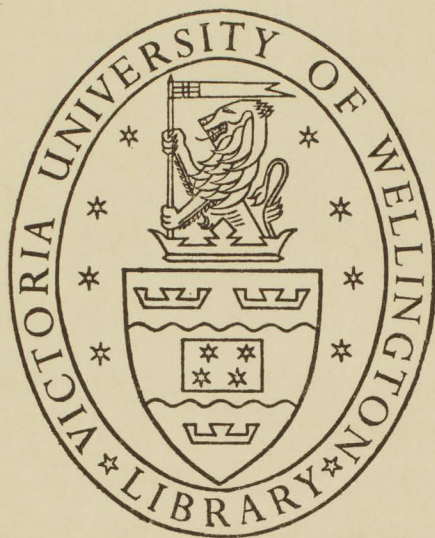
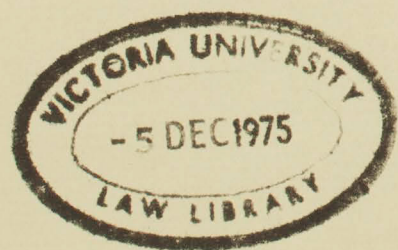


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## A DRAMATISTIC PERSPECTIVE OF THE COURT.

The perspective employed in this paper is that of studying the court as theatre; as a stage upon which the various actors involved in court room drama assume various roles which they present to both their fellow actors and a pseudo-dramatical body referred to as the audience. The first part of this paper will consider, briefly, the dramatic approach to society as expounded by Burke<sup>1</sup> and Duncan<sup>2</sup>, whilst the later and major part of the paper will be concerned with the techniques that are essential if court room drama is to achieve its objectives, which are set out in the discussion of the general dramatic approach below.

The dramatic approach to society (of which the courts are a micro-cosm) owes its existence largely to the work of H.D Duncan<sup>2</sup> who approaches institutions and events as if he were a critic viewing a theatrical performance. Duncan argues that by analysing the form and content of symbolic acts we see how these acts create and sustain social order, for symbols, the forms in which we express ourselves, are goads to action, not merely signs or referents to some reality beyond words; the symbols themselves become the reality giving experience a form and order which makes action possible. People must act to live in the community, playing parts in dramas of community life and, by acting together under great community symbols, men identify with society. Men do not want to communicate ideas but rather to express them in community with other men.

Duncan regards communication as symbolic interaction between individuals and following from this sees society "as the product of a process whereby symbols are created and then used to uphold social order."<sup>3</sup>

1. Burke, Kenneth. Permanence and change: An anatomy of Purpose. (Los Altos, Calif: Hermes Publications 1954)
2. Duncan H.D. Symbols In Society. (New York, Oxford Univ. Press 1968)  
Communication and Social Order. (New York, Bedminister Press 1962)
3. Cleveland, Les. Royalty as Symbolic Drama. Journal of Commonwealth Political Studies, Volume XI, No 1 (1973) page 30

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Hence communication can be seen as the "symbolic representation of repetitive dramatic forms which provide a cultural matrix for the legitimation of authority, the management of power conflicts, and the conduct of social affairs in such a way as to uphold social order and the struggle against disorder."<sup>4</sup>

Duncan looks to Burke for the foundations of his theories. Burke suggests that human relations are best analysed in terms of drama. "Men enact roles, change roles, they participate, they develop modes of social appeal.....they relate as actors playing roles to achieve satisfaction only other human actors can give them. They do so through communication, which like struggles in drama, involves both competition and cooperation."<sup>5</sup>

To produce an effect upon an audience, symbolic drama must reflect the real obstacles of social drama. The symbolic drama must be representative of the reality with which we are faced. Hence we resolve conflict in the symbolic realm in order to obtain conformity. For example, in the court room it is not enough to just talk of rules, but rather, we must enact a drama through playing various roles in which each participant styles himself as a character in popular fiction (the judge representing all that is good and pure whilst the thief represents the evil forces that threaten society's stability). We are not concerned purely with finding a person's guilt, but rather to dramatize it, so that everyone will know the strength of these enemies to the common conscience (defined by Durkheim as the "totality of beliefs and sentiments common to average citizens of the same society forming a determinate system that has its own life... ..It has specific characteristics which make it a distinct reality"<sup>6</sup>); these enemies can be seen to be vanquished by those devoted to upholding social order. These heroes so called must be in, yet above the battle, the hierarchy must remain pure in order to justify

4. Cleveland, Les. Symbols and Politics: Mass Communication and Public Drama. Politics, Volume IV(2) pages 186-196.  
5. Duncan H.D. Communication and Social Order. op.cit, 112.  
6. Durkheim E. The Division Of Labour In Society. (New York, The Free Press 1964) at page 108.

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the punishment it inflicts. Hence the appeals to authorities higher in the hierarchy evidenced in such phrases as 'In the name of the father,' or 'to uphold justice'. These appeals serve to purify the hierarchy by justifying the actions of those in power by appeals to the emotions of the audience.

Hence the structure is dramatic, but what of its social function? Burke suggests that the symbolic expression of social structure is an expression of authority through which we both create and sustain social order. Social order is always expressed in some kind of hierarchy which differentiates members on some kind of social ladder. Such differentiation is always resolved by an appeal to an authority higher in the hierarchy. The expression of hierarchy is best seen through forms of drama in which those in power present themselves as heroes struggling against villainous powers who seek to destroy sacred principles of social order. The institution in power must both create and sustain symbols of integration great enough to overcome counter definitions of reality. This is done by dramatic enactments in community drama where principles of institutional order become those of social order.

Hence we can see that the structure of social action is essentially dramatic and the function of the structure is both to create and sustain social order which we have seen to be expressed through hierarchies which differentiate men into ranks, classes, and social groups and at the same time resolve differentiation through appeals to principles of social order which transcend those upon which differentiation is based. The sociological function of the dramatic structure is therefore an act of organization. If symbols are to become important in organizing social relations they must inspire belief in their capacity to consecrate certain styles of life as the true source of order in society.

"The public trial symbolizes for them (the mass of the people) the heaven of justice which lies behind the insecurity, cruelty and irrationality of the every day world. In the public trial we find the

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government speaking ex cathedra. Other actions of the government may be subject to political attack or may be called corrupt or foolish. The action of the court cannot be so considered without seeming to endanger the very fabric of the state.

The judicial trial thus becomes a series of object lessons and examples. It is the way in which society is trained in the right ways of thought and action, not by compulsion, but by parables which it interprets and follows voluntarily."<sup>7</sup>

The dramatic theory of social action recognizes four basic dramas or plots which are aimed at gaining consensus amongst actors and audience. That is, these four functional categories are presented in order to persuade people that the values held by the institution in power are those held by the common conscience. The aim of these dramas is persuasion.

The four dramas identified by Burke and Duncan are: guilt, hierarchy, victimage and redemption. Of these the central drama is clearly that of hierarchy, because as we have already seen, social order is always expressed in some kind of hierarchy, and it is to authorities higher in the hierarchy that we appeal to resolve conflicts. Superiors must persuade inferiors to accept their rule and to recognize their values as those held by the common conscience. They do this through the glorification of symbols of majesty and power. The ruler or higher official in the hierarchy is seen as symbolically representing some transcendent principle of social order which we are attempting to dramatize. The dramatization is intended to create and uphold the dignity of the office as representing some transcendent principle of social order, rather than upholding the position of the man himself. The man in this perspective is seen as the agent of a higher power. While we may show reverence to the person

7. Arnold T.W. Symbols Of Government (New Haven 1935) at page 129.

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holding the office, it is in fact to the role enacted by him to which we pay homage. Thus on our court room stage it is not to the judge that we pay homage but rather to all those principles of social order that the common conscience sees his role as embodying; justice, law and order, honesty, fairness etc. In enacting this drama we attempt to intensify what the common conscience perceives as the existing social order.

