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Untold Stories or Miraculous Mirrors? The Possibilities of a Text-Based Understanding of Socio-Legal Transcript Research

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1. Introduction

Austin Sarat has described the transcript as “the verbatim record of a present soon to become past, a mirror / a record / a voice machine in which the “author” exercises no authorial presence.”¹ In this paper I argue that by seeing a transcript as an authorless mirror of court proceedings, socio-legal scholars risk overlooking the ways in which the technology of transcripts influences the record that is produced. Paying attention to the laws and practices governing transcript production allows those who engage in transcript

¹ Austin Sarat, “Rhetoric and Remembrance: Trials, Transcription, and the Politics of Critical Reading” (1999) 23 *Legal Studies Forum* 355 at 356. (Accessed electronically via Lexis Nexis on 9 March 2005.)

research to appreciate how the transcript is defined in relation to the spoken proceedings it purports to represent even while the act of representation alters those proceedings.

This paper contributes to the large body of work that has been produced in recent years by law and society scholars on legal transcripts. Profoundly influenced by Foucault, socio-legal transcript research is largely concerned with unearthing law's "untold stories" and placing legal decisions back within the context of the legal and social disagreements from which they arise. Foucault-influenced socio-legal scholars use transcripts in their quest to understand "the methods by which established meanings are derived, or rather, the means by which alternative meanings are hidden [by a court's judgment] ... what counts as success in this particular context."² In section two, I discuss some of the work that has been done by these scholars and explain how this work has added to our understanding of the adversarial legal process as a contest for the power to ascribe meaning to a particular event (or set of events) after they have taken place.³

Studying transcripts allows socio-legal scholars to reclaim the meanings that are hidden or delegitimated by the legal act of deciding a case. This reclamation complements the work of lawyers and activists who bring marginal cases before the courts in order to memorialise particular events, sometimes with little hope of succeeding in their legal claims.⁴ Law's promise to listen to marginal stories is not always fulfilled in the

² Desmond Manderson, "Apocryphal Jurisprudence" (2001) 23 *Studies in Law, Politics and Society* 81 at 90.

³ *Ibid.*, at 87. See also Austin Sarat, and Thomas Kearns, "Writing History and Registering Memory in Legal Decisions and Legal Practice: An Introduction" in Sarat and Kearns (eds.) *History, Memory and the Law* (Ann Arbor: University of Michigan Press, 1999) at 3.

⁴ This is a tactic that has been especially common in cases concerning native title and the abuse of indigenous people— see Manderson, *supra* note 2 for an example of two such cases in Australia and Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (London: Weidenfeld and Nicolson, 1990) for an example of a similar case that was heard in British Columbia. However, it is not by any means confined to these cases.

decisions that arise from these cases.⁵ As Sarat and Kearns note however, even when judges fail to engage with the stories that are marginalised by their decisions, law “serves memory” by ensuring that the future remembers that a dispute for meaning occurred.⁶

I interrogate the terms on which legal transcripts act as memory’s handmaiden. While the work discussed in section two shows the power of transcript research to unearth hidden memories, I suggest that socio-legal scholarship has occasionally failed to pay regard to transcripts’ limitations. In particular, this work sometimes mistakes the transcribed word as a “voice machine” (to borrow Sarat’s term) for the court proceedings it represents, or as a “mirror” (another of Sarat’s terms) for the person whose voice is transcribed. The risk inherent in this conflation of transcript and subjectivity is that it can lead us to overlook the constraints imposed by the legal form and the process of transcription. These constraints include: the fact that the story told in court may be “something more and something less”⁷ than the story that a witness would tell in other contexts and for other purposes; the fact that the transcript only memorialises one aspect of the court proceeding (the words spoken by certain authorised actors); and the compromises inherent in the translation of spoken proceedings into a written transcript. I explain each of these constraints in greater detail in section two of this paper. Overlooking these constraints can lead the researcher to falsely believe that she understands and is able to empathise with the person whose stories she recounts – when in fact the researcher may be contributing to a recurrent pattern of domination of that

⁵ Manderson, *supra* note 2 at 109.

⁶ Sarat and Kearns, *supra* note 3 at 14 – 15. A striking example is given by the Haida case that is recounted by Goodrich, *supra* note 4. Unusually, the judge ordered that the proceedings of an application by a logging company for an injunction against the Haida people be transcribed – presumably so that the Haida’s claims to sovereignty in the Queen Charlotte Islands and the basis on which these claims were made could be memorialized.

⁷ Anne G. Walker, “Language at Work in the Law: the Customs, Conventions, and Appellate Consequences of Court Reporting” in Judith N. Levi and Anne G. Walker (eds.) *Language in the Judicial Process* (New York: Plenum Press, 1990) at 204.

person and appropriation of her subjectivity.⁸ By explicitly attending to the constraints I have identified, it may become possible for the legal transcript researcher to represent (re-present) the other's stories as they appear in the transcript without repeating law's tendency to appropriate or erase that other.⁹

The methodology I propose in section three for reading and writing about transcripts builds on the predominantly Foucauldian work of other socio-legal scholars in this area using insights from the work of Jacques Derrida and Dorothy E. Smith. There has been a "vast literature" spawned in law by Derrida's lecture "The Force of Law".¹⁰ This paper draws on that lecture and the associated literature, particularly the ethic of alterity (or otherness) proposed by Derrida in relation to law. However, in the context of transcripts and how to read them, I am also interested in Derrida's work on the relation between the spoken and written word – most particularly his book *Of Grammatology*.¹¹ Drawing on Derrida's work on the relation between spoken and written language, I argue in section three that the trial transcript can never merely reproduce the spoken proceedings it purports to represent. While the written transcript is usually defined in (subordinate) relation to this spoken "other", it is merely a similitude of the spoken proceeding it represents. In *Of Grammatology*, Derrida suggested that rather than reading the written text as a perfect substitute for the spoken event, we should pay attention to the relation

⁸ Lucie E. White, "The Faces of Otherness: A Response to Professors Sarat, Felstiner and Cahn" (1991) 77 *Cornell Law Review* 1499 [**White, "Faces of Otherness" at 1511**].

⁹ Jacques Derrida "Force of Law: The Mystical Foundation of Authority" in Jacques Derrida *Deconstruction and the Possibility of Justice* (1991) [**Derrida, "Force of Law" at 16**]. See also Margaret Davies, *Delimiting the Law* (London: Pluto Press, 1996) at 2.

¹⁰ Manderson, *supra* note 2 at 97 citing Drucilla Cornell, Michel Rosenfeld and David Gray Carlson, (eds.) *Deconstruction and the Possibility of Justice* (Routledge: New York, 1992) as a good starting point for this literature. Davies, *ibid*, is also deeply influenced by "The Force of Law". In this paper, I also draw extensively on White, "Faces of Otherness", *supra* note 8 who does not cite Derrida but shares his vocabulary and his concern with the other.

¹¹ Jacques Derrida, *Of Grammatology* (trans. Gayatri Chakravorty Spivak) (Baltimore: The John Hopkins University Press, 1976).

between the signified event and the signifier. Derrida's method of revealing this relationship is deconstruction – by paying close attention to the text, it is possible to identify the unanswered question at its origin.¹² I suggest in section three that the unanswered question hidden by the rhetoric surrounding the transcript is how to read the transcript's claim to be a true reproduction of the court proceeding it memorialises.

I partly answer this question using Dorothy E. Smith's characterization of the text as a:

¹² I must admit that, as a feminist, my decision to employ the deconstructive method is one about which I am, perhaps ironically, ambivalent. Why should feminism make me cautious of deconstruction? Many feminists have seen real possibilities in Derrida's vision of binaries as being defined in relation to one another rather than necessarily importing hierarchy and the deconstructive method is unquestionably a useful addition to the array of analytic tools available to critical scholars. For me, the "unanswered question" at the centre of the deconstructive method is the fact that the deconstructive reading necessarily asserts priority over the deconstructed text. (Gayatri Chakravorty Spivak raises this problem in the "Translator's Preface" to *Of Grammatology* at lxxiv – lxxv.) Derrida's observation that there is a chain of signifiers is well made – you, the reader, may well choose to deconstruct my deconstruction of Derrida, in which case you claim priority over my text. What does all this have to do with feminism? In *La Dissemination*, Derrida compares textuality with dissemination – "seed spilled in vain", "a proliferation of always different, always postponed meanings" (Spivak, "Translator's Preface to *Of Grammatology*, supra note 11 at lxxv). Derrida compares the hymen to the "always folded (therefore never single or simple) space in which the pen writes its dissemination." (Ibid, at lxxvi.) Spivak calls the "hymeneal fable" feminist (ibid at lxxvi.) (borrowed from Heidegger, the diagonal crossed lines denote that feminist is a term that is "under erasure" - it is presumptuous to believe that the problem is solved but the old term needs to be liberated – ibid at xv.)

