ERASMUS MUNDUS MASTER
IN WOMEN'S AND GENDER STUDIES

"DOING JUSTICE DIFFERENTLY":

"Alternative" Courtroom Spaces & Practices in Contemporary Australia

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ABSTRACT

This thesis is situated at the crossroads of feminist theory, feminist legal theory, critical legal theory, critical race theory, feminist post-colonial theory, architectural theory, television studies, media studies and performance studies. Its aim is to detail the (predominantly) affirmative differences between "mainstream" and "alternative" courtroom spaces and practices. Means of determining these differences include personal observations, communication with professionals in the legal field, feminist phenomenology, embodied theory, standpoint theory and "politics of location".

In addressing five "alternative" courtroom spaces in contemporary Australia this thesis found instances where certain social categories of difference (i.e. gender, Indigenousness and age) converge to create and/or repeat certain patterns of legal inclusion with particular excluding affects. Under examination is the use of dominant normative ideas and concepts informing legal subjectivity – e.g. "victim", "objectivity" etcetera. New patterns emerge just as historical, cultural and (post-)colonial patterns are repeated. In the process of considering the theoretical and practical implications of inclusion (with excluding affects) I do not prioritise gender over Indigenousness or Indigenousness over age; rather I address intersectional moments of convergence of social differentiation as highlighting the patterns of dissymmetry regarding legal participation. Legal participation thus comes to mean legal inclusion (with excluding affects). As this thesis shows this inclusion is enacted on a range of levels, including architectural, procedural and technological.

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TABLE OF CONTENTS

LIST OF FIGURES VII

LIST OF ABBREVIATIONS VIII

PART ONE: INTRODUCING & SITUATING 9

1. INTRODUCTION 9
2. THREE LEVELS OF ANALYSIS 11
   - *2.1 Architectural 12*
   - *2.2 Procedural 13*
   - *2.3 Technological 14*
3. FIVE SITES OF ANALYSIS 14
   - *3.1 Koori Court 14*
   - *3.2 Less Adversarial Trial 17*
   - *3.3 Roma Mitchell Commonwealth Law Courts Building 18*
   - *3.4 Neighbourhood Justice Centre 19*
   - *3.5 Closed Circuit TV 20*
4. CONCLUSION 21

PART TWO: METHODOLOGICAL, CONCEPTUAL & THEORETICAL COMPONENTS 23

5. METHODOLOGY 23
   - *5.1 Aims 23*
   - *5. 2 Methods: Personal Observations, Personal Communication & Interviews with Professionals 25*
6. KEY TERMS/CONCEPTS 25
   - *6.1 Courtroom 25*
   - *6.2 Justice 26*
   - *6.3 Gender 29*
   - *6.4 Indigenous Belonging 31*
7. CRITIQUING (LEGAL) OBJECTIVITY 33

8. SITUATED KNOWLEDGE AND ACCOUNTABLE RESEARCH 36
8.1 Marginalisation *37*
8.2 Standpoint Theory *40*
8.3 Embodied Theory *42*
8.4 New Materialism *46*
8.5 Critical & Feminist Legal Theory *47*
PART THREE: ARCHITECTURAL 49
9. INTRODUCTION 49
10. RECONSIDERING THE PHYSICAL COURTROOM 52
11. INCLUSIVE COURTROOM ARCHITECTURE (WITH EXCLUDING AFFECTS). 54
12. ARCHITECTURAL AFFECTS 57
13. OUTSIDE WALLS 59
14. INSIDE WALLS 64
14.1 Affects of Artworks *67*
15. OBJECTS 71
15.1 Benches *74*
15.2 Sightlines *77*
16. CONCLUSION 83
PART FOUR: PROCEDURAL 85
17. INTRODUCTION 85
18. THE NEED FOR "ALTERNATIVE" COURTROOM PROCEDURES 91
18.1 Disqualifying Women's Voice & Testimony *91*
18.2 Disregarding Cultural Diversity *96*
18.3 Formatting Courtroom Behaviour *99*
19. THE RESPONSE FROM "ALTERNATIVE" COURTROOMS 106
19.1 Mediation & Restorative Justice *106*
19.2 Enactment of Indigenous Subjectivity *108*
19.3 Koori Court *109*
20. PROCEDURAL LIMITATIONS: SUSPENSION OF KOORI COURT 114
21. CONCLUSION 117
PART FIVE: TECHNOLOGICAL 119
22. INTRODUCTION 119
23. VIRTUAL PHENOMENOLOGY 121

24. TECHNOLOGICAL EMBODIMENT 123
25. TRANSPARENCY OF JUSTICE 128
26. EXPANDING THE BOUNDARIES 130
26.1 Dispersed Courtrooms 131
26.2 Protective Empowerment 133
26.3 "Vulnerable" "Re-victimisation" 134
27. CONCLUSION 137

PART SIX: CONCLUSIONS, RECOMMENDATIONS & FUTURE RESEARCH DIRECTIONS 140
28. ANALYTIC CONCLUSIONS 140
29. STEPS FORWARD 145

BIBLIOGRAHPY 147

LIST OF FIGURES

FIGURE 1: RMCLCB (STREET VIEW) 18

FIGURE 2: "THE BEND IN THE MURRAY RIVER" (FOYER OF RMCLCB) 66

FIGURE 3: "CONTINUUM" (RMCLCB) 66

FIGURE 4: CERAMIC BOWL 67

FIGURE 5: SQUARE "MAINSTREAM" COURTROOM (E.G. ADVERSARIAL TRIAL) 72

FIGURE 6: CIRCULAR KOORI COURT (AND OTHER INDIGENOUS COURTROOMS) 72

FIGURE 7:TRIANGULAR LAT COURTROOM 73

FIGURE 8: COAT OF ARMS (FRONT ENTRANCE TO RMCLCB) 101

FIGURE 9: (FROM RIGHT TO LEFT) TORRES STRAIT ISLAND, AUSTRALIAN & ABORIGINAL FLAGS 108

FIGURE 10: IMAGE OF JUSTITIA 129

LIST OF ABBREVIATIONS

NJC	Neighbourhood Justice Centre
RMCLCB	Roma Mitchell Commonwealth Law Courts Building
LAT	Less Adversarial Trial
CCTV	Closed Circuit TV
MMC	Melbourne Magistrates Court

Part One: INTRODUCING & SITUATING

1. INTRODUCTION

The aim of this thesis is to show that in the past decade or so there have been the beginnings of an affirmative shift from "so-called objective law"[1] to situated decision-making on a national level. Causes of this shift can be noted as an inspired response to international examples of community justice centres (e.g. Red Hook Community Justice Center in New York and The Community Justice Centre in North Liverpool) as well as reformative reactions to profoundly damaging national legal practices (e.g. Mandatory Sentencing of Indigenous people in certain areas of Australia). To demonstrate this shift I will analyse the emergence of five "alternative" courts in Australia. Namely;

(1) Koori Court (Victoria wide)

(2) Neighbourhood Justice Centre (NJC) (Melbourne, Victoria)

(3) Roma Mitchell Commonwealth Law Courts Building (RMCLCB) (Adelaide, South Australia)

(4) Less Adversarial Trial (LAT) (Sydney, New South Wales)

(5) Closed Circuit TV (CCTV) (Australia wide)

[1] See section 7 for definition and critique of "so-called objective law". Placing the entire concept of "so-called objective law" in quotation instead of just "objective" indicates my analysis of the perception of objectivity, not an actual stance of objectivity, and different approaches to it.

The central question in this thesis is: in what ways are these five "alternative" courts perceived to be "doing justice differently"? Using these five "alternative" courtroom spaces as my sites of research this thesis offers three main levels of analysis: architectural, procedural and technological. These levels also form the divisional framework for the three analytic parts of this thesis; i.e. *Part Three: Architectural*, *Part Four: Procedural* and *Part Five: Technological*. The status of the courts (listed above) as "alternative" stems from the overarching theme of this thesis, precisely, what I have come to call, "doing justice differently". Now, utilising the term "differently" implies a variety of things. Let me explain my strategy. Although my use of the statement "doing justice differently" is primarily a means of noting an affirmative shift from "so-called objective law", or impartial law, to partial and situated legal decision-making, I must mention here that "different" is not always necessarily positive. Permeating the concept of "doing justice differently" with (standpoint) feminist terminology "alternative" can thus be taken to mean a shift (or in the very least an attempted shift) to "better" (more on this later) courts and courtrooms. This brings me to the next point of who "alternative" courts have in mind when creating "better" courts and courtrooms. The three main categories of social difference in relation to the five courts under examination are: gender, Indigenousness and age. Let me say from the very outset that I do not consider these social categories to ever operate in isolation to, nor be removable from, one another or any other category or marker of difference in the "multiculturalist mantra" (Brown, 1995:61) of class, religion, geo-political location etcetera. Intersectional thought is one possible means of mapping markers of differentiation. Providing a workable definition of intersectionality, Davis writes:

> 'Intersectionality' refers to the interaction between gender, race, and other categories of difference in individual lives, social practices, institutional agreements, and cultural ideologies and the outcomes of these interactions in terms of power (2008:68).

I consider intersectionality – coined by Kimberle Crenshaw in the 1990s – a useful theoretical mode for my research, as it provides a means of mapping configurations of difference that assumes mutual affect and encoding from the very first instance.

2. THREE LEVELS OF ANALYSIS

In addressing five "alternative" courtroom spaces (see section 3) in Australia this thesis found instances where certain social categories of difference (i.e. gender, Indigenousness and age) converge to create and/or repeat certain patterns of legal inclusion with particular excluding affects. Also under examination is the use of dominant normative ideas and concepts informing legal subjectivity – e.g. "victim"[2], "objectivity" etcetera. New patterns emerge just as historical, cultural and (post)-colonial patterns are repeated. Similar to Michel Foucault's notion of power that always exists in both its forms (potentia and potestas)[3], this model of "including exclusion" and "excluding inclusion" suggests that acts of inclusion and exclusion are not simple linear lines of cause and affect. In the process of considering the theoretical and practical implications of inclusion (with excluding affects) I do not prioritise gender over

[2] The term "victim" is highly debated, especially within Gender Studies. I use this term because it is widely used within legal discourse. In scrutinising the use and implications of the term, and to indicate that I do not simply take the term at face-value, I always use it within quotation marks. Legally speaking, the following definition is provided: "victim", under the *Victim's Charter Act* 2006, is defined as "a person who has suffered injury or harm (or both) as a direct result of a criminal offence, whether or not that injury or harm was reasonably foreseeable by the offender" (*A Victim's Guide to Support Services and the Criminal Justice System*, 2009:43).

[3] For elaboration of potentia and potestas, and relevance to my research, see section 7, p.37. For an external reference refer to Braidotti's work, for example, *A Critical Cartography of Feminist Post-modernism* (2005:171).

Indigenousness or Indigenousness over age; rather I address intersectional moments of convergence of social differentiation as highlighting the patterns of dissymmetry regarding legal participation. Legal participation thus comes to mean legal inclusion (with excluding affects). As this thesis shows this inclusion is enacted on a range of levels, including architectural, procedural and technological.

Space is the central organising concept of this thesis, and, as I move through the three analytic parts, perception of the three spaces (i.e. architectural, procedural and technological) remains important. Legal subjectivity is produced and maintained differently via inclusion (with excluding affects) into "mainstream" and "alternative" courtroom spaces. Leading on from this, space is perceived differently, thus behaviour is affected and moderated accordingly, also differently. Proving an itinerary of this thesis for you, the reader, let me give an overview of how the three levels of analysis operate and the ways in which the five sites of analysis feed into the discussion as empirical examples of "doing justice differently". This overview is guided by three central questions:

(1) Which courtrooms feature in each analytic part and why?

(2) What kinds of different spaces does each courtroom produce?

(3) What differences does each courtroom make?

2.1 Architectural

Drawing upon empirical examples from four of the five "alternative" courtrooms (Koori Court, NJC, RMCLCB and LAT) *Part Three: Architectural* details the architectural shifts

towards "doing justice differently". This part of the thesis begins by reconsidering the importance of the physical courtroom and how the very architecture and design of courtroom buildings is imbued with power (both forms). Following on from this I address three significant architectural features of contemporary Australian courtrooms: inside walls, outside walls and courtroom objects. Section 13 *Outside Walls* (p.59) is concerned with spatial entitlement and the power buildings have to include and exclude courtroom participation. Section 14 *Inside Walls* (p.64) is more concerned with representational entitlement and deals specifically with the inclusion and exclusion of "Australian" and Indigenous artworks at RMCLCB. Section 15 *Objects* (p.71) details some of the modifications "alternative" courtrooms have made to the shape and design of courtroom benches. The affects of replacing "mainstream" square benches with circular tables in Koori Court and different seating arrangements in LAT mean that different sightlines are created. Following on, conversations and decision-making is encouraged between people who in "mainstream" courtroom spaces and practices would be prevented from making contact. Creating different spaces in "alternative" courtrooms highlights the very capacity of "doing justice differently".

2.2 Procedural

This part of the thesis documents the need for "alternative" courtroom procedures via three claims: that "mainstream" courtroom procedures (1) disqualify women's voice and testimony, (2) disregard cultural diversity, and (3) format courtroom behaviour. With these three affects of "mainstream" courtrooms in mind I analyse mediation and Restorative Justice (at NJC) as affirmative "alternative" avenues for reaching justice. As detailed in section 19.2 (p.108) and 19.3 (p.109) Koori Court is seen, on the one hand, to generate inclusive and

positive differences such as the role of Indigenous Elders in hearings, acknowledging traditional owners of the land and smoking ceremonies before the commencement of each hearing. On the other hand, in section 20 (p.114), Koori Court can be observed to contain serious limitations, particularly when it comes to matters involving women and children. Procedural limitations of Koori Court are examined through the suspension of the court for trials involving sex matters and family violence. Empirical examples from Koori Court features heavily in this analytic part, alongside other examples from LAT and NJC.

2.3 Technological

The analysis of courtroom technology complicated my analysis in determining affirmative differences between "mainstream" and "alternative" courtroom spaces and practices. CCTV was primarily introduced in Australian courtrooms as a protective means for "victims" giving evidence in a hearing. Just as other concepts can never operate in isolation to one another (e.g. potentia and potestas, inside and outside, inclusion and exclusion) I found that when it comes to the uses of courtroom technology protection becomes entangled with empowerment, "vulnerability" and "re-victimisation". Also under scrutiny are issues of courtroom visibly and the perceived affect this has on legal transparency and accountability. CCTV is the central "alternative" court under examination in this analytic part.

3. FIVE SITES OF ANALYSIS

3.1 Koori Court

Since 1999 Indigenous sentencing courts have been established throughout Australia. The first courts began as a response to the over-representation of Indigenous people in the

Australian criminal justice system (Marchetti & Daly, 2007). The Royal Commission into Aboriginal Deaths in Custody (established in 1987) produced a number of reports including the *Victorian Aboriginal Justice Agreement* (2000). This report detailed strategic planning with the aim of delivering reduced Indigenous contact with the criminal justice system. Key recommendations were made, one of which was the implementation of Indigenous sentencing courts.

Indigenous sentencing courts, as detailed by Marchetti and Daly (2007), differ from Indigenous justice practices and Indigenous customary law. Indigenous sentencing courts are not Indigenous controlled courts like, for example, in the USA or Papua New Guinea[4]. Rather, they remain within "mainstream" criminal and sentencing laws (Marchetti & Daly, 2007:419). This does not mean, however, that they remain within "mainstream" courtroom spaces. Indigenous courts are often located in the same building as other traditional trials, but are physically set up very differently. Everyone, including the magistrate, sits at the same round table and those present try to reach a sentence that avoids a jail term. A custom-made Circular Sentencing courtroom in Adelaide has attempted to eliminate the "intimidating and alienating" (Chief Justice Diana Bryant, 2006) affects "mainstream" courtrooms have on Indigenous people. In the opening speech of the Roma Mitchell Commonwealth Law Courts Building, in 2006, Chief Justice Diana Bryant listed some of the special features of the Indigenous courtroom. Standing apart from "mainstream" courtrooms these special features include circle seating, warm earthy tones, the use of woodwork, and Indigenous artwork.

[4] Exploring possibilities for Indigenous controlled courts in Australia is a definite future trajectory of this thesis.

Without taking these differences at face value this thesis considers the possible ways these special features enact "doing justice differently" (section 14, p.64).

Australian Indigenous sentencing courts are similar to other international legal schemes for Indigenous offenders, such as Circular Sentencing that originated in Canada. Indigenous courts now exist in seven of the eight states and territories in Australia (with Tasmania being the exception). These courts operate under state legislation and each state refers to these courts with a different name. These are;

- Circle Court (Australian Capital Territory and New South Wales)
- Community Court (Northern Territory)
- Murri Court (Queensland)
- Nunga Court and Aboriginal Court (South Australia)
- Aboriginal Sentencing Court (Western Australia)
- Koori Court (Victoria)

Koori Court is the central Indigenous court investigated in this thesis. As outlined in Koori Court pamphlets (e.g. *Koori Court Information Pack,* 2010) and repeated by Marchetti and Daly (2007:421) common features of Indigenous sentencing courts include:

- The offender must be Indigenous (for my elaboration and critique of what this means in historical and contemporary terms refer to section 6.4, p.31)
- The offender must have pleaded guilty (this is because some courts restrict their cases to ones where incarceration is the most likely outcome and defendants are deemed ready to change)

- The offender must agree to have the matter heard in an Indigenous sentencing court (refer to thesis section 19.3, p.109 for more details on this)
- The offender must be willing to come to Koori Court and talk about their story and join in the sentencing conversation
- The charge must be something that is normally heard by a magistrate
- The offender must be charged with an offence that does not involve family violence or sexual assault (section 20, p.114, explores the arguments and issues involved in the suspension of Koori Court for family violence and sex matters)
- The offence must have occurred in the geographical region covered by the court
- The magistrate retains the ultimate power in sentencing the offender (also refer to section 19.3, p.109 for the role Indigenous Elders play in Koori Court proceedings)

A really important point, and one which is often overlooked, is that Indigenous defendants can chose between Koori Court or "mainstream" court. Reasons for having matters heard in a "mainstream" court, as signalled above, can be due to living outside Koori Court boundary areas or pleading not guilty to an offence. Reasons for opting for a "mainstream" court hearing, as detailed by a range of experts involved in Koori Court, include not wishing to be confronted by Indigenous elders and members of the community (*Koori Court: A Sentencing Conversation*, 2007*)*. Koori Court often requires "involvement" that is not requested at "mainstream" courts. By "involvement" I mean things such as the defendant being directly involved in the hearing rather than being represented by a lawyer (see section 19.3, p.109).

3.2 Less Adversarial Trial

Characterised by a "search for something new" and a way to depart from traditional trials

(Justice Collier, *Less Adversarial Trial Education Package*, 2009) the Less Adversarial Trial (from here on referred to as LAT) began in Paramatta in Sydney. LAT is perceived as a way to "break out of traditional hearings" for trials involving separated parents (Chief Justice Diana Bryant, *Less Adversarial Trial Education Package*, 2009). Differences between traditional adversarial trials and LAT include magistrates not necessarily wearing wigs, standing not necessary when addressing the magistrate, and in the case of Justice Le Poer Trench's courtroom parents sitting opposite one another instead of both facing the judge (see figures 5 & 7, p.73). Justice Le Poer Trench strives for a more "collaborative approach" and believes "the way you set up your courtroom does add a dimension to that" (*Less Adversarial Trial Education Package*, 2009). The outcomes of this example of "alternative" courtroom setup are addressed in substantial detail in *Part Three: Architectural*.

3.3 Roma Mitchell Commonwealth Law Courts Building

Opened in 2006 in Adelaide, South Australia, the Roma Mitchell Commonwealth Law Courts Building (from here on referred to as RMCLCB) (see figure 1) has various functions. Operating mainly as a court complex, the conventional functions include trial hearings in ten courtrooms over five levels. "Unconventional" (Chief Justice Bryant, 2006:1) aspects include the considerable focus on the "uniquely 'Australian'" (Chief Justice Bryant, 2006:3) architecture and artwork. Issues of representation, multiculturalism and colonial hauntings are discussed in greater detail in the body of this thesis (see section 14, p.64 & 14.1, p.67).

Figure 1: RMCLCB (Street View)

Advertised as a landmark of the city of Adelaide, the court also functions as a site of tourism and an art gallery. Visiting the court complex in February 2010 for this research gave me face-to-face encounters with the space and functions of this court complex.

3.4 Neighbourhood Justice Centre

In an interview with a lawyer working at the Neighbourhood Justice Centre (from here on referred to as NJC) the following description of NJC was offered:

> It's a court that's one of a kind in Australia… People can have their cases listed there either if they live in the City of Yarra or have a strong connection to the City of Yarra. It's set up to be not just a court but also a diverse service provider. So whilst there are court proceedings, which take place in only one courtroom, the court aspect doesn't actually outweigh the other things going on there. There's also a salvation arm presence, a little café, drug and alcohol councillors, there's a housing person … from Home Ground, there's community correction officers, so if someone get's put on a community based order for offences before the court they just have to go back to the… court complex that they are already familiar with to report to their corrections officer. There are also two Koori justice workers and different community events are held there (Interview One, February 2010).

The main goals of NJC include: increasing community participation in the justice system, increasing offender accountability, improving identified community outcomes in the administration of justice (this includes improving confidence of "victims", defendants, witnesses and local community in the justice system), and modernising courts by "contributing to cultural and procedural change in the justice system" (2009:2). *Part Four: Procedural* engages in a nuanced reading of procedural and cultural aspects of "mainstream" and "alternative" courtrooms.

During a tour of NJC in February 2010 I was shown the entire complex including the "Remote Room". The "Remote Room" provides a live link-up to the courtroom for anyone who is required for a trial but does not want to physically appear in court. This is a significant example of NJC proclaiming the building as being "designed for 'victims' needs" (http://www.neighbourhoodjustice.vic.gov.au/site/page.cfm, 2010). Other examples of the building design "with victims' needs in mind" include "greater privacy and increased sense of safety" (http://www.neighbourhoodjustice.vic.gov.au/site/page.cfm, 2010). As outlined by NJC this is achieved via a separate entrance to the building for "victims" so that they don't have to come in contact with offenders, a separate waiting lounge and counselling area for "victims", a remote camera link to the court so "victims" can give testimony remotely, and a courtroom that is welcoming and comfortable (2010). *Part Five: Technological* explores these spatial and procedural developments through concepts of protective empowerment and "vulnerable" "re-victimisation". The "Remote Room" as an "alternative" courtroom space at NJC connects to the next "alternative" courtroom practice involving CCTV.

3.5 Closed Circuit TV

Closed Circuit TV (here on referred to as CCTV) is where the "victim" is in another room and presenting evidence to the court through a live televised link-up. The "Remote Room" mentioned above in section 3.4 is a prime example of this. The introduction of CCTV into Australian courtrooms was primarily as a provision to protect child "victims" or witnesses in court. Legislative provisions now exist so that CCTV is available for anyone defined as "vulnerable". It is believed that the use of CCTV reduces the trauma experienced by children, and particularly "victims" of sexual assault, during court appearances. Interestingly in the Australian Capital Territory it is mandatory for all sexual assault "victims" to give evidence

via CCTV. In the Australian Capital Territory two moves are made: first, people who have experienced sexual assault and labelled as "victims" and, second, "victims" must give evidence via CCTV.

Much of the predominantly feminist research on sexual assault testimony shows that giving evidence in court face-to-face is significantly more stressful and can "re-victimise" the "victim" more so than other modes of testimony, for example CCTV. Courtroom technologies, accordingly, have the potential to have a positive affect on those using it. As *Part Five: Technological* explores, this potential for courtroom technologies enacting "doing justice differently" does not automatically result in positive affect or change for those previously marginalised, silenced or excluded by "mainstream" courtroom spaces and practices.

4. CONCLUSION

Now, as Bruno Latour reminds us, "in law: suddenly, after months or years of waiting, the case has to be concluded. And this is not just a possibility but an obligation, which is inscribed into the law: a judge has to decide" (2004:795). This is a poignant remark, one which this thesis does not lose sight of. Indeed, "alternative" courtrooms "are using Australian criminal laws and procedures" (Marchetti & Daly, 2007:420). Nevertheless, as this thesis shows, "alternative" courtrooms create different architectural, procedural and technological spaces and ways of doing so. In other words, the focus of this thesis is not *what* decision is made (although this is still important), but rather *how* a decision is made. The focus on *how* "alternative" courtrooms are "doing justice differently" – in terms of

architectural, material, procedural, cultural and technological differences – allows an unfolding of new and different perspectives on patterns of inclusive exclusion and exclusive inclusion in the contemporary Australian courtroom. Let me demonstrate.

Part Two: METHODOLOGICAL, CONCEPTUAL & THEORETICAL COMPONENTS

5. METHODOLOGY

5.1 Aims

A new area of study is emerging which can be deemed "Courtroom Studies"[5]. Similar to this thesis, it has appeared from an overlap of interests from, and investments in, various disciplines. Combining objects of study, methods and theories, "Courtroom Studies" builds upon other interdisciplinary areas of study such as law and literature and feminist legal theory. Informing "Courtroom Studies" includes media studies (Crary, 1999), television studies (Andrejevic, 2003; Friedman, 2002; Kilborn, 2003) visual culture (Bloom, 1999; Rose, 2001), performance studies (Radul, 2008), feminist philosophy (Grosz, 1994 & 1995; Haraway, 1991a), international humanitarian law (Campbell, 2002), architectural discourse

[5] From what I can tell the terminology "Courtroom Studies" has never actually been previously used to denote an area or object of study. Studies such as a degree in Socio-Legal Studies do exist, for instance at the University of Sydney. The description of this area of study gives an indication of the development of "Courtroom Studies": "The Bachelor of Socio-Legal Studies is designed for students who are interested in studying and understanding legal ideas, institutions and practices from the perspectives of the humanities and social sciences. It is not a professional law degree, but an opportunity to engage with the ever-changing relationship between law and society using the methods of a broad range of humanities and social science disciplines, including history, philosophy, political science, sociology, social policy, performance studies, anthropology, literary studies, and economics" (http://sydney.edu.au/arts/future_students/courses/under graduate /socio-legal_studies.shtml, 2010).