The drama of guilt is also important to the maintenance of social order. In order to maintain social order we need guilt. Durkheim stresses the necessity of guilt in maintaining social order or cohesion. In talking of the necessity to punish the guilty he states:-

"Its function is to maintain the social cohesion intact while maintaining all its vitality in the common conscience.....It is necessary, then, that it be affirmed forcibly at the very moment it is contradicted, and the only means of affirming it is to express the unanimous aversion which the crime continues to inspire, by an authentic act which can consist only in suffering inflicted upon the agent. It is a sign that witnesses that collective sentiments are always collective, and that the communion of spirits in the same faith rests on a solid foundation and accordingly is repairing the evil of the crime inflicted upon society."<sup>8</sup>

Thus the drama of guilt acts upon upright citizens, healing wounds that have been inflicted upon the collective conscience.

Closely connected with the drama of guilt is that of victimage. Society needs a victim upon whom it can attach guilt. A victim is needed to act as an agent upon whom we can inflict suffering in order to both create and maintain the reality that is the common conscience. Thus in Durkheim's terms the following is evident:- A crime (for example, rape) consists essentially of an act contrary to strong and

8. Durkheim E. The Division Of Labour In Society. op.cit, 79

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defined states of the common conscience. Thus an innocent person has suffered; an attack has been made on a principle of social order that the institution in power has, by repetitive community drama, instilled in the common conscience so that the principle of institutional order has become that of social order. Durkheim would say that we need to punish someone in order to forcibly affirm the values of social order that have been threatened. Hence the need for a victim. Thus for the purposes of maintaining social order the innocence or guilt of the victim is non-essential so long as someone is seen to be punished. It is the punishment that re-affirms the social order.

The final drama is that of redemption, a drama invoked to save society from the dangers that threaten it. The rapist is caught, tried and put in prison; the threat to society has been removed and the courts can be seen to protect the values that are at the core of the common conscience.

Having now considered the general dramatic approach to society and identified what may be regarded as the four main dramas that will be enacted in society we can now turn to the central theme of this paper, which is to look at the various techniques that must be employed by those presenting community dramas in order to persuade the audience that their values represent those held by the common conscience.

When individuals play parts they implicitly request observers to take seriously the impression fostered before them. They are asked to believe that the characters they see before them possess the attributes they appear to possess, and that the tasks they perform will have the consequences implicitly claimed for them. To achieve this the performers must ensure they use effective dramatical techniques which succeed in 'persuading' the audience that what they see before them is representative of reality. To get the audience to respond the actor must often select symbols of identification and formulate goals which will produce emotional rather than rational effects. Dramatical techniques employed in the court room are many and varied, and it is the intention of the writer to here examine

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these techniques in some detail.

The elements discussed below will be considered under the following general headings: front, expressive control, mystification, regions, belief in the part played, teams, direction and negotiation.

FRONT.

"It will be convenient to label as front that part of an individual's performance that regularly functions in a general and fixed fashion to define the situation for those who observe the performance."<sup>9</sup>

Front may be divided into several parts, the first of which is setting, involving decor, physical layout, and scenery generally. Consider the following description of the No. 1 Supreme Court in Wellington:- The court room is large with a lofty ceiling, elegantly wood panelled with some almost Maori looking carved strips extending in dark strips along the walls upon which hang large oil paintings in ornate frames of judges of the past. At the front rears up a large high wood bench where the judges sit in massive throne-like chairs. Being raised above the main body of the court it appears physically aloof and consists of an enclosure framed by deep blue curtains. Above the bench are the words DIEU ET MON DROIT, surrounding a large coat of arms. In front of the bench and to the right is the jury enclosure which is also raised, though not so high as the bench, in which are twelve large, comfortable leather seats. The witness box, upon which lies a copy of the bible, is situated directly in front of the bench. Opposite the jury enclosure the press tables are to be found. Literally holding the centre of the stage is the 'arena' where opposing counsel do battle. Towards the back of the court and isolated from the bench is the dock, entered, not from the floor of the court, but by narrow winding steps from the cells below. A wooden bench, with a thin cushion is provided for the defendant. At the rear of the court seats are provided for the

9. Goffman E. The Presentation Of Self In Everyday Life. (Great Britain. Allen Lane The Penguin Press 1969) at page 32

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audience, who are effectively isolated from the main stage by a barrier of rather incongruously painted iron battens. Such is the setting in which all drama enacted in the court must take place.

We have seen that the drama of hierarchy is the central drama staged in society to uphold social order. We have also noted that it is to authorities higher in the hierarchy to whom we appeal to resolve conflict, this being achieved by the glorification of symbols of majesty and power, in an effort to intensify that which the common conscience regards as the reality of the existing social order. We can see in the above description of the Supreme Court the emotional appeal to the upholders of justice in the past, witnessed by the awe-inspiring portraits of past judges; the bolstering of the judge's position in the hierarchy by such props as the rich blue drapes surrounding the bench, the regal chairs with their royal red padding and the bench's elevation and distance from the main body of the court. All tend to support the impression fostered of the judge as the omnipotent power in the court structure. Diametrically opposed to this is the dock, positioned at the back of the court and far below the bench, sparsely furnished, entered from the cells 'below'. Immediately we see the contrast; the relative positions of the actors symbolically defined by the bench's magnificence and richness as against the starkness of the dock. The social order representative of society generally is established; upholders of justice at the top with the offender as the under-dog, society's scape-goat, at the bottom of the social ladder. The drama of victimage is also emphasised by the setting, being illustrated by the singling out of a victim and placing him in the degrading surroundings of the dock even before his guilt has been officially determined. The principle of innocent until proven guilty seems almost irrelevant when the suspected offender is seen in this light.

We can also see how the setting allows the drama of hierarchy to leave the presumably rational bounds of the court room with appeals to the supposed fountain head of all justice, the very summit

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of the hierarchy, namely God who may be used as a convenient excuse to justify all action taken within the confines of the court. These appeals to the summit of the hierarchy are evidenced in the presence of the Bible and its use in court, and also in the words DIEU ET MON DROIT positioned 'above' the bench. The God concept is stressed at all stages of the performance. Whilst the jury are being sworn in each juror is instructed to clasp the Bible in his right hand whilst repeating the required oath, and witnesses appearing in the course of any trial are required to place their hand on the Bible whilst swearing to tell the 'truth, the whole truth, and nothing but the truth so help me God'. Clearly this indicates an emotional rather than a rational appeal to the audience.