I disagree with Spivak. In this binary hymen/dissemination, the deconstructive act of writing dissemination is masculine and the deconstructed space feminine – rather than being unfolded, the act of penetration, as a precursor to dissemination (deconstruction), ruptures the hymen (text). Whether I deconstruct Derrida's text or you deconstruct my deconstruction, Derrida's priority is accorded to the masculine disseminating pen(is) rather than the feminine text. Is this a problem? Well, yes, to the extent that it demonstrates how difficult it is to avoid prioritizing one half of a binary, and how insidious the use of feminine language is to describe the passive, the subordinate, the penetrated half of the binary. Of course, Derrida himself argues that language is inadequate to perform the task we ascribe to it. But Derrida has not persuaded me that these hierarchical relations between binaries can be removed through deconstruction – I agree with Dorothy E. Smith that we operate in a world of the actual, although this world is partly constituted through language. Language has real effects. Deconstruction can help us to understand language, but this understanding must be supplemented with attention to the realm in which people work and play.

material object that brings into actual contexts of reading a standardized form of words or images that can be and may be read / seen / heard in many other settings by many others at the same or other times.¹³

The trial transcript, being a paper or readable electronic document,¹⁴ fits Smith's definition of "text". For legal researchers and courts of appeal alike, the key practical benefit of a trial transcript is that it supplies a detailed and replicable source of information about what took place in a local, particularised and subsequently inaccessible court proceeding. Of course, this doesn't mean that all researchers (or all courts) will read transcripts in the same way – part of Smith's point is that the text does not change, but the reader and the context in which she reads are crucial to how the text is understood.¹⁵ One method of reading the text is to attend to the manner in which it is produced. In relation to transcripts, this requires an understanding of the legal role of the transcript as the authoritative legal record of "what happened" in court and the power that this vests in the hands of the court reporter and appellate courts. I discuss this ~~legal~~ role and this power in section three.

The broader project of which this paper forms a part is concerned with the transcripts of certain criminal trials that took place in Canada and Australia in the 1990's and early 21st

¹³ Dorothy E. Smith *Writing the Social: Critique, Theory and Investigations* (Toronto: University of Toronto Press, 1999) [Smith, *Writing the Social* at 7]. See also Dorothy E. Smith, "Textually Mediated Social Organization" (1984) 36 *International Social Studies Journal* 59 [Smith, "Textually Mediated Social Organization"] for an early formulation of Smith's theory of texts as the bridge between the local and the social.

¹⁴ I exclude court recordings from my use of the term "transcript" in this paper although it should be noted that the characteristics of replicability and constancy that are ascribed by Smith to texts also apply to court recordings. My exclusion of court recordings from the definition of transcript is functional – the following discussion problematises the notion that a transcript is "verbatim" and applies most closely (but not exclusively) to the transcript as a finished product.

¹⁵ Dorothy E. Smith, *The Conceptual Practices of Power: A Feminist Sociology of Knowledge* (Toronto: University of Toronto Press, 1990) [Smith, *Conceptual Practices of Power* at 177 – 199].

Century. These are trials in which a mother is accused of murdering her infant,¹⁶ in circumstances in which the defendant denies having killed her child. The murder trials with which I am concerned are different from infanticide cases because neither defence nor prosecution alleges that the mother was mentally ill – the dispute in these cases is about how the baby died. This dispute takes shape within two complementary discourses: a discourse of motherhood, in which the defendant’s behaviour as a mother is constructed as being consistent or inconsistent with social expectations about how “good” mothers behave; and a medical-scientific discourse about how to know the cause of a baby’s death. Reading the transcripts of these cases allows a detailed consideration of how these powerful discourses “weave together” to produce a picture of the mother’s guilt or innocence and how these discourses also produce resistance.¹⁷ In the second part of section three of this paper, I explain the process by which transcripts are produced and suggest some ways in which understanding the relation between the written transcript and the court proceeding allows me to read these transcripts more effectively.

Derrida’s work is philosophical and analytical whereas Smith is historical and materialist in her concerns. The two disagree on some fundamental issues.¹⁸ However, for my

¹⁶ Or infants. For readability, I have assumed here that a single death is at issue.

¹⁷ Alison Diduck, “Legislating Ideologies of Motherhood” (1993) 4 *Social and Legal Studies* 461 at 466.

¹⁸ Derrida tells us that we inhabit a textual system (Derrida, *Of Grammatology*, supra note 11 at 160) and that:

“in what one calls the real life of these existences “of flesh and bone,” beyond and behind what one believes can be circumscribed as ... text, there has never been anything but writing; there have never been anything but supplements, substitutive significations which could only come forth in a chain of differential references, the “real” supervening, and being added only while taking on meaning from a trace.” (Ibid at 158 – 159.)

Smith takes a different view:

“discourse, and the ruling relations in general, are, ontologically, fields of socially organized activity. People enter and participate in them, reading / watching / operating / writing / drawing texts; they are at work, and their work is regulated textually ... Society is emphatically, from this

purposes Smith and Derrida are both concerned with the relation between the written word and the events it seeks to describe. I conclude this paper by suggesting that employing the insights of both these authors in addition to Foucault's genealogical method reveals the transcript as being at once "something more and something less than what happened"¹⁹ in court. In keeping with the law and society tradition, I am concerned not just with the legal role of a transcript as the authoritative record of a court proceeding, nor am I only interested in the potential value of the trial transcript as a means by which legal scholars can better understand the genesis of a given judgment. Instead, while I make extensive reference to the law relating to the production of transcripts and the courts' treatment of transcripts, I propose to reposition the transcript as a socially-produced record of a process (a court proceeding) that is both quintessentially legal and saturated with the conditions of its production. This repositioning allows me to read transcripts critically, with an eye to what they contain and a concern to unearth what they might efface.²⁰

2. The possibilities and limitations of socio-legal transcript research

a. The possibilities of socio-legal transcript research

My work fits within the diverse field of scholarship that is often referred to as "law and society". Law and society comprises an assorted group of scholars from a range of academic disciplines and any generalisation about law and society research risks oversimplifying the movement or excluding some of its key contributions. Bearing this risk in mind, a central theme of law and society scholarship can usefully be noted. In

viewpoint, not an ensemble of meaning. The social happens." (Smith, *Writing the Social*, supra note 13 at 75.)

¹⁹ Walker, supra note 7 at 204.

²⁰ Sarat, supra note 1 proposed that a critical reading of trial transcripts requires the reader to attend to the "silences and exclusions" of the transcript (at 355). His concern in this article was with transcripts as a memory of law's rhetorical performance. In this paper, I extend Sarat's call for a critical reading of trial transcripts to include a call for a critical reading of the *production* of trial transcripts and a suggestion that trial transcripts must be read in light of the conditions of their production.

general terms, law and society scholars maintain a critical stance toward schools of jurisprudence, such as positivism and natural law, which purport to demarcate “law’s empire”. Rather than seeking to define or purify law according to law’s posited essence,²¹ the law and society movement traces the mutually constitutive relationship between legal knowledge and social knowledge.²² Socio-legal transcript research fits this tradition in its concern to reposition the legal decision within the context of the social and legal dispute that the decision purports to conclude, thereby bringing excluded knowledges and alternative meanings to light.

In *Taxing Choices*, Rebecca Johnson explains that she relied heavily on transcripts in writing her account of the Symes case²³ because she wished to:

reclaim the other voices presented in legal discourse ... illuminating the way the various judgments were affected by diverse texts, actors, strategies, and politics.²⁴

Austin Sarat and Thomas Kearns similarly see the possibility for stories of resistance to emerge from a study of the minute detail of legal records, this time from the point of view of lawyers and litigants who participate in the creation of the court record:

²¹ By “essence”, I mean the search within jurisprudence for the origin of law or for a single, anterior location of law’s authority over the social.

²² For a more detailed description of this aspect of law and society scholarship, see Davies, *supra* note 9 *passim* but see especially the introduction. Other authors who discuss this aspect of law and society include Frank Munger, “Mapping Law and Society” in Austin Sarat et al (eds.) *Crossing Boundaries: Traditions and Transformations in Law and Society Research* (Illinois: Northwestern University Press, 1998) and Mariana Valverde, *Law’s Dream of a Common Knowledge* (Princeton: Princeton University Press, 2003).

²³ *Symes v. Canada (Minister of National Revenue)* [1993] 4 S.C.R. 695 (Supreme Court of Canada); *Canada (Minister of National Revenue) v. Symes* [1991] 3 F.C. 507 (Federal Court of Appeal); *Symes v. Canada (Minister of National Revenue)* [1989] 3 F.C. 59 (Federal Court, Trial Division).

²⁴ Rebecca Johnson, *Taxing Choices: The Intersection of Class, Gender, Parenthood and the Law* (Vancouver: UBC Press, 2003) at 58 – 59.

Because the litigated case creates a record, courts can become archives in which that record serves as the materialization of memory. *Due process guarantees an opportunity to be heard by, and an opportunity to speak to, the future.* ... The legal hearing provides lawyers and litigants an opportunity to write and record history by creating narratives of present injustices, and to insist on memory in the face of denial. By recording such history and constructing such narratives lawyers and litigants call on an imagined future to choose Justice over the “jurispathic” tendencies of the moment.²⁵

The opportunity afforded by law’s insistence on due process to memorialise untold stories is also emphasised by Martha Minow, who argues that “legal rights matter ... because they provide an opportunity to tell a story that might not otherwise get to be told.”²⁶ Minow, Sarat and Kearns, and Johnson each articulate a version of the most commonly cited justification for using transcripts in socio-legal research.

The concern to hear the untold stories of the law and to understand the decisions written by judges as a matter of choice and constraint²⁷ rather than inevitability provides an excellent reason to conduct transcript-based socio-legal research.²⁸ The drive to listen and bear witness to law’s subordinated stories stems in large part from the influence that has been exercised on socio-legal scholarship by Foucault’s genealogical method of history and Derrida’s ethic of alterity.

²⁵ Sarat and Kearns, *supra* note 3 at 13. Emphasis added, citations omitted.

²⁶ Martha Minow, “Interpreting Rights: An Essay for Robert Cover” (1987) 96 *Yale Law Journal* 1860.

²⁷ Johnson, *supra* note 24 at [##insert]; Sarat and Kearns, *supra* note 25 at 7; Goodrich, *supra* note 4 at 183.

