. Although they seldom succeed in court, the legal outcome of such performances is irrelevant. The other consequences of a SLAPP are far more significant; a SLAPP usually leaves activists exhausted, traumatised, financially disadvantaged and disillusioned. The goal of a SLAPP, to silence criticism, is often achieved. In the course of Pring and Canan’s initial study, they saw ‘committed hard-charging activists become frightened into silence, supporters drop out, resources diverted, fund-raising wither, public-issue campaigns flounder and community groups die.’

Possibly the most infamous example of a SLAPP is the McLibel suit: a lawsuit undertaken by McDonalds against activists Dave Morris and Helen Steel who, however, remained undaunted, utilising the courtroom as another performance space in order to convey their message about the exploitative and environmentally destructive practices of this multinational corporation. SLAPPs are most common in the United States, but are increasingly to be found in other countries, including Australia. The most well-known recent example in Australia is the SLAPP instigated by Gunns Ltd (‘Gunns’), Australia’s largest forests product company, against twenty defendants involved in environmental direct action, including protesters, filmmakers and even Greens members of parliament. In the view of Rob White, the Gunns writ ‘constitutes the most sustained private attack on environmental activism of its kind in Australia.’

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100 See Beder, above n 98, 65.
101 Wells, above n 99, 458.
102 Pring, above n 97, 7.
103 See Beder, above n 98, 68–9; see also Dave Morris, ‘McLibel: do-it-yourself justice’ (1999) 24 Alternative Law Journal 269. According to Morris, one of the important questions which arose from the experience was: ‘In what ways can courts be transformed into arenas around which public debate and struggles can be stimulated and mobilised?’ (at 273).
104 See Brian Walters, Slapping on the writs. Defamation, developers and community activism (2003) 14–49.
Gunns issued the original writ in December 2004, claiming damages of $6.8 million on the basis that the company had suffered financial loss as a consequence of various protest events. The Gunns action has not met with a favourable reception in the Victorian Supreme Court. Justice Bongiorno struck out three versions of the statement of claim; in his view, the ‘various versions of [the] statement of claim were too complex, prolix and confusing – a state of affairs which, had it been permitted to continue, would have resulted in procedural confusion of a high order and enormous, perhaps insuperable, difficulties at trial.’

In fact, the delays are characteristic of a SLAPP, since the applicant usually is not interested in a legal victory; rather the goal of a SLAPP is to subject the defendant or defendants to ongoing financial and emotional pressure. Finally, in April 2007, Justice Bongiorno ruled that Gunns could proceed with its fourth statement of claim against 14 of the original defendants. The Greens members of parliament are among six defendants no longer targeted.

In his detailed analysis of the original writ, White observes that many of the claims made by Gunns against the defendants could in fact be made against Gunns itself: claims of extensive networking, participation in campaigns which disadvantage their opponents, and evasions and breaches of the law. Gunns objects to various aspects of environmental campaigning in the writ, including direct action which is characterised as ‘guerilla activities’. The SLAPP, however, has to some extent backfired, in that it has generated negative publicity and associated adverse economic consequences for Gunns.

In this section, I have considered legal responses to direct action performances. Direct action performances, of course, can also mimic and thus critique legal performances. Schlossman describes a United States guerrilla theatre piece designed as a response to the withdrawal of federal funding from health clinics which provided abortion advice. Actors representing pregnant United States Supreme Court judges ended up huddled on their knees, jeered at by the crowd. In another protest, a ‘maniacal’ judge tore pages from a book marked Roe v Wade but also concluded the piece as a quivering abject object on the ground. Perhaps it is

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107 Gunns v Marr (No 4) [2007] VSC 91.
108 White, above n 105, 269–270.
109 Ibid 270.
110 Ibid 272.
112 Ibid 105.
true to say, when comparing direct action performances with legal performances, that neither form of performance has the last word.
Chapter 11

Angels and Chasers: Performances of embodied resistance in a state of exception

And if, in the end, we have all other avenues denied to us, if we are left with no other alternative, if it takes standing on the road to the pulp mill site and placing our bodies between their machines and our home, we will stand there, in peace and with pride, united against hate and greed, joined in our love for our island. And if we are arrested and thrown in jail, then we will go to jail in our tens, we will go to jail in our hundreds, we will go to jail in our thousands, and Paul Lennon will have to build seven new prisons to house all the people who will come and who will keep on coming before they even attempt to pour the foundations of one new pulp mill.¹

In chapter nine, I focused on case studies which took place well before the war on terror. As I have already pointed out, it is unlikely that activists could today invade a government building with only minor consequences, or indeed that white middle-class protesters would be so readily labeled terrorists. Opportunities for ‘acceptable political discourse’ are often curtailed during a perceived crisis in security.² Activists who participate in the performance of protest today may reasonably fear a hostile, even punitive response in a political environment characterized by revamped sedition laws, unprecedented levels of personal surveillance, and increasing restrictions on political liberties. This environment has been described as the

Chapter 11 – Angels and Chasers: Performances of embodied resistance in a state of exception

In this chapter, I focus on two recent performances, the Chaser’s comic, even carnivalesque intrusion into the APEC restricted zone, and the Weld Angel’s protest in Tasmania, in order to answer a critical question: namely, are there performative spaces for effective political resistance in the contemporary Western political landscape?

On 6 September 2007, 11 people involved as producer, actors and supporting cast members in a fully mediatised performance for the Australian Broadcasting Corporation’s programme, The Chaser’s War on Everything, exposed to an Australian and international audience the vulnerability of Sydney’s seemingly formidable security apparatus during the Asia-Pacific Economic Co-operation meeting (APEC). They were arrested and charged under legislation enacted specifically for APEC, the APEC Meeting (Police Powers) Act 2007, and the resulting legal performance, already deferred on several occasions, now may or may not take place in March 2008 in the Sydney Local Court. Through an adept use of parody, improvisation and carnivalesque humour, the Chaser delivered a mortal blow to the APEC spectacle of power and authority.