(Massey, 1994; Mulcahy, 2007) and human rights discourse (Douzinas, 2009a, 2009b, 2009c & 2009d).

Over the past few decades various aspects of the courtroom have been addressed from different angles. Deconstructionists such as Nina Philadelphoff-Puren (2003a, 2003b) and Alison Young (1996) focus on re-examining legal transcripts from a feminist perspective. Artist and Social Theorist Judy Radul (2008) is mostly interested in drawing parallels between the theatre and the courtroom, thus exposing the performative nature of the courtroom. Legal Professor Linda Mulcahy (2007) is interested in the materiality of justice, that is, how power is physically inscribed into the material courtroom.

The aim of this research has been to address how Koori Court, NJC, RMCLCB, LAT and CCTV are perceived to be "doing justice differently". By analysing these five "alternative" courtrooms that have recently emerged in Australia I demonstrate that there has been the beginnings of an affirmative shift from "so-called objective law" to situated decision-making. Taking this analysis one step further I detail what makes "alterative" courts different to "mainstream" courts. The three levels of analysis in determining instances of "doing justice differently" are architectural, procedural and technological. It is my aim to contribute to "Courtroom Studies" with a particular focus on the transformative potential offered by "alternative" courtrooms in Australia. In this way my work documents change, is critical of both "mainstream" and "alternative" courtrooms, and displays a political edge to what I hope is "better" courtroom practices for those previously negatively affected by courtroom spaces and practices, specifically women, Indigenous people and children.

5. 2 Methods: Personal Observations, Personal Communication & Interviews with Professionals

The basis for the analysis of courts on the national level incorporates my initial perceptions from visits to these courts (i.e. from my "primary perception… 'my body'" (Rich, 1987:215)) (in other words, embodiment and experience), with interviews (anecdotal rather than quantitative/quantative), meetings and personal communication with a Melbourne based lawyer, a child psychologist, and legal researchers. I thus had multiple entry points into these courtroom spaces. *Fart Four: Procedural* explores the benefits and drawbacks of my position as a Gender Studies student in researching legal spaces and practices. Acknowledging certain limitations, I deploy Hill Collin's (1991) concept of the "outsider-within" as an informative and interesting way to explore these issues. "Outsider-within" can operate as a concept and means to generate multiple dialogues and coalitions and is, in Patricia Hill Collins's terms, "a position of strength" (1991:36).

6. KEY TERMS/CONCEPTS

6.1 Courtroom

This thesis is predominantly organised around the idea of courtroom space: architectural, procedural and technological. This division guides the three analytic chapters, however strict lines cannot always be drawn. Architectural developments, for example, can and do affect courtroom procedures, whilst technological developments necessarily require procedural change etcetera. At this point let me give my working definition of a courtroom:

> The *first* is a built environment (courtroom with judges' bench, witness dock, lawyers' tables, jury box, etc.) in a stable location. This environ structures and frames the court performances, including

> testimony, argument, judgment, and so on. The *second* would be the performative elements, including the costumes, rituals, affective and argumentative behaviours. The *third* component, which literally underwrites the other two, is the use of script in the form of jurisprudence, written argument, testimony, and judgment. Increasingly, "technology" has entered as a broad and unruly *fourth* element in the presentation, recording, and playback functions of the court (Radul, 2008:2 emphasis added).

Radul provides a succinct and workable definition of the courtroom – one that captures both the pragmaticism of a courtroom and potential for flexibility.

6.2 Justice

"If we can imagine the injustice
we can imagine its opposite.
And we can have justice"
(Prime Minister Keating, Speech, 1992)

I fully acknowledge that there are many difficulties in deploying a term such as justice. One of the greatest difficulties is defining the meaning of justice. There are many different uses and conceptualisations of this term, depending on cultural and political histories, geographical location, and being positioned as coloniser or colonised. These are just a few examples of the long list of the things informing definitions of justice. What is clear is that justice, just like other concepts already discussed, is located, positioned and, most certainly, partial. My aim here is to contextualise some of the theoretical, political and practical understandings and applications of the term justice in contemporary Australia. Given my research parameters I am not suggesting that this is an exhaustive analysis of possible definitions, uses and applications. Rather, I recommend some main ways in which the concept of justice has been deployed, and importantly, why the concept of justice is central to

my overall thesis.

Instead of dealing with theoretical, political and practical definitions and applications of justice separately, I look at the ways in which these overlap, speak to, and contradict one another. Politicians, such as previous Prime Minister of Australia Paul Keating, consider justice to be inherently connected to the acknowledgement of injustice. Speaking specifically about historical and ongoing colonial injustices in Australia he suggests that by imagining injustice we can imagine justice, thus "we can have justice" (Keating quoted on previous page). Similarly, transnational feminists[6] such as Ranjana Khanna (2003) appear to agree that this version of justice is concerned with solving inequalities. Solving inequalities has a certain ring to it, suggesting a political agenda with a necessary system of regulations and practices that aim for an equilibrium between injustice and justice. Commonly, this can be explained as crime and reparation. Grosz suggests that "this system of equivalences... is the foundation of systems of justice, and the means justice uses to achieve such an equivalence is punishment" (1994:132). According to this, not only is justice possible but the process of achieving justice can also balance the dissymmetry caused by injustice. Khanna, on the other hand, argues that a wrong is irreconcilable, particularly through legal punishment. This irreconcilability, as specified by Khanna, is on account of a re-inscription of ethics whereby ethics is removed from the realm of justice and placed firmly within the realm of law (2003:209). Khanna's ethical equation states that instead of there being a responsibility from one person to another (as in justice) there is now a responsibility from one person to a set of codes, rules and regulations (as in law). Justice, along these lines, is no longer ethical. Instead, the displaced ethical responsibility is deposited onto legal processes. Justice thus

[6] Transnational feminism can be broadly defined as critically interrogating normative multiculturalism, normative internationalism, transnationalism and globalism (Nagar & Swarr, 2010:59).

becomes the upholding of a legal set of rules, that is, laws to be obeyed and deviance from the law to be punished. When it comes to the concept of punishment it makes sense to turn to Foucault's extensive analysis and writings.

In *Discipline and Punish* Foucault gives the following description of punishment[7]:

> The council met in the centre; each officer made a report of his troop for the proceeding twenty-four hours. The accused were allowed to defend themselves; witnesses were heard; the council deliberated and, when agreement was reached, the major announced the number of guilty, the nature of the offences and the punishments ordered (1995 edition:177).

Foucault's emphasis on guilt and punishment, as a mechanism, at the conclusion of the trial is a central point – in fact, "the heart" – of both historical and contemporary "disciplinary systems" (Foucault, 1995 edition:177). Does justice, then, become synonymous with punishment within the disciplinary system of law? If this is the case, and if "punishment is what revenge calls itself" (Brown, 1995:71), then justice (as a mode of exercising disciplinary power) and law (as a site of exercising disciplinary power) continues to operate within the prevailing "eye for an eye" compensatory model. This model of justice – emerging out of a specific conception of injustice regarding fairness and the intent to make a wrong right – formats all people who participate in the processes of law and justice.

Intersecting Khanna's and Foucault's trajectories of justice suggest that justice is now located within law and the purpose of law is to solve inequalities with punishment. Justice can thus be observed to operate as a binary system. Precisely, law becomes a mediated site of

[7] It is worth mentioning here that Foucault is of course referring to a "Western" tribunal even through he does not state it per se.

exchange from injustice (from "victim") to justice (to "perpetrator"). The mediated site, as suggested by Foucault, is the ("Western") tribunal (or courtroom). Extending with Khanna's trajectory, what happens, however, when justice and injustice are irreconcilable, hence cannot be neutralised? If we accept that injustice is irreconcilable through justice then we are encouraged to conceptualise justice as "coming to terms" with a wrong. Shifting this from a theoretical consideration, this mode of conceptualisation calls for very different legal practices – precisely, "doing justice differently". Justice then becomes something greater than simply compensation and a guilty verdict. Section 19.1 (p.106), for example, explores particular "alternative" options such as Restorative Justice and mediation as possible ways to avoid this "eye for an eye" model. Thus, "alternative" courtroom spaces and practices are "doing justice differently".

6.3 Gender

I do not consider the concept "gender" to be anything less than slippery. As Judith Butler claims, gender "is in no way a stable identity" (1997:402). Despite this, gender (as a social category, concept and tool for analysis) remains a pivotal aspect of my research. Somewhat differing definitions of gender have emerged in feminist debates. For instance, gender can be taken as: a process (de Lauretis, 1987), positionings (Haraway, 1991a & 1991b), interpretive frameworks (Stanley, 1993), and social and signifying relationships of perceived differences and power (Scott, 1986). Rosi Braidotti contributes to gender theory, articulating gender as a cultural and historical product. Another distinct definition recognises bodies as sexed rather than gendered (Grosz, 1993 and Gatens, 1996). I approach gender (which in my analysis is not necessarily separated from sexed bodies), as a tool and site for analysis, in an intersectional (Crenshaw, 1989 and 1995) manner. This means gender can never be separated

from ethnicity, age, class, geo-political location, education (the list goes on). The compatibility of intersectional thought (refer back to section 1, p.9) with feminist legal scholarship is demonstrated in the introduction of Anne Bottomley's *Feminist Perspectives on the Foundational Subjects of Law* (1996). Bottomley states: "the need to think laterally, in terms of relations, through and over categories, has often been important in feminist analysis" (1996:4). Intersectionality can be seen to also operate in feminist legal analysis.

I maintain that gender theorists, and indeed this thesis itself, requires an intersectional approach to gender because in doing so it highlights other axes of social-cultural differentiation and the way in which these other axes relate to gender without repeating the essentialist gesture it argues against. In this way sexual difference theory coupled with an intersectional approach to gender effectively allows differences to be imploded from the very first instance. Taking an Irigarayian line, Braidotti (2004) charts this by emphasising sexual difference as differences between men and women, differences amongst women, and differences within each individual woman. A sexual difference approach is useful in my research as it allows particular lines of questions to be framed around diversity from the very first instance, and not added to the analysis at a later point. Indeed, definitions and lines need to be drawn. Mapping outlines of working definitions – for example "Indigenous belonging", "gender", "experience" – is a necessary component of researching and writing, however lines of difference can, and are, traced through these definitions. When I claim that "alternative" courts are "doing justice differently" (e.g. different courtroom bench design, acknowledging traditional owners of the land, or providing remote participation via technology) I immediately acknowledge that "alternative" courtrooms have responded to the need to accommodate difference and diversity simply because "mainstream" courts have not.

6.4 Indigenous Belonging

In almost all of the Koori Court websites and materials I collected the following was stated: "To be eligible for entry into the Koori Court, you must… be Aboriginal and/or Torres Strait Islander" (*Koori Court Information Package: An Offender's Guide,* 2010). More details on Koori Court will be given later, but it's worth mentioning here that Koori refers to Indigenous people within the geographical boundaries of the state of Victoria. Current day geographical boundaries are reminiscent of "initial colonial legislation that grouped Indigenous people… by reference to their place of habitation" (Gardiner-Garden, 2003:3). I wish to add here that this is in contradiction to the 1788 British colonial declaration of terra nullius (meaning no-ones land, or land belonging to no-one).

"Blood classification" was the legislative means of inclusion and exclusion to Indigenous belonging or identity from 1839 until the late 1950s (Gardiner-Garden, 2000:1). As blood[8] (in the literal sense) does not identify Indigenousness the legislation of "blood classification" was practiced through perceived skin colour. That is, belonging as being connected to race and so-called biological "visible differences" (Gunew, 2004:21). The late 1950s onwards saw a legislative shift from "blood classification" to "skin-colour classification" (Gardiner-Garden, 2000:1). Will Kymlicka (1989) presents a Canadian case that, interestingly, suggests that Canadian belonging is returning to "blood classification" rather than in Australia's (perceived positive) direction of cultural belonging. According to Kymlicka, "among

[8] Commemorating the national apology to the Stolen Generations in 2008 *The GetUp Mob* (comprised of ten Indigenous and non-Indigenous Australian musicians) released a version of Paul Kelly's song "From Little Things Big Things Grow". In this version, the final words on the track, spoken by an Indigenous elder, are: "All of us are one, because we are human. And if I cut you, you cut me, what comes out? Red blood, not different colour blood, only red blood. Yes."

Aboriginal peoples, the adoption of 'blood quantum' membership rules by some bands is a notable exception to the trend towards cultural definitions" (1998:96).

Both legislative means of determining Indigenousness was based on Aboriginal and/or Torres Strait Islander belonging and/or identity. In 1981 the Australian Government Department for Aboriginal Affairs published a report proposing a new definition. The Australian Government officially adopted the proposed three-part definition offered in the *Report on a Review of the Administration of the Working Definition of Aboriginal and Torres Strait Islanders* (1981) (Gardiner-Gardner, 2000:1). A legal operational example of this three-part definition (including Indigenous descent, self-identification and community recognition) is evident in the landmark case in the High Court of Australia *Mabo v Queensland (No. 2)* (1992)[9]. According to Justice Brennan:

> Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people (1992).

Some objections to the success and limits of the legal liberalism of this definition are, for example, the call for plurality in the recognition of Indigenous rights (Stacy, 1995).

[9] Commonly known today as the Mabo decision, this case was the first successful legal challenge to terra nullius. What followed was the introduction of native title into Australian law. Native title is a legal development involving two parts: the rejection of terra nullius, and the recognition of Indigenous rights and traditions of particular parts of the land. It recognised that Indigenous people can have a legal claim over land which they had a use or beneficial interest in prior to colonisation, and this use or interest continued or survived the acquisition of land during colonisation.

The shifting of legislative classifications and cultural definitions signals what a plethora of critical scholarship on race and ethnicity has continued to adamantly suggest. That is, as scholars such as Floya Anthias and Nira Yuval-Davis (1992) and Toni Morrison (1992) suggest, the "distinction of race and ethnicity is increasingly a blurred one" (Gunew, 2004:21). Extending this point, there is blurring between all categories of differentiation.

7. CRITIQUING (LEGAL) OBJECTIVITY

As indicated, in *Part One: Introducing and Situating*, this thesis provides a three level analysis of five "alternative" courtroom spaces and practices. It could be contended that this, predominantly, affirmative analysis of "alternative" courts sidelines the necessary analysis of the negative operations of "mainstream" courtrooms. Theoretical movements such as critical legal theory and feminist legal theory have been spearheaded by this kind of analysis, which focuses on the negative impacts of "mainstream" courts. Positioned within, and building upon, these (interdisciplinary) disciplines, with a shift towards an affirmative analysis of "alternative" courtroom spaces and practices I pose my central question: in what ways are "alternative" courts perceived to be "doing justice differently"? I deliberately use the term "perceived" as this incorporates more levels of experience than the more readily deployed terms of "vision" or "seeing".

Having said this, I consider my *focus* on "perceived" as not *blind* to the historical and cultural prevalence of the hierarchy of the senses in which vision dominates over all other senses (sound, touch etcetera). Evelyn Fox-Keller and Christine Grontowski bring a gender dimension to this hierarchy in *The Minds Eye* (1983). Various scholars offer their theoretical in*sights* into this. "Vision", according to Sara Ahmed (2006) may be considered closer to

"perception" in any event. For example: "I close my eyes. The other senses are inactive in relation to the table. I have now no perception of it. I open my eyes and the perception returns" (Husserl quoted in Ahmed, 2006:548). Donna Haraway, also commenting on the prevalence of vision, writes: "vision can be good for avoiding binary oppositions" (1991a:188) as well as the embodiment of vision allowing "us to construct a usable, but not an innocent, doctrine of objectivity" (1991a:189). Haraway's "doctrine of objectivity" leads to a rejection of any kind of pure objectivity. In the legal sense objectivity can, as the following quotation indicates, be viewed as objective. Kent Greenawalt outlines four possible ways that the law could be regarded as objective:

> (1) Addressing external acts, not thoughts and emotions; (2) taking acts as they reasonably appear, rather than examining intents, motives, and understandings; (3) viewing acts in light of what 'reasonable people' would be expected to do, not in light of what the particular individual might do; and (4) establishing criteria of liability and designing remedies and punishments with regard to general classes of people and circumstances, rather than individuals and particular situations (1992:4).

Feminist scholarship, particularly feminist science studies, has radically critiqued the notion of objectivity as an unbiased approach (in Haraway's terms a proclaimed "culture of no culture"). Instead, scholars such as Sandra Harding (2004) have produced a "doctrine of objectivity" that is *always* positioned, partial, situated and embedded. This approach is an attack on, for example, the legal form of objectivity that Greenawalt outlines. Other areas of scholarship that have rejected "so-called objective law" include legal realism, hermeneutics, feminist legal thought, and critical legal studies (Greenawalt, 1992:7).

In this thesis I do not utilise the term "objectivity", but rather I deploy the concept "so-called objectivity". By doing so, I signal my theoretical move (with practical applications) from the

pretence of "actual objectivity" (which is characterised by positionlessness and neutrality) to "so-called objectivity". Likewise, this research does more than simply creating "a feminist version of objectivity" (1991a:186). The result is that this thesis produces an embedded "material-semiotic" (Haraway's term) account of architectural, procedural and technological spatial and procedural shifts towards "doing justice differently".

As I indicated in the above section titled *Justice* (section 6.2, p. 26), in the general context of post-colonial reconciliation, there has been a shift in ethics from justice to law (Khanna, 2003). This displacement can be seen through the prevalence of responsibility to laws and rules rather than responsibility or accountability to individuals or the community. The focus of this thesis is on a "visionary" return to community participation, responsibility and a more localised "decision-making". This is conceptualised as a shift from "so-called objectivity" in "mainstream" courts to embodiment in "alternative" courts. This departure from "mainstream" Western law and emergence of "alternative" courtrooms and "decision-making" can be translated as Haraway's "visionary" or "utopian" in which "feminist objectivity means quite simply *situated knowledges*" (1991a:188). The Australian media has also deployed the term "alternative" to describe, for example, Koori Court. In 2008 *The Age* reported the first County Koori Court as "providing an alternative sentencing process for Aboriginal offenders" (July 30, 2008). Comparably, other scholars use the term "alternative" to denote a critique or move away from the traditional adversarial system. *Good Courts* (2005:39), for example, uses the term "alternative dispute resolution" to refer to a variety of "mechanisms for resolving conflict" such as mediation. Taking examples from NJC, other alternative "mechanisms" that come under this rubric are "restorative justice" and "community justice". My use of "affirmative" can be read along Ahmed's lines of "creative". "What follows 'creatively' from such critique" (the critique being feminist

philosophical approaches to social differences and how bodies inhabit space), writes Ahmed, is "in the sense of what the critique allows us to think and to do" (2006:544). In other words, potentiality. Australian fictocritical writer and theorist Anna Gibbs sheds light on the interconnections of potentiality and affect. As opposed to disaffection (mourning and loss) cultural studies, explains Gibbs, has taken up affect as an opportunity, a capacity of force, a means to thinking beyond horizons (2002:336). In the next paragraph let's connect these ideas of affect, potentiality and capacity to the concept of power.

Remembering that power always operates in both its forms (potestas and potentia), this part of the thesis pays homage to the "alternative" capacity of court initiatives and justice centres that are actively "doing justice differently". Potentia being positive, creative, active and empowering. Potestas being negative, constraining and restrictive. Utilising this particular conceptualisation of power in both it's forms is in reference to Braidotti's (1994, 2005) reading of the Foucauldian model of power that is never a single entity, but rather always in operation as two main forces – potentia and potestas. Reading affirmative spaces and practices in this way allows a multiplicity of viewpoints, perspectives and possibilities of "doing justice differently". Again, this is about the potentiality and capacity of diversity and difference.

8. SITUATED KNOWLEDGE AND ACCOUNTABLE RESEARCH

Since the 1990s there has been a strong feminist tradition of calling for accountable scientific and academic inquiry alongside self-reflexivity. Haraway calls this "partial perspective" – allowing accountability for both its "promising" (potentia) and its "destructive monsters" (potestas) (1991a:190). Calling for situatedness, locatedness and accountability this thesis is

inspired by feminists such as Haraway (*Situated Knowledges*, 1991a) and Adrianne Rich (*Notes Towards the Politics of Location*, 1987). Paraphrasing Braidotti (Lecture, October 28th 2008) "politics of location" emerged in the mid 1980s within a particular political and historical context. It was at this moment in which the feminist political movement became instutionalised in academia. "Politics of location" – with a particular focus on sexual politics, the material body, differences between women, and the specificities of women's lives – surfaced. Forged by feminists such as Rich, "politics of location" radically critiqued the notion of "woman". Encouraging critical, yet interactive, feminist thought, "politics of location" paid attention to the differences between women, calling women to not necessarily be responsible for their colour/gender/sexuality but to be accountable for what they do with it. Thus, "politics of location" became a critical and navigational tool in feminist thought. Location can also be articulated as standpoint. Let me now address the importance and applicability of standpoint theory to this thesis and how it can be deemed as situated knowledge.

8.1 Marginalisation

Much of the critical literature on courtroom practices suggests that "mainstream" courts have further marginalised minorities. In response to this I argue that "mainstream" courts have indeed been instrumental in systematically marginalising people of difference via over-representation as criminals and perpetrators and under-representation as "victims"[10]. As *Part*

[10] A problem here is that this over-representation and under-representation relies heavily on the categories offender and "victim". Contrary to the position just stated, it could be argued that in the legal arena "victims" are over-represented because of the title "victim". In other words, the complainant is always positioned as "victim". So, there could be an over-representation of "victims" and under-representation of complainants not defined by "victimhood". These terms are explored in greater detail in section 26.3 (p.132). Moreover,

Five: Technological shows "mainstream" courts are also often guilty of "re-victimising" "victims" in attempts to protect and empower them. "Mainstream" courts, nevertheless, have not *always* enacted further marginalisation. For as Rich reminds us, "'always' blots out what we really need to know: When, where, and under what conditions has the statement been true" (1987:214). Feminism, as well as other social and political movements, has fought hard for the right to legal representation and to be part of the legal process – i.e. to be included in the legal process. Feminists such as Catherine MacKinnon (1979) have shown that "mainstream" legal processes can in fact benefit marginalised groups (e.g. women experiencing sexual harassment in the workplace). This said, I am certainly *not* suggesting that the legal system treats marginalised groups fairly. Koori Court came about (in Victoria) as a response to the recognition of (a nation wide) over-representation of Indigenous people in the legal system. Policies such as "Mandatory Sentencing" (introduced in Western Australia (WA) and the Northern Territory (NT) in 1996 and 1997 respectively) amounted to the removal of judicial discretion and the automatic detention of people arrested for any property offence (Australian Human Rights Commission, 2001). Commonly known as "three strikes and you're in" these laws subjected people to a mandatory minimum 14 days imprisonment for the first offence, 90 days for the second offence and 12 months for the third offence. This applied to both adult and juvenile offenders. The Australian Bureau of Statistics published findings in late 1997 (only six months after these laws were introduced) showing the NT prisoner population had increased by 42%. Most of the prisoners were young Indigenous men (Australian Human Rights Commission, 2001). In an act of colonial echolalia these more recent removals of Indigenous people from their communities can be

this categorisation produces hierarchical categories of difference such as "minority", "marginal", "mainstream", "victim", and "offender" etcetera.

criticised as a replication of the Stolen Generation[11].

In response to Mandatory Sentencing newspaper reports (e.g. "The boy condemned to jail for stealing $3.50 biscuits" Lagan, 1999) began to appear. Sentencing (predominantly) Indigenous people to mandatory jail time for stealing packets of biscuits, chocolate bars and shop signs certainly was evocative of Australia's (white) past – Australia's convict legacy apparently lives on through race relations. Even before Mandatory Sentencing was introduced there were concerns about the high number of Indigenous people dying in custody. As a response, in 1987, *The Royal Commission into Aboriginal Deaths in Custody* was established by the Australian Government (Australian Human Rights Commission, 2008) to inquire into the 99 Indigenous and Torres Strait Islander people who died in custody between the period of January 1, 1980 and May 31, 1989 (Australian Human Rights Commission, 2008). Confirming bell hooks' (1992) claim that black bodies really are expendable, the number of Indigenous deaths in custody rose from 99 in the decade of the Royal Commission to 147 afterwards.

[11] The Stolen Generation refers to the forced removal of Indigenous children from their communities and families from roughly 1860s until late 1960s. Over this 100-year period the Australian Government legislatively orchestrated the removal of Indigenous children. It is unknown how many children were removed, however some reports claim that up to 30% of Indigenous children were taken and placed in institutions or with "white" families. This was done under the guise of "protection" and "assimilation". Section 27.2 deals with the complications and contradictions inherent in deploying a term such as "protection". The Australian Human Rights Commission conducted a detailed inquiry into the Stolen Generation titled *Bringing Them Home Report* (1997).

8.2 Standpoint Theory

Similar to the popular argument presented above that "mainstream" courtrooms enact further marginalisation, it could be objected that marginalised groups are unfamiliar with the "mainstream" legal system (or any legal system for that matter). This can be connected to colonial legacies that consider Indigenous people as inferior to "Westerners" because they lack knowledge, understanding and experience of "Western" developments such as law. My response to this claim is rooted in feminist standpoint theory. Let me explain this connection and what standpoint theory can lend to my overall analysis.

Standpoint theory suggests that from a socially disadvantaged position the periphery (i.e. marginalised groups) has an epistemological advantage in that it has knowledge of *both* centre and periphery. A lawyer well experienced with contemporary Victorian Indigenous cases offered her perspective on this:

> Sadly a lot of my clients come to court knowing a bit about the system, whether that's through their own dealings with the criminal justice system or having seen family or friends go through it. It's amazing actually just how much knowledge people can have of it just through absorbing other peoples stories (Interview One, February 2010).