²⁸ The trend toward using an expanded range of sources in socio-legal research is not confined to case transcripts but is part of a broader interest in using sources that are not usually the subject of legal research in an effort to obtain a better understanding about the relationship between law and society – for example, Susan B. Boyd has made extensive use of the transcripts of parliamentary proceedings in her consideration of the evolution of child custody law in Canada – a recent example is Susan B. Boyd “Demonizing Mothers: Fathers’ Rights Discourses in Child Custody Law Reform Processes” (2004) 6 *Journal of the Association for Research on Mothering* 52. Others rely on newspaper articles about legal issues – for example, Carmela Murdocca “The Racial Profile: Governing Race through Knowledge Production” (2004) 19:2 *Canadian Journal of Law and Society* 153.

While Foucault spent very little time dealing explicitly with the operation of law, his understanding of the role of discourse in constructing our understanding of truth has had a profound effect on socio-legal scholarship. When writing or speaking about “discourse”, Foucault referred to the notion that experience and subjectivity are constituted through language. Discourses are “frameworks which structure what can be experienced, or the meaning that experience can encompass”.²⁹ Foucault defined discourse in reaction to what he saw as the totalising and stereotypical Marxist concept of dominant ideology; emphasising that discourses are manifold and competing.³⁰ While a given discourse may attain dominance for a period of time in a particular location, this dominance itself produces resistance in the form of counter-discourses.

In “Nietzsche, Genealogy, History”,³¹ Foucault challenged historians to move beyond the notion of history as linear, cause-predicated and progressive to an understanding of history as “a complex system of distinct and multiple elements, unable to be mastered by the powers of synthesis.”³² Proposing a methodology styled after Nietzsche as genealogical, Foucault exhorted historians to attend to the element of chance, “the details and accidents that accompany every beginning” – the discourses that succeed and those that are temporarily defeated. Foucault’s history of knowledge emphasised

²⁹ Alan Hunt and Gary Wickham, *Foucault and the Law: Towards a New Sociology of Governance* (London: Pluto Press, 1994) at 8.

³⁰ But see Marlee Kline, “Complicating the Ideology of Motherhood: Child Welfare Law and First Nations” in Martha Albertson Fineman and Isabel Karpin, *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood* (New York: Columbia University Press, 1995) and Susan Boyd “Some Postmodern Challenges to Feminist Analyses of Law, Family and State: Ideology and Discourse in Child Custody Law” (1991) 10 *Canadian Journal of Family Law* 79 for two examples of a body of scholarship that use the notion of ideology to analyse law without adopting a conceptualisation of the dominant ideology as relentless or unchanging.

³¹ Michel Foucault, “Nietzsche, Genealogy, History” in Paul Rabinow (ed.) *The Foucault Reader* (New York: Pantheon Books, 1984) [**Foucault, “Nietzsche, Genealogy, History”**].

³² *Ibid*, at 83.

an *ascending* analysis of power, starting, that is, from its infinitesimal mechanisms ... and then see how these mechanisms of power have been – and continue to be – invested, colonized, utilized ... by ever more general mechanisms.³³

For Foucault, power was neither negative nor something that is “held” by particular people or institutions but was instead a relation of force that circulates, producing truth effects through discourse.³⁴ Foucault’s conception of power and his genealogical method informs the search by socio-legal researchers to understand the outcomes of particular cases in light of the contest of discourses that is manifested in trial transcripts. Court records, especially trial transcripts, offer the possibility of a minute consideration of how discourses emerge, are transformed, utilised, and discarded within legal processes.

A second notion that has influenced socio-legal transcript research is the idea of an ethic of alterity.³⁵ The ethic of alterity is most often explained in relation to Derrida’s work. In “The Force of Law”, Derrida sought to unpackage the modernist conflation of law and justice: “Law is the element of calculation, and it is just that there be law, but justice is incalculable, it requires us to calculate with the incalculable”.³⁶ Because of the incalculable demands of justice and its “difficult and unstable” relationship with law, each instance of law is new and, to approach justice, each engagement with law requires a relation to the other rather than an appropriation or erasure of that other.³⁷ While a legal decision purports to put an end to speculation or to effect a closure of the events with which it is concerned, that decision always retains a trace of the other. Derrida

³³ Michel Foucault, “Two Lectures” in Colin Gordon (ed.) *Power/Knowledge: Selected Interviews and Other Writings 1972 – 1977* (Brighton: Harvester Press, 1980). [Foucault, “Two Lectures at 99].

³⁴ Ibid, at 96.

³⁵ This paragraph is based on part of an essay I wrote for the Doctoral Seminar in term one. This essay was titled “The Judicial Decision as a Performative of Law (or why is Mrs Clark sometimes murderous, sometimes ordinary but always and never both?)”.

³⁶ Derrida, “Force of Law”, supra note 9 at 16.

³⁷ Davies, supra note 22 at 2.

proposed an ethic of alterity, which would require legal decision makers (and legal researchers) to acknowledge and account for the other as a means of more closely approaching incalculable justice through calculable law.

The ethic of alterity is partly a way of describing the need to try to understand and be generous to those who are different. This includes understanding and giving voice to the people whose narratives are subordinated within the legal process – a key concern of socio-legal scholars when conducting transcript work.³⁸ It also includes understanding and being generous to those who hold positions with which the legal researcher may disagree.³⁹ The ethic of alterity informs my consideration of the first of the constraints of transcript research – the restrictions imposed on storytelling within the law.

b. The limitations of socio-legal transcript research

i. Storytelling within the law

It has at times been fashionable to speak of the “stories” that can be found within the law.⁴⁰ Law’s stories are manifold and the quest to know and understand these stories is the impetus for legal transcript research. However, law’s stories are also constrained by the requirements of the adversarial legal form – witnesses are required to respond to questions rather than speaking freely⁴¹ and stories are likely to be tailored to the broader

³⁸ Johnson’s reference to the “other voices” of the *Symes* case suggests exactly this ethical concern. Johnson, *supra* note 24 at 58. Minow’s reference to “a story that might not otherwise get to be told” exhibits a similar priority. Minow, *supra* note 26 at 1874.

³⁹ An example of this concern to understand the other with whom the author may disagree is provided by Johnson, *supra* note 24, at 177 - 180

⁴⁰ See for example the essays collected in Peter Brooks and Paul Gewirtz *Law’s Stories: Narrative and Rhetoric in the Law* (New Haven: Yale University Press, 1996).

⁴¹ I discussed the implications of this constraint in one case, the trial of Lindy Chamberlain, in Emma Cunliffe, “Weeping on Cue: The Socio-Legal Construction of Motherhood in the Chamberlain Case” (unpublished LL.M. thesis, 2003). A copy of this thesis is on file with the author and at the University of British Columbia library. See Jill Hunter and Kathryn Cronin *Evidence, Advocacy and Ethical Procedure:*

objectives of the speaker in the context of the case. The stories that are told in the legal forum are not necessarily the same stories that the speaker would tell at a different time, in a different place, to a different audience.

The key contribution made by Derrida is that he suggests that, while understanding the other is an ideal to be striven towards, achieving that ideal can only happen momentarily, if at all.⁴² This seems nihilistic, but for me it speaks to the fact that I can only ever stand in relation to the other – I can't become the other without one or both of us disappearing.⁴³ For socio-legal researchers who are engaged in the Foucauldian-influenced task of mining subordinated discourses, Derrida's ethic of alterity speaks to the importance of remembering that it is never possible to present (or even know) the truth of the other, but only to see and represent a version or similitude of the other and to understand that version within the context in which it is produced. This notion applies most clearly to the opposing interests within a particular litigation. However, the ethic of alterity also informs our understanding of the relation between two people whose interests seem to be aligned.

The relevance of the ethic of alterity within apparently allied relations and the limited nature of legal storytelling are both well demonstrated by a story recounted by Lucie E.

A Criminal Trial Commentary (Sydney: Butterworths, 1995) at paras 607 – 609 for a discussion of the relation between credibility and the form of witness examination that is used in adversarial common law courts. Dorothy E. Smith also discusses how the questions asked influence the account that is given in response in *Conceptual Practices of Power*, supra note 15 at 75 – 77.

⁴² See Davies, supra note 22 at 112 – 113 – “The decision is that which is formative of the law in its (theoretically) closed state, because the decision continually concludes questioning about the law so that its processes may continue.” I would argue that the academic treatment of a case operates similarly – legal scholars seek to explain a case in order to conclude questioning about how a particular outcome arose. But in the course of purporting to close that avenue of enquiry, academic treatments of a case raise new questions and new responses.

⁴³ Ibid. This notion is similar to that of Lacan in relation to the stages of child psychological development. Once a child recognizes his or her separation from the other of mother, he or she may strive to return to a unity with the mother but cannot achieve that unity without disappearing. See Jeanne L. Schroeder, “The Vestal and the Fasces: Property and the Feminine in Law and Psychoanalysis” in Peter Goodrich and David Gray Carlson (eds.) *Law and the Postmodern Mind: Essays on Psychoanalysis and Jurisprudence* (Ann Arbor: University of Michigan Press, 1998).

White. In “Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs G.,” White wrote about her experience of representing a black single mother – the eponymous Mrs G.⁴⁴ Mrs G. was accused of receiving a welfare overpayment in circumstances in which the welfare office was arguably at fault. White was faced with deciding which of two rhetorical devices (or stories) would most likely enable Mrs G. to avoid having to repay some of her welfare. One option was to blame the welfare office for misleading Mrs G. The other was to argue that Mrs G. had used the little extra money that she had received to buy necessities for her daughters. In consultation with Mrs G., White decided to argue that the money had been spent to buy necessities – new school shoes and sanitary napkins. Mrs G. arrived at court with shoe boxes and receipts, but much to White’s surprise, when Mrs G. gave evidence, she testified that the money had been spent on Sunday shoes for her daughters. Mrs G. lost her case but, for reasons that White never learned, the welfare office immediately advised White that it had decided not to enforce the repayment order.