The performance of the Weld Angel challenged another form of state violence: profit-driven violence directed at Tasmania’s old-growth forests. In March 2007, Allana Beltran, a young performance artist, dressed as an angel and climbed a tripod which blocked the road to a popular Tasmanian tourist attraction, the Tahune Airwalk. The effectiveness of this performance lay in its visual and symbolic impact. The state’s defensive response in suing Beltran for damages inadvertently amplified the symbolic impact of the original performance by representing, in itself, a potent demonstration of irrational and inappropriate commodification. The courtroom performance, eventually derailed by a technicality, involved a surreal collision between two opposing discourses. The proceedings formed part of the modernist discourse of industrialism, in which nature is objectified and commodified, and

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within which damages could be claimed for the arduous but necessary task of grounding an angel who had briefly disrupted the flow of tourism-generated income. This discourse was challenged in the forest and in the courtroom by Beltran, whose actions were an expression of an ecocentric discourse: radical environmentalists embed themselves in nature in a performative enactment of their fundamental belief that humans are part of, rather than separate from, nature.⁵

The legal outcomes of the Chaser’s satirical deconstruction of the pomp and paranoia of the APEC security machine, and of the angel’s silent indictment of modern capitalism and its self-generated wastelands, are largely irrelevant. These performative critiques of state authority and state violence have already been viewed by diverse and multiple audiences, and the legal proceedings enhance the impact of the original performances. I shall argue that the Chaser’s playful penetration of the apparently impermeable barrier which the state sought to erect between the outside world and the dignitaries who attended APEC, and the incandescently beautiful angel, who floated solemnly over the forest until cut down and grounded by men and machinery, attest to the continuing viability and power of performances of embodied resistance in today’s oppressive political circumstances.

The Chaser at APEC

The Chaser team’s first appearance at APEC occurred during the Student Walkout Against Bush protest. Chris Taylor, dressed as a policeman astride a particularly unconvincing pantomime horse, was forced to change his outfit after he was warned that impersonating a police officer was a criminal offence.⁶ This constituted merely a preliminary playful intervention.

On the following day, members of the Chaser cast and crew infiltrated the security barriers of APEC in what appeared, despite some subtle and unnoticed anomalies, to be an official Canadian cavalcade consisting of vans, a hire car, motorcycles and jogging ‘security guards’. The actors were forced to improvise when, unexpectedly, the police waved them through checkpoints and they penetrated the heavily guarded restricted zone which contained

⁵ Ibid 56–7.
President George Bush’s hotel and the Opera House. Chas Licciardello, in his guise as Osama bin Laden, emerged from the car on to Macquarie Street, whereupon the 11 participants in the performance, including actors, crew members and hire car drivers, were arrested and charged. News of the stunt, and images of Chas impersonating Osama bin Laden, spread rapidly around the world. The political fallout was immediate.

Representatives of the state solemnly emphasized the seriousness, and potentially fatal consequences of the escapade. According to Police Minister David Campbell and the Police Commissioner Andrew Scipione, the actors could have been shot by overly-zealous police snipers. Yet there were few signs of contrition from the Chaser team. Indeed, immediately after the incident, Craig Reucassel reportedly told journalists: ‘I have no comment. Other than to say they were the least talented members of the team, and the show will go on.’ The following day, the actors re-enacted the original performance, this time outside the APEC restricted zone; the vans and cars were replaced by black cardboard boxed shaped like limousines, with paper plates as wheels. On this occasion, the police correctly read this procession as a simulation and reacted accordingly; in the footage of this incident, which was aired on the The Chaser’s War on Everything the following week, the actors appear puzzled, openly questioning as to why a successful ruse on the previous day should now backfire.

The public reaction was mixed, and vocal. After the first performance, switchboards were jammed by radio talkback callers wishing to express a view. These views were in turn satirised by the Chaser; one of the actors telephoned a radio station and offered exaggerated and implausible suggestions about possible punitive responses. Footage of this also appeared on the show the following week. In a final flippant reference, executive producer Julian Morrow identified the pending court proceedings as yet another opportunity for revisiting and re-playing the original performance. Clearly, from the perspective of the Chaser, all

8 Paul Bibby, ‘Chaser pair thought gag would fail’, The Sydney Morning Herald (Sydney), 12 September 2007, 6.
12 Bibby, above n 8.
performances, including official and legal performances, are open to further performative interventions in the form of parody.

The Chaser performance was embedded within the ‘real’ performance of power and authority by the state; the state’s ongoing enactment of power contextualised and formed an integral part of the Chaser’s performance. Furthermore, the Chaser performance cannot be considered in isolation from its legal finale, the courtroom proceedings, which will quite possibly result in punitive consequences attaching to the Chaser’s perceived performative excesses. One may well speculate as to the reason why the legal proceedings were originally deferred on the eve of the federal election. It is plausible that this additional performance was postponed lest the Chaser further undermine official discourse, at a politically sensitive time, by exposing its incapacity to distinguish between embodied resistance in the form of parody, and embodied resistance in the form of crime and terrorism.

Context and setting

As Baz Kershaw has pointed out, we function within a ‘performative society’,13 in which the ‘performative quality of power’ is enhanced by hitherto unprecedented opportunities for mediatisation.14 APEC was one of the carefully choreographed performances of power in contemporary Western societies, a feting of world leaders against the glittering backdrop of Sydney skyscrapers, the Opera House and Sydney Harbour in a central business district emptied of its ordinary inhabitants. Ordinary people may have vanished but the police were everywhere, patrolling the streets, guarding barricades, poised as snipers in buildings and on rooftops, cruising the harbour on jetskis and in inflatable boats, and swooping overhead in helicopters.15

At a cost of $150 million,16 APEC was ‘the biggest security operation in Australia’s history’.17 By the end of the APEC week, there had been numerous incidents of invasive and

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14 Ibid 6.
15 Dylan Welch, ‘Chairman checks the seating arrangements’, The Sydney Morning Herald (Sydney), 4 September 2007, 10.
16 David Braithwaite, ‘The day bin Laden crashed APEC’s party’, The Sydney Morning Herald (Sydney), 7–9 September 2007, News 1.
even violent over-policing: journalists filmed by police,\textsuperscript{18} their notebooks scrutinised,\textsuperscript{19} a magistrate frisked while walking through Hyde Park,\textsuperscript{20} an accountant strip-searched, arrested and detained overnight after an attempt to cross Pitt Street,\textsuperscript{21} and a photographer knocked to the ground.\textsuperscript{22} An amateur pilot who inadvertently strayed into the APEC exclusion zone was intercepted by two fighter jets.\textsuperscript{23} The city was officially in ‘lockdown’ mode,\textsuperscript{24} an apt term which originated in prisons; certainly the levels of control and intrusive surveillance were reminiscent of Bentham’s Panopticon as described by Foucault.\textsuperscript{25}

The appropriation of public thoroughfares by the state was a key feature of APEC. Main roads were closed in deference to the passage of presidential cavalcades.\textsuperscript{26} Key streets in the Sydney central business district were transformed by the arrival of temporary but substantial steel fences and barricades, which delineated a succession of forbidden zones. To enter such a zone, let alone to perform in such a zone, was an act of transgression under the (also temporary) draconian \textit{APEC Meeting (Police Powers) Act.}\textsuperscript{27}

