Notes

Chapter 1 Criminal Trials, Foucault, Discourse

1 For a detailed discussion of the Foucauldian approach as it is applied to the discourses of adversarial justice, see Chapter 5, *Discourse Defined*.
2 See Chapter 6, *History, Discourse and Genealogy: Displacing Truth Claims*.
3 For an extended discussion of the issues, see Chapter 1, *Courts of Therapeutic Justice*, and Chapter 4, *Therapeutic Jurisprudence and Problem Solving Courts*.
4 See Chapter 3 for an extended discussion of control orders for domestic law and order.
5 The European Court of Justice (ECJ) is the highest court of the European Union (EU) on issues of community law. National law is left for the domestic courts. The national courts may refer issues of EU law to the ECJ. The national court will then apply the decision of the ECJ within its own domestic framework, including other cases that may share similar facts or points of law than that decided by the ECJ. This process enables all courts within a national hierarchy to refer questions of EU law. The ECJ is bound to apply EU law similarly throughout the EU, in the attempt to bring a measure of consistency between national courts.
6 The European Court of Human Rights (ECtHR) is an international court bound to interpret the European Convention on Human Rights and Fundamental Freedoms (ECHR). Litigants will complain to the ECtHR where they feel that their rights under the ECHR have been violated. However, a decision of the ECtHR does not become part of domestic law unless it is ratified by the government of the member state. In England and Wales, for instance, the courts may take the jurisprudence of the ECtHR into account when formulating future decisions pursuant to s2 of the *Human Rights Act 1998* (UK).
7 For an extended discussion of the cases flowing from art. 6 of the ECHR, see Chapter 4, *Human Rights under the ECHR*.
8 Horwitz (1981: 1058) considers such modes of analysis as anti-historical, regarding them with a fervent cynicism, thus 'History came to be subversive at just the moment when, for reasons that are difficult and obscure, the analytic tradition committed itself to the suppression of contradiction to the basic attempt to reconcile the irreconcilable by showing that X and not X can exist at the same time, which is essential to demonstrating that an unjust social order is capable of being rational. The interesting and difficult question, the really complicated question of historical explanation, is: Why did this particular form of rationalizing analytic scholarship come, by 1900, to represent the dominant apologetic mode of thought? Why, in turn, was history given up as a mode of apology?'.
9 See Chapter 4, *Intervention Programs, Forum and Circle Sentencing*.
10 Other issues which have been cited as significantly modifying the criminal trial include the law and order debate and the need for greater expediency in criminal justice. Each of these issues is discussed in detail in Chapter 3.

11 Criminal law is used as a key reference here, however, whether the reforms introducing control orders or the establishing of alternative mechanisms for the hearing of evidence is seen to be a development in criminal law, or civil law, or the common law more generally, is open to debate. This issue is canvassed in Chapter 1 but is referred to throughout this book. Also see Chapter 3, *Control Orders – A Criminal Charge?*.
12 Indeed, this has led some to argue for a normative theory of the criminal trial. See Duff et al. (2007).
13 See Chapter 3, *Non-derogating Control Orders and the ECHR*, for an extended discussion of the relevant cases in English law. The House of Lords have addressed the use of preventative detention in *A v Secretary of State for the Home Department* [2005] 2 AC 68. In this case, the House of Lords declared s23 of the *Anti-Terrorism, Crime and Security Act 2001* (UK) is incompatible with articles 5 and 14 of the ECHR. The discussion in the book tends to focus on control orders, however, given that such orders have been said to usurp the criminal trial for an alternative means to justice and punishment (Fairall and Lacey, 2007: 1075).
14 The English authorities are discussed in Chapter 3.
15 See Chapter 3 for an extended discussion as to the extent to which non-derogative control orders under the English legislation may be considered a criminal charge.
16 For a further discussion of ASBOs and control orders for the restraint of domestic order see Chapter 3, *Control Orders, ASBOs and Domestic Order*.
17 See Chapter 4 for an extended discussion of victim rights under the ECHR.
18 The Act of Settlement 1701 (12 and 13 Will 3 c 2) provided for judicial tenure *quamdiu se bene gesserint*, or during good behaviour. Such standards reflect judicial tenure today, which requires a vote of both houses of parliament on the proven incapacity or misbehaviour of a judge.

Chapter 2 A Genealogy of the Trial in Criminal Law

1 See the discussion of the Assize of Clarendon of 1166 and local governance, below.
2 Warren (1973: 283) describes the ordeal by water as a process whereby the hands of the accused were bound under their bent knees, who was then bound around the loins with a strong rope, such that the rope formed a knot at the distance of the length of his hair. The accused was then let down into the water without a splash. If the accused sank he was pulled up and saved, otherwise the accused would be adjudged a guilty man by the spectators.

Chapter 3 Shifting Boundaries: Recent Changes to Criminal Justice Policy

1 See Chapter 2, *The Trial in Customary Law*.
2 As to other innovations involving the use of the jury, see Spigelman CJ's suggestion as to the expansion of the jury into the sentencing process, by

allowing the jury to make recommendations to the sentencing judge on the appropriate sentence that the offender should serve. This proposal was considered but ultimately rejected by the NSWLRC (2007) as inappropriate, as confidence in the justice system ought to be encouraged by further public education rather than direct participation. See Spigelman CJ, *A New Way to Sentence for Serious Crime,* Address for the Annual Opening of Law Term Dinner for the Law Society of New South Wales (31 January 2005).