In reflecting on the case, White ultimately concluded that the “necessities story” that had been agreed between White and her client excluded Mrs G.’s voice in favour of a concern to paint the “right” picture. Mrs G.’s strategy was bolder in the end, but it worked – perhaps because it forced the representatives of the welfare office to regard her as “a person rather than a case”. As White notes, Mrs G.’s “victory” (the decision by the welfare office not to enforce repayment) was at best ambivalent – while she did not have to repay the welfare overpayment, she remained poor, black and welfare dependant in a county (in a country) with a racist history and present.⁴⁵ But White’s story is not really about the success of Mrs G.’s strategy or about her continued subordination – it is about

⁴⁴ Lucie E. White, “Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs G.” (1990) 38 Buffalo Law Review 1.

⁴⁵ Ibid, at 47.

the lesson that White herself learned from Mrs G. of how important it is for a lawyer to see her client (her other) as an authority in her client's own life.⁴⁶

Mrs G.'s case demonstrates that it is possible for individuals to resist the knowledge claims of lawyers and the legal form and to tell their stories in ways that differ from law's expectations. However, only part of Mrs G.'s experience would have been revealed from a transcript of her case – Mrs G. told her story about her daughters' shoes quite differently to the welfare office and differently again to White. None of these versions of the story was necessarily more authentic than any other – but each was tailored to the audience and the forum. White's account of Mrs G. shows that law's stories are partial stories, and that the process of choosing which part of the story should be told to law is coloured by law's imperatives as well as the speaker's priorities. The danger of reading the transcript as a means of reclaiming the "untold story" of Mrs G.'s experience with her welfare agency is that it becomes possible to miss the partiality of the story she related to the courtroom. This blindness can make us think that we are being empathetic with the other when in fact we are implicated in a recurrent pattern of domination by assuming that it is possible to know and understand her point of view on the basis of a courtroom narrative.⁴⁷ The words that are memorialised in the transcript are likely to be something more and something less than the story that the other would tell if it were possible for her to speak her unfettered version of events.⁴⁸

⁴⁶ White sees the possibility for false empathy or false understanding to be the most significant danger of Foucauldian-based socio-legal research. In an article written partly in response to a piece by Sarat, White wrote "We must seek, in our encounters with others, not just to map the power or read the text, but also to recognise, in all its alterity, the other's face." White, "Faces of Otherness", supra note 8 at 1511.

⁴⁷ White, "Faces of Otherness", supra note 46 at 1508.

⁴⁸ Smith makes a slightly different, but related, point in *Conceptual Practices of Power*. She identifies a split between women's experience and the mode of participation in the relations of ruling. Smith argues that, in order for a woman's voice to be heard, the woman must translate her voice into the language and practices of the ruling relations. Smith, *Conceptual Practices of Power*, supra note 15 at 3 – 4. For Smith, the female voice that is memorialised in the transcript can never be an unalloyed representation of the speaker's lived experience because the speaker has necessarily adapted her mode of being to the powerful institutional forum of the courtroom.

ii. The one-dimensionality of transcription

Clients such as White’s may and possibly often do rebel against trial strategy in favour of speaking in their own voice.⁴⁹ In other cases, a party may reject “legal translation” in favour of speaking to the court directly. However, even when this occurs, the transcript will not represent the totality of the court proceedings or the party’s perspective on those proceedings. An example of a party that eschewed lawyers in favour of speaking directly to the court is provided by Peter Goodrich. He cites a case involving the Haida Nation, which defended an application by Western Forest Products Ltd for an injunction to prevent Haida members from interfering with WFPL’s logging activities on traditional Haida land. The Haida arrived at the court in ceremonial dress, refused to appoint a lawyer and called witnesses who told stories, sang songs and produced sculptures to defend their claim that they held exclusive rights over Haida land. Justice McKay initially encouraged the Haida Nation to appoint a lawyer – but his advice was refused by the Haida because “the issue of our lands is too important to leave in the hands of lawyers who are unfamiliar with our people”.⁵⁰ After this refusal, Justice McKay heard the witnesses brought by the Haida and directed the production of a transcript of the Haida evidence. Ultimately, however, Justice McKay declared himself constrained to consider only the technical legal question of whether the Haida had interfered with a valid logging licence.⁵¹

⁴⁹ Arguably Lindy Chamberlain is an example of another such client. During the trial in which the Crown alleged that she had murdered her daughter Azaria, she clashed privately with her own counsel as to the best means of presenting her story. The result of this clash was a disjuncture within the defence narrative that, I have argued elsewhere, increased juror suspicion of Chamberlain’s truthfulness and of the integrity of her lawyers. Emma Cunliffe, “Weeping on Cue: The Socio-Legal Construction of Motherhood in the Chamberlain Case” (LL.M. Thesis, 2003 unpublished: on file at the University of British Columbia Law Library and with the author).

⁵⁰ Quoted by Goodrich, *supra* note 27 at 180.

⁵¹ Goodrich, *ibid* at 179 - 184. Goodrich explains this case as an example of law’s refusal to recognise the other, characterising Justice McKay’s decision as Pontius Pilate-like: “this washing of hands, had as its underside the annihilation of the opposing language” (Goodrich at 183). My reading of the case as it is recounted by Goodrich (I have not read the transcript) is slightly different – if Justice McKay was only

The Haida case is an unreported decision of the Supreme Court of British Columbia and the only “public” legal record of the case is a trial transcript which is held by the court but Goodrich reports that it cannot be copied or removed from the court.⁵² Entombed in the court registry, this thousand page transcript documents an untold story of a legal event that reveals a great deal about the problematic nature of First Nations relations and legal pluralism in Canada.⁵³ Retelling the Haida’s story on the basis of the transcript allows the Haida’s act of rebellion to become more widely known and the implications of the case to be pondered. However, the transcript does not convey everything there is to tell about the case – for example, although the Haida elders appeared in ceremonial dress:

No comment was made as to the ceremonial dress, nor was evidence allowed as to its significance. It was passed over in silence, it was not seen, it was not a language which the court was prepared to countenance: before the law there are only individuals, subjects that can be reconstructed as legal actors, abstract subjects, individuals without clothes, certainly without all that clothes imply, namely the social and ceremonial dimensions of collective and ethnic life, the material and social habitus of the individual.⁵⁴

Perhaps it would be more accurate to say that before the law there are only the properly clothed (those who wear the apparel of lawyers – in some jurisdictions, the wig and gown) and those whose clothing is passed over without comment, but not without being noticed. The transcript is stripped of this dimension entirely. If the clothing worn by the

concerned to morally absolve himself from implication in the annihilation of Haida land, why did he make the unusual direction that the transcript be produced from the court recording? And why did he allow the Haida to introduce witnesses who could easily have been construed as legally irrelevant to the proceeding at hand (by allowing these witnesses, Justice McKay ensured that their evidence was included in the transcript, even if it did not influence the legal outcome)? In keeping with the ethic of alterity (see text accompanying note 39, *supra*), I believe that it is possible that Justice McKay truly felt himself to be constrained to grant the injunction but hoped that the act of memorializing the Haida point of view would create the possibility of change via another means.

⁵² *Ibid*, at 179, note 1.

⁵³ See John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) for an account of the history of legal pluralism in Canada.

⁵⁴ *Ibid*, at 181.

Haida was not commented upon by anyone whose words were recorded by the court reporter, it did not find its way into the transcript. The meaning of the Haida's decision to wear ceremonial dress (and even the fact that they wore this dress) was therefore hidden entirely from the face of the transcript. Other aspects of "the material and social habitus of the individual" – her clothing, her accent, her affect – are similarly routinely absent from a transcript of her trial.

By paying attention to the relation between the form of the trial and the conditions of production of the transcript, it becomes easier to avoid conflating the narratives memorialised on the face of the trial transcript with the subjectivity of the person whose story the researcher wishes to tell. The absences that I have identified in relation to the Haida case and Mrs G.'s hearing are accompanied by other, more subtle distortions that are produced by the process of transcription. Some of these aspects are explained further below.

iii. Translating the courtroom proceeding into written form

A small but (for my purposes) important group of legal scholars are concerned with explaining the trial transcript *as text*. These scholars seek to displace the myth that trial transcripts are or can ever be "a mirror / a record / a voice machine".⁵⁵ Perhaps the most illuminating work in this field has been done by Anne G. Walker, who was a court reporter before she entered linguistics. Walker's work is largely concerned with rebutting the pretence that a transcript is or ever can be "verbatim".⁵⁶

⁵⁵ Sarat, *supra* note 1 at 356.

⁵⁶ U.S. law governing court reporters requires a court reporter to produce a "verbatim" transcript. Walker, *supra* note 7. The comparable Australian and Canadian requirements are discussed in section three of this paper.