Just how important setting is to court room drama may be determined from the following comments by a judge of the New York Criminal Court about the court room in which she presided:-

"I was holding the hearing in a back-up courtroom about 15 feet by 20 feet; no bench, but a table on a small dais, dirty and dingy, ill-lit and ill-maintained.....I feel strongly.....that we cannot separate justice and courtroom conduct from the physical setting of the court. We in my court.....are dealing with often violent individuals, some sociopathic, some psychopathic; the courtroom setting as it now exists encourages the volatile and the hostile to violence."<sup>10</sup>

Hence the importance of setting; the decor, the physical layout, and the scenery, symbolically show regard to those highest in the hierarchy who represent such principles of social order as justice, law, order and fairness. By exalting the position of the judge we exalt the principles of social order he represents.

The second aspect of front goes under the general heading of personal front and within its ambit are included such factors as

10. Disorder In The Court: Association of the Bar of the City of New York. Special Committee on Courtroom Conduct. Report (prepared) by Norman Dorsen and Leon Friedman. (New York, Pantheon Books 1973) at page 240.

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insignia of office, clothing, posture, speech patterns, bodily gestures and facial expressions. Personal front consists of two distinct but related elements; appearance and manner.

#### APPEARANCE.

"Appearance may be taken to refer to those stimuli that function at the time to tell us of the performer's social status."<sup>11</sup> This is illustrated in the garments worn by the principal actors in the courtroom: the judge, majestically resplendent in black robes and wig with a stiff white collar, fostering the impression of great age and wisdom which tends to suggest his omnipotence in the hierarchy; the lawyers and court officials, as representatives of the system, are attired in similar but not so elaborate costumes. In contra-distinction those not officially part of the system arrive in civilian clothes to face the magnificence of a system designed to inspire awe and respect in those unacquainted with it. It is also recognized that the defendant must not be dressed in such a way so as to detract attention from the drama being enacted in the court setting. This point is brought out clearly in the following extracts.

#### " SWASTIKAS OFFENSIVE

An Otahuhu magistrate, Mr K.L. Richardson SM asked a police constable to remove two youths from the courtroom because they were wearing jackets displaying Swastika symbols. 'Constable, I see two people at the back of the court wearing jackets with Swastika emblems, I find that displaying a Swastika emblem is offensive.....would you kindly ask those displaying the Swastika emblem to remove themselves from the court and return when they are properly attired.' "<sup>12</sup>

"Dunedin magistrate Mr T.A. Ross said, 'If people appear in court so untidy or so unkempt or in such a way out style of dress that I feel in their appearance they are deliberately

11. Goffman E. The Presentation Of Self In Everyday Life. op.cit, 34

12. The Evening Post. 30 January 1971.

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showing disrespect for the court I should take some action."<sup>13</sup>

"Mr E.A.Missen (secretary of justice 1971) said 'It is his court, the magistrates court, he has the authority to rule out even mini skirts if he thinks they are not befitting the dignity of his court.'"<sup>14</sup>

Just how important some magistrates consider dress to be to the dignity of court proceedings was brought to a head when Auckland magistrate Mr B.O.Nicholson refused to hear Auckland lawyer Mr K. Langton who appeared in court wearing shorts, open necked shirt and sandals because of the exceptionally hot weather being experienced in Auckland.<sup>15</sup>

Also of interest is the following recent occurrence in the Wellington Magistrates Court :-

"Prominent Wellington solicitor Michael Bungay made a brief but memorable appearance in the traffic court today. Mr Bungay appeared.....wearing a brown coat over the top of his suit.

The magistrate, Mr N.L.Bradford, SM, told Mr Bungay he could not see him.

'I'm here,' Mr Bungay said.

'Take off your coat in my court,' Mr Bradford said.

'I'll leave your court,' Mr Bungay replied and went."<sup>16</sup>

Not all magistrates take such an extreme view, however, and many allow counsel to appear in shorts and open necked shirts in hot weather, providing they are neat and clean.<sup>17</sup> Indeed many although recognizing the principle that the dignity of the court must be preserved, have warned against too rigid standards of dress in court proceedings.

13. The Evening Post. 30 January 1971.

14. The Evening Post. 28 January 1971.

15. The Evening Post. 13 February 1973.

16. The Evening Post. 21 August 1975.

17. The Evening Post. 30 January 1971. (Magistrate dislikes dress rules)

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"As long as justice is done and a proper order and dignity are observed, surely a court might find it possible not to insist on witnesses and others appearing in uncomfortable dress in the interests of preserving strict formality. The courtrooms, in an age of sartorial and adventurousness and tolerance, will be in danger of becoming remote from the people if they insist too rigidly upon observance of a dress code that so many people look upon as drab and fusty. Neat shorts and walk socks, with shirt and tie but no jacket are almost standard dress for city men in Auckland's summer months. It's not only comfortable but sensible too - in court or out one would imagine." 17(a)

It is the writer's contention, however, that remoteness as regards the courts are concerned is not necessarily a detrimental side effect of the maintenance of rigid dress codes. Indeed as will be noted below remoteness tends to add to the sense of mystery that surrounds the courts and this may indeed be beneficial to effective courtroom drama. Although dress may not be as important in the more informal proceedings in the Magistrates Court, it is in the writer's contention, of vital importance in Supreme Court proceedings where the offences dealt with are of a generally more serious nature and are thus viewed as a greater threat to the established social order.

Newspapers, especially student newspapers, seem much more ready to criticize actions taken in the Magistrates Court than they do those taken in the Supreme Court. It is submitted that this is connected with the lack of ceremonial dress and the more informal proceedings in the Magistrates Court which have the effect of leaving the audience feeling they are able to question proceedings more readily than those in the Supreme Court. Hence the lack of ceremonial dress in the Magistrates Court seems in part to affect the persuasiveness of the parables enacted there.

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Thus we can see that appearance can be an important aspect of any emotional appeal to an audience, requiring it to accept the social order presented in the parables they see enacted before them. It is one way of symbolically delineating the positions of the actors in the social hierarchy, and, if properly employed will convey an appropriate air of gravity to the proceedings which will also aid their persuasive affect.

#### MANNER.

"Manner may be taken to refer to those stimuli which function at the time to warn us of the interaction role the performer will expect to play in the oncoming situation."<sup>18</sup>

For example an aggressive, haughty, manner will suggest that we can expect the performer to initiate verbal interaction and control its course. In this regard note the stern forbidding aspect adopted by a judge in a criminal case (this may not be the same aspect adopted in a family case where different values are at stake). We sense immediately that no nonsense will be tolerated, that it is the judge who will control the movements and interaction of all other participants, his word will be final so long as the court is sitting. This impressive demeanour adds to the gravity of the courtroom atmosphere ensuring proceedings will not be dismissed out of hand. This aspect of courtroom drama is also significant as regards impression management<sup>19</sup>

Successful courtroom drama requires that there be consistency between setting, appearance and manner. Without such consistency the court cannot hope to persuade people that what they are witnessing symbolically represents the social reality that exists in society, and that indeed the symbols themselves have become the reality of the common conscience. Thus if the formal and ceremonial setting of the supreme court with its attendant air of gravity is to be effective, it is essential that those within the confines of the court

18. Goffman E. The Presentation of Self In Everyday Life. op. cit, 35

19. Below, page 31

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ensure their appearance and manner also reflect this aspect. Hence the robes, the wigs, the lack of gaiety and the detached impersonal air of the principal actors. Thus the actions of the participants in courtroom drama, their manner and appearance, are necessarily restricted by the surroundings in which they find themselves.