At the centre of this re-configured city was one of Australia’s most cherished icons, the Opera House. The Opera House, Sydney’s famous performance space, had been claimed as a site for radical performance when anti-war activists painted one of its sails with the words ‘No War’ in 2003. Now the Opera House was triumphantly appropriated by the state as the primary venue for what was designated by one journalist as ‘APEC: the costume drama’.\textsuperscript{28} The image of a sniper crouched on the sails of the Opera House was a potent symbol of this

\textsuperscript{18} David Marr, ‘Display of muscles from a thick blue line’, \textit{The Sydney Morning Herald} (Sydney), 6 September 2007, 9.
\textsuperscript{19} Sunanda Creagh and David Braithwaite, ‘Drop the fork, raise your hand’, \textit{The Sydney Morning Herald} (Sydney), 6 September 2007, 9.
\textsuperscript{20} Marr, above n 18.
\textsuperscript{21} Matthew Benns, ‘Jailed for jaywalking’, \textit{The Sydney Morning Herald} (Sydney), 9 September 2007
\texttt{<http://www.smh.com.au>}.
\textsuperscript{22} Paul Bibby, ‘Call for inquiry into clash that felled photographer’, \textit{The Sydney Morning Herald} (Sydney), 11 September 2007, 4.
\textsuperscript{23} Tom Allard, Alexandra Smith, Jordan Baker and David Braithwaite, ‘Cessna pilot flew into dogfight with RAAF’, \textit{The Sydney Morning Herald} (Sydney), 10 September 2007, 1.
\textsuperscript{27} Section 19 stated that a person must not, without special justification, enter a restricted area or any part of a restricted area. The maximum penalty was six months imprisonment or, if circumstances of aggravation existed in relation to the offence, two years imprisonment.
\textsuperscript{28} Huxley, above n 24.
appropriation. The Opera House, ‘newly-secured, locked-down and done-up’, had become the central performance site for APEC.

It was against this setting, in these contested spaces, that the Chaser actors invoked parody, mockery and all-encompassing laughter.

**The script**

Although, presumably, the Chaser had prepared a tentative script for their performance, the actors were forced to improvise due to the unexpectedly genial response of their police co-actors. Licciardello explained afterwards that their entry into the APEC restricted zone was unplanned; they had in fact assumed that the barriers would prove as formidable, as impermeable, as they appeared, and that they would be turned back at the first checkpoint. However, invited and even encouraged to transgress by their fellow actors, the Chaser team found itself in a difficult situation: their police co-actors, so easily duped, were clearly unaware of their role in what was intended to be a comic performance or parody. At what point, in the unscripted sequence of events which followed, should the actors abandon all pretence and reveal themselves as actors?

As Kershaw has observed, ‘the unexpected and the surprising are especially potent weapons for disrupting the spectacle and challenging authority’. This observation applies only too well to the impact of events as they spontaneously unfolded after the first checkpoint had been cleared.

**The actors**

David Schlossman points out that protesters are not the only ‘actors’ in protests. Spectators and authority figures frequently become part of the performance and can even, unintentionally, add to the political efficacy of the protest. For example, police personnel who

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29 Welch, above n 15.
30 Bibby, above n 8.
31 Kershaw, above n 13, 98.
wore rubber gloves in dealing with ACT UP (AIDS activists) visibly demonstrated the pervasiveness of public ignorance about the transmission of the disease.\textsuperscript{32}

In the Chaser performance, the APEC policemen became important participants although clearly they were co-opted into their role as actors without their knowledge or consent. Key figures included the policemen who waved the cavalcade through the first checkpoint, the policeman who assured Morrow that ‘the road is yours’, and his colleagues who guarded the barricade with a keen vigilance for external threats, but who remained apparently oblivious to the security breaches which were being enacted within the restricted zone, literally while their backs were turned. The police actors would become the objects of ridicule in the Chaser’s subsequent broadcast. Certainly, their faces were pixelated in belated deference to the dignity of these representatives of the state; Morrow explained that ‘we didn’t want to ridicule them individually.’\textsuperscript{33} However, their implausible gullibility was exposed to the watching audience of 2.24 million Australians,\textsuperscript{34} and an unknown number of international viewers who watched the footage.

The necessary participation of the ‘real’ policemen in the performance contributed to its subversive quality. Despite their numbers, costumes, weapons and assumption of authority, they failed to read or interpret correctly even revealing signs such as the ‘insecurity’ passes, or the fine print on the ‘APEC 2007 Official Sticker’ which stated that the car belonged to a member of \textit{The Chaser’s War on Everything}, and proclaimed the owner’s preference for trees, poetry and carnivorous plants.\textsuperscript{35} They were easily duped, lacking in vigilance, exposed as an unimpressive and insubstantial bulwark against more serious threats.

However, the leading role in the performance belonged to Osama bin Laden: not the ‘real’ Osama bin Laden, but who is the real Osama? Osama, the leader of the terrorists, the enigmatic embodiment of evil, the ever-elusive fugitive, is, for all of us in the West, necessarily a media construction. Licciardello re-invented this mythic figure as Osama the gatecrasher, a vaguely comic, harmless figure in a white robe who objected somewhat petulantly to missing out on an invitation to APEC and, far from being elusive and impossible

\textsuperscript{33} Michael Idato, ‘Chaser blitzes war on ratings’, \textit{The Sydney Morning Herald} (Sydney), 14 September 2007, 5.
\textsuperscript{34} Ibid.
\textsuperscript{35} Braithwaite, above n 16.
to capture, meekly followed Julian’s police escort down Macquarie Street despite the apparent reluctance on the part of these policemen to similarly manhandle him. In the subsequent broadcast, Licciardello interpreted this reluctance as further evidence of the incompetence of his co-actors. It could also be argued that the representatives of the state avoided physical contact with even a ‘fake’ Osama because the terrorist (and even more so, the leader of all terrorists) is necessarily ‘imagined as outside the law’, as ‘wild, aggressive and everywhere’.36

In the subsequent broadcast, the Chaser inserted footage of the ‘real’ Osama, speaking in a language incomprehensible to the vast majority of Western listeners, and by providing contrived subtitles, continued to develop their own construction of Osama: he is portrayed as not only petulant but also vain, objecting to Licciardello’s imitation beard as an imperfect representation of his own black and luscious appendage.

There are similarities here with Charlie Chaplin’s parody of Hitler, another mythic evil figure, in Chaplin’s film The Great Dictator. Chaplin saw Hitler as an ‘obscenely comic’ figure, like a ‘bad imitation’ of Chaplin himself. 37 He undermined Hitler’s own carefully mediatised performance as triumphant, all-powerful dictator by portraying him as an ‘inept tyrant’.38

By superimposing Osama’s image against the backdrop of APEC, and thereby demonstrating that Osama could so easily gain access to the most heavily guarded men in the Western world, including his formidable arch-enemy, President Bush, the Chaser deconstructed one of the central myths in the war on terror: namely, that enhanced surveillance and security and a corresponding curtailment of civil liberties are vital and effective strategies in defeating terrorism. By humanising Osama (Licciardello’s version is self-absorbed, incongruously offended by his exclusion from the meetings of the world’s leaders, and both biddable and vulnerable when confronted by armed policemen), the Chaser interrogated the mediatised construction of Osama.