The notion of “verbatimness” assumes and reinscribes a hierarchy identified by Derrida between spoken and written language⁵⁷ – the court reporter’s legal role is to subordinate her text to the spoken words of others. However (as Derrida would predict), this is an impossible task:

what actually constitutes a “word”[?] (Is a nod a word? Is “uh” a word? Is a stammer, a stutter, a false start a word?) ... For the lawyers and judges whose speech and acts “make” the record, these aspects of verbatimness, if recognized at all, are connected more with the readability of a record than with any potential appellate significance. For the court reporters, who “take” the record, verbatimness is a daily ad hoc problem that must be coped with.⁵⁸

The problem faced by the court reporter extends beyond false starts and stuttering. The reporter must decide how to punctuate speech when it is transformed into a written record and whether to correct a speaker’s grammar. On this latter issue, Walker reports on the basis of a survey she conducted of court reporters that court reporters are most likely to “correct” the speech of judges and more likely to correct the speech of advocates and expert witnesses than that of lay witnesses.⁵⁹ One justification given for this is that lay witnesses, speaking under oath, should have their utterances recorded more precisely. This justification is difficult to sustain in light of the fact that the vast majority of appeals from criminal trials conducted in front of a jury arise from a claim that the trial judge misdirected the jury. It is also difficult to understand how the witness’s oath is more solemn than the duty owed by the judge and lawyers to the administration of justice. A second justification, contained in a textbook that was endorsed by the National Shorthand Reporters’ Association until 1989, is that:

⁵⁷ Derrida, *Of Grammatology*, supra note 11 at 8. Derrida’s treatment of this hierarchy is explained further in section three of this paper, below.

⁵⁸ Walker, supra note 19 at 213.

⁵⁹ *Ibid*, at 224.

Presumably all judges and most if not all lawyers are men of education, and they will resent having attributed to them in stenographic reports ungrammatical and carelessly-phrased remarks.⁶⁰

Again,⁶¹ one can only refer to the fact that many criminal appeals arise from the aforementioned “carelessly-phrased remarks”.

Another significant tendency Walker has identified, at least in the USA, is that court reporters (and court reporting manuals) generally edit dialect out of the record for all witnesses. Walker quotes a court reporter who responded to her questionnaire as writing - “No one attempts to reproduce dialect. What may sound like dialect to one is normal pronunciation to another.” Walker notes “a professionwide reluctance to put into a transcript any of the features of speech that might mark a person’s origin.”⁶²

What are the implications of this reluctance to report dialect for socio-legal scholars who seek to tell subordinated stories? On the one hand, reporting standard English greatly enhances the readability of transcripts. On the other hand, removing dialect means that the speaker’s membership of a subordinated social group may be less apparent from the face of the record than would otherwise be the case.⁶³ Returning to Mrs G.’s hearing, it is highly unlikely that anyone referred to Mrs G. as black during her hearing – and if this fact remained unspoken, any transcript would also exclude this information. If Mrs G. had patterns of speech that identified her as African-American, it is highly likely that

⁶⁰ National Shorthand Reporters’ Association, *English* (Virginia: NSRA, 1983) quoted *ibid*, at 218.

⁶¹ Aside from the objection that even in 1983 when this textbook was printed, not all judges and lawyers were men.

⁶² Walker, *supra* note 19, at 219. In fact, in America, the appearance on the transcript of an expression such as “Mm-hmm” can form sufficient grounds for appeal. *Commonwealth of Pennsylvania v. Stuffle* [1980] 419 A.2d. 184 cited by Walker at 236.

⁶³ John Gibbons provides a very useful analysis of the tension between accuracy and readability in transcription. John Gibbons, *Forensic Linguistics: An Introduction to Language in the Justice System* (Malden: Blackwell, 2003) at 27 – 35.

those speech patterns would not have been reproduced in a transcript of her hearing.⁶⁴ Far from being the authorless text of legal scholars' imagination, what starts to emerge from Walker's work is a trial transcript that is carefully and selectively edited in ways that have the potential to significantly alter the representation of subordinated voices. Most particularly, the assumptions underlying the micro-linguistic analysis that is undertaken by some legal scholars on trial transcripts must change if the words that are reported in the transcript are not necessarily the words that were spoken in court. However, Walker's insights do not nullify the usefulness of trial transcripts: they simply provide a warning to socio-legal scholars to read transcripts carefully and critically, with an eye to the context in which the transcript was produced.

Walker's findings suggest to me that, in the American courts she studies, trial transcripts are produced in ways that reveal the institutional bias of their site of production (the courtroom) and the manner in which they are commissioned (by courts in some jurisdictions and by lawyers with court approval in others). This demonstrates the importance of Smith's admonishment to attend to the institutional context within which the text is produced.⁶⁵ A key step in developing a methodology of transcript research is to consider whether Walker's findings hold in the jurisdiction in which the relevant transcripts are produced. It seems likely that they do – the difficulties identified by Walker will not miraculously disappear in Canada or Australia. However, that expectation requires further research in order to become an assertion. For my purposes, this means considering court reporting practice in the State of Victoria, Australia and the

⁶⁴ The fact that this can be a problem is illustrated by a conversation I recently had with a legal historian who told me that she had been researching sexual assault trials in Canada. She was particularly interested in a case that had occurred in Yellowknife, in which a woman was accused of sexual assault after allegedly kissing another woman. This was one of the earliest, and one of the few, sexual assault cases she had found that involved a lesbian act. After searching the archives and the public records about the case, my colleague spoke to some people who had been involved in the case – they informed her that the defendant was black. Arguably this fact (which was not contained in any written record) casts a whole new light on how to read the case.

⁶⁵ Smith, *Writing the Social*, supra note 13 at 85 – 86.

province of British Columbia, Canada. In section three of this paper, I make a start toward such an investigation.

3. Toward a text-based understanding of the trial transcript

a. Derrida, Smith and the relationship between spoken and written language

I noted in section two that the US law relating to transcription seems to privilege the spoken word over the written transcript by requiring “verbatim” transcription even though verbatimness is practically impossible. Similarly, forensic linguists focus their studies of courtrooms on spoken language rather than the written trial transcript.⁶⁶ Structural linguists including Saussure asserted “linguistics to be a study of speech alone, rather than speech and writing.”⁶⁷ These are examples of a tendency that Derrida identified in *Of Grammatology* as pervasive in Western thought – the ascription of authenticity to the spoken word and unreliability to the written word.⁶⁸ Writing in response to Saussure, Derrida “relates this phonocentrism to logocentrism – the belief that the first and last things are the Logos, the Word, the Divine Mind, the infinite understanding of God, an infinitely creative subjectivity, and closer to our time, the self-presence of full self-consciousness.”⁶⁹ Derrida suggests that the spoken language is privileged in the binary spoken / written, not just by linguists but also by western

⁶⁶ See for example, John M. Conley and William M. O’Barr *Just Words: Law, Language and Power* (Chicago: University of Chicago Press, 1998); Gregory M. Matoesian, *Law and the Language of Identity: Discourse in the William Kennedy Smith Rape Trial* (New York: Oxford University Press, 2001).

⁶⁷ Gayatri Chakravorty Spivak, “Translator’s Preface” to Derrida, *Of Grammatology* supra note 11 at lxvii – lxviii. This privileging of the spoken word over the written word is discussed further below.

⁶⁸ Derrida, *Of Grammatology* supra note 11 at 37.

⁶⁹ Ibid.

philosophers. Within this paradigm, the written language is seen merely as “a supplement to the spoken word”.⁷⁰ Derrida explains further that:

With an irregular and essentially precarious success, this movement would apparently have tended ... to confine writing to a secondary and instrumental function; translator of a full speech that was fully *present* (present to itself, to its signified, to the other, the very condition of the theme of presence in general).⁷¹

By defining speech as “presence” in opposition to the written text as “absence”, the “unanswered question” posed by language’s inability to represent the signified without altering it is obscured. In *Of Grammatology*, Derrida proposes that a reading of the written text which has regard to the way in which the signifier alters the signified allows the reader “to see the text coming undone as a structure of concealment, revealing its self-transgression, its undecidability.”⁷² This does not “unlock the way to truth” but allows us to see the relationship between the written trial transcript and the spoken trial “not that of patency and latency but rather the relationship between two palimpsests”, each containing the trace of the other.⁷³

By adopting Derrida’s formulation of the relationship between spoken and written language as one of differance rather than hierarchy, it is possible to view the trial transcript as defined in relation to the proceedings of the spoken trial and containing the trace of that other. Equally, the trial itself, which is largely predicated on oral evidence and oral argument, is always conducted partly with regard to the written record that will emerge. The written transcript is not an incomplete or inferior representation of the

⁷⁰ Ibid at 7.

⁷¹ Ibid at 8.

⁷² Spivak, “Translator’s Preface”, supra note 67 at lxxv.

⁷³ Ibid.

spoken truth of the courtroom, but a text. This text should read in its own right, carefully and with a view to finding contradiction.

As I noted in the introduction, Smith focuses on texts in a somewhat different way from Derrida. Smith's definition of the text as "replicable"⁷⁴ is not confined to written texts but also to media such as video and audio recordings. However, given my focus on trial transcripts as a written or electronic readable text, my discussion of Smith's text-based theory will focus on written texts. Because of the attributes of materiality and replicability, Smith regards the text as the "technology" that coordinates relations of ruling and the local activities of actual people.⁷⁵

The materiality of text and its replicability create a peculiar ground in which it can seem that language, thought, culture, formal organizations, have their own being, outside lived time and the actualities of peoples living. ... It is the materiality of the text itself that connects the local setting at the moment of reading into the non-local relations that it bears.⁷⁶

The key insight that can be derived from seeing the text as a material object is the revelation that texts are not "neutral systems of representation external to the organization they produce and regulate. The production of forms to correspond to and realize locally the forms and norms borne by text-mediated discourse is not confined to Disneyland."⁷⁷ The transcript presents itself as a window into the reality of the courtroom. In doing so, it suppresses the conditions and conventions of its production.⁷⁸ By paying attention to the way in which texts are produced and the institutional context within which that

⁷⁴ Smith, *Writing the Social* supra note 13 at 7.

⁷⁵ *Ibid.*, at 79.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.* at 85 – 86.