Perhaps the best example of the importance of setting, manner and appearance in courtroom drama is illustrated by the trial of John Thomas Scopes in 1925<sup>20</sup> for violating a Tennessee Statute making it an offence to teach any theory that denies the story of the divine creation of man as taught in the Bible. The case aroused a great deal of public interest and as a result the trial was moved outside:-

"The trial is moved from the courthouse to the lawn outside to accommodate the audience and the members of the press who are in attendance. Since it is unbearably hot, permission is given to remove coats and participate in shirt sleeves." The result:- "At numerous points the record shows applause or prolonged laughter from the audience. At one point, (counsel for the prosecution) having stated.....that members of the jury were better experts on the Bible than any of the scholars the defence hoped to put on the stand, the record reads: 'Voices in the audience. Amen' At another point there is a fuss about a ten-foot sign placed near the jury in the outside courtroom. It reads, 'Read your Bible' (Defence counsel) objects that this is prejudicial to his case, and after some controversy the court orders the sign down."<sup>21</sup>

Clearly the trial was more akin to a circus than a dignified community drama, and the reactions of the audience suggest that it, and indeed counsel saw the proceedings as being in the nature of a

20. SCOPES v. STATE. South Western Reporter, 1927, 289, 363-370.

21, Kalvin, Harry jnr, "Please, Morris, Don't Make Trouble": Two Lessons in Courtroom Confrontation. Journal of Social Issues. Volume 27 No. 2 1971 at page 221.

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farce displaying an entirely different reality from that which court proceedings normally attempt to convey. The dignity of the court is in this case discarded in favour of a more comic, mocking atmosphere. The wrangle over the ten-foot sign would not have occurred in a formal courtroom as it would have been ordered to be removed immediately; the audience would not be able to applaud in the formal confines of the courthouse as immediate action would be taken to quell such disorder, and the general atmosphere in the courthouse is not conducive to such behaviour. Indeed the Tennessee Supreme Court, upon appeal from conviction by Scopes, after witnessing the first trial, was reluctant to send the case back to the lower court for a rehearing because of non-compliance with a technicality:-

"We see nothing to be gained by prolonging the life of this bizzare case. On the contrary, we think the peace and dignity of the state will be better served by the entry of a nolle prosequi herein."<sup>22</sup>

#### EXPRESSIVE CONTROL.

When an individual is in the presence of others he must infuse his activity with signs that dramatically highlight confirmatory facts about the performance in which he is engaged. In order that his activity becomes significant to others he must mobilize his activity so that it will express during the interaction what he wishes to convey. He must avoid, therefore, signs that are going to highlight facts inconsistent with the drama being presented. Thus the performer needs to maintain 'expressive control' during the performance so as not to convey an expression incompatible or inconsistent with the overall definition of the situation. Expressive control is most significant in cases where it is known that the audience is sceptical of the reality the drama is supposed to symbolically represent. When this is the case the audience is apt to treat trifling flaws as

22. Kalvin, Harry jnr. "Please Morris, Don't Make Trouble": Two Lessons In Courtroom Confrontation. Op.cit, 221

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evidence that the whole performance is a falsehood. Even an audience that appears sympathetic may become momentarily disturbed, or shocked and their faith weakened as a result of discrepancies in the impressions presented for their benefit. Lack of expressive control may result in the whole drama lacking the persuasive quality necessary if the institution in power is to impress its values on the common conscience. That audiences are quick to pick up inconsistencies in any performance is clearly indicated in the following report from Salient.

".....I would like to complain on behalf of a person who received an unfair penalty from a magistrate. An unemployed waitress was charged with being in a building without lawful excuse (it was conceded by the prosecution that she had no intent to commit a crime).....she was fined one hundred dollars, which for a starter seemed unfair, since it was her first appearance and she was unemployed. Certainly her act was stupid, but it was harmless and the penalty doesn't go anywhere near the case heard just minutes before, in which a man assaulted his de facto wife with a pipe.....he was fined one hundred dollars also, which is incredibly strange when lined up against the case of the waitress. I regarded the assault as far more serious than the other case."<sup>23</sup>

Now people generally believe that the courts dispense justice and are fair. However, even a sympathetic audience will have doubts in cases such as the above where the two sentences are inappropriate considering the seriousness of the offences when compared, one with the other. Although the writer recognized the waitress's sentence as being prima facie unfair it is suggested that this impression was aggravated by the fact that the writer was able to compare it with the more serious offence that she witnessed in the same proceedings.

23. Salient. Volume 38 No. 18 'From The Courts' page 6.

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It is the writer's contention that symbolic drama is severely handicapped as regards persuasive quality, in the magistrates court, because of the sheer number of cases that the court hears in a single sitting. This leaves a great deal of room for inconsistency in the sentences of similar cases. The Supreme Court, however, only hears one case at a time and thus such inconsistencies as do exist in the treatment of offenders are less likely to come to the public's notice.

In considering 'expressive control' we are looking at the role of the performer himself. An actor may present a discrepant definition of a situation in a number of ways; he may accidentally convey incapacity, impropriety or disrespect by a loss of muscular control. If a judge, upon entering the courtroom, is to stumble or trip the audience sees him as momentarily prone, stripped of the dignity and stature that his robes, wig and the setting generally seek to convey. If on falling he makes an involuntary exclamation (eg. 'Bloody Stair') his stature is further reduced to the extent that the ordinary man in the street is able to identify with him, and thus much of the mystery<sup>24</sup> that surrounds him is stripped away. In a sense the social order that the court attempts to establish is put in jeopardy.

Another way in which a performer may present an impression inconsistent with the reality it is hoped to convey is that he may give an impression of being either too much or too little concerned with the interaction; thus a lawyer may stutter, appear nervous or self-conscious, or a judge may give way to an inappropriate burst of anger.

"The trial judge must be firmly in charge.....An exited voice, a display of alarm could set the spectators off."<sup>25</sup>

Perhaps the clearest case of over-involvement in proceedings is provided by the case of U.S.A. v. MARZANO<sup>26</sup> where the judge insisted

24. Below page 19

25. Disorder In Court. op cit ,193

26. 149f.2d. 923

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on calling and questioning two witnesses that neither party had put on the stand. On appeal Hand J. had this to say:-

"The judge was exhibiting a prosecutor's zeal, inconsistent with the detachment and aloofness which the courts have again and again demanded, particularly in criminal trials. Despite every allowance he must not take the role of partisan; he must not enter the lists; he must not by his ardour induce the jury to join in the hue and cry against the accused. Prosecution and judgement are quite separate functions."<sup>27</sup>

A performer may also allow his presentation to suffer from inadequate dramaturgical direction; thus unforeseen contingencies may arise, causing embarrassing lulls in the interaction. Examples of this often occur in the Magistrates Court, where either counsel or the defendant is absent when called. In one recent case observed in the Wellington Magistrate's Court, the police prosecutor found he was required to appear in two courts at the same time. Five minutes confusion resulted whilst the court decided where he should be, ending in the police prosecutor being severely admonished in front of the large audience present. Thus because of the lack of dramaturgical direction the magistrate lost all patience, admonishing the prosecutor in front of the audience, which as we will see can itself have a detrimental effect on proceedings.

Thus human beings are possessed of variable impulses with moods and energies that are constantly changing, but, as actors before an audience we must resist all these impulses, moods and energies.