3 Section 80 of the Australian Constitution 1900 provides that 'The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.'

4 See Chapter 3, *Infringements and Penalty Notices*.

5 See Chapter 7, *Substantive and Procedural Justice*, for a discussion of the rise of ASBOs in the context of human rights.

6 See *Gouriet v Union of Post Office Workers* [1978] AC 438 at 487, discussed in Chapter 3, *Charge Bargaining*.

7 See the discussion of *Thomas v Mowbray* (2007) 233 CLR 307 in Chapter 1.

8 Also see *Chu Kheng Lim v Minister for Immigration Local Government and Ethnic Affairs* (1992) 176 CLR 1 as to the power of the executive to detain without charge. In this case, it was held that the executive power to detain persons who arrive in Australia without an entry permit is a valid exercise of executive power. Brennan, Deane and Dawson JJ note, however, (at 27–28): 'In exclusively entrusting to the courts designated by Ch. III the function of the adjudgement and punishment of criminal guilt under a law of the Commonwealth, the Constitution's concern is with substance and not mere form. It would, for example, be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt. The reason why that is so is that, putting to one side the exceptional cases to which reference is made below, the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt. Every citizen is "ruled by the law, and by the law alone" and may with us be punished for a breach of law, but he can be punished for nothing else'.

9 See Chapter 7, *Substantive and Procedural Justice*.

Chapter 4 The Transformative Criminal Trial Emerges

1 See Chapter 1 for a discussion of the protective mechanism in place for rape victims in international law.

2 For an extended discussion of the statutory modification of victim rights in sexual assault and rape trials, see Chapter 4 *Human Rights and Statutory Reform*.

3 Art. 2 of the ECHR provides: (1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execu-

tion of a sentence of a court following his conviction of a crime for which this penalty is provided by law. (2) Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

4 Art. 6 of the ECHR provides: (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. (3) Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

5 Art. 8 of the ECHR provides: (1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

6 Also see the discussion of *Doorson v The Netherlands* (1996) 22 EHRR 330 in Chapter 1.

7 See Summers (2007) argument for the emergence of a criminal procedure that overcomes the normative boundaries of adversarial and inquisitorial processes, as discussed in Chapters 6 and 7.

8 Criminal Procedure Regulation 2005 (NSW) Sch 5, cl 7. For al list of offences for which intervention programs are appropriate, see *Criminal Procedure Act 1986* (NSW) s348.

9 Primary victims include persons or witnesses to an offence that have suffered personal injury as a result of an offence. Family victims include members of the primary victim's immediate family. See *Crimes (Sentencing Procedure) Act 1999* (NSW) s26.

10 Also see recommendation 3 of the New South Wales Law Reform Commission, *Sentencing*, Report No 79 (1996). Hunt J advocates the treatment of family impact statements in homicide cases along similar lines to those proposed by the NSWLRC.
11 The one exception recognised by Hunt CJ at CL may be where the primary victim dies a slow, lingering death. The circumstances of the offence would thus come to encompass family victims, who may come to care for the primary victim before death. See *R v Previtera* (1997) 94 A Crim R 76, 86.
12 Also see *Re Gangemi* [1971] QWN 19, *R v Allsop* [1972] QWN 34, *R v Johnson; Ex parte McLeod* [1973] Qd R 208.

Chapter 5 The Criminal Trial as Social Discourse

1 See *Barton v The Queen* (1980) 147 CLR 75; *Dietrich v The Queen* (1992) 177 CLR 292 at 299–300. As to art. 6 of the ECHR, see *Khan v United Kingdom* (2001) 31 EHRR 45; *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1; *Fitt v United Kingdom* (2000) 30 EHRR 480; *Windisch v Austria* (1990) (1990) 13 EHRR 281.
2 The Sixth Amendment to the Constitution of the United States reads: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.'
3 Also see *Davis v Washington* (2006) 547 US 813. In *Davis v Washington*, the United States Supreme Court ruled that the transcript of an emergency 911 call was not testimony and so the sixth amendment did not require the caller to appear at trial and be cross-examined.
4 The blurring of the public/private dichotomy may be taken to the extent that one can question whether it is fair to conceptualise clear public and private spheres. The focus on discourse attempts to debunk such concepts as taken for granted assumptions, at least in criminal law. What is offered instead is an interrelated concept of public and private that seeks to problematise the legal convention that separates life into spheres, constituting the terrain of certain jurisdictions such as criminal law and civil law.

Chapter 6 The Trial as Hermeneutic: A Critical Review

1 See Chapter 4. Non-derogating control orders have been characterised as non-criminal but this point is, arguably, debatable.
2 As to the centrality of the adversarial tradition in Canadian criminal law, see *R v Swain* [1991] 1 SCR 933.
3 Also see *Medellín v Texas* (2008) 552 US 491.
4 See Chapter 5, *Discourse Defined*.

5 Compare the *tribunal correctionnel* or *tribunal de police* in France and local or magistrates' court in common law jurisdictions in terms of the degree to which cases are dealt with by direction of the judicial officer over party representing the accused. See Hodgson (2006) and McBarnett (1981a, 1981b).

Chapter 7 Implications for Criminal Justice Policy

1 See *Crimes (Criminal Organisation Control) Act 2009* (NSW) s32(1); *Serious and Organised Crime (Control) Act 2008* (SA) s5(1).

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