⁷⁸ Smith, *Conceptual Practices of Power* supra note 15 at 78 – 80.

production occurs, it becomes possible to see institutionalised biases within those texts. Why are transcripts are produced? When are they produced? Who produces them? By asking these questions, we can begin to see not only that transcripts are different from the spoken proceedings that they represent, but also that the surface of transcripts “both organize and conceal the social relations ... [through which they] are fed into the lives and doings of others, becoming their constraints, contingencies, opportunities and disasters.”⁷⁹

The remainder of this paper represents an attempt to find a way of reading transcripts that reflects the similarities and differences between spoken and written language. I seek to attend to the technologies of production of the transcript without positing the transcript as an imperfect representation of the courtroom’s truth or conversely asserting that the transcript represents a truth of its own. My intention is not to devalue the transcript – to the contrary, I regard the transcript as an immensely valuable resource because it mediates between the local practice of the courtroom and the seemingly transcendent judgment. However, the transcript conceals a particular social organisation of knowledge even as it reveals the meanings that are hidden by the legal judgment. Understanding this social organisation of knowledge is largely a practical task – it involves an inquiry into the laws that govern transcript production, how they are produced and who produces them. Perhaps the most important reason why transcripts are produced is for use in appeal proceedings. Unpacking the production of transcripts therefore requires an understanding of the jurisdictional and procedural imperatives of appeal courts as these imperatives might be experienced by a court reporter, an appellant, a lawyer and a judge. Of course, it is not possible to do justice to each of these perspectives in a paper of this kind. Accordingly, in the next two sub-sections I begin to trace the law relating to transcript production and suggest how this work could be extended to encompass transcription practices and conventions.

⁷⁹ Smith, *Writing the Social* supra note 13 at 82.

In the next section of this paper I discuss the law of transcription in criminal proceedings in the State of Victoria, Australia and in the Province of British Columbia in Canada. These two jurisdictions are, respectively, the jurisdiction of my training and the place where I now live and work. They provide examples of transcription practices in Australia and Canada, but transcription practices within these countries varies from jurisdiction to jurisdiction – for instance, the laws and practices organising transcription in New South Wales differ in important ways from those of Victoria. Considering the law relating to transcript production is an important part of understanding the institutional context in which transcripts are produced. However, a consideration of the law is not itself adequate to understand the practices of court reporters within the relevant jurisdictions. Obtaining this information requires further study – for example, obtaining the manuals used by court reporters may allow the researcher to understand transcription conventions and interviewing or surveying court reporters could permit an understanding of editing practices. This information is not included in this paper.

b. Relevant criminal and evidence law in Victoria and British Columbia

In Australia, criminal law is largely a state jurisdiction. Common law criminal offences including murder have been codified in Victoria in the *Crimes Act 1958* (Vic.) (**Crimes Act**). Defendants who are accused of murder are committed to stand trial in the Magistrates' Court and their trials occur in the Supreme Court of Victoria. The production of evidence in Victorian courts is governed by the *Evidence Act 2008* (Vic.) (**Victorian Evidence Act**).

In Canada, criminal law falls within federal jurisdiction.⁸⁰ Part VIII of the *Criminal Code*, R.S.C. 1985, c. C-46 (**Criminal Code**) deals with homicide. The production of evidence in criminal trials is governed by the *Canadian Evidence Act*, R.S.C. 1985, c. C-5 (**Canadian Evidence Act**). In British Columbia, homicide is prosecuted by the B.C.

⁸⁰ Section 91(27) of the *Constitution Act 1867*.

Attorney-General in the B.C. Supreme Court, which court consists of federally appointed judges. Canadian criminal law is also influenced by the *Charter of Rights and Freedoms*, which guarantees the right to life, liberty and the security of the person (section 7) and provides certain specific rights in sections 11 and 14 to persons charged with an offence.⁸¹

Part VI of the *Evidence (Miscellaneous Provisions) Act 1958* governs the production of transcripts in Victoria. Section 130(1) of the Act provides that a judge may order that any evidence in a proceeding be recorded and transcribed “in any manner that he or she directs.” It appears that criminal trials are routinely recorded⁸² by the Victorian Government Reporting Service but that not all proceedings are transcribed (i.e. converted from recorded or shorthand form to a written or electronic text). Rule 2.17 of the *Supreme Court (Criminal Procedure) Rules 1998* (Vic.) provides that where a person appeals from a decision in a criminal trial, the court registrar may direct that the shorthand record or recording of that trial be transcribed by a competent person or persons. Rule 2.19 provides that the appellant and respondent may obtain a copy of the transcript from the registrar. The cost of transcript production in criminal proceedings is met by the State of Victoria.⁸³

In British Columbia, court reporting and transcription services are provided by private contractors. A party who wishes to appeal from a judgment must find out which

⁸¹ Kent Roach, *Criminal Law* (2nd ed., 2000). Accessed electronically via Quicklaw on 24 March 2005.

⁸² Supreme Court of Victoria Practice Note No. 3 of 2002 provides that civil proceedings in the Supreme Court will be transcribed as a matter of course. The Supreme Court of Victoria website states that the Victorian Government Reporting Service (VGRS) “provides transcript for all criminal proceedings in the Supreme Court” (<http://www.supremecourt.vic.gov.au>). However, there does not appear to be a practice note equivalent to No. 3 of 2002 in relation to criminal proceedings, nor does any applicable legislation provide that all criminal proceedings must be transcribed. In fact, rule 2.17 of the *Supreme Court (Criminal Procedure) Rules 1998* seems to assume that all criminal proceedings will be recorded but that they will not necessarily be transcribed unless the need arises.

⁸³ <http://www.supremecourt.vic.gov.au>.

companies or individuals are authorised to produce the transcript and pay that contractor to produce the transcript.⁸⁴ As is the case in Victoria, B.C. Supreme Court criminal cases are recorded as a matter of course but that transcripts are only produced upon request. Rule 6(5) of the *Criminal Rules of the Supreme Court of British Columbia 1997* provides that an appellant from a verdict or sentence in a criminal case must furnish proof that a transcript has been ordered to the court registry within 14 days of an appeal being lodged. The cost of transcription may be considerable if the trial was long.⁸⁵

The B.C. Legal Services Society (BCLSS) offers legal aid to applicants who are financially eligible and whose legal problem fits within the Legal Aid criteria. For a single person, annual income must be less than \$17,640 in order to qualify for legal aid.⁸⁶ A defendant to a criminal charge is eligible for Legal Aid if he or she could go to jail in the event of being convicted, or if he or she meets certain alternative criteria.⁸⁷ These criteria, particularly the financial eligibility rules, are likely to exclude many criminal defendants. Even if a defendant qualifies for legal aid at first instance, a criminal appeal will only be funded if BCLSS determines that the appeal is likely to succeed or the defendant is a respondent to the appeal. If the criminal appellant does not qualify for legal aid, he or she must meet any costs of appealing from a conviction (including transcription) or apply for court assistance under section 684 of the *Criminal Code*.⁸⁸

⁸⁴ http://www.ag.gov.bc.ca/courts/general/order_transcript.htm.

⁸⁵ Telephone conversation with Reportex, the private firm that is contracted to prepare Supreme Court of B.C. (Vancouver registry) transcripts. The appellant is required to pay for the crown's copy of the transcript as well as for the copies used by the court and the appellant's own copy. This telephone conversation was conducted on 30 March 2005.

⁸⁶ http://www.lss.bc.ca/legal_aid/doIQualifyRepresentation.php (accessed electronically on 1 March 2013).

⁸⁷ http://www.lss.bc.ca/legal_aid/criminalLaw.php (accessed electronically on 1 March 2013).

⁸⁸ Section 684 of the Criminal Code provides:

- (1) A court of appeal or a judge of that court may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal

The requirement that is imposed on criminal appellants to pay for transcript has been challenged several times in British Columbia and Alberta (where the rules are similar to those in B.C.). The first of these challenges occurred in Alberta in *R. v. Claude Robinson*.⁸⁹ In this case, Robinson argued that section 684 of the Criminal Code when read together with section 7 of the Charter⁹⁰ required the Alberta Court of Appeal to direct the preparation of a court book (including a transcript) at the Province's expense on behalf of an indigent appellant who had been refused legal aid.

The Alberta Court of Appeal held that it was not obliged to order the production of a province-funded transcript, finding after a long survey of historical treatments of the "right" to obtain transcripts that:

the foundation of appellate review in Alberta is the printed transcript but unless there is entitlement to it by statute or by the payment of the fee for its preparation, that transcript has never been given to a convicted appellant upon his demand. If legal aid (including that available under section 684) is declined, the appellant remains responsible for the

where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that aid.

- (2) Where counsel is assigned pursuant to subsection (1) and legal aid is not granted to the accused pursuant to a provincial legal aid program, the fees and disbursements of counsel shall be paid by the Attorney General who is the appellant or respondent, as the case may be, in the appeal.
- (3) Where subsection (2) applies and where counsel and the Attorney General cannot agree on fees or disbursements of counsel, the Attorney General or the counsel may apply to the registrar of the court of appeal and the registrar may tax the disputed fees and disbursements.

⁸⁹ [1989] A.J. No. 950 (Alberta Court of Appeal) (Accessed electronically by Quicklaw on 30 March 2005). I have used the appellant's first name because, confusingly, the relevant B.C. authority is also *R v Robinson*.