"But whether the visage we assume be joyful or a sad one, in adopting it we define our sovereign temper. Hence for so long as we continue under the spell of this self knowledge we do not merely live, but act, we compose and play our chosen character.....we defend and idealize our passions, we

27. U.S.A. v. MARZANO 149f.2d. 923 at 926.

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encourage ourselves eloquently to be what we are, devoted or scornful or careless or austere; we soliloquize.....and we wrap ourselves gracefully in our inalienable part.....under our published principles we must assiduously hide all the inequalities of our moods and conduct.....our animal habits are transmitted by conscience into loyalties and duties, and we become persons or masks."<sup>28</sup>

Thus the actor in courtroom drama must strive to 'become' the part he acts, highlighting some aspects of his performance, whilst concealing others. The above quote also indicates just how the part or role we assume becomes accepted as representing reality and we become wrapped in our 'inalienable' part. By continually acting in our assumed role we ourselves come to identify with our personality which, as pointed out above, is in fact a mere mask.

#### MYSTIFICATION.

We have seen that it is essential to the drama of hierarchy that the judge, in courtroom drama, maintain social distance from the rest of the court, and how the court room setting, the manner and appearance of the actors and the employment of expressive control by the main actors help to emphasize this social distance. It is also true that forms of address used in court stress the social differences between actors. The judge is always addressed as 'Your Honour' or 'Sir', and counsel always 'Respectfully submit' matters to him. This formal address also helps to create an aura of mystery around the judge.

Mystification is another of the mechanisms employed in courtroom drama in order to create a feeling of social distance, thus upholding the officially recognized social order. It is one of the ways in which awe can be created and maintained in an audience. Thus we rarely see the judge in any other capacity than that he assumes in

28. Santayana, Soliloquies In England and Later Soliloquies. (London Constable 1922)

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court; he is not seen in the local pub having 'a drink with the boys' and when appearing at race meetings he will be found in the members stand and not fraternizing with the ordinary man in the public enclosure. Hence a sense of mystery envelops him and helps to enhance his prestige. There may in fact be no mystery, but for successful courtroom drama the audience must not be aware of this. The judge must therefore take care when outside the courtroom not to be seen frequenting the haunts of the common man. Two examples of how a sense of mystery can be produced in courtroom drama may be cited at this point. Firstly, the practice of retiring to chambers in order to hear matters not considered appropriate to be heard in front of an audience. Thus counsel and judge are closeted from the audience in the privacy of chambers, that mystical world beyond the courtroom. A further sense of mystery is invoked when judges talk in whispers amongst themselves during proceedings. The audience and other actors can only guess at what passes between the judges, and furtive glances from the bench will further intensify the mystery that envelops them thus increasing the social distance between them and the rest of the court.

#### REGIONS.

The concept of regions is also important to the success of any dramatical presentation. Goffman defines a region as "any place that is bounded to some degree by barriers to the perception."<sup>29</sup> These barriers may be either visual, audial or both. The Scopes Trial<sup>30</sup> gives a vivid example of the importance of regions to courtroom drama. In that case proceedings were removed from the formal surroundings of the court, to the lawn outside. Once outside all barriers to perception disappeared with the result that the trial came to resemble a circus; the heat, which we can assume would not have been a problem in the air-conditioned courtroom, meant that the lawyers

29. Goffman E. The Presentation Of Self In Everyday Life. op cit, 109

30. Supra page 14

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could remove their coats thus adding a further element of informality to the proceedings. Huge signs were placed in such a position so as to be visible to the jury, a problem that would not have arisen in the enclosed confines of the courtroom. Thus we see that the trial arena is better suited to an enclosed, indoor region, rather than a limitless outside one.

If we take a particular performance as a point of reference, we can use the term 'Front Region' to refer to the place where the performance is given, in our case the courtroom. In the front region, as we have already seen, the actor's actions are very much restricted by the setting in which he finds himself. Equally important to any performance are what may be referred to as 'Back Regions', for it is in these regions that an actor can, divorced from his audience, drop the pretence he adopts in front of the audience. What occurs in the back region is to a large extent a mystery to the audience, and as previously noted this can in itself have a beneficial affect. In the back region actors need no longer impress the audience with the use of such language as 'Your Honour' or 'My Learned Friend'. These are abandoned for more informal, colloquial language. Since vital secrets about the performance that is presented in the front region may be visible back stage, and since performers act out of character in these regions, they must be kept closed from the audience remaining shrouded in mystery. Thus the courtroom audience will be unaware of the mundane paper work and the tedious administrative matters involved behind the scenes of a full criminal trial.

#### BELIEF IN THE PART ONE IS PLAYING.

It does not appear to be necessary that an actor in community drama have any belief in the part or role in which he appears. Thus an individual, although enacting a specific role, may have no belief in his own act. Hence in courtroom drama it is not essential that a defence counsel necessarily believe in the innocence of his client, so long as he can get the judge and jury to believe in his innocence.

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We may therefore regard him as a cynic. On the other hand we find those who may be termed sincere, believing in the impression fostered by their own performance. Thus a jury may find a man not guilty of murder on grounds of insanity, believing that in delivering such a verdict the defendant will be 'treated', not punished, in a mental institution. Hence a form of the drama of redemption is being enacted with the defendant being 'treated' to save him from his mental affliction. The jury may sincerely believe that in sentencing him to a stay in a mental institution they are preventing him from being 'punished' in prison. What they do not realize, however, is that a prison sentence of determinate length may be less of a punishment than an indeterminate stay in a mental institution, where he may be subjected, against his will, to such 'cures' as electric shock treatment.

It is important to note, however, that although a person may approach a role as a cynic, in time he may come to believe that the role in which he is cast is representative of reality.

"It is probably no mere historical accident that the word person, in its first meaning, is a mask. It is rather a recognition of the fact that everyone is always and everywhere, more or less consciously, playing a role.....It is in these roles that we know each other; it is in these roles that we know ourselves. ....this mask is our truer self, the self we would like to be. In the end our conception of our role becomes second nature and an integral part of our personality. We come into the world as individuals, achieve character, and become persons."<sup>31</sup>

The above quote, as well as indicating just how we can come to accept our role as reality, also provides an excellent illustration of how symbols (or in this case our personality or 'mask') come to be accepted as real themselves. Thus our personality becomes the

31. Park, Ezra Robert. Race and Culture. ( Glenville Illinois: The Free Press, 1950 )page 249. Passage cited in The Presentation Of Self In Everyday Life. op.cit, 30

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reality and not what may be hidden beneath it.

The following extract also indicates how easy it is for the cynic to accept his role as reality and hence to become absorbed in it.

"He"(Thurman Arnold)"replied-'Well, we can sit here in the class room and dissect the conduct of judges, but when you put on those black robes and you sit on a raised platform and you are addressed as Your Honour, you have to believe that you are acting according to some objective standard.'"<sup>32</sup>

However, as will be shown below, an actor's belief in the role in which he is cast will have little effect on the impression given to the audience so long as the audience is unaware of inconsistencies existing within the role. Hence the cynic is capable of just as a persuasive performance as the sincere actor.