37 Joel Schechter, Satiric Impersonations. From Aristophanes to the Guerilla Girls (1994) 68.
38 Ibid 65.
The art of satire, according to Schechter, is designed to expose a public figure as ‘a fraud’ and ‘directs irreverence towards adversaries’.\(^{39}\) Here, Licciardello’s satiric impersonation had a multi-layered effect; it directed irreverence not only towards the ‘real’ Osama, but also towards the mythic figure of evil constructed as a pivotal focus for Western fear and aggression in the war on terror, and furthermore targeted those who have contributed to the construction of Osama as such a mythic figure. The Chaser’s satirical re-invention of Osama compels its audience to reflect on whether the dominant Western construction of Osama is equally implausible. The true nature of the ‘real’ Osama remains unknown; indeed, Baudrillard might question whether there is a ‘real’ Osama.\(^{40}\)

**The Carnivalisation of APEC**

Mikhail Bakhtin has described the incorporation of carnival humour into literary discourse as carnivalisation.\(^{41}\) In his celebrated work, *Rabelais and His World*, he explored the nature of carnival and its significance in popular culture, and highlighted its subversive quality: the laughter of carnival ‘degraded power’.\(^{42}\)

Carnival requires popular participation; it is all-embracing and all-encompassing.\(^{43}\) In contrast, the Chaser performance was mediatised spectacle with a limited cast, designed for television.\(^{44}\) The televised broadcast alone reached a massive audience of 2.24 million, but did not involve popular participation, although as commentator Gerard Henderson pointed out with some ire, it was subsidised by Australian taxpayers.\(^{45}\) Nor will the public participate, except as an audience, in the courtroom sequel. Furthermore, true carnival is, in all its unruly subversiveness, sanctioned by the state. Clearly the Chaser performance, although approved by the Australian Broadcasting Corporation management and lawyers,\(^{46}\) was not. Carnival expresses the popular voice; although this particular performance may have indeed reflected popular frustration with the Sydney lockdown, the humour of the Chaser team is often elitist,

\(^{39}\) Ibid 4.

\(^{40}\) See Jean Baudrillard *The Gulf War did not take place* (Paul Patton trans, 1995).


\(^{42}\) Mikhail Bakhtin, *Rabelais and His World* (Helene Iswolsky trans, 1984) 93.

\(^{43}\) Ibid 7.

\(^{44}\) Similarly, protest events can be distinguished from carnival. See Kershaw, above n 13, 101.

\(^{45}\) Henderson, above n 7.

\(^{46}\) Idato, above n 33.
as its critics have observed, and therefore not carnivalesque at all. The Chaser performance was not true carnival. Yet the irreverent, irrepres sible, playful nature of the performance and the quality of the laughter it generated, festive, universal and ambivalent, were carnivalesque.

As in carnival, the Chaser created an unofficial world which challenged the ‘official world’ and the ‘official state’, and did so by staging theatre in the streets. As ‘the carnival feast of fools contrasts with the high culture’s celebration of kings’, so the Chaser’s insertion of an imitation Osama complete with cavalcade into the heart of APEC parodied and mocked the feting of world leaders. In penetrating the physical boundaries of APEC’s painstakingly constructed zones of exclusion, the Chaser symbolically violated the social boundaries which separate leaders from the people. Such a transgression of boundaries reflects the spirit of carnival.

One of the many ironies of the Chaser’s carnivalisation of APEC is that the state had used pre-emptive legal performances and the spectacle of power to ensure that the popular voice was contained and controlled during APEC. Students were targeted by police as potential troublemakers, and experienced increased degrees of surveillance in the months leading up to APEC. In March 2007, protesters who were involved in Melbourne’s G-20 demonstrations in 2006 were rounded up in dawn raids in Sydney and charged with various offences. Victorian residents charged in relation to the demonstrations were given bail conditions which prevented them from going to New South Wales, and thus were effectively kept away from APEC demonstrations. One of the main purposes of the APEC Meeting (Police Powers) Act was to exclude protesters and indeed ordinary members of the public from the APEC restricted areas in order to prevent ‘large, organised and sustained violent protests’, and the physical barriers were a tangible reminder of the legislative prohibitions. As David Marr put

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47 Henderson, above n 7.
48 Bakhtin, above n 42, 11–12.
49 Ibid 88.
51 Ibid.
54 Ibid 40.
55 Second reading speech by Tony Kelly, New South Wales Legislative Council Hansard, 21 June 2007, 1500.
it, the government’s message was ‘loud and clear: we don’t want demonstrators making a mess of the streets while the leaders of the world are in town.’

Furthermore, immediately prior to APEC, the New South Wales Police Commission obtained from Justice Adams of the New South Wales Supreme Court an order which prevented the Stop Bush Coalition from proceeding along a planned protest route, after the commander of the New South Wales public order and riot squad confidently claimed that ‘a full-scale riot’ and ‘a level of violence not previously experienced in Sydney’ would ensue unless such legal constraints were imposed. The actual protest took place well away from the APEC security zone, within parameters clearly defined by a ‘human chain’ of police personnel and police riot buses. In fact, the protest was peaceful despite the presence of hundreds of heavily armed policemen conspicuously missing nametags and in ‘Darth Vader gear’, dogs, machines for pumping gas, and even a black water cannon.

Thus, although popular protest did occur, and indeed had carnivalesque elements, including masks and the exposure of 21 bottoms in a tribute to the 21 APEC leaders, the state ensured that protest was contained within defined parameters and vigilantly over-policed. The state, represented by battalions of police personnel, maintained an authoritative performative presence for the duration of the popular protest.

The Chaser performers, much to their surprise, encountered no such constraints. Waved through checkpoints, assured that the road was theirs, the Chaser group effortlessly avoided disciplinary consequences until securely within the restricted zone, and within a few metres of President Bush’s hotel. It was only then that they abandoned the pretence that they were an official cavalcade. Without undue effort, the Chaser reversed the balance of power between the state and the people, and they invited their audience into the inverted world of carnival.