The epistemological workings of feminist standpoint theory (Harding, 1993; Hartsock, 1987; Hill Collins, 1991) emphasise the importance of researching marginalised perspectives. That is, as suggested above, a social disadvantage is an epistemological advantage. Feminist historical materialism, such as work by Nancy Hartsock (1987), stemmed from historical materialism with a Marxist methodology claiming that not only is knowledge always situated

but also that experience *is* knowledge and that the margins in fact "know better"[12]. Hartsock was interested in "showing how women's lives differed systematically from men's" and "she aimed to establish the ground for a feminist materialist standpoint" (Haraway, 1991b:140). "Better" knowledge, as a result of marginalisation, is gained through a deeper understanding of both centre and periphery. It can be understood then that the epistemology of feminist standpoint theory assumes that marginalised people (e.g. women and Indigenousness people) are legitimate knowers, and that their knowledge is "better knowledge" because of their marginalised experiences. Now although the "margins" (Harding's earlier terminology) or "standpoints of the subjugated" (Haraway's post-modernised terminology) may in fact produce "better" knowledge we must not forget that they, just like any position, "are not 'innocent' positions" (Haraway 1991a:191). Hill Collins also sheds light on this, explaining that no position or standpoint is "innocent" (Haraway's term) or "neutral" (Hill Collins's term) because "no individual or group exists unembedded in the world" (Hill Collins, 1991:33). As *Part Five: Technological* indicates later in this thesis, particularly within the legal arena, there certainly are no "innocent" or "neutral" positions (see section 26.3 for more on this, p.134). In Foucauldian terms, in law everyone is positioned on a sliding scale of normativity (see section 19.3, p.109 for a discussion on normativity and "sameness"). Acknowledging the prevalence of this, my research aims to unpack this legal "sameness" while at the same time promote affirmative difference and diversity.

With an eye on difference, diversity and "subjugated standpoints" my aim in this thesis is to show that "alternative" courts engage in "doing justice differently". Remaining within

[12] The view from the margins values concrete experience over abstract masculinity. There is an assumed transferability of experience via trust, solidarity and empathy whereby women become the subjects and not objects of research.

standpoint terminology, "alternative" courts, consequently, have greater potential to create "better" legal processes, and hopefully "better" outcomes. NJC, for example, is a "diverse service provider" (Interview One, February 2010) providing a great deal more than just a courthouse or courtroom for individuals and the community. NJC promotes itself "as a community justice centre… much more than a courtroom" (http://www.neighbourhoodjustice .vic.gov.au/site/page.cfm, 2010). Through services as diverse as mediation, crime prevention, problem solving, and drug and alcohol rehabilitation NJC has "a problem solving approach that focuses on the causes of offending as well as the crime" (http://www.neighbourhood justice.vic.gov.au/site/page.cfm, 2010).

Moving beyond a liberal (feminist) agenda this thesis is embedded in a "material-semiotic" (Haraway, 1991a) account of new architectural, procedural and technological courtroom spaces that treat legal disputes as "human events" rather than "courtroom procedures" (McIntosh, personal correspondence March 2, 2010). In other words, replacing "mainstream" sterile "so-called objectivity" with "alternative" courtroom features focusing on compassion and situation specific responses. A deconstructive feminist agenda focusing on courtroom language, text and transcripts has proved to be a somewhat fruitful way of theorising contemporary courtroom spaces and procedures. Building upon this, I address the materiality of "alternative" courtrooms that encompass more than just an and/or approach to language and materiality.

8.3 Embodied Theory

Using embodied theory as a platform, this thesis provides a bottom-up analysis of "alternative" courts. Feminist and Foucauldian body scholar Kathy Davis explains the

relevance of embodied theory for such an analysis:

> Bodies are not simply abstractions... but are embedded in the immediacies of everyday, lived experience. Embodied theory requires interaction between theories about the body and analysis of the particularities of embodied experiences and practices. It needs to explicitly tackle the relationship between the symbolic and the material, between representations of the body and embodiment as experience or social practice in concrete social, cultural and historical contexts (1997:15).

Important key concepts for this chapter emerging from embodied theory are: bodies, experiences and representation. There are various definitions and theoretical frameworks of the body. Davis claims:

> For feminist scholars, the body has always been – and continues to be – of central importance for understanding women's embodied experiences and practices and cultural and historical constructions of the female body in the various contexts of social life (1997:7).

Grosz, on the other hand, opening *Volatile Bodies,* writes:

> The body has remained a conceptual blind spot in both mainstream Western philosophical thought and contemporary feminist theory. Feminism has uncritically adopted many philosophical assumptions regarding the role of the body in social, political, cultural, psychical, and sexual life… feminists and philosophers seem to share a common view of the human subject as a being made up of two dichotomously opposed characteristics: mind and body, thought and extension, reason and passion, psychological and biological (1994:3).

Davis and Grosz are both feminist scholars interested in historical and contemporary patterns of bodies in culture, society, biology and philosophy. Their sites of analysis range from cosmetic surgery (one of Davis's main interests) to buildings (one of Grosz's earlier

interests). Indeed, feminist scholars have provided invaluable considerations on the body and embodied theory. Embodied theory, however, spans beyond the scholarly arena of feminist thought. Theorists in the areas of critical theory, and critical legal theory also utilise embodied theory in their research. Combining a phenomenological approach with critical race theory scholars such as Peter Halewood (2007) calls for an embodied and contextualised theory of knowledge. The objectives of my research fit alongside Halewood's concerns with law, in that a feminist and critical race critique of epistemology has the potential to shift the "perspectiveless" disembodied knower to becoming embodied and contextualised (2007:628). Embodied theory is, thus, situated knowledge.

This thesis takes a predominantly affirmative reading of feminist thought (plural not singular) which has not sidelined the body. Besides, many scholars *have* shown great interest in the body. Foucault, claims Davis, "has probably done more than any other contemporary social theorist to direct attention to the body" (1997:3). According to Foucault there are two kinds of bodies: "a sort of global, molar body, the body of the population... and down below, the small bodies, the docile, individual bodies" (Foucault in Rabinow, 1984:66). In other words there is the "molar body of the population" and the "microbodies of individuals" (Foucault in Rabinow, 1984:66). Foucault's interest in the body could, however, be "complicit in the misogyny that characterises Western reason" (Grosz, 1994:3).

Entangled in definitions of embodied theory and the body are other terms such as experience and representation. Experience can be located as part of the above definition of the body. The "body" writes Grosz, "is always necessarily embodied" (1994:95). She continues, "experience can only be understood between mind and body – or across them – in their lived conjunction" (1994:95). This chapter fits within this scheme of boundary work; that is, the

embodied and embedded space across two traditionally dualistic notions. A more productive way to view the "space" between these two entities is not about bridging the gap between them (otherwise running the risk of re-producing binaries), but rather reviewing this "lived conjunction" as a "space" of continual production of bodies and experiences (therefore with a focus on *how* things get made).

Representation is often distinguished as being separate from the body. The concept of representation is heavily influenced by post-structuralist French Philosophy and the theory of language. Theorists such as Lacan argue that the real escapes representation, meaning there is no direct access to experience or reality. For Lacan language is the matter under examination[13]. For Foucault, on the other hand, representation is discursive and material (i.e. language and representation as existing as a power structure). Gayatri Spivak (1988), claiming that there is always a disjuncture between experience and representation, is concerned with the ways in which we are able to articulate thoughts and experiences. In the mode outlined above, when bridging the gap, language thus becomes the connecting device. Stuart Hall comments on positions of language (his term is enunciation): "what recent theories of enunciation suggest is that, though we speak, so to say 'in our own name', of ourselves and from our own experience, nevertheless who speaks, and the subject who is spoken of, are never identical, never exactly in the same place" (1993:222). Identity is thus constituted *within* representation; however, confirming Lacan and Spivak, there is *always* a split/divide between the real/experience and representation. This formulation allows no space for bridging the gap. Foucault's emphasis on representation being discursive *and* material, on the other hand, allows slippages into a "lived conjunction". The emergence of new

[13] For a feminist engagement with Jacques Lacan see Griselda Pollock's "The Visual" in *A Concise Companion to Feminist Theory* (2003).

materialism offers new and inventive ways to over come this split/divide.

8.4 New Materialism

Like this thesis, new materialism has strong Australian and European roots. New materialism takes stock of key feminist theories and methodologies that have come before – i.e. feminist science studies (Haraway, 1991 and Harding, 1987), feminist postcolonial studies (Mohanty, 1997; Khanna, 2003; Spivak, 1988), feminist standpoint theory (Harding, 1993; Hill Collins, 1991) and historical materialism (Hartsock, 1987). Haraway's "material-semiotic" eventuates through new materialism by not remaining strictly within the traditions or paradigm of materialist feminism as "the view that all that exists is material or is wholly dependent upon matter for its existence" (Urmson & Rée quoted in Lovell, 1997:161).

New feminist materialism is a conglomeration of theories and methodologies that focus on the material and the semiotic/discursive dimensions of, for example, women's subjectivity. Scholars such as Braidotti label the theories as "new materialist" so as to give an account of the move they make: a move away from the dominancy of "the" linguistic turn in feminist scholarship. Interpretations, such as Vicky Kirby's (1997), of De Saussure's *ambiguous* relationship with bodies and matter are part of the new feminist materialism. Braidotti's sentiments on sexual difference speaks to that relationship: "this school of feminist thought [sexual difference theory] argues that an adequate analysis of women's oppression must take into account both language and materialism and not be reduced to either one" (1994:153).

This thesis does not overlook the importance of any of these concepts (bodies, experience, representation and language). Providing an affirmative critique of the infrastructure (literally

and figuratively) of "alternative" courts, this thesis shows that there has indeed been (the beginnings of) a shift from "so-called objective law" to embodied decision-making. Standpoint theory, embodied theory, politics of location and new materialism are some of the conceptual and theoretical situated knowledge inroads into understanding the differences these "alternative" courtrooms make.

8.5 Critical & Feminist Legal Theory

Feminist legal approaches to women and gender can be described, as post-modern feminist scholar Frug does, in three models: (1) "sameness/difference", (2) "dominance", and (3) "cultural representation" (1992:x). Just to clarify, these three models are presented as some of the main ways in which feminists have described and interpreted the meaning of "women" in society and law. They all, according to Frug, have insights and limitations. "Sameness/difference" compares women to men in terms of both culture and biology, and determines women's difference to men's as negative. Feminist equality agendas, claiming that women's rights should be equal to men's, fits into this first model. "Dominance" describes a patriarchal system that places men at the top of the hierarchy. The third model, "cultural representation", fits into a postmodernist approach and focuses on how "reality" is constituted (especially through language) (Frug, 1992:x). Model two and three are similar in that they both place emphasis on power (potestas, not potentia). All three models can, and have been, critiqued from the position that these feminist legal approaches to women and gender assume and purport an essentialist notion of woman that is white, western and middle-class. Offering an escape from essentialist feminist gestures sexual difference suggests, just as Frug does, that there are not only differences between men and women but also between women. In sexual difference theory, and likewise in this thesis, difference implies affirmative

difference not negative difference.

Liberal feminist claims of equality from the 1970s have been interpreted in many discourses as meaning the same treatment. What we are left with now, and some would call a misunderstanding of certain feminist aims, is a climate where women are being disadvantaged twofold. The first one is whereby women suffer discrimination precisely because they are women and therefore treated differently (as negative or lack) and subordinately to men. And second, where women suffer discrimination because legal, medical and other discourses have come to treat women the same as men and therefore women suffer because this uniform treatment actually disadvantages women because of their differences (with emphasis on difference as affirmative). In her critique of the Australian sex discrimination legislation Rosemary Hunter argues "that what we need most of all is a sophisticated understanding of equality to become an accepted, normal, natural and important part of legal discourse in Australia" (1998:77). The "we" Hunter speaks of is Australia as a society. What "we" have at the current time is a skewed idea that to eliminate gender inequality men and women need to be treated the same, however this results in gender inequality being reinforced and further entrenched into Australian social and legal discourses. As I move through the three analytic chapters the relevance and importance of feminist and critical legal theory will be demonstrated and unpacked.

Part Three: ARCHITECTURAL

9. INTRODUCTION

"I begin from the originating place,

the ground zero of law's power,

the courtroom" (Mohr, 2006:10).

This chapter critically examines the role architecture and design plays in the regulation of legal inclusion and participation of bodies of difference in the contemporary Australian courtroom. Bodies of difference can be read as intersectional markers of differentiation informed by gender, age, and ethnicity etcetera. As stated earlier, inclusion necessary has excluding affects. The heart of this chapter is comparing and contrasting how the architectural differences between "mainstream" and "alternative" courtrooms creates physical space that is perceived to embody and enact "doing justice differently". As outlined in the introduction to this thesis, in section 2 *Three Levels of Analysis*, my main aim is to address five "alternative" courtroom spaces in Australia that by "doing justice differently" have the potential to alter the dissymmetry of legal "inclusive exclusion" and "exclusive inclusion" for the "better". The central question in this chapter is: how does courtroom architecture inform courtroom entitlement? By this I mean, how does courtroom architecture spatially structure inclusion (with excluding affects), which then produces and maintains legal subjectivity?

This chapter considers both the positive and negative differences between "mainstream" and "alternative" court and courtroom architecture. In some cases, for example, both

"mainstream" and "alternative" courts demonstrate continuing assemblages between contemporary Australian courtrooms and Australia's colonial past. Identifying three main aspects of courtroom architecture and design (outside walls, inside walls and courtroom objects) my conclusion leans towards "mainstream" courts having a lot to learn from the advances made by "alternative" courts.

As just indicated, this chapter is framed around three main analytic sections: outside walls (section 13, p.59), inside walls (section 14, p.64) and objects (section 15, p.71). Four of the five "alternative" courtrooms are used as architectural examples of "doing justice differently". These are: Koori Court, LAT, RMCLCB and NJC. I take empirical examples from these four courts to examine the central questions of this chapter.

Outside Walls traces scholarly contributions to the conceptualisation of spatial entitlement. Drawing from feminist philosophy, feminist geography and post-modern approaches to architecture I look at the differences "alternative" courtroom architecture of outside walls makes to the perception of legal inclusion and "doing justice differently".

Inside Walls critiques "Uniquely 'Australian'" (Chief Justice Bryant [Public Speech], 2006) artwork displayed at RMCLCB (see figures 2, 3 & 4, p.66-67). These empirical examples of artwork are addressed in terms of assumptions about nationality, nation building, national identity, and lingering colonialism. Significant features of this discussion are, thus, multiculturalism and post-colonialism. Multiculturalism, in Australia, often implicitly refers to minorities, but in doing so purports a relationship with the majority (Gunew, 2004:16). Vijay Mishra and Bob Hodge describe post-colonialism as foregrounding "a politics of opposition and struggle, [that] problematizes the key relationship between centre and

periphery" (2005:276). Extending the definition of the term post-colonialism to post-colonial theory Sandra Ponzanesi writes:

> [Post-colonial theory is] an interdisciplinary field of studies that is not characterised by a cohesive set of theories and methods. However, a definition is possible. The common denominator of postcolonial studies is that it offers a critical tool for exposing, studying, and interrogating the ongoing legacies and discursive operations of Empire (2009:181).

Connecting this back to the overarching questions of this thesis part, artwork displayed at RMCLCB offers an insight into what constitutes entitlement. In other words, what (and how) is something such as artwork accepted as "Australian" and what is not? This section is one of the more explicit examples of how courtrooms display and enact (nationalistic) inclusion (with excluding affects).

The central empirical examples in *Objects* are benches (section 15.1, p.74) and sightlines (section 15.2, p.77). Using benches and sightlines as a platform to explore the differences of architectural affects between "mainstream" and "alternative" courtrooms this section provides a comparative analysis of three different courtroom design plans: that is, square "mainstream" courts, circular Koori Court, and triangular LAT (see figures 5, 6 & 7, p.73). Addressed in terms of courtroom bench shape and layout I demonstrate how the shape of courtroom benches prescribes seating arrangement that in turn directly affects sightlines. The commonly overlooked aspect of courtroom bench shape does, therefore, have a direct consequence on how sightlines are created (potentia) and/or restricted (potestas). Panopticism is introduced in this section as a means of exploring sightlines in terms of architectural design and behavioural and/or emotional affect. A definition and elaboration of the panopticon and panopticism is given on page 58-59 when I draw together Bentham's original panopticon

designs, Foucault's notion of panopticism and Mulcahy's work on courtroom sightlines. In doing so I highlight the relationship between architecture, buildings bodies and affect.

10. RECONSIDERING THE PHYSICAL COURTROOM

Until recently the physical courtroom has been overlooked as playing a key role in the upholding of the law. As Mulcahy reminds us:

> The absence of research on the experience of internal space in courtrooms can, in part, be explained by lawyers' obsession with the word. When we teach our students about law we do so through the medium of the written judgement or transcript as though these give a complete account of why a case is decided in a particular way (2007:384).

Consistent with Mulcahy's proposition, theorists such as Philadelphoff-Puren (2003) claim, the written judgement or transcript does not supply a complete account of the law. Similar to lawyers, it seems, deconstructionists[14] are also obsessed with the word. With good reason, as Costas Douzinas explains: "the visible surface has its invisible side, an underlying plot" (2009:1). Indeed, as Philadelphoff-Puren argues, the primary access the court has to "the event" (i.e. the criminal act that is being judged) is through language. Concerned with the power (in the controlling potestas sense) legal reasoning and legal language has in disqualifying women's testimony, Philadelphoff-Puren writes: "since rape before the law is an act of writing... the matter to be judged does not exist empirically but rather textually" (2003:50). Indeed, the focus on the word is an important one, but as Mulcahy suggests this "obsession" with the word as a surface (with an underlying plot) has overshadowed critical research of other components of the courtroom, namely the "spatial dynamics" (Mulcahy,

[14] Derrida being the exemplary person for using texts only in deconstruction.

2007:384) (i.e. the material surface, also with an underlying plot). In line with Mulcahy, highlighting the importance of courtroom spatiality and architectural affects is where I wish to make one of my main scholarly contributions.

Just like court transcripts, court buildings are not neutral surfaces. Writing on spaces, Foucault notes:

> A whole history remains to be written of *spaces* – which would at the same time be the history of *powers* (both these terms in the plural) – from the great strategies of geo-politics to the little tactics of the habitat, institutional architecture from the classroom to the design of hospitals, passing via economic and political installations (1980:149).

Feminists writing much earlier than Foucault were already providing critical commentary on the relationship between spaces and powers. In her classical feminist text *A Room of One's Own* Virginia Woolf (1929) foregrounds this concern of women's access to (public) space in her realisation that women's bodies are regulated and confined to only certain areas through patriarchal formations of power, and men's access is not[15]. She writes:

> What idea it had been that had sent me so audaciously trespassing I could not now remember… Strolling through those colleges past those ancient halls the roughness of the present seemed smoothed away; the body seemed contained in a miraculous glass cabinet through which no sound could penetrate, and the mind, freed from any contact with facts (unless one trespassed on the turf again), was at liberty to settle down upon whatever meditation was in harmony with the moment. (1929:10)

Foucault's statement, echoing Woolf's observation, are compelling considerations of the

[15] It is worth mentioning here that by "women" and "men" Woolf is referring to white women and men.

correspondence between the formation of space and power – one that does not preference the significance or importance of one over the other. The Foucauldian model, extended by feminists such as Braidotti, is important here as the notion of resistance and space for dissonance (even though this can be a difficult process) thus emerges, or at the very least the potential for it. Signifying the possibility for resistance, courts can, like other buildings, be viewed as having the potential to be "permeable and changeable" (McDowell, 2003:20).

11. INCLUSIVE COURTROOM ARCHITECTURE (WITH EXCLUDING AFFECTS)

In *Haunted Nations* (2004) Sneja Gunew poses an important question: What does spatial entitlement entail? For me, considering such a question involves bodies and spaces. I consider courtroom space (if not all space) and bodies to be *always* already gendered and *always* already intersecting with other categories and markers of difference. Griffin and Braidotti point to one possible way of addressing the gendering of space and bodies in relation to citizenship (which is another form of entitlement enacted through national inclusion with necessary exclusion) "which outlined the allowance of certain symbolic spaces – such as that of the public sphere of citizenship – to men, and the exclusion of women from that space" (2002:16). Ruth Miller, alternatively, argues that women are not only included in modern citizenship, but "relentlessly included" (2007:13). Another way of viewing this could be that there are differently gendered symbolic spaces within the "public sphere of citizenship". I claim that bodies and space mutually encode each other with gendered, aged, ethnicised (etcetera) attributes. These attributes are encoded within a dissymmetry of power (potestas and potentia), which then informs spatial entitlement. Extending this point, I observed that there is a correlation between how particular bodies are gendered, aged,

ethnicised (etcetera) in accordance with the space they inhabit, and visa versa. In other words:

> Viewing geography as a key constituent of identity, and assuming that the body and environment produce each other, feminist geographers have studied the spatial dimensions of gender re/production: how men and women are constructed in space (the home, the workplace, metaphors like 'women's sphere'); how cultural patterns related to space influence the construction of gender, race, class, and other social markers – hence the relationship between identity and space (Borghi, 2002:83-84).

A "politics of location" would investigate "how place is gendered (masculinised or feminised) and how this delineates what kinds of bodies are permitted and welcomed in certain kinds of spaces, and what kinds are not" (Cranny-Francis, 2003:212).

I claim gender norms and gender assumptions to be built into the design of buildings, and thus influence the way in which people experience the space. David Bell et al. draw upon Butler's notion of gender as performative maintaining that "repeated performances of expected behaviours, then, establish regulatory practices for gendered, sexed, and sexualised bodies – and these practices are, importantly, imprinted on space" (2001:xi). Planners, architects, councils, governments etcetera "do not necessarily promote their own interests at the expense of women's, but they may not have considered whether different sections of the population have different environmental needs" (Matrix, 1984:3). The overall conclusion to this thesis touches upon future potential for university courses on courtroom architecture to be offered to architecture students at Melbourne University

I consider architecture to be shaped by social relations, and architecture to equally shape social relations – it is not a one-way relationship. By saying architecture is shaped by social

relations I mean that "if an assumption is made that men primarily use a space, the space will be designed to cater for their perceived needs, ignoring or sidelining the concerns of subsidiary users of space: women" (Rosewarne, 2005:70). Grounding Lauren Rosewarne's claim, similarly, if a space such as a "mainstream" courtroom assumes that non-Indigenous Australians primarily use the space then the space will be designed for non-Indigenous Australians. Architecture is, thus, impregnated with biases purporting certain assumptions about the usage of space. Accordingly, it is no surprise that research shows Indigenous people to experience "mainstream" courts as particularly dominating and intimidating[16]. It is precisely because of these widespread Indigenous experiences of "mainstream" courts that "alternative" courts such as Koori Court were established. Mark Harris's evaluation of Koori Court over a two-year period (2002-2004) signals Koori Court as an "attempt to remove the more intimidating elements of the courtroom architecture" (2006:31).

Feminist geographers such as Doreen Massey (1994) and Gilian Rose (1993) have argued that the built space we inhabit to be imbued with predominantly masculinist ideas of how space should be built, organised and used. Massey and Rose's similar arguments can be successfully transferred from a discussion about women and space (which is their particular grounded theoretical preoccupation) to any marginalised group and space, such as Indigenous people in "mainstream" courtroom space. Scholars such as Massey and Rose tend to have a richly grounded approach. This approach is something I find useful to build upon for my own research (particularly in this part), and is also highly compatible with other strategies and theories I have deployed, such as standpoint theory (see section 8.2, p.40) and phenomenology (see section 15.1, p.74). As a researcher I use these approaches as a means of

[16] I say *particularly* dominating and intimidating for Indigenous people because as Mulcahy's research notes attending court can be intimidating for anyone (2007:397).

determining and measuring differences between “mainstream” and “alternative” courtrooms.

12. ARCHITECTURAL AFFECTS

It can be somewhat difficult to prove the actual cause and affect of architecture and the dissymmetry of spatial inclusion/exclusion based on categories of difference. Again, feminist geographers have been concerned with the links between the maintenance of public space (particularly public space at night) and women’s fear of attack. Feminist geographers such as Liz Bondi et al. (2002) bring in the spatial dimension of fear that, she believes, has been neglected by other disciplines dealing with fear, such as psychology and sociology (Listerborn in Bondi et al., 2002:35). Fear can be understood as an affect of the perception of a masculine dominated public space, but the fear is not necessarily in accordance with anything other than a (usually) gendered perceived possibility of dangerous dark streets at night. As indicated by Listerborn, not all women fear violence in public space, but those who do reflect the reality of women’s experiences (2002:36). Taking stock of feminist geography contributions and bridging it with more recent accounts of gendered spatial entitlement it is noted that masculine dominated space can have a negative affect on women and men. In this case by gendered I mean both women and men.

Despite some of it’s difficulties Foucault paved a significant theoretical path for noting the relationship between architecture and human behaviour. Similar to feminist lines of arguments from theorists such as Rose, Massey and Bondi, theorising Jeremy Bentham’s panopticon as panopticism Foucault made a great impact on forging the connection between architecture and psychological affect (Foucault in Rabinow, 1984). Panopticism continues to be a prime example of how architecture can, and does, have psychological affects on behaviour precisely because of how buildings are made. To demonstrate this, let’s consider

the following example of panoptic practices in Australia.

The panopticon was first introduced in Australia in 1853 in the form of an isolated prison to hold re-offending convicts in Port Arthur, Tasmania. This building was a physical manifestation of power and signalled the shift from a solely physical form of punishment to psychological punishment becoming a primary feature[17]. Based on the panopticon designs by Bentham from the late 1700s the prison allowed an observer to observe all prisoners at all times without the prisoners knowing whether they were being watched. In this way surveillance became not only something of watching and being watched but also something psychological which manifested itself physically into buildings. Contemporary post-modern architectural scholarship suggests that, indeed, psychological attributes (in this case the act of being watched) are imbued physically into buildings, but that physical buildings make a "distinct contribution" (de Botton, 2006:11) to human psychological conditions (de Botton is speaking specifically of happiness, but the impact of architecture could, following his reasoning, affect any human emotion)[18].

The emphasis for my analysis is on panopticism. By this I mean Foucault's development of the panopticon into something he called panopticim, which can be understood as a metaphor or mechanism of the panopticon. As the well-known example of prison panoptic practices demonstrates, architecture and design does affect behaviour. The following sections of this chapter will address *how*.

[17] This is not to suggest that it was only psychological punishment. The Oxford Companion to Australian History, suggests quite the contrary: "the chain gangs and the penal colonies... here men toiled in agony at senseless tasks intended only to punish and deter" (Davidson et. al., 1998: 157).

[18] Also see Gibb's *Disaffected* (2002) for an account of the relationship between emotions and affect.