⁹⁰ "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

cost. To urge otherwise, as a principle of fundamental justice, is not historically supportable.⁹¹

The Alberta Court of Appeal's decision in *R. v. Claude Robinson* was followed by the B.C. Supreme Court in *R. v. Kimberley Robinson*.⁹² Kimberley Robinson was ineligible for legal aid on financial grounds and represented himself at trial before the Provincial Court of B.C. He was convicted of two out of six counts. Interestingly, his success in defending four of the counts against him was one of the grounds on which Justice Blair denied Robinson's application for provision of a transcript at the Province's expense:

Mr. Robinson presents as an articulate person who acted on his own behalf at the trial following which he was convicted on just two out of six charges under the Wildlife Act, a success which reflects positively on his competency to act for himself.⁹³

R. v. Claude Robinson was mentioned in the majority judgment of the Supreme Court of Canada in *New Brunswick (Minister of Health and Community Services) v. G. (J.) [J.G.]*.⁹⁴ Lamer C.J.C., writing on behalf of the majority, noted that cases including *R. v. Claude Robinson* adopted criteria to determine whether a criminal accused was eligible to receive legal assistance under section 684 of the Criminal Code and section 7 of the Charter. However, Lamer C.J.C. expressly stated that his reference to *R. v. Claude Robinson* should not be taken as a comment on the correctness of that decision.⁹⁵

⁹¹ *R. v. Claude Robinson* per McClung J.A. (Harradence and Côté JJ.A. concurring), supra note 89 at paragraph 67 [footnotes omitted].

⁹² *R. v. Kimberley Robinson* [2002] B.C.J. 1693 (Quicklaw, accessed electronically on 30 March 2005).

⁹³ *Ibid.*, at paragraph 9. Blair J was following the criteria specified by Justice Hinds of the B.C. Court of Appeal for use in determining an application under section 684 of the Criminal Code – see *Re. Baig and the Queen* (1990) 58 C.C.C. (3d) 156 (B.C. Court of Appeal) (Quicklaw accessed electronically on 30 March 2005).

⁹⁴ [1999] 3 S.C.R. 46 at paragraph 90 per Lamer C.J. and Gonthier, Cory, McLachlin, Major and Binnie JJ (Quicklaw accessed electronically on 30 March 2005).

⁹⁵ *Ibid.*

As things stand in British Columbia, criminal trial proceedings are recorded as a matter of course but will not be transcribed unless an appeal is lodged or one of the parties otherwise elects to pay for transcription. Either way, if a defendant seeks transcription but is not funded by Legal Aid, it is extremely likely that the defendant will be required to pay for the production of the transcript. In Victoria, proceedings are routinely recorded but transcription only occurs as required (usually when an appeal is lodged). Unlike B.C., in Victoria the cost of transcription in criminal matters is borne by the State of Victoria.

Several points of note emerge from this survey for socio-legal transcript research. In both Victoria and British Columbia, transcripts are prepared as an exception and not as a rule. In these jurisdictions, the mere fact that a transcript exists marks the case as unusual – most likely, one in which the defendant appealed from an initial decision. The defendant who appeals in British Columbia must either have the financial means to pay for transcription or be legally aided in his or her appeal. In Victoria, an appellant is entitled to transcription but is also likely to depend on legal aid or private means for other aspects of his or her appeal. Far from containing every one of law’s untold stories, trial transcripts in these jurisdictions represent a privileged few cases within the current criminal justice system. Legal researchers who wish to use legal transcripts to understand the social and legal context from which a case arose must either confine their work to transcribed (i.e., usually, appealed) cases, apply to be permitted to (pay to) transcribe case recordings⁹⁶ or seek to obtain recordings of court proceedings via Freedom of

⁹⁶ In *Linter Group Ltd (in liq) & Anor v Price Waterhouse (a firm) & Ors* [2000] VSC 90 (20 March 2000), Justice Harper of the Supreme Court of Victoria ordered the production of a transcript at the request of a news publisher, finding that the preparation of the transcript was in the interests of the transparent administration of justice. However, he also ordered that the news publisher pay for the transcript. This unreported decision of the Supreme Court of Victoria can be accessed electronically via www.austlii.edu.au. I was unable to find a similar case in B.C., although there are several decisions in which a court has ordered discovery of a transcript from an earlier proceeding in a new proceeding.

Information legislation.⁹⁷ Where a transcript has not been produced, it may be difficult to obtain tape recordings or shorthand notes if considerable time has elapsed since the proceedings concluded. If Sarat is right when he writes that in “the transcription of trials law provides the raw material from which history may subsequently be authored”,⁹⁸ it is important to add that the history (even the legal history) enshrined in transcripts is partial and incomplete. The promise of “speaking to the future” through litigation is also impugned if there is no guarantee that your words will be archived.

c. What laws apply to court reporters in British Columbia and Victoria?

The *Official Reporters Regulation 1984* (B.C. Reg. 222/84) (Official Reporters Regulation) provides that court reporters in B.C. must be current members of the B.C. Shorthand Reporters’ Association and be able to write shorthand manually or by stenotype at a speed of at least 200 words per minute.⁹⁹ Court reporters are officers of the court and must take an oath that they will “faithfully and accurately” record “evidence given on examination and at a proceeding and everything said by counsel and the judge, master or registrar”.¹⁰⁰ Where no court reporter attended a proceeding, an authorised

⁹⁷ An innovative way around this limitation appears from the decision in *Ontario Criminal Code Review Board v. Hale and Others* [1999] O.J. 472 (Ontario Court of Appeal, 28 September 1999). In this case, the respondents applied under s. 10 of the *Freedom of Information and Protection of Privacy Act* R.S.O. 1990, c. F.31 for access to backup audio tapes prepared by the court reporter at their hearings. The Ontario Criminal Code Review Board (**Board**) denied these applications on the basis that these tapes were not under the Board’s control but were controlled by the court reporter who was an independent contractor to the Board. The court reporter who was also named as a party in this case alleged that the only record that was under the Board’s control was any transcript that was prepared from the stenographic notes and audio tapes of the hearing. The Ontario Court of Appeal found that the audio tapes constituted part of the Board’s records or alternatively that the Board had control over the audio tapes. Accordingly, the Court ordered that access to these tapes be provided. A copy of this decision can be obtained at <http://www.gov.on.ca/MBS/english/fip/jr/p912ca.htm> (accessed on 30 March 2005).

⁹⁸ Sarat, *supra* note 1 at 358 – 259.

⁹⁹ Official Reporters Regulation, rule 1.2.

¹⁰⁰ *Ibid*, rule 2.1.

court reporter may be commissioned to prepare a transcript based on a recording of that proceeding.¹⁰¹

If a transcript is prepared, the authorised court reporter must certify that the transcript is “complete and accurate”.¹⁰² In turn, the registrar certifies the transcript,¹⁰³ at which time the transcript becomes “evidence of the official record.”¹⁰⁴ The Official Reporters Regulation also stipulates the format for the transcript (e.g. page size, margins and the format in which the style of cause must be specified).¹⁰⁵

It is striking that the Official Reporters Regulation requires the court reporter to certify that the transcript is “complete and accurate” rather than that it is “verbatim”. Although the rules appear to assume that transcription will be verbatim,¹⁰⁶ the law does not expressly require a word-for-word record. British Columbia (or, more properly, Canada) does not specify an offence of wilfully mis-transcribing court proceedings or wrongfully certifying a transcript. A situation of this sort would likely be dealt with as a breach of the court reporter’s oath and be prosecuted as perjury under section 131 of the *Criminal Code*.

One B.C. case in which the accuracy of a transcript was impugned by an appellant is *H.F. v. Canada (Attorney-General)*.¹⁰⁷ In *H.F.*, the appellant complained that she had been

¹⁰¹ Ibid, rule 2.2(3).

¹⁰² Ibid, rule 3.01(1.1).

¹⁰³ Ibid, rule 3.01(3).

¹⁰⁴ Ibid, rule 3.01(4).

¹⁰⁵ Ibid, schedule 1.

¹⁰⁶ The only reference to “verbatim” text appears in Schedule 1 in relation to the formatting that should be adopted “if the last line of verbatim text extends beyond line 37 on the last page of a proceedings transcript”.

¹⁰⁷ 2002 BCSC 325 (Quicklaw accessed on 30 March 2005) [*H.F.*].

sexually assaulted while she was a student at the Sechelt Indian Residential School. Her action in tort for damages was dismissed on the basis that she had failed to prove that she had been assaulted. The appellant alleged that inconsistencies in her evidence had arisen because her discovery examination had been incorrectly transcribed by the court reporter. Neilson J. of the B.C. Supreme Court dismissed this allegation, holding that “[w]ith respect to her answers at discovery, I accept the transcript as the official record”.¹⁰⁸ Neilson J.’s refusal to countenance the possibility of mis-transcription was absolute – there is no indication that any party suggested going back to the audio recording or shorthand notes of the discovery examination in order to check the transcription.

In another B.C. case, *Grenier v. Wagner*,¹⁰⁹ the appellant asked the court reporter to check her notes in circumstances in which he believed that the court reporter had mis-transcribed his answer. The reporter responded “that she had checked [the relevant] passage against her notes; that it corresponded word for word; that it was possible that she had made an error and transposed the names . . . , but that she did not believe that to be the case.”¹¹⁰ Errico J. chastised counsel for asking the court reporter to check her notes:

I have the greatest misgivings about this practice adopted by counsel. Accepting it for what it is worth, I am of the view that the transcript ought to be accepted as it stands over Grenier's refusal to accept a portion of it. *Grenier's credibility and accuracy of recollection is, in my view, no challenge to the accuracy of a Court Reporter's sworn transcript.*¹¹¹

¹⁰⁸ Ibid, at paragraph 162.

¹⁰⁹ [1991] B.C.J. No. 2570 (Quicklaw accessed on 30 March 2005).

¹¹⁰ Ibid.

¹¹¹ Ibid [emphasis added].