56 David Marr, ‘Crossing a line drawn on a map’, The Sydney Morning Herald (Sydney), 4 September 2007, 10.
57 David Braithwaite, ‘Court bans marchers from security zone’, The Sydney Morning Herald (Sydney), 6 September 2007, 9.
60 David Marr, ‘Lucky we all got out alive in Fear City’, The Sydney Morning Herald (Sydney), 10 September 2007, 7.
61 Ibid.
The political potency of the Chaser’s deconstruction of the authoritarian apparatus of APEC cannot be underestimated. Commentators have argued that the Chaser stunt contributed to the downfall of Howard, who spectacularly lost power in the federal election which followed in November.\(^{63}\) However, the political ramifications of the Chaser performance were broader than this. By importing parody and play into the closed off, orderly environment of APEC, the Chaser demonstrated that the game of power could be played quite differently; that it might, in fact, be nothing more than a game. Kershaw’s analysis of the political impact of protest performances is relevant here; to adapt his terminology, the Chaser ‘disrupt[ed] … the seductive sweep of the spectacle’ of APEC, and thus ‘present[ed] a reflexive critique of the machinations of authority … by exposing the assumption of power by the State as based ultimately on nothing more substantial than the chimera of presumption or a predisposition to violence.’\(^{64}\) The Chaser performance, a simulated transgression featuring a simulated cavalcade and a simulated Osama, exposed the security apparatus of APEC as itself a simulation, an insubstantial chimera.

As a simulated transgression, the performance still constituted a transgression. The Chaser’s enacted demonstration of the permeability of the barriers enclosing the APEC restricted zone, while clearly undertaken in the spirit of satirical play, nevertheless altered their legal status. The Head of APEC Investigations Squad, Detective Superintendent Ken Mckay, stated: ‘Who they are is irrelevant – they were charged like anyone else who breaks the law.’\(^{65}\) They were no longer merely actors or satirists; they had become offenders.

Baudrillard describes parody as ‘the most serious crime since it cancels out the difference upon which the law is based’:\(^{66}\) the difference between obedience and transgression. Those who simulate transgression will ‘unwittingly find [themselves] immediately in the real’.\(^{67}\) Parody is an affront to the literalness of law, to its ‘deadly seriousness’.\(^{68}\) Here the limitations of the discourse of law become self-evident; in other discourses, including literary discourse, transgression is recognized as play and is considered valuable and desirable.\(^{69}\)

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64 Kershaw, above n 13, 94.
65 ‘Chaser pranksters could have been shot’, *The Age* (Melbourne), 7 September 2007 <http://www.theage.com.au>.
67 Ibid 39.
69 Rawdon Wilson, above n 41, 30–1.
In the forthcoming legal performance, if it takes place, law will confront parody as transgression.

The legal performance

While it is impossible to speculate on the possible consequences of the pending legal proceedings for the 11 defendants, one outcome is inevitable: unless the state decides to drop the charges, the courtroom performance will extend or continue the Chaser’s performative engagement with the state. The Downing Street courtroom is yet another performance site, a site of contest between the Chaser and the state, where the original performance will be verbally and possibly visually re-created for the extended audience which views the inevitable media coverage. A punitive outcome is possible, but some magistrates may take a more lenient, even appreciative, approach. A precedent exists: earlier in 2007, magistrate David Heilpern (by a strange coincidence the same magistrate frisked by APEC policemen while walking through Hyde Park on his lunch break) refused to convict two protesters who, in their parodic guise as members of the Tranny Cops Dance Troupe, had been charged with impersonating police officers.

According to media reports, Sarah Harrison and Annika Vinson wore dark blue overalls which featured the words ‘Cop it sweet!’ to a demonstration outside Dick Cheney’s hotel in February 2007.\(^{70}\) They also wore caps decorated with ‘disco ribbon’, sported fake handlebar moustaches, and carried fluffy purple handcuffs.\(^{71}\) Members of the APEC forum squad claimed that they had impersonated police officers in an attempt to direct traffic. However when Harrison re-enacted her original performance in the witness box, the magistrate was reminded of Popeye. He pointed out that satire could be distinguished from a genuine attempt to deceive the irritable drivers involved in the incident. In his view, street theatre provided a ‘reasonable excuse’ for the attire of the Tranny Cops, and challenging authority figures was an acceptable, even necessary aspect of protest.\(^{72}\)

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\(^{71}\) Alecia Simmonds, ‘The battle of Briton all over again’, *The Sydney Morning Herald* (Sydney), 11 July 2007, 19.

\(^{72}\) Marr, above n 70.
The Tranny Cops performance was also described and even imitated by a police sergeant in the courtroom; this re-enactment met with laughter from the courtroom audience and provoked a further comparison, this time with a scene from the comic opera *The Pirates of Penzance*. The original street theatre of the Tranny Cops deployed performance as a means to mock the over-zealous policing of the APEC forum squad. The courtroom proceedings were a continuation of the original performance, and furthermore exposed these representatives of the state as humorless, sadly intolerant of play, and incapable of distinguishing between genuine attempts at police impersonation and satirical displays incorporating fluffy purple handcuffs. One commentator concluded that ‘the Tranny Cops were guilty of turning a uniform of the state into a piece of carnivalesque drag.’

The dilemma for the court in judging carnivalesque humour is this: to treat such humour as legal transgression invites further mockery and parody of an official voice.

The Weld Angel

In March 2007, Allana Beltran, a young performance artist now known as the Weld Angel, dressed as an angel and climbed a tripod which blocked the road to the Tahune Airwalk. She was protesting against the logging of the Weld Valley, an old-growth river valley adjacent to the Tasmanian Wilderness World Heritage Area.

Beltran’s protest was primarily a symbolic rather than a practical intervention in logging operations, although she did impede the flow of traffic to the Airwalk for a day and thus, in conjunction with activists located at other entrances to the Valley, also briefly prevented access by loggers. The act of blocking a road has of itself, as De Luca reminds us, a symbolic value. Blocking a road is both a literal and symbolic disruption of ‘a major artery of industrialism’. It is a gesture of defiance, a refusal to comply with the prevailing social code which privileges cars over people on roads. Here, however, ‘the industrial juggernaut’ was

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73 Ibid.
74 Simmonds, above n 71.
77 De Luca, above n 4, 161.
78 Ibid 162.
briefly halted by an angel. It is the other-worldly quality of Beltran’s performance which distinguishes it from other road blockades, tree sit ins and forms of environmental protest which are centred around the placement and performance of human bodies in particular places.

De Luca argues that radical environmentalists use ‘the rhetorical tactic of image events’ to challenge ‘the hegemonic discourse of industrialism’ and indeed, the Weld Angel’s performance endures as a compelling image: the image of an ethereal, white-skinned, white-robed angel with enormous feathered wings, perched aloft a crude wooden tripod against a backdrop of forest and sky.