13. OUTSIDE WALLS

According to Australian legal theorist Richard Mohr "dating back to Ancient Greece, courts have been held in special places" (1999:1)[19]. One of the earliest ("Western") written descriptions is by Homer as "polished stones in a sacred circle" (Homer quoted in Mohr, 1999:1). In England, for example, although there may not have been specific "custom built courthouses", trials were held in buildings such as castles, churches, manor houses and assembly rooms (Mulcahy, 2007:388). Mapping the relationship between geographical approaches to buildings and feminist theory, scholars such as McDowell, suggest the interrelationships between space, place and location have converged with how we identify ourselves (identity is McDowell's terminology; I prefer subjectivity). Confirming this, Mulcahy writes of courthouses in England:

> From 1870 to 1914 a number of public bodies stamped the London suburbs with a recognizable, repetitive building type that contributed to the capitals and its suburbs identity (2007:388).

Although not a hard and fast rule, the significance of "mainstream" courts being in a particular "special" place continues today[20]. Graham's (2003) work on the architectural and social history of courtrooms in England provides a historical account of this. A more recent comparison is the *Court Standards and Design Guide* (2004). To date, as far as I'm aware there is no such publication in Australia.

[19] It could also be argued that non-"western" courts also resided in "special places" and that Indigenous controlled courts were also located in "special" places.

[20] More detail in *Part Five: Technological* on the blurring of courtroom boundaries and tensions between the location of the courtroom and place and space the courtroom needs to accommodate and/or incorporate via technology (e.g. jury, "victims", witnesses etc located outside the courtroom).

A notable exception to courts being held in a "special place" occurred in 1847 in Adelaide, South Australia. At the opening of RMCLCB in February 2006, Chief Justice Bryant reminded her audience of South Australia's interesting history of courts located in "less-than-traditional" settings. Reminiscing the beginnings of the Supreme Court in Adelaide, Chief Justice Bryant reflects:

> While the Supreme Court was being built, the Court was temporarily housed in the Queens Theatre in Playhouse Lane. These thespian surrounds lent a certain drama to the court's daily work: Judge Cooper presided from underneath a crimson canopy on the main stage, which also had the benefit of sheltering him from rain when it came through the leaky roof. The theatre boxes were filled with eager spectators and the hapless prisoners awaiting trial were housed in a pen under the stage, which in a previous life had been used to enable ghosts and other theatrical apparitions to rise before the audience ([Public Speech], 2006).

As this quote demonstrates, conventional geographical location or not, courts themselves can be read as the "physical expression" (Mulcahy, 2007:384) of law. In fact, being held in a theatre gives the impression of a greater appearance of performing (so to speak) law and power (potestas). We will see in a following section that the performativiety of Indigenousness is also inscribed into Koori Court architecture and procedure. Mulcahy's Foucauldian line of argument stems from the emphasis of power and control being "inscribed in architecture" (Foucault, 1980:150). In Foucault's work there is particular mention of military school where the "very walls speak the struggle against homosexuality and masturbation" (Foucault, 1980:150). An analysis of courtrooms can borrow critical insights from detailed accounts from other institutions such as the military as both display a deeply inscribed and embedded relationship between power *and* architecture, and power *in*

architecture. As Foucault highlights, the buildings we occupy speaks this power back to its occupants through expected normativity and prescribed regulation (see section 26.3, p.134). Just as "the body", writes Susan Bordo, "is a medium of culture" (1989:13) so are buildings (in terms of both design and architecture). Similarly, both bodies and buildings can be read as "surface[s] on which the central rules... are inscribed and thus reinforced" (Bordo, 1989:13). The distinction between bodies and buildings is, as indicated in *The Architecture of Happiness* (de Botton, 2006), collapsible. From the very outset of his work de Botton describes buildings in human bodily terms. The "terraced house on a tree-lined streets" (2006:10) that he begins with has joints, veins, feet, flanks and innards. Buildings, accordingly, are also types of bodies.

Placing contributions from scholars such as Foucault, Bordo and de Botton into a melting pot re-arranges the ways in which we conceptualise bodies, buildings and surfaces. In this way the body is not only a text but also a concrete surface that is made, practiced and regulated (Bordo, 1989; Foucault, 1995, 1980). de Botton's writings on architecture correlates with Bordo's view of surfaces where he describes certain characteristics of the "terraced house" as obedient. Grosz, on the other hand, suggests the opposite of texts, which she describes as being many things, including "book, paper, film, painting, or building" (1995:125). de Botton's obedient architecture comes up against Grosz's "explosive, dangerous, labile, with unpredictable consequences" text (1995:126). But, if we take de Botton's house as making a contribution to happiness and Grosz's labile building as a text, perhaps their accounts of buildings are not so far apart. Both, after all, are concerned with architectural affects.

New materialism offers a different reading of bodies – this being bodies as *only* surfaces. Bodies, according to Ahmed, become "present as bod[ies], with surfaces and boundaries, in

the showing of the limits of what it can do" (2006:552). Combining Ahmed's affirmative claim with Foucault's enables a reading of court boundaries as the material court institution policing boundaries of power and knowledge (potestas) while simultaneously creating surfaces (potentia). Ergo, material boundaries are imperative in creating legal subjectivities and maintaining court power (in both its forms). This certainly may be the case, but what does this mean in terms of my research aims? Until now I have forged theoretical connections between bodies, buildings, surfaces and power that necessarily have behavioural and emotional affects and responses. Grosz suggests a new question in architectural discourse: "How to *think* architecture differently"? (1995:127 emphasis in original). Explaining what she means by this question, Grosz calls for ways of thinking about architecture, which becomes ways of thinking "*in* architecture", or "*of* architecture" that does not simply conform to the standard assumptions between "being and building" (1995:127). So, in bridging the above theoretical approaches to a grounded analysis of outside courtroom walls and intersectional inclusion (with excluding affects) into courtroom space, I keep Grosz's reminder of not sinking into routine, formula and commonly accepted terms at the back of my mind.

Nevertheless, I remain in two minds about conceptualising "outside walls" of contemporary Australian courts. I consider this to be a productive consideration rather than a simple equivocation. Let me explain why and how I consider this to be the case. On the one hand, there is no disputing the fact that there are physical tangible walls between the "inside" and the "outside" of a court. This is evident to anyone, whether they enter the court or not. On the other hand, the terms "inside" and "outside" are debateable, for where does the court actually begin? Let's take my experiences of visiting the Melbourne Magistrates Court (from here on referred to as MMC) ("mainstream" court) and NJC ("alternative" court) in February 2010 to

unpack what I mean by this. Upon reflection the greatest similarity between my arrival at the MMC and NJC was not having a discernable arrival at either – but for very different reasons.

Arriving at the MMC, located in the business district of Melbourne, requires passing other courts and many large imposing buildings, mostly occupied by banks, law firms and insurance companies. Security and surveillance over this part of town is highly evident – in the form of security guards, police and security cameras. By the time I walked through the front doors of MMC and lined up for "'airport style' security screening"[21] I was very much aware that I had already been affected by the surrounding environment, and in ways had been implicitly prepared by the greater vicinity before entering the controlled (potestas) space of MMC. This is why I say my arrival at MMC was indiscernible. Indeed, the physical outside walls of the building did indicate my arrival into the court, but I had already been affected prior to arriving.

Located in an old boot and shoe trades school in an inner-city suburb, my arrival at NJC was similarly undetectable, not because I perceived my arrival to begin before entering the building, but because at no moment did I feel that the literal outside walls of NJC enacted a physical or psychological barrier between the "outside" space and the "inside" space. Immediately greeted by the Maori security guard I wasn't asked to display photo identification, open my bag or walk through any form of security screening. Walking into the spacious reception area I was approached by an NJC information officer who informed me that the complex gives public tours of the space every Tuesday. Although I was there on a Monday the Office Manager was more than eager to give me a tour of the entire complex. In comparison to my arrival at MMC where I felt anxious and very much like an "outsider", at NJC I not only felt welcomed, but also that the focus on community was literally built into

[21] I borrow this term from a RMCLCB pamphlet where they write: "All visitors to the building must pass through 'airport style' security screening" (2010).

the complex. “Doing justice differently” was embedded into the very design and architecture.

Evaluating my, what can be considered, ethnographic field notes, the question of what differences and/or improvements the “outside walls” of “alternative” courts make returns. Various scholars working on linkages between architecture and affect confirm similar suggestions to my own. That is, architecture does affect behaviour and emotions, and “alternative” courts do improve inclusion, for example, inclusion is enacted through the greater potential for community participation. The following section will explore what happens to legal inclusion (with exclusive affects) “inside” the courtroom space.

14. INSIDE WALLS

Courts, just like other buildings, are “a container for many things” (McDowell, 2003:15). The interior walls of “mainstream” courts are usually bare. Some have, for example the Supreme Court of Victoria, a plaque reading “Peace and Prosperity”. This is in stark contrast with the “alternative” courts I visited. On a tour of NJC, for example, the Office Manager made a point of drawing my attention to local Indigenous artwork throughout the complex. The only area completely bare was the “Remote Room”. This room provides a live link-up to the courtroom for anyone who is required for a trial but does not want to physically appear in court.

Priding itself on architectural and artistic success it is no surprise RMCLCB also features considerable amounts of artwork and sculptures. Artists include Warren Langley, Jeff Mincham, Nici Cumpston and Neil Crannery. All sculptures and paintings featured in RMCLCB intend to portray a space that is “uniquely ‘Australian’” (Chief Justice Bryant

[Public Speech], 2006). My purpose here is to use the display of certain artwork as an empirical case study to explore the central aim of this thesis. That is, in this context, the inclusion of certain "uniquely 'Australian'" artwork and the necessary concurrent exclusion hinting at artwork not shown being non-representative of something Australian.

Breaking away from dualistic thought, remembering that in practice dichotomous meanings are collapsible, we see that in this instance what defines inclusion *also* defines exclusion. As section 14 just suggested, this indistinguishability can also be applied to outside and inside walls. This begs the following three interconnected questions: what is representative of "Australian", who is entitled to represent (potentia) and who is not (potestas), and who decides who can represent (potentia) and who cannot (potestas)? Focalising this question, how do contemporary Australian courts, particularly "alternative" courts, provide space for the entitlement of representation? Connected to this, what are the affects of not only displaying artwork in courts but displaying *certain* artwork. Following on does, for example displaying Indigenous artwork at RMCLCB and NJC, translate as these "alternative" courts "doing justice differently"? From here I proceed in three stages. First, I consider how, for instance, RMCLCB regards itself to have captured something it calls "uniquely 'Australian'". Second, I present particular artworks displayed at RMCLCB. Following on, third, I consider the affect these commissioned artworks have on the perception that RMCLCB is "doing justice differently".

Opening the complex in 2006 Chief Justice Bryant announced its success in capturing the Australian landscape:

> The Court's tapestry-like façade invokes South Australia's contrasting eucalyptus, grassy plains and arid hinterland, which are captured in the use of local colours such as bronze-ochre, wheat and

> cinnamon ash. Like the Australian Landscape, which shifts and changes at different times of the day, the Court's colours too change, appearing as saturated blocks of colour in the midday sun and becoming pearlescent at dusk [Public Speech].

Cumpston, with the Murray River as the subject of her work, displays eight commissioned panel paintings at RMCLCB entitled "The Bend in the Murray River" (see figure 2). Of Afghan, English, Irish and Barkindji Aboriginal heritage, Cumpston aims to capture the two sides of the South Australian landscape (thriving and harshness) whilst also calling for an artistic witnessing of the destruction of the environment and Indigenous land.

Figure 2: "The Bend in the Murray River" (foyer of RMCLCB)

Entitled "Continuum" (2005) Langely's three-piece sculpture appears on various levels of RMCLCB (see figure 3). Working with light, glass and other permanent materials Langley's work defines and reinforces "their immediate locations, providing focus and drams in their settings" (http://www.warrenlangley.com.au /index.html, 2006). The three sculptures "acknowledge the importance of the Rule of Law to the society at large" (caption on sculpture). The individual titles of his sculptures reflect this: (level 1) "The Window of Opportunity", (level 3) "The Law of the Land", and (level 5) "The Fabric of Democracy".

Figure 3: "Continuum" (RMCLCB)

Mincham, trained in ceramics, has maintained a "strong landscape theme" since his first exhibition in 1976. Gaining inspiration from his studio window Mincham describes a:

Remarkable landscape setting at Cherryville in the Adelaide Hills… look[ing] eastward across deep timbered valleys and forested ranges that provide a dramatic backdrop to some spectacular weather events" (http://basement.craftaustralia.org.au/LivingTreasures/20071110.php, 2008).

Figure 4: Ceramic Bowl

He reflects, "so it is hardly surprising that the colours, moods, textures and events of the landscape should find their way into my work" (http://basement.craftaustralia.org.au/LivingTreasures/20071110.php, 2008). The titles of the two ceramic bowls at RMCLCB capture his passion for the local environmental landscape: "Linchen" and "Flood Plain" (see figure 4).

Crannery's sculptures, "Gravity", featured in the courtyard of RMCLCB "were devised as an allegory for the Courts of Law. The forms are based on weights used on old mechanical scales and imply balance, solidity, weight and tradition" (caption on sculpture).

14.1 Affects of Artworks

Taking the next, analytic step, I question the affects these specially designed and commissioned artworks have on the perception of this courtroom "doing justice differently". Chief Justice Bryant claims that the artwork at RMCLCB "create a courtroom that [is] as

close to an on country open air Aboriginal court" and provides a "welcoming and inclusive environment" ([Public Speech], 2006). My visit to RMCLCB in February 2010 certainly confirms this attempt to capture the Australian landscape. Nevertheless, what we must remember is that this "inclusive environment" only exists via a symbiotic relationship between inclusion *and* exclusion. Once again, inclusion as a concept and practice can only exist via exclusion operating in the very same instant. Theoretically, Giorgio Agamben (1995) explores these concerns of inclusive exclusion and exclusive inclusion through citizenship. Agamben's ideas of something being enabled (e.g. protection by law) existing simultaneously with something being disabling (e.g. subject to law) will return in section 26.3 (p.134) where I position the recognition of "vulnerability" as necessarily creating "re-victimisation".

With this inclusive (with exclusive affects) model in mind, I do not take the inclusion of significant "uniquely 'Australian'" artwork in RMCLCB at face value. I certainly do not dismiss its importance either. Embracing "uniquely 'Australian'" terminology is in itself calling for a unified national identity available for representation through artwork. Here multiculturalism enters as a nationalistic concept for building cohesiveness. Accordingly, RMCLCB is, thus, trying to represent Australia "as homogenous in spite of [its] heterogeneity" (Gunew, 1997:23). Gunew claims that the "politics of representation" is at the heart of multiculturalism. Rather than a nation purporting an image of homogeneity, Hall calls for the "recognition of the extraordinary diversity of subject positions, social experiences and cultural identities which compose the category 'black'" (1996:225). As this is extended to Australian Indigenousness particular questions emerge, such as can certain artists be representative of "the" Indigenous connection to land and experience? My research finds that the key term of importance thus becomes diversity. Diversity, claims Hall engages

rather than represses difference (1996:225). The artwork at RMCLCB could very well be not only representing but also engaging with an artistic project on diversity. The RMCLCB complex, however, does not hide it's aesthetic agenda – that is, creating a "uniquely 'Australian'" court of law. Conducting research on spatial practices in Australia (at the East Melbourne Garden Club and Fitzroy Police Station) Allaine Cerwonka indicates that it's not the first time Australian landmark buildings have employed such aesthetic agendas. Describing the Parliamentary Building in Canberra Cerwonka writes:

> The association between the nation-state and the natural environment was strongly reinforced by the construction of a new Parliamentary Building in Canberra in 1988, a national icon that traded heavily on images and symbols of the landscape and animals. The use of the environment and Aboriginal art as symbols for the new Parliamentary Building furthered the status of Australian nature, again suggesting the hegemonic status of 'recognising' the worth of the Australian natural environment (2004:141).

In this aesthetic agenda, as McDowell argues, "images and artefacts are used to create a particular image of nationalism and national identity" (2003:21). From the great Murrary River to microcosmic moss RMCLCB engages in an aesthetic project about not only "who is included and who is excluded from the nation-state" (McDowell, 2003:21) but *what* is included and excluded.

Regarding the enactment of including/excluding thinkers as diverse as Jacques Derrida (2002) and Susan Sontag (2003) encourage us to consider that by saying (Derrida) or showing (Sontag) one thing the text necessarily covers something else. This fits well with my conceptualisation of inclusion with necessary exclusory affects. Inclusion and exclusion can be theorised as opposite, but which in practice are collapsible. That is, saying or showing one thing (inclusion) covers something else (exclusion, with traces of inclusion). Sontag, for

example, poignantly reminds her audience that war pictures shown to the public "should not distract you from asking what pictures, whose cruelties, whose deaths are *not* being shown" (2003: 14). Similarly, Trinh Minh-ha offers a way of configuring representation and how this is interconnected with memory and forgetting. Speaking specifically of the increasing return of American soldiers to Vietnam who fought during the Vietnam War Minh-ha offers a very theoretical, cultural, political and personal commentary to this return (*Framer Framed* [Lecture], 2009). Typically, this return has been viewed as an act of remembering, but during her lecture Minh-ha urged her audience to consider the opposite; that it is not in fact an act of remembering but an act of forgetting. This is a useful configuration of memory, especially in post-colonial times and places. Before taking the next step let me say that at this point, as a researcher, I find myself in a position I never intended, that of deconstructing deconstruction. Alluding to architectural metaphor, in at attempt to build rather than deconstruct, allow me to elaborate.

Contemporary Australia, for instance, is currently experiencing a wave of cultural amnesia, that is, a collective remembering which often behaves as a collective forgetting in order to ease the shame, pain and confusion of the process and affects of colonisation. Artwork at RMCLCB may enact a haunting of colonisation in the current "time and place" (Chief Justice Bryant [Public Speech], 2006) of this contemporary building. Artwork can then be seen (literal and metaphorical vision) as playing a vital role in complex memory formations of remembering and forgetting – potentially sites of resistance to collective amnesia. As a counter-action to dissymmetries of who and what is remembered and forgotten, to paraphrase Braidotti, there is power (potentia) in forgetting to forget (2006:141).

Although not necessarily escaping inherent problems of deconstruction (that is, unpacking by

rebuilding, and rebuilding by unpacking) an alternative way of regarding concerns in the previous paragraph is through further questioning of categories and inclusion. Indeed, Minh-ha offers a persuasive argument, but what requires additional interrogation are concepts such as "collective". In an assumed well-meaning gesture of inclusion the concept such as "collective" necessarily implies a unity between certain people (inclusion) and not others (excluding affects). Following on, who is considered to be part of the collective? And, who regulates this inclusion/exclusion (potentia/potestas)? I pose these questions, but I do not have definitive answers. Returning to an earlier point about post-coloniality, if we imagine exclusion as minorities and inclusion as the majority, we see that minorities certainly do have a defining relationship to the majority.

15. OBJECTS

This section considers the courtroom affects of differing courtroom layouts. These different layouts are one of the architectural/design changes that I have noted as indicating a shift from "mainstream" to "alternative" courtrooms. As I argue, these changes of courtroom layout have consequential enactments and embodiments of "doing justice differently". For this analysis let us imagine three types of legal benches/tables commonly used in three different courtrooms:

(1) Square – "Mainstream" courtroom (figure 5, next page)

(2) Circular – Koori Court (and other Indigenous Courts) (figure 6, next page)

(3) Triangular – LAT (figure 7, p.73)

The squares in figures 5 (below) and 7 (next page), and circle in figure 6 (below), represent the bench shape and position. The X in figures 5 and 7 indicate where people are sitting. Similarly, figure 6 labels where certain participants are positioned around the Koori Court table. The arrows in figures 5 and 7 indicate available sightlines according to physical positionality. Figure 6 is taken from *Koori Court: A Defendants Guide* (2010). I created the images in figures 5 and 7 from my observational notes taken from the DVD from *Less Adversarial Trial Education Package* (2009).

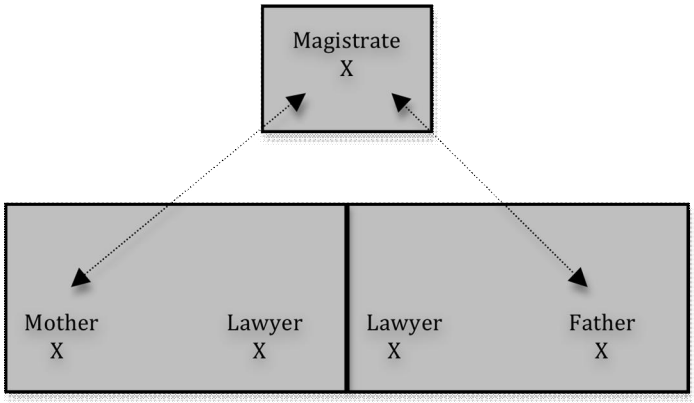

Figure 5: Square "Mainstream" Courtroom (e.g. Adversarial Trial)

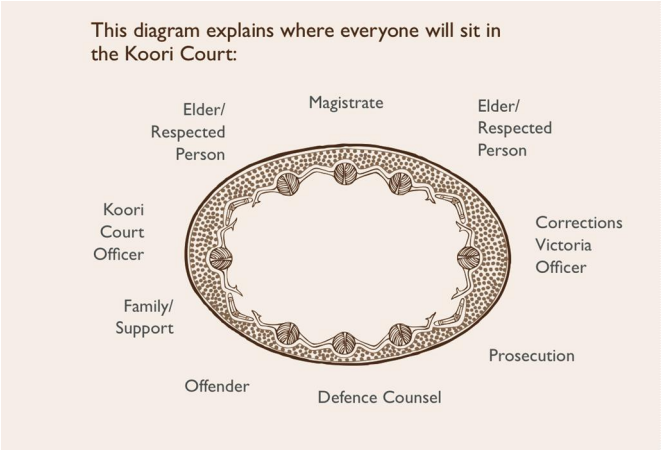

Figure 6: Circular Koori Court (and other Indigenous courtrooms)

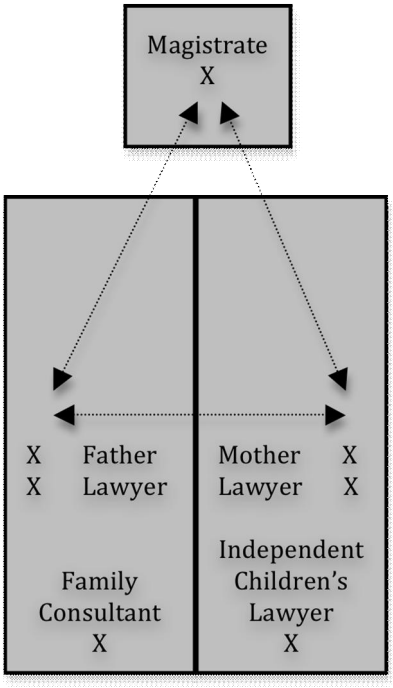

Figure 7:Triangular LAT Courtroom

The analysis of the differences between these three courtroom layouts will proceed in two interrelated sections: courtroom benches and courtroom sightlines. I say interrelated because, as you will read below, I found that courtroom sightlines are created and/or restricted *precisely* as a result of the physical positioning of courtroom benches, ensuing particular positioning of bodies. Similar to the section *Outside Walls,* my research establishes a causal relationship between design and affect. What I mean by this is that the layout of courtroom benches prescribe precisely where people sit in the courtroom. This physical positionality then has direct affects on what participants see and hear etcetera. My premise is that both benches and sightlines in "mainstream" courtrooms are the results of "architectural embodiment of power" (Mulcahy, 2007:399). For most participants, excluding the magistrate, this operation of power is in the restrictive potestas sense. "Alternative" courtrooms, such as Koori Court and LAT, actively re-position courtroom benches so that sightlines between participants are more prevalent, thus encouraging dialogue between, for example, complainant and defender. It is precisely because of these architectural and design changes that I consider Koori Court and LAT to be "doing justice differently".

Cerwonka's research into the Fitzroy Police Station (which happens to be just one suburb away from NJC) illustrates a unique insight into Australia's colonial fixation on squares and grids. Her analysis on colonialism and spatiality feeds directly into my own:

> The very design of the city itself [Melbourne], a grid formation, came out of an Enlightenment impulse to rationalize society. As a colonial space, Melbourne was designed following Governor Darling's 1829 Regulations, which mandated that all Australian townships be structured in rectangular form. As Paul Carter points out, "One constant feature of the grid plan is its association with the notion of authority or the idea of control"… the grid territorialized Australia by connecting its colonial cities back to an imperial source on a number of levels at once. Reproducing the British grid city was a means of reinventing Australia as a British place and erasing Aboriginal meaning and presence from the landscape (2004:197-180).

Cerwonka offers such a rich account of how power and regulation is played out locally but on such great scale. At the same time it highlights the position of Australian city design as adhering to colonial legacies and practices. The Australian courtroom can be seen to operate in a similar colonial vein, that is, a grid or square (figure 5, p.72) representing (colonial) authority and control and the presence of Indigenous artwork and circular courtroom table representing Indigenousness and the Australian landscape.

15.1 Benches

Returning to a phenomenological analysis of space, philosophers (particularly those with a phenomenological approach) remind us, time and time again, of the importance of tables. Scholars such as Iris Marion Young (2005) and Sandra Bartky (1990) provided the classical feminist accounts of phenomenology. More recently, queering phenomenology, Ahmed's variation on feminist phenomenology, reminds us (in turn evoking of Husserl and

Heidegger's preoccupation with tables) that:

> Bodies as well as objects take shape through being oriented toward each other, as an orientation that may be experienced as the cohabitation or sharing of space… bodies are hence shaped by contact with objects and others… they may even take shape through such contact or take the shape of that contact… stay[ing] with the example of the table. As an object it also provides a space, which itself is the space for action, for certain kinds of work (2006:552).