#### TEAMS.

Until now we have been looking, in the main, at the role played by the individual on the courtroom stage. But it must be remembered that the personal front of a performer is employed not so much because it allows him to present himself as he would like to appear but because his appearance and manner can do something for a scene of wider scope. Hence we often find that the definition of a situation projected by an individual is but part of a projection that is fostered by the intimate cooperation of several participants. Thus the concept of teams. Often members of a team must appear in different lights if the overall definition of the situation is to be portrayed successfully. Thus in the criminal trial we can see the judge and defendant as occupying diametrically opposed roles. The judge along with the police represents law and order; the judge taking a passive verbal role whilst the police represent the physical arm of the law ready to quell any disturbances as they may occur, by force

32. Berman H.J. Notes on the interaction of Law and Religion. (Abingdon Press 1974 at 109)

if necessary. On the other hand the defendant is the bad guy whose actions must be suppressed by the forces of law and order. We have already seen how the courtroom setting is designed to indicate the differing roles played by the various participants (for example the bench in its majestic elegance, contrasted with the nakedness of the dock).

It may be argued by some that the defendant and the judge are not members of the same team, but rather members of opposing teams. But if we adopt Duncan's general approach as to the use of drama to uphold the values of the common conscience, it is clear that the judge and the defendant are members of the same team, however reluctant they may be. Note that they are only members of the same team as regards the definition of the total situation. Thus whether members of a team stage similar individual performances or dissimilar performances, when the totality of the situation is observed an emergent team impression arises which can be conveniently treated as a fact in its own right. A kind of plane develops between the individual performance and the total interaction of participants.

The concept of teams has important over-tones a propos the definition that is being proffered whilst a team performance is in progress. Any member of such a team has the power to give the show away or to cause a disruption by inappropriate conduct. Thus each member of the team is forced to rely on the good conduct of his fellow team-mates hence creating a reciprocal bond of dependence between the various members of the team. Members of the team must therefore cooperate in order to maintain a given definition of the situation. Even when a member of the team goes beyond the sanctions governing behaviour within the team, insisting on giving the show away, he is never the less a part of the team and indeed it is his position as such that enables him to have this effect.

An example of how a team member is able to disrupt a perform-

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ance is provided in a 1784 English case<sup>33</sup> in which the judge and the lawyer concerned, both members of the legal team, exchanged words in what can be seen as an attempt by the lawyer to undermine the judge's authority in the court. When a lawyer disagrees with a judge's ruling, the correct procedure is for him to lodge an appeal in accord with the formal court rules and it is not for him to question the judge's ruling during the actual proceedings in which the problem arises. The case concerned the utterance of a seditious libel, and the jury in delivering its verdict found the defendant guilty of publishing only.

"Buller, J: I believe that verdict is not quite correct....  
if you find him guilty of publishing you must  
not say the word only.....

Erskine: I desire your lordship sitting here as judge to  
record the verdict as given by the jury.

Buller, J; (stated that the jury did not understand their  
verdict)

Erskine: The jury do understand their verdict.

Buller, J: Sir I will not be interrupted.

Erskine: .....I desire that the word only may be recorded.

Buller, J: SIT DOWN SIR: REMEMBER YOUR DUTY, OR I SHALL BE  
OBLIGED TO PROCEED IN ANOTHER MANNER.

Erskine: YOUR LORDSHIP MAY PROCEED IN WHATEVER MANNER  
YOU THINK FITS. I KNOW MY DUTY AS WELL AS YOUR  
LORDSHIP KNOWS YOURS. I SHALL NOT ALTER MY  
CONDUCT."<sup>34</sup>

33. Case of The Dean Of St. Asaph. See Lord Cambell, 4 Lives Of The Lord Chancellors Of England 343-44 (1834).

34. Disorder In Court. op.cit, 31. (extract from the Case Of The Dean St. Asaph.)

Erskine, as a member of the legal profession (or team), breached the rules governing proper conduct in court which require that homage be paid to the judge. Such conduct has the effect of questioning the judge's authority in the social hierarchy and, although such conduct may up to a point be expected from the defendant who may not share the values of the common conscience, thus representing a threat to it, such behaviour is not expected from members of the legal team who are supposedly a cohesive body who accept those social values that the criminal law and the court structure represent.

In any social establishment, (in our case the court) individuals who are socially dissimilar and thus desirous of maintaining social distance from each other, find they are in a relationship which of necessity makes them a part of the same team. In court, judge and defendant, usually social opposites desirous of avoiding each other, are forced to become members of the same team in the presentation of community drama. Social distance is maintained in the very setting of the courtroom, but this is because for the drama to be successful the actors must be seen in differing lights; the defendant as evil and a threat to the values guarded by the common conscience, whilst the judge is seen as the hero defending the values of the common conscience. Thus social distance is essential to the parable of good triumphing over evil.

Hence all the participants are members of the same team as regards the overall definition of the situation that it is hoped to convey to the audience, however, within this master team, several sub-teams may exist, and these may need to compete with each other in order to present the overall definition of reality that the court strives to achieve. One actor may find that he is a member of two or more competing sub-teams, and this can, unless properly managed have disastrous consequences for the drama as

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a whole. The judge and the lawyers make up a team representing the law, but the defence lawyer also finds himself as a member of a team in which he and the defendant are the principal actors. This can cause serious dilemmas to occur, disrupting the image of reality that the main drama seeks to impress on the common conscience.

The defence lawyer as a member of the legal profession owes a duty to that team, and thus he must not show any disrespect for the judge, nor indeed to his opponent, with whom he may disagree. He must therefore express his disagreement in muted terms (ie. commencing any disagreement with words such as 'My Learned Friend' and by 'Respectfully' disagreeing) thus displaying deference to his profession. He may appeal from a judge's ruling, but must not openly disagree with him during the actual proceedings. On the other hand as a member of the defendant's team he also owes a duty to the defendant. Whilst he may not directly attack counsel for the prosecution he will attempt to destroy his opponent's arguments in his cross examination of witnesses who are not themselves members of the legal profession. However on occasions the conflicting duties have had a disruptive effect on proceedings. This is clearly seen in the open conflict between Buller J. and Sir Thomas Erskine in The Dean Of St. Asaph Case<sup>35</sup> and in the following extract from the New York Black Panther Case.<sup>36</sup> In the Black Panther Case the judge ruled that the lawyers were not to argue objections without the court's consent. One of the lawyers informed the court he would not be intimidated.

"Court: Your statements are noble, counsel, but I remember-

Defendant: ...and the people are going to back him up.

Court: I beg you to remember-

Defendant: Don't Beg.

Court: That as a member of the bar you have a duty to

35. Supra page 25.

36. PEOPLE v. LUMUMBA ABDUL SHAKUR, Indictment No. 1848-1969. Transcript of Proceedings, November 17, 1969, See extract in Disorder In The Court op.cit, 71.

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act with respect to this court.

Counsel: The court has an obligation to try-

Defendant: His first obligation is to his client...."<sup>37</sup>

Clearly if the social drama enacted in the court is to succeed then the controlling team must be that representing the law, and thus a lawyer's loyalty lies first with the court and secondly with the defendant.

#### DIRECTION.

In most team performances someone is given the right to direct and control the dramatic action. This 'director' may himself play a prominent part in the actual performance as a member of one of the various sub-teams.

Clearly the director in courtroom drama is the judge, who is given the power to bring back into line any member of either his own sub-team, or members of any team whose performance becomes unsuitable. As director he must be continually attuned to the probable reactions of the audience and performers to any action he may take, and hence the success of courtroom drama depends largely on the manner in which he handles proceedings. Various methods of control and direction are available but care must be taken to avoid using those methods that may be inappropriate in the circumstances.