The Weld Angel provided a powerful symbolic counterpoint to the profit-driven ethos which drives the destruction of Tasmania’s forests. Chaudhuri notes that ‘apocalyptic angels’ which are ‘closely linked to eco-catastrophe’ have begun to appear on the American stage and cites, as an example, the angel who appears in Tony Kushner’s Angels in America, who descends to earth through a hole in the ozone layer. The arrival of an angel in the Tasmanian wilderness was a particularly potent image, given that wilderness is loaded with spiritual and religious meanings in modern environmentalism. The Angel’s performance event involved an incongruous juxtaposition of images. We are accustomed to mediatised images of environmental activists in tripods; we do not expect to find an angel in a tripod. Condemning Tasmanian Forestry and Gunns with the piercing, pitiless, all-seeing gaze of an angel, protecting the wilderness by her mere presence, the Angel represented both judge and guardian. One of the recurrent myths of the environmental movement is that of ‘nature as avenging angel’: nature ‘reassert[ing] its own authority over all this human unreality’. Here, nature as avenging angel is exemplified in the Weld Angel. However, the Weld Angel was also vulnerable scapegoat. The power of the image was amplified by the cross formed by the poles of the tripod; this symbol invoked concepts of sacrifice and self-immolation.

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79 Ibid.
80 Ibid 51.
81 Una Chaudhuri, ‘There must be a lot of fish in that lake: Towards an ecological theater’ (1994) 25 Theater 23, 23.
82 Ibid 24.
The grounded angel had little mystique, despite valiant efforts by court supporters to mimic her costume.\footnote{Maria Rae, ‘Angel’s costs case delayed’, \textit{The Mercury} (Hobart), 5 October 2007 \url{http://www.news.com.au/mercury}.} However, as an image event, the performance remains untarnished and inhabits our imaginations as an other-worldly visitation. The image reminds us that there are alternative discourses to that of industrialism, in which nature is characterised as commodity; these include the Biblical discourse of good and evil, the Edenic narrative ‘in which an original pristine nature is lost through some culpable act’,\footnote{William Cronon, ‘Introduction: In search of nature’ in Cronon, above n 83, 37.} and the discourse of ecocentrism, according to which non-human species are as important as human beings.

Images of the Weld Angel have been widely disseminated. They have appeared on postcards, were reproduced on Senator Bob Brown’s website, and perhaps most tellingly, illustrated Richard Flanagan’s searing indictment of Tasmanian forestry operations and the collusion between the Tasmanian government and Gunns, a corporation which carries out the bulk of woodchipping operations in Tasmania.\footnote{Richard Flanagan, ‘The tragedy of Tasmania’ forests’, \textit{The Monthly}, May 2007 \url{http://www.themonthly.com.au}.} This article supposedly inspired the formidable and well-resourced campaign against the proposed Gunns pulp mill by businessman Geoffrey Cousins.\footnote{Alan Ramsey, ‘Vision Ltd: Turnbull yes to mess for 50 years’, \textit{The Sydney Morning Herald} (Sydney), 6–7 October 2007, 33.} Furthermore, images of the Weld Angel appear in media commentary on the surprising efforts by Tasmania Forestry to obtain reimbursement for the costs of earthing the Angel.

Shortly after her earthing, the Weld Angel was charged with two offences, committing a nuisance and failing to obey a police officer’s direction. She pleaded guilty, and received a one year behaviour bond.\footnote{Maria Rae ‘Police target forest angel’, \textit{The Mercury} (Hobart), 5 September 2007 \url{http://www.news.com.au/mercury}.} In September, however, a second legal performance was initiated by Forestry Tasmania and the Tasmanian police. The Weld Angel was sued for damages which were costed by reference to lost revenue on the part of Forestry Tasmania, and the police expenses in bringing her to earth.\footnote{Andrew Darby, ‘Police sue angel of the trees’, \textit{The Age} (Melbourne), 5 September 2007 \url{http://www.theage.com.au}.} Shortly before her first court appearance in early October, the police withdrew their claim after being told by lawyers that it was unlikely to be successful. Forestry Tasmania continued its pursuit of costs, although it reduced its claim to

\footnotesize{\begin{itemize}
\item Maria Rae, ‘Angel’s costs case delayed’, \textit{The Mercury} (Hobart), 5 October 2007 \url{http://www.news.com.au/mercury}.
\item William Cronon, ‘Introduction: In search of nature’ in Cronon, above n 83, 37.
\item Alan Ramsey, ‘Vision Ltd: Turnbull yes to mess for 50 years’, \textit{The Sydney Morning Herald} (Sydney), 6–7 October 2007, 33.
\item Andrew Darby, ‘Police sue angel of the trees’, \textit{The Age} (Melbourne), 5 September 2007 \url{http://www.theage.com.au}.
\end{itemize}}
$2000.\textsuperscript{91} At the time of Beltran’s first court appearance, there had been 57 other anti-logging protests in 2007 in Tasmania.\textsuperscript{92} In choosing a scapegoat, however, Forestry Tasmania and the Tasmanian police chose the Weld Angel.

Both performance and angels resist commodification. Performance art cannot be reproduced, cannot ‘participate in the circulation of representations of representations’ without becoming something other than performance;\textsuperscript{93} performance art has, therefore, been described as ‘economically subversive’.\textsuperscript{94} Angels are, of course, unearthly and therefore immune to commodification. What, however, happens to angels when they descend or are dragged to earth?

In Wim Wenders’ film, \textit{Wings of Desire}, angel Damiel incarnates as a human being in order to experience human time and sensation. He is immediately offered money by another earthed angel, in a friendly gesture of initiation. David Harvey has observed that ‘Damiel’s entry into this human world is now firmly located within the co-ordinates of social space, social time, and the social power of money.’\textsuperscript{95} The central irony of the Weld Angel’s extended performance is that her ‘earthing’ was so precisely costed and that, having been so powerfully judged and condemned by an angel, the state then enacted its own performance in judging whether the angel should pay the costs of her involuntary re-entry into ‘social space, social time, and the social power of money’.

Thus the state created its own legal performance and in so doing, inadvertently increased the impact of the Weld Angel’s original performance. Through this legal performance, the state sought to attach monetary value to that which cannot be quantified in economic terms, and thus demonstrated the dangerously disproportionate reliance on commodification which characterises the discourse of industrialism. In a fully mediatised event, within the arena of the courtroom, the discourses of industrialism and ecocentrism collided yet again. The intended impact of the legal performance was much more politically focused; according to the

\textsuperscript{91} Darby, above n 75.
\textsuperscript{92} Ibid.
deputy leader of the Tasmanian Greens, the state sought to deter activists from conducting future protests against the Gunns pulp mill.96

Performances of Embodied Resistance in a State of Exception

I have already considered the possibility that we are living in a state of exception. The question which I wish to address here is whether performances of embodied resistance such as those described in the two case studies above are viable in the new political environment created by the war on terror.