The importance of this observation will become more and more apparent as I move through this section. Nevertheless, just to be clear, my starting point is that, as suggested in the above quote, bodies and objects *are* shaped through one another, bodies and objects *do* share the space they co-habit, and this co-sharing and co-habiting *does* create space. This understanding of bodies, objects and spaces is very Foucauldian in the potentia sense of generating spaces, actions and interactions. Unfortunately this analysis would not be complete with taking account of the ineluctable operations of potestas. In this section I examine the affects (both potentia and potestas, whilst still trying to escape the dialectical and/or of power operations) of courtroom benches on the participation of people in "mainstream" and "alternative" courtrooms. By participation I mean active engagement with trial proceedings which can be defined through speaking, hearing, sight, being addressed directly by others in the courtroom (as opposed to being addressed indirectly via a lawyer, e.g. a magistrate speaking to a lawyer about the defendant instead of directly to the defendant) etcetera. Participation, in this sense, means that the affect courtrooms have on bodies needs to be examined. Phenomenology is one significant means of doing this.

With continued interest in women's bodies and subjectivity various feminist thinkers have adopted a phenomenological approach to their research (Lovell, 1997). For example, classical

second wave feminist scholars such as Simone de Beauviour used phenomenology as a means of measurement in the embodied and lived project of "becoming woman" (*The Second Sex*, first published in French in 1949 and published later in English in 1953). Other influential feminist scholars integrating a phenomenological approach include Grosz (1994), Ahmed (2006, 2007), Bartky (1990), Young (1990, 2005), Butler (1997) and Vivian Sobchack (1995). Phenomenology can be defined as an approach and focus on "lived experience of individuals and their perception and consciousness of objects and relationships" (Lovell, 1997:199). One way of accounting for the popular feminist integration of phenomenology is because it offers a significant means of measuring experience (e.g. female experience). A classical example of this is Young's work *On Female Body Experience: "Throwing Like a Girl" and Other Essays* (1990) where she explicitly uses a phenomenological approach to consider "breasted experience" as something which frames women's lived experience as distinctly different to men's.

Ahmed, bringing queer studies into dialogue with phenomenology, writes: "phenomenology emphasizes the importance of lived experience" (2006:544). Bringing object relations to the fore, Grosz contends, "although the body is both object (for others) and a lived reality (for the subject), it is never simply object nor simply subject" (Grosz, 1994: 87). According to Grosz, the body thus becomes an "instrument by which all knowledge and information is received" (1994:87). Bodies, as knowledgeable and receivers of information, is the hinge to phenomenology. As I have illustrated in previous sections of this thesis part, particularly the details regarding architectural affects, bodies are affected differently according to their environment. If, as I argue, bodies are positioned around a circular table (as in Koori Court) information is received differently than when positioned in strict angular "mainstream" court format.

Courtroom benches, like tables, are objects that both *provide* space (for legal work) and *create* spatial divisions (between magistrate, lawyers, "victim", "perpetrator" and public seating etc.). This philosophical obsession with tables gives rise to a different viewpoint, precisely the shape of courtroom benches/tables and the consequent "facing" (Ahmed, 2006) of bodies in the courtroom. One of the most significant affects of this is sightlines.

15.2 Sightlines

I borrow the term "sightlines" from Mulcahy's article *Architects of Justice* (2007). Sightlines in the courtroom, according to Mulcahy, are a good example of the "panoptic ideal" (2007:396). I acknowledge the historical (and continual) prevalence of the magistrate having control over sightlines (and other spatial and sensory modes of communicating and engaging, for example what can be – combing my own and Mulcahy's terminology – deemed "lines of hearing"). Meanwhile, in a similar move to Mulcahy, my focus is on courtroom participant's sightlines. Whereas Mulcahy's participant is the general public and media located in the public seating available in many trials, my courtroom participant is defined by being involved (that is, participating) in the trial. Examples of these kinds of participants are defendants and witnesses. As we will see, like most things, lines between Mulcahy's and my own participant subjects are blurred. This is particularly evident in Koori Court where the general public sitting in the public seating (Mulcahy's definition of participant) is actively encouraged by the court to contribute at any time during the hearing. These contributions are usually from members of the general public who personally know the defendant and wish to offer an opinion or story about particular circumstances that they believe have contributed to the defendant being charged with a crime. In these cases, lines of participatory inclusion in the

legal process are not only blurred but also significantly extended. I regard this as positive participatory inclusion that signals a shift away from a strictly controlled "mainstream" courtroom to a more inclusive "alternative" courtroom. The fact that Koori Court encourages anyone in the court to contribute to the proceedings indicates the enabling (potentia) dimensions of "doing justice differently".

"Sightlines" are created by specific courtroom design resulting in certain eye-contact being made between some people and not others (again we "see" that vision has maintained is preferential position in the hierarchy of the senses). The magistrate in "mainstream" and some "alternative" courtrooms, for example, is architecturally positioned as raised and facing everyone in the courtroom. The material positioning of the magistrate (discussed in greater length in *Part Four: Procedural*) "reiterates the expectation that the[y]… should have visual control over everyone in the court in order to maintain full control of the proceedings" (Mulcahy, 2008:396). The well-known saying "justice should be seen to be done" captures the continual pre-eminence of vision in the courtroom. There is, according to Mulcahy, an "interface between the physical environment of the court and the fundamental principle that justice should be seen to be done" (Mulcahy, 2007:383). Visibility of justice can also be conceptualised as legal transparency. The transparency of justice is considered in greater depth in *Part Five: Technological* (section 25, p.128).

Even architects and designers of courtrooms are concerned with the issue of visibility and sightlines. Since 2004 England has had an "authoritative 'manual' for court architecture" (Mulcahy, 2007:387). Providing a template for court planning *Court Standards and Design Guide* (2004) demonstrates an architectural concern of sightlines. Historically, this concern of sightlines has reflected a trend in isolating and surveilling public attendance and participation

during trials[22]. According to Mulcahy, this trend reflected "a mid-Victorian era in which the public were often conceived of as threatening and 'dirty'" (Mulcahy, 2007:383). These guidelines, although attentive to the importance of sightlines, were concerned with the "visibility of spectators rather than the visibility of proceedings" (Mulcahy, 2007:396). My focus is a shift away from analysing sightlines available to the magistrate (in order to facilitate surveillance of the public) to architectural and design changes enabling sightlines for courtroom participants.

Ahmed claims, "if we face this way or that, then other things, and indeed spaces, are relegated to the background; they are only ever co-perceived" (2006:546-547). In line with this, the magistrate perceives everything and everyone in the courtroom (or at least is expected to), whereas the lawyers, jury, public and media etcetera only ever "co-perceive" the courtroom and everyone in it. Consider the following description of "mainstream" children's courts:

> The courtroom itself is set up in the same way in terms of the magistrate being at a bench that's higher and oversees the whole courtroom. There's the same bar table where the solicitors are and the prosecutor and sitting with the client sitting behind you. Whereas in the Magistrates court you stand up when you are making your submissions, at the children's court you generally stay sitting which I suppose is an attempt to make it less formal and also you have this little person sitting behind you so they have to be aware of what's going on. So the judge is still raised but both parties at the bar table are sitting down (Interview One, February 2010).

[22] Likewise, *Part Five: Technological* will address the historical shift from public trials, judgement and punishment (e.g. public execution) to closed and confined trials and discipline (Foucault) only to return to a highly visualised operation of justice and judgement (e.g. live streaming of court trials at the International Criminal Tribunal in The Hague).

As established, "mainstream" courtrooms physically design the layout so proceedings are conducted in a square (see figure 5, p.72). In accordance with this courtroom layout, the magistrate faces the defence and prosecution which both face back. Correspondingly the defence and prosecution, "in the very preoccupation with what it is that [they] face" (Ahmed, 2006:547), do not face one another (refer to arrows in figure 5, p.72). With extensive experience as a legal mediator, facilitator and judicial educator Joanna Kalowski considers "mainstream" courtrooms to be "disabling" (*Less Adversarial Trial education package,* 2009*)*. Let me pause here to compare and contrast what Kalowski calls a "disabling mainstream" courtroom with what I envisage as an "enabling alternative" courtroom. The term enabling very much exists within the lexical web of potentia, referring to possibility, empowerment and entitlement. If "alternative" courtrooms are enabling the key consideration is in what ways they are enabling. "Alternative" courtroom design and layout, with consequential sightlines *between* participants, can be read as knowingly enacting counter-strategies to legacies established by "mainstream" courtrooms that "disable" courtroom interaction and participation. Turing specifically to LAT we can see that "alternative" courtrooms are spatially configured in fundamentally different ways to "mainstream" courtrooms in that "alternative" courtrooms encourage conversation and dialogue with the aim of decision-making.

The Family Court of Australia documented the shift in 2007 from "the traditions of the common law adversarial trial" to the "less adversarial trial". The publication, *Finding A Better Way* (Harrison, 2007), records the development of a this new approach as a "response to a long recognition of the need to provide better ways to decide disputes between separating parents when the best interests of children is the paramount concern" (Harrison, 2007:iii).

This focus is parallel by the lawyer in Interview One: "children courts are about the best interests of the child" (February 2010). A significant difference between children's courts and regular "mainstream" courts is the importance of the "best interests of the child" rather than, for example, the best interests of the community. LAT can be summarised as a shift from a formal courtroom environment to "an informal environment" (2007:53). According to Margaret Harrison (2007:53) characteristics of LAT include both courtroom layout and procedure. Some characteristics are the same or similar to "mainstream" courtrooms. These include: procedures are conducted in an ordinary courtroom and the magistrate controls the process. Although each magistrate may have other particularities to their courtroom, generally speaking characteristics signifying a departure from the "mainstream" court environment include:

- the layout of the courtroom is in a manner which best suits the needs of the case
- no formal requirements as to where anyone in the courtroom should sit
- the trial pays attention to cultural and family violence issues
- the trial proceeds in the form of a structured discussion
- there is direct interaction between magistrate, parties, witnesses, family consultant and lawyers
- the interaction is less formal than a traditional trial
- there is the expectation that the trial remains respectful
- the same magistrate and family consultant remains with the trial until it's resolution

As Justice Collier says, the LAT "can be fashioned and designed to suit any case" (*Less Adversarial Trial education package,* 2009*)* and if it does not work then the case can turn to a "mainstream" approach.

To explore this further let's take Justice le Poer Trench's LAT courtroom as an empirical example. Justice le Poer Trench re-arranges the courtroom so the two parents face one another instead of the magistrate (see figure 7, p.73). As this figure indicates, a simple rearrangement of the two courtroom benches has a considerable affect on the hearing proceeding as a structured, whilst remaining magistrate controlled, dialogue between two parents[23]. An interview with Justice le Poer Trench about LAT conveyed why he believes this is a "better" way of conducting a LAT hearing. He says: the way you set up your courtroom does add a dimension to the sense of "working together" (*Less Adversarial Trial Education Package,* 2009*)*.

My research found that this is a strategic attempt to move away from "so-called objective" legal discourse primarily between magistrate and lawyers. This enabling and positioned shift confirms my claim that these courts are "doing justice differently". On this account, courtrooms such as LAT foster a greater potential for "working together" (Justice le Poer Trench), cultivating "conversation" (*Koori Court: A sentencing conversation,* 2007) and promoting a paradigm shift from objective law to a "more collaborative approach" (Justice le Poer Trench, *Less Adversarial Trial education package,* 2009*).* In practice this gives parents the opportunity to address the magistrate and one another in person. In sum, these "alternative" courtroom strategies provide a "way to move forward" (Justice Collier, *Less Adversarial Trial education package,* 2009) and can be encapsulated at the very least as

[23] The DVD in the *Less Adversarial Trial Education Package* showed parts of four or five LAT hearings with different magistrates presiding. Each magistrate has discretion over the courtroom layout. All LAT hearings shown on the DVD were of parents involving a mother and father. It is for this reason that I label "mother" and "father" in figure six. Although never specifically mentioned at any point I presume LAT is also available to same-sex parents.

"doing no further harm" (McIntosh, *Less Adversarial Trial Education Package*, 2009*).*

16. CONCLUSION

Architecture plays an important role in the way justice is carried out in the contemporary Australian courtroom. To paraphrase Grosz, law and architecture are part of a field on which power relations play themselves out (2001:103). Instances of "mainstream" courtroom architecture include highly regulated outside walls, which form grandiose barriers between the inside and the outside of courts. Inside the space, "mainstream" courtrooms enact "so-called objective law" by dislocating interaction between people in the courtroom. This is done by formatting where each and every person is positioned in the courtroom and in relation to one another. This creates distances between people, and also prevents sightlines and eye-contact between certain people. Paralleling "sightlines", the result is that the physical positioning of bodies reflects the "political economy of attention" (Ahmed, 2006:547) in the courtroom. The magistrate in "mainstream" courtrooms regulates the strict hierarchy of participation in legal proceedings. "Mainstream" courtroom architecture is geared towards purporting the control the magistrate has over the courtroom and legal proceedings, meaning that benches are constructed precisely to allow the magistrate to watch over everyone, and for everyone to have clear sight of the magistrate but not of anyone else. This square format reflects spatialised power that limits inclusion and amplifies exclusion.

Positioned as "alternative" courtrooms Koori Court, LAT, RMCLCB and NJC reflect architectural shifts that demonstrate the strategic intention in generating courtroom inclusion and participation. Using these four "alternative" courtrooms as sites for analysis, I found that increased courtroom inclusion results in greater potential for localised decision-making.

Court architecture does, like at NJC, embody it's aim to create a community space that focuses on restoring community justice rather than simply punishing people going though the legal system. Some LAT magistrates make small layout changes to their courtrooms, which then make a big difference to how the hearing proceeds. Justice le Poer Trench, for instance, re-arranges the courtroom benches so that the two parents face one another and the magistrate, thus creating triangular sightlines (refer back to the arrows in figure 7, p.73). A conversation between all parties involved can therefore unfold. Put simply, this is "doing justice differently".

The aim of this chapter has been to demonstrate that architectural changes towards "doing justice differently" can and do have enabling and positive affects on those participating in courtroom processes.

Part Four: PROCEDURAL

17. INTRODUCTION

This chapter contributes to debates surrounding three significant points:

(1) The need for "alternative" courtroom procedures in Australia

(2) How "alternative" courtroom practices have responded to the dominance of "mainstream" courtroom practices

(3) How and why Koori Court (as an "alternative" courtroom) is suspended in sex matters and family violence matters

First, in demonstrating why Australia requires "alternative" courtroom procedures[24] I argue the following three points. That "mainstream" courtroom procedures systematically:

(1) Disqualify women's voice and testimony

(2) Disregard cultural diversity

(3) Format courtroom behaviour (resulting in "sameness" rather than "difference")

[24] As a side note, I feel it important to say that although my interest is on the national level, the need for different or "alternative" courtroom procedures is, of course, not unique to Australia. Beyond this thesis, with more time and space, an international comparison is definitely a future direction for this project. There is, nevertheless, a certain urgency in Australia as issues such as Indigenous justice and reconciliation are still not adequately dealt with on national and state levels.

Second, building upon feminist legal theory and post-colonial feminist theory my aim is to detail how "alternative" courtroom procedures have responded to "mainstream" procedures. In doing so I work through notable changes between "mainstream" procedures and Koori Court, NJC and LAT[25].

Third, providing a balanced analysis, I attempt the difficult task of addressing and unpacking the procedural limitations of "alternative" courtrooms, in particular the suspension of Koori Court in sex matters and family violence. This is a delicate analysis, mostly because there is so much at stake. The fact that sex matters are automatically excluded from Koori Court indicates that there are no spatial or procedural provisions or means to deal with these legal matters. As this part of the thesis, and *Fart Five: Technological*, shows both "mainstream" and "alternative" courtrooms simply do not know how to approach sex matters. These legal matters are literally pushed out of the courtrooms. This systematic exclusion, combined with the gravity of sex matters, is why I say there is so much at stake. We could say that sex matters matter more. I wish to position Koori Court as enabling the beginnings of "doing justice differently" in the affirmative sense without entirely dismantling the progress because sex matters are excluded.

It is my hope that these three sections will demonstrate that there has been an affirmative shift from "mainstream" courtroom procedures – that systematically exclude difference – to "alternative" courtroom procedures signalling the beginning of new ways to practice justice.

[25] CCTV does not feature in this chapter, as it the central "alternative" court in the following chapter. Connecting concerns (between, for example, the exclusion of sexual assault hearings in Koori Court and the mandatory/optional live-streaming of sexual assault testimonies in "mainstream" courts) from this chapter and explored in different directions in the next chapter with the introduction of technology into the contemporary Australian courtroom.

This chapter finds that feminist legal theory and other disciplines critiquing the dominance of "mainstream" legal discourses and processes have "begun to expand the boundaries, [and] redefine the borders of law" (Feineman & Thomadsen, 1991:xvi). Identifying that critiques of the traditional adversarial trial not only exist on a conceptual, theoretical and methodological level my research pinpoints particular instances where the shift away from "mainstream" courtroom procedures has resulted in the implementation of new procedures that focus on location, positionality and cultural sensitivity.

As the researcher, this chapter produced more hurdles than I had expected. Positioned very much as an "outsider" of legal theory and legal practice I had to find certain inlets into the procedure of law. This came about via feminist legal theory[26], speaking with lawyers working in "mainstream" and "alternative" courtrooms in Melbourne, and attending various courtrooms in Melbourne. To date there is not a huge amount of literature available on "alternative" courtrooms, such as Koori Court, NJC and LAT. Apart from detailed information available on the NJC website from what I can ascertain no research has been conducted on NJC itself.

Most of the information about LAT has been generated by government funded research including research and interviews with magistrates and other stakeholders (psychologists, separating parents etcetera) involved in the LAT process (e.g. *Finding a Better Way*, Harrison, 2007). *Family Transitions*, a Melbourne based child psychology clinic dedicated to

[26] Feminist legal theory, such as MacKinnon, Smart, Young, Frug, Fineman & Thomadsen and Bridgeman & Mills, was still somewhat difficult to wade through mainly because to a certain extent a lot of this literature presupposed professional or academic exposure or experience to law. Nevertheless it provided insight into legal practices via a feminist critique of them.

the needs of children experiencing the separation of parents, became a rich resource for me in terms of LAT research. The director, Jenn McIntosh, has conducted detailed reports into how LAT creates a more "user-friendly" legal system for parents and children (e.g. *Evidence of a Different Nature*, McIntosh, Bryant & Murray, 2008)

More so than NJC and LAT, research into Koori Court (and other Indigenous courts across Australia) is on the incline. From what I can tell, however, it is still an under-researched area. Also, because Koori Court has only existed since 2002 the long-term affects have not yet been seen or documented. To date, Elena Marchetti and Kathleen Daly have provided a snapshot of Koori Court practices (2004), and more recently how Indigenous courts in general have a procedural and political aim to transform the practice of law (2007). Other than this, those involved in Koori Court have published research based on their own "insiders" experience. Kate Auty and Daniel Briggs (2004), for example, reflect the views of their experience of the process of being the first magistrate and Aboriginal Justice Officer from the Shepparton[27] Koori Court. Briggs (a Yorta Yorta man from the north east of Victoria was the first person employed as an Aboriginal Justice Officer in any Koori Court) and Auty (a non-Indigenous with a background in law, arts and environmental science who worked as a senior solicitor with the *Royal Commission into Aboriginal Deaths in Custody*, 1991) make a poignant point at the beginning of their paper. They write: "we believe that in engaging insiders and outsiders… we can start to unpack our complex exclusiveness with its insistent inclusiveness" (2004:6).

It is the "insiders" perspectives and experiences from scholars, psychologists, lawyers,

[27] Shepparton is a large rural town (fifth largest town in Victoria) located approximately two hours drive from Melbourne. This is where the first Koori Court commenced in 2002.

magistrates, Indigenous Elders, etcetera that gave me, as an "outsider", perspective into the differences between "mainstream" and "alternative" courtroom practices. Utilising Hill Collins trope of the "outsider-within" (1991) these ideas of "outsiders" and "insiders" are extended further in the section on the suspension of Koori Court in sex matters and family violence matters. Australian Indigenous feminist scholars[28], such as Aileen Moreton-Robinson, have written on the "displacement" of Indigenous women in Australian feminism. She writes, "to address feminist theory and practice means one is positioned within that discourse not outside it" (2006:246) but her experience as an Indigenous feminist scholar locates her as "outsider-within". In true standpoint form Hill Collins does not see this as a disadvantaged position. Instead, she writes that "black women intellectuals can use our outsider-within location in building effective coalitions and stimulating dialogue with others who are similarly located" (1991:38).

In a footnote in Carol Smart's *Feminism and the Power of Law* (1991) I found a reference to Australian feminist legal theorists. This note spoke to me and some of my "outsider" difficulties in researching and writing this chapter;

[28] In the opening paragraph to *Thinking Differently: A Reader in European Women's Studies* Griffin and Braidotti pose a two part "game, for you, the reader" (2002:1). They ask the reader to (without looking them up) write down the name of five feminists from each of the following countries: America, Britain, Germany, Italy, Spain, Slovenia, Greece, Hungary, Portugal, Finland and Belgium. Their guess is that we would be able to think of five American and British feminists, and less (if any) from the other countries. As Moreton-Robinson alludes, this is also of particular importance in Australian feminism. There is a tendency to remain with theories and theorists that we know well and to not look further for more located texts. Indigenous feminist contributions are a rich resource for unpacking the ongoing difficulties of Indigenous women's issues and concerns in contemporary Australia. This is an area that deserves more serious attention.

> Feminist legal scholars are expected to think and write using the approaches of legal method: defining the issues, analysing relevant precedents, and recommending conclusions according to defined and accepted standards of legal method. A feminist scholar who chooses instead to ask different questions or to conceptualise the problem in different ways risks a reputation for incompetence in her legal method as well as lack of recognition of her scholarly (feminist) accomplishment (Mossman in Smart, 1991:166).

This quote implies that there is a legal method, and a feminist legal method. According to Nicola Lacey, feminist legal theory suggests that there is something about the structure of method of modern law that is hierarchically gendered (1998:2). Knowing by now that gender is never removable from any other marker or category of difference we can extend this claim to say that the structure of law also operates in a hierarchy in terms of ethnicity, race, age, class, etcetera. Following Lacey's explanation, feminist legal method is about revising "powerful social institutions such as law" (1998:4). Martha Fineman and Nancy Thomadsen (also feminist legal theorists) have a more sceptical view of the relationship between feminism and law. They write: "feminism, it seems, has not and, perhaps, cannot transform the law. Rather, the law, when it becomes the battleground, threatens to change feminism" (1991:xii). In this line of thought "alternative" courts are viewed as a "'tinkering' type reform" (1991:xiv) that does not fully change the structure, and therefore replicates injustices. This is seen most clearly in the suspension of Koori Court for (predominantly) cases involving women "victims" of sexual assault and family violence.

Despite the difficulties of this chapter I agree that "a characteristic of much feminist legal method is that the vision it propounds or employs seeks to present alternatives to the existing order" (Fineman & Thomasden, 1991:xiv). With this in mind, coupled with the aim of contributing to a deeper and "better" understanding of "alternative" courtroom procedures,

this is what I found.

18. THE NEED FOR "ALTERNATIVE" COURTROOM PROCEDURES

This section considers why Australia requires "alternative" courtroom procedures. In three sections, my argument is that Australia needs "alternative" courtroom procedures because "mainstream" courtroom procedures generally; (1) disqualify women's voice and testimony, (2) disregard cultural sensitivity, and (3) format courtroom behaviour. As the following paragraphs will show these claims have a long history in feminist theory, feminist legal theory, and post-colonial feminist theory. My aim here is to reflect upon previous contributions in order to account for why marginalised people require "alternative" courtroom procedures as a response to dominating "mainstream" procedures.

18.1 Disqualifying Women's Voice & Testimony

A common epistemological argument by feminist legal theorists, such as MacKinnon, is that law constructs knowledge, which then claims objectivity. The problem is that, even if objectivity does exist, it is expressed as a male point of view (Lacey, 1998). This "male point of view" is presented by Lacey and can be criticised as being quite reductive, however it does still speak to sexual assault trials where women are silenced (more to follow on this). This argument suggests that "mainstream" courtroom procedures subsume women's experiences under the dominant legal point of view that prioritises the male point of view over women's knowledge. Greg Bergman and John Feinblatt note a trend in America that since the 1960s onwards "victims" of crime "have consistently assailed a criminal justice system that places defendants at the center stage while all but ignoring the victims" (2005:43). To paraphrase Lacey, "this process writes certain bodies out of law" (1998:8). The bodies Lacey is referring to are of course women's bodies. Another way of looking at it would be that these "certain

bodies" are anything different to the universal subject position (male, white, wealthy, and of course "Australian").

Standpoint theory has made a strong case against the systematic disqualification of women's lives and experiences. Combining legal procedure and standpoint theory produces some really interesting results, as both are interested in truth claims. Attempting to dismantle grand-narratives purported by the "centre" standpoint theory emerged in the 1980s as "a method for naming the oppression of women grounded in the truth of women's lives" (Hekman, 2004:233). Law, similarly, actively seeks the truth. On this Latour reminds us that we should consider legal judgement "as truth" and not "as the truth" (2001:109). The problem with any kind of legal grand narrative or truth, as feminist legal theorists warn us, is that law systematically silences women and other marginalised groups in an attempt to do so. Another way to put this would be to say that law constructs women and other minorities as homogenous groups via the politics of representation (Brown, 1995). Reflecting back on the initial overarching aims of this thesis, this systematic silencing is a clear example of the dissymmetry of bodies (based on difference) that legal procedures creates and maintains. Following this line of thought means that an analysis of law could (or should) not be differentiated from other institutions and other forms of knowledge production. Knowledge, in standpoint terms, is "always socially situated" (Harding, 2004:7).

As signalled in the introduction to this thesis, my stance on "so-called objective law" is that law is not characterised by neutrality and positionlessness. Instead, confirming Harding's claim above, law (and law's quest for truth) is always situated. Connecting this to Haraway, law is also always partial. Partiality means that law is not objective or isolated, but rather exists in constant relation to other perspectives. Indeed, knowledge is always situated and

partial, but this does not mean that in authoritative institutions such as law knowledges are regarded in the same way. The following example, taken from a sexual assault trial, highlights the silencing and scripting of women's experience by "mainstream" law.