The judge's control function, is to some extent made easier by the existence of various formal rules governing procedure to be followed during the hearing, which are known to those who are members of the legal sub-team. Because of this, the success of courtroom drama will depend to a large extent on the loyalty of the members of this sub-team, who, with this inside information

37. PEOPLE v. LUMUMBA ABDUL SHAKUR, Indictment No. 1848-1969.  
Transcript of Proceedings, November 17, 1969 at pages 6259-60  
See extract in Disorder In The Court op. cit, 71,

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can effectively disrupt proceedings by non-observance of these formal rules. Therefore one of the major problems for the judge as 'director' is to maintain a sense of loyalty amongst the members of the legal sub-team so as to prevent them becoming too sympathetically involved with the audience or with any other sub-team of which they may be a member. The results of such involvement are obvious in the Dean Of St Asaph Case<sup>38</sup>. One way of ensuring loyalty is to develop a high degree of in-group solidarity so that in effect the legal team becomes a closed social community offering each member moral support. Hence we can see the importance of such organizations as the New Zealand Law Society and the Inns Of Court In England, each fostering a kind of cohesiveness within the profession that has its results in the courtroom by helping to ensure the success of proceedings by the formation of a cohesive body who, out of a sense of loyalty to their fellow team members, will not deliberately breach procedural rules. The practice of referring to one's opponent as 'My Learned Friend' also helps reinforce this high sense of group solidarity. The judge whilst directing a courtroom performance must take care to maintain this sense of group loyalty and even when he finds his fellow teammate's performance inappropriate or incompetent he should be slow to criticize the individual's performance with whom he ought to be in dramatical cooperation. To do so may have a devastating effect on the performance that the disputants ought to be presenting. The effect of quarels between judge and counsel, is, as we can see in the Dean Of St. Asaph Case<sup>39</sup>, to provide the audience with a back-stage view and to leave them with a feeling that something is suspicious about the performance when those who know it best cannot agree. It is suggested, therefore, that this is the reason that cases involving misconduct of counsel are dealt with outside the court by the law society.

38. Supra page 25 .

39. ibid.

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In this way, at least as far as the public are concerned, a united front is presented, as quarrels within the team are dealt with backstage, away from the public eye.

The judge as director also has the power to bar an actor or a member of the audience from the courtroom until such time as he is prepared to comply with the conduct expected of him. This is done by the use of contempt provisions, and will often result in a term of imprisonment until such time as the individual concerned agrees to play his part in accord with the rules. A recent example of this is provided in the following Christchurch case.

" YOUTH JAILED FOR CONTEMPT

An 18 year old youth was jailed for a week for refusing to answer questions concerning a bikie gang reprisal raid. S.J.Maitland was sentenced for contempt of court for refusing to answer questions from Mr G.K.Pankhurst at the Christchurch Supreme Court yesterday.....Mr Justice Roper: I don't think you are trying very hard to remember. Would you please try to think a little harder. Maitland: I know I'm not trying hard. I'm not going to answer the question. Court orderly Constable W.Mather, was told by the judge: Constable, the witness having refused to answer the question he is sentenced to 7 days imprisonment. Take him into custody. A warrant for his arrest will be issued. Other witnesses were told of what happened."<sup>40</sup>

We also see in the above extract that the presence of the police, a highly trained and disciplined force who will resort to physical force if need be, ensures that the judge's directions will be enforced and carried out.

The judge also controls proceedings by determining when an actor will participate in the drama, and, with the support of

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various procedural rules, what an actor may say. Thus the prosecution can not make a character assassination of a witness unless that witness himself first provides references as to his good character; the number of previous convictions that a defendant may have cannot be disclosed to the jury while the proceedings are in progress, though they may be used by the judge in considering the appropriate sentence. In some ways the judge, although ostensibly the leader in courtroom drama, is merely a figurehead representing the formal rules that actually govern the performance. None the less the success or failure of the performance is directly affected by his actions.

As director of courtroom drama the judge is in effect the royal star of the performance and as such is dressed more spectacularly, and seated higher than anyone else present. This elevation represents an emotional appeal to the audience and actors to respect his position and thus, theoretically at least, should enable him to keep control of proceedings. We have already seen how the manner of the judge can be used to aid control in the courtroom.<sup>41</sup> A haughty, aggressive manner will suggest to other participants that he can be expected to initiate verbal interaction and control its course. Again the appeal to the audience is in the main emotional, but is none the less effective in most cases.

#### NEGOTIATION.

At this point the work of Thomas Scheff<sup>42</sup> should be mentioned as it may prove an invaluable aid to those wishing to direct a performance towards a particular definition of reality. It is true that much of what occurs at a criminal trial is a process of negotiation, whether the participants are aware of this or not. The court attempts to negotiate a definition of reality that is acceptable to it, whilst the defendant seeks to have his

41. Supra page 13.

42. Scheff, Thomas Negotiating Reality, Social Problems Volume 16 1968 page 8.

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definition accepted even although this may contravene the values held by the common conscience. Scheff puts forward two propositions both of which are significant for the control and direction of courtroom drama.

"(1) In a given situation, the greater the shared awareness of the participants that the situation is one of negotiation the more control the, "(defendant, audience etc) "gets over the resultant definition of the situation."<sup>43</sup>

Thus a defendant, fully conversant with the way in which the court functions, will realize that he can disrupt proceedings by offering persuasive counter-definitions of reality to the audience, whilst a defendant unaware of the negotiability of the situation will not so easily be able to proffer an alternative definition of the situation that has any persuasive affect. The ability to spot a weak judge who is unable to direct proceedings adequately means that the defendant can impose his own definition of reality and indeed expose the weaknesses of the whole drama. The Chicago Conspiracy Trial provides a good illustration of this point. The defendants were clearly aware of the way in which the court functioned and the purpose of the drama in which they were unwilling participants. Possessing this knowledge they effectively managed to reduce proceedings to the level of a circus in which both the law and the values of the common conscience that the law represents were ridiculed.

" We brought the same attitudes and strategy from the streets into the courtroom.

The court in American society is something like the church. There is a widespread conspiracy to hold the court holy, above the world of sin and deals and power. It is

43. Scheff, Thomas. Negotiating Reality. op.cit, 11

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to be treated with a special respect; quiet is to be observed by those who enter, and the speech is only to follow formal procedure. The judge is a high priest possessed of a wisdom that citizens do not have. He wears robes, makes interpretations of obscure scriptures, and holds a gavel representing authority. He is referred to as your 'Your Honour' or 'If the court please' much as the pope is 'His Holiness'..... the court system demands absolute conformity to its rules and its atmosphere. If citizens respect this institution, then all their conflicts can be sifted, negotiated, and resolved. At the same time everyone knows this concept of the court is a myth. The court is political. The judges are appointed by politicians.....when the courts are turned into a weapon against change trials must be turned into an attack upon the courts. Treating a trial politically means dealing with the courtroom the way it is not the way it is ritualized."<sup>44</sup>

The above passage, written by one of the defendants in the Chicago Conspiracy trial<sup>45</sup> shows that the defendants were aware that the situation in which they found themselves was of a negotiable nature. Upon realizing this the defendants set out to disrupt the ritualized impression that the court conveyed. They attacked the principles of hierarchy put forward by the court, attempting to reduce the judge to the level of the other participants in the drama. Although they realized they could do little to violate aspects of spatial distance designed to create and defend the judge's position in the hierarchy, they made frequent attacks on aspects of social distance with remarks such as:-

44. Hayden, Tom. Trial (Great Britain 1971)

45. UNITED STATES v. SEALE. 461 F.2d 345 (7th Cir. 1972).

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"Mr Rubin: You're the laughing stock of the world Julius Hoffman.