The Chaser actors are satirists rather than activists. Still, in its carnivalesque quality, their performance captured the flavour of protest in the postmodern era of globalisation. It could be argued that carnivalesque protest offers an effective mode of political critique in a state of exception. As Agamben has pointed out, carnival ‘represents a symmetrical and in some ways inverse figure’ to the state of exception.97 Roberto Da Matto argued that the central paradox of carnival is that ‘the law is to have no law’.98 Similarly, the state of exception is ‘the original structure in which law encompasses living beings by means of its own suspension’.99 If carnival, despite its similarity to the state of exception, lies in an inverse relationship to the state of exception, if carnival is, if you like, the flipside of the state of exception, perhaps carnival may offer unique political possibilities for resistance in a political environment in which arbitrary decision-making by the executive arm of government has replaced, at least in part, the rule of law.

The significant drawback to performances of embodied resistance are the legal and political consequences. Of course, not all performances of embodied resistance are transgressive. Performance takes on a transgressive quality when it involves entering contested places, as the Chaser entered the APEC restricted zone. Activists can thus transgress by enacting particular performances in a contested place, performances which would not necessarily be

97 Giorgio Agamben, State of Exception (Kevin Attrell trans, 2005) 71.
99 Agamben, above n 97, 3.
transgressive if enacted elsewhere. Alternatively, the nature of the performance itself may be transgressive.

Yet, ironically, the state’s deployment of criminal and civil law in an attempt to punish performer transgressors, and prevent further performative expressions of resistance, often contributes yet another layer of performance which enhances the impact of the original event. The Chaser team of actors, who are popular minor celebrities and can directly broadcast their views on their own show without relying on other media, are in a uniquely privileged position. It is unlikely that heavy penalties will be imposed given the public outcry which would ensue. The Weld Angel stated that she was unfazed by the state’s pursuit of damages, and added that she had been inundated with offers of financial assistance. There is no doubt, however, that the prospect of legal proceedings can deter performers who wish to resist through transgression.

The heavy penalties imposed on the activists who painted ‘No War’ on the Opera House sail suggest that the state, while partaking in the war on terror, is prepared to punish anti-war activists harshly. Few protesters would be willing to face nine months of periodic detention. Most people would baulk at paying the Opera House $151,000 for its cleaning bill, a cost which was imposed as an additional part of the court’s sentence. As a consequence of this protest, legislation containing a new set of offences specifically relating to the Opera House was passed by the New South Wales government.

Activists must also contend with the provisions of the anti-terrorism legislation which has been passed by the Federal and State governments. Certainly, protest events which do not lead to physical harm or risk to the public are specifically excluded from the definition of a terrorist act under the Federal legislation. Justice Whealy in one of his rulings in the Lodhi trial commented that the actions of the two men who painted ‘No War’ on the Opera House ‘would have been unlikely to have sustained a conviction under s 101 [of the Federal anti-terrorism legislation].’ Yet Australian protesters have been charged under provisions in other anti-terrorism legislation. In October 2006, six anti-logging protesters who chained

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100 Denholm, above n 96.
102 Sydney Opera House Trust Amendment Act 2004 (NSW).
103 Security Legislation Amendment (Terrorism) Act 2002 (Cth), s 100.1(2A).
themselves to a ship laden with woodchips became the first people charged under maritime
terror laws introduced as part of the International Ship and Port Facility Security Code,
designed to boost port and shipping security as part of the war on terror. Eventually, the
police agreed to drop these charges provided that the activists pleaded guilty to charges of
willful trespass. 105

There are disturbing signs that other activists are being surveilled and subjected to punitive
interventions by the state as part of the war on terror. 106 Scott Parkin’s confinement and
deportation by the Australian government in 2005 constitutes one such intervention. Parkin,
an American peace activist who had given workshops in Australia on non-violent political
activism and participated in demonstrations, was assessed as a security risk by ASIO and the
then Attorney-General Philip Ruddock, but the government was not prepared to explain why
they had formed this view. 107 Nor has our new Prime Minister, Kevin Rudd, demonstrated a
greater tolerance for protest. In 2007, Rudd described a group who demonstrated against Dick
Cheney as ‘a bunch of violent ferals’ who ‘should expect absolutely no sympathy’. 108

Environmental activists have been silenced in other ways. For instance, environmental groups
which engage in political activity were warned by the Federal government in 2005 that they
would lose their tax deductible status. 109 Funding for such groups was curtailed. 110 Other non-
government organisations dependent upon public funding have felt intimidated by a ‘culture
of threat’. 111

Although the prospect of legal proceedings and other punitive interventions on the part of the
state can deter activists, the significance of performances of embodied resistance in an age of
biopolitics, and in a culture of the spectacle, cannot be understated. Agamben adopts a

106 See, for example, Nicholas Riccardi, ‘FBI goes to war against activists’, The Sydney Morning Herald (Sydney), 28 March 2006 <http://www.smh.com.au>.
108 Marr, above n 53, 40.
111 Marr, above 53, 51.
characteristically bleak view of the potential for embodied resistance in a state of exception. He writes:

The ‘body’ is always already a biopolitical body and bare life and nothing in it or the economy of its pleasure seems to allow us to find solid grounds on which to oppose the demands of the sovereign power.\footnote{Giorgio Agamben, \textit{Homo Sacer. Sovereign Power and Bare Life} (Daniel Heller-Roazen trans, 1998) 187.}

However, Foucault reminds us that ‘there are no relations of power without resistances’ and that resistances ‘are formed right at the point where relations of power are exercised’.\footnote{Colin Gordon (ed), \textit{Michel Foucault. Power/knowledge. Selected interviews, Other writings 1972–1977} by Michel Foucault (1980) 142.} If the human body is ‘the site at which all forms of repression are ultimately registered’,\footnote{See discussion in Harvey, above n 95, 45.} the body is arguably also a primary site for resistance. Performances of embodied resistance can be subtle and oblique;\footnote{Dwight Conquergood, ‘Performance Studies. Interventions and Radical Research’ (2002) 46 \textit{TDR: The Drama Review} 145, 148.} such performances can be more effective than more direct forms of communication in conditions of oppression in which all communications are rigorously surveilled. Conquergood writes that:

The state of emergency under which many people live demands that we pay attention to messages that are coded and encrypted; to indirect, nonverbal, and extralinguistic modes of communication where subversive meanings and utopian yearnings can be sheltered and shielded from surveillance.\footnote{Ibid 148.}

In other circumstances of extreme oppression, one can find embodied resistance. For instance, people would silently point out houses of torture during Pinochet’s regime in Chile; since the gesture was so commonplace, it could not be policed or punished by the regime.\footnote{Kershaw, above n 13.} Eugene Genovese has famously documented the spaces for performative resistance on the part of African-American slaves whose bodies were owned, disciplined and controlled by American white slaveholders.\footnote{Eugene Genovese, \textit{Roll, Jordan, roll: the world the slaves made} (1974).} Conquergood points out that often oppressed people are denied written texts, and their culture of resistance therefore depends upon performance.\footnote{Conquergood, above n 115, 150.}
I would like to believe that after the graphic performance of terror and violence which horrified the Western world in September 2001, there are still performative possibilities for protest of a different, non-violent nature. Certainly, the political successes of the Chaser performance and the Weld Angel’s image event do not suggest otherwise. Perhaps the existence of spaces for the performance of protest in the contemporary political landscape indicates that we are not, after all, living in a state of exception.
Epilogue

In the prologue, I declared my intention to eschew grand truths in favour of localised investigations. In this final section, I shall provide an overview of my investigations, and some concluding remarks about the intersection between law, play and violence.