Taking a Melbourne based sexual assault trial from 2004 exemplifies the feminist claim that "mainstream" law disqualifies women's voice and testimony. This trial – involving aggravated burglary[29], rape[30] and indecent assault[31] – is referred to as the David Sims case. This case proceeded in two trials: first at the Melbourne County Court in April 2004 and second at the Supreme Court of Victoria in July 2004. My analysis of these two proceedings is based on my reading of the court transcripts. Methodologically, this kind of investigation deploys a certain kind of deconstruction that assumes the court transcripts to be cultural texts that can be analysed as discourse. Scholars such as Norman Fairclough (e.g. *Analysing*

[29] "Aggravated burglary" is "burglary committed by an offender carrying a firearm, offensive weapon, or explosive" (*Encyclopaedic Australian Legal Dictionary*, 2008).

[30] "Rape" is defined as "an offence at common law of having carnal knowledge of a woman without her consent. Consent obtained by fraud or mistake is not consent... there are statutory forms of the offence in some jurisdictions, under which rape is the sexual penetration of another person without consent while being aware that the person is not, or might not be, consenting; or the failure to withdraw from a person who is not consenting on becoming aware that the person is not, or might not be, consenting" (*Encyclopaedic Australian Legal Dictionary*, 2008).

[31] "Indecent assault" is "an assault accompanied by an act of indecency... there need not be separate acts of assault and indecency, as an assault which is itself an indecent act is sufficient... the indecency may derive from the area of the body to which the assault is directed, the circumstances of the assault, or from the intention of the accused to obtain sexual gratification... the offence can be committed although there is no touching provided that the complainant is put in fear of immediate violence" (*Encyclopaedic Australian Legal Dictionary*, 2008).

Discourse: Textual Analysis for Social Research, 2003), who suggest that there is always something ideological to be read in the text, influence my working definition of discourse analysis. Stemming from Marxist theory about distorted reality Althusser extended the perspective to attribute ideology to a "more complex role… representing reality where the act of representing is obscured" (Pilcher & Whelehan, 2004:75). This perspective emphasises the connection of ideology to lived experience – rendering it important to an analysis of the materiality of lived experience or embodiment of legal procedure. Problematising ideology, Hall provides the following definition:

> By ideology I mean the mental frameworks – the languages, the concepts, categories, imagery of thought, and the systems of representation – which different classes and social groups deploy in order to make sense of, define, figure out and render intelligible the way society works (Hall 1996:26).

As I see it, one of the most significant differences between the two hearings is the positioning of rape as, on the one hand "sexual assault", and on the other hand an "opportunity". The terms "sexual assault" and "opportunity" both carry heavily loaded concepts, meanings, imagery, representation and connotation. These are terms used by the magistrates from the two trials. According to the magistrate in the County Court this "opportunity" had arisen due to a twenty-one year old woman leaving her door unlocked and falling asleep on her couch with the curtains open. Reconstructing events in the courtroom, responsibility was placed purely on the female. Not only was the responsibility transferred onto the woman, but additionally the defendant was positioned as being even less responsible because his "inhibitions were reduced" due to alcohol consumption (2004:31). In stark contrast, Australian feminist criminologist, Young details how alcohol consumption by women is used against them in sexual assault trials (1996). This is one of the strategic means "mainstream" courtrooms deploy in undermining women's experience and claims to truth. Referred to as

re-victimisation "the [Australian] criminal justice system has come under criticism for re-victimising the victim" (Taylor & Joudo, 2005:1). The Melbourne based lawyer in Interview One spoke of the cross-examination of sexual assault "victims" in these terms: "It's recognised as being a really traumatic process for people to have to go though those things again" (February, 2010). The next part, *Part Five: Technological*, will explore this is greater depth in terms of the potential courtroom technology has to "protect" "vulnerable" people in court (i.e. women and children).

Smart critiques law's claim to truth and indicates how re-victimising eradicates women's experiences and claims to truth. She writes:

> What is also important is how this claim can disqualify other discourses, confirming a hierarchy of knowledges in which law is positioned close to the top. Lay knowledge and women's experience does not count for much in this regime of Truth (1990:90).

This typically Foucauldian "regime of truth" works alongside the feminist argument of how gendered grammar of sexual assault operates. Philadelphoff-Puren claims that often grammar used by judges in sexual assault cases "constructs the woman as actively seeking to be raped" (Philadelphoff-Puren, 2002: 50). "Opportunity" is a prime example of this.

In this section I have mapped out some of the "mainstream" courtroom deployments of disqualifying women's voice and testimony in court, which are especially prevalent in sexual assault trials. Feminist legal theory has been of particular importance in addressing the systematic silencing of women in "mainstream" courtroom procedures, and for making legal changes from the "inside". The David Sims case, from only six years ago, highlights that there is still substantial gender dissymmetry in terms of legal inclusion. Section three of this

chapter details some of the significant responses "alternative" courtrooms have had in addressing this dissymmetry.

18.2 Disregarding Cultural Diversity

Much of the research into Indigenous experiences of "mainstream" courtrooms claims that the courtroom is an alienating place for Indigenous people (Auty & Briggs, 2004; Eades, 2010; Marchetti & Daly, 2004, 2007; Stroud, 2006). The co-ordinating Koori Court magistrate – Deputy Chief Magistrate Jelena Popovic – believes Koori people have never felt part of the "mainstream" system and that it is "something [that is] being done to them rather than them having an actual voice in the process" (*Koori Court: A Sentencing Conversation*, 2007).

With a particular interest in linguistics Natalie Stroud is concerned with the cultural and language disadvantages experienced by Australian Indigenous people in "mainstream" court. Stroud refers to "mainstream" court as the "formal court context" (2006:1). Just as "mainstream" court is seen to format and/or disqualify women's testimonies, many procedural features of "mainstream" court are deemed problematic for Indigenous people. Two things of particular concern, according to Stroud, are the question and answer format, and cultural meanings attached to silence (2006:1). "Language", writes Stroud, "used in the justice system can disadvantage people who traditionally are less powerful or are already disadvantaged in other ways" (2006:2). This confirms other research done on the power of legal language to further marginalise people in "mainstream" courtroom settings. Law and language, as an area of study, converged in the 1970s and 1980s around the idea of the "linguistic enactment of law's power" (Conley & O'Barr, 2005:9). With publications from

1988 onwards Diana Eades could be regarded as the leading Australian scholar addressing the cross-section of Indigenous experiences of "mainstream" legal systems, language and law.

According to Eades (2010) and Stroud (2006) there are a multitude of problematic features facing Indigenous people in "mainstream" courtroom procedures. These range from non-verbal signs such as silence (which is often mistaken as mis-communication), not engaging in direct eye-contact (which is often taken to mean that the person is non-cooperative), and the question and answer format (which can be difficult for Indigenous people who communicate using narrative format). Another common example is the defendants use of the term "yes" to mean "yes, I hear you" and not "yes" in response to a "yes"/"no" question (Stroud, 2006:3). Other disadvantages include the over-use of professional legal language and terminology that is not accessible to many people attending court. Eades argues that courtroom language not only operates as a mechanism that legitimates (neo)colonial power over Indigenous people but also legitimately fails to deliver justice to Indigenous people in "mainstream" courtrooms (2010:115).

Research into marginalised groups and having voice is wide-spread particularly in feminist post-colonial theory. This research trend was pioneered by Spivak's seminal article *Can the Subaltern Speak?* (1988). This pivotal article gives rise to an epistemological feminist stance within post-colonial debates. Providing a comprehendible definition of the "subaltern" Ponzanesi writes, the category of "'subaltern' or 'Third World Woman'[32] is an effect of

[32] Aijaz Ahmad discusses the differences between 'First World' 'Second World' and 'Third World'. Differentiating them, he writes: "First and Second Worlds are defined in terms of their production systems… whereas the third category – the Third World – is defined purely in terms of an 'experience' of externally

discourse, rather than an existent, identifiable reality" (2009:189). My understanding is that Spivak suggests that even if the subaltern can speak, or be heard, the subaltern remains trapped between hegemonic narrative and language that the "dominant discourse" (Fineman & Thomadsen, 1991) assigns to them, or silence. Uttering the word "yes" is an example of this trapped position between hegemonic voice ("yes" being understood as a response to an answer) and silence (literally not speaking at all). On language and performativity Butler claims "speaking is itself a bodily act" (1997:10). Strangely – especially in light of culturally specific silence – silence is often viewed as a void or lack, as something that is not a bodily act. Culturally specific silence is not, however, a lack, but rather an embodiment of Indigenous communication.

In response to alienating and "legitimate" disqualifying practices "alternative" courtroom procedures, such as Koori Court, actively seek procedural ways to overcome the disadvantages facing Indigenous people experiencing court. This is why I say that "alternative" courts are "doing justice differently". And, importantly, that these differences are "better" than what "mainstream" courtrooms offer. Some of these "successful" (Stroud's terminology) approaches to language differences in Koori Court include the presence of Indigenous Elders, recognition of Indigenous cultural values, and Indigenous speaking styles (2006:7). Section 19.3 (p.109) addresses other advancements Koori Court has made towards courtroom procedures being more accessible to Indigenous people. These include recognition of the traditional owners of the land, smoking ceremonies, the role of Indigenous Elders, and

inserted phenomena" (2005:85) Other theorists caution against the use of 'Third World' as it can easily come to define a place in terms of its experience with colonialism and "entirely by its relation to colonialism" (Loomba, 2005:21). Chandra Talpade Mohanty explicitly tackles the specific production of the 'Third World Woman' (2005:242-245).

the encouraged participation of the defendant in courtroom proceedings.

18.3 Formatting Courtroom Behaviour

Terence Hawkes describes a structuralist framework for the existence of knowledge as deriving from semiotics. This, he writes, is "the assertion of propositions through the second 'triad' of signs: *icon, index* and *symbol*" (1977:128 emphasis added). Let me explain what I take this to mean and how it relates to courtroom symbolism. The icon is the visual resemblance of the signifier to the object. A diagram, therefore, "has an *iconic* relationship to its subject in so far as it resembles it" (Hawkes, 1977:129 emphasis added). For instance, the symbol of a woman wearing a skirt resembles a real life woman. The index is a concrete relationship: "a knock on the door is an *index* of someone's presence, and the sound of a car's horn is a *sign* of the car's presence… smoke is an *index* of fire" (Hawkes, 1977:129 emphasis added). Ergo, the index connects two things solidly. In other words, smoke equals fire. The symbol is a relationship between the signifier and the signified, and "requires the active presence of the interpretant to make the signifying connection" (Hawkes, 1977:129). Hawkes uses Saussure's well-known example of the tree to make these relationships clear. Replacing the term "tree" with the term "woman" demonstrates this:

> Where my painting or diagram of a [woman] constitutes an *icon* of the [woman], my utterance of the word '[woman]' is a *symbol* of the [woman] because there is no inherent, necessary '[woman-like]' quality in that signifier: its relationship to an actual [woman] remains fundamentally arbitrary sustained only by the structure of the language in which it occurs, and which is understood by its interpretant, and not by reference to any area of experience beyond that (Hawkes, 1977:129 emphasis added).

Gendering this relationship Butler claims that the symbols on toilet doors display the same

connection. Operating in the same way as Saussure's icon, index and symbol of a tree, an image of a woman denotes a real life woman. Before moving onto an empirical courtroom example, let me demonstrate the prescribed intelligibility and functionality between the symbols of "woman" and "man", correct reading of these codes, and subsequent gendered behaviour. In the courtroom example that follows I show that this gendered relationship can be extended to racialised, ethnicised and nationalistic behaviour. In both cases, importantly, the power the sign has as master signifier "depend[s] finally on its *context*" (Hawkes, 1977:129 emphasis added).

Keeping with Butler for the time being, almost all toilets outside the domestic sphere are divided into two areas with two separate doors; one depicting a man and one depicting a woman. These symbols of "woman" and "man" signify gendered (and sexed) identity. Entering one of these doors is often an unconscious decision, but I argue *always* a prescribed, yet nevertheless embodied, experience. The feeling of "rule-breaking" that one feels when making the mistake of entering the "wrong" toilet signifies that the segregation of men and women into two toilet spaces is socially and internally highly regulated and enforced. The act of walking through one door and not the other is more significant than generally acknowledged. I argue that by walking through the door signifying "woman" you are becoming gendered (and sexed) "female" by responding to the sign. Conceptualising gender in this way is useful because it allows an understanding of gender (and to a certain extent sex) as something that is socially and culturally assigned rather than biologically determined.

Identities, however, cannot be freely chosen. For example, the signs on toilet doors signifying a man wearing pants or a woman wearing a dress means that there are only two possible predetermined identities available. These significations then, I argue, assign behavioural

expectations. The reason I use identity in this particular instance and not subjectivity, as in the rest of my work, is to denote the term identity as being associated with stricter categorisation. I take subjectivity, on the other hand, to allow room for a mutating subject. Defining "subject-in-process", as part of a post-structuralist project, Lovell explains "the fluidity of subjectivity is such that it never fully coincides with identity" (1997:286). This way of thinking enables a reminder that we should not forget that the subject is *always* in process and is *always* negotiating between power that prohibits and constraints (potestas or "subjected to") and power that enables (potentia or "subject of"). I consider this view of the subject, similar to many other feminists, to be a positive one (Hughes, 2002:66). Foucault's legacy is strong within feminist traditions suggesting that subjectivity is in constant process, therefore, we should not deny nor forget the productive capacities of bodies. This capacity has the potential to enact "doing justice differently".

The above example clearly illustrates the direct cause and affect between sign and behaviour. With this in mind, let's turn to a concrete example from a Contemporary "mainstream" courtroom in Melbourne.

Figure 8: Coat of Arms (front entrance to RMCLCB)

"Mainstream" courts often adorn their front entrances and courtrooms with the Australian Coat of Arms. A photo from the outside of RMCLCB (see figure 8) shows that some "alternative" courts also do the same. RMCLCB, however, occupies an interesting position between my "mainstream" and "alternative" courtroom classification, as the complex does appear to house both. As the previous chapter showed RMCLCB certainly

stands architecturally apart from "mainstream" courts. Procedurally, however, it operates as both "mainstream" and "alternative" as it has one Indigenous Courtroom and several "mainstream" courtrooms in the procedural sense (so there is difference, but it is still encompassed within). During my tour of NJC Office Manager, Michelle Paul, made a point, of informing me that the NJC courtroom does not display a Coat of Arms.

Connecting symbolism and courtroom power Mohr notes: "In Australia this object [Coat of Arms], usually in three dimensions or bas relief, is placed over the head of the judge, either on the wall behind or, particularly in older courts, on a canopy above" (2006:245). Arriving, as a visitor, at the Supreme Court of Victoria I was reminded of the prevalence of the Coat of Arms. As I was entering the court building via "airport style" security screening I unexpectedly met a friend who had studied law with my sister. Knowing that I didn't have a legal background she asked whether I knew about courtroom protocol. Most importantly, she reminded, I was to bow to the judge upon entering the courtroom. Approximately ten meters away was another "airport style" security screening for those entering that particular courtroom. At this security check, where I was also required to provide name, address and photo identification, I was instructed by the female security guard to remember to bow to the Coat of Arms upon entering. With trepidation, entering the courtroom I deliberated; to whom am I bowing? The magistrate risen above everyone else, signifying "the power… to survey all that goes on in the court" (Mulcahy, 2007:396)? Or, the Coat of Arms officially "symbolising the Commonwealth of Australia" and signifying "Commonwealth and ownership" (http://www.itsanhonour.gov.au/coat-arms/, 2008)?

Like most nations Australia displays native flora and fauna on its Coat of Arms: Kangaroo, Emu and Golden Wattle. It is the fauna of this that I wish to focus on. The Kangaroo and

Emu, as animals that cannot walk backwards, represent Australia as a progressive and forward moving nation. Paradoxically, Australia takes pride in consuming (literally eating!) its national fauna emblems, invoking images of nationalistic cannibalism. Returning to Australian fictocritical writer and theorist previously mentioned, Gibbs, writes of cannibalism as "an attempt to hold onto something one once possessed – or believed one possessed – an attempt that is doomed precisely because it renders inaccessible precisely what one wanted to keep" (2003:316). She continues, "cannibalism then becomes a metaphor in colonial discourses" (2003:317). Law, colonialism and cannibalism – an apt analogy for the legal/justice system that produces and consumes it's own social deviants and deviancies.

Production and consumption (this time cultural consumption, not literally eating) is explored in greater depth in *Part Five:Technological,* where I position technology as requiring the maintenance of categories of "deviant" and "victim" in order to retain it's own requirement within the contemporary courtroom. Defining and elaborating of the use of "deviant" requires an interwoven relationship between normalisation and pathologisation. Keeping these definitions grounded in relation to the aims of this research also requires the dimension of "sameness". Feminist legal theory, with a Foucauldian legacy, considers institutions such as law to have developed out of the disciplinary society with the growth of new knowledges from those institutions (Smart, 1991:7). These institutions and knowledges, in turn, produced their own modes of regulation and surveillance etcetera. "Deviant" (criminal) and "victim" (complainant) are pathologised through the disciplinary mechanism of the legal institution, therefore require subjection to "close surveillance" with the ultimate "cure" being "normalization" (Smart, 1991:7). This normalisation can be read as "sameness", which in Foucauldian terms produces the "same social body" via legal disciplinary coercion (Smart, 1991:7).

Returning to the empirical example under scrutiny, in that very instant of bowing (to magistrate, Coat of Arms, or both), who, or what, was playing the "god-trick"? (Haraway, 1991a:187). In that moment of performing the act of bowing the "gaze from nowhere... the gaze that mythically inscribes all the marked bodies, that makes the unmarked category claim the power to see and not be seen, to represent while escaping representation" (Haraway, 1991a:188) was upon me. Theorising this moment, when entering a courtroom as a member of the public it is expected you nod or bow to the magistrate or Coat of Arms (perchance both) and in this way, you see yourself (potentia) because someone sees you (potestas). It is through the gaze of *something* else (coat of arms) or *someone* else (magistrate) that constitutes who you are in that moment (Derrida, 2002). In other words nodding or bowing to the Coat of Arms or the magistrate is an acknowledgement of your legal subjectivity (potentia), or an acknowledgement of the privilege of the "seer's look" (potestas) (Irigaray, 1993:153). At the same time, it's more than that. National identity formations enter as a central aspect of legal subjectivity. Just as swearing on the bible before giving evidence in a hearing enacts a power relationship between the individual and religion (not to mention the relationship between religion and the state), bowing to the Coat of Arms is a literal bodily confirmation that you are subjected to nationalistic modes (and codes) of regulation and behavioural expectations. The public is not forced to bow to the magistrate of Coat of Arms but, just as we obey signs on toilet doors, we confine courtroom behaviour to a perceived correct reading of nationalistic codes.

Building upon my main argument from the previous analytic chapter, that perception of space does affect behaviour, I argue that symbols such as the Coat of Arms act as the master signifier directly affecting people's courtroom behaviour. Put simply, in courtrooms where

the Coat of Arms is displayed, anyone entering that courtroom must bow. My premise is that this power relationship between symbols and behaviour correlate with the reading of national codes. More than just the reading of codes is the *correct* reading of codes. The correct (or incorrect) reading of courtroom symbolism enacts the refining of national identity with those who correctly read the codes (*and* behave accordingly) being included and those who read incorrectly (or behave incorrectly) being excluded. Operationally, once more, we see that the postulation of inclusion and exclusion is based on the construction and maintenance of one other.

In theoretical opposition to this hegemonic prescribed behaviour, I suggest sexual difference as an affirmative critique to the master signifier and prescribed "sameness". By this I mean, courtroom subjectivity is never singular but rather always different. This claim is not particular to the courtroom. Subjectivity in this sense is always already positioned differently even before entering the courtroom. My use of difference is in line with the affirmative sexual difference mode of thinking, where "sexual difference stresses the positivity of difference" (Braidotti in Jagger & Young, 1998:302). Following on, "politics of location" returns as a conceptual means of positioning difference. Likewise, post-structuralism and new materialism also feed into this sexual difference project. More so than the previous chapter on courtroom architecture, new materialism returns as a theoretical mode of research focusing on the spaces between "the" material and "the" linguistic. Courtroom procedure very much fits within this understanding of "in between" space because, as this chapter demonstrates, the tangible symbolism (e.g. Coat of Arms on the wall above the magistrate) can never be separated from the affected behaviour of courtroom participants (e.g. bowing).

19. THE RESPONSE FROM "ALTERNATIVE" COURTROOMS

This section poses and responds to three key questions:

(1) How have "alternative" courtroom practices responded to the three identified problems detailed in section 18?
(2) What are some of the key procedural differences between "mainstream" and "alternative" courtrooms?
(3) What are the implications of these differences?

In three sections I consider the shift away from the traditional adversarial trial. Epitomising this shift is LAT and services offered by NJC. Influenced by international examples critiquing the traditional adversarial system – and characterised as "alternative dispute resolutions" (Berman & Feinblatt, 2005:39) – NJC adopts techniques such as mediation and Restorative Justice. These "alternative" courtroom practices are changing "how justice is done" (Marchetti & Daly, 2004:4). These changes are not just for the people they affect directly, but have the potential to fundamentally alter the justice system for all in Australia, and for the "better". In line with feminist legal thought, that aims to reform the traditional adversarial trial, Koori Court is considered to be a "key influence in correcting and modifying established criminal processes" (Marchetti & Daly, 2004:4).

19.1 Mediation & Restorative Justice

Mediation and Restorative Justice are two key "alternative" modes of dispute resolution offered by NJC. "Alternative dispute resolution" can be described as a series of mechanisms for resolving conflict that do not rely on traditional adversarial processes (Berman &

Feinblatt, 2005:39). Mediation at NJC is described as:

> An informal problem-solving process in which the parties in dispute meet with the guidance of two skilled and impartial mediators, discuss the issue in dispute, identify options, consider solutions and work toward a mutually acceptable agreement (*Mediation at the Neighbourhood Justice Centre*, 2010).

Particularly in contrast to the David Sims case discussed in section 18.1 (p.91), mediation is one way of signifying the shift away from an either/or judgement. Instead, mediation has been perceived as a "win-win process" (Berman & Feinblatt, 2005:40) that focuses on empowerment and responsibility rather than the imposition of laws. This can be reflected back to Khanna's suggestion, mentioned in section 6.2 (p.26), that injustice and justice do not exist in a simple equation available via "mainstream" courtroom procedures. My reading of this is that "alternative" courtroom procedures such as mediation provide (or at least "ideologically" stand for) bottom-up accountability rather than top-down enforcement of legal control and power.

Restorative Justice, also a response to disabling and damaging "mainstream" courtroom procedures, is similar to mediation and Koori Court in that it encourages defendant responsibility, looks for ways to restore injustice, while simultaneously searching for ways the defendant can address their behaviour. Similar to mediation, Restorative Justice also places "victim" and defendant in dialogue in a "safe and controlled environment with a trained facilitator" (*Restorative Justice Group Conferencing at the Neighbourhood Justice Centre*, 2010). Researching Restorative Justice in America, Berman and Feinblatt found that across the board this mode of legal procedure reduces fear for the victim and increases the sense of fairness for the defendant (2005:44). The implications of this is a perception that

Restorative Justice is "better" for both parties involved in a dispute in that it restores safety and a sense of community.

19.2 Enactment of Indigenous Subjectivity

"Alternative" courtrooms have responded to the prevalence of "mainstream" courtroom symbolism by removing nationalistic symbols completely or replacing nationalistic rituals with Indigenous ones. As noted earlier in this part of the thesis NJC does not display a Coat of Arms in any section of the court complex. Instead the three flags (see figure 9) – Australian, Indigenous and Torres Strait Island – are flown and courtroom rituals involve smoking the court before each Koori Court hearing and acknowledging the traditional owners of the land. These rituals convey respect for Indigenous people, land, culture and traditions. These symbolic gestures reflect a general trend in Australia towards recognition of the need for reconciliation. The national apology ("Sorry Day") to the Stolen Generation in 2008 is a large-scale example of this.[33]

Figure 9: (from right to left) Torres Strait Island, Australian & Aboriginal flags

[33] With more time and space I would have liked to provide a more sceptical approach to the terminology and enactment of "respect" and "apology". The politics of both these words lies at the heart of many critiques of liberal multiculturalism. "Respect" implies a respecting subject who is not Indigenous. To the question "whose respect"?, the answer is obviously, "Australia's". The move of respect here functions to separate respectful Australia from respected Indigenousness (hence the separate flags) and thereby retain the fundamental non-Australian-ness of the Indigenous identity, even as this identity is played out performatively in the space of the "alternative" courtroom in the name of positive values.

NJC publically acknowledges that it is situated on Wurundjeri people's land, and Wurundjeri descendants still live in the area today. This information is available on their website as well as their publications. Inside the entrance of NJC three flags are flown – Australian, Aboriginal and Torres Straight Islander. Similar to NJC, RMCLCB also recognises the traditional owners of the land. Courtroom One (Indigenous Court) at RMCLCB has a plaque on the door reading: "The Land of the Kaurna People". The lawyer in Interview One spoke of the recognition of traditional owners in all Koori Courts across Victoria: "To start off with there is a recognition of traditional owners of the land" (February 2010).

19.3 Koori Court

Koori Court emerged for several different reasons (Marchetti & Daly, 2004). It is believed that Koori Court can address the over-representation of Indigenous people in the criminal justice system (this over-representation is detailed in the introduction to this thesis). The emergence of Koori Court is connected to two important documents. Firstly, the *Royal Commission into Aboriginal Deaths in Custody* (1991) made 399 national recommendations with the aim of reducing the amount of Indigenous Australians passing through the criminal justice system, of which Indigenous sentencing courts was key. Secondly, the *Victorian Aboriginal Justice Agreement* (2000) – written in accordance with the principles underlying the *Royal Commission into Aboriginal Deaths in Custody* – aimed at improving Indigenous justice outcomes through partnerships between state governments and Indigenous organisations (Marchetti & Daly, 2004). The director of Indigenous Issues at the Victorian Department of Justice, Andrew Jackomon, considers Koori Court to be the "jewel in the crown" of this agreement (*Koori Court: A Sentencing Conversation*, 2007). Detailing Indigenous sentencing courts from across Australia, Marchetti and Daly believe Koori Court

(and other Indigenous courts) can offer "better systems of justice for Indigenous people" (Marchetti & Daly, 2004:2). The aim of this thesis section to is unpack the enabling and disabling aspects of Koori Court procedures.