Mr Hoffman: We'll see you at the standard club Julie."<sup>46</sup>  
and

" 'Mr Hoffman', Dellinger told him, 'We are observing the moratorium.'

'I am Judge Hoffman, sir.'

'I believe in equality', Dellinger replied, 'So I prefer to call people mister or by their first name.' "<sup>47</sup>

By using the personal form of address and this form of informal joking, the defendants forced the judge to attempt to put increased social distance between himself and the defendants, thus showing increasing hostility towards them, until one of the defendants was actually bound and gagged by the court. This greatly aided the impression that the defendants hoped to convey, of the court as being unjust and oppressive. Thus the judge was in effect playing into the hands of the defendants.

Another tactic of the defendants was to point out weaknesses in the judge's presentation so as to destroy the image he hoped to present of an infallible pillar of wisdom. A clear indication of this is provided by the following passage.

"Toward the end of the day, however, especially days as difficult for him as the last few had been, he would occasionally lose control of his features and his face would sag expressionless, or would seem to reveal feelings he may not have had. On this occasion it appeared he was laughing and Hayden.....called out, 'Let the record show the judge is laughing.' "<sup>48</sup>

This has the effect of drawing to the audience's attention the in-

46. Epstein, Jason: The Great Conspiracy Trial (Random House New York 1970 at page 400.

47. Epstein, Jason: The Great Conspiracy Trial *ibid*, 213

48. Epstein, Jason: The Great Conspiracy Trial *ibid*, 247

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appropriate conduct of the judge which puts his position in the hierarchy in question. Thus the defendants refused to recognize those rules of conduct required of them by the court, upon realizing that the situation in which they found themselves was negotiable. Yet another tactic employed by the defendants whilst attempting to negotiate their own definition of reality was to attempt to turn the trial setting into that of a political forum. This was achieved by introducing a Vietnamese flag into the court room, and then attempting to read out the names of those killed in Vietnam. The defendants then went on to call for a minute's silence in memory of the dead.

The above examples represent just a few of the techniques used by the defendants in attempting to negotiate their own impression of reality. It is suggested that the reason that in the majority of cases there is little disruption to proceedings is ~~That~~ the defendants are unaware of the true purpose of the criminal trial, namely, to present an exemplary parable of what those in power view as the reality held by the common conscience, and also ~~That~~ they lack an understanding of how mechanisms such as those discussed in this paper operate to control courtroom drama. In cases where the defendant is aware that the situation is negotiable there is more chance of disruption.

Scheff's second proposition, perhaps of more use to counsel than to the judge, also has important implications as regards the definition of the situation that it is hoped to convey to the audience.

"(2a) Concerning organization of the format of a particular transaction the party to a negotiation who responds rather than the party who makes offers, has relatively more power in controlling the definition of the situation.

(2b) The responding party making counter offers has relatively more power than the responding party who limits his

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response to mere acceptance or rejection of the other party's offers.

(2c) The more direct the questions of the interrogator in a given situation and the more direct the answers the more control the interrogator has over the resultant definition of the situation."<sup>49</sup>

Putting this into practice means that the defendant's view of reality can be effectively suppressed. By employing the above theory in courtroom drama and asking questions that require simple yes/no answers the defendant is given little opportunity to put forward his interpretation of the situation and hence the ambient details of his case are suppressed from the audience. This method of control, although it may be used by the judge on occasion, is best employed in the hands of prosecuting counsel. The wisdom of employing (2c) rather than (2a) above is shown in the following example taken from the trial of Susan B. Anthony:-<sup>50</sup>

"Mr Justice Hunt: The prisoner will stand up. Has the prisoner anything to say why sentence should not be pronounced.

Miss Anthony: Yes your honour, I have many things to say; for in your ordered \_\_\_\_\_ verdict of guilty, you have trampled underfoot every vital principle of our government. My natural rights, my civil rights, my political rights, are all alike ignored.....All my prosecutors.....from .....to your honour on the bench, not one is my peer, but each and all my political sovereigns....."<sup>51</sup>

Although it is established practice to put the above question to a defendant, in criminal cases, by adopting the approach in (2a)

49. Scheff, Thomas. Negotiating Reality. op cit, 11  
50.3 American State Trials 1 49-53 (1873)  
51.3 American State Trials 1 50-53 (1873)

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and (2b) the prisoner is given the opportunity to offer his or her own definition of the situation which as we can see from the above passage does not represent the reality of the situation as seen by those who direct the performance. In the above case the court did in fact realize that the defendant was attempting to put forward a view of reality conflicting with their own and attempted rather unsuccessfully to get the prisoner to sit down and discontinue her critical appraisal of the proceedings to which she had just been subjected.

. The perspective employed in this paper, of studying the court as theatre, is only one of many approaches that may <sup>be</sup> adopted, many of which are just as valid. The approach used in this paper is clearly functional in that it highlights many of the weaknesses in the way in which present criminal trials are run and suggests various dramatical techniques that can be employed by actors on the court stage in order to ensure that the proceedings in which they are engaged will have the persuasive quality necessary in order to instill the values of the institution in power on the common conscience. As we have seen the judge can control proceedings by using the formal contempt provisions set out under various acts but these should be used as a last resort. It is suggested that the effective employment of the dramatical techniques discussed in this paper should minimize the number of times these formal and necessarily oppressive contempt provision are used. If the above techniques appear to have no affect on a defendant's behaviour and the judge does not wish to employ the contempt provisions it is suggested that the defendant be remanded in custody for a psychiatric report as this impresses on the audience that any behaviour they have observed on the part of the defendant that does not accord with the official view of reality can be dismissed as not to be taken seriously.

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and (2) the witness is given the opportunity to offer his or  
her own explanation of the situation which as we can see from  
the above passage does not represent the reality of the situation  
as seen by those who direct the proceedings. In the above case the  
court did not find that the defendant was attempting to  
put forward a view of reality conflicting with their own and  
attempted rather unsuccessfully to get the witness to all doors  
and distances her critical appraisal of the proceedings to which  
she had just been subjected.

The perspective employed in this paper, of studying the court  
as theatre is only one of many approaches that may be adopted, many  
of which are valid. The approach used in this paper is  
clearly functional in that it highlights many of the techniques in  
the way in which present criminal trials are run and suggests  
various practical techniques that can be employed by actors in  
the court stage in order to ensure that the proceedings in which  
they are engaged will have the persuasive quality necessary in  
order to install the values of the institution in power on the  
common consciousness. As we have seen the judge can control proceedings  
by using the formal witness provisions set out under various  
acts and these might be used as a last resort. It is suggested  
that the effective employment of the dramatised techniques dis-  
cussed in this paper should minimize the number of times these  
formal and necessarily oppressive contempt provisions are used.  
If the above techniques appear to have an effect on a defendant's  
behavior and the judge does not wish to employ the contempt  
provisions it is suggested that the defendant be rewarded in  
some way for a particular report on the progress of the evidence  
that may demonstrate they have operated on the part of the defendant  
that does not accord with the official view of reality can be  
discussed as not to be taken seriously.

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