These cases suggest that, once a transcript is certified by the court reporter, it is extremely difficult to challenge its accuracy.¹¹² Even if the court reporter herself admits that it is possible that the transcript contains an error, the court will accept the fact of certification ahead of the reporter's admission. In a sense, the trial transcript *becomes* the history of the case, to the exclusion of alternative recollections. This accords with Smith's account of the social role of the text – provided that transcription conventions appear to have been followed, the transcript comes to “stand in for the actuality it claims to represent.”¹¹³ From the court's point of view, the transcript serves to “stabilise” the memory of the trial and that stabilisation is privileged over the (subsequently inaccessible) event itself.¹¹⁴ This stabilisation is justifiable (and is rhetorically justified) because of the court reporter's oath to record the trial “completely and accurately”. Law uses the rhetoric of the court reporter's impartiality and professionalism to suppress any perspective on the transcript that might cause it to be read as something less than a mirror of the proceedings it remembers.

In Victoria, section 131 of the *Evidence (Miscellaneous Provisions) Act* provides that evidence that is recorded pursuant to that Act must be recorded by a shorthand writer or mechanical means. A person who records evidence is an officer of the court and is under the direction of the court in relation to both recording and transcribing evidence.¹¹⁵ Section 135 of the Act provides that transcripts and court recordings made in accordance with the Act “when certified as correct by the shorthand writer or the person recording the evidence or the person preparing the written transcript are evidence of anything recorded in the notes, record or transcript.”

¹¹² In *R. v. Jack Cewe Ltd.* [1982] B.C.J. No. 1911, the B.C. Court of Appeal held that the onus was on an appellant to demonstrate that the transcript was faulty or incomplete. The appellant in that case had not discharged that onus.

¹¹³ Smith, *Conceptual Practices of Power* supra note 15 at 73 – 74.

¹¹⁴ *Ibid.*, at 74 – 75.

¹¹⁵ Section 133 of the Victorian Evidence Act.

Any person who wilfully records or transcribes evidence “in a false or incorrect manner”, or “tampers with or alters or falsifies” evidence or wilfully certifies false or incorrect evidence to be correct is guilty of a criminal offence punishable by up to 5 years imprisonment.¹¹⁶ Unlike B.C., Victoria does not specify the qualifications required of a court reporter and nor does it specify the format in which transcripts must be produced. My research¹¹⁷ suggests that there have been no cases in Victoria that consider the question of what is a “correct” transcript or what might constitute transcribing evidence in a “false or misleading manner”. However, the terminology “correct”, “false” and “misleading” (together with the fact that transcripts do not appear to be challenged in Victoria) suggests that a similar stabilising and suppressing effect occurs in that jurisdiction to the approach I have explained in relation to B.C.

In Victoria and B.C., court reporters hold a position of trust. They are expected to transcribe what is said in court “accurately and completely”. Once the court reporter has certified that she has fulfilled this duty, the B.C. cases I have surveyed suggest that the courts are extremely reluctant to look behind the surface of the transcript, even in circumstances where the accuracy of the transcript is impugned. This prioritisation of the written transcript over the spoken word (*contra* Derrida) suggests a judicial preference for the stability of the record over fidelity to the speaker’s intention. As Smith suggests, once it is produced the transcript literally serves to stand in for the court proceeding that it represents.

The courts’ refusal to countenance challenges to the accuracy of a transcript suggests that the purpose of producing transcripts is not only, as Sarat suggests, one of memorialisation. It may also have something to do with justice being balanced with pragmatism – the trial transcript proves that the law allows its subjects to speak but law

¹¹⁶ Ibid, section 137.

¹¹⁷ Using the “noteup” feature of Austlii – www.austlii.edu.au.

closes the door on that opportunity once the court is no longer in session. While the appeal process allows the defendant a second chance to place him or herself before the law, that second chance is jealously guarded, rarely given freely and rarely successful.

Transcripts are not always produced – they are exceptional documents, their production is accessible only to a privileged few defendants who have the financial means to appeal their convictions or who are legally aided. Reading transcripts in light of their exceptional nature allows socio-legal researchers to displace the assumption that they are discovering hidden treasures – “untold stories” – within the transcript. The stories that are transcribed represent a small, and institutionally skewed, group of the many stories heard by our criminal courts each year. This is not to say that these stories are unimportant, but they should be read in light of the conditions in which they are produced.

Transcripts are produced by court reporters, who are employed by courts or lawyers. The relationship between court reporters, judges and lawyers is arguably reflected in the practice adopted by court reporters in the USA of editing the speech of judges and lawyers so that the record shows “what they meant to say” rather than what they actually said. Does the same thing happen in Victoria and British Columbia? Probably. However, no one has published a study of court reporting practice in these jurisdictions that compares to Walker’s work. I have had difficulty obtaining information about the working practices of court reporters. In itself, this provides an insight into the institutional place of transcripts – they are documents to be received and read as a “complete and accurate” entity – not documents that should be read as the outcome of a process of drafting and editing.

Transcripts are perhaps the single most significant source of information, other than precedent and statutes, for appellate decisions in common law countries. But as documents that primarily deal in “facts”, they are not accorded the importance that is given to the more “legal” judicial decision – they are excluded from the privileged definition of law. In keeping with that inferior status, transcripts are regulated very

stringently in some ways. When the transcript is threatened, however, the law asserts the transcript's finality and refuses to engage with the manner in which transcripts are produced. This refusal produces an illusion of a transcript that just "is" – the work of the court reporter in producing and editing the transcript is rendered invisible in favour of a vision of the transcript as a miraculous mirror in which the court proceeding is rendered complete. It helps that the reflection held up by the transcript is in many ways a favourable one to those who stand in judgment. Unpacking this "reflection", noting its small flatteries and the realities it obscures, allows the socio-legal researcher to attend more carefully to the stories that she reads and to the people about whom these stories are written.

4. Conclusion

Law and society scholars in Australia and Canada are increasingly turning to trial transcripts in an effort to find other stories and other voices. Trial transcripts do not merely provide the basis for appeal courts to consider a case; they are a textual site of memory that offer socio-legal scholars an opportunity to unpack the judicial act of choosing among competing narratives about a case. By returning to the transcripts, researchers can reposition the legal judgment within the context of the dispute from which it arose. This is an effective means of challenging law's claims to coherence and ineluctability. However, the richness and depth of transcripts conceals their socially constructed nature, their partiality and the institutional constraints underpinning their creation.

Reading the transcript as a mirror of the court proceeding can lead socio-legal researchers to overlook the ways in which transcripts direct the researcher's attention to a finely calibrated picture of "what happened" in court. It is equally important to consider what the transcript excludes. Other versions of the story that is told to the court may exist, but will be excluded because they are adjudged legally irrelevant or strategically inappropriate. Only the words spoken by those who are recognised by the court as being authorised to speak are transcribed – this approach excludes unauthorised "interjections"

and non-verbal forms of communication. The process of transcribing spoken English into written English is replete with compromises and value judgements about what should be “corrected” and what should be reported unchanged.

To these constraints, which apply to any transcript, an understanding of the law and practice of transcription in Victoria and B.C. adds other insights. Not every trial is transcribed. Once produced, the transcript is taken by the court to “stand in” for the proceeding it represents. Provided that the transcript is certified as authentic, the court’s tendency is to reject in strong terms any suggestion that the transcript might be inaccurate. The transcript is effectively rendered as an “authorless text” – the conditions of its production are suppressed so effectively that it is difficult to discover the conventions used by court reporters in B.C. and Victoria. The transcript therefore serves to “stabilise” the history of the trial – rather than reflecting the trial with all its indeterminacies, slurred words and dialect, it replaces the trial with a text in standard English that is unchanging and replicable.

One of the very earliest descriptions of the kangaroo by a European was written by Captain James Cook. Cook explained:

I saw myself one of the animals which had been so often described: it was of a light mouse colour, and in size and shape very much resembling a greyhound; and I should have taken it for a wild dog, if instead of running, it had not leapt like a hare or deer.¹¹⁸

Law deals in the currency of words, particularly written words, and lawyers are especially prone to believe that all of life’s experience can be reduced to a description. As Derrida noted, language is often inadequate for the task we prescribe to it and, like the

¹¹⁸ John Hawksworth, *An Account of the Voyages Undertaken by the Order of His Present Majesty, for Making Discoveries in the Southern Hemisphere, and Successively Performed by Commodore Byron, Captain Wallis, Captain Carteret, and Captain Cook, in the Dolphin, the Swallow, and the Endeavour : Drawn up from the Journals which were Kept by the Several Commanders and from the Papers of Joseph Banks, Esq* (London : Printed for W. Strahan and T. Cadell, 1773) at 561. This extract appears electronically at <http://www.lib.monash.edu.au/exhibitions/history/xaustcat.html>.

early European visitors to Australia, law's actors grapple daily with the task of translating an often strange and incomprehensible world into an explicable, relatively seamless narrative. Like the kangaroo described by Cook, the transcript is both more and less than the sum of its parts – the transcript is a text that accomplishes the task of rendering law's daily practices into a stable, replicable history of the present.

Reading the transcript as a text has important implications for socio-legal research. While retaining the sense of a transcript as a site of history, a place with the potential to “remember the future”,¹¹⁹ it repositions that site within the context of its creation. The histories that are enshrined by the transcript are partial and the futures that are promised are incomplete. The transcript is not a miraculous mirror, but rather a prosaic and imperfect rendering of law's prosaic and imperfect processes. Reading the transcript in light of the constraints and imperatives of its creations may help to avoid the temptation to laud the transcript as something more than the sum of its parts.

¹¹⁹ Sarat, *supra* note 1; Sarat and Kearns, *supra* note 6; Minow, *supra* note 26.

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