As detailed in section 6.4 (p.31) Indigenous belonging remains a disputed and problematic categorisation. To recap, access to Koori Court is based on the offender being Indigenous, pleading guilty, and willing to go to Koori Court and participate in the sentencing conversation. The charge must be something that is normally heard by a magistrate, but cannot involve sex matters or family violence. The offence must have also occurred in the geographical region covered by the court. Meeting all of these criteria the defendant can then choose to have the matter heard in Koori Court, choice being in no way mandatory or enforced. My thesis suggests that Koori Court has enacted an affirmative step towards the practice of justice accommodating Indigenous people in a culturally sensitive manner.

Koori Court: A Sentencing Conversation (2007) covers one hearing of a drug related offence by a young Koori woman (aged approximately 20 years). The conversation between magistrate and solicitor is a great entry point into detailing the differences Koori Court enacts. Transcribing the conversation, this is what was said:

> *Solicitor:* Today the defendant Haley Coburg is joined by her father Mr. Coburg sitting to her left
>
> *Magistrate:* Hello Mr. Coburg
>
> *Solicitor:* We also have her support in the court, her brother Jason…
>
> *Magistrate:* Hello Jason
>
> *Solicitor*: … as well as her Uncle Derek
>
> *Magistrate*: Hello Derek

The beginning of this hearing highlights a few different things, mainly that the family and community of the defendant are welcomed to the Koori Court hearing, and that there is direct communication between the magistrate and everyone in the courtroom. These are two things rarely occurring in "mainstream" courtrooms. The next step involves considering the implication of differences such as these. In response to the claim that "mainstream" courtroom procedure is something "being done to" Indigenous people, Koori Court enables defendants, family members and other support people to have a voice in the hearing. This enables community participation and a sense that Indigenous voices and perspectives are being heard, and thus taken into account, in legal procedures. The role of Indigenous Elders in Koori Court exemplifies the importance of respecting cultural issues, considering the history of Indigenous people (including the impacts of colonisation), and taking Indigenous perspectives seriously.

The magistrate in Koori Court is not legislatively required to follow the advice of Indigenous Elders or Respected Persons. Nevertheless, Harris found that in the seven interviews he conducted with Elders and Respected Persons the general feeling is that "their contribution is both sough and listened to" (2006:41). Most hearings have two Elders: one female, one male (although some sit with between one and four Elders). Some courts try to match the sex/gender of the Elder with the defendant, although most courts consider "all Elders as being equal" (Marchetti & Daly, 2004:2). Indigenous Elders can talk to the defendant at any point of the hearing and advise the magistrate as to certain details or information about the defendant that the court may otherwise never hear about[34]. Towards the end of the

[34] A detailed explanation of the role of all parties involved in Koori Court (i.e. magistrate, Koori Court Officer, Indigenous Elders and Respected Persons, defendant, prosecutor, corrections officer and "victim") can be found in *"A Sentencing Conversation": Evaluation of the Koori Courts Pilot Program October 2002 –*

"sentencing conversation" the Elders usually give the defendant a stern talking to with an emphasis on the need for community accountability. The following is a snippet from the end of a Koori Court hearing shown in *Koori Court: A Sentencing Conversation* (2007):

> *Defendant*: I won't do it again
>
> *Indigenous Elder:* You won't do it again?
>
> *Defendant:* No, I will not
>
> *Indigenous Elder:* Well I hope you don't come before me again because I'll be very disappointed

Elder's disappointment is connected to the notion that Indigenous people should be accountable to their community. Based on personal experience working in Koori Court, the lawyer in Interview One offered her perspective on this:

> Sometimes the things said by the elders can be very confronting for people coming before the court because they might know the elders or they might not, but either way it's very intense because everyone is sitting around a table and it can get really heated at times.
>
> If the elders know the persons family they often talk to the person about knowing their grandparents and saying how disappointed they would be with the person. That they owe more to their families. That they should be setting a better example for their siblings or children. There are similar threads through the things which are said in that respect which comes from Elders knowledge of the communities and knowledge of the families going before the court. Things can be very specific at times and sometimes things come out through the interaction between the Elders and client and that you might not know or the person may never have told you to do with losses, pressures in the family, or health issues, things like that (Interview One, February 2010).

October 2004 (Harris, 2006).

Community accountability and participation is something Koori Court regards highly. Popovic considers these interactions – between defendant and Indigenous Elders – as having three main beneficial outcomes (*Koori Court: A Sentencing Conversation*, 2007). One, Koori Court is reinforcing respect for Indigenous Elders. Two, Elders have a renewed sense of pride. As an outcome, three, communities are benefiting from re-establishing this structure. From what I can ascertain, the desired outcome of this is stronger intergenerational Indigenous communities.

Despite the documented benefits of the Koori Court process some defendants choose to have their matter heard in "mainstream" court. This, according to Angela Clarke (Indigenous Respected Person), is because Koori Court can be quite "confronting" (*Koori Court: A Sentencing Conversation*, 2007). "Confronting" is the term Clarke uses to describe why some defendants prefer to go through "mainstream" courts. Elaborating, she considers Koori Court to have this affect because it's not just the magistrate who is involved in the procedure but also Indigenous Elders and Respected Persons.

Despite all the evidence that Koori Court is enacting a fundamentally affirmative shift towards a better justice system for Indigenous people, Koori Court has come up against criticism that it is a "soft option" for Indigenous defendants. This stance appears to have two main arguments. First, that Indigenous defendants will receive different treatment in Koori Court to everyone else in "mainstream" court. Attached to this argument is the supposed claim that if "mainstream" courtroom procedures treat everyone the same then Indigenous people do not need their own courts. In opposition to this, I have argued from the very beginning that "mainstream" courts format everyone as the same but systematically treat everyone differently according to intersectional markers of difference (different treatment in

the negative sense). As "mainstream" courts systematically exclude Indigenous people from courtroom procedures "alternative" courtrooms are a necessary step towards legal sensitivity and diversity. To avoid risk of essentialism the notion of strategic essentialism, coined by Spivak in 1987, is useful. Post-colonial scholars Bill Ashcroft, Gareth Griffiths and Helen Tiffin describe essentialism as "the assumption that groups, categories or classes of objects have one or several defining features exclusive to all members of that category" (1998:77). In full awareness of the dangers of essentialist gestures, strategic essentialism has the potential to operate as a policy and rights platform. Standpoint theory has also been accused of purporting similar essentialist notions. Hartsock, for example, claimed that a feminist standpoint reflects the systematic differences between women's and men's lives. Janice McLaughlin claims standpoint theory to "focus on how women's experience can be the source of knowledge about both oppressive processes and modes of resistance) (2003:47).

20. PROCEDURAL LIMITATIONS: SUSPENSION OF KOORI COURT

So far this part of the thesis has demonstrated three main reasons as to why and how "mainstream" courtroom procedures elide women's experiences and testimonies and alienate Indigenous people. Indeed, "alternative" courtrooms have responded to this exclusion by providing gender, Indigenous and age specific procedures. At this point in time this inclusion is not without limitations. This section is dedicated purely to an analysis of the suspension of Koori Court in regards to sex matters and family violence. As I showed in one of the previous sections (19.3, p.109), Koori Court works towards building stronger Indigenous communities. With this in mind it is believed by some that taking sex matters and family violence matters through Koori Court would have "adverse effects" (Marchetti & Daly, 2007:422) on the collaborative nature of the court. Despite the overwhelming concerns for women and

Indigenous people going through the "mainstream" court system, sex matters and family violence matters remain within "mainstream" courtrooms.

I will address the suspension of Koori Court in two stages. First, unpacking the arguments feeding into why Koori Court is ineligible to hear sex matters I look at the contradictions involved in limiting Koori Court. Second, analysing how these arguments are justified I deal with group versus individual (legal) rights.

On the suspension of Koori Court (suspension is my terminology) for sex matters and family violence matters Marchetti and Daly (2007) write:

> Family violence and sexual assault offences are viewed by some communities as being too complex for the Indigenous sentencing courts and as offences that might have an adverse effect on the collaborative nature of the courts. Informal discussions with key people involved with the courts have also revealed a concern that the penalties imposed in family violence and sexual assault cases may appear to outsiders as being too 'lenient'. For this reason it is believed that such offences are better left for sentencing by the mainstream court system. Indeed, with the Federal Government's focus in the past two years on the physical and sexual abuse of Indigenous women and children, debates surrounding the question of how to best address family violence have intensified (2007:422).

This quote is useful in understanding what arguments are being made about the relationship between Koori Court and sex matters, but it does not tell us much about why sex matters are "too complex". We could ask, what makes sex matters more complex than other matters in Koori Court? It could be because "victims" of sexual assault are "vulnerable" and in need of extra protection (this will be discussed in great detail in *Part Five: Technological)*. Another possibility is that "mainstream" courts, as colonial legacies, retain control and power (potestas) over Indigenous bodies, and particularly women and children's bodies. This

argument is connected to sovereignty and control over bodies and, importantly, sexuality. Sexuality (as an institution), sex (as a practice) and reproduction overlap specifically on women's bodies. The desired management of sexuality, reproduction and bodies is connected to entitlement of sexuality and the exercising of this entitlement. As we can see, women and children (specifically Indigenous women and children) do not have any access or right to this entitlement.

Using the above quote by Marchetti & Daly (2007) as a platform I want to analyse how these arguments are justified and what the implications are. To begin with, there is an emphasis on the community and collaborative nature of the courts. This implies a collective, which for the sakes of this analysis can be understood as an Indigenous community or group. There is also mention of "outsiders" implying that there are "insiders" and "outsiders" to both the Indigenous group and Koori Court proceedings. Taking family violence and sexual assault cases through Koori Court is positioned as having negative affects on the Indigenous group. "Victims" of family violence and sexual assault are therefore placed "outside" the group. Feeding into this are debates surrounding group versus individual (legal) rights. Instead of perpetrators being positioned as having "adverse" affects on the community, complainants who may wish to take the case through Koori Court are deemed to be disrupting the community and collaborative nature of the court. At the very least this displays a convergence of differences constructing dissymmetrical inclusion into "alternative" courtroom procedures.

Family violence and sex matters, therefore, are left to "mainstream" courtrooms. This is a contradictory position because, as I have detailed, "mainstream" courts disqualify testimony, disregard cultural diversity and format courtroom behaviour. In relation to family violence

and sex matters these three disadvantages affect women in particular.

21. CONCLUSION

This was certainly one of the more difficult chapters to research and write. Being entrenched in an interdisclipinary field such as Gender Studies creates, on the one hand, ways and tools of thinking differently, and, on the other hand, barriers. Certainly, the fact that I have never had any legal training prevented me from pursuing differences between how laws are used in "mainstream" and "alternative" courts. Similar to the *Part Three: Architectural* and *Part Five: Technological*, I was very much an "outsider" looking in. Despite this, critical distance enabled different perspectives of the courtroom on a procedural level, including what is even constituted as procedural. In this way, this chapter extends the notion of what is procedural to incorporate the affect space has on behaviour.

This chapter re-confirmed feminist legal theory and post-colonial feminist theory claims that "mainstream" courtroom procedures disqualifies women's testimonies, disregards cultural diversity, and formats courtroom subjectivity as "sameness" (negative) rather than encouraging "difference" (positive). This is done, for example, by re-victimising "victims" of sexual assault through cross-examination, ignoring Indigenous communication and language styles that can easily lead to misunderstanding, and using nationalistic codes to format courtroom behaviour. In response to this, "alternative" courtroom procedures from Koori Court, NJC and LAT have fundamentally shifted away from the traditional adversarial trial, replacing it with more community orientated and participatory focused legal decision-making that focuses on "victim", defendant and the community. This enacts a decentralisation of top-down legal procedures with the power to include and exclude experiences and voices. The

result of this decentralisation is the beginnings of new ways to practice justice that focuses on diversity, dialogue, accountability, and a "better" experience of courtroom procedures for marginalised people.

Part Five: TECHNOLOGICAL

22. INTRODUCTION

The central question to this chapter is: how is the utilisation of new technologies in contemporary Australian courtrooms perceived to be instances of "doing justice differently"? Sub-questions emerge, such as, to what extent are theories of performativity and embodiment useful in accessing differences between "mainstream" courts and "alternative" courts? In examining these questions new concepts manifest, thus, expanding the analytical, theoretical and methodological components of this thesis. I call these new concepts "virtual phenomenology" and "technological embodiment". I define and map these concepts in sections 23 and 24.

Also under critical consideration is the role courtroom technology plays in challenging and/or reinforcing dominant conceptions of legal subjects according to social categories of differentiation. Considering this I present two models[35]: (listed on the next page)

[35] Let me offer a more metadiscursive commentary on the process of framing these two models. To begin with these two models stood as (1) protection versus empowerment, and (2) "vulnerability" versus "re-victimisation". Quickly realising that, like other parts of this thesis, two things rarely exist in opposition to one another I reframed them as (1) protection and/or empowerment, and (2) "vulnerability" and/or "re-victimisation". What I found was this and/or approach functioned awkwardly in my analysis because it still assumed two separate categories that, even when in relationship to one another, stand alone. Remaining consistent to the framing of other terms, such as inclusive exclusion and exclusive inclusion, the two models became (1) protective empowerment, and (2) "vulnerable" "re-victimisation". In this way the terms convey

(1) Protective empowerment

(2) "Vulnerable" "re-victimisation"

Following on, I ask whether the highly visualised nature of courtroom technologies repeats or reduces the dissymmetry of legal participation according to gender, Indigenousness, age etcetera. The shift from "so-called objective law" to localised decision-making is repositioned in this chapter as a shift to "justice-at-a-distance" (Aas, 2005:139). "Justice-at-a-distance", enacted by courtroom technologies such as CCTV, is considered in terms of the relationship between technology and the perceived transparency of justice. In other words – framing this as a question – do courtroom technologies produce more accountable courtrooms? If so, *how*? Power in both its forms (potentia and potestas) remains central to this chapter. Taking the analysis one step further, I examine the implications of courtroom technology and "justice-at-a-distance", and who or what are affected (or disaffected) by courtroom technology.

For the purposes of this section I define the use of CCTV as "alternative". Similar to my analysis of Koori Courts, "alternative" does not necessarily always translate as positive. Instead of addressing *why* the use of technology is positive or negative for women appearing in court I analyse *how* these technologies are creating new patterns of courtroom participation and subjectivity. Thus, "alternative" becomes a means of determining difference from "mainstream".

With these questions (stated above) in mind this chapter takes four analytical steps. The first is a methodological engagement with the relationship between embodiment and courtroom

mutual operation and affect from the very first instance.

technology, with subsequent emergence of new methodological possibilities such as "virtual phenomenology". In relation to this, the second step considers how embodied (and embedded) technological developments expand the perceived boundaries of the architectural and procedural courtroom presented in *Part Three: Architectural* and *Part Four: Procedural* of this thesis. The third step accounts for the affects of this expansion and questions its connection to the perception of transparent justice. In doing so I map the rise, fall and return of the importance of transparency and public visibility of justice. Last, but not least, this chapter engages in a practical analytic step addressing courtroom participation and the role courtroom technology plays in challenging and/or reinforcing dominant patterns of courtroom inclusive exclusion and exclusive inclusion. This is explored primarily through the introduction and operation of CCTV provisions for "vulnerable" people in Australian courtrooms since the early 1990s. "Vulnerability" in the Australian courtroom context typically applies to women and children. An important consideration I wish to make here is that the definition and operation of "vulnerability" is connected to ideas about masculinity. The "vulnerability" of women and children exists as a universal discourse, and as Koori Court demonstrates there is a racialised version of this "vulnerability". In section 26.3 (p.134) I offer a critique of the definition of "vulnerability" and map the positive and negative implications of defining people (more precisely, women and children) as "victims" and "vulnerable".

23. VIRTUAL PHENOMENOLOGY

If, as suggested in *Part Three: Architectural*, phenomenological theory "seeks to explain the… way in which social agents constitute social reality through language, gesture, and all manner of symbolic social sign" (Butler, 1997:402) then it is not too much of a step to extend

a phenomenological approach to courtroom technology. A phenomenological inquiry into courtroom technology approaches technology as "physical objects that make us subjects" (Mohr, 2008:3). If so, this part of the thesis is not as distinct, as it may initially appear, from the previous two analytic parts on architecture and procedure. Technology certainly extends the boundaries of courtroom procedure, but the analysis remains focused on the affects on courtroom behaviour and subjectivity. Moreover, courtroom technology expands the research boundaries of "legal geography" (Mulcahy, 2008:2) and courtroom architecture to include virtual courtroom space and bodies.

One of the most innovative aspects of this chapter is the possibility of a new type of methodology. This is what I have come to call "virtual phenomenology". It has similar threads to "virtual ethnography", which emerged a few years ago by researchers interested in online gaming and online communication. The main similarity is that courtroom technology and online gaming/communication are both mediated by and through computers and the Internet. Christine Hine, in defining the principles of virtual ethnography, writes: "virtual ethnography is used as a device to render the use of the Internet as problematic: rather than being inherently sensible, the Internet acquires its sensibility in use" (2000:64). Using "virtual phenomenology" in addressing the enabling and disabling aspects of courtroom technology this is my spin-off from Hine's definition: virtual phenomenology is used as a device to render the use of courtroom technology as problematic: rather than being inherently necessary, courtroom technology acquires its necessity in use. By introducing and deploying "virtual phenomenology" I am hoping to achieve a more nuanced reading of courtroom subjectivity that accounts for technological embodiment.

24. TECHNOLOGICAL EMBODIMENT

Let's begin this section by taking the definition and elaboration of embodiment from an earlier part of this thesis (section 8.3, p.42). Davis suggests, "bodies are not simply abstractions… but are embedded in the immediacies of everyday life" (1997:15). This part of the thesis pushes the embodied account of courtrooms beyond the architectural and material (seen in *Part Three: Architectural),* and procedural and cultural (seen in *Part Four: Procedural)* aspects into the less charted area of bodies and courtroom technology. It is precisely because of this relatively new research area that I consider this chapter to hold exciting and important research potential. Bringing technology to the fore questions whether embodiment is necessarily bodily (in the fleshy bodily sense). Technology, such as CCTV[36], allows for a virtual "prosthetic extension" (Hayles, 1999:2) of the fleshy body. Courtroom technologies like this do not de-materialise the body that is sitting in the "Remote Room"[37]. Instead, with the aid of technology, the fleshy body extends itself to become "an informational pattern and [then] re-materialize[s]… at a remote location" (Hayles, 1999:1). It would be easy to suggest, as Hine (2000) does, that the virtual body is disembodied simply

[36] Referring to an earlier definition, CCTV is where the "victim" is in another room presenting evidence to the court through a live televised link-up.

[37] To recap, the "Remote Room" is located in the court building but isolated from the courtroom where the trial is being held. From this room "victims" and witnesses can give evidence via CCTV that is then directly broadcast in the courtroom. In *A Victim's Guide to Support Services and the Criminal Justice System* (2009:32) this is listed as a "special arrangement" for those giving evidence via CCTV. Researching CCTV in Melbourne in February 2010 included a personal tour of the NJC complex including the "Remote Room". This room, which can only be entered with a security key-pass, contains two desks, two computers and two chairs. According to NJC the "Remote Room" provides protection and support to "victims" so that they do not come into contact with the offender (http://www.neighbourhoodjustice.vic.gov.au/site/page.cfm?u=72, 2010).

because it is not a "real" (meaning fleshy) body. Arguing the opposite, I consider the relationship between bodies and technology as always embedded. If, using Braidotti's terminology, the virtual body is a "bodily entity" then it remains embodied and, therefore, affective (2006:238).

Accordingly, this reading of the relationship between bodies and technology feeds into the post-human project that views virtual bodies as a continuation of a process rather than a breaking with a process (Aas, 2005; Hayles, 1999). This results in both virtual bodies in the courtroom, and fleshy bodies in the "Remote Room", as "embodied form[s] of subjectivity" (Hayles, 1999:7). Proving a balanced analysis addressing the enabling (positive) and disabling (negative) features of courtroom technology my argument is that technology does not necessarily produce abstraction, but rather different forms of embodiment, and different legal boundaries. Remembering – from *Part Three: Architectural* and *Part Four: Procedural* – that distinctions, definitions and dichotomies are often collapsible, we must not forget that there is never a simple equation of enabling *or* disabling affects of courtroom technology. Haraway (1991b) and Braidotti (1997) encourage multiple connections or "figurations" to signal "not… only one correct connection but, rather, many, heterogeneous and potentially contradictory ones" (Braidotti, 1997:59). This also fits alongside Haraway's notion of partial perspective explored in previous sections of this thesis (1991a). This part of the thesis is certainly not without complications or contradictions, which is why I provide two possible models for mapping the affect of courtroom technology on those using it – (1) protective empowerment, and (2) "vulnerable" "re-victimisation". The implications of courtroom technology becomes more apparent as I work through particular examples of courtroom technology in action.

Media Studies, Television Studies and Performance Studies[38] have much to lend to research on virtual embodiment and courtroom technology. Just like television and its audience, CCTV allows those in the courtroom to see at a distance – literally, *tele* (at a distance) *vision* (ability to see) (Berenstein, 2002). Writing on the relationship between television, actuality, liveness and performance Berenstein summarises television as possessing three primary qualities – immediacy, spontaneity and actuality. The television viewer, according to Berenstein, can be characterised as having "temporal simultaneity" and "spatial mobility" (2002:25). In this way the relationship between television and the audience is one of nowness, hereness and reality. Beginning with a non-courtroom, yet well known, example of the Vietnam War epitomises the relationship between television, perceived injustice/justice, and remote audience participation. The reason I use this example is because television was the catalysis in generating great amounts of critical attention to what was happening in Vietnam. This highlighted the relationship between an event in one place (i.e. Vietnam), perceived injustice in another place (i.e. Australia), with resulting public access and visual participation of perceived justice (i.e. television). Infusing technology into Ahmed's (2007) reading of Husserl's "zero point of orientation" means that there is an enabling participatory function of technology that allows something that is "there" (e.g. Vietnam War) to be broadcast to someone "here" (e.g. Australian public watching the daily news on television). In this case, for the first time, there was a direct relationship between the actuality of war and immediate public viewing. In this way the general public had access to the "injustices"

[38] Without getting too sidetracked by definitions, I provide the following description by, what can be considered, one of the leading Performance Studies schools in the world. On their website *Tisch* write: "We use performance as an organizing concept for studying a wide range of behaviors and situations, from museums and food to landscape and the aesthetics of everyday life. We use performance as a theoretical lens for thinking about how elections are organized or how gender, race, and sexuality are performative (and often performances)" (http://performance.tisch.nyu.edu/object/what_is_perf.html, 2010).

occurring in Vietnam and could thus voice their opposition. As a result of public resistance (enabled via visual exposure to war scenes in Vietnam) "justice", in the form of withdrawing Australian troops, followed[39]. Technology, and in this case precisely the role of television, encourages a supportive reading of technology as something that not only enables but also generates resistance – the very essence of potentia.

The previous paragraph demonstrates the linkages between public viewing and the need for the transparency of justice. Transparency can be read here as access and understanding of a process. Connecting these observations back to the courtroom, the very first filmed courtroom trials, the Nuremberg trials, exemplified the relationship between technology, the public, and the transparency of justice. From 1961 in Jerusalem, the Nuremberg trials were the very first filmed trials, with Adolf Eichmann's trial being the first trial filmed in its entirety. Not only was this trial filmed but news programs all over the world were able to broadcast the trial live with very few restrictions (Radul, 2008). The film archive of this trial consists of over 500 hours of tape, while 72 hours of it forms the official history archive of the trial. From this a documentary was made titled *The Specialist: Portrait of a Modern Criminal* (1999), which is made up of excerpts of footage from the trial (Radul, 2008). The Nuremberg trials culminated with Eichmann being found guilty of Nazi war crimes and consequently sentenced to death in 1962. Similar to recent international developments in The Netherlands – such as The International Criminal Court and The International Criminal Tribunal for the Former Yugoslavia – the Nuremberg trials demonstrate a truly international justice arena, as opposed to national justice spaces. What I mean by an international justice arena is that Eichmann, for instance, was charged with Nazi war crimes in Germany, yet

[39] This is of course the official line, and as we know there are always multiple histories and stories and we should never take "facts" as "the truth".

trialled and sentenced in Israel, with the trials recorded and televised across the world. This public legal spectacle fits into Crary's historical analysis of perception and attention where he claims that both (perception and attention) were transformed in the 19th Century alongside the emergence of new technological forms of spectacle, display, projection, attraction and recording (1999:2). Whilst mainly researching the dramatisation of Soviet courts Cassidy's commentary on "Western" courts is that "drama and law have been longtime partners in the Western legal tradition" (2000:3). Cassiday considers the Nuremberg trials to have demonstrated the extent law relies upon drama in its determination of justice. Drama, in this sense, refers to the trials being recorded and screened to the public[40]. This can also be read as public spectacle.

Foucault noted, in *Discipline and Punish,* that historically there was a shift from public spectacle to confined normalisation (1995 edition). Updating this observation, I note that there has been an overwhelming surge of re-opening of law to the public. This is not to say, however, that the implications of this "re-opening" are the same as the "pre-modern" spectacle described by Foucault in *Discipline and Punish* (1995 edition). This re-opening is accompanied by the high visualisation and accessibility of law, or at least the perceived visibility and access. Discussed in greater detail below, this re-opening of public visibility via technology can be noted as a paradigm shift, encapsulated if not spearheaded (in the USA at least) by the sexual harassment allegations Anita Hill made against Supreme Court nominee Clarence Thomas[41]. These allegations were televised nationally across America from 11

[40] In addition, think of the extremities of the dramatisation of law such as the plethora of crime shows such as *Law and Order*, and the magnitude of dramatisation, not to mention performance, of the courtroom in *Judge Judy*.

[41] Refer to Toni Morrison's edited volume of essays relating to these hearings *Race-ing Justice, En-gender-ing Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality* (1992).

October to 13 October 1991 (http://www.museum.tv/archives/etv/H/htmlH/hill-thomash/hill-thomas.htm, 2010). Returning to a central point, first made in *Part Three: Architectural*, the use of technology in the courtroom only enhances the perceived importance of vision (discussed earlier in terms of courtroom design and resulting sightlines) and the idea that "justice should be seen to be done" (Mulcahy, 2008).