In Act I, I interrogated the contrasting functions and roles of legal and theatrical performances in the war on terror. In particular, I was interested in the way in which these two forms of play responded to, supported and justified the implementation of state violence. My initial assumption was that the terror trials in particular, and legal performances generally, were in fact complicit in the administration of state violence; in contrast, the theatre of dissent provided a performative rejoinder, exposing and challenging the administration of such violence. However, as I discuss in chapter four, sometimes the rule-bound play of the terror trials delivers an unforeseen critique of state violence.

This is one of the more interesting implications of the rule-bound nature of the performance of law. English historian E P Thompson, in his analysis of an English statute which served to protect the property interests of the ruling classes at the expense of the common property rights of the lower classes, has argued that the ruling classes effectively became the ‘prisoners of their own rhetoric’ by using the language of the law in defence of their property. It was, he states, ‘inherent in the very nature of the medium which they had selected for their own self-defence that it could not be reserved for the exclusive use only of their own class’. Similarly, the state, in utilising the orderly play and spectacle of law in order to denounce and punish suspected terrorists, is caught by its rules and conventions. The rules of law, whether they be rules prohibiting the use of evidence obtained under conditions of torture, or rules prohibiting the use of evidence obtained through oppressive conduct, or rules prohibiting false imprisonment, can empower the otherwise disempowered, the suspected terrorist, and transform the performance of the terror trial from an overt demonstration and vindication of state power into a very public critique of an overly-zealous

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1 The Black Act 1723, 9 George I c 22.
3 Ibid 264.
executive. In the spectacle of the terror trials, the ‘dull talk of rules’ can do ‘its invaluable historic work as a substitute for the dangerously inflated language of good and evil’.

My initial assumption about the nature of legal and theatrical performances was further compromised by the limitations on the subversive potential of the theatre of dissent. Factors such as restrictions in the numbers and composition of theatre audiences, the constraints of a competitive market place in which theatre functions as a commodity, and theatre’s incapacity to harness the power of the media in delivering its message to a broader audience, all play a role in diluting the radicalism of such performances. The theatre of dissent, while often delivering subversive messages, still functions within the established parameters of theatrical conventions, which constitute rules. This is possibly why the state takes a relatively lenient view of the theatre of dissent. Such theatre does not have the disruptive and uncontrollable characteristics of pre-rational play.

In the Interlude, and in Act II, I searched for more authentic expressions of pre-rational play, or playfulness. My intention in the interlude was to problematise and deconstruct accepted understandings of law and play. I looked for signs of pre-rational play in legal performances; it appeared, from analysing various judicial responses to manifestations of playfulness in the courtroom, that law is intolerant of such forms of play. The rational play of law is not prepared to encompass the arbitrary and the frivolous, satire and parody, the carnivalesque.

I then considered the potential in theatre to embrace the rational play of law, investigating performative attempts to undo the link between law and violence and re-present the text of legal performances in a different, playful context. The subversive impact of such documentary theatre lies in this uncoupling of law and violence, and the performative juxtaposition of legal language and conventions with unexpected images, behaviour and concepts.

In the final Act, I focused on a different form of violence and a different form of play. I considered violence directed towards the environment and the play of environmental direct action which, in its spontaneity, its unruliness and its indiscriminate adoption of irony, satire, parody and comedy, resembles pre-rational play. Direct action can overlap with the disruptive play of terrorism; similarly, direct action can ostensibly usurp the law preserving role of the

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state. Activists can appeal to higher laws, as do terrorists; alternatively, they can claim to be upholding existing laws, as does, or should do, the state. Despite this latter role, direct action offers more possibilities for a critique of state violence than do corresponding legal performances. In legal performances, the constraints of an anthropocentric, property-centred legal system prevent the courtroom from becoming a performance site in which ecocentric values can be expressed and enacted.

Yet direct action, like carnival, may function as a safety valve, providing an outlet for the expression of oppositional ideas without necessarily challenging the power and authority of the state. Despite the expressed defiance, the sense of empowerment experienced by participants, and the punitive response of the state, which may or may not enhance the overall impact of the performance of protest, the radical nature of direct action is debatable.

In contrasting legal performances with other forms of performance, I have highlighted limitations and restrictions in the play of law. Spariosu depicts an ongoing cultural contest between pre-rational and rational play; in the arena of law, rational play clearly dominates and pre-rational play is poorly tolerated. Law is used as a repressive instrument to silence, punish and prevent arbitrary and unruly pre-rational play in the form of terrorism, direct action and even, potentially, theatre. However, law can neither repudiate nor tame this form of play.

We find pre-rational play in the performative moment of the foundation of every legal system, in the manifestation of justice in all its unpredictable singularity, and even in defiantly anti-institutional, extra-legal performances like carnivalesque protest, which nevertheless support and complement the institution of law. Law, rule-bound by definition, may deny the centrality of pre-rational play; it cannot avoid it.

Pre-rational play, or playfulness cannot be successfully banned or suppressed by law. Victor Turner argues that it is protected by ‘its lightness and fleetingness’, by ‘its infantine audacity

7 Ibid 15–7.
in the face of the strong’. Playfulness is as fundamental to the human condition as is violence, and indeed, it provides us with the necessary resilience to evade violence. It involves a celebration of transgression, a rejection of rules and boundaries. It is the tool of trade of the joker, the jester and the fool, all of whom share a degree of immunity from the rule-bound violence of the law. In fact, it is worth noting that the two most unconventional figures and the two most consistent dissenters on the High Court bench in recent years, Justice Kirby and Justice Callinan, have been described as court jesters.

In searching for playfulness in law, we must adopt the role of fool and renounce the role of judge or bureaucrat, prioritise spontaneity over predictability, and search for elusive traces of justice.

And, in the spirit of playfulness, this Fool doffs her cap and takes a bow.

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