25. TRANSPARENCY OF JUSTICE

One significant representation of law and justice upholding the apparent transparency and impartiality of law is the figure of Justitia (see figure 10, next page). Symbolically this blindfolded goddess has represented the impartiality (Felman, 2002) and neutrality (Douzinas, 2009) of law and justice. Douzina's plays on this image in his work *The Blindness of Law and the Insight of Justice* (2009). This image suggests the necessity of blinded vision to have "objective vision" (Haraway, 1991a). Ass describes this image to her readers:

> If we were to imagine a picture of justice, the Roman goddess Justitia would probably come to mind. The image of Justitia, holding scales of justice in one hand and a sword in the other, adorns numerous courthouses, city halls and other civic buildings throughout the Western world. Justitia wears a blindfold, indicating that the scales and sword are to be used regardless of skin colour, social status and other more or less sympathetic qualities in those who appear before the courts of law (2005:2).

By this point I hope to have conveyed my point that the actual enactment of law does not correlate with this image of impartiality or objectivity. As *Part Four: Procedural* demonstrated, "mainstream" law disqualifies, silences and disregards minorities in the courtroom. Through the image of Justita we are presented with a view of law being just to everyone who enters the courtroom. This attempt for legal blindness has already been

investigated through the example of Mandatory Sentencing (see section 8.1, p.37 on marginalisation), which by turning a blind eye to "skin colour, social status… and other qualities" systematically targeted Indigenous people. The removal of judicial discretion from the sentencing process meant that mainly young Indigenous men were subjected to automatic detention for up to twelve months for petty crime. In these cases justice certainly was blind, but not in the way the image of Justitia implies. Operationally, it seems, legal blindness produces potestas and not potentia. But what about legal visibility?

Figure 10: Image of Justitia

What I have found is that there has been a radical shift in the way justice is presented. In other words – how justice is perceived to be operating. Justitia, on the one hand, represented impartiality via blindness. More recently, on the other hand, technology represents heightened transparency via vision. For better or worse, this is the perception of "doing justice differently". This observation updates Foucault's analysis of trends in the visibility of justice. According to Foucault there has been a shift in public judgement and punishment (e.g. public executions) to discipline that occurs in confined and closed spaces (e.g. mental institutions). Referring back to an earlier elaboration of disciplinary institutions, feminist legal theorists such as Smart note that law as an institution developed out of the emergence of the disciplinary society. The legal institution, just like schools, prisons and hospitals, operated on an affective level of reform through the internalisation of norms. To recap, norms or normalisation is connected to disciplinary coercion to create "sameness". What this thesis notes is the return to a highly visualised operation of justice and judgement. International examples include live-streaming of court trials at the International Criminal Tribunal in The

Hague. More localised examples include the use of CCTV in trials for sexual assault "victims". This, I argue, can be understood as a re-opening of law, judgement and punishment to the public gaze.

26. EXPANDING THE BOUNDARIES

With attention to the physically bounded courtroom *Part Three: Architectural* demonstrated the significance of a court being held in a "special" place. This, as mentioned earlier, is not necessarily only associated with "mainstream" "Western" courtrooms, but also Indigenous legal practices and rituals (in terms of Indigenous controlled courts, not "mainstream" or "alternative" courts)[42]. This implies that not only are courts located in uniquely selected locations, but that there is continuation. In other words, traditionally (most) courts are not mobile. Technology can be observed to disrupt courtrooms being held in one particular "special" place. As detailed above, other forms of technology such as television have produced new modes of remote participation producing simultaneity of being both "here" and "there" at the one time (Ahmed's terminology). Remembering back to the definition of what constitutes a courtroom, from section 6.1, technology, as an "unruly" element (Radul, 2008), has been entering the courtroom via various avenues for quite some time now. Earlier examples of courtroom technology range from the use of photography (enabling the documented crime scene to enter the courtroom) to detailed scientific techniques for determining scales of illegality and deviance. Both of these examples point to the courtroom remaining within patrolled physical boundaries. Crime scene photography is an instance of

[42] As I wrote earlier, this thesis does not deal with the histories, possibilities or implications of Indigenous controlled courts. As a reminder, at this point in time Indigenous courts still come under Australian law. Looking at the potential for Indigenous controlled courts is definitely a future direction for the extension of this project.

transference from outside the courtroom into the bounded court arena. Mohr's research (1999) shows us, however, that the contemporary courtroom is moving further away from maintaining a fixed place with solid borders. The new direction of contemporary courtrooms is towards a dispersed courtroom. Let me elaborate on this shift through two examples detailed by Mohr (1999): the OJ Simpson trial and the Oklahoma bombing trial. In the next section, building upon these examples from another national context (USA), I will explore the use and implications of courtroom technology in contemporary Australian courtroom practices and the extent to which they contribute to "doing justice differently".

26.1 Dispersed Courtrooms

Mohr considers the OJ Simpson trial to be an exemplary example of a "court without limits" (1999:2). In this case technology operated in such a way that the entire trial was shown to the public on the cable channel Court TV – hence Mohr naming this trial "court without limits". Technology, enacting a delocaliation of the place of the trial, merged boundaries of courtroom and media. This is similar to Cassiday's (2000) observations of the Nuremberg trials, where law and drama amalgamated. Blending both time and space the OJ Simpson trial was displayed to the public through "sequences of the trial [being] cut in and out of real time [with] flashbacks, and predictions about the verdict" (Mohr, 1999:3). On the one hand, connecting this back to Crary's (1992) historical commentary of spectacle, the implications of using technology as a means to involve the public transformed the trial into a public spectacle, even entertainment. On the other hand, the heightened public participation can be regarded as transparency of justice. Remembering that transparency is connected to understanding and knowledge about a process one has to question whether the role of technology actually provides anything more than a perception of transparency and public

involvement as adjudicators.

Similar to the OJ Simpson trial, the Oklahoma bombing trial exemplifies the affect of technology on the expansion of courtroom boundaries. The very notion of courtroom boundaries was radically reconceived in this trial as it involved one court sitting in two places simultaneously. Deploying high security technology enabled a closed circuit signal in Denver (where the trial was) and Oklahoma (where the audience was). As detailed by Mohr, this was to accommodate for an unbiased trial as well as meeting the needs of the "victims" families (1999). "Unbiased" can be translated as the transparency of justice. "Meeting the needs" can be understood as participation and involvement. Participation in this trial, however, is different to the form of participation discussed in *Part Three: Architectural* and *Part Four: Procedural* where by the act of participation was very much defined by physical inclusion into the courtroom space. Participation, in the Oklahoma bombing trial and other trials utilising courtroom technology, enable "remote participation" meaning that physical inclusion (in the fleshy bodily sense) is not required. On one hand, the use of technology in the OJ Simpson trial and the Oklahoma bombing trial is positioned as an enabling mechanism to accommodate "victims" and their families – therefore "doing justice differently" by responding to "victims" needs. This reading parallels claims from Television Studies suggesting that the introduction of television into the family home enacted spatial empowerment (Berenstein, 2002:35). This ties into one of the key questions posed in the introduction to this thesis where I asked what role courtroom technology plays in challenging and/or reinforcing dominant conceptions of legal subjects. Interrogating this question produces two possible models for mapping legal inclusive exclusion and exclusive inclusion. These are: (1) protective empowerment, and (2) "vulnerable" "re-victimisation".

26.2 Protective Empowerment

Empowerment is of key concern to those promoting CCTV as a technological means in giving "victims" voice. This conceptualisation of courtroom technology leads to a view of technology, such as CCTV, as providing an enabling function. Accordingly, CCTV is very much a practical response to feminist legal theorists claims of "re-victimisation" due to physical proximity to the offender (e.g. Smart, 1990) – hence, "doing justice differently. Using technology as a tool for empowerment is reflective of earlier feminist debates surrounding the liberation of women via reproductive technologies. In the 1970s feminists such as Shulamith Firestone "called for a revolution in the technology of reproduction that would liberate women by bypassing our bodies, enabling us to avoid a process which makes us vulnerable to male domination" (Lovell, 1997:182). Agreeing with this argument to a certain extent, let me unpack this claim.

Indeed technology of reproduction has played a significant role in the liberation of women (at least some women). As I suggested in section 25 *Technological Embodiment* it would be easy to say that technology disembodies or bypasses bodies. A more balanced approach considers technology as having the potential to enable and disable. Nevertheless, the relationship between bodies and technology always renders bodies embedded and embodied. Enabling voice Mulcahy writes of the relationship between "victims" of sexual assault and CCTV: "if they were unable to use live link [CCTV], many witnesses in this position would refuse to give evidence at all" (2008:6). In this way, expanding the boundaries of the courtroom has enabling outcomes for marginalised people. This is a direct legislative and practical response contemporary courtrooms have made to the claim that "mainstream" courtroom spaces and practices often "re-victimises" "vulnerable" people.

So, in this first model – protective empowerment – we see courtroom technology enacting a form of protection to those negatively affected (or re-affected/"re-victimised") via courtroom spaces and practices. At the same time, providing an "alternative" space encourages "victims" to participate in courtroom protection which can then result in an empowering affect.

26.3 "Vulnerable" "Re-victimisation"

The flip side to the protective and empowering functions of courtroom technology is technology such as CCTV having the potential to enact "re-victimisation" itself by forcing "vulnerable" people to give evidence via CCTV. Encapsulating "re-victimisation" Taylor and Joudo write:

> Giving evidence in court for sexual assault victims can be a traumatic, stressful and intimidating experience. The need for victims to confront the person alleged to have assaulted them, the difficulties of talking about the circumstances surrounding the assault and the embarrassment of being questioned in public about sexual matters can make committals and trials highly traumatic experiences for victims. In the event that a mistrial occurs or the matter is referred for a further hearing at appeal, the trauma is exacerbated because the complainant is required to go through the entire process again. Such a prospect may not only discourage sexual assault victims from being willing to give testimony, but may also discourage victims from reporting the sexual assault to police in the first place (2005:18).

Let me just pause for a moment to provide clarification of terms and key arguments. Current legislative provisions across Australia mean that "alternative" provisions are made available for "vulnerable" witnesses. "Alternative" and "vulnerable" are the terms used in the Government funded research conducted by Taylor and Joudo on the relationship between video recorded and CCTV testimony and the affect on jury decision-making (2005:8). Their

use of the term “alternative” feeds into my overall thesis project, signalling a shift from “mainstream” to “alternative” courtroom spaces. The introduction of CCTV was introduced in Australia primarily as a provision to protect child “victims” or witnesses in court. Legislative provisions now exist so that CCTV is available for anyone defined as “vulnerable”. It is believed that the use of CCTV reduces the trauma experienced by children, and particularly victims of sexual assault, during court appearances. In most states and territories CCTV is available as an optional protective measure for “vulnerable” people. The Australian Capital Territory, however, has made it mandatory for anyone defined as “vulnerable” to use CCTV in giving evidence. This is what I have come to call “optional vulnerability” and “mandatory vulnerability”. My observation is that the definition and operation of “vulnerability” is based on markers and patterns of difference, with this generally being gender (i.e. female) and age (i.e. a child). Without disregarding Indigenousness, the next paragraph explores the extension of specific patterns of dissymmetry for Indigenous women and children from “mainstream” courts to “alternative” courts (e.g. Koori Court and courts utilising CCTV).

Reflecting back on section 20 (p.114), Koori Court does not allow sex matters to be heard. So, first, Indigenous women and children “victims” of sexual assault are unable to take matters through Koori Court because it may cause “adverse harm” (refer to *Part Four: Procedural* for critique of this) to the overall agenda of Indigenous courts. Second, these same people who are denied access to Koori Court spaces and procedures are positioned as “vulnerable” in “mainstream” courts and therefore encouraged (if not enforced) to give evidence via CCTV. From what I can delineate, no Indigenous woman or child in the Australian Capital Territory can ever be physically (in the fleshy bodily sense) present in a courtroom and give evidence. A dissymmetry to say the least, and a dissymmetry based on

gender, Indigenous and age markers of differentiation from the "norm". This confirms Smart's feminist legal claim that there is no possible space for women in law (1990). Smart's comment can also be extended to children. This explodes the previous model of technology enabling protection and having empowering affects on those who use CCTV. Another way of looking at this – with virtual phenomenology in mind – is that, indeed, "vulnerable" "re-victimisation" pushes women and children out of the courtroom, however they still remain embodied and embedded, just differently. This feeds into my claim that courtroom technology is an instance of "doing justice differently", but as I indicted in the introduction to this part of the thesis, these particular differences do not necessarily have positive affects. Technology such as CCTV, without a doubt, provides "alternative" courtroom spaces and practices in that they are different to "mainstream" ones, but this does not automatically translate as positive outcomes for those using it. This idea of law "providing" space and marginalised people "claiming" this space is a liberal idea and very much open to question. I will pick up on these affects and outcomes in the conclusion to this part of the thesis.

A Foucauldian analysis is really interesting here as it brings another dimension to the perceived deviancy of all courtroom participants. We have already seen earlier in this thesis that, historically, courtroom architecture has operated to separate the public. This was because the public was perceived as deviant, positioned as threatening and dirty, thus requiring physical isolation (via architecture) and surveillance (via sightlines). This is an historical example of deviant positioning incorporating those who are participating in the legal arena but have not committed an illegal act per se. Courtroom subjectivity, in this regard, encompasses everyone on a sliding scale of perceived deviancy and perceived normativity. Extending this point, both defendant/offender and "victim"/"vulnerable" person are positioned within legal knowledge production with pathologising affects. So, on a scale of

legal health, both are in need of legal expertise and professional help. Thus, legal procedure becomes a process of regulation and rehabilitation for both. Agamben's observation speaks to this, where he suggests that to enable citizenship, with the benefit of being protected by law, one must be subjected to law (1995). In this sense, the state acts as the protector of marginalised people. "Vulnerability", in definition and operation, is thus coded according to gender, Indigenousness and age (not to mention other categories of difference). Women and children (particularly Indigenous women and children) are collapsed into one general category of "victims" and "vulnerable" people in need of protection. In addition to Spivak's claim of "white men... saving brown women from brown men" (1988:92) (brown) children are also in need of protection and "saving"[43]. This need automatically produces a (liberal) discourse striving for empowerment and voice for marginalised groups – thus my use of the terminology protective empowerment (perceived potentia). In action, this has the potential to re-produce legal subjects based on "vulnerability" and "victimhood" – enacting potestas.

27. CONCLUSION

Literature on the impacts of courtroom technology tells me that live-streaming, pre-recorded

[43] This begs a footnote on the so-called national emergency announced by the previous Prime minister, John Howard, in 2007 in remote Indigenous communities in the Northern Territory. What this amounted to was a military intervention into the area, which resulted in health checks for children, the banning of alcohol and pornography, stricter regulation of welfare payments, and a winding back of Indigenous land rights. This neo-colonial gesture epitomises the entanglement of state control and protection. This reinforces two ideas: (1) the colonial notion that Indigenous people are not capable of governing themselves (and especially their sexuality!), and (2) that mainstream courts (and other institutions) would be undermined if Indigenous people did have control, because control translates as sovereignty. I would like, in particular, to acknowledge and thank my main supervisor for her contribution on these points.

testimony and CCTV do not alter jury or magistrate decision-making. Accordingly, it can be observed that localised decision-making and "justice-at-a-distance" have the same outcomes in terms of sentencing. Taylor and Joudo's research, for instance, found the mode of testimony to be "negligible" on juror perceptions and beliefs about guilt in sexual assault trials (2005:36). This apparent lack of affect technology has on decision-making tells us something important about the affect on those utilising the technology. It proves that certain things are still communicated by the "victim" even though they are not physically present in the courtroom. This leads me to consider, contrary to some body theorists, courtroom technology as enacting a different form of embodiment (technological embodiment) and not disembodiment. This, furthermore, questions what we can say about the affects of courtroom technology on "vulnerable" people. In response to earlier feminist claims that legal spaces and proceedings silence women (and other marginalised people) courtroom technology provides "alternative" spaces (e.g. "Remote Room") for "victims" to participate in trials and have voice – hence, protective empowerment. This, potentially, is an answer to exclusionary problems posed in *Part Three: Architectural* and *Part Four: Procedural*. As presented in the sections above, courtroom technology is not without drawbacks. Replicating the position of women and children as "vulnerable" does not break with the overwhelmingly pervasive perception of women and children's involvement in legal processes as "victims" – hence, "vulnerable" "re-victimisation".

In concluding my analysis of courtroom technology I am in two minds about considering technological modes of giving evidence as "alternative" courtroom spaces and procedures. One of my main aims throughout this thesis has been to map some of the positive shifts that have been occurring in contemporary Australian courtrooms. I envisaged that my use of the term "alternative" would denote positive change for those who had previously been

systematically disadvantaged, excluded and marginalised from “mainstream” courtrooms. The introduction of technology, such as CCTV, questions the very basis of the noted shift indicating “better” spaces and practices. In my analysis I documented the ways in which courtroom technology can protect and empower people by allowing them to be physically outside the courtroom (“here”) while still participating in the proceedings in the courtroom (“there”). At the same time courtroom technology undermines the very thing it sets out to do. In other words technology, as a double-edged sword, protects and empowers only by “re-victimising” “vulnerable” people. My final remark on this analysis is that courtroom technology does enact “doing justice differently” but with inseparable potentia and potestas affects on those involved.

Part Six: CONCLUSIONS, RECOMMENDATIONS & FUTURE RESEARCH DIRECTIONS

28. ANALYTIC CONCLUSIONS

The overall question guiding this thesis was: in what ways are "alternative" courts perceived to be "doing justice differently"? My response to this question is that Koori Court, NJC, RMCLCB, LAT and CCTV are instances where "alternative" courtrooms are producing "better" legal spaces and practices for women, Indigenous people and children. I deem this shift away from "mainstream" courtroom practices to result in mainly positive and enabling features which mean increased participation, greater understanding and knowledge about courtroom procedures and a less intimidating and controlling courtroom space. I have called this "doing justice differently" to signify the beginnings of new, and hopefully continuing, Australian courtroom spaces and practices. This thesis invested in creating links between a very large range of theorists, theories, ideas, concepts and observations including, but not limited to, feminist legal theory, critical legal theory, critical race theory, feminist post-colonial theory, architectural theory, television studies, media studies and performance studies. Adopted mainly from various strands of feminist theory I explored standpoint theory, "politics of location", embodied theory (with the spin-off of technological embodiment) and phenomenology (with the spin-off of virtual phenomenology).

The central question in *Part Three: Architectural* was: how does courtroom architecture inform courtroom entitlement? This was addressed through three main sections: outside walls, inside walls and courtroom objects. My main argument was that courtroom buildings can be researched and read as bodied and texts, and those courtroom buildings are the embodiment of power (in both its forms).

Via feminist philosophy, feminist geography, phenomenology, embodied theory and post-colonial theory the section *Outside Walls* addressed how the literal outside walls of "mainstream" courtrooms discourage, even exclude, participation. Whereas *Outside Walls* mainly dealt with spatial entitlement, the main concern in the section *Inside Walls* was on representational entitlement. In other words, what is representational of "Australian" or "Indigenous" and who has power to represent these things? I found that the affect of those representations (e.g. artwork at RMCLCB) cause inclusionary exclusion in that for something to be represented (e.g. "Australian) it must be distinct from something else (i.e. "non-Australian"). Post-colonial notions of remembering and forgetting can also be applied, and collapsed, here. *Objects* dealt specifically with the shape of courtroom benches and the affects this has on participation and "doing justice differently". The most significant affect I noted was the causal relationship between the shape of courtroom benches and sightlines. In sum, the design of courtroom benches results in a particular positioning of bodies, which then produces certain sightlines between courtroom participants. Thus, "alternative" courtroom design and architecture produce *different* spaces (circular and triangular benches) which then produces *different* practices (sightlines). These different spaces and practices signify a shift away from restrictive "mainstream" courtrooms. In turn, this indicates a change in courtroom participation in which disabling courtroom spaces and practices are being replaced with enabling courtroom functions and affects. My concluding remark on courtroom architecture

is that architecture plays an important role in the ways in which justice is carried out. "Alternative" architecture and design of Koori Court, NJC, RMCLCB and LAT are instances of, in the affirmative sense, "doing justice differently".

Part Four: Procedural contributed to three on-going questions in feminist and critical legal theory: (1) the need for "alternative courtroom procedures in Australia, (2) how "alternative" courtroom practices have responded to the dominance of negative "mainstream" courtroom practices outlined in the first point, and (3) how and why Koori Court is suspended in legal matters involving sexual assault and family violence. Answering these questions I analysed instances of "doing justice differently" from Koori Court, NJC and LAT. In this part of the thesis I pose and respond to three claims: that "mainstream" courtroom practices (1) disqualify women's voice and testimony, (2) disregards cultural diversity, and (3) formats courtroom behaviour. Empirical examples include court transcripts, and my personal observations and experiences from attending some "mainstream" and "alternative" courtrooms. In this part of the thesis I engage critically with feminist legal theory (among other theories) in determining if and how transformations are possible in courtroom procedures. What I found is that almost all feminist legal theory, although often focusing on negative affects of "mainstream" courtrooms, is characterised by a search for, and generation of, "better" courtroom practices.

Some of the problematic factors of "mainstream" courtroom procedures for women is that in sexual assault trials, for example, women are silenced and scripted by courtroom language, grammar and control. Language constraints and mis-understandings are also common for Indigenous people in "mainstream" courtrooms. Examples of these are culturally specific

silence and the question and answer format being mis-intrepreted as Indigenous people not complying with courtroom communication expectations. Behavioural expectations (for everyone, not just Indigenous people) in "mainstream" courtrooms is exemplified through bowing to the magistrate upon entering the courtroom. I position this bowing as an enactment of the correct reading of nationalist codes. The correct reading of these codes (i.e. the Coat of Arms) signifies normativity, and thus results in legal entitlement. I found that "alternative" courtrooms, specifically NJC and Koori Court, are either removing nationalist symbols and rituals all together or replacing them with Indigenous ones. Examples of this are the Coat of Arms not being present anywhere in NJC or Koori Court, NJC displaying three flags (Australian, Indigenous and Torres Strait Islander) instead of just the Australian flag, smoking ceremonies before the commencement of Koori Court, and the recognition of the traditional owners of the land. The role of Indigenous Elders has had a great impact on how we can distinguish Koori Court as "alternative". The available literature on Koori Court proceedings shows that the role of Elders in Koori Court hearings has three positive affects: (1) reinforces respect for Elders, (2) renews Elders pride, and (3) benefits Indigenous communities as a whole.

Part Four: Procedural provided examples and evidence of: (1) how "alternative" courtrooms have responded to the negative affects of "mainstream" courtrooms, (2) how "alternative" courtroom procedures differ from "mainstream" courtroom procedures, and (3) what the procedural implications of these differences are. Exploring the ways in which mediation and Restorative Justice at NJC are actively offering "alternatives" to traditional adversarial trials, I found that these are instances of enabling bottom-up accountability rather than top-down enforcement. Mediation (characterised as promoting empowerment and responsibility to those involved) and Restorative Justice (as a search for ways the defender can address and

alter their own behaviour), confirms my claim from the very outset that "alternative" courtroom practices are the beginnings of a shift from "so-called objective law" to situated decision-making. My main conclusion to this part is that "alternative" courtroom practices are changing how justice is done for the "better".

The central question guiding *Part Five: Technological* was: how is the utilisation of new technologies in contemporary Australian courtrooms perceived to be instances of "doing justice differently"? CCTV, as the central "alternative" courtroom under scrutiny in this part of the thesis, complicated my overall analysis of documenting how "alternative" courts indicate a shift from "mainstream" so called objectivity, to situated decision-making with an affirmative edge. Situated decision-making was successfully repositioned as "justice-at-a-distance". Extending central theories and concepts form earlier parts of this thesis my analysis of courtroom technology produced new ways of thinking about the relationship between bodies and technologies. Embodied theory was expanded to incorporate bodies that are both "here" and "there" simultaneously, hence technological embodiment. Just as scholars such as Young and Ahmed used phenomenology as a means of determining difference, I explored the beginnings of a new mode of mapping courtroom participation via virtual phenomenology. Writing against the grain of many feminists interested in technological affects on bodies, my central claim remains embedded in that the use of technology does not automatically produce abstraction. Rather, it produces different forms of courtroom participation and behaviour. Exploring these through protective empowerment and "vulnerable" "re-victimisation" I found that courtroom technology often takes two steps forward and one step back in terms of transforming Australian courtrooms for the "better". Linked to these issues, the main internal concern in this part of the thesis was claiming technological differences as positive. Indeed, courtroom technologies are transforming

courtroom spaces and practices (Feigenson and Dunn, 2003), therefore courttroom technologies are acts of "doing justice differently". As Taylor and Joudo (2005) found, these differences are not changing the outcome of trials, however the nuanced affects of courtroom technologies on those using it remains largley undocumented. I hope that the new connections and links introduced in this part of the thesis can enable future research and insight into the technological angle of Courtroom Studies.

29. STEPS FORWARD

My intention in researching and writing this thesis was to provide a critical and comprehensive account of architectural, procedural and technological differences between "mainstream" and "alternative" courtrooms that indicate a transformative and affirmative potential towards "doing justice differently". The heart of my research is in exploring and developing ideas that promotes legal diversity with a (sexual) difference. Like all research, given time and length limitation, this thesis could not cover every angle and trajectory of this area of study. Throughout the thesis I indicated some possible future directions of this research. With the current state of Indigenous concerns in Australia I consider this thesis to be a stepping stone to further investigation into long term affects of Koori Court, for example a comparative analysis between short and long term affects on those going through "mainstream" courts and Koori Court. Additionally, I believe an international comparison of Indigenous sentencing courts and their role in addressing justice and reconciliation to be of value. In terms of future change I discovered that architecture students at Melbourne University will soon have courses that request them to attend various courts (Auty & Briggs, 2004:36). The future plan is to develop a component into their degree that deals with court interior. Other future research projects could document the role of incentives offered by the

Australian Government and Australian universities to encourage Indigenous students to study and then practice law. With confidence and optimism that "from little things big things grow" (The Getup Mob, 2008) I hope this thesis provides a platform to extend and explore these issues in the